

1967

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1966

Herman Ginsburg

Nebraska State Bar Association, president

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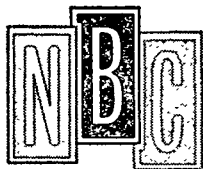
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NEBRASKA STATE BAR ASSOCIATION

HOUSE OF DELEGATES

WEDNESDAY MORNING SESSION

October 12, 1966

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

CHAIRMAN MULLIN: The House of Delegates will come to order. I welcome you to this meeting and to Omaha, the site of our convention.

The first order of business will be Roll Call by our Secretary, George Turner.

[Roll Call.]

SECRETARY-TREASURER GEORGE H. TURNER: I declare a quorum present, Mr. President.

CHAIRMAN MULLIN: Thank you, Mr. Secretary.

The next order of business is the approval of the Calendar as printed in the program as our order of business. Do I hear a motion that the Calendar be approved in its present form?

JOHN W. DELEHANT, JR., Omaha: I so move.

DIXON G. ADAMS, Bellevue: I second it.

CHAIRMAN MULLIN: You have heard the motion and it has been seconded. All in favor say "aye"; opposed. Carried.

We have now the privilege of hearing from our President, Mr. Herman Ginsburg, who will make to this House whatever statement he wishes to make at this time. It is my distinct pleasure and privilege to introduce Herman Ginsburg, President of our Association.

REPORT OF PRESIDENT

Herman Ginsburg

Mr. Chairman, Members of the House: I take it that our rules by which we are governed contemplate that the President shall

make a report to the House of Delegates, not only as to what the Association has done during the past year, and particularly what the President *himself* may have done, but in addition recommendations which the President, in his wisdom, may deem appropriate for consideration by this House. My report will, therefore, be in two parts: First, a report of the year's activities that I was engaged in; and secondly, and I hope you will bear with me, some recommendations which I submit for your consideration.

I want to say preliminarily that I do not indicate by any recommendation that I make that you must go along with me. I will not be upset if you don't approve or agree with anything I recommend, but I do at least feel that these are subjects which are worthy of consideration and which this House ought to perhaps give some consideration to.

In the first place, may I say that during this past year we have had five meetings of the Executive Council. We will today have our sixth one. The President attended all of those. The attendance by the members of the Executive Council was unexceptional; it was beyond criticism. The President, further, and the members of the Executive Council attended the Mid-Year meeting. We were sort of insistent upon having the Mid-Year meeting, and I want to talk more about that later in my report.

I attended every local Bar Association to which I was invited, and my recollection is that there were five of them. They were well worthwhile from the standpoint of the President, in this respect—they were not only social gatherings but they were serious gatherings, business-like gatherings where the members were interested in the activities of the Bar Association and in the new fields of law where there was some study made. I am going to talk more about that later on. I am very much in hope that we can do something more in our affiliation, if I may use that word, with local Bar Associations.

In addition to attending local Bar Association meetings I also attended the meetings of the Iowa Bar, the Kansas Bar, the Wyoming Bar, and the Missouri Bar. The President-Elect attended the meeting of the South Dakota Bar, which the President was not able to attend because the South Dakota Bar meeting and the Iowa Bar meeting came at the same time. Each of these visits to our neighboring states was of great value to us, since in each instance we were able to pick up ideas and ascertain what was occupying the attention of our brother lawyers in adjoining states.

In general, I may report that our Association is well in the forefront in all matters affecting the practice of law and the improve-

ment of the administration of justice. You might, however, be interested to note that the subjects under general consideration in the other states were:

(1) New methods of election of judges. We have that in Nebraska.

(2) New methods of streamlining and modernizing the procedures of courts. You may be interested to know that in many of these states they now have citizens' conferences working with the Bar Association in streamlining the lower courts, and that is something I'll have more to say about later on.

(3) Consideration of minimum fee schedules.

(4) Consideration of client security funds.

(5) Continuing Legal Education.

(6) Sponsoring of legislation to improve the administration of justice.

(7) Sponsoring of amendments to court rules to improve the administration of justice.

(8) The role of the Bar in the New Economic Opportunity program of the United States.

You will note from your own knowledge of the affairs of our Association the subjects that we have been active in and the subjects that we have not yet considered.

It should also be interesting to note that at the meeting of the Wyoming Bar a suggestion was made that consideration be given to possible amendment of the Canons of Ethics in order to bring them up to date to serve modern needs.

Incidentally, I would like to call your attention to a project of the Iowa Bar which has been eminently successful in that state and which I was very much sold on, and that is the adoption and promulgation of forms. The Bar Association in Iowa has, I believe, over 150 forms of business documents, court documents which a committee of the Bar Association has prepared and which the lawyers in Iowa can use with confidence and just fill in. They have been very successful. As a matter of fact, in Iowa it has become even a money-making project for the Bar Association. You may be interested to know that when I was there at their meeting they were discussing the new Uniform Commercial Code which was just going into effect in Iowa, and their committee had prepared and promulgated the forms for use under the Uniform Commercial

Code, which those of us here in the practice who have had any contact would know have caused some of us considerable headaches in making up forms for our clients.

Without intending to encroach upon the reports of the various committees which will be submitted to you for consideration, I would like to submit to you for such consideration as you so deem appropriate various subjects as they have come to my attention.

First and foremost, I want to call your attention to the fact that the rules, Section 2 of Article V of our organization provide that this House is more than just a rubber stamp to rubber stamp by O.K.ing or disapproving reports of committees. I want to call your attention to part of the rule referred to: "It is the duty of this House to propose and initiate such policies for the Association as may be deemed advisable and to designate appropriate personnel to carry out and make effective such policies." I commend to you that statement because I feel that my own experience with this House in the past few years has been that we have just acted on committee reports and have not fulfilled the injunction set forth in our rules which I have just referred to.

First I would like to talk to you about the difficulty that I know I had, and I think every President before me and probably every one after me until we adopt a new procedure or get better advice has with reference to the matter of appointment of committees.

Last year we sent out questionnaires asking members of the Bar to list committees upon which they desired to serve, or would be willing to serve, or preferred to serve. We got back something like 800 questionnaires completed. The trouble with it was that our questionnaires were not in proper form, I guess, so they weren't all answered correctly. I had to use a computer device to get the 800 forms figured out, if I may use that phrase, because the forms were not adequate for the purpose. We did a poor job. But here was the problem: Out of the 800, and I think I have a pretty good knowledge of the Bar of this state, next to our Secretary I thought I knew about as many members of the Bar as anyone, but I surely didn't know the 800. I venture to say that out of the 800 replies I got, I probably knew about one-third of them. It is quite a tremendous responsibility to put somebody on a committee that you don't know. Somebody sends in a report saying that he would like to serve on the Committee on Legislation. The President knows nothing at all about him, never heard of the man. What do you do in a case like that? I know that Mr. Maupin is already trying to designate his committees for this coming year.

Last year I spent from October to January trying to work out committees, trying to put in new blood, trying to get people interested in the work of the Association. And when all was said and done I didn't accomplish very much because there just seems to be no particular method by which a President can determine whom to appoint. You refer to the chairman of an existing committee and he will say, "Oh, well, I would recommend all the members on my committee. They have all served well." Well, if they have all served well and are deserving of reappointment, then how do you put a new one on there? I would like to have this House give some thought, perhaps, to some method of appointment of committees other than leaving it just to the President alone.

Secondly, I was very much concerned during the past year with the poor relationship between the State Bar Association and the local groups. I am informed by Mr. Turner that we have no way of knowing who the officers of the local groups are. Many of them make no report to the State Association. Many of them exist but are unknown to anyone in the State Association. I felt, as I mentioned earlier in my report, that these local groups were very worthwhile, that strong local Bars are an essential. It has been well said that lawyers are without an effective local administration and action unit if their county or community Bar Association is weak. If the local Bar is ineffective, communication among lawyers and between lawyers and the public is practically non-existent. On the other hand, where there exists an active, dynamic local Bar, usually there is good public relations for the profession and better service to the public.

In most other states there is an active relationship between the State Bar and the local Bar groups. One of the methods by which this is done is by a Conference of Bar Presidents. Acting through this Conference of local Bar Presidents as a part of the State Bar Association, the program of the State Bar Association is carried down to the local level. I would venture to say that no program of this Association would ever be effective until it is integrated at the local Bar level.

I would also suggest for your consideration that the local Bar groups ought to be permitted to send delegates to the House of Delegates of this Association so that they may be represented in this Association and so that there may be a unity of purpose and activities between the State Bar and the local Bars. I am not suggesting that there be any change in the election of delegates as now selected, but it would seem to me that it might be advisable to add to the House of Delegates representatives from each local Bar Association, this for the purpose of integrating the local Bar

into our State Association. I realize, of course, that this will require an amendment of the rules, but I submit it to you for your consideration. I am very much sold, and my own experience has convinced me, that we must have a better relationship with the local Bars, and we must see to it that the local Bars do more.

I have attended some local Bar Associations where their meeting consisted of nothing more than a dinner and some drinks and a good time. Well, that is all fine, but that is not enough. The business of this Association and the demands upon our profession are such that we lawyers cannot just get together on occasion for a good time, but every good time must have with it some seriousness. I can think of no better way of doing that than to make the local Bars part of this House so that at least we have some representatives from each local Bar Association who can act as a connecting link.

Along with that I would also like to call your attention to a tentative suggestion that was made last year which we weren't able to follow through, but I would recommend also for your consideration that something be done to try to integrate other Bar Associations into the work of this House. By that I am referring to the Trial Lawyers Association, the Probate Lawyers Association, the American College of Trial Lawyers, whatever organizations we have. Since this is an integrated Bar, and since we are all members of one organization, why ought not these other organizations be permitted to have delegates to this House so that we can work together and not have what we have had happen in the past where, in my own experience, the Bar Association, and now I am speaking of the official integrated Bar, appeared before the legislature on behalf of or sponsored certain legislation, and some other group saying, "We also are Bar Association," appeared in opposition. That ought not to happen. That ought not be permitted to happen. That certainly is not good for our public image.

The third matter which I would like to submit to you for your consideration is the matter of the training for a young lawyer, both while in law school and after being newly admitted to the Bar. It has come to my attention, and maybe to some of the others here listening to me this morning, that some of these young lawyers get out in the practice and they have absolutely no knowledge, or at least no significant knowledge of the Canons of Ethics. I had a case of my own where a young lawyer in Lincoln, Nebraska, got involved in one of these deals where he took a divorce case with a fee from the client and also got himself allowed a fee by the court. When it was called to his attention that he couldn't do both he said, "I never knew. I never knew." I believe him. I believe that he never knew.

There should be some correlation between the Bar and the young lawyers. And not only with reference to the matter of Canon of Ethics, but they should be trained, either as a part of their law school activities or training after graduation through some such program as a "Legal Intern Program" or something of that kind. The type of service from lawyers now demanded by the public just simply does not admit a Bar placing before the public young lawyers who, no matter how well they are trained in the theory of the law, are unfamiliar with practice and procedure.

In this respect I would like to call to your attention that while our Association rules provide for student membership, we have apparently neglected that. At least I have seen no active enforcement, if I may use that word, of our relationship with the students in the law schools. Perhaps we should integrate them into the Bar Activities and the committee meetings and put them on committees, and so forth, while they are still in law school to give them some familiarity with what they will be encountering in their practice.

I would also like to call your attention to the provision in the Bylaws relating to resolutions. This upsets me very much. During the year I have had a number of lawyers throw at me this statement, "Oh, well, it is a closed organization. Nobody has a chance except those that are in power. It is all arranged beforehand so what is the use of my trying to do anything?"

It seems to me that the procedure that we have with reference to resolutions somewhat lends some support to that complaint. Let me call your attention to this matter. Section 5 of Article I provides that resolutions which are adopted at a general session of the Association shall be effective upon approval by the House of Delegates. So if somebody presents a resolution before the meeting of the Assembly itself, it is meaningless until it is approved by the House of Delegates. Section 4 of Article II provides that every resolution must be referred without debate to the Executive Council for consideration and report. Section 2 of Article III provides for the employment of a Hearing Committee to hear resolutions of members of the Association. Frankly, the thing to me is a maze. If I wanted to present a resolution and I was not a member of the House, I don't know how I would go about doing it. I realize that when you have democracy, when you lay the floor open to everyone, you are going to have some crackpots, and you are going to have some crackpot resolutions. But I wonder if maybe it might be worthwhile to have some crackpot resolutions if we, in turn, can let the membership know that this is not a closed organization, and if someone has something to present he will be given due and

honest consideration. To me, this entire subject of resolution by members, not members of the House of Delegates, is a maze. It seems that no resolution can be acted upon until approved by a Hearing Committee, then by the House of Delegates, and then by the Executive Council. I suggest that this be clarified. I think it would be more worthwhile and more in accord with democratic procedure to invite resolutions by members, to give them an opportunity to have a resolution acted upon by the appropriate body at an early date, even as I realize, and we all do realize, that we are bound to have thereby some crackpots who will take advantage—but that is the price of democracy.

I would also now like to call your attention to the matter of Sections. I personally think the Sections have got to be revamped. Some of the work along that line has already been taken into account by the Executive Council during this past year. The Section on Corporations has been changed to a Section on Insurance, Banking, Corporate and Commercial Law. The Section on Practice and Procedure had some problems. We've got a Section on Practice and Procedure and a *Committee* on Procedure. What is the function of each? Where do they exist and why do we need a Committee if we have a Section, or why do we have a Section if we have a Committee?

Then we are now confronted with another problem, and that is that for the last few years we have had just one program each year. One Section sponsors the program. The result has been that to a great extent the other Sections are dormant. They come to life once every three or four years when they are called upon to present an Institute at an annual meeting and the rest of the time they are dormant. As far as I know—and I hope I will be forgiven for saying this; I don't mean to tread on anyone's toes—but so far as I know the only Section that was really active, outside of the Section that produced this meeting, was the Real Estate, Trust and Probate Section. They met during the semi-annual meeting in June. They produced some programs. They have had a number of meetings of their Executive Council, and their membership and their officers, and so forth. That Section has been active, but I don't know of any others that have been active.

There are a number of provisions in our rules about what the various Sections shall do, but there are no provisions in the rules as to how you go about *making* them do anything that the rules require they do. Therefore I think it would be appropriate for that entire subject to be studied and that the Bylaws relating to Sections be overhauled, that further consideration be given to the matter of the meetings and the Institutes to be held by the Sections.

That is a subject which has been rather close to my heart because I feel that the Sections are important, and yet there is something that is holding back the activities of the various Sections.

Then I come to the need for strengthening our Continuing Legal Education program. It is not enough that we have an Institute once a year at the annual meeting and that we have a Tax Institute once a year. The lawyers in attendance at these Institutes constitute but a small part of the total Bar, and one program per year is not sufficient.

There is a tremendous amount of new law constantly coming to light, and it is necessary that all of these new developments be carried to all the members of the Bar throughout the state. You will recall that in the past we have had Institutes sponsored by different Sections held at different times and different places in the state. However, it is too much to expect busy practitioners to give up a large amount of time to such an extensive program. I, therefore, submit for your consideration the possible use of professionals, such as are being used in other states, and I particularly call your attention to the program sponsored by the University of Michigan Law School, which is now being used in many of our states. As a matter of fact, some of our neighboring states have suggested that if we would join with them in these programs and share expenses, we both would be able to save something in the total outlay involved.

You might be interested to know that statistics show that the Nebraska Bar Association is one of only nineteen Associations that does not have a professional Continuing Legal Education Director. Those nineteen are, almost without exception, the states that have less than 1,000 lawyers. All the other states now have full time professional Continuing Legal Education experts. In the State of Kansas their Executive Secretary fills that bill; the State of Iowa has, and in the State of Missouri they have four professionals on the staff engaged in these activities. I submit to you that we in Nebraska are going to have to do something of this kind, and niggardliness is not justified. It has been pointed out that there exists in this country today a legal explosion which involves not only the demand for legal services, but there are demands by a number of people who have never before been involved, and we have to answer that demand.

Now, in addition to this we have a legislative program. I am not going to re-plow the old field, but all of you are familiar with the troubles that we have had in that field in not knowing what is going on in the legislature, of not having anyone ready to represent us before the legislature, not having a legislative counsel. We need

a legislative counsel. It has gotten to the point now where it is impossible for the President—and I know I can speak for Murl Maupin—impossible to get a Legislative Committee if they know that they are going to have to devote all their time during the legislative session to the necessary work that other organizations get through a paid representative. We have to have somebody who will be on the floor. We have to have somebody who can give the time, and it is absolutely too much to expect lawyers in the active practice to do that, so we must have a legislative counsel of our own.

In addition to this, some of you may laugh at this but I feel concerned because this came right to me, I was threatened because of my position as President of the Bar with a lawsuit. I was told that if I did not appear before the Supreme Court and concede error on the part of the Bar Association and ask to have a certain man reinstated to practice law that I was going to be sued. I told him that I was sure that the Supreme Court would not pay any attention to my recommendation one way or the other. But I was told that it was my duty as President of the Bar to so appear. I have also been told, and this by good authority, that there is in the works now contemplated some litigation against the Bar Association as a group. Again I say, it is too much to expect people giving of their time, as they do to the work of this Association, that they should be involved in matters of that kind. I feel along with the other professional advice that we need, we need a General Counsel. We need someone to act for and to represent our Association in matters of this kind and to advise the Association generally. We also need somebody to represent us before the public, a real representative in the field of public relations and matters of that kind.

Now, I am talking about four different men. We can't, with our limited membership, employ four different men. But I think if we would pay an adequate salary we could obtain *one* man who could do all of these things for us, one man, a lawyer, who would be qualified in these fields. But you don't get that kind of a man cheap.

In my visits to these other states I inquired about compensation. The compensation will run from \$15,000 to \$18,000 a year minimum. Then of course not only do you have the \$15,000 to \$18,000 a year for the man himself, but you do have the expense of the education program, which I have been referring to and stressing, which will run another \$5,000 or \$10,000 a year, the mere supplies, traveling expenses, the expense of bringing in speakers, the expense of bringing in programs, and so forth. So I am talking to you about an additional expense of somewhere in the neighborhood of \$25,000 a year.

Then what does that mean? It just means simply this: We cannot under our present income in any way meet such an expense. Our present income on the basis of the dues which we now obtain from the membership just about pays our expenses for the year as they now exist. We come out even. And bear in mind one of the reasons we come out even is because we pay such inadequate salaries for the assistance which we do obtain.

So I submit to you that in order to raise this additional \$25,000 which I advocate, it will mean an increase in dues of \$10.00 per year, which would raise our dues for an active member to \$40.00 per annum.

As a matter of comparison, let me call your attention to the fact that the fees for membership in the State Dental Society are \$60.00 per annum; for membership in the State Medical Society, \$45.00 per annum. I would also call your attention to the fact that the fees in the neighboring State of Iowa are \$35.00 per annum, *but* in addition there is a charge for registration for attending the annual meeting. At their last meeting, the one that I attended, there was a \$20.00 registration fee. So they have not only their \$35.00 per annum charge but a \$20.00 registration fee for the annual meeting. In Michigan the fee is about \$35.00 per annum; Minnesota, \$36.00; Missouri \$35.00 with a \$25.00 registration fee for the annual meeting; North Dakota, \$40.00; South Dakota, \$100 per annum. It would seem that anyone who was in the active practice could well afford the \$40.00 per annum, particularly when he would be gaining the benefits of the Continuing Legal Education program.

I state most emphatically that in my opinion if the dues are not increased in order to provide for these additional services, our Bar Association will not be performing its duties to its membership nor to the public, and it will be in no position to complain when the public gradually dispenses with the services of the lawyers and uses other instrumentalities. Now, that may sound like a silly far-out remark, but I am willing at the appropriate time to point out to you that that is the trend of the times right now, and we are obligated to furnish the public the information and the service to which they are entitled.

It has been my great privilege to serve this Association during the last year. I have enjoyed it very much. Whether I have done a decent job or not is a matter for you alone to decide. But I am deeply grateful to all the officers of the Association and to all the members for the many courtesies and consideration given to me during the past year. I close my year and my report with my most sincere thanks to all of you and the expression of my best hopes for the continued progress and improvement of our Associa-

tion and of the profession of law in which we serve. This, not only for ourselves, selfishly, but for the benefit of the public and the service to our state and nation in order to preserve, protect, and defend the rule of law and our democratic way of life.

CHAIRMAN MULLIN: Mr. President, I think I speak for everyone in this room when I say "Thank you for a fine report on many subjects of interest to everybody here." We will defer at this time further discussion on any of the suggestions that have been made because later in our calendar there is a time when those things can be brought up.

Under the calendar under which we now operate, the next order of business calls for the introduction of resolutions. Do we have any resolutions? No resolutions have been submitted to Mr. Turner that we are aware of.

No. 3, Report of the Secretary-Treasurer, and this is important because we want to hear about the money—George Turner!

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman and Members of the House: The books of the Association have been audited by Peat, Marwick Mitchell & Company through their Lincoln office, and they submit the following report:

We have examined the statement of cash receipts and disbursements of the Nebraska State Bar Association for the year ended August 31, 1966. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and other auditing procedures as we considered necessary in the circumstances.

In our opinion the accompanying statement of cash receipts and disbursements presents fairly the cash transactions of the Nebraska State Bar Association for the year ended August 31, 1966.

The accompanying statements of condition as of August 31, 1966, and cash receipts and disbursements of the Daniel J. Gross-Nebraska State Bar Association Welfare and Assistance Fund for the year ended August 31, 1966, have been prepared from the books without audit and we express no opinion thereon.

Then they attach to that the statement of cash receipts and disbursements which, of course, as is customary, will be printed in detail in the proceedings of this annual meeting. They show a total Receipts of \$65,709. The largest items of expenditure are Salaries and Wages, \$11,293; Postage and Express, \$2,517; publishing the Directory, \$1,191; expenses of the Executive Council, \$1,936; our

share of printing the *Nebraska Law Review*, \$7,873; the full cost of printing the *Journal* less receipts, \$1,899; Public Service Expenditures, \$5,448; American Bar Association Meeting, \$6,941; Annual Meeting last year less reimbursements and exhibit space, \$9,304.

We started with a cash balance at the beginning of the year—that would be the close of last year—of \$8,588. As of August 31 our Cash on Hand was \$13,238.

CHAIRMAN MULLIN: Are there any questions? If not, the report will stand as read.

The report of the Committee on American Citizenship. The Committee's report appears on page 16 of the printed program, Mr. Leslie H. Noble, Chairman.

REPORT OF COMMITTEE ON AMERICAN CITIZENSHIP

Leslie H. Noble

President Herman, Members of the House of Delegates, and Fellow Lawyers: As has been suggested, the report of the Committee on American Citizenship may be found in your program on pages 16 and 17.

One recommendation was made to the Bar Association by our Committee. At this time, Mr. Chairman, I would like to move that the following recommendation be adopted:

We recommend that Nebraska lawyers individually and collectively through their various county and district Bar Associations continually strive to stimulate the public interest and deep concern in the promotion of the spirit of patriotism and loyalty to our nation.

CHAIRMAN MULLIN: Thank you. Is there a second to that motion?

HARRY N. LARSON, Wakefield: I second it.

CHAIRMAN MULLIN: You have all heard the recommendation that has been made and seconded. Any discussion? If not, all in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Committee on American Citizenship

The aims and objectives of the American Citizenship Committee, which were so well and effectively stated in the report of this committee at the Sixty-Sixth Annual Meeting of the Nebraska State

Bar Association, have been carried on in the activities of our various Bar Associations throughout the State of Nebraska during the past year.

We believe that the members of our Nebraska Bar individually and collectively are becoming more and more aware of the necessity of stressing to the general public the extreme importance of promoting and maintaining the ideals of our American heritage, the principles of freedom, liberty, justice and good government.

We are pleased to report continued and increased activities among our fellow lawyers and members of the judiciary as speakers at various patriotic community meetings and public events. Bar Associations are jointly participating with the American Legion in the promotion of County Government Day in several Nebraska communities. Lawyers are assisting in jury trials with high school students present in several judicial districts. Many of our lawyers are speaking before high school classes and assemblies on subjects relating to our Constitution, citizenship and a strong and sound government.

We recommend that Nebraska lawyers individually and collectively through their various county and district bar associations continually strive to stimulate the public interest and deep concern in the promotion of the spirit of patriotism and loyalty to our nation.

Leslie H. Noble, Chairman
Rollin R. Bailey
Glenn 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
Howard W. Spencer
Clyde R. Worrall

CHAIRMAN MULLIN: The next report will be presented by Harold L. Rock, Chairman of the Committee on Continuing Legal Education.

REPORT OF COMMITTEE ON CONTINUING LEGAL EDUCATION

Harold R. Rock

Gentlemen, I do recommend the report to your reading. I am not going to repeat it.

We were fairly busy this year. The major task of the Committee was to prepare an Evidence outline. I have one in my hand, and all those attending will get one. It will be bound a little differently with a spiral binding. This is what the Committee, with the help of probably many of you here, put out this year.

We do have a recommendation, and maybe it should be amended slightly:

The Committee recommends that the practice of preparing an outline of some area of the law be continued each year—and I would amend it there—*as often as possible*, with primary responsibility for the preparation in the Section presenting the program.

I make the amendment because we haven't started on an outline for next year's topic yet. It does take some time. I think you will find that it is a worthwhile project. The Iowa Bar Association has been doing it, and other Bar associations have been doing it, and I think it is a reasonable project for our Association to undertake.

I do move the acceptance of the recommendation.

CHAIRMAN MULLIN: Is there a second?

THOMAS W. TYE, Kearney: I second it.

CHAIRMAN MULLIN: Any discussion? All in favor say "aye"; opposed. Carried.

CONTINUING EDUCATION OF NEBRASKA LAWYERS: REPORT ON A SURVEY OF CHARACTERISTICS AND INTERESTS

Dr. Alan B. Knox

Formerly Head, Adult Education Research, University of Nebraska, currently Director, Center for Adult Education, Teachers College, Columbia University.

INTRODUCTION

This article is the final report on a survey of the interests and characteristics of Nebraska lawyers related to continuing legal edu-

cation. The survey was conducted in the spring of 1964 by the Continuing Legal Education Committee of the Nebraska State Bar Association and the Office of Adult Education Research of the University of Nebraska. A copy of the survey proposal was contained in 43 NEB. L. REV. 202-06 (1964). Two preliminary reports were previously prepared on this project. The first was contained in the October 1964 issue of the *Nebraska State Bar Journal*, pages 121 through 136. The *Journal* article described the research procedure, the frequency of responses to the major survey questions, and an analysis of the representativeness of returns. The second report was contained in 44 NEB. L. REV. 258-67 (1965). The preliminary report in the *Review* described the characteristics of the lawyers who had expressed varying degrees of interest in an illustrative topic for a continuing legal education program, analyzed the relation between the proportion of time devoted to an area of practice and the extent of interest expressed in it, and indicated the characteristics of Nebraska lawyers that were associated with extent of participation in previous continuing legal education programs.

The purpose of the present article is to present the summary findings from the Continuing Legal Education Survey of Nebraska Bar members. The present article incorporates in modified form some of the findings previously presented in the October 1964 issue of the *Nebraska State Bar Journal*. In addition, one section of this article reports findings from an intensive analysis of data on characteristics and interests of Nebraska lawyers related to legal topics that in varying ways and degrees dealt with the field of taxation. This analysis of data related to taxation will illustrate the use of the survey data for planning continuing legal education programs in the field of taxation. The Continuing Legal Education Committee may want to arrange for similar analyses to be conducted for other topic areas included within the survey.

SUMMARY OF PROCEDURES AND FINDINGS

The survey questionnaire form was prepared after consultation with leaders in the Association, was pretested in Council Bluffs, and was sent to 1,872 active members of the Nebraska Bar Association with Nebraska mailing addresses. A small random sample of NSBA members were selected for interview, as a check on bias due to nonreturns. Six hundred and twenty-seven of those who received a questionnaire completed and returned it. Fifty-one of the fifty-two scheduled interviews were completed.

The responses to completed questionnaires were compared with those from an ABA Survey reported in the February 1964 issue of the *Practical Lawyer*; with information about the total NSBA mem-

bership; with those who were interviewed; and with information about those who had attended prior CLE programs. The results of the Nebraska survey were similar to the ABA Survey, especially for lawyers from the West North Central Region of the U. S. In general, the characteristics of the Nebraska lawyers who returned questionnaires were sufficiently similar to the total membership of the State Bar Association that it seems warranted to generalize the most marked findings to the total membership. This procedure would be least justified for lawyers over 65 years of age and for responses directly related to extent of interest in participation in CLE programs. The questionnaire data provided an excellent basis for generalizing to those most active in recent CLE programs. Compared with one-third of the total membership who returned survey questionnaires, 95 per cent of the lawyers who had attended a sample of CLE programs during the previous year did so.

The sub-population of lawyers who in the past had attended the most CLE programs included somewhat higher proportions of lawyers in the following categories: residence in Lincoln; connected with a larger firm; higher income; and participation in legal associations, especially the NSBA.

The areas of legal practice in which the most lawyers were interested in learning more in CLE programs were those areas in which most lawyers were spending more than one-third of their time. These areas included Probate, Trial Practice, Estate Planning, Personal Income Tax, Real Estate, Automobile Negligence, Corporation Legal Counsel, Commercial Law, and Estate Tax.

Almost all of the lawyers who expressed no interest in learning more about an area of practice were spending less than ten per cent of their time in the area. About an equal number of those who expressed high interest in learning more about an area of practice were spending little time in the area, as was the case for those who reported spending much time in the area.

Of those lawyers who expressed much interest in several illustrative topics, those who reported spending much time in the area differed from those who reported spending little time, primarily by being slightly younger, connected with a larger firm, more active in organizations, and by reporting more prior participation in CLE programs.

In response to a question, which requested any observation that the lawyer wanted to make, many suggestions were made regarding ways in which future CLE programs could become even more useful and convenient to Nebraska lawyers. A listing of these suggestions was included on pages 129 and 130 of the October 1964 issue of the *Nebraska State Bar Journal*.

The survey questionnaire also contained questions to provide a description of the characteristics of the lawyers who returned completed questionnaires. The October 1964 issue of the *Nebraska State Bar Journal* contained detailed frequency distributions and comparisons between the data from the questionnaires, interviews, and NSBA records. It was concluded that the questionnaire data was quite representative of the total membership who were under 65 years of age. The remainder of this section is a summary of the characteristics of the Nebraska lawyers who participated in the survey, which provides useful background for the subsequent analysis of preferences and activities related to continuing legal education.

Eighteen per cent of the lawyers practiced in communities with less than 2,500 population; 18 per cent in towns between 2,500 and 10,000; 16 per cent in cities between 10,000 and 50,000; 15 per cent in Lincoln; and 33 per cent practiced in Omaha.

Twenty-six per cent of the lawyers were under 35 years of age; 30 per cent were between 35 and 44; 21 per cent were between 45 and 54; 15 per cent were between 55 and 64; and 8 per cent were 65 and older.

A majority of the lawyers were classified within one of two types of practice. Thirty-six per cent were performing general legal matters as a member of a law firm, and 28 per cent were practicing general law by themselves. Fourteen per cent were specializing, 9 per cent as a member of a law firm and 5 per cent in practice by themselves. The remaining 22 per cent of the lawyers were classified in one of 15 other categories of work with no more than 3 per cent in any one category. Of the 45 per cent of the lawyers who were members of law firms, 34 per cent were in practice with one other lawyer, 31 per cent were with two or three other lawyers, and 35 per cent were in firms with four or more other lawyers.

Regarding annual income bracket, 9 per cent of the lawyers received less than \$7,000; 16 per cent received between \$7,000 and \$10,000; 31 per cent between \$10,000 and \$15,000; 19 per cent between \$15,000 and \$20,000; and 25 per cent earned \$20,000 or more.

Regarding membership in all types of organizations, 5 per cent belonged to one or two; 25 per cent belonged to three or four; 36 per cent belonged to five or six; and 36 per cent belonged to seven or more. Regarding attendance at the annual NSBA meetings, 62 per cent attended frequently; 25 per cent attended sometimes; and 13 per cent attended almost never.

After responding to each of 58 areas of practice in terms of time devoted to the area and interest in learning more about the area, the respondents were requested to select the three areas in which they were most interested in learning more. The nine topic areas that were most frequently selected are listed below. The number following each is the number of lawyers who selected the area as one of the three primary choices: Probate (196); Trial Practice (144); Estate Planning (129); Personal U. S. Income Tax (117); Real Estate (98); Auto Negligence (91); Corporation Legal Counsel (72); Commercial Law (50); and Estate Tax (49).

PREFERENCES AND ACTIVITIES RELATED TO CONTINUING LEGAL EDUCATION

In the survey, Nebraska attorneys were asked a series of questions regarding the arrangements that they would prefer for CLE programs. The fall of the year was clearly preferred by most lawyers as a time for conferences or short courses devoted to legal subjects. Twenty-two per cent selected September and October; 18 per cent selected July and August; and 17 per cent selected November and December. Only 13 per cent indicated that season of the year didn't make any difference. More than twice as many lawyers suggested a preference for attending a program during the second and third weeks of the month, compared with the first or the last; although more than half of the lawyers indicated that period of the month made no difference. The end of the week was preferred by most lawyers, with 35 per cent suggesting Friday and Saturday and 28 per cent suggesting Thursday and Friday as the preferred days. Only 14 per cent indicated that the part of the week made no difference.

Two-day conferences were checked as preferable by almost 60 per cent of the lawyers, and only 6 per cent indicated a preference for conferences of three or more days' duration. Regarding the organization of future CLE seminars or conferences, 59 per cent of the lawyers expressed a preference for devoting each seminar to two or three related topics, to allow detailed exploration of each. The remaining lawyers were about evenly divided between a preference for many short topics of an hour or two in duration, and a preference for a major topic for about half of the available time with short topics for the remainder. The method of increasing legal knowledge and competence that was checked most frequently was the combination of lecture and discussion. This method was checked by 22 per cent of the lawyers. About 10 or 12 per cent of the lawyers checked each of the following methods of instruction: lecture, panel discussion, demonstration, seminar, and informal discussion with other attorneys. This finding suggests that future

CLE programs should place more emphasis on varied methods of instruction, especially for small group sessions on the same topic in which participants may select the instructional method they prefer. The NSBA is clearly moving in the direction of more varied instructional methods in CLE programs. In the 1965 NSBA annual meeting a full-length movie and a comprehensive workbook were presented on the topic of revocable trusts in estate planning. The plans for the 1966 annual meeting session on the subject of evidence provide for the presentation and consideration of extensive practice materials.

The foregoing information regarding preferences for continuing legal education may be better understood within the context of the amount of time that the lawyers were devoting to their legal practice, the amount of time they were devoting to self-directed study not directly related with specific legal matters, and the extent of prior participation in CLE programs. Regarding time devoted to legal practice, 15 per cent of the lawyers who responded to this survey were devoting no time to the private practice of law. Fourteen per cent were devoting some time but less than 36 hours per week on legal practice, 32 per cent were spending between 36 and 45 hours per week, 27 per cent were spending between 46 and 55 hours per week, and the remaining 12 per cent were spending 56 or more hours per week on their legal practice. Regarding self-directed study, 13 per cent were spending no time on self-directed study, 30 per cent were spending one or two hours a week, 41 per cent were spending between three and six hours per week, and 16 per cent were spending seven or more hours per week on self-directed study.

Regarding prior participation in CLE programs, during the three years prior to the survey, 10 per cent of the lawyers had attended no CLE programs. Twenty-three per cent had attended one or two, 24 per cent had attended three or four programs, 19 per cent had attended five or six programs, and 24 per cent had attended seven or more CLE programs. During that same period of time, 57 per cent of the lawyers had attended no CLE programs outside of the State of Nebraska, 30 per cent had attended one or two, and the remaining 13 per cent had attended three or more. In general, the Nebraska lawyers who completed a survey questionnaire or interview varied greatly regarding the amount of time they were devoting to their legal practice and to continuing legal education activities.

Part II of the survey questionnaire contained a list of 58 areas of legal practice. The list was representative of the specialized legal matters with which lawyers deal. In responding to the ques-

tionnaire, the attorney indicated for each area of practice approximate proportion of his time that he typically devoted to that area, and his degree of interest in learning more about topics related to the area. Fourteen of the areas were related to taxation. Table 1 lists the areas of practice related to taxation. The areas of practice are listed in descending order in terms of the number of lawyers who reported devoting more than one-third of their time to that area of practice. For instance, "Probate" was listed by 119 lawyers as an area in which they were devoting one-third of their time, whereas "Pension and Profit-Sharing" was listed in this category by only two attorneys. In general, the number of lawyers who checked these areas of practice in the Much Interest column regarding continuing legal education paralleled the order in terms of time devoted to the area. The number of lawyers who selected the area of practice as one of the three topics in which they were most interested for future CLE seminars also tended to parallel the order based on time spent in the area of practice. There were some topics, however, in which the relative proportion of attorneys who expressed interest in studying more about the topics was higher than the relative proportion of attorneys who were devoting more than one-third of their time to the area of practice. This was clearly the case for "Personal U. S. Income Tax," "U. S. Estate and Gift Tax," and "Trusts," and to a lesser extent for "Estate Planning," "Commercial Law," and "Securities Issuance and Regulation."

TABLE 1
Time Devoted to and Interest Expressed in
Areas of Practice Related to Taxation

No. of Lawyers Devoting More Than One-Third Time	Area of Practice	No. Checking Much Interest Column	No. Select- ing as One of Three Highest Interests
119	Probate	232	196
47	Estate Planning	251	129
44	Business Legal Counsel	146	72
43	Real Estate	149	49
35	Personal U. S. Income Tax	182	117
23	Trust and Estate	149	35
21	U. S. Estate & Gift Tax	162	49
20	Commercial Law	125	50
17	Business Income Tax	121	33
7	Nebraska Taxation	80	8
7	Other U. S. Taxes	47	0
4	Trusts	74	17
4	Securities Iss. & Reg.	30	16
2	Pension & Profit Sharing	36	5

ANALYSIS OF THE CHARACTERISTICS OF LAWYERS WHO EXPRESSED THE GREATEST INTEREST IN TOPICS RELATED TO TAXATION

One of the major benefits of the survey results is the opportunity that the collected information provides to explore in detail the characteristics of the lawyers who expressed the greatest interest in specific topics. The purpose of this section of the report is to present the analysis related to the area of taxation, as a way of illustrating the type of analyses that could be conducted in other areas.

The area of taxation was selected for many reasons, including the many and varied CLE programs on taxation that have been presented during the past twenty years, current changes related to taxation, high interest in the subject within the NSBA, efforts by the Taxation Section to diversify the form and content of their programs, and anticipated differences related to section of the state and type of practice. The extent of interest that a lawyer might have in topics related to taxation might be assumed to be associated with the general characteristics of the community in which he practiced. Two questions on the survey questionnaire provided relevant information. One dealt with the county in which the lawyer resided. These counties were grouped into nine regions of the state, consisting of Douglas, Lancaster, and Sarpy Counties in one region; Hall and Adams Counties in a second region; with the remaining groups of counties labeled East, South, Northeast, North Central, Sandhills, Central, and Southwest. The proportion of the lawyer's time that was devoted to tax-related areas was lowest for lawyers practicing in Lincoln and Omaha and to some extent in Hastings and Grand Island; and was highest for lawyers practicing in the Sandhills and to some extent in the Central region. However, almost all regions of the state included at least one area of practice in which a relatively high proportion of lawyers were engaged and at least one in which a relatively low proportion were engaged.

Regarding interest in further study related to taxation, the pattern related to region of the state was substantially the same as for proportion of time devoted to the area, but there were two exceptions. The proportion of lawyers who expressed much interest in "Business Legal Counsel" was highest in the metropolitan areas and lowest outstate, and about the only interest expressed in "Securities Issuance and Regulation" was in Lincoln and Omaha.

The second questionnaire question that dealt with community size allowed classification of the lawyers regarding population of

the community, into communities under 2,500; between 2,500 and 5,000; between 5,000 and 10,000; between 10,000 and 50,000; and Lincoln and Omaha. Regarding time devoted to areas of taxation, the largest proportion of time was reported by lawyers who resided in communities between 2,500 and 5,000 population. Regarding interest in continuing legal education and topics related to taxation, the highest interest was consistently expressed by lawyers in communities under 5,000 in population, and the lowest interest was expressed by lawyers who resided in Lincoln and Omaha. The two exceptions to this trend were "Securities Issuance and Regulation" in which the highest interest was expressed by lawyers in Lincoln, and exceedingly low interest was expressed by lawyers elsewhere in the state; and the area of "Pension and Profit-Sharing" that was checked primarily by lawyers from Lincoln and Omaha.

In general, the proportion of time that was devoted to taxation topics and the extent of interest expressed in attending CLE programs on tax topics was higher for lawyers who resided in smaller communities outstate than it was for lawyers from Lincoln and Omaha. This finding is undoubtedly related to the greater degree of specialized legal practice and of accounting firms in the larger cities. The major implication for continuing legal education is that although some highly specialized tax topics are relevant to only a few lawyers, most of whom practice in the larger cities, there appears to be substantial experience and interest related to taxation by lawyers throughout the state. The planning of continuing legal education programs should take this into account.

Two characteristics of lawyers that might be expected to be associated with time devoted to and expressed interest in areas of practice related to taxation were level of income and age. Income level was grouped within seven categories, ranging from less than \$5,000 up to \$40,000 or more. The largest proportion of time devoted to tax areas was reported by lawyers in the \$15,000 to \$40,000 income bracket. The lowest proportion of time spent on tax areas occurred for lawyers who earned less than \$5,000 a year and for those who earned more than \$40,000 a year. Regarding interest in continuing legal education programs related to taxation, lawyers who earned more than \$40,000 a year expressed the least interest, while consistently the highest interest was expressed by lawyers in the \$5,000 to \$7,000 income bracket.

The six age categories ranged from under 35 up to 65 and over, with four categories between. Regarding time devoted to taxation areas, there was little evidence of age-related trends, with the exception of a decline with age in the proportion of time spent on "Commercial Law," "Other U. S. Taxes," and "Nebraska Taxation";

and an increase with age in the proportion of time spent on "Trusts and Estates." Regarding interests in continuing legal education related to taxation, the highest proportion of interest was expressed by the lawyers under 35 years of age, and the least interest expressed by lawyers 65 years of age and over. The trend was most pronounced for "Securities Issuance and Regulation," a specialty that has developed rapidly in Lincoln and Omaha in recent years. Three exceptions in which there was no age-related trend were "Estate Planning," "Probate," and "Personal U. S. Income Tax." The area of "Trusts" was also an exception, in that the highest interest was expressed by lawyers in the 35 to 44 age group, and the lowest interest was expressed by those in the 60 to 64 age group.

The greatest potential response to CLE programs on taxation would be expected to occur from younger lawyers at the lower income levels. Although the lawyers who were most active in the tax areas were in the income range between \$15,000 and \$40,000 a year, the highest proportion of interest was expressed by those in the \$5,000 to \$7,000 a year income range. The proportion of time devoted to taxation was not related to age, but the greatest extent of interest in tax topics was expressed by lawyers under age 35. It would appear that lawyers viewed CLE programs on tax topics as a means of developing a specialty in this area instead of a way of maintaining a specialty that had been developed during the years of practice.

An analysis of the interests of Nebraska lawyers regarding CLE related to taxation must take into account the fact that this is an area in which the NSBA has been exceedingly active in the past. Previous programs have included a series of annual Tax Institutes. It is therefore important to examine the extent of time spent on and interest in tax areas in relation to frequency of attendance at NSBA meetings. In order to ascertain the degree to which a lawyer's extent of prior activity in various types of community organizations might be related to either time spent on or interest in tax areas, these two variables were cross tabulated with the number of organizational memberships that the lawyer held. There was no relationship between the number of organizational memberships that the lawyers reported, and either the proportion of time spent in the tax area or the extent of interest in studying more about the tax area. It was therefore concluded that most of the association between frequency of attendance at NSBA meetings and time spent on and interest in tax areas was associated with the activities of the NSBA and not the lawyers' extent of organizational participation generally.

The highest porportion of time spent in the tax area was reported by lawyers who frequently attended meetings of the NSBA and the lowest proportion of time spent in the tax area was reported by lawyers who almost never attended NSBA meetings. There were, however, some exceptions in which there was no association between the extent of participation in NSBA meetings and the proportion of time spent in tax areas. These exceptions were "Commercial Law," "Securities Issuance and Regulation," "Personal U. S. Income Tax," and "Trusts." Regarding interest in continuing legal education related to taxation, the highest extent of interest was expressed by those who frequently attended NSBA meetings, and the least interest was expressed by those who never attended. The one exception related to interest was the topic "Trusts."

The finding of no relationship between time or interest related to tax topics and general organization participation, but a strong positive relationship with activity in the NSBA, can be given at least two interpretations. One explanation is that the same type of lawyer is active in both the NSBA and continuing legal education including the tax area. A second explanation is that the finding is evidence of past NSBA efforts to encourage active members to devote increased time and interest to the tax area and CLE related to it. A large proportion of CLE programs during the past twenty years have been devoted to the field of taxation. Both interpretations appear relevant. A major implication of this finding centers on the question: What, if anything, should the Continuing Legal Education Committee do to encourage the less active NSBA member to develop greater interest and competence in the tax area. This is a matter that warrants further exploration.

The amount of time a lawyer spent each week on his legal practice was also examined in relation to both time spent on and interest in the tax areas. There was little relationship between time spent in the tax areas and the amount of time spent on the legal practice, for most of the topics. Those who reported spending the greatest amount of time in the area of "Trust and Estate Tax" were primarily those who were spending more than 46 hours a week on their legal practice, while those who reported devoting no time to a private legal practice reported spending the least time on "Real Estate." The highest interest in continuing legal education related to tax subjects was expressed by lawyers who were spending between 46 and 55 hours per week on their total legal practice. Those who were spending more than 55 hours a week on their legal practice expressed relatively greater interest in "Real Estate," "Security Issuance and Regulation," and "Nebraska Taxation." By contrast, those who were devoting between 1 and 34 hours a week

on their legal practice expressed the least interest in "Commercial Law," "Legal Counsel," "Pension and Profit-Sharing," "Real Estate," and "Security Issuance and Regulation." The finding of highest interest in attending CLE programs on tax topics expressed by lawyers who were devoting about 50 hours a week on their practice, in comparison with no relation between the proportion of time spent on the tax area and the amount of time spent on the total practice, suggests that the length of the work week may influence extent of interest in continuing legal education. Lawyers who devote substantially less than a full work week to their practice may be either purposely restricting their time spent on legal practice and therefore may not want to further develop competence in tax law, or may be devoting their time and energies to increasing the size of their legal practice and therefore may not want to channel time into education instead of expanding the practice. Lawyers who devote substantially more than a full work week to their practice may believe that there is no time remaining for continuing education. Perhaps the use of home study methods of continuing education would reach a larger proportion of the lawyers who are now devoting relatively high or low portions of their time to their practice.

The remaining characteristic that was analyzed in relation to the tax area was extent of participation by the lawyer in CLE activities, including self-study. Regarding the number of prior CLE seminars that the lawyers had attended, six categories were used—none, one or two, three or four, five or six, seven or eight, and nine or more. Regarding time spent in the tax area, those lawyers who had attended no prior CLE seminars reported the least time to the tax area, whereas those lawyers who had attended seven or eight prior seminars reported devoting a larger proportion of their time to the tax area. Those who had attended nine or more prior seminars reported spending the second highest amount of time. Expressed interest in CLE seminars was highest for those who had attended more than seven previous seminars and was lowest for those who had attended none. It was noted that lawyers who had attended nine or more prior CLE seminars devoted the highest proportion of their time and expressed the highest degree of interest concerning "Security Issuance and Regulation" and "Estate Planning" compared with other lawyers.

For self-directed study, those lawyers who reported spending seven or eight hours a week on self-directed study were devoting larger proportions of their time to the tax area than were lawyers who spent either less or more time per week on self-directed study. The lowest proportion of time spent on the tax area was reported by lawyers who spent no time in self-directed study or who spent

eleven or more hours per week in self-directed study. Regarding interest, there was little association between the amount of time spent in self-directed study and the amount of expressed interest in continuing legal education related to the tax topics. Clearly, the relationship between orientation toward the tax area and continuing legal education was different for attendance at seminars than it was for self-directed study. Interest and activity in the tax area directly paralleled the general level of activity in CLE seminars, but this was not the case for self-directed study. It would appear that generalizations about the characteristics of participants in CLE seminars would apply directly to lawyers who are active and interested in the tax area.

SUMMARY

The foregoing analysis of the characteristics of lawyers who expressed the greatest interest in topics related to taxation was presented to illustrate the type of analysis that can be conducted in greater detail for any of the additional characteristics and topic areas included in the survey questionnaire. For the present analysis related to tax topics there was a close correspondence between the proportion of time devoted to each tax area and the extent of expressed interest in learning more about the area. The proportion of lawyers who indicated substantial interest and activity related to each of the selected tax topics varied greatly, but in general the characteristics of the lawyers who were active and interested in each of the selected topics were very similar. The major exception was the lawyers who were interested in "Securities Issuance and Regulation." The description of the target population of younger lawyers throughout the state who expressed much interest in studying more about tax topics provides one type of information that is useful in the process of planning programs of continuing legal education related to taxation. If this is the target population that has been attending previous CLE programs, and if this is the target population that the CLE Committee wants to reach, then future programs should be similar regarding topics, methods, location, and other arrangements. However, if this is not the case, the characteristics of the lawyers who have attended previous tax seminars can be compared with the characteristics of the lawyers that the Committee wants to reach, as a basis for deciding upon the program arrangements that might be changed. In this way, survey findings regarding the characteristics and interests of Nebraska lawyers can be combined with the best judgment of CLE Planning Committee members in the process of developing increasingly more effective educational programs.

[The report of the Committee follows.]

REPORT OF THE COMMITTEE ON CONTINUING LEGAL EDUCATION

The Continuing Legal Education Committee respectfully submits the following report:

The Committee has met three times in the past year.

The Committee on Continuing Legal Education prepared, for distribution to the members of the Nebraska Bar, an Outline of the Law of Evidence in Nebraska. The project was undertaken in 1965 so the Outline would be ready for distribution in conjunction with the presentation of a program on Evidence at the Annual Bar Association meeting in 1966. The work is the result of the efforts of many members of our Association but principally Jack North, who supervised the initial drafts, and David Dow, who did the final editing job.

The bulk of the draft has been prepared by John North and certain colleagues, has been circulated for improvement, correction, elaboration and additions to members of the practice throughout the state and, in the hands of Dean Dow, it was molded into a final form for publication. The Committee hopes this will be the first of many publications on all areas of Nebraska law.

The annual Bar Association meeting program was the responsibility of the Section on Practice and Procedure. For details, you may refer to the report of that Section.

The Bridge-the-Gap program was presented by the Junior Bar Section on June 22 and 23. Attendance was over seventy law graduates and others interested in a refresher course.

On May 5, 1966, the Continuing Legal Education Committee and the Committee for Cooperation with the Medical Profession cooperated with the Nebraska Medical Association to present a program on Trauma and Heart Disease to a combined meeting of the Nebraska Bar Association and the Nebraska Medical Association. The meeting was unusually successful and well attended.

The Tax Section is planning its regular December tax courses, out-state and in Omaha.

At the Committee meeting on February 11, 1966, the consensus was that the 1967 annual meeting should be devoted to a program on taxation. Although the Section on Taxation has been receiving competition for time by other non-lawyer groups, its programs are uniformly well done and registrations run high.

The Committee met with the Executive Secretary of the Kansas State Bar Association to consider joining forces with that Associa-

tion in presenting programs of interest to members of both Associations. The full Committee is considering the proposal. No recommendation is made at this time.

The Committee has under consideration sponsoring a regional institute to be put on in Omaha by the Practicing Law Institute. The Executive Council of the Nebraska Bar Association has considered and approved a regional institute by the P.L.I. in May of 1967.

The institute by the Junior Bar Section was held this fall. It was an Institute on Insurance held September 16 and 17.

The report of Dr. Alan B. Knox was submitted to the House of Delegates for the mid-year meeting.

The Committee recommends that the practice of preparing an outline of some area of the law be continued each year with primary responsibility for the preparation in the Section presenting the program.

Harold L. Rock, Chairman
A. Lee Bloomingdale
Thomas R. Burke
John R. Cockle
Warren K. Dalton
David Dow
James A. Doyle
John M. Gradwohl
Deryl F. Hamann
John C. Mason
John E. North
Jerrold L. Strasheim
Flavel A. Wright

CHAIRMAN MULLIN: We come now to the report of the Committee on Crime and Delinquency Prevention, Gerald S. Vitamvas, Chairman.

REPORT OF COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

Gerald S. Vitamvas

The Committee on Crime and Delinquency Prevention made four recommendations:

1. That this Association go on record as approving an amendment to Section 29-1804 to permit the appointment or selection of a public defender by the county board at the time such an office is

authorized for the county, the public defender to serve until he can be elected as other county officers.

There is a gap. This section provides that a public defender may be inaugurated in any county in the state by the approval of the county board, but if they do that right following a general election there is no provision for appointment, as such, until he is elected at the following election when county officers are elected. So there is a gap there and the purpose of this is to fill that gap.

2. It is recommended that a procedure be adopted to permit the determination of whether or not an accused is without necessary funds to pay for his own counsel in situations arising prior to the preliminary hearing or filing of the complaint.

The purpose of this is obvious. There is a gap in our law at present. An individual, if he says he is without funds, is poverty stricken or indigent, then on the face of it there is no specific provision. There has been some indication that the courts might approve the determination of this, but at the present time it would be better to have some form of statute, and I do not think it would be too difficult to draft such to provide that the judge who makes the appointment or is required to make the appointment for a supposedly indigent defendant could make a determination on evidence or factual hearing as to the indigency of that individual.

3. That the Association go on record as favoring a procedure permitting a trial court to appoint a commission, at the instance of either the county attorney or defense counsel, for the purpose of examining an accused who has been charged with a felony to determine whether or not such individual is competent to stand trial.

This is a little different than to determine the competency of an individual accused at the time that he committed the act. This goes to the time of the trial. This is not a pressing situation because, to my knowledge, it has only arisen once within the last two or three years, but it is an area that should be covered.

4. That the Association go on record as favoring repeal of Section 83-455, and as favoring the adoption of legislation providing in substance that when a child sixteen years of age or over in custody in a training school commits an act which, if committed by an adult, would amount to a crime, said child may be charged in the district court of the county wherein the training school is located and upon conviction recommitted to the training school or committed to the Nebraska Penal and Correctional Complex in the discretion of the district court.

This situation is a serious one as far as the Committee is concerned. This recommendation is not quite stated precisely, I might say. This is due to my fault, and my apologies to these gentlemen, but the purpose of it is that under the present Nebraska Penal and Correctional Complex setup, the training school, the reformatory, the girls' and boys' retraining school, and the penitentiary, are within the Nebraska Penal and Correctional Complex. There is a provision whereby inmates of one may be transferred to another by the Director of Public Institutions. This can result in a child being committed to the training school at Kearney, then by administrative action wind up in the penitentiary. And, gentlemen, this has happened. We are speaking for our office. We are seriously concerned about such procedure. We feel that an individual committed to the reformatory or the penitentiary should only be committed to such institution after a trial, a criminal trial before a district court. This is the purpose of the recommendation.

I therefore move the adoption of the recommendations of the Committee. I will not make a motion that the Committee be continued because it is a standing committee and it will be continued.

CHAIRMAN MULLIN: Thank you, Mr. Vitamvas. Is there a second?

ROBERT D. MOODIE, West Point: I second the motion.

ROBERT A. BARLOW, Lincoln: Might I ask, if we go on record as favoring these recommendations, what will happen then as far as a follow-through?

MR. VITAMVAS: I would assume, and I am assuming for myself, that our Committee will then prepare or cause to be prepared the necessary amendments and submit them to the Committee on Legislation.

FRANCIS M. CASEY, Plattsmouth: Mr. Vitamvas, may I ask a question? I note the verbiage on item 4, that the accused is tried in the district court of the county where the training school is located.

MR. VITAMVAS: Probably you have a point there that is well taken. It probably should be the district court where the offense has been committed.

MR. CASEY: The reason I bring that up, there was a boy from the training school who just committed a crime in Omaha a few days ago and it might be an awful expensive thing to get all of the witnesses from here to go there.

MR. VITAMVAS: Correct. I will explain this. The normal situation is that where the boy is committed to Kearney, the offense is going to be committed at Kearney rather than in another county. Incidentally it could, yes, but this would be an independent offense which has been committed outside while he is on escape or something of that nature.

HARRY B. COHEN, Omaha: You related something about an experience of the Director of the Penal Complex having the authority to take...

MR. VITAMVAS: No, it's the Director of the Department of Institutions.

MR. COHEN: Yes. He has the authority to take an inmate of any institution and transfer him to another institution?

MR. VITAMVAS: That is correct.

MR. COHEN: For no reason at all?

MR. VITAMVAS: Well, it is limited. As I recall, it is limited from a transfer from the penitentiary or the reformatory to the training school, you can't do that but you can do it up. It has to be with cause, yes. If they are incorrigible or to a point where they cannot be controlled. It is subject to the Board of Pardons' discretion to some extent. I know in a recent situation the Board of Pardons has reviewed the transfer of one of the boys from Kearney to the reformatory.

MR. COHEN: Notwithstanding that the commitment originally came from the district court or the juvenile court, as the case might be?

MR. VITAMVAS: Well, you have two different type situations. If the boy was committed pursuant to a juvenile court, this is normally a juvenile hearing without benefit of trial by jury. And they can be committed for delinquency or a various number of factors to the training school.

MR. COHEN: The point I make is, it doesn't have to go back to the original court making the commitment.

MR. VITAMVAS: No, not if he commits a new crime.

CHAIRMAN MULLIN: Gerald, would you accept an amendment to No. 4 in line with Mr. Casey's observation, so that it would read toward the end, "may be charged in the district court of the county wherein the training school is located or the county in which the crime was committed."

MR. VITAMVAS: I would accept such an amendment.

CHAIRMAN MULLIN: Does that satisfy your question?

LEO EISENSTATT, Omaha: I would like to recommend an amendment to the report, that the committee within a stated period, say sixty days, prepare specific resolutions and/or proposed amendatory statutes to the Committee on Legislation which, in turn, will be required to make its recommendation to the Executive Council of the Association so that it, in turn, could be presented to the next legislature.

CHAIRMAN MULLIN: Is there a second to the amending motion?

ROBERT A. BARLOW, Lincoln: I'll second that.

MR. VITAMVAS: I was just wondering, the point was made by Mr. Turner that this would not have to go to the Executive Council. The Committee on Legislation could handle it.

MR. EISENSTATT: My only request is that this be made specific by definite recommendations and be submitted to the legislature for action through the appropriate channels of this Association.

CHAIRMAN MULLIN: Would you also move that we otherwise generally approve the contents of the report? All right, you have heard the motion and I believe it has been seconded.

DALE E. FAHRNBRUCH, Lincoln: I've got one in regard to the third recommendation relating to the commission procedure of determining whether or not an individual is capable of standing trial. I think we are getting away from having a judge determination then if we are going to rely upon commissions. I am wondering what the feeling of the House is relative to that, by rather appointing psychiatrists and having a hearing rather than a commission making that determination.

MR. VITAMVAS: The thought of the Committee, Mr. Fahrnbruch, on this, it may not be well stated in the recommendation but the thought of the Committee was that this would have to be a final determination of the trial court. The commission would be one that would report to the trial court.

MR. FAHRNBRUCH: The point is, would the defendant have an opportunity to present evidence in rebuttal to this commission's report? I would gather from the way this is worded that it would rather be conclusive.

MR. VITAMVAS: As I stated, this is something that would have to be considered in drafting any legislation along this line.

I am not prepared to state the precise form because before we go to the work of drafting legislation our committee wanted the thinking of the House of Delegates on it first.

MR. FAHRNBRUCH: In that regard, then, I would move that the recommendation be amended: That the Association go on record in favor of setting up a procedure rather than a commission-type hearing.

CHAIRMAN MULLIN: In view of the approach that we are taking on this now, I am wondering if it might not be better to take these one at a time and vote on them separately.

The first recommendation is that we go on record as approving an amendment to Section 29-1804 to permit the appointment or selection of a public defender by the county board at the time such an office is authorized for the county, to serve until such officer can be elected as other county officers.

That, included with the others, has been seconded. Is there any discussion of No. 1? If not, we will vote on it at this time. All in favor say "aye"; opposed. Carried.

No. 2, it is recommended that a procedure be adopted to permit the determination of whether or not an accused is without necessary funds to pay for his own counsel in situations arising prior to the preliminary hearing or filing of the complaint.

That also has been moved and seconded. Is there any question or discussion?

JAMES I. SHAMBERG, Grand Island: I have some concern for the last portion of it, situations arising prior to the filing of a complaint. I am wondering whether we aren't getting into a legal aid situation there, that we are setting out a procedure.

MR. VITAMVAS: The reason this recommendation was made in this manner, I might point out, we don't know at this time how far the Supreme Court is going on its requirement for counsel. If we have to get to the situation where a counsel has to be appointed, for instance, for the individual before the complaint is even filed, from the criminal standpoint we might have to provide counsel for an indigent person even prior to the filing of a complaint. A person is entitled to counsel, according to them, at the time he is picked up and arrested and in effect more or less charged before you interrogate him; that is, you can't interrogate him. We don't know how far it is going, but the procedure that could be set up certainly would not be one that requires the appointment of counsel in certain situations, but the procedure could be

set up that in the event the appointment of counsel is required for indigents a procedure at that time could cover this. There is no problem there. This is not providing for the appointment of counsel. This is for the procedure in event counsel must be appointed to determine the indigency of the accused.

CHAIRMAN MULLIN: Any further questions, discussion, or motion in connection with No. 2? If not, all in favor of the motion say "aye"; opposed. Carried.

No. 3 has already been moved and seconded. The question has been raised by Mr. Fahrnbruch, although no amending motion has as yet been offered.

MR. FAHRNBRUCH: I would move that the word "commission" be changed to "psychiatrists and psychologists."

CHAIRMAN MULLIN: Is there a second to the amending motion? Hearing no second, the amending motion will die for lack thereof.

Is there any further discussion of No. 3? Are you ready to vote? All in favor say "aye"; opposed. The "ayes" have it.

No. 4 has been moved and seconded and relates to legislation to transfer a child from a training school to some other institution. There also has been an indication by the Chairman that he would accept an amendment which would permit a hearing in the county where the offense occurred. Is there any further discussion or question or amending motion at this time? The amending motion has not been made as such.

MR. VITAMVAS: Well, I didn't write it down precisely.

CHAIRMAN MULLIN: The amending question would relate to Mr. Casey's inquiry as to whether or not somebody could be prosecuted in the county where the offense occurred.

MR. VITAMVAS: The recommendation would read as follows: That the Association go on record as favoring the adoption of legislation providing in substance that when a child sixteen years of age or over in custody of a training school commits an act which, if committed by an adult, would amount to a crime, said child may be charged in the district court of the county wherein the crime is committed, and upon conviction recommitted to the training school or committed to the Nebraska Penal and Correctional Complex, in the direction of the district court.

CHAIRMAN MULLIN: May we then, Mr. Chairman, submit the motion in its amended form as you've just read it?

MR. VITAMVAS: I would concur in that.

CHAIRMAN MULLIN: Any other questions, discussion? All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Committee on Crime and Delinquency Prevention

One meeting of the committee was held during April of this year. The committee discussed problems relating to county attorneys, the commitment of juveniles to Kearney and other related juvenile matters, the problems of defending indigent accused and the problem of determining mental competency with relation to criminal trials. Subcommittees were appointed to investigate and study the various problems which have been presented in these areas.

With reference to county attorneys, the committee was aware of the difficulties of some counties, particularly the smaller ones, in obtaining local counsel to represent the county as county attorney. A subcommittee was appointed to study this matter in detail. The committee is advised that at the meeting of the County Attorneys Association that association went on record as favoring the retention of the present county attorney system. In view of the position taken by the County Attorneys Association it is the recommendation of this committee that no further action be taken on this matter at this time.

With reference to the defense of indigent persons and the public defender system, it was pointed out in Section 29-1804, R. S. Supp., 1965, authorizes each county board in the state to adopt a public defender system for the county. Under that section, however, there is no provision for the appointment of a public defender immediately upon approval of the system by the county board. In some cases there could be a delay of almost four years before a public defender's office could actually be established after the approval of such by the county board. It is the recommendation of this committee that this association go on record as approving an amendment to Section 29-1804 to permit the appointment or selection of a public defender by the county board at the time such an office is authorized for the county to serve until such officer can be elected as other county officers.

The committee feels that it should study further the question of extending appointments for indigent defendants to certain misdemeanor cases and for the appointment of counsel in situations prior to the preliminary hearing of an accused. In this connection it is felt that a means should be established to determine in each

individual case whether or not, in fact, an individual is without the necessary funds to pay for his own counsel. It is recommended that a procedure be adopted to permit such determination at a preliminary stage of the proceedings; or at the time that an accused asserts his indigency.

The committee was also interested in remedying the inadequacy of procedure for the determination of mental competency of an accused to stand trial. It is suggested and is recommended that the association go on record as favoring a procedure permitting a trial court to appoint a commission, at the instance of either the county attorney or defense counsel, for the purpose of examining an accused who has been charged with a felony to determine whether or not such individual is competent to stand trial.

The committee was also concerned about the constitutionality of Section 83-455, R. S. Supp., 1965, which provides that the Department of Public Institutions, with the approval of the Board of Pardons, may transfer an inmate sixteen years of age or over from the Boys Training School because of incorrigibility to the Nebraska Penal and Correctional Complex. Part of the problem in this statute is that juveniles under other statutes may be placed in the training school when found to be a delinquent child or a child in need of special supervision, both of which are specifically declared by statute not to be crimes; the child could then, by the workings of the above statute, end up in the Penal Complex without having the legal safeguards provided by law, the state and the United States Constitutions for adults charged with crime. In the light of this situation, a subcommittee was appointed to study this matter. It is the recommendation of the subcommittee, and adopted by this committee, that the association go on record as favoring repeal of Section 83-455 *supra*, and as favoring the adoption of legislation providing in substance that when a child sixteen years of age or over in custody in a training school commits an act, which if committed by an adult would amount to a crime, said child may be charged in the district court of the county wherein the training school is located and upon conviction recommitted to the training school or committed to the Nebraska Penal and Correctional Complex in the discretion of the district court.

The committee therefore recommends:

1. That this association go on record as approving an amendment to Section 29-1804 to permit the appointment or selection of a public defender by the county board at the time such an office is authorized for the county to serve until such officer can be elected as other county officers.

2. It is recommended that a procedure be adopted to permit the determination of whether or not an accused is without necessary funds to pay for his own counsel in situations arising prior to the preliminary hearing or filing of the complaint.

3. That the association go on record as favoring a procedure permitting a trial court to appoint a commission, at the instance of either the county attorney or defense counsel, for the purpose of examining an accused who has been charged with a felony to determine whether or not such individual is competent to stand trial.

4. That the association go on record as favoring repeal of Section 83-455, supra, and as favoring the adoption of legislation providing in substance that when a child sixteen years of age or over in custody in a training school commits an act, which if committed by an adult would amount to a crime, said child may be charged in the district court of the county wherein the training school is located and upon conviction recommitted to the training school or committed to the Nebraska Penal and Correctional Complex in the discretion of the district court.

Gerald S. Vitamas, Chairman

Bernard J. Ach

Donald L. Brock

Seward L. Hart

Melvin K. Kammerlohr

John H. Keriakedes

Alfred J. Kortum

Richard L. Kuhlman

Walter J. Matejka

Clark G. Nichols

W. W. Nuernberger

Walter D. Weaver

CHAIRMAN MULLIN: Now the report of the Committee on Judiciary, James N. Ackerman.

REPORT OF THE COMMITTEE ON JUDICIARY

James N. Ackerman

Mr. Chairman, the Committee's report is in writing and complete except in one detail or footnote that I will mention. There are no recommendations that need to have action by the House, according to my understanding, so unless there is some question on the written report I will simply say that the recommendation which we made, which is the latter recommendation having to do with judicial compensation, appears to have had a limitation in it that was not intended.

After our report was published, several members of the Committee, including myself, received friendly letters from members of the Municipal Bench in Lincoln and Omaha asking that the Municipal Judges be included in any legislation which we might foster for the improvement of judicial salaries.

The Committee has not had time to have another meeting, but I would suggest that if we wish to enlarge the recommendation which ultimately, I think, will need to come from the Executive Council, that this matter be considered in connection with our report, although I do not think it needs to be amended.

CHAIRMAN MULLIN: Thank you. I believe one of the other members of the House has already spoken to me and alerted me that he will be making a motion in that connection when the Legislative Committee presents its report.

MR. ACKERMAN: Otherwise I have no further discussion unless someone has a question on this report.

CHAIRMAN MULLIN: Thank you. Is there any discussion? All in favor of approving the report as submitted say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Committee on Judiciary

The Committee on Judiciary met at the First National Bank building in Lincoln on May 3rd, 1966 and took the following action.

All members present and all absent members responding to the notice of meeting by mail voted to recommend to the Executive Council active support of the Constitutional amendment set out in Legislative Bill 834 providing a procedure for reviewing the qualifications of judges serving under the Merit Plan.

The Chairman brought to the attention of the Committee a communication from one of the members of the committee suggesting that consideration be given to further amending the constitutional provisions relating to the Merit Plan by providing that each Commission on Judicial Qualifications for Supreme Court vacancies be limited to three nominations and that other Commissions on Judicial Qualification nominations be limited to two nominations in order to avoid political maneuvering by nominating a larger number of candidates to fill vacancies. This follows the Iowa practice. It was the unanimous opinion of those present that the matter should be referred to the Executive Council for further review.

The Chairman called the attention of the Committee to the suggestion made by one of the members that at the 1967 session of the Legislature attention should be given to the level of judicial salaries in Nebraska. A recent issue of the Journal of the American Judicature Society carried a summary of judicial salaries indicating that Nebraska has again slipped to the bottom of the list. The Committee voted unanimously to refer to the Executive Council and to the Legislative Committee the introduction of legislation at the 1967 Legislature raising judicial salaries in the medium range as shown in the summary in the American Judicature Society.

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
Joseph T. Vosoba
George E. Svoboda
Ralph E. Svoboda
Richard N. Van Steenberg

CHAIRMAN MULLIN: The report of the Committee on Legal Aid, Robert R. Camp.

REPORT OF COMMITTEE ON LEGAL AID

Robert R. Camp

Mr. Chairman and Members of the House: The report is in full on page 20 of the program. Just a few comments.

The bill as submitted to Congress by the President on poverty has passed both Houses of Congress in a little bit different version, so they are trying to compromise it down, and at last report when I checked on this yesterday the Lincoln non-profit corporation which is heading up Lincoln's Legal Aid Society does expect to be funded probably around the middle of November. At that time Lincoln will then go into a full-time staff member Legal Aid Society, which will not be comparable to Omaha which has, I believe, four or five attorneys and neighborhood offices. Lincoln will have a downtown office with one attorney and one secretary.

I believe your Special Committee on Availability of Legal Services covers the state program of what would be recommended to you as a state program of legal aid.

If there are any questions I will be happy to answer them.

CHAIRMAN MULLIN: If there are no questions . . .

LEO EISENSTATT, Omaha: I would like to ask a question. Is there any wisdom to combining this Committee with the other committee mentioned?

MR. ACKERMAN: I recommended to your President-Elect that possibly the members of the Legal Aid Committee be also members of the Special Committee on Availability of Legal Services, or at least that there would be some overlapping so that we are not going out in all directions and so that we are working toward one common goal.

MR. EISENSTATT: I suggest that they are operating in the same field and probably should be combined.

CHAIRMAN MULLIN: The Legal Aid Committee is a standing committee, whereas the Committee on Availability of Legal Services is a special committee, and both are operating more or less in the same area. If there are no additions or corrections or further questions, Bob's report will stand as read. Do you wish to make any formal recommendation or motion in that connection, Mr. Eisenstatt?

MR. EISENSTATT: No, I'll leave it up to the Executive Council.

[The report of the Committee follows.]

Report of the Committee on Legal Aid

During the past year, the Legal Aid Committee of the Lincoln Bar Association has filed Articles of Incorporation of the Lincoln Legal Service Society, a non-profit corporation and has through the Lincoln Action Program Committee filed an application with the Office of Economic Opportunity for funds to support a broadened legal service office. At the time of the writing of this report, word has not been received on the acceptance of the application.

The Legal Aid Bureau of Omaha is in full operation with several full time attorneys out of their main office in the A. C. Nelson Center for committee services and several neighborhood legal aid offices.

The State Bar Committee on The Availability of Legal Services has met with representatives of the Office of Economic Opportunity on the advisability of providing State Legal Aid Centers and has submitted its own report to the State Bar Association. In

addition, a committee of the Junior Bar has circularized members of the Nebraska Bar Association of the members feelings to the need of local legal aid centers and how the same should be supported.

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

CHAIRMAN MULLIN: The report of the Committee on Legislation will be passed until the Chairman can be present.

The report of the Committee on Procedure, Norman Krivosha.

REPORT OF COMMITTEE ON PROCEDURE

Norman Krivosha

Mr. Chairman and Members of the House of Delegates: As the Chairman has indicated, the report of the Committee appears on page 21 of your program. I would simply like to make a few brief comments in connection with the report itself.

One of the recommendations of the Committee was the matter of the introduction of a "Long Arm Statute" at the next session of the legislature. I believe when the Legislative Committee reports this morning they will advise you that such a statute has been drafted by the Committee and will be recommended for introduction at the next session of the legislature, so that recommendation of the Committee on Procedure has already been taken care of.

We make reference in the report to a study being given to amending the "Dead Man's Statute." You gentlemen will recall that in the case of *Fincham v. Mueller*, in 166 Nebraska 376, the Nebraska Supreme Court said that if the "Dead Man's Statute" and the reference to whether an automobile accident was a transaction was to be changed, it was up to the legislature to change it and not up to the court. They repeated that in two decisions following, and it seems to me that it is the obligation, then, of the Bar Association when the court says that it is up to the legislature, it is the obligation of the Bar Association to promote or prompt that legislation because obviously no one else is aware of where this has to be done, if not the members of the Bar Association. So I would suggest that the House of Delegates go on record as approving this investigation and the possible amending of that statute.

The other matter that I would like to make particular reference to is our recommendation that a committee be appointed to begin studying the revision of the entire Nebraska civil procedure. I think this is a matter which will take some considerable time to accomplish, but it is one that will never be accomplished unless it is started. It seems to me that it ought to be started at once. By way of suggestion, not by specific recommendation, perhaps the committee ought to consist of the chairmen of all the committees and certain members of the Executive Council so that the various substantive areas as it overlaps into procedure might be investigated. But in any event we could urge that this committee be appointed at once, and the work of the committee be started.

Mr. Chairman, I move the adoption of the report of the Committee on Procedure.

CHAIRMAN MULLIN: Is there a second?

LEO EISENSTATT, Omaha: I second it.

CHAIRMAN MULLIN: I will now ask if there is any question or discussion with reference to Recommendation No. 1 which relates to the "Long Arm Statute." Seeing no hands raised, I will ask whether or not there is any question or discussion concerning Recommendation No. 2 which deals with the suggestion that further work be done in connection with the matter of settling the claims of minors so as to simplify the procedure. Seeing none, I will ask on No. 3 if there are any questions or discussion concerning the recommendation to appoint a subcommittee to study and re-examine the entire Nebraska Code of Civil Procedure. And No. 4, the recommendation that investigation be made into the possibility at least of recommending legislation to amend the "Dead Man's Statute" as in the case of automobile accidents.

ROBERT A. BARLOW, Lincoln: Mr. Chairman, as to No. 4 I can't quite follow the recommendation there. The report of the Committee seems to indicate that it is the duty of the House of Delegates to go on record to promote the repeal of the "Dead Man's Statute" as it pertains to automobile accidents, and then they recommend that investigation be made into the "possibility" . . . It seems to me if the House of Delegates at this point goes on record as favoring the recommendation that investigation be made into the possibility, it might be said that we are giving tacit approval to the repeal of a statute the bench recommended. I don't know that the House of Delegates takes that position or whether they can express an opinion based on this particular wording.

CHAIRMAN MULLIN: All right, in view of your question, and I think it is a good one, Bob, I will first ask that we vote on 1, 2, and

3 and then we will open this for discussion. All in favor of Recommendations 1, 2, and 3 say "aye"; opposed. Carried.

Now, Norman, would you wish to answer the inquiry?

MR. KRIVOSHA: I suppose by natural training my thoughts on the matter and Bob's may differ, but setting that aside as to which side of the table we might be inclined to find ourselves, this matter was prompted simply by virtue of the language which has now appeared three times in three different opinions of the Nebraska Supreme Court. The last decision in 179 Nebraska 239, was a four to three decision of the court in which it appeared to me the court was saying that they didn't want to be stuck with holding that an automobile transaction fell within the "Dead Man's Statute." Judge McCown went so far as to say that if the court did it, he didn't see why the court couldn't *undo* it. But here again, as I say, there are three opinions in which the court says that if it is too severe a rule it is a matter for the legislature. It seems to me that the Bar Association, then, has some obligation to the public to determine whether (1) it is too severe a rule, and (2) if it is too severe a rule, see to it that legislation is adopted.

I happen to have my own personal feelings as to the rule, which I choose not to express because I don't think that is the issue. I think the only issue is whether the House of Delegates will go on record as saying, "Yes, we take the mandate of the Supreme Court in the opinions to at least require that the Committee on Procedure is justified in investigating whether or not the rule is too severe and whether appropriate legislation should be adopted. It may well be that the Committee would conclude that the rule is *not* too severe and that legislation not be adopted. But there was concern on the part of the Committee itself, because of personal differences of opinion, as to whether the Committee even had any business deciding whether it was too severe or not. I think the Committee has a very direct obligation to at least make that determination in response to the Supreme Court.

CHAIRMAN MULLIN: Mr. Ginsburg would like to talk.

PRESIDENT GINSBURG: I would just like to say that on that subject I recognize Bob's point, and I think Bob is correct based upon the language used. I am wondering if we changed the word "possibility" to read "advisability" if that wouldn't take care of the situation. In other words, we would then be saying that an investigation be made into the *advisability* of recommending legislation. It would seem to me that would take care of Bob's problem.

MR. KRIVOSHA: I would have no objection if it were so amended.

MR. BARLOW: That would be helpful because, I may be wrong but I thought your initial presentation was in terms of the Bar Association going on record to promote the change of the "Dead Man's Statute" to that extent. If you later say now that the Committee might well feel that it might or might not . . .

MR. KRIVOSHA: If it came out that way it is perhaps just my inner soul coming through and I apologize for it.

MR. BARLOW: It offended my inner soul.

MR. KRIVOSHA: I would ask that the record not reflect that I am promoting the legislation but simply suggesting that the Bar has an obligation to investigate the matter.

CHAIRMAN MULLIN: May we amend, on your own motion, Norman . . .

MR. KRIVOSHA: I would ask that the report be amended to state "advisability" instead of "possibility."

CHAIRMAN MULLIN: Is there a second to the amended motion as we now have it?

JOHN W. DELEHANT, JR., Omaha: I'll second it. I have a question. Why is the automobile accident the only area where the "Dead Man's Statute" might be reviewed. If we are getting into an amendment of the "Dead Man's Statute" in tort cases I think we had better review the whole area of tort and not merely automobile accidents.

MR. KRIVOSHA: The Committee would not object to expanding their investigation. It was limited simply because there was some question as to whether they ought to be making *any* investigation, and it seemed easier to start somewhere than nowhere. We would be glad to accept an amendment that suggests we investigate the entire "Dead Man's Statute" and its application in the tort field.

MR. DELEHANT: I would like to so broaden it if we get into the subject at all.

MR. KRIVOSHA: The Committee would not object to that.

CHAIRMAN MULLIN: Do you accept that without a second?

MR. KRIVOSHA: I do.

CHARLES E. WRIGHT, Lincoln: My only thought on it is why not just delete the words "as it pertains to automobile accidents" because I think there are other areas other than even tort cases.

CHAIRMAN MULLIN: I believe that would satisfy Mr. Delehant. How about that?

MR. KRIVOSHA: I have no objection. We will look into it.

CHAIRMAN MULLIN: We will now vote upon the recommendation which will read as follows: That investigation be made into the advisability of recommending legislation to amend the "Dead Man's Statute"—period. All in favor say "aye"; opposed. Carried.

Are you a standing committee?

MR. KRIVOSHA: Yes, at least until we complete the investigation of the "Dead Man's Statute."

[The report of the Committee follows.]

Report of the Committee on Procedure

The Committee on Procedure has continued during the year to carry out the work decided upon at the meeting of the Committee during the Mid-Year meeting.

Following the meeting, subcommittees were appointed to take up the various matters. The Committees consisting of Mr. D. Nick Caporale, Mr. Keith Howard and Mr. Thomas A. Walsh were appointed to a subcommittee concerning itself with the establishment of a "Long Arm Statute." Mr. Caporale was appointed to serve as Chairman and the Committee is to report on proposed legislation which could be submitted to the Legislative Committee for further examination and ultimate introduction in the Legislature.

A second Committee consisting of the Chairman of this Committee and Professor Richard Harnsberger was appointed to examine possible statutes in connection with County Court jurisdiction of minors and the settlement of personal injury claims. This was an outgrowth of earlier work approved by the House of Delegates at its meeting in 1965.

A third Committee was appointed consisting of Kenneth H. Elson, John C. Mitchell and Daniel W. Jewell to investigate the matter of the "Dead Man's Statute" as it pertains to automobile accidents. The Committee discussed the possibility of recommending to the Legislative Committee, legislation which would eliminate the good faith requirement in condemnation proceedings. This matter will be further investigated and reported upon at a later time.

During the Mid-Year meeting, the Committee further recommended that a subcommittee be appointed to begin studying and

re-examining the entire Nebraska Code of Civil Procedure with a thought toward recommending modernization and recodification.

It is therefore the recommendation of this Committee:

1. That some form of "Long Arm Statute" be introduced with the next session of the Legislature and that the Nebraska State Bar Association appear in favor of such legislation.

2. That further work be done in connection with the matter of settlement of claims of minors so as to simplify the procedure.

3. That a subcommittee be appointed to begin studying and re-examining the entire Nebraska Code of Civil Procedure with a thought toward recommending modernization and recodification.

4. That investigation be made into the possibility of recommending legislation to amend the "Dead Man's" concept as it pertains to automobile accidents.

5. That the foregoing report of the committee be adopted.

Norman Krivosha, Chairman
H. J. Holtorf
D. Nick Caporale
Kenneth H. Elson
Richard S. Harnsberger
Keith Howard
Daniel D. Jewell
John C. Mitchell
William T. Mueller
Robert D. Mullin
Albert G. Schatz
Warren C. Schrempp
Thomas A. Walsh
C. Thomas White

CHAIRMAN MULLIN: I will move back to No. 10 on the program, report of the Committee on Legislation, Robert Perry, Chairman.

REPORT OF COMMITTEE ON LEGISLATION

R. Robert Perry

With regard to the report of the Committee on Legislation, the specific report is rather brief. It is contained on pages 56 and 57 of your program. I might just preface my remarks by saying that two principal projects that we attempted to take on beyond the normal scope was setting up a program with the University of

Nebraska whereby we could make use of student help under a system whereby they get 90 per cent of their money from the federal government and the Bar Association furnishes 10 per cent. This was used this summer with some success, and I think the students involved felt they had obtained some benefit as far as training is concerned. I think the Bar Association got benefits in getting bills drafted and having the time devoted to them whereas if we leave it with practicing lawyers among us we have difficulty finding the time necessary to do the work.

With that preface, I will go to the second specific mention in the Committee's report: the House of Delegates directed the Committee during the year to employ law students in cooperation with the College of Law of the University of Nebraska. Through the good offices of Dean Grether, of the University of Nebraska College of Law, the assistance of two students was obtained during the summer months. Kevin Colleran and Ronald J. Dolan, both juniors in law college, worked on the research and drafting of proposed legislation under the supervision of the Committee.

We recommend this practice be continued and that from donations of members of the Bar Association or other sources funds be obtained necessary to put up the Bar Association's 10 per cent so that this student help can be continued.

With reference to the selection of a paid legislative specialist, it was felt by the Committee that if it is financially feasible for the Bar Association to employ a person to assist the Committee during the 1967 Legislative Session, that the person employed should be a practicing lawyer who would be willing to limit his work before the Legislature to representing the Nebraska State Bar Association, and a further recommendation that, if possible, such an individual be employed at least two months before the beginning of the 1967 Legislative Session, that is, by November 1, 1966.

Then the next recommendation is that the Bar Association specifically sponsor legislation with regard to salaries of the justices and judges of the state courts. When this request was originally drafted we included municipal courts and then it was called to my attention by members of the Committee outstate that there are municipal courts that are not full time and that we shouldn't use that wording in its entirety, but it was the desire of the Committee that the municipal courts in Lincoln and Omaha be included in that recommendation. So I think perhaps without changing the context of the recommendation it should be considered with the understanding that the Committee is recommending this, including in its recommendation as to salaries the judges of the municipal courts of Lincoln and Omaha.

The next recommendation was that the practice of the Legislative Committee be continued, in that we have had in the past three or four years regional legislative committees of the Bar Association, both as to recommendations as to what legislation should be and also with reference to contacting the legislators when matters come up before the legislature. It is invaluable to our Bar Association that those regional committees be active and that the state committee keep in touch with them and work with them.

Those are basically the recommendations the Committee has.

I would like to mention that immediately following that are four bills that the Committee recommended to the Bar for sponsoring. There are about seven or eight other bills drawn that the Committee could not agree upon. One thing I might call to your attention with reference to it is, as you might expect, the bill upon which there is a unanimous agreement that it should be amended but absolute disagreement on what the amendment should be, has to do with how the exemption statute should be changed. That is the third bill that starts on page 60.

With that report, I move the adoption of the positive recommendations of the Committee.

CHAIRMAN MULLIN: I think it might save time, Bob, if we take them up one at a time. The first recommendation has to do with the continued employment or authorization for employment of law students. Is there any discussion on that question? Seeing no hands raised, all in favor say "aye"; opposed. Carried.

The next recommendation concerns the recommended selection of a paid Legislative Specialist, as appears on pages 56 and 57 of the program. Is there any discussion or question? This man would perform what I would assume would be lobbying services. Is that right? And this would be a recommendation by this body, the House of Delegates; inasmuch as it involves the expenditure of money, the Executive Council would have to finally pass on it. Do I see any hands raised to discuss or to ask questions? If not, all in favor of so recommending indicate by "aye"; opposed. Carried.

No. 4 concerns the recommendation that the Bar Association sponsor and request salary increases for the various judges. Do I hear a second?

ALBERT B. SCHATZ, Omaha: Mr. Chairman, rather than just leave this as an understanding that it may include the municipal judges of Lancaster and Douglas Counties, I move that the recommendation be amended to include specifically the municipal court

judges of Lancaster County and Douglas County, prior to the last four words "and other judicial positions."

CHAIRMAN MULLIN: Is there a second?

THOMAS A. WALSH, Omaha: I second it.

CHAIRMAN MULLIN: You have heard the amending motion. Would you, Mr. Perry, as Chairman care to comment upon that before I open the discussion?

MR. PERRY: I would be happy to accept that amendment.

CHAIRMAN MULLIN: All right, if the Chairman so accepts, in the absence of any discussion we will now vote upon the recommendation relating to the increase of judges' salaries. All in favor say "aye"; opposed. Carried.

The final recommendation urges that the State Association enlist the assistance of local, county, and regional Bar associations in establishing a legislative committee in each area.

Is there a second? This is Item No. 5 but is Recommendation No. 4.

JOHN W. DELEHANT, JR., Omaha: I'll second.

CHAIRMAN MULLIN: Is there any further discussion or question?

MR. DELEHANT: I want to discuss a specific recommended bill. When it is proper to do so, let me know.

CHAIRMAN MULLIN: What is causing our confusion here is that the first paragraph in black print is not actually a recommendation. We have now voted on the second, third, and fourth and are about to move on what is called the fifth, which will be our fourth recommendation. All in favor say "aye"; opposed. Carried.

Do I understand now that you wish to ask about a bill on this subject, Mr. Delehant?

MR. DELEHANT: Yes. I don't want the House of Delegates to go in favor of recommending the last bill until we have had a discussion. That is a bill to amend Section 52-102. I would ask the Chairman of the Committee what prompted this amendment. Who is behind it?

CHAIRMAN MULLIN: Do you want at this time to take up all of the bills in order, or what is your wish? That wasn't my intention but inasmuch as we have a specific inquiry relating to one of the bills . . .

MR. PERRY: Let me turn to the bill he has inquired about and I would be happy, if the House of Delegates wants to take the time, to briefly mention what the other bills relate to and then if there are any questions that would be a convenient time to take them up, if that isn't taking too much of the Board's time.

With reference to the bill beginning on page 65, two or three of the members of the Legislative Committee had noticed what they felt was a misplacing of a comma in this statute. We could not obtain agreement of the Committee with regard to what the meaning was with the comma in or out. Therefore to clarify it, we drew a paragraph. What the confusion was, was frankly this: As the statute now stands there is a question on the part of some of the members of the Committee whether a materialman or other supplier of labor or material to a subcontractor would have a right to a lien, the way it is presently drawn.

I, frankly, didn't see this problem and still don't but some of the members of the Committee did. So to obtain language about which we hope there could be no question, we drew a proposed new paragraph to this section which makes it clear, or we *hope* makes it clear, that any materialman or other person furnishing labor, material, and so on to a subcontractor would have the same right to a lien as a subcontractor. In other words, what it does, it defines all of those people as subcontractors.

Let me say this: This has been the way in which this section has been interpreted in the past, and then there was an amendment to this section one or two sessions ago which put this comma in a confusing spot. That is the reason for this paragraph.

CHAIRMAN MULLIN: Does that answer your question, John?

MR. DELEHANT: Yes. I am glad you recognized that that comma was misplaced. It has been misplaced a long time. But the real problem that is created here is that he defines a subcontractor as anyone who furnishes material or labor to either a contractor or another subcontractor, regardless of any contractual relationship with the owner or the prime contractor. Then you go on to say that if the prime contractor doesn't pay the person furnishing the material to the sub, no matter how far down the ladder you go, that that person shall have a lien which dates back, if he files it, just three months after the last work is done. So you have a situation developing here where a contractor employs a sub, the sub employs a sub, that sub employs a sub, and that sub buys a hammer from Jones Hardware Store. Under this definition the hammer salesman has a lien and can file his lien any time within three

months after his last supply to that sub, regardless of delivery to the site. The net result of it would be that if you have a building contract that takes a year, no one is going to get paid for a year and three months because no one can safely pay anybody on a job site with this type of statute.

If the purpose was merely to take care of the comma, which has been misplaced for years, I don't think you have achieved it. I think you have broadened the statute probably on that.

MR. PERRY: I don't agree that it has been broadened at all. The lien right is still for the same three months. It hasn't extended that. The rights are all in the part of the section that isn't changed, but in any event this is the right that I believe is the same as it now exists, except it eliminates the effect of the comma.

MR. DELEHANT: The three months is still the same, but I submit that you have extended the lien right ad infinitum down to the last man that supplied the last bolt on the job.

MR. PERRY: That is true at the present time.

CHAIRMAN MULLIN: To resolve this dispute . . .

JOHN E. NORTH, Omaha: Is this a matter that is up for recommendation now?

CHAIRMAN MULLIN: No, we are not voting at this time on it, but there was an inquiry about it inasmuch as it was contained in the program.

MR. DELEHANT: We are asking the Bar Association to support this legislative program, are we not?

MR. PERRY: It is not one of the official recommendations. It has been presented to the House today.

CHAIRMAN MULLIN: All they are reporting is that specific suggestions for legislation have been turned over to the Committee, either by the officers or the House of Delegates or the members during the year. A proposed draft of many of these bills is being forwarded to the House of Delegates for approval with a copy of this report. Is it your opinion, Mr. Chairman, that we are voting on each and every one of these bills which are contained in the program?

MR. PERRY: As I understand the custom or procedure with regard to legislation, all legislation which the Bar Association sponsors or approves has to go through the Legislative Committee and that all things possible, in other words up to the time the House of Delegates meets the last time before the legislative session, are sub-

mitted to the House of Delegates for sufficient approval so that the Committee can proceed. I think some type of action is normally taken. At least as Legislative Chairman I have been advised in the past that these bills have been approved by the House of Delegates. So whether you have taken specific action on each one or not, I don't know.

LEO EISENSTATT, Omaha: Mr. Chairman, I might clarify it. They are referring to Article VI, Section 3 of our Bylaws which says:

Section 3. The Committee on Legislation shall have authority, unless countermanded by the President of the Association, to represent the Association before the Nebraska Legislature, or any committee thereof, on any pending legislation of direct concern to the Association, and to take a position favorable or opposed to such legislation in its discretion, absent any prior action on such proposed legislation by the House of Delegates or the Executive Council.

I think it would be appropriate at this time for this House to contermend the action of the Legislative Committee under that Bylaw.

CHAIRMAN MULLIN: I would take it that this is the time, then, if anybody wishes to offer a motion challenging any one of these attached bills contained in their report to make such a motion. Since we have started with the one on page 65, let's stick with it for a moment.

Is there any motion relating to the bill on page 65 relating to a lien for materials?

MR. DELEHANT: I have a motion: In view of the fact that this bill as proposed would have an adverse and harmful effect on all of the home owners in the state and the subcontracting industry, that the House of Delegates does not approve the amendment to 52-102.

CHAIRMAN MULLIN: Is there a second to his motion?

JOHN C. MASON, Lincoln: I rise to second the motion, Mr. Chairman. I would like to comment in doing so that I think there is a further reason beyond the ones mentioned by Mr. Delehant, and that is it seems to me this does not constitute something of any direct interest to the State Bar Association sufficient to justify our taking a strong position on it one way or the other. It is a problem for contractors and home builders and people who finance those businesses, and I think they can take care of themselves quite adequately if they wish to.

CHAIRMAN MULLIN: You have heard the motion, and it has now been seconded by Mr. Mason. Any further discussion? See-

ing no hands raised, all in favor of the motion, and you are now voting to disapprove the authorization to support this particular statute, say "aye" . . .

MR. PERRY: Is the motion to disapprove, or is the motion to take no action, either approving or disapproving the bill?

CHAIRMAN MULLIN: It is a motion to delete it from our Legislative program. How's that? Now once again, all in favor of that motion say "aye"; opposed. Carried.

I suppose we should take up these other bills. There is one on page 57. Do you want to explain that one?

MR. PERRY: Starting on page 57 the bill that is proposed in effect would require the County Board of Mental Health to see that each person had legal representation before the Board; that is, to afford them first opportunity to obtain counsel if they desired it, and if they desired it and did not have the means to supply counsel. On the Committee there was one of the members who had served on one of these Boards who did not feel this would be wise. There were two other members of the Committee who had served on Boards who felt that this was badly needed. The Committee as a whole felt that this was remedial legislation that was in line with some of the other actions that the Bar Association and judiciary have taken with regard to representation and the requirement for it.

CHAIRMAN MULLIN: Is there any motion in connection with this particular proposed statute?

JOHN J. SULLIVAN, Clay Center: Mr. Chairman, I recommend that this proposed bill be deleted. It appears to me that under this bill it would be compulsory on the Board of Mental Health to provide counsel in the event of any complaint filed with them. Now this may be all right in some places, but in smaller counties such as ours this would cause a hardship, particularly where we might have a violent person or where we need immediate treatment. This would cause a delay. We can't get him into the hospital without having a commitment from the Board of Mental Health and we don't have any place to keep him in between. If we appoint him an attorney he is going to have to have time to investigate in order to represent his client. This is going to cause delay. He is going to have to have a second hearing and we have to call in witnesses in most cases.

It seems to me that at the most the bill should provide that the Board would advise the person who is brought before it of his right to have representation in the hearing, and then let him choose whether he wants the attorney to represent him or not. As this says, he *must* have one regardless of whether he requests it or not.

CHAIRMAN MULLIN: We have before us a motion to delete the proposed amendment to Section 83-325 from our legislative program. Is there a second?

W. E. GARRISON, Nelson: I'll second it.

CHAIRMAN MULLIN: It has now been seconded. Is there any further discussion?

CHARLES H. YOST, Fremont: Mr. Chairman, I think this statute deserves more consideration than just to knock it out of here like we did the last one. I know of two cases at the present time in outlying counties where people were committed to Norfolk who never appeared before the Board. In fact, they weren't even in the county jail. The Sheriff went out to the farm with the papers and took them to Norfolk. I don't think the statute was ever meant to allow that. Bill Line has pending, he tells me, a writ of habeas corpus in another county. I think we do need amendments to that section. I do think we need legislation such as this.

I have served on the Mental Board and I have been County Attorney, and I think we need to protect those people. I think that that fellow they say is crazy, and you don't give him a chance to have an attorney, needs protection just as much as a criminal needs it, and probably a darned sight more because you say he is crazy.

MR. PERRY: I would like to say this: The person making objection pointed out that he didn't like perhaps the language but he didn't particularly object to the general purpose. Of course the Committee on Legislation spent a good deal of time hashing this over. I don't think it should be completely thrown out because there is some detail of it you don't particularly care about. The reason I think this deserves serious consideration is that the law as it presently stands does not contain the requirements that the Supreme Court of the United States has indicated are required to have a constitutional putting away of a person; that is, if you follow anything similar to the criminal law. In other words, this whole set of statutes doesn't follow the same safeguards that we furnish for persons accused of a crime.

Whether there are any abuses or not, I think this is an area where the law as it now stands opens itself to a rather horrendous type of abuse and an accusation of this type of abuse. I think we should propose legislation of this character. Whether it should be this broad or not, I don't know. But if a person is mentally ill to where they perhaps do not know the effect of their own acts, a refusal by them of counsel may be meaningless. That is the rea-

son that bothered us to where we felt we still had to have somebody present to be sure that at least due process was followed with regard to them. So I think this is something that deserves serious consideration.

MR. SULLIVAN: It appears to me that this goes far beyond the criminal statutes, the protection that we give them. The court is not required to appoint counsel for the defendant in a criminal case unless he asks for it. Here you are required to appoint counsel for the person whether or not he wants counsel, which seems to me goes far too far. At most the Board should be required to advise the person of his right to have counsel, of his right to have a postponement, and to appoint counsel if he wishes. But to require it in every case that appears before the Board of Mental Health seems to me to be going far beyond what is required in other areas. This may be all right in Lincoln and Omaha and counties which have facilities available, but when you get in our area the only thing you can do is take him over and lock him up in the county jail, which to me doesn't serve the defendant when he could be committed to the hospital and be receiving treatment during that time.

CHAIRMAN MULLIN: Any further discussion? I would suggest that we limit it to some extent.

CLARK G. NICHOLS, Scottsbluff: My question to Mr. Perry is, this proposed statute says that the Board may allow the counsel time to prepare. Did you discuss that in committee? It sounds to me like that is in the discretion of the Board. I have been in a position where I was called at one o'clock and my client was to be in a commitment hearing at one-fifteen, and I was not permitted to have any time to prepare. Counsel is pretty ineffective in this situation. I wonder if you have discussed this particular wording.

MR. PERRY: Yes, to some extent. There was some debate on the Committee as to whether that should be "shall" or "may." The problem is, the party involved may be in a condition where you need rather immediate steps to be taken. If you have the word "may" and they unreasonably refuse without good cause, it would certainly be a basis for error, and that is the reason we settled on "may." I think your point has some merit to it but I don't know which is the best word to use.

JOHN C. MASON, Lincoln: It seems to me that contrasted with our last bill that we discussed, this is one of real direct interest to the Bar Association, and I feel that there has been a considerable amount of public interest in the procedures for commitment and the lack of the judicial process that we do have available in criminal cases. It seems to me, therefore, that the Bar Association should

encourage the Legislative Committee to present legislation which would make it possible to have counsel in a commitment proceedings. I am not sure that I feel the House of Delegates should try to determine the exact language of the statute, and I therefore ask the question of the Chairman whether he feels it would be possible for the motion to be amended to approve the Legislative Committee's study and presentation of legislation which would afford counsel at commitment proceedings, but not necessarily to approve the specific language of the bill that is included in their report. If so, I would think that might be a proper thing for the House of Delegates to do.

CHAIRMAN MULLIN: Do you accept such an amendment?

MR. PERRY: Yes, I think that would be proper. As a matter of fact, I have always understood these approvals are not necessarily the exact language that the Committee uses but to the general intent and purpose of what the Legislative Committee is attempting to get passed in the way of remedial legislation. I think that would be a proper amendment.

CHAIRMAN MULLIN: In view of the Chairman accepting it I doubt if we need to vote on the amendment. Seeing no further hands raised, we will now vote on Mr. Sullivan's motion, which has been duly seconded, to delete from the Legislative program of this Association the particular legislation which we have been discussing. All in favor say "aye"; all opposed "nay." The "nays" have it.

I guess you can carry on again, Bob.

MR. PERRY: The next bill that we recommended the Bar sponsor relates to extending the service of foreign corporations as non-residents to about the same length that they have been extended in other states; in other words, the legislation we are here proposing is pretty much an extract from the laws of other jurisdictions where it has been passed and upheld by their Supreme Courts and also as near as we could determine by the federal courts, as a basis for jurisdiction within this state of foreign corporations and foreign persons.

CHAIRMAN MULLIN: That would be the "Long Arm Statute," would it not?

MR. PERRY: Yes.

CHAIRMAN MULLIN: Is there any discussion or question concerning this bill?

JOHN W. DELEHANT, JR., Omaha: I have just an inquiry. Why is the bill restricted to the purchase of installment paper and

the making of loans. Did you feel that was the only area that should or could be covered?

MR. PERRY: No, you are misreading the bill. The part of the bill that has a white line through the middle is the part that is being *deleted*. That should be a black line, and that is confusing. I intended to explain that when I started on the bills and then forgot to. In printing it, instead of coming out with a black line, which would have smeared the print too bad so it wouldn't have been readable at all, the part that is being deleted has a white line through the middle.

CHAIRMAN MULLIN: The general idea, I believe, is that any firm which is transacting business within the state is subjected to suit within the state. Is that a broad statement, Bob?

MR. PERRY: Yes.

CHAIRMAN MULLIN: Any further questions?

CHARLES H. YOST, Fremont: It goes further than that, does it not?

MR. PERRY: Yes, it does go further than that; it goes beyond business. Actually about the best way I know to put it, it extends our ability to serve anyone to practically the length that has been held legal in any of the other states. In other words, this is a Long Arm Statute for businesses and persons, administrators, and everything else.

MR. YOST: In other words, under product liability we could reach a corporation that sold a defective appliance of any kind.

MR. PERRY: That is right. If there is any possible way to do it, this should do it.

CHAIRMAN MULLIN: Is there any motion to delete this from our Legislative program? In the absence of any such motion, it will stand as read. Seeing no such motion, it will stand. Go to the next.

MR. PERRY: The next bill is the one I mentioned in my first presentation. I starts on page 60 and it has to do with our homestead exemptions, both real estate and personal property.

There was unanimous agreement that this bill should be amended, that it was a real horse-and-buggy law the way it stands, and so forth and so on. So we prepared an amendment which we thought streamlined it and then members of the Committee didn't like that. So some of the things were put back in by members of the Committee, and this is as close to anything we could

agree on in the way of modernizing our exemption statute with about ten or twelve members of the Committee participating and having an opinion. A copy of it has also been sent to the Referee in Bankruptcy for the State of Nebraska, and I understand he doesn't like it in its present form.

I would suggest that rather than approving this in its present form, if this group feels that this is a proper field for the Bar to propose legislation, and I believe it is, we should be instructed to pursue the thing but having in mind that we will probably go ahead and take further suggestions on any way of improving what we've got so far. This bill is better than the present statute. But I think there is still a lot of feeling that it isn't in the form we would want it in.

CHAIRMAN MULLIN: Do you so move, Mr. Perry?

MR. PERRY: Yes.

CHAIRMAN MULLIN: Is there a second?

THOMAS W. TYE, Kearney: I'll second it.

CHAIRMAN MULLIN: Any further discussion? Seeing no hands raised, all in favor say "aye"; opposed. I guess that authorizes the Committee to carry on on that subject. The next one is on page 62.

MR. PERRY: Yes, the next bill at page 62 was prepared by our Committee at the request of the Committee on Oil and Gas and is what they tell us they need to permit conservators, as well as administrators and so on, to execute oil and gas leases and is remedial and has been, as I understand it, approved by their committee.

CHAIRMAN MULLIN: Does anyone in the room care to offer a motion objecting to this proposed legislation? Seeing none, it will stand as printed in the program.

Bob, I thank you for your hard work during the past year and for your fine report.

WARREN K. DALTON, Lincoln: Mr. Chairman, I would like to raise a question which has to do with the work of the Committee on Legislation, I think; at least I can't find any other committee that ought to take care of it. It seems to me that there is a problem as to some of these bills with which our Committee has no direct contact necessarily, yet which get passed, and then after the legislative session is over we find that somebody has been raising hell in our playhouse.

For example, at the last legislative session there was an amendment to the Uniform Commercial Code which provides for a kind

of central filing. Filing the documents it refers to are instruments evidencing the debts—I think I am going to say this right—debts of the corporation which is a railroad or any corporation, including public service corporations furnishing telephone and electric service.

This statute came to my attention a couple of weeks ago in connection with a corporation which is furnishing gas service. If you read that statute carefully, any corporation is required, not permitted but required to file its mortgages and financial statements with the Secretary of State. At least I think that is what it says. To my knowledge, I don't think our Legislation Committee ever looked at it and I don't know that anybody ever looked at it except the committee of the legislature which passed it. The language is such that it creates a number of problems for people who are advising creditors who want to file financing statements and other mortgages, and so forth.

It seems to me that the Committee on Legislation should study the question of how this sort of legislation can be reviewed to see what legal problems it is going to raise. I was talking with Emory Burnett at least and I don't believe the Revisor of Statutes feels he has necessarily any policy powers with respect to bills which are presented to him for drafting.

I would move that the Committee on Legislation study the problem of how legislative bills not presented by the Committee can be reviewed for their contents with respect to existing legislation and how it fits into existing legislation and the problems it may create in its operation.

MR. PERRY: I would like to say this, and this is something that Herman Ginsburg got established when he was Chairman of this Committee. It's one of those things that sort of tends to slide away from the Committee until we wake up to the dangers of it, and that is that it is very important before the legislature that the Bar Association speak with one voice and that only one committee have direct authority over any legislation that is proposed by the Bar Association or opposed by the Bar Association. This, I think, is contained in your rules.

With reference to that, we have other committees, either temporary or standing committees, that come up with a matter that needs legislative attention. I think the way the rules and procedures are presently set up, those are supposed to be submitted to the Legislative Committee for final approval and drafting and action; even though another committee may draw a bill, it is supposed to go through the Legislative Committee and actually be

presented to the legislature by the Legislative Committee in conjunction with whatever other members or committees are interested.

With reference to that, there is another problem, and I have found this to be true. You can't be acutely aware of all the fields of law just because you happen to be on the Legislative Committee. One of the places where we perhaps need a better method of communication is between the Legislative Committee and the other committees that might be directly interested; for example, a committee which had as its main interest the Commercial Code.

Maybe I am begging the question, but this probably is the way to answer your question.

MR. DALTON: I don't think there was any functioning committee on the Uniform Commercial Code during the last legislative session. As I say, I don't know the source of this amendment and I don't even know the reasons for it. It looks as if it was probably drawn by somebody who wanted to do something for public utilities, which is fine, except as I read the statute this may very well apply to all corporations.

PRESIDENT GINSBURG: This subject that Mr. Dalton has brought up is very close to my heart. That was the reason for Section 3 of Article VI which was previously referred to. We had that situation come up. We had nobody that had any means of expressing the position of the Bar Association, so that this section was adopted giving the Committee on Legislation authority to speak on behalf of the Association for or against any bill presented by anyone.

But the problem is this: It lies in the legislature itself. They are operating under rules, and once they get these bills going they push them along with the minimum of delay. They have this five-day rule, or at least they did have when I was on the Legislative Committee, where all they gave you was five days' notice of a hearing on a certain bill. In the first place, when I was on the Committee I never knew that the five-day notice was in effect until a day or two later, so we had two or three days. It isn't physically possible to contact all the members of the Committee and the various groups involved and then come back with an answer. And that goes back to what I said, that we've got to have a full-time legislative representative, or Mr. Dalton's question can *never* be answered. It is physically impossible for Bob Perry or his Committee to come up with an answer when somebody has got something on the Uniform Commercial Code when they don't know about it and only have two or three days to prepare.

THOMAS W. TYE, Kearney: Mr. Chairman, I submit this problem has already been answered by Mr. Perry's committee in the adoption of the third recommendation in his report.

CHAIRMAN MULLIN: Mr. Dalton, I believe you did make a recommendation. I don't know if there was a second. Hearing no second, the recommendation or motion will die for lack thereof.

[The report of the Committee follows.]

Report of the Committee on Legislation

This Committee is pleased to be able to report that the work of the Committee, during the year in which the Legislature is not in session, has underway most of the duties to prepare the Bar Association for the coming Legislative Session.

FIRST: Specific suggestions for legislation have been turned over to the Committee, either by the officers or the House of Delegates of the Bar Association or by members during the year. A proposed draft of many of those bills is being forwarded to the House of Delegates for approval with a copy of this report.

SECOND: The House of Delegates directed the Committee during the year to employ law students in cooperation with the College of Law of the University of Nebraska. Through the good offices of Dean Grether, of the University of Nebraska College of Law, the assistance of two students was obtained during the summer months. Kevin Colleran and Ronald J. Dolan, both juniors in law college, worked on the research and drafting of proposed legislation under the supervision of the Committee.

THIRD: With reference to the selection of a paid legislative specialist, it was felt by the Committee that if it is financially feasible for the Bar Association to employ a person to assist the Committee during the 1967 Legislative Session, that the person employed should be a practicing lawyer who would be willing to limit his work before the Legislature to representing the Nebraska State Bar Association, and a further recommendation that, if possible, such an individual be employed at least two months before the beginning of the 1967 Legislative Session, that is, by November 1, 1966.

FOURTH: It appears to the Committee that the continued inroads of inflation make it both necessary and desirable in order to maintain and approve the present generally excellent quality of the members of our judiciary that the Bar Association sponsor and request substantial increases in salary for the Justices and Judges of the Supreme Court, District Court, Juvenile Court, County Court, Workman's Compensation Court and other judicial positions.

FIFTH: We again renew the recommendation of the 1963 Committee on Legislation that the State Association enlist the assistance of local county and regional bar associations in establishing an effective Legislative Committee in each area that will work in cooperation with the Legislative Committee of the state association, and that this practice, which was used with some success during the 1965 Legislative Session be continued.

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

A BILL

FOR AN ACT to amend section 83-325, Reissue Revised Statutes of Nebraska, 1943; to allow representation by retained counsel to proposed mental patients; to require the Health Board to appoint counsel to a proposed patient if none is retained by him; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 83-325, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

When an application for admission to a state hospital for the mentally ill has been filed, the county board of mental health shall at once investigate the grounds for admission. The board members may require that the person for whom admission is sought be brought before them, and that the examination be made in his pres-

ence. The board members may issue their warrant for the proposed patient, and shall provide for the suitable custody of him until their investigation shall be concluded. The warrant may be executed by the sheriff or any constable in the county. **An opportunity to be represented by counsel shall be afforded to every proposed patient.** At the time of taking the patient into custody, the sheriff of the county, or such other person who may have custody of the patient, shall inquire if the patient has legal counsel. If the patient has such legal counsel, such counsel must be notified of the proposed patient's commitment proceedings immediately by the officer or person having custody of the patient. If neither the patient nor others provided counsel, the board of mental health shall appoint counsel, to be compensated by the county in such amount as the board of mental health shall determine to be reasonable. The hearing may be adjourned to allow counsel time to prepare. If after a preliminary inquiry, at which the board members shall hear what testimony they deem desirable and necessary, they decide that the presence of the proposed patient is unnecessary or would probably be injurious to him, the board members shall not require the proposed patient to be present at the hearing on the application. **Patient's counsel shall be present at the hearing on the application.** In their examination the board members shall hear testimony for and against the application, if any is offered. Any citizen of the county or any relative of the person alleged to be mentally ill, may appear and resist the application; the parties may appear by counsel.

Section 2. That section 83-325, Reissue Revised Statutes of Nebraska, 1943, is repealed.

A BILL

FOR AN ACT relating to civil procedure; to amend section 25-511.01; to provide for jurisdiction over an individual, his executor, administrator, or other personal representative or a corporation, partnership, association or any other legal or commercial entity, who is not a citizen of this state and whether or not organized under the laws of the state; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. That Section 25-511.01, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-511.01. Any person, his executor, administrator, or other **personal representative**, partnership, or corporation, who is a non-resident of the State of Nebraska and who ~~engages in the business~~

of purchasing or soliciting the purchase of installment or direct loan or sales paper within the State of Nebraska, does any of the acts hereafter enumerated, shall be deemed to have waived any immunity from the jurisdiction of the courts of this state that he or they might otherwise possess, to have appointed the Secretary of State of Nebraska as his or their true and lawful attorney, upon whom may be served all legal processes in any action or proceeding against such person, partnership, or corporation, growing out of such transaction within this state. Service of such process shall be made in the same manner and for the same fees as set forth in section 25-530, arising from the doing of any of said acts:

- (a) The transaction of any business within this state;
- (b) The commission of any act which results in accrual within this state of a tort action;
- (c) The ownership, use or possession of any real estate situated in this state;
- (d) Contracting to insure any person, property or risk located in this state at the time of contracting;
- (e) Engaging in the business of purchasing or soliciting the purchase of installment or direct loan or sales finance paper within this state.

(2) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(3) Service of such process shall be made in the same manner and for the same fees as set forth in section 25-530.

(4) Nothing contained in this section shall limit or abridge the right to serve any process, notice, or demand upon any person or foreign corporation in any other manner now or hereafter permitted by law.

Section 2. That original section 25-511.01, Reissue Revised Statutes of Nebraska, 1943, is repealed.

MEMORANDUM

Note the article in 45 Neb. L. Rev. 166 for an excellent discussion of Nebraska's need for a long arm statute.

The Supreme Court held in *Travelers Health Ass'n v. Virginia*, 339 U. S. 643 (1950), that personal service outside the state was constitutional if the defendant's conduct or actions constitute minimum contacts, ties or relations with the state in which plaintiff was bringing suit.

The enactment of a long arm statute will increase the opportunity for extra-territorial service and thus allow Nebraska citizens to litigate in their own forum. Nebraska courts would then be given a better opportunity to enforce its laws and protect its citizens.

The proposed statute has been borrowed essentially from that in force in Illinois for several reasons. First, it has been successful in that it has passed the tests of constitutionality and use. Secondly, it is sufficiently flexible to take care of novel situations which may arise. Third, there will be no real problem of interpretation. The Illinois statute has been in force for some time, and thus has none of the liabilities of new, untried legislation. If there is any question of meanings, a quick look at the annotated statutes or state court decisions can resolve them.

There might be an argument to delete subsection (d) on the grounds that the Nebraska Statutes cover this provision. I feel, however, that the applicable statutes are not adequate. Authorized and nonadmitted insurance companies are dealt with by existing statutes, but there seems to be a gap in the statutory material dealing with unauthorized companies.

In the area of insurance companies not authorized by the Director of Insurance, the declared legislative policy found in section 44-137.01 is:

The Legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while such insurers are not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies.

Section 44-137.02 seems to have been enacted to cure this defect. But this statute only allows service on nonresident insurance companies whose actions are "systematic or continuous acts in this state." This clause is strengthened by 44-137.04 which allows service of process "if served upon any person within this state who, in this state on the behalf of such insurer, is (1) soliciting insurance, (2) making, issuing, or delivering any contract of insurance, or (3) collecting or receiving any premium. . . ." Certainly only a company whose activities were systematic or continuous would have such a person in the state. It seems that the problem of the insurance company which sells only a handful of policies, is unauthorized.

A BILL

FOR AN ACT to amend sections 25-1552, 1556 and 40-101, Reissue Revised Statutes of Nebraska, 1943, relating to exemptions; to ~~the amount of Homestead exemptions; to~~ the amount of exemptions for heads of family without homestead; to revise the personalty exemptions selected by debtor; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 40-101, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

40-101. A homestead not exceeding ~~two thousand dollars~~ _____, consisting of the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens, and from execution or forced sale, except as provided in sections 40-101 to 40-117 and in sections 38-601 to 38-643.

Section 2. That section 25-1552, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1552. All heads of families who have neither lands, town lots or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale or execution the sum of ~~five hundred dollars~~ _____ in personal property, except wages. The provisions of this section shall not, in any manner, apply to the exemption of wages, that subject being fully provided for by section 25-1558.

Section 3. That section 25-1556, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1556. No property hereinafter mentioned shall be liable to attachment, execution or sale on any final process issued from any court in this state, against any person being a resident of this state and the head of a family; (1) ~~the Family Bible~~ Family pictures, the family library, including The Bible, and the family crypt or burial ground; (2) ~~family pictures, school books and library for the use of the family~~ sufficient furnishings, equipment and supplies, including food, fuel, and clothing, for the family for a period of one year on hand and reasonably necessary at the principal residence of the family; (3) ~~a seat or pew in any house or place~~

of public worship one means of conveyance reasonably and regularly used for transportation of the family, or for transportation to and from work and not to exceed five hundred dollars in value in equity; (4) a lot in any burial ground the books, documents, furniture, instruments, tools, implements, equipment, breeding stock, or other tangible means of production regularly and reasonably necessary in carrying on his profession, trade or occupation. (5) all necessary wearing apparel of the debtor and his family; all beds, bedsteads and bedding necessary for use of said family; all stoves and appendages put up or kept for the use of the debtor and his family, not to exceed four; all cooking utensils, and all other household furniture not therein enumerated, to be selected by the debtor, not exceeding in value one hundred dollars; (6) one cow, three hogs and all pigs under six months old, and if the debtor be at the time actually engaged in the business of agriculture, in addition to the above, one yoke of oxen, or a pair of horses, in lieu thereof; ten sheep, and the wool therefrom, either in the raw material or manufactured into yarn or cloth; the necessary food for the stock mentioned in this section, for the period of three months; one wagon, cart or dray, two plows and one drag; necessary gearing for the team herein exempted; and other farming implements not exceeding fifty dollars in value; (7) the provisions for the debtor and his family necessary for six months' support either provided or growing, or both, and fuel necessary for six months; (8) the tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business; the library and implements of any professional man. All of the articles hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, clerk or legal representative as the case may be.

Section 4. That original sections 25-1552, 25-1556 and 40-101, Reissue Revised Statutes of Nebraska, 1943, are repealed.

MEMORANDUM

Section 40-101. The statutes of Alaska and North Dakota have set their homestead exemptions at \$8000 and this figure appears to be a middle of the road approach. Most states still have a \$1000 to \$2000 limit, at least one state is lower, and California with a \$12,500 exemption is the highest that I found. Kansas, which has recently updated its exemptions has a 160 acre rural exemption and a one acre exemption in an incorporated town with no ceiling, as far as value is concerned, on either one. The Kansas exemption also includes improvements placed on the homestead. The \$8000 figure is that for the present creditors may think it is too high a figure, and if the legislature acts with no more regularity in the fu-

ture than they have in the past in this area, the \$8000 figure may well become antiquated.

Section 25-1552. The only possible justification that I have been able to figure out for this additional exemption given to non-homeowners is so the additional property exempted might be sold by the debtor and the proceeds used to pay the rent; if this is so, then I think that there is little or no justification to keep any amendment of 25-1552 in line with 40-101 and this figure may well be too high.

In *Johnson v. Bartek*, 56 Neb. 422, 76 N.W. 878, it was held that the exemption in this section is additional to property specially exempted by law. Thus, if 25-1556 is adequately brought up to date, it would appear to minimize the need for this section (1552) unless, as mentioned above, the additional exemption is needed to raise money for rent purposes.

Section 25-1556. This section is modeled after Kansas, 1965 Cumulative Pocket Supplement, Kansas statutes annotated 60-2304, covering the same area. The Kansas statute goes on to limit part 4 by saying "in an aggregate value not to exceed five thousand dollars (\$5000)." However Nebraska's 25-1556 in its present form has no such limitation. Thus part four does not make any substantial change, except that it now avoids the specific list of the present section and includes within it agricultural exemptions as well. This, perhaps, would be more practical and realistic over the long run.

A BILL

FOR AN ACT to amend sections 57-210, 57-211, 57-212, 57-401, and 57-402, Reissue Revised Statutes of Nebraska, 1943; to provide that conservators as well as administrators, executors, trustees, and guardians may execute oil and gas leases; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 57-210, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

57-210. Proceedings may be had in the district court of the county in which an estate or trust is being administered or ~~guardianship proceedings is being had~~ **proceedings for guardianship or conservatorship are being had** or in the district court of the county in which real estate is situated, for authority to lease any interest in real estate, or any part thereof, of any deceased person, beneficiary of a trust, minor, ~~or~~ incompetent, ~~or person unfit by reason of infirmities of age or physical disability~~ or to ratify any

prior unauthorized or defective lease executed by any executor, administrator, guardian, **conservator**, or trustee. If it shall appear to the district court or judge thereof sitting in chambers within the district to be for the advantage of the estate of any decedent, beneficiary of a trust, minor, ~~or~~ incompetent person, **or person unfit by reason of infirmities of age or physical disability** to make a lease, ratification agreement, or contract for the exploration and development or pooling or unitization of the real property of the estate or trust, or any part thereof, for oil, gas, or other hydrocarbons, the court or judge, as often as occasion therefor shall arise in the administration of any estate or trust, or in the course of any guardianship matter, **or in the course of administration by a conservator**, may on a petition, notice, and hearing, as provided in sections 57-211 and 57-212, authorize, empower, and direct the executor, administrator, trustee, **conservator**, or the guardian of such minor or incompetent person to lease such real estate or any part thereof or enter into pooling or unitization contracts.

Section 2. That section 57-211, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

57-211. The petition for such lease shall show (1) the advantage that may accrue to the estate or trust being administered or guardianship or **conservatorship** proceedings being had from making such proposed lease or entering into such pooling or unitization contract; (2) a general description of the property to be leased; (3) the term, rental, and general conditions of the proposed lease or pooling or unitization contract; and (4) the names of the (a) legatees and devisees, if any, or the heirs of the deceased, (b) beneficiaries of the trust, (c) minor, ~~or~~ (d) incompetent person, ~~so far as known to the petitioner~~, **or (e) a person unfit by reason of infirmities of age or physical disability, so far as is known to the petitioner.**

Section 3. That section 57-212, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

57-212. (1) Upon the filing of such petition, the court or judge thereof sitting in chambers within the district, if such court or judge deems the petition sufficient, shall set the matter down for hearing and direct to what persons and in what manner notice of such hearing shall be given.

(2) At the hearing provided for in subsection (1) of this section, any person interested in the estate, trust, or guardianship **or conservatorship** proceeding may appear and present objections to the proposed lease or proposed pooling or unitization contract. If objections are filed to the petition, the court or judge thereof may

adjourn the hearing to enable the parties to fully present their reasons and evidence for and against the proposed lease or pooling or unitization contract.

(3) If no objections are filed, as provided for in subsection (2) of this section, or if upon such hearing the objections are deemed insufficient, the court or judge thereof may make an order authorizing such lease or pooling or unitization contract upon such terms and for such consideration and period as is deemed proper by the court or judge thereof. Such lease or pooling or unitization contract may be for a term as long as ten years and as long thereafter as oil, gas, or other hydrocarbons shall be, or can be, produced in commercial quantities. The lease or pooling or unitization contract shall not be invalid or voidable because its term may or does extend beyond the term of office of the executor, administrator, trustee, **conservator**, or guardian making the same, beyond the time of final settlement of the estate or trust beyond the minority of the minor, **or beyond the time of infirmity and physical disability of the person having a conservator**, or beyond the period of incompetency of any such incompetent.

Section 4. That section 57-401, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

57-401. Administrators and executors of the estate of deceased persons, trustees of trust estates, **conservators of estates of persons unfit by reason of infirmities of age or physical disability**, and the guardians of estates of minors and incompetent persons are hereby authorized to enter into contracts with pipe line companies, corporations, individuals, or partnerships for the construction, operation, and maintenance of pipe lines for the transmission of oil or gas, and to sell and dispose of an easement under the contract for such purposes, upon and across the lands, or any interest therein, belonging to the estates of deceased persons, beneficiaries of a trust, **estates of persons unfit by reason of infirmities of age or physical disability**, and estates of minors and incompetents, upon such terms and conditions that the administrators, executors, **conservators**, trustees, or guardians of such person may deem reasonable and equitable, and for the best interest of the estates of deceased persons, minors, **persons unfit by reason of infirmities of age or physical disability**, and incompetents and the beneficiaries of a trust.

Section 5. That section 57-402, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

57-402. (1) Before entering into such contracts for such easements, an application shall be duly filed in the district court of the county in which the estate, ~~or~~ **guardianship or conservatorship**

proceedings are pending, or trust is being administered, or in the district court of the county where the real estate is located, duly sworn and signed by the executor, administrator, trustee, **conservator**, guardian, as the case may be. The application shall set forth in detail the nature and character of the contract and conveyances of the easement upon and across the lands of the estates, the purposes for which the same are to be used and maintained, the terms and conditions thereof, the consideration therefor, and the reasons why the same is for the best interests of the estate. The district court or any judge thereof in chambers shall set the application for hearing and direct to what persons and in what manner notice of such hearing shall be given.

(2) At the time and place set for the hearing, as is provided for by subsection (1) of this section, the court shall conduct a hearing upon the application and if, after due consideration thereof, the court finds that the granting of the easement for the erection and maintaining of the pipe line upon or across the land, will not result in a material injury to the property of the deceased person, beneficiary of the trust, minor, ~~or~~ incompetent, **or person unfit by reason of infirmities of age or physical disability**, and further finds that the consideration therefor is adequate and proper, the district court may approve the application and authorize and direct the executor, administrator, trustee, **conservator**, or guardian to enter into such contract and to execute such grants or conveyances to carry the same into effect, and authorize and direct the executor, administrator, trustee, **conservator**, or guardian to deliver the same to the persons, individuals, firms, or corporations with whom the same were authorized to be made.

Section 6. That sections 57-210, 57-211, 57-212, 57-401, and 57-402, Reissue Revised Statutes of Nebraska, 1943, are repealed.

A BILL

FOR AN ACT to amend section 52-102, Reissue Revised Statutes of Nebraska, 1943; to provide for a lien for material furnished to a subcontractor as well as a contractor; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 52-102, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

52-102. A subcontractor shall be defined as one who performs any labor for, or furnishes any material, machinery, or fixtures, including gas and electric apparatus and lighting fixtures, whether

detachable or undetachable, for any of the purposes mentioned in section 52-101, to the contractor or to any subcontractor of the contractor.

Any person or subcontractor who shall perform any labor for, or furnish any materials, machinery, or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, for any of the purposes mentioned in section 52-101, to the contractor, or any subcontractor who shall desire a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him from such contractor for such labor, material, machinery, equipment rental, or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, together with a description of the land upon which the same was done or used, within three months from the performing of such labor or furnishing such material, machinery, equipment, or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, with the register of deeds of the county wherein said land is situated. If the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such labor, material, machinery, equipment rental, and fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, on such lot or lots and the improvements thereon from the same and in the same manner as such original contractor; and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the three months hereinbefore specified. No owner shall be liable to any action by the contractor until the expiration of said three months, and such owner may pay such contractor or person the amount due him from such contractor for such labor, material, machinery, equipment rental, and fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable; and the amount so paid shall be held and deemed a payment of such amount to the original contractor. In cases when a dispute arises between the contractor and his journeyman, or other person, for work done or furnished, the owner may retain the amount claimed by said subcontractor, journeyman, or laborer until the dispute has been settled by arbitration or otherwise. Such sworn statement or claim of lien shall be recorded by such register of deeds in the same manner and remain in force for the same length of time as other liens provided for in section 52-101.

Section 2. That original section 52-102, Reissue Revised Statutes of Nebraska, 1943, is repealed.

CHAIRMAN MULLIN: Next comes the report of the Committee on Public Service, Pat Healey.

REPORT OF COMMITTEE ON PUBLIC SERVICE

Patrick W. Healey

Thank you, Bob. The Committee on Public Service again has carried forward an active program of public service. The main project, or one of the main projects of course is Law Day, which continues to move forward and gain recognition as a significant observance in this state, as throughout the country. We are very much indebted to Don Brock who served as Law Day Chairman, and to Allen Overcash who was Vice-Chairman for the past year.

In radio and television we continue to produce materials for use by radio and TV stations on public service time, also in the TV field to distribute and make available the American Bar Association TV tapes and scripts.

We continue the program of Awards, which will be again made at the annual banquet tomorrow, both to a member of the Bar and to a person not a member of the Bar who have made significant contributions in public service areas.

George Turner continues to operate the newspaper column.

We are looking also towards further implementation in the television field working with the educational station.

Our public relations counsel, Tom Carroll, was authorized by the Committee to go down to Jefferson City and consult with the Executive Directors of the Missouri Bar Association which carries on an extremely well developed program of public relations, and very fine ideas and recommendations that grow out of that.

Following up from there, we are attempting to move, I think, for the first time really into the field of active cooperation with the University's Extension Service in providing legal programs of a public service nature throughout the state.

Other activities which the Committee has engaged in are set forth in the report. We are also hoping to develop some form of program along the lines of a Centennial observance, to cooperate with that endeavor and to bring the Bar Association into line with the activity recognizing the Centennial. We have two different committees pursuing ways and means of doing this at reasonable cost.

We recommend that the Association continue to take advantage of the fine services of Tom Carroll as Public Relations Consultant, and that an expanded program of public service be carried forth.

I want to thank George Turner and his staff again for their continued and valuable assistance.

I move the adoption of the report.

CHAIRMAN MULLIN: You have heard the report and there is now a motion for its adoption. Do I hear a second?

ROBERT A. BARLOW, Lincoln: I second it.

CHAIRMAN MULLIN: Any discussion? All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Committee on Public Service

During the current year the primary public service program of our committee has continued to be Law Day—USA. Our state chairman for 1966 was a man who demonstrated by the excellence of his performance as a county chairman that he was qualified to give direction to the state-wide program. This man was Don Brock of Hastings, who was ably assisted by Allen Overcash of Lincoln as vice-chairman.

We are confident that the emphasis we have placed upon this project is thoroughly justified in terms of the results obtained in progressive acceptance of Law Day as a patriotic observance with an increasing impact upon the people of our state.

In addition to the amount of public service time contributed by the radio stations of Nebraska in connection with Law Day, we have continued to be the beneficiaries of public service time from a wide network of stations which make use of our one minute radio tapes titled "Mr. Middleton, Attorney-at-Law." These tapes are produced from manuscripts which are carefully checked prior to their use by a panel of attorneys selected by our committee.

We also are grateful to the television stations of Nebraska which utilize film messages produced by the American Bar Association and distributed through us.

During the past year, we produced a series of 20-second messages for use on television based upon material originally developed for radio use in the "Mr. Middleton" series. These, too, were distributed to all television stations in the state. During the summer of 1967, we anticipate working with Station KUON-TV in the production of two experimental fifteen minute educational programs. These will be dramatizations of stories showing the relationship between clients and legal counsel with special emphasis on the

services the clients receive from the attorney "behind the scenes," as it were. We confidently believe that if these programs are successful, it will be possible to produce a continuing series which will have a beneficial effect in helping to explain to the public the breadth and depth of a lawyer's service to his client, much of which is unknown to the average citizen.

Our committee continues its program of awards to increase public awareness of the value and service of the legal profession. The President's Award (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 Award of Appreciation (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) are given at the annual dinner meeting of the State Bar in the fall. Our committee diligently searches for outstanding nominees for each of these awards and makes the selection of the winners in the month of September.

The newspaper column on various legal subjects of interest to the general public is being distributed through the office of the secretary of the State Association, as are also legal pamphlets and other publications of value in terms of public service.

Looking ahead, our committee authorized our public relations counsel, Thomas L. Carroll, to visit the offices of the Missouri Bar Association at Jefferson City. Our primary purpose in this was to develop some understanding of the research which has been done by the Missouri Bar in the area of lawyer-client relationships and also the educational materials developed as a product of that research. A report of Mr. Carroll's findings and recommendations from this visit is presently under consideration by our committee; and it is our hope that from this we may develop our own program designed to improve lawyer-client relationships in everyday practice in Nebraska.

The committee wishes to express its thanks to George Turner and his staff for continued valuable assistance.

The committee also expresses its appreciation for the invaluable services of Thomas L. Carroll as professional public relations consultant.

It is recommended that we are to continue to take advantage of the services of Mr. Carroll, and that a continually expanded program of public service and public relations be continued during the coming year.

Patrick W. Healey, Chairman

CHAIRMAN MULLIN: We are nearing the end of our morning session, and with your permission and in the absence of any suggestions, I will move to some of the less controversial matters at this time.

Paul Martin, I believe, is in the room. Paul, would you give us a report of the Trustee of the Rocky Mountain Mineral Law Foundation. This is item 28 on your program.

REPORT OF TRUSTEE OF THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Paul L. Martin

This is certainly not controversial. I merely want to call attention to the fact that the Rocky Mountain Mineral Law Foundation now consists of 15 law schools, 11 Bar Associations, 6 mining associations, and 3 oil and gas associations. The states involved are Oklahoma, Kansas, Nebraska, the Dakotas, Wyoming, Montana, Idaho, Colorado, New Mexico, and Arizona.

It is a very interesting organization. The list of their publications is shown in the report on page 53.

During the past year as representing the Nebraska State Bar Association I have served as President, and it has been an enjoyable and rewarding service.

Next year the Annual Institute will be held in Colorado at the University of Denver in the middle of July, and I recommend to all of you the possibility of a short mountain vacation and a really worthwhile Institute.

[The report of the Trustee follows.]

Report of the Trustee of the Rocky Mountain Mineral Law Foundation

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 increasing 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.
2. The Gower Federal Service. (Public Lands Oil and Gas Leasing Service).
3. Gower Federal Service. (Outer Continental Shelf).

4. Gower Federal Service. (Public Land Mining Service—In 1965 a compilation of the general mining laws and regulations was added).
5. American Law of Mining. (5 volume treatise).
6. Law of Federal Oil and Gas Leasing.
7. Rocky Mountain Mineral Law Review.
8. Water Law Newsletter. (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. One of the other important projects is the awarding of scholarships of \$200.00 each to students at each of the 15 member law schools belonging to the Foundation. The scholarships are designed to promote and encourage interest in oil, gas and mining law and are awarded annually to law students who have done outstanding work in this field.

One of the principal functions of the Foundation is the annual three day Institute devoted to oil and gas law, mining law and allied subjects. These Institutes feature scholarly papers and discussions by outstanding authorities and reflect the thinking, experience and research abilities of the leading minds in the field; that they have attained national prominence is indicated by the continued large attendance by lawyers and industry representatives from all parts of the nation and certain foreign countries. Proceedings of each Institute are edited by the Foundation and are preserved for the use and benefit of all in permanent form by Matthew Bender & Company. The Institute for 1967 will be held in Denver, Colorado, in the Legal Center of the University of Denver.

During the past year, I have served as President of the Foundation. The new President is Roscoe Walker, Jr., a prominent oil and gas attorney of Denver, Colorado, and a member of the faculty of the School of Law of the University of Denver. Don H. Sherwood, a graduate of the University of Nebraska is the present Executive Director, and is doing an outstanding job.

The experience of the past year has been interesting and rewarding. I have enjoyed the opportunity of serving the Foundation and hope that my efforts contributed to the success of the Foundation.

Present members of the Association consist of 15 law schools, 11 bar associations, 6 mining associations and 3 oil and gas associations.

Paul L. Martin

CHAIRMAN MULLIN: We next will call upon Bill Meier, Chairman of the Committee on County Law Libraries, who has asked to make his report, inasmuch as he must attend another meeting this afternoon.

REPORT OF COMMITTEE ON COUNTY LAW LIBRARIES

William H. Meier

Mr. Chairman and Members of the House: Our report appears on pages 41 and 42. You will note on page 42 that now the official reports and Session Laws are being furnished to 15 county law libraries. There are 48 others which are listed there which have come to the attention of our committee as being established and operating.

The Committee recommends that the Secretary be directed to cause the said County Law Libraries to be added to the several distribution lists so that the proper state publications will also be supplied to each of them.

I move the adoption of this recommendation and that our Committee be continued.

CHAIRMAN MULLIN: You have heard the motion. Is there a second?

JOHN W. DELEHANT JR., Omaha: I second the motion.

CHAIRMAN MULLIN: George Turner would like to make a statement in that connection.

SECRETARY-TREASURER TURNER: I simply wish to state that there are county law libraries that do not need nor want these publications because they are otherwise provided under the free distribution list provided by statutes, the county judge, county attorney, and so on. So we have adopted a policy of waiting until we receive a request for a library to be added to that mailing list.

CHAIRMAN MULLIN: Thank you, George.

All in favor of the motion signify by "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the County Law Library Special Committee

The Secretary has reported that the following County Law Libraries are now receiving copies of the Statutes, Session Laws and other official publications provided by law to be distributed to County Law Libraries:

County of Law Library	Address
Douglas	402 County Court House, Omaha
Holt	PO Box 487, O'Neill
Saline	Wilber
Pawnee	Pawnee City
Rock	Bassett
Brown	Ainsworth
Adams	Hastings
Buffalo	Kearney
Phelps	c/o Clerk of Dist. Court, Holdrege
Dawes	c/o Jen Umshler, Clerk of Dist. Ct., Chadron
Knox	Center
Cherry	c/o Deputy Clerk of District Court, P.O. Box 589, Valentine
Richardson	Falls City
Nemaha	c/o Clerk District Court, Auburn
Dodge	Fremont

Your committee has been advised by the County Attorneys and District Judges that there are established County Law Libraries in the following locations:

Otoe	Nebraska City	Kimball	Kimball
Boone	Albion	Lancaster	Lincoln
Box Butte	Alliance	Lincoln	North Platte
Butler	David City	Logan	Stapleton
Cass	Plattsmouth	Madison	Madison
Cheyenne	Sidney	Merrick	Central City
Clay	Clay Center	Nance	Fullerton
Custer	Broken Bow	Perkins	Grant
Dawson	Lexington	Pierce	Perce
Deuel	Chappell	Platte	Columbus
Dixon	Ponca	Red Willow	McCook
Fillmore	Geneva	Saline	Wilber
Frontier	Stockville	Sarpy	Papillion
Gage	Beatrice	Saunders	Wahoo
Garden	Oshkosh	Scotts Bluff	Gering
Gosper	Elwood	Seward	Seward
Greeley	Greeley	Sheridan	Rushville
Hall	Grand Island	Sioux	Harrison
Hamilton	Aurora	Valley	Ord
Harlan	Alma	Washington	Blair
Howard	St. Paul	Wayne	Wayne
Jefferson	Fairbury	Webster	Red Cloud
Kearney	Minden	Wheeler	Bartlett
Keith	Ogallala	York	York

The Committee recommends that the Secretary be directed to cause the said County Law Libraries to be added to the several distribution lists so that the proper state publications will also be supplied to each of them. If other counties are maintaining County Law Libraries, the local bar should notify the Secretary of the Association so that they also will receive the state publications to which they are entitled.

William H. Meier, Chairman
Joseph Ach
Dixon G. Adams
John O. Anderson
John Elliott, Jr.
Mark J. Fuhrman
David E. Gregory
Jack R. Knicely
James A. Lane
Harry N. Larson
Russell E. Lovell
William H. Norton
W. A. Stewart, Jr.

CHAIRMAN MULLIN: Is Mr. James Nanfito, Chairman of the Committee on Military Law here?

REPORT OF COMMITTEE ON MILITARY LAW

James A. Nanfito

In order to make this short, I move adoption of the report of the Committee.

FRANCIS M. CASEY, Plattsmouth: I second it.

CHAIRMAN MULLIN: It has been moved and seconded. All in favor signify by "aye"; opposed "nay." Carried.

[The report of the Committee follows.]

Report of the Special Committee on Military Law

At the specific request of the Judge Advocate of the United States Army, this Special Committee on Military Law was organized. The Committee has been functioning since the year 1960 and has in the past acted on numerous matters which involved military personnel who were stationed in the State of Nebraska, and on many occasions for military personnel stationed outside of the Continental United States.

This past year has witnessed somewhat of a decline in the interest shown toward this Committee by Active Military personnel. This situation can probably be explained by the greater influx of legal talent into the respective Armed Services, such as the Army, Navy, Air Corps and Marine Corps. Yet many problems have been asked of the Omaha lawyers belonging to this Committee which problems concern themselves with the right of military personnel in such fields as Forcible Entry and Detainer, Divorce, Bankruptcy, Collection cases, and above all, matters involving the Soldiers and Sailors Relief Act.

Though this Committee is not truly performing any of its original purposes and aims, the Committee has performed some tasks which have aided not only the military, but have also aided civilians who have had problems. One task of the Committee which proved to be a success was the participation of two of the Committee members on a panel program sponsored by one of the radio stations in Omaha. This program was apparently well received by the audience of the radio station, inasmuch as many questions were asked and answered in the half hour allotted time. Some of the questions that were asked during this program involved the Status of Force Treaty and Dual Jurisdiction of the Military and Civil Authorities on a military base where a crime had been perpetrated, and the explanation of a NATO Treaty Officer arriving in the United States on active duty status concerning what rights he had to bring certain items to this country duty free.

We do feel that the one purpose of the Committee to assist our fellow military attorneys is being served. **For this one good point, the Committee recommends to the Bar Association that the Special Committee on Military Law be continued another year.**

James A. Nanfito, Chairman
Eugene T. Atkinson
Vincent Brown
Carl D. Ganz
Jerome P. Grossman
Barlow Nye
L. W. (Jim) Weber
Robert M. Zuber

ALFRED G. ELLICK, Omaha: The Lawyer Referral Committee is ready to report.

CHAIRMAN MULLIN: This is No. 21 and the report appears on page 40.

**REPORT OF SPECIAL COMMITTEE ON
LAWYER REFERRAL****Alfred G. Ellick**

Our Lawyer Referral Service is proceeding in good order in Omaha. From the statistics in the report you will see that referrals in 1965 were 25 per cent higher than in '64; and during '66 the increase is about the same, about a 25 per cent increase over '65.

Lincoln has not yet established a Referral Service but the Bar Association there has authorized one and "Buzz" Dalton informs me this morning that they hope to get it under way when they receive their O.E.O. grant.

Our report ties in to some extent with the report of the Committee on Availability of Legal Services for referral service throughout the state.

This is a Special Committee, so I would move simply that the Committee be continued.

CHAIRMAN MULLIN: You have heard the motion. Is there a second?

WARREN K. DALTON, Lincoln: I second the motion.

CHAIRMAN MULLIN: Any discussion? All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Special Committee on Lawyer Referral

The function of this committee is to encourage and assist local bar associations in establishing a lawyer referral system. At present Omaha is the only city in Nebraska with a referral service. In February of this year, however, the Lincoln Bar Association authorized its lawyer referral committee, under the chairmanship of Kenneth Cobb, to prepare specific plans for a referral system for approval by its executive committee. It is hoped that Lincoln will have a referral service in operation by the end of this year.

In its annual survey of lawyer referral services, the American Bar Association reports that there are now approximately 218 services in operation throughout the country. In 1965, over 97,000 clients were referred to panel members, an increase of 22 per cent over the number of referrals for the previous year. The total fees earned from referred cases by panel lawyers of 38 services (not all services keep these statistics) was \$689,764.14. Over 18,000 lawyers are serving on referral panels in the United States. These statistics indicate that more and more bar associations are realizing that

a well-run lawyer referral system has many benefits. It benefits the public by providing a method whereby persons of moderate means who do not know a lawyer can obtain legal help. It benefits the individual lawyer who is a member of the referral panel by creating a new source of clients. It benefits the profession as a whole by improving its public image and, through advertising and news releases, by informing the public generally of the many situations encountered in everyday life where the services of an attorney may be helpful.

The following statistics relate to the operation of the lawyer referral service in Omaha:

	1965	6 Mo.-1966
Total number of active referrals (an increase of 25% over 1964)	427	275
Number of cases closed	230	128
Total fees collected	\$6,002.36	\$4,909.00
Average fee per closed case	\$ 26.97	\$ 38.35
Number of closed cases in which the fee collected exceeded the minimum of \$7.50	67	45
Highest fee collected	\$ 475.00	\$ 800.00

The committee renews its offer to assist any local bar association or group of lawyers who may be interested in establishing a referral system. The mechanics are simple and the plan is largely self-supporting.

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

SAM VAN PELT, Lincoln: Mr. Chairman, the Administrative Agencies Committee would like to give a very brief report too.

CHAIRMAN MULLIN: All right.

JOHN J. WILSON, Lincoln: Al, I just happened to see a report of one of the Legislative Council committees and they are asking that a counsel be furnished to all indigent people before the County Court of Mental Health.

MR. ELLICK: I heard that.

CHAIRMAN MULLIN: Sam Van Pelt is Chairman of the Committee on Administrative Agencies and has asked for permission to make his report at this time.

REPORT OF COMMITTEE ON ADMINISTRATIVE AGENCIES

Samuel Van Pelt

Mr. Chairman, with the full report appearing on page 26, I don't see any need to engage in repetition. For that reason I would simply like to move the approval of the report and also the recommendation that the work of the Committee be continued, as it is a Special Committee.

CHAIRMAN MULLIN: Thanks, Sam. Is there a second?

PAUL P. CHANEY, Falls City: I second the motion.

CHAIRMAN MULLIN: You have heard the motion and the second. All in favor say "aye"; opposed "nay." Carried.

[The report of the Committee follows.]

Report of the Special Administrative Agencies Committee

The Administrative Agencies Committee, in an effort to outline the scope of its activities, compiled a list of all State Administrative Agencies. Particular attention was given to agencies conducting adversary type proceedings, together with the specific problems met by members of the Bar appearing before these agencies. The Committee then contacted these various agencies to determine whether they have adopted rules of practice and procedure, whether they have been filed with the Secretary of State and kept in conformity with the requirements of the Administrative Procedure Act, and whether the adopted rules have been adhered to in actual practice.

In connection with the Railway Commission's recent adoption of new rules of practice and procedure, several committee members appeared at the public hearing and worked very closely with the commission in formulating the new rules. The committee has also received suggestions for proposed legislation from the Railway Commission staff, and from other administrative agencies, and will review these suggestions and propose specific legislation at the next session.

Because the committee is in the midst of its work with the various administrative agencies and the preparation of proposed legislation, it is the recommendation of the committee that its work be continued, with instructions from the association to pursue those matters referred to it by the president, and any and all other matters which would properly come within the scope of the committee's jurisdiction.

Samuel Van Pelt, Chairman

Under the Nebraska State Constitution, there are six constitutional agencies which have been established apart from the legislative, executive, and judicial branches. These include:

1. **BOARD OF PARDONS:** This board can remit fines and forfeitures, grant commutations, pardons and paroles and hold public hearings in connection with the same.

2. **STATE RAILWAY COMMISSION:** This agency regulates the rates, services and general control of railroads, street railways, telephone companies, express companies, telegraph companies, motor carriers, electric transmission lines, irrigation companies, public storage warehouses, airlines, and itinerant merchants, and holds hearings and adversary proceedings in connection with the same.

3. **BOARD OF EDUCATIONAL LANDS AND FUNDS:** The primary purpose of this board is to administer the state's educational endowments, consisting of approximately a million and a half acres of land and sixty-nine million dollars in trust funds.

4. **BOARD OF EDUCATION OF STATE NORMAL SCHOOLS AND**

5. **THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA:** These two agencies can be considered together as their purposes are quite similar. There is little adversary practice before either of these two agencies.

6. **STATE DEPARTMENT OF EDUCATION:** This department, as well as the State Board of Education, holds certain hearings relating to school accreditation, districts, etc. and is oftentimes the forum of controversial adversary proceedings. A special state committee for the reorganization of school districts was set up in 1949, which has the duty to initiate, set up, and recommend plans and procedures for reorganization of school districts.

In addition to the above constitutional agencies, the remaining administrative agencies are found either in the various administrative departments of the executive branch, or among other miscellaneous legislative enactments.

Among the executive branch agencies are:

1. **DEPARTMENT OF AERONAUTICS:** This department together with the Nebraska Aeronautics Commission holds hearings in designating sites for airports, and in formulating regulations and policies to be carried out by the department.

2. **DEPARTMENT OF AGRICULTURE:** This department contains the Division of Agricultural Statistics, the Bureau of Animal Industry, the Bureau of Dairies, Foods, Weights and Measures,

the Bureau of Plant Industry, and the Division of Motor Fuels among others. All of these various divisions hold adversary proceedings and investigations.

3. DEPARTMENT OF BANKING: In regulating the chartering of state banks, as well as the registration of certain securities, this department frequently holds contested proceedings.

4. DEPARTMENT OF HEALTH: This department holds occasional investigatory proceedings, but few adversary proceedings.

5. DEPARTMENT OF INSURANCE: In regulating the insurance industry this department has occasional adversary proceedings.

6. DEPARTMENT OF LABOR: This department's Division of Safety formulates safety codes and standards, enforces such codes, as well as the female labor and child labor laws, and regulates employment agencies. In so doing, it has some public hearings. The Division of Employment, and particularly its appeal tribunal, appears and decides disputed claims which are nearly always adversary in nature.

7. DEPARTMENT OF MOTOR VEHICLES: With the authority to administer the state point system and thereby revoke drivers' licenses, this department has frequent adversary proceedings.

8. DEPARTMENT OF PUBLIC INSTITUTIONS: This department is concerned primarily with the administration of the various public institutions and has little or no adversary activity.

9. DEPARTMENT OF PUBLIC WELFARE: This department is concerned with old-age assistance, ADC, child-welfare services, etc.

10. DEPARTMENT OF ROADS: This department has frequent public hearings over highway location and improvement, but these are more of a legislative-type hearing than an adversary proceeding.

11. DEPARTMENT OF VETERANS AFFAIRS: This department along with the Veterans Advisory Commission administers the Nebraska Veterans Aid Funds, and hears the various relief applications of ex-servicemen and servicewomen.

12. DEPARTMENT OF WATER RESOURCES: This department itself governs irrigation and riparian rights, and is often the forum of far-reaching litigation. In addition, the Nebraska Power Review Board, a subsidiary of this department, has the authority to authorize the construction of transmission lines and related facil-

ities outside the corporate limits of cities and villages, and as such is the scene of heated legal battles between the various public power districts.

13. **ADJUTANT GENERAL'S DEPARTMENT:** The Adjutant General in administering the National Guard and Civil Defense has few public hearings or proceedings. The area of court martials and military justice would not seem to come within the scope of administrative law.

14. **TAX COMMISSIONER:** This is a constitutional rather than an administrative department, but it functions as the latter. In administering the property tax system, with its inherent problems of assessments and exemptions, this agency has frequent significant proceedings.

In addition to the above agencies, there are certain other administrative agencies that have been established by the legislature from session to session which should be mentioned only in passing. These include:

1. Nebraska State Board of Public Accountancy
2. Nebraska Armory Board
3. State Athletic Commissioner
4. Nebraska Board of Barber Examiners
5. Big Blue River Water Compact Commission
6. Nebraska Joint State Boundary Commission
7. State Building Commission
8. Board of Canvassers
9. Capitol Mural Commission
10. Centennial Commission
11. Nebraska Educational Television Commission
12. State Employees Retirement Board
13. Board of Examiners for Professional Engineers and Architects
14. Game and Forestation Parks Commission
15. Nebraska Hall of Fame Commission
16. Historical Landmark Council
17. Indian Law Enforcement Advisory Committee
18. Nebraska Industrial Research Institute
19. State Board of Examiners for Land Surveyors
20. Nebraska Public Library Commission
21. Board of Library Examiners
22. Merit System
23. Board of Nursing
24. Nebraska State Racing Commission
25. Board of Registration for Sanitarians
26. Nebraska Retirement Systems
27. Soil and Water Conservation Commission

28. Nebraska Song Committee
29. Tri-State Water Compact
30. Commission on Uniform State Laws

In addition to the above, there are five legislatively created commissions and boards which play a more important role in the field of administrative law. They are as follows:

1. **BOARD OF EQUALIZATION AND ASSESSMENT:** This board, working in conjunction with the tax commissioner, meets for assessment on the first Monday in May, and for equalization on the first Monday in July of each year. The board fixes the assessed valuation of railroad property, equalizes the assessments of property in all the counties, determines the rate of taxation on all property in the state, and prepares the schedule of values for the assessment of motor vehicles. Proceedings before this board are normally adversary involving members of the bar.

2. **LIQUOR CONTROL COMMISSION:** This commission has the power to regulate all phases of the control of the manufacture, distribution, sale and traffic in alcoholic liquors. Hearings on liquor licenses before this board are usually adversary and contested.

3. **MOTOR VEHICLE DEALERS LICENSE BOARD:** This recently created board has the power to regulate the issuance and revocation of licenses to both the wholesale and retail automobile dealers in the state. Licensing hearings, and more particularly complaint proceedings brought against licensees, are sometimes warmly contested adversary proceedings.

4. **NEBRASKA OIL AND GAS CONSERVATION COMMISSION:** This commission has the authority to provide for the operation and development of oil and gas properties in the state and is specifically empowered to hold hearings and to formulate and adopt policies to accomplish its duties. Although the commission is unknown to most eastern Nebraska attorneys, it is a frequent forum of activity for members of the bar practicing in the western and panhandle portion of the state.

5. **SUNDRY CLAIMS BOARD:** This board receives and investigates all claims against the State of Nebraska for which no money has been appropriated by the legislature. Hearings are frequently held on such claims. The board may approve certain claims under \$250.00, and all others are submitted to the legislature for payment.

CHAIRMAN MULLIN: We will stand adjourned until one-thirty o'clock this afternoon.

... The morning session adjourned at twelve noon ...

* * *

WEDNESDAY AFTERNOON SESSION**October 12, 1966**

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

CHAIRMAN MULLIN: I now declare the meeting of the House of Delegates back in session. We will take up where we left off in the program at the report of the Committee on Atomic Energy Law. Is Dick Wilson here?

ROBERT A. BARLOW, Lincoln: I am subbing.

CHAIRMAN MULLIN: Step right up—Bob Barlow!

REPORT OF ATOMIC ENERGY LAW COMMITTEE**Robert A. Barlow**

Dick Wilson couldn't be here today and made arrangements for Bob Berkshire, a member of the committee, to give his report. Bob spent the morning here expecting to be on about ten-thirty. He came to me and said he had to leave.

The report begins on the last line of page 29. I did discuss it with Dick Wilson. The last paragraph refers to the fact that the Atomic Energy Commission had under consideration an agreement proposed by Nebraska for Nebraska to assume a part of the AEC's regulatory authority over the use of radioactive materials in the state. It goes on to add that this proposed agreement is the result of legislation which had been previously supported by this Committee. That agreement has now been executed and is in effect. I was asked to bring that to the attention of the House of Delegates.

That is the report. It has no recommendations.

CHAIRMAN MULLIN: I wonder if there is a request that that Committee be continued in existence. Do you know?

MR. BARLOW: It is my understanding that there is some question in the Executive Council whether it is essential that it be so continued and therefore the committee did not recommend it. There is, however, some sentiment that it be continued, but primarily by Judge Novicoff of the Workmen's Compensation Court which has been interested in the work of the committee.

CHAIRMAN MULLIN: In the absence of any formal recommendation from anybody on the committee, the report will stand as read.

[The report of the Committee follows.]

Report of the Special Committee on Atomic Energy Law

In December, 1965 the Atomic Energy Commission announced that in conjunction with the Department of Labor it was soliciting state cooperation in a program to improve state workmen's compensation laws for employees involved in radiation work.

In January, 1966 at the request of the Presiding Judge of the Nebraska Workmen's Compensation Court, the Chairman of this Committee discussed with that Court the request for research and information being made by the Atomic Energy Commission and the means by which the research should be carried out in Nebraska. It was generally agreed that all steps possible should be taken to keep workmen's compensation at a state level rather than having the federal government take it over and that the state statutes should continue to be modified whenever necessary to meet any new problems arising from radiation. The Compensation Court kept the Committee Chairman advised as to the agreement the Court planned to and has now executed with the Federal Government to provide research on the Nebraska Act and reports for the AEC.

AEC has under consideration an agreement proposed by Nebraska for assumption of part of AEC's regulatory authority over the use of radio-active materials in the State. This proposed agreement is the result of legislation supported by this Committee several years ago.

Richard D. Wilson, Chairman
 Wilber S. Aten
 Robert H. Berkshire
 Boyd R. Critz III
 Vance E. Leininger
 Tracy J. Peycke

CHAIRMAN MULLIN: I overlooked item No. 13, the report of the Committee on Unauthorized Practice, Albert T. Reddish.

**REPORT OF COMMITTEE ON UNAUTHORIZED
 PRACTICE OF LAW**

Albert T. Reddish

Thank you, Mr. Chairman. I didn't know that my report was controversial until they passed me by before lunch, and then everybody told me that it was passed by, not because the report was controversial but because I was.

We have not too much in the way of firm recommendations. We have recommendations but they are for study rather than for

immediate action. I believe that the recommendations, which go mostly to the conference committee setup, are matters which should be considered among the Real Estate, Probate Trust Law Section, the Tax Section, the Executive Council, and the Unauthorized Practice Section, or any other groups where you have conference committees.

Before I get into the recommendations I want to make one advance report of a development since this report was written, and that is that the proposed conference of lawyers and collection agencies has a meeting set for this Saturday, at which time we will discuss possible statement of principles and also some possible joint action on legislative proposals.

You will note some comment on the penitentiary inmate problem, legal representation. I assume that Judge Van Pelt's decision has more authority than any action that our Committee could take, but it does seem as though there should be some better way of handling that. I just suggested to Clarence Meyer that he appoint Barney Packett to represent all of the fellows out at the penitentiary, and he thought that might be a good idea.

As for recommendations, we recommend:

1. That the concept and function of conference committees be studied and implemented.
2. That consideration be given to giving conference committees standing committee status within the Bar Association.
3. That 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 three years of the ten years last preceding their original appointment to a conference committee.
4. That legislative recommendations approved in the 1965 committee report be actively pursued with the 1967 legislature.

I move the adoption of the report and its incorporation in the proceedings of the meeting.

CHAIRMAN MULLIN: Is there a second?

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

ROBERT A. BARLOW, Lincoln: Briefly, what were the legislative recommendations?

MR. REDDISH: They go mostly to simulated process. We recommended that the prohibition against simulated process be ex-

tended against use of your provisional remedies, garnishment and so on and so forth, where some collection agency or creditor has used simulated process in an effort to collect an account and then brings a suit on the account that he can't pursue any of his provisional remedies, if it is shown in the lawsuit that he used simulated process—John Gradwohl has the report right there; and that the scope of simulated process be expanded to include simulation of government documents. This goes primarily to a form which is called "Payment Demand" which comes out in a brownish window envelope and looks like it has come from the Internal Revenue or some other government body, having a Washington 25, D. C. return, and so on; and also that if any legislation is introduced in connection with debt adjusting that the Bar Association oppose licensing, or recognition of debt adjusting by the legislature, but we don't recommend that the Bar Association take a stand on debt adjusting before the legislature unless there is legislation introduced to authorize the licensing of debt adjusting agencies.

Those were approved in 1964 and 1965.

I think that covers all of our legislative recommendations.

CHAIRMAN MULLIN: Any other questions?

JOHN M. GRADWOHL, Lincoln: Speaking as Chairman of the Tax Section, I would join in the motion to study the concept and function of conference committees, although the report of the Tax Section I am going to present later is at variance with the statement in this report as to whether or not the joining of duties previously done by separate committees into the Section has been good. We feel it has been desirable and efficient to combine, where this Committee seems to indicate an opposite position.

MR. REDDISH: Well, our point is, if I may elaborate, that the original function and purpose of conference committees has been to form a basis for consideration of statements of principles and to resolve areas of complaint. This is the tenth time I have appeared here as Chairman of the Unauthorized Practice of Law Committee, and this is the first time, John, in ten years that any conference committee chairman has contacted me in advance of the conference committee meeting to inquire if there are any problems that the UPL Committee had to raise with the conference committees. I appreciate it deeply, and I think I have indicated that to you before. All we are asking for in the report is consideration and study. We are not asking for any action at this point because I think it is something that should be studied by a number of different agencies before formal action is taken on any recommendation, or before any recommendation is made as far as final action.

CHAIRMAN MULLIN: Any further discussion? All in favor of the recommendations contained on page 25 in black print, four in number, say "aye"; opposed. Carried.

Do you have a question on this subject?

CHARLES E. WRIGHT, Lincoln: It is on this subject and I don't know which is the appropriate committee to consider it, but we are going to have a report presently from our Special Committee on the Availability of Legal Services, and one of the recommendations contained in that committee report is the formation of a non-profit corporation for carrying out the work that is proposed by that. This corporation will hire lawyers to render legal services. I understand also that there are two of those corporations now in existence in this state. I have some question in my mind as to whether or not this involves unauthorized practice of law. I am not saying whether it does or does not, but I think it is something that deserves study. I do know that in other states where they have found it desirable to authorize a corporation to practice law they had to have some implementing legislation and/or change in their Supreme Court rules. I think some consideration should be given to this problem.

CHAIRMAN MULLIN: Frankly, under our present rules and our integrated Bar as a corporation could in and of itself practice law, don't you think?

MR. REDDISH: Well, Canon 47 says that a lawyer will not use his services to aid and abet the practice of law by corporations or lay person. That isn't the exact language of it but it's the implication and the meaning of it. I think you get down basically to a matter for the Advisory Council as to the ethical problem, and the position of the Unauthorized Practice of Law Committee has been, where they have incorporated Legal Aid Societies, for example, that if it was within the scope of the Canons of Ethics and with the approval of the Advisory Committee, the Unauthorized Practice of Law Committee would not take any stand opposed to it.

The American Bar Unauthorized Practice of Law Committee has taken a stand opposed to the concept of group legal services as it was proposed in California two years ago. But that is different from this legal aid to indigent persons which the American Bar and the Unauthorized Practice Committee of the American Bar both have approved; the concept of legal aid to the indigent as considered by the Economic Opportunity Act is proper if it is within the scope of the Canons of Ethics and the organization of the Bar within the state. So as long as the Advisory Committee and the Supreme Court are happy, they are way beyond our authority or thoughts on it.

MR. WRIGHT: That is why I said I am not certain whether it is your committee *but* to a certain extent the state and the Supreme Court do regulate the practice of law in this state. I am not questioning the policy behind this non-profit corporation; I am just wondering if we do not need some implementing legislation or court ruling.

CHAIRMAN MULLIN: I think either that or submit it to the Advisory Committee.

MR. REDDISH: I think your Advisory Committee would have to consider that, because you take on your title guarantee problem; they thought there that you would need enabling legislation and perhaps even a constitutional amendment before you could have that.

[The report of the Committee follows.]

Report of the Committee on the Unauthorized Practice of Law

Proposed Conferences. The committee has been negotiating with two separate lay groups to establish conference committees between the Nebraska Bar Association and representatives of the lay groups. Regrettably, negotiations with one group have been tabled because of administrative directive to that group, although your Committee believes that the proposed conference committee would relieve one of the major sources of controversy and create a vehicle to resolve complaints and establish mutual understanding to the public and professional benefit.

A Conference Committee is being established with collection agencies with the intent of adopting a joint statement of principles for submission to the governing bodies of the respective Associations and to constitute a forum to resolve any complaints members of either Association may have with respect to activities of members of the other Association. Past cooperation between the Bar and most collection agencies in Nebraska presages success for this Conference.

Simulated Process. This remains one of the most active areas of complaint to the Committee and is particularly objectionable because the majority of recipients of offending forms hesitate to consult a lawyer and may be overwhelmed by the official appearance of the forms. Forms simulating government process have become more common, but the vast majority of collection agencies in Nebraska have resolved not to use the forms simulating government agency notices. The Committee has referred to the Bar's Legislative Committee recommendations adopted in the past for legisla-

tion with respect to simulated process and forms simulating government agency notices.

Penitentiary Inmates. The Committee has received several communications with respect to designation by the warden of the Nebraska penitentiary of an inmate to assist other inmates in post conviction, habeas corpus and similar proceedings. The proposition that such procedure may constitute unauthorized practice of law was rejected by the United States District Court for Nebraska, which Court according to press reports has approved the procedure announced by the warden. It does appear to the Committee that there are critical problems involved in this practice, and that more appropriate representation could be provided.

Conference Committee Policy. The original purpose of establishing conference committees between the Bar Association and other professional or lay groups has been to consider and adopt joint statements of principles and to provide effective means of resolving complaints of improper activities by members of either group without resort to courts. Impetus for conference committees usually has been supplied by the Unauthorized Practice Committee. Unfortunately, some conference committees have failed to function in this area, and have been either inactive, have devolved into inter-professional social groups, or have concerned themselves with subjective law problems. The Conference committee between the Bar and the Nebraska Real Estate Association has been assigned to the Real Estate, Probate and Trust Law Section and the conference of lawyers and accountants to the Tax Section of the Bar. This does not appear to be consistent with function of the conference committees or to provide basis for understanding and resolution of inter-professional practice complaints.

The joint conference committees have proved highly successful in resolving complaints and providing understanding with other lay and professional groups of the American Bar Association. Conference committees on the state level within the scope of their original concept could likewise resolve differences, furnish basis for mutual understanding and agreement and minimize risk of bitter, divisive, expensive litigation.

The Committee believes that interprofessional and public welfare can best be served by establishing conference committees as independent of any substantive law section of the Bar, giving them standing committee status and providing that at least one-third of the members of any conference committee shall have served on the Unauthorized Practice Committee at least 3 years of the 10 years

last preceding their original appointment to the conference committee.

The Committee therefore recommends:

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.
4. Legislative recommendations approved in the 1965 committee report be actively pursued with the 1967 Legislature.

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

CHAIRMAN MULLIN: Item No. 16, all of which brings us to the report of the Committee on Availability of Legal Services, Warren K. Urbom. Warren, did you tell me you had two reports?

WARREN K. URBOM, Lincoln: Yes.

CHAIRMAN MULLIN: All right; you can make this one first and then move into the next one.

MR. URBOM: The other report, Mr. Chairman, has to do with the Section on Practice and Procedure and perhaps I can make it first because it will be brief.

CHAIRMAN MULLIN: That would be item 37.

REPORT OF SECTION ON PRACTICE AND PROCEDURE**Warren K. Urbom**

Tom Walsh could not be here this afternoon and asked me to report for the Section.

As I understand it, our duty in reporting on a Section is to report to you election of officers. Insofar as that is concerned, Harold W. Kay has been elected as Chairman and James M. Knapp as Secretary. Both of these men's terms, however, on the Section have expired, and it is requested, therefore, that they be reappointed to the Section.

Is there anything further, Mr. Chairman, that needs to be done except asking that it be done?

CHAIRMAN MULLIN: Such reappointment would be by the President, I would assume.

MR. URBOM: His impression was they needed to be appointed. I have no knowledge.

CHAIRMAN MULLIN: Move into your next area and I will check that out.

MR. URBOM: I might mention, in passing, Mr. Chairman, that Tom raised with me the question of the advisability of having both a Section on Practice and Procedure and a Committee on Practice and Procedure and said that the Section's view on it is that they probably ought to be combined but he is not suggesting a recommendation or a motion at this time.

**REPORT OF COMMITTEE ON AVAILABILITY
OF LEGAL SERVICES****Warren K. Urbom**

Now having to do with the Committee on the Availability of Legal Services, this is an area which I think is of considerable significance to the Bar, and you have before you the report beginning on page 30 with the recommendation beginning at page 32. Simply stated, it is a proposal by which free legal service would be provided for those in the state who cannot afford to pay for legal service. This is an area which this Committee now has studied for about ten months, and we think in some depth, studying plans throughout the country by both state Bar Associations and local communities, including local Bar Associations.

Perhaps I can summarize the first portion of the report by saying only that it is our conviction that something *will* be done

in the area of providing free legal services for those who cannot afford to do them with the use of federal funds. The only question is whether the *Bar Association* or the legal profession as a whole will take over the responsibility and guide it, or whether it will be done aside from and around the Bar Association. Our conviction is that the Bar Association is the one that ought to take an affirmative position on it, take hold of it and guide it in the direction which we think it *ought* to go rather than permitting it to be done otherwise.

With that as a background, I now present the recommendation of the Committee for a plan. You will note that the plan as it is outlined in the report is a general plan, with a comment at the end that specific details will of necessity have to be by negotiation with the Office of Economic Opportunity. As I understand it, the experience of most groups is that the first specific plan presented is rarely accepted by the Office of Economic Opportunity. It does have guidelines which it insists upon, and insists that each plan be tailored to fit the community that is promoting the plan. Therefore I probably cannot even suggest to you some of the specifics which must be going through your mind, or will before we are through, and have gone through our mind as well. We do have some thoughts which I will be glad to share with you, but we thought that in this more generalized form is the best we could do in presenting it to you now, and if we can get approval of a general concept and then seek and obtain from you authority to negotiate with the OEO for a specific plan within this broad outline, we will have done as well as we could do.

I think it necessary to go through the recommendations in detail so you will understand them and so you will know they have been interpreted elsewhere and how we interpret them to mean in some of the specific areas.

This is the recommendation. We propose a plan akin to that now adopted by the State of North Dakota:

1. The Nebraska State Bar Association would form a non-profit corporation for the operation of the program, the directors of which would consist both of laymen and lawyers. Wherever feasible, the directors would be representatives of the areas and deprived groups principally served by the plan.

Let me explain for a moment that in most of the plans similarly presented elsewhere, the majority of the directors are lawyers. This is not a requirement but it is our suggestion that it *ought* to be done, if possible, so that the lawyers of Nebraska remain in control of the organization.

The last sentence, providing for use of representatives of the areas and the deprived groups principally served by the plan, is a requirement of the Office of Economic Opportunity, so that if we are to ask for federal funds this **must** be done. The thinking behind it is that when a plan is set up for serving a deprived group, members of that deprived group ought to have a voice in how it is operated. That is, "wherever feasible," and those were the words of the Office of Economic Opportunity, persons from those areas would be utilized within the plan.

So far as the corporation portion of it is concerned and the ethical questions that are involved, we have in mind the necessity of submitting that subject to the Advisory Committee for an opinion and report. We have no doubt that it does present some questions, at least, and those questions ought to be cleared before any final plan is approved and put into operation.

2. The entire State of Nebraska would be covered and served by the plan, except those communities having in operation federally funded local programs for providing legal services to the poor. Encouragement would be given to local communities to establish local programs and the state-wide program would withdraw from a local community establishing a local program, except in an advisory and coordinating capacity.

You ought to understand that there are several different forms of plans which are in operation, or which people have thought of, but this is the plan which we thought best suited to the needs of Nebraska were we would have one state-wide plan to supplement the local programs. If Omaha, for example, has its program, as it now does, the state plan would not interfere with it in any sense but would cooperate with it. It would, as is pointed out, continue in an advisory and coordinating capacity. That is, in any areas where the state organization could be of assistance to Omaha or Lincoln, now that Lincoln is getting its program going, or any other local community which sets up its own program in any direction that it requests our help and we are in a position to help, we would be happy to do so.

Furthermore, there might be, we anticipate, some coordinating problems. For example, if an organization, whether it be local or part of the state organization, in Scottsbluff has a problem representing a poor person, and the poor person moves to Omaha, there perhaps ought to be some coordination going on rather than the man in Scottsbluff having to continue to represent the man in Omaha because he once took on the representation. Maybe this could best be done, from a coordinating standpoint, through a state-wide organization. This is what we mean by "coordinating."

Additionally, there may be some ability of the state-wide organization to do things which would be helpful to *all* local communities whether they are part of the state program or have their own separate local organization. For example, it may be feasible to prepare legal memoranda on some specific legal problems that beset the poor, and rather than having each local office of the plan do its own research on the problem so that half a dozen offices in the state are doing the same research on the same problem, perhaps we could have through the state organization a local person, one person who would do some, at least, legal research and then share that with all of the local communities or the lawyers within the state-wide plan. So there would be that additional service that the state plan could do and perhaps thereby save some money because of the elimination of overlapping of the doing of the same legal research by many different people rather than at one central location.

3. Applications would be made to the Office of Economic Opportunity for funds up to ninety per cent of the cost of the program and ten per cent to be provided by the Nebraska State Bar Association.

Under the Office of Economic Opportunity procedure no more than ninety per cent can be provided by the federal government. The other ten per cent must come from the local community. Typically, these arrangements are with a local community, meaning a town or a county, or several counties joined together, however the local group wants to define itself as being a local community. It contracts directly with the federal government. Under this arrangement it would not be a local community in that sense; it would be the whole state in effect which would be contracting with the federal government for the plan. Ninety per cent of the funds would be furnished by the federal government if this plan is approved by the Office of Economic Opportunity and by you, and the other ten per cent would have to come from Nebraska. That does not necessarily mean that it must come from the Nebraska State Bar Association. However, in our recommendation we are asking that the Nebraska State Bar Association commit itself to that amount so that we will know the funds are committed from *some* source rather than just having to pick it up from whatever groups we were able to find.

Let me make it clear that this ten per cent does not mean that the State Bar Association or any other organization must agree to furnish that much money, but only services or facilities or equipment in an amount equal to, or the value of, ten per cent of the entire program. So if we could get lawyers in a particular com-

munity, for example, to donate so many hours a month or a year or a week, or whatever they are willing to allow at the rate of \$15.00 an hour for that time, so that that service which you or I would furnish would count toward the ten per cent which the Bar Association would be agreeing to furnish.

Under these plans, as experience has shown, almost no money has been involved as far as the ten per cent is concerned. They have been able to find ways to give ten per cent in services or equipment or offices. Any kind of furnishing of services or of facilities or equipment is considered proper. It would be our hope, the Committee's hope, that we could work out an arrangement like that so that the actual outlay of cash would be very small, if any, but we cannot assure you or anybody else that there would be none.

I will discuss later, if you want me to, the possible cost of all of this, and it will be only a wild guess based upon the experience of some other groups. I will be glad to do that if you are interested in it.

4. Legal services to the poor would be directly provided by attorneys employed full time by the corporation. Such attorneys would staff community offices throughout the state so situated as to be able conveniently to serve all areas of the state not reached by a local program. Part time and full time paid secretaries and typists would be utilized.

I suspect that that is clear enough. Generally speaking, you see, you might have an office in Chadron, and that man would serve a wide area, not just that particular town.

5. Central administration of the state-wide plan would be by a full time administrative director, employed by the corporation, and such full time assistant administrative directors as would be required. The director or one or more of the assistant directors would work closely with the University of Nebraska and Creighton University Schools of Law, compiling memoranda and educational materials, preparing and sponsoring legislative proposals, and conducting orientation programs for lawyers employed by the corporation for providing direct legal services to the poor.

6. Private practitioners could participate in the plan on a voluntary basis, contributing time to the administration of the program and conducting research services. Additionally, private practitioners would be paid to handle one side of cases involving two poor people.

7. All legal matters for those qualified, including persons confined to the Nebraska Penal Complex, would be handled, ex-

cept:—and here I want to draw to your attention a change in the report as it is written. As it is now written it says “except:

a. Cases involving serious crimes in which an attorney for the defendant has been appointed by the court.”

The Committee now feels that probably as a starting proposition, at least, we ought to eliminate criminal matters altogether, at least until we become more equipped to know wherein the state’s obligation ends for providing legal counsel.

Then also excepted from any services performed under this plan would be

“b. Cases from which a private practitioner could expect to earn a fee without substantial expense to the client, probably including contingent fee cases and probate of estates.”

There may be others that you can think of. The general proposition would be that if a case is kind of self-generating, fee-generating, then there would be no service performed under this plan for that kind of arrangement. That would be for a private practitioner to perform.

8. Intensive use would be made of students at the University of Nebraska and Creighton University Schools of Law, wherever practicable.

9. A lawyer referral service would be maintained for problems not covered by the plan or persons not eligible to receive free legal service.

It is the recommendation of the Committee that those provisions be accepted and that the Committee on the Availability of Legal Services be granted authorization to make such further studies, and thereafter to establish through negotiations with the Office of Economic Opportunity a plan within the broad framework as outlined above.

CHAIRMAN MULLIN: Do I have a second?

LEO EISENSTATT, Omaha: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the Committee’s report be approved as read and that all of the nine recommendations which have just been submitted be adopted. Is there any discussion? Does anyone have any questions?

CHARLES E. WRIGHT, Lincoln: I have a couple of questions about paragraph 1 of Proposal No. 1. If a corporation were not used, could you utilize an unincorporated association?

MR. URBOM: I think the answer to that is "yes."

MR. WRIGHT: No. 2, what is the reason for having laymen on the Board. Is that because the federal government prefers it?

MR. URBOM: Yes. I am confident the OEO would require laymen to be on the Board. This is an organization with more people interested than the Bar Association. The people who are being served also are directly and intimately involved in the kind of legal services that are to be provided and they, it is felt by the OEO, should have a voice in it.

MR. WRIGHT: Finally, I don't like the use of the words "deprived groups" when the Committee itself says that the precise extent of the need in Nebraska for further assistance is not known. Would it be objectionable to delete the word "deprived?" I think it admits we are taking a position that there are deprived groups, when I am not entirely certain that that exists.

MR. URBOM: My only answer would be that I cannot, on behalf of the Committee, agree to the elimination of the word "deprived" for the reason that I think the whole plan is centered around the idea that there are deprived groups, and if there are no deprived groups I don't think there is any point in discussing the plan at all.

MR. WRIGHT: One other thing: On your questionnaire that you sent out, 106 out of 171 answered it by saying that they didn't feel that legal services of this type were needed, and we already have, as I understand it, similar programs in operation in Lincoln and Omaha.

MR. URBOM: In Omaha that is true. In Lincoln it is not true. Lincoln is in the process of getting one, Charlie, you are right. The survey you have spoken of was not made by our Committee but was made by the Young Lawyers Section, and that report is available in full. This portion that I quoted in the report has to do only with lawyers other than in Lincoln and Omaha, and it is true that of those responding there were a considerable number more who favored it who responded that they felt the legal aid concept should not be extended in their groups. Our response in reaction to that is that the extent of the need in any particular area probably is not known by lawyers—period. The people who come to the office are served, I have no doubt of that. The people who do *not* come to the office we have no way of assessing at this point. Our desire is to make further studies, Charlie, to determine the full extent of the need. We recognize that we do not know how extensive the need is. We doubt that

any lawyer or law groups know the full extent of the need in this area.

We do know that in other plans that have been set up in other states it has been found that what was assumed to be the initial need fell way short of the actual need that was found; that is, the demand for the services was much greater than had been anticipated. I know of no group that has been established on a local basis or a state-wide basis which now has said, "Well, we've overestimated the need; there really isn't any need for this after all." It has been just the contrary; the need is there more strongly than the members of the Bar ever expected.

MR. WRIGHT: Two more questions and I'll give them both at once: Would the attorneys employed by the group be attorneys required to be admitted to practice in Nebraska?

MR. URBOM: Oh, indeed yes.

MR. WRIGHT: So they would remain subject to regulation by the Bar?

MR. URBOM: Absolutely.

MR. WRIGHT: And finally, what would happen if the Office of Economic Opportunity withdraws their funds after the project is started? Who would support it?

MR. URBOM: It may well do that, and the Bar Association may also withdraw their funds. You see, this is a year-to-year program. We make a contract for a year at a time. If the Bar Association later concludes this is a poor program and wants to get out, it can withdraw its funds; if the OEO decides to withdraw its funds because it is a poor program, it can withdraw its funds. It is a one-year program.

JAMES I. SHAMBERG, Grand Island: Warren, in your report you say "to establish through negotiations with the Office of Economic Opportunity a plan," that you intend to draw up a framework. Is it your thinking that by adopting your proposals today the Bar Association is being committed to a plan? Now before you answer I might point this out: I personally am in favor of the Bar Association committing itself to a plan eventually, but I also am thinking of the remarks of our President this morning in terms of a representative system here, and the thought that I supposedly am representing the Eleventh Judicial District, and I believe that the whole framework of the plan that has been outlined here is completely new to the attorneys in my district.

We received our Bar Association program last Saturday. I frankly have not had opportunity to go over the matter with the thirty-five or forty attorneys within my district to discuss with them the pros and cons of whether they desire to be committed to a plan.

I don't know whether the thought I have in mind, of possibly submitting a final plan back to the entire membership for a vote, or just what procedure should be followed, but I noticed in the first part of it your thought is that we study it further and then the last part is to establish through negotiations. . . . Would you comment on the various questions I have raised?

MR. URBOM: Yes. I think on your first question as to whether this is a commitment by the Bar Association, the answer is "yes." As we would interpret our recommendation, it is the commitment by the Bar Association for approval of a general plan as outlined.

I think that this is a matter of sufficient importance that it ought to be given full consideration. I think there ought to be no appearance even, much less factual basis, of this being a rapid-fire affair which was done quickly and without full consideration. We have no objection to anything that anybody has to offer in the way of giving it a full hearing or full consideration by any group or the full Bar Association, for that matter. We bring it to you as representing our best thinking to the group that represents the entire Bar Association. What you want to do with it is for you to decide and to instruct us as to how to go from here.

On your question about further study, we do not suggest that further study is needed in order to go on record as approving this kind of plan. Our proposal having to do with further study is to study further the specific **amount** of need that is in Nebraska and, accordingly, what kind of specific program needs to be set up. And by "specific" I mean the number of lawyers who ought to be hired to do this work, whether one director and one assistant director be hired, how many offices need to be set up in Nebraska. That is what I am talking about in specifics. I do not suggest that the Committee thinks further study needs to be made for the adoption of the general recommendation.

MR. WRIGHT: Is this entire program contingent upon obtaining approval of federal funds from the Office of Economic Opportunity? In other words, is this something you would propose that we follow through with some other type of money if federal funds are not made available?

MR. URBOM: The Committee has not considered that, Charlie, and I can't very well answer it. You see, our recommendation

is that the Office of Economic Opportunity be involved. I would think that if you approve our recommendation and then it develops that the Office of Economic Opportunity is not interested or we cannot work out a plan within this framework, we would not go ahead with some other plan but would come back to you for further instruction.

DIXON G. ADAMS, Bellevue: The question which occurs to me concerns the matter of eligibility. I read in paragraph 7, "All legal matters for those qualified . . . would be handled . . . with certain exceptions." Now who would fix the guidelines?

MR. URBOM: This would have to be set out in our specific proposal to the Office of Economic Opportunity, and it sets up certain guidelines and generally speaking its thought is that any single person who makes \$2,000 a year or less is qualified, and then you add onto that \$500 for each dependent. That you gives you a rough idea of how much money the OEO thinks the person ought to be making before he is no longer qualified to receive free legal services. However, the OEO makes it clear that this will not be determined by the OEO solely, but it is open to suggestions by Nebraska in view of the economy of Nebraska. In other words, if we want to establish different guidelines than that, it will be open to suggestions of that kind. Whether it will approve it, of course, we do not at this moment know, you see. But it has said "These are not firm guidelines. They are only suggestions and recommendations and you may provide some different guidelines." In our specific program we would have to suggest what our guideline would be.

As to the person who would determine whether an individual fell within the qualified category, it would need to be done, in our present thinking, by the attorney who is in charge of the office to whom the poor person comes asking for the service, as in Legal Aid now. When a person approaches Legal Aid and asks for free legal services, a determination has to be made as to whether he is qualified. So it would be here, on the same kind of basis.

MR. WRIGHT: I would like to propose a brief amendment, then.

In paragraph 1 I would like to move that the words "or Association" be added after the word "corporation" in line 2; that the words "both of laymen and" be deleted from line 3; that the word "deprived" be deleted from line 5; and that in paragraph 4. . .

CHAIRMAN MULLIN: Why don't we stop there, Charlie, and vote on them one at a time. Do I hear a second to Charlie's motion? The motion dies for lack of a second as to paragraph 1.

MR. WRIGHT: All right, on paragraph 4 I would like to add the words "admitted to practice in Nebraska" after the word "attorneys."

MR. URBOM: I have no objection to that at all.

CHAIRMAN MULLIN: Being accepted by the Chairman of the Committee, the amendment will stand without a second.

Anything else? Seeing no other hands up for discussion, we will now vote upon the over-all nine recommendations with the one amendment in paragraph 4. All in favor say "aye"; opposed. Carried.

Now answering your question on the Section on Procedure, a quick check of the Bylaws indicates that "Each Section shall have an Executive Committee of six members. No members of the Association shall serve on the Executive Committee of more than one section at the same time. At the annual meeting following the adoption of the original Bylaws, each section which meets at the annual meeting shall elect six members of an Executive Committee, two for a term of three years, two for a term of two years, and two for a term of one year. Thereafter, two members . . . shall be elected in the manner hereinafter provided, for a term of three years or until their successors are elected." Then it concludes, "No member of the Executive Committee shall be elected for more than one successive term." I would say that the power to select and elect lies entirely within the Committee, as restricted by the Rules and Bylaws.

MR. URBOM: Thank you, Mr. Chairman.

I think I must do one further thing, and that is to move for a continuation of the Committee on the Availability of Legal Services.

CHAIRMAN MULLIN: Is there a second?

ROBERT D. MOODIE: West Point: I have a question on that, Mr. Chairman. This morning, whether Mr. Urbom was here or not I do not recall, the suggestion was made that the Committee on the Availability of Legal Services be combined with the Committee on Legal Aid. Do you have any thoughts on this?

MR. URBOM: I would go one step further. It seems to me actually it ought to be combined with the Committee on Legal Aid and the Committee on Lawyer Referral. I nevertheless make the motion, to get it before us, and it is perfectly all right with me that you combine all three.

MR. MOODIE: Mr. Chairman, is this something that the House of Delgates can consider?

CHAIRMAN MULLIN: Do you know of any reason the House cannot vote on that?

M. M. MAUPIN, North Platte: Your problem is that one is a standing committee, one is a special committee, and the other one is a special, and we are trying to handle it by interlacing the committee members this year so we can get it done for next year.

FRANCIS M. CASEY, Plattsmouth: Warren, may I ask you one question while you are there? Maybe you can answer it and maybe you can't but down in my county we have a lot of these cases. I had one just yesterday of a woman who should be in court and had no money to even pay the court costs. We couldn't find anybody to represent her so I sent her up to the Legal Aid Society in Omaha. Do you know if the Omaha Society will go outside of this county and do those things?

LEO EISENSTATT, Omaha: Yes. How far? Where was she living?

MR. CASEY: Plattsmouth.

MR. EISENSTATT: Did you have any trouble on it?

MR. CASEY: No, I just sent her up. This happened yesterday and I didn't know what else to do.

MR. EISENSTATT: I'm on the Legal Aid Board. Let me know if there is any problem.

DIXON G. ADAMS, Bellevue: They come down to Papillion, so at least they go that far.

MR. CASEY: She didn't even have enough money to pay court costs. A lawyer can do the work but he can't be a banker too.

ALFRED G. ELLICK, Omaha: You might ask your Bar to help support our Legal Aid Office.

CHAIRMAN MULLIN: I want to thank those of you who are here in the room to make reports for being so patient. As far as possible I would like to follow the order of the program.

Was the motion seconded to continue the Committee on Availability of Legal Services?

ROBERT A. BARLOW, Lincoln: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

**Report of the Special Committee on the Availability
of Legal Services**

Since its creation in late 1965 the Committee on the Availability of Legal Services has engaged the challenging subject of how best to provide legal services to those who cannot afford to pay for them.

Traditionally, Nebraska lawyers have responded generously in giving their legal skills without charge when called upon to do so. We have every reason to think that this spirit is no less alive now than it ever was. With the growing complexity of our society, however, has come the necessity of change of method. In many instances we have moved from the bearing of the burden by the individual lawyer to the burden's being shared by the local community through legal aid organizations financed in part or in whole by public funds. In this Nebraska's experience largely matches that of other states of the nation.

Despite these efforts there is a nagging realization that there remains a considerable segment of our indigent population who either is not aware of important rights and obligations of its members or receives less adequate, less inspired, or less persistent representation than the more affluent segment.

With the Congress of the United States having now declared in effect a national policy of eradicating the causes and effects of poverty a new opportunity is presented for the spreading of thorough legal representation to the economically deprived. Funds through the Economic Opportunity Act of 1964 are available for the financing of locally sponsored and locally operated "community action programs" designed, among other things, to expand legal assistance programs to the poor.

How the Nebraska State Bar Association properly can join and guide this movement toward a worthy goal is the subject of this committee's efforts. We suffer no illusions. Probably most Nebraska lawyers, like others across the nation, would have preferred local projects locally financed. But that consideration is moot. We believe that programs for providing free legal services to the poor through federal financing will be instituted by someone; it is our conviction that only by an aggressive acceptance of the task by lawyers will such programs be guided within channels defining the

best interests of the poor, the general public, and the legal profession. Nor need we accept this task with major misgivings. Edward W. Kuhn, President of the American Bar Association, has declared that the legal services program of the Office of Economic Opportunity "offers the legal profession its most exciting challenge and greatest opportunity to realize its ancient and honored goal: equal justice for the poor." In 1965 the House of Delegates of the American Bar Association, after extensive study of the OEO program, without dissent authorized cooperation with the legal services program of the War on Poverty. By January, 1966, twenty-seven grants for legal service plans in twenty-three communities had been made; ten additional proposals had been approved; and ninety-one more were in the formative stage. These one hundred twenty-eight plans called for an expenditure of a minimum of twenty-one million dollars. The latest figures we have is that by the end of June, 1966, twenty-five million dollars in federal funds had been allocated for legal services programs serving hundreds of thousands of underprivileged. That expenditure is nearly five times the amount expended in 1965 by all locally supported legal aid offices. These programs are under the direct operation and supervision of lawyers, local bar associations and state bar associations.

The precise extent of the need in Nebraska for further assistance to the poor is not known. The committee thinks that the most apparent need has been in the larger population centers. Omaha already has established through OEO funds a legal services program, involving the establishing of neighborhood law offices staffed by full time lawyers. Lincoln is now preparing an application for OEO funds under a similar arrangement. Several other Nebraska communities have established community action programs, although they have not yet included legal services adjuncts. In a survey of lawyers by the Young Lawyers' Section of the Nebraska State Bar Association one hundred six of the one hundred seventy-one lawyers responding from localities in Nebraska other than Omaha and Lincoln said that they thought legal aid services should not be expanded and improved in their communities. Conceding that lawyers may be fairly good judges of the quality of service given those who come to the lawyers' offices to seek legal advice, it probably is true that they are not wholly reliable as assessors of the numbers of the poor who need legal advice but do not come to the offices to seek it. Perhaps, then, it is more significant that sixty-five of the outstate lawyers thought that legal aid services should be extended and improved in their communities. It further should be said that generally the experience of communities in other states has been that the need is discovered after institution of a

legal services program to have been greater than anticipated before the adoption of the program.

Your committee is of the conviction that there should be no reasonable opportunity for any informed person to say that there is inadequate legal service available to the poor of Nebraska. Accordingly, it recommends the adoption of a plan for providing that adequate legal service.

Having studied detailed plans now adopted by the state bar associations in Ohio, Iowa, North Dakota, and Wisconsin, as well as plans in operation in several local communities, we propose one akin to that of North Dakota, whereby:

1. The Nebraska State Bar Association would form a non-profit corporation for the operation of the program, the directors of which would consist both of laymen and lawyers. Wherever feasible, the directors would be representatives of the areas and deprived groups principally served by the plan.
2. The entire state of Nebraska would be covered and served by the plan, except those communities having in operation federally funded local programs for providing legal services to the poor. Encouragement would be given to local communities to establish local programs and the state-wide program would withdraw from a local community establishing a local program, except in an advisory and co-ordinating capacity.
3. Applications would be made to the Office of Economic Opportunity for funds up to ninety per cent of the cost of the program and ten per cent to be provided by the Nebraska State Bar Association.
4. Legal services to the poor would be directly provided by attorneys employed full time by the corporation. Such attorneys would staff community offices throughout the state so situated as to be able conveniently to serve all areas of the state not reached by a local program. Part time and full time paid secretaries and typists would be utilized.
5. Central administration of the state-wide plan would be by a full time administrative director, employed by the corporation, and such full time assistant administrative directors as would be required. The director or one or more of the assistant directors would work closely with the University of Nebraska and Creighton University

Schools of Law, compiling memoranda and educational materials, preparing and sponsoring legislative proposals, and conducting orientation programs for lawyers employed by the corporation for providing direct legal services to poor.

6. Private practitioners could participate in the plan on a voluntary basis, contributing time to the administration of the program and conducting research services. Additionally, private practitioners would be paid to handle one side of cases involving two poor people.
7. All legal matters for those qualified, including persons confined to the Nebraska Penal Complex, would be handled, except:
 - a. Cases involving serious crimes in which an attorney for the defendant has been appointed by the court;
 - b. Cases from which a private practitioner could expect to earn a fee without substantial expense to the client, probably including contingent fee cases and probate of estates.
8. Intensive use would be made of students at the University of Nebraska and Creighton University Schools of Law, wherever practicable.
9. A lawyer referral service would be maintained for problems not covered by the plan or persons not eligible to receive free legal service.

Details of such a program would need to be developed after further study of the precise needs of various areas of Nebraska and during negotiations with the Office of Economic Opportunity. It is requested that the Committee on the Availability of Legal Services be granted authorization to make such further studies and thereafter to establish through negotiations with the Office of Economic Opportunity a plan within the broad framework as outlined above.

Warren K. Urbom, Chairman
 William D. Blue
 Robert B. Crosby
 Edward F. Carter, Jr.
 Alfred G. Ellick
 Louis B. Finklestein
 John C. Gourlay
 Howard E. Tracy
 Allen Overcash
 Donald W. Pederson

CHAIRMAN MULLIN: The report of the Committee on Cooperation With American Law Institute, John C. Mason.

**REPORT OF COMMITTEE ON COOPERATION WITH
AMERICAN LAW INSTITUTE**

John C. Mason

Mr. Chairman, this report can be very brief. It is found on page 35 of your program. Primarily it reviews the work of the American Law Institute currently in progress and reports on some of the matters which were taken under consideration by the Institute at their annual meeting in 1966.

As I think most of you realize, the American Law Institute deals in several areas. They work on the Restatements of the Law and are engaged presently in the revision of several of the Restatements. They work on the promotion of Uniform Laws, Model Codes, and then they do a considerable amount of work in the field of legal education.

In that area there is a Joint Committee of the American Law Institute and the American Bar Association which is very actively engaged in advancing the cause of continuing legal education.

In our Committee report we make two recommendations for studies, continuing study, as distinguished from specific action. In approximately the fifth paragraph of the report reference is made to the Uniform Commercial Code. The Institute has been studying the deviations from uniformity which have occurred in some of the states which have adopted the Code, and they are making recommendations which will try to resolve some of these areas in which the various states have not seen fit to follow the specific original wording of the Code.

There are deviations to some extent in the Nebraska version of the Uniform Commercial Code, and it is the recommendation of our Committee that these matters be given continuing study. I think it is probably an item for the Legislative Committee and probably also for the subsection on Commercial Law, which is a new subsection recently created in the Section of Insurance, Banking, Corporation and Commercial Law. It would seem to our Committee that further uniformity could be considered and perhaps legislation presented to the next session of the legislature.

The final paragraph of the report contains another suggestion. The Joint Committee of the American Law Institute and the American Bar Association has encouraged the growth of state

Continuing Legal Education organizations and professional administrators of these organizations, and a number of states, approximately thirty as I understand it at the present time have such professional legal education administrators, including our neighboring States of Colorado, Kansas, and Missouri. This is a matter which has previously been given consideration by our Committee and one which we feel deserves continuing study by the Nebraska State Bar Association.

An additional recommendation which does not appear in the printed report because we took it for granted, I guess, but it should be made as a recommendation, and that is that the State Bar Association continue to be represented at the annual meeting of the American Law Institute to keep in close touch with the work of that organization.

I move, Mr. Chairman, the approval of the report and the recommendations contained in the report, and that the Association continue to be represented at the next annual meeting of the Institute.

CHAIRMAN MULLIN: Do you also move the continuance of your special committee?

MR. MASON: If that is necessary, I so move also.

CHAIRMAN MULLIN: Do I have a second?

FRANCIS M. CASEY, Plattsmouth: I'll second it.

CHAIRMAN MULLIN: You have heard the motion and the second. Any discussion? All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Special Committee on Cooperation with American Law Institute

The following report is presented by the Committee on Cooperation with the American Law Institute for presentation to the House of Delegates of the Nebraska State Bar Association at their annual meeting in the fall of 1966.

At the meeting of the American Law Institute in Washington, D. C. during May, 1966, two days were devoted to discussion on the new model code of prearrest procedure, one day on the study of division of jurisdiction between state and federal courts, and one day on the *Restatement of the Law, 2d, Torts*.

Work is also progressing on the revision of the restatement of contracts, the restatement of conflict of laws, a study of the pos-

sibility of a restatement of labor relations law, consideration of a restatement of public control of land use, and a tax advisory group study of suggested revisions of the estate and gift taxation laws.

In its work on model and uniform laws, the Institute is developing a model penal code, which has not yet been finalized, but has already resulted in stimulating revisions of penal codes in a number of states of the United States. The uniform commercial code has now been adopted in an additional 20 districts, territories and states subsequent to Nebraska's adoption of the code. As of May, 1966, it had been adopted in all of the states except Arizona, Delaware, Idaho, Louisiana and Mississippi, and it will undoubtedly be adopted in at least two of those states shortly.

The Institute reports reemphasized the desirability of complete uniformity in the uniform commercial code, and your Committee therefore suggests that the Nebraska State Bar Association give serious study to the possibility of recommending additional revisions of the uniform commercial code in Nebraska in order to obtain more complete uniformity. This should be presented to the 1967 session of the Legislature.

The strong program of continuing legal education sponsored by the joint committee of the American Law Institute and the American Bar Association continues. Its long-term goals are: to develop literature and organize and conduct courses for lawyers; to demonstrate the need for locally organized and supported programs at the local level of the bar; and to extend legal education programs beyond the concept of training for competence to also include education for awareness of the lawyer's responsibilities to his profession and to society.

The joint ALI-ABA committee is seeking to develop model courses of study and course materials on selected subjects of national concern, to develop courses for advanced study of certain sections of the uniform commercial code, and to experiment with courses in areas where technological, economic and social developments have an impact on the law.

The joint committee has encouraged the growth of state continuing legal education organizations, with professional directors. The number of states using such professional help has increased steadily. At the present time there are 30 states with such professional legal education administrators, including our neighboring states of Colorado, Kansas and Missouri. This is a matter which your Committee feels should receive continuing study by the Nebraska State Bar Association.

John C. Mason, Chairman
 Dean James A. Doyle
 Allen J. Garfinkle
 Dean Henry M. Grether, Jr.
 Daniel B. Kinnamon
 Barton H. Kuhns
 Hale McCown
 Thomas N. Wright

CHAIRMAN MULLIN: The report of the Committee on Co-operation With Law Schools and on Admission to Practice. I understand Charlie Wright will report in behalf of Charles Oldfather.

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

Charles E. Wright

The report is very brief and it is in your outline. It starts on page 33. The only thing I would like to have included in it, in paragraph 2 which starts on page 34, the final sentence, following the word "Committee" on about the fifth line down should have added in there "and the representatives of the two law schools were asked to prepare . . ." If we could get that included, please.

This being a special committee, it is recommended that the work of the Committee and the Committee be continued.

CHAIRMAN MULLIN: Is there a second?

JOHN J. WILSON, Lincoln: I'll second it.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Special Committee on Cooperation with Law Schools and on Admission to Practice

A meeting of the Committee on Cooperation with Law Schools and on Admission to Practice was held on June 10, 1966 at the Mid-Year Meeting. Seven 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. Heretofore the materials have appeared in the January issue. It

was suggested that it might be more helpful if the materials were published in the early part of the preceding November, inasmuch as many senior law students make commitments prior to the January publication date.

2. Further discussion was had relative to the establishment by appropriate statute or rule of court of an arrangement whereby senior law students could obtain a limited amount of court experience under the supervision of members of the Bar. The general principle of such a program was endorsed by the Committee, and the representatives of the two Law Schools were asked to prepare for the Committee a specific plan which would set forth the scope of the program and the method of implementation, following which this Committee will give the matter further consideration.

3. Note was taken by the Committee of the condition and inadequate design of the physical facilities of the two Law Schools. It was recommended that serious consideration be given to the rehabilitation and expansion of the Schools' physical plants, and that all members of the Bar familiarize themselves with the present condition of the facilities and support a program, to the end that needed improvements and additions consistent with present needs of modern legal education be made.

4. Discussion was had relative to the obtaining for the Nebraska Law School and the desirability of obtaining for Creighton Law School closed circuit television facilities so that District Court trials could be viewed by law students. Some of the problems involved in the same were discussed, and it was suggested that this was a project which the State Bar Foundation might be interested in supporting.

5. The present rules for admission to practice were reviewed and no changes were recommended.

6. 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.
John E. Newton
Marvin G. Schmid

CHAIRMAN MULLIN: We'll have the report of the Committee on Interprofessional Relations, Vance Leininger, Chairman.

REPORT OF COMMITTEE ON INTERPROFESSIONAL RELATIONS

Vance E. Leininger

Mr. Chairman and Members of the House: The report of this special committee appears on pages 36-40 in your program. I will not read the report but will briefly summarize it.

This special Committee was called on to meet with a smaller committee of the Professional Engineers of Nebraska, which was a newly formed and consolidated professional association, the result of a merger of two predecessor associations.

Two years ago by joint conference of lawyers and engineers there was adopted an Engineering-Legal Interprofessional Code. The consolidation of the two engineering associations rendered it obsolete as to the name of the engineering association participating, and in addition the representatives of the engineering group had found some difficulty with some of the language, so we met with them and participated in a revision of this Code, which appears in full on pages 37 through 40 as revised and as it has now been adopted by the Professional Engineers of Nebraska.

The principal changes were for clarification. I call your attention to paragraph 2 on page 38 near the end of the paragraph where it is made plain that "the engineer should refuse to prepare in final form, without approval of an attorney, a resolution for a municipality or a corporation, a contract for any client, or any instrument necessary to the obtaining of a bond issue."

There has been some misunderstanding about that and we feel that this will clarify the participation of attorneys in the final preparation of legal documents involving the engineering profession.

Also in paragraph 3 on the same page there is a reciprocal provision which guarantees to the engineer his right to practice his profession without interference from the legal profession; and on page 39, paragraph 7 there is a clarifying provision beginning about seven or eight lines down with the sentence that starts, "The engineer should submit all technical reports and copies thereof only to the attorney requesting them."

The reason for this language was that there had been experience in the past where engineers had been requested to submit reports and had done so willy-nilly without authorization of the

attorney or the client who employed him, and as a result the value of the services of the engineer were being made available to adverse parties prior to the time that the attorney or his client wanted them released and prior to the time that effective court measures could compel their release.

Furthermore there had been some misunderstandings between members of the two professions as to responsibility for compensation and for payment of the cost of reproducing multiple copies of engineering reports, which get expensive. Paragraph 8, toward the end of the paragraph, has some clarifying language in it regarding arrangements for compensation of engineering services.

Paragraph 9 we feel was rather important. The language in the earlier Code limited the considerations to be applied in fixing legal fees to certain specific matters and we felt left out a number of items that are considered appropriate in the fixing of legal fees under the Code of Ethics. So we broadened that language to make it plain that attorneys' fees should be based, not only on the nature of the work, the expenses involved, the time consumed, but other matters which may be appropriate for consideration pursuant to the Canons of Professional Ethics recognized by the Bar Association.

The engineering group has accepted these revisions and has adopted the Code as it appears here. It is the recommendation of this Committee that this revised Engineering-Legal Interprofessional Code be adopted in the form precisely as it appears in this program and as it has been adopted by the engineering group, and I so move.

CHAIRMAN MULLIN: Is there a second?

DIXON G. ADAMS, Bellevue: I second the motion.

CHAIRMAN MULLIN: Any questions or discussion?

JOHN C. MASON, Lincoln: May I ask whether the architects are included in the term "engineers" in this situation?

MR. LEININGER: I don't know whether the architects belong to this particular professional association. I suspect that there are firms that have both architect and engineer members of this association but I don't really know just what the extent of their membership is. This is the Professional Engineers of Nebraska, and I think there is another group of architects also.

MR. MASON: With respect to future work of the Committee, I would like to suggest to the Chairman consideration of the problem of the preparation of construction contracts by architects. This was called to my attention in connection with your item 3. It might be something worth studying in the future.

MR. LEININGER: The suggestion is welcome.

CHAIRMAN MULLIN: Any other discussion? If not, all in favor of the motion signify by "aye"; opposed. Carried.

MR. LEININGER: Mr. Chairman, this is a special committee, and in order that it may be available to the President for such work as he might want to assign to it for the next year, I'll move the continuation of the Committee.

CHAIRMAN MULLIN: Any second?

PAUL P. CHENEY, Falls City: I'll second it.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Special Committee on Interprofessional Relations

This committee received one request to meet with representatives of another professional association to consider mutual problems, with the following results.

In 1964 the House of Delegates approved the Report of the Committee on Joint Conference of Lawyers and Engineers, which in turn recommended approval of an Engineering-Legal Interprofessional Code. Since that date two professional engineering associations have been merged and consolidated into a single association known as the Professional Engineers of Nebraska, rendering the original Code obsolete as to the name of the engineering association involved. The Committee on Professional Practice of the Professional Engineers of Nebraska requested a meeting with this committee, to which we responded, and joined with them in reviewing and redrafting the original Engineering-Legal Interprofessional Code in order to bring up to date the name of the engineering association, and to remove some problems raised by the committee of the Professional Engineers of Nebraska by clarifying certain statements in the Code, particularly with reference to determination of professional fees and responsibility for compensation for professional services.

The revised Code was subsequently approved by the Professional Engineers of Nebraska, and is now submitted for consideration by the State Bar Association. This committee believes the revised Code is in harmony with the original Code as adopted in 1964, and incorporates changes which only serve to clarify and improve the original language in certain respects. **This committee recom-**

mends the adoption and approval of the revised Engineering-Legal Interprofessional Code, which appears following this report in form as adopted by the Professional Engineers of Nebraska.

Vance E. Leininger, Chairman
Dean G. Kratz
Joseph Ginsburg

ENGINEERING-LEGAL INTERPROFESSIONAL CODE

Preamble

It is recognized that a substantial part of the practice of engineering and of law concerns the problem of persons who need the combined services of both the engineer and lawyer. The engineer as a technical advisor and the lawyer as the legal advisor, frequently find they have a joint interest in serving the same client. This joint interest is magnified when the attorney at law serves as an advocate for his client whether he be plaintiff or defendant in any claim or advisory proceeding in Court.

It is with the public's interest in mind that proper principles concerning the functions of the engineering profession in relation to the practice of law and the functions of the attorneys at law in relation to the engineering profession be set forth and agreed upon by both the Professional Engineers of Nebraska and the State Bar Association of Nebraska. Both the profession of engineering and the profession of law are obligated to respect and honor each other. Either profession should not tolerate incompetency, corruption, dishonesty or unethical conduct on the part of any of its members. On the other hand each profession should strongly support and encourage a high standard of ethics consistent with public interest.

Where the services of the two professions meet and overlap in the serving of the interest of a single client, it follows that the service to be given to the client by one profession may be more effective and co-operative, if its workings, philosophy, ethics, and province are fully understood by the other profession. Both professions will profit by a greater mutual understanding. Therefore, to better serve their client, to increase the benefits to the public and to develop a mutual understanding, the following interprofessional Code of Co-operation is adopted by the Professional Engineers of Nebraska and the State Bar Association of Nebraska.

1. Inter-Professional Understanding.

Both the engineering and legal professions are essential to our present day society. The aims of both professions in that regard are essentially parallel. Each profession has a duty to develop an

enlightened and tolerant understanding of the other in the best interest of the public as well as the reputation of the two professions. The Engineer and the Attorney both shall recognize that with the complexities of today's business, neither functions within the narrow limits of his profession, but each renders valuable service to his client in broader fields. Each shall respect the right and responsibility of the other to function in those broader fields, always recognizing that engineering matters are for the Engineer and legal matters for the Attorney. By this joint action in adopting this Interprofessional Code of Co-operation, the members of each profession seek to eliminate misunderstanding and at the same time to develop the honor and dignity of the two professions.

It is the hope of the Professional Engineers of Nebraska and the State Bar Association of Nebraska that by this joint code of inter-professional co-operation, the two professions will join hands in increased understanding and co-operation.

2. Engineers and the Practice of Law.

The Engineering profession recognizes and agrees that it has an obligation and duty not to engage in the practice of law. It recognizes that the rules of practice do not permit an Attorney to accept employment by or through an intermediary. The Engineer or his representatives should not deal or settle directly with any client represented by an attorney without the consent of the attorney. The Engineer may properly interview witnesses or prospective witnesses, so long as they are not parties to the action without the consent of opposing counsel or parties. At no time should the Engineer or his representatives advise a client to refrain from seeking legal advice or against retention of counsel to represent his interest. An Engineer may be permitted to fill in the blanks of any forms previously drafted by counsel, but in general he is forbidden to draw or draft any legal instruments either in part or in their entirety. Consequently, the Engineer should refuse to prepare in final form, without approval of an Attorney, a resolution for a municipality or a corporation; a contract for any client; or any instruments necessary to the obtaining of a bond issue. The Engineer should not attempt to advise his client as to his legal rights in any controversy or any project.

3. The Attorney and the Practice of Engineering.

The legal profession recognizes that the Engineer is primarily concerned with the engineering technicalities of any given project. The attorney at no time should attempt to advise or counsel a client concerning the engineering technicalities of any project whether it be actual construction or a study made prior to construc-

tion. The attorney should look to the engineer to obtain the technical facts and to supply the professional engineering opinion or conclusion that may be ascertained therefrom.

4. Inter-Professional Conference.

Considerable misunderstanding can be avoided by an interprofessional conference between the engineers and the attorneys early in a project or in litigation. The conference is extremely helpful in deciding the province of each profession in a project or in gaining a detailed and full understanding of the matters involved in the litigation. Such conferences should be held at a time and place mutually convenient for both the engineer and the attorney. If the conference concerns an engineering project, the engineer and the attorney should co-operate by outlining the respective steps that each will take and then follow up by coordinating their efforts towards completion of the project. If the conference concerns pending litigation, the engineer should be ready to fully disclose all the facts in the case and the attorney should be ready to indicate the matters about which the witness will be interrogated. If the attorney plans to serve a subpoena on the engineer he should notify him, if at all possible, in advance of the actual service. While the administration of justice by the court and various administrative bodies cannot always accommodate the litigants, attorneys, or witnesses, however, if it is at all possible, the attorney should notify the engineer in advance, when he is to testify and to keep him advised of any changes in this respect as they arise. The engineer, of course, should always be prompt in his attendance in court and before the various administrative bodies unless circumstances are such that they would actually constitute a legal excuse.

5. The Engineer as a Witness.

The engineer when testifying in court or at any administrative hearing should at all times maintain the honor and dignity of his profession. His answers to questions should be concise and objective. It is recognized, of course, that many times questions cannot be answered by yes or no and that the answer must be qualified. The engineer should at all times try to keep his testimony in a language that would be understandable to the jury of laymen. The engineer as a witness should so state if he does not know the answer of a question. He should not attempt to answer by speculating, conjecturing, volunteering testimony or by giving answers not responsive to the question propounded.

6. The Attorney's Examination of the Engineer.

The attorney when examining or cross examining the engineer as a witness, should prepare and propound his questions in such

a form and manner as will permit a clear understanding and a forthright answer. He should co-operate with the engineer by minimizing, as far as practicable, the time required for the engineer's attendance in court. The attorney should avoid all questions which would badger or browbeat the engineer. It is to be expected that should an attorney use such questions that the court or administrator will not tolerate such tactics.

7. Technical Reports by the Engineer.

The engineer must appreciate the importance of promptness in providing the attorney with technical information particularly if there is pending litigation of extreme importance to the legal rights of the client. A correct, accurate technical report often-times makes possible the settlement of the case out of court to the mutual satisfaction of the parties involved in the litigation. A delay in giving such a report may prejudice the client's opportunity to make a proper settlement. The engineer should submit all technical reports and copies thereof only to the attorney requesting them, or if requested directly by a mutual client, directly to the client, and should be entitled to look to the person requesting such reports for payment of the engineer's compensation for supplying them. Additional copies of such reports should not be released to other persons except upon the authorization of the attorney or the client who originally requested their preparation, and then only after satisfactory arrangements have been made for the expense and reasonable charges incurred in the production of such copies. The engineer should be entitled to, and should, respect the confidential nature of his work in accordance with accepted legal rules respecting their disclosure. The engineer is not to be required to give a technical report concerning a client except upon proper authority. The attorney, when requesting a technical report should clearly specify the information desired and indicate whether or not it is to include opinions and conclusions of a technical nature. The attorney should always strive to give the engineer adequate time in which to prepare a comprehensive report in order that a satisfactory result may be obtained.

8. Compensation for Services of Engineers.

The engineer is entitled to charge accepted and going rates as compensation for his professional services after they have been rendered. The engineer is also entitled to require that satisfactory arrangement be made for the payment of his services in furnishing any reports, attending any conferences, making investigations, or rendering any other professional services when requested by an attorney. This right may be waived by the engineer when in his

judgment, the person or corporation involved is unable to make payment. The attorney should make the necessary arrangements and should take the necessary steps to see that an engineer who testified in legal proceedings as an expert legal witness is adequately compensated for his services. It should be recognized that the Engineer's code of ethical practice provides that the charges the engineer makes for reports, conferences and testimonies should never be made contingent upon a recovery. The fact that a claim has been made or a law suit is pending, should not in any way influence the fee charged by the engineer as an expert witness. The engineer's fee for such services should be consistent with the reasonable fee schedule of the locality or community for like services and a like amount of time spent by the engineer. Under no circumstances should the attorney attempt to estimate or set the fee to be paid to the engineer as compensation for his professional services.

9. Attorney Fees.

Fees set by the attorney for representing a client should be consistent with the reasonable fee schedule of the locality or community. Attorneys' fees should be based on the nature of the legal work, the expenses involved, the time consumed in rendering the service, and other matters which may be appropriate for consideration pursuant to the Canons of Professional Ethics recognized by the Bar Association. Under no circumstances should the engineer attempt to estimate or set the fee to be paid to the attorney as compensation for his professional services.

CHAIRMAN MULLIN: Item No. 22 on page 6, report of the Committee on Legal Economics and Law Office Management, Howard H. Moldenhauer.

REPORT OF COMMITTEE ON LEGAL ECONOMICS AND LAW OFFICE MANAGEMENT

Howard H. Moldenhauer

The report of the Special Committee on Legal Economics appears on pages 43-47 and a lot of it appears as information. I hope it meets even President Ginsburg's exacting standards of a fairly busy year.

We will first take up the recommendation of the minimum fee schedule, that a section be added in connection with services to municipalities. I would like to explain a little bit about the background behind the recommendation of this section, since it does have a little history.

Originally this section was taken from a schedule of another state, and it was recommended to us by a lawyer in Nebraska. Then copies of the section were sent to attorneys who do work for municipalities all around the State of Nebraska, and we got replies which were quite varied but which included comments such as the following: "I would favor the establishment of fee schedules for municipal attorneys. It would serve as a guide for the mayor and council who generally are not familiar with fee charges which should be paid for the work involved in counseling and serving as city attorney."

Another comment "The City of X pays Y dollars per year retainer, in return for which it expects attendance at all meetings, regular and special, and full legal service. The retainer is apparently set capriciously with a strong reliance upon how motivated the attorney is toward the service of his home town. This same rate has prevailed for more than ten years, although the other help has an annual increase."

Another comment, after recommending the schedule, a lawyer from another small town said: "Certainly with the rising inflation of today any part-time city attorney who has to maintain his own office at his own expense is justified in charging the amount suggested in the minimum fee schedule."

Now, there were some problems, and there were one or two negative responses. I have to mention these to you, in all fairness. One attorney said: "We believe there are statutory restrictions upon fees which can be charged by municipal attorneys." This, evidently, from our study is not clear-cut, but there is some question about it.

Other attorneys have said: "Some cities have ordinances which set the amount that can be paid municipal attorneys."

Recognizing these restrictions which were built in, the Committee decided that there was enough need evidenced by many lawyers throughout Nebraska that a section such as this in the fee schedule would constitute a tremendous help to them, both in setting a statement of policy and helping them in explaining and justifying a fair attorney's fee to the municipality or the mayor or the council. So we decided to make the recommendation that this material be added, but we have put in a proviso at the beginning "In the absence of statutory restrictions to the contrary, the following is adopted. . ." which should make this section consistent.

A by-product of the Committee's investigation has been that many of these lawyers have begun to study whatever statutory

restrictions there might be, and there is a movement to remove some of these statutory restrictions on attorneys' fees which are quite archaic.

In light of this background, gentlemen, I would like to move that the Section on Municipalities, which appears in dark type on pages 43-45 be adopted and added to the Minimum Fee Schedule of the State of Nebraska.

CHAIRMAN MULLIN: Is there a second?

HARRY N. LARSON, Wakefield: I second it.

CHAIRMAN MULLIN: Any discussion or question?

FRANCIS M. CASEY, Plattsmouth: May I ask one question which has been propounded to me, and that is the effective date of this. The reason for the question is that most of your small towns have just set up their budget for the next year, and an increased fee has not been included in the budget. They are wondering about that.

MR. MOLDENHAUER: I believe that if it were adopted now, perhaps the best that could be done would be that it would be presented at the next consideration to be given by any council or municipality.

MR. CASEY: So any lawyer who acts in the interim would not be . . .

MR. MOLDENHAUER: I don't believe there is any problem of violating ethics by not complying with the minimum fee schedule.

CHAIRMAN MULLIN: Any other questions? If not, all in favor of the motion signify by "aye"; opposed. Carried.

MR. MOLDENHAUER: Mr. Chairman, I would then not reiterate all the informational material which appears in our report but would just like to state that the State Committee here does need the cooperation of the local Bar Associations, as President Ginsburg indicated, because we do have information concerning legal service plans for the financing of legal service and we do have assistance and programs in the Law Economics field which could be very helpful to the local Bar. These are programs that do not really lend themselves on a state-wide basis but would in a small community.

I would also like to call your attention to the recommendation from special committee of the Young Lawyers Section about dis-

crimination of fees based upon age of lawyers. We have submitted the Committee's position in this report.

The remaining recommendations I think are almost self-explanatory and really do not require action.

Mr. Chairman, I would like to move that the Committee be continued and that this report be adopted.

CHAIRMAN MULLIN: Is there a second?

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

CHAIRMAN MULLIN: Any discussion or question? All in favor say "aye"; opposed "no." Carried.

[The report of the Committee follows.]

Report of the Special Committee on Legal Economics and Law Office Management

At the mid-year meeting of the House of Delegates of the Nebraska State Bar Association the Committee made a formal motion that the President of the Nebraska State Bar Association or his representative appear before the District Judges and the County Court Judges at their respective annual meetings to discuss the problem of the policy of some Judges, setting legal fees lower than provided in the Minimum Fee Schedule. The Committee also submitted a resolution which was duly adopted, that there be added to the Minimum Fee Schedule and Manual On Economics a section concerning Federal Restrictions on Attorney's Fees and a Chart of Income, Overhead & Hourly Charges.

The Committee has considered the Minimum Fee Schedule and recommends that the following section relating to fees in municipal matters be adopted:

"MUNICIPALITIES:

In the absence of statutory restrictions to the contrary, the following is adopted as the Minimum Fee Schedule for services to Municipalities:

Full-Time Attorneys

In the larger size cities, full-time salaried attorneys are required. The salary must somewhat depend on the size of the city and the amount of legal business. In no case should the salary of the attorney be less than comparable salaries for other professional service.

Part-Time Attorneys

In the smaller municipalities in the state, legal services must be performed on a part-time basis. Occasional legal services for municipalities should never be performed at less than the prevailing hourly rate for legal services in the district.

In setting a fee for part-time legal services, it is necessary to keep in mind the fact that the lawyer in private practice must pay office overhead, secretarial help and maintenance of the library and this cost has to be included in the fee before a lawyer can obtain any pay for his service. A lawyer who gives legal services for less than full compensation is unfair to himself, to other attorneys and to his client. Even where the lawyer can afford to do public work without compensation, such work should not include legal service except on a casual basis. Where a lawyer performs more or less continuous legal services for less than adequate compensation, he reduces the value of lawyers' services in the minds of laymen; he takes away the opportunity of another lawyer; and usually he does not perform the work adequately because of interference with his private occupations.

Where an attorney agrees to act as attorney for a city or village on a continuing basis, he assumes a public office and owes a duty to citizens of the community, as well as the governing body. No lawyer should accept this responsibility except under an agreement for a monthly retainer. In accepting a retainer, the lawyer agrees to make his services available to the city or village and to refuse to accept legal business which would involve a conflict of interest.

A minimum fee for a monthly retainer is \$50 a month. Such minimum retainer should not include anything but routine telephone calls and incidental matters, not including such time-consuming services as attendance at council meetings, conferences, court appearances and preparation of legal documents. Additional compensation should be required for all such services at the ordinary legal rate for legal services in the district.

For a minimum retainer fee of \$75 a month, the lawyer may include attendance at one monthly meeting and ordinary routine services. It must be recognized that attendance at council meetings may not justify a lawyer's hourly rate since it does not include office, stenographic and other overhead expenses.

For a retainer fee of \$100 a month, a lawyer may reasonably agree to attend two council meetings a month and ordinary routine services. The fee for other legal work should be at not less than the minimum hourly rate for legal services in the district including such matters as:

- a. drafting ordinances and resolutions;
- b. preparing and reviewing contracts;
- c. improvement proceedings;
- d. municipal bond proceedings;
- e. condemnations;
- f. zoning and removal of nuisances;
- g. prosecutions.

In cities and villages of 5,000 or more, it may be desirable to include a larger part in the retainer. This should require a higher retainer. It is suggested that in cities or villages from 5,000 to 10,000, a retainer fee of \$300 a month might be a minimum and for cities over 10,000, a retainer fee of \$500 a month might be a minimum.

In no case should a minimum retainer include court appearances. For such appearances the lawyer should receive not less than the minimum hourly rate for legal services in the district.

It is recognized that a lawyer should obtain more than the minimum rate for performing services for which he has a high degree of skill and competence. However, except for services covered by the ordinary bar statement of minimum rates, it appears impossible to provide a reasonable minimum fee because of the great variance in the time involved in such matters."

The Committee is also familiar with a study of probate fees made by the Section on Real Estate, Probate and Trust Law but has received no recommendations from that Section at the time of preparation of this report. The Committee has available to it summaries of the most recent Fee Schedules from the various states as prepared by the American Bar Association and is making further study of these Schedules. The Committee has no other recommended changes in the Nebraska Fee Schedule at this time since it is still gaining acceptance around the state.

The Committee has received and studied material from the American Bar Association concerning the Legal Service Plan for financing of legal services under an installment loan type arrangement. This plan is gaining popularity across the nation and it is recommended that the Local Bar Associations consider this plan for adoption in their particular areas. The Committee has furnished information concerning the plan to some local bar associations and solicits your inquiries.

The Omaha Bar Association is commended by the Committee for the preparation and distribution of the Omaha Bar Association Law Office Manual and it is recommended that every lawyer in Nebraska consider the utilization of such a Manual in his own office.

The Committee has prepared a poll on Law Office Management matters and is submitting it to the Executive Council together with a request for expenditures in order to process this poll. The Committee firmly believes that an exchange of information concerning law office problems, practices, and procedures is essential to the continued progress of the Bar as a whole and, if the Executive Council gives its approval and the poll is taken, strongly urges that every lawyer participate and cooperate to the fullest extent in this project for their mutual advantage. Economic polls in other states have proved to be a great advantage both in the planning of programs and in improving the status of the Bar and the Committee requests your cooperation in this project.

Members of the Committee have participated during the past year in local programs connected with Fee and Law Office Management problems and such programs have been well received. The Committee continues to hold itself available in assisting in the providing of speakers or programs on the subject of Law Office Management for your Local Bar Associations. In addition, your Committee has studied various articles on Law Office Management subjects and at least one such article has been reproduced in the *Nebraska State Bar Journal* during the past year.

A special Committee of the Young Lawyers Section studying economic problems of the younger lawyer has indicated that in some areas of Nebraska the Local Bar Associations have considered or established a varying hourly rate depending upon the years in the practice of the particular lawyer or whether a lawyer is a young lawyer or an older lawyer without giving any criteria as to who is considered an older lawyer.

The young lawyers feel that this has resulted in a ceiling being imposed upon the value of their services and that the resulting discrimination is extremely limiting to them. They have suggested that age or years in the practice should not be a limiting criterion in determining the lawyer's ability or the value of his services. The Committee would suggest that the point is well taken and would discourage this type of arbitrary classification in local Fee Schedules. The Committee would further re-emphasize that the hourly charge is recommended as a **minimum** and, if properly used, should not constitute a limitation on the fees charged by the attorney.

The Young Lawyers Section also has taken a survey of starting salaries of lawyers admitted to the Bar of the State of Nebraska in June of 1966 and the results of this survey are included in this report for your information as follows:

Total Replies	38
Going into Military Service ..	7

Salary	
Omaha	
No. of Lawyers	
4	\$600.00 Monthly
1	600.00 Monthly Plus 1/3 of business
1	500.00 Monthly
1	400.00 Monthly
Lincoln	
3	\$500.00 Monthly
Outstate Nebraska	
1	\$415.00 Monthly
1	450.00 Monthly
1	485.00 Monthly
4	500.00 Monthly
1	525.00 Monthly
3	550.00 Monthly
1	566.00 Monthly (Teaching)
1	600.00 Monthly
2	50/50 Partnership
Out-of-State	
1	\$785.00 Monthly (City of 3,000,000)
Government Jobs	
1	\$540.00 Monthly
1	550.00 Monthly
1	650.00 Monthly
1	660.00 Monthly
Trust Officer	
1	\$525.00 Monthly

The Committee recommends:

1. That the section on fees for services to municipalities be adopted and added to the Minimum Fee Schedule.
2. That the Minimum Fee Schedule and Manual on Economics of the Bar be constantly reviewed and revised and expanded.
3. That Local Bar Associations be encouraged to direct requests to George Turner, Secretary-Treasurer, Nebraska State Bar Association when they desire programs or speakers to be presented by members of the Committee on subjects of economics of the Bar and law office management.
4. That Local Bar Associations be encouraged to direct requests to George H. Turner, Secretary-Treasurer of the Nebraska State Bar Association, for information concerning the financing of legal services under the installment financing type plan.

5. That the Committee be continued.

Howard H. Moldenhauer,
Chairman
Thomas R. Burke
Thomas M. Davies
Harvey D. Davis
Richard A. Dier
Leo Eisenstatt
James J. Fitzgerald, Jr.
Richard E. Gee
Robert A. Munro
Benjamin M. Wall
DeWayne Wolf
Robert G. Simmons, Jr.
Richard Tempero

CHAIRMAN MULLIN: It is always a pleasure and a privilege to introduce my associate and a man for whom I have the highest regard, George Boland, Chairman of the Medico-Legal Committee. George!

**REPORT OF COMMITTEE ON MEDICO-LEGAL
JURISPRUDENCE**

George B. Boland

Mr. Chairman and Members of the House of Delegates: The report of the Committee on Medico-Legal Jurisprudence is found on pages 46 and 47 of the printed program so I will not review that.

I would, however, like to call to your attention the fact that we felt we had, first of all, a very excellent committee, an active committee, and a very busy committee. In view of the fact that it has been said, and probably correctly so, that eighty-five per cent of the litigation now before the courts has to do with claims involving personal injuries, you can readily understand how important it is to have a well-rounded relationship with the medical profession which forms such an integral part of the presentation of that type of litigation. I want to say also that our Association has had a most cordial and friendly cooperation with the Nebraska State Medical Association. It has been a pleasure for all of us who have served on your Committee to serve with the like committee of the medical profession.

In view of the recent removal of the charitable immunity of hospitals, as decreed by the Supreme Court, the matter of malpractice actions, both against hospitals and doctors, has reached a

place of high priority in both the medical profession and in the legal profession, to such an extent that we called another special meeting of the Joint Committee of both the medical association and the Bar Association in Lincoln in June. Dr. Gilligan, who heads up the committee for the doctors is from Nebraska City and was most helpful and most gracious in supplying us with material which he had accumulated from all over the country.

You can readily understand how important this particular field has become, both to the doctors and to the lawyers. It was apparent from the tremendous amount of work that Dr. Gilligan had done in assembling all of this information so that some workable plan might be finally arrived at that would be satisfactory to both professions, as I say, you can readily see how important it was to both professions.

And so it was that your Committee appointed a subcommittee that had to deal strictly with the assembling of all of this information and then disseminating it to all of the members of both committees and to the officers of the associations with the hope that we could arrive at some presentation for you at this meeting. But the task was just too great.

In this connection I want to tell you that your Committee chairmen and I am sure you members of the Association when you realize what a task some of the members of the committee, and particularly the members of the Subcommittee on Malpractice, did, you will realize how indebted we are to Kenneth Cobb and to Charlie Wright and also to Tom Tye who lent his invaluable assistance.

We believe that since it was not humanly possible to get this matter in proper form to present to you at this meeting, a proposal of the plan—we had a plan drawn up by these gentlemen of the subcommittee which we think really covers the subject—but we didn't want to ask you to pass upon it without your having an opportunity to examine it and to know its contents, so we would like, as a suggestion, to have this proposed plan published in the official publication of the State Bar Association, and we feel confident that it will be published by the medical profession and that by the next meeting of the Association we can finalize a plan which both professions realize is of such great importance to the members of both professions.

I, therefore, wish to extend my sincere thanks to all the members of this Committee for their valuable assistance, and particularly to you for listening to me. I would make a motion, then, that the Special Committee on Medico-Legal Jurisprudence be continued.

CHAIRMAN MULLIN: Is there a second?

L. F. OTRADOVSKY, Schuyler: I second it.

CHAIRMAN MULLIN: Any discussion? All in favor signify by "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Special Committee on Medico-Legal Jurisprudence

The Committee on Medico-Legal Jurisprudence of the Nebraska State Bar Association met at Suite 300 Farm Credit Building, Omaha, Nebraska, on March 10, 1966. A general discussion was had relating to items of general interest to the members of the legal profession as related to contacts with the medical profession in the fields of treatment, conferences and testimony.

It was brought to the attention of the Committee that the Nebraska Association of Trial Attorneys will sponsor a Medical Malpractice Seminar immediately prior to the fall meeting of the Nebraska State Bar Association. It is anticipated that the members of both the medical profession and legal profession will participate in the Seminar and the general discussion that will follow.

It was agreed by all of the members of the Committee in attendance that there was a lack of unanimity and uniformity of medical opinion evidence in regard to the nature and effect of so-called "whip-lash" injuries. It was suggested that it might well be advisable for the Committee of the Nebraska State Bar Association having to do with uniform instructions to prepare suggested instructions in this field which would formulate rules readily understandable by jurors. It was also deemed advisable that District Courts prepare guide lines as to admissibility of evidence relating to this particular type of injury.

It was felt that there was need for better public relations between the members of both professions relating to the waiver of privilege of the physician. Suggestion was made that in the discussions or attempted discussions with the attending physician of a litigant that the lawyer make plain to the physician the removal of the privilege by the filing of an action in which a claim for damages for personal injuries was asserted.

It was earnestly urged that there be a joint meeting of this Committee of the Nebraska State Bar Association with the similar Committee of the Nebraska State Medical Association. It was suggested that the most appropriate time and place would be that which would correspond with the State meeting of the Ne-

braska State Medical Association. It is hoped that arrangements can be made with the Executive Secretary of the Nebraska State Medical Association far enough in advance so as to avoid conflicts with the Medical Association Meeting.

It was again urged that an effort be expended by both Associations to arrive at uniformity of charges for medical testimony.

It was the consensus of the members of the Committee that there is generally speaking a spirit of cooperation between the two professions.

Geo. B. Boland, Chairman
Ivan Blevens
Charles M. Bosley
Joseph P. Cashen
Kenneth Cobb
Charles E. Kirchner
Joseph H. McGroarty
William H. Riley
Thomas W. Tye
Harry L. Welch
Charles E. Wright

SUPPLEMENTAL REPORT OF SPECIAL COMMITTEE ON MEDICO-LEGAL JURISPRUDENCE

Our Committee met with the like Committee of the Nebraska State Medical Association on June 9, 1966 at the office of the State Medical Association at 1315 Sharp Building, Lincoln, Nebraska. Both Associations had a very representative attendance. Dr. Gilligan of Nebraska City, a long time member of the Medical Association Committee who had done an immense amount of work in connection with formulating a plan for submission to Committees of both the Nebraska State Bar Association and the Nebraska State Medical Association in regard to malpractice of cases was in attendance. He supplied us with a large volume of material which he had acquired from all sections of the country on the subject of procedures for the handling of malpractice suits against doctors and hospitals. Mr. Kenneth Cobb and Mr. Charles E. Wright of our Committee very graciously offered to Xerox copy all of this material and supply each member of our Committee as well as the President of our Association and all members of the Medical Association Committee with copies of that material.

The copies of Dr. Gilligan's papers, dissertations, suggestions and procedures from other jurisdictions have been copied and the copies are in the hands of all the members of our Committee. Each

member has been requested to furnish their suggestions to the Sub-Committee of the Medico-Legal Jurisprudence Committee consisting of Mr. Cobb and Mr. Wright so that a definite plan can be formulated and submitted to the Association at the October meeting. Suggestions are starting to arrive and we are in hopes that we will have a finalized plan to submit to the Association at its meeting on October 13 and 14.

Geo. B. Boland, Chairman
Charles E. Kirchner
Charles E. Wright
Kenneth Cobb
Thomas W. Tye
William W. Riley
C. M. Bosley
Ivan Blevens
Harry L. Welch
Joseph P. Cashen
Joseph H. McGroarty

CHAIRMAN MULLIN: Next is the report of the Committee on Oil and Gas Law, Paul Martin.

REPORT OF COMMITTEE ON OIL AND GAS LAW

Paul L. Martin

Mr. President and Members of the House of Delegates: This should not be controversial.

During the past twelve months the activities in the Oil and Gas Industry in Nebraska have been considerably curtailed, but with the increase of secondary recovery operations problems have arisen which should be corrected by the next session of the legislature in 1967.

Therefore your Committee recommends the following legislative changes:

1. Limit the time for appeal from an order of the Oil and Gas Commission to thirty days.

The present sixty-day limit is just too long in a fast-moving operation like the oil business.

2. Provide for appeals from the orders of the Commission to the District Court of the county in which the land or a part thereof is located.

We feel that it is very important in case of an appeal from the order of the Commission that the case be heard in the county where the witnesses and the interests lie.

3. Eliminate from the percentage of owners necessary to consent to involuntary pooling or unitization persons owning overriding royalty interests or production payment interests.

The real persons of interest are those who have the working interest in the oil and also those who are the owners of the oil. The mere fact that there have been peddled out, certain interests carved out of the oil production in the way of overriding royalties or production payments, makes it too complicated to expeditiously take care of a pooling arrangement.

4. Provide that service of notice in all proceedings before the Commission, except in cases involving a direct complaint by the Commission, should be given by certified mail and publication instead of requiring the same notice as provided by the Code of Civil Procedure.

This also is an expedition of the procedure.

5. Enlarge the provisions of 57-210 and 57-401 Revised Statutes of Nebraska to permit conservators to have the same authority as administrators, executors or guardians.

This has already been taken care of by the report.

6. For several years this Committee has had under consideration legislation providing for the extinguishment of dormant or abandoned severed mineral or royalty interests and the problem of leasing such interests.

In the oil area, especially out in the west end of the state, where fifteen, twenty, thirty, or fifty years ago somebody peddled out their interest in the minerals and it has been completely forgotten, nobody has done anything about them, it is a cloud on the title and there should be some way of extinguishing it.

One approach to the problem is coverage by an amendment to the Marketable Title Act, but the consensus of the Committee is that the matter can best be approached by action in the nature of a quiet title action unless the owner of interest within twenty-three years from the date of reservation or acquisition exercises publicly the right of ownership by one of the following acts:

(a) Acquired, sold, leased, pooled, unitized, mortgaged, encumbered or transferred said interest or any part thereof by an instrument which has been properly recorded in the county where the land from which said interest was severed is located.

(b) Removed, produced or withdrawn minerals from under the lands or used the geological formations, or spaces or cavities

below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which created the severed mineral interest.

(c) Recorded a verified claim of interest in the county where the lands from which said interest was severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same.

The interest of any such owner is extended for a period of twenty-three years from the date of any of said acts.

This isn't an attempt to take away anything from anybody who wants it. They've got all the means in the world of continuing their interest. But if they have abandoned it for twenty-three years, forgotten it, and it is just a cloud on the title, the attorneys examining titles in an oil area feel there should be some method to get rid of it.

Any owner or owners of the surface of real estate subject to an abandoned severed mineral interest, either severally or jointly, may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such abandoned severed mineral interest and cancellation of the same of record, naming as parties defendant therein all persons having or appearing to have any interest in such abandoned severed mineral interest, and if such parties defendant are not known and cannot be ascertained, they may be proceeded against as unknown defendants under the provisions of Sec. 25-321, R.R.S. Neb.

If this report is approved, the Committee will request the Committee on Legislation of the Nebraska State Bar Association to present to the legislature drafts of bills in compliance with the recommendations of the Committee.

I therefore move the acceptance of the report and recommend the continuance of the committee.

CHAIRMAN MULLIN: Is there a second?

CHARLES H. YOST, Fremont: I will second it.

CHAIRMAN MULLIN: You have heard the motion. All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

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:

During the past twelve months activities in the Oil and Gas Industry in Nebraska have been considerably curtailed, but with the increase of secondary recovery operations problems have arisen which should be corrected by the next session of the Legislature in 1967.

Your Committee recommends the following legislative changes:

1. Limit the time for appeal from an order of the Oil and Gas Commission to thirty days.

2. Provide for appeals from the orders of the Commission to the District Court of the County in which the land or a part thereof is located.

3. Eliminate from the percentage of owners necessary to consent to involuntary pooling or unitization persons owning overriding royalty interests or production payment interests.

4. Provide that service of notice in all proceedings before the Commission, except in cases involving a direct complaint by the Commission, should be given by certified mail and publication instead of requiring the same notice as provided by the Code of Civil Procedure.

5. Enlarge the provisions of 57-210 and 57-401 Revised Statutes of Nebraska, to permit conservators to have the same authority as administrators, executors or guardians.

6. For several years this Committee has had under consideration legislation providing for the extinguishment of dormant or abandoned severed mineral or royalty interests and the problem of leasing such interests.

One approach to the problem is coverage by an amendment to the Marketable Title Act, but the consensus of the Committee is that the matter can best be approached by action in the nature of a quiet title action unless the owner of interest within twenty-three years from the date of reservation or acquisition exercises publicly the right of ownership by one of the following acts:

- (a) Acquired, sold, leased, pooled, unitized, mortgaged, encumbered or transferred said interest or any part thereof by an instrument which has been properly recorded in the

county where the land from which said interest was severed is located.

- (b) Removed, produced or withdrawn minerals from under the lands or used the geological formations, or spaces or cavities below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which created the severed mineral interest.
- (c) Recorded a verified claim of interest in the county where the lands from which said interest was severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same.

The interest of any such owner is extended for a period of twenty-three years from the date of any of said acts.

Any owner or owners of the surface of real estate subject to an abandoned severed mineral interest, either severally or jointly, may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such abandoned severed mineral interest and cancellation of the same of record, naming as parties defendant therein all persons having or appearing to have any interest in such abandoned severed mineral interest, and if such parties defendant are not known and cannot be ascertained, they may be proceeded against as unknown defendants under the provisions of Sec. 25-321, R. R. S. Neb.

If this report is approved, the Committee will request the Committee on Legislation of the Nebraska State Bar Association to present to the Legislature drafts of bills in compliance with the recommendations of the Committee.

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

CHAIRMAN MULLIN: The report of the Committee on Publication of Laws, Richard M. Duxbury, Chairman.

REPORT OF COMMITTEE ON PUBLICATIONS OF LAWS

Peter J. Vaughn

My name is Pete Vaughn. Mr. Duxbury couldn't be here and asked me to make the report. It is very brief.

The Committee basically has three recommendations:

The first one is to urge the continued cooperation of the Bar Association with the University of Nebraska in the study of computer tapes in research into the Nebraska statutes.

The second recommendation is to urge the legislature to look into the possibility of our publishing the Supplement a little sooner after its adjournment rather than the way it was done this year, about a year later.

The third recommendation is a resolution to the legislature that funds be appropriated for the publication and revision of a new Index for Nebraska Statutes.

I urge the passage of these recommendations and the continuation of the Committee.

CHAIRMAN MULLIN: Do I hear a second?

ROBERT D. MOODIE, West Point: I second the motion.

CHAIRMAN MULLIN: Any question?

JOHN J. WILSON, Lincoln: Mr. Chairman, I can answer a couple of those questions I think to your satisfaction.

The legislature can only appropriate money to get out a new Index and authorize it.

Last February I attended a two-day session with a book publishing company about getting out a new Index, which is technical within itself. It is going to cost about \$125,000, and it is going to increase your cost of purchasing one. We have a bill prepared to present to the legislature to ask for an appropriation of \$125,000 and to contract directly with the publishing company. Most publishing companies do not want to get out an Index unless they publish all your laws. If you want that done, then we are going to increase our cost of statutes about \$250, and I don't believe lawyers generally are for that.

But if the legislature passes the bill and if you give us some assistance so we can get the money appropriated and the authorization of the contract, it will be turned over to a law publishing company and it will take about two years to get the Index out. That is what is being done, and several members of the legislature are in favor of it, and all they ask us to do is get some facts.

Kansas had their Index published by the Law List Publishing Company. They did their own printing but List Publishing Company did the editing. There are not too many Index editors in the United States and you have to go to a law book publishing company to find one. Again, they are reluctant to take on just the Index unless they have the entire statutes.

As to the Supplement, it is a problem. I attended a meeting this August with practically all of the Revisors of Statutes in the United States being present, and they are all having the same problem we have. The legislature is passing more laws. This last time they passed 800-and-some laws, and some of them are long. It becomes a physical proposition rather than a mental proposition of how are you going to get your work done. Our Supplement this year went to about 3,200 pages, and you can only print so many pages a day, you can only proof read so many a day, and then they all have to be indexed.

Your processing like at the University has not been satisfactory in the states that have used it.

Nebraska does something that most states don't do. You can buy the slip laws within a few weeks after the legislature adjourns which will give you all the new laws, and the title will show you what changes are made. I would advise every lawyer to get a set of the slip laws. I think they charge you \$10.00 or \$7.50. Those are available within six weeks after the legislature adjourns. You are going to have to wait for your Supplement until it gets out. I think your Supplement will probably be anywhere from 600 to 800 pages smaller next year than it was this year, and it should be gotten out several months earlier. When you get 3,200 pages it is a problem. I have worked on it for twenty-one years and I think I know a little more about it than some of you, but there is still a lot to learn.

I attended this meeting in Portland, Maine primarily to see what others are doing with it. There are two answers: First, you can own your own type, which would cost about \$50,000, and it is probably only usable about eight years. In the second place, where are you going to store it and where are you going to get a printer who will keep it current for you? In Lincoln nobody wants

to fool with you owning your own type. That's part of the cost of being in storage. The state cannot absorb it. If you do, you are going to spend about \$75.00 for a Supplement which I don't believe is in keeping with most people's minds because you can answer most of this question if you will just buy the slip laws which are available from the Clerk of the Legislature.

I am sorry they come out so late but it becomes one of those physical problems of what you are going to do. John Gradwohl and I have been doing some work on it. John can get out your current laws, but if you don't carry all your laws, and you don't carry your Annotations and have some type of Index, you're not much better off than going out and buying the slip laws.

I pass that on to you as to what is being done. I think everybody is interested in this Index because we are getting low and it is just a question of bargaining to get somebody to print it. We have a commitment now from one law book firm that will print it provided the legislature appropriates the \$125,000.

CHAIRMAN MULLIN: Thank you, Jack, for your explanation. If I understand correctly, you are not speaking against the motion but more as an explanation of the situation.

You have all heard the motion and you have heard the explanation. All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Special Committee on Publication of Laws

One of the primary functions of this committee is the coordination of the interest of the Bar Association in the electronic processing of the Nebraska Statutes, with the program in this area being carried on by the University of Nebraska College of Law. At this time this program is still in the developmental stage but it is expected that within the near future, all statutes of Nebraska through the 1965 Legislative session will be on computer tape so that the practical use of modern day electronics in legal research will be a reality. This project has (like all persons researching Nebraska statutes) been handicapped by the unavailability of the 1965 Cumulative Supplement to the statutes until July 1966.

This committee feels that the Bar Association should stand ready to encourage and assist the efforts of the College of Law in its program in whatever way possible. The committee also feels that an effort should be made to publish a statutory cumulative supplement closer to legislative adjournment and the effective dates of new legislation.

Another area of concern to this committee is the planned revision and publication of the index to the Nebraska Statutes. The need for such a revision is great as members of the Bar Association can readily attest. Indications are that the 1967 Legislature will be asked to appropriate funds sufficient to pay for the necessary revision. It is the opinion of this committee that such a request be supported by the Bar Association.

This committee makes the following recommendations:

1. Continued efforts be made to encourage and assist the University of Nebraska College of Law in research on the electronic processing of Nebraska Statutes.

2. A resolution be adopted by the Bar Association urging the 1967 session of the Nebraska Legislature to investigate means of publishing a current statutory supplement sooner after adjournment of the Legislature, whether by electronic processing of statutes or otherwise.

3. A resolution be adopted by the Bar Association urging the 1967 session of the Nebraska Legislature to appropriate sufficient funds to allow for the revision and publication of the index to the Nebraska Statutes.

4. This committee should be continued to carry out these projects.

Richard M. Duxbury, Chairman
Richard L. DeBacker
Vance E. Leininger
Pliny M. Moodie
Winsor C. Moore
Robert A. Munro
William F. Ryan
Lyle E. Strom
Peter J. Vaughn

CHAIRMAN MULLIN: Now the report of the Committee on World Peace Through Law by Joe Tye.

REPORT OF COMMITTEE ON WORLD PEACE THROUGH LAW

Joseph C. Tye

Mr. Chairman, Members of the House: Prior to lunch I was prepared to make the shortest report of any committee, I thought, based upon the presumption that the members of this House could read English. But over the noon luncheon I became considerably

in doubt of that and thought perhaps I had better make a little longer report.

This Committee is a special committee. It was set up to cooperate with the Committee of the American Bar Association on the subject. This project came about principally because of the thinking and activity of Charles Ryan, past President of the American Bar Association, and I believe as a part of the project there came about Law Day, USA which, as you all know, is internationally in competition with May Day in the Soviet Union.

The American Bar Association is now preparing a special activity in recognition of Law Day, USA on the Tenth Anniversary of the program. Coming out of this program has developed an independent organization of more than 3,000 lawyers and jurists in one hundred fifteen nations. This separate organization has established a permanent secretariat in Geneva, Switzerland, and Mr. Ryan is President of that Association.

I think many of us in Nebraska originally thought this World Peace Through Law had no particular interest nor applicability to us. But with the international affairs and particularly the scouting activity, or whatever you may choose to call it, in Vietnam, this project becomes more and more interesting and important. The lawyers of the world are taking a very active interest in world peace, and it is the hope of the profession that they may assist someone in bringing about peace through law.

This being a Special Committee, Mr. Chairman, I move the adoption or approval of the report and that the Committee be continued.

CHAIRMAN MULLIN: Thank you. Do I hear a second?

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

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

[The report of the Committee follows.]

Report of the Special Committee on World Peace Through Law

This committee has continued to cooperate with the ABA committee on World Peace Through Law. We are receiving material continuously, from the ABA committee, including publications of the various forums which are being held in the United States with reference to the rule of law as it would be applied in various countries of the world who might subscribe to an international forum.

These publications are being placed in public schools and particularly colleges, where conferences on world peace are being held.

There was an extensive program on this subject at the American Bar Meeting in Montreal in August of this year. We are advised that a number of states have been conducting institutes including this subject and that the ALI-ABA Committee is cooperating with these institutes. Many lawyers in the past have felt that this is a subject of interest only to large city lawyers and particularly, those dealing in the field of international law. However, there is recent material on the subject for general practitioners calling attention to many subjects which the general practitioner may encounter in his day-to-day practice, such as:

- a. Descent and distribution with foreign aspects;
- b. Proof of foreign law, obtaining evidence abroad, and other aspects of litigation involving foreign law or facts;
- c. Domestic relations problems with foreign aspects; and
- d. How to advise with respect to torts that occur abroad.

There has been established a World Peace Through Law Center in Geneva, Switzerland. There are membership applications on the secretary's desk for anyone interested. You may well ask the reason for such a center and the use which the Nebraska lawyer might make of it. One practical use is the World Library which is being developed in the Center. It is amazing to learn the dearth of legal libraries in the world. We in the United States are spoiled by the law available to us, where we now have city or county law libraries containing several thousand volumes. In the largest law libraries around the world, we find that Paris University has 390,000 volumes; the Japanese Law Ministry, 270,000; Russia's Academy of Science, 260,000; Italy's Ministry of Justice, 150,000; Canada's Supreme Court, 130,000; England's Oxford and Cambridge, 110,000 each; University of Rome, 75,000; China's Soochow University, 50,000; Mexico's Institute of Comparative Law, 40,000; Helsinki Law School 30,000; Philippine University, 25,000 and Turkey's Istanbul University, 20,000. These are the great collections. Throughout the world, the law volumes usually available to the legal profession are few. Especially is this true in Latin America, where the average law library size per nation is around 10,000 volumes and in Africa, where Nigeria is the largest law library, is less than 5,000 volumes and in other nations sometimes only a few hundred volumes.

Nations around the world are appealing for legal publications, textbooks, treatises, anything which we may be willing to furnish them.

The Center has entered into an agreement with members of the International Law Libraries Association, to open the doors of their libraries to lawyers world-wide. This undertaking opens the law information resources of the world's greatest law libraries to Center members in 121 nations. The Center is also taking on computerized law. This will make available in a few minutes, the statute, and particularly the tax laws, of the nations of the world for a minimum cost of approximately \$10.00 per request. To the amazement and probably chagrin, of many lawyers, computerization of law is no longer a dream. It is a fact.

A study of computerized law is being prepared and will be presented at the next world conference of the center in Geneva, Switzerland, on July 9-17, 1967.

It is the hope of leaders in this field that war may be replaced with a world system of law. True a most ambitious hope, but if ever accomplished, a lasting monument to the legal profession.

Material is available from your committee for addresses on this subject and we have already been called upon for such information and it has been used by members of this association in delivering addresses on the subject.

This being a special committee for the purpose of cooperation with the ABA committee, it is recommended that the committee be continued.

Joseph C. Tye, Chairman
Rollin R. Bailey
LeRoy E. Endres
Benjamin Groner
Paul J. Hickman
Walter G. Huber
Doane F. Kiechel
William C. Ramsey
Hugo F. Srb
John R. Barth
Margaret R. Fischer
William Grodinsky
Roman L. Hruska
Melvin K. Kammerlohr
Harry B. Otis
Harry A. Spencer

CHAIRMAN MULLIN: Not shown on the report but included at the request of the President and others, is a subject which I believe will be of interest to all of you.

Larry Myers, a practicing attorney here in Omaha, with the help of other lawyers has just completed a detailed study of the Bail Bond question and they have come up with some conclusions and recommendations.

It is my pleasure to call Larry to the microphone and ask him to make a report on his work.

REPORT ON STUDY OF BAIL BOND

Larry W. Myers

Thank you, Chairman Mullin. President Ginsburg and Members of the House of Delegates: For nearly two centuries little attention has been devoted to bail, despite its lofty niche in the Bill of Rights and the guarantee by federal statute and state constitutions of a so-called **right** to bail in non-capital cases. After all, bail occupies but a small moment in the long continuum of the criminal process, but recent studies have shown that a reappraisal of this single subject can influence not only the liberty of suspects prior to trial but the effectiveness of police forces, the outcome of trials, the sentences of convicted offenders, and the allocation of crime-fighting funds.

Recent reports by Bar Committees and law professors across the country have shocked the conscience of citizens whose feelings are now beginning to find expression in legislation which is designed to curb the vices of America's anitquated bail systems.

With this in minds, over a year ago Bob Kutak, who had helped Senator Hruska on the Federal Bail Bill, and Sheldon Krantz, who had been with the Justice Department, organized Sam Jensen, Pat Green, and myself to assist them in analyzing the faults in Omaha's bail system.

After gaining approval from past President Bill Baird and the Omaha Bar Association, we researched the records of federal courts sitting here in Omaha for one year, the District Court of Douglas County for three months, and the Omaha Municipal Court for one month.

It took us a year to finish a tentative draft of our report, which was recently approved by President Fitzgerald and the Executive Council of the Omaha Bar. The report has now been sent out to all judges, police, and interested officials in Douglas County for their suggestions and criticism. And today, based upon the belief that our tentative conclusions are perhaps applicable to the entire State of Nebraska, President Ginsburg has graciously given us the time to present these conclusions and proposals to you.

It is our first finding that present bail procedures are grossly inequitable to indigent defendants. Last year hundreds of Omahans spent long periods of time in Omaha's overcrowded jail simply because they could not afford the price of a bail bond. This was **before** they were even tried, let alone convicted of a crime. Whether they were innocent or guilty had no bearing on whether they were imprisoned before trial. And many of them **were** innocent. Statistics show that 25 per cent of the misdemeanor suspects who did not post bail were later released or found innocent at trial. Whether they lived here, worked here, or had families in Omaha was not considered. Whether they had sufficient **money** in their pockets was the criterion which was considered in determining their release. And many of them, gentlemen, did not have the sufficient money in their pocket.

Statistics show that in one month in Omaha in 1965, 821 persons were arrested. Almost 600 of these were either unemployed or from the laboring class, and one-half of these 600 could not afford to post bond and therefore had to sit in jail.

As a result, the average misdemeanor suspect who could not post bond spent three days in jail prior to trial. Fifty-five per cent of all felony suspects in Douglas County could not post bond, and their average detention time was two months. The average burglary suspect who could not post bond spent fifty-five days in jail prior to trial. One spent 120 days. The average larceny suspect who could not post bail spent sixty-six days. One spent 159 days. The longest time that present jail officials could recall a person spending in jail before trial because he could not post bond was nine months.

The adverse side effects of these detentions do not require much explanation from me. Men are separated from their wives and families. The families are humiliated and the husbands may become estranged from their wives and families. The detention time is also a potential breeding ground for further crime, in that the people who are detained are not separated from those who have already been convicted of a crime. Prolonged detention also can adversely affect his chances at trial because he cannot help to locate witnesses or gather evidence. His demeanor and attitude in the court room are depressed, and the jury sees him escorted into the court room as a prisoner.

Consequently studies show that more persons who cannot post bond plead guilty. More of them are convicted at trial, and more receive stiffer sentences than those suspects who **could** post bail for the same crimes. In short, gentlemen, these people are being

victimized by a bail system which requires that every person who is arrested put up a specified amount of money before he can gain his liberty.

As Mr. Justice Goldberg stated, "This is just another example, too often repeated, of justice denied or a man imprisoned for no other reason than his poverty."

Our findings further show that Omaha society is injured by current procedures. They are extremely costly to local government. It costs \$3.00 a day to house a prisoner in the Douglas County Jail—over \$20,000 a year for all misdemeanor suspects—and much of this could be eliminated.

Omaha police estimate that in the last year they saved the city \$2,700 just on the elimination of the drunk traffic alone. And besides this financial strain, present bail procedures are a drain on the manpower of local law enforcement. It takes up to one or two hours to bring a suspect to jail for booking and the setting of bail. These are two hours that the Omaha policemen is not on his beat, and the possible consequences of this speak for themselves.

Based upon the success of legislation in other areas of the country, several legislative steps should be taken in Nebraska to return our bail system to its historical mission. This legislation is not in final crystallized form by our Committee as of now, and it is certainly open to suggestion, but we feel legislation should be taken in the next session of the legislature along the following general lines:

1. Summons in lieu of arrest should be utilized at the misdemeanor level. "Summons in lieu" is an order issued to a suspect by an officer directing him to appear in court at a future time for hearing. The most common example that we all know is the ordinary traffic ticket. Twenty-eight states in the federal jurisdiction now use this procedure, and this is the way it works: A summons is simply issued by the officer on the spot to any person who is suspected of a misdemeanor, unless his identity is unknown, he is believed to be dangerous, he has failed to show up before after a summons was issued, or there are reasonable grounds to believe that he will not obey the summons.

It should be added that the Omaha police have been successful during the past half year with their "summons in lieu" experiment for a small group of select misdemeanors, such as littering and selling liquor to a minor. We only recommend that their experiment be extended to cover all misdemeanors.

2. Release on recognizance should be increased at both the felony and misdemeanor levels. Release on recognizance for ROR, as it is commonly called, is the outright release of a defendant after arrest simply upon the defendant's word of honor that he will return for trial or hearing. Dozens of cities now use such a plan, but the most famous one, the Manhattan Bail Project, works in the following manner: When a person is arrested and brought to jail, a person from VERA, a private organization, helps the suspect to fill out a sheet which lists his residence, his employment, his family contacts, prior criminal record, and references in the community. The VERA personnel then checks out the information by telephone to determine if the suspect is a good risk to release. If the suspect has sufficient local ties, VERA recommends to the judge that the person be released, and the recommendation is almost always followed.

After several years of using this plan the following amazing statistics stand out: Out of all the thousands of persons released under this plan, only seven-tenths of one per cent have failed to return for their next hearing, and the amount of new crime committed by these releasees has been negligible. Similarly, the default rate under the Des Moines Bail Project, which has been in effect several years, has only been 1.6 per cent. These statistics should be compared with the fact that in one month in Omaha last year 33 per cent of the bailees forfeited bonds totalling \$3,400.

It should be noted that only two months ago the judges of the District Court of Douglas County adopted a local rule providing for release on recognizance under proper circumstances. This is certainly a step in the right direction, but legislation is needed to provide for a uniform investigation of all suspects by qualified personnel. Agencies already existing in Nebraska which could suitably qualify are the adult probation officers or the clerks of the District Courts or the public defenders. The smaller town, especially, would be well suited to this procedure, since the reliability of the accused would be of general knowledge in most instances.

3. To give these pre-trial release projects some teeth, bail-jumping and recognizance-jumping statutes should be enacted. At present in Nebraska there is no additional penalty for failing to appeal. We should follow some plan along the line of the Illinois statute adopted last spring which says that if a person fails to show up within thirty days from date of hearing, he can be given up to one year or \$1,000 fine if the charge was a misdemeanor, and up to five years or \$5,000 if the charge was a felony.

4. Finally, there will be some persons still, such as indigent drifters, who will probably not be released under these programs.

For them, fundamental fairness dictates recognition and enforcement of at least four more basic rights: (1) Immediate appeal and bail review; (2) separate detention facilities apart from those who are already convicted of a crime; (3) a speedy trial—they should automatically be moved to the top of the trial list if their defense is ready; and (4) credit, if convicted, for the time they have already served prior to sentencing.

In conclusion, most of us here today are not touched by the administration of bail in our daily law practices, and to the great majority of our brethren who are, the problems of bail have become almost commonplace and the capacity for indignation and reform have become attenuated. But there is still one class that is personally involved in this problem, the criminal defendants, a class to which few aspire and whose problems are not only not thought about but are avoided by most people. There is hope for them only if the legal community becomes acquainted with their problems and develops a fresh approach to one of the most antique problems in our jurisprudence.

I hope that the success of other projects around the country stimulates awareness of Nebraska's antiquated bail system and serves as a stimulus for reform for our entire state.

For instance, I noted in the Sunday World Herald that the Kansas Bar is now asking for bail bond changes. The Kansas Bar Association has recommended that the State Bail Bond Act be reformed. At a meeting in Wichita the Association's Criminal Law Committee proposed that the Act be patterned after the bail bond procedures used by federal courts.

Let's not permit Nebraska to be the fiftieth state to enact bail legislation providing for greater pretrial release of those accused. The Nebraska Bar Association should be the initiator and primary supporter of such legislation because, as Mr. Justice Goldberg stated shortly before his retirement from the Bench, "If it is true that the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law, then the American bail system as it now stands can no longer be tolerated. At best, it is system of checkbook justice; at worst, a highly commercialized racket."

Therefore, gentlemen, I would like to move—and I am not familiar with your procedure but I would like to have a resolution to adopt the broad guidelines of this report and also a resolution to refer this problem to the Criminal Law Committee to look into the problem on a statewide basis, with an aim at providing specific leg-

isolation and specific statutes along the lines of these broad guidelines. I hope I am not out of order.

CHAIRMAN MULLIN: Thank you very much, Larry, for a fine report. In order to make things legal here, with your permission, I am going to ask if any delegate in the room would care to make that motion in your behalf.

ROBERT K. ADAMS, Omaha: I will so move.

CHAIRMAN MULLIN: Do I hear a second?

FRANCIS M. CASEY, Plattsmouth: I will second it.

WILLIAM J. BAIRD, Omaha: Just one problem with the motion: We don't have a Criminal Law Committee.

CHAIRMAN MULLIN: The Crime and Delinquency Committee might handle it. I think that the President will refer it to the proper committee if the motion is passed.

Any further questions or discussion? All in favor say "aye"; opposed. Carried.

Report of the Committee on Federal Rules of Procedure, Bill Spire, Chairman. I don't believe Bill is here. He was here earlier today but had to leave.

M. M. Maupin, North Platte: Mr. Chairman, may I report that the entire membership of this Committee has been canvassed and it is the opinion of Mr. Spire and the President-Elect that this committee should be dispensed with. Since there is no report it will automatically terminate.

CHAIRMAN MULLIN: Thank you very much. Hearing no objection, we will go on to item 30, the report of the Committee on Federal Criminal Justice Act, Bob Kutak.

REPORT OF COMMITTEE ON FEDERAL CRIMINAL JUSTICE ACT

Robert J. Kutak

Mr. Mullin, the Federal Criminal Justice Act, 18 U.S.C. 3006A, became effective in the District of Nebraska on August 20, 1965. Prior to that date, and certainly afterwards, a great deal of interest was generated as to its scope, effectiveness, and certainly its activities, all pointed in the direction of whether in fact this law would more adequately assure the defense in criminal cases of those persons financially unable to obtain counsel.

Among the questions legitimately asked by those who were supervising its operation are: Can attorneys be furnished more promptly than before? Will they be able to continue through successive stages of the proceedings? Are they able to secure needed services other than counsel in the preparation and trial of the cases? What are the costs that are involved and, in fact, what is really the adequate scope of the legislation?

The Committee on the Federal Criminal Justice Act, as the first anniversary of the Act was reached in this district, decided to make a case-by-case study of the operation of the Act. In that regard, the Chairman of the Committee enlisted the support of two Senior Law Students, one from Yale and one from NYU, and we went to work this summer and fall. The report isn't finished, hence this is the reason why it is not printed in your program today. As a matter of fact, however, the report will be finished shortly, and if it were attached to this report it would probably be longer than the report itself.

The first motion I would like to make Mr. Chairman, is that the study of the operation of the Federal Criminal Justice Act in the District of Nebraska be attached as an appendix to this oral report today.

CHAIRMAN MULLIN: Do I hear a second? Before we vote on this, is it your thought that this would be included in the annual proceedings?

MR. KUTAK: Yes.

CHAIRMAN MULLIN: Is it so thick that it couldn't be?

MR. KUTAK: No sir. We are talking about ten or fifteen typewritten pages.

SECRETARY-TREASURER TURNER: When do you expect it to be ready?

MR. KUTAK: I would say, Mr. Turner, probably in about thirty days or forty-five.

CHAIRMAN MULLIN: George Turner says it might hold up the printing of our proceedings.

MR. KUTAK: I am really embarrassed about this complication. If it did it could be withdrawn and just circulated later.

ROBERT A. BARLOW, Lincoln: How about printing it in the *State Bar Journal*?

MR. KUTAK: Fine. The motion will so be amended.

MR. MULLIN: Do you wish to withdraw the motion in view of the ...

MR. KUTAK: Withdraw or amend it as it has been suggested by Mr. Barlow.

CHAIRMAN MULLIN: Is there a second to the amended motion?

DALE E. FAHRNBRUCH, Lincoln: I second it.

CHAIRMAN MULLIN: All in favor of printing it in the *State Bar Journal* say "aye"; opposed. Carried.

MR. KUTAK: The only other point in that regard, and the reason why I suggested that somewhere it might be circulated, is not only will the lawyers in this state be extremely interested in the way the two federal judges are interpreting the Criminal Justice Act in Nebraska, but as a matter of fact the courts will be interested in that fact, I am sure, and so will the Judicial Conference of the United States and, in fact, the Department of Justice.

There is only one other comparable study that has been done on the basis of the first year's operation of the Criminal Justice Act, and that is in the Eastern District of Michigan. Coincidentally, as you gentlemen know, that is where the University of Michigan is located, and one of the gentlemen of the faculty is doing that study.

The second and only other motion I would like to make at this time, Mr. Chairman, is that because of the interest renewed—I hope—continued, I am sure in the work of the Committee, the Chairman requests that it be renewed for an additional year.

CHAIRMAN MULLIN: Is there a second?

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

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

CHAIRMAN MULLIN: No. 31, report of the Committee on Rules of the Road, Donald P. Lay, Esq. I understand that Don's responsibilities will be fulfilled by Mr. Albert G. "Duke" Schatz. "Duke" is a member of the Committee.

REPORT OF COMMITTEE ON RULES OF THE ROAD

Albert G. Schatz

Mr. Chairman: Our Committee has been working on this topic for approximately two years. It is a vast field which includes the

recodification and, in some parts in some aspects, some revision of the Rules of the Road in this state. It is a monumental task. It isn't finished as yet, to my knowledge. I am making this report merely as a committee member. We are without a Chairman at the present time, but I think Mr. Maupin is going to make that appointment when he takes over the presidency.

So the only report or motion that I would have is that this Committee, which I think is a special committee, be continued to finish this job.

CHAIRMAN MULLIN: Do we have a second?

DIXON G. ADAMS, Bellevue: I second the motion.

CHAIRMAN MULLIN: It has been moved and seconded that the Committee on Rules of the Road be continued in existence. Is there discussion?

ROBERT BARLOW, Lincoln: Let me ask a question. Is this thing going to be presented to the legislature, to your knowledge, in January?

MR. SCHATZ: I don't know, Bob. I have no knowledge of that. I would rather doubt it but I don't know.

CHAIRMAN MULLIN: The question was, Will the revision be ready for the legislature in January and the answer is that he doubts it.

MR. BARLOW: The other question, I understand that it will repeal the guest statute. What do you think of that?

MR. SCHATZ: No. Let me explain that as best I know how, Bob. The guest statute and its retention or repeal, to my knowledge, is not within the purview of the Rules of the Road Committee, whatever. It is my knowledge that certain people who have been working with us on the Rules of the Road Committee, mainly Nebraska University research students and/or professors, may well plan to introduce such a repeal, but this is not within the purview of our Committee and we have made no study of it one way or the other.

CHAIRMAN MULLIN: Does that answer your question, Bob? If there are no other questions, that report will stand as given and the Committee will be continued.

CHAIRMAN MULLIN: Item No. 32, the report of the Committee on Resolutions. There is no report.

No. 33, report of the State Advisory Committee, Ray Young.

Bill Baird will report for him. Ray was here earlier this morning and had to leave.

REPORT OF ADVISORY COMMITTEE

William J. Baird

Mr. Chairman, Mr. Young wasn't able to stay so he asked me to present the report of the Advisory Committee which does not appear in the program.

The first half of it is devoted to statistics as to the various matters covered by the District Committees on Inquiry and the review matters of the Advisory Committee and I don't think it would be of any particular interest. It might be of general interest if I hit the high spots of some of the opinions which the Committee rendered in its advisory opinion capacity.

The disciplinary activities since the annual report made October 20, 1965, may be summarized as follows:

REVIEW

The Advisory Committee considered charges which were filed in District No. 2, held the members of the Committee on Inquiry to be disqualified and referred the matter to the Committee on Inquiry for District No. 1 and, upon review of the action of that Committee, sustained its determination that no sufficient cause for disciplinary action had been shown.

MEETING

The Committee held one meeting in Omaha on October 21, 1965.

SUPREME COURT

One application for reinstatement is pending in the Supreme Court, and one motion for modification of judgment.

COMMITTEES ON INQUIRY

Districts in which no action by Committees on Inquiry has been required are 5, 8, 14, 17, 18, and 20.

Minor matters not involving the filing of formal charges were disposed of satisfactorily in District 10.

Informal charges were investigated and found to be without merit in Districts 2 and 12.

Formal hearing resulted in dismissal in District 1 of a matter which was referred to it from District 2.

Charges are under investigation in one matter in each of Districts 2, 7, and 15, and in two matters in District 16.

In District 3 (Lincoln) charges were received in eleven matters. Eight informal hearings were had resulting in four dismissals, one formal complaint. Charges are pending in five matters.

In District 4 (Omaha) charges were received in nineteen matters. Thirteen of them were dismissed after consideration of the Committee, one was withdrawn, two are awaiting final hearing, and three are under consideration of the Committee.

In District 6 (Fremont) there were three dismissals. One formal hearing resulted in a complaint which is in process.

In District 9, without formal action, the Committee procured the discontinuance of the use of objectionable stationery.

In District 10 in one case Committee action is being deferred until conclusion of a civil proceeding which is pending.

In District 11 (Grand Island) one matter is pending in which evidence has been taken and two hearings had.

In District 12 the Committee on Inquiry received charges which were more properly within the scope of the Committee on Unauthorized Practice of the Law and the matter was accordingly referred to that Committee.

The Committee in District 13 (North Platte) after lengthy investigation in one case found no cause for complaint. In another case the Committee procured the discontinuance of certain practices which appeared to constitute advertising in violation of Canon 27.

In District 19 the Committee deemed that a dispute over fees should be determined in a Court rather than through the Committee. It found that charges in one case were the result of a mathematical error and that adjustment should be made accordingly. It has one matter under investigation.

Committees on Inquiry have been uniformly vigilant and diligent in the performance of their duties. They are to be commended for constructive service in helping to adjust minor differences before they become of major concern, and in assisting the Bar in the interpretation and application of the Canons.

ADVISORY OPINIONS

The Advisory Committee adheres to its policy of declining to render opinions upon a course of action which has been accom-

plished, 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.

Many of the Advisory Opinions which have been rendered related to special and unusual situations and were not of general interest to the profession. Some of the opinions which have more than a strictly local and limited application are as follows:

1. Bold-face type listing or other distinctive listing in telephone directory or in city directory violates Canon 27. (N.L.R., March 1965, p. 305)

2. A lawyer may not properly submit a competitive bid for professional services. (A.B.A. Opinion 292; *Drinker, Legal Ethics*, pp. 174, 191, 220, 249-50.)

3. A law firm and all members of it are barred from accepting employment that any member of the firm is prohibited from taking. (A.B.A. Opinions 33, 49, 72, 296)

4. The use of an improper letterhead may be a violation of Canon 27 or otherwise an infringement of the rules against advertising or solicitation.

5. Neither a County Attorney nor his partner may advise or represent a landowner in condemnation proceedings in the attorney's County but such attorney may represent a landowner in such proceedings in another County. (See N.L.R., March 1965, p. 304)

6. Canon 6 prohibits a County Attorney from representing persons charged with a crime in any County of the State. (A.B.A. Opinions, 30, 77, 142, 186; *Drinker*, p. 118)

7. It is the view of the Committee that a lawyer who has an office-sharing arrangement with a County Attorney or a Deputy County Attorney and who is employed by the latter in certain professional matters is precluded from defending persons charged with crime.

8. The Committee is of the opinion that the employment of a lawyer by a city or village to handle civil matters only will not ethically disqualify that lawyer from defending persons accused of crime under the statutes of the State, or ordinances of any city or village other than the city or village employing the lawyer. The Committee suggests that the contract of employment specifically provide that the lawyer is not appointed as city attorney or village attorney, but is merely employed to handle such civil matters as may be determined and agreed upon by the parties.

9. A lawyer should not accept employment as an advocate in any matter upon which he has previously acted in a judicial capac-

ity. After his retirement from public office or employment, a lawyer should not accept employment in any matter which he has investigated or passed upon while in such office or employ. (Canon 36; A.B.A. Opinions 72, 79, 296)

10. The Committee made a study of the propriety of lawyers engaging in panel discussions of legal subjects in public information programs and expressed its views as to the applicable standards and guidelines, with special reference to A.B.A. Opinion 298 (1961) and to *American Bar Association Journal*, Vol. 47, p. 695, July 1961. The subject is increasingly important and is being given further study by the American Bar Association.

As a matter of general interest—and I think Mr. Ginsburg alluded to this general subject this morning—it should be known that all of the Canons of Professional Ethics are being, and have been for the past year, intensively studied and reviewed by a Special Committee of the American Bar Association, of which Mr. Edward L. Wright, former Chairman of the House of Delegates, is Chairman. It is expected that a tentative draft of proposed changes will be ready for distribution for criticism and suggestions in June 1967 and that a final draft will be submitted to the House at the mid-year meeting of the American Bar Association in 1968.

Respectfully submitted,

Raymond G. Young, Chairman
Charles F. Adams
William J. Baird
Lester A. Danielson
George B. Hastings
Bert L. Overcash
Lloyd L. Pospishil

Mr. Chairman, this being a standing committee, I believe all I do is to move adoption of the report.

CHAIRMAN MULLIN: Thanks very much, Bill. Is there a second?

CHARLES E. WRIGHT, Lincoln: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

Harry L. Welch will give the report of the Trustees of the Daniel J. Gross-Nebraska State Bar Association Welfare and Assistance Fund, item 34 on your program.

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

Harry L. Welch

Mr. Chairman and Members of the House of Delegates: You have probably heard me make some preliminary report on this fund before. As many of you know, this fund was started through a bequest by my former partner, Dan Gross, in his will, it being a bequest of \$25,000 to the Nebraska State Bar Association for the help of needy and indigent lawyers and their families.

There have been two other contributions to it since his bequest, and the President of the Association at that time named—technically we are not a committee of the Bar Association—but the President named three trustees to manage and handle the fund; myself, John Mason, and Lester Danielson, and we have carried out this work.

We have, I think—I hope—I was going to say **wisely** invested this money, but since last year, a year ago this time, our seven blue chip stocks are down a little bit; nevertheless we still are on the plus side.

I am happy to report that the total assets of the fund now stand at \$29,450, and we have paid out, of course, a considerable amount of money down through the years that we have been in existence. This year we paid out \$2,650 to two attorneys who needed help, both of whom have passed away.

We have also considered some other requests but at the present time I report to you there are no present requests, nor are we paying out any contributions to any of the persons that might need them at this time.

Mr. Chairman, I move the adoption of this report, but, as I say, this isn't a committee; it is a group of trustees managing this fund, so I imagine there is no sense for a motion to continue it.

CHAIRMAN MULLIN: Is there a second?

DIXON G. ADAMS, Bellevue: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried. Harry, thank you very much.

Only yesterday I got a surprise opportunity to rate Harry in a Martindale-Hubbell questionnaire. Rather than guess, I called his office and asked him what his financial worth was and

how prompt he was in paying his bills. On the latter question he wanted to know if I meant claims or regular bills.

The Trustees of the above Fund have heretofore made an annual report of the operation of this Fund, and the annual report made in October 1965 reviewed the operation of the Fund since its inception, so that will not be repeated in this report. This report will be somewhat of a supplement to last year's annual report.

Checking Account—First National Bank, Lincoln	\$ 690.34
Savings Account—First Federal Savings & Loan Association, Lincoln	2,990.14
Certificate of Deposit with First National Bank of Lincoln	6,000.00
Bonds of National Cylinder Gas Company, Principal amount \$5,000, market value \$98 3/4	4,937.50
Bond of Allied Stores Corporation, Principal amount \$300, market value 92	276.00

Common Stocks

Standard Oil of Calif, 48 shs. at 58 3/4	\$ 2,820.00
American Natural Gas—New Jersey, 75 shs. at 37 1/4	2,793.75
Allied Stores Corp., 75 shs. at 24 3/4	1,856.25
General Motors Corp., 40 shs. at 73 3/4	2,950.00
Northern Natural Gas Co., 25 shs. at 42 1/2	1,062.50
Pacific Lighting Corp., 30 shs. at 25 7/8	776.25
Union Electric Co., 100 shs. at 23	2,300.00

Total Value of Assets	<u>\$29,452.73</u>
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Total contributions from 10/1/65 to 9/30/66 were	<u>\$ 2,650.00</u>
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At the present time there are no recipients of contributions from the Fund. Applications or requests for contributions have been reviewed, and as of this date there are no pending requests for help.

Respectfully submitted,
Harry L. Welch, Chairman
John C. Mason
Lester A. Danielson

CHAIRMAN MULLIN: The report of the Section on Real Estate, Probate and Trust Law. I see Frank Mattoon way back in the corner. Come on up, Frank, and make your report.

REPORT OF SECTION ON REAL ESTATE, PROBATE AND TRUST LAW

Frank J. Mattoon

Mr. Chairman and Members of the House of Delegates: I have seen what has happened to many who have been up here on this rostrum today, so I am going to stick to my prepared script and not deviate, nor am I going to raise my eyes.

I. GENERAL COMMENT

During the year of 1966 the Executive Committee of this Section and the various subcommittees have been active in exploring and developing numerous areas for the improvement of the Bar Association and the standards of practice of individual Nebraska lawyers. Many meetings have been held in various central areas of the State which precipitated a wide variety of developments and activities of the Section.

An interim report of the activities of the Section was presented at the mid-year meeting held in Lincoln, Nebraska, on June 10, 1966. Some of the recommendations of the Executive Committee were approved by the House of Delegates. Other matters were deferred for action by the House of Delegates at this, the annual meeting of the Nebraska State Bar Association.

At the mid-year meeting the Section sponsored a very illuminating program on "Condemnations in Nebraska," presented by Bernard B. Smith of Lexington, Asa A. Christensen of Lincoln, and Norman Krivosha also of Lincoln.

With the full approval of the House of Delegates the Bylaws of the Section were amended in the following particulars:

1. That the officers of the Executive Committee be elected at the mid-year meeting instead of at the annual meeting of the Bar Association.
2. That the Section consist of two divisions—the Real Estate Division and the Probate and Trust Law Division, the latter is a combination of the former Probate Division and Trust Law Division.

The effect of the latter amendment was to reduce the number of divisions from three to two and the entire committee structure from fifteen committees to eight committees.

The Real Estate Division now consists of the following sub-committees:

- a. Current Legislative and Judicial Matters Affecting Real Property Law.
- b. Improvements in Conveyancing.
- c. Committees on Title Guaranty Insurance.
- d. Committee on Collaboration with Nebraska Real Estate Association.
- e. Title Standards Committee.

As a matter of record, we direct your attention to the fact that the Committee on Title Guaranty Insurance and the Committee on Collaboration with the Nebraska Real Estate Association were formerly special committees of the Bar Association which subsequently have been assigned to the Real Estate, Probate and Trust Law Section.

The Probate and Trust Law Division now consists of the following committees:

- a. Committee on Procedures.
- b. Committee on Fees and Commissions.
- c. Committee on Legislation, Decisions and Literature.

In recognition of the desirability of a closer liaison between the Executive Council of the Bar Association and each individual Section, it was recommended at the mid-year meeting that Article IV of the Bylaws of the Association be amended to make suitable provision to obtain this result. We were instructed to prepare for submission and final approval to the House of Delegates an appropriate amendment. Accordingly, we recommend and move for adoption that Section 5 of Article IV of the Bylaws of the Nebraska State Bar Association be amended to provide as follows:

Each section shall have an Executive Committee of seven members, one of which shall be appointed by the President of the Association from the membership of the Executive Council to serve for a term of one year. No member of the Association shall serve on the Executive Committee of more than one section at the same time. At the annual meeting following the adoption of the original Bylaws, each section which meets at the annual meeting shall elect six members of an Executive Committee, two for a term of three years, two for a term of two years, and two for a term of one year. Thereafter, two members of the Executive Committee shall be elected in the manner hereinafter provided for a term of three years until their successors are elected. No member of the Executive Committee shall be elected for more than one successive term.

Mr. Chairman, I move the amendment of Section 5 of Article IV of the Bylaws, and I would like to have a second to that.

CHAIRMAN MULLIN: Do I hear a second to that motion?

ROBERT K. ADAMS, Omaha: I second the motion.

CHAIRMAN MULLIN: Is there any discussion or question? If not, all in favor of the motion signify by saying "aye"; opposed. Carried.

MR. MATTOON: I will now go into the herculean task of attempting to report for each one of our committees, to save some time rather than to call upon each individually.

II. REPORTS OF SUBCOMMITTEES

A. PROBATE LAW-TRUST LAW DIVISION

The Chairman of this Division was Keith Miller of Omaha, Nebraska, who has obtained and submitted for presentation at this meeting the reports of the various subcommittees of the Division.

1. COMMITTEE ON PROBATE AND TRUST PROCEDURES

This report was given in detail by Vance Leininger at the mid-year meeting, but I think for purposes of our record and the continuity of the work of this Committee I should like now merely to review those areas which are under study and which will be the subject of the work of the Committee for the coming year:

1. Simplifying and making uniform the computation of homestead exemption in inheritance tax proceedings.

2. Modernization of exemptions specified in Sec. 25-1556(6) of R.R.S. (1943), as supplemented and amended. Here I note that the Legislative Committee already has this subject under consideration, so probably this committee will discontinue any study of this particular problem.

3. Amendment of R.R.S. (1943) Sec. 30-237 to eliminate the necessity of attaching a certificate of probate in certain cases.

4. Modernize R.R.S. (1943) Secs. 38-121 through 38-123 to reflect a more realistic minimum amount in a minor's estate which would not require appointment of a guardian—perhaps \$2,000 in lieu of the present \$200.

5. Consider modernization of Secs. 30-334 and 30-335 to provide an additional amount of property over and above that which is wholly exempt, perhaps up to \$2,000 if debts are all paid, which would still permit use of the "Small Estate" procedure.

6. Consider modernizing R.R.S. (1943) Sec. 30-339 to permit closing small guardianships with up to \$2,000 worth of property in them if the bills and debts could be taken care of for this amount.

7. Consider modernizing R.R.S. (1943) Sec. 30-341 and 30-343 to permit passage of a defeasible title without estate proceedings where a more realistic amount may be involved—perhaps up to \$2,000.

I don't know why the committee had that \$2,000 bug, but apparently that was the starting point for consideration.

8. Consider providing procedures for filing claims in a guardianship matter.

9. Consider formalizing procedures for collection of attorneys' fees allowed in final decrees in probate and guardianship matters.

10. Consider revising R.R.S. (1943) Sec. 30-1302 to provide for filing a simple "Short Notice" in lieu of certified copies of final decrees in the Office of the Register of Deeds.

Here again we direct your attention to the increase in costs of recording.

11. Keep informed as to, and report on progress of the development of the "Model Probate Code."

12. Consider problems involved in probate and testamentary trusteeship matters where non-resident corporate trustees or non-resident corporate beneficiaries may be involved—do modern methods of transacting this type of business require any changes in our statutes?

13. Consider means of providing for the use of uniform time schedules in all probate courts in the state with reference to the publication of notice to creditors, the time allowed for filing claims, and the time for hearing on claims in estate proceedings.

14. Harmonize provisions in our probate procedures and provisions regarding actions to construe wills brought in District Courts, in order to eliminate the possibility of duplicitous litigation and to specifically define the jurisdiction of the County Court where it may be necessary to construe a will as a matter incidental to the administration of an estate.

15. Consider revisions to existing forms, or the preparation of new forms as an aid to bringing about uniformity in the handling of State Inheritance Tax determinations throughout the state.

The Committee reports that some of the foregoing matters may not present problems which are widespread enough throughout the state to justify intensive study. However, all of the problems have received attention and are the subject of continuing study for appropriate action during the coming year.

2. COMMITTEE ON FEES AND COMMISSIONS

Ray R. Simon of Omaha is Chairman of this Committee and reports that it has been an extremely active committee over the past year. The Committee has set forth its special recommendations with regard to the existing Nebraska State Bar Association fee schedule which have previously been submitted to all members of the House of Delegates. President Ginsburg has recommended that the work of this Committee be coordinated with the Committee on Economics of the Bar Association for a further study of the problems involved and action to be recommended.

At this time I would like to make as a matter of record the report which has been disseminated to you and I'll give a copy of the same to the reporter. However, as far as the action of the House of Delegates is concerned today, in substance it merely amounts to this: We do not feel that any specific action should be taken on this matter.

I think you are all aware of the fact that probably for one hundred fifty years we have all wondered about how much to charge in fees in various cases. This is merely an offshoot to the same problem.

The Committee itself feels that its study has been beneficial. However, the report which you have before you was also accompanied by a proposed revision in the percentage arrangement for fees in probate matters and estates. Therefore we do not have the entire report before us.

We recommend, therefore, that this be the subject of continuing study rather than action today, and that the Committee on Economics also be consulted, and that a joint meeting be held and then the study continued throughout the year. I don't think that takes a formal motion, except to note this, that as a part of your report we delete that portion at the end where it is stated "adoption of the above amendment is respectfully urged." We do not urge any action at this particular time.

Are there any questions about that before I go further?

At the Mid-Year meeting of the Nebraska State Bar Association in June, 1966, the Section on Real Estate, Probate and Trust Law, Division of Probate and Trusts, *Committee on Fees and Commission* moved that the House of Delegates adopt amendments to the minimum fee schedule of the Nebraska State Bar Association as follows:

On page 12, under Section 2, the following five paragraphs would replace the four full paragraphs now existing:

2. Definition of "Gross Value"

"Gross Value" for the purpose of determination of fees, shall include the value of all real estate less mortgages not in default, all personal property, and in addition, the non-probate assets which are reportable for Nebraska inheritance or federal estate tax purposes, but only to the extent that the value of such assets is considered in the determination of the respective tax (i.e., mortgages on real estate not in default, contributions of a survivor are to be deducted).

For the purpose of this definition, non-probate assets shall be valued at fifty per cent (50%) of their reported value, except that life insurance proceeds directly payable to a surviving spouse and/or the issue of the decedent or to a trust for the benefit of any of them shall be taken at twenty-five per cent (25%) of value.

The asset valuations to be employed in effecting the above computations will be those values as reported for federal estate tax purposes, where a federal estate tax return has been filed. When modifications are made in the value so reported, the fee should be adjusted to conform with the values as finally determined for federal estate tax purposes.

In the absence of a federal estate tax return, the asset valuations shall be those approved by the County Court in connection with the Nebraska inheritance tax determination.

If a federal estate tax return has not been filed or if the property of the estate is not subject to Nebraska inheritance tax, then the asset values shall be those set out in the inventory of the estate, adjusted as above provided.

On page 14, Section 4, Paragraph (d) would be amended to read as follows:

4. Extraordinary Services defined—

* * * * *

(d) Contested tax claims or returns, including controversies involving contemplation of death claims.

EXPLANATION

The italicized portions of the above amendments are added. There are other slight changes in language which are deemed to be improvements in semantics but not effectuating substantive changes.

Publication during the past year of certain printed material with which we are all familiar, at least by word of mouth, gen-

erally leads the lay public to believe that probate must be avoided at all costs, because lawyers will take an inordinately disproportionate and arbitrarily great fee for probate services. Since the probate and administration of decedents' estates is the one single instance in which a vast majority of the lay public ever come in contact with the legal profession, it behooves the profession to make certain that its suggested fee schedules are reasonable.

It is the belief of your undersigned reporter, and of at least some members of the Committee on Fees and Commissions of the Division of Probate and Trusts, that more ill will and public distrust towards the legal profession is caused by traditional probate fee schedule and charges than by any other facet of the profession. The currently popular, oft-quoted author has only brought out in the open some ugly but prevalent notions of mistrust of the legal profession. In any event, it behooves the profession to re-examine its fee structure, and the Committee feels that the proposed amendments to the existing fee schedule are at least a slight step in the right direction.

Specifically, the amendments will decrease the recommended minimum fee for probate to the following extent:

(a) Where mortgaged real estate is an asset of a probate estate, and the mortgage is not in default at the date of death of the decedent, only the equity in the real estate will be included in "gross value" for purposes of determining the minimum fee.

(b) Life insurance proceeds payable to the surviving spouse of the decedent, or to the decedent's issue, will be includable only to the extent of twenty-five per cent (25%) of such proceeds, for purposes of determining the "gross value"; and all other non-probate assets will be included in "gross value" only to the extent of fifty per cent (50%). (Under the current existing minimum fee schedule, all such assets are included at one hundred per cent (100%) of value. Thus, each of us is presently faced with the dilemma of trying to justify to a client a charge of \$2,500 when the decedent's widow collected a \$100,000 life insurance policy, or in the alternative, of "cutting" the suggested minimum fee.)

It is further called to the attention of the House of Delegates that the recommended amendments will adopt language which already exists in the minimum fee schedule of the Omaha Bar Association; on the other hand, the Omaha Bar Association Committee on the Minimum Fee Schedule presently has recommended a further reduction in its schedule, by excluding all real estate mortgages, and also by excluding any other mortgage, lien, or encumbrance on any real estate or any personal property included in the

estate; in other words, its latest proposal will include only the equity in both real estate and personal property for the purpose of determining "gross value." The Omaha Bar's Committee also has recommended that only twenty-five per cent (25%) of life insurance proceeds be included in "gross value" regardless of the beneficiary designation.

Keith Miller, Chairman

Division of Probate and Trust Law

3. COMMITTEE ON SIGNIFICANT LEGISLATIVE AND JUDICIAL MATTERS AFFECTING PROBATE AND TRUST LAW

Chairman Warren K. Dalton of Lincoln reports: "that all committee members are actively compiling significant legislation and decisions which will be of general interest to members of the Bar. It is the recommendation of the committee that its reports of any such significant matters be published, from time to time, either in the *Nebraska State Bar Association Journal*, or in the *Nebraska Law Review*. The committee will continue to function as a standing committee of this Section throughout the coming year."

The House has already given its approval to publication of these reports as they are presented from time to time. They are in the process of compilation at the present time and will be available, together with the next committee report which I am about to give to you.

B. REAL ESTATE LAW DIVISION

The Chairman of this Division was James A. Lane of Ogallala, Nebraska, who has obtained and submitted for presentation at this meeting the reports of the various subcommittees of this Division.

1. CURRENT LEGISLATIVE AND JUDICIAL DECISIONS AFFECTING REAL PROPERTY LAW

Chairman Robert J. Bulger submits the following report of the activities of his Committee and the areas of study involved.

Incidentally, this is to be handled in the same manner as the previous committee with regard to probate and trust law; that is, the publication of the various areas of study of this Committee. Already some of them are in the process of a final report and final preparation of publication materials to be made in the future.

1. The lawyers in Lincoln object to the present form of Sec. 15-901, 1965 Supp., and Sec. 23-174.03, which require a full scale subdivision before conveyances of tracts of less than five acres in Lincoln and Lancaster Counties can be recorded.

2. It was the sentiment of the Committee that the possibilities of some modification relaxing the stringencies of the rule against perpetuities should be considered in the future in line with similar action in other jurisdictions.

3. The Committee considered the possibility of clarification by statute or title standard of the question whether or not the statute of non-claim applies to unpaid personal taxes of a decedent, particularly as to an estate prior to the 1959 modification of our statute, in response to a claim asserted that the statute of non-claim never bars personal property taxes.

4. The question has been raised that Sec. 76-1001 to 1018, the Nebraska Trust Deeds Act was ineffective to create an effective power in the Trustee to sell and convey a good title as such Trustee for failure of the law to amend our mortgage foreclosure statutes or to exempt Trust Deeds from such foreclosure statutes, in view of the fact that a Trust Deed has historically been defined in Nebraska simply as a mortgage.

2. IMPROVEMENTS OF CONVEYANCING

Chairman George A. Skultety of Fairbury reports that the agenda of his Committee included the reconsideration of all deed forms which have been approved by the House of Delegates with a view toward incorporating improvements that may have developed from their use in practice. The Committee has recommended approval of both a short and long form of real property mortgage.

Specific and formal approval of these mortgage forms, I understand, is to take place during the coming year.

The big project of this Committee is development of a real estate purchase contract and an installment sales agreement of real property. The Committee recommends that the printed forms should be accompanied by a complete analysis of the legal effect of every provision suggested in such contracts.

When published and when completed, this work should be of benefit to all members of the Bar Association.

Deed forms previously have been approved by the Nebraska State Bar Association and are available at the Fairbury Journal-News, Fairbury, Nebraska, as follows:

One page forms with recording data on face of instrument

1.2 Quitclaim Deed

2.2 Warranty Deed

4.5 Joint Tenancy Warranty Deed

5.3 Joint Tenancy Quitclaim Deed

6.2 Corporation Quitclaim Deed

Acknowledgment forms, four on one page

Two page forms for use when more signatures and acknowledgments are required

1.3 Quitclaim Deed

2.3 Warranty Deed

6.1 Corporation Quitclaim Deed

7.2 Corporation Warranty Deed

Prices Postpaid

1	.15
10	.50
25	1.30
50	1.95
100	3.60

This Committee further reports that: "The survivorship warranty deed and survivorship quitclaim deed which had been previously approved were superseded by 4.5 joint tenancy warranty deed and 5.3 joint tenancy quitclaim deed, because *Ballard v. Wilson*, 364 Mich. 479, 110 N.W.2d 751, held that the words 'joint tenants with right of survivorship and not as tenants in common' create a joint life estate followed by a contingent remainder in fee to the survivor which cannot be partitioned or conveyed by one of the co-owners. However, —he notes— "some lawyers do not regard the right to partition as being important and prefer to use the survivorship form because lay persons can understand this terminology."

Well, I commend that to your own individual study in your own individual practices, but George did want me to make that comment.

3. COMMITTEE ON COLLABORATION WITH NEBRASKA REAL ESTATE ASSOCIATION

This is one of the committees which I previously referred to as being assigned to the Real Estate, Probate and Trust Law Section this year. L. R. Ricketts of Lincoln has served as the Committee Chairman since its establishment in 1960. He reports that a statement of policy of the Association was previously adopted and published in the *Nebraska Law Review*, following closely the national policy between the American Bar Association and the National Association of Realtors. At that time an approved form of offer and acceptance to purchase real estate was prepared for use by members of the Real Estate Association.

During the past few years there has been limited activity on the part of the Committee, but it is the consensus of the Executive Council that this Committee should be continued as a standing committee of the Section.

4. COMMITTEE ON TITLE GUARANTY INSURANCE

At the mid-year meeting John R. Fike prepared a very comprehensive analysis of the activities of this Committee over the years. No specific recommendations were included but the report was very helpful in providing a complete explanation of developments in this relatively new field. Because the report was given in detail at that meeting I shall merely refer to it and request that it be included in the printed report of these proceedings of the House of Delegates. I have a complete copy which I will give to the reporter for this purpose.

Report of the Committee on Title Guaranty Insurance

Mr. Chairman and Members attending the Mid-Year meeting of June 10, 1966: To give you a status report of the work of this committee, I believe it would be helpful to first briefly review the past work of the committee.

Originally this committee was appointed in 1962 by Ralph Swoboda as the then President of our Nebraska Bar Association. Herman Ginsburg was appointed Chairman and served in that capacity until he became our President. The work of the committee is reflected in four annual reports made to the House of Delegates at Bar Association annual meetings. Those reports appear in the following issues of the *Nebraska Law Review*:

Vol. 42 No. 2 issue of Feb., 1963, page 295

Vol. 43 No. 2 issue of Feb., 1964, page 230

Vol. 44 No. 2 issue of March, 1965, page 294

Vol. 45 No. 2 issue of March, 1966, page 289

A reading of those four reports will give you a fair idea of the pain and suffering and the trials and tribulations of the committee from the time it first began to wrestle with its problems in 1962 down through its ultimate conclusions and recommendations. The approval of its suggested program and, as instructed by the Executive Council, its efforts toward the implementation of the approved program.

Merely touching the highlights, those four reports discuss the following points:

1. Question of the need for title insurance in real estate transactions.

2. The assurance which a purchaser or a lender is entitled to have in determining whether his title is good.

3. The encroachment of commercial title insurance companies into the field of real estate practice.

4. The failure of the public to recognize the need for independent legal advice in such transactions.

5. The failure of the public to comprehend that title insurance alone does not guarantee marketability of title but merely indemnifies against loss.

6. The failure of the public to recognize the limitations and exceptions which may be contained in an insurance policy.

7. The awakening of Bar Associations to the problems presented.

8. The various methods devised by Bar Associations to deal with such problems, commonly referred to as the Florida plan, the Colorado plan, the Illinois plan, or the Kansas plan.

9. The recommendation of the Committee that Nebraska should take some action.

10. The practical problem of raising money and organizing a Bar-related Title Insurance Company and the further problem of staffing and operating such a company.

11. The difficulty in determining which program to adopt.

12. The ultimate conclusion and recommendation that we should affiliate with the Kansas Bar-related company.

With the fourth report in November, 1965, the Committee was not continued and apparently went out of existence, but only temporarily, as in January, 1966, it was recreated as a Committee of the Real Estate Division of the Real Estate, Probate and Trust Law Section of our Bar Association.

So much for the past, and now let's take a look at the present. From the above information it is obvious the decision has been made and approved for Nebraska to affiliate with the Kansas existing and operating program, so we are now assisting in any way possible to implement the Kansas program.

First of all, Kansas Insured Titles made some changes in its articles of incorporation. Originally stock ownership was limited to Kansas lawyers and abstracters. It was simply a Kansas program. Now with its expanded program it will permit stock ownership by lawyers and abstracters in other states, so it changed its articles in that respect and at the same time changed its name to Insured Titles, Inc.

Then, so far as Nebraska is concerned, it applied to the Nebraska Insurance Department for permission to do business in Nebraska, and to the Securities Exchange Commission for permission to sell stock to Nebraska lawyers and abstracters.

At the same time, Kansas was invited to likewise seek such permission in Oklahoma and Wisconsin, and accordingly made its application to do business in those states and sought Securities Exchange Commission permission for sale of stock to attorneys and abstracters in those two states.

In Nebraska a mailing was recently made to all lawyers and abstracters offering to sell stock in the company at exactly the same price as was paid by Kansas lawyers and abstracters when they were organizing their company. Remember, the Kansas lawyers had no assurance their project would be successful, but they saw the need of doing something, of providing a means by which the relationship of attorney and client would be maintained in real estate transactions, yet the client would in addition have the benefit of title insurance, and on a straight risk basis they subscribed \$350,000 to get their company started.

As a result of our mailing to Nebraska lawyers and abstracters, we have to date received thirty subscriptions for 154 shares amounting to \$21,560. Recently we have received quite a few inquiries from Nebraska lawyers who intended to purchase stock but for some reason didn't make it by the May 1 deadline, inquiring if they will have another opportunity to purchase. The answer to that is "yes," and it is contemplated that sometime in the near future another mailing will go out to Nebraska lawyers and abstracters who did not respond to the first mailing.

A few inquiries were received as to whether it was necessary for one desiring to be either an agent or an examining attorney to be a stockholder. The Offering Circular-Prospectus at the middle of page six answers the questions in the negative as follows: "There is no requirement that any or all of a stockholder's title insurance be with the Company or that agents or examining attorneys be stockholders."

You can support the program, become an agent, become an examining attorney, without owning stock, but it is thought you might more enthusiastically support the company and their program if you had some financial interest in it.

As to Securities Exchange Commission approval for sale of stock, it is obvious the company received such approval as the Offering Circular-Prospectus was mailed out. As to permission to

do business in the State of Nebraska, the company has tentative approval with a requirement that it must make a suggested increase in its surplus account. It is our understanding this requirement can be complied with at any time, but the company does not intend to do so until stock subscription mailings have been completed in Nebraska, Oklahoma, and Wisconsin. The bottom of page three of the prospectus recites that in no event will the offering extend beyond December 31, 1966. So we have from now until the end of this year to satisfy Nebraska Insurance Department requirements for issuance of a certificate of authority to do business in Nebraska. When this certificate is actually issued, the company will have a terrific administration problem of obtaining, appointing, and training agents. It is experienced in these matters, however, and it will soon thereafter have its designated agents and will be in operation to furnish Title Insurance based on an attorney's opinion.

The funds sent in by Nebraska stock subscribers have been impounded under an Impounding Agreement submitted to and approved by the Nebraska Department of Insurance. Under the agreement, the funds are in a trust account in The United States National Bank of Omaha and cannot become the property of Insured Titles, Inc. or subject to its debts unless and until the company receives its certificate of authority to transact business in Nebraska and the Director of Insurance in writing authorizes the release of the funds to the company. If said authorizations are not obtained within the specified time, the funds are to be returned to each of the subscribers.

We hope this resumé report has given you a bird's-eye view of what your committee has done, first by studying and analyzing the problem; second by recommending a suggested program for Nebraska; and third, after approval of the program by the House of Delegates and the Executive Council, by obtaining the assistance of our brother lawyers in Kansas to help us get their program into operation in Nebraska.

5. COMMITTEE ON TITLE STANDARDS

At the mid-year meeting Title Standard No. 71 was approved and adopted by the House of Delegates. Under consideration at this time is Title Standard No. 72 and another very interesting problem and suggestion, all of which will now be explained to you by Lumir Otradosky who will report the activities of the Title Standards Committee.

Lumir, do you want to give them the sum and substance of these two matters.

LUMIR F. OTRADOVSKY, Schuyler: Mr. Chairman and Members of the House: I am pinch-hitting for Walt Huber who is the Chairman of the Title Standards Committee.

At our mid-year and September meetings of the Committee we considered a number of questions and problems that had been raised during the past year, and only one of these did we feel warranted the formulation of an additional title standard.

This one has to do with Executor's Deed given under a power of sale contained in the will. It seems that in some instances over the state title examiners have objected to an Executor's Deed given under power of sale where it appeared that the bond of the executor given in the probate proceedings was less than the consideration being paid for the property being conveyed by the Executor's Deed. Apparently also in some instances title examiners have held up approval until the executor had increased the amount of the bond.

The Committee considered this to be of no merit; that is, this objection, and has formulated the following Title Standard which will be Title Standard No. 72:

Executor's Deed Under Power of Sale:

It is not negligent to approve an Executor's Deed under a power of sale contained in a will if the executor has given bond in due form with surety and bond is approved by the court, even though the amount of the bond is less than the amount of consideration for which the deed is given.

The comment or explanation of this refers to Section 30-303 of the Statutes, and this additional comment: "The Executor's authority comes from the will. If the testator has not seen fit to make any special requirements as to bond, the title examiner should not do so. Any bond which is sufficient to make the executor's appointment valid should likewise be sufficient for this purpose."

This Standard has been submitted to the Executive Committee of the Section and approved, and we now move the adoption of it by this body.

JOHN B. CASSEL, Ainsworth: Does that cover the situation where the will provides for no bond and the judge permits the appointment of the executor without bond?

MR. OTRADOVSKY: No. We felt this was probably a controversial area so we wanted to limit this to the area where there could be no controversy; that is, where there is a bond and there is a surety, and both have been approved by the court.

We know, for instance, here in Omaha where you have many corporate sureties it is customary in such case for the court to re-

quire merely a nominal bond. I think in all cases in your court here, in Judge Troyer's court, he does insist on a bond. We felt that if we limited it to this area there would certainly be no controversy, and that is not saying that if you had an executor appointed where there was no bond given it wouldn't be valid, but I wouldn't want to venture an opinion on that, nor did our Committee want to get into that question. The statute, I think, contemplates a bond. That being the case, we wanted to stay on the safe side.

CHAIRMAN MULLIN: Is there a second to the motion?

JAMES I. SHAMBERG, Grand Island: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

MR. MATTOON: We have just some concluding remarks:

III. GENERAL CONCLUDING COMMENTS

We report to you that the new members of the Executive Committee of the Section for the ensuing year are Keith Miller and James A. Lane replacing Frank Mattoon and Barney Pierson. The officers of the Executive Committee are Keith Miller as Chairman, Alex Mills, Vice-Chairman, and John Cockle, Secretary.

President-Elect M. M. Maupin has recommended that the Committee Chairmen of all committees of the Bar Association remain unchanged for the coming year. In pursuance of this recommendation, we submit that the same principle should apply to the subcommittees of the Real Estate, Probate and Trust Law Section. Many important matters are still under consideration and the effectiveness of the activities of the Section will be enhanced by adherence to this principle.

Respectfully submitted,
Frank J. Mattoon, Chairman
Bernard B. Smith
Alex Mills
George Farman
C. M. Pierson
John Cockle
James A. Lane
Keith Miller

Are there any questions about this report? I am going to get out of here fast.

CHAIRMAN MULLIN: I would like to say, Frank, congratulations on a real fine year. This, as you can see, is really a working Section and we are going to miss Frank Mattoon when he goes off the Executive Committee.

The next report is the report of the Section on Taxation, John Gradwohl.

REPORT OF SECTION ON TAXATION

John M. Gradwohl

Mr. Chairman and Members of the House of Delegates: My report is in five brief parts:

1. **1965 Tax Institute.** The Section on Taxation sponsored its Twenty-Third annual Institute on Federal Tax Law in December, 1965. One-day sessions were held at Sidney and Kearney on "Basic Taxation for the General Practitioner." A two-day session dealing mainly with corporate tax problems was held in Omaha and featured Mortimer M. Caplin, former Commissioner of Internal Revenue, and Willard Pedrick, Professor of Law at Northwestern University, now Dean of the new School of Law at Arizona State University. These meetings were attended by 31 lawyers at Sidney; 85 at Kearney; and 78 at Omaha. There was a total of 194 lawyers from 90 Nebraska counties.

2. **New Executive Committee Members.** Elected to the Executive Committee in 1965 for three-year terms were Richard E. Person of Holdrege and Deryl F. Hamann of Omaha. Officers of the Section are John M. Gradwohl, Chairman, and Deryl F. Hamann, Secretary.

3. **1966 Annual Tax Institute.** Plans have been completed for one-day sessions in Alliance on December 10, and Grand Island on December 16. I should say that I think one of the highlights of this Institute will be that Judge McCown has agreed to appear on this program and to review recent decisions of the Nebraska Supreme Court of interest to people dealing in taxation in estate planning. Plans are also complete for co-sponsoring the Great Plains Federal Tax Institute with the Nebraska Society of Certified Public Accountants as well as the University of Nebraska Law School, College of Business Administration, and Center for Continuing Education in Lincoln on December 5 and 6 at the Nebraska Center for Continuing Education.

4. **1968 Annual Meeting.** Following action of the Executive Committee of this Section, I understand that the Executive Council of the Association has today decided that this Section should cooper-

ate with the Real Estate, Probate and Trust Law Section in preparing a Probate Handbook, which will combine both the probate administration law and practice and the taxation practice involved in the probate of estates, in a manner comparable to that which has been done in Iowa and other states; and that these materials will be published before the 1968 annual meeting of the Association, and the annual meeting educational program be built around those materials.

5. **Joint Conference of Lawyers and Accountants.** The Executive Committee of the Section was assigned the duties formerly performed by the Special Committee on Joint Conferences of Lawyers and Accountants. The joint meeting was held in September. The assumption of these duties seems to our Committee to have been both desirable and workable. Following the prior recommendations of the Special Committee, which appear at 45 *Nebraska Law Review* 198-99, the Section on Taxation is now cooperating in co-sponsoring the Great Plains Federal Tax Institute with the Nebraska Society of Certified Public Accountants. Both organizations circularized the officers, the responsible committee within the respective groups, and I am pleased to state that no problems of professional responsibility involving members of the two groups were presented by either our committee or the committee of the Certified Public Accountants at the joint meeting in September.

Respectfully submitted,
John M. Gradwohl, Chairman
Deryl F. Hamann, Secretary
Leo Eisenstatt
Robert D. Moodie
Richard E. Person
Flavel A. Wright

Mr. Chairman, I move that the report be adopted.

CHAIRMAN MULLIN: Thank you, John. Is there a second?

ROBERT D. MOODIE, West Point: I second the motion.

CHAIRMAN MULLIN: All in favor say "aye"; opposed. Carried.

We have already had the report of the Section on Practice and Procedure. This brings us to Item 38, the report of the Section on Tort Law, Bernard B. Smith.

REPORT OF SECTION ON TORT LAW

Bernard B. Smith

The Executive Committee of the Section on Tort Law has given consideration and study throughout the past year to the coordination of the work of this Section with that of the Nebraska Association of Trial Attorneys.

NATA has made a valuable contribution to the lawyers of this state in the representation of both plaintiffs and defendants in matters involving tort liability.

There has developed an increased duplication of effort and personnel, and overlapping of objects and purposes between this Section and NATA.

The Committee further considers that it would be detrimental to the objects and purposes of the Bar Association if there were additional groups interested in a specialized field of law that organized themselves and operated independently of the Association.

This Committee recommends that a serious effort be made to coordinate the program of NATA and this Association. To that end, it is further recommended that NATA should be entitled to elect a member to this House of Delegates. Therefore it is recommended that the House of Delegates adopt an appropriate resolution to authorize this Committee to proceed, in keeping with the foregoing recommendations.

Further report is made that the following individuals have been duly elected to membership of the Executive Committee of the Tort Section:

Al Fiedler, Omaha	3 years
C. Russell Mattson, Lincoln	3 years
Frank B. Morrison, Jr., Omaha	3 years
Kenneth Cobb, Lincoln	2 years
Howard Tracy, Grand Island	2 years
Bernard B. Smith, Lexington	—as the only

holdover member with a term expiring, God willing, in 1967.

The Committee will proceed with its organizational meeting at first opportunity and at that time will elect its officers, which will be immediately reported to the Association.

This report is submitted by myself and the other members of the Executive Committee:

Robert Mullin
James A. Lane
Albert G. Schatz

I now move adoption of the report.

CHAIRMAN MULLIN: You have heard the motion. Is there a second?

FRANCIS M. CASEY, Plattsmouth: I second the motion.

CHAIRMAN MULLIN: Any discussion or question? If not, all in favor say "aye"; opposed. Carried.

MR. SMITH: Mr. Chairman, I next submit the following motion: That the Executive Committee of the Section on Tort Law be authorized to negotiate with the Board of Governors of NATA for the coordination of activities; that the Section be further authorized to give consideration to NATA electing a member to the House of Delegates.

CHAIRMAN MULLIN: Do I hear a second?

LEO EISENSTATT, Omaha: I'll second it.

CHAIRMAN MULLIN: Before we vote I might mention, I just learned this noon that Tom Walsh, who is a member of our House of Delegates now and who is also Chairman of the Section on Practice and Procedure, happened to be elected President of NATA this noon, Bernie, so we ought to be able to work things out with him in office.

MR. CASEY: One question: Does that require a change of the Bar Association Bylaws?

CHAIRMAN MULLIN: It would require a change in the makeup of the House of Delegates.

PRESIDENT GINSBURG: Mr. Chairman, I would like to be heard on this point about the delegates because I think the number of delegates and their representation has been fixed by the rules of the Supreme Court with which we are bound. We could not, of course, guarantee that that could be changed. But as I understand the resolution by Mr. Smith, it would simply be that we negotiate along that line with, of course, the understanding that there could be no change in the delegates unless the rules were changed by the Supreme Court.

MR. SMITH: That is the motion.

CHAIRMAN MULLIN: You have heard the motion and it has been seconded. All in favor say "aye"; opposed. Carried. Thank you.

The report now of the Section on Insurance, Banking, Corporate and Commercial Law, Bert Overcash, Chairman.

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

Bert L. Overcash

Mr. Chairman and Members of the House: This Section was originally the Corporation Section. As a background, a special committee of the Bar reviewed all the corporation laws of the state, and over a period of five years proposed amendments and legislation to be adopted, and on top of that, later a Business Corporation Act.

Early this year President Ginsburg and the Executive Council reviewed with me the matter of reorganizing this Section. It was decided by the Executive Council to expand the Section and make it an Insurance, Banking, Corporate and Commercial Law Section. Therefore my report deals with the matter of the reorganization of this Section.

We started with a questionnaire that President Ginsburg had sent to all the lawyers as to their interest in the various phases of law practice. After reviewing that questionnaire we sent out some 400 letters to those who might be interested in this expanded Section. As a result of those letters, and a review and study of the matter I determined that it would be possible to organize four subsections.

One was organized as an Insurance Subsection to be headed by James Hewitt. That Subsection is now in the process of appointing committees and dealing with specific problems in the insurance field.

Another Subsection was organized headed by Charles Wright, and it is to be the Banking Subsection. This Subsection, in turn, after a meeting on September 17, was divided into two groups: One was Banks and Banking, to be headed by Charles Reed; another was the Commercial Law Section to be headed by Robert Guenzel.

The first Subsection under Banks and Banking has these as the special committees that work: (1) Committee on Legislation; (2) Loan Service Rates, including installment sales; (3) Bank Operations; (4) the Relationship between lawyers and bankers; and (5) Non-Bank Lending Institutions.

The Commercial Law Section is again divided into three committees for specific work: (1) Subcommittee on Education; (2) Creditors' rights and related laws; (3) Legislation.

The Banking Committee is headed by an Executive Committee with Charles Wright as Chairman, Virgil Haggart as Vice-Chair-

man, and John Mason as Secretary. That is a very active group and if any of you have any problems in those fields you should refer to those committees or to myself and we will see that it gets there.

Furthermore, if any of you know any lawyer who is interested in any phase of any of these activities, we would like to have their names. Each of these various committees has a roster and a group of problems and subjects that they are studying.

A third general Subsection was organized under the heading of Corporations. This is headed by Howard Moldenhauer of Omaha. Among the projects that that Committee has under consideration are amendments to the Business Corporation Act which was adopted in 1963.

The first general Subsection of this general Section is Municipal Corporations. This is headed by Ralph Nelson of Lincoln. We are having difficulty with this Subsection. There does not seem to be sufficient general interest in municipal law for a Subsection at this time. However, we are continuing with the matter. Apparently there is not a sufficient continuity of city attorneys to present a background for a continuing organization in this field. That is our report to date. However, if you have any interest in a Subsection on Municipal Law, I hope you will get in touch with Ralph Nelson or myself so we can generate sufficient interest in this Subsection to make it one of the four Subsections of this general Section.

By and large this general Section should provide a very useful tool for members of the Bar. One of the Committees, the Commercial Law Committee of the Banking Section, is engaged now in the matter of the Uniform Commercial Code and all of the problems in that field.

I solicit your interest, the support of the lawyers in your various districts, to get their names to us if they are interested in any phase of the activities of this Section. If there are any problems, I know we would be glad to take care of them through the various committees.

I submit to you that this is a report of organization, and that was the framework under which it is being organized at this time. I don't know of anything requiring action of the House at this moment.

CHAIRMAN MULLIN: Thank you very much, Bert, for a good report. Any questions? If not, the report will stand approved as given.

The report of the Young Lawyers Section, Howard H. Moldenhauer, Chairman.

REPORT OF YOUNG LAWYERS SECTION

Howard H. Moldenhauer

Mr. Chairman and Members of the House: The Young Lawyers Section has enjoyed an extremely active year, highlighted by the participation of the largest number of its members in history. Obviously that statement has to be true since this is the first year that the Section has operated under its present nomenclature. However, aside from that technicality I believe that the statement is still a correct one and is indicative of the interest of the younger lawyers in the future of the Bar Association. They have all been extremely eager to work, if just given the opportunity.

The Bridge-the-Gap program was conducted in June under the capable direction of William Campbell of Omaha and John Gourlay of Lincoln, and was extremely successful. Seventy recently graduated law students were registered for the Institute and showed great interest in all of the subjects. We should like to thank Dean Dow and Dean Doyle for their cooperation, and we should also like to thank all fifteen speakers who so generously donated their time to both prepare the outlines and give the lectures.

The annual Fall Clinic was held on September 16 and 17 on the subject of Insurance Law and Policy Problems. In addition to a number of distinguished lawyers from Nebraska, we were privileged in having as participants authorities from Colorado and Illinois, together with the Director of the Department of Insurance of the State of Nebraska. In spite of the fact that the topic chosen was in a fairly specialized area, we were still extremely pleased with the attendance—183 lawyers were registered from 48 different cities and towns. Thomas Tye from Kearney was in charge of arrangements for the Institute and he did an excellent job. He was assisted by Al Kortum of Scottsbluff. Again we owe a deep debt of gratitude to Dean Henry Grether and Professor John Gradwohl of the University of Nebraska who assisted in the arrangements.

Last Spring the Executive Council of the Young Lawyers Section elected four committees of approximately ten lawyers each to study problems of particular importance to the young lawyer. The Section felt that the problems of the young lawyer, as opposed to those of the experienced practitioner, were unique in certain specific areas and that study committees could make valuable recommendations to the appropriate committees of the Nebraska State Bar Association with the hope that this would be of assistance to

these committees. We realize that any recommendations would only be that, and in no sense do we intend to infringe upon the authority of the committees of the State Bar Association, but we would hope that the applicable committees to which reports are submitted would give any recommendations their serious consideration.

With this in mind, Glen Burbridge of Omaha acted as Chairman of a committee to study the availability of economic services and the poverty program. We felt that to the young lawyer ten or twenty years from now this might have a tremendous impact upon him and his practice. His committee, with the assistance of George Turner, took a poll of the members of the Bar Association and have submitted the results of this poll, together with a four-page report, to the annual meeting of the Young Lawyers Section, which report was unanimously adopted. It has been submitted to members of the Committee on Availability of Legal Services of the Nebraska State Bar Association for their consideration, and you will note that reference to this study was made in the report of the Committee on Availability of Legal Services.

The Committee on Law Economics, with Bob Otte as Chairman, took a poll of young lawyers' salaries at the Bridge-the-Gap program, and this poll has been submitted to the Committee on Economics and Law Office Management of the Nebraska State Bar Association and the results appear in the report of that committee. In addition, in the report of that committee you will find a recommendation concerning the minimum fee schedules as applicable to the young lawyer, which was unanimously adopted by the Young Lawyers Section and which appears as a recommendation of the Committee on Law Economics and Law Office Management.

In addition, Ron Sluyter acted as Chairman of the Unauthorized Practices Committee, and Jim Hewitt acted as Chairman of the Unethical Practices Committee, both of which committees have been active during the past year.

Our Section cooperates fully with the Young Lawyers Section of the American Bar Association. Thomas Tye and I acted as delegates of the Section to the American Bar Association meeting of the Young Lawyers Section in Montreal, and James Knapp of Kearney served as a director of the Young Lawyers Section of the American Bar Association. Our Section participated in the annual Awards of Achievement Competition and, for such participation, received a Certificate of Performance from the Young Lawyers Section of the American Bar Association.

The Section is also cooperating with the Creighton and Nebraska Law Schools in jointly sponsoring the Regional Moot Court

Competition for Regions X and XII to be held in Lincoln on November 18 and 19.

In connection with the law schools, the Section recommends that the Nebraska State Bar Association and its individual members strongly support the law schools and engage in an active program of promotion with the regents and the public toward the end that the law schools may obtain improved physical facilities and stronger support for their faculties. This requires more than that the lawyers just tell themselves of the contributions of the profession. We also have to convince the public. The law schools constitute the backbone of a healthy Bar, and we feel that they should participate in any capital improvement programs and expenditures of the university towards their continued growth and excellence. We have to look ahead to the needs of the state and the public over the next several years, and the Young Lawyers Section urges the support of the law schools by the entire Bar.

At the annual meeting of the Section, Glen Burbridge of Omaha and John Gourlay of Lincoln were elected to succeed Thomas Tye and myself as members of the Executive Council. The following have just been elected officers of the Section for the coming year:

Chairman	Claude Berreckman of Cozad
Vice-Chairman	William Campbell of Omaha
Secretary-Treasurer	Richard Huebner of Grand Island

In conclusion, we should like to express our appreciation to George Turner for his cooperation and assistance during the past year, and we should like to thank the Executive Council of the Nebraska State Bar Association for their cooperation and support. I would like to add my personal thanks to all those members who participated in the Section's projects.

Now for a personal comment: I hope that in light of this report President Ginsburg might see fit to amend his earlier remarks about activities of the Sections to include our Section with those active and productive Sections of the Nebraska State Bar Association. I say that not just in behalf of myself but because I got the needle a little bit over the lunch hour. Thank you.

Howard H. Moldenhauer,
Chairman
Thomas Tye
Claude Berreckman
Al Kortum
Richard Huebner
William Campbell

CHAIRMAN MULLIN: I believe your remarks are well taken, Howard.

PRESIDENT GINSBURG: Mr. Chairman, may I, as a matter of personal privilege, at this time put in the record my heartfelt apologies to the Young Lawyers Section.

CHAIRMAN MULLIN: Thank you very much, Howard, for a year of hard work and for a very fine report.

This concludes our regular reports of committees and Sections. We come now to Item 41: Presentation of any matters that any Section or Committee wishes to bring before the House of Delegates. Is there any such matter at this time?

LEO EISENSTATT, Omaha: Am I in order at this time?

CHAIRMAN MULLIN: I would assume so, Mr. Eisenstatt. Leo Eisenstatt of Omaha apprised me yesterday of his desire to be heard upon a matter, and maybe it would fall under the heading of such matters as we now discuss.

MR. EISENSTATT: Mr. Chairman and Members of the House: The hour grows late and I have two matters that I want to present to the House of Delegates at this time.

The first one, I have copies of the first resolution that I will be happy to hand out, and by way of preliminary remarks this resolution deals with a matter which was brought to our attention by Tom Burke. The annual Directory, as you know, contains a copy of the Rules Governing this Association, the Bylaws, and the Canons of Ethics. It is our recommendation, which I will present in a formal manner in a minute, that those items which are not changeable and which are of a continuing nature, be taken from the Directory and be placed in the Desk Book; and that whenever any amendments are required with respect to them that they can be done by appropriate amendments to the Desk Book; and that the Association continue to publish on an annual basis the Directory. This will save approximately sixty pages in the book. In other words, we feel a one-time publication will be enough.

So I move that Article V, Section 4 of the Bylaws of the Association be amended by amending Section 4 and adding new Sections 5, 6, and 7 as follows:

Section 4. The Secretary shall prepare and distribute annually to each member of the Association in good standing a Directory of the Attorneys of the State of Nebraska.

Section 5. The Secretary shall furnish to each member of the Association in good standing, appropriately printed for insertion in the Nebraska Lawyers Desk Book:

(a) Rules of the Supreme Court of the State of Nebraska governing the integrated Bar;

(b) The Bylaws of the Nebraska State Bar Association;

(c) Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association, which are, by rule of the Supreme Court, constituted the Canons of Ethics of the Nebraska State Bar Association;

(d) Rules and standards as to law lists on and after July 1, 1938.

Section 6. The Secretary shall supplement the materials furnished under Section 5 above whenever any changes are made in any of same.

Section 7. The Treasurer shall prepare and distribute to each member of the House of Delegates at least two weeks prior to their annual meeting a copy of the Financial Report of the Association for the preceding fiscal year, which report shall be itemized as to items of income and items of expense.

CHAIRMAN MULLIN: Leo, may I ask one or two questions. Are the rules and standards as to law lists available and published in some form somewhere? We don't have them in our present Directory, do we?

MR. EISENSTATT: Yes. I call your attention to page 237 of the Directory. So all we are doing, and our only intention was to go through and eliminate these sixty pages from annual publication, with one addition, and that is Section 7 about the Financial Report.

CHAIRMAN MULLIN: To very briefly summarize the first part of his motion, I think we ought to take these up one at a time, the motion is that starting at page 180 of your Directory everything after that be deleted in future years from the Directory of Attorneys and be made up as an insert for the Desk Book that the lawyers have, and that your Directory then would just contain the names of the attorneys. Is that correct?

MR. EISENSTATT: Yes.

CHAIRMAN MULLIN: Do I hear a second to that motion?

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

CHAIRMAN MULLIN: Is there any discussion?

ROBERT A. BARLOW, Lincoln: I've always been curious, our Directory of Attorneys comes out as of June 1 and then within a matter of three or four weeks we add one hundred or so. Is there any magic in that, that the Directory might not come out after the new admissions? There probably is a reason.

SECRETARY-TREASURER TURNER: Well, really, there isn't, except that thirty days after delinquency the Supreme Court enters an order suspending the licenses of all those who have not kept their dues current. We wait until that order is entered to

delete them, and in the process of printing it does take until about the first of June. We would have to wait probably until the 20th or after to take in the new Bar admissions.

CHAIRMAN MULLIN: Are there other questions on this point? Any discussion? We are now discussing only the question of removing the Rules and Bylaws from the rear of the Directory and putting them as an insert in the Desk Book and publishing future Directories with names only.

CHARLES E. WRIGHT, Lincoln: I am sorry to add to this but I had one question: There are a certain number of our Advisory Committee Opinions that are of general interest to the Bar, and to my knowledge they are not published or disseminated generally. I was wondering—I am not trying to upset this motion—but I was wondering if some time, maybe not today but sometime, we shouldn't give consideration to publication and dissemination of those opinions that are rendered by our State Committee to all the membership of the Bar for inclusion in the Desk Book. I know it is done in other states and they get them out right away.

CHAIRMAN MULLIN: I think it may be a good idea but it does not form a part right now of the present motion, Charlie, and unless we have a formal motion to amend the present motion I would have to rule the question out of order.

MR. WRIGHT: No, I don't want to do that.

SECRETARY-TREASURER TURNER: I can explain to Charlie why they don't: The Advisory Committee has never felt it wise to publish their opinions because so many of them are personal and contain names.

JOHN C. MASON, Lincoln: The present motion would not preclude, as I understand it, publishing the Directory at a somewhat later date in order to pick up the names of the newly admitted lawyers. Is that correct?

CHAIRMAN MULLIN: That is true.

MR. MASON: That could be handled by some other action later on?

CHAIRMAN MULLIN: Yes. Anybody else? You have all heard the motion and it has been seconded. All in favor of the motion as made signify by saying "aye"; all opposed "nay." Carried.

The second motion offered by Mr. Eisenstatt is that the Treasurer shall prepare and distribute to each member of the House of

Delegates at least two weeks prior to their annual meeting a copy of the Financial Report of the Association for the preceding fiscal year, which report shall be itemized as to items of income and items of expense.

Would you, Mr. Turner, as our Treasurer wish to make any comment upon that? First of all, I will ask if there is a second to that motion. Does anybody desire to second that motion?

ROBERT K. ADAMS, Omaha: I'll second it.

CHAIRMAN MULLIN: I will ask our Treasurer to make any observations which might be pertinent to this motion.

SECRETARY-TREASURER TURNER: The only difficulty that I am likely to encounter is that I don't usually have the Auditors' report as early as two weeks ahead of the annual meeting. They close their audit as of August 31, and this year I got it on October 5. We probably could get the auditors to hurry it up, but there again I am not sure of it. I simply raise that question.

FRANCIS M. CASEY, Plattsmouth: Would there be anything wrong in amending that to say "prior to the annual meeting" and not make it two weeks?

CHAIRMAN MULLIN: Mr. Eisenstatt?

MR. EISENSTATT: Well, I have no particular magic. The only thought behind this that we had in proposing it was that we would like to have it in sufficient time so that if there are any questions with respect to the financial statement we would be able to present it and consider it at the House of Delegates' meeting. We felt that two weeks before would be not too soon, but we of course are not familiar with the mechanics and problems of the Secretary's office in this regard.

Right now the report appears in the *Nebraska Law Review* which comes out some time the following spring. It is a matter which gets little or no attention by the House of Delegates at the annual meeting, and we just feel it ought to get to them in advance so that if there is anything that needs explanation or comment or suggestion they would be well advised in advance with respect to it and could probably get it in time so that any questions they might have could be answered.

CHAIRMAN MULLIN: Leo, I believe the Treasurer usually at the very beginning makes an oral report but it is not written formally.

MR. EISENSTATT: Yes, but it doesn't get to the members ahead of time for prior consideration.

CHAIRMAN MULLIN: Would there be any willingness on your part to accept the amendment suggested by Mr. Casey to resolve this time question; in other words, that it would be submitted to each member of the House of Delegates prior to the annual meeting?

MR. EISENSTATT: Yes, I'll accept that amendment.

CHAIRMAN MULLIN: With the acceptance, a second will not be required for the amendment. We had a second on the original motion. Is there any further discussion? All in favor say "aye"; opposed. Carried.

MR. EISENSTATT: I seek your indulgence, gentlemen, although the hour grows late, but we were asked by the Chairman to stick to the published agenda, and this is the time when it comes up for consideration.

In a sense my next proposition is anti-climatic because the background and thinking and the words and the feelings of those of us who considered this amendment have been spoken by Herman Ginsburg prior to this meeting.

I might say that this motion came about as a result of a conference at various meetings between Tom Burke and myself, particularly, and other members of the House of Delegates and members of the Association, and we are presenting this because we think it is vital to the continued health of the Association. Happily, it doesn't come as a matter of first impression, Herman Ginsburg having covered the matter before.

The problem, as we see it, is that George Turner has over the past attempted to be all things to all people, and this is an impossible task. As much as George would like to, it would be humanly impossible to provide the type of service that we feel this Association should provide to its members. So what we are asking here in our motion that we will be making is that the efforts and abilities of George be expanded by providing for a full-time Executive Director to cover the areas that are set forth in our motion.

I've got citations in the prior proceedings and in our *Law Review* of this specific problem that our over-burdened Secretary has.

For example, in the Proceedings of 1964 there is a statement that the Advisory Committee in handling disciplinary matters needs supplemental help of a lawyer to take testimony and act in the nature of a master. The report of President Wright to this Association in 1964 says that the program of the Committee on Continuing Legal Education should not be curtailed but it should be broadened

and enlarged. He said also that our Association should be in a financial condition to relieve the Legislative Committee of its burdens.

Then I want to cite Harry B. Cohen's report made with respect to the 1965 meeting in which he stated, page 308, "Over the years I have become well acquainted with the activities of George Turner, Secretary and Treasurer of the Association. Frankly and honestly, George literally is the Association most of the time. George has occupied this position for many years, and I shudder to think of the chaos that would result if George became incapacitated or passed away." How's your health, George? "The time has come for all of us to face realities. We should begin now to train someone for the position of Secretary-Treasurer." And he makes a recommendation to the members.

So it is in this framework, that our Association is not providing what we consider the required services, required activities to its membership that it should because it is physically impossible for one man to do this. The only way things in this area get done today is because of the activities of a few dedicated individuals. Luckily for our Association, we have had such dedicated individuals.

But if we had a paid Executive, if we had a full-time Executive Director performing these duties, it would be possible to amplify and extend this in an extensive manner.

For example, our Tax Section and the Probate Section are now going to get together and put out a Probate Manual. The State of Iowa has had one for five years. If any of you have never seen this, it is an amazing thing. And this is something our Association should do. We have done a revision of it for our own office, but once you get this, all the law, even the form letters, are set forth. As I have often said, even an orangoutang could probate in Iowa State by using this Manual. This is the type of service that our Association should be providing our members.

The Uniform Commercial Code in the State of Iowa was passed and that Association did the same thing with the Uniform Code, the law, the forms, etc. are all set forth. We are not set up to do this for our own members. I am citing this to you as to why we think that our Association should do it.

Tomorrow we are going to be given a copy of this document on Evidence, which has taken two years in preparation. When you see it tomorrow you are going to be amazed. The members of our Association who worked on it really did an outstanding job. But we feel it was only because we are lucky enough to have some

members who took the time and donated considerable time to this and spent two years in its doing, that we have it.

The Omaha Bar Association put out a Law Office Manual. Most of you I think are aware of it. It took us four years to put it out. If we had an Executive Director this sort of thing could be done with a lot less effort.

We feel that the matter is long overdue, that our Association is missing the boat in providing the services that we need as practicing lawyers to (a) be better lawyers, and (b) be more efficient lawyers.

We observe this sort of thing all around us. The State of Kansas, for example, has an Executive Director who works in this field of continuing legal education, and contact with him has indicated that this is a financially self-supporting activity. They even make a profit; that is, enough to pay for his salary and the cost of all the materials. They are putting things out all the time. I talked with the President of the Kansas Bar Association who said they have no problem in making the proper charges which provide this type of extra income.

Our Legislative Committee for as long as I can remember has been asking that we have a full-time lobbyist. This man could provide that service as well—and on and on.

In making this recommendation we examined the rules which are applicable to our Association—this of course is part of the rules which only the Supreme Court can adopt—so we therefore move that the necessary rules be amended, as set forth in the thing which I've passed out to you, and also it will require one amendment to the Bylaws. Therefore, Mr. Chairman, with your permission, I move that it be recommended to the Supreme Court for adoption as an amendment to Article V of the Rules Creating, Controlling and Regulating the Nebraska State Bar Association by the addition of an officer called an Executive Director, and that there be added a new subparagraph (e) as follows:

The Executive Director is charged with the responsibility in the following areas:

1. **Continuing Legal Education.** On a long term and consistent basis, he would be responsible for initiating and carrying out the continuing legal education program of the Association in areas of interest to the members. This would include the organization of institutes at regular and special meetings of the Association. He would work not only with the Continuing Legal Education Committee but with the particular committees and sections involved. He would arrange that the institutes would not only have leading attorneys and law professors giving papers on their subjects but would also distribute manuals which would become resource material for continuous use. (See Paragraph 3 below.)

2. **Lobbying.** He would act as the Association's representative during the state legislature sessions to contact the various members of the legislature to secure the passage of Bar Association bills and would organize whatever support from the Bar and the public as would be necessary. He would keep Association members advised of legislative action of interest to the Bar.

3. **Office Manuals.** As a part of the continuing legal education program and projects in the field of law office economics, he would be responsible for the preparation of various manuals and research material, such as has been accomplished by the Iowa and Kansas Bar Associations on such subjects as probate, uniform commercial code, etc. He would work closely with the Nebraska Law School and Creighton University Law School in securing the necessary specialists, etc. for the preparation thereof.

4. **Law Economics.** He would be responsible for collecting necessary information concerning the economic conditions of the members of the Nebraska Bar and see to the compilation of data, analysis thereof, and the dissemination of the results and conclusions to be drawn therefrom.

5. **Public Relations.** He would be responsible for the dissemination of educational materials and educational programs through all of the various media, the purpose of which would be to improve the image of the Bar with the public and to educate the public concerning the availability of legal services and the benefits to be obtained from an educated and dedicated Bar.

6. **Jurisdiction.** The Executive Director would be independent in his areas of responsibility and would report directly to the Executive Committee of the Nebraska State Bar Association. He would be a full-time employee of the Nebraska State Bar Association.

With respect to Subparagraph 2, it will require an amendment of Article VI of Section 3 of the Bylaws; to wit:

Section 3. The Committee on Legislation through the Executive Director of the Association shall have authority, unless countermanded by the President of the Association, to represent the Association before the Nebraska Legislature, or any committee thereof, on any pending legislation of direct concern to the Association, and to take a position favorable or opposed to such legislation in its discretion, absent any prior action on such proposed legislation by the House of Delegates or the Executive Council.

That, Mr. Chairman, is my motion.

CHAIRMAN MULLIN: I might mention, Mr. Eisenstatt, that in Paragraph 6 where you refer to an "Executive Committee," there is no such body; it is the "Executive Council."

MR. EISENSTATT: I will accept that.

CHAIRMAN MULLIN: Is there a second to the motion?

CLARK G. NICHOLS, Scottsbluff: I second it.

CHAIRMAN MULLIN: It has been moved and seconded. I will now accept discussion upon the matter. Mr. Paul Chaney!

PAUL P. CHANEY, Falls City: Mr. Chairman, this is a complete surprise about which I have had no information except as to the reading of it here, but this Executive Director that is suggested is apparently to take the place of all the committees of the House of

Delegates who are representing our organization free of charge by devoting their full and sincere time to the assignments that are made. It would appear that the present members of the committees will be eliminated by the Executive Director, and those who are serving free of charge without expense or wages will cost by the appointment of an Executive Director—perhaps I am mistaken—about \$20,000 a year. That would increase our membership dues from \$10.00 to \$15.00 per person. It would seem to me, and I commend and I feel, that the service of the individuals who have been serving and today have been a very fine representation of what the sincere committees have done, that we will serve better under the present setup without the appointment of an Executive Director at the additional expense. Therefore, I move that the motion **not** be accepted.

CHAIRMAN MULLIN: You are speaking in opposition to the motion.

CHARLES H. YOST, Fremont: I am a little bit like Paul. I knew nothing of this coming up. I think we've started, or maybe we did some of this already today when we said that at least we favored going from here to try to get an attorney to represent us and pay him especially for handling our lobbying before the legislature, but it would seem to me that if we do this we are certainly, as Paul has pointed out, departing rather radically from our policy and what we have been doing in the past.

While we are the elected delegates of the rest of the members of the Bar, certainly as far as I am concerned I would like to know a little bit how some of the other fellows in my district feel about this and how they would want me to vote on such a thing as electing someone who is going to take over in a different manner than we have ever conducted our integrated Bar before. I don't think that this is something we should rush into without a chance to talk with other members of our organization and to give it serious study to see if this is the thing that we want to do.

I thoroughly agree with Leo that what they have done in Iowa is a good thing, and I think we should have these things and work toward getting them, but I don't think we at this late hour ought all of a sudden to jump in and change our entire organization without giving it a lot of thought and study and, if necessary, possibly a committee could be appointed by the Chairman or by the President. We are going to have to raise dues if we do this. We know that.

JOHN M. GRADWOHL, Lincoln: After the discussion ends,

I intend to move that we lay this on the table until the 1967 annual meeting of the House of Delegates.

FRANCIS M. CASEY, Plattsmouth: I just want to ask a couple of questions. I am a little ignorant about this procedure. One is, it was stated earlier by our President that if we created such a position it was to be a member of our Bar. I can't tell from reading this whether we would hire a lawyer or a lobbyist or a public relations man. I was wondering if that should be included here.

Also when Leo answers this, I've got a couple more questions. Is this broad enough to cover the secretarial staff that this individual would be required to have to fill the job; and third, are we authorized to go ahead and do something like this without first finding out where the money is coming from?

MR. EISENSTATT: First let me respond and I will try to cover all of them: This particular amendment, this particular plan is new for Nebraska but not new around the country. If you will notice on page 36 of your program in the report of the Committee on Cooperation With American Law Institute, there are thirty states that have professional help on the Bar Association staff to conduct just the Continuing Legal Education phase of the Bar's activities. We have it all around us—Colorado, Kansas, and Missouri all have it. Iowa has it in a little different manner. So what we are proposing is not novel.

We are just saying that our present staff cannot physically provide the service—I am not talking about supplanting any committee—but right now in order for a job to be done, whether it be a Law Office Manual or a Manual on Evidence, it requires lawyers to give up a substantial amount of time, whereas if we had a Director these committees would be able to do more work, the lawyers involved would be able to do the same service to the Bar with less work. So this does not supersede any committees and doesn't change anything.

Now, if it costs extra money, the only answer I can give you to that is that I submit it is worth the extra cost.

A Director, in my opinion, would have to be an attorney, and if that requires an amendment I would accept that.

The Executive Director, having greater duties, would have to have staff, and there would have to be probably secretarial services provided, but I accept this as a part of the responsibility that the Bar Association owes to its membership. We cannot go on continuing to rely on the good offices and time and effort of our mem-

bers. We just can't continue to rely on them in a haphazard manner.

I am saying to you that no matter how hard George Turner would try, it would be impossible for him to do so. He is already overburdened in what he has to do. All of you know the attempts he has made to try to provide this, but it is just impossible. I don't think it is fair to George to try to saddle these things on him, as much as he would like to try.

I say to you that this Association has a duty to its membership to provide the tools of continuing education and the other things covered here in order for us to be better lawyers and more efficient lawyers and more financially remunerated lawyers.

That is my answer. I don't know how much would be gained by putting it over. As I said, the amendment of the rules would require an action by the Supreme Court of Nebraska, and I don't know whatever study might be needed to smooth out any of the rough edges on this. But I suggest to you that the time is *now*, and I think that the matter should be put in motion at the present time, and I suggest that there is no need to wait. The matter probably would have to be considered by the Executive Council before it would be passed on anyway. I also think that this requires under our rules a three-fifths majority for passage.

CHAIRMAN MULLIN: On the question of whether or not the Executive Council would have jurisdiction in the matter, on page 187 I find this paragraph: "The Executive Council shall be the executive organ of the Association, shall have sole authority to approve the expenditure of funds, and the contracting of obligations" and then it carries on. To what extent that answers your question or bears upon it, Francis, with relationship to the financing of the proposition, I would assume that some action by the Executive Council would be necessary somewhere.

VANCE E. LEININGER, Columbus: Mr. Chairman, I think this is a matter that is properly before the House of Delegates, as it deals with the policies of the operation of the Association. I personally did not feel that it should be acted upon one way or the other at this meeting. I would like to commend Mr. Eisenstatt and his colleagues for providing the initiative to get it before us at this time. I have been visiting with my colleagues from my home district and I think they feel it would be improper for them to act on this without further communication with the lawyers they represent.

Did John Gradwohl move to lay this matter on the table?

MR. GRADWOHL: I will move that the pending motion be laid on the table until the 1967 meeting of this body.

MR. LEININGER: I would second that motion.

May I say this: Certainly we are heading towards a change in the administration of the Association's affairs. My first impression right now is that any particular quarrel that I might have with the motion presented might be in the matter of semantics. It occurs to me, for example, that what we need perhaps is more in the nature of a coordinator to administer and regulate the affairs of the various committees. But I do think we need a working group of committees and a working membership in the Association to keep it alive and active. I second the motion to lay it on the table.

CHAIRMAN MULLIN: It is my understanding that a motion to table which is duly seconded is not subject to further discussion, so I will put the question. All in favor of the motion to table signify by saying "aye"; all opposed signify by saying "nay." The "ayes" have it and the motion to table at this time is carried.

Are there any other matters pertaining to committees or anything any other person wishes to present?

JOHN C. MASON, Lincoln: Mr. Chairman, I don't know that a motion is necessary but I raise a question for the House of Delegates to consider. It seems to me that it would be appropriate to have the President of this Association to appoint a representative committee which could study this proposal, and particularly the question of coordination of the duties of the proposed Director and his relationship with committees and with Sections and with the House of Delegates itself, the nature of his activities, the question of housing and staff, the question of funds, the question of dues, and all the things that are related to this. The committee could also report back to the House of Delegates.

I recall a discussion sometime recently on the Executive Council in which we considered the fact that the House of Delegates may be called into session at any time.

I voted against the motion to lay on the table for the reason that it apparently precludes bringing the matter up again until the 1967 annual meeting, and I am not sure it is in the best interest of the Association to delay further consideration that long.

With that background, I would like to move that the President be authorized to appoint a committee which would be representative of the Bar Association for the purpose of studying this ques-

tion and report back as soon as their study has been completed, in advance of next year's meeting if possible.

MR. LEININGER: I'll second that.

CHAIRMAN MULLIN: You have all heard the motion and it has been duly seconded. Is there any discussion on this motion? If not, all in favor signify by saying "aye"; opposed "nay." The motion is carried.

FRANCIS M. CASEY, Plattsmouth: Is it the Chair's opinion that this body might consider this before the next annual meeting of this body?

CHAIRMAN MULLIN: The motion to table in its previous form, I believe—and I would have to appeal to the record—was that it was tabled until the next annual meeting of the House of Delegates. Am I right? Is that correct? The 1967 meeting.

MR. EISENSTATT: Thank you, Mr. Chairman.

CHAIRMAN MULLIN: Thank you, Mr. Eisenstatt.

Does anyone else wish to present any new matter or any unfinished business? Yes, Mr. Smith.

BERNARD B. SMITH, Lexington: I would like to know the feeling of this House—I hate to defeat any of the moves of economy suggested by Mr. Eisenstatt by deletions from the Directory, but I consider that it would serve our purpose a lot better if we did have the phone numbers and possibly under each county have the name of the county seat and maybe three of the principal officers of that county, such as the sheriff, maybe the county attorney, and the county judge.

To get the feeling of this group, I will submit that in the form of a motion.

CHAIRMAN MULLIN: To add to the Directory the phone numbers of the lawyers listed.

SECRETARY-TREASURER TURNER: How would we get them?

MR. SMITH: I can give you a directory that I buy now that has all of them.

SECRETARY-TREASURER TURNER: Really? One thing we are going to have to have is zip codes.

MR. SMITH: I don't care about a zip code or social security number. I would also think it might be useful if we had the

county seat and two or three county officers under the heading of each.

SECRETARY-TREASURER TURNER: We have that.

CHAIRMAN MULLIN: We have the county judges and attorneys in there.

SECRETARY-TREASURER TURNER: And the clerks of the district court.

CHAIRMAN MULLIN: Do you pose your motion in its present form, Bernie?

MR. SMITH: No, that's good enough.

CHAIRMAN MULLIN: Does anyone assert a second?

VANCE E. LEININGER, Columbus: I'll second it.

CHAIRMAN MULLIN: You have heard the motion which has been duly seconded. Is there further discussion? Do you wish to say anything, George. You put the Directory out.

George says it sounds like an impossible job. The motion is that we include all phone numbers of all attorneys listed in the Directory. Your motion relates strictly now to the phone numbers?

MR. SMITH: I'll limit it to that.

CHAIRMAN MULLIN: The question is, Shall the Directory contain all phone numbers of all attorneys. Does anybody wish to speak on it?

MR. LEININGER: How much will it cost?

CHAIRMAN MULLIN: Do you know, George?

SECRETARY-TREASURER TURNER: No, I have no idea. I would tell you to bear this in mind, that we have more than a ten per cent change of address every year. It looks to me like an endless job. A Directory is almost obsolete when it comes out. During the last year we changed over 300 addressograph plates.

CHAIRMAN MULLIN: Are you ready for the question? All in favor of the motion say "aye"; all opposed say "no." The "noes" have it.

Gentlemen, we stand adjourned. Thank you all for your patience this afternoon.

. . . The pre-convention meeting of the House of Delegates adjourned at five-fifteen o'clock . . .

**NEBRASKA STATE BAR ASSOCIATION
THURSDAY MORNING SESSION**

October 12, 1966

The opening session of the Sixty-Seventh annual meeting of the Nebraska State Bar Association, convening in Hotel Sheraton-Fontenelle, Omaha, Nebraska, was called to order at ten o'clock by President Herman Ginsburg of Lincoln, Nebraska.

PRESIDENT GINSBURG: The Sixty-Seventh annual meeting of the Nebraska State Bar Association will now come to order.

In recognition of the Divine Presence, we start our meeting with an invocation which this year will be delivered by Rabbi Sidney Brooks of Temple Israel of Omaha, Nebraska. Will the members please rise. Rabbi Brooks!

INVOCATION

Rabbi Sidney H. Brooks

"Let justice well up as waters, and righteousness as a mighty stream." Unto Thee, O God, have come these rapturous words of the prophet, and to them have been joined the pleas of the humblest of men in an unending search for truth, for mercy, and for the law of justice. And now in these quiet moments those who serve the law approach Thee, who art the giver of the law.

We ask not for divine certainty but for the humility of honest doubt, and then courage to dispel that doubt with truth. We ask not for the power to battle for the right as we see it, but for the grace to discover the right and then to defend it. In the quest for legal wisdom we would find ourselves blessed, not with the victories of favorable judgment, but rather with the knowledge that our defense of goodness and the denouncement of wrong are both exaltations of moral conduct in the affairs of men.

In this spirit, O God, we devote the freedom of our minds to the freedom of all men. We pray that the deliberations of this Association, of those dedicated to the law, may bring nearer the association of all men in a world governed by law and administered in mercy. And then justice shall "well up as waters, and righteousness as a mighty stream." Amen

PRESIDENT GINSBURG: You may be seated.

The address of welcome this year will be delivered by Mr. James J. Fitzgerald, Jr., President of the Omaha Bar Association. Mr. Fitzgerald:

ADDRESS OF WELCOME

James J. Fitzgerald, Jr.

Mr. President, Fellow Members of the Nebraska Bar Association: On behalf of the Omaha Bar Association I would like to extend to all of you who have come from outside of Omaha a very, very sincere and warm welcome.

I have one announcement: Next Sunday afternoon all of you who can, listen in on WOW-TV to hear and see a film that the Omaha Bar Association has purchased. This is a professionally prepared film. It is entitled "The True and the Just." E. G. Marshall of "Defenders" TV fame is the narrator. The film was paid for by the Ford Foundation and was made specifically for the American Bar Association. It depicts, and I think very excellently, the important role an individual plays as a juror in our judicial system. That is Sunday afternoon the 16th on WOW-TV at three o'clock.

In thinking about what I might say here this morning I was sort of scared out by that word "address." I would rather get down to earth and just talk a little bit about what might be new in Omaha since the last Bar Association convention.

I am not going to burden you with what you saw in the paper last night, the plans for a 280-million dollar downtown development, but I do wish to say a few things about some of our new things.

Those of you who came in on West Dodge Street may have noticed that at 102nd and Dodge there is a brand new underpass. That underpass leads to streets and so forth at the north side of Dodge Road and surrounds a number of brand new buildings that are in the process of being erected. That area will be the new West Roads Shopping area. The principal tenants in that area will be Kilpatrick's, Montgomery Ward, and Penney's, in addition to one hundred other shops. The total area for sales at that crossroads will be one million square feet. To give you some idea of the size of that, that West Road Shopping area will be twice the size of the present crossroads at 72nd and Dodge Street.

A brand new South Road Shopping Center has just opened on Highway 75 about two-thirds of the way to Bellevue. The principal tenants there are Brandeis, Sears Roebuck, and Penney's.

If you come down to Grover Street, those of you who have traveled in the East will notice a brand new Howard Johnson's Restaurant. The restaurant just opened. It is to be surrounded now with a motel and when completed the total expenditure is estimated at about \$2,700,000.

Coming down Dodge Street further, at 31st and Dodge is a brand new building which will shortly be enclosed for the winter. It will be the home of the business college, Commercial Extension College here in Omaha, and it is estimated that it will cost about one million dollars when completed.

A couple of blocks east of that, at Turner Boulevard and Douglas Street you notice a big addition going up there to the Twin Towers Apartments. When completed that will practically double the square footage in the present Twin Towers Apartments.

Coming down Douglas a little further, between 22nd and 23rd on the south side of the street, you will notice the New Continental Towers 14-story apartment building, which is just completed and is now leasing.

Another couple of blocks to 20th and Douglas Street, and you will notice the brand new home of the Omaha Club. It is nearing completion and should be completed by November or December of 1966.

A block further to the east is the brand new Continental Building. Any of you who want to see what a new law office looks like are invited to come up to 300 Continental Building.

Since you were here last, also, the Executive Building at 17th and Douglas is completed and accepting tenants.

Any of you who walked around Omaha last night noticed a couple of big holes in the ground. One of them resulted at Farnam between 17th and 18th from the demolition of the old City Hall and the Insurance Building. Rising at that point now, and it is in its foundation stage only, is the new 28-story WOW Fraternal Life Insurance Society's Building. The first three floors are to be devoted to the home office of the Omaha National Bank.

The other big hole in the ground resulted from the demolition of the old Post Office building. To arise there shortly will

be a new building which will be the headquarters of the First National Bank and an office building, parking area, and a contemplated 300-500 room hotel.

Lest you get the idea that all our developments here are along business lines, Omaha is also advancing along cultural and educational lines.

At 24th and Dodge, as all of you know, is the location of the Joslyn Memorial Art Museum. That museum has just purchased land to the north and is contemplating and ready to go on an 8-million dollar improvement.

A few blocks north of that is the Creighton University campus. Creighton University is in the midst of a 20-million dollar development. Any of you members of the alumni of Creighton who haven't been to the Creighton campus should not fail to see it while you are here in Omaha.

With all of this progress building-wise naturally Omaha has grown in size population-wise. Our population is now 353,000, and the metropolitan area, 530,000.

Again, a warm welcome to all of you men who have come to Omaha from out of town. We do hope in this very busy program that you are going to see here you will find time to see a little more about our home town of Omaha.

PRESIDENT GINSBURG: Thank you, Mr. Fitzgerald. I think you pulled one faux pas. You welcome the men but didn't say anything about the ladies, and I think the ladies are going to be the shoppers.

The response to the address of welcome will be made by Mr. John C. Mason of the Executive Council. Mr. Mason!

RESPONSE

JOHN C. MASON

Mr. President, Ladies and Gentlemen: I am sure I speak for all the lawyers attending the meeting in this response to Mr. Fitzgerald's fine address of welcome.

It is a pleasure which many of us have enjoyed for many years to come to Omaha annually to attend this meeting. It is of great interest to us to observe the development of this great dynamic, metropolitan area. As we see it occasionally, it probably impresses us more than one who sees it every day. The development is outstanding and it helps provide the service which an Association in its annual meeting needs. It provides

us with good hotel facilities which, as I understand it, are even going to become greater in the downtown area if some of the developments projected for Omaha materialize. It provides us with recreation and entertainment when we attend these meetings. It provides our wives and perhaps ourselves, to some extent, with shopping facilities, and indeed it is a great service.

The physical development of Omaha, however, I think is in a sense equalled or exceeded by the development of the Omaha Bar Association who are hosting our convention this year again. I think all of us who work in Bar Association matters are tremendously impressed with the activity and leadership furnished by the Omaha Bar Association in many different areas of their work locally, and we, of course, are also very grateful for the leadership which many of their individuals give to the State Bar Association.

So I think it would not be proper to accept a welcome from you, Mr. Fitzgerald, without acknowledging this leadership in the Bar Association work, as well as the development physically of the City of Omaha.

The only problem that I think all of us experience is that our President schedules such a tight meeting every year that we don't have time to fully appreciate it, and I am sure we all regret this; that is, we don't have time to fully appreciate the other activities and things that are available in Omaha.

We also acknowledge with gratefulness the honor which the Omaha Bar Association is giving to us this evening in furnishing a social hour, as it is called in the program, prior to the annual dinner. This is a custom which had existed for several years but had not been followed in the last two or three years, I believe, and we are grateful to all of you for that too.

Therefore, on behalf of all the members we acknowledge your welcome and we appreciate the opportunity to meet together in your city.

PRESIDENT GINSBURG: Thank you, Mr. Mason. I am sure that each and every member of the Bar Association present seconds the remarks which Mr. Mason has just made.

ADDRESS OF THE PRESIDENT

HERMAN GINSBURG

You will notice that the next item on the program, the item that probably concerns me more than anything else that has happened to me during the past year is the address of the Presi-

dent. I am a great believer in definitions. So I thought before I did anything in the way of preparation I had better look up and see the meaning of the word "address." What does it mean? Frankly, I had originally assumed that all I needed to do on this occasion was simply to make a report of the past year's activities, but I noticed that the Rules and Bylaws of our Association specifically do not use the words "President's Report" but say that the President shall deliver an "Address." So in checking with the dictionary I find that an address is a lecture, an oration. So it was something other than a report which apparently was expected of me.

If I may be forgiven, I would like to commence on a note of levity which may be a little inappropriate at this time—I'm afraid it is, and yet I want to tell you about the dilemma that I got into when I started to prepare this address.

I have been pretty much buried this last year in the activities of the Association and the work of the committees, and I could see all these things that I thought we had accomplished. So I started out with the thought in mind of making one of these glorious reports about the activities, the accomplishments and the great status of our Association. So I started going into the literature, into the daily papers, the news media, and so forth, and I found myself somewhat in the position of the sales manager of the Super X Dogfood Company who was conducting a sales meeting of the organization. He had, just as I have now, all the salesmen before him at the meeting. He delivered the talk about their product and then he asked, "Now, gentlemen, who has the best product?"

And everybody in the room shouted, "We do!"

"And who has the best management?"

"We do!"

"Who has the best sales force?"

"We do!"

"Who has the best advertising program?"

"We do!"

And then came the snapper, "Well, then, why in the hell aren't we *selling* the product?"

And some voice in the back of the room said, "Well, the damn dogs just won't eat it."

I found that we were somewhat in that position, that it

didn't behoove me to brag about our product because the public just doesn't believe it; it just isn't accepting it.

With that note of apology I will start with my formal address.

THE LEGAL PROFESSION—AN EVALUATION AND A CHALLENGE

When the Nebraska Bar Association as an integrated Bar was first created, the last President of the voluntary Bar Association counseled us as follows:

"The Bar should give more attention to matters of government and particularly to legislation relating to the administration of justice. Practice and procedure should be revised, simplified, expedited, and its cost reduced. Whether common law, code or rule, it should be brought to date. Failure of the processes of judgment to keep step with physical science and the changing economy has resulted in criticism of courts and lawyers. Remedial and corrective judicial processes should come from the bench and bar. There, responsibility lies, and delay will be costly We should frankly admit that the administration of justice by our courts has lacked efficiency in an age when efficiency is a fetish. Expense, slow procedure, delayed trials, have driven business from the courts. Certainly it is time to study and consider a constructive program to counteract these tendencies"

And then the first President of the new Nebraska Integrated Bar had this to say:

"I remind you that the public already is discussing socialization of the legal profession, just as it is with medicine The demand for socialization hinges on the feeling that the legal profession is not making available the necessary services for every social and private wrong. Ours is the task of convincing the public that we are willing and capable of meeting the problem."

I propose to invite you to join with me in some research to see whether we have lived up to the challenges thus presented to us. Since practically a generation has elapsed since the creation of the Nebraska Integrated Bar it is but fair to ask at this time whether we have met the challenges before us. Have we convinced the public that we are willing and capable of making available the necessary services to the public? Have we made the administration of justice more efficient and less expensive? Have we kept up with the tremendous changes in the physical and behavioral sciences so as to qualify ourselves to help the

public answer the problems with which we are all daily confronted? I greatly fear that our answers must to a considerable extent be in the negative.

I shall refer first to the matter of efficiency and expense. We are all familiar, I know, with the book, *How to Avoid Probate* by Dacey. This book has been No. 1 on the non-fiction best seller list for many months. The overwhelming acceptance accorded this book is an indictment of the slowness and archaic procedure in probate matters and the inflated fees which may oftentimes be involved.

Let me quote further from the October 1, 1966 issue of *The Reader's Digest*, which has possibly the greatest readership and perhaps following of any magazine in this country. The title is, "The Mess in Our Probate Courts." This article states: "Inflated fees, paralyzing delays . . . are only some of the many ugly abuses fostered by our antiquated and inefficient probate system The high cost of dying is not the funeral; it's the legal and administrative costs of getting the dead man's estate—his lifetime earnings—through the probate courts."

This article discusses the general tendency of our profession to fix fees on a percentage basis of the amount of the gross estate involved with out regard to the amount of time and effort actually required to render the needed service. This article further discusses the archaic and dilatory procedures involved. It is pointed out that the public demands that there be a re-evaluation in fee schedules to make them more commensurate with the services rendered, and that there further be a modification in procedure so as to modernize the same and expedite the closing of estates and remove unnecessary expense.

If we are frank with ourselves, whether we like it or not, we must admit that this criticism is in a large measure justified. The small or medium estate ought not to be saddled with a year's delay and the expense now involved.

This criticism is not limited to the field of probate alone. I submit to you that in the field of practice real estate, conveying, and other fields of legal practice as well, we lawyers are entirely too dilatory and too expensive. We have created a system of procedure that just does not fill the public needs today. That is why, to a large extent, the public is turning to other agencies to get the job done. The public is not concerned with whether the legal profession makes a living, but rather is concerned only with whether the public needs are met and fulfilled, irrespective of who renders the service.

And what about procedure in the courts? I know that everyone within the sound of my voice would, at first blush, say that we have accomplished a great deal, particularly in Nebraska. We have new rules of court. We have new discovery procedures. We have a new method for selecting judges, intended to raise their level of competency. But what have we done about the outmoded justice court system? What have we done about our magistrates in traffic courts? These are the courts where the majority of the public meet the courts and obtain their impressions of the courts.

As stated in a speech before the National Association of Bar Executives at the American Bar Association convention at Montreal, Canada, on August 4, 1966:

"Inherent in all this is the requirement that lawyers not be talking only among themselves or thinking of law as for lawyers, but that there be a clear recognition that law is for society, and that lawyers have a singular responsibility in interpreting the law to the members of society and in guaranteeing that the *machinery of the law* . . . can never become outmoded or dilapidated."

In the book which I commend to you all, *The Courts, the Public and the Law Explosion* it is said, and I wish to emphasize:

"In a decent legal order it is not enough that justice be done; it must also be seen to be done. This common law maxim is a shorthand way of saying that the rectitude and humaneness of the law's workings must be manifest to all members of the community, and particularly to those whose interests are adversely affected by the operations of legal institutions What are the implications for law and social order, when untold thousands of people charged with criminal offenses are handled in the lower courts as if they were mere blanks for processing? Can justice be administered on a mass production basis? Are there no middle ways between the glacial slowness of the court process in personal injury suits and the frantic speed of the magistrate courts in misdemeanor cases? So far we have made only a little progress in recasting our judicial institutions to meet the quantitative burdens imposed upon them by the law explosion. There are widening discrepancies between the formal law in the books and the law in action in the courts. These are not cracks to be painted over, but faults that imperil the structure of American justice. We are going to have to be searching and candid in our appraisal of existing judicial procedures and boldly imaginative in

reconstructing traditional institutions to meet the challenge of our own times."

Again I say, "Have we met this challenge?" The public does not think so; and I believe that upon reflection we must admit that we have not done the job. Whatever we have done we have done only part way and as if it were a matter committed exclusively to the Bar alone, without consideration for the public's interests and the public's will. In many of our adjoining states there have been created citizens' conferences on the courts so that the voice of the public could be heard and heeded. After all, the courts exist for the public and not for the lawyers. It is time that we too invite the public to participate with us in the endeavor to reconstruct our court system to meet the challenges of the times.

And where are the lawyers in endeavoring to assist the public in the decision of the grave questions that have been and are confronting our democracy in recent years? Where the John Adamses, the Henry Clays, the Daniel Websters, the Abraham Lincolns, the Stephen Douglasses, the William Jennings Bryans, the Clarence Darrows, the Louis D. Brandeises, men who were in the forefront of the public controversies of the age and who tried to aid the public in an understanding and arriving at just decisions. Where are the lawyers' voices today in the civil rights matters? Where are the lawyers in making services available to the poor and the underprivileged? We who deal with all sorts of problems every day, who ought to be in the forefront in leading the discussions to answer these problems, have simply forfeited the field.

In 1835 Alexis DeTocqueville in his book *Democracy in America*, speaking of the American legal profession said:

"The influence of legal habits extends beyond the precise limits I have pointed out. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas and even the language, peculiar to judicial proceedings The language of the law thus becomes, in some measure, a vulgar tongue The spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the taste of the judicial magistrate."

But in 1966 this is what is said, and again I quote:

"Lawyers, in short, have lost and are losing caste in this country There is little evidence to indicate any real aware-

ness within the legal profession of the truly revolutionary type of society in which we live. Lawyers are not dinosaurs; they will not disappear, but they will continue to become mere legal mechanics as the Bar becomes more and more de-professionalized"—and I stress that word—"unless and until a breakthrough is made to a new order of viewing the human condition It could even be that if the proper study of law encompasses, as it must, much more than the traditional legal lore so adored by hornbook writers and restaters of the law, then law will be seen and used in the manner for which it should; the technique through which humanistic values can be preserved in a society dominated by the non and anti-humanists. For that is the end and purpose of law, in addition of course to its normative ordering function; the infusion of humanism into cold rationalism . . . just as lawyers replaced the clergy, so now the scientists (natural and behavioral) are replacing the lawyers. The technocrats have arrived and are taking over."

You might be interested to know that the caption of the article from which I am reading from a national magazine is as follows: "Where Are the Lawyers? A Charge of Truancy."

And listen to this one: "Timid Lawyers and Neglected Clients," again from a national magazine, where it is said:

"To translate the spirit of Law Day into every day reality, the lawyer must recognize that the lay person looks to him for comment and advice, and that when his voice is stilled, the vacuum is often filled by the hate and bias of the demagogues. He must work to make the process of law as solid as possible There is more to membership in the Bar than a license to sign a brief or intone a prose argument. The Bar has become a group of thoroughly orthodox, time-serving, government-fearing individuals."

And that is not from just a, what shall I say, confession type magazine; what I have just read to you is from *Harpers Magazine*, which you will all recognize as an outstanding periodical in the United States.

And *Time*, the weekly news magazine has said this:

"In a nation that professes equal justice for all, U. S. jurists have long been troubled by the fact that reality seems to provide quite a bit less justice for the poor The poor need more legal aid than any other class in the nation—and get less of it."

And this:

"Concerned public leaders emphasize that Constitutional guarantees are realized by people with money, but denied to people without it."

And again I quote from *Time*:

"Seen at first-hand, the helplessness and bewilderment of the poor when faced with the legalities of our complex society are staggering The poor need lawyers, not only to stay out of jail, but also to contend with landlords, bureaucrats and faithless welfare agencies. Forever trapped in a debtors' spiral, the poor constantly face repossession because of a missed payment, as well as wage attachments, that often lead to their being fired."

In answer to the foregoing, this statement was made by a former Chief Justice of the Ontario Court of Appeals before the American Bar Association at its Montreal meeting on August 9, 1966:

"Leadership toward change cannot come from lawyers and judges, who too often regard 'order' as a shield for the protection of the privileged through laws that have prevailed in another society and procedures that are incompatible with modern day living."

In Nebraska what have we done in this respect? I submit, next to nothing. Outside of some beginning steps taken by the Omaha Bar Association here in Omaha, there just simply has been no real action whatever by our Bar in these fields. Must we not confess that we have not been interested in the criminal practice; that those who have engaged in the criminal practice have been looked down upon; that we lawyers have measured standing, prestige, and success at the Bar by the number of wealthy clients that we have and the ability to keep out of the courtroom, rather than by any standards of advocacy of the rights of the individual? Have we not rather been representatives and spokesmen, yea, even servants of the privileged and socially powerful classes, and have we not neglected those less privileged, less solvent, and less socially acceptable? Have not we lawyers failed to concern ourselves with the rights of the unpopular individual and the unpopular cause? The legal profession cannot justly quarrel with the present day impression held by the public, as I have quoted to you, for it is a fact, and we must recognize it to be such, that lawyers have treated the economically indigent, the so-called inferior or minority groups as simply necessary evils in the practice of law, to be shrugged off with a minimum of service and consideration.

I know we are all concerned, and justly should be, with the

so-called disrespect for law. I wonder, however, how much of this can be attributed to the fact that there are minority groups who simply are not being given their share of equality before the law which our government purports to guarantee. When the rules of law are applied for the benefit of the wealthy, and the poor cannot share therein, it is difficult to tell the poor man that he must have respect for the law. When a minority group is not given justice before the law in its particular community, it is ridiculous to tell it and its members that they must have respect for the law.

I would like to quote from a speech of a former Chief Justice of the Ontario Court of Appeals, again made at the last American Bar Association meeting:

"It may be that what is interpreted as disrespect for the law is nothing more than the burning desire for justice. We have moved into a new era where public opinion will not tolerate hypocrisy. And this intellectual revolution against bad laws, bad administration, and bad procedures is just as healthy in 1966 as it was in 1773."

We cannot use the slogan of "Respect for the Law" when in practice we permit any citizen to be deprived of his rightful share in the use of the law.

As was said by the new President of the American Bar Association, Mr. Orisen Marden:

"The poor are more apt to become good citizens, more apt to observe the law and to regard the law as their friend rather than their enemy, once they discover that the law protects them to the same extent that it protects the wealthiest person in the land."

It is up to us as members of the Bar to carry this message to the poor and to demonstrate its truth. We must prove that the law is equally for the weak as well as for the strong; and that we as lawyers will see to it that such is the case. If in order for us to do this it is necessary to reexamine some old precedents, or the entire doctrine of precedents itself, so be it. It has been reported the the House of Lords, Britain's Court of Last Resort, has announced that it is abandoning the rule of the "Binding Force of Precedent" in certain circumstances. At the last meeting of the American Bar Association in Montreal Mr. Justice Samuel Freedman of the Supreme Court of Manitoba said that in order to keep the law "responsive to the needs of a changing society, we cannot lean too heavily on precedents." Mr. Justice Freedman pointed out that precedent "can sometimes be pushed too far, sometimes to the detriment of justice."

I quote from an editorial in a leading Canadian newspaper, the *Chronical Herald of Halifax*, Canada, issue of August 17, 1966:

"Lawyers and Judges alike will recognize the merit in the plea of Mr. Justice Samuel Freedman of the Supreme Court of Manitoba for judicial decisions which are responsive to the needs of a changing society, and not determined too strictly by historic precedents By seeking to find similarities between the set of facts before him and the facts upon which an historic precedent-making decision was based, a modern judge sometimes finds himself applying horse-and-buggy logic to a jet-age problem. It is tempting to a judge to feel his work is done when he finds in his law books a set of facts comparable to the case he must decide Surely it would be possible for judges . . . to lay more stress on the general principles which determine historic judicial decisions, and less emphasis on precedents suitable to an earlier period, but not necessarily to these times It is particularly important for the courts to bear in mind the needs of a changing society"

In this respect I submit to you that the courts will go no further than the Bar appearing before them. If the lawyers devote themselves simply to researching cases which match on the facts, and have no understanding or desire to understand the underlying reasons and principles relating to such decisions, the courts in turn will most likely decide the cases presented to them *in the same way*. I submit to you that there has been altogether too slavish a following of precedent based simply on comparable facts, and with altogether too little discussion of the fundamental principles underlying the precedential decisions. Precedent is a valuable thing—I do not deny it—but too slavish a pursuit of precedent can lead to disaster unless the fundamental principles are reconsidered in the light of modern day problems and needs.

So also with reference to the canons of ethics which were adopted more than a generation ago, and which are now being reexamined by the American Bar Association. The canons which prohibit lay intermediaries and the solicitation of business undoubtedly were suitable in the age when they were adopted; but what about their applicability today?

At this point I would like to digress. One of my favorite stories is a story I read in *the Life of Abraham Lincoln* by Carl Sandburg.

The Illinois Central Railroad was the leading enterprise in the State of Illinois. It got into a lawsuit with the State of Illinois. I

think it involved about 5-million dollars in connection with some taxes that the State of Illinois tried to levy on the Illinois Central.

The story was that the original charter of the Illinois Central provided that it was to be perpetually free of tax. The legislature, after some years, decided that that had been a very poor thing to do and they decided to levy a tax on the Illinois Central. It got into court, as all problems in the United States do. Abraham Lincoln wrote to the administration in Springfield and tendered his services to the State. They said no, that they didn't need his services, that the attorney general of the state would take care of it. So Abraham Lincoln then wrote a letter, and it is set out in full in Sandburg's *Life of Abraham Lincoln*, to the Illinois Central Railroad saying, "Well, I tendered my services to the other side in your case and they didn't need me. I now offer my services to you. I think I can be very helpful to you."

That was entirely, I assume, within the canons of ethics of that day. Any lawyer who would do that today would probably be disbarred. I merely cite that to show you that codes of ethics, just as all precedents, are not always the same in all ages.

The wealthy, who have the means, can finance the employment of experts and specialists and can obtain the finest legal counsel on any problem. The small man, without such means, cannot do battle on equal terms with the man or concern of great wealth and power. In many cases, however, he can do this only by uniting in groups and by exercising the power of numbers to accumulate funds with which to procure equal expertise and counsel in order for him to do battle on equal terms with the wealthy and powerful. If this is necessary, it should be recognized as such and the public be given the opportunity demanded. It is my belief that it is this thought which lies behind the United States Supreme Court decisions in the Brotherhood cases and in the NAACP cases. Either the public will be permitted to join together in groups, even if thereby the old prohibition of lay intermediaries is violated, or the use of the courts in solving present-day problems will be eliminated.

It is amusing to me to note that it has been charged that the legal program established under the Economic Opportunity Act deprives the poor man of his free choice of a lawyer. What a deprivation! This choice usually amounts to little more than the ability to leaf through the yellow pages of the telephone book and indiscriminately take the first name that sounds good to him. This is similar to the argument made at the time of the minimum wage cases, that the laborer was being deprived of his right to contract freely for his labor at whatever price he saw fit, which simply meant that as a matter of fact the employer

was free to fix the price of the labor. If it is necessary in order to give every man an opportunity to obtain adequate counsel, whatever advertising may be necessary for that purpose, let it be furnished. If, in order to refer the public to competent and skilled experts in any particular field it is necessary that referral agencies be set up and advertised as such, so be it. If it is necessary to give the public the service of experts by permitting a notice to be published that a certain person is an expert in a certain field, so be it. I do not mean to indicate that the profession must engage in advertising, such as in the industrial and commercial trades, but I do indicate that it is time that the full rigor of the canons against advertising be reconsidered in the light of modern-day needs.

To show you the low estate to which our profession has now sunk in public estimation, let me quote to you the following—and this absolutely floored me when I read it in a national magazine:

“And when will the graduates of our University Law Schools be asked to take a pledge, much like the Hippocratic oath of the newly graduated medical students, that will solemnly commit them to the defense of our Constitutional liberties as lawyers in the courts, as counsel of spokesmen of unpopular, even hateful, causes, and as lawmakers in our legislative assemblies.”

Just think of the necessity of having a question like that asked today!

We who assume that we are the spokesmen for the individual and the guardians of the individual liberties are now understood by the public as being so derelict in that respect that we must be taught to take an oath that we will defend the Constitutional liberties of the citizens. What a commentary on the legal profession!

And what about our own training in education for public service? Way back in 1921 Elihu Root described the complexities of the laws as they then existed as follows:

“A wilderness of laws and a wilderness of adjudications, which no man can follow—which require not less but more ability, not less but more learning, not less but more intellectual training in order to advise an honest man as to what his rights are and in order to get his rights for him.”

Now, forty-five years later it is said:

“We have a society that is far more complex and vastly more demanding on law and legal institutions. New rights . . . have been brought into being, and old rights made subject to government regulations and legal control. New social interests are pressing for recognition . . . Groups long inarticulate . . . are asserting grievances long unheard.”

In the face of all these problems, what have we done to better prepare ourselves to serve the public? All too often we are content to continue with the hornbook law which we learned in our law schools many years ago, with no attempt whatever to educate ourselves to answer the *new* problems and the new activities which have arisen. It is not only enough that we as lawyers know the law, but in addition we must know our contemporary civilization and must steep ourselves in the myriad fields of human endeavor. I submit that this has not been done. An annual clinic in connection with an annual meeting, and perhaps an annual tax meeting is not sufficient, especially when even these meetings are attended only by a small minority of the lawyers of the state. I submit that it is required that a continuing legal education program be provided for all practitioners; not only for those newly admitted to the practice but for those long in the practice. We must provide a constant program of legal education in the new developments of the law, together with a constant program of education to make the practitioners of the law knowledgeable in the new fields of the sciences and humanities which now demand solution. I submit that it must be required that every lawyer continue his education after his admission to the Bar, and thereby continue to demonstrate his ability and his rights to continue to serve the public. If we do not do so we have no excuse for being.

At one time we were considered a learned profession, because lawyers were truly learned, not only in the narrow field of the law but in the humanities, the arts, the sciences, and in all fields of human endeavor. We have forfeited that position. I venture to make the bald statement that unless we mend our ways in that respect we will have no more right to call ourselves a learned profession. As Justice Owen J. Roberts of the United States Supreme Court once said:

"Professions exist because people believe they will be better served by licensing specially prepared experts to minister to their needs. The licensed monopolies, which professions enjoy, constitute in themselves severe restraint upon competition. But they are restraints which depend upon capacity and training, not privilege The people give the privilege of professional monopoly, and the people may take it away."

Unless we, the members of the Bar, justify our professional monopoly by demonstrating our capacity and ability to serve the public in meeting the problems of the present age, not only for the wealthy and the privileged but for the poor, underprivileged, the weak, and the distressed, the people will have the right, and will exercise it, of taking our professional status away from us.

I submit that we must give ever-increasing work and study to the program of continuing legal education as a daily, neverceasing task, as well as continued training and improvement in the mechanics of the practice of law itself. This will be difficult, but what of it? Nothing that is worthwhile is easy. Great privileges entail great responsibilities. One of the great responsibilities of the legal profession is the absolute necessity of its being capable to serve the public needs by possessing the requisite knowledge and training for this purpose.

I submit that the continued existence of our profession is more than just a selfish concern of its practitioners. I submit that the continued existence of the legal profession is of utmost importance to the continued existence of the American democracy. DeTocqueville in his book, *Democracy in America* predicted that the American democracy could continue to exist only if, and so long as, the dominant role of the legal profession continued.

Democracy, as we understand it, can only exist where the rule of law and respect for the rule of law is of paramount concern to all citizens. I would like to quote:

"It has been said that democracy is bound to wage a losing fight against communism, because democracy lacks an ideology. It is said that communism can give a man a book by Marx that ties together the reasons for his hunger and misery with articles of faith and a blueprint for a way out. Communism promises him a full and just share of what he and his society together are able to produce.

"It is said that democracy cannot expect to compete with this appeal. Don't believe it! We can agree that it is not enough to talk theoretically about the miracle of freedom to a man whose family needs food and medicine and who is apt to regard talk of freedom as freedom to suffer. But we should not regard democracy as lacking an ideology. The points of that ideology are tangible. They are meaningful.

"The ideology of democracy begins with the idea that man owns himself—owns his mind and body and the right to his full growth as an individual. He is the most important unit in his society. Nothing the government owns is as precious as he is.

"No government should have the right to tell an individual what to think or believe, or what he should do with his life. The individual, however, should be powerful enough to tell his government and the people who work for it, that they are knaves or fools, if he believes such to be the case. He can try to persuade other people to do the same."

The implementation of this democratic ideology depends wholly upon the legal profession. Only the legal profession, the Bench and the Bar, can speak up for the individual and act as his spokesman in preserving for him the human rights to which he is entitled. Only by providing for this through the rule of law can we prevent anarchy and tyranny. We lawyers can make the ideology of democracy work. If we fail, democracy fails. It is therefore the promulgation and implementation of this democratic ideology which constitutes the justification for the continued existence of the American legal profession, and of our concern that it do continue. For many years our profession did act as the spokesman for this idea; but in recent years we have grown sluggish. Our members have become powers in the business world, have become spokesman and hirelings for the powers that be, and we have tended to forget our duty to carry out and implement this democratic ideal.

In closing, I feel I can make no better expression of my sentiment and the way I feel than in quoting from the closing words of President Campbell's address 'way back in 1937:

"In conclusion, our problems are many and perplexing. May we hope for their solution? The answer is, yes The Bar will not fail. It looks to the future with confidence, realizing that such questions involve a sustained struggle and that a changing social order will not permit final and complete solution at any one time.

"So we accept the challenge, and will work together in the common cause. Our task involves improving the law, simplifying the practice, correcting abuses in the administration of justice, elevating the standards of our profession, and above all, adhering to the American principles of government. This commands unselfish work, all the talent we possess. But, with the will to do and that proud spirit that has made our profession great, we shall not fail."

The next item on our program is the report of the Secretary-Treasurer, Mr. George Turner.

REPORT OF THE SECRETARY-TREASURER

George H. Turner

Mr. President, Ladies and Gentlemen of the Association: The Secretary-Treasurer's report this year is a little better than it has been in previous years.

The books have been audited by the firm of Peat, Marwick, Mitchell & Company, checking all receipts and disbursements and finding them to be in complete order.

They report that the Total Receipts for the Association year were \$65,709.

The principal items of expenditure have been for Salaries, \$11,293; Postage and Expense, \$2,517; Publication of the *Nebraska State Bar Journal*, \$1,899; Public Service, \$5,448; American Bar Association meeting, \$6,941; Cost of last year's annual meeting, \$9,304; other items are rather small.

At the end of the Association year, one year ago, our Cash on Hand was \$8,588. The Association year closes August 31. Our Balance on Hand August 31 of this year, \$13,238, an improvement of approximately \$5,000 in our financial condition.

This audit was submitted to the Executive Council at its meeting yesterday and has been accepted and approved.

PRESIDENT GINSBURG: Thank you, Mr. Turner. In the absence of any questions, the report of the Secretary-Treasurer will be ordered received and placed on file.

The next matter of business is the report of the Executive Council, to be furnished by myself.

REPORT OF EXECUTIVE COUNCIL

Herman Ginsburg

Inasmuch as I transgressed so much upon your time in my presidential address, I am going to make this report of the Executive Council very short by telling you that the Minutes exist and you are all welcome to read the Minutes.

I am going to summarize by telling you that we have had during this past year six sessions of the Executive Council, most of them taking a full day's time. I tried to total up the various items of business that were handled and I gave up after I reached the number fifty, so I will just say to you the the business of the Association was handled.

The Executive Council tried to reconsider the functions of the various sections and committees. There has been some overlapping, some delay in the actions of certain of the sections, and so forth. We tried to revitalize the sections and also the committees. I think that those of you who happened to drop in at the House of Delegates' meeting yesterday would recognize that a full year's work was accomplished.

In addition to matters of this kind, of course the Executive Council handles all the financial affairs of the Association. We did spend, and I say this because I should be the one who is criticized if anyone is, we did perhaps spend an inordinate amount of money

on certain things. We felt it was advisable to support various other groups and institutions, the law schools, the law students, the various legal associations throughout the state. We contributed well to all of them. We spent a substantial amount of money for this Evidence book, which has been given to you here this morning, trying to provide for you a real fine meeting.

I do say this—and I am very sorry that time does not permit a full, itemized report to you of what the Executive Council has done during the past year—but I hope that all of you will be interested in checking with the Secretary and examining the six sets of Minutes of the meetings of the Executive Council, I believe they will be quite an interesting thing for you to read, and I think you may get a new concept of what your Association amounts to.

If there are no further questions, this will constitute the report of the Executive council.

The next matter of business is the report of the American Bar Association Delegate, Mr. John J. Wilson. Mr. Wilson!

REPORT OF AMERICAN BAR ASSOCIATION DELEGATE

John J. Wilson

Mr. President and Members of the State Bar Association: The American Bar Association today is enjoying probably the largest membership that it has ever had and it is continuing to grow, and I am happy to say that more than fifty per cent of the lawyers in Nebraska belong to the American Bar Association. I happen to be Chairman of the Membership Committee for Nebraska. I don't know off-hand who belongs or who doesn't belong, but if anybody wants to join, don't feel that you have been slighted because you haven't been asked; if you make your presence known I will see that you get an application, and we would like to have you join.

The American Bar now is an organization for lawyers of America. There is a program for all types of study. The sections are growing. You can find at the annual meeting any type of a study that you want to attend. I am informed by the ones who attended the Montreal meeting that the sections were well attended and well organized. Many of them are very proud that they belong to the American Bar and could attend such meetings.

The American Bar is trying to find a script for a mock trial to be given before the high schools. The script may be either criminal or civil, and cases should be simple and dramatic. They want student participation. If any of you want to write a script, or know of any local Bar that has such a script, I wish you

would get in touch with me and we would make arrangements for it to be sent to the American Bar Association, because that is the type of work that we are carrying back to the public that Mr. Ginsburg speaks about.

The usual amount of discussion and problems came before the House of Delegates at Montreal. One of them that you might be interested in is the regional meetings. Next week there is a regional meeting in Oklahoma City. The next close regional meeting in 1968 will be held in June at Denver.

Of course all of you should make plans next year to take your vacation and attend the American Bar by going to Honolulu. Reservations should be made in advance. We are trying to line up a group flight, which might reduce the fare. If you are interested, get in touch with George Turner who is trying to line up this group that will probably fly out of Omaha.

One of the items that was taken care of at the House of Delegates was the approving of the work of the National Conference of Commissioners on Uniform Laws. They approved two new Acts: One is the Uniform Land Sales Practice Act; and the other was the Uniform Post-Conviction Procedure Act. Nebraska has adopted a Post-Conviction Procedure Act, but this one might be looked into for improvement because everybody is worried about the post-conviction procedure.

They revised the Uniform Federal Tax Lien Registration Act, and modified the Uniform Deceptive Trade Practices Act, Uniform Gift to Minors Act, and Uniform Disposition of Unclaimed Property Act.

It was a great meeting at Montreal. It was a large attendance. A little French might have made it easier for getting around and understanding what was going on because we found that most of the menus were in French. One of the things that was quite noticeable was that when you went to get off the floor on the elevator, the floors were called both in English and in French. So there was quite a French predomination at Montreal. But everyone enjoyed themselves. Everyone thought they had a good meeting. We enjoyed it and we welcome all of you who are not members of the American Bar to join because I am sure it is beneficial and you will improve your practice and improve your knowledge of the law.

PRESIDENT GINSBURG: Thank you, Mr. Wilson. The report will be accepted.

The next order of business is the report of the House of Delegates, which will be delivered by the Honorable Robert D. Mullin, Chairman of the House of Delegates. Mr. Mullin:

REPORT OF THE HOUSE OF DELEGATES

Robert D. Mullin

Thank you, Mr. President. Mr. President and Fellow Members of our Association: This report was prepared about ten o'clock last night, reduced to writing, and is an attempt to highlight what took place over many hours, all day yesterday.

Your House of Delegates convened promptly at nine-thirty in the morning on Wednesday, October 12, and remained in session until five-fifteen o'clock.

Following a challenging statement by President Ginsburg, which included a recommendation that we consider a raise in dues in order to place ourselves in a position to render more service to the lawyers, and following the report of Secretary-Treasurer George Turner, detailed reports were submitted by the following committees:

- American Citizenship
- Continuing Legal Education
- Crime and Delinquency Prevention
- Judiciary
- Legal Aid
- Legislation
- Procedure
- Public Service
- Unauthorized Practice
- Administrative Agencies
- Atomic Energy Law
- Cooperation With American Law Institute
- Cooperation With Law Schools and Admission to Practice
- County Law Libraries
- Interprofessional Relations
- Lawyer Referral
- Legal Economics and Law Office Management
- Medico-Legal Jurisprudence
- Military Law
- Oil and Gas Law
- Publication of Laws
- World Peace Through Law
- Federal Rules of Procedure
- Federal Criminal Justice Act
- Rules of the Road
- Advisory to District Court Committees on Inquiry

That gives you some idea of the scope of the subjects which were gone into yesterday. The printed reports of all these com-

mittees will be found in your annual meeting program and will not be mentioned in detail by me at this time.

Two of the committees recommended that they not be continued in the coming year, these being the Committee on Atomic Energy Law and the Committee on Federal Rules of Procedure. All others will continue in existence, either as standing committees or special committees for the one year ahead.

In addition to these committee reports, reports were also received from the Trustee of the Rocky Mountain Mineral Law Foundation, the Trustees of the Daniel J. Gross—Nebraska State Bar Association Welfare and Assistance Fund, the Section on Real Estate, Probate and Trust Law; the Section on Taxation; the Section on Practice and Procedure; the Section on Tort Law; the Section on Insurance, Banking, Corporate and Commercial Law; and the Young Lawyers Section.

Time does not permit a detailed review of the acts and accomplishments of all these various committees and sections, apart from a brief reference to several of the more significant actions taken by the House of Delegates.

First, it was unanimously voted to enlarge the number of members on the Executive Committee of each Section of our Association from six to seven, for the purpose of enabling your President to designate one member to each of these Executive Committees of each Section. It was felt that a closer liaison will thus be maintained between the Executive Council and our various working Sections.

Next, after considerable discussion and debate it was voted to delete from the report of the Committee on Legislation that portion of the report which recommended passage of a statutory amendment to Section 52-102, which relates to a lien for materials furnished to a subcontractor as well as a contractor. I mention that because that Bill is contained in your printed program under the report of the Legislation Committee and was deleted by action of the House, whereas all other Bills contained in your program were favorably considered by the House.

The House approved the recommendation of your Public Service Committee that we continue to utilize the services of our Public Relations Counsel, Thomas L. Carroll, and that a continually expanded program of public service and public relations be continued in the coming year.

The Committee on Availability of Legal Services made detailed recommendations for the adoption and implementation of a plan to provide adequate legal service throughout the entire state, with

the exception of those communities which already enjoy the benefit of federally-funded programs for legal services to the poor. The proposed plan contemplates the possible formation of a non-profit corporation under the auspices of the Nebraska State Bar Association for operation of the program. Application would be made to the Office of Economic Opportunity for funds up to 90 per cent of the cost of the program with the remaining 10 per cent to be provided by our Association, either in the form of services or other type of contributions, cash or otherwise. Legal services to the poor throughout the state would then be provided by attorneys employed full time by the non-profit corporation with administration by a full-time administrative director. Private practitioners could participate on a voluntary basis and could be paid for their services to indigent clients. No cases would be accepted where a private practitioner might expect to earn an attorney fee, including contingent fee cases and probate matters. Intensive use would be made of law school students, and a lawyer referral service would be maintained for problems or persons not covered by the plan.

This particular committee has now been authorized to move ahead rapidly under the direction and leadership of its chairman, Warren K. Urbom of Lincoln.

The Section on Tort Law received general approval for a recommendation to explore the possibility of a closer working relationship with the Nebraska Association of Trial Attorneys. This is the organization, as you know, which held its seminar yesterday at the Town House.

A provocative report on bail bond procedure in Nebraska was given by attorney Larry Myers of Omaha who appeared before the House at the invitation of President Ginsburg. This thirty-minute report highlighted the present abuses and the pressing need for reform in the bail bond area. The House was quick to unanimously pass a resolution authorizing next year's President to appoint a special committee to study and make recommendations for improvements in bail bond procedures in Nebraska.

Last and not least, members of the House were invited to bring new matters to the floor for consideration and possible vote. These included a motion to remove from our annual Directory of Attorneys, which all of you receive, that part which includes the Rules of the Supreme Court, the Bylaws of our Association, the Canons of Professional Ethics and of Judicial Ethics, and the rules and standards as to law lists, all of which material now appears between pages 180 and 239 of your present Directory. All of this material is to be furnished to the members of our Association in proper form for insertion in their Nebraska Lawyers Desk Book,

and the Association will thus save the annual cost of printing some 60 pages of repetitious material that never changes from year to year. The Directory itself with the names and addresses of lawyers will continue to be published on an annual basis.

There was also passed a motion to require the Treasurer to furnish each member of the House of Delegates a copy of the Financial Report of the Association for the preceding year sometime prior to the start of our annual meeting and before the House of Delegates convene.

Finally, there was offered in written form a motion to recommend to the Supreme Court that Article V of the Rules of our Association be changed so as to add an additional Association officer whose title would be that of Executive Director. This motion contemplated that such an Executive Director would be charged with responsibility in areas of continuing legal education, lobbying, preparation and distribution of office manuals, legal economics and public relations.

After a spirited discussion which lasted well over one hour in which both sides of the motion and the details of the motion itself were closely examined, and after considering the fact that the motion, if passed, would probably involve the necessary expenditure of funds between \$25,000 and \$30,000, and we only have \$13,000 in our treasury at this time and there is no present anticipated raise in dues, the House finally voted to table the motion until the next annual meeting, but did pass a motion authorizing your President, next year's President, to appoint a committee to consider the entire question and return next year and submit recommendations to the House of Delegates at its next meeting.

Permit me to conclude my report by thanking all members of the House who participated so actively in making this latest meeting a day of enlightened discussion, friendly controversy, and significant accomplishment.

PRESIDENT GINSBURG: I want to thank Mr. Mullin for making a most excellent summarization of what went on yesterday. I think it was a wonderful job, and I am very grateful to Mr. Mullin. I was anxious for the membership to know something about the work of this organization. I think you may now have some understanding of it. The report will be ordered received and placed on file.

The next item of business is the report of the Judicial Council. Your program calls for it to be delivered by Honorable Edward F. Carter, Judge of the Supreme Court of Nebraska. Judge Carter, unfortunately, is ill. He has delegated the Honorable Herbert A.

Ronin, Judge of the District Court of Lancaster County, Nebraska, to deliver the report on behalf of the Judicial Council, and I now call upon Judge Ronin.

REPORT OF JUDICIAL COUNCIL

Herbert A. Ronin

Mr. President and Members of the State Bar Association: I sincerely regret that the temporary physical ailment of our distinguished Chairman, the Honorable Edward F. Carter, is the reason why I am making this report for him and in behalf of the Judicial Council. Those of us who have been privileged to be members of the Council bear witness that under the leadership of our Chairman it is truly a working Council, embodying a great deal of research and study.

The avowed purpose of the Judicial Council is to improve court procedural matters in the administration of justice and to serve as a strong right arm of the Courts to implement recommendations to the legislature. The Council is an instrumentality to project into realization those suggested improvements contained in the stirring address of our President a few minutes ago.

The Judicial Council carefully examines all deficiencies in legal procedures that are submitted to it from any source and welcomes at all times suggestions from members of the Bench and Bar. Those which we determine meritorious are prepared in legislative bill form and processed by the legislature. In the 1965 session of the legislature the Judicial Council prepared and proposed fifteen bills, all of which were enacted into law. One of these is a proposed Constitutional Amendment to provide a workable procedure for removing or retiring unfit judges and which will be voted on at the next election as Amendment No. 7.

There has been no session of the legislature since our report a year ago, so this report necessarily will not reflect any fruitage of our work sessions. The Council has about a dozen proposals currently under consideration, including proposed third party practice legislation and the so-called "Long Arm" Statute relating to tort liability of foreign corporations. The Council will meet again prior to the 1967 session of the legislature. I talked with our Chairman last evening and he says we will be meeting yet this month. We will meet several times, of course, during the next legislative session. If there are new proposals for our consideration to be submitted to this coming legislative session, it will be necessary that the Council receive them in the immediate future.

PRESIDENT GINSBURG: Thank you very much, Judge Ronin. The report of the Judicial Council will be received and ordered placed on file.

You will recall that Judge Ronin referred to Amendment No. 7. It is not on the printed program but I think it is appropriate for me to exercise my power as President at this time to call upon Jim Haggart, who is on the committee sponsoring Amendment No. 7, to make a report concerning the progress and the work of that committee. Mr. Haggart!

CONSTITUTIONAL AMENDMENT No. 7

James Haggart

Thank you, Mr. Chairman. Fellow Members of the Association: As Judge Ronin has indicated, the proposed Constitutional Amendment No. 7 was adopted with the support of the Judicial Council in the last session of the legislature as Legislative Bill 834 and will appear on the ballot on November 8 as proposed Constitutional Amendment No. 7.

Acting on recommendations from the Executive Council, the President of the Association in July appointed a special committee of the State Bar Association to encourage and support the adoption of this Amendment. Mr. Flavel Wright of Lincoln is Chairman of that special committee, and Mr. John Ford of Omaha is the Treasurer. We have so far been in the process of preparing information pieces which I will discuss in a minute for distribution to the general public. But I think our first problem is one of familiarizing the members of the Association itself with the content of this proposed Constitutional Amendment.

In this connection you have received communications from the State Bar Association, but very briefly I would like to review this proposed Amendment with you so that we will all have at least a sketchy knowledge of what it provides for.

The Amendment establishes a procedure for the removal of judges of any court in the state for willful misconduct in office, willful disregard or failure to perform their duties, habitual intemperance, conviction of a crime involving moral turpitude, disbarment, or permanent mental or physical disability.

It provides for a single Commission on Judicial Qualifications, which is constituted in a manner similar to the Merit Plan Commissions which are now in existence and in action throughout the state. This Commission has power to make investigations of judges upon the request of any citizen and to make recommendations,

for removal or retirement, to the Supreme Court. The Supreme Court may appoint masters to assist the Commission in taking testimony. It may take additional testimony in evidence, and the Supreme Court is vested with the final and only authority to accept or reject the Commission's recommendations.

Now if the Commission, in the course of its investigation, finds that a complaint is without merit, then no further action will be made to the Supreme Court. Only in those cases where the Commission does find merit in the complaint will a recommendation be made to the Supreme Court.

The makeup of the Commission: It consists of two Supreme Court judges; two district court judges; one county judge; one municipal judge; two lawyers; and two non-lawyers. All of the judges are proposed to be appointed by the Chief Justice of the Supreme Court. The two lawyers are to be appointed by the Executive Council of this Association; and the two lay members to be appointed by the Governor of the state.

We believe that this proposed Amendment will provide a workable procedure for the removal of judges far superior to the only available procedure now, which of course is impeachment.

A similar system has been in operation in California for about six years and it has proved very satisfactory there. The experience there has been that when a meritorious complaint is presented to the Commission and the judge is asked to appear before the Commission, in many instances a satisfactory solution is worked out privately and in confidence with that judge for his retirement, if he is found to be unfit, without embarrassment, without publicity, and without any public clamor.

I failed to mention that all proceedings before the Commission are of a confidential nature and are in the nature of privileged communication.

Now, to the work of the Committee, the Committee was constituted in July. We have had several meetings. Another meeting of the State Bar Committee is scheduled for this afternoon.

We have a limited budget with which to work. We have prepared one piece, which I understand will be available for distribution here either later today or tomorrow, and I urge each of you to take as many of these little pamphlets as you think you can use. This is a little Question and Answer pamphlet entitled, "How Can You Have Responsibility in Assuring Qualified Judges?" It is intended primarily for the information of the general public. It is in Question and Answer form and sets forth the highlights of the proposed Amendment.

We will also have available to you a reprint from the July 1966 issue of *Reader's Digest* an article entitled "Is That Judge Fit to Sit?" That article starts out with a series of horrible examples, from other jurisdictions, and points up the need for a workable system, not only for the election or selection of judges, but also for their removal or retirement. Of course in Nebraska we are half-way home because we have the Merit Plan system in operation, and the point of this article would be to point up the need for completing our system by providing a workable method for removal or retirement of judges. I urge each of you to take as many of these two documents with you as you think you may need in passing the word to your clients.

I am concerned, and I think the other members of the Committee are concerned, because this isn't a controversial amendment—we aren't aware of any organized opposition to it—and there are so many controversial issues that will appear on the November ballot that I am afraid this one could just get lost. So I think we each have a responsibility to familiarize ourselves with this Amendment, and then if we find it desirable, to actively urge our clients to support it and to vote for it in November.

The Committee has made plans for radio, television, and press coverage of the Amendment but I think the most effective method of encouraging its adoption is by each of us going to our clients with the message and urging them to act favorably.

I want to point out that this proposed amendment is not aimed at any specific problem or at any specific individual presently holding judicial office in the State of Nebraska. It seems an opportune time when the situation is so good to adopt this procedure so that it will be available in the event it is required in the future.

I don't believe that time permits us to entertain questions from the floor. I urge each of you who requires additional information or has questions about this Amendment to contact one of the members of the Committee, many of whom will be here at this meeting. As I mentioned, Flave Wright is the Chairman and John Ford of Omaha is the Treasurer; in addition Charlie Adams from Aurora, Vic Bruckner from Lincoln, Bob Crosby from Lincoln, Jim Knapp from Kearney, Jim Land from Ogallala, Vance Leininger from Columbus, Bob Moran from Alliance, Harold Rock from Omaha, Joe Vosoba from Wilber are members of this State Bar Committee.

Jim Fitzgerald as President of the Omaha Bar Association has named a special committee of the Omaha Bar Association to work on this issue. He made me Chairman. In addition to the

members of the State Bar Committee, all of whom are on the Omaha Bar Committee, Sam Jensen of the Omaha Bar, and Harry Welch, who is our President-Elect of the Omaha Bar, are on this committee.

I think we've got an extremely desirable amendment here. I think our problem is going to be in stimulating public interest in it and in getting the word to the electorate. In this connection I urge each of you to do everything within your power to urge your clients and those other laymen with whom you have contact to familiarize themselves with this Amendment and to vote favorably on it in November.

PRESIDENT GINSBURG: Thank you Mr. Haggart.

The Chair will now recognize Mr. Julius Cronin for a statement concerning the Nebraska Bar Foundation. Mr. Cronin!

NEBRASKA BAR FOUNDATION

Julius D. Cronin

Mr. President, Ladies and Gentlemen of the Bar: Back in 1962, I believe, the House of Delegates of the Nebraska State Bar Association authorized the past President of the State Bar Association to organize a Nebraska State Bar Foundation. In 1963 such a Foundation was organized and incorporated and is now in existence.

The purpose of these short remarks is to call your attention to the existence of the Foundation and to ask for your support. The arrangement now provides for three classes of membership: first, a Member with annual dues of \$10.00; second, a Sustaining member with annual dues of \$25.00; and third, a Fellow with dues of \$1,000 payable \$100 a year over a period of ten years.

Up to this time it has not been definitely established or determined the uses to which the funds will be put. It has been suggested, however, that the funds might logically be used for some of these purposes: For research projects, such as (1) the Nebraska Annotations to the Restatements; (2) Rules and Regulations of the Nebraska State Administrative Agencies; (3) Indexing of Attorney General's Advisory Opinions; (4) Uniform Model Forms. My understanding is that Judge McCown is exploring with his colleagues and the heads of various state administrative agencies and departments, and with the Attorney General the items that I have just mentioned, and to consider generally what other research projects might be desirable.

Secondly, supplementary grants designed to assist in obtaining and retaining distinguished teachers of law at the University of Nebraska and at the Creighton School of Law.

Thirdly, scholarship awards in one or more of three forms: (1) awards and prizes for scholastic achievement; (2) law student loans similar to the ABA program; and (3) grants to and fellowships for needy law students.

Needless to say, there are many other possible purposes for which the funds could be utilized. Up to the time of this meeting I understand that the Foundation has somewhere around \$10,000 to \$12,000. Since the meeting has started here I understand several new members have signed up. Just how much additional money that is going to provide, I can't tell you, but in any event there is or will be a stand out by the registration desk in charge of one of the past Presidents where every member of the Association can join the Bar Foundation in any one of the three memberships that he may elect.

Someone has said that every professional man owes a responsibility, intellectual and financial, to his profession to do something for it. So now here is the opportunity to do something for your profession by joining the Foundation in any one of the three membership programs. This is an invitation to all members of the Association and, indeed, it is an appeal to the members of the Association to join before you go home.

PRESIDENT GINSBURG: The next item of business is the announcement as to our Group Life Insurance. The Chair will recognize Mr. Walter Black for a few words of explanation. Mr. Black!

ANNOUNCEMENT AS TO GROUP LIFE INSURANCE

Walter Black

Mr. President and Members of the Nebraska Bar Association: The few points that I wish to point out to you were contained in your October *Nebraska State Bar Journal*. It has to do with the group life coverage that your Association enacted eight years ago.

Since that time beneficiaries have received just over \$700,000 in death claims.

At this time there is an open season in joining, if you are now not a member. To those who are just beginning their career, through the ages of 35 to 40, the premiums as you have noticed here, and which I have in this brochure which you will find out

on a table in a booth just around the corner, are so low that you can hardly afford not to have it.

For those of you who have gray hairs, reaching that mid-life stage, you may now feel a problem of what to do because with your personal plan, at age 65, as you well know, the coverage begins to drop off. The Company, the John Hancock Mutual of Boston, Massachusetts, thinks it has a suggestion to make to you that might be of great interest. I will be available this afternoon at the booth and tomorrow morning and would be very happy to try to answer questions and give you any desired information that you might wish.

— This open season starts today, the 13th of October, and it closes December 1. The application blanks that are simple to fill out, I have an ample supply. If you will get that to us at George Turner's office or to myself between now and December 1, we will see that the coverage starts for you, unless you have passed age 50; then there probably would be required a medical examination. Those are some of the details that I will be happy to explain further, Mr. President, and to you members.

PRESIDENT GINSBURG: Thank you, Mr. Black.

The next order of business I know is quite breathtaking. We all want to know who the new officers are. I now call upon Secretary George Turner to make the announcement of the new officers of the Association.

ANNOUNCEMENT OF NEW OFFICERS

George H. Turner

Mr. President and Members: One year ago at your 1965 annual meeting you chose M. M. Maupin of North Platte as your President-Elect. He will become your President just as soon as Herman gives him his gavel.

At a meeting of the Executive Council held in June, George B. Boland of Omaha was nominated as President-Elect, and John J. Wilson of Lincoln was nominated as member of the House of Delegates of the American Bar Association representing this Association.

No opposing nominations were made, so they are automatically elected to their respective offices.

PRESIDENT GINSBURG: Thank you, Mr. Turner.

As we began our meeting we recognized our obligations to the Divine. As we close our meeting we recall with honor the memory

of those of our group who have passed on. The report of the Committee on Memorials will be delivered by the Honorable George B. Hastings.

REPORT OF COMMITTEE ON MEMORIALS

George B. Hastings

Mr. President, Ladies and Gentlemen of the Association: The following report of the Committee on Memorials is respectfully submitted to you:

To everything there is a season,
And a time to every purpose under the heaven:
A time to be born and a time to die;
A time to weep and a time to laugh;
A time to mourn and a time to dance.

The wise and venerable author of the Book of Ecclesiastes observed that all life is subject to change; that in the endless flow of time and events there is in every thing a season.

It is our sad duty to record the names of those members of the Nebraska State Bar Association who have passed from this life during the past year. Since the meeting of the Association one year ago, forty-eight members have answered their summons to the life hereafter. For them who have gone, it is the last and final transition from life to death, and to the new life beyond the grave.

In every field of human experience changes inevitably occur. In the span of their professional careers our departed brothers at the Bar witnessed profound changes in the law. For them, as for us, the living, it was a constant struggle to keep abreast of these changes. Lawyers are always alert to new practices and procedures. In the field of criminal law, new statutes and recent court decisions have made obsolete rules and administrative procedures which had long been accepted when our brothers began the practice of law. The concept of civil rights has taken on new dimensions. Revisions of statutory law and late decisions overruling earlier cases have brought new and broader rights to minority groups and to all groups. Old precedents have been swept away. Commercial law and labor law have been rewritten. Fundamental changes, legal, social, political, and commercial, all these and more have occurred during the lifetime of these Nebraska lawyers whose memory we now honor.

They were distinguished lawyers. They were members of our Bar in high standing. We knew them. We walked and talked together. They were deeply concerned with the problems arising from the maze of changed laws and sweeping decisions of courts. We had

much in common with them. We practiced in the same courts. We studied the same statutes. We analyzed the same cases.

Now they are gone. We shall see them no more. Their passing leaves an empty void in our hearts, and there lingers now only the memory of their lives, their contribution to establish law, to the administration of justice, and to the preservation of freedom under law. We are grateful for them and their lives among us. We are saddened by the thought that they have departed from our midst.

Engraved on the capstone of the beautiful and imposing American Bar Center in Chicago are these words:

To Uphold and Defend the Constitution of the United States, Maintain Representative Government, Advance the Science of Jurisprudence, Promote the Administration of Justice and the Uniformity of Legislation, Uphold the Honor of the Profession of Law, Promote the Public Good.

The words engraved on this stone might well serve as the epitaph for these distinguished Nebraska lawyers who have served their time and who have now gone to their final reward. We commend their spirits to Him from whom they came.

The Lord giveth and the Lord taketh away.
Swift to its close ebbs out life's little
day.

Earth's joys grow dim, its glories pass
away.

Change and decay in all around I see,
O Thou who changest not, abide with me.
I fear no foe, with Thee at hand to bless,
Ills have no weight and tears no bitterness.
Where is death's sting?
Where, grave, thy victory?
I triumph still,
If Thou abide with me.

Ladies and gentlemen, let us now stand in
reverence and in silence as the roll is called:

Willard L. Atkinson, Omaha
E. D. Babcock, West Hartford, Connecticut
Stanley Bartos, Wilber
Charles Beckenhauer, Sr., West Point
Edith Beckman, Omaha
Fred J. Cassidy, Lincoln
John L. Chew, Omaha
Morris D. Cook, Omaha
Cyril L. Coombs, Maddox, Maryland
E. B. Crofoot, Omaha
Roscoe B. Davidson, Beatrice
A. Z. Donato, Omaha

Raymond J. Fogarty, Kansas City, Missouri
 Augustus I. Hasskarl, Green Lane, Pennsylvania
 Ernest M. Johnson, Chadron
 D. L. Jouvenat, Lincoln
 Theodore L. Kowalski, Omaha
 Herman E. Kuppinger, Harlingen, Texas
 Loren H. Laughlin, Washington, D.C.
 George W. Leamer, South Sioux City
 James W. McGan, Omaha
 James G. McIntosh, North Platte
 Richard Mackey, Denver, Colorado
 J. Gerald MacVeigh, Bethesda, Maryland
 Herbert H. Meile, Omaha
 Henry F. Meyers, Omaha
 George H. Milliken, Los Angeles, California
 Frank J. Munday, Red Cloud
 Sterling F. Mutz, Lincoln
 Ray W. Nedrow, Washington, D. C.
 I. J. Nisley, North Platte
 James M. Patton, Omaha
 Walter B. Phelan, Cheyenne, Wyoming
 George W. Pratt, Omaha
 Franz C. Radke, Lincoln
 E. L. Randall, Kearney
 Harold Rice, Neligh
 Carl E. Sanden, Lincoln
 Harold H. Schaaf, Lake Wales, Florida
 Elwin W. Sherrard, Lincoln
 Frank B. Sidles, Lincoln
 Grace H. Simpson, Hastings
 Floyd A. Snyder, Tulsa, Oklahoma
 Eva L. Spencer, Indianola
 Merlin L. Springer, Lincoln
 Varro E. Tyler, Nebraska City
 M. H. Worlock, Kearney
 Paul D. Tillett, Jr., Princeton, New Jersey

This constitutes the report of the Committee, Mr. President.

PRESIDENT GINSBURG: Thank you, Mr. Hastings. You may all be seated now.

Before I recess the meeting I want to call your attention again to the luncheon this noon. You may be amused at a note which I just received. I sure hope that our speaker at this noon luncheon will not take it amiss that I lightly treat the tragedy that befell him, but I think you would all be interested in knowing just through

what hazards our speaker went in order to be with us this noon. This message was just received by me:

"Glenn Winters has arrived and is in Room 125. He went through a drenching downpour at O'Hare and is in the room without a suit on until he can get it pressed and back to him. He will be down here just shortly before 12:15."

Recognizing what our speaker has gone through, I am sure we will all be more than anxious to hear from him.

In the absence of any further business, the meeting will stand recessed until four-thirty o'clock Friday, October 14.

[The session adjourned at twelve-five o'clock.]

ASSOCIATION LUNCHEON

October 13, 1966

The annual Association Luncheon, held in the Sheraton-Fontenelle Ball Room, was presided over by President Ginsburg.

PRESIDENT GINSBURG: I want first to introduce to you the gentlemen sitting at the head table so you will know who they are. I am going to ask, in the interest of conserving time, that you do not applaud as each one is presented to you, but that you save your applause until the end. Then if you want to give a round of applause to all of our honorees, that will be very fine.

At my extreme left sits the gentleman who is anxiously counting the minutes until he takes over in my place, your new President, Mr. Murl Maupin.

Next on my left is the representative of the Iowa Bar Association. Their President could not be present but they wanted to show that they did think of us, that they did appreciate our inviting them, so they sent the man who, I have been told, is called in Iowa "Mr. Bar Association"—Mr. S. David Peshkin of Des Moines.

Second on my right is the newly elected officer whom you've just elected this morning as your President-Elect, Mr. George Boland.

On Mr. Boland's left is Mr. H. T. Fuller, President of the South Dakota Bar Association.

Next to Mr. Fuller, Mr. Clayton Davis, President of the Kansas Bar Association.

Next to Mr. Davis, Mr. Warren Welliver, President-Elect of the Missouri Bar.

At the extreme end, all by himself, Mr. George Guy, President of the Wyoming Bar.

I don't believe in the old cliché about saying "I am about to present a speaker who needs no introduction," and then launching into a long harangue of introduction. Either I am lying when I say he needs no introduction or I am trespassing upon the speaker's time. In this particular instance I'll say, and I will live up to the statement, I am presenting to you a speaker who needs no introduction. He is, if anyone, responsible for the adoption in Nebraska of the so-called Missouri plan for judges. I understand he is an ex-Nebraskan; that, I didn't know. Why he left Nebraska, I will never know. At any rate, he has graciously consented to come to us today and to speak to us on "Current Trends in Court Improvement."

I present to you Mr. Glenn R. Winters, Executive Director of the American Judicature Society.

CURRENT TRENDS IN COURT IMPROVEMENT

Glenn R. Winters

Mr. President, Distinguished Guests, and Ladies and Gentlemen: I thank you for the privilege of being with you here today. I think you might perhaps have said, instead of "needs no introduction" "was already introduced." There is a verse of Scripture which says, "The things that are whispered in the bedchamber shall be shouted from the housetops." I think when the Bible is put into modern English that will be recast, that "What is said over the telephone from a hotel room will be broadcast over the P.A. system." I'm the fellow who got caught in a rainstorm this morning. I'm dried out now, as you can see.

Other details of my private life, if you are interested, you can get from a fellow around here named George Turner, who has known me for a long time. I do not recommend that you check Dean David Dow, however. He has known me much longer than George Turner, and he knew me back when he and I were students together at a certain law school over in Ann Arbor, Michigan. And he might tell you too much.

I have not been back in Nebraska as frequently as I would have liked during the years since they took me away. The reason they got me out of Nebraska was because they sneaked me out at the tender age of five years, and it was many years before I ever got back. Most of the time when I have been in Nebraska since then hasn't been on the ground; it has been about six miles up from where I could see the shining curve of the Platte River, so

I would know I was in my native state, on my way to or from the West Coast.

I have always had reason to be proud of my Nebraska origin. I was born with a love of the great open spaces. I feel sorry today for people who have never stood out there where the distance that you can see is limited only by the keenness of your vision, and breathed the pure air that flows out of those winds.

I am proud that my state has made governmental history in being the first to have that great institution known as the unicameral legislature. A couple of years ago Lieutenant Governor Sorensen was speaking on that subject at a meeting I attended in Milwaukee, and I have never forgotten his expressive figure of speech. He said that trying to sell the unicameral legislature was like peddling naughty photographs on the streets of Paris; everybody wants a peek but nobody wants to buy.

I am especially proud of Nebraska because it has demonstrated its leadership as a progressive state in my own special field of judicial administration. Immediately after the 1959 National Conference on Judicial Selection and Court Administration, the Nebraska delegation to that conference went home and started work at once on the first state citizens' conference, which was held in Lincoln just about seven months after that. That conference, in turn, was directly responsible for the approval by the legislature, and subsequently by the voters, of the Nebraska Merit Plan for selection and tenure of judges. Since then other states have followed along until today the roll of states that are using the Merit Plan in whole or in part are all a part of their state judiciary, now numbers something over a dozen, and there are more that are almost sure to join their ranks in the very near future, because on November 8 three states, Colorado, North Dakota, and Kentucky, all are going to pass on constitutional proposals which include merit judicial selection on a basis approximately comparable to yours.

I suppose it would be as superfluous as carrying beans to Boston to describe that plan to you Nebraska lawyers, but for the sake of any visitors who might be in the room I will just say very briefly that it is a plan where the filling of judicial vacancies by nomination of a non-partisan nominating commission composed of lawyers, judges, and laymen, followed by appointment by the Governor, with the judges so nominated and appointed thereafter going before the voters at intervals on the sole question of their retention in office without competing candidates and in case of rejection with the resulting vacancy filled as before by nomination and appointment.

Day before yesterday in Chicago I had a telephone call from a lawyer friend in Louisville, Kentucky, who has been active in the campaign for adoption of the constitutional proposal that is pending there now. With that election less than four weeks away, that campaign is beginning to get warmed up about now, and he said someone the other day had published a criticism of the Merit Plan on the ground that its provision for removal of judges by vote of the people had almost never been used, and therefore it was only a useless appendage to the plan.

I was able to point out to him that since the plan is primarily, and most importantly, a *selection* plan, it would be more subject to criticism if that removal feature had been used a lot than if it wasn't.

Certainly the objective of an adequate judicial selection and tenure plan should be to get well qualified judicial talent on the bench and then *keep* it there. The removal *should* be infrequent, and that is just what they have been in Missouri, Alaska, Iowa, Nebraska, and the other states that are using the plan. In fact, the only Missouri judge ever to be removed by this means in twenty-six years of experience in that state was a hold-over from the previous plan who had not been selected under the Missouri Plan.

I suggested to my Kentucky friend on the telephone that the fact that the elective removal procedure had been used at all was evidence that it is a real and useful part of the plan and not a mere appendage; while the fact that it has been used so rarely is evidence that the selection part of the plan is doing a good job, that it is getting the right kind of men on the bench, men who are regularly retained in the office, and ought to be.

My friend agreed that this was a pretty good answer to the criticisms that he had encountered, but nevertheless thoughtful people for a number of years in a number of states have realized that this is really not quite the whole story as far as judicial discipline and removal is concerned. Judges are people, just like the rest of us, and sooner or later the time has to come, in fact *has* come, when a bad apple turns up, a man who either should be removed from office or should have some kind of disciplinary action short of removal. Now, this is bound to be a rare event, and with the Merit Selection Plan it can be expected to be exceedingly rare, but no system ever can be designed that will guarantee that it won't happen.

Furthermore, the very best judges grow old and they are subject to various forms of mental and physical disability which may also require their removal, and sometimes this sort of thing is a lot more difficult to deal with than misconduct. It is a whole-

some and good thing for the voters to have that power of removal of judges, which they have in Missouri and other states. It is a known fact that the voters normally do vote to retain their incumbent judges in office, and if they do have a collective negative opinion with respect to one judge strong enough to vote him out, he probably *ought* to go. However, there may be the very weightiest of reasons why a certain judge ought to be removed that are not known to the electorate, and that ought not to be made known publicly. The vote of retention in office is a good thing as far as it goes, and it keeps in the voters' hands an important governmental power that is worth keeping, but it is not the whole answer.

New York made a start some twenty years ago by establishing what they call a "Court on the Judiciary" composed of judges drawn from all levels of the state judiciary to hear and determine in a judicial manner charges against judges.

In 1960 California improved on that pattern with the establishment of its Judicial Qualifications Commission composed of judges from all ranks of the judiciary, plus a few lawyers and laymen, and with permanent offices and staff to receive and investigate all kinds of complaints against judges. That Commission is the constant recipient of complaints from all kinds of sources. Most of them are without substance, and they are dismissed without action of any kind. The bulk of these are simply disappointed litigants who can't accept the fact that they didn't win and they are looking for somebody on whom to pin the blame. A few of them are found worthy of investigation. Some of them are disposed of by means of an informal word to the judge. Lawyers and litigants in many states suffer along with judges who are neither dishonest or incompetent but who make people around them miserable by their rudeness, arbitrariness, and inconsiderateness. In most states there isn't anybody to take them to task for things like this, but the California Commission does, and has done some good work in that respect.

A few of the complaints get to the stage of formal hearing and action, and this may end with a recommendation to the state's highest court. The court has the final power of removal, which it has not yet exercised, but some judges have resigned rather than let the proceedings run their full course. There are over a thousand judges in the State of California, and that record is pretty good. The number of offenses has been commendably few.

Within a year or two after the California Commission went into operation judicial administration leaders around the country came to realize that this constituted what had been hitherto the missing link in the judicial selection and tenure picture. Here was

a way to supplement tenure subject to the non-competitive vote of the people, with an effective removal plan that would serve four functions: (1) it would provide a reasonably sure means of getting rid of the "bad apple" of a judge in the rare case when that would be necessary; (2) it would provide a discreet and inconspicuous means of easing out of office the good judge whose best days are over but who doesn't realize it, or for other reasons is not willing to resign or retire voluntarily; (3) it would protect the accused judge from the embarrassment and humiliation of having to endure in silence the public airing of charges which, for his protection and the dignity of the judiciary, should be dealt with in private; and (4) it would provide a place for people with a grievance, whether real or fancied, to tell their story and feel that they would at least have a hearing.

The shocking spectacle a couple of years ago in Oklahoma of several judges of that state's highest court being indicted and convicted on charges of corruption hastened tremendously the nationwide acceptance of the California Commission Plan. Texas went right to work on it. They have already submitted it to their voters and it has been approved and is now set up and in operation. The Oklahoma voters last spring approved a "Court on the Judiciary" which is modeled after the earlier New York one.

In addition to the three states I mentioned that are voting on the Merit Selection and Tenure next month, there are four states that are going to be voting on the California-type judicial discipline and removal plan. Those four States are Maryland, Kentucky, Florida, and your own State of Nebraska. And again I am proud to say that my native state is taking its place among the leaders in adoption of this significant judicial reform measure.

Now, I suppose again it is probably superfluous to recount to you Nebraska lawyers the details of this plan that is going to be voted on here next month, but again for the sake of the visitors who may be among us, I will just briefly summarize what it will do.

The membership of this Commission will consist of six judges from representative courts; two members of the Bar; and two citizens. A justice or a judge of any court of the state may be retired for a physical or a mental disability seriously interfering with the performance of his duties, if such disability is determined to be permanent or reasonably likely to be permanent.

In addition to involuntary retirement, a justice or judge of any court may be removed from office for (a) willful misconduct in office, (b) willful disregard of or failure to perform his duties, (c) habitual intemperance, (d) conviction of a crime involving

moral turpitude, or (e) disbarment as a member of the legal profession entitled to practice law in the State of Nebraska.

Any citizen of the state may register a complaint and the Commission is empowered to investigate and in its discretion order a hearing before it or request the Supreme Court to appoint one or more special masters who will be judges of courts of record to conduct the hearing. The Commission then has the privilege of recommending to the Supreme Court that the justice or judge be involuntarily retired or removed from office.

The Supreme Court will then review the record of those proceedings, and it may permit the introduction of additional evidence. It may order retirement or removal, or it may reject the recommendations of the Commission. This is the situation in California. The one time that a recommendation of removal has gone to the Supreme Court of California, the Supreme Court heard the case and rejected that recommendation. That is why no removal has yet taken place under that plan.

But this Nebraska plan, as you can see, is a fairly faithful copy of the California plan and for that reason there is every reason for confidence that the satisfaction of the Californians with it after six years of experience will be duplicated in this state.

I understand that there is a large number of amendments on the ballot in this state next month, and I think this amendment is fortunate to have the lucky number, No. 7. I hope that that will be an omen that will auger its success.

Approval of this on November 8 will give Nebraska another clear "first" in one very important area of judicial reform. Missouri was the first state to adopt the Merit Plan at all. Alaska was the first to apply it to its entire trial and appellate bench. Iowa was the first to do this by constitutional amendment. Dade County, Florida was the first to do it for a court of limited jurisdiction. New York was the first to adopt a "Court on the Judiciary." And California was the first to have a Judicial Qualifications Commission. All of these are important "firsts" of which these states might well be proud. But on November 8, if the amendment passes, Amendment No. 7, Nebraska will be the first state to have adequately covered the entire judicial personnel spectrum of nomination, appointment, election, discipline, and removal of judges. Nebraska judges themselves will be the most important beneficiaries, but all citizens of the state as well will be beneficiaries of this pioneering venture in judicial personnel.

I might add at this point that the California Commission plan is not something that was forced on the judges of that state and

is held as a club over their heads. On the contrary, the California judges themselves realized the need for this thing and they, through their organization, the Conference of California Judges, took the initiative in getting that plan drafted and presented to the voters for adoption.

I mentioned earlier that in June, 1960, Nebraska held the first state citizens' conference on court modernization following the National Conference of 1959. I think you might be interested in a brief rundown on how that series of citizens' conferences has developed since then.

The second state conference took place in Columbus, Ohio, in March, 1961. A few weeks after that conference the Joint Committee for the Effective Administration of Justice was organized, with Justice Tom C. Clark of the United States Supreme Court as its Chairman. And with the aid of a grant from the Kellogg Foundation of Battle Creek, Michigan, an aggressive nation-wide program was started of court modernization conferences and trial judges' seminars. After three years the country had been blanketed with the seminars, and the National College for State Trial Judges was established, and a total of seventeen citizens' conferences had been held.

On December 31, 1964, the Joint Committee came to an end, and the American Judicature Society, which had been conducting the citizens' conferences for the Joint Committee, then took full charge of them in cooperation, of course, with state and local Bar Association and other local sponsors and with continuing support from the Kellogg Foundation.

The pace of that conference program has been intensified, and 1966 is going to be our biggest year of all. Four of them were held on four successive week ends last month alone: In Minnesota, North Dakota, Wyoming, and Montana. The first three, in Tennessee, Georgia, and Idaho, had been held earlier in the spring. Two more will be held next month in Washington and Utah, and the tenth one will be in Alabama the second week of December.

The North Dakota Conference last month was noteworthy, in that it was a repeat performance. A prior North Dakota Conference in 1964 had resulted in the submission of a judicial selection and tenure plan similar to yours to the voters in next month's general election. The September Conference was a followup one to acquaint citizens and the outstanding citizen leadership of that state with that proposal and to lay the foundation for a campaign for its adoption. This was the third repeat conference; the second one was held in Ohio in 1963.

Another one is being planned for Nevada next year. Other States in which citizens' conferences have been held have included Wisconsin, Oklahoma, Colorado, Pennsylvania, Louisiana, Texas, Indiana, New Mexico, Kansas, New York, Florida, Arkansas, South Dakota, and Missouri. Future conferences are in the planning stage now for Mississippi, North Carolina, Arizona, West Virginia, Hawaii, and a number of other states.

I have emphasized judicial selection and tenure and judicial discipline and removal, and these have been taken up in these various conferences I think without exception, but the subject matter of the conferences in all instances is tailor-made to the individual needs of the state as determined by the responsible leadership of the state.

In Tennessee one conference topic was "Civil and Criminal Rules." In New York, "Court Congestion and Delay." In Washington next month there is going to be one on "Appellate Court Problems." In Wyoming last month a special conference topic was "Judicial Compensation and Retirement."

Since Wyoming is your next door neighbor, and that one was so recent, you might be interested in a few more words about that conference. It was held on the University campus in Laramie. It was officially endorsed and sponsored by Governor Hansen. The invitations went out on his executive office stationery.

Justice Tom Clark addressed the opening session on Thursday evening, September 22. Ed Murane, former President of the Wyoming Bar and former Chairman of the American Bar Association, House of Delegates, gave the conferees an opening explanation of the Wyoming judicial system today.

The next day Jack Healy, recent retired Judicial Administrator of the State of Colorado, outlined for the conferees what Colorado had done about modernizing its minor court systems. Jack Frankel, Executive Director of the California Judicial Qualifications Commission, gave a lecture explaining that Commission's work and operations. Judge Leslie Anderson of Minneapolis gave a talk on Judicial Salaries and Retirement Plans, and Judge Harry Hall of Kansas City, Missouri, described the twenty-five years of experience in that state under the Missouri Plan for Selection and Tenure of Judges. These lectures were interspersed with group discussions on each of those topics, plus a lecture and discussion on possible action programs.

At the end the conference approved a strong consensus statement which was drafted by the reporters of the group discussions which called for citizen action to achieve certain specific improve-

ments which the conferees felt were needed. One of these was to add at least one judge to Wyoming's four-judge Supreme Court in order to do away with the nuisance of two-to-two decisions. Another was adoption of a constitutional amendment, which is now pending and will be voted on next month, to take the justices of the peace out of the constitution and make possible legislative enactment of a modern minor court system.

A dozen members of that conference were selected by the conferees meeting in their groups to be members of a Steering Committee to go to work on translating those objectives into reality. They adopted the putting over of the minor courts amendment as their first project, and since the conference they have been very busy establishing county committees throughout the state and hard at work plugging for its adoption.

George Guy has been in close touch with them, as he was throughout the planning stages of the conference, and he can tell you more about what they are doing. That same amendment failed to pass in 1962, and I think that the extra push that the citizens' committee which came from the Wyoming citizens' conference is giving to it is going to be the difference in 1966.

Other conferences have followed about the same pattern. Most of them have produced similar citizens' organizations for followup action.

Just two days ago a regional conference on a followup basis was held by that citizens' group in Johnson City, Tennessee, and a series of seven one-day followup conferences is being held this month and next month on a regional basis throughout the State of Idaho.

Whether or not a second Nebraska conference should be held is a question that only Nebraska lawyers can answer. Your first conference was six years ago, and it dealt with only that single topic of selection and tenure of judges. Possibly there are other matters awaiting action in this state as to whether a second citizens' conference might be helpful. If so, it would certainly be a pleasure for our organization to work with yours in planning and co-sponsoring it.

I might say that we have assurance of financial assistance for one more year, and we are planning 1967 conferences on that basis. At this time we don't know just what the financial picture will be in 1968, and so if anything is going to be done it would be a good idea to try to work it into the 1967 schedule, which is being made up now.

In the meantime, I think I should acknowledge the assistance that has been given by Flavel Wright and others in other state conferences, by way of sharing the Nebraska experience, as panelists in those conferences.

Your experience has been an encouragement to lawyers and judges and citizens in North Dakota and Kansas and Colorado and Wyoming, and other states, to realize that if Nebraska could do it, so can they. I hope and believe that the Nebraska voters are going to do it again on November 8, and I hope also that I shall have future opportunities to be with you people again on pleasant occasions like this one.

PRESIDENT GINSBURG: Thank you very much, Mr. Winters. We are indeed truly grateful to you for coming here. If there was anything noised around which shouldn't have been, I want to apologize. I wanted to demonstrate to our members through what perils you went to get here.

We have an Institute scheduled for this afternoon. The room will have to be cleared, so we will adjourn for about ten minutes to give the management an opportunity to straighten up. Then we will meet here promptly at two o'clock.

[The Luncheon session adjourned at one-fifty o'clock.]

INSTITUTE ON EVIDENCE
THURSDAY AFTERNOON SESSION

October 13, 1966

The first session of the Institute of Evidence was called to order at two-ten o'clock by President Ginsburg.

PRESIDENT GINSBURG: We are running a little bit late, and I want to apologize to the membership for the delay. As you know, it is difficult to have a luncheon and then get the room cleared in time to start another meeting right away. If everybody will please find a seat we will start with the main business of our meeting, which is some self-education.

Before I turn the meeting over formally to the program for this afternoon, I have two things that I want to do: No. 1, those of you who attended the luncheon heard of the presentation concerning Amendment No. 7, the proposed Constitutional Amendment to the Constitution of Nebraska relating to the retirement of judges. You may all be well aware of that, but what is bothering me is, Is the public aware? Some of you may have read in the paper that a very responsible citizen of the great City of Omaha made the statement last week, "If in doubt, or if there is any amendment you don't understand, or if there is any amendment you don't know anything about, vote 'No.'" Well, of course that could kill Amendment No. 7, and it is our duty therefore to see to it that the public is advised and understands Amendment No. 7. That is *the* project for the Bar Association this year, and I hope and expect that everyone present will see to it that he distributes the proper information concerning that Amendment. Remember that there are statutory and constitutional requirements as to the percentage of vote which the amendment must obtain in order to pass, and things of that nature, so we just can't sit by and let the thing take its own course. It is up to us to see that Amendment No. 7 is adopted.

Any of you who have any questions, Mr. Winters will be here during the remainder of the meeting, contact him, or contact the Committee of which Mr. Flavel Wright is Chairman. Mr. Wright and the members of his Committee will be right outside the door, and they would be glad to answer any questions and give you any help in promoting the adoption of this Amendment No. 7.

Now the second item that I feel I should, as President, mention is a word of thanks to the Committee that prepared the

Evidence book. I want officially on behalf of the Bar Association to thank all those who participated in the publication of this book on Evidence which has been distributed to everyone in attendance. It was a labor of love on the part of those who compiled it and who presented it, and words are inadequate to give our thanks to all the men who prepared this valuable book for us. I can only say to you that it was an expensive book to prepare from the standpoint of material, the paper, the printing, and so forth. The men who put the thoughts in the book made no charge. We couldn't pay them for the work and the knowledge that they have given us. But the labor, the printing, the binding, and so forth is an expensive proposition. The reason I am telling you that, that accounts for the reason that we could only print enough at this time to give everyone in attendance a book. We have arranged for, and if there is demand for it we can have some more published, but then there will have to be a charge, and we are estimating a nominal charge of \$5.00 a book for the printing again of an additional number of volumes if there is request therefor.

The reason I am telling you this, I have already received some complaints. I received a letter from one man who said he couldn't be here and since he was a paid up member of the Bar he couldn't see why he couldn't have a book. Well, the idea simply was, and I apologize to that person, we just couldn't afford the expense of printing any more than what we did print, which we hoped would be enough to take care of everybody in attendance. If there is a call for any more, we will try to provide it and there will be a small charge.

The Institute this year is on Evidence, presented by the Section on Practice and Procedure in cooperation with the Committee on Procedure and the Committee on Continuing Legal Education.

I think it is my place now to get out of here and I now turn the meeting over to Mr. Thomas A. Walsh, Chairman of the Section of Practice and Procedure who will present the panel and who will direct the Institute from this point on.

THOMAS A. WALSH, Jr., Omaha: Mr. President, and Members of the Nebraska Bar Association: on behalf of the Section on Practice and Procedure, as well as the Committee on Continuing Legal Education, I certainly would want to add my word of welcome to that you have already received from Mr. Ginsburg, as well as some others. I also apologize for the fact that we are running somewhat late, but the delay unfortunately seemed unavoidable.

I am not going to prolong this. We will get under way immediately. You always look for a good team to lead off, and I think we have them here.

The first speaker today will be Mr. Alfred A. Fiedler of Omaha, and together with Mr. Kenneth Cobb of Kier, Cobb & Luedtke of Lincoln, Nebraska, their topic is "Investigation."

INVESTIGATION

Alfred A. Fiedler

Thank you, Mr. Walsh. Fellow Members of the Nebraska Bar: I assume from the physical appearance of Ken Cobb and I that they looked for the two biggest lawyers in Omaha to tell you how to investigate a case and they came up with Ken Cobb and Al Fiedler.

I sort of thought when the lights went off a moment ago that they were going to expect the room to be lit with the gems of wisdom that would pour forth from your speakers here this afternoon. Then one thing did happen in the darkness: I realized that in preparing for this both Ken and I talked about preparing for an automobile accident case, and we realized that there are other fields of law.

So, as I say, what we are going to say here this afternoon really applies to all fields of litigation, and it will be primarily directed toward negligence cases. However, it does apply whether you have a case in your office of contract or will contest or any kind of a case. I think that the principles we are going to talk about this afternoon would be applicable.

It is my opinion that if you take any case in your office that is worth handling or worth taking into the office, you ought to make an investigation before you feel like you have done the job. I think you are taking money under false pretenses from a client on a contingent fee basis if you merely write a letter and try to settle that case.

The minute that case comes into the office, the first thing to do of course is to have an interview with your client. We in our shop have developed our own form of questioning and it provides a check list. There are any number of forms that can be purchased. I think the law firm of Sindell, Sindell & Sindell in Cleveland have an excellent form that can be purchased, but we have developed our own through the years and primarily the first thing is client information. We take every bit of information about the client, practically from the year one, the Social Security number, things that sound irrelevant at the time, but I think sometime later on become very important.

Then we try to do our own investigations, if possible. If you are going to have an investigator, and there are a few here in

Omaha now that do investigations, you should guide that investigator.

I might say at this point that I am going to talk more on the phase of investigation on behalf of the plaintiff, because the plaintiff is usually at a disadvantage in a negligence case because he doesn't get into the case until sometime afterwards, unless he is one who rides with the ambulance, and I don't think there are too many of those in Nebraska.

If you are representing the plaintiff in a case, you usually are in there much after the accident occurs or much after the event occurs, and the defendant has a distinct advantage, in that he has probably completed his investigation before you get into it.

After you go through this form that you've developed, you've developed a check list in this form, and I think everybody can develop their own but if anyone is interested in getting a copy of the one we use in our office I will be glad to send it to them if they will write to me so that they might use it as a basis, but there is always something new and each year we keep adding onto the form because there is some information you are always looking for that you don't have. But make your own investigation, if possible; if not, guide the investigator as to what you want done.

I am a firm believer in using a court reporter on the taking of statements, for several reasons: First of all, if there is any question about a witness changing his testimony, it is much better to bring a court reporter on to impeach them from stenographic notes. I think the impression is much greater on a jury or on a court, if you are trying an equity case, to have a court reporter or official notary who is disinterested in the case, rather than having someone called on who will be qualified as being your paid investigator. So I suggest that you use a court reporter, if at all possible, in questioning all persons.

The second place we start after interviewing the client is the accident report. I think in addition to just the accident report we always interview the police officers, and we interview them personally because they make their own notes and from that they fill in their blanks and forms. An interview personally as soon as possible with that police officer or highway patrolman, whoever he might be, is often very fruitful.

Digest the information on that accident report. The weather conditions: If it said it was cloudy or rainy, don't always take their word for it; check with the Weather Bureau. If they say that the street is 40-feet wide, don't always take their word for it; have it measured. Digest that information.

Most policemen take pictures. You get hold of those pictures immediately, if possible, because by the time you usually get into this thing, and maybe if you wait like a lot of lawyers do until just before the trial to get pictures, your whole topography might be changed. The trees might be leafed out when they weren't leafed out at the time. There might be bushes that have grown into leafage where there wasn't at the time of the intersection accident. So get these pictures right away. Get the police pictures from the newspapers. TV stations get out and take pictures too. One of the things that we do have in this community that probably some of you could develop in your communities is amateur photographers who go to all accidents and take pictures. If you tell them what should be taken this can often be very very fruitful.

In the taking of statements we follow this principle—I'm hoping that what we give you here today will give you some ideas; maybe you have all used them before but it may give you some ideas—take the court reporter to take negative statements. Anybody that you think might have been around that accident, be sure to get a statement from him, even if he says, "I was asleep," or "I didn't know anything about this thing," or "I was a passenger in the car but I was in the back seat"—get those negative statements so that that person can't come on later to testify. Even go to the defendant and have the court reporter there when he says, "My insurance company won't let me tell you anything about how this accident happened." Get that down by the court reporter, even though he refuses to give you a statement.

If you are going to go out and have pictures taken, go out and have them taken right away, and you go along with that photographer. Don't just say, "I want you to go out and take the intersection at 40th and Dodge." You go out with him and you direct him as to how he should take these pictures, from what direction, from how many feet back, and you should, if possible, have your drivers tell you how many feet they were back when they first saw the other car, so you can have the camera placed at that position and have the camera placed at the position that the defendant says. If you don't get that from them you might get it from the police officer, as to what they told him.

The diagrams should be made immediately, not just the day before trial or the week end before trial a year later, but they should be made immediately because things change. They might widen the street. They might put some traffic lights up. They might put stop signs in after the accident which would not be admissible. So I say, do all this preparation, do all this investigation real early in the game, right after the thing comes into your office.

One of the things to do in investigating is to check your ordinances, your statutes, or any law that would be applicable to the type of investigation you have to make. If it is going to involve a right-of-way case, check the law of right-of-way. Know what you want to develop in your investigation. If it is a law of traffic control signals, develop that line of law and know what you are looking for. Just don't go out and say, "Investigate the case."

In a products liability case, get your experts in early. Get hold of an expert, discuss the matter, give him what you have and let him guide your investigation on behalf of the plaintiff.

It would seem to me that this would all follow in connection with a will contest case. Get hold of all the witnesses, anybody who might know anything about this thing. Get all of that done early. As soon as you get into the case it would seem like in any civil litigation that this sort of investigation should be made.

I think as part of the investigation in a negligence case the medical investigation is very important, and you control that too. Get authorizations signed immediately from your client. We use an authorization in our office that the doctors like because this paragraph is in there: "In the event of any settlement, compromise, or payment of any judgment as a result of my claim, I hereby authorize my attorney named herein to deduct from my portion and share of said settlement, compromise, or judgment any sums due and owing at said time to the said _____." Doctors kind of like that if they think you are going to see that they get paid, and they will cooperate better with their reports. If a doctor tells you that he is not through with the treatment, or it is going to take some time, just say, "Well, please give me a preliminary report," because I think it is very important to have this. I think you should guide the medical treatment. You may challenge that statement, but I think if you read that preliminary report over and you think there is a neurological problem or an orthopedic problem, I think you ought to be in position to suggest to that general practitioner that he refer your client, his patient, to these specialists, because this helps find out in many instances how serious the injury might be.

Another thing, as far as photographs are concerned, that we follow is to get color photographs of the immediate bruises, the injuries, and the incision of the patient or the client in the hospital, in surgery if possible, and follow that right down to the time when he reaches the maximum point of recovery. I think it is important that you use these photographs. Photographs, as the Chinese say, "One photograph is worth 10,000 words," and I think that this follows.

I think part of your investigation ought to include investigation of the damages that your client may have suffered, such as his earnings. You ought to immediately get a letter from the employer as to what his wages are and his loss of time. You ought to get copies of his prior income tax returns if he is a man of business. You ought to get accountant's statements of his previous business profit and losses. You ought to get all bills. You ought to develop a check list of all of these things that I have suggested here.

Then one of the things yesterday that we had at a seminar, we heard a man from the St. Paul Insurance Company talking about lawyers' liability, and one of the things he said was from now on on their application they are to ask, What type of docket control do you have in connection with your cases as far as the statute of limitations is concerned? His statistics run at 45 per cent of the malpractice claims against lawyers were for not meeting the statute of limitations. So this form I mentioned to you also has a docket control. The first thing you put at the top of the page is when the statute of limitations will run and you keep another index of cases as to when this will run. I think part of your investigation is to set up your file properly, and I don't think under those circumstances you will find many of those types of claims against lawyers.

Then the next step that we use, and I think it is really part of your investigation and preparation, is to prepare a settlement brief. We in our office have our contingent fees based on settlement before suit and settlement after suit is filed, so we feel that we owe an honest duty to our clients to really try to settle that case before the suit is ever filed. We prepare a settlement brief with all of this evidence, the names of your witnesses and what they are going to testify to, pictures, if you please, the bills, the medical reports, the law in case, the brief of the law, and then the damages and what we conclude our demand is, and then if we can't settle it this serves a wonderful purpose as your trial brief, your trial manual, and you are ready to go. When you hand this settlement brief to the insurance company investigator, when he reports to his company he is not giving *his* version of the case but your pitch is right there and they have your pitch on the case too.

So with these few ideas I am hoping you did get something that might be helpful in investigating a case because I think that the primary investigation is a very important factor in this evidence that is going to come in later and what you are to do about it.

Kenneth Cobb

From a defense standpoint, when they've got the investigation that Al has referred to, the best defense is get your checkbook out and settle because, believe me, you've had it and they've got the witnesses first.

But seriously, from a standpoint of the defense, they always say that you have an advantage because the investigation is already made. I think everybody here who has ever done defense work, particularly for an insurance company, knows that the investigation just begins when they send you what they call "a file."

It is real easy to put off reading all those statements, going through the police report, but the best thing in the world is the day you get that file to sit down and read it and then start your investigation, because more lawsuits are won on investigation than are won in the courtroom. You've got to get the facts.

One of the first things that we think should be done in our office is call in the insured. Meet the man. Don't meet him for the first time the day you walk into the courtroom. Have him come in. Go over his statement. Review the actual accident with him and, for that matter, this is the best time in the world to go out to the scene of the accident. Take your insured. Go out there to the scene. Have him go through that accident with you. What happened? Have him get in his car and drive it just as he was doing that particular day. There will be landmarks there. He may not be able to say, "I was sixty feet back or I was forty feet back," but there is a landmark, there is a telephone pole, there is a fence post. He has a chance to look at it and refresh his memory on "What could I see?" He has got this and you can get it down and start your defense from that particular point.

Another thing, on your witnesses, something that is very important and something which should definitely be done is to go to the point where that witness says he was and see that he can see exactly what he is claiming he saw. This is very important because we have all had that experience when somebody comes in and claims he saw an accident and then they prove that he couldn't possibly have seen what he claimed he did. Check these things out and go over this and find out if this man could have seen what he claims he saw; or is there something that might have interfered with it? If you start doing this two days before you get in that courtroom, then you are going to be in trouble because you are not going to be able to get all that evidence together, and this is important evidence; it is the most important.

Another thing—and I don't want to duplicate; there is a tre-

mendous amount of similarity when you are investigating for either the plaintiff or the defendant—look at the photographs that were taken at the scene of the accident and if at all possible, identify people who were standing around the scene of that accident. Many times you can find a witness to an accident by sitting down with the patrolman or sitting down with your insured and going over these pictures. “Do you know who this is?” Or to go to the area where the accident was and find somebody, if it is in town, and see if they can identify people who were there at the scene, because the physical facts as they exist after that accident might be just as important as the actual eyewitness to that accident. Here, again, you can find a good source of information, a tremendous source of evidence which can be used in the trial of that case.

When you start looking from the defense standpoint as to evidence of prior injuries, of course there are always certain basic checks which we go into, but don't be satisfied with just a resumé or a summation of a man's hospital records. If the case warrants defense, if you are going to go in there and try that case, get *all* of those hospital records, not only for the hospitalization which he had specifically as a result of that accident, but if he has been in any other accident, or had any other sickness in any other hospital, because a lot of times this will give you a lead, something which will get you started on finding out something. We all know how valuable it can be to surprise a plaintiff when he comes in and says, “I have never had a backache; I have never had a headache,” and here he has been in the hospital for the same thing four times, and you all know that feeling when it happens.

The service records, a man's military records are a tremendous source of information on his past history. This is something that I learned the hard way: When you ask the VA for his hospital record, this is what you get. They make distinctions. There is a claim record, there is a clinical record, there is a hospital record, and if you ask for one you are not going to get the other.

Also, you can go to the U.S. Army Records Center in St. Louis and they have photostatic copies of every day a man went on sick call, and you can get these either by subpoena, taking a deposition, or the man's consent. You can get actual photostats of their records and any claim they made while they were in the service for an injury or a disability. These are in the man's own handwriting and you can get copies of them. So here, again, is a tremendous source of information from which you can find evidence on a man's previous physical condition.

You should also evaluate your case, from an evidence standpoint—and I don't want to get into somebody else's field—for the possible use of an expert, not only in your products liability cases but from a defense possibly you can *negative* a contention of speed on the part of your driver by the use of an expert on skid marks. You all know, you talk to the average person and they say they can stop a car instantly going thirty-five miles an hour. Well, we all know this is not true. So if you've got 40 or 50-feet of skid marks, look at it from the standpoint of, "Can an expert negative excessive speed? Can we do anything with the force of impact?" These are all things to consider in your investigation and to follow through on before you get in that courtroom.

It has been covered here, the use of demonstrative evidence, getting your charts, getting your photographs, and getting them before you get near that trial. Yes, it is expensive, and your insurance companies and your clients are going to question you when you start saying, "Let's spend \$100 for photographs," or "Let's spend \$250 for an expert witness to find out what we can or can't prove," but in the long run it is cheaper, and you've got a job of selling to convince your client to spend the money for that investigation for their defense.

Another possible source of information in your investigation is to check a man's driver's license record. For instance, down in Lincoln they have on file with your driver's license every single accident that you have been involved in, whether it was sixteen years ago or whether it was six days ago, whether it is a chargeable accident or not. You can find out this man's driving record, not only as to offenses but you can also find it out as to accidents. This costs the great sum of fifty cents. So you have a tremendous source of information right there, and you can check these people out when they claim, "I've never had another accident."

You've got your Index Bureau checks when you are on the defense, your mutual index and your stock index, in which you can get a description of your claimant, send it in and find out what their history is, if they have made any previous claims. All of these things give you a tremendous source of information on which to build up this evidence so you can defend your case.

But I can't emphasize enough, do this investigation long before the time of trial. The sooner you get your investigation done, the sooner you know where you are going, and you are not caught short when you walk in that courtroom.

CHAIRMAN WALSH: Thank you very much, Al and Ken, for those informative remarks.

Our next speaker is Mr. James A. Lane. Mr. Lane practices with the firm of McGinley, Lane, Mueller & Shanahan of Ogalala, Nebraska. His topic is "Using Discovery Effectively."

USING DISCOVERY EFFECTIVELY

James A. Lane

It always takes a minute to discover the notes on Discovery. Sometimes I think in the year's program that they feel there should be a little heresy interjected so that we don't rely entirely on the notes that are given to us at these meetings. That may be the purpose or reason why I am here.

My discussion here is to be on "Discovery Through Interrogatories and Depositions, and Requests For Admissions of Fact, and Genuineness of Documents."

Our purpose in using the discovery procedure provided under the federal rules and under our statute is to obtain necessary facts not disclosed by the investigation to clarify the issues, to contain the adverse party, and to set up a proper atmosphere for settlement from knowledge of facts on both sides.

This discussion is directed first to written interrogatories served upon an adverse party, the discovery depositions, and the requests for admissions of fact, and genuineness of documents, each of which is an important tool provided to accomplish the above objectives. They are available and they are useful in every type of suit or every type of litigation that comes into your office.

Generally the first discovery procedure used after suit has been commenced is written interrogatory served upon the adverse party under section 25-1267.37 of our statutes, and under Federal Rule 33 of the Federal Rules of Civil Procedure. These interrogatories have the wholesome effect of making the opposition, or other party, work for you. The statute in its introduction states that "any party may serve upon any adverse party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or an association, by an officer, member, or agent who shall furnish such information as is fully available to that party." If the interrogatory requests an answer which the adverse party can dig up, he must do the necessary footwork to fully and—in quotes—"fully" answer the interrogatory that has been submitted. There is no hiding out here, as sometimes occurs in a deposition. If you ask, "What was your net income for a particular year?" this has to be answered even though that information is not immediately available to you; of, if it is a description, for instance, on land or an

assessed valuation, something of that sort, you run up to the courthouse and get the answer, and answer that interrogatory.

There has been some talk here about background information that is important to an investigation, and if it hasn't been obtained from the adverse parties, this is the place to get it, through your written interrogatories, because (1) it gives the opposition time to answer with consideration. In other words, they can take their time and they can dig up facts and give full answers. Get the wife to help as to birth dates and background, when they were injured, what hospital they were in, what they were treated for, and the like.

The second factor there to be considered is that you owe some obligation to a client to cut down the size and cost of depositions. If you ask for this background information through your interrogatories you won't have to go into it, except very lightly on the deposition, and this results in a considerable saving of time. You realize that on oral deposition many times a witness might very honestly state that he does not know the answers to many of these background questions.

Where the adverse party is a public or private corporation or a partnership or an association, you can obtain a composite knowledge of that entity by your interrogatory. The agent or officer answering must work for you, and he must find out from his fellow corporate officers all available information to answer the interrogatory. This, as you realize, would result in a very substantial saving in the number of depositions that are taken, because they can't just sit back; they have to go ahead and find out what the corporate entity here, for instance, knows about the particular question involved that is submitted in the interrogatory.

The use of the interrogatory, again, can accomplish the same purpose by locating the man with the facts or the documents. An example of this may occur in dealing with the corporation or with, let's say, the state in a condemnation action. There are a number of employees there with the federal government and they have to get the composite knowledge of everyone in order to properly answer the interrogatory, and there is no other vehicle that is afforded to you, and the discovery procedures can accomplish this so well.

Now, you may serve as many interrogatories or sets of supplemental interrogatories as you wish. This may be done prior to deposition or after deposition, and it may be upon any matter not privileged which is relevant to the subject matter. It is no ground for objection if the testimony will be inadmissible at

trial, if the evidence sought appears reasonably calculated to lead to evidence which will be admissible.

The purpose of the interrogatory, of course, is not to oppress or harass the other party, and should that develop or the other side believe that it is developing, then they can get a protective order from the court.

Interrogatories generally are used as a probe. They are not a substitute for a deposition. If the evidence sought is subject to coloration or interpretation, then I say, go to the deposition. Don't use the interrogatory, because the party has got all day and all week to answer them and he has got an attorney at his right hand to assist him. There is no element of surprise.

One further factor to be considered here is that where an objection is made in an oral deposition, an answer will come in subject to the objection, or if the witness is instructed **not** to answer, you still have the leeway of going by different leads and different approaches, and you may get the testimony which you need. In the interrogatory, where there are objections filed there are no answers to the interrogatories until there is a ruling by the court. So you've got a postponement there and you may not get at what you need.

Another limitation that we must consider is the fact that interrogatories of course can only be served upon the *adverse* party. You may have another defendant in the action who is not adverse to you and you can't use interrogatories; you can't serve interrogatories on him. You may take his deposition by interrogatories.

Some useful areas for the use of the interrogatories are to obtain the composite knowledge of a party, and this is particularly helpful when you are dealing with a corporation, as I've mentioned, facts which will lead to evidence; for instance, the existence and location of documents and tangible things, people who have knowledge of facts concerning the particular matter at issue, the existence of statements and reports, books and documents.

Another factor here is that the interrogatories can be made continuing, and require that the adverse party come up with the answers if additional information comes into his hands at a later time or if additional parties who have knowledge to the facts come to his attention prior to trial.

Some feel that obtaining this type of information I've talked about here may be wrong, in that it is an invasion of the work product of counsel. However, on that an objection is premature because if later it develops that this is an invasion of the work

product, then it is time to make the objection at that time, but not to the interrogatory.

Your interrogatories can seek facts that are presently known or later discovered. In that regard there is broad discretion in the court, particularly in the use of requests for admissions. The court in several instances here has permitted an amendment to append an oath at a later time or to answer request for admissions after the time therefor had elapsed, and the same rule apparently should apply here to interrogatories.

In this matter of making your interrogatories continuing, it is important because you should avoid a surprise matter coming up that nobody knew about during the various stages of the pre-trial discovery, and the same is true of witnesses. You cannot ask in your interrogatory, of course, who the man's witnesses are going to be or what evidence he is going to put on, but you can properly ask if he has a list of persons who have knowledge of the facts that are involved, and in that way you will get to the same end. As far as your list of witnesses is concerned to be picked up at the pre-trial conference, you can ask for a list of witnesses at that time.

The interrogatories may call for hearsay; they may seek admissions; ascertain specifications of foreign law relied upon; they may see opinions and comparisons; they can see ultimate facts and evidentiary facts relevant to the subject matter; and of course they can form the basis for impeachment.

It may be well to suggest that you should not in your interrogatories, as I pointed, ask for the people who are going to testify. It will get knocked out nine times out of ten.

There is little difference between the federal rule and the Nebraska rule, as I interpret it. Interrogatories under the federal rule may be served on the attorney. It is specifically provided under Rule 5(b). There is no such provision that I find in the Nebraska statute. It provides that service be made on the adverse party, but as a matter of practice they are always served under both practices on the attorney for the other side.

The answers to the interrogatories are to be in writing, signed by the party making them, and verified under oath. They should be direct and should be concise. You should avoid using compound questions.

In the Nebraska cases I recall where the court permitted an attorney to sign interrogatories, it was under the theory that the parties being sued were sued in a representative capacity. I

think it is bad practice for the attorney to sign. He may be making himself a witness in the case.

In regard to discovery depositions, the deposition is used after you have had the benefit of an investigation, information from the interrogatories, and have obtained documentary evidence under the available rule or statute for discovery and production of documents.

The deposition may be taken either on written interrogatories or on oral examination. If taken on written interrogatories, cross-interrogatories, re-direct, and re-cross interrogatories may be served. The deposition by written interrogatory is the poor man's deposition, and it is useful in many cases where an undue amount of cost would be involved or where, again, the facts that are required to be obtained are not subject to coloration. Again, you are not there. If the question asked is not concise and clear enough, you may get an answer by mail that is not responsive, and you have no way of clearing it up except to go back and start over again.

For specific information, like values of vehicles or heirship, citizenship, other background information, it is very useful.

Most frequently, as we all know, depositions are taken on oral examination. Generally they are taken by agreement of counsel. Many times it is helpful to take the other party's deposition before you take your party, and the first request then that is made should be honored. If there is any question about it, of course, serve a notice, and then the first notice out is the one that is going to take precedence. A subpoena is not required to be served upon an *adverse* party, but if it is a witness that you are calling, and particularly if it is a deposition being taken at some distance away from home as to the parties involved, you had best have a subpoena served or you may end up paying the costs involved in a failure of the witness to appear and attend a deposition, and that will include probably an attorney's fee for the other side.

Most depositions are taken on stipulation and I would say on that, "Be careful as to the stipulation that you do enter into." It may develop that you will want to offer that deposition at trial, even though it was taken purely for discovery. If you have agreed all objections may be made at trial, you may be in for a shock. Half of the deposition may go out the window on valid objections as to form and foundation and the like, which could have been cured at trial. If you had stipulated that way, even though it is contrary to the federal rule and to the state statutes, you are probably going to live with it. You are safe there in stipulating that all objections are reserved to trial time except those that are

required to be made at the time of the deposition by the statute or by the federal rules.

You should use the same care in the selection of your questions at a discovery deposition that you would on a deposition intended to be used at trial because all too often it develops that the discovery deposition *has* to be offered, and if you have not properly protected your record, you will have problems in having the deposition accomplish the necessary purpose.

It is bad practice, I would say, to discover what you already know unless you believe the deponent may not be available for trial. You are opening up your case for the other side and you are helping them to develop strategy and obtain ammunition for impeachment. Develop the points that you need from the witness, tie him down on these points, and then drop him.

If it is an adverse witness, do not bring out the whole adverse story; just get what you need and quit ahead. Otherwise, you probably will have helped the opposition in developing support for their case. This is doubly true of a deposition of an adverse party. You'll offer the good parts at trial as admissions against interest. They will turn around and offer the relevant portions of the same deposition in support of their case, and then they will have their witness on there telling the same story again.

Another reason in support of this suggestion is that the adverse party just might not be available at the time of trial and your overproduction at the deposition may well make their case at the time of the trial.

It is generally bad practice to extensively cross-examine a friendly witness if you believe they will be available at trial, if you are reasonably sure that the witness will come up with the right answer if you do cross-examine him. It is the better practice not to cross-examine your own party at all unless special circumstances require it, and I would say that there would be an exception to this in regard to injuries. If the opposition has not brought out the full extent of the injuries in a personal injury case, for instance, I think that you *should* bring them out at that time, otherwise you're into the position of bringing something new at trial and having to explain why it wasn't brought out at the time of deposition. If it is a deposition of the adverse party, remember you are after admissions against interest, you are trying to tie down his story, test his credibility, and cut down the impact of his testimony, as well as set the stage for impeachment. If it is a friendly witness you are getting the necessary facts without unnecessary exposure to later thrust at his testimony on cross-examination or by impeachment. As to the friendly witness, do not

weaken your testimony by gambling he knows more than he does. If he has covered the facts essential to your case it is best to drop him. If you, with unwarranted optimism, go into the facts he may not know or is fuzzy about, you've weakened his testimony and you have exposed him to an embarrassing cross-examination on non-essentials.

It is good practice to use an outline for the deposition. The preparation will help you get matters in focus, it will save time, it will insure that you do not forget the big question for which the deposition was intended. On discovery depositions, like interrogatories served on the adverse party, the scope is broader than the test of relevancy at trial. You may seek information which will *lead* to relevant evidence. Inquiry, among other things, may be directed to the existence of documents and tangible things: good faith in starting suit, hearsay, conclusions, persons who have knowledge of the facts, insurance where relevant, statements, damages, the position being taken in the suit, opinions of experts—there's little question there on work product; I'm talking about obtaining the opinions of experts who are not the experts hired by the other side. You will get shut out on that in all likelihood. Generally it is any relevant matter within the knowledge of a particular witness, or knowledge of a fact which may *lead* to a relevant fact.

The last item that I will discuss here is the request for admissions of fact and genuineness of documents. These are covered under Rule 36 of the Federal Rules of Civil Procedure, and section 25-1267.41 of the Revised Statutes of Nebraska.

The purpose of the request for admission is to expedite the trial and relieve the parties of the cost of proving facts which will not be disputed at trial and the truth of which can be ascertained by reasonable inquiry. This is not a discovery procedure. You are merely trying to get your opponent to concede the facts and to concede the genuineness of a particular document.

The answer to the request for admissions is similar to a judicial admission and is regarded as conclusive upon the party making it. The form of the request should be direct, material, relevant, and concise—and remember your rule as to relevancy is tighter here. There is a split of authority on it, but generally you are held on request for admissions to something that will be admissible at trial.

The request should be so framed that the answer can be a simple "yes" or "no" that the party does not know, or a simple explanation can be given why he does *not* know.

Copies of documents to which reference is being made should be served with the request unless they have already been furnished.

The adverse party should sign the answers to the request. Our court, as pointed out before here, has permitted an amendment on an oath, and also has permitted an attorney to sign where the defendants are acting in a representative capacity.

The matters for which the admission is requested shall be deemed admitted unless within a period designated in the request not less than ten days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny these matters, or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest possible time. If you object to a part, you must answer the balance to meet the substance of the request, and when good faith requires a denial of only a part or the qualification of a part, the party must specify the part true and deny only the balance. The court under our cases may, upon application, permit answers to be served in response to the requests after the time therefor has elapsed. In one case it was permitted after a motion for summary judgment had been filed. I wouldn't rely on it, however. It is in the discretion of the court, and if you can't show some good reason you are liable to find yourself in trouble.

You may effectively take part of the questions and answers which have been given to interrogatories or which have been set out in a deposition and make requests for admission on those items. And this is particularly important where somebody has gone astray in a discovery deposition and got in too much support for the other side and you now want to limit that so that you don't get this matter of the offer of relevant parts when you have offered parts for admissions. The party upon whom the request is served must answer the request even though he has no personal knowledge of the facts if the means of obtaining the information is available to him. This would include all types of records available to the parties, the balance due on notes or accounts.

Agency—and this might be particularly important where you are going to have difficulty in proof. Where you can't prove it through the agent himself, you can take your deposition or serve your written interrogatory to get your background information, and then by the request establish the agency; or you may just serve the request for admission itself as to the matter of agency and get

a reply and get it out of the road. You can obtain relationships between persons, family purpose doctrine, the extent in ownership of property, consideration for instruments or the lack thereof, citizenship, and the like, almost anything across the board. The admissions sought of course must be relevant to the issues at trial.

Now say here that in the autopsy of a case you take the skin off with the interrogatories, you carve out the meat with the motion for production and depositions, and then you nail the skeleton with the request for admissions. Each one of these procedures, of course, serves as a helpful link in establishing your chain of evidence in any case that you may have.

CHAIRMAN WALSH: Our next topic is "Using the Expert Witness." The speakers are Mr. Kenneth H. Elson of Grand Island and Mr. Albert G. Schatz of the firm of Gross, Welch, Vinardi, Kauffman & Schatz of Omaha, Nebraska.

USING THE EXPERT WITNESS

KENNETH H. ELSON

The information which Mr. Schatz and I will give to you is supplemental to Chapter 21 in your Evidence Handbook. You will there find the basic rules that apply in Nebraska with respect to the use of expert witnesses.

It is interesting to note, in studying this topic, that lawyers are experts. It came as a shock to me because I have felt we generally look to all the other professions—engineers, scientists, etc.—as being the only experts. I have case authority, *Robinson v. Bressler*, 122 Neb. 461. In that case the question of marketability of title was at stake. Our Supreme Court held: "The good faith opinion of counsel of experience and good standing in reference to a title which he has examined is a material fact to be considered by the court in determining the marketability of title."

I thought that was quite interesting, that we can now, if we have examined an abstract of title and found it marketable, and find when the client goes to sell the property the other side disputes the marketability of title, we can take the stand and say that in our opinion title is marketable and the court says they will listen to us. They say, "We do not mean to hold that the opinion of counsel is controlling in a case of this kind for the purpose of determining whether the title is good or bad, but we recognize that it is the usual practice for persons dealing in property of this nature to apply to attorneys having some knowledge and experience in that line, and to rely upon the advice given to them. That

case, again, is 122 Neb. 461. You might have to cite it to your client sometime in defense.

Those of you who are pedantically inclined, I would refer you to Volume 2 of *American Jurisprudence Trials*, in which there is an extensive and exhaustive treatment of the topic of the use of expert witnesses.

Who decides who is to use an expert in any lawsuit? There is only one person who is going to make that decision. That's you, the trial lawyer, because if you plan the strategy you are going to use in the case, you execute the plan you have and then you accept and show the responsibility you have to your client by the results you've obtained. Therefore it behooves each one of us, in any case we have of any type or character, whether it be to the court or to the jury, to ask ourselves the question, "Should an expert be used in this case? Is there somebody who has specialized training, esoteric knowledge, or scientific information and training who can persuade the court or jury to decide a fact or come to a conclusion in a way favorable to my client?"

Our country is so close together today in this day of the jet aircraft that it takes less than three hours for you to get an expert in New York City to sit here in a district court in Omaha, testify to his specialized training and to a fact which will enable your client to get a favorable verdict, and for that expert to be back home that same night in New York City. This is a small world and getting smaller. Experts are all over, if we just open our eyes and ears, look and listen and see what we can find.

When do you call an expert in a specific case? Generally the guidelines are there: That if the jury would be appreciably helped, and if general experience of an ordinary person is not sufficient—if those factors are in play in the case then that is when you should look for an expert.

When do you *not* use an expert? If it is a case where the jury can just as easily determine the answer to the questions and the issues you will not need an expert, and may hurt yourself by trying to force them to accept some expert's opinion. If the case does not warrant the expense of use of an expert, then of course the disproportionate risk involved is not going to merit the use of an expert. When a satisfactory expert is not available you should not use one, and I'll touch on that briefly in a moment. One of the last situations where you do not need an expert is when your client knows enough facts, knowledge, and has enough information that they can be an expert witness themselves. If they can give the technical information necessary for you to prevail in your lawsuit, you do not need an expert.

What are the characteristics of a persuasive expert? And you will notice I have used the words "persuasive expert." I think that he should be an experienced expert with stature in the community. Many of us come from smaller communities outside of Omaha or Lincoln, and the expert we choose there is going to be known in a general way to the jurors, so you will want to choose an expert who has stature in the community and who is respected.

Another asset for that expert is that he be able to communicate clearly. He is able to explain technical or scientific subjects and matters in plain, understandable language, and when he is on the stand he is not trying to impress the jury with his learning but he is trying to communicate in a way that they can understand what he is talking about.

We have to very carefully observe the personal traits and characteristics of our expert. An expert can offend the jury by his appearance, by the way in which he dresses, by his general demeanor, and by the personality he conveys to the jury.

We must keep in mind always that whether it is an expert we are using or any other witness, we are trying to establish the truth of facts to cause the jury to reach a conclusion in favor of our client. We are not there for any other purpose. There is an issue to be decided. The jury is to decide it and we want to use that expert and those witnesses who will appeal to the jury and who will be believed by the jury, whose testimony will be accepted, and therefore have a verdict in favor of our client.

We must find experts who are honest, those upon whom we can rely, because if we talk to an expert in advance of the trial and he misinforms us for one reason or another, then our client is the one who is going to have to suffer.

We want an intelligent expert, one who can hold his own in his field and one who has a good speaking ability.

We must have an expert who is definite in his opinion or opinions. In many cases you have experienced this, I am sure, yourself, where the expert was on the stand and by the time you got through with cross-examination of him, or the other side got through with your expert in cross-examination, he had said so many things and he had bent like the weeping willow tree so far in all directions that the jury completely disregarded his testimony. So you want an expert, in my judgment, who will stand on his opinion. First of all, he won't render you an opinion unless he has one and unless it is sound, based upon good scientific knowledge and experience; and secondly, he will stick to it if he has rendered it. So another asset of a good persuasive expert

is that he is able and has the ability to withstand extensive cross-examination.

Another favorable asset of a good expert, a persuasive one, is one who will be available to you to discuss the case before you go to trial. You should make it an inflexible rule not to go into court unless you have sat down with you expert and have said, "Tell me about this case. Tell me about this particular field. Inform me about what I need to know to intelligently question you upon trial of this case." Your expert must not be a phony, because if you can't see through him, the jury will.

He must be one also who is going to be available to come to court. There is nothing that gives the attorney more difficulty, I feel, than to find out when the case has been set for trial that everybody can be at trial except the expert, and he gives him a hard time and thereby makes his case that much more difficult to defend.

I would like briefly to cite some Nebraska cases that have set some precedent for us with respect to expert witnesses as witnesses. The subject of the testimony will be given, then the type of expert used, and the Nebraska Reports Citation:

For intoxication of automobile driver a chemist has been used—*Schacht v. State*, 154 Neb. 858.

For X-ray interpretation, in addition to licensed physicians, our court permitted a duly licensed chiropractor to testify from X-rays—*Fries v. Goldsby*, 163 Neb. 424.

For alteration of written document, an examiner of questioned documents—*Budde v. Anderson*, 156 Neb. 812.

For forgery, signature on a contract, an examiner of questioned documents, in that case Professor Winsor C. Moore of Creighton University—*Dubier v. Rafert*, 170 Neb. 570.

The earliest Nebraska case I could find where our court allowed an expert to testify, and our Supreme Court affirmed, was in the case of *Sioux City and Pacific Railroad Co. v. Finlayson*, 16 Neb. 578, an 1884 case. The question there was as to defects in an engine boiler, and the court let boilermakers, men who make boilers, testify as experts.

For value of services of a professional man, our court permitted an architect to testify as to what his services were worth in *Davis v. School District*, 84 Neb. 858.

As to the mental capacity of a testatrix to make a last will and testament—*In re Estate of Witte*, 145 Neb. 295, a physician

and surgeon was permitted to state after sufficient foundation was laid.

What about the meaning of entries in office records, evidencing business transactions? Who would you get to testify if you needed to know and had to explain to the jury the meanings from certain office records. In *Paxton v. State*, 59 Neb. 460, the court permitted the office holder who succeeded to the office and had held office for a considerable period of time to testify to the meaning of the records in that office.

How would you prove the market value of livestock where the livestock was to be sold? In *Allender v. Chicago & N.W.R. Co.*, 119 Neb. 559, the court permitted a cattle buyer to testify as to the value of livestock at the place where they were to be sold. In addition, they permitted an auctioneer who sold cattle to so testify.

If you had a question as to whether or not the truss rod or bolt on a railroad coal car was properly constructed, who would you use to prove the defect in it if it weren't? In *Missouri P.R. Co. v. Fox*, 60 Neb. 531, the court permitted a yardmaster who had been a switchman; in other words, they permitted a man who by experience, not by higher education but by his lifetime experience as a railroader, to testify as to whether or not there was defective construction.

How would you prove the signature on a promissory note if you didn't have a professor of law or a questioned document examiner available? In *Heffernan v. O'Neill*, 1 (Unofficial) 363, the court permitted an instructor in penmanship for twenty-five years who gave special attention to the study and comparison of signatures, to testify.

Of course you are familiar with the cases Nebraska has had recently as to automobile speeds where the experts had been permitted to testify to the minimum speeds, based on skid marks and so on. In *Nisi v. Checker Cab Co.*, 179 Neb. 49, the Captain of the Nebraska Safety Patrol was permitted to testify.

Minimum speed when an automobile struck a child—*McKinney v. Withersteen*, 122 Neb. 679. The expert there was an automobile driver who had made experiments with a car of similar weight and good brakes.

In *Flory v. Holtz*, 176 Neb. 531, a professor of mechanical engineering was permitted to testify as to the minimum speed of vehicles based on length of skid marks.

If you are in the personal injury field or if you have a situation where you have a question as to whether there has been acci-

dental death so that your client's widow, or widower, would be entitled to double indemnity benefits, two cases are particularly important in Nebraska as to the cause of death being accidental. In each case a licensed physician was permitted to testify as to the cause of death.

The first case I want to cite is *McNaught v. New York Life Insurance Co.*, 143 Neb. 213. The second case is *Long v. Railway Mail Association*, 145 Neb. 623.

My thinking is that these are keystone cases as to causal connection, where you can bump a leg and end up having a coronary thrombosis, and the doctor testifying the bump on the leg caused the heart attack that resulted in death, death being determined by him, and his opinion being it was caused by accident.

What would you do if you wanted to prove that the lug bolts on the wheel of a car were not tightened and as a consequence the car upset and people were severely injured? In *Petracek v. Haas O.K. Rubber Welders, Inc.*, 176 Neb. 438, an engineer was permitted to testify that the fact the lug bolts were not tightened caused the car to upset.

How would you prove the causal relationship between the duties of a fireman and heart disease resulting in his death? How would you prove that one? Now there are a lot of lawyers smiling here, and I think they have the case. A medical internist was able to testify in that case and state his opinion as to the causal relationship between the duties of a fireman as creating stress and strain resulting in heart disease, resulting in his coronary occlusion—*Campbell v. City of North Platte*, 178 Neb. 244.

How do you prove the value of a tract of land immediately before and immediately after appropriation by condemnation proceedings? In the western part of the state you will have more and more of these condemnation cases. It is real easy. In *Twenty Club v. State*, 167 Neb. 37, our court held that persons familiar with the particular land in question can testify as to its value. In *Chaloupka v. State*, 176 Neb. 746, they also permitted licensed real estate brokers to so testify.

The last case I want to cite is this: What do you do if you think you have an accident which probably caused your client to have the condition or disease he has, and I use the word "probably" in quotes? You simply get a licensed physician to say it is his opinion that the accident probably caused this injury or condition, because in the case of *Welke v. City of Ainsworth*, 179 Neb. 496, our Supreme Court said that was all right. That is a workmen's compensation case but it is very likely to be thrown over in the third party liability cases.

I've tried to give you briefly what Mr. Schatz and I worked out as a format as to what type of an expert you should use and some of the more common expert cases that Nebraska has decided permitting expert testimony.

Mr. Schatz will now, being an expert in his field, go into the more esoteric and specialized expertise.

Albert G. Schatz

Mr. Chairman, I think all of the trial lawyers here and all throughout our state have noticed through the past many years that demonstrative evidence has clearly become the mode and fashion of today in the trial of cases, and particularly in the trial of damage cases, personal injury cases, casualty cases, and death cases. I don't think there is any question but what emphasis upon demonstrative evidence is a part of our times, even though we all recognize that it has been used in one form or another ever since the trial of cases began.

Today, though, people are getting more and more pictorial-minded. They want to be "showed" what evidence is. They want to see it or feel it. They are more pictorial-minded today, and the use of visual aids in the presentation of evidence, in my opinion, is conceded by most trial attorneys to be one of the most effective methods of presentation that we now have.

Going hand in glove with this method of trial, as it occurs to you, is the liberal and ever growing use of expert testimony and expert witnesses. Most demonstrative evidence is directly related to expert testimony, and generally the expert witness is called to testify so as to enable a jury and a court to understand scientific types of visual aids, and to enable the court and the jury to more easily and alertly and thoroughly comprehend and evaluate the visual aids that you use.

I have been asked to comment briefly today on the subject of "The Use of Expert Witnesses and Expert Testimony" in situations which may be a little bit out of the ordinary, and in situations which maybe to a lot of us it hasn't occurred that we could help the cause we are heading and that it would help implement our presentation to the court if we used expert testimony.

First of all, one of the most important issues that often arises in the trial of a personal injury case or, of course, a death case, is the duration of the person's life, or as we lawyers all call it and the courts all call it, "life expectancy." This issue arises in proving damages for permanent impairment or permanent disability and, of course, in death actions.

Ordinarily in this type of case a counsel for the plaintiff will attempt and will prove up the duration of life of the deceased person or the injured person with the use of actuarial tables, or what is getting more popular now, with the use of an actuary himself, and oftentimes, more often than not when he uses tables, he will use those actuarial tables provided in our revised statutes.

Now, keep in mind that those tables, and the actuaries called upon to testify so far as duration of life is concerned, give a full life expectancy. However, what may not occur to a great many defense attorneys and to a lot of us is that in determining damages for loss of future earning capacity it is not just the *life expectancy* of the party that is involved, whether he is deceased or disabled, but more important it is the time during which he can be expected to have accumulated the earnings in question.

How do you go about proving or differentiating, other than in merely arguing the fact to the jury and hoping that out of sheer common knowledge and sheer common notice they will grasp it, how do you go about proving any difference between the life expectancy and the work duration of the party?

Well, the earnings capacity of most people will be determined by that part of their lifetime during which they will be regularly employed, and this period has been designated as the "work expectancy" period to distinguish it from the period of "life expectancy." Some courts are now indicating an awareness of this question when they have emphasized the necessity to consider the decrease of earning capacity in a man's declining years, and many courts have now and are clearly distinguishing in their instructions work expectancy on the one hand and life expectancy on the other.

Now, all of us realize that tables used or the actuaries used are not binding on the jury; they are merely guides that go to the jury. But all of us also know that when an actuary testifies as to life expectancy or when actuarial tables are introduced and received in evidence that they are impressive upon a jury for its consideration, obviously they, being human beings, are more apt to accept that.

In most cases, we all know there has been no express distinction between these two terms, "life expectancy" and "work expectancy." All too frequently what we will find in the instructions is something to the effect, "If you find from the evidence that the decreased earning capacity herein is permanent, then you would multiply what the evidence shows to be the plaintiff's average yearly loss on this account, if any, by the number of years that

you find from the evidence he would have lived, but for the injury," or, in a death case "but for his death."

Now, where the expert witness comes in in this type of situation is to demonstrate the distinction between "work expectancy" and "life expectancy." Tables have been prepared by the Bureau of Labor Statistics of the United States which clearly and effectively demonstrate the distinction, and there is a marked distinction between the two. With the proper foundation laid, I can see no reason why an official of the Bureau cannot be properly qualified as an expert and demonstrate with the visual use of tables prepared by the Bureau the "life expectancy" of a person on the one hand, and the "work expectancy" of a person on the other hand.

For example, tables prepared by the Bureau, which are easily available and accessible to all of us if we but ask and search them out, indicate for example that in 1950 the life expectancy of a 22-year old average male was 48.9 years, and that for the same individual the work expectancy would be 43.2 years. This represents a difference of more than five years, which obviously is a substantial difference and which could readily and very probably reflect itself in the verdict and judgment subsequently entered in the case.

I suggest, therefore, in this field, that defense counsel can make considerably more use of the statistical expert and present a somewhat new approach in cases where the plaintiff is either permanently disabled or injured, and thereby precluded from employment, or, of course, in death actions.

Another area in the field of personal injury or damage suits, which heretofore may not have occurred to most of us to even attempt to use an expert witness, is the area of presenting to the jury a reconstruction of an unwitnessed accident, or in cases where we have to attempt to overcome the testimony of maybe a sole surviving witness. I am sure that in recent years many such cases have undoubtedly been looked into and investigated and then abandoned, due to what appeared to be the absence of any competent proof in order to prove up a case, either plaintiff-wise or defense-wise, either way.

Today, however, the possibility of establishing such a case based on the reconstruction theory is gaining widespread use. There are available today testing laboratories and individual experts who are trained in school to analyze and draw conclusions from physical facts surrounding an accident, even where there may be no available eye-witnesses or survivors. These experts are able to determine and testify whether the accident, in their opinion, was due to a product liability failure, such as metal fatigue. They

are able to evaluate skid marks, gouge marks on the pavement or on the road way; the damage to and the position of the damage inflicted on the motor vehicles in question; the friction of the road surface and the relationship between the facts of the accident and the law of physics.

It would appear that the courts and the public are accepting such proof, provided of course it is presented in an understandable, logical, and fair manner.

Incidentally, proof concerning the reconstruction of accidents by the analyzing of physical facts by qualified experts has been approved in many reported decisions, including Maryland, West Virginia, Minnesota, New York, and in a recent railroad crossing accident in our own state; namely, in the case of *Carter v. CB&Q Railroad Co.*, 175 Neb. 188. Both sides in that case used expert witnesses in order to reconstruct the accident which had occurred. In that case the plaintiff used a mechanical engineer and also a professor and specialist in dynamics; and defense counsel used a professor of engineering and mechanics, and another qualified expert who specialized in the dynamics of automobile collision cases.

Also in a recent federal court case, for which I don't have the citation, from Indiana, *Pavy v. Van Gorp*, proof concerning the reconstruction of the accident in question by an expert called by the defense was allowed and approved.

Those are just two examples that certainly I don't say occur every day in every case coming into our offices, but it would be a good place to keep in mind where an expert might just be the one witness who could either make or break the case.

In general, experts in situations can be used which might not at the outset occur to most of us in cases involving brakeline ruptures and brake failures, effect of automobile chains when the car is being driven on ice, stopping distances and inability to swerve vehicles when their brakes are locked, point of impact, what the traction of tires is on different kinds of pavements, such as wet or gravel or ice. Experts are frequently and almost invariably used in all escalator accidents. Experts are becoming more and more popular and used extensively in herbicide spraying and crop damage cases, and also, finally, in product liability cases.

In the product liability field, one case that our office itself happened to have and which was very similar to the one that Mr. Elson cited from 176 Neb. was a case where a stock truck and another vehicle were coming toward each other on a two-lane highway out near Wahoo, Nebraska. The front left wheel of the

small stock truck came off, causing the stock truck, which was east-bound, to swerve into the west-bound lane occupied by the automobile driver, who was killed as a result of the accident, and whom we, in this case, represented.

At first blush it might well have been a case of a typical mechanical defect over which the defendant had no knowledge or control and no previous warning, and very easily it could have resulted in a judicial finding that it was an unavoidable accident. However, we were fortunate enough to obtain the wheel from the truck, at least to see it and photograph it and have an expert examine it. The expert of course also examined the truck body itself, which by then was in a garage in Wahoo, Nebraska, and he was able to give us his opinion, and he was able to subsequently testify, and I am sure was the one sole thing that made the difference in the case, that there hadn't been any spurs or lug nuts on the wheel studs for many, many months, except for two prior to this accident. Therefore this one witness, in my opinion, in a case such as that which was an important situation, was the one witness who could either make or break the lawsuit.

Finally, gentlemen, I might point out that the use of expert witnesses is covered and annotated very thoroughly in a set of texts known as the *Defense Law Journal* which is published by the Allen Smith Company of Indianapolis, and citations for all of the above cases that I have referred to wherein expert testimony could be used are contained in this particular journal, and I thoroughly recommend its use to you in this regard.

CHAIRMAN WALSH: At this time I would like to introduce to you Mr. Norman Krivosha of Lincoln, Nebraska. Norman is the Chairman of the Committee on Procedure that has produced this program for you, and he will introduce the next panel of speakers.

CHAIRMAN Norman Krivosha, Lincoln: In continuing with the topic of the program, it occurred to the committee that so often when we conduct these meetings we call the various lawyers and ask them to give their views, and to some extent I suppose the views are somewhat tainted by their own personal experiences. I know myself if I am successful in a lawsuit and I am feeling pretty good about it, I am inclined every once in a while to walk in to the judge—I don't usually do that when I lose but if I've been successful I don't hesitate to visit with the court about it—but I am feeling pretty good about it, and just about at that moment the court will point out to me something that I did or failed to do that might have made even a greater difference.

We thought it would therefore be of some benefit to you to get the viewpoints of the trial of a lawsuit from the standpoint of a trial judge.

We are indeed privileged to have with us today one of our outstanding trial judges, a gentleman who has had a great deal of experience, both as a practitioner and as a member of the Bar, and we are indeed pleased to have with us this afternoon to speak on "Effective Evidence From the Standpoint of a Judge," Honorable Elmer Scheele, District Judge, Lancaster County. Judge Scheele!

EFFECTIVE EVIDENCE FROM THE STANDPOINT OF A JUDGE

Elmer M. Scheele

Thank you, Norman. Ladies and Gentlemen: I don't know what Norman had reference to. If I said that he had never come in to see me after a lawsuit it might imply that he had never won one in my court.

I notice from the program that I am scheduled to talk to you on "Effective Evidence From a Judge's Standpoint."

A trial judge is primarily worried about the admissibility of evidence that is presented during the course of the trial. He worries as to whether or not sufficient foundation has been laid. He worries to some extent about his rulings on objections to certain evidence, and whenever I think of that I am reminded of the first jury case I ever tried, and the trial judge was my former evidence instructor in law school. Of course I was nervous to begin with, and when a question was asked that I thought was outrageous, I objected vehemently and loudly, and I thought I had put in every possible ground that we had ever been taught in law school. Judge Wilson looked down over the bench at me for a long time before he ruled, and he finally said, "Sustained—but on none of the grounds stated."

Then a trial judge is constantly concerned as the trial develops with tailoring his instructions to the evidence that is actually received; for example, which items of damage to submit to the jury in a personal injury case. Also a trial judge should be concerned with making an intelligible record for the *appellate* court.

In a recent case a number of exhibits were identified. Proper foundation was laid for their admission and they were received in evidence. They were fingerprints, both latent prints which had been lifted from the scene of the crime, and known fingerprints and palm prints of two defendants who were standing trial. So

you had the known fingerprints of the two defendants, you had the latent prints and palm prints lifted at the scene of the crime, and the fingerprint expert had blown up some photographs of these documents and had drawn lines showing the points of similarity which caused him to conclude that the latent fingerprints found at the scene of the crime were those of the two defendants on trial.

Now after all of these exhibits had been received in evidence they were fastened onto a board on an easel and displayed there in front of the jury, and the witness was called upon to explain to the jury the various points of similarity and the reasons upon which he based his opinion that the prints were identical. But in the process of doing this, about halfway through they forgot all about exhibit numbers and he was pointing "this" compares to "this," and "this is identical with that," so we had to stop the trial at that point and point out to the attorneys that after all the Supreme Court would have no way of knowing what the witness was referring to. So we do have to keep in mind that the appellate court should be given a break too.

But when those things happen and evidence is interrupted, or something happens to cause it to be kept out of evidence, it does reduce, if not destroy, the effectiveness of that particular piece of evidence.

The trial lawyer is primarily concerned, I suppose, with impressing the jury with his evidence in order to obtain a favorable verdict, which is usually his first concern, and I suppose properly so. However, sometimes if the lawyer is not prepared and has not planned the strategy and the presentation of his evidence to do it effectively, he loses the value of that evidence.

In a recent case the first piece of evidence that was offered was a plat or diagram of the terrain involved in the lawsuit. The attorney, who was not a novice by any stretch of the imagination, had this large plat or diagram prepared by the county surveyor. He had the county surveyor there to testify as to its accuracy, and then offered it in evidence. There was an objection as to foundation, which was good and was sustained. The attorney called the court's attention to the statute which deals with the foundation necessary for the admissibility of records of the county surveyor, and so forth, but he had stopped there and figured that automatically made it admissible, but he had not related it to the date involved in the litigation, and the witness was unable to furnish the necessary information without calling a recess and going back to his office and checking his records to fill in the gap in the foundation.

He had started out with a bang, just like the Cornhuskers in the first couple of games. There was a lot of sputtering going on, and that piece of evidence had lost its effectiveness, and instead of getting off to a smooth start he was back on his haunches.

Our statute defines "oral testimony" and the methods of introducing it in section 25-1240. It says, "The testimony of witnesses may be taken in three modes: by affidavit, by deposition, and by oral examination." The statute does not, unfortunately, define the effective presentation or oral testimony. A trial judge can't help but observe some common mistakes that are made as these cases are tried. It is amazing sometimes that they do occur as frequently as they do.

You see a witness slouched in the witness stand chewing gum in front of a jury, and you wonder how that could ever have been permitted to happen in the first place.

You see the jurors straining to hear the questions and the answers of the witnesses, and you remind the witness to speak up. Sometimes it is necessary to remind *counsel* to speak up. But I think it should be basic that to be effective, the evidence must first of all be heard. That is something that probably we all could pay a little more attention to.

The matter of the preparation of witnesses has been referred to by some of the other speakers but, remember, I think for most witnesses this is a new and strange and somewhat frightening experience, and they are apt to be ill at ease and not to be natural. So it would seem that if you can get the witness to relax and to be at ease and to present his natural personality, that would be one of the first objectives you would want to accomplish.

It is apparent, I think, to any trial judge that not enough preparation is undertaken before placing some witnesses on the witness stand. Many witnesses need to be warned of what to expect, particularly on cross-examination. If they have given depositions or statements or have testified previously at another hearing, that should be gone over with them so they at least remember what they did say on those prior occasions.

We had a case recently where the matter of the identification of the defendant hinged upon one witness. The witness was testifying in great detail as to what he saw a half block away at four o'clock in the morning on a cold wintry February night. But on cross-examination he was unable to remember whether or not he had testified in that case in the municipal court. So there went that one out the window. It was effective evidence, but not in the manner intended.

I think, too, that trial lawyers need to pay careful attention to the order of the presentation of their witnesses. Most lawyers like to start out strong and they like to finish strong, and if there is going to be any lull it should be in the middle.

Some fallacies that are noticed is that where there are cumulative witnesses, as sometimes there must be of necessity, the same pattern of questioning is followed with each witness. This does not seem to be a very effective way to present it to the jury. So if you have witnesses who are going to testify to basically the same information, vary your questions with the witnesses, and it probably isn't necessary to cover the entire range with each witness.

On cross-examination I think probably more harm is done through improper cross-examination than any other single fallacy that occurs in the trial of lawsuits.

Recently there was a case tried in which I was prepared to sustain a motion to dismiss. The plaintiff had been unable to get the opinion of one of its witnesses into evidence that was absolutely essential to making a jury question, and on cross-examination the missing link was supplied. The jury got the court off the hook.

The same thing is true with reference to rebuttal testimony. That can sometimes let the case end on a flat note, if you are not careful. Some lawyers have the impression, apparently, that rebuttal means repetition. And of course if that is their theory of rebuttal they will be stopped in their tracks with proper objections.

In a recent case the plaintiff felt that four rebuttal witnesses were necessary. The first two that were called very effectively rebutted one or two pieces of testimony made by the defendant. Then he put on two more witnesses who rebutted some minor point made by some minor witness for the defendant and ended his case on *that* note. He would have been much better off, in my opinion, had he quit with his first two rebuttal witnesses.

Then there is another class of evidence that reference has been made to throughout the afternoon and that you will hear more about, I am sure, and that is "demonstrative evidence." The Nebraska statutes are relatively silent in this field. In visiting with a retired district judge out in the lobby a few minutes ago he told me that he had never had a case reversed because of one of his rulings on evidence. I told him we should be very thankful that we have such broad discretion in the field of the admissibility of evidence.

Then we have had some reference here to demonstrations, and there was a reference made to a case that was tried recently, *Petracek v. Haas*, where the wheel came off the car. In that case they brought into court the wheels and the air wrench which was used to tighten the lug bolts and a big compressor, and they put on a demonstration there in front of the jury. Before they got through we could hardly get in or out of the courtroom, and they couldn't try anything in any of the other courts while the compressor was being operated, but it was a very effective demonstration.

Frequently you will see in drunken driving cases, particularly on cross-examination, where the arresting officer is asked to demonstrate for the benefit of the jury these various intoxication tests that they administer to these unsuspecting victims. This is effectively presented to the jury. Sometimes the officers have difficulty finding the end of their nose. And if you are a prosecutor and you plan to use the officer, you had better have him stay home the night before he is going to testify.

We had a case recently that Judge Ronin, if he is here, could tell you about—it happened in his court—where one of the questions was the range of motion of one of the limbs. On the witness stand on direct examination the plaintiff was unable to raise the right arm above shoulder height, I believe, forgetting completely that a few minutes before she had no trouble when Judge Ronin administered the oath. So these demonstrations can be very effective one way or another.

Experiments are becoming frequently more common, and these experiments sometimes can be tricky on getting the proper foundation. A few years ago in a motor vehicle homicide case the Safety Patrol had gone out to the scene of the accident and had conducted a series of experiments as to how fast the curve in the road could be negotiated, as to how far back from the curve the curve sign could be seen with the headlights on bright, and so forth and so on. They had the officers all primed to testify as to the results of these experiments, which effectively shot the defendant's contentions in the head as to the speed at which he claimed he had been driving when the accident occurred. But our Chief Justice would not let the results of those experiments in evidence because the Safety Patrol had not simulated the conditions that existed at the time of the accident; particularly, they had not even used the same make and model of the automobile involved. So we had to call a recess overnight and put the Safety Patrol back to work with the proper mechanical devices at its disposal before we could get the results of the experiments in evidence.

In a recent grain elevator case where the question was whether or not an explosion occurred within the elevator, they attempted to use models and to simulate the explosion which transpired. I don't know what success they had in getting those into evidence. The last I heard they were having trouble.

Photographs can be particularly effective, and sometimes, gentlemen, in our desire to save time and to appear agreeable and cooperative, we may stipulate away some very damaging evidence if we are not careful. In a case that was tried several years ago, it was a head-on collision on a gravel country road over the crest of a hill, and of course the issue was, on which side of the road did the collision occur? The plaintiff had testified that it occurred on his side of the road and the defendant had introduced photographs which tended to show that the opposite was true. Plaintiff's attorney requested that the jury be taken to the scene of the accident, and the request was granted by the trial court. They were taken out there and while out there, I forget what the ruse or the device was, but the location of the telephone poles alongside of the road was called to the jury's attention.

The plaintiff's attorney laid back and didn't say anything until his final argument in response to the defendant's argument in which he showed them that according to the location of the telephone poles on the photographs, when they compared that with which side of the road the telephone poles actually were, it showed that the accident happened on the plaintiff's side of the road. And that was the truth—at least, so the jury found.

In criminal cases, particularly, very frequently gruesome, bloody photographs are offered in evidence, and the trial judge has a broad discretion to admit photographs, if relevant, and their probity or explanatory value outweighs the possible passion or prejudice they might arouse, no matter how gruesome or revolting they may seem. Photographs have been offered and received in evidence taken at autopsies in criminal cases showing the location and number of bullet holes that caused the fatality.

You've heard that old saw about a good photograph being worth thousands of words—there seems to be a dispute in the authorities whether it is 1,000 words or 10,000—but in a recent homicide case where the defendant beat his wife to death with a hammer, colored photographs taken with him sitting at the police station, blood-spattered from head to foot, remorseful, with his head in his hands, was worth much more than the written confession that was taken with the use of a court reporter.

You do have to watch for distortions and that sort of thing in the use of photographs, particularly of colored photographs and slides to make sure that your color reproduction is accurate and not distorted. We recently used some colored slides, I think they were 3D or something, I'm not sure, but anyway the jury had to be supplied with special glasses, and we had to have a preview outside the presence of the jury to make sure that distortion did not occur and that the slides could be shown to the jury.

In a recent case where a beauty queen had suffered permanent hideous facial scars in this accident, the use of photographs before the accident and of the hideous scar caused the flow of tears on the part of plaintiff's counsel in his final argument to the jury, and resulted in a very adequate award.

The question of blackboards and charts is a controversial one. Some attorneys prefer to start right out with this in their opening statements and some of them invariably resort to the devices, or one of them, in their final argument. It seems that they are permitted to do this without objection, very often. However, we do not permit the use of blackboards in evidence. In other words, if a witness is testifying and he is asked to draw on a blackboard the intersection and the location of the vehicles and then to testify as to what he saw and what he knows about the scene, would not be permitted because no proper record can be made for preservation in the appellate court. So the attorneys would have to do it on paper or on a piece of cardboard or something that could be sent up to the State House where it could be properly reviewed.

All I am trying to say to you is that you should have a plan for the presentation of your evidence. You should have made sufficient preparation for the efficient execution of your plan, and if you do that the jury will be impressed and you will return successful.

CHAIRMAN KRIVOSHA: Thank you very much, Judge. The next matter that we would like to turn to is one which perhaps we do *not* give enough thought to. We concern ourselves so often with the actual trial of a lawsuit, but this matter of getting to the client in time and having the client aid you in preparing the evidence is important. After all, it is the client who experienced the problem; it is the client who perhaps has the best knowledge of what happened, and so often we talk to him once and then we never bother to confer with him again until we get ready to try the case. There are many areas where the client can be helpful in building the case from the time you first visit with him until the time you actually go to trial.

To discuss that topic with you we have with us Mr. John P. Miller of Omaha.

THE CLIENT AIDING AND DEVELOPING EVIDENCE

John P. Miller

The subject I have been asked to visit with you about this afternoon is "The Client Aiding and Developing Evidence." I think that the extent to which the trial lawyer will utilize the client in helping him to procure and develop the evidence will vary, of course, from case to case and will depend in large part upon the intelligence and resourcefulness of the client himself. There are, however, many ways in which the client can be of great assistance to the trial lawyer in procuring and developing the evidence to be used at the time of trial.

However, I would give this admonition: I think that any such evidence should be checked and double-checked and closely scrutinized by the trial lawyer for its accuracy and its truthfulness. Clients don't always view their lawsuits with the same objectiveness which we tend to think that they do, and this is probably by reason of their personal involvement.

I personally suspect that many good lawsuits have been lost by reason of very minor and insignificant matters upon which it has been made to appear to the jury that the client, be he plaintiff or defendant, was lying or was not telling the truth.

One of the areas in which the client can assist a trial lawyer—I think it is very basic and I think it very often is overlooked, and it has already been mentioned by Kenny Cobb—the client can and should in all cases go with the trial lawyer out to the scene of the occurrence, no matter what kind of a lawsuit it is, whether it is an automobile case, a slip and fall case, or what. The client many times, by going out to the scene of the occurrence with the trial lawyer, can point out to the lawyer things which the client himself did not mention and perhaps overlooked in the oral interview because he as a layman didn't think it was important.

I recall a case that came into our office when a gentleman said that he slipped and fell on a patch of ice outside a business establishment on their sidewalk. All he could recall was that the sidewalk had been shoveled; nevertheless there was a small patch of ice upon which he slipped and sustained a very serious injury.

When we went out to the scene of the occurrence with this gentleman he pointed out to us the exact location on the sidewalk where he fell, and lo and behold it was right below a downspout

that came down the side of this business establishment, ejecting water into a depression on the sidewalk from which the water could not flow away, thereby forming a very small but nevertheless dangerous puddle, which in the wintertime formed a patch of ice.

If we hadn't gone out to the scene of the occurrence with the client he never would have mentioned the downspout because to him as a layman it wasn't important, but in this case the client supplied a very essential, a very vital piece of evidence to the trial lawyer.

Another area in which the client can be of assistance to the lawyer, and this is not true in all cases, but in some minor cases you may want the client to take some photographs for you. He can take photographs of the instrumentalities involved. If it is an automobile collision he can take photographs of his automobile; if it is a water damage case, property damage case, he can take photographs of the real estate involved; in a condemnation case perhaps he can take photographs of the land involved. You can also utilize the client to take photographs of specific injured areas of his body. In some cases you may want to use a professional photographer. That is something that will vary from case to case.

Again, you can have the client's wife take photographs of the client in a personal injury case, sitting in a chair using a head traction device to demonstrate to the members of the jury how a traction device is actually utilized, what it is and what it does.

Another admonition I would make is that in taking photographs of the injured area of the client's anatomy you must use good taste. I recall a case when I first got out of law school and went to work for Leo Eisenstatt and Don Lay. They sent me out with a professional photographer to take some photographs of a 65-year old man who had been brutally assaulted by another 65-year old man, both of whom were fighting over their 67-year old girl friend.

When I got to the man's house the girl friend was there on the premises with him, and sure enough his eyes were both black and his jaw was out of place, and he had bruises and contusions all over him. He was lying in bed there. His girl friend was holding his hand consoling him.

We took photographs of the black eyes and the bruises. We started to leave and she said, "You're not leaving yet, are you?"

I said, "Yes."

She said, "Well, you ain't done yet."

I said, "What do you mean?"

And with that she whipped back the sheet and there he lay, just as naked as a jaybird, and sure enough he had been brutally beaten around the groin.

The point I am making is that we had to take a photograph before we were able to leave her house, but we didn't use this at the trial. This, of course, would have been in poor taste.

Another area in which I think the client can be utilized to help the trial lawyer develop evidence, to save the trial lawyer from doing a lot of leg work and running around, is in helping you to acquire and accumulate documentary evidence. He can get income tax records for you, copies of the pharmacy bills, the medical bills. He can get copies of employment records and show how much time he missed from work. If he is in the contracting business he can get you copies of contracts, past contracts, prospective contracts, and so on. You can let the client do this for you. But again I would make the admonition that all of these things must be checked and double-checked for their accuracy and their veracity by the trial lawyer.

I personally believe that at any time that a lawyer is asking a jury to award his client money for loss of income or loss of wages, whether past or prospective, he must never, *never* rely upon the oral testimony of the client alone. I think you make a fatal mistake if you do this, because if the client is mistaken or if he is not telling you the truth and this is brought before the jury, this can destroy an otherwise good lawsuit. I think any testimony as to loss of income and loss of wages must be supported by documentary evidence.

Another area in which the client can be of great assistance to the trial lawyer is in bringing forth witnesses who can relate some of the occurrences that led up to the incident about which you are in court and some of the occurrences that occurred afterwards. Many times we overlook this, and many times they are important. If there are witnesses who can relate what happened to the plaintiff before the accident or afterwards, the trial lawyer should check with them.

I recall a case in which a plaintiff took the witness stand. She testified she had been with her boy friend. They were involved in a rear end collision. She was asked by her attorney, "What did you do after the collision?"

She said, "Oh, I had a terrible headache and a terribly painful neck. My boy friend took me home. I went to bed—without him of course—but I went to bed and called my doctor."

On cross-examination of the boy friend, the boy friend testified basically to the same thing, that following the injury she went home. On cross-examination defense counsel said, "Well, Mr. Jones, *immediately* following the collision where did you go?"

He said, "We went down to the Rocket."

The defense attorney said, "Where is the Rocket?"

He said, "Oh a little place down here between 15th and 16th and Farnam."

He said, "You mean the Rocket Bar and Grill, the pool room down there?"

The boy friend said, "Yeh."

He said, "What did you do down there?"

He said, "Well, we had a few drinks and we danced a little bit."

The point I am making is that this should have been verified by the plaintiff's attorney before he put his plaintiff on the witness stand.

Another area where I think we can utilize the client to supply evidence for us is with reference to pre-existing injuries or conditions, previous injuries. I think too many times, particularly in a plaintiff's case, in a personal injury case we ask the client, "Have you ever been injured before?"

"No."

"Ever been in an accident before?"

"No."

We accept that and we go on and we try the lawsuit. We get into the courtroom and we find out this isn't necessarily so. I think we've got to make it clear and essential to the client, as Kenny Cobb pointed out, that defense counsel have access to this information. If you've been involved in previous litigation, if you've made a previous claim for personal injury, they are going to know about it, and you've got to let me, as your lawyer, know about it.

I think if clients do relate previous conditions or injuries to the trial lawyer, it is his obligation to get into those hospital records and find out the full extent. It is a terrible time to find it out in the courtroom.

I recall one of the first plaintiff's personal injury cases I tried. I had a middle aged lady that had a cervical sprain. She testified in direct examination she had never been hurt before.

Seeing Mr. George Boland a little earlier in the day recalled to my mind that he was the defense attorney and he said, "Now Mrs. Jones, you've testified that you've never been involved in an injury before."

"No."

"Never made a claim before?"

"No."

"Did you used to live at such-and-such an address?"

"Yes."

"You are the same Mrs. Jones?"

"Yes."

"Well, don't you recall about four years ago you fell on the escalator down here at Brandeis Store and you made claim against them, and they paid you some money?"

"Oh, that's what you're talking about? Yes, I remember that, but I didn't think that was what you meant."

He said, "Oh. Well, do you recall the time down here at 24th and Poppleton in, I think, 1961 when you were riding in an automobile and you were stopped at a stop light and this other man, named So-and-So, ran into the rear of your car and you were hurt. You were taken to the county hospital and this insurance company paid you some money for that? Do you remember that?"

"Oh, yes. I forgot that."

Well, after about the fourth one of these he went through I was half underneath the counsel table trying to hide. This is not the time for the trial lawyer to find out about it. It is his obligation to find out about these things before he gets into the courtroom.

Another area in which the client can be of assistance, and I think the most important area, the most vital thing that a client can do for a lawyer, and I am referring specifically now primarily to damage cases or personal injury cases, is that the client can supply the evidence that the lawyer needs to corroborate and to substantiate the extent of the injury and the resultant disability. In most of the personal injury cases we try, the item for which we are asking the jury to award our client the most compensation is for the intangible pain and suffering and the resultant disability. It is the trial lawyer's obligation, it is his duty to try to convince the jurors that pain and suffering and disability is a marketable commodity for which they should award lawful compensation to

your client. It is essential that we make this point clear to the client and that we utilize him in having him assist us in developing this type of evidence.

What I am referring to is having the client provide us with other lay witnesses who can corroborate and substantiate his testimony as to the pain and suffering. In that connection, as to lay witnesses testifying as to hearsay as to pain and suffering, I would refer you to 90 A.L.R. 2d at page 1072. The Nebraska rule, briefly, is that manifestation of present pain is O.K. In other words, the next door neighbor can come in and testify, "When I talked to John Smith he said to me, 'Charlie, I can't go golfing with you today because my neck and back are just dealing me a terrible fit.'" That is admissible. But the neighbor cannot testify, "When I went to see Charlie he said to me, 'Well, I couldn't go golfing last week end because last week end my neck and back were causing me terrible pain.'"

Some of the lay witnesses that the client can bring in for us and introduce us to, for example, are co-workers, fellow employees, superiors who can testify as to the efficiency with which the claimant did his job before the injury and the inefficiency and the difficulty he now experiences.

He could introduce us to neighbors, friends, members of the family, all of whom can testify as to the activities that this man was able to engage in before the accident which he can no longer engage in: "I used to go hunting with him." "We used to go fishing together." "Charlie and I were on the same bowling team."

Again I think what we've got to keep in mind, what we have got to make the client understand in asking him to help us develop this evidence is what we are trying to do for the jury, to demonstrate to them how this injury and disability has affected this man's entire way of life, how it has affected his enjoyment of living. Isn't it much more effective, rather than having the plaintiff say, "My knee hurts me," to have the minister come in, perhaps, and maybe this is a little corny: you've got to use good taste, but think about this, have the minister come in and say, "Yes, I know that Charlie has a terrible disability here. Every Sunday morning when he comes to church and he kneels at that communion rail I can see he is in terrible pain with that knee of his." This is just to illustrate. You've got to use good taste, of course. But isn't this more effective than having Charlie get up there and say, "My knee hurts me."

Again, I think by bringing in members of the family, a young boy who says, "Daddy doesn't play softball with me any more," or a mother who testifies, "Daddy used to put up the storm windows

and take them down, and he used to paint the house; now he has got to hire somebody to do that."

I think all of these things are essential parts of our evidence in portraying disability to a jury, and I think this information has to come from the client.

Some lawyers use medical diaries. I will talk about that briefly. I personally don't prefer to use them. A medical diary is sometimes utilized. You have a client take a piece of paper or notebook and from the day he is injured up until the time of trial he keeps a running history or summary of how the injury has affected his way of life, loss of weight, loss of appetite, loss of sleep, objective signs such as swelling and discoloration, the amount of medication he takes, the times he went to a doctor.

I personally don't like to do this. I think over a year or a year and one-half period of time which it takes us to get our case to trial, this tends to make the injured man somewhat of a neurotic. The injury becomes a focal point of everything that has gone wrong in his life. And secondly, I don't like to think of a guy like "Duke" Schatz getting hold of that diary and cross-examining my client with it. I think he would have a field day.

I think these things are important, and I think the lawyer can keep in touch with the client, and the *lawyer* should keep the diary periodically as to how the client is progressing. What we do in our office is, sometime prior to the trial, have the client and his family come and we explain to them what we are trying to project to the jury. We say, "Charlie, I want you and the wife and the kids to go home, and I want you to put down every single thing that you could do before that you can't do now. I want you to list every single thing you can think of, from tying your shoes to brushing your teeth, that is affected by this injury." We say, "Pretend it's a game, Charlie. For every one you list you are going to get \$100," and, boy, when we tell him this you would be amazed at the list we get.

In any event, Charlie does that and he comes back and then we select those areas that we think we want to utilize as evidence in trial of the case. Then Charlie tells us which of his neighbors used to be his bowling team mate, which of his neighbors used to be his hunting companion. Then we bring them in and they testify as to the disability.

I think in projecting disability to a jury this is much more effective because if we do this with lay testimony, when we get our doctor on the witness stand instead of saying, "Doctor, what

kind of disability does Charlie have out of his fractured heel?" and the doctor says, "Well, he has got, I would say, a ten to fifteen per cent permanent partial disability of the right lower extremity." What does that mean to a jury? I think if we can have this lay testimony, when we get the doctor on the stand and we say, "Doctor, there was testimony in this courtroom yesterday that Charlie used to hunt but now, by reason of his fractured heel, he says that when he walks over uneven ground or broken ground or out in the country, this causes him pain and discomfort. Is this compatible with this injury?" The doctor will say, "Yes it is."

"Doctor, is this a permanent condition?"

"Yes."

"Will Charlie have this for the rest of his life?"

"Yes."

"Doctor, Charlie tells us in his work he has to bend over and pick up television sets. He testified yesterday that when he picks them up it causes pain in his right leg. Is that compatible with the type of injury he had?"

"Yes, it is."

"Is this a permanent condition?"

"Yes, it is."

"Will he have this for the rest of his life?"

"Yes."

"Charlie tells us he lives in a two-story house. When he walks up and down the stairs it causes pain in his right leg. Is this compatible with his injury?"

"Yes, it is."

"Is this a permanent condition?" and so on.

I think this means a great deal more to the members of the jury than "a ten to fifteen per cent disability of the right lower extremity." If we can relate the disability into the areas of this man's life, show how it affects not only himself but his entire family, I think the jury will be in a position to award us much more adequate compensation for his injuries. I think a jury will be much more willing to award the compensation for the man's loss of the thrill of wrestling with his four-year old son than they will be for his getting on the witness stand and saying, "I have a headache," because a headache jurors tend to relate to one specific area of the

body, but if we can make them understand that although the arms and the legs don't hurt by reason of the severe pain he is experiencing in his head and his neck, this makes him unwilling to use his hands and his legs to wrestle with his small son. I think this is more effective evidence, and I think we can utilize the client to a great deal of advantage in having him help us procure this evidence.

I've talked longer than I intended. These are just a few of the areas in which I think the client can be used to assist the trial lawyer in procuring and developing evidence for use at trial.

There are undoubtedly other areas and I think it is an unlimited area, limited only by the intelligence and the resourcefulness of the trial lawyer himself.

CHAIRMAN KRIVOSHA: Gentlemen, before we conclude the program I would like to depart for just two minutes. I have been requested to talk to you about a matter that was brought up this morning at the meeting. Some of you may not have been in attendance.

As you all know, Nebraska now has the Merit Plan System for the selection of judges. It appears that we have but half the program to make the system effective, the other half being the removal of judges selected under the Merit Plan System. There will be at this election a Constitutional Amendment No. 7 which will complete the entire Merit Plan program.

The concern of the Committee of the Bar that is working on this is that this is a non-controversial amendment, and since there are many controversial ones that one could be lost and not receive a sufficient majority to enact it. It seems that if the lawyers are not going to take the forefront in it, it may not be adopted.

There is material that has been provided. I believe it is in the lobby or will be out there. You are asked to take that material with you, take as much of it as you think you may be able to hand out, and get the information to your clients and persons with whom you come in contact, and point out to them the need for the adoption of Amendment No. 7 in order to complete the Merit Plan System. Please don't leave the meeting this week without taking that material and keeping that matter in mind.

Now to move along with the program, we have heard a number of matters about obtaining evidence, the effectiveness of it, and the presenting of the evidence. Many, many times we fail to be able to provide sufficient foundation for questions which are helpful. Many times we wrestle trying to get documents in evidence, calling the Register of Deeds and having him bring up all the books, or

areas such as that that simply bog down the trial and do nothing to make the necessary impression.

Now I would like to call upon our next speaker who will give us some information as to how these documents can be obtained, what documents are available, and how they may be introduced in evidence. For that I call upon Mr. Bernard B. Smith of Lexington.

OBTAINING DOCUMENTS

Bernard B. Smith

When I was first invited to participate in this program I think I experienced a reasonable amount of hesitation and reluctance along the same lines as the man who was attending his wife's funeral. After the service had been concluded in the church, the undertaker told him they were a little short on automobiles, would he mind riding out to the cemetery with his mother-in-law?

He said, No, he guessed not. He could probably do it, but he said, "Most likely it is going to spoil my whole day."

My subject has to do with obtaining documents and, in my opinion, documents is probably one of the most valuable aids in the trial of a lawsuit that is available to the practitioner. I consider this so for three or four reasons. One of them is that in some cases it is the only manner in which the particular issue in question can be proved. And next it is a type of evidence that is ordinarily and generally acceptable to the jury. The part that I like best about it is that once the document becomes an exhibit it continues to testify to that jury a long time after all the other witnesses have been excused. I think a good document is a little bit like some radioactive material—it may continue to radiate throughout the deliberation of the jury, and we hope favorably so.

Many other documents serve a useful function in enabling the jury to understand and to follow the evidence. I think this is particularly so where you are talking about real estate, you are talking about a scene, you are talking about mechanical problems and things of this nature, where the thought and the impression cannot be effectively conveyed by mere words.

There are many statutes that are available and give assistance in obtaining documents of this nature. At this time I make grateful acknowledgements to those who have preceded me for touching upon some of these statutes, and if there is any repetition it isn't because I wanted it that way.

All of the ones that I shall refer to are found in Chapter 25. The first one is section 25-1218 which, in substance only, provides

that historical works, books of science, art, and other published maps or charts made by persons indifferent between the parties, are presumptive evidence of facts, provided that they are of general notoriety or interest.

Section 25-1968: Either party, or his attorney if required, shall deliver to the other party or his attorney any deed, instrument, or other writing wherein the action or the defense is founded or he intends to offer. And then if he refuses to do so, this statute provides that the other party may not introduce the original.

Section 25-1269 provides that printed copies of laws of other states, purported to be published under the authority of that state, are admissible.

Section 25-1278 pertains to the field notes, maps, plats, and so forth that are prepared by a county surveyor and duly certified to by him, are admissible.

Section 25-1279: Certified copies of most any other public records where they are required by law to keep and maintain records certified to by the officer in charge and responsible for those records should be admissible.

Section 25-1280: The public officer in charge is required by this statute to furnish the records upon request and upon an offer to pay whatever the fee might be.

Section 25-1281 is that photocopies of these same records stand in the same shoes and on the same footing as the originals or certified copies, if the photographs have been certified to.

Section 25-1285 touches on judicial records and certification for admission by them.

Section 25-1292, as most of the older ones know, pertains to abstracts. They are admissible, but opportunity must be given to the adverse party to examine the thing before it is submitted as an exhibit.

Section 25-12,101: All Nebraska courts take judicial notice of the statutes and the common law of every other state.

Section 25-12,104 provides for reasonable notice to be given the other party in the event you plan to introduce the common law or the statutory law of another and foreign jurisdiction.

Then we have the Uniform Business Records Act which is found under section 25-12,108, and the business shall include every kind of business, profession, occupation, calling, and operation of institutions for profit or not. Then section 25-12,109 touches upon the necessary foundational material.

Section 25-12,112 authorizes photocopies of these same exhibits.

Now just a few suggested documents—and I've tried to break this up into the different categories involving various types of litigation.

A few of the documents that might be of assistance and value, we will say, in the trial of an automobile case: I should always want an accurate plat or map, preferably drawn to scale, depicting the situs of the accident itself, the streets, other objects that are pertinent and material. In conjunction with that I frequently like to have cutouts drawn to scale, or of scale at least, of the vehicles involved so that they might be maneuvered and moved by the different witnesses, placed upon the diagram or plat that is being used, and then the permanency can be established by having them outline with a pencil going around the cutout that you have used.

Reports of investigating officers should always be obtained. Admissibility might be another question. Reports that contain opinions of course are subject to objection.

Factual matters are ordinarily admissible. In any event, the reports of the accident, either by municipal officers or by the State Patrol, should always be on hand and available. In some instances they should be admitted and in others they should be referred to simply to refresh recollections or for cross-examination, depending on what your position is.

Lots has been said about photographs, and I would like to emphasize that I think a photograph is one of the best ways of creating an impression upon a juror that there is available. I like to have all of them.

Then where do you obtain them? Most of us, or some of us, aren't always there when the accident happens. In instances there may be a delay of ten or fifteen minutes. But I do think that you should make all reasonable inquiry, first as to the investigating officers. Frequently these gentlemen will, on their own and for their own little scrapbook, take photographs that never show up in any official report. You might also, as has been suggested, study the other people that were there and appear perhaps in some photograph, or by any other means where the names and identity of these people come to your attention as to whether or not any of them happened to take any photographs.

In two or three instances perhaps the most valuable picture that was presented during the trial was obtained by some amateur photographer who perhaps took it as a matter of curiosity only.

Aerial photographs are oftentimes a good means of presenting to the jury a complicated traffic pattern or highway system that is involved in your particular accident.

Of course, all of us know to go to the newspapers and obtain the photographs of the one that they published and attempt to obtain copies or duplicates of the eight or nine that they *didn't* publish. Sometimes the gory ones that appear in the newspaper are of less value and assistance in the trial than the eight or nine other pictures that were taken that were not used at all as far as a newspaper publication.

Schematic drawings are often beneficial in explaining to the jury a chain of events, or how a particular accident developed. They are admissible, and if you fail there I think in any event that a schematic drawing is extremely beneficial in explaining your theory of the lawsuit in your final argument to the jury.

Weather reports of course are sometimes pertinent. Those reports are available. They should be scrutinized to determine whether or not it coincides with your understanding of the facts. Oftentimes this is true: the weather station is fifteen miles from the scene of the accident, and according to some judges that is stretching it a little bit so far as admissibility is concerned. I would like to think that if it rained at the accident, it rained harder at the weather station, or something, but it doesn't always turn out that way.

Reports are sometimes required by various corporations and companies of their agents and employees as to any unusual or accidental matter that might take place. Through the methods that have been suggested by a prior speaker I think an effort should be made to obtain such reports.

I know of one case that involved a bus company and they did obtain a report that had been tendered by the driver employee of the bus company, and it was ruled out by the court, although admission was requested under the Uniform Business Records Act. This decision overruling the admissibility of that particular document is found in 318 U.S. 109, and in that case the court held that under the Uniform Business Records Act the bus company was in business for the purpose of carrying passengers and not maiming them, and accordingly that this particular report was not kept in the regular course of business of that company. Now some taxicab companies might not qualify.

A great deal has been said about hospital records and charts, and these should always be examined, and if favorable they should always be requested and made available and introduced as an

exhibit. In your examination I think you should be careful about opinions. Generally opinions expressed by different people and appearing in the hospital records as such would not be admissible if it is simply set out in the document. You would have to go to the individual and then have him give his opinion, if he is otherwise qualified and foundation is laid.

I think that anatomical charts serve a great convenience, particularly with medical testimony. You should have the charts that are prepared by the commercial people in this field, and I haven't any particular company to plug at this moment, but I think a chart illustrating the particular member of the body that is in question and it then is marked and identified by the expert doctor so that it can become a part of the record, and it isn't simply shown on a blackboard, is of material and valuable assistance to the jury.

Repair bills: I won't go into those. Ordinarily they should be admitted, and usually these things are taken care of in the pre-trial.

Income tax returns have already been touched upon. I think income tax returns are extremely valuable in showing the earning capacity of an individual *before* the injury or the accident. I think from the defense standpoint they might want the income tax returns, and they could be obtained on request for admissions; they could be obtained on interrogatories, and things of this nature. I don't believe, and I hope most of the judiciary concurs, that a tax return governing and covering earnings prior to any injury or accident should be kept out of evidence. It is a tendency, I believe, on the part of most taxpayers not to overstate their earnings when they have no reason to do so *before* the accident takes place.

In actions involving real estate: The actions that I have in mind here for the most part consist of flooding, change of water course, quiet title, condemnation, and similar actions of that nature.

Aerial photographs are particularly valuable. As all of you know, the government has been photographing the land for a long time. They have done this on three or four occasions. You could obtain the first and earliest ones that came out. They have two or three since that time. They are all taken to scale and you can obtain copies that are on such scale as you may request as long as it is within reason. First you have to identify your particular piece of real estate with the code that is employed by the government. Your ASC office or Soil Conservation Office can easily pick out any particular piece of real estate and give you the proper reference numbers so that copies of this photograph can be ordered. They are obtained from the Agricultural Stabilization and Conservation Service Division of the U. S. Department of Agriculture at 2505

Parley's Way, Salt Lake City, Utah. Most of you are too tired to write or take notes, and if you are interested you can always obtain this same information from the ASC or the Soil Conservation Office. I consider that in actions of this kind the ASC records may be of considerable help and value to you. Ordinarily it will set out all of the acreage in any particular farm. It will show the cultivated land, the wasteland, the irrigable land, and things of this nature, sometimes along with production records that would have a bearing and touch upon the value of the land in question.

The Department of Roads and Irrigation has surveyed most of the state fifteen or twenty times, and oftentimes you can find a map, survey or chart through that department that may be beneficial.

Topographical maps are good ones, and rather frequently the Soil Conservation Office has made a topographical survey of the particular farm in question. If these works can be obtained from somebody who has already paid the bill, it will be a great saving to your client.

Certified copies of assessors' records are sometimes beneficial and helpful depending upon how zealous an assessor you have and the State Tax Commissioner is keeping them on their toes these days, and their records are rather complete in most instances.

A search should be made of anything of material assistance that might be found in the office of the Register of Deeds.

There is another field that I think I should mention. The hour isn't too late, I hope. I assure you my personal discomfort is at least equal to yours, so we will shorten this as much as we can. I think this has become increasingly important in products liability cases for the most part. What I have in mind is safety standards and codes. What is due care, or the lack of due care, becomes a bit more sophisticated in this particular field. The old standards of common sense and "a reasonable and prudent man" are not just quite equal to what does constitute "due care" in a products liability case or any similar or related matter. "Due care" as we understand it here requires study; it takes research, experiment, and you have to learn the relationship between man and machines of the product and what its intended uses were, what its foreseeable unintended uses might be, and things of this nature.

Now generally safety standards represent less than due care, and that is true for these reasons, that industry to a large degree has played a vital role in establishing and setting up standards and codes of safety. Industry generally, I think it might be said in

fairness to them, are not usually concerned with helping you in your lawsuit but only setting up minimal requirements so that if these are met it is hoped that that will constitute due care. Quite often these standards represent a compromise between only what is safe and unsafe.

Now safety codes are available from three or four primary sources. One is that your governmental units do set up a set of standards and a code of safety, and most of these can be obtained from a government printing office. You will find many other codes are in effect by various industries that on a national basis have adopted and established a set of standards. Individual concerns sometimes have a set of codes or standards and you will frequently find in contractual matters that what is standard so far as that contract is concerned is prescribed and denoted by the terms of the contract itself.

We do have a number of independent sources that prescribe safety codes, and things of this nature, that are operated primarily for the benefit of the ultimate consumer. Some of these codes, and certainly a few that would provide a good place to start, would be the American Standards Association, next the National Safety Council, and then next, if one were looking for these standards I think interrogatories should be submitted to the defendant manufacturer or corporation as to the organizations or societies that they belong to that prescribe and set forth the standards that will govern that particular industry.

We have an Accident Prevention Manual for industrial operations that is published on a national scale, together with a Fire Protection Handbook and the National Electric Code, Scientific and Engineering Indices are available in most libraries in the larger cities, and that is an excellent source that you might contact in picking out a set of standards or a code of safety that is pertinent to the particular problem that you might have in mind.

As far as use is concerned, this is a little bit of a new concept, probably no newer than products liability but certainly not much older, for use, if the defendant admits knowledge and participation in the formulation and the acceptance of the particular code or standards that you are using, then it should be admitted by the court as a guide for what is standard, or what minimum requirements should be met by that particular manufacturer.

Next, many courts admit codes and standards of safety that have universal or national publication and acceptance in the light of a proper foundation in evidence, and they do so under the Uniform Rules of Evidence. It should be kept in mind that all

of these codes and standards represent only a custom in that particular business or industry, and it does not necessarily constitute due care. But if the act or the product is in violation of a code or standard or some of their requirements, it is certainly evidence to be considered along with any other evidence on the lack of due care.

In conclusion, the foregoing remarks suggest only a few examples of documents that may be employed in the trial of a given cause, and I would like to leave with the additional admonition that has been suggested by many of the other speakers today, that you should never consider the use of any document without researching the statutory and the case law, and whenever expedient all questions concerning the admissibility should be resolved at the pre-trial conference.

I have sat up here long enough to note that at the conclusion of the remarks of each speaker a small number of folks have left this room. I anticipate that when I am through probably most of you will leave.

CHAIRMAN KRIVOSHA: Two matters before we adjourn: I would like to call your attention to the fact that the program continues beginning at nine-thirty o'clock tomorrow morning, and we will begin promptly. I think the matters we take up tomorrow will be of equal interest.

I personally would like to extend my deep thanks to all of the members who appeared today for helping put this program together, and I think they deserve a warm round of applause from everyone.

[The session adjourned at four fifty-five o'clock.]

ANNUAL ASSOCIATION DINNER
THURSDAY NIGHT SESSION

October 13, 1966

The annual Association dinner for members and their ladies was held in the Ball Room of the Sheraton-Fontenelle Hotel, President Ginsburg presiding.

PRESIDENT GINSBURG: Ladies and gentlemen, I hope you have all finished your repast. Now we want to go on with the real business of the meeting, the real justification for our all being here. The first order of business, I would like to introduce to you the honored guests sitting at the table at which I am also sitting. I will ask you, please, not to applaud for the individual. It will just delay proceedings. If you feel so inclined after I have introduced everybody, then you can give a round of applause. I asked the same thing this noon and was outvoted and turned down. But please bear with me tonight, and let's have one round of applause for everybody. I know that the honored guests will appreciate it just as much.

At my extreme left I want to present to you Mr. George B. Powers of Wichita, Kansas, an ex-Governor of the American Bar Association and the director of this evening's entertainment.

Next to Mr. Powers, Mr. Clayton Davis, President of the Kansas Bar Association and Mrs. Davis, where are you, would you please stand and be recognized?

Next, Mr. George F. Guy, President of the Wyoming Bar Association; and Mrs. Guy, will you please stand.

Next, Mr. H. T. Fuller, President of the South Dakota Bar Association; and Mrs. Fuller.

Next, Mr. James J. Fitzgerald, Jr., President of the Omaha Bar Association. Is Mrs. Fitzgerald here?

Next, Mr. John J. Wilson, Association Delegate to the House of Delegates of the American Bar Association; and Mrs. Wilson.

I am going to skip the next man. I hope he will forgive me. Next to the man whom I've deliberately overlooked, Mr. George B. Boland, President-Elect designate of the Nebraska Bar Association; and Mrs. Boland.

Next, Murl M. Maupin, the new President of the Nebraska Bar Association; and Mrs. Maupin.

Now, starting at my extreme right, Mr. Warren D. Welliver, President-Elect of the Missouri Bar Association; and Mrs. Welliver.

Next, Mr. S. David Peshkin, representing the Iowa Bar Association.

Next, Mr. William Sahr, Secretary of the South Dakota Bar Association.

Next, Mr. Glenn Winters, Executive Director of the American Judicature Society.

Next, Mr. Anan Raymond, the oldest living past President of the Nebraska Bar Association.

Next, Mr. George H. Turner, Secretary of the Nebraska Bar Association and State Delegate to the House of Delegates of the American Bar Association; and June Turner.

I am going to skip the lady here at this table, deliberately on purpose.

Next, Mr. Robert D. Mullin, Chairman of the Nebraska House of Delegates; and Mrs. Mullin.

Next, Dr. Daniel Nye, President of the Nebraska Medical Association; and Mrs. Nye.

Now I want to do something personally, for me, myself alone. I don't know whether this is proper or not, but whether or not it is proper I feel I have to pay tribute to my partners who during this last year "covered" for me and let me do the work for the Bar Association while they earned a living for me: My brother, Joe—will you rise, Joe; my partner and brother-in-law, Hymen Rosenberg, and his wife, Mrs. Rosenberg, Zella; my youngest partner and dearest friend, Norm Krivosha, and Helene Krivosha.

Now I must confess something to you. I thought I was through. George Turner called my attention and said, "There is somebody else here in the audience that I think you ought to introduce. I don't know, I guess George has been able to read my mind as the result of a year's contact almost daily on Bar Association activities, because I intended to introduce this person anyway. May I say to all those here that were it not for this particular person whom I am about to name I would not be here tonight. I owe everything that I have *ever* done, whatever little I have accomplished, to my darling wife, and I want her to stand—Rebecca Ginsburg.

Again George is reading my mind, and I appreciate it. George has told me that I have been talking too much but I want to talk a little more, if you will forgive me.

When the ancient Hebrews were about to organize their first government, as Moses led them to the Promised Land, the first injunction that was given relating to government was, and I quote, "Judges and officers shalt thou appoint me in all thy gates, and they shall judge the people with righteous judgment. Thou shalt not wrest judgment, thou shalt not respect persons. Justice shalt thou follow, that thou mayest live and inherit the land which the Lord thy God giveth thee."

The Bible thus clearly sets forth that in order to perpetuate a nation and to enjoy the benefits of civilization, the first commandment is that justice must be provided for, both for the great and the small, the strong and the weak, and that that justice must be administered without fear or favor.

In the commentaries on this Biblical injunction it has been said that the judges must be both competent and impartial, and they are not to be appointed for social or family reasons. Absolute fairness must be shown in the hearing of cases, and the judge is to give every one a patient and a courteous hearing. He is warned against yielding to the subtle temptation of giving an unjust judgment out of pity or sympathy.

It is further said that the use of the word "justice" twice in the phrase which I have already quoted brings out with greatest possible emphasis the supreme duty of administering justice to everyone. In the eyes of the prophets, justice was the divine, irresistible force. Justice is the foundation for all the other qualities required of man. Justice is the awe-inspired respect for the personality of others and their inalienable rights.

Nor is justice limited to the relations between individuals. It extends to the relations between group and group, and it asserts the claim of the poor upon the rich, of the helpless upon them who possess the means to help. The administration of justice is thus one of the preconditions of a nation's continued existence. Any perversion of the cause of justice is a sure sign of national decay.

It has been pointed out that the Biblical statements concerning justice even precede those relating to the appointment of a king. Hence it is said that justice is to be *above* the executive power. England's advance on the road to freedom, as our own, is due to the fact that from an early date in history the administration of justice became independent of both the executive and the legislative.

In this year of riots and civil commotion and disrespect for law and order, it is most fitting that we dedicate our annual meeting to justice and respect for the law. We must carry this message to all the people of our country everywhere. We do this by presenting

to the world a spectacle of the servants of the administration of justice in the State of Nebraska, the Bench and the Bar of this State.

At the head table before you you will find the representatives of the Bench, the judges who judge the people of this state with righteous judgment. Without these judges we could not exist. We recognize these judges as the representatives of that branch of the administration of justice which must exist in order for our country to continue to exist.

Now it gives me the greatest pleasure to present to you our distinguished guests and representatives whom I have referred to:

Starting at my extreme left, Judge Herbert Ronin, representing the Nebraska District Judges Association and who is here as the representative of all the district judges of this state; and Mrs. Ronin.

Next to Judge Ronin is Judge Robert L. Smith of the Nebraska Supreme Court; and Mrs. Smith.

Next, Judge Leslie Boslaugh of the Nebraska Supreme Court; and Mrs. Boslaugh.

Next, Judge Harry A. Spencer of the Nebraska Supreme Court; and Mrs. Spencer.

Next, Judge Richard E. Robinson, Senior Judge of the United States District Court in the District of Nebraska.

Next, Judge Harvey M. Johnsen, Judge of the United States Court of Appeals for the Eighth Circuit.

Next, John W. Delehant, Sr., Judge of the United States District Court for the District of Nebraska; and Mrs. Delehant.

Next, Chief Justice Paul W. White, Chief Justice of the Supreme Court of Nebraska.

Next, Judge Robert C. Brower of the Supreme Court of Nebraska; and Mrs. Brower.

Next, Judge Hale McCown of the Supreme Court of the State of Nebraska; and Mrs. McCown.

And at the end, the Honorable William A. Goetz, County Judge of Platte County, Nebraska, the President of the Nebraska County Judges Association and the representative of all the County Judges in this State.

I regret extremely that Judge Edward F. Carter, probably well known to you, is ill and unable to attend; and that Judge

Robert Van Pelt of the United States District Court had to send his regrets and was prevented from being here tonight.

I am sure we are all proud and honored to have these representatives of the Bench with us this evening.

Now, if I may continue for another moment or two: judges cannot perform their duties in the administration of justice without the service and the assistance of the Bar. The Bar is the advocacy and advisory branch of the profession which represents each individual and stands for him in the assertions of his rights and privileges as a person, which he has not only by divine right but as recognized by the fundamental law of our democracy. The judges are only as effective as the lawyers who appear before them.

So I now present to you, as representatives of the Bar, a group of our members who are about to receive their 50-Year Certificates, men who have practiced this noble profession of the administration of justice for half a century. These men whose names I will now call are representatives of all of the remainder of us who daily appear before the courts and represent our clients in the search of justice and in the intent to fulfill the divine commandment that "Justice shalt thou pursue."

I will call the names of those who are to be awarded the 50-Year Certificate. I want to announce that not all the 50-Year recipients were able to be present. We will only call the names of those who are present in person and they will be asked to step forward and receive their certificate at the hands of Mr. George Turner. In the meantime I want to report to you that all those who are not present will receive their certificates by mail.

I now present to you Mr. William P. Kelley; Mr. Julius D. Cronin; Mr. L. Orville Chatt; Mr. Golden P. Kratz; the Honorable Ellwood B. Chappell; and Mr. Harvey W. Hess.

Now that we have honored the representatives of the Bench and the Bar, I want to present to you and call upon a member of our Association for a two-minute talk, limited to the next Law Day, Mr. Allen Overcash.

LAW DAY

Allen L. Overcash

I would like to say very briefly that I am honored to be able to speak just a few brief words on behalf of forthcoming Law Day in Nebraska.

I think I would be less than candid with everyone here if I said that Law Day is the greatest day to publicly occur in this

state. I think, and it certainly has been suggested to me by many people, that if Bob Devaney's tackle will sprain a finger or something else will happen to a Nebraska quarterback, it may get more publicity and more recognition and possibly more understanding than Law Day.

In this regard, the Bar Association faces a crisis with Law Day, and that is simply the fact that this occasion does not convey to the people of Nebraska the meaning which I believe is inherent in it.

In my own opinion, the people we are honoring here this evening convey the meaning of Law Day. The inspiration of these gentlemen, which has been an inspiration to all of us in the legal profession, is to me the central fact of the essence of the rule of law, which is the principle that this day is established upon, which is the opportunity, in my view, that this day and this occasion gives to the Bar Association to convey to the people of this state and the laymen who are not members of the Bar an understanding and a certain appreciation for this great, unique, western institution, the rule of law.

This year's theme for rule of law is taken from a quotation from Theodore Roosevelt: "No man is above the law, and no man is below it." I think the significance of this message not only lies in its words but more importantly lies in the way and in the manner that everyone here this evening articulates that message in their own way and in their own area of the state to the laymen and to the others who may reach and appreciate the Law Day message.

I would say to you that this a great opportunity for the Bar Association, because this is the one single *public* occasion throughout the year that we are given the opportunity to convey to the lay public an appreciation of the great ideals that we are gathered here to honor.

I would also say that the Committee on Law Day is starting its activities for the coming year right now, and we are going to be at a very early date soliciting the interest of everyone throughout the state in this year's occasion. We hope, and we sincerely request, that any member of the Bar who is asked to participate in this program, and all those who are not, will heartily lend their efforts to the glorification of the great principles that the gentlemen we are honoring here tonight represent.

PRESIDENT GINSBURG: Yes, Judge Chappell.

JUDGE ELLWOOD B. CHAPPELL, Lincoln: I honestly believe that the ladies who made it possible for us to survive for fifty years ought to be introduced to this audience.

PRESIDENT GINSBURG: That is a most excellent suggestion, and may I ask those ladies to please rise and share in the applause for their husbands.

JUDGE CHAPPELL: I think you ought to let people know which one of them is which.

PRESIDENT GINSBURG: Well, I will have to ask them who's who—I don't know.

JUDGE CHAPPELL: I will introduce my wife, Mrs. Chappell. This is Mrs. Golden Kratz. And this is Mrs. Harvey Hess.

PRESIDENT GINSBURG: Thank you very much.

We now proceed to the matter of the presentation of awards, and I want to say that the award which is to be presented next was presented at my insistence.

I have had during this past year some knowledge of the wonderful work done by the Omaha Bar Association, and I wanted to start the program of recognizing any local Bar Association which does an outstanding job. I had, as I said, knowledge of my own, but in order to be sure that I didn't overlook anything I wrote a letter to Jim Fitzgerald and I said, "Please give me in complete detail everything that the Omaha Bar Association did." He sent me a letter of six pages and I promptly lost it. So I can't give you all the details of what the Omaha Bar Association did, but from my own knowledge may I say that they work not only for the profession, not only for their members, but for the public interest, and that is a big thing we must remember.

They prepared the Desk Book and the Legal Economics Program of which so many of us have taken advantage. They have had Legal Aid in full force, Lawyers Referral in full force, educational programs, and last but not least a wonderful study of the Bail Bond project which those of us who were fortunate enough to attend the House of Delegates were thrilled with learning about.

So on behalf of the Nebraska State Bar Association, and I hope as a starter for the years to come, I take this occasion to present to Mr. James J. Fitzgerald, President of the Omaha Bar Association, this Award of Merit, reading as follows:

Nebraska State Bar Association Award of Merit:

This is to certify that the Omaha Bar Association has been duly selected to receive this honor award in recognition of its outstanding service to the public, its members, and the legal profession.
Awarded October 13, 1966

Herman Ginsburg,
President

JAMES J. FITZGERALD, Jr., Omaha: Thank you very much.

PRESIDENT GINSBURG: Now I am going to call upon our Chairman of the Public Service Committee, Mr. Patrick J. Healey, to present the next two awards, and to explain to you why I deliberately overlooked two of the occupants of the head table. Mr. Healey.

PATRICK W. HEALEY, Lincoln: Thank you, Herman. The Public Service Committee, on behalf of the Bar Association, in the last few years has had a program of presenting awards—one to a member of the Bar who has typified the highest in the profession and who has contributed to public understanding of the profession and to confidence in the profession of the practice of law; the other to a person or group *not* a member of the Bar who has contributed substantially to public understanding of the legal profession and to the furtherance of the aims of this profession.

Again this year we have outstanding nominees for both awards. The President's Award in recognition of outstanding contributions in civic activities, religious activities, and leadership as a practitioner and active member of the Bar is awarded to Mr. George B. Hastings. Will Mr. Hastings step up.

I may say that the awards that I am handing to these people now are temporary ones. The permanent award in the form of a very beautiful plaque is not ready for the meeting but will be mailed directly to the people involved.

The second award, to a person or group *not* a member of the Bar who contributed substantially to carrying out the goals of the legal profession, I am awarding to Mrs. Tyler B. Gaines on behalf of the Junior League of Omaha. The people here from Omaha do not need to be told, I am sure, of the work that has been done by the Junior League in carrying out the program and contributing many hundreds of hours of work, and financial support to the Legal Aid Bureau, and in cooperating with the Bar Association to make legal services available to those who might otherwise be unable to have them or afford them.

So on behalf of the Bar Association I would award the Award of Appreciation to Mrs. Tyler B. Gaines on behalf of the Junior League.

MRS. TYLER B. GAINES, Omaha: In view of the fact that some of you may know that this is the second award which the Junior League has been honored to have awarded to them because of our work with the Legal Aid Service, I had better let some of you in on the truth of the matter.

The catalyst in this situation is the Omaha Bar. They came to us, as the United Community Service, and said there was this need in the community and could we help with a little money and, hopefully, a little know-how and some good trained volunteers, which we were pleased to do. They should be the true recipient, and we are very grateful that we are getting these accolades from all of you. Since possession is nine points of you know what, I'll get off with it quickly.

PRESIDENT GINSBURG: Ladies and gentlemen, I now come to the portion of the program which gives me the greatest pleasure, because I am now about to lay down the duties of my office and transfer them to the hands of my most capable successor. As you all know, my successor is Murl M. Maupin, who has been an active worker in this Association since the year 1934, to my personal knowledge.

In 1934 and for a number of years thereafter he served as Chairman of the Special Committee on Judicial Selection; for several years he served on the Special Committee on the Bylaws of this Association; and from 1937 to 1941 he was a member of the Executive Council. He helped steer this Association in its infancy and has given of himself to its work as it has grown and matured.

As was well said at the installation of the integrated Bar by its first President, "Anything that comes out of the integrated Bar will be the fruits of our own will and efforts. He who is not willing to pour something from inside himself into the activities of the integrated Bar will contribute nothing to its success. He will be merely a name on the roster. Every lawyer should ask himself 'Am I really willing to give of myself for the unselfish activity and group service of my profession?'"

Murl M. Maupin has answered this question and has for almost forty years given of himself to the unselfish action and group service of the profession of the law in the State of Nebraska. It is only fitting therefore that we now recognize those years of service by conferring upon him the mantle of the presidency of this Association so he can now proceed to do even more.

In handing over the gavel of office to Mr. Maupin I not only do so with satisfaction, but I do so with the most explicit confidence that this gavel is going into the most capable hands of one who will serve our Association not only wisely and well but also with energy and diligence. The future of our Association, I am confident, is in safe hands.

In token of our respect for that office and the man whom we have selected to fill it, I now call upon all in this room to rise as

I formally deliver this gavel to President Maupin and duly declare him to be the President of the Nebraska State Bar Association for the ensuing term.

PRESIDENT MURL M. MAUPIN: President Herman, Distinguished Guests, and Ladies and Gentlemen of this Gathering: I accept this token of office and prepare to enter upon my duties as the President of this Association with a firm conviction that no finer nor more exalted honor can be conferred upon a Nebraska lawyer than election to the presidency of this Association. To be President and to be permitted to join the host of the truly distinguished lawyers who have preceded me in this office with their individual contributions to our profession and to the public welfare of this state, is an awesome responsibility, a recognized responsibility that I shall exert my best efforts to discharge to the best of my ability.

In accepting this token of office I express my heartfelt appreciation and thanks to the members of this Association who have conferred this honor upon me.

**INSTITUTE ON EVIDENCE
FRIDAY MORNING SESSION**

October 14, 1966

The second session of the Institute on Evidence was called to order at nine-thirty o'clock by Norman Krivosha of Lincoln.

SECRETARY-TREASURER TURNER: Gentlemen, if I may have your attention for a moment, the attendance at this meeting has so far exceeded our wildest expectations, I brought only 800 of the books on Evidence to this meeting. If those of you who have not received one will leave your name, please, with one of the girls at the desk we will mail it to you. Frankly, I didn't want to carry a lot of them home. I am sure some of you who registered late may not have put your name on the list to receive the book. Be sure to do so because it is a very valuable thing and we have plenty of them but we do not have them here. If you have not received a book or signed the senate pad out there, please do so so that you will not miss out on this very valuable part of the program of this annual meeting.

CHAIRMAN KRIVOSHA: Gentlemen, we said we would begin at nine-thirty and we are going to try to start right now and move along.

The first topic that we would like to take up with you this morning is a matter which probably most lawyers in the trial practice give little thought to, and this is the matter of filing motions before trial to limit the evidence. So many times that question gets in and you make the objection and the objection is sustained but you sure wish the question had never been asked. The judge very carefully turns to the jury and says, "And I admonish you that you are to disregard the question." It is kind of like asking them not to think about a pink elephant for the next fifteen minutes, and all they think about then is the pink elephant.

From the plaintiff's standpoint, then, on motions to limit evidence, I would like to present Mr. Hans J. Holtorf of Gering, Nebraska.

MOTIONS TO LIMIT EVIDENCE

Hans J. Holtorf

I don't know of a motion or anything they could have given me that I knew less about. Consequently it has been a real challenge

to find out what it was all about. On the surface it sounds like a real simple subject. I find that all of the reported cases, unless I have missed some in the last year—I can't find anything that went to the Supreme Court in this state on that subject; these were first allowed in Texas and they have since been allowed very extensively in Texas. Therefore most of the citations that I will give you are from Texas. I found one in Virginia, and on my own I found one in Iowa on a subject and I just remembered it because it is on a subject I am very interested in, a farm accident case up there in Iowa.

In talking with lawyers over the state I find that it is being used to some extent in districts in eastern Nebraska, in Lincoln, and in several of the outlying districts.

Often when you get into something that hasn't been used before, it is just like a pendulum—they go too far, and I think when it is accepted in this state we will have cases go up and probably some reversals because that seems to be the way it usually happens.

For example, I think most of this has been covered for a long time in this state by just discretion of counsel, whether it be a plaintiff or a defendant. At this point all I can find on motions in limine, is that plaintiffs are using them.

The theory of the plaintiff using them is that any prejudice brought into the case which is not reversible can be harmful to his case, and therefore he wants to keep out any possibility of anything that might hurt his award. This is the reason they use the motion in limine.

For those who are not familiar with this practice, this is "a motion heard in advance of jury selection which asks the court to instruct the defendant, its counsel and witness, not to mention certain facts unless and until permission of the court is first obtained outside the presence and hearing of the jury."

Since 1937 motions in limine have steadily increased. You must keep in mind that many times there is a legitimate difference of opinion between logical relevancy and legal relevancy which cannot be resolved without the court's ruling. The plaintiff's lawyer says this: "If prejudicial matters are brought before the jury, no amount of objection or instruction can remove the harmful effects, and a plaintiff is powerless unless he wants to forego his chance of trial and ask for a mistrial. Once the question is asked, according to him, the harm is done. Under the Harmless Error Rule many of these matters would probably not be reversible error, even though they have a subtle effect upon the plaintiff's case."

The argument for this motion is that the greatest single advantage to the motion in limine is not having to object in the jury's presence to evidence which is logically relevant. Jurors cannot be expected to understand why they should not be allowed to consider all evidence which is related to the case and will usually resent the fact that our objection kept them from hearing it.

Another advantage, it is argued, in the use of these motions is to allow the trial judge an opportunity to read the question and the authorities involved. If presented in advance of trial with a brief and with time to study it, the court will be more inclined to grant the motion.

Now rather than giving you a Texas case or a Virginia case I will give you this farm accident case I found up here in Iowa, just stumbled onto it. Incidentally, if you want to try to look this up, it is under Motions, Keynote No. 2 in the West System. Reading from the case of *Wagner v. Larson*, which is an Iowa case in 136 N.W.2d 312, here is the motion they filed there: "Comes now the plaintiff and before trial and before the selection of the jury, moves the Court in limine to instruct the defendants and all of their counsel as set forth below on the following grounds:

1. Since it is immaterial to this suit whether or not
 - (a) This plaintiff was ever convicted of any crimes;
 - (b) Plaintiff has never received any Social Security, Veterans, or other pensions;
 - (c) Plaintiff has never had marital difficulties;

the defendants are precluded from using any pleading, testimony, remarks, questions, or arguments which might inform the jury of any such facts."

The court said, "Such a motion is a useful tool in preventing immaterial matter from encumbering the record. It gives the Court an opportunity to rule in advance on admissibility of evidence," and the motion was sustained.

Now how did this affect the plaintiff's trial in this case? This is a case where they got \$70,000, so it was darned important to them to retain it. And they didn't.

"On direct examination plaintiff testified that he was married and had three children. On cross-examination he was questioned and answered as follows:

'Mr. Wintergreen, you testified you have three children. Do you have more than that?'

'No sir.'

"That is all the children you have?"

"Yes sir."

"At this point counsel for plaintiff asked for a conference in chambers. In chambers plaintiff's counsel asked for admonition of counsel in re motion in limine as in violation of the Court's ruling thereon. The motion was sustained and defendant's counsel was admonished *not* to ask any questions in connection with the birth or existence of another child. Defendant offered to prove by the discovery deposition of plaintiff that he had admitted a previous marriage and a child by that marriage. Defendant asked permission to impeach the testimony of plaintiff by his own deposition. The offer and request were refused.

"A trial court has considerable discretion in limiting cross-examination, especially when, as here, the matter sought to be inquired of is not material to the main issues of the case.

"Plaintiffs in having opened the subject, defendants were unduly restricted in cross-examination relative thereto. Plaintiff admitted a previous conviction of a felony. The Court instructed on impeachment. The restriction on cross-examination curtails defendant's attempted impeachment. However, the number of plaintiff's children was so immaterial to the issue of how he was hurt that the restriction was not so serious as to require reversal."

In other words, in a part of it they said it was harmless, in part of it they said it was serious. Now what did that do to the plaintiff's attorney there? He has got a case to try over. He lost a \$70,000 verdict. That's what I am getting at—when we buy something new we usually go too far.

One of the best arguments for the use of the motion in limine is that the granting of the motion as worded "cannot be reversible error." It is only when the evidence is offered out of the presence of the jury and then excluded that possible reversible error occurs. Appeal is taken from the rejection of the evidence tendered, not the granting of the motion. The rule is no different from the rule concerning other evidence questions. That is the point I want to make.

For example, I cannot understand in this Iowa case, and I just cannot see a Nebraska judge going as far as that judge went there, because certainly most judges in my experience on a question that goes to impeachment, particularly of a party who is sued, is certainly relevant, and if he has misstated one fact or two facts or three facts, who is to say that the sum total of that would not be a serious limitation of the defendant or the other party to suit.

This can work two ways. What I am saying is that up to now in most of the cases I find, it has been used by the plaintiffs.

I do want to point out this point and remind counsel of this: when you have one of these items come up, like what happened in this Iowa case, you must remember that upon discovery thereof you have got to ask the judge, out of the hearing of the jury, whether you can pursue the line of inquiry. If he then yet refuses, you must remember to take witness outside the hearing of the jury and have the judge rule on the question so that the Supreme Court, as Judge Scheele said yesterday, you must remember that if you are going to go up you have to have something to go up from. You have got to preserve your records. You've got to have the questions and the answers, and the only way I know how to do it is outside the hearing of the jury.

The power of the trial court to grant such a motion is inherent in its right to omit or exclude evidence and will probably not be specifically mentioned in procedural rules.

Now going back, because I've got too much material and I never was able to put it in a paper form, some citations for you as to the powers thereof : *Condra Funeral Home v. Rollins*, 314 S.W.2d 277—that's a Texas case.

The part that the granting of the motion as worded cannot be reversible error is *Hartford Accident and Indemnity Company v. McCardall*—that is a Texas S.W.2d case which I didn't have the citation on; it is 6 Supreme Court Journal of Texas 549.

Another case is *Aetna Casualty and Insurance Company v. Finney*—346 S.W.2d 917.

Another Texas case, *Bridges v. City of Richardson*—354 S.W. 2d 366.

The advantages to be gained by trial motions for the plaintiff is an article in 6 South Texas Law Journal, 179.

Examples of the type of evidence that has been excluded by a motion in limine are limited only by the particular facts of each case and by counsel's ingenuity. Some of the more common and obvious uses of the motion fall within the collateral source rule. As you know, there is much on that. There is an article "Collateral Source Rule and Full Special Damages" in the book *Trial and Tort Trends* put out by the Central Book Company of New York, 1957.

Then, such as medical expenses, sick leave, vacation time, social security, pensions, and withholdings from salary, your cases on that are *Chapman v. Evans*, 186 S.W.2d 827; the one on the VA

hospital proposition is *City of Fort Worth v. Barlow*, 313 S.W.2d 906; the one on collateral source as paid by insurance is *Texas Central Railway Company v. Cameron*, 149 S.W.2d 709.

If I give you too much citation I will run out of time and encroach on my co-counsel.

You can see by excluding mention of these matters it is argued that you not only add to the amount of damages which the jury may award, but you also prevent yourself from getting into the prejudicial position of having asked the jury to award damages that you have not actually lost.

I do want to caution you again that in many of these items when you read the cases you will find that courts have many times excluded these matters only later to find that they should have allowed the defendants to inquire into some of the excluded items. So I really think that although you can't find it in written form in this state, it has been done by all knowledgeable counsel by either not mentioning them or mentioning them only when they have briefed it ahead of time to know that it is relevant and proper in the particular case. That is the reason we have no cases making a big to-do about it in Nebraska. These cases are in Texas and I will leave it up to you whether they would apply in Nebraska. Some would not.

In death actions in some states a motion can exclude the remarriage or engagement of the surviving spouse, as well as the surviving spouse's income from employment, life insurance, social security pensions, Veterans Administration pensions, or other matters which fall under the collateral source rule.

Another item, the personal habits of the plaintiff or the decedent may also be excluded. For example, unless there is direct proof that the decedent or injured plaintiff was intoxicated at the time of injury, his personal drinking habits are inadmissible, and so on and on and on.

I think we have given you just enough to show you what, in the minds of fertile counsel, or the fertile minds of competent counsel—you see, you are awake! I keep finding that out—and I have never known yet when I was defending a case that the counsel on the other side did not have an active working mind at all times. So I think Nebraska is not too far behind the other states. Like I say, if you get into that series of cases you will find a Virginia case, this Iowa case, and a wealth of Texas cases.

CHAIRMAN KRIVOSHA: What has been said in connection with the plaintiff's case applies equally as well with the defendant's case. Oftentimes plaintiff's counsel, perhaps properly, but inten-

tionally will ask that one or two questions that he knows full well no answer will be received, and he is probably better off not getting an answer, but being able to ask that question and putting it into the minds of the jury is all that he seeks to accomplish.

To look at it then from the defendant's standpoint on motions to limit, Mr. Lawrence J. Tierney of Omaha.

Lawrence J. Tierney

Hans has talked and discussed this matter from the plaintiff's standpoint. I think it would be more appropriate to attack it from a *practical* standpoint.

As a matter of fact, there is no authority for such a motion, and you would have a hard time digging into the books to *get* some authority for it. I think if any defendant objected to it on the basis that it was frivolous or something, a good sound court would probably say, "What is your authority for it?" and you would say, "I can't find it."

But assume that you *did* get past the first step, what judge would take the time to hear enough evidence so that a proper ruling could be made and a proper record preserved? We have a difficult enough time with our pre-trial hearings any more to get a record made, and that sort of thing. It is all so informal that everybody just kind of passes it, and unless you've got some particular point it's just pretty tough to make a record.

Then you get into this problem: suppose there is a ruling on such a motion. Then the judge, at a hearing on such a motion, has to consider what other evidence there would be in the case that might change the situation so that such excluded evidence might become admissible at the time of the trial, even after it has been ruled out. I am sure that you can all think of a hundred cases where this could happen. And what judge is going to pass on such matters without hearing all there is to hear for fear of committing error.

Keep in mind that notwithstanding the prior statements, certainly such procedure could not be a one-sided affair; it must apply equally to the plaintiffs and the defendants. It is not all one-sided, although sometimes I think it is, but keep in mind that if there are what we call the Canons of Ethics—I haven't read them and I am sure Hans hasn't read them lately—but here is the way they read on this point: "The conduct of a lawyer before the court and with other lawyers should be characterized by candor and fairness. A lawyer should not offer evidence which he knows the court should and would reject, in order to get the same before the jury by argument for its admissibility, nor should he address

to the judge arguments upon any point not properly calling for determination of him."

The last time I heard this read was when our Supreme Court Judge, Judge Smith, called DeLacy down for just handing the hospital record to the court reporter and saying in a loud voice, "The defendant offers the hospital record."

Well, the plaintiff right off had to object in front of the jury, and Bob Smith called DeLacy in and read this, and I am sure Mr. DeLacy even hadn't read it for a long time.

There is no question but what such motions are applicable to depositions that have already been taken; that is, where you've got something in a deposition that has been taken, but there you've got specific questions and answers. I think the time to do it is at the pre-trial. You've got everybody there and at least he can bring it up and the court and both lawyers are aware of the problem. The way we have been doing it here, both in the state court and the federal court, is just before trial we go in and tell the judge, "We've got this problem and I don't think Tierney ought to be talking about that until we can get into the case far enough to see what's involved."

And the judge will say, "Yes, Tierney, don't you mention anything about this particular point in your voir dire opening statement and let's see what we get to when we get into it. Then when we get to it we will excuse the jury and take the witness and go back and make a record."

I think that would probably be the proper way to do it. There are actually very few cases, but for your information Steve Davis over in my office ran down an annotation in A.L.R. It is 94 A.L.R. 2d 1087. It doesn't have very many cases in it but you run into such problems as the "Dead Man's Statute," res gestae statements, insurance, compensation, criminal history, marital history, and this plaintiff widow remarriage business. You can see that each one of them may, at the time of trial, change from the time of such a motion; for instance, the widow plaintiff having remarried.

The last time I had that was when Mr. Boland and I were down in federal court and he had a plaintiff that had remarried. I searched my brain as to how I was going to get my new name in. We had talked to the judge before, and for the first three or four questions everything came in with her deceased husband's name, but it wasn't very long when everybody was talking about her new name. So it didn't take long to get that in. Then a doctor came in with the new name on a bill. "Did you treat her?"

"Yes, I saw Mrs. New Name," you know . . .

Some of the cases that we were able to find, and I will try to cover them briefly, and the language is pretty good: there is a condemnation proceeding. The plaintiff made a motion to exclude evidence of damage from increased flooding which would be caused the defendant's property by proposed construction of levees on the portion of land condemned. The motion was made at the outset of the trial of the case. The defendant opposed the motion to exclude, and the court evidently ordered the exclusion of direct evidence of decrease in value attributable to such future projects, but held that the evidence as to the future flooding might be admitted.

The court on appeal commented on the propriety of the motion, saying as follows: "While the motion to exclude was not a conventional procedure, it is well conceived under the circumstances. Counsel for the condemnor might have waited until valuation witness had testified, and after eliciting on cross-examination that his appraisal had included impermissible factors, moved to strike it. Such a motion even when soundly grounded generates practical difficulties for witnesses, counsel, and court."

An order granting the motion in mid-trial has frequently harsh effects, and the trial judges are understandably reluctant to make it. The order imposes on jurors the intellectual surgery entailed by the direction to ignore what had been heard. The motion to exclude, adopted in this case, is vastly more rational. It reduces the surprise factor. It is calculated to iron out a disputed issue before the jury trial gets under way and before the actual expressions of value opinions. Expanded pre-trial discovery techniques furnish occasion for its use. The motion in this case was precisely directed at a well defined issue. Once the trial court ruled on it, no further objection or motion were necessary to preserve the point for appeal purposes. Well, that is one case.

Here is another: *Bradford v. Birmingham*, 228 Alabama 285. In this action the plaintiff, whose reputation was evidently not what it should be, had an action against the defendant for personal injuries sustained while a passenger in the defendant's streetcar. Before the trial the plaintiff filed a motion which sought to have the court enter upon a preliminary investigation to ascertain whether or not the attorney for the defendant intended to offer certain testimony touching upon the life and character of the plaintiff, and to have the court inform and admonish the attorney that in the trial of the case he must not offer or attempt to offer testimony which the plaintiff thought he would offer and which the plaintiff insisted was illegal and incompetent. The trial court refused to make the order or enter upon the investigation, and the plaintiff preserved the exception.

While the following language from the court on appeal must be considered as dicta on the grounds that the plaintiff in direct examination had gone fully into the matters which he sought to have excluded in regard to the motion, the Court said, "There is no rule of law or practice in this state (Alabama) which authorized the procedure called for by the plaintiff's motion. The trial court will not put itself in a position of assuming in advance of trial that the attorney licensed to practice before it would offer legal or incompetent testimony, nor will it arrogate to itself the prerogative of requiring counsel to inform it as to what evidence he will or will not offer in the client's behalf, nor will the trial court assume the right in advance of the offering of the evidence to instruct an attorney on what evidence he may introduce on the trial of a cause. Such a procedure in this jurisdiction finds no support in any of our adjudged cases. To give judicial sanction to the procedure attempted to be engrafted upon our well understood and long established practice in the trial of cases is wholly unjustified and in violation of all precedents and unwarranted usurpation of the judicial power and authority."

Now there are many, many problems that come up, and as I said before, I think that the practical problem is, number one, in having a judge that will spend the time that is necessary to preserve the record and sit and listen to all the evidence. They are more inclined to say, "Well, let's wait until the trial goes and then we will get into the matter."

There is possibility of too much error and I am sure from the judge's standpoint, rather than rule on it, I think he would rather wait and listen to see what the evidence is in the trial before they get to this, with the simple admonition that before the trial you speak to the judge that you have this one problem, and I am sure the judge would say, "Mr. Tierney, don't mention that in your voir dire opening statement," and I'll tell you, Tierney won't do it if the judge tells him.

I think that is the answer, and I think such a motion is more satisfactory than one made some time ago by simple filing of a motion.

CHAIRMAN KRIVOSHA: Certainly in any event we hope we have suggested an area to you that may not have occurred to you before. Lawyers ought not to be reluctant to enter into new areas and see if we can't establish what the level of the law is.

Turning now to our next topic, perhaps one of the greatest areas of weakness in the trial of a lawsuit is that we as lawyers get so involved in trying to make the record that we forget that we are trying a case to the jury, and that before we concern our-

selves about the appellate court we've got to take care of the trial court and the jury and obtain the verdict that we are seeking to obtain. So often you see where the trial just falls apart because not adequate thought has been given to the matter of "How do you get the evidence in, and how is it going to get in most effectively?"

To take up that matter for you this morning, I first would like to call upon Mr. William G. Campbell of Omaha to speak on "Introduction of Evidence at Trial."

INTRODUCTION OF EVIDENCE AT TRIAL

William G. Campbell

I heard an announcement on the radio this morning on the way in to the office. For those of you who are entertaining the thought of going to the freshman football game down at the University, I understand it has been canceled because they are anticipating rain this afternoon and they don't want to ruin that field for that Kansas State ball game tomorrow, so there will be no reason for anybody to be gone this afternoon on account of that freshman football game.

First I want to call your attention to an error in your program. The second speaker on this half hour of the program is listed as Mr. F. L. Winner of Scottsbluff. Frank was unavoidably detained, I understand, by virtue of weather in Scottsbluff. It is snowing there. His able partner, Don Wood, happened to be in Omaha attending the bar convention and he has graciously accepted Mr. Winner's plea to step in and bail him out in this situation. So I do want to have you correct your program to show that Don Wood is handling the second half of this topic.

We have been asked to talk about introduction of evidence at trial. We've been given suggested items of interest to most lawyers that are most frequently introduced. We will discuss the introduction of photographs, the introduction of mortality tables, official documents, and records, medical records, charts, plats, diagrams, and the like. So we will be concerning ourselves mostly with the practical aspects of introducing documentary and demonstrative evidence.

As we all well know, the rules of evidence are subject to a wide variety of interpretations by the various courts. I am often reminded of one particular interpretation of the hearsay rule as interpreted by the municipal court of the City of Omaha. I have it on good authority that a couple of lawyers were trying a case in municipal court one day and counsel asked his witness a question

which indicated that the witness should be repeating a conversation which was said to him outside the courtroom by somebody else, and properly so an objection was lodged, and the judge turned to the witness and said, "Well, Mr. Witness, now when this conversation was going on between yourself and Mr. "X" outside this courtroom, were you looking him right in the eye? And likewise, was he looking you right in the eye when this conversation took place?"

Answer: "Yes, Your Honor, certainly."

"You may testify."

That has become known as the face-to-face exception to the hearsay rule as it exists in Omaha.

I am sure we all have our little favorites like that that will crop up in any court on any particular judge's honest interpretation of what a rule of evidence is.

Talking about photographs, first of all I think Mr. Fiedler yesterday, when he opened the program, pretty well covered this topic. From the investigative standpoint it is extremely necessary and helpful to have your photographs taken as soon after you get the assignment as possible and, as Mr. Fiedler said, go to the scene with the photographer and instruct him on what you want photographed. The question then is not, "Do we have photographs?" but, "How do we get them into evidence when we come to the time of trial?"

We will assume, for the purpose of this discussion, that the photographs we have taken are relevant and they are material to the inquiry.

The Supreme Court has announced just two tests for the admission of photographs, and they are found in the case of *Markey v. Hunter*, 170 Neb. 472, and that is, "Is the photograph a true and correct representation of the place or the subject matter, and is the representation pertinent to the time of inquiry?" In other words, was the photograph taken at an approximate time after the event occurred, or roughly at the same season of the year, and so forth, so that it is a true and correct representation of the place or subject matter?

Just as a matter of practicality for introducing the photograph into evidence, you would want to call the photographer, although that is not necessary, I think any witness who is familiar with the scene can look at a photograph and say that this photograph truly and correctly portrays the scene, but I think if you have the photographer on the stand you want to ask him a routine set of questions as quickly as possible to establish the identity of the

photograph, the date and the place of taking, and so forth, the direction the camera was facing, what is generally shown in the photograph—that it is the intersection of 14th and Q or something like this, taken from the south looking north. Then there's the question, "Does this photograph correctly and truly represent the subject?"

If the answer is "yes," you should have your photograph admitted into evidence.

Importantly, in using a photograph as a testimonial aid I think it is good to remember that when you are using a photograph and a witness is testifying and pointing things out in a photograph, that it be within the sight of the jury so the jury can see what the witness is doing, and so forth.

If he is identifying a semaphore signal or a crosswalk or something like that, or some debris in the street, you ought to have this conducted within the view of the jury so they can see what the witness is referring to. Likewise, you've got to keep in mind you are making a record at the same time, and rather than have the fingerprint be the identification on that photograph for posterity, it is always helpful to have the witness mark what he is talking about. If he is talking about a semaphore signal, "Will the witness please put the letter 'x' by the semaphore signal that he is referring to and put his initials on it," so you have that in your record.

Of course, needless to say, the jury is extremely anxious to take a look at these pictures closely. They don't care much about what is said about the photograph; they want to look at them themselves and determine for themselves, so be sure you ask the court for permission to circulate the photographic evidence among the members of the jury, and do so as soon after they are offered and accepted into evidence as possible, because they will be sitting there curious about looking at these photographs if they are standing idle on the court reporter's stand and not being circulated among them.

I think everybody has to recall humorous experiences in their practice, and in connection with photographs I am reminded of a humorous incident that occurred in my early practice when I was with Kirk Tierney. Kirk gave me a case shortly after I went into his office as a young associate. He said, "Campbell, here is a case I think you can probably handle all right." It was a little plaintiff's case. It dealt with a breach of warranty or failure to construct a cement floor in a basement in a workman-like fashion. The contractor had poured a cement slab floor which, as all cement slab floors will do ultimately, cracked.

This floor had cracked in a great number of places. The plaintiff was very irate about it, having paid \$400 or \$500 to have the work done. She didn't think it was right that the concrete had cracked up and broken, and so forth, so she enticed Kirk to file a lawsuit for her, and Kirk handed it to me.

I thought, "Golly, it's a low-budget case and we really can't afford to send a professional photographer out, so I'll ask the plaintiff to take her own little camera and get some shots of the scene in question so that the jury can see just exactly how bad this cement floor is cracked up."

Lo and behold, she comes in with a lovely set of polaroid prints. Gosh they were just beautiful! These cracks were so prominent—she had just done a marvelous job.

We now come to the trial of the case and the photographs are introduced as part of our case, of course. There was a sage older lawyer on the other side. He picked the photographs up and he looked at them and said, "My, those are mighty nice photographs. Those cracks show up so well." He said, "Mrs. Witness, did you dust anything out of those cracks, or did you scrape any other concrete that may have fallen down into those cracks out before you made this photograph?"

"Well, yes, I did that."

"Well, did you do anything else?"

"Yes, I took some white chalk and I went along all these cracks and put chalk down in there."

He said, "My word! Why did you do that?"

She said, "The first set of photographs I took you couldn't see the cracks."

Needless to say, the jury was liberal with us and gave us about enough to pay for the chalk.

Let's talk just a little bit about the use of mortality tables. I think "Duke" Schatz pretty well covered this area yesterday. We will talk here strictly about their introduction into evidence and their use as evidence. They can only be used when they are relevant, and they only become relevant when there is a permanent injury involved or it is a death case or the damages in the case are to be measured in terms of life expectancy. So before they can be introduced you have to cross that hurdle of having the relevance and the need for the introduction of the mortality tables.

Now, how do you go about getting a mortality table into

evidence? There is a very complicated calculation that goes into making up a mortality table, a lengthy study, and so forth.

For many, many years the courts in Nebraska have simply taken judicial notice of mortality tables, at least those that are contained in Volume 2 (a) of our Revised Statutes. In the table section there are two or three mortality tables. The courts will take judicial notice of those and several others, as a matter of fact. At least the court says they are some evidence of the span of human life.

I refer you to a case of *General Credit v. Imperial Casualty*, 167 Neb. 833. There are some jurisdiction which admit mortality tables into evidence on the basis of an exception to the hearsay rule, which is the old treatise exception, the scientific treatise. However, I do feel the correct method of getting a mortality table into evidence is merely asking the court to take judicial notice of the table.

There is another table that Mr. Schatz mentioned yesterday which is becoming more and more widespread in its use in the courts, and that is the Work Expectancy Table that is prepared by the United States Department of Labor. You have a little more problem getting these tables into evidence because they have not been used long enough for the courts to accept them commonly, and so you probably cannot ask a Nebraska court to take judicial notice of the Department of Labor's Work Expectancy Tables and get it into evidence on that basis. So in that situation if you plan to introduce the work expectancy table you are going to have somebody from the Department appear and testify, identify the tables, establish the foundation, the method of preparation and so forth, and then you may offer it as an exception to the hearsay rule as a treatise; it is a scientific treatise that is substantiated mathematically in various types of jobs and professions.

In passing, and not dealing with mortality tables, I would like to mention if any of you ever had problems in proving wages of an individual perhaps you might be trying a case in the area where the accident did not happen; you might be miles away or you might be across the state or in another state, for that matter, but the federal government and, once again, the Department of Labor has a very helpful set of figures that they call the Davis-Bacon Wage Rate Pre-determination. They are prepared for use in government contracting but they are available. They cover almost every area in the United States by locality. So if you need the Davis-Bacon tables for your area, you may either get them from the Department of Labor or, if you have a governmental unit in your community

such as the Corps of Army Engineers of an Air Force Base or an Army Base or something like that, their contracting officer will be happy to furnish you with the Davis-Bacon Wage Rate Pre-determinations that exist for that area. You will find those can be very helpful to you.

Lastly, I would like to talk about the use of plats and diagrams and such at trial. First of all, if you've got a case involving real estate and you are offering a county surveyor's plat, let's say, you are faced with a little different problem than you are if you are offering a plat prepared by a private engineer or a private surveyor. The county surveyor, you will find, has special treatment in section 25-1278 of the Revised Statutes which provide that his field notes as well as a plat prepared by him are admissible over his certification to show the dimensions of real estate, as well as its shape. And that goes into an official record area which Don will cover later. I don't want to go into it any further than that.

Secondly, if you are using a private engineering firm or private engineer or private surveyor, then it is necessary of course to call the surveyor who prepared the plat and diagram, go through a series of foundation questions with him as to the methods employed in obtaining the data that went into making up his plat; that is, how did you measure it? What devices were used to measure distances? What devices were used to measure the angles? What devices were used to measure the radius of curves? How did you prepare this document? That is, what scale was it reduced to? That general foundation will generally get a plat established in evidence without anything further.

I will talk a little bit about the use of a diagram of an intersection frequently used in accident cases, intersection cases, and so forth. In the use of the plat it can be accurate from an engineering standpoint, although it doesn't necessarily have to be, to show the location of signals, crosswalks, the width of streets, curbs, and the like—all can be shown in the same method, although as I say it is not absolutely necessary if you are using the chart or the diagram only as an aid to testimony. In other words, if you are just asking the witness, say a patrolman or a police officer, to illustrate his testimony by the use of the chart, it is not really necessary that it be drawn to scale. It is helpful. I think it is better for you to have a good scale drawing made rather than one you would quickly pencil out for use in court.

If you are using a safety patrol officer on the stand and a safety patrol officer has himself measured skid marks, located debris, and things of that nature, it is permissible as a testimonial aid and an aid to the jury to understand the case for him to locate

these skid marks and so forth on the chart. You will find it a great help to the jury in understanding what the lawsuit is all about.

I refer you for authority for that type of use to a federal court case in the District of Nebraska, *National Alfalfa v. Sorenson*, 220 F. 2d 858. That was Holt Blackledge's case. The specific question as to the use of the chart was presented to the Eighth Circuit Court of Appeals and they so ruled that it was perfectly all right for an officer who was familiar, who had investigated shortly after the accident, to trace his skid marks on a diagram and, for that matter, to draw the diagram himself to scale based on his measurements.

One thing, in closing. When you are using a diagram like this, frequently you will have it marked for identification before you start having the witness use it as an aid in giving his testimony, and frequently you will get to the place where you'll rest your case and you will find that you have not offered the diagram. So be sure you always make a note to offer the diagram as a part of your case; otherwise a good portion of your testimony is wiped out. Likewise, again, when the officer is testifying or anybody is putting a mark on that chart, for the preservation of the record be sure you have him identify what he is doing either by location on the chart, by putting his initials on it, or by using a particular color for whatever he is doing so that when it comes time to have the bill of exceptions prepared, if somebody is reading that bill of exceptions over they will know exactly what he is talking about.

With that I will turn it over to my good friend, Don Wood from Scottsbluff and he will continue on.

Donald L. Wood

When it was learned by myself that Mr. Winner was going to be unable to attend, I inquired of him what one could possibly say about a topic so broad as introduction of evidence at the trial. "What can I possibly say about this? What have you considered, Frank?"

He said, "Don, I have considered this and you can tell them this for me: the better practice is to introduce your evidence at the trial."

Much has been said yesterday and today also about records. I am going to touch upon two topics, official records and medical records, and to fulfill the last part of my journey which is get us back on time as fast as I possible can.

With official records there is really no problem. Assuming they are otherwise admissible, the only problem is proving their

authenticity. Authenticity presents no problem, inasmuch as the signature of the certifying officer is presumed to be authentic. Consequently if it appears to you necessary in the course of your lawsuit that it will be necessary to introduce an official record, all that is necessary for you to do is to make request of the officer in whose charge the record is kept for a certified copy of the original, and there is a presumption of authenticity carried with this.

If this record is challenged for some reason on the ground that it is not the record in the custody of the custodian charged by law to have the record, then of course the burden is upon the party challenging the record to establish that it is *not* authentic. However, much has been said about pre-trial discovery yesterday, and the better practice is to make demands for its authenticity in the course of this pre-trial discovery procedure.

Now to medical records: Nebraska, as you know and as the outline points out, contains the Uniform Act with respect to the admissibility of what we used to call business entries. Under the old business entry law, entries in physician's day books and pertinent hospital records were admissible. However, the Uniform Act does contain some additional language which was not previously involved. It provides that "a record of an act, condition, or event, shall insofar as relevant be competent evidence if the custodian or other qualified witness testifies as to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission."

Consequently, we are here making a distinction between the use of medical records by a doctor who is present in court and testifying and who might resort to those records to refresh his recollection. Here we are seeking to introduce the records themselves. Let's assume a case where the defendant intends to introduce the hospital records of the plaintiff. What objections can be made by the plaintiff to the introduction of such records: (1) hearsay; (2) possibly a breach of the physician-patient privilege.

However, the cases with which we are most concerned with hospital records, the personal injury type case, is a case where the physician-patient privilege would not apply because when a person places an issue, his physical or mental condition is all that you know, he is deemed to have waived the privilege both as to the testimony of physicians and the hospital records.

The remaining objection is the hearsay objection. Is there a way to get around it? If there is, it must be found in the Uniform

Act. If the records meet the exception dealing with business records, they can be received. The Uniform Act has been interpreted broadly enough to include laboratory analysis, physician's day book, and like medical data.

To lay a foundation for the medical records we must establish (1) the testimony of the custodian or other qualified witness who testifies to its identity, its mode of preparation, and whether the entry is made in the usual course of business and at or near the time of the act, condition, or event.

Let's suppose that we are seeking to get into evidence the medical record pertaining to a particular individual and the witness, Mr. Medicare, is on the stand and we are asking him, "Mr. Medicare, you are here pursuant to a subpoena duces tecum to produce the medical records of Harry Slip-and-Fall."

"Yes, I am."

"Produce them."

He hands them over and we give them to the court reporter and they are marked for identification.

"Please state your occupation."

"Medical Records Librarian for Immune Hospital."

"Are the records which you have identified as Exhibit 2 all the records which you are able to locate concerning Harry Slip-and-Fall?"

"Yes."

"Are you the custodian of these records?"

"Yes."

"How are they prepared?"

"On standard forms for use by the hospital and by the technician, nurse, and physician handling the patient's case."

"When were they prepared?"

"At the time the particular examination or test is made."

"Are the entries made in the usual course of the hospital's business?"

"Yes."

"Who made the entries in question in Exhibit No. 2?"

"The attending physician, the lab technician, and the attending nurses."

"How was the information obtained and recorded?"

"By interviews, examination, and laboratory tests which are recorded by the examiner at the time of the test."

"Who made the entries in Exhibit No. 2?"

"Doctor XYZ, Nurse ABC, and Lab Technician DEF."

"Are these individuals available to testify?"

"No, they are unavailable, due to the death of Doctor XYZ; Nurse ABC is in Vietnam; and Lab Technician DEF is out of the city."

"We offer Exhibit No. 2."

Now, another question might arise. Suppose the medical records contain the comments of the physician that this man is a malingerer. Can this conclusion be received as a part of these medical records? This is questionable, perhaps within the court's discretion. The Uniform Act does deal with conditions as well as acts and events. However, we do have a case, *Anderson v. Evans*, 164 Neb. 599, which would indicate that such conclusion is probably not admissible. In that case the nurses's comments on the medical records concerning the pain and suffering apparently experienced by the patient were found to be inadmissible. But in the same case a color photograph, which was also part of the medical records, was held to be properly received by the court.

Again, this particular discussion pertaining to medical records makes a distinction between the case where the doctor shows up in court with the records and merely uses them to assist in refreshing his recollection, as against an effort to introduce the records.

I have done my best to keep us on time. Thank you.

CHAIRMAN KRIVOSHA: Thank you very much, Don. You are certainly a very able substitute. They are blaming Frank for not coming because of the weather. I think maybe the truth of the matter is that Frank got to worrying about the story they tell of the young boy who was writing his composition on Socrates. He wrote: "Socrates was a very wise man. He went around giving people advice. The people poisoned him." Frank just wasn't going to take any chances.

At this time I would like to call upon the Chairman of the Committee on Continuing Legal Education to introduce our next speaker, Mr. Harold Rock.

HAROLD L. ROCK, Omaha: Thank you. I have been allowed to make a couple of points first.

Available out at the desk are pamphlets on Amendment No. 7. We would appreciate it if you would pick some up, take them to your offices, and as you mail out letters or bills, or whatever it is that is going out, mail them to your clients. Place them around wherever you think somebody would get their hands on it. It is important. It is not a controversial issue as far as I know, and it is important that we get as large a turnout as possible voting "yes" for that amendment. It is the incompetent judges' bill.

No. 2, the Evidence outline was prepared by members of the Bar Association. I want to pay a special tribute to Jack North who kicked it off and to Dean David Dow who completed or did the final winding up and putting it into the form that you see it here. In between, everybody listed in the front of this book, and probably others, though I hope we didn't forget anybody, worked hard on it, but I do want to single out both Jack North and Dave Dow.

Jack North, you know, offered a \$200 reward if anybody could find his wife's kitten. I asked him, "Jack, isn't that a lot of money for your wife's kitten?"

He said, "I drowned it last week."

The person I am to introduce today is Dr. Richard Smith. He is not a stranger to most of you lawyers. I am sure many of you have called upon him, and some have been called upon to cross-examine him.

He was graduated from the University of Omaha with his Bachelor of Arts degree; attended the University of Nebraska School of Medicine where he received a Bachelor of Science and his M.D. degrees. He interned at Immanuel Hospital here in Omaha, spent two and one-half years in the Army in orthopedic services. He had a preceptorship for one and one-half years with a certified orthopedic surgeon; attended the University of Pennsylvania Graduate School of Medicine for a year; Hope Haven Hospital, Jacksonville, for crippled children in orthopedics for another year; a hospital for special surgery in New York City for one year; back in the Army for six months as Chief of Orthopedics out at Camp Carson; and has been in private practice since 1951 here in Omaha. He is an Associate Professor at the University of Nebraska School of Medicine in Orthopedic Surgery. He is a member of the staffs of all the hospitals in town, and many others. He is a consultant at Veterans and Offutt.

He belongs to a list of medical societies here that I can't get into because we just wouldn't have time for his talk.

I appreciate his taking time out today to come down here. Please welcome Dr. Smith.

WHAT I SHOULD BE ASKED

Dr. Richard Smith

I hope you will bear with me. Whenever I am asked to speak I always thank God that I don't make my living as a public speaker because I would starve to death.

This should be a good paper because I've known about it since last Monday. As a matter of fact, I got the final details yesterday as to what I was to speak on, so I have had a lot of time to prepare it. I was out of town all last week.

I do feel as though I am among friends because I know I deal with a good many of the attorneys. I necessarily don't approve of all of them, or rather I don't necessarily like all of them I know, but those are in the minority.

I've found you can't please everyone. About half the attorneys label me as a defense doctor, or, more charitably they say I am conservative, and the other half say I am a radical or a plaintiff's doctor. So it depends on whom you talk to. I do know that everything we see isn't compensable—or I think your term is "actionable."

Now, I can tell you several things *not* to ask me, and one is not to call me the same day and ask me to come to court, because we just can't do that. We do schedule surgery and office appointments several weeks ahead, and usually we're being asked to see a patient the same day, as though it were an emergency, and then find out it has been in litigation for three years or so. I realize you have to play a lot of trial work by ear, but it seems to me you can get another opinion before the trial starts if one is necessary.

I was told to keep this fundamental. I feel that you know a lot more about this business than I do. I was to talk about what you would ask me on the stand. The place to start is my name. This has been overlooked a couple of times; my address, to show that I am a local physician; my training. And I think it is worth discussing training. Just as you are, every doctor is proud of his training, as is every attorney. I think it may be important to the witness. I think certification is important when it comes to medical testimony; that is, certification of the physician by an American board. It doesn't matter whether he belongs to the American College of Surgeons and all that stuff. What is important is that he is certified by the American board in his spec-

iality. I think there is greater value in an expert opinion. I think all the doctors will agree.

I think there was a time when any doctor, at least this was true in this town, could testify and some would testify to anything that they were paid to testify to, and I understand there are still some attorneys who do have a sort of stable of witnesses, but I think the day of the professional medical witness, at least I hope so, is passing. I don't think an expert's opinion should be compared to the Joe Bloes who spent a year in school forty years ago. The jury doesn't know the difference unless you point it out to them. As far as a jury is concerned a doctor is a doctor and it doesn't really matter what kind of a doctor he is. They don't know the difference.

Then I think the time and the place of the examination and the circumstances of the examination. Who sent the patient in? Was he referred by a physician? Was he referred for treatment and diagnosis, or was it for an opinion only from a medical-legal standpoint? Perhaps originally it was an emergency. I think you have to get all the facts.

The history is important and the symptoms. The complaints that we get from the patient, and these are symptoms, and this is often mixed up in the courtroom. I guess it doesn't make any difference, but symptoms are what the patient tells us, and signs are what we find in the patient as objective evidence, or lack of it, of disease.

We don't go into the details of the accident. That is really not in our province. We don't know anything about how the accident happened, except what the patient tells us, and I think we are better off to leave that out, unless the accident had a direct bearing on the diagnosis and the establishment of the diagnosis; for example, as to how he got a particular kind of a fracture resulting from a particular kind of trauma.

The examination, then, is concerned with the physical findings or signs. We use tests to rule out disease, just as well as we do to establish a disease.

I don't know about this malingering business but I think we *can* spot a malingerer when we see one. I guess we just aren't permitted to talk about it in court, because I was told not to one time.

We can diagnose anxieties. Just because we are an orthopedic surgeon doesn't mean that we are not also something of a psychiatrist. As a matter of fact, you had better be something of a psychiatrist or you're not going to practice good medicine.

The X-rays might be important. Sometimes even if they are negative they can be helpful. As you know, everything doesn't show up on an X-ray. I think it is important to point out that even though we don't find anything on an X-ray, this doesn't mean the patient doesn't have disease or doesn't have pathology.

Then the diagnosis, of course, sometimes isn't even asked for. I think that that is the whole point in the history and the examination, to come up with a definitive diagnosis, if possible. And then the prognosis, of course, as to what we can expect in the way of disability.

Doctors are not really partisans, unless they are stirred up in the courtroom and unconsciously become partisan, but we really don't have any axes to grind. We don't get paid any more—as a matter of fact, we are no more apt to collect whether the client wins or not, and certainly we collect no more. So we are not there to grind any ax for anybody unless we get picked on and maybe we get mad, but that really shouldn't happen.

As for medical reports, I think they should be brief. Whenever I see these four and five-page medical reports, they don't do anything for me. If it is orthopedic examination you are not interested in the blood pressure, the past history, how many children, and so forth, I don't think, unless it is pertinent to the diagnosis or to the problem at hand. This business of a tall white male, his stated age, and so forth, I don't know if it has any place in an orthopedic report. We stopped doing that when we were medical students.

I think we should in our medical report state the symptoms, the complaints that brought the patient to us, state the physical findings, the abnormal X-ray findings or normal if they are pertinent, state the diagnosis, the prognosis, the temporary or total disability, if we can't prognosticate it as to whether there is to be any permanent disability or not, and we can't always do that. A lot of times we see a patient very soon after an accident, not to treat, but they are sent in by an attorney perhaps two weeks after an accident. Well, you can't prognosticate disability at that point; it is just much too soon.

Many of the cases that we see, of course, have very meager physical findings, and you can't make too much out of tenderness because this is really a subjective thing. It is objective to some extent because the doctor has to be able to attempt to evaluate whether the patient is tender or not, but it is still pretty much subjective. If I push and the patient says, "That hurts," it is not an objective finding.

I don't think that you should overdo hospital records. They are really not that accurate. I hate to say that but there are a lot of student nurses who keep a lot of these records, and all they are trying to do is find something to fill up the page with and get through. They might have made good attorneys, I don't know.

I think on the hospital records the fact that analgesics were given might be important, and what kind and how often, as partial evidence as to how much pain that patient suffered—however, not necessarily. Again, this has to be evaluated with regard to a given patient. You can always talk about a thousand patients, but you can never talk about *one*, because they don't fit the pattern.

The length of time in the hospital sometimes is important but, again, not necessarily. A lot of people find a home in the hospital, especially if an insurance company is paying the tab, or if Uncle Sam is now. So how long they are there isn't necessarily pertinent.

The case that really has disability from an orthopedic standpoint is no problem for us. In other words, if a patient is significantly injured we like to treat him, we like to get him as well as we can, and we like to estimate whatever disability he has as a result of that injury. It is these border-line things, the so-called "whiplash" term which we avoid like the plague but which has found high esteem in the courts. Those are the bad cases. There really isn't anything to find. A good many of those people are anxiety problems. They were just scraping by before they got hit in the rear. As a matter of fact, it is too bad they weren't hit in the rear instead of the car.

One thing in court, just at random, we don't like to be standing with blood dripping off our hands, and so on. I know this looks good to the jury, but we kind of like to minimize that. I realize sometimes it is important, but not just for window dressing. If the facts of the surgical procedure are pertinent, then I think that is all right, but I don't like a lot of gory pictures and I don't like to show too much gore to the jury. I really don't know that that is pertinent. I suppose you will disagree with me. I don't mind using props, again, if pertinent in helping the jury realize what has happened to the patient and what the treatment was, and so on, but not just to cloud up the issue.

I don't like to discuss diagnoses that aren't in the problem at all. In other words, frequently I am asked to discuss hernia of the disc just at random. Well, there is no question of hernia of

the disc in this patient. It is just so much verbiage, or "garbage" would be better, to cloud the issue.

I think I know that one of your rules is that you shouldn't ask anything you don't know the answer to on cross-examination, but I think a lot of times you are too conservative. I think most doctors just don't answer the question as straightforward as they can. I think a lot of times you are wrong in hesitating to ask questions that you really ought to ask for and afraid of what the answer might be. If I've submitted a report, or any other doctor has, and he feels that a patient has disability or does not, he is willing to defend that stand and it doesn't matter what you ask him, he will answer it in that regard.

I suppose pre-trial conferences help, but we really don't have too much time for those, and I don't know really how much it contributes. I think most attorneys that are doing a lot of trial work, if a fellow was only doing it once in a while then I think he needs more preparation, just as a doctor who does an occasional operation or something, but an attorney who does a lot of trial work I really don't see much in pre-trial conferences now. I know in the past it has been sort of an effort for the attorney to influence my opinion rather than to gain anything that might help him in the trial itself.

I could go on. I really don't have much else to say. I would just plead from a medical standpoint that clients, your clients and our patients, not be crippled by prolonged litigation. We see so much of this, where the injury doesn't amount to peanuts, and three years later this patient is still off work, he is an emotional physical cripple, and believe me we are going to support him the rest of his life. I realize that a lot of the cases that you try just can't be settled or they can't be worked out for some reason, but what it does to many litigants just isn't worth it, believe me.

CHAIRMAN KRIVOSHA: Turning now to our next topic, I think this is an area where not enough thought is given by the trial attorney. We read so much about getting that lawsuit off to a good start. I personally feel that the first time you speak to the jury ought to be the place where you start to make the impression with the jury. It is at that point that you have to start to build your case.

The other day I thought about that and I suppose we are all prone to do this but you go through the voir dire, and I don't know whether the jury gets bored with it but I know I do about half way through it. You are trying a products liability case and you ask the lady on the jury, "Are you married?"

She says, "Yes."

"Do you have any children?"

She says, "Yes."

"What are their names and how old are they?"

She gives you their names and she tells how old they are and you write it down on the pad, and you go back to select a jury and I'll be darned if I know why I asked that. It doesn't make for a good juror, I suppose, one way or another. But there are certainly important things that you *can* start to ask the jury during the voir dire to start to create the necessary impression.

To discuss that matter with you, first I would like to call upon Mr. Warren Urbom of Lincoln.

PICKING A JURY AND REFERRING TO EVIDENCE

I have interpreted the subject given me as asking the question, "To what extent can and *should* an attorney refer to evidence while he is selecting the jury?" That will limit me somewhat, in the sense that I will not try to discuss with you the general techniques of selecting a jury but rather limiting it as much as possible to the referring to evidence while you are selecting the jury or to what evidence will be or what you expect it to be.

The cases on this subject are very few. Not very many guidelines have been given in any cases that I can find on the subject of how far you are permitted to go in referring to evidence or in asking questions about evidence that you expect to put in. I think that we can arrive at about this kind of general rule: in order for a question to be proper, or within the discretion of the trial court to permit to be answered, it must at least have some reasonable relationship to evidence which you expect will be offered, or some reasonable relationship to a possible point of bias or favoritism on the part of the juror toward the particular people involved in this lawsuit or the issues in the lawsuit. That is about as specific as I can make it, I think.

I will cite to you only four cases which I think point that direction, although these do not lay down any specific standards. They sort of say rather than, "Here's the boundary within which you must work," they say, in effect, "The boundary is over there," or is over there, and that is about as far as they go without any specific discussion of the issue.

The first case is a Nebraska case, a malpractice case arising many years ago in which a doctor had operated on a knee of a

person and thereafter was sued for malpractice. The plaintiff's attorney sought to ask the jurors whether they belonged to any religious society or any secret order. The judge refused to permit the answer, and on appeal this was held to be within the discretion of the trial judge and he properly ruled, so the court said. As you see, this doesn't point much in any direction, except that in this particular case where probably nothing having to do with religion or secret orders was involved there was no relationship between that question and any possible bias that would reflect itself in this case, and no particular relationship to any of the parties that were involved in the lawsuit. That case was *Van Skike v. Potter*, 53 Neb. 28.

The next case is a New Jersey one, also a malpractice case, in which a wrongful death occurred after surgery for a gastric ulcer. One of the jurors, during questioning, said that he had had surgery for a gastric ulcer. Then the plaintiff's attorney asked him, in effect, this: "Did the doctor tell *you* that you might not survive that operation?"

The trial judge refused to permit it to be answered and the Supreme Court of New Jersey affirmed that holding saying only, without discussion really, that it was an obviously improper question.

It seems to me that it may be that the difficulty with the question was that it really did not relate itself to any feeling or thought or impression that the juror might have as a result of that experience, which is a perfectly proper area for inquiry by counsel, but rather was in essence seeking to find out whether this juror would say, in effect, that it is a good thing for doctors to tell you whether you are going to survive operations or not. This is not a proper area of inquiry. That is a New Jersey case, as I have said. It is *Schueller v. Strellinger*, 43 New Jersey 330.

The third case is an Oklahoma case, sort of 'way out but I think it may be illustrative of how a thing *could* be made pertinent in a particular case but not in this set of circumstances.

The plaintiff's attorney in making his voir dire examination said to one of the jurors, "Do you know Mr. Kroh, the adjutor, sitting over there, the fellow from Oklahoma City?"

This was intercepted and properly so, the court ruled. Now I would submit to you that if the attorney knew or had reason to believe that Mr. Kroh would be called as a witness, it was a perfectly proper question, but very apparently in that particular case there was no probability of his testifying, there was no proper issue of insurance involved in the case, and this appeared to be an

improper attempt to inject insurance into the case. I will give you the Oklahoma citation in case you are interested in that one. That is *Barry v. Parks*, 185 Oklahoma 118.

The fourth case is a Nebraska case not dealing with voir dire at all, but I think it may be instructive anyway. It is a recent case. A condemnation action in which, during the opening statement, not during the voir dire, the attorney asserted that two witnesses would testify to the value of the land being condemned at \$125,000 to \$150,000. In fact, the witnesses testified to \$80,000 and \$81,630. The Court said that both attorneys knew or had reason to believe that these witnesses would not testify as the plaintiff's counsel had said they would because one of them had testified by deposition four months before the trial, and the other had submitted an appraisal. Therefore, on proper motion, the court had the duty to take the proper action to overcome the prejudicial nature of those statements, and in this instance the court said, "An admonishment of the trial court to the jury to disregard the statement was not sufficient and that a mistrial, or later a new trial, had to be granted."

I think it has bearing on the subject of voir dire because it seems to me that it may equally be the responsibility of the attorney to reveal to the jury during voir dire examination only those bits of evidence which he has full reason to believe will be introduced, and if on the contrary he has reason to think they will *not* come into evidence or that the evidence will be *different* from what he says it will, then he must refrain from it or be subject to a possible motion for mistrial.

That case, you will recall, is a fairly recent one—*Lybarger v. Department of Roads*, 177 Neb. 35.

Now with that background it seems to me then generally that about the best we can say, in this state or almost any other state, is that a question in order to be properly put to the jury as it refers to evidence must have some reasonable relationship to the evidence which you fully expect will be brought in, or it must point to a specific kind of bias or prejudice which may affect the people involved in the lawsuit or the issues that are in the lawsuit.

With respect to whether an attorney should, or to what extent he should refer to evidence while he is questioning the jury, with the understanding that up to this point there has been nothing presented about the evidence and the jury knows nothing about the case, it seems to me that a general observation can be made at least that the jurors, in order to help you decide whether they are qualified or disqualified from serving on a jury, need to know

the general facts about the accident, whether it was an intersection accident or whether it was a malpractice case involving an operation on some particular part of the body, or that general kind of statement. That ought to be given in every instance. Then so far as other particular facts are concerned, that will depend wholly upon the case and the imagination as well as the personality of the lawyer involved. I doubt that we can make any very serious rules for any specific lawyer because his personality will make a considerable difference in how he can approach it and what he thinks he ought to be able to approach.

In my own thinking, as I have tried to analyze in what areas I should like to go in to the jury with, so far as prospective evidence is concerned, I come down to this: I should like to go into those areas which, if merely stated bluntly, appear to indicate that I or my side is walking on shifting sand; that is, the areas which appear to be the weaknesses in our case. I think these things need to be explored in order for me to know whether a particular juror will view that weakness strongly or whether he is willing to look at *all* the circumstances around that weakness and then make his decision.

I am thinking, for example, of a pedestrian case. Every juror, in a pedestrian case, I think ought to be inquired about whether *he* has been involved in any situation, had any experiences where he has been struck as a pedestrian or has been riding in an automobile which has struck a pedestrian, and then go into something of the effects of that circumstance in order to tie it in or differentiate that experience with the experience that the plaintiff has found himself in.

I think, for instance, that if in a pedestrian case you are representing the plaintiff who finds himself out in the middle of the street, not at a crosswalk, it is important to inquire of the jurors respecting *his* past experiences with pedestrian matters, but to go further and learn from him whether he now has, from past experience or from any source, any feeling or thought that any pedestrian who finds himself in the middle of the street, *not* at a crosswalk, ought *not* to recover under *any* circumstances, irrespective of what the rest of the facts are.

The plaintiff's attorney, I think, needs at least to find that the juror is willing to commit himself to the extent of saying, "No, I haven't decided that no pedestrian who is not in a crosswalk can recover." I think an attorney need not go into more detail than that, except to inform the juror that in *this* instance the plaintiff was not at a crosswalk, if that is the truth, or that there will be *evidence* that he was not at the crosswalk, although there may be

evidence to the contrary, and then impress him to commit himself to the notion that not all pedestrians who are *not* in the crosswalk are necessarily thereby denied recovery. I think you need to go that far.

Or if the plaintiff is being charged in some fashion with having drunk intoxicating beverages, I think it is important to bring that evidence to the jury immediately, even though this is damaging to you for them to know it. They will know it very shortly, and I see no reason for not giving it to them now, and then probing that subject with them. This is a weakness in your case and it ought to be probed so that you know whether the juror has such a predilection against anybody who drives after drinking that that ends the case so far as he is concerned. You ought to be able to commit him to the proposition that there may be other circumstances which outweigh the drinking factor and commit him to the idea of listening to all those circumstances before he concludes that the drinking ought to end the plaintiff's possibility of recovery.

I think proximate cause at that point becomes important and that enough facts ought to be gone into with the juror to show him that there may be a possibility that your client was indeed drinking, had been drinking, but that that drinking had nothing to do with the cause of this accident. Inquire of him whether he would be able, not that he will but that he would be able, other things being equal, to lay aside the facts or evidence having to do with drinking if, indeed, the juror finds that that drinking had no relationship to the cause of the accident. I think if you have gone that far, you have gone far enough to learn whether he is willing to give your client a fair shake so far as the evidence is concerned.

On the subject of injuries, I think that particularly in a case where the evidence will be primarily, if not wholly, of a subjective nature, you need to go into *that* subject with the jurors and reveal to them in the voir dire examination that the evidence will be, or may indeed be largely of complaints of pain which the plaintiff had, although the doctors cannot feel or see that pain or any manifestations of it. I think that needs to be laid out to them immediately, and then, you see, some questioning can be done with them as to whether they feel that no plaintiff can suffer pain for long periods of time when a doctor cannot see that pain or any manifestations of it.

I am sure there are other areas that a plaintiff's attorney ought to enter into so far as revealing evidence is concerned, but I think that generally speaking the areas that I think are important in touching for a plaintiff are the areas where it appears he has a

weakness. The thing I fear most when I am in a plaintiff's case is that a particular juror will go into the jury room and, rather than considering all of the circumstances that surround the weak part of the case, he will simply make some blunt announcement, "Well, as far as I can see, anybody who is out in the middle of a street ought to lose." That ought to be attacked first and at the beginning of the trial in the voir dire examination, so if he is going to make any such pronouncement, he makes it now in the open court room, openly, and you can deal with it by trying to condition his mind or remove him, rather than permitting him to make this statement in the jury room without having been given any conditioning on the subject.

I am not concerned terribly, personally, with getting unsatisfactory answers by these jurors on these weak points. I think it is important for me to know if he is going to give an unsatisfactory answer. Then I will know the answer, rather than letting him get into the jury room and make his announcement at that time where he can be persistent and where he can be destructive, because he has a vote. In the courtroom where he is a juror he has no weight at that time, and the only thing that will be left by an unsatisfactory answer is an echo in the minds of the others who become jurors. I would much rather have that echo exist than an actual conversation in the jury room by that particular person who has unsatisfactory answers to give.

CHAIRMAN KRIVOSHA: Taking it now perhaps to the other side and carrying it on further as to the matter of interrogating the jury, I would like to call upon Mr. Robert Skochdopole of Omaha.

Robert A. Skochdopole

As most defense counsel find, after they get all prepared to conduct a voir dire examination of a jury, the plaintiff's counsel has asked most of the questions and you don't have much left to talk about. That is the kind of position I find myself in here now after Mr. Urbom. I think I will go into it in a little more detail and maybe in some different areas.

The historical purpose of permitting the counsel to conduct a voir dire examination is to select a jury that is impartial and free from prejudice or bias prior to the introduction of evidence.

After the jury has been assembled it is up to the counsel to determine whether or not the jurors possess the necessary qualifications and, in fact, will be impartial and not commence the lawsuit with any prejudice or bias against his own client.

There are three approaches by which you can test jurors: (1) a challenge to the array; (2) a challenge for cause; (3) a peremptory challenge.

The challenge to array simply means it's a challenge to the entire panel rather than any individual, and this is referred to in section 25-1637 of the statutes. You don't find this challenge used much in trial of civil cases; more it is used in criminal cases, principally by defendants. If you do not intend to use this type of challenge it has to be done before there is any evidence introduced, or you waive this right. Also you have to introduce evidence yourself to show that the array is improper. It might be well to keep this in mind, particularly defendants, as many times when you approach the end of a jury panel, at least here in Omaha, you find that practically all of the jurors from which you have to select are laborers or white collar workers, or they are practically all employees of one company, or else they are otherwise non-representative. So that you don't feel your client could obtain a fair trial in this atmosphere, you might want to use the challenge for array at that time.

I won't go into detail on this any more, but there is quite an exhaustive article on this in 1958 Belli, Seminar of Trial in Court Trends, on page 257.

The rest of my talk I will concern myself with getting information either for the exercise of the challenge for cause or the peremptory challenge.

There is no mistake, and our court has said so, that it is the duty of counsel to elicit such information as he desires before the juror is qualified. Now you have reasonable limits within which to put pertinent questions for the purpose of ascertaining whether there are sufficient grounds either for a challenge for cause or to help you in the exercise of your peremptory challenge.

The trial courts have been vested with a great amount of discretion in what questions they will allow you to answer, and it is in the sound discretion of the trial court what you may ask, and its ruling won't be disturbed unless there has been an abuse of discretion, and it has to be to the prejudice of the party complaining. And never forget that you, as counsel, have the sole burden of seeing that there is an impartial jury before you start the trial of your client's case. Even though part of the examination may be conducted by the judge, you still have that responsibility, so you should go on and ask what questions you think need to be asked, or at least tender them before you start the introduction of evidence.

To conduct an effective voir dire examination, particularly on the part of the defendant, since you have to know what the plaintiff's evidence is as well as your own, this takes about as much preparation or more as an effective cross-examination of a witness, because you have to anticipate what the plaintiff's evidence will be and know who his witnesses are.

I consider witnesses, their personality, and their identity as being part of evidence, so you must know who these witnesses are so you can ask the jury, then, if they know the witnesses, and if any of them happen to, whether or not they will lend any more weight to that witness' testimony simply because they know them, rather than if they were a witness not known to the jury. This, I think, is particularly critical on medical witnesses. You must ask the jury whether or not they know of any of the medical witnesses which the plaintiff intends to use. You must know whether or not he or any members of his family have been treated by these witnesses, because if someone gets a family doctor, or a doctor whom they have faith in, they are going to tend to lend more weight to this medical witness' testimony simply because they know him rather than take his testimony and balance it against all the rest. So it is very important, I think, that you must know and find out from the jurors whether they will be fair and impartial in view of any acquaintanceship with the plaintiff's medical witnesses.

It is pretty much the general practice here, at least, to have a company select a doctor to which it refers all of its employees, or labor unions will employ a doctor to whom they will refer all of their members. So class exposure to a particular doctor is very common, and this makes this voir dire on medical witnesses important.

Along that same line, I think it is important to find out whether the plaintiff is a member of any fraternal organization or labor union, to know this before the trial and if you do find this out you should ask the jurors whether they are fellow lodge members or whether they are fellow union members or members of a union, and find out whether or not this is going to have any effect on the weight they would give a particular witness or the weight that they will give the plaintiff's testimony.

I don't think you are running any hazard by doing this because the plaintiff always gets this in one way or the other, either by just a casual statement by the plaintiff, or he always wears his lodge pin or his pin that denotes his membership in any organization. So I think this is another thing which you should find out so you don't have any prejudice or bias towards the plaintiff or away from the defendant.

Of particular importance is if your defendant or any of his witnesses are going to be a member of any minority group, I think you should inquire whether or not this makes any difference in the minds of the jury, and if they have any prejudice against certain minority groups. This is one question that you should very carefully phrase, work it out before you ask so that you won't be offensive, but it is one that I don't think you can dodge or that you should dodge if you are going to do a proper job for your client.

The area in referring to evidence which generally causes the most difficulty is where you get into asking hypothetical questions which are based on evidence which is expected to be educed. For example, if you inquire of the jurors what their reaction would be to certain facts if they were proved, or how they would apply legal principles to certain factual situations if such situations appeared.

An example of this type of question which was held to be objectionable and prejudicial was one asked by a plaintiff's counsel in the case of *Ventrus v. Panico*. It is an Illinois case but you will find it in 99 A.L.R. 2d 106.

Here the plaintiff's counsel asked the jurors if they were instructed by the court that if a coal miner was injured by reason of a willful violation of a state mining law, then he would be entitled to recover damages regardless of whether or not he was in exercise of due care for his own safety, would they have any prejudice against this rule of law? And if they believed from the evidence that the plaintiff was injured under these circumstances, would they find for the plaintiff?

The defense counsel objected that it was prejudicial, and this was sustained by the Supreme Court. It was held to be error because it went too far and extracted a pledge from a juror to find for the plaintiff. This is what you have to be careful of.

But, also from the defendant's standpoint, *you* have to ask some questions like this where you have principles of law which are relied upon which are not popular, perhaps, or which are not common. I think contributory negligence is one that you should ask about. You should phrase it so that the juror would say that he would not have any prejudice in obeying this instruction of law, but not that he would find for the defendant if it was proved, since this goes too far again and extracts a promise from him.

The same thing holds true with defendants who have been drinking, as Mr. Urbom stated applied to the plaintiff. This should be brought out, I think, on the proximate cause angle.

Another thing, if during the trial of the case it is necessary for the defendant to introduce pictures or use demonstrative evi-

dence or have evidence from a witness which would be gruesome in detail; for example, a bad accident where a highway patrolman's picture might have three or four dismembered people lying around, but you had to use it to show point of impact. There are a lot of jurors that this might be objectionable to and take offense at this, or you would have witnesses testify to this verbally, or you would have demonstrative evidence such as skeletons, or have some physician testify to injuries. I think you should go into this and find out whether this is offensive to any jurors. Sometimes this has happened and it reacts against you, and it is your own fault if you don't ask about it, and your client suffers from it.

Another area which I think should be gone into is if the defendant does not intend to introduce any evidence on his behalf. This happens a lot of times where you have a deceased defendant and you know the plaintiff plans to call all the witnesses for his case in chief, and about all you have to offer is cross-examination. I think the silence of the defendant should be gone into to see whether or not this excites any prejudice or makes an impartial jury, just because the defendant does not introduce evidence.

It's the same thing if you don't call a witness whom the plaintiff is aware of has some knowledge, and for some reason you don't call him. Maybe he is out of the jurisdiction, maybe you don't care to call him, because there is a little tough part on cross-examination and you don't want him. I think the jury should be inquired about whether this will cause any prejudice in their minds so that you block off the referral and final arguments to this fact by the defendant.

All of these questions are generally allowed, with the exception of the one that I mentioned that went too far. In the cases where they have refused to allow these questions they have generally tended to influence and entrap, to commit or obtain a pledge from the juror, or to ask him for his decision before the trial starts. They were either irrelevant, because the answer couldn't have any bearing on his qualifications, or they covered areas in which the juror was expected to receive instructions from the court, or they were improper because they were faulty in form, either in being ambiguous, obscure, confusing, or inconsistent, or they contained incorrect statements of the law.

The Supreme Court of Nebraska has never specifically ruled on the point of abusing reference to evidence in voir dire examinations.

Mr. Urbom cited one of the cases which gives you some guideline. I think that you would be pretty safe where you did not deliberately refer to evidence which you had no intent of intro-

ducing or which was solely for the purpose of exciting prejudice or passion.

A point of tactics: I think it is always well to have the voir dire examination of the plaintiff taken down by a court reporter. If you want to prove prejudice you have to show that an objectionable question was permitted, that you objected to it and show it was prejudicial error to allow this question to be asked. It may be that a single question in itself is not prejudicial error, but when you take all of the questions of the plaintiff as a whole, the impact is so to influence the jury that they would be biased in the plaintiff's favor prior to the commencement of introduction of evidence.

The voir dire examination has been the subject of a special instruction to the Omaha Bar by one of the district judges here. He states that part of the evils sought to be eliminated is the practice of counsel in disguising statements as questions, who proceed to attempt to indoctrinate the jury by explaining what he hopes the law of the case will be, or by expressing his theory of the case and thereby hoping to establish attitudes and make an argument in advance. He sets down five rules by which he is governed in his court, and counsel should also be:

- (1) the case may not be argued in any way while questioning the jury;

- (2) the counsel may not engage in efforts to indoctrinate, visit with, or establish rapport with the juror;

- (3) the jurors may not be questioned concerning anticipated instructions or theories of law;

- (4) the jurors may not be asked what kind of verdict they might render under certain circumstances, which is one that is directly related to evidence; and

- (5) that questions are to be asked collectively of the entire panel whenever possible.

I think the taking down by the court reporter of voir dire will go a long way to slowing down counsel in attempting to go too far or violate these rules.

In order to conserve time I have not set forth every citation I've used in the place that it was referred to, but if you will refer to 99 A.L.R. 2d commencing on page 1 with a case there, there is a very exhaustive A.L.R. annotation. It starts out on hypothetical questions to jurors, but it covers practically the field. It also refers on page 16 to about fifteen other A.L.R. citations of related matter, so that I think this gives you a pretty good reference point if you have questions on the law. I have also used some material

out of Volume 3 of the Defense Law Journal on page 137; and in Volume 10 of the Defense Law Journal on page 13. There are several Nebraska cases that I have referred to, several of which Mr. Urbom has mentioned.

CHAIRMAN KRIVOSHA: I think this does one thing, if nothing else, and that is to point up to you the importance of a voir dire examination, and the fact that you ought to be taking time to prepare that with the same kind of time you spend in preparing the evidence for the trial. You ought to be giving thought to it long in advance of the time you actually get to the courthouse and the judge says, "You may begin," and you suddenly jump up and think, "What am I going to ask them?"

In attempting to keep with the theme of this program and the practical basic aspects of the trial of the lawsuit, we turn now to our final subject, and so often I think it happens that the trial lawyer labors through two or three or five or ten days of trial, he gets all his evidence in, and the reporter's table is piled with it, and nothing more ever happens to it. It gets up to the jury room and they really don't know what to do with it. We fail to know what to do with that evidence in connection with our closing argument.

So we would like to call on a couple of gentlemen now who are experts in that field to discuss with you the matter of using the evidence in the closing argument. First, from the plaintiff's standpoint, Mr. Robert Mullin of the Omaha Bar.

USING EVIDENCE IN CLOSING

Robert D. Mullin

Ladies and gentlemen, and fellow lawyers: it is a pleasure to be here, and particularly a pleasure to be sharing this subject with my friend, John Dougherty from York.

I have always had the feeling that closing arguments are the greatest tool in the trial lawyer's arsenal. This is your one golden opportunity to select and discriminate from the mass of the evidence which has been coming in with tedious foundation, piling up to the boredom of the jury, no doubt, to select and discriminate one or three or four vital pieces of evidence which you will highlight to the jury in making your final presentation.

Stopping there for a moment, naturally if you are going to exercise this selection you must also be in a position when you start your argument to be able to refer to the particular exhibit upon which you are going to rely and base a large part of your presentation in such a manner that the jury as a whole can see it at the

same time you are talking about it. No longer can you pass it back and forth among them.

So very basically the first and most obvious method of doing that is usually the enlarged photograph. We use various concerns here in Omaha, one in particular but I cannot think of a case where we were involved with perhaps a defect in a step, or a floor, where we did not at the time we had the original photographs 8 x 10 developed showing the head of the screw that sticks up about the level of the step just as you go to step down, or whatever other defect may be there, that we didn't also order the photographer to prepare a huge enlargement of this. Not only does it serve the purpose of enabling you to point out with your finger the offensive area about which you are talking but it also in a sense exaggerates the size of that, and you've got to tell the jury honestly that it does do that, but it does have an impact. I think also with the trial courts, witnesses have difficulty explaining in words things like unevenness, and yet here in a picture it's very real. So this enables you to have it there before the jury to utilize it during your argument.

I have seen fenders brought into court to show point of impact. Naturally I have seen trials where tires or frayed wiring from vehicles was brought in. All of this type of evidence is the type of evidence which should be highlighted in your argument.

When and how do you go about preparing an argument that is going to utilize selected pieces of the evidence? Very early in the game I learned that sometimes you can be planning to prepare your closing argument during the next recess or during the noon hour or perhaps this evening, and all of a sudden when you rest, somebody else says "We rest" and there you are with your mouth hanging open and no advance thinking.

As a consequence, I start preparing my closing argument toward the end of the plaintiff's case, when I am representing the plaintiff. By then you have some idea of the direction that the evidence itself is taking. You know what has gone in and what has been kept out.

How do you go about preparing it? Well, normally everybody has their own technique for this and it doesn't take too long. I try to prepare an outline of some of the subjects which I am going to cover, and particularly when I get to the evidence select and highlight those portions of the evidence upon which I am going to concentrate. I particularly try to select certain areas, one or two perhaps, of my argument that I am going to try to dramatize and come up with some sort of impact words or phrases to use in that direction. Then after this outline is prepared I try to read it over

two, three, or four times perhaps before I give it, and then I put it aside and never again look at it because once you stop and hold a piece of paper I think you have lost your contact with that jury and you've lost half of your effectiveness. But at the same time unless I, myself, have put it down in writing and have an imprint of it on my mind, the words don't come as well as they do when I have gone through that outline work.

A good example, just a week or two ago we had a case up in Judge O'Brien's court. I saw him in the back of the room. It involved a gross negligence situation where the defense was that this car went out of control up over a curb and had an accident. The passenger was the plaintiff.

The defense was, the boy said, "Well, I was driving at a reasonable speed, I thought, and I don't know what happened."

This is sort of hard to approach to the jury. Is this gross negligence? And how do you sell it? The idea that I tried in my argument at that time and in the outline which I prepared ahead of time, was that this was gross negligence at its very worst. It was gross negligence which came to the jury in naked form, without excuse or justification, and without even the slightest explanation. It was gross negligence which says to the jury, "I did it, and I shan't tell you why I did it, and I am not going to be responsible for doing it."

Well, if you can think out those phrases in advance, they will come, and they require a little ingenious thought the day before or the hour before you get up and try to do it.

The evidence on damages: I was very interested in hearing Dr. Smith state that he doesn't want to walk in the courtroom with blood all over his hands. I think all too many of us made the mistake when Mr. Belli became popular, of over-building the damage evidence in these cases. Once the jury even has the feeling that you are trying to shock them in order to obtain a verdict based upon emotion rather than fairness and justice, your client is a dead duck. I much prefer to approach it now on the basis that as bad as these injuries are and as terrible as they are, we have tried to present our evidence on damages, as distinguished from liability, conservatively. We could have brought in the interns and the nurses at the emergency hospital. We could have brought in the fellow employees who saw the man limping every day on his job. We could have had him tell you hour by hour what he has gone through day after day. We chose not to do this. The injuries are terrible enough on their face that we didn't have to. Approach it in that type of a vein rather than your gory pictures, your offensive descriptions, perhaps, and the like.

What you must do is convince that jury that all you are seeking is a fair and a just verdict, and that under the damage evidence in your case, in this particular case such a fair and just verdict must be a substantial one.

Finally, it is always a good idea to highlight you opponent's *lack* of evidence if he has any weak areas. If he has failed to produce a doctor or a key witness, this of course must be pointed up. Whenever I can find examples of arguments given by other lawyers I like to read them, and there is an excellent book put out by the New York State Trial Lawyers' Association which contains two or three hundred pages of observations on arguments and some sample arguments. One in particular appealed to me. I read it a year or two ago. It was by a man I had never heard of named Alfred S. Julien, who I see is going to be here this afternoon speaking at two o'clock.

He was involved in the trial of a case involving a sign which had fallen from where it had hung over a sidewalk and hit a lady who was walking under it below. By the time he got the case and the suit was filed, no one knew where the sign was. The sign was a Coca-Cola sign, but it had once been put up for one merchant, and there had been a change in the hands of the merchants there. His argument in this particular phase went something like this.

"Ladies and gentlemen, I will always wonder what the sign might have said had *it* been able to come to court. Perhaps it might have said something like this: 'Once upon a time I was a bright new shiny enameled sign. The Coca-Cola people bought me and they put their name on me to advertise their product. Then they brought me down into the heart of New York City and hung me out in front of a small store. The man who worked in there soon moved on, but I stayed, and I stayed there through winter and through summer, through rain and snow and sleet, and I kept getting rustier and rustier and rustier. But everybody seemed to forget about me. One day this nice lady came down the walk. I didn't want to fall on her but I couldn't do anything about it and I did fall and hit her right on the head. And then when I laid there in a condition to show what happened to me, somebody came and stashed me away. Oh, what a story I could tell you if I could only have come to court.'"

I thought that was a pretty good example of highlighting evidence which the other side failed to produce.

That about covers the subject as I was going to touch it, and I invite your attention to John Dougherty.

John E. Dougherty

You can readily understand why Bob is effective on either side of a lawsuit.

I like to think of the trial of a lawsuit, starting out on the morning of the voir dire and ending up with the closing argument as a piece of white canvas upon which the lawyers must necessarily paint a picture.

We must all keep in mind that when trying a lawsuit we are bringing in twelve people from every possible walk of life, some educated and some not trained, who are going to listen to that evidence as presented by you and come up with the kind of a verdict you want.

Every lawyer has a different way of analyzing evidence and different ways of presenting it. Some lawyers can take a deposition, where it is the worst possible evidence that can be offered, and make it very effective simply by saying to the jury this: "Don't let me misquote this witness," calling him by name. "Let me give you his own words. Here is what he told you in this particular piece of evidence." You must always remember that the jury are not trained in a memory feat so far as your closing argument is concerned, but necessarily must be reminded of that particular evidence so that when they take those instructions to the jury they have got some kind of means and method of applying it. The direct quotation, rather than your standing there and telling them what that witness particularly said, is more effective, in my judgment, if you will read to them what was actually said, because the deposition will never go to the jury room. The exhibits that you use are the silent witnesses that travel into the jury room. They are there for their inspection, and no one here within the hearing of my voice has ever talked to a jury after the trial has happened that the jury didn't try to figure out how much smarter they are than the lawyers themselves. So if you will use the exhibits and particularly strike home to that jury that those exhibits are what you say they are, your interpretation thereon, and everybody else's interpretations thereon, you are going to make that stand out.

There is another way of making an argument to a jury that sometimes doesn't even get into the record. Let me give you an actual experience of it in one of the courts of this state not too long ago.

We had a case where a young man had pulled out around traffic and as he did he hit the car coming from the opposite direction. He was clean, he was sweet, he was everything that a person would want as a juror. One night I was walking through a depart-

ment store and I noticed on the thing that they had some movements of a placard, and I stood there for one minute and I watched it. Everybody that came into that store was attracted to that movement.

So when the court went out and said, "You are going to go to the question of the amount of damages and that, and that only in this lawsuit," I got hold of this young man and I said, "Put your hands down on the table during plaintiff's argument and keep your hands going this way, but please *never* look at the jury."

No sooner had counsel started to give him the devil in this lawsuit than the eyes of the jury were constantly watching his particular movements of those hands.

So when I stood up to make the closing argument, which was only to be fair, I said, "Bend your head down this way and keep your hands going." If you don't think that jury watched that, you are mistaken, because two of them told me afterwards they felt rather sorry for him because he seemed to be so worried how this thing was going to come out.

You have always got this argument, and many lawyers use it very effectively, by taking the admissions that are made and put them in big letters on charts so that the jury gets the benefit of the visual words as well as the memory words, because you must remember they are going to decide this and they've got to decide it from memory, except as to those express exhibits that you carry into the jury room themselves.

I have always used the famous saying when my witnesses made some inconsistent statement, "Why, certainly, ladies and gentlemen of the jury, they did do it. You can take the four disciples. Matthew, Mark, Luke, and John, gave their own version of the life of Christ, and even in that you are going to find a certain amount of inconsistencies all the way along." Let them take it for what it is worth from there, because in some cases you have on that jury some good religious individual who thinks if *they* made a mistake, God knows that somebody else could make a mistake with them.

CHAIRMAN KRIVOSHA: Gentlemen, that does conclude this portion of the program. I should like to extend my deep thanks to all the members of the panel who participated yesterday and today.

I invite your attention to the afternoon program: Alfred Julien and Percy Foreman. You are in for a real treat, and I urge you to be back in time for that.

We are now adjourned.

[The session adjourned at twelve noon.]

**INSTITUTE ON EVIDENCE
FRIDAY AFTERNOON SESSION**

October 14, 1966

The Third Session of the Institute on Evidence was called to order at two o'clock by Chairman Thomas A. Walsh of Omaha.

CHAIRMAN WALSH: May we have your attention, please, gentlemen.

It is now an extreme pleasure for me to introduce a speaker I am sure you will find rewarding to hear. This gentleman has as recently as twenty minutes ago arrived on an airplane from Boston. There was a three-hour delay in Chicago and I thought for a while it perhaps would be the same story as with Frank Winner this morning, and that he might not be able to get here. Fortunately he has arrived.

Mr. Julien is a graduate of the Brooklyn Law School where he received his Law Degree and also a Master of Laws, both with honors.

He is a past President of the New York State Association of Trial Lawyers and a past President of the American Trial Lawyers, known to many of you by its old name of NACCA. He is presently a Director of the American Trial Lawyers and has passed up a Directors' meeting being held today in Boston in order to be with us this afternoon.

Mr. Julien is a lecturer with the Practicing Law Institute in New York. Equally as important, he is very well known in the plaintiff's Bar, and if I were to recount for you some of the astronomical verdicts that he has obtained in liability situations which to us might very well seem hopeless, I would spend more time than certainly I should take.

It is a great privilege and a pleasure for me to introduce him to you. He is a man who is rather modest in stature, but let me assure you he is one of the giants of the American Trial Bar.

HIGHLIGHTING THE EVIDENCE IN CLOSING ARGUMENT

Alfred S. Julien

Thank you, Mr. Walsh, and thank you, fellow lawyers.

As I had this layover on my trip here—we stayed at Chicago for several hours—I thought once again about the perils of the lecturer. There was a time when traveling about the country in

behalf of the American Trial Lawyers Association, then known as the National Association Claims Counsel of America, NACCA, that I first learned this. When you are President of that Association your job is to appear at many Bar Associations throughout the country. And I did, attendant with great peril! As an example, the occasion where I was asked to appear at the Mississippi Bar Association. I hadn't been told what the program was like. When I arrived there the first speaker was Governor Faubus. The second was Senator Eastland—and I can see that you have an idea what they were talking about. I was there talking about products liability.

Things went rather well. They were cordial. The reception was good. That evening we had a dinner. There was a table like this and the speakers were arrayed along the various sides of the table. Mississippi was then a dry state. You would never believe it! Along comes the Chairman who introduces Governor Faubus again, and there are loud rebel cheers; and Senator Eastland, and the same thing occurs again. By this time the Chairman, well libated, says to his audience, "And here's that trial lawyer from New York, the President of the NAACP." I barely made it out of town, insisting all the way that it was just the mulatto branch, you understand.

Well, that wasn't the end of the perils. I will take just one more moment to tell you about another one. This was the occasion when I appeared before the Missouri State Bar Association. I took my wife along. We had the usual lectures and we had the usual table. They sat her at one end and they sat me at the other. They had a lovely young lady conversing with me during the course of the evening and we were deep in conversation when the introductions were once again made. It got to be my turn, and we were talking down there, and the Chairman said, "And here is that trial lawyer from New York, Mr. Julien, and his lovely wife. And I get up and my wife gets up—and this lady, somewhat confused, gets up too. Then, sensing that something is wrong, she looks out at the audience and she mildly says, "You must forgive me. I am from out of town." A very perilous undertaking!

I am enlarging on the subject which you find in your program, "The Use of Evidence In Summation." I am enlarging on it to the extent that I am going to chat with you as a fellow professional about summations in general. I have the feeling, and so long as I have taught the subject of trial technique I've constantly urged that the summation is the quintessence of the trial lawyer's art, and it is, indeed, the foremost important part of the trial.

In approaching that problem I must say to you that one of my

fixations on the subject of trial technique and trial advocacy is the employment of appropriate language.

I see a well organized trial lawyer as a man who can talk on three levels: first, as a lawyer would talk were he to be trying a bench trial, a non-jury trial, or arguing an appeal; next, as he must talk as a trial lawyer to a jury; and finally, of course, the way he talks to his wife.

It is the second level that has always intrigued me, because the law is a profession of words. Semantics is the art of a trial lawyer. You have seen, and I know I have seen cases turn upon the use of a phrase, upon the selection of one word in preference to another, and it is this art that I constantly address myself to.

Let's take a little example, and it would apply to any phase of the trial—opening statement, if you will. I don't know if you are permitted to have opening statements where you discuss the facts. I will assume that you can.

Supposing a man is trying a case in behalf of the administratrix of a young son sixteen years old who was killed in a fishing accident. He was part of a crew on a converted submarine chaser and was compelled to do difficult work far beyond his capabilities because he was a novice at the work. They didn't give him enough help. The equipment was poor and because of that, while handling a difficult device, it fell, struck him in the head and killed him.

Now supposing the trial lawyer representing that lady starts off when first he meets the jury and says, "My name is Mr. Julien. I am the attorney for the administratrix of Peter Sylvester, and we are here seeking damages for his death."

Look at it for a moment. If you were a dramatist—and you are—if you are producing a play—and you do—would you think of opening anything with that kind of hoary nonsense? This is the language of the dead!

The same lawyer, same case, meets the jury for the first time and his opening paragraph is something like this: "Ladies and gentlemen, I am here in behalf of a mother of a boy who was killed at sea as the result of carelessness."

Do you see the difference? It is just as though the curtain has gone up on an interesting play, and those in the audience know something of importance is going to take place. Instead of the layman wondering, "What's an 'administratrix'?" or "What's a 'plaintiff'?" or "What's a 'defendant'?" they have in their own language the beginning of the setting of the play.

What is language all about? It has a three-fold purpose, and we in our practice as lawyers have, for some reason unknown to me, concentrated on only one of the three. We know it means communicating facts to people. Language is employed for that purpose. But there are two other purposes: one, you try to get your audience to think and to feel, to feel the visceral approach; and third, you try to get your audience to act by way of decision, by way of movement, by way of activity, or anything like that.

Now, how are you going to do it? Are you going to do it by employing the old-fashioned language of the lawyer? I met a lawyer from England in a recent visit out there and he used the phrase, "My privy is in jeopardy." It wasn't until days later I found out his toilet was on fire. That's all right for the English but not for us. The language of the people!

If you want to communicate with somebody, use his wave lengths. If you want to reach his mind, employ the language of the living and not the language of the dead! We lawyers have to bring back the jargon of the street into the courtroom so that when we reach people's minds we are talking on *their* level; we are not confusing them with ours.

This is the heart of the technique of the trial lawyer. Until he has learned not to say "plaintiff" but to say "Peter Sylvester"; until he has learned not to say "administratrix" but to say "a mother"—why, do you know what an impact word "mother" is? Nowadays worlds are built around it! And the word is there for use—"mother and son" or "administratrix and decedent"—you begin to see how important the choice of language can be.

In the employment of language like that you are assisting in employing the "sincere look," the Madison Avenue, the "sincere look," and I don't mean it as a pretense; I mean it really because here is the stage of the trial where emotion, however repressed and under control, must somehow seep across that jury rail so that the people can feel it. To be a persuader, that emotion must be present and must get over the jury rail.

Now, how does one become a persuader? By himself being persuaded. The first one to be persuaded in a lawsuit is yourself. The cases I have done the worst at, and I've just passed a mark of having tried one thousand cases in my trial lawyer activities, the worst cases I have tried are those I had no confidence in. I was not myself persuaded.

Having been persuaded, are we going to employ the following "ploy" which you so often hear in the courts of this country: "Ladies and gentlemen"—either in opening or in summation—"I

wasn't a witness to these proceedings but this is what we expect to prove through the witnesses in the case." Or, in summation, you hear people say to a jury, "Well, if I said something wrong, don't take my word for it. Your recollection counts." That sort of attempt to reach for the sound of fairness—forget it! Forget it! The public knows us now. The public is aware that we are partisans. Even the district attorneys, who are not supposed to secure convictions in cases where the evidence points the other way, are all partisans, and the public knows it and they expect it of us. And when we pretend to be non-partisans they do not believe us, and it destroys the sincerity of our approach.

Take another example. Suppose you were a vacuum cleaner salesman. Suppose you were going from door to door with this contrivance. Would you say to the lady who answers the doorbell, "I've got a vacuum cleaner here. I don't know how good it is. It may be good, it may be bad. Don't take my word for it"—that sort of thing. The sales would drop off tremendously. You wouldn't stay at it very long.

In addition to being dramatists, stage directors, we are salesmen. We are psychologists, and of course we're lawyers as well. The psychology of the courthouse and the courtroom requires a practical and affirmative approach, and only by that kind of approach do we persuade. It is bad enough that our opponent is going to get up later on and say, "Mr. Julien wasn't there and he doesn't know." But by that time I will have had their minds and their ears for twenty minutes to half an hour, and some of it will stick.

I say, "Ladies and gentlemen, this is what has happened. This is the case you are going to hear," and then I tell them the facts in opening. And when I get to summation I don't suggest that I may be mistaken. I don't want them to think I may be mistaken. I want them to think I sincerely believe in what I am saying and that I know my case, because if I don't know it, why should they bother to learn about it?

This is the dynamic approach I prefer for the courts. It doesn't mean that this is the technique or that it is necessarily the true technique. There is no "the technique" in trial work. There are "techniques." And next year or perhaps in another hour you will hear somebody talk about a different technique, and he may be right for himself. But I find the common denominators in trial technique are these things that I am talking about so far as language is concerned and so far as the dynamic affirmative approach is concerned. "People, this is my case. This is what happened." Not, "We expect that the proof will show," or "Witnesses may tell

you, and if they don't you can forget it." That is a negative approach.

Every summation, every summation should have a life of its own. By that I mean, a summation should not be keyed to your opponent's summation. You have an additional advantage here on the plaintiff's side. You get two turns at bat. In New York we get but one. But since we follow the defendant we consider it to be a catastrophe from a trial technique standpoint to devote a summation to answering our opponent.

Every now and then you get this sort of thing: A clever defendant's man will get up and say, "Ladies and gentlemen, before I conclude my summation I am going to pose eight questions, and you listen to see if Mr. Julien can furnish the answer to these eight questions."

I don't write them down, to begin with, because that makes them seem the more important. And I don't reply to them, not head-on, question by question. But still you can't leave it alone entirely. So I take the jury behind the scenes and I say, "Ladies and gentlemen, Mr. Gladstone has just suggested that I answer eight questions. That is a very clever trial technique. I want you to see what he is trying to do. These questions, you are going to find, are not the true issues in the case because, listen to what the Judge has to say and he will never say that these questions propounded by my opponent are the questions that you have to answer at all. It is his questions that count, not the lawyer's questions. But his purpose is to divert me and to divert you from the true issues in the case, and I would be failing in my duty to my client were I to do it. So you will forgive me if I don't take you down some alley which has nothing to do with the heart of this case." And I leave the questions alone.

That is another way of saying that since your summation has a life of its own, has been planned on its own, while you will occasionally embrace within it something said by your opponent which is easily answered, you will not build, you will not make a theme out of the reply to your opponent's summation.

What use should be made of the evidence in the summation? I do not believe, and most of my compatriots at the trial Bar in the areas I operate do not believe, that summation should have a detailed statement of the facts. If by the time summation has arrived the jury doesn't know the facts, it is a trifle late in the hour, approximately, which is allowed you to try to acquaint them with the facts by saying, "Mr. Jones, the policeman, testified to thus-and-so and thus-and-so, and he was followed by Mrs. Mattox who said the following. . . ." That isn't the way. That's not the way at all.

It is a time, not to summarize, but to draw objectives and conclusions from the testimony, to capsulize it, to summarize it.

I selected at random a transcript of a trial in which I had been engaged at one time, because I found in coming across the country on the plane that there were so many principles which I believe in which I have somehow carried into practice in this particular summation. Since I am going to make reference to it on several occasions, just let me fill you in with the facts.

This was a medical malpractice case. Even though it is an odd type of case and we don't run into it so often, it still embodies some of the things which we can talk about on summations in general.

An elderly man, seventy-five years of age, a Mr. Holland, enters a hospital to have a prostatectomy performed upon him. It was performed in two stages because of his advanced age. They performed the first part of the prostate operation and within three days after the performance of that operation, while in a most enfeebled state, he is asked to walk some forty yards to a bathroom, and he is left there alone. He emerges twenty minutes later and he falls on the floor and fractures his skull.

Notwithstanding that this happened, they performed the second stage of the operation some eight to ten days later, and he then dies as a result of the operation and the fractured skull, says the plaintiff, and the defendant says he just died of a heart attack which, incidentally, they never said anything about in their hospital records.

I just want to show you what I mean by capsulizing the testimony rather than reciting it:

"We urge that the second operation should have been delayed. Now, we are not saying, 'Dr. So-and-So said it should have been delayed,' but we say, 'Why should the operation of the 20th have been delayed?' We know it was an elective procedure. We know that Dr. Rath, the surgeon, has testified both here and in his examination before trial that he could have delayed it weeks or months or indefinitely, but they didn't.

"You have testimony that a spinal tap was in order and should have been done. The testimony was given to you by a doctor who appeared for our side, a man of the highest qualifications. He says that a spinal tap can be safely performed, and we know that spinal taps are performed in almost all the hospitals in the country and it is an expected procedure. Somebody said, 'Well, isn't there some danger attendant upon it?' and I will never forget what the doctor said: 'There is less danger in doing it than in not doing it.'"

I want to call your attention to three things here: first, the use of "we." I am talking to a jury. I am trying to embrace them in a grouping with myself so as to constitute myself, if possible, the thirteenth juror in a group. I'm promoting togetherness. What a great word! "Togetherness."

So I don't say to the jury, "You know this." More often than not I will be saying, "We have learned. We are going through this together." There is another spot in the summation when I say, "We have entered figuratively into this hospital hand-in-hand," and that word "we" is embracing, all-inclusive, whereas when you talk to the jury and say, "You members of the jury," there is a slight divisiveness. You are separating yourself, the architect for the plaintiff or the defendant, from the jury. In that case the jury rail becomes really a rail between you, and the idea is to embrace them.

Secondly, the language, if you will: you'll notice that there wasn't a single word here that wouldn't be in the ken of anybody on that jury, easily understood, nothing at all like our electronic age—which I somewhat despise for reasons I'll tell you in just a moment.

And third, I am capsulizing the testimony without detailing it.

I must tell you why I dislike the electronic age. It started with doctors. You may think I have "a thing" about doctors—and you're right, I have. I'll tell you how it started.

There is a chap in Upstate New York who is the local medical examiner. He examines for the district attorney in fatality cases. He also makes examinations for local insurance companies, an extremely busy man. And because he is so busy he rarely gets to his office. He has devised a method, a plan, where he keeps all his material on index cards. Many of them he keeps in his pocket. He may have to go from one court to another.

One time he examined a Mr. Houston who was killed in a bar-room brawl, five bullet wounds in the chest—very dead. He examined him for the district attorney.

The case comes to trial about nine months later. They need Dr. Rapaport. They need him in a hurry. They hadn't alerted him in advance. The assistant district attorney calls him to get him down to the court, no chance to do any briefing, and throws him on the stand. They get his qualifications and then they say, "Doctor, did you examine Mr. Houston on September 9 of 1964?"

Doctor says, "Yes," and he is going through these cards; he hasn't found the card yet, see? As he is riffling through these cards the district attorney says, "Well, what do you find?"

He said, "Well, I gave him the Babinski Test, and I gave him the Laseque's Test, and I gave him all the neurological tests, and they all turned out to be negative. I would give this man about a fifteen per cent disability."

Wait! The Judge raps his gavel and he leans down to the doctor and he says, "But, Doctor, this man is *dead!*"

"Dead?" says he, riffling through the cards. "In that case I give him an eighty-five per cent disability."

When the doctors started using these electronic answering devices for their telephones, that really got me. Then I noticed that some lawyers in our area began to do it, too. There is a lawyer whom I know, a Mr. Shine, and if he is not at his office there is a disc that answers. It says, "Mr. Shine is not in his office. When the beep sounds you have thirty seconds to state your case."

I felt so bad about it I decided to do something to Mr. Shine. So the beep sounded and I said, "Mr. Shine, I am just passing through town and I have been recommended to you. I've had a terrible rear-end collision. My spine has been fractured and I am lying in the hospital, and they tell me I am going to be here six months." That's all. No name and no address.

Well, we have talked about the employment or the non-employment of evidence, but there are types of evidence that I like to make great use of, and strangely enough it is negative type of evidence: the play that goes, "Why didn't they call?" or "What might have been said?" I find that the jurymen accept this. He likes to know that something isn't being covered up, something hasn't been buried, something hasn't been kept from him; and if it is, then he knows what to do with it.

That sort of thing can work this way: same summation. "Now you see, here is the bare bones of the problem, ladies and gentlemen. Let us fit in the fabric as it applies to these bare bones so that we can intelligently see what we are called upon to do here." Now look what the "we" has been promoted to. "We" are called upon to do. I am now joining in their decision, you see. "I said before, and I am going to talk about the defense of the sanitarium. First, not with any malevolence at all but I think the attorney for the sanitarium has been conducting a very quiet defense up to the time of the summation. I think it's a rather brilliant approach to a problem when you don't really have a defense at all. You stay quiet, you stay in the background, you let the other lawyers"—there were lawyers for the doctors of course—"you let the other lawyers seem to be conducting the battle because you appreciate, as anyone who looks at these facts must appreciate, that the

basic problem with respect to the defendant sanitarium has never been answered. But never!

"It has been said here that good and accepted practice by a hospital requires, if you are taking a man of his age on his first walking day some thirty or forty feet to a lavatory, after he has had a soapsuds enema, you must closely watch and supervise the man. That's the testimony! Where's the contradiction! What hospital administrator, what nurse, even from their own institution, has been called here to say 'That's not the practice'? What official of any institution through the length and breadth of the city has the defense called to say, 'What is the practice or what is not the practice'? And you quietly sit by with me and listen. We say it was wrong. And not even a house doctor has been called. Where are they keeping him? What are they concealing? What is buried in this case?" That sort of thing.

You do it with a policeman. You can say—now I'm not sure, and please forgive me about this, whether or not this rule of evidence would apply in your jurisdiction, but you can approximate it to other situations which are akin to it—but in our jurisdiction if a person injured in an accident were to talk to the policeman and give a version to him contrary to what she testifies to at the trial, it of course would be an admission against interest, and it would be appropriate for the police officer to testify to it. But, were she to say to the policeman, as not part of the *res gestae*—that's the kind of language I don't like to use, *res gestae*—not part of that, were she to say it happened exactly as she says it happens at the trial, that doesn't make it admissible. The policeman would not be permitted to give the corroborating statement which he made at the scene. It may not apply in your case, but in order to use negative testimony in our summation we would say in a case where the policeman has not testified to a contradictory statement, but he is in court testifying to other things, "You understand, of course, that no witnesses could be brought here to say, 'Mrs. Curn said the same thing elsewhere as she said here, but we want you also to know that were she to say things *contradictory* to what she said here, then those witnesses could be called, or could be asked. And you know, of course, without knowing what she said, that she did talk to the policeman at the scene of the accident.'" Negative testimony. Negative testimony.

There are other types of testimony which have impact force in a summation. When you are talking about the recollection of people and how they change from time to time, how interest can affect testimony of people, you've got to be careful. You never do more than you have to do to win a lawsuit. The art of the trial lawyer,

on the plaintiff's side at any rate, is to lessen the issue. The art of the trial lawyer on the defendant's side is to broaden the issues so as to provide as much chaos and confusion as possible.

Now, you broaden an issue when you call someone a liar. It's a hard concept for a person on the jury to accept. I have an example. How many of you have read Louis Nizer's book "My Day In Court"? How many of you have read it? Fine. Well, you know Mr. Nizer is an outstanding, wonderful trial lawyer. His book said so. Well, Nizer in his book tells you about a malpractice case which he tried. It was an open-and-shut case, no reason not to win it. And as some of us do, we are carried away at times in our summation. You have seen it happen. And Nizer, who speaks beautifully, was carried away. He said to the jury, "What these doctors did to my client wasn't just negligence; it was *criminal* negligence."

The jury files out and eight hours later they report they cannot agree. Of course they couldn't agree. He meets them in the hallway and he says, "How could you disagree? The proof was so clear for the plaintiff!"

They said, "Well, we were for you one hundred per cent, Mr. Nizer, but *criminal* negligence? We weren't going to send that doctor away." True! It's true! He had widened the ambit of the issue and therefore made it the more difficult for the jury to accept it.

And just so it is when we do that with a witness, where we stand up in all our righteous wrath to a jury, "She lied! She falsified! She misled you under oath," when the same result can be accomplished as well, and even better by saying "Do you think that that lady may have misunderstood? Do you think she really recalls these details as she attempts to now? Do you think somebody clever has spoken to her and planted some ideas in her mind?" Let your opponent be the beast, you know. "Do you think she really remembers what happened four days ago? Look, people on the jury. Test your own memories. You have been sitting here for four days. You have been in this courtroom five or six hours a day. Don't look now but ask yourself how many chandeliers there are in this room. And I am asking you about something that is recent, up to date. Do you think this lady remembers what happened five years ago in that kind of detail? But people can be led to believe that they remember these things."

Believe me, people, that is much better than going overboard and calling a lady or even a man a liar. There is no need for it. You widen the ambit of the issue of the case.

I like to employ portions of my opponent's summation when I come last, always so far as key words and phrases are concerned. A recent case in which I was engaged had a hospital record that contained an entry. In our jurisdiction, and I trust in yours, we can read the hospital records when once they are in evidence. This hospital record contained an entry that said "proffed bleeding." Now, don't try to cast back in your mind. We looked it up. There is no such word—"proffed." We came to the conclusion, and it was important in that case, a very crucial part of the case, that "proffed" in that instance meant "profuse." There was no other possible logical explanation of that term. So we claimed that it was "profusion." Our opponent said, "Oh no. While we don't know what it is, it can't be profuse bleeding; it cannot be profusion." This was a defendant hospital, by the way, so if there is some difference in our interpretation of the phrase, surely it is their duty to provide the right one, wouldn't you say? They didn't. So we contended "proffed" meant "profusion."

In summation I said to the people on the jury, "Well, *we* have been listening to a 'profusion' of discussion concerning certain elements in the case; or perhaps I should have said 'proffed'?" And they smiled, and when they smiled this was, I thought, the proper use of a key word. You will notice I didn't draw the conclusion. I didn't say to them, "You see, you feel you know what 'proffed' means."

I extrapolated. Now there is a word I recommend to you. Well, all rules have deviations, people. "Extrapolate" is the art of stating some of the logical facts in steps which lead to an irresistible conclusion, and you don't state the conclusion. You leave it for your audience to find the conclusion.

For example, you will recall when I told you about the Mississippi State Bar Association. I said that Governor Faubus was talking. I didn't say what he was talking about. You knew. I "extrapolated" with you.

So I did the same thing with the "proffed" with this jury audience. It can be done time and time again. In cross-examination you cross-examine somebody, you develop step by step until you feel, because of the sensitivity of your experience in the courtroom, that your audience cannot miss the conclusion, but you never state it. You never force them to say it. You leave it for the jury to find it. The greatest accolade you can ever get is to have a juryman come to you in the hallway after you have won a case—only if you have won it, of course—and say to you, "Mr. Brown, we thought you had that witness on the ropes. You were heading for

that point, and you never got to it. But, do you know, we found it in the jury room and then we stated it."

That is true art, the art of extrapolation. You don't have to hit them on the head any more. Believe me, the juries of our country are getting much smarter. Year after year I see this improvement, and I don't confine myself to one place; I travel about and I have seen them elsewhere. The juries are improving. And it may very well be because they have seen some programs on television which are a cut better than this fellow Burr—what's he in? Perry Mason? I say that because I don't watch it—but "The Defenders," there's a program that did a lot for all of us.

It tends to get the juries of the country somewhat closer together in appearance, in thinking, and in what they expect in the courtroom. They expect people who dress the way you and I do to come into the courtroom as the lawyer. They don't want lawyers who come in in sport clothes, in loud non-jury ties. They expect you to look like E. G. Marshall, the nice quiet type.

And this is important. It really is. It is important not only that we dress the part; it is important that our clients and our witnesses dress the part too. So when you have a case with a beautiful young lady, you dress her appropriately. You recognize, as the psychologist that you are in the courtroom, that other ladies have a natural built-in animosity toward the beautiful one, and even though they deny it, it's present. So to lessen, again, this difference, you dress them appropriately. We do it. If we have a good-looking lady—no cosmetics, a very simple hairdo, a quiet dress. That is the way you do it.

We had such an instance recently in Queens County. Queens County in New York City is a county of small householders of relatively moderate incomes, and they are real people; they're down-to-earth people. We had a case involving a gorgeous young lady. She was seventeen years of age. My assistant instructed her as to how she was to dress, and she came in absolutely suitably attired for the occasion. But she brought her mother along—you're extrapolating again—and her mother wore a gorgeous mink coat.

So we said to her, "Mrs. Forbes, you needn't stay. We will take care of your daughter's case."

"No," said she, "Mr. Julien, I am here to see that my daughter gets justice." She is here to see that she gets justice.

So we compromised. Her daughter was the plaintiff. We allowed Mama to stay, but she had to sit with the defendant and his witnesses.

Well, I have a few more key word situations employed in this case, and I want to show you how some of them were dealt with. Here is one. One of my opponents in an attempt to get his doctor out of the case said that his doctor, the surgeon, "leaned on" the advice of a neurologist whom he brought in to decide whether Mr. Houston could have the second phase of the operation. So I say, "In listening to Mr. Shandell, for example, it appears to me that he is attempting to thrust off some of his liability on another doctor. He says that he did not 'rely,' referring to the side whom his office represents, he did not 'rely' but he 'leaned.' Now, there is a distinction which none of us can really see! It surely escapes me and I have the feeling that it escapes you. He 'leaned' but he did not 'rely.'"

So by seizing a word out of a summation, you build up an entire thing about it.

Or, here again at another phase in the same summation: "The defendant is saying that we on the plaintiff's side were second-guessing the doctors, and that while they had to deal with flesh and blood, we on the other hand had had many years to go over it to decide whether or not their activity had been appropriate at that time. So they said we were second-guessing."

I used it as a key word or a key phrase: "About second-guessing, it is they who second-guessed. It is they who say, 'Well, even if I had examined'—as we say they should have—even if I knew, it would have made no difference.' That's second-guessing!"

"It is they who say, 'Even if a spinal tap were performed, it would probably show no blood.' They are doing the second-guessing."

"It is they who said, 'Even if an electroencephalogram were taken, that brain wave, which is the same and is no more painful than a cardiogram, it would not have shown anything.' It is they who are second-guessing."

You are pounding on the key word and you are making them aware of this weakness in a summation which begins to pervade the entire estimation, if you are able to do it.

There are always key words. There are always key phrases—if you listen. If you listen. The worst enemy that trial lawyers have is the pen and the pencil. You sit there and write down the name of the jurymen who is being called to sit on jury duty instead of looking at him and watching him walk and seeing what material he carries with him in the way of a newspaper, or the Wall Street Journal, if you are representing the plaintiff! There is

a wealth of material to be had just for the looking, but if you are doing the writing you never see it.

They call jurymen here and they walk to the box, don't they? All right. Somebody calls Thomas Walsh, and he meekly says "Present," and he ambles up and sits down in his chair. No problem! He is not a prospective leader, and your challenges have to be saved for prospective leaders who you think might be against you.

Same man: "Thomas Walsh!"

"Here!" He squares back his shoulders, marches up like a West Point cadet, sits down, looks up and down the jury box to find out who is going to give him trouble. A leader! And really you've got to watch them.

Somebody is testifying, direct examination, and you are the prospective cross-examiner. If you have to write, why don't you write this way, look at them, watch when the eyelids get hooded over because there is something being held back; watch the withdrawn look that a man gets that changes from his ordinary appearance because he is covering up; watch the way the throat tenses at some particular point when you know you are reaching something that is crucial that you've got to dig at. And you can't see it when you are wedded to the pencil. I'm a little off my subject, am I not? But it is important in summation. Listen! Listen!

Now I want to talk to you about the take-off. The take-off is not a dive and it is not anything that has to do with some kind of athletic event. It is something that you do when an objection ends up with a ruling in your favor. You are on your feet. You have done something. Your opponent objects. "Overruled!" You take off. You use it as a platform to drive something home stronger.

Here it is. I am talking and I say, "The hurt that they spent a week trying to minimize as though we came here just newborn, you twelve people and myself, just newborn, never heard of injuries before, and now within the confines of this courtroom we learn that a fractured skull is nothing? And the tearing of a brain is nothing?"

My opponent objects, "I object, Your Honor. It is not a fair representation."

I say, "It is my argument. I've got a right to argue."

The court says, "We will let the jury determine whether it is a fair representation of the evidence or not."

So my opponent sits down, and here I begin to take off: "Yes, I am delighted to have this opportunity to have you judge whether

it is a fair statement that a fractured skull is not important in a man seventy-five years old; and the tearing of the brain not important in a man of that age."

With the tone of my voice and the repetition, I've taken off. The advantage of that is, in addition to securing emphasis and building up the emotion which I want to muster during the course of my summation, I hope to keep my opponent from making too many objections.

As a matter of fact, another method that can be employed where you have a chronic objector—and you know who they are; everybody knows who they are—when you have a chronic objector you might start your summation this way. Now, let's see. You go first so you can't quite do that. Well, you can do your final leg on your plaintiff's argument that way; or if you are the defendant you can do it, having heard the plaintiff first. You may say, "I've listened to Mr. Walsh talk to you, ladies and gentlemen, and I must commend him. In a case in which there is so little merit to his side of the case, he made an admirable summation." I made it a point not to interrupt him because while there were many things I disagreed with, many things, and I'll talk to you about some of them, I believe, and I am sure that you do too, that at this stage of the trial every man who is a lawyer representing his client should have an opportunity to talk to you without interruption." It works! It works!

Well, really it doesn't, however. I tried a case in New Jersey on one occasion and I was told I had a chronic interrupter against me. I used that against him. It didn't work. Nevertheless he started to make objections every third or fourth paragraph. So I began to keep count. When he stood up about the seventh time I said, "That is Counsel's seventh interruption, Your Honor."

The Judge said, "Yes, but he has a right to object if he wants to."

I said, "Yes, he has a right."

The next time he went up I said, "Now that's the eighth objection, Your Honor."

You know, when it was the tenth the Judge said, "Mr. So-and-So, that's your tenth interruption!"

There are lawyers who believe that it is a good idea to read some testimony to the jury. I don't quite subscribe to that school of thought, although I think there is much to be said for it, only because I believe in the eyeball-to-eyeball approach. I'll be looking at a jury most all of the time, eye-to-eye. I think it is important.

It is a great way to try to reach them. I stand as close as I can to the jury rail, as close as they'll allow me to stand, and I recommend that to you too—unless you suffer from some kind of a body odor. And that is important too!

I like to read no more than a single paragraph of something very persuasive, something that approaches the jugular of the case. Then it is worthwhile reading.

I do have one place here where I did that. There is no need to read this to you because it doesn't quite fit into the context of what I am saying. I simply read no more than two sentences, and for that period of time I was willing to look away from the jury.

Don't think this is just my idea, this business of eyeballing the jury. Do it all the time. I have one associate in New York City who will at no time during the trial of the case turn his back on the jury. If he wants to get from here to here he'll walk somewhat crab-wise, like this—never turns his back on the jury. And it is important. It's important.

I am going to fit some of these things very closely together for a moment and not spend too much time on some of these other precepts or principles because you've got a man whom I am very anxious to hear and I know you are anxious to hear who is going to follow me and I don't want to delay your meeting with him.

I like to get in a summation as close to the charge as possible. I can relatively anticipate what the charge is going to be like on some of its major points, and while I will not state what the law is I will find some method to discuss the law with them without saying "The law is so-and-so," or "His Honor will tell you that the law is so-and-so." For example, if contributory negligence is in the case I might say to them, in laymen language again, "You have heard a lot of talk about contributory negligence, and actually I shouldn't like you to be misled about that.

"You have a daughter who may attend high school, and perhaps she gets seventy-five per cent in Spanish, a passing grade; not the best, not perfect, you see, but a passing grade. And we don't look for the perfect man in the law, either, because the law has got to be reasonable. We look for what is a passing grade, what the average man might do, what the ordinary person might do, what we might do. So we don't look for the one hundred per cent perfect man; we look for the reasonably careful man.

"Of course the architects for the defense who have had three years since this occurrence took place can in those three years figure out safer ways to do it, but my client, Mr. Palmer, had only

twenty seconds to figure it out. Don't second-guess him. Don't Monday-morning-quarterback him. What he did was reasonable for twenty seconds; what they are talking about now is the architecture of three years."

Now, I have been talking law to them, yet I've been talking in such fashion that there can rarely be an interruption because I am discussing the law. And when they hear "contributory negligence" in the court's charge, in some fashion, the antiquated language of the courts and the lawyer, I hope that it will be my statement that they will more easily recognize, and that under those circumstances, "Well, remember 'contributory negligence'? Julien talked to us about that. We know what that is. That fits that bill. We're not going to throw him out. After all, they've had three years to figure this out."

Save something new for the summation. Save something that hasn't been talked about before. Once again we have a hospital record. I will not have read all of this during the course of the trial, leaving something for the summation that has a feeling of freshness about it. Take, for example, the case of a child, injured. The hospital record is in but I haven't read the nurse's notes. I say to the jury: "We've a difficult task here today, you and I. We have a task of translating into dollars and cents the pain, the agony, the suffering of a child, a four year old child, and I wouldn't think of asking you to put yourself in the place of a four year old child"—I wouldn't think because I am not permitted to do it—"I wouldn't think of asking you to do that, but there must be some way for us to feel the pain of a child, the agony, being torn away from those whom she loves, from her usual circumstances where she feels safe. And yet here it is. Here is the means of our learning a little something about it, by trained observers, nurses, if you will, at this very fine hospital. Look at the nurse's notes and look what they say :

"8:00 P.M.—child refused all food; 8:30 P.M.—child crying for its mother; 9:15—child cannot be consoled, sedative; 11:30—child awake, crying, tossing restlessly; 2:00 A.M.—child refuses all food and drink, crying for mother; 4:00 A.M.—child has had no sleep."

"What have I done? What have *we* done? In twenty seconds, people on the jury, in twenty seconds we have taken an eternity from the life of that baby, and we have to replace that today in dollars and cents—fully, completely. Because if you find for this baby and don't find enough, then you will have given her perhaps sixty per cent justice, perhaps seventy per cent justice, but not one hundred per cent justice. And any time you bring in a verdict that is only sixty or seventy per cent justice, you have brought in a

verdict that has forty or thirty per cent injustice. Only full justice can properly compensate this child."

Well, I don't want to leave you on that kind of sad note, so I am going to take perhaps five minutes to give you one more principle, and the best kind of example that you will ever hear about that principle so you will never forget it. And here I get away from summations for a moment to talk about cross-examination again.

Some of us get angry during cross-examination and our least appealing aspect and visage is when we are angry. If you ever have enough control of yourself, look in a mirror when you are angry. You are impossible! You look terrible! You are not your best, apart from what it does to you when you lose control over what you are saying and doing. There is no point just saying it to you, because if you cross-examine that way, if you are a finger-waver and an angry man, the jury is going to side with the fellow that you are bellowing at. So the best way to drive that principle home is to give you the contents of a true transcript of a trial where somebody cross-examined in that angry fashion.

This was a products liability case. Plaintiff has called an expert to testify. He is a professor—always a professor! He is a professor. Three-quarters of an hour before lunch, defendant's lawyer has been angrily cross-examining and getting nowhere. So he goes out and he drinks his lunch and he comes back loaded for bear. This is the remainder of the cross-examination:

"Questioner: 'Professor? You say you're a professor?'"

"Answer: 'That's right; that is, a former professor. You see, I retired in 1915. No, it was really 19—'"

"Just a minute! That's all right, Professor, but professor of what, Professor?"

"Answer: 'Zoology.'"

"What's that?"

"Zoology."

"Yes, but what is zoology—and don't try to evade or quibble!"

"Answer: 'I am not quibbling.'"

"Oh yes you are. Yes you are. Just like all the so-called experts."

"The Court: 'Treat the witness fairly. He isn't trying to quibble. He just doesn't understand you.'"

And here is a classic reply: "I have practiced in this court for twenty-nine years and no court has ever accused me of mistreating any witness or any client."

"The Court: 'Proceed.'

"Questioner: 'What do zoologists do, Professor?'

"Answer: 'They study and they sometimes teach animal life. It is a bit difficult to define in a sentence. As in many other sciences there are many varied branches and specialties. It is the study of animals and animal life. Why, I know one professor of zoology at a school in Ohio who spent thirty-five years studying one family, the snail family.'

"What was his name!"

"Answer: 'James H. Hereford.'

"Where is he now?"

"The Court: 'What has that got to do with this matter? I am afraid you are wandering far afield.' "

And here is another classic answer: "Your Honor forgets this is cross-examination."

"The Court: 'I don't forget anything of the kind. Proceed.'

"Questioner: 'Answer the question.'

"Answer: 'What is the question?'

"Mr. Eikert, we will start all over again and I will put it in such a simple child-like way that even a professor who comes to court knowing all about snails can answer it."

"Opposing Counsel:"—I don't know where he has been all this time!—"I certainly want to object to these remarks."

Now that's a classic too.

"The Court: 'Yes, that is very objectionable. Now get on with your cross-examination.'

"All right. So you say you are a specialist, an expert on beavers"—this was a beaver trap case—"an expert on beavers and beaver traps and snails."

"Answer: 'I didn't say any such thing, sir. I said I know a great deal about beavers, just as I think I know, or many people say I know, a great deal about many animals. I have lived with them. I have observed them. I have handled them. I have fed them. I was almost going to say I conversed with them. You

know, they've a sort of language. Why, the worst thing you can say is that they are inarticulate or that they are dumb animals.'

"You say they can talk!"

"Well, there is a sense in which all nature has a language which we who study it can understand."

"Well, answer my question!"

"What is your question?"

"You say a beaver can talk?"

"Well, please don't try to make me look ridiculous. What I said was this: All animals can speak; and I mean that they communicate with one another and they understand their own language."

"Can you talk it?"

"I can answer it this way. . . ."

"Answer 'yes' or 'no.' "

"Yes."

And counsel turns to the court reporter and says, "Mr. Reporter, I want you to get this. This is good!"

"The Court: 'He is getting it.'"

"Witness: 'I was about to say that if one wanted to draw an analogy, even plant life has a language.'"

"You talk that too! As I said before, now don't quibble. Just answer 'yes' or 'no.'"

"Witness: 'Well, subject to what I said I will answer "yes."'

"Did you ever talk to a buttercup?"

"Now, Your Honor, this is too much," the other lawyer says.

And Counsel says to him: "He's your witness and you are bound by his testimony. Did you ever talk to a buttercup, Professor?"

"Answer: 'Well, to those who are familiar with them and have learned to love them, some flowers have a certain language.'"

"What did the buttercup say to you? And what did you say to the buttercup?—and fix the time and place!"

"The Court: 'You don't have to answer that question.'"

"All right. Did you ever talk to a giraffe? Answer 'yes' or 'no.'"

"I can't answer that 'yes' or 'no.' With qualifications I would say 'yes.'

"And do giraffes talk to you?"

"Yes, with qualifications."

"Did you ever talk to a lion?"

"Yes."

"And the lion talked to you?"

"Again, with qualifications."

"Did you ever talk to a skunk?"

"Answer: 'Yes.'

"And the skunk talked to you?"

"Answer: 'Yes.'

"Well, the next time you have a talk with one of them, ask him for me, 'What's the big idea!'"

I just would like to say that they sent this poor lawyer away for thirty days and they released him for good behavior after eleven.

Well, gentlemen, I have enjoyed chatting with you on the general subject of trial techniques. You know, of course, that I should love to be able to talk to you for many hours on this subject which constantly intrigues me and which I am constantly digging within myself to try to find the reasons for things I have been doing as a matter of practice for many years. By doing that I feel I have contributed in a little way to continuing to refurbish my own techniques and to induce people to stay in the courts and to continue the adversary system, which I believe is the best system ever devised for ascertaining justice.

Somebody once said, "The trial of a lawsuit before a jury is a small miracle of democracy in action." I am dedicated to that miracle, and I hope you are too.

CHAIRMAN WALSH: I certainly do want to thank you, Mr. Julien. I know I speak for every one in the room when I say that your remarks were certainly well received and most welcome.

I neglected to tell you that Mr. Julien is an Admiral in the Nebraska Navy. I think if it were possible to promote him, we would all be in accord with doing just that.

MR. JULIEN: I can't find a ship, Tom.

CHAIRMAN WALSH: Yesterday Mr. Ginsburg mentioned the Evidence book that has been published by the Committee on Continuing Legal Education, but he neglected to tell you the men

who were the powers behind the throne, so to speak, in getting that book out: Harold Rock, of course, was the Chairman of that Committee. He insists that I give all the credit to Jack North of Omaha and Professor David Dow of the University of Nebraska, College of Law. We certainly are indebted to them for all their hard work. For my part, I certainly would want to express my thanks to Norm Krivosha, who is the Chairman of the Committee on Procedure. He is the man who really was the working oar behind the program that you have attended the last day and one-half.

It has been suggested at this point—in fact, it has been requested that we declare a short recess. Our next speaker is here. He was late in arriving. I am going to suggest that we take perhaps five minutes. It is not my idea but perhaps it is a good one.

CHAIRMAN WALSH: Ladies and gentlemen, we would like your attention. Earlier this week, on Wednesday to be exact, a small portion of our Bar Association had the pleasure of listening to Mr. Gerstein, a prosecutor from Miami, Florida, who tried the famous case known as the *Mossler* trial. I won't be redundant and tell you anything about that case or what it involved. Just let me say that the defense always has a chance for rebuttal, and today certainly appropriate time will be given.

If you have heard it once you have heard it said a hundred times, I am sure, that a speaker about to be introduced needs no introduction. I don't know of any time when that would be more true than at this moment. So having said it, I will make no further introduction except to ask you to welcome with me, Mr. Percy Foreman of Houston, Texas.

RECOLLECTIONS OF EVIDENCE GOOD AND BAD

Percy Foreman

Thank you, Mr. Chairman. Distinguished Judges and Fellow Lawyers: That concludes the prepared portion of my address.

There was a Texas Democrat, moved to Kansas, who was called on by the Republican Committeeman and asked to enroll so as to vote as a Republican. He said, "No, I guess not."

"Well, why not?"

"Well, I'm a Democrat."

"Yes, but why are you a Democrat?"

He said, "Well, my pappy was a Democrat and my grand-pappy was a Democrat. That's why I'm a Democrat."

He said, "That's not logical at all. Suppose your pappy had been a horse thief and your grandpappy had been a horse thief. Would you be a horse thief?"

He said, "No, in that case I'd be a Republican."

An old gray-haired Texas rancher heard his grown son ask a stranger, "Where are you from?"

He said, "Don't ever ask a man where he's from. If he's from Texas he'll tell you; and if he's not, no use making him feel sorry for himself."

They say in New York the way to get to Texas is to go west until you smell it and south until you've stepped in it. A lot of people think we wear those boots on account of rattle snakes.

Actually, Texans are not vain, egotistical, or conceited. They just don't have anything to be modest about. Take me, for instance. I am a very modest man. I don't think I'm nearly as good as I really am.

For instance, I don't think that I am the greatest lawyer that ever lived. I don't claim to be. Or even the greatest living lawyer. But on the other hand, I don't deny it. After all, what is one man's opinion against the world? Besides, I'm not always right. But I am never wrong. I've only been wrong once in my life, and that was when I thought I was wrong and found out eventually I was right.

I understand that tall distinguished, Southern gentleman, Richard Gerstein, addressed you fellows of the prosecution. He is your National President. He is a gentleman, a scholar, a fine man, and a great prosecuting attorney. I understand he told you that in this little misdemeanor murder case I tried down in Miami he got either a sixth grade jury or a sixth grade justice—it was reported both ways to me. My only answer to that is, he had about eight challenges left. He had as many challenges as we had. He could have gotten rid of at least two-thirds of the jury, and he told the judge at least twenty-two times that the jury was satisfactory from every standpoint to him before we commenced the trial.

You may wonder why I am here. I haven't written a book. I'm not running for office, either in the American Bar or elsewhere, but I have never met with even two lawyers that I didn't gain more from having met them than they did from having met me. And just listening to this very fine address from one of America's great trial lawyers, as I did to Mr. Julien, I will carry with me a great reward for having been here.

But I do not either write "How To" books—Matthew Bender wants me to—or make "How To" talks, although I know that is

what you come here to hear. And if you hadn't heard one of the best that could ever be heard at a Bar Association, I might consider talking about—and if I did it would be the first time in my life—cases I have tried and experiences I've had. Jerry Geisler used to do that.

But to me it's hard, hard work. Besides, I have a theory—you tell me if I am wrong—that I don't know anything that every trial lawyer in America doesn't know. I was amazed in my tenure as President of the National Association of Defense Lawyers in Criminal Cases how the problems in Spokane were the same as in Boston, or the same as in Little Rock or Houston or Missouri, or any other place. And if I knew anything that you don't know, I wouldn't tell you, for it is my experience that if you tell a fellow something he doesn't know, he thinks you are a dern fool; if you tell him something that he already knows, he knows you're a smart man. That was one of the fine things about what Mr. Julien told us. It wasn't what he told us, every one of us know it, but it was the way he told us that we will remember it and will be inspired to apply it.

I knew for the first time when I got off the plane and coming in the car to the hotel here what my subject was to be, and that is the last time I've known what it was to be. I don't remember it now. I always like to have a subject to announce in the beginning. When I had a call and was asked what my subject would be I said, "It doesn't matter what the subject is, it will be the same talk anyhow." But the reason I like to have a subject is so the audience will know what I am talking about, and the reason I announce it in the beginning is that I seldom have occasion to refer to it later on in the address.

But there is something you invited me here for, because of the publicity that you saw as a result. I don't try to play down publicity. I don't court it either, but I recognize as fundamental fact that the goose stopped laying the golden egg because she didn't have the propa-ganda.

But if I were going to name a subject it would be "The Rights of the Individual." Since we are talking to lawyers and judges and among ourselves as such, it would be the constitutional rights of the individual. That is what the public is most interested in.

Every newspaper reporter, every television inquisitor that interviews asks about the so-called "new" law interpreted within the last five years, since June of 1961, when *Mapp v. Ohio* was decided, the new law of the Supreme Court: Has it made your work as a defense lawyer easier? Has it made the work of the prosecuting attorneys harder? What do you think will be the effect on the

additional cost for the administration of justice in view of the new law that the Supreme Court has enunciated in *Aguilar*, *Miranda*, *Escobedo*, *Massiah*, et cetera?

Every one of you took the same oath that I took when admitted to the Bar. Those of you who have been honored by appointment to public office, either as prosecuting attorneys or assistants or to judgeships at whatever level, have taken that oath twice. To me, that oath is a serious commitment. I shall, in the few minutes remaining, attempt to discuss your and my responsibility with reference to that oath and with reference to upholding the Constitution of the United States.

In the first place, the Supreme Court didn't bring forth any new law. There is not one iota of new law or new interpretation of the law, even *Miranda*, *Escobedo*, *Giordenello*, or any of the other opinions. What the Supreme Court has done, and you know it as well as I, is to apply the law, as it has been since 1791 when the Bill of Rights was adopted, to criminal trials in state courts. That's all it did, because everything that's in *Escobedo*, *Giordenello*, *Aguilar*, *Massiah*, *Mapp*, has been the law in federal courts forever. The same limitations have applied on the federal constabulary, the FBI, since its organization in 1923, the Internal Revenue Service since its organization in '13, Customs since 1791, and it has worked successfully and has caused the law in federal courts as administered to be respected, and law enforcement in the federal courts has not been nullified. Federal officers have been taught to investigate and get evidence against a prospective defendant, rather than to predetermine the guilt. Some investigative officers, some members of the constabulary, preconceived the idea that some individual is guilty and then proceed, instead of getting evidence against that individual, to arrest that individual and get evidence *from* the individual in violation of his constitutional rights not to be required to give evidence against himself.

In 1843 the Supreme Court of the United States held that the fifty-eight or fifty-nine guaranteed rights of the individual—guaranteed against whom? Against the *state*, against the prosecution, against the government. For the people who wrote the Constitution and wrote the Bill of Rights realized that the greatest enemy of a free people is its government, and that has been true forever, back as long as history is recorded. And if we in this country ever lose our liberties, we are not nearly as apt to lose them to China or to Russia as we are to Washington.

In 1843 the Supreme Court of the United States in an opinion refused to apply to the practice of law in state courts, criminal law, to criminal procedure in state courts the rights theretofore and

thereafter applying in federal courts. In that opinion the Supreme Court said, "We *assume* the states will protect the rights of their citizens in and under their own respective Bills of Rights of the various states because every state constitution is almost a replica so far as the rights of the individual, the Bill of Rights is concerned of the Federal Bill of Rights."

Well, it didn't work out that way and most states, including my own, the "chiefest of sinners"—the last time I quoted that they wrote it "c-h-e-a-p-e-s-t"; it's c-h-i-e-f-e-s-t" and it comes out of the Scriptures—the state courts at trial level and the state constabulary interpreted that 1843 decision as meaning the Bill of Rights don't apply in state courts—period—and ignored the remainder of the opinion.

As a result, in these United States of America in more than ninety-eight per cent of the criminal prosecutions the individual has not had the rights that the Constitution contemplated he would have. I say ninety-eight per cent of the cases because there are only 30,000 criminal cases pending in the district courts of all the fifty states—30,000, as of last May, and that has been an average for the last several years. You have that many pending here in Omaha in your municipal, in your county and circuit courts. And when you multiply that throughout the United States by every city in accordance with its population, you will see that to all intents and purposes we have been, to a greater or lesser degree, depending entirely upon the humanity of the local law enforcement officer or officers—a police state! The capstone of the prosecution of every major criminal case is and has been the so-called voluntary confession of the defendant.

There are communities, there are counties, there are districts in Texas that will not even indict in a capital case unless and until they have a confession. I went into one district, Lubbock, Texas, a few years ago, maybe five or six or seven, tried a case, took several weeks to try it, and while I was there I learned of a man who had been in jail two and one-half years and hadn't been indicted because he hadn't yet confessed.

Human nature is the same everywhere. There is no difference in human nature in Japan or Russia or Germany or any totalitarian country, and in the United States of America. The difference is the theory of government, the theory of the importance of the individual, the theory of the individual's rights against the state.

You go back and read, and they are bringing out in some twenty or thirty volumes the life of Madison, and about four of them are already out. He preached and he wrote against the time when

the government would absorb the liberties of the citizens of this country.

To the average layman everything is black and white. He hasn't studied constitutional law or any other phase of the law. The editorial writers, even some judges who were raised from silver spoons and come from the better families and went to Oxford and never met a payroll, can turn beautiful phrases—as "Whizzer" White's opinion dissenting in Escobedo: "Does this mean that we are going to have to have a defense lawyer in every patrol car to protect the rights of the individual?" And it is picked up and parroted by the constabulary and by editorial writers.

What about the rights of the innocent? Is that or not superficial thinking to people who have devoted their lives to the law as each and all and every one of you have?

I realize that the individual has had very, very little consideration even in our Bar heretofore in my time. When I was admitted to the Bar, and for many years thereafter, every Bar Association such as this one would be eighty per cent people who could ride on the railroad. We didn't have planes and paved roads then. The American Bar was dominated by the banks and the insurance companies and the major corporations and their attorneys. It was because of that that we who have devoted our lives to the life and liberties of our fellow man, organized the National Association of Defense Lawyers. Now the American Bar welcomes us, due as much to the activities of the American Trial Lawyers Association in organizing their Bar as our own, and now the rights of the individual are as important as property rights used to be when I was admitted to the Bar.

I was a successful lawyer for a young man in 1933. I had retainers of several thousand dollars a month. I took a job as Assistant District Attorney for \$350 a month, which was a lot of money in '33, because I saw the revolution coming and I wanted to be closest to the guns. I knew that the state would have the guns, at least to start with, and we had the revolution. We didn't have the blood in the streets that I thought, and a lot of other people thought we would have, but we did have a complete revolution in our thinking in courts, in the legislature, in Congress. And eventually the articulate common man's voice was heard in the land and at the monolithic structure in Washington. Finally we received and have a Supreme Court that is concerned with the rights of the individual, not to write new laws for the individual but to apply the law as it has always been, and the courage to go out and do it in the state courts where it wasn't done.

I don't mean to say that all judges disobeyed the law, but it's a rarity, it's easier, and the practice grew up of letting the sheriff of each county handle the judges, the circuit judges when several counties were involved, politics, or advise the judge. And as a result, the individual has had in the state, until the federal courts commenced giving him a hearing, it has had a salutary effect.

We couldn't even make the Supreme Court for criminal cases in Texas pay a bit of attention to the Supreme Court of the United States opinions until we took all of those opinions and wrote them into a new Code, and now since they have announced it at the legislature and we got the Code adopted, we do have the protection of the United States Constitution because it is a part of the Texas law. Now, where does that lead us?

Just this year, and I am not speaking for my clients because my clients are going to be represented and your clients are going to be represented and they are going to have their constitutional rights, but what about the fellow who can't hire you or can't hire me? For every man who can afford to hire a lawyer and go into criminal courts with an attorney representing him, there are eight or ten defendants who cannot do that.

Somebody asked me once on television in Houston, "Why, Mr. Foreman, are you always representing the poor and the underprivileged?"

Well, I've got two answers to that. One is, if they aren't poor when I start, they are when I finish. I have devoted my life trying to disprove the old adage that crime doesn't pay. I have done my best to put it on a paying basis. But the other answer is that hardly anybody else ever gets indicted, and if I were going to practice this kind of law at all, that is who I would be representing.

Now that the Supreme Court has said in *Gideon v. Wainwright* that every individual charged with an offense is entitled to be represented by an attorney at every level, from the time that suspicion focuses on him until the case is over in the appellate courts, I'll tell you I was never as prideful, and I've mentioned it in at least twenty states since, as I was at that which happened here in the Great State of Nebraska last fall when I was trying a sixteen-weeks case over at Sioux City, Iowa, when this bank robber was so well and so ably and so faithfully and so diligently represented by court-appointed lawyers. Yes, he got the extreme penalty, but as long as there is such a penalty, the way that case was tried was an inspiration to me who has dedicated my life largely to this phase of the law.

But the time has come now when, if the Constitution of the United States is to be enforced, every one of you is going to be a

criminal lawyer at one time or another. And the way it has worked in our town, Houston, Texas, those trial lawyers from either the big firms representing and defending insurance companies or the plaintiff's Bar, and we have a good one in Houston, every one of them who is appointed once asks to be appointed again. The reason most people are lawyers in the first place is the drama of the criminal courts. That's when, as a boy, you imagined you wanted to be a lawyer. As a law student you visualized yourself being such. It was not until your professors showed you how much more money there was and is in the other phases of the law that you changed your mind in that direction.

When I have the opportunity to talk to a group of lawyers, such as we have here today, I sometimes draw this illustration as regards the two phases, the so-called criminal law. Actually, there is no difference—the same psychology with reference to courtroom practice, the same intelligence that you use in selecting your jury, the same rules of evidence, practically, by and large.

The reason I went into criminal law, aside from the fact that I love it, was that when I was Assistant District Attorney the only time I had a problem on my hands from the other lawyer was when a civil lawyer took a criminal case. Most criminal lawyers practice by ear instead of by note. They did not brief their cases. They did not prepare a trial brief. They didn't investigate their cases. They didn't go on the scene and talk to witnesses. They took whatever witnesses the police said, and of course they only had favorable witnesses to the prosecution in their reports. But when a civil lawyer took a case he approached it as he would a civil suit, and I had to work five times as hard. Well, I simply concluded there was less competition in the field, and if a man would go into criminal law and approach it as a civil lawyer did their cases, there was a great field in Houston. If you don't believe it was an intelligent move, you should see my net worth statement.

The next comparison is not rhetoric. If you prefer to represent the banks, the insurance companies, the railroads, the airlines, if you prefer to sue those people for the plaintiff you are working solely with property, working with money; if you, on the other hand, love life and liberty, that is what you defend when you are in the criminal courts. It is just a matter of values. If you love money more than you do life and liberty, pay no attention to what I am saying. But if you love life and liberty more than you do money, I suggest that even those of you who may be encrusted over with your own experiences and your own maledictions against the so-called criminal lawyer, I suggest that you make yourselves available.

You are going to have to do it anyhow, if you judges do your duty. And you are going to have to if you do your duty. And you are going to have to if you uphold.

I say to you, my friends, defending the life and liberty of a man charged with crime, be he a communist, a child molester, a dope peddler, or a habitual, congenital thief, is a great privilege because if that person, black though his heart be, does not have the protection of the law, neither does any other citizen in America. And the only difference between our so-called freedom of the western democracies and the totalitarian countries is the concept of the value of the individual.

In the totalitarian countries the individual is only important insofar as he advances the interest of the state. That is why I never take one of them on a jury. They are conditioned for generations back that the state is right and the individual has no rights; whereas we who derive our jurisprudence from the Anglo-Saxon tenets and from the common law of England are taught to believe that the individual is of paramount importance, that the state derives its powers from the consent of the governed. Is that just an empty phrase?

Now, where does that lead us? We will tie these knots together and I am through. There was a time when the members of the Bar controlled the thinking of the community. Now it is done by headline writers or the pundits, the commentators. We are so used to letting someone else cook our bread and record our music that we used to learn to play in the home that we even let them do our thinking. There is no place, there is no group of people that could be assembled anywhere in America that represents the ability to conceive and interpret the rights of the individual, to underline the difference between the totalitarian doctrine and that of free democracy than this audience gathered here. You have spent your life doing it. You have sworn that you will uphold that Constitution.

I ask, when you go back to your various communities, into your various civic groups, lodges, churches, whatever be your activity outside of your profession, when you address a luncheon club or when you are just talking with members, I ask you to consider whether or not you feel that you have a responsibility to explain to your fellow men and women that what the Supreme Court has done in the last five years in decision after decision is merely to give meaning, to give substance to the phrases that had so little meaning before then in state courts. If you think you should, then my trip here is not in vain. That is what I came to say.

GENERAL ASSEMBLY

PRESIDENT GINSBURG: Before closing, I do want to thank the Section on Practice and Procedure, the Committee on Procedure, and the Committee on Continuing Legal Education for this wonderful Institute and program that we have had. I know you all will agree with me that we can't thank these groups sufficiently for what they have done.

Then I also want to express our thanks to the various men who appeared on the panels, our speakers, the men who devoted their time and talent to talking to us for the last two days, and also to those who worked on the Evidence book. Thank you all very much, and I want to say that that is the official thanks of the Bar Association, the best that I can put it into words.

Now we have a little matter of business before we close. There has been submitted to me, for presentation to this body, a resolution as follows:

RESOLVED that this Association endorse Constitutional Amendment No. 7 and recommend the same for adoption by the people of this state; and

BE IT FURTHER RESOLVED that it is the consensus of this Association that Constitutional Amendment No. 7 will provide a workable method of removing or retiring a judge in the event any judge of the courts of Nebraska should become unable to continue to competently perform his judicial duties, and the amendment merits the support of the voters of Nebraska.

Is there a second to that resolution.

ROBERT D. MULLIN, Omaha: I second the motion.

PRESIDENT GINSBURG: It has been moved and seconded. Is there any discussion? All in favor say "aye"; contrary "no." Carried unanimously and the record will so show.

Is there any further business to come before the meeting before we adjourn?

In my own behalf I again want to thank everybody for the wonderful cooperation that has been given to me during this past year. I feel we have had a successful meeting. I am told there were over 1,100 registered, which is an all-time high, and that is due entirely to the work of the myriad members of our organization who have worked so hard through the year. My thanks to all.

I now close the Sixty-Seventh annual meeting of the Nebraska State Bar Association and declare the same to be adjourned.

[The Sixty-Seventh annual meeting of the Nebraska State Bar Association adjourned sine die at four twenty-five o'clock.]

* * *

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements

Year ended August 31, 1966

Receipts:

Active members' dues	\$59,520
Inactive members' dues	5,670
Reinstatements	90
Bridge the gap program	35
Expense refunds	394
	<u>\$65,709</u>

Disbursements:

Salaries	\$11,293	
Payroll taxes	590	
Printing and stationery	926	
Office supplies and expense	725	
Telephone and telegraph	138	
Postage and express	2,517	
Directory	1,191	
Officers' expenses	807	
Executive council	1,936	
Judicial council	211	
Nebraska Law Review	7,873	
Nebraska State Bar Association		
Journal	\$ 2,492	
Less receipts for advertising	593	1,899
Public service	5,654	
Less receipts for pamphlets		
and racks	206	5,448
American Bar Association meetings		6,941
Mid-year meeting	309	
Less reimbursements	178	131
Annual meeting	9,844	
Less reimbursements and		
exhibit space	540	9,304
Committee on inquiry		1,414
Committee on legal education and		
continuing legal education		3
Advisory committee		175
Committee on cooperation with		
American Law Institute		288
Committee on title guaranty insurance		71
Committee on legislation		72
Section on real estate, probate, and trust law		222
Young lawyer's section		50
Aid to local bars		264
Carried forward	<u>\$54,489</u>	<u>65,709</u>

Statement of Cash Receipts and Disbursements, Continued

Brought forward	\$54,489	65,709
Disbursements, continued:		
Tax institute	\$ 3,842	
Less reimbursements and registration receipts	1,295	2,547
Medico-legal institute		926
Institute on insurance		50
Institute on new legislation	303	
Less reimbursements and registration receipts	589	(286)
Institute on current developments in criminal procedure		105
Law day U.S.A.		1,071
State ex rel Nebraska State Bar Association, Blanchard		428
State ex rel Nebraska State Bar Association, Neilson		266
Insurance		77
Maintenance expense		321
Auditing		297
Dues and subscriptions		115
Nebraska State Bar Foundation		3
District Judges Association		250
Student conference		150
Aid to Law Students Association	250	61,059
Excess of cash receipts over cash disbursements		4,650
Cash balance at beginning of year		8,588
Cash balance at end of year		<u>\$13,238</u>

Note: The association receives dividends in respect to a group insurance contract. The dividends, interest on related investments, cash balances and investments have been segregated from the operating funds of the association. During the year ended August 31, 1966 a dividend of \$4,168 was received and income collected on the segregated investments amounted to \$874. At August 31, 1966 segregated cash and investments amounted to \$30,954. Also, a claims stabilization reserve fund is maintained with the insurance company.

ROLL OF PRESIDENTS

1.	1900	*Eleazer Wakely	Omaha	35.	1934	*John J. Ledwith	Lincoln
2.	1901	*William D. McHugh	Omaha	36.	1935	*L. E. 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	Lincoln
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				

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	97.	1945-49	Leon Samuelson	Franklin
25.	1918-18	A. C. Wakely	Omaha	98.	1946-48	Harry W. Shackelford	Omaha
26.	1918-22	Fred A. Wright	Omaha	99.	1946-48	Paul F. Good	Lincoln
27.	1919-19	R. E. Evans	Dakota City	100.	1947-48	Joseph T. Votava	Omaha
28.	1919-22	Geo. F. Corcoran	York	101.	1947-48	John E. Dougherty	York
29.	1919-20	L. A. Flansburg	Lincoln	102.	1947-55	Lyle E. Jackson	Neligh
30.	1920-20	W. M. Morning	Lincoln	103.	1948-49	Robert H. Beatty	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	Omaha
35.	1923-26	E. E. Good	Wahoo	108.	1949-54	Wilber S. Aten	Holdrege
36.	1924-26	Robert W. Devoe	Lincoln	109.	1948-49	Abel V. Shotwell	Omaha
37.	1924-24	Fred A. Wright	Omaha	110.	1949-55	Paul L. Martin	Sidney
38.	1925-28	Paul Jessen	Nebraska City	111.	1949-55	Joseph C. Tye	Kearney
39.	1925-27	Clinton Brome	Omaha	112.	1949-51	Earl J. Moyer	Madison
40.	1927-29	Charles E. Matson	Lincoln	113.	1950-60	Harry A. Spencer	Lincoln
41.	1927-28	Fred S. Berry	Wayne	114.	1950-56	Paul P. Chaney	Falls City
42.	1928-29	Robert W. Devoe	Lincoln	115.	1950-59	Paul Bek	Seward
43.	1928-30	T. J. McGuire	Omaha	116.	1950-52	Clarence A. Davis	Lincoln
44.	1928-34	Harvey Johnsen	Omaha	117.	1951-55	Barton H. Kuhns	Omaha
45.	1929-31	E. A. Coufal	David City	118.	1952-57	Thomas C. Quinlan	Omaha
46.	1929-29	Anan Raymond	Omaha	119.	1951-52	George B. Hastings	Grant
47.	1930-32	Paul E. Boslaugh	Hastings	120.	1952-53	Laurens Williams	Omaha
48.	1930-30	J. L. Cleary	Grand Island	121.	1953-54	J. D. Cronin	O'Neill
49.	1931-33	W. C. Dorsey	Omaha	122.	1954-57	Norris Chadderdon	Holdrege
50.	1931-31	Fred Shepherd	Lincoln	123.	1954-56	John J. Wilson	Lincoln
51.	1932-34	Richard Stout	Lincoln	124.	1955-56	Wilber S. Aten	Holdrege
52.	1931-32	Ben S. Baker	Omaha	125.	1955-58	F. M. Deutsch	Norfolk
53.	1933-35	Barlow F. Nye	Kearney	126.	1955-64	Clarence E. Haley	Hartington
54.	1933-33	J. J. Thomas	Seward	127.	1955-58	R. R. Wellington	Crawford
55.	1934-36	Chas. F. McLaughlin	Omaha	128.	1955-64	Alfred G. Ellick	Omaha
56.	1934-34	John J. Ledwith	Lincoln	129.	1954-55	Jean B. Cain	Falls City
57.	1935-35	L. B. Day	Omaha	130.	1955-57	Hale McCown	Beatrice
58.	1935-37	James M. Lanigan	Greeley	131.	1956-62	C. Russell Mattson	Lincoln
59.	1935-38	H. J. Requartte	Lincoln	132.	1956-58	Barton H. Kuhns	Omaha
60.	1935-38	Raymond M. Crossman	Omaha	133.	1957-59	Paul L. Martin	Sidney
61.	1935-40	F. H. Pollock	Stanton	134.	1957-60	Richard E. Hunter	Hastings
62.	1935-41	T. J. Keenan	Geneva	135.	1957-64	John R. Fike	Omaha
63.	1935-39	Walter D. James	McCook	136.	1957-64	Thomas F. Colfer	McCook
64.	1935-37	Roland V. Rodman	Kimball	137.	1958-63	William H. Lamme	Fremont
65.	1936-36	J. G. Mothersead	Scottsbluff	138.	1958-61	Carl G. Humphrey	Mullen
66.	1936-36	James L. Brown	Lincoln	139.	1958-60	Joseph C. Tye	Kearney
67.	1937-39	David A. Fitch	Omaha	140.	1959-65	Charles F. Adams	Aurora
68.	1937-39	Raymond G. Young	Omaha	141.	1959-61	Flavel A. Wright	Lincoln
69.	1937-41	M. M. Maupin	North Platte	142.	1959-60	Thomas C. Quinlan	Omaha
70.	1937-41	Golden P. Kratz	Sidney	143.	1960-61	Hale McCown	Beatrice
71.	1938-42	Sterling F. Mutz	Lincoln	144.	1960-63	Ralph E. Svoboda	Omaha
72.	1938-42	Don W. Stewart	Lincoln	145.	1960-	Herman Ginsburg	Lincoln
73.	1940-46	George N. Mecham	Omaha	146.	1960-65	James F. Begley	Plattsmouth
74.	1940-42	Abel V. Shotwell	Omaha	147.	1961-64	George A. Healey	Lincoln
75.	1940-42	Frank M. Colfer	McCook	148.	1962-65	Lester A. Danielson	Scottsbluff
76.	1941-43	Virgil Falloon	Falls City	149.	1962-65	Floyd E. Wright	Scottsbluff
77.	1941-43	Joseph C. Tye	Kearney	150.	1962-	John C. Mason	Lincoln
78.	1941-47	Earl J. Moyer	Madison	151.	1961-	Vance E. Leininger	Columbus
79.	1937-37	C. J. Campbell	Lincoln	152.	1964-	Fred R. Irons	Hastings
80.	1938-38	Harvey Johnsen	Omaha	153.	1964-66	Wm. J. Baird	Omaha
81.	1939-39	James M. Lanigan	Greeley	154.	1964-66	Tracy J. Peycke	Omaha
82.	1940-40	E. B. Chappell	Lincoln	155.	1964-	W. E. Mumby	Harrison
83.	1942-45	Fred J. Cassidy	Lincoln	156.	1964-65	Hale McCown	Beatrice
84.	1941-41	Raymond G. Young	Omaha	157.	1963-	Harry B. Cohen	Omaha
85.	1942-48	Max G. Towle	Lincoln	158.	1965-	Bernard B. Smith	Lexington
86.	1942-42	Paul E. Boslaugh	Hastings	159.	1965-	Robert D. Mullin	Omaha
87.	1942-45	John E. Dougherty	York	160.	1966-	Paul P. Chaney	Falls City
88.	1942-49	Yale C. Holland	Omaha	161.	1966-	M. A. Mills, Jr.	Osceola
89.	1943-45	Robert R. Moodie	West Point	162.	1966-	M. M. Maupin	North Platte
90.	1941-45	E. F. Butler	Cambridge				
91.	1943-46	Frank M. Johnson	Lexington				
92.	1944-49	Floyd E. Wright	Scottsbluff				
93.	1945-50	John J. Wilson	Lincoln				
94.	1945-48	Robert B. Waring	Geneva				
95.	1944-46	George L. DeLacy	Omaha				
96.	1945-47	Virgil Falloon	Falls City				