

1962

Proceedings of the Nebraska State Bar Association House of Delegates Meeting, 1962

Ralph E. Svoboda

Nebraska State Bar Association, president

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THIRD DISTRICT:

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Harry B. Otis.....	Omaha
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Rudolph Tesar.....	Omaha

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Ivan Blevens.....	Seward
Alex Mills.....	Osceola

SIXTH DISTRICT:

John M. Brower.....	Fullerton
Vance E. Leininger.....	Columbus

SEVENTH DISTRICT:

Robert H. Downing.....	Superior
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EIGHTH DISTRICT:

Philip H. Robinson.....	Hartington
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NINTH DISTRICT:

P. M. Moodie.....	West Point
Elmer C. Rakow.....	Neligh

TENTH DISTRICT:

Lansing Anderson.....	Holdrege
Frederic R. Irons.....	Hastings

ELEVENTH DISTRICT:

Kenneth H. Elson.....	Grand Island
E. L. Vogeltanz.....	Ord

TWELFTH DISTRICT:

James M. Knapp.....	Kearney
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THIRTEENTH DISTRICT:

Bernard B. Smith.....	Lexington
Ivan Van Steenberg.....	Kimball

FOURTEENTH DISTRICT:

Henry W. Curtis.....	Imperial
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FIFTEENTH DISTRICT:

Samuel C. Ely.....	Ainsworth
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SIXTEENTH DISTRICT:

Wendell E. Mumby.....	Harrison
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SEVENTEENTH DISTRICT:

Floyd E. Wright.....	Scottsbluff
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EIGHTEENTH DISTRICT:

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**NEBRASKA STATE BAR ASSOCIATION
HOUSE OF DELEGATES**

October 31, 1962

The Wednesday morning session of the House of Delegates of the Nebraska State Bar Association was called to order at 9:40 o'clock by Chairman Herman Ginsburg of Lincoln.

CHAIRMAN GINSBURG: The 1962 session of the House of Delegates of the Nebraska State Bar Association will please come to order. The Secretary will call the roll.

[Roll call by the Secretary.]

SECRETARY-TREASURER TURNER: There is a quorum, Mr. Chairman.

CHAIRMAN GINSBURG: A quorum being present, the House is declared duly convened and now open for the transaction of business. All members present, I am sure, have received the printed program which contains the calendar of the agenda for this meeting, and I will entertain a motion approving the calendar as the order of business before the House. Is there such a motion?

FREDERICK R. IRONS, Hastings: I so move.

JOHN J. WILSON, Lincoln: I second the motion.

CHAIRMAN GINSBURG: It has been moved and seconded that the printed calendar be approved as the order of business. Is there any discussion? All in favor say "aye"; contrary. Carried.

The first order of business under the calendar is the statement by the President of the Association. I present to you President Ralph E. Svoboda.

STATEMENT OF PRESIDENT

Ralph E. Svoboda

Gentlemen of the House of Delegates: Welcome! This is a duty laid on me by the bylaws. I don't know what it really contemplates but our rules provide in Article V, Section 2, "Except as otherwise provided herein, the administration of the Association shall be vested in the House of Delegates" with powers and duties as outlined in subsection e. thereof. I take it, therefore, that this is the ruling body of the Association, except in the intervals when the House of Delegates is not in session, when the Executive Council takes over.

I have a proposal to make that will have to be initiated with the Executive Council at its meeting this noon. I am referring to

Article IX of the rules of the court governing this integrated bar respecting amendments. That provides that on a three-fifths vote of the Council and then an adoption by the majority of this House we may recommend to the court amendments to the rules.

Here is the amendment I have in mind. I have discussed it with Mr. Turner and we think because of the mounting volume of work, committees, correspondence, and everything else, that we should appoint three vice presidents, and I will so recommend to the Executive Council. That is in addition to the President-Elect. Three vice presidents, one from each congressional district. They will be below the President-Elect. The initial appointments will be made by the Executive Council and thereafter their election will take place in the same manner as the President-Elect.

Now why do I say that? I am not trying to cover myself with glory and I am not crying for help, but this job is getting pretty strenuous. I know from half to three-quarters of my mail is Association mail. I always thought the American Bar Association must be running a paper mill for the benefit of the state bar presidents because I certainly get mail every morning, and just distributing it to the committee chairmen is a chore.

Then there are visits to adjoining state bar associations, meetings of the National Association of Bar Presidents, local bar associations, section meetings. If this work was spread among vice presidents who were closer sometimes to the scene of the particular meeting, it would relieve the President as well as the President-Elect. For instance, our President-Elect will be from Scottsbluff. Why should the President-Elect when he is President have to come clear to Omaha if there is a congressional district vice president near the scene who can do that job?

Truly, I think we ought to follow the pattern that is used in adjoining states: Colorado, for instance, where I was recently a guest at their state bar association meeting has exactly that plan. Each congressional district is represented by a vice president and they spread the work, even at the annual meeting, and everybody then is able to bear the load without undue strain.

Another topic—as I said, our work has been growing and necessarily so because new things keep cropping up all the time. For instance, within the last one or two months, subject to approval of the Executive Council, I have appointed five new committees and they are beyond those listed in the program, or not otherwise provided for.

It is a rule that unless a special committee makes a report to this House and recommends that it be continued, that committee, if

it is a special committee and not a standing committee, will automatically be disbanded. Well, these committees should not be disbanded. They have just recently been formed. They haven't been able to organize themselves and therefore they should be continued because they are necessary. I will name them:

First there is a Committee on Joint Conference of Lawyers and Engineers. That came about when the Nebraska Society of Engineers—about 500 in that, aren't there, George?—asked that we appoint a counterpart committee so we could collaborate as we do with the doctors of medicine or with the accountants or the real estate people.

With this problem, Al Reddish has been doing a terrific job in the field of unauthorized practice of law, and the only way we can control it is to keep in close touch with these other organizations that might otherwise overlap and get into our field. In other words, it is well to have these joint committees so that each will define his own particular area of work and then there won't be any invasion by one or the other. This is very well done, for instance, with our Medical-Legal Committee. They have agreed on an interprofessional code, and the areas have been very well defined, and it is working well.

Another committee—as you may know, Charlie Rhyne, who was President of the American Bar Association some three or four years ago, has made quite a name for himself in the field of trying to get world peace through law. Maybe this is not the best time to be launching a committee like that in our Association, with Cuba hanging over us, but certainly the objective of the American Bar Association committee is superb and is to be commended. Charlie asked me, not once but two or three times until I couldn't stand the pressure any more, "Would you please form a committee in your Association that could collaborate with the American Bar Association, even though it is no more than to say 'Aye, we want it too.' "

So I have appointed that committee. Joe Tye has been made chairman of it. On the committee we have put members of this Association who are not too active in the practice, for instance like Mr. Skutt. He maintains an active membership in this Association. Mr. Joe Seacrest maintains an active membership in this Association. So we have access to the press; we have access to the various large gatherings that Mr. Skutt is constantly attending. I put them on this committee to give the committee prestige, and they have accepted.

Another committee is sort of an offshoot of a committee formed

earlier this year, the Committee on Economics of the Bar and Professional Incorporation. We had here in Omaha a sort of an impromptu committee. The younger partners or associates of some of our larger firms I found were meeting at lunch spontaneously every once in a while, and for the first time to my knowledge they were letting their hair down and telling each other what they paid their secretaries, their stenographers, their associates, and how they handled their time records.

Harold Rice from Neligh wrote and said, "Can't I get some help from this Bar Association? I want to know what is fair to do for my associate. If he pans out, I expect to make him a partner, but what do I do now? What kind of a contract do I draw?"

Alex McKie's Committee on Economics was getting too much of a load. They've got plenty to do, so I formed a new committee on Law Office Management. Howard H. Moldenhauer here in Omaha, who has been sort of the spearhead of these impromptu luncheon meetings, I have made chairman.

Then there is another thing I didn't know until a few days before this convention. Mr. Turner informed me that we always did have what he called a Protocol and Arrangements Committee, somebody to help him with this convention, and there are numerous jobs. Of course George is a master but he still has to have somebody meet all the people, arrange seating, and do the various and multitudinous things that you have to do at an annual meeting. So I asked George, "Why don't we give official recognition to this committee, make it one of our committees?" They do in other bar associations. They have tremendous committees for that purpose. So I formed the Committee on Entertainment. Raymond M. Crossman, Jr., who has been chairman de facto I made de jure chairman, so we will have that taken care of.

There is a lot of work in this Association that has got to be passed around and spread among the members.

Then there is another committee that didn't even exist officially, but the Taxation Section, in response to the Internal Revenue Service request, goes something like this: The Internal Revenue Service has formed regional committees to maintain liaison with bar associations. You see, we happen to be the headquarters of a particular Internal Revenue region and there is one here. They said, "Send your people over."

The chairman of the Taxation Section didn't know what to do about it so he sent Warren Dalton and said, "You're chairman." We ought to have an official committee, then, that will maintain that. It is not just a temporary thing, it is permanent. The Internal

Revenue Service is going to have these regional committees from now on.

All of those I will recommend to the Executive Council this noon for confirmation. I wanted to tell you about it because, of course, our work is done principally through committees and we need these committees.

There is another committee that is not mentioned in our annual meeting program and it rather important, I think. That is the present committee to collaborate with the Nebraska Real Estate Association, of which Lewis R. Ricketts is chairman. Because they have no report, I don't know whether Mr. Ricketts will appear here to give an oral report. That committee I think should be continued, for this reason. I don't know whether you have heard about the fiasco in Arizona. The Arizona Supreme Court in two decisions, although in the same case—the second time they refused to take back the first one—really spanked the realtors out there for practicing law in drawing various instruments. What did the realtors do but they turned around and started a state-wide referendum to reverse that decision and put it in the state constitution, and it looks like they're going to win.

Just the other day North Carolina handed down another decision that said in effect "If you, realtor, you businessman, you banker, if you are acting in your own interest you are not invading the practice of the law if you draw your own legal instrument." Well, there we go! Here Al Reddish has been trying to keep the field from being invaded and here is a decision or an expected referendum which will contradict a lot of that effort.

We have to keep up good relations with the Nebraska Realtors. Otherwise, they are liable to borrow a leaf out of the other guy's notebook and do the same thing to us here. So I think it is important that that committee be continued and that we maintain cordial relations with the Nebraska Real Estate Association for that purpose.

As I said, we have new committees that already have been confirmed by the Executive Council. One of them, of course, is working night and day, and as a chairman he should be here to report for his committee. Do you know where he is? He is out in the hustings, getting votes down in Falls City for the Merit Plan today. He will be here tomorrow but today he is busy getting votes. That is the Committee on the Merit Plan of Judicial Selection. He is doing a tremendous job.

Then there is the Committee on Economics of the Bar and Professional Incorporation, which I have already told you about.

There is the President's Advisory Council. I thought I saw Mr. Williams here. He is the chairman. The past Presidents want to help. They say, "Give us something to do and we'll help you," so we formed a Past Presidents Advisory Council to be of help to us.

There is a Committee on Title Guaranty Insurance. Your own Herman Ginsburg is chairman. That is a thing that is sweeping the country from one end to the other. It looks as if our real estate business is gradually going to go where the woodbine twineth unless we do something about it.

Then there is a Committee on Lawyers Referral. Al Ellick is chairman of it. He has already started it for the Omaha Bar Association and, of course, if it works well we want to extend it to the state.

In addition, the Standing Committee on Procedure which is provided for in the bylaws was again this year newly staffed with "Rocky" Mueller as chairman and has been active during the year.

Now there are some other topics I want to advert to which might require your attention. For two years now we have held a midyear meeting at Lincoln. As you know, it is a one-day meeting. The main purpose of it is to enable the sections to meet and the committees to meet at least once a year, because we have changed our annual meeting program so that one section takes the whole program, the whole institute program. That leaves the other sections that year, so to speak, without something to do. So we had a meeting in June in Lincoln. It was very successful. The Nebraska Appraisal Society came down there and had a seven- or eight-man panel that put on an institute on the process of appraisal, the mechanics of appraisal. It was very good, very well attended, and then the sections held their meetings and the committees held their meetings.

Now that may require, Mr. Chairman, a change in the bylaws to make it official in that sense.

This year I visited the annual meeting of the bar association of every state adjoining the State of Nebraska. I was graciously welcomed and received. You learn a lot from going to these other associations and seeing what they are doing and comparing notes with them. They borrow from us, we borrow from them.

I have attended the Judicial Conference of the Eighth Circuit to which I was invited. I have been twice at the meetings of the National Association of Bar Presidents; I have met with local bar associations, and I have attended section meetings. There was quite a large one at Fremont not long ago. George Skultety presided over the Real Estate, Probate, and Trust Law Section.

We have also started a program of welcoming new entrants to the bar. It was mostly Hale McCown's idea and it is a fine thing. On the day that they are being admitted to the bar, the boys who pass the state bar examination are also welcomed by an officer of this Association, given a lawyer's desk book, and otherwise inaugurated into the Association.

We also have had a "Bridge-the-Gap" program that the Junior Bar Section has been sponsoring; in other words, teach these neophytes the things they didn't learn in the books. That is held at the Nebraska Center for Continuing Education. It is an institute to give them some of the know-how of the practicing of law that they might not have learned in law school.

Then there is a student placement program. You probably noticed in the spring issue of the *Nebraska State Bar Journal* that we now print the photographs and a little biography of each graduating member of our law schools. It is taking on well; it is accepted; and I think it should be continued.

Then our committees have been handling these Career Day Programs. As you are probably aware, the law schools are shrinking in freshmen. I guess our profession is not as attractive as it used to be. They all want to be engineers—space electronics and what-not engineers. So we have to be recruiting a little in order to keep the ranks filled. That has been a good work, these Career Day Programs, furnishing pamphlets at the levels below the law college so that we can support our law schools and get a proper supply of students.

I will want to talk a little later in this meeting on the Public Service Committee program. They printed their recommendations in the recent issue of the *Nebraska State Bar Journal* and there are one or two items in that that I would like to stress as being worthy of consideration, but more about that when we come to that report.

As I said, Flav Wright is not going to be present today because he is out gathering votes, but I would ask, Mr. Chairman, that Mr. Tracy Peycke, who is going to take his place, be accorded time to deliver a real Sunday punch exhortation on this Merit Plan.

We here in Omaha are in trouble. I don't know whether you gentlemen have noticed outstate, but for some reason or other the hot Juvenile Court race here has permeated over into our Merit Plan. It has nothing to do with it. We've got to straighten out the perspective and we've got to bat hard for votes because here is where we anticipate we will get most of our opposition—no organized opposition, understand, just that silent kind that makes

you start running scared. You are just afraid of it. As I say, Mr. Chairman, I would like Tracy Peycke to give this gathering a refreshing talk on how important it is to get this Merit Plan across. We have been at it for thirty years, the last eleven years intensively, and we ought to run out the mile and get it passed.

I will be present and reserve the right to speak later.

CHAIRMAN GINSBURG: Is there any discussion concerning the President's report? Aside from the request for a rip-snorting speech from Tracy Peycke, I don't recall that there is anything in the report that requires or suggests action at this time. However, there are important matters that have been referred to in the President's report and before we order it received and placed on file I think that all the delegates should be given an opportunity to ask questions or make any suggestions they might have. Therefore I ask if there is any discussion concerning the report of the President. Hearing none, the report of the President will be ordered received and placed on file.

The next order of business, according to our calendar, is the report of the Secretary-Treasurer, which will now be called for. Mr. Turner!

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. Chairman, Members of the House: The books of the Association have been audited by Peat, Marwick, Mitchell and Company of Lincoln. Closing the year as of August 31 it shows total receipts of \$45,048, and total disbursements of \$48,834. Bear in mind that prior to the first of September the Merit Plan campaign was financed almost entirely out of Association funds. Starting in September an intense drive was made to pick up contributions for it and in the last figure I saw we had taken in slightly over \$12,000 to finance that campaign, which is not shown in this report.

The accountants conclude by saying: "In our opinion the accompanying statement of cash receipts and disbursements of the Nebraska State Bar Association presents fairly the cash transactions for the year ended August 31, 1962, and the cash balance on that date applied on a cash basis consistent with that of the preceding period."

This year they also, for the second time, audited but do not report in detail on the Dan Gross Memorial Trust. They simply check the books of the trustees and verify the securities that they

have on hand. That is all included in this year's audit and will be published in the proceedings of the Association meeting.

CHAIRMAN GINSBURG: Are there any questions or any discussion concerning the Secretary-Treasurer's report? If not, the same will be ordered received and placed on file.

If I may revert to a matter which was brought up by the President, I thought that the House might want to be advised of some research I made as the President was speaking. There was a reference concerning the midyear meeting and I notice that in the proceedings of the House last year the bylaws were amended, Mr. President, to provide that midyear meetings could be held, so I do not believe that needs to be on the agenda this year.

The next matter of business is the introduction of resolutions. The bylaws provide: "The Chairman of the House of Delegates shall, prior to the annual meeting, appoint a hearing committee to hear resolutions of members of the Associations who are not members of the House of Delegates. The committee shall then report to the House at its annual meeting."

There have been no requests made to me for an opportunity to introduce any resolutions. Is there anyone who wishes to offer any resolutions to be submitted to a Resolutions Committee?

RUDOLPH TESAR, Omaha: Mr. Chairman, I have a resolution which I have submitted to Mr. Turner.

CHAIRMAN GINSBURG: There has been introduced a resolution by a member of the House of Delegates as follows:

"WHEREAS William Lamme of Fremont, Nebraska, outstanding member of the Nebraska Bar, former member of the House of Delegates and Executive Council of this Association, is presently confined to an Omaha hospital suffering from a serious ailment and will soon be confined to his home for a period of time recuperating; and

"WHEREAS it is the desire of this body to express to Mr. Lamme our hopes for a speedy recovery and return to his endeavors in our profession; now therefore be it

"RESOLVED by this House of Delegates, speaking for and on behalf of the entire Nebraska Bar, that we extend to our friend, William Lamme, our most sincere and earnest wishes for a speedy recovery and restoration to good health and his return to his active participation in the law.

"BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to Mr. Lamme to show him the affection and esteem in which he is held by this body and Association."

"I move the adoption of the above resolution this 31st day of October, 1962, Rudolph A. Tesar."

FRANK J. MATTOON, Sidney: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion on the resolution? The question being called for, all in favor of the resolution as submitted say "aye"; contrary. The motion carried unanimously.

Are there any other resolutions by members of the House?

NICK CAPORALE, Omaha: These are resolutions adopted by the Executive Committee of the Junior Bar which deal with judges' salaries. If this is the appropriate time, fine, if not whenever the appropriate time might be.

CHAIRMAN GINSBURG: I will submit these resolutions at this time for such action as the House may see fit to take thereon. As I understand it, Mr. Caporale, you are sponsoring these resolutions. Is that right?

MR. CAPORALE: Actually they have been adopted by the Executive Committee of the Junior Bar for presentation to the House.

CHAIRMAN GINSBURG: "WHEREAS the present salaries of Nebraska District Court Judges are demonstrably lower than salaries paid to comparable judges in other states; and

"WHEREAS the present salaries of Nebraska District Court Judges are inadequate to insure that the most qualified members of the Bar will accept and retain judicial office except at great personal financial sacrifice; now, therefore, be it

"RESOLVED: That the Executive Committee of the Junior Bar Section and the Junior Bar Section of the Nebraska State Bar Association urge the House of Delegates, Executive Council, Officers, Legislation Committee, and members of the Nebraska State Bar Association to energetically endeavor to secure legislation for a very substantial increase in salaries of Nebraska District Court Judges at the 1963 Session of the Nebraska Legislature."

Mr. Turner, isn't this included in a report of a committee that will be presented to the House?

TRACY PEYCKE, Omaha: It is in the report of the Judiciary Committee.

CHAIRMAN GINSBURG: I will therefore pass this resolution, at least for the time being, because it will be considered as a part of the report of the Judiciary Committee.

Are there any other resolutions? If not, the next order of business is the report of the Committee on Revision of Corporation Law, Mr. Bert L. Overcash, chairman. Mr. Overcash!

REPORT OF COMMITTEE ON REVISION OF CORPORATION LAW

Bert L. Overcash

Mr. Chairman and Members of the House of Delegates: I assume each of you has read in full the report of this committee and therefore I will not go through it.

This report is the culmination of four years of work by this committee—a lot of work, I might add. Early in July, a printed report and a proposed business corporation act were sent to all the lawyers in the state. The foreword in this report reviewed the committee's program that this group has approved for four years, and discussed what had been accomplished and what was involved in this act. There are footnotes in this act showing the source of each of the provisions.

I won't review that in any detail but I merely want to state to the House of Delegates that following this printed publication there was further work by the committee. We received a number of suggestions. They were carefully considered and the report that you have now in your printed report, page 35, reviews the individual proposals that were received and considered in connection with our final action. I won't go over those specifically except in one case: Paragraph 4 of the report and Paragraph 5 I think should be called to your attention because they involve a point of law that you will all be concerned with under this proposed act. It involves the matter of the election of directors.

Our constitution provides that every stockholder shall have a right to vote for a director and that directors shall not be elected in any other manner. During the course of our studies our attention was called to a decision from Illinois that would suggest possibly that in the case of a vacancy the board of directors under the Nebraska statute couldn't appoint someone to fill the vacancy.

Also there was a question of whether or not the initial directors, who ordinarily are appointed by the incorporators under our present procedure, could be so appointed. So what we decided to do is to recommend an organization meeting at the beginning and to provide that the initial board of directors shall be elected by special meeting of the stockholders, in practical effect by the use of proxies. We will proceed as we always have. The incorporators will hold the meeting and with their proxies elect the first board of directors.

By adding this provision (and we have adopted the Illinois first organization provisions) we eliminate the constitutional ques-

tion that might arise in the collective election of the first board of directors.

There are some other corrections. We found some typographical errors. We found a few omissions in the act as printed that are included in the report. Otherwise the act that we propose for adoption is the same as the one submitted to all of you.

Now the work of this committee we feel is substantially completed if this law is passed. We think there are other problems. There are some more obsolete laws that might be eliminated in the future; for instance, the cooperative laws, but the situation is not appropriate at this time to do that. We think in the future we should have a further constitutional amendment, but we don't think it is appropriate at this time. The amendment that was passed in 1960 was good but it didn't go far enough.

It is the recommendation of this committee that this act as proposed, with the amendments I suggested, be introduced and supported for passage by the legislature; that this committee be continued for the purpose of assisting in the enactment of that legislation; and that upon the enactment of that legislation this committee's function be terminated.

At this time I want to thank myself as chairman, and the members of this committee who devoted a lot of time and work to this job. It is no simple task, gentlemen, to write a complete law of this kind. We had the assistance of the work in other states; we had the advantage of the three-volume work prepared by the American Law Institute on the model act that correlated all the provisions of every statute of every state in the Union; and we have had printed publications with the assistance of the *Nebraska Law Review* staff; and as you know there have been articles on this subject during these intervening years.

It has been a very difficult but I think a worthwhile task, and I think the Bar Association has rendered a distinct public service in this work. I think that this will provide Nebraska with a modern up-to-date business corporation act that has a lot of the features of our present law but will provide you with a working tool that you will find will be of some help to you and will be easier to work with than our former law.

Therefore, Mr. Chairman, I move that the report and the recommendations of this committee be approved by the House of Delegates.

CHAIRMAN GINSBURG: You have heard the report and the motion. Is there a second?

JOHN J. WILSON, Lincoln: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion? It seems to me this is a very constructive piece of work that this committee has done and it is a very important piece of work and should not be lightly passed over. If there are any questions or any discussion concerning the report the floor is now open to you. Does anyone have any questions at all? Hearing no questions, the Chair will now put the matter to a vote. All in favor of the adoption of the report as recommended by the committee say "aye"; contrary. Carried unanimously. The President told me to be sure to add that, and it is true because I heard no vote to the contrary.

[The report of the committee follows.]

Report of the Special Committee on Revision of Corporation Law

This committee completed and distributed to members of the bar in July a proposed Nebraska Business Corporation Act. The statement accompanying this publication reviewed the activities of this committee since 1957 and there appears to be no reason to repeat this statement in the present report.

Since the distribution of the above act this committee has received a number of suggestions for improvements therein. Those which the committee feels should be included in the proposed act are reviewed hereafter.

1. The following language taken from the South Carolina act as to the identification and description of shares is to be added to Section 14—Authorized Shares:

If shares are divided into two or more classes the shares of each class shall be so designated as to distinguish them from the shares of all other classes. Shares which are not preferred as to dividends or other distributions, including distributions in liquidation, shall not be designated as preferred shares. Shares which are preferred as to dividends or other distributions, including distributions in liquidation, shall not be designated as common shares.

2. The words "or a duplicate thereof" are to be added to Section 31—Voting List—in the second sentence after the words "Such list." This would make it possible to provide a duplicate stock list if the meeting of stockholders referred to in this section is held outside the State of Nebraska.

3. The words "beneficially and" in Section 36—Number and Election of Directors—in the third line thereof are to be stricken. This amendment will eliminate the problem of determining as a

matter of fact whether stock was beneficially owned for the purpose of determining the number and election of directors.

4. The following paragraph is to be added to Section 51—Incorporators:

Until the directors are elected, the signers of the articles of incorporation shall have the direction of the affairs and of the organization of the corporation, and may take such steps as are proper to obtain the necessary subscriptions to stock and to perfect the organization of the corporation, including calling the first meeting of stockholders for the election of directors.

The foregoing amendment would eliminate any question that might be raised under Article XII, Section 5, of the Nebraska Constitution prohibiting the election of directors other than by shareholders. The problem is referred to in the footnote to Section 38 of the proposed act. The committee feels that, as a practical matter, the initial board of directors may be elected by the stockholders through proxies furnished the incorporators. As thus amended, Section 51 is consistent with the language of Section 36 relating to the first meeting of shareholders for the election of directors.

5. The committee believes that it would be advisable to add to our proposed act a section relating to an organizational meeting similar to Section 51 of the Illinois act. This new section would follow Section 54 of the printed act and would read as follows:

Section —. Organization Meetings

After the corporation comes into existence, the first meeting of shareholders shall be held, either within or without this State, at the call of the incorporators or a majority of them, for the purpose of electing directors, of adopting bylaws if the articles of incorporation provide for the adoption thereof by the shareholders, and for such other purposes as shall be stated in the notice of the meeting. The incorporators so calling the meeting shall give at least three days' notice thereof by mail to each shareholder, which notice shall state the time, place and purpose of the meeting.

After the election by shareholders of the directors constituting the first board of directors, an organization meeting of such board of directors shall be held, either within or without this State, at the call of a majority of the directors so elected, for the purpose of adopting bylaws if the articles of incorporation do not provide for the adoption thereof by shareholders, for the purpose of electing officers and for the transaction of such other business as may come before this meeting. The direc-

tors calling the meeting shall give at least one day's notice thereof by mail to each director so elected, which notice shall state the time and place of the meeting.

6. The designation of subparagraph (h) in Section 112—Change of Registered Office or Registered Agent of Foreign Corporation—was an error and this subdivision lettering should be omitted.

7. In the preparation of Section 112—Change of Registered Office or Registered Agent of Foreign Corporation—which follows Section 107 of the Model Act, it appears that two paragraphs were omitted which should be added to our Section 112. These paragraphs should be added immediately after subdivision (g) and read as follows:

Such statement shall be executed by the corporation by its president or a vice president, and verified by him, and delivered to the Secretary of State. If the Secretary of State finds that such statement conforms to the provisions of this Act, he shall file such statement in his office, and upon such filing the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, shall become effective.

Any registered agent of a foreign corporation may resign as such agent upon filing a written notice thereof executed in duplicate, with the Secretary of State, who shall forthwith mail a copy thereof to the corporation at its principal office in the state or country under the laws of which it is incorporated. The appointment of such agent shall terminate upon the expiration of thirty days after receipt of such notice by the Secretary of State.

This committee feels that its present assignment will be substantially completed with the passage of a new business corporation act by the next session of the legislature. Some further activity in the future may be required, particularly with reference to amendments to our constitution. The amendment made in 1960 authorizing the use of preferred stock was good but such amendment did not go far enough. The committee is of the opinion, however, that further amendment in this connection should not be urged at this time.

It is the recommendation of this committee:

1. *That the proposed Nebraska Business Corporation Act with the amendments and changes outlined in this report be approved and supported for passage at the next session of the legislature.*

2. *That this committee be continued in order to assist in carrying out the foregoing recommendation.*

3. *That this committee be terminated upon passage by the legislature of the proposed act.*

Bert L. Overcash, Chairman
James A. Doyle, Coordinator
David Dow, Coordinator
W. J. Baird
Edmund O. Belsheim
A. Lee Bloomingdale
Robert G. Fraser
C. E. Heaney, Jr.
Warren C. Johnson
Barton H. Kuhns
Donald E. Leonard
Roland A. Luedtke
Howard H. Moldenhauer
Francis V. Robinson

CHAIRMAN GINSBURG: The next order of business is the report of the Committee on Legislation, which will also be submitted by Mr. Bert L. Overcash, Chairman.

REPORT OF COMMITTEE ON LEGISLATION

Bert L. Overcash

Mr. Chairman, Members of the House of Delegates: I took over as chairman of this committee only recently, or a couple of months ago, by reason of the resignation of the chairman who had been appointed at the last meeting.

The report that is presented to you here includes proposed legislation in two categories. The first category comprises proposals that came to this committee from other committees of the Association; and the second category comprises proposals that came to the committee from individual lawyers.

In the first category the first proposal is the bill that was in the last session of the legislature with reference to instructions to the jury, which would require the attorneys to make exceptions at the time the instructions were given, similar to the federal rule, that bill being Law Bill 76 that failed of passage in the last session of the legislature.

The second item in this report is the corporation bill that I referred to in my previous report.

The third item is a recommendation of the Committee on County Libraries which would restrict the circulation of certain

decisions, statutes, and information to certain county officials as provided in my report.

The individual items are: First, a suggestion and recommendation of Judge Troyer of Omaha of a clarification with reference to the rights of adopted children; the second is a matter of Justice Court procedure in county courts; and the third is a matter of filing transcripts in certain misdemeanor actions.

In addition to those items since the report was submitted, my attention has been called to a recommendation of Robert Berry of the Kennedy firm in Omaha relating to the tax provisions of Section 77-730 which involved profit-sharing trusts. The Supreme Court, in the *Davis* case, held that the taxation provisions of that statute were unconstitutional. I am advised that consideration is being given to a proposed constitutional amendment in connection with this matter and my committee was asked to support such an amendment if it was presented to the legislature.

Now the committee has given no consideration to that proposal; I merely call it to this group's attention for such consideration and action as you may care to give to it.

Furthermore, there was another proposal that came to me as chairman after the report was submitted from Mr. McEachen of Omaha, chairman of the Omaha Bar Legislative Committee, with reference to the statute on change of name, Section 61-102, which provides that the court order with reference to change of name of an applicant who wants his name changed can only be entered in the next term of court after the application is filed. They propose an amendment here in Omaha to permit that order to be entered within a fixed time and not at a subsequent term because of the confusion in many places as to the matter of when terms begin and end and whether they follow terms.

Those are the proposals that are before you. The last two proposals are not in my report. I see no objection to the Association or this committee supporting them, if that is the desire.

The recommendations that the committee makes: That this House support the specific items of proposed legislation that are referred to in the report, and that this committee be continued.

I don't know whether it should be a recommendation or not but from the standpoint of the working of this committee as a practical matter I think there should be some machinery whereby all of the proposed legislation that this group, or anybody else such as the Executive Council, approves should be got into the hands of the committee so they know where they stand. Even since these other proposals were made I have had other proposals come to me, and I

can see there is a lot of uncertainty and confusion involved in this matter, or there might be.

As I understand the last action of the House of Delegates in January, 1960, the rule about legislation is as follows, and I think you should all understand this, and if you don't want this system you should make such changes as you want: "Unless countermanded by the President of this Association or unless the House of Delegates or the Executive Council has taken some action, in the absence of one of those three things, this committee has the responsibility and the duty and the authority to appear for or against any legislation."

I think as a practical matter, if I were chairman of the committee I would want this House or I would want the Executive Council or the President or somebody to join in determining some of these questions, because there are numerous bills in the legislature and I don't know whether this Association can trust too much authority to any one individual or group, but my recommendations are those I indicated in my report, and I would like to suggest informally, if not formally, that some machinery be created so this committee knows what it is to support and what it is not to support. Thank you.

CHAIRMAN GINSBURG: You have heard the report of the Committee on Legislation, and I assume that as a part of that report Mr. Overcash is moving the adoption and approval thereof. Is there any second to the motion?

[The motion was duly seconded.]

CHAIRMAN GINSBURG: Mr. Turner.

SECRETARY-TREASURER TURNER: Mr. Chairman, did the committee consider the statute involved in 29-2306 in Mr. Powell's recommendations? I somewhat question the necessity of it. I think the particular situation that prompts this suggestion arose at a time when criminal cases came to the Supreme Court on petition in error, and it was then the duty of the attorney to file a transcript. The '61 session of the legislature did away with the petition of error method and provides the same method in criminal cases as in civil, by simply giving a notice of appeal and then it becomes the duty of the clerk of the district court to file a transcript. If he fails to do so, it is administrative fault and neglect and does not defeat jurisdiction. Under the old system, where it was the responsibility of the attorney to file the transcript, if he failed to file it it was held to be jurisdictional and cases have been dismissed for that reason. But I am quite sure, without having the statute here to check, that the

act of the '61 legislature has cured this. Mr. Wilson, the bill drafter, could probably answer that.

JOHN J. WILSON, Lincoln: I can't answer that.

SECRETARY-TREASURER TURNER: I am quite sure it has.

MR. OVERCASH: I can't recall exactly myself the situation as we reviewed it. I sent it out to members of the committee, but I would accept your information and I see no need whatever for any further legislation unless it is essential.

CHAIRMAN GINSBURG: If I may butt into this thing, I received a letter from Mr. Powell about it and my understanding of it is—I didn't check it at all—my understanding of it is that he thought there was some confusion as far as misdemeanor cases were concerned. I know that is what he wrote me about, the matter of applicability with reference to misdemeanor cases. I would say this, that Mr. Turner has explained the situation which would eliminate the problem certainly as far as all other types of criminal action are concerned.

Is there any further discussion on the report of the Committee on Legislation?

KENNETH H. ELSON, Grand Island: Mr. Chairman, I refer to paragraph 1 on page 40 which would need this House of Delegates' approval for sponsorship of a bill similar to L.B. 76 in the last legislature, which would go to jury instructions and objection being made by trial counsel at the time of the trial.

I call your attention to page 17 where the Committee on Procedure has a similar recommendation. I am a member of the Committee on Procedure and I opposed that action of the Committee on Procedure and I opposed the action of this House of Delegates in recommending such legislation. There are many reasons for it: One, I do not believe that a client should be handicapped by a lack of astuteness of his counsel in the heat of battle objecting to instructions which he has not had time to study. I think most of you trial lawyers will agree that the other side can propose instructions that would take hours of research to determine whether they are good or bad. I do not feel this legislation is necessary, and I feel our Supreme Court should have the right to determine whether the client's rights have been prejudiced by the instructions. I think it puts a greater duty on trial counsel and I am opposed to that part of the report. If proper, I would like to move that paragraph 1 on page 40 be deleted from the report.

JOHN J. WILSON, Lincoln: I second the motion.

CHAIRMAN GINSBURG: Is there any further discussion?

Now as I get this, I am going to rule that the last motion is an amendment to the report to the effect that the report be adopted with the exception of Item No. 1.

MR. ELSON: That is correct.

CHAIRMAN GINSBURG: You have heard the amendment? Is there any discussion on the amendment? Gentlemen, I hope you will forgive me for doing this but this is a matter of great concern. I know it is to the judges. I know there was a very spirited battle before the Legislative Committee or Judiciary Committee of the legislature. I know that this very thing was approved two years ago. There should be some feeling about it other than just what has been expressed thus far. I hope we will have a real battle over this thing and get it settled once and for all. Mr. Wilson!

JOHN J. WILSON, Lincoln: Mr. Ginsburg, I have talked to some of the judges on the trial level and I have talked to some of the judges on the appellate level and I think it would be very disadvantageous to approve this recommendation. After all, your district judge is supposed to write instructions under our law. There are many times when inadequacy of instructions or over-zealous lawyers with instructions might be a miscarriage of justice and there would be no right of correcting that in a higher court. If we were all trial lawyers of experience and trying cases day by day and we had a standard form of instructions, I would think it might be proper. But your instructions don't come out in a tailored fashion, they have to be changed and altered.

Even in the federal court where you used to have to take your exceptions to the instructions as they were read by the judge—that has been changed to give you an opportunity. I think this needs more time for study. I went back and read the report of the Committee on Judiciary last year after they turned this down and there was a large number of lawyers that appeared both pro and con on this amendment to the law. I think we would be very foolish to try to pass this type of legislation.

CHAIRMAN GINSBURG: Is there any further discussion? I don't want to cut anybody off, and I want to be sure that you thoroughly understand the problem. Mr. Overcash.

MR. OVERCASH: Mr. Chairman, I wonder if I shouldn't make at least a short statement on this amendment?

CHAIRMAN GINSBURG: You have a right to as the chairman of the committee.

MR. OVERCASH: This is not a piece of legislation that I have proposed myself nor have been working with but I want this House

to know this, that the recommendation came to me from what I understood to be the Association of District Judges. It was my understanding that they were, I don't know whether unanimously or not, but at least that group was proposing this legislation. In the consideration of it I want you to know that that was my information.

CHAIRMAN GINSBURG: Any further discussion? Are you ready for the question? The question being called for, we will put at this time the amendment which is the adoption of the report with the exclusion of Item No. 1. All in favor of the amendment say "aye"; contrary. I think I will call for a show of hands. All in favor of the amendment raise your hand; all opposed. (28 for; 8 against) The amendment is carried.

Then I suppose we should now put the motion as amended. All in favor say "aye"; contrary. Carried. The report of the Committee on Legislation is now approved with the exception of Item No. 1.

THOMAS R. BURKE, Omaha: Mr. Chairman, does that recommendation then include the matters that were submitted to Mr. Overcash following his written report, so that his committee will be authorized to appear before the legislature if there is an amendment to the constitution?

CHAIRMAN GINSBURG: May I answer you in this way, the bylaws now provide—and Mr. Overcash quoted from them—that the Committee on Legislation has authority to use its judgment, so to speak, pro or con on any of these measures in the absence of any contrary action by the President, the Executive Council, or the House of Delegates. So unless there is some desire on someone's part that any of this legislation be affirmatively banned so far as the Association is concerned, no further action is necessary.

MR. BURKE: Thank you

CHAIRMAN GINSBURG: Now there is one other thing, Mr. Overcash, if you will forgive me. Mr. Overcash brought up a point that I harped on for a number of years while I was chairman of the committee; and before I let Bert leave the floor I would like to see if there is any way that this situation can be remedied.

If you will recall, as a part of his report Mr. Overcash asked about some way of channeling all legislation into the committee instead of having lawyers go outside of the committee and make their own presentations and appear for legislation or against legislation that the committee has no opportunity to study or speak on. I don't know myself what the answer is. We have discussed it in the past, but before Mr. Overcash leaves the floor is there anyone who has any suggestions on this problem?

PRESIDENT SVOBODA: May I make a statement? What our good chairman has just referred to was an amendment of the bylaws that I initiated while I was a member of the House of Delegates, and that was that when a Terry Carpenter—and I use him merely as a symbol—was chairman of the committee and Herman appeared before him he would always ask him a disconcerting question, "How many people do you represent?" Herman would say, "Twenty-five hundred."

He would say, "Now wait a minute. You're just representing a small committee."

Well, we corrected that so that Bert, as our present chairman, can speak with authority. Now that ought to be a two-way road. The suggestion that I make is this, that the members of the bar, if they have any legislation which affects the field in which Mr. Overcash is acting, should channel their work through him. He can be useful. Herman, when he was chairman of that committee, was always well received in the legislature; he carried a Sunday punch when he made a recommendation before a committee. We want to keep it that way. Mr. Overcash has the ability and the stature to keep it that way.

If you have any legislation that you yourself would like to see, or if you have opposition to legislation that you would like to have prevail, work through Mr. Overcash and his committee, and he can then help you before the committee because he now has the authority from this Association, this House, to speak with authority, lacking a countermanding by the President, the Executive Council, or the House of Delegates itself.

Does that help clear it for you, Bert?

MR. OVERCASH: Yes, except that I would like to have someone advise me when the meetings are all over what affirmative or negative actions are taken by the President, the House of Delegates, or the Executive Council.

PRESIDENT SVOBODA: Most of it comes up so fast. The twenty-day hopper is open and on the twentieth day there might be a slug of bills come in that the Committee on Legislation can consider, and we can't always call an Executive Council meeting in a hurry; we can't assimilate all the bills that are poured in during the twenty days. That is why we had to leave it so that an intelligent and well-versed committee like our Committee on Legislation could proceed to act when it was necessary.

MR. OVERCASH: Well, I am not asking that we have a meeting every time. What I am suggesting is that someone in the House

of Delegates or the Executive Council advise this committee of whatever actions you do take here.

[The report of the committee follows.]

Report of the Committee on Legislation

This committee has received for consideration the following legislative proposals from other Bar Association committees or committees made up of Bar Association members:

1. Honorable Victor Westermarck, District Judge of McCook, as chairman of the Judges' Committee, has requested that we consider and recommend the reintroduction at the next session of the legislature of L.B. No. 76 that was killed by the Judiciary Committee at the last session of the legislature. This bill pertains to certain reforms with reference to instructions to the jury and would require the making of objections at the time of trial similar to the procedure followed in the federal courts and in certain state courts, such as those in Iowa. The House of Delegates, in 1960, approved this legislation and the report of the Legislative Committee in 1961 discusses the presentation of this bill to the legislature.

2. The Special Committee on Revision of Corporation Law of the Nebraska State Bar Association has printed and circulated a Proposed Nebraska Business Corporation Act and has recommended that this act, together with such amendments as may be hereafter recommended by the House of Delegates, be presented to the legislature for enactment.

3. The Committee on County Law Libraries of this Association is recommending in its report that legislation be drafted to amend Sections 24-209, 49-502 and 49-617 of the statutes to provide that state agencies will circulate decisions, statutes and regulations only to county judges, county attorneys, county law libraries and to clerks of the district courts for the use of district courts. The committee feels that further distribution of this material to other county officials is wasteful.

This committee has received the following legislative proposals from individual lawyers and judges:

1. Honorable Robert R. Troyer, County Judge at Omaha, has suggested that legislation passed in 1955 may have inadvertently omitted adopted children. He refers to L.B. No. 93 which enacted what is now Section 30-228.03 of the statutes and repealed what was Sections 30-228.01 and 30-228.02.

Judge Troyer suggests that the sections just named be amended to make it clear that adopted children are subject thereto.

2. Honorable B. H. Bracken, County Judge of Minden, has suggested that Section 24-502 of the statutes be amended so that justice cases filed in county court would follow the same procedure as term cases.

3. E. H. Powell, an attorney at Aurora, has suggested that the statutes be amended so that in misdemeanor actions, the clerk of the court has the responsibility of filing the transcript of appeal. He suggests in this connection that an amendment be made to Section 29-2306 by adding thereto the following:

"It shall be the duty of the clerk of the district court to prepare and file with the Clerk of the Supreme Court such transcript within the time provided by law, and the failure of such clerk to complete said act within said time shall not operate to deny jurisdiction in the Supreme Court."

It is the recommendation of this committee:

(a) *That the legislation above reviewed be approved and supported subject to the action of the House with reference to any such legislation as may be contained in any committee reports.*

(b) *That this committee be continued.*

Bert L. Overcash, Chairman
Herman Ginsburg, Chairman Emeritus
Chauncey E. Barney, Vice Chairman
Roger V. Dickeson
Kenneth B. Holm
Richard E. Hunter
Raymond E. McGrath
R. Robert Perry
Lewis R. Ricketts
William A. Sawtell
Robert A. Skochdopole

CHAIRMAN GINSBURG: Next is the report of the Committee on Administrative Agencies, Mr. Einar Viren, chairman. Mr. Burke will appear for Mr. Viren.

REPORT OF THE COMMITTEE ON ADMINISTRATIVE AGENCIES

Thomas R. Burke

This is the report of the Committee on Administrative Agencies. The committee has met frequently during the year. Various conferences were held with the Judicial Council subcommittee concerning the uniform process for judicial review of contested cases; and suitable legislative review was made and presented to this subcommittee.

In addition to that, the committee would like to study, during the coming year, the updating of the Administrative Procedure Act and the question of a uniform published notice to advise all parties of matters pending and dates set for the hearing.

Accordingly it is the recommendation of the committee that its report be approved and that the committee be continued for the ensuing year. With that, I so move the recommendation of the committee.

CHAIRMAN GINSBURG: Is there a second to the motion?

THOMAS M. DAVIES, Lincoln: I second the motion.

CHAIRMAN GINSBURG: You have heard the report and the motion that the report be adopted as submitted. Any discussion? If not we will call for a vote. All in favor say "aye"; contrary the same sign. No votes to the contrary, the report is adopted.

[The report of the committee follows.]

Report of the Committee on Administrative Agencies

It is with a great deal of pleasure that your Committee on Administrative Agencies desires to make its report on the course and conduct of its business and deliberations during the period ending October 1, 1962, since its appointment by you.

On May 14, 1962, a conference between the Committee on Administrative Agencies and the Judicial Council Subcommittee was held at Lincoln, Nebraska. During the course and conduct thereof, a thorough discussion was had concerning the Judicial Council's desire to have uniform process for judicial review of contested cases.

This matter was reviewed in its entirety, and a form of the draft of legislation was submitted. The form of draft of legislation was reviewed and upon motion unanimously agreed to by all of the members of this committee who were present; the proposed form

was endorsed and submitted to the Judicial Council Subcommittee for its consideration.

During the course of the year, numerous informal meetings of this committee were held for the purpose of discussing pertinent matters necessary for their consideration. All of the items referred to this committee by you, as President, were considered at some time or other. Because of the complexities thereof, and the desire to obtain a uniform judicial review of contested cases from all tribunals inferior to the district court, and feeling that that matter was the most pressing at this time, no further action was taken upon many of the other items submitted.

There remains to be considered by this committee, should it be retained in power for the ensuing year, the updating of the Administrative Procedure Act, and the question of a uniform published notice to advise all parties of matters pending and dates set for hearing.

It is the unanimous recommendation of this committee that it be continued with instructions from the Bar to pursue the matters referred by the chairman, other matters referred to the committee during the course of the ensuing year by the President, and such other matters as would properly come within the scope of this committee's jurisdiction.

Einar Viren, Chairman
J. Max Harding
Samuel Van Pelt
C. Thomas White
Frank J. Mattoon
Edson Smith
Harry B. Otis
Harry R. Henatsch
Elmer J. Jackson

CHAIRMAN GINSBURG: The next order of business is the report of the Committee on American Citizenship.

REPORT ON COMMITTEE ON AMERICAN CITIZENSHIP

Dewayne Wolf

Mr. Chairman, I am not going to read the report. As in past years the principal work of this committee has been the conducting of trial demonstrations in the various counties of Nebraska, principally for juniors in high school who are participating in the County Government Day.

After two years on the committee I wonder if we could prob-

ably fulfill an even greater need by assisting the American Bar Association's special committee through encouragement and support of our schools of Nebraska—to give instruction in some depth on communism and its contrast to our form of government and our liberties that we enjoy. I personally feel that the Nebraska Bar Association has a vested interest in this sort of endeavor, that it would be most appropriate for the American Citizenship Committee of this Bar Association to work with our schools to help them formulate a regular course in every high school of Nebraska so as to arm our junior citizens with the facts and with the knowledge so that they in their years of later life can recognize communism at work and be able to combat it in this great challenge for the minds of men.

I therefore recommend the adoption of the report of this committee.

CHAIRMAN GINSBURG: Is there a second?

JOHN J. WILSON, Lincoln: I second the motion.

CHAIRMAN GINSBURG: You have heard the report of the committee and the motion that it be adopted. As I understand it, the affirmative action required or recommended in this report is that the Association consider the creation of a special committee or authorization to this particular committee to cooperate with the American Bar. Is that correct?

MR. WOLF: That's correct.

CHAIRMAN GINSBURG: Is there any discussion on that? Any question about the recommendation of the committee? If not, we will call for a vote. All in favor say "aye"; contrary "no". Carried.

[The report of the committee follows.]

Report of the Committee on American Citizenship

During 1962, the Committee on American Citizenship continued its program to present trial demonstrations for high school youth throughout the judicial districts and counties of Nebraska. The purpose of this program, which has been continued for many years, is to assist Nebraska lawyers to present accurate and purposeful trial demonstrations to the young citizens of our state, proudly displaying the process of law and its protection to American citizens.

Members of the American Citizenship Committee and President Ralph E. Svoboda represented the Nebraska State Bar Association as co-sponsors of the "Cold War Strategy Seminar" held April 6th and 7th at the Joslyn Memorial in Omaha, Nebraska. Also, the

committee represented the State Bar Association in co-sponsoring the Radio Free Europe Fund and have received on behalf of the Nebraska State Bar Association a certificate of appreciation from Radio Free Europe Fund, which certificate is herewith enclosed.

The chairman of the American Citizenship Committee recommends that the State Bar Association give consideration to the creation of a special committee, or the authorization of this committee, to undertake co-operation with the American Bar Association to encourage and support our schools and colleges in the presentation of adequate instruction in the history, doctrines, objectives and techniques of communism, thereby helping to instill a greater appreciation of democracy and freedom under law and the will to preserve that freedom, as outlined in the resolution of the House of Delegates of the American Bar Association in February of 1961 and as briefly set forth in the booklet of the American Bar Association entitled "Instruction on Communism and Its Contrast With Liberty Under Law".

Dewayne Wolf, Chairman
Charles F. Adams
Thomas F. Colfer
Dale Cullen
Robert V. Denney
George B. Dent, Jr.
Joseph J. Divis
Robert H. Downing
James E. Fellows
Raymond Frerichs
James F. Green
Robert C. Guenzel
Robert M. Harris
Fred R. Irons
Daniel D. Jewell
Clarence C. Kunc
Frank J. Mattoon
W. E. Mumby
L. F. Otradovsky
Carlos E. Schaper
James I. Shamberg
Rodney R. Smith
Richard L. Spittler
Arthur A. Weber
C. R. Worrall

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Atomic Energy, Mr. Richard D. Wilson, Chairman.

REPORT OF COMMITTEE ON ATOMIC ENERGY LAW

Richard D. Wilson

Mr. Chairman, Members of the House: This committee has been active principally on two items. The first one relates to workmen's compensation for injuries arising out of radioactivity. The legislature this next year will probably have a bill before it to change the workmen's compensation laws with respect to injuries from radioactivity.

The second field has been cooperating with the Department of Health in drafting of atomic energy control legislation, which has been the responsibility of the atomic coordinator, who is the Director of the Department of Health. This involves setting of standards for hearings, licensing—the sort of thing that lawyers are interested in. Since there will probably be a bill on that subject before the legislature also, the committee recommends that this Committee on Atomic Energy Law be continued and that its report be accepted by the House.

CHAIRMAN GINSBURG: As I understand it, the report of the committee requires no action since it makes no recommendation. The report will therefore be automatically accepted and placed on file. However, there is a motion made by the chairman of the committee that the committee be continued. Is there a second to that motion?

CHARLES E. OLDFATHER, Lincoln: I second the motion.

CHAIRMAN GINSBURG: Any discussion? If not, we will call for the vote. All in favor of the motion to continue the committee say "aye"; contrary. Carried.

[The report of the committee follows.]

Report of the Committee on Atomic Energy Law

The committee has participated in activity in several areas.

A subcommittee of the United States House of Representatives Labor Committee held hearings in February on a bill which would have transferred to the Federal Government jurisdiction over workmen's compensation for injuries arising out of radioactivity. The bill would have made it practically impossible for an employer using radioactivity to defend against any claim for compensation which

might be made by one of his employees or former employees who had some disease which might possibly have been caused by radioactivity, and it would have provided substantially higher benefits for employees involved with radioactivity and therefore under federal jurisdiction than for other employees of the same employer.

The Nebraska Bar Association Committee on Atomic Energy Law opposed the bill at the hearing in Washington with testimony to the effect that the present Nebraska Workmen's Compensation Law was adequate to cover radioactive injuries, and that there was no need for the Federal Government to take over this activity. Representative Dave Martin of Nebraska was on the subcommittee hearing the bill and cooperated in having this testimony presented. There was much testimony in favor of federal jurisdiction from various labor groups, but the bill was not endorsed by the administration and was not reported to the House.

A member of this committee has attended meetings held by the Nebraska Atomic Energy Coordinator, who is the Director of the State Department of Health. These meetings have been designed to develop a new atomic energy law for Nebraska, and the participation of the committee would be to aid in drafting proper standards for hearings, licensing, and so forth.

The committee has also been in contact with the Nebraska Workmen's Compensation Court in connection with eliminating deficiencies which are alleged by the Federal Department of Health and Welfare to exist in the Nebraska Workmen's Compensation Law. It is expected that the committee will cooperate in drafting any changes which may be proposed in the field of workmen's compensation relating to radioactivity so as to have a clear and workable arrangement that will be adequate for the employee and not unfair to the employer.

As directed several years ago by the Executive Council of the Bar Association, your committee has also cooperated with the American Bar Association Committee on Atomic Attack, principally by providing information as to Nebraska law.

Richard D. Wilson, Chairman
Wilbur S. Aten
Robert H. Berkshire
Robert E. Johnson, Jr.
Vance Leininger
Tracy J. Peycke

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Cooperation with the American Law Institute.

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

Hale McCown

Mr. Chairman, Gentlemen: The report of the committee is on page 50. I shall not review it entirely. All of you, I am sure, are familiar with the work of the American Law Institute, particularly in the *Restatements*. The *Restatement* as far as the foreign relations law of the United States is concerned was the major object in the past year.

There are only two specific recommendations of the committee: One, that the Association be represented at the next annual meeting of the American Law Institute; and the second one I suggest be technically changed since only the Executive Council has the authority to expend funds. I shall move that the Association be represented at the next annual meeting, and that this House recommend to the Executive Council that the expenses of the delegate be paid by the Association.

CHAIRMAN GINSBURG: You have heard the report and the motion. Is there a second?

FRANK J. MATTOON, Sidney: I'll second it.

CHAIRMAN GINSBURG: Is there any discussion? If not, we will call for the question. All in favor say "aye"; contrary "no". Carried. Thank you.

[The report of the committee follows.]

**Report of the Committee on Cooperation with the
American Law Institute**

In accordance with the action of the House of Delegates, the Nebraska State Bar Association was represented at the annual meeting of the American Law Institute held in Washington, D. C., May 23rd to 26th, 1962, by the chairman.

The members of the Nebraska State Bar Association are generally familiar with the work done by the Institute, and an extensive report is not permitted by either time or space. The restatement of the foreign relations law of the United States exceeding 700 pages required the principal attention of the annual meeting. Additional work on the proposed Model Penal Code was accomplished as well as further work on the restatement on conflict of laws. Some additional work was also devoted to the second restatement on torts. The Committee on Continuing Legal Education of the American Law Institute and the American Bar Asso-

ciation is continuing its efforts to provide better cooperation and unified action between the membership of both associations for the extended service provided to the profession in the field of continuing legal education.

The contribution of the American Law Institute in the development of the law itself, exemplified in the restatements, as well as in the field of jurisprudence, continue to be as they have always been a tremendous contribution to the profession and the public. It is the opinion of your committee that the work done by the American Law Institute fully justifies the continued cooperation of the Nebraska State Bar Association and each of its members.

Your committee recommends that the Association be represented at the next annual meeting of the Institute and that the expenses of the delegate be paid by this Association.

Hale McCown, Chairman
Richard L. Berkheimer
James A. Doyle
Henry M. Grether, Jr.
Walter D. James, Jr.
Barton H. Kuhns

CHAIRMAN GINSBURG: The next order of business is the report of the Committee on County Law Libraries.

REPORT OF COMMITTEE ON COUNTY LAW LIBRARIES

William H. Meier

Mr. Chairman, Members of the House of Delegates: Our report points out that the 1961 amendment of Section 51-220 of the Nebraska Statutes places county law libraries under the supervision of the judges of the district court of the respective counties; that various statutes provide for varying types of distribution of statutes and other of the state's legal publications; and three, that the *American Bar Journal* has been publishing articles of special interest relating to county law libraries in other jurisdictions.

Our recommendations are based upon these three facts and are as follows:

1. That the Nebraska Bar Association invite the Nebraska District Judges Association to appoint a Committee on County Law Libraries to work with the County Law Library Committee of this Association to implement the provisions of Section 51-220, Revised Statutes, 1961, so as to speed the establishment and improvement of the county law libraries in each of the counties of the state (with

the exception of Douglas and Lancaster Counties, where adequate law libraries are now available).

2. That the Legislative Committee of this Association be requested to formulate and sponsor in behalf of the Association appropriate legislation to amend Sections 24-209, 49-502, 49-617 of the Statutes, or otherwise to provide for the distribution for use in the counties of decisions, statutes, and regulations only to the county judges, the clerks of the district courts (for use of the district courts), the county attorneys, and the county law libraries.

3. That the local bar associations, the county boards, and the county officials of each of the counties be requested to cooperate to the end that all of the previously issued legal publications issued to the various county officials in the past are transferred to the county law libraries of their respective counties for the common use thereof by the courts, the county officers, the bar, and the general public.

4. That the articles regarding the county law libraries in California and Florida contained in recent issues of the *American Bar Journal* be published as an appendix to this report and that similar articles published in the future be republished in the *Nebraska Bar Journal* as they become available.

This portion about the publication of the articles on California and Florida county law libraries has already been complied with by the publication of them as an appendix to the report. For that reason there is no further action required as to that portion.

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

ROBERT H. DOWNING, Superior: I second the motion.

CHAIRMAN GINSBURG: You have heard the report of the Committee on County Law Libraries. Is there any discussion? It is a very elaborate report and well submitted. Is there anyone in the room that has any questions of Mr. Meier or any of his committee? If not, we will put the question to the vote. All in favor say "aye"; contrary. There being no contrary votes, the report is unanimously adopted.

[The report of the committee follows.]

Report of the Committee on County Law Libraries

Section 51-220, R. S. Supp. 1961 now provides:

The county board may, when in its discretion it shall deem it advisable, provide by purchase or otherwise for the procuring and maintaining of a suitable law library for the use

of the public. Such library shall be under the supervision of the judges of the district court of the county wherein the same is located.

This statute places considerable responsibility upon the several district judges for the successful operation and building up of the law libraries of the counties within their respective judicial districts. The interest of the district judges individually in suitable libraries for each county has been demonstrated in the past by their responses to requests by this committee for information regarding the libraries in their respective counties.

A number of different statutes provide for circulation of decisions, statutes and official regulations by state officials and agencies to various county officials. Some of these are necessary tools for the county judges, some for the district judges and some for the county attorneys. Those required by the county judges and county attorneys should continue to be supplied to them. Those required by the district judges should be supplied to the clerks of the district courts. We are of the opinion that all future publications supplied by the state officials and agencies for use in the counties should be distributed to these officials only, and to the county law libraries. This could result in a substantial saving to the state.

Interesting articles regarding county law libraries have been published in recent issues of the *American Bar Journal*. These and other similar articles published in the future should be made readily available to the members of the Nebraska Bar.

We make the following recommendations:

1. *That the Nebraska Bar Association invite the Nebraska District Judges Association to appoint a Committee on County Law Libraries to work with the County Law Library Committee of this Association to implement the provisions of Sec. 51-220, R. S. Supp. 1961 so as to speed the establishment and improvement of county law libraries in each of the counties of the state (with the exception of Douglas and Lancaster Counties, where adequate law libraries are now available).*

2. *That the Legislative Committee of this Association be requested to formulate and sponsor in behalf of the Association appropriate legislation to amend Sections 24-209, 49-502 and 49-617, R. R. S. 1943, or otherwise, to provide for the distribution for use in the counties of decisions, statutes and regulations only to the county judges, the clerks of the district courts (for the use of the district courts) the county attorneys and the county law libraries.*

3. *That the local bar associations, the county boards and the county officials of each of the counties be requested to cooperate to the end that all of the previously issued legal publications issued to the various county officials in the past are transferred to the county law libraries of their respective counties for the common use thereof by the courts, the county officers, the bar and the general public.*

4. *That the articles regarding the county law libraries in California and Florida contained in recent issues of the American Bar Journal be published as an appendix to this report and that similar articles published in the future be republished in the Nebraska Bar Journal as they become available.*

William H. Meier, Chairman
Leo M. Bayer
Alfred W. Blessing
Frederic Coufal
John S. Elliott, Jr.
Kenneth H. Elson
Russell E. Lovell
William H. Norton
Harvey M. Wilson

Appendix 1

California's County Law Libraries

Very few attorneys have good law libraries available to them at no cost to themselves, but California lawyers do. **Litigants in California pay a small fee as part of their filing costs, which goes to the county law library in the county in which their suits are filed.** These county law libraries are free public law libraries, which serve not only the Bench and Bar of the state, but all governmental officials, local, state and federal and all residents of the counties. While a wide clientele is fully served, the needs of the Bench and Bar are given primary consideration.

The California legislature, in 1891, provided for the establishment of county law libraries throughout the state which were to be supported by adding to the filing costs of each party to a civil action, with a few exceptions, one dollar. The maximum fee which boards of law library trustees were authorized to charge each party was raised to two dollars in 1947, to three dollars in 1957 and to four dollars in 1961. The fees which are collected by the county clerk in superior court cases and by the clerks of the various municipal courts are deposited with the county treasurer who holds the money for the law library and, in fact, pays interest on surplus

funds which he invests. The county auditor disburses the funds upon authorization of the board of law library trustees. A California county law library is **not a part of county government**, but is rather a **type of independent state agency**. The statutory law relating to county law libraries is found in Sections 6300-6365 of the Business and Professions Code of the State of California.

County law libraries are governed by boards of trustees, which in the larger counties, consist of six members: three superior court judges, one municipal court judge, the chairman of the board of supervisors (or another supervisor, or member of the Bar appointed by the supervisors in his place) and a member of the Bar of the county. Trustees serve without compensation, but of course carry the ultimate responsibility for the operation of the library. In most counties, the operation of the library is carried on by the librarian, appointed by the trustees and directly responsible to them.

An outstanding illustration of how California's county law library system works is the Los Angeles County Law Library. Established in 1891, with a collection of 5,000 volumes housed in the courthouse, this library has grown to become one of the largest law libraries in the country and the largest west of the eastern seaboard. Its collection of approximately 376,000 volumes, including over 125,000 volumes of foreign law, provides research facilities for determining the law of practically every country in the world. Further, the Los Angeles attorney has available to him as complete a collection of law books for any state of the United States as can be found in that state.

The Los Angeles County Law Library has, since 1953, been housed in its own million-and-a-half dollar air-conditioned building, paid for out of accumulated surplus income. As well as the usual law library facilities, it contains a special foreign and rare book reading room, eight conference and dictating rooms and a combined lecture and conference room, all of which are available at no charge to members of the Bar. It is open daily except for six national holidays and serves an average of 600 to 800 patrons each day. Five branches are maintained in other cities of the county: Glendale, Long Beach, Pasadena, Pomona and Santa Monica, as well as a judges' library in the county courthouse in Los Angeles and a criminal law library in the county jail.

In addition to providing books and physical facilities, the Los Angeles County Law Library provides complete reference service in both American and foreign law. In difficult foreign law matters, this service is utilized by lawyers from all over the country. It also distributes bibliographies, prepared by the library's staff,

covering fields of law and related subjects which are of importance to the Bar. Many of these bibliographies have been reprinted in *The Practical Lawyer*. The library's staff has also developed a classification scheme for law libraries which makes its collection more readily available to patrons and which is being used in many other law libraries.

All of the facilities and services of the Los Angeles County Law Library are made possible by the fee income, which averages about \$45,000 per month even though only two dollars per party is charged instead of the four-dollar maximum permitted. The total receipts of the library for the fiscal year ending June 30, 1961, were \$593,276.00 and total expenditures \$526,896.87.

FORREST S. DRUMMOND

Librarian, Los Angeles
County Law Library

Appendix 2

Libraries for Florida Lawyers

In the article entitled "California's County Law Libraries," in the April, 1962, issue of your *Journal*, Forrest S. Drummond, Librarian of the Los Angeles County Law Library, explains the fine facilities of his library and other county law libraries, and how they are financed by filing fees in litigation.

In Florida, libraries for lawyers, financed by allocation of part of the occupational tax paid by lawyers, have been in existence for the past twenty-five years. A part of the filing fees in litigation has been added to the cost of maintenance of the libraries of Florida.

In sixteen counties in this state, there are bar libraries located in the county seats, and in three of the counties there are libraries in county seats and in cities other than the county seats: Dade, with branches at Miami Beach and Hialeah in addition to the main library at Miami; Pinellas, with a branch at St. Petersburg in addition to the main library at Clearwater; and Volusia County, with a branch at Daytona Beach in addition to the main library at DeLand.

These libraries are generally complete working libraries, and the supply of books has been augmented, in instances, by private donations.

HERBERT U. FEIBELMAN

Miami, Florida

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Crime and Delinquency Prevention.

REPORT OF COMMITTEE ON CRIME AND DELINQUENCY PREVENTION

Gerald S. Vitamvas

There were no positive recommendations made by this committee, but supplemental to the information contained therein I am advised by Mr. Kammerlohr, who is working with the juvenile court laws, that certain specific recommendations in the way of legislation will be ready shortly.

At that time I think the matter should be referred for further study by the committee and a determination made whether the legislation as proposed should be accepted and supported by this Association and, in turn, then, as I understand it, referred to the Committee on Legislation for positive action by the Association.

With reference to the *Mapp v. Ohio* case involving the illegal search and seizure problem, the Judicial Council or a subcommittee thereof, is preparing legislation that is under the direction of Mr. Meyer, the Attorney General. When that is prepared and the problems are ironed out then the committee should take a look at that and determine the attitude of the Association thereon. As I state, there are no positive recommendations at this time by this committee other than that it is assumed they will look at this proposed legislation.

CHAIRMAN GINSBURG: You have heard the report of the committee. Are there any questions or any discussion? The report does not require any action by the House since it contains no recommendations and therefore the report will be ordered received and placed on file.

[The report of the committee follows.]

Report of the Committee on Crime and Delinquency Prevention

The committee met once during the year. At this meeting discussion was had concerning the amendment of certain criminal statutes which were in part unconstitutional under the holding of the Supreme Court in the case of *Abel v. Conover*. Other matters considered were those concerned with illegal search and seizures and the juvenile court laws.

The chairman of the committee has had occasion, together with representatives of the Omaha and Lincoln Bar Associations and of

various other civic groups, to attend several meetings called by the Nebraska Committee for Children and Youth. That organization has secured funds and has instituted an extensive study of the juvenile court laws. The study is being made to clarify and to point up conflicting provisions of the law. Any reports made and conclusions drawn will come to the attention of this committee. No such reports have been received to date, but it is suggested that positive action by this Association await the results of the study being conducted by the Nebraska Committee for Children and Youth.

It has come to the attention of the committee that the Judicial Council has appointed a subcommittee to prepare legislation in the area of search and seizure. The proposed legislation has been circulated to the members of this committee for their comment.

To date no such comment has been received.

Gerald S. Vitamvas, Chairman

CHAIRMAN GINSBURG: We will go to the next order of business, which is the report of the committee on Bar Association Foundation. Mr. John J. Wilson, chairman, will submit the report.

REPORT OF COMMITTEE ON BAR ASSOCIATION FOUNDATION

John J. Wilson

Mr. Chairman, this is a special committee appointed by the Executive Council as a result of conversation with our President last year at the Bar Association when several lawyers thought maybe Nebraska was getting far enough along that they should have a foundation set up.

After the committee did some research there was some doubt in our minds as to what should be done, so we enlisted the services of Laurie Williams to give us some ideas on tax status. About the same time the question of donating funds to the Bar Association for the Merit Plan came up and it was determined that funds could be given to the Bar Association because, having been created by the court, it was a part of state government. That changed again the thinking of the committee on the Bar Foundation because we found that while you could be exempt from income tax as a civic organization, you might not be exempt from receiving of funds for inheritance reasons, and that would be our big source of income.

We had some meetings; we checked the proceedings of other states; and the report sets out a few of the foundations organized in other states. Some have been organized as a part of an integrated

bar, some had been organized independently, and Arkansas was organized by law.

The purpose of this committee is to set out in the report what has been done, what might not be done, and what could be done. We are of the opinion that the same purposes could be carried out by the integrated bar by amendment of the bylaws and the constitution as you could do by a foundation. If it is the purpose to raise funds, you might raise more funds with a foundation because it might be better known than setting up amendments to the bylaws.

We are asking that this committee be continued and we hope at this time that there is enough interest among the lawyers to stimulate an expression of whether or not the committee should be continued. Will you advise the next committee, if there is one appointed, how you feel? If there is no opposition I hope the committee next year can come up with a definite recommendation.

At this time the committee was divided. Some thought it should be a foundation; some thought the integrated bar should carry it out.

The committee might be enlarged because I think primarily the whole thing comes to: What can you do with the Internal Revenue Department? Any foundation you set up must be approved by the Internal Revenue Department. I understand you have to be in existence six months to a year before they will even give you an approval or disapproval. On the other hand, Hale McCown and Flav Wright discovered a ruling of the department that as a part of the state government an integrated bar could receive funds.

There is no reason to read all of the report. I am sure you have all read it, but at this time I think the Association would like to know the expression of the House of Delegates as to how they feel on whether or not a foundation should be created. I know the committee would appreciate any remarks from anyone here regarding his feelings. With that closing, I move that the committee be continued.

CHAIRMAN GINSBURG: Is there a second to the motion?

CHARLES F. ADAMS, Aurora: I'll second the motion.

CHAIRMAN GINSBURG: You have heard the report of the committee. The report in and of itself requires no action; however, there has been a motion that the committee be continued. Is there any discussion? Does anyone care to ask any questions of the committee or have anything to propose? Mr. Mattson.

C. RUSSELL MATTSON, Lincoln: What are the objects of the thing and what use is the money going to be put to?

CHAIRMAN GINSBURG: Mr. Wilson, I'll give you an opportunity to answer that.

MR. WILSON: Mr. Mattson, that would all depend on how the foundation is set up, whether you are setting it up to build a building to have housing for our Bar Association, whether it was to be used to further education, to grant scholarships. That is something that would have to be worked out in detail. At the present time it is a question of whether or not something should be done or whether nothing should be done. I think by continuing the committee it means they want something done or a further report of definiteness by the next annual meeting. If you approve it I am sure they will come up with some recommendations for the House to pass on. If you turn it down that means that anything that is carried out would have to be carried out through the integrated bar by amendment of the bylaws. So I think it is whatever this group wants.

THOMAS M. DAVIES, Lincoln: Mr. Chairman, I would suggest the committee give very serious consideration to carrying out President Svoboda's suggestion as to scholarships. Perhaps this should be done by the law schools. All of the big law schools have this now. They are getting money from their alumni to get out and actively recruit good young men for the profession. I think it is a crying need. Whether it should be done by the foundation, I don't know, but it is something that definitely should be done.

PRESIDENT SVOBODA: I might interject, too, that I think if we look into the future we are going to need a Nebraska Bar Center. I say that principally because our adjoining states are creating bar centers. Oklahoma has just put up a magnificent building. Jack, I haven't sent you the pictures yet, a magnificent building running around \$400,000 or \$500,000. Missouri is on its way to creating one. They have already raised half the money of about \$400,000. Iowa is over the \$200,000 mark. I think that ultimately this Association will have to sponsor a Nebraska Bar Center because, as I earlier alluded to it, the work is growing and we certainly could use a Bar Center in this state.

That, Mr. Davies, I think would be one of the other objects of the foundation; plus, when Jack and I talked this over at the last annual meeting we drooled a little bit because, do you know that there are foundations in this state—I don't mean Bar Association foundations, I mean other foundations—that are looking for places to place their money. Believe me! We shouldn't pass up that opportunity to be recipients of that money. You see, these

foundations have to get rid of their money. They can't keep it, it can't snowball. We certainly ought to get in the way of some of that charitable giving, because I am sure this Association could use it, as George could probably testify here, as he looks at the mounting expense of our Merit Plan campaign. I think we ought to be progressive. I am sure Oklahoma and Missouri and Iowa are being progressive, and I think we ought to look toward the future, under Jack Wilson's guidance, to be receptive to receiving funds perhaps for building, perhaps for scholarships, perhaps for both.

CHAIRMAN GINSBURG: Is there any further discussion? As I understand it, the vote is simply on the matter of continuance of the committee but it is to be taken as an indication of the attitude of this House toward the eventual creation of a foundation. Therefore the matter is quite important.

Is there any further discussion? If not, we will call for the question. All in favor say "aye"; contrary. Carried.

[The report of the committee follows.]

Report of the Special Committee on Bar Association Foundation

Lawyers throughout the nation are beginning to realize that a bar association foundation is a great asset to a bar association.

An integrated bar has certain tax advantages. You can do the same sort of thing for the bar association through the integrated bar as you can with a foundation except own and use real property.

Foundations formed particularly and solely for the purpose of building and erecting a building are not considered to qualify as a foundation for tax purposes even though the building is to be used by the foundation in the furtherance of purposes which in itself might qualify. If formed to advance the science of jurisprudence and promote the administration of justice and the uniformity of judicial decisions exclusively through educational and scientific means of research and to assist in carrying out such purposes, a foundation would qualify. This same purpose could be carried out by the integrated bar.

Nebraska State Bar Association is in effect a part of the state government and therefore, contributions to it for exclusive public purposes would be deductible for tax purposes.

Wisconsin organized a bar foundation and then erected a building. It was then turned over to the integrated bar with a reverter clause that if the bar association was dissolved the building would revert to the foundation.

Rhode Island has a separate bar foundation.

Iowa organized a separate foundation under their nonprofit corporation act and have raised about \$200,000. The contributions in Iowa are deductible tax contributions. These contributions are used for bar activities.

Ohio has a separate foundation modeled very much upon the principles of the American Bar Association Foundation. The foundation holds the stock of an Ohio Bar Title Insurance Company. They have worked out a contract with the Ohio State University providing for the construction of a new building in close proximity to the recently dedicated new College of Law Building. The foundation donated the funds for the construction of the building and contracted for the use and occupancy of it in relation to continuing legal education and research.

Arkansas has a foundation incorporated as a benevolent or nonprofit corporation under the statutes of that state. It was incorporated to improve and facilitate the administration of justice; to promote study and research in the field of law and continuing education; the publication of works on legal subjects; the preservation of rare books and documents; and to hold and use real property for purposes of the foundation. It contained a statement that no part of the income was to be used for purposes of carrying on propaganda or otherwise attempting to influence legislation, etc. The Arkansas foundation obtained a tax exemption status.

Oklahoma formed a separate foundation to advance the science of jurisprudence and promote the administration of justice and the uniformity of judicial decisions exclusively through educational and scientific means of research; to assist in carrying out such purposes; and to acquire for such purposes property, and to own or dispose of such properties. Recently the foundation built a bar center that has the appearance of greatness.

Since most of the activities of a bar foundation may be carried on by the integrated bar with proper amendments to our constitution and bylaws with the exception of owning real property, we feel that more time should be given to study and research. The tax exemption must be given careful study before electing which route should be followed if the Nebraska State Bar Association is to step forward in setting up a foundation or amending its constitution and bylaws.

We wish to thank Laurens Williams for his timely effort in advising the committee on the perplexing problem of tax exemption.

We recommend that the committee be continued.

John J. Wilson, Chairman
Harry B. Cohen
Fred T. Hanson
Louis E. Lipp
Bert L. Overcash
Einar Viren
John R. Swenson
Frank D. Williams

CHAIRMAN GINSBURG: The next item of business is the report of the Special Committee on Joint Conference of Lawyers and Accountants.

REPORT OF SPECIAL COMMITTEE ON JOINT CONFERENCE OF LAWYERS AND ACCOUNTANTS

Harry B. Cohen

Mr. Chairman and Gentlemen: The Committee on Joint Conference of Lawyers and Accountants has been in existence for quite some time, since 1951. What we do is meet annually with an equivalent committee of the Accountants' Society and discuss any problems we may have and also anything we desire to come up with in the way of services in the future.

This last year we had no problems of any kind. There were no areas in which there were any conflicts of interest. Also during this last meeting the accountants proposed an idea that they were the ones that at times get into areas where they cannot tell definitely whether this is an accountant duty or a lawyer duty. What they would like to do is to present to this committee a set of facts setting out, "Now, this is what our client wants us to do. Is this a lawyer's area or is this an accountant's area?" We can guide them in that respect. They want guidance from the committee. So we propose, in the fourth paragraph of the report: "It was apparent that members of both professions had been working together with the avowed purpose of rendering the best possible services to the public. During the course of the meeting, most of the discussion related to a desired service proposed to be rendered by the committee, in the nature of granting advice (when requested) as to whether or not designated services in designated situations by a member of one of the professions would amount to an invasion of the area of activity of the other profession. The joint conference resolved to render such services. Accordingly, if any member of either of the professions desires advice in any matter involving

possible conflicts, he should direct his inquiry, in writing, to the chairman of the respective committee of his association or society, as the case may be, and set forth a full and detailed description of the facts and the specific inquiry on which advice is sought. The chairman in question will then consult with his counterpart and the two will thereafter proceed to conclude the matter."

I think that probably requires authority from this body to this committee.

Also we want to call your attention in the report to the Great Plains Tax Institute which is going to be held May 7, 8, and 9 of 1963 at the Kellogg Center in Lincoln, Nebraska. This is to be put on by both professions and there will be lectures delivered by members of both professions. We urge your attendance.

This committee has been in existence now for about eleven years, and we request that the life of the committee be extended and that it be a continuing committee.

CHAIRMAN GINSBURG: You have heard the report. As I understand it, the report is amended in two particulars: One, there is a recommendation that the establishment of the conference in resolving the question of interprofessional relationships be approved; and, second, that the committee be continued.

If I may be pardoned, I have a question with reference to this matter of giving advice as to possible infringements in the field. Where does that relate to the scope of activities of the Committee on Unauthorized Practice of Law?

PRESIDENT SVOBODA: Well, it ties with it, but I think, Mr. Chairman, that it is important that we do maintain this liaison between the two groups. I think Harry Cohen's committee has done a marvelous job of holding down encroaching on our field by the accountants and they certainly are tempted, what with estate planning, income tax work, and everything else. There are fields where Al Reddish's committee on Unauthorized Practice of Law might not want to put the arm on somebody, and they darn near did during my administration in one case, but it was straightened out and the respective areas were defined. I think Mr. Cohen is right, that the committee should be continued to eliminate these possible frictions and differences.

MR. COHEN: In our area that we are asking authority for, all we would do would be to give advice, and presumptively that advice would be given before any service was rendered. Therefore the question of whether or not it is an illegal practice of law couldn't come into existence until service has been actually rendered. We try to take care of these things before anybody gets out of line. That

is the purpose of this committee. It is a liaison committee. That's all it is.

CHAIRMAN GINSBURG: You have heard the report. Is there any further discussion? Does anyone have any questions concerning the report? Any discussion from the floor? Is there a second to Mr. Cohen's motion?

THOMAS M. DAVIES, Lincoln: I second the motion.

CHAIRMAN GINSBURG: Are you ready for the question? All in favor say "aye"; contrary. Carried.

[The report of the committee follows.]

Report of the Special Committee on Joint Conference of Lawyers and Accountants

The American Bar Association and the Certified Public Accountants Society, in 1941 adopted a statement of principles, which in essence appears to define the exclusive areas of each profession in federal income tax matters and suggests collaboration between the two professions. This statement of principles, which has been adopted by the Nebraska State Bar Association, can be found on page 141A of Volume III of Martindale Hubbell Law Directory.

The Joint Conference of Lawyers and Accountants for the State of Nebraska was created in 1951, as a result of the activities and pursuant to suggestions of the American Bar Association.

The Joint Conference consists of two equivalent committees composed of representative members appointed by the respective presidents of the Nebraska Bar Association and the Nebraska Society of Certified Public Accountants. The two committees meet annually in joint session. This year's annual meeting of the conference was held at the Blackstone Hotel, in Omaha, Nebraska, on September 10, 1962. Both professions were well represented.

During the course of the current year no violations by any members of either of the two professions have been brought to the attention of the joint conference. It was apparent that members of both professions had been working together with the avowed purpose of rendering the best possible services to the public. During the course of the meeting, most of the discussion related to a desired service proposed to be rendered by the committee, in the nature of granting advice (when requested) as to whether or not designated services in designated situations by a member of one of the professions would amount to an invasion of the area of activity of the other profession. The joint conference resolved to render such services. Accordingly, if any member of either of the pro-

fessions desires advice in any matter involving possible conflicts, he should direct his inquiry, in writing, to the chairman of the respective committee of his association or society, as the case may be, and set forth a full and detailed description of the facts and the specific inquiry on which advice is sought. The chairman in question will then consult with his counterpart and the two will thereafter proceed to conclude the matter.

The meeting was also informed of the holding of the Great Plains Tax Institute, at the Kellogg Center, in Lincoln, Nebraska, on the 7th, 8th and 9th of May, 1963. The institute is being sponsored by both professions, and members of both professions will deliver the lectures. Attendance is open to members of both professions. The institute is a part of the continuing educational activities of both professions. The joint conference suggests that members of both professions should make every effort to attend.

Harry B. Cohen, Chairman
Robert K. Adams
James W. R. Brown
Thomas M. Davies
Roger V. Dickeson
Frank J. Mattoon
Eugene L. Radig
Paul A. Rauth
Albert T. Reddish
John W. Stewart

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on the Judiciary.

REPORT OF COMMITTEE ON JUDICIARY

Tracy J. Peycke

Mr. Chairman, I have two or three things I want to say about this report. For many years the Committee on Judiciary has been basically concerned with this Merit Plan project. We still have manifested our interest in that this year.

Our recommendation, the basic part of our report, has to do with judicial salaries and that matter, I think, is coming to be of critical importance. You have already heard some reference to it. Our committee makes the recommendation "that the Association strongly support legislation for a significant improvement in judicial salaries with particular reference to those of the supreme and district courts."

I would like to say these two things about that in particular. One of them is that the language is not intended to depreciate in any way any questions as to salaries of municipal courts or county courts. It is true, however, that the district court salaries are an effective ceiling to any movements there and should have first consideration.

The other thing I want to say is this: If this next legislature enacts remedial legislation in this respect, it can become effective first in January of 1965. If it doesn't, and a subsequent legislature has to deal with it under the present law with respect to terms of court, it will be January 1969 before, under the constitution, any increases could become effective, I believe. So this matter, I think, from a time standpoint has come to be pretty critical at this session of the legislature, and I think justifies any emphasis that may exist with respect to the urgency of this recommendation, the adoption of which I recommend, Mr. Chairman, and move.

CHAIRMAN GINSBURG: You have heard the report and the motion. Is there a second?

ROBERT D. MULLIN, Omaha: I second the motion.

CHAIRMAN GINSBURG: Any discussion? There being no discussion, we will call for the question. All in favor say "aye"; contrary, "no." Carried.

[The report of the committee follows.]

Report of the Committee on Judiciary

For a number of years this committee has been chiefly concerned with considering and promoting the adoption of the Merit Plan for selecting judges in Nebraska. The great test will come at the general election in November.

The responsibility for this effort on the part of the Association has been that of a special committee. Several members of the Committee on Judiciary are members of the special committee and all have been actively concerned with this very important matter. In deference to this project, our committee has not undertaken any other major activity in the past year.

We wish, however, to refer to one matter in the area of the committee's interest which should engage the attention of the Association and receive its support. This is the subject of judicial salaries. Regardless of the adoption of the Merit Plan, salaries of judges, and particularly of district judges and supreme court justices, are greatly in need of improvement. We recommend that the

Association strongly support substantial increases in these salary levels.

The committee appreciates the budgetary problems which confront the legislature at each session. However, we are, we hope, on the verge of achieving important improvements in the selection of judges. It would certainly be false economy to set up the new system and then neutralize it by salary limitations which keep much of the best legal talent from being available. To the extent that able men are available, it is only simple justice to pay them adequate salaries.

Of all the state appellate court judges only three have lower salaries than Nebraska. Of all the judges of courts of general jurisdiction of the 50 states only three have lower salaries than Nebraska. The national average for appellate judges is about \$19,000 compared with our \$13,000 and for the trial judges it is about \$16,000 compared with our \$11,000.

It is significant that the seriousness of this situation is currently being widely recognized by legislatures throughout the country. Since 1960 well over one-third of the states have increased appellate court salaries and almost half (24 out of 50) have increased those of trial courts. These include Iowa, Missouri, Kansas, Colorado and South Dakota, to cite a few near at hand.

In August a request was made to the committee by a special committee of the District Judges Association for support of an instruction reform bill in the legislature, generally similar to LB76 introduced at the last session and to Federal Rule 51. The bill would require objections to instructions to be made at the trial and to limit review on appeal to objections so made. It was not feasible to have a meeting of our committee to consider this matter. The chairman requested individual expressions of opinion from members of the committee. The response was limited, as might be expected at this season, and widely diverse views were expressed. The committee calls the subject to the attention of the House of Delegates but plainly is in no position to make any recommendation.

We recommend that the Association strongly support legislation for a significant improvement in judicial salaries with particular reference to those of the supreme and district courts.

Tracy J. Peycke, Chairman
Milton R. Abrahams
James N. Ackerman
Wilber S. Aten
Paul P. Chaney

Thomas F. Colfer
Henry W. Curtis
George W. Haessler
Virgil J. Haggart
Hans J. Holtorf
James M. Knapp
Joseph H. McGroarty
Alexander McKie, Jr.
Robert D. Moodie
Farley Young

CHAIRMAN GINSBURG: Next we will have the report of the Committee on Lawyer Referral.

REPORT OF COMMITTEE ON LAWYER REFERRAL

Alfred G. Ellick

Mr. Chairman and Members of the House: The report is self-explanatory so I won't read it.

I would like to report to you that starting this coming Monday, November 5, our lawyer referral service in Omaha is going to begin operation. We have been very pleased with the response of the Omaha attorneys to this plan. We have fifty-five lawyers who have agreed to serve as members of the referral panel, each of them has paid a \$5.00 fee, and the program is going to be run or operated through our Executive Secretary.

I think you understand how this works but in case you don't it is simply a method whereby people who do not have a lawyer and want to seek a lawyer for legal advice can obtain the name of an attorney by calling the Bar Association or the Legal Referral Service. The Secretary handles the service in alphabetical order then gives the prospective client the name of an attorney on the referral panel. That attorney has agreed ahead of time to grant a half hour consultation for a fee of \$7.50. Now in various plans those fees differ. In Omaha we decided on \$7.50 for a half hour consultation.

The fees for any subsequent legal work to be done by the attorney on behalf of the client are then agreed upon between the lawyer and his client.

It has been my definite impression this year, as the President of the Omaha Bar Association, that we vitally need a referral service in Omaha. I have been called numerous times and our Secretary has been called numerous times by people who say they have just moved into town and don't know a lawyer but want to talk to some

attorney. And it may not be people who have just come into town. It can be people who for some reason or another have not had an occasion to consult an attorney.

This program is in operation in many other cities, in almost all major cities of the United States. As you know, the American Bar Association has a committee on lawyer referral service which has gathered many statistics to show that this is beneficial to the public. So we hope our plan will work here. This committee can report to you next year on exactly what has happened. We hope to make the benefit of our experience available to other communities in Nebraska. Possibly Lincoln would be the city next in line to consider establishing a referral service.

The report makes no recommendations so I presume it should be simply accepted and placed on file, and I will so move.

CHAIRMAN GINSBURG: Do you move for the continuance of your committee?

MR. ELLICK: Is it a special committee? Apparently this is a special committee so I will then move that the committee be continued.

CHAIRMAN GINSBURG: Any second?

EDSON SMITH, Omaha: I second the motion.

CHAIRMAN GINSBURG: You have heard the report and the motion. Is there any discussion?

SECRETARY-TREASURER TURNER: Mr. Chairman, has your committee given any study to establishing a referral on a state-wide basis?

MR. ELLICK: No, we haven't, Mr. Turner. That is something I think the committee should consider this next year. We have been fighting to get it established on a local basis, frankly, for the past twelve months and we have not considered it on a state-wide basis. I don't know how it would work on a state-wide basis but it is something that we will surely consider.

SECRETARY-TREASURER TURNER: The reason for my question is that I get a substantial number of calls largely from air base people there in Lincoln. They don't know anybody. Under our present setup I can't do any more than give them the names of a number of lawyers that I know to be active in that particular field, be it probate, automobile, or what-not, and let them make their own choice. That has helped but to me it isn't satisfactory.

MR. ELLICK: Would a referral service established by the Lincoln Bar solve that problem in Lincoln?

SECRETARY-TREASURER TURNER: Yes, it would.

MR. ELLICK: My own personal opinion is that it would be difficult to have this on a state-wide basis. It seems to me that each community is going to have to consider itself whether it should have a referral service.

PRESIDENT SVOBODA: How about regional, Al? I mean, like in your Scotts Bluff district where you have an active regional association. You have one at McCook.

MR. ELLICK: That's a possibility.

CHAIRMAN GINSBURG: Mr. Ellick, may I display my ignorance on this subject. Does this involve specialization; in other words, does the lawyer who becomes a member say that he'll take probate matters only or he'll take divorce?

MR. ELLICK: Well, the way it works is that the lawyer, when he enrolls in the program or agrees to become a member of the referral panel, is entitled to state on his card what matters he does not want to accept. It may be, for example, criminal matters, domestic relations matters, and if he so states that he doesn't want to handle domestic relations matters—for example, if his card is next in line when a prospective client calls up on a domestic relations matter—his card is passed over and his card is taken out and put down at the bottom of the pile so he loses his turn. Then the secretary simply goes to the next card to see if that lawyer will accept domestic relations matters and so forth until she comes to the card of an attorney who will accept it. So if a lawyer does want to exclude certain types of business, he can do so but he suffers the penalty of losing his turn in the card file.

CHAIRMAN GINSBURG: Is there any further discussion? Does anyone have any other questions?

MR. COHEN: This question I am asking may be a little delicate but I would like to know of the fifty-five lawyers that have registered for the panel, in your estimation are they the type of lawyers that could handle any business matter that would come up? For example, if it is a domestic relations matter are they the type of fellows who would give the client good service, because I can conceive of the fact that we may get blamed if something should happen in the course of the service.

MR. ELLICK: A good question. In the plan as we have set it up here in Omaha we have not had a screening board to review the qualifications of the lawyers participating in the plan. Some lawyer referral services do that. They will not accept an applicant to participate until he has been passed by a screening board. That

gets delicate and a little bit complicated and we decided we would not do it. So our only requirement here is that the applicant be a member of the Omaha Bar Association, because it is our Association that is sponsoring the plan and handling the finances and it is our secretary who is going to administer it under the chairmanship (I should have said prior to this) of Bill Day, Jr.

Sure, I suppose it is possible that an applicant might get a matter referred to him in which he is not an expert, but we think that is just a risk we are going to have to take. I will say this, that we have been very surprised at the number of fine attorneys, the caliber of the attorneys, who have agreed to participate in the plan. It is most encouraging and we have been surprised at the number who have applied, so we think it is going to work out fine. The biggest problem, I think, is whether our secretary, who is simply a woman working part time, is going to be able to handle all these calls. We are having some advertising in the *Sun* newspapers this Thursday and we hope in the *Omaha World Herald* this week end advising people that the plan will be in operation.

ROBERT D. MULLIN, Omaha: One other thing, Al. I think it is contemplated that for \$7.50 they will talk to the panel member and if he feels they should see some specialist he will, of course, refer them.

MR. ELLICK: Yes. That is a good point, Bob. If we can get a legal aid clinic established here in Omaha, which we are also working on, then we might have a full-time secretary to handle both legal aid and legal referral. Then I think our secretarial problem will be solved.

PRESIDENT SVOBODA: Mr. Ellick, I notice in some cities that part of the fee that the lawyer gains from referral work is paid to the Association for support of the program. Did you do anything like that here?

MR. ELLICK: No, the fee that the lawyer collects is going to be his to keep. He pays, however, an annual registration fee.

CHAIRMAN GINSBURG: Are there any further questions on this most interesting subject? If not, we will call for the question on the motion which is simply the continuance of the committee. All in favor say "aye"; opposed. Carried. The report will be ordered received and placed on file.

[The report of the committee follows.]

Report of the Committee on Lawyer Referral

There is presently no formal lawyer referral service operating anywhere in Nebraska. The Omaha Bar Association, however, is about to embark upon such a program and it is expected that a referral service will be functioning on a modest scale by the time of the annual meeting. There is no question about its need in Omaha; the president and executive secretary of the Omaha Bar Association are constantly being asked to recommend attorneys by persons who can pay a lawyer but simply don't know anyone to call. It is hoped that the experience gained from the Omaha program will be helpful to other Nebraska bar associations which may be considering establishing a referral service.

This committee can probably best serve the Association by giving a helping hand to local bar groups which may be considering setting up a referral program and by acting as a sort of clearing house for the exchange of information on the general subject of lawyer referral.

Alfred G. Ellick, Chairman
John R. Dudgeon, Vice-Chairman
James D. Conway
Kenneth H. Elson
Daniel D. Jewell
Murl M. Maupin
Francis L. Winner

CHAIRMAN GINSBURG: The next item is the report of the Committee on Legal Aid.

REPORT OF COMMITTEE ON LEGAL AID

William D. Blue

Mr. Chairman and Members of the House of Delegates: At the present time there are three free legal aid clinics operating in the State of Nebraska. The Lincoln Legal Aid Clinic is sponsored by the Nebraska College of Law, by the Lincoln Barristers' Club, and by the Lincoln Bar Association. We picked up another sponsor last year, the Lincoln Community Chest, which helps out somewhat with finances.

The office, as in the past, is in the College of Law building downtown in Lincoln. The procedure and work of this clinic during the past year have been about the same as in the past.

At Sidney the Cheyenne County Legal Aid Bureau has handled nine legal aid cases. Eight of these cases were referred to attorneys in Sidney in regard to divorce matters and out of these cases re-

ferred, petitions for divorce were filed in eight cases. There was also a case referral for defense in a garnishment action.

In Scotts Bluff County the Legal Aid Bureau was reactivated about two years ago, and during the past year the Legal Aid Bureau in Scotts Bluff has handled eleven cases. Scotts Bluff Barristers' Club operates this clinic.

In Omaha there has been a problem. In the past the Creighton University Law College operated the Omaha Legal Aid Clinic from September 1915 to 1960. At the present time there are a large number of residents in Omaha for whom free legal aid services are not available. However, there has been some action and interest on the part of Omaha in this matter.

The Study Committee of the Social Planning Unit of the United Community Services investigated this problem of lack of legal aid service in Omaha and submitted a report to the Board of Directors recommending several things, including the establishment of an independent Legal Aid Society in Omaha, staffed by a full time attorney and secretary and the maintenance of a small office under the supervision of the Board of Directors. It recommended that the Legal Aid Society be a full participating member of the United Community Services and that this be carried on each year. However it also recommended that additional funds be sought from other sources, if possible. I suppose they meant the Bar Association.

It further suggested that arrangements be made with Creighton University Law College to make available senior law students to assist, which is a rather standard procedure I think, and it also recommended that the Bar Association act as consultants to serve as members of the board of directors. It recommended that the Barristers' Club assist with the operation of this Legal Aid Clinic.

This report was approved by the Board of Directors of the United Community Services. They thought it was a very good thing; however, the Board indicated that no immediate action was possible, as there were no funds available. So really nothing came of this. However, in the face of this the Omaha Bar Association concluded that it should still try to establish a free legal aid society or clinic in Omaha in the form of a nonprofit corporation. It is hoped that after the society has been organized the Omaha Bar will be in a better position to find ways and means of obtaining the necessary money and necessary facilities to reactivate their legal aid clinic.

This was the picture as of the time the report was written. Perhaps recently the picture has changed, but I think this is an accurate portrayal of the situation as of now.

CHAIRMAN GINSBURG: Is there any discussion of the report? Any questions of Mr. Blue? There being nothing further and the report containing no recommendation requiring action by this House, the report will be ordered received and placed on file.

[The report of the committee follows.]

Report of the Committee on Legal Aid

Your Committee on Legal Aid respectfully submits the following report:

The Lincoln Legal Aid Clinic is sponsored by the Nebraska University College of Law, the Lincoln Bar Association, the Lincoln Barristers' Club and the Lincoln Community Chest. The office is in the College of Law building. The procedure and work of this clinic during this past year have been the same as in the past.

The Cheyenne County Legal Aid Bureau at Sidney has handled nine legal aid cases. Eight of these were referred to attorneys in Sidney on causes of action for divorce. Out of the eight referred, petitions were filed for divorce in five cases. There was also one referral for a defense against a garnishment action.

In Scotts Bluff County, the Legal Aid Bureau was reactivated two years ago, and during the past year has accepted eleven cases. The Scotts Bluff Barristers' Club handles the legal aid system.

The Creighton University Law College operated the Omaha Legal Aid Clinic from September 1915 to September 1960. At present there are a large number of residents for whom legal service is not available in Omaha. The Study Committee of the Social Planning Unit, United Community Services, investigated the legal aid situation in Omaha and on May 24, 1962, submitted a report to the Board of Directors, recommending that:

1. An independent legal aid society be established in Omaha, to be staffed by a full-time attorney and secretary, located in a small office with a minimum operating budget, under the supervision of a representative board of directors.
2. The Legal Aid Society, as a basic community responsibility, become a financially participating member of the United Community Services.
3. The United Community Services and the Omaha Bar Association develop joint financial arrangements for the support of the service each year.
4. Additional funds be sought from other sources as needed.

5. Cooperative arrangements be made with:
 - a. Creighton University Law School to make available senior law students for research and investigation.
 - b. The Bar Association to act as consultants and to serve as members of the board of directors.
 - c. The Barristers' Club to assist the attorney in peak periods.
 - d. Social agencies to provide board members and assist the attorney in social counseling as the need arises.

This report has been approved by the Board of Directors of the United Community Services, but the Board indicated no immediate action is possible as there are no Community Service funds available to establish and operate the clinic at this time. In the face of this, the Omaha Bar Association concluded that it would establish a legal aid society in the form of a nonprofit corporation. It is hoped that when the society has been organized, the Omaha Bar will be in a better position to find ways and means of obtaining the necessary money to start a legal aid clinic.

William D. Blue, Chairman
 Robert R. Camp
 Kenneth H. Elson
 Melvin K. Kammerlohr
 Jack R. Knicely
 Winsor C. Moore

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Procedure.

REPORT OF COMMITTEE ON PROCEDURE

William P. Mueller

Mr. Chairman, Members of the House: During the past year various problems came before this particular committee concerning various problems of procedure. It appears that a major problem which exists is the conflict which arises between the various district courts and also our federal courts in the assignment of the trial of cases. It was the opinion and the judgment of the committee in this regard that the case first given a trial assignment should have priority, and it was our recommendation to Judge Kokjer, coordinator with the committee, that he take this matter up with the various judges, including the federal judges, so that that could be considered by them.

It also appears that throughout the state there is no definite procedure concerning the handling of pre-trial conferences. It is

pretty much left to the discretion of the trial court, and it was our judgment in that regard that it should be left just as it exists, the only thing being that where possible the judge that handles the pre-trial conference should also be the judge who will try the case. This problem does not arise as much outstate, I am sure, as it does here in Omaha.

It was further noted—and this too is a problem which arises in the different districts—that each judge handles it differently, but it was our suggestion, and it is our recommendation, that the trial courts, in accordance with existing law, order the jury commissioner to disclose the names of persons drawn for jury service for the term immediately after the names are drawn by posting a list in the office of the clerk of the district court. There is existing law in that respect but, as I stated, some of the district judges do not do that and it is difficult to obtain a trial list prior to the time you commence trial.

We also considered matters concerning a third party practice to be adopted in Nebraska, the adoption of the federal court rules of allowing attorneys to sign all pleadings, doing away with the verification of the pleadings by the parties, and also the problem of service of process by the plaintiff in a suit against a minor under guardianship or an incompetent under guardianship. In that respect there was no action taken one way or the other but these were matters which were discussed and which are under consideration.

As to specific recommendations, a resolution was passed by the committee recommending to the Legislative Committee that legislation be prepared and submitted to the legislature that the existing physician-patient privilege statute be amended so that upon the filing of an action by a party the privilege which now exists as to the physical condition of the plaintiff or the defendant should be considered as waived.

It was also the recommendation of this committee, and a recommendation was made to the Legislative Committee, that the statute now in existence concerning instructions should be amended.

It is the recommendation of this committee, and I so move, that the committee be continued; that the members of the Association be requested to submit to the committee for study and action any problems arising in connection with procedural matters; and that the report of the committee be adopted.

CHAIRMAN GINSBURG: Is there a second?

JOHN M. BROWER, Fullerton: I second the motion.

CHAIRMAN GINSBURG: If you will pardon me, there are several matters that need to be clarified before we proceed with the motion. One is the continuance of the committee. That is automatic since it is a standing committee and therefore that is not necessary.

The second item is the item with reference to the recommendation concerning instruction procedure, which has already been eliminated by this House in the consideration of the report of the Committee on Legislation.

Now then I do want to go one step further and call your attention to the fact that the motion now provides that the report of the committee be adopted. If and when you do adopt the report you will therefore and thereby be adopting the resolution relating to the existing physician-patient privilege statute and the matter relating to the fees and subrogation claims. I think those are the only two matters that I see offhand now that would be considered legislation approved by this House for action by the Committee on Legislation, with, of course, the exclusion of the instruction procedure which has already been eliminated.

With that lengthy explanation is there any discussion of the report?

KENNETH H. ELSON, Grand Island: Mr. Chairman, on page 17 setting forth the subparagraph, a matter came up before the committee of which I am a member, that some district judges in the past have refused to permit counsel to study the instructions before they are submitted to the jury. In other words, counsel was not advised of the contents of the instructions; he didn't know what law he could argue properly to the jury.

I think that the subparagraph is proper and that we should follow up on the recommendations of this committee that there be some legislation enacted whereby counsel is permitted the opportunity to examine instructions that the court proposes to tender to the jury and that counsel be given the opportunity to point out to the trial court any obvious errors he sees in those instructions. It would assist the court in doing justice; it would be a protection of the parties involved.

I propose that this report be amended to exclude from the report the last six lines of that subparagraph which read as follows:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

I think that that subparagraph is proper and good, up to the last six lines of the subparagraph, so I move that that be deleted from this report.

CHAIRMAN GINSBURG: May I put it this way, Mr. Elson. Do you move as an amendment to the report that there be included therein the adoption of legislation which would consist of the first thirteen indented lines in the paragraph on page 17, with the elimination of the last six?

MR. ELSON: That is correct. I propose that as an amendment to the report.

CHAIRMAN GINSBURG: Is there a second to the motion?

JAMES M. KNAPP, Kearney: I second it.

CHAIRMAN GINSBURG: Is there any discussion on the amendment at this time?

MR. MUELLER: In my own opinion I think this is a good suggestion and I would be in favor of the amendment. The main objection, as I understand it, is the requirement that immediately after instructions are given trial counsel be required to take exception to those instructions. I think it is felt that is the part that is objectionable. I would certainly wholeheartedly endorse Mr. Elson's statement and I do endorse the amendment as suggested.

CHAIRMAN GINSBURG: Is there any further discussion relative to the amendment? If not, are you ready for the question on the amendment? All in favor of the adoption of the amendment say "aye"; contrary. Carried.

Now you have the motion before the house to adopt the report as amended. Is there any further discussion?

DWIGHT GRIFFITHS, Auburn: Mr. Chairman, on the question of the waiver of privilege, or that recommendation, I would assume, although I don't believe it is clearly stated in that paragraph, that the waiver comes about only by the action of the party filing the action; it would not waive as to a defendant who did not act affirmatively in filing the answer.

MR. MUELLER: That is correct. The purpose of the proposal is that upon the filing of an action . . .

MR. GRIFFITHS: But it is the party who files who waives the privilege and it is not waived as to the other party.

MR. MUELLER: That is correct unless he comes in and files a cross-petition and takes affirmative action, but it is necessary for him to do something in that regard insofar as filing is concerned.

CHAIRMAN GINSBURG: Is that clear now, Mr. Griffiths?

C. RUSSELL MATTSON, Lincoln: May I ask if this exists only during the existence of the action? By that I mean, supposing a plaintiff commences an action and then dismisses it. Is the privilege waived from then on or is it solely for the purpose of the action?

MR. MUELLER: Solely for the purpose of that action. It does not waive the privilege as it exists to other—well, as an example, other medical information or medical history of that particular individual. I mean, you can't go back forever and ever. It is only a waiver of the privilege for that particular litigation and it ceases upon the cessation of the litigation. It couldn't be continued, I don't believe.

CHAIRMAN GINSBURG: Are there any further questions?

ALFRED G. ELLICK, Omaha: Did your committee, Mr. Mueller, consider this in relationship to the medical profession? They are pretty sensitive about this kind of thing. Do you feel that there will be any problems with the doctors if we have a statute of this kind?

MR. MUELLER: That problem was discussed at great length and originally it was proposed that the privilege only be waived as to medical reports and items such as that, but that you would not be allowed to move in, for instance, and take the deposition of the doctors. I think that was the main fear, that there would be a tendency primarily for defense counsel to immediately move in, take the depositions of all the doctors, to more or less alienate them more, perhaps, than maybe we do at the present time. I think as in everything else it is certainly a situation where you have to exercise good discretion. I think the primary concern is to see that the true situation is developed. I don't think we should be primarily worried about the medical profession. But I do think it is a situation where it is up to counsel to exercise discretion. I think it would be more likely to facilitate an orderly disposition of the case. It has been allowing them to hide behind the privilege.

MR. ELLICK: That answers my question. Thank you.

Just one other minor point. I notice you are suggesting that the Committee on Legislation prepare the legislation. Is that the normal procedure?

MR. MUELLER: It was my understanding that it was the function and the duty of the Committee on Legislation, with our help or with such help as they requested or desired, but that the primary function of the Committee on Legislation was to prepare and present, with our cooperation and help.

CHAIRMAN GINSBURG: Are there any further questions?

VANCE E. LEININGER, Columbus: May I inquire as to the terminology that is used here, that the privilege "be amended in toto." Do you mean by that that the recommendation is that upon filing this action it is just as though that section of the statute does not exist as to the plaintiff? You say "amended in toto." Do you mean repealed in toto?

MR. MUELLER: It should be changed, it should be repealed, yes, because as the statute now reads the privilege is not waived until such time as evidence is offered at the trial. It is our position and our recommendation that upon the filing of a suit at that time the privilege is waived, so it would require repeal of the statute and new legislation in that regard. Perhaps the wording was not absolutely correct.

CHAIRMAN GINSBURG: Is there any other question? Are you ready for a vote on the motion as amended, that we adopt this report with the legislation recommended therein? Hearing no objections, I will call for the question. All in favor say "aye"; contrary. Motion carried.

[The report of the committee follows.]

Report of the Committee on Procedure

The Committee on Procedure respectfully submits the following report:

During the past year various problems concerning procedural matters were submitted by members of the bar to the committee.

It has come to the committee's attention that conflicts are arising as between the various state courts and also between the state courts and federal courts in the assignment of cases for trial. It was the opinion and feeling of the committee that the case first given a definite trial assignment should take priority over cases subsequently assigned for trial in other courts. In this connection, Judge H. Emerson Kokjer, coordinator with the committee, was to call this particular matter to the attention of the state and federal judges for their consideration.

Apparently, throughout the state there is no definite procedure concerning the necessity for or handling of pre-trial conferences. It was pointed out that some courts expect and order a pre-trial conference while other trial judges do not order a pre-trial conference unless requested by one or both of the attorneys involved. In this regard, the committee is of the opinion that the system of leaving it up to the individual trial judge and the attorneys was working out satisfactorily and that there need be no resolution or

change of the rule in this regard. The committee was of the opinion, however, that when pre-trial conferences were held, they should be held before the judge who would try the case in question, if possible.

A resolution was passed by the committee recommending to the Legislative Committee that they prepare legislation to be submitted to the legislature that the existing physician-patient privilege statute be amended in toto so that upon the filing of an action by a party the privilege heretofore existing as to the physical condition of the plaintiff, or defendant, should be considered as waived.

A resolution was also passed by the committee recommending to the Legislative Committee for further action by that committee that a new rule to govern instruction procedure in the district court should be adopted. The committee recommended to the Legislative Committee the adoption of the following rule:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury and prior to said arguments the court shall submit to counsel all of the instructions proposed to be given by the court and shall allow counsel such reasonable time, either before the arguments or prior to submission of the cause to the jury, as will enable counsel to examine said instructions for the purpose of making objection thereto if counsel deems any portion of said instructions erroneous. The court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Since the decision of the Nebraska Supreme Court in the case of *United Services Automobile Association v. Hills*, 172 Neb. 128, 109 N.W.2d 174, there has been a great deal of controversy as to the propriety of a party's attorney being allowed a reasonable fee for the collection of a subrogation claim for the respective party's Workmen's Compensation carrier and also collision carrier. The committee has recommended to the Legislative Committee that that committee study the existing situation as to property damage subrogation claims (having in mind the *Hills* case) and that appropriate action be taken by the Legislative Committee to insure that rea-

sonable fees be paid to the respective party's counsel for the collection of said subrogation claims.

The committee also recommends that the trial courts, in accordance with existing law, order the jury commissioner to disclose the names of persons drawn for jury service for the term, immediately after such names are drawn, by posting a list thereof in the office of the clerk of the respective district court.

During the year the following matters were also discussed although there was no definite action taken by the committee, either pro or con:

1. A third party practice to be adopted in the State of Nebraska.
2. Adoption of the federal court rule of allowing attorneys to sign all pleadings, thereby doing away with the necessity of filing pleadings verified by litigants.
3. The problem of service of process by the plaintiff in a suit against a minor under guardianship or an incompetent under guardianship.

It is the recommendation of this committee:

1. *That the committee be continued.*
2. *That the members of the association be requested to submit to the committee for study and action any problems arising in connection with procedural matters.*
3. *That the report of the committee be adopted.*

William P. Mueller, Chairman
H. Emerson Kokjer, Coordinator
Kenneth H. Elson
Lyle C. Holland
Hans J. Holtorf
Daniel D. Jewell
Charles E. Kirchner
Milton C. Murphy
Albert D. Schatz
Warren C. Schrempp
Bernard B. Smith
Thomas A. Walsh
Francis L. Winner

CHAIRMAN GINSBURG: The next item is the report of the Special Committee on Oil and Gas Law, Mr. Paul L. Martin, Chairman.

REPORT OF SPECIAL COMMITTEE ON OIL AND GAS LAW**Paul L. Martin**

During the year of 1962, there have been few suggestions for possible revision of any statutes with reference to oil and gas law in the State of Nebraska. During the past years, since oil and gas has become a major industry in Nebraska, the Nebraska State Bar Association has been very active in successfully promulgating laws to cover many items of procedure involving all phases of the industry. The legislature of Nebraska, 1961, enacted a group of bills sponsored by the Association.

It is the feeling of your committee that the Bar Association should take no position on controversial matters involving industry problems and should limit its activities to recommendations as to procedure and proper administration of the law.

We feel that the problems arising from the oil and gas industry in Nebraska are covered by present adequate laws and we do not anticipate problems arising requiring substantial changes in the present statutes. New problems will continue to arise and the members of the Bar interested in oil and gas law will have the responsibility of promoting legislation in the State of Nebraska to protect the interests of the public as well as the oil and gas interests.

The committee, therefore, recommends that it be continued in order that the Association may have a group available for study and recommendations on any problems arising in connection with oil and gas law and, if desirable, to present proposed legislation to the proper committee of the Association.

Mr. Chairman, I move adoption of the report.

CHAIRMAN GINSBURG: Is there a second?

JOHN J. WILSON, Lincoln: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion? There being no discussion, I will call for the question. All in favor of the adoption of the report say "aye"; contrary. The motion 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 submits the following report:

During the year of 1962, there have been few suggestions for a possible revision of any statutes with reference to oil and gas law in the State of Nebraska. During the past years, since oil and

gas has become a major industry in Nebraska, the Nebraska State Bar Association has been very active in successfully promulgating laws to cover many items of procedure involving all phases of the industry. The legislature of Nebraska 1961 enacted a group of bills sponsored by the Association.

It is the feeling of your committee that the Bar Association should take no position on controversial matters involving industry problems and should limit its activities to recommendations as to procedure and proper administration of the law.

We feel that the problems arising from the oil and gas industry in Nebraska are covered by present adequate laws and we do not anticipate problems arising requiring substantial changes in the present statutes. New problems will continue to arise and the members of the Bar interested in oil and gas law will have the responsibility of promoting legislation in the State of Nebraska to protect the interests of the public as well as the oil and gas interests.

The committee, therefore, recommends that it be continued in order that the Association may have a group available for study and recommendations on any problems arising in connection with oil and gas law and, if desirable, to present proposed legislation to the proper committee of the Association.

Paul L. Martin, Chairman
P. M. Everson
P. J. Heaton
Hans J. Holtorf
John D. Knapp
Hammond McNish
R. L. Smith
Ivan Van Steenburg
Floyd E. Wright

CHAIRMAN GINSBURG: This closes the printed program. I understand there is a representative of one of the special committees who would like to make a motion for the continuance of his committee.

RAYMOND FRERICH, Nebraska City: Mr. Chairman, Gentlemen: During the past two years I have been a member of the Committee to Collaborate with the Real Estate Association. Maybe that word "collaborate" has sinister implications to some of you but I assure you we have been working on behalf of the interests of the Bar Association.

There has been no formal report filed this year; there has been no formal meeting of the committee. Dick Ricketts is the chairman of our committee. He has been active and keeps in close touch with

the House counsel for the Real Estate Association. A year ago we did have several committee meetings and had a rather active project.

There are problems, however, which arise from time to time between the members of our Association and the Real Estate Association, problems which should be referred to our committee and which require attention of our committee. Our work is very similar to what Harry Cohen has described to you here as liaison between two organizations.

We therefore recommend that the committee be continued for the coming year and I make the motion accordingly.

CHAIRMAN GINSBURG: Is there a second?

SECRETARY-TREASURER TURNER: What is the formal name of your committee?

MR. FRERICHs: Committee to Collaborate with Nebraska Real Estate Association.

JAMES N. ACKERMAN, Lincoln: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion? Are there any questions anyone would want to submit to Mr. Frerichs with reference to that committee? May I say that I think it was two years ago we had considerable work for and with that committee. I think it is a very fine committee. I am not giving any electioneering speech in behalf of the committee. Is there any discussion? If not, we will call for the vote. All in favor of the motion say "aye"; contrary. Carried.

MR. FRERICHs: I might make one comment. There are, of course, statutes in some of the other states that have been trying to draw the lines between these two fields of work. There has been litigation in several states. Arizona is one of them involved. Maybe our committee work can be preventative and helpful to our Association.

CHAIRMAN GINSBURG: Thank you.

DEAN KRATZ: Mr. Chairman, I am here representing Frank Winter on the Committee of Joint Conference of Lawyers and Engineers. I am here to move that this committee be continued for the coming year. It is a new committee and they haven't met as yet and have no report to make.

CHAIRMAN GINSBURG: That is very fine. Is there a second to the motion?

PHILIP H. ROBINSON, Hartington: I second the motion.

CHAIRMAN GINSBURG: You have heard the motion that

the special committee be continued. Any discussion? All in favor say "aye"; contrary. Carried.

I want to call your attention to the fact that we are to reconvene at 1:30 and that means 1:30 prompt. We have considerable business to take care of during the afternoon session.

We will now stand adjourned until 1:30 P.M.

[The Wednesday morning session adjourned at 12:00 noon.]

WEDNESDAY AFTERNOON SESSION

October 31, 1962

The Wednesday afternoon session was called to order at 1:40 o'clock by Chairman Ginsburg.

CHAIRMAN GINSBURG: May we please come to order. Before starting the printed program for this afternoon, we have a special report of the President's Advisory Committee. I have asked Mr. Laurens Williams of this committee to present that report, and I now present to you Mr. Williams.

REPORT OF PRESIDENT'S ADVISORY COUNCIL

Laurens Williams

Mr. Chairman, Gentlemen of the House: This last year the Executive Council passed a resolution creating what I think is called the President's Advisory Council, which is comprised of all past presidents of this organization. It fell to my lot to be the first chairman of that group.

I report to you that I corresponded with all past presidents inquiring of them what, in their judgment, should be the function of the President's Advisory Council. I report to you that all past presidents replied and that it is the unanimous opinion of all past presidents that their function in this new council should be to do such things at such time as the President or the Executive Council of the organization asks it to do, and that we will not undertake to promote new or different ideas; we will just do whatever you call upon us to do.

The council has not had a meeting but will meet tomorrow. I am told by the Secretary that I have one duty, which is to move the continuance of the President's Advisory Council. On behalf of that council I now do so.

CHAIRMAN GINSBURG: Is there a second to the motion?

EDSON SMITH, Omaha: I second the motion.

CHAIRMAN GINSBURG: You have heard the motion that the President's Advisory Council be continued for the coming year. Is there any discussion on the motion? Does anyone have any questions of Mr. Williams relative to the affairs of that council or committee? If not, I will call for the question. All in favor say "aye"; contrary. Carried.

At this time we will refer back to Item 13 of the calendar and we will have the report of the Committee on Economics of the Bar and Professional Incorporation.

REPORT OF COMMITTEE ON ECONOMICS OF THE BAR AND PROFESSIONAL INCORPORATION

Alexander McKie, Jr.

Mr. Chairman, and Members of the House: First I would like to apologize for the chairman and to the members of the House for failure to have the report in the printed proceedings. George Turner's letter reminding me of the necessity for the report reached me the day before I was leaving the office to be gone for a month. I called Tom Davies and asked him if he would make the report and he said, "Yes, I'll make the report." It so turned out that he was unable to make the report. So since it is not in the printed proceedings I shall read some of the discussion that we had at the committee meeting.

Members of the committee met at the Cornhusker Hotel in Lincoln, Nebraska, during the midyear meeting of the Nebraska State Bar Association. The principal matter considered was the advisability of recommending the introduction of legislation to permit professional incorporation.

The committee considered the opinion of the Committee on Professional Ethics of the American Bar Association which was issued November 27, 1961. Although the opinion gives approval to the practice of law by a professional association or professional corporation, the opinion is severely qualified. The following is from the preamble to the opinion:

Lawyers who practice law in a form of organization usually designated by a professional association or professional corporation, which has the characteristics in whole or in part, of limited liability, centralized management, continuity of life, and transferability of interests, may be, but are not necessarily, acting in violation of one or more of the Canons. The mere fact that the form of organization used by lawyers to practice law is a professional association or professional corporation

does not in and of itself constitute a violation of any Canon as it is the substance of the arrangement and not the form that is controlling.

I presume that most of you have read Opinion No. 303 issued by the Committee on Professional Ethics. It is a very qualified opinion.

Your committee next considered the income tax advantages of a professional association. It was pointed out that although one or two such professional associations have received approval from the Bureau of Internal Revenue, a large number of cases remain undecided and it cannot be definitely stated at this time that a professional association will receive the approval of the Internal Revenue Bureau.

The committee next considered the manner in which professional associations might be authorized, whether by legislation or by supreme court rule. In Colorado, the supreme court adopted a rule entitled "Professional Service Corporations," providing that lawyers may form corporations under the corporation code if the various provisions of the rule are followed. Following is a brief summary of the rules:

1. The name must contain "professional company" or "professional association" or an abbreviation, but must also meet the standards of Canon 33 "as if all the stockholders of the corporation were partners."
2. The corporation must be organized solely to practice law through persons licensed in Colorado.
3. It may exercise corporate powers only in furtherance of and subject to its corporate purpose.
4. All shareholders must be Colorado-licensed lawyers who own their shares in their own right and practice law actively in the offices of the corporation.
5. Shareholders are required to dispose of their shares either to the corporation or to one eligible to be a shareholder.
6. The president must be a shareholder and director, and "to the extent possible" officers and directors should be lawyers. Lay directors or officers will not be allowed to "exercise any authority whatsoever over professional matters."
7. All shareholders shall be jointly and severally liable for all acts, errors, and omissions of the employees of the corporation, or as an alternative the corporation must maintain prescribed professional liability insurance.

The Florida legislature passed a Professional Services Corporation Act which was not sponsored by the Florida Bar, although the Bar subsequently endorsed the bill but gave it no active support in the legislature. The Board of Governors of the Florida Bar took the position that members of the Florida Bar were without authority to take advantage of the Professional Services Corporation Act, notwithstanding the legislative authority to do so, on the ground that the Florida Bar is an integrated bar and under the Florida constitution the Supreme Court of Florida has the exclusive jurisdiction of admissions and conduct of practicing lawyers. A petition was filed by the Florida Bar with the Supreme Court of Florida, which granted the petition with rules somewhat similar to those announced by the Colorado Supreme Court.

After consideration of the various elements above outlined, the committee felt that no action should be taken at this time, either through legislation or petition to the supreme court, particularly because of the uncertainty of obtaining any tax advantage.

As of July 1962 only eleven professional service corporations were established by Florida lawyers. Of these eleven, five are one-man corporations, three are four-men corporations, and there is one each consisting of three-men, six-men and seven-men corporations. Several of the eleven are not active and will not become active until the issuance of a United States Treasury Department ruling regarding the tax treatment to be given to professional service corporations.

The following is quoted from a report by a member of the Florida Bar, printed in the bulletin of the National Conference of Bar Secretaries, and I think it is interesting after the time that Florida has had to read the rather qualified approval which Florida attorneys have given:

From the statistics reflecting the number of lawyers who have incorporated and from opinions expressed by the general membership throughout the state, it appears that there remains a mixed attitude concerning the virtues of professional service corporations in Florida. Until a Treasury ruling is formulated defining the tax status of professional service corporations for federal income tax purposes, it will be difficult to evaluate the purported merits of professional service corporations advocated by those who have for some time vigorously supported the initiation of the practice of law in corporate form.

Your committee now has under study, a plan submitted to the Committee to Implement the Keogh Bill recently enacted by Congress in a watered-down form.

It is, therefore, the recommendation of your committee that no action be taken at this time, either through legislation or petition to the supreme court, to permit lawyers to practice law as a professional corporation.

The committee recommends that this committee be continued for further consideration of professional incorporation and plans to implement the Keogh Bill.

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

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

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

CHAIRMAN GINSBURG: Is there any discussion on the report of the committee? Any discussion on the report of the committee? Any questions that anyone has?

MR. McKIE: I might say that your chairman was a member of the committee. He attended the meeting and was very helpful in formulating the ideas of the committee.

CHAIRMAN GINSBURG: Thank you, Mr. McKie. Any further questions? If not, I call for the question. All in favor of the motion say "aye"; contrary. Carried.

MR. McKIE: May I just add one word which I did not include in the report. At the meeting in Lincoln the committee did not consider the question of the economics of the bar. The Omaha Bar Association has a committee which has put in a great deal of study and has now just issued, or is about to issue, a proposed new fee schedule. It has not yet been presented but will be presented, as I understand it, by Tom Burke on November 8 before the Omaha Bar Association. It is a very expensive piece of work and our committee felt that we could take the advantage which we will have from the work of the Omaha Committee of which, incidentally, I was a member.

CHAIRMAN GINSBURG: In view of the fact that Mr. McKie already has the floor, and I understand is prepared to make the report for the Committee on Publication of Laws, which is Item 27 of our calendar, I will ask Mr. McKie to make the report for that committee at this time.

REPORT OF COMMITTEE ON PUBLICATION OF LAWS**Alexander McKie, Jr.**

Bob Denney was unable to be here and asked me if I would make the report. I was not present at the committee meeting in Lincoln because my committee on the professional associations was meeting at the same time. However, the primary recommendation of the committee is contained in the same recommendation which was made last year, and that is that we request the legislature to send to each clerk of the district court in every county in the state every bill introduced and the data each day showing the progress of the bill through the legislature so that the district court clerks can keep the record of the legislative acts and their daily progress available to each county as a public record.

That was presented to the legislature last year, and I understand it was the clerk of the legislature who turned it down on the ground that there was too much expense involved. The whole purpose of it is so that each county, every lawyer in every county can be able to go to the clerk of the district court any day and find the status of any bill on the day immediately preceding.

We recommend that the matter again be presented to the legislature and that the legislature be urged to budget for the necessary expense.

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

CHAIRMAN GINSBURG: Is there a second?

KENNETH H. ELSON, Grand Island: I second the motion.

CHAIRMAN GINSBURG: You have heard the report. Is there any question, any discussion? You understand that the report recommends, as I understand it, three things: First, that the committee be continued; second, that an attempt be made through the Budget Committee to procure funds for the daily report; and, third, that the committee approach the deans of the two law schools to see whether they would be interested in taking on the matter of working on indices. Is there any discussion on the report? If not, are you ready for the question? All in favor say "aye"; contrary. Carried.

[The report of the committee follows.]

Report of the Committee on Special Publication of Laws

The Committee on Special Publication of Laws met in the Cornhusker Hotel on June 1, 1962, and reviewed the recommenda-

tions made to the Nebraska State Bar Association for the 1961 annual meeting of this association.

It was unanimously the opinion of the committee that the recommendations made for the year 1961 be repeated in this year's committee report. The recommendation made last year was to "request the Legislature to send to each Clerk of the District Court, in every county in the state, every bill that was introduced and the data each day showing the progress of the bill through the Legislature so that the District Court Clerks could keep available in each County as a public record the record of the Legislative Acts as they progress."

The committee also thought it was necessary to have all members of the association attempt to influence the Budget Committee and members of the legislature for the adoption of this recommendation, since the public interest requires that a daily record be made available in each and every courthouse in the State of Nebraska, so that the attorneys and other interested persons would know at all times the progress of pending legislation and those laws that are passed and approved with emergency clauses that immediately become law prior to adjournment of the legislature.

The committee also recommended that this committee be continued and, as an additional subject matter for next year's committee, contact be made with the deans of the two law schools of the State of Nebraska, University of Nebraska Law School and Creighton Law School, to see whether or not the law schools would be interested in taking on a project of attempting to work on the indexes of the Nebraska Statutes for the purpose of revising them and making a better index available, all subject to the approval of Walter James, who has charge of the Nebraska Statutes index. The thought of the committee was that such work should be an assistance program to Mr. James' work.

Robert V. Denney, Chairman
Dixon G. Adams
Robert Barlow
John Dudgeon
Winthrop B. Lane
Alexander McKie, Jr.
Warren K. Urbom

CHAIRMAN GINSBURG: Next is the report of the Committee on Public Service.

REPORT OF COMMITTEE ON PUBLIC SERVICE**William B. Rist**

Mr. Chairman, Members of the House of Delegates: The report of the Committee on Public Service does not require enlargement by me at this time except in one area, and that is the area of the public relations program that the committee has investigated during the past year.

At the beginning of this year the Executive Committee of the Bar Association authorized the committee to enter into a contract with a professional public relations firm for a preliminary study of this matter. The firm, in conjunction with the committee, undertook to do three things: First, it sought to increase publication of publicity in the various news media concerning the activities of the Bar during the past year.

Second, it was asked to make a study of the present activities of the Bar Association in the field of public relations and to do what it could to determine where, within that program, we could further our efforts.

Third, it was asked to make an examination of the public relation programs of other bar associations throughout the United States.

And, lastly, after consideration of these factors, to come up with a comprehensive recommendation, not only to include enlarging activities already under way, but also to make new suggestions.

Our committee met following the last annual meeting and shortly after that entered into the contract just described. We again met at the midyear meeting in June of this year, at which time we had before us evidence that increased publicity had been obtained for the activities of the Bar during the current year and we also had the benefit of a study of work done by other bar associations.

In August of this year the committee met again and at that time we considered recommendations for an enhanced program of public relations for the Nebraska Bar. That meeting resulted in the article which appears in the October issue of the *Nebraska State Bar Journal* commencing on page 142. If you have not already done so, we urge you to read that proposal. We believe that it merits the careful consideration of all attorneys in the state.

Our committee at the present time is awaiting the reaction of the members of this Bar as to what they feel would be a good public relations proposal. The committee, on its own, proposes to continue

its own investigations in this field and proposes, unless it receives suggestions to the contrary, to ultimately recommend a comprehensive program for the consideration of this Bar. In all probability it will result in our taking it up initially with the Executive Committee, and if they deem it necessary then back to this House of Delegates.

From our work during the past year it is our feeling that this is an area in which attorneys are inclined to devote insufficient time and thought. We trust that the work that the committee has done this year will stimulate your thinking along these lines.

I don't know, Mr. Chairman, whether this report requires a motion, inasmuch as no affirmative action is taken, but if it does I move the adoption of the report.

CHAIRMAN GINSBURG: Since the report contains no recommendations for affirmative action at this time, it is the ruling of this Chair that no action is required other than to order the report to be received and placed on file. However, the Public Service Committee is a special committee and therefore a motion is in order that the committee be continued. Do you so move, Mr. Rist?

MR. RIST: If it is a special committee, I do so move, Mr. Chairman.

CHAIRMAN GINSBURG: Is there a second to the motion?

JOHN J. WILSON, Lincoln: I second the motion.

CHAIRMAN GINSBURG: You have heard the motion that the committee be continued. Any discussion? Are there any questions concerning the report? Hearing none, I will call for the question. All in favor say "aye"; contrary. Carried.

[The report of the committee follows.]

Report of the Committee on Public Service

During the past year this committee has carried out two projects. One was the observance of the annual Bar Association project of Law Day U. S. A. The other was the carrying out of a pilot public relations program for the Nebraska Bar, through the use of a professional public relations firm.

The committee member in charge of the observance of Law Day U. S. A. 1962, was Edmund D. McEachen of Omaha, who successfully expanded this observance throughout the state. The committee is proud of his excellent work. Both the Douglas and Lancaster County Bar Associations carried out their own observance of this program, and through county chairmen appointed in other

counties, more counties participated in the program than heretofore. The coverage of this observance by the news media continued to expand and improve. In addition, there were many local programs conducted by members of the bench and bar in observance of this day. Again this year radio and television tapes of the Governor's proclamation of Law Day were broadcast throughout the state.

It is the judgment of the committee that our work in this area can be improved with an earlier appointment of the state Law Day chairman, and the committee proposes to make that appointment at or before the 1962 fall meeting of the state Bar.

We wish to again acknowledge the help and assistance received from Mr. George Turner, Secretary of the State Bar Association, and his staff for their help and assistance.

The committee continued its project of a series of articles entitled "It's the Law in Nebraska," published in the "Nebraska Farmer." The response received to these articles indicates this project is worth continuing and expanding wherever possible.

The pilot public relations program conducted by the committee during 1962 was carried out through the Carroll Company, a professional public relations firm of Lincoln, Nebraska. The committee was authorized to enter into a six months contract with this company for the purpose of investigating public relations programs of other bar associations, making an evaluation of the present public relations efforts of the Nebraska Bar, preparing a suggested public relations program upon an expanded basis, and promoting further the publicity of the activities of the Bar presently being carried out. This did not include work with reference to the Merit Plan proposal, in as much as the Association had previously made other plans in that area.

The committee was pleased with the increased publicity the activities of the Bar received during this six months period. We also believe that a workable program for increased public relations for the state Bar has been submitted, which merits the thoughtful attention of all lawyers. Our report on this proposed program is too lengthy to include in this report, so it has been published in the October issue of the *Nebraska State Bar Journal*. The committee will continue to meet with the Executive Committee of the Bar, with a view to implementing this program. It is the committee's opinion that the public relations program proposed by the committee merits the careful consideration and support of all Nebraska lawyers.

William B. Rist, Chairman
Auburn H. Atkins

Tyler B. Gaines
Patrick W. Healey
Richard A. Knudsen
James A. Lane
Edmund D. McEachen
C. Russell Mattson
Pliny M. Moodie
Donald F. Sampson
Bernard M. Spencer
Joseph C. Tye

CHAIRMAN GINSBURG: The next item is the report of the Committee on Liaison with Internal Revenue Service.

REPORT OF COMMITTEE ON LIAISON WITH INTERNAL REVENUE SERVICE

Warren K. Dalton

Mr. Chairman, Members of the House of Delegates: The committee in question is a committee in which this Bar Association participates rather than a committee of this Bar Association. This is a committee of lawyers from the nine states in the Omaha region of the Internal Revenue Service, which meets with representatives of the Internal Revenue Service. The purpose of the committee is to work out some ground rules for procedure with the Internal Revenue Service and to eliminate so far as possible points at which friction occurs and in which misunderstandings are likely to occur.

There has been one meeting which was held in Lincoln. There is another meeting which has been scheduled for Kansas City on November 15-16. The committee is in its formative stages, to say the least.

Mr. Chairman, I would like to move that the report be accepted, that the committee be continued, and I would like to suggest that the Executive Committee determine whether this should be a separate committee or whether it is properly a function of the Tax Section or some other committee.

CHAIRMAN GINSBURG: There is a motion that the Committee on Lawyers Liaison with the Internal Revenue Service be continued and that its functions be outlined and determined by the Executive Committee. Is there a second to the motion?

CHARLES F. ADAMS, Aurora: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion? I take it this is a relatively new field and if any of you have any questions

of Mr. Dalton I am sure he would be happy to answer them. Are there any questions of Mr. Dalton, any discussion? If not, we will call for the question. All in favor of the motion say "aye"; contrary. Carried.

[The report of the committee follows.]

**Report of the Committee on Lawyers Liaison Committee
with the Internal Revenue Service (Omaha Region)**

The initial meeting of the Lawyers Liaison Committee with the Internal Revenue Service (Omaha Region) was held in Lincoln, Nebraska, on August 10, 1962, attended by representatives from each of the nine states included in the Omaha region, and a number of representatives from the Internal Revenue Service, including Homer O. Croasmun, the Regional Commissioner, Frank C. Conley, the Regional Counsel, a number of the members of their staff, and Ernest W. Bacon, Edwin O. Bookwalter, and William C. Welsh, District Directors of Internal Revenue from Des Moines, Iowa, Kansas City, Missouri, and Aberdeen, South Dakota, respectively.

In recent years both the Internal Revenue Service and the American Bar Association have been concerned with mutual, practical problems relating to everyday operations of the Internal Revenue Laws. It was recognized that both the revenue agent and the practicing attorney have areas of friction relating to the preparation, filing, auditing, settling and contesting of Internal Revenue Tax matters.

A solution was proposed in 1955 when Mr. William Loeb, then Regional Counsel in the Atlanta Region, together with representatives of the American Bar determined that it would be beneficial for a forum to be provided where representatives of the Service and representatives of state and local bar groups might meet on a regional basis to exchange ideas on problems of mutual interest.

In 1959 the Section on Taxation of the American Bar Association began the organization of lawyers regional liaison committees and the Nebraska Bar, realizing the need for the effort, actively cooperated.

Liaison committees have been organized and are active in the Atlanta, Philadelphia, San Francisco, Dallas and Cincinnati Regions. The Boston and Chicago Regions, and now the Omaha Region, have also held their first meetings. Interest is very keen. The Service officials are cooperating wholeheartedly and their attitude and the atmosphere of the Omaha regional meeting was very open, frank and cooperative.

The initial meeting was stimulating and productive. Several of the subjects covered at the meeting were referred to members of the committee for summarization, with the hope that conclusions might be reached which could be used as ground rules in dealings between lawyers and the Internal Revenue Service. The next meeting will be held in Kansas City, Missouri, on November 15 and 16, 1962.

Members of the Nebraska Bar are encouraged to present their representative on this committee with accounts of their own satisfactory or unsatisfactory experiences with the Internal Revenue Service, and their observations, criticisms, and suggestions for the improvement of matters relating to practice before the Internal Revenue Service. In this way, matters of general concern throughout the region can be brought to the attention of the regional commissioner's office. There is every reason to believe that a serious effort will be made to reduce friction where it arises from practices and procedures which can be improved.

W. K. Dalton, Chairman

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Unauthorized Practice.

Preliminarily may I say that Mr. Reddish spoke to me before the opening of the session this afternoon and stated that this was a lengthy report and he wanted to be excused from going through it in detail and wanted to know if he could summarize it. I told him that of course he could, that that was the purpose of the oral report. But at the same time if there are any of the delegates in the room who have not read the report in detail, I suggest that they do so, and do so immediately, before we pass upon the recommendations of the committee.

REPORT OF COMMITTEE ON UNAUTHORIZED PRACTICE

Albert T. Reddish

Thank you, Mr. Chairman. Delegates: In summary I would point out that Nebraska now is honored through the appointment of George Turner to the American Bar Unauthorized Practice Committee. I would point out that George probably should receive condolences rather than congratulations, as he has already discovered he is facing a heavy workload.

Our problems this year have been in estate planning, problems with county officers, simulated process. They are old problems, some repeated, some variations on them. They are outlined in the report.

Under conference committees President Ralph Svoboda appointed UPL Committee members to conference committees with accountants and with the Real Estate Association. The Joint Conference of Lawyers and Accountants has determined to negotiate any complaints against members of either association similar to the activities of the conference committees of the American Bar and on the American Bar level. This appears an excellent step forward.

The Real Estate Association conference committee is in its infancy. This committee exists in one of the most controversial fields, and an effectively functioning conference committee could provide substantial progress in instructing realtors on limitations of their authority and cementing relations between the two groups.

Under Bar cooperation, the committee has received enthusiastic cooperation from Association officers, particularly President Ralph Svoboda and Secretary George Turner. The Attorney General's office also has been particularly cooperative. Among the bar generally, however, there exists the tendency to ignore unauthorized practice problems until they hit the pocketbook, to make general rather than specific complaints, and to fail to comprehend that the primary purpose of the fight against unauthorized practice is protection of the public. General complaints, such as "you fellows ought to do something about realtors," are of no benefit to the committee. The committee must have specific complaints, with samples of documents, names and dates.

Only a small number of lawyers probably knowingly assist in unauthorized practice. Such assistance, however, is grievous. A lawyer who prepares instruments for use by laymen, effectuates an estate plan designed by a layman, or merely acts as a scrivener for a realtor, pension plan broker, or bank, or trust company not only violates the Canons of Ethics, not only degrades his profession, but he deprives the individual of his right to independent, disinterested, confidential, privileged legal representation.

Under investigation, aside from fragmentary or shotgun complaints, weakness of investigative procedure presents the greatest obstacle to effectiveness of the committee.

The committee believes the Bar Association should look into the employment of a general counsel for the Association. The duties of the general counsel would be outlined by the Executive Council. He would work in cooperation with the Attorney General's office. Included in these duties, however, would be investigation and prosecution, under Executive Council direction, of both unauthorized and grievance complaints. In all matters the general counsel

would cooperate with the Advisory Committee, the Unauthorized Practice Committee, and the Attorney General's office.

The American Bar Association recommends employment of general counsel by all state bar associations. Kentucky, on May 1, 1962, became the fifteenth state known to the committee to employ counsel either on a part-time or a full-time basis.

It appears to the committee that all pending complaints could be fully processed and resolved or presented to courts had Nebraska employed the services of a general counsel the past year.

In conclusion, the committee emphasizes again that the battle against unauthorized practice is the public's fight, but that it must be carried on by the Bar. The committee recommends:

First: Continued aggressive opposition to activities of unauthorized persons in all aspects of the practice of law.

Second: Investigation by the Executive Council of the Bar of the desirability of employing a State Bar general counsel.

Third: If such investigation reveals employment of a general counsel desirable, able counsel be promptly retained.

Fourth: Continued cooperation among other committees of the Bar, conference committees and all members of the Bar in the battle against unauthorized practice of law.

Mr. Chairman, I move the adoption of the report as printed in the program.

CHAIRMAN GINSBURG: Is there a second?

JOHN J. WILSON, Lincoln: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion on the report of the Committee on Unauthorized Practice of Law? This report, as I have already indicated, is quite detailed and covers quite important ground. I hope we do not just pass over it perfunctorily. Are there any questions of Mr. Reddish?

I don't feel it is proper for me to intrude in the discussion but I was very interested when I read this report about a week or so ago and there was a comment in here about lay agencies practicing law. I will tell you of an experience that I had just the other day. I had one of these condemnation cases for a village, to take over a public utility. We got all through after a trip to the court of appeals and they had the hearing before the condemnation court and then I told my co-counsel, "Well, if the village fathers decide to go ahead I suppose it will be up to us to draft the bond ordinance and take care of all the details."

My associate said, "Oh, sure, I'll let you know." The next thing

I knew I got a letter that enclosed a copy of the canned ordinance and proceedings, all of which had been submitted to the village council one evening by a bond house, passed and adopted without knowledge of counsel at all. I was very much interested to learn that the bond houses furnish that service. That was news to me.

Now is there any discussion on that very interesting and very able report? If not, are you ready for the question? All those in favor of the motion so signify by saying "aye"; contrary. Carried.

[The report of the committee follows.]

Report of the Committee on the Unauthorized Practice of Law

A real estate broker draws a deed to Joe Doakes and/or Mary Doakes.

A notary public draws a will, places an acknowledgment form on it rather than attestation clause, and thereby deprives a beneficiary of her expectancy.

A trust officer or life underwriter attempts to prepare an estate plan. He elicits pithy comments from his prospects such as his lack of confidence in his wife's business ability, his fear that a son-in-law is heading toward alcoholism, and his son is shiftless. The prospect does not know his statements are not privileged, as the lawyer-client confidential relationship does not attach to either interview. In subsequent litigation his comments are reported from the witness stand resulting in deep-seated family bitterness.

Each of these represents an oft-repeated incident. In each the person who used the services of the unauthorized practitioner suffers through the unauthorized acts. In each, lawyers earned fees that they could not have earned had the services of a lawyer originally been sought.

These examples illustrate the statement of the Iowa Court that "the public, far more than the lawyers, suffers injury from unauthorized practice of law. The fight to stop it is the public's fight."

This is the nub of the unauthorized practice campaign. The corollary of it is that the courts and the bar must carry the burden of the fight.

Immediate Past President of the American Bar Association John C. Satterfield gave new impetus to the unauthorized practice campaign through his personal efforts while President and through sponsorship of a National Conference on the Unauthorized Practice of Law held in New York on May 25 and 26, 1962. The chairman of the Nebraska committee attended the conference and served on a conference evaluation committee.

Nebraska now is honored through appointment of our Secretary, George Turner, to the American Bar Unauthorized Practice Committee. Probably George should receive condolences for this appointment, as he is facing an excessive work load.

The year saw a number of additional developments in unauthorized practice on the national field. The Arizona Court re-stated its firm opposition to activities including filling out forms in the title insurance and real estate broker cases. The Court vigorously rejected the offensive "incidental to business" doctrine. Two Washington attorneys were suspended for a year because of their assistance to unauthorized practice through operation of an escrow company. The Wisconsin Court ruled an ICC lay licensee could not represent truckers before the Wisconsin Public Service Commission.

In Nebraska the committee observed continued growth of unauthorized practice activities, particularly in the estate planning field. It noted continued apathy among lawyers until their individual efforts were personally involved, and observed the truth that most unauthorized practice is founded upon the active or passive cooperation of lawyers. Positively, the committee noted a greater willingness among offenders to cooperate in efforts to halt unauthorized activities.

Estate Planning. This field has presented the greatest scope of unauthorized activity, perhaps because it offers the unauthorized practitioner the largest potential return. The life underwriters, who formed a corporation with the avowed purpose of estate planning and published pamphlets offering by implication to perform legal services, are cooperating with the committee in efforts to modify their articles, their pamphlets and their activities to take them out of the unauthorized practice fold. We sincerely hope this matter can be closed before the end of 1962.

The committee has fielded many complaints concerning activities of trust officers in one city, and general complaints concerning activities of bankers and trust officers in all sections of the state. In one instance it appears a trust officer held a conference similar to that stated in the opening illustrations, and proceeded to draft a will proposal which emitted a vigorous sense of complete distrust of all his family members. The committee has reviewed the problem with the attorneys for the particular trust company, and is now sending a letter warning of the risks of unauthorized practice to all banks and trust companies in the state. Such letters have proved particularly effective in several states.

A mutual fund salesman, by radio advertising, solicited inquiries into a revocable trust agreement, purportedly designed to

eliminate the need and publicity of probate and to save the expense of lawyers. Upon request of the committee the advertising has been stopped, and submission of proposed revocable trust forms temporarily withheld pending final disposition of the complaint.

The case of a former veterans service officer who prepared will proposals for veteran benefit recipients, naming himself as executor, is still being investigated. This is an extreme case and if investigation supports initial reports, court action may be necessary.

County Officers. The committee continues to receive reports of the drafting of deeds and other instruments by county officers. It also has learned that certain county judges permit laymen to file pleadings in their courts, particularly with respect to delayed birth registration. These judges apparently have acted under the misguided view that it is necessary to charge a fee to be engaged in unauthorized practice. The Nebraska Supreme Court has expressly held a fee is not necessary.

The committee has sent letters commenting on the impropriety of these acts to all registers of deeds and to all county judges.

Simulated Process. From reports received by the committee, our previous campaigns against simulated process seem to be bearing fruit. Only one report of use by a Nebraska firm has been received. The weakness of the Nebraska statute is well demonstrated, however, in the instances of use by outstate firms. Under the Nebraska statute sanctions against provisional remedies apply only where the creditor has been convicted of a misdemeanor. As proposed by the committee the legislation would have barred resort to provisional remedies in any case where it appeared simulated process had been used. As nonresidents are not subject to Nebraska process and thereby are substantially immune from misdemeanor conviction, the statute's sanctions are not available against them. Unfortunately, the committee continues to receive a fair number of complaints against out-state firms. In addition, the committee is aware that certain publishing firms prepare and sell packages of collection forms which include "final notices before suit" and "notices of intention to garnish." If the committee were able to receive one or more of these packages of forms, complaint could be filed with the Federal Trade Commission which has previously entered cease and desist orders against firms preparing simulated process forms. The committee is forwarding one complaint to the Missouri committee for action.

Conference Committees. President Ralph Svoboda appointed UPL Committee members to conference committees with account-

ants and with the Real Estate Association. The joint conference of lawyers and accountants has determined to negotiate any complaints against members of either Association, similar to the activities of the conference committees on the American Bar level. This appears an excellent step forward. The Real Estate Association Conference Committee is in its infancy. This committee exists in one of the most controversial fields, and an effectively functioning conference committee could provide substantial progress in instructing realtors on limitations of their authority and cementing relations between the two groups.

Municipal Bond Firms. Several years ago the committee had numerous complaints concerning unauthorized practice activities of municipal bond firms. Conference with counsel for these firms resulted in modification of fiscal agent contracts and appeared to relieve verbal offers of legal assistance. Developments during the past year, however, have cast a shadow upon the apparent improvement in conduct. Several complaints against municipal bond firms are under consideration by the committee, but none has advanced to the investigative stage.

Bar Cooperation. The committee has received enthusiastic cooperation from Association officers, particularly President Ralph Svoboda and Secretary George Turner. The Attorney General's office also has been particularly cooperative. Among the bar generally, however, there exists the tendency to ignore unauthorized practice problems until they hit the pocketbook, to make general rather than specific complaints, and to fail to comprehend that the primary purpose of the fight against unauthorized practice is protection of the public. General complaints, such as "you fellows ought to do something about realtors," are of no benefit to the committee. The committee must have specific complaints, with samples of documents, names and dates.

Only a small number of lawyers probably knowingly assist in unauthorized practice. Such assistance, however, is grievous. A lawyer who prepares instruments for use by laymen, effectuates an estate plan designed by a layman, or merely acts as a scrivener for a realtor, pension plan broker or bank or trust company not only violates the Canons of Ethics, not only degrades his profession, but he deprives the individual of his right to independent, disinterested, confidential, privileged legal representation.

Investigation. Aside from fragmentary or shotgun complaints, weakness of investigative procedure presents the greatest obstacle to effectiveness of the committee. Each committee member is a practicing lawyer, burdened with demands of office and court work,

and harassed with cries of procrastination from clients. Committee members can devote only limited time to investigation of complaints.

The committee believes the Bar Association should investigate the employment of a general counsel for the Association. The duties of the general counsel would be outlined by the Executive Council. He would work in cooperation with the Attorney General's office. Included in these duties, however, would be investigation and prosecution, under Executive Council direction, of both unauthorized and grievance complaints. In all matters the general counsel would cooperate with the Advisory Committee, the Unauthorized Practice Committee, and the Attorney General's office.

The American Bar Association recommends employment of general counsel by all state bar associations. Kentucky, on May 1, 1962, became the 15th state known to the committee to employ counsel either on a part-time or a full-time basis.

At the National Conference on Unauthorized Practice of Law, general counsel of the Michigan, Ohio, Illinois and Texas Bar Associations presented papers. General counsel in Indiana, Wisconsin, and other associations were active in the program. The committee chairman for the first time observed fully the benefits of general counsel and was highly impressed with the desirability of employing a general counsel in the Nebraska Bar.

It appears to the committee that all pending complaints could have been fully processed and resolved or presented to courts had Nebraska employed the services of a general counsel the past year.

Committee Organization. The committee believes each metropolitan community and each judicial district or regional bar association should have an unauthorized practice of law committee. These committees should report regularly to the State Bar UPL Committee to keep it advised and co-ordinate efforts. Wherever possible it would be desirable to have a member of the State Bar UPL Committee on the local, district, or regional committee. Such committees would provide much broader coverage and would offer improved opportunity to publicize and promote the campaign against unauthorized practice of law. The committee urges any existing local committees to maintain constant communication with the state committee.

The committee has resolved to designate one committee member as subchairman for each broad phase of its activities. Subcommittees will be formed within the state committee, and where deemed appropriate the committee desires to appoint additional sub-

committee members who are not members of the state Unauthorized Practice Committee. The committee believes such organization will spread the work load, improve its efficiency and stimulate interest among both committee members and the bar generally.

Public Service. The committee report adopted in 1961 recommended preparation of a public service pamphlet for distribution among the public describing what a lawyer is, what he does, the reasons for the prohibitions against unauthorized practice of law, the damages which follow, and the need for having only a lawyer give legal advice and perform legal services. The Unauthorized Practice Committee is presently cooperating with the Committee on Public Service in preparation of such a pamphlet.

The committee has made preliminary arrangements for discussions with law students at both of Nebraska's excellent law schools, Creighton and the University of Nebraska, on unauthorized practice problems. The committee believes early and comprehensive training in ethics and unauthorized practice problems will substantially curb future assistance by practicing lawyers in the unauthorized practice of law.

In conclusion, the committee emphasizes again that the battle against unauthorized practice is the public's fight, but that it must be carried on by the bar. *The committee recommends:*

1. *Continued aggressive opposition to activities of unauthorized persons in all aspects of the practice of law.*
2. *Investigation by the Executive Council of the Bar of the desirability of employing State Bar general counsel.*
3. *If such investigation reveals employment of a general counsel desirable, able counsel be promptly retained.*
4. *Continued cooperation among other committees of the Bar, conference committees and all members of the Bar in the battle against unauthorized practice of law.*

Albert T. Reddish, Chairman
Bevin B. Bump
Edward F. Carter, Jr.
Raymond M. Crossman, Jr.
Walter H. Smith
William A. Stewart, Sr.

CHAIRMAN GINSBURG: The next item on the program is the report of the Committee on Medico-Legal Jurisprudence.

REPORT OF COMMITTEE ON MEDICO-LEGAL JURISPRUDENCE

George B. Boland

Mr. Chairman, Members of the House of Delegates: The Committee on Medico-Legal Jurisprudence consists of Mr. George L. DeLacy, Joseph P. Cashen, George A. Healey, Harry L. Welch, Murl M. Maupin, and myself.

The Committee on Medico-Legal Jurisprudence met at the Omaha Club on September 19, 1962. General discussion was had with reference to the attendance of doctors at trials and the co-operation which should properly exist between attorneys and doctors. It was the consensus of the committee that attorneys do and should continue to cooperate with the doctors and arrange as far as possible in advance for their attendance at the trial and to give the doctors a notice of any delays or changes in the progress of the trial. It was felt that the doctors should correspondingly co-operate with the attorneys so as to make themselves as readily available as possible considering the nature of their profession and their other hospital and office commitments.

It was brought to the attention of the committee that the North Dakota Bar Association has recently adopted the National Inter-Professional Code for Physicians and Attorneys. In doing so, North Dakota followed the precedent set by the Nebraska State Bar Association on October 5, 1960, and by the Nebraska State Medical Association on May 4, 1961.

It was recommended by the committee that the Inter-Professional Code for Physicians and Attorneys be reviewed periodically by members of the bar and that appropriate mention of it be called to the attention of the Nebraska State Medical Association.

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

CHAIRMAN GINSBURG: Is there any second to the motion?

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

CHAIRMAN GINSBURG: You have heard the motion. Is there any discussion? If not, all in favor say "aye"; contrary. Carried.

[The report of the committee follows.]

Report of the Committee on Medico-Legal Jurisprudence

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It was recommended by the committee that the Inter-Professional Code for Physicians and Attorneys be reviewed periodically by members of the bar and that appropriate mention of it be called to the attention of the Nebraska State Medical Association.

Geo. B. Boland, Chairman
Joseph P. Cashen
George L. DeLacy
George A. Healey
Murl M. Maupin
Harry L. Welch

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Uniform Commercial Code.

REPORT OF COMMITTEE ON UNIFORM COMMERCIAL CODE

Daniel Stubbs

Mr. Chairman, Members of the House of Delegates: Since Mr. Boland referred to the members of his committee, permit me to call your attention to the members of this committee as they are printed in the program, because all of them have done a great deal of work in studying the Commercial Code and in working out all of the details that were necessary to prepare it for introduction in the legislature. That has been accomplished. The bill has been prepared by the legislative drafting service under the supervision of Jack Wilson. It will go to the printer Monday of next week so that it will be ready for introduction on the first day that the legislature meets and should be Bill No. 1, 2 or 3, Jack says.

The bill is 265 pages long. You can see what that will do to the session laws. When adopted it will probably constitute a separate volume in your statutes of Nebraska.

The committee recommends that the Special Committee be continued for the purpose of promoting the passage of the act in the legislature, and for that purpose I move the adoption of the report and the recommendation, Mr. Chairman.

CHAIRMAN GINSBURG: You have heard the report. Is there a second?

PETER E. MARCHETTI, Omaha: I'll second it.

CHAIRMAN GINSBURG: Is there any discussion?

CHARLES F. ADAMS, Aurora: Mr. Chairman, in view of the remarks of Mr. Overcash this morning I would like to inquire: What is the status of the coordination between your committee and the Legislative Committee on this most important subject?

MR. STUBBS: Well, Chick, there has been none up to this point because so far our efforts have been directed toward making sure we wanted the Uniform Commercial Code and then placing it in a form which would take care of the existing Nebraska statutes.

Of course from now on anything that is done, as far as I am concerned, if I am continued as chairman, would be done only in cooperation with and after consultation with the Legislation Committee. It would have to be coordinated, of course. We would only do what they asked us to.

CHAIRMAN GINSBURG: From my broad experience in the field, I would call Mr. Adams' attention, and also that of Mr. Stubbs—and this is a legitimate inquiry which Mr. Adams has made—to the method that has been followed in the past. You recall, two years ago we had the Legislative Committee and we also had the Committee on the Merit Plan. The Committee on the Merit Plan drafted the bill, proposed it, sponsored it, and at the same time it was the duty as well as the privilege of the Legislative Committee to assist in sponsoring it, and as a matter of fact we said this is the special committee which has been created by the Bar Association for this purpose. So there is no question about coordination between the committees.

Are there any further questions?

PETER E. MARCHETTI, Omaha: Mr. Chairman, as one who had the opportunity this summer of attending the University of Michigan Law School for two weeks, studying just two sections, Section 2 and Section 9 of this Uniform Code, I would like to commend this committee for the tremendous work that I know has been done, from reading the report, in order to make it possible to have this bill introduced the first day of the legislature. Having

spent four hours a day on two sections of this Code, I know this committee has done a tremendous job.

CHAIRMAN GINSBURG: On behalf of the committee I thank you, Mr. Marchetti.

MR. STUBBS: May I express the appreciation of the committee for Mr. Marchetti's kind remarks.

Let me say that when I refer to the members of the committee I mean to exclude the chairman because all he has done has been to act as the coordinator; the members of the committee have done the work.

CHAIRMAN GINSBURG: Is there any further discussion on the report of the Committee on Uniform Commercial Code?

MR. STUBBS: I might mention this: Because of the size and the extensive changes that are made in a lot of the law that you know now, the bill will be introduced to become effective (our thought is now) at least one year after its passage; probably if it is passed during the '63 session, on September 1 of '64, everyone will have at least a year to study it and to make changes as needed in their practice. This is particularly true of the banks that will have to change all their forms.

CHAIRMAN GINSBURG: Any further discussion? Are there any questions? Is there anything further you wish to add, Mr. Stubbs?

MR. STUBBS: Jack Wilson suggests that I tell you that in the Commercial Code there is an alternative provided for filing liens, security transactions, as they are called. You can either go to a central filing, which would place everything in Lincoln, or you can go to local filing.

The committee agreed that we would keep our local filing systems and we have not gone to the central filing at all, although there was some thought that eventually we would like to go to central filing in some fields, but we didn't feel we should at the present time. The law would still be uniform because that is an alternative provision in the act as drawn. We thought to go to central filing even in a small way now would be too big a change and it might endanger the entire passage of the act.

MR. MARCHETTI: In Wyoming they use both methods. In Wyoming local filing is had in every instance and central filing only in those instances where your security agreement provides for a lien on the proceeds of goods, such as inventory. That was worked out in the Wyoming legislature when it became effective last January 1. They use the local generally and the central filing

in the Secretary of State's office in specific instances where your security agreement covers the proceeds of the goods on which your lien was originally. . . .

MR. STUBBS: This bill doesn't go that far. We retained local filing.

CHAIRMAN GINSBURG: Is there any further discussion? If not, are you ready for the question? There being no further discussion I will call for a vote on the motion to accept the report of the Committee on Uniform Commercial Code. All in favor say "aye"; contrary. Carried.

[The report of the committee follows.]

Report Of The Committee On Uniform Commercial Code

This special committee has met several times during the course of the year and devoted a great deal of time and study to the preparation of a specific bill to introduce the Code in the 1963 legislature of Nebraska. In this respect, it was necessary to conform the Code to existing statutes; to repeal many statutes which will be superseded by the Code and to amend others. This has been accomplished and the Code is ready for introduction.

We have continued to receive cooperation and substantial help from the Nebraska Bankers Association and we are assured of their support in promoting the adoption of the Code by the legislature.

It is the opinion of the committee that the effective date of the legislative act which adopts the Code should be delayed until September, 1964, so that all who are interested in it will have at least a year to become familiar with it before it becomes effective. The legislative act will so provide.

The committee recommends that the special committee on this subject be continued for the purpose of promoting the passage of the Uniform Commercial Code by the legislature.

Daniel Stubbs, Chairman
A. Lee Bloomingdale
John W. Delehant, Jr.
Robert C. Guenzel
Lynn O. Hutton, Jr.
Walter D. James
Barton H. Kuhns
Winthrop B. Lane
John C. Mason
Ben F. Shrier
Arthur C. Sidner
Frank D. Williams

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Attorney Fees in Governmental Matters, Mr. Leo Eisenstatt, chairman. Is there anyone here to report for that committee?

SECRETARY-TREASURER TURNER: Mr. Chairman, since their only recommendation is that the committee is no longer necessary and could be discharged, on behalf of the chairman I would move that the recommendation of the committee be approved by the House.

CHAIRMAN GINSBURG: It has been moved by Secretary Turner that the report of the Committee on Attorney Fees in Governmental Matters be approved and that the recommendation made by that report, that the committee be dissolved, be accepted. Is there a second to that motion?

JOHN J. WILSON, Lincoln: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion? If not, we will call for the question. All in favor say "aye"; contrary. Carried.

[The report of the committee follows.]

Report Of The Special Committee on Attorneys' Fees in Governmental Matters

Since this committee was continued by the President of the State Bar for the purpose of following the progress of federal statutes through Congress dealing with payment for defense counsel in the nature of a public defender and to encourage the American Bar Association to work on the matter of fee limitations for Governmental services, it remained active for these purposes.

Since that time the House of Delegates has considered the matter and at the meeting in San Francisco in August of 1962 specific action was taken. The following is copied from Volume 7, No. 9, *American Bar News*, dated September 15, 1962.

Defense of Indigents: Heard a report by Chairman John W. Cummiskey of the Committee on Legal Aid Work urging continued effort toward passage of a bill now before Congress which would provide for creation in each federal court district of a Public Defender or payment of \$50 daily compensation to court appointed attorneys.

Fee Limitations: Authorized creation of a seven-member Special Committee on Federal Limitations on Attorneys Fees to consider and determine (1) the extent to which limitations are imposed by Federal statutes and administrative regulations

upon attorneys' fees; (2) the extent to which such limitations affect the availability and quality of legal services to persons subject to such regulations; (3) what remedial legislation or administrative action may be necessary or desirable, and (4) to recommend such plan of action by the ABA as may be in the interest of the bar and the public. The project was recommended to the House by the Committee on Economics of Law Practice headed by Lewis F. Powell, Jr.

In view of the foregoing we feel that the matter is being given proper attention, and we again recommend that our committee be dissolved.

Leo Eisenstatt, Chairman

CHAIRMAN GINSBURG: The next item is the report of the Committee on Cooperation With Law Schools.

REPORT OF SPECIAL COMMITTEE ON COOPERATION WITH LAW SCHOOLS

Walter P. Lauritsen

Mr. Chairman and Members of the House of Delegates: This is a special committee which is actually used only on those occasions when there are sore spots. If you will refer to Item 5 you will see the indication that we have had no formal meetings of the committee this year, which speaks well for a number of things.

Running through the report in summary only, you will notice we have again published pictures and biographical sketches of the seniors of each of the law schools. This met with favorable response last year and I believe again this year and we suggest that that be continued.

Enrollments of the two law schools are up slightly. It has been estimated by Dean Dow that it is approximately ten per cent above. He suggests what I believe is obvious that it will not be sufficient to supply the needs. Placement of graduate attorneys is no problem, and we consider that it is a public relations job for every attorney of this Bar to encourage qualified persons for the study of law.

The relationships between the colleges and the Bar Association as far as we know are excellent. We think that their training is good. We have received no complaints and as far as we know there are no sore spots. The matter that was considered in detail last year has apparently been ironed out with the confident feeling that our law professors are accepting an entirely normal load by comparison with any other law school.

Only because this committee is of value when there are things that need to be said between Bar Association and law schools or the other way around, we suggest the continuance of this special committee, although there has been no real work before it this year. Accordingly, Mr. Chairman, I move that the report be adopted, that the practice of publishing the pictures and biographical sketches be continued, and that the special committee be continued.

KENNETH H. ELSON, Grand Island: I second the motion.

CHAIRMAN GINSBURG: You have heard the report and the motion and there has been a second. Is there any discussion of the report of the Committee on Cooperation with Law Schools?

I take it that the only formal action really required by the House is that the committee be continued. Any discussion? It not, we will call for the question. All in favor say "aye"; contrary. Carried.

[The report of the committee follows.]

Report Of The Special Committee on Cooperation With Law Schools

The committee respectfully reports:

1. As recommended by last year's committee, publication of photographs and biographical sketches of Nebraska and Creighton Law School seniors was continued. The material appeared in the January, 1962, issue of the *Nebraska State Bar Journal*. *It is recommended that this practice be continued.*

2. It is reported that enrollments of the colleges are up slightly but not sufficiently to offer a solution to the present or future need for lawyers. Placement has not been a problem. Lawyers should continue to encourage consideration of the profession by qualified persons.

3. The committee believes that the law schools are offering quality legal education and are producing well-trained graduates.

4. The relationship between the law colleges and the organized bar is excellent with full cooperation between them.

5. The committee has received no complaints, and no problems have been suggested for its attention. There have been no formal meetings during the year. The committee does, however, serve a purpose in availability for advice and assistance when needed, is a means by which the deans of the law schools can secure the atten-

tion of the Bar, and the Bar can take suggestions to the schools. *It is accordingly suggested that the committee be continued.*

Walter P. Lauritsen, Chairman
Robert D. Baumfalk
Ivan Blevens
C. F. Bongardt
David Dow
James A. Doyle
I. H. Floersch
Joseph L. Leahy
Daniel J. Monen, Jr.
Wilfred W. Nuernberger
Charles E. Oldfather

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Military Law.

REPORT OF COMMITTEE ON MILITARY LAW

James A. Nanfita

Mr. Chairman and Members of the House: This committee has been in existence for two years. The first year we actually did some work. The second year we have not had to do any work.

It seems that the military were satisfied with what we did the first year; the second year they had no need for us. Even though we requested—or told the military that we were available to assist them in any matter that might come up with regard to better liaison between the military and the civilian, SAC and the other Judge Advocate's offices here in town have not requested any help.

However, because of the fact that the military seems to want the civilian counterpart to assist them only whenever they get into a muddle, we feel that the committee should be allowed to remain active for at least another year, and it is the recommendation of the committee that the committee be allowed to stay in existence for at least one more year to find out what the military wants on this matter.

CHAIRMAN GINSBURG: Is there a second?

KENNETH H. ELSON, Grand Island: I second the motion.

CHAIRMAN GINSBURG: You have heard the motion. It has been moved and seconded that the Committee on Military Law be continued for an additional year. Is there any question or any discussion? If not, we will call for a vote. All in favor say "aye"; contrary. Carried.

CHAIRMAN GINSBURG: The next item of business is the report of the Committee on Federal Rules of Procedure, Mr. William C. Spire, Chairman.

REPORT OF COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE

William C. Spire

Mr. Chairman, Mr. President: Our committee has been outstanding this year in that we have had no expenses, no meetings, and no mailings. The Federal Rules of Civil Procedure are in the process of being remodeled, renovated, and brought up to date. Through appointment by Chief Judge Johnsen of the Eighth Circuit I have been serving this year on the Eighth Circuit Committee on the Revision of the Federal Rules. Judge J. Smith Henley of the Eastern District of Arkansas has been chairman of that Circuit Committee. Mr. Flavel Wright of Lincoln has also been serving on it.

Our recommendations have gone forward at the request of the Chief Justice and the Judicial Conference of the United States, as they have from all the circuits in the country. There will undoubtedly be some rule revisions adopted. They are not actually particularly significant, which is why I haven't bothered to fill your program with a long printed report on it. They are primarily of a minor nature, but at the Judicial Conference of the United States in May many of these proposed revisions, coming not only from our circuit but from the other circuits where similar committees have been functioning, will be adopted by the Judicial Conference and put into effect.

For that reason I recommend that our committee be continued for a period of one year for the primary purpose of circulating the bar with a summary and substance of what revisions of the rules are ultimately adopted by the Judicial Conference.

CHAIRMAN GINSBURG: You have heard the report and the motion that the Committee on Federal Rules of Civil Procedure be continued. Is there a second?

ALFRED G. ELLICK, Omaha: I second the motion.

CHAIRMAN GINSBURG: It has been moved and seconded that the Committee on Federal Rules of Civil Procedure be continued. Is there any discussion? Are there any questions? If not, I will call for a vote. All in favor say "aye"; contrary. Carried.

The next item I am going to skip for the time being and go down to the report of the Committee on Title Guaranty Insurance,

which I guess I will have to give myself as the chairman of that committee.

REPORT OF COMMITTEE ON TITLE GUARANTY INSURANCE

Herman Ginsburg

I am not going to go into the subject in detail at all. I think everything I can say is in the report. However, I would like to bring you up to date with several matters that have occurred since the report was published.

Let me put it to you this way. As you will have grasped, if you have read our report, the biggest problem involved is the matter of the type of business being handled in such a way as to avoid ethical problems. We all know that there are great problems in a lawyer serving as agent for an insurance company and dealing with his own client, writing insurance, and perhaps getting commissions and things of that type. The result has been that many states have adopted rather peculiar types of organizations. The principal one in existence and the most famous is the Lawyers Title Guaranty Fund of the State of Florida which exists as a common law trust. I call it a Massachusetts trust. Under that procedure when a member of the fund—and not everybody can be a member; you have to apply for membership and show your qualifications, and so on and so forth—and if you are accepted into membership when you write an opinion on a title you can substantiate that opinion, so to speak—I use the word substantiate, that is my word—but you can buttress your opinion with a guarantee of the title by the fund, which you are authorized to make as a member of the fund.

Now no separate charge is made for that guaranty. The lawyer just simply charges for his services, whatever his fee may be, \$50.00 or \$100.00 or \$500.00 or whatever his fee may be for his services in the entire transaction. Then the lawyer, as a part of his office overhead, remits to the fund an underwriting charge to support the fund and pay its expenses, and the client has nothing to do with that; he is not billed for it. They have been very successful in that operation. As a matter of fact, the fund has made money and has returned substantial dividends to the members of the fund. It has grown very rapidly.

Now you have this problem in a number of states, and particularly in the State of Nebraska: No. 1, the matter of doing insurance business under the Nebraska Insurance Code. A fund trust couldn't operate as such and you would have to have it in the form

of a corporation. The minute you have the corporation then you have the ethical problem as to whether the lawyer can represent this corporation and charge a premium and get a commission on the premium.

Here is how they have tried to reach that—it is very interesting. I circularized all the states that I could to see what has happened. Some states just have refused to recognize the problem altogether and said, "We don't pay any attention to it." That is what they have done down in Kansas. In Kansas the bar went ahead and formed a corporation. The only difference between that corporation and the Lawyers Title Guaranty Company (just to take a comparison out of the air) is simply that the stock belongs to lawyers. Outside of that there's no difference. You write the policy, guaranteeing the title and you charge the premium and apparently you pay no attention to the rulings of the Ethics Committee of the American Bar Association raising serious questions about that kind of a deal.

In Minnesota they recognize the problem. I am just helter-skeltering through here just to show you the problems that are involved. In Minnesota they went to the legislature and got legislation through to permit them to operate in such a manner as they do in Florida. They got special legislation to authorize the creation of a fund that could engage in this type of business without being a corporation, etc. They had a tremendous fight in Minnesota because naturally the realtors, the title companies, and a good many other enterprises fought the bar. A good deal of money was spent and a good deal of effort went into it, but the bar finally was triumphant and got a bill through the legislature permitting them to adopt the Florida procedure. The bar, to the last of my knowledge, is now in the process of trying to get contributions to this fund so they would have adequate capital to start with. So far they are not completely organized and they are still trying.

The closest thing to our situation in Nebraska I found exists presently in Colorado. There they didn't go to the legislature for special enabling legislation as they did in Minnesota, but the bar created a corporation called Attorneys Title Guaranty Fund. They created it just as any corporation, any insurance corporation, with a capital I think of \$200,000 or \$250,000—I forget the exact figure. Then in order to try to avoid the ethical complications they limit the memberships in the corporation; in other words I have to apply to buy stock in the corporation and if I am a good title lawyer they may accept me or not as they see fit, and then if I become a stockholder in the corporation I can bind the corporation by giving certificates supporting my title opinions. And, again, I operate as

they do in Florida by not making any charge for that service at all. The charge is based simply for the legal services involved and the title guarantee is incidental, which the lawyer furnishes, just as the lawyer furnishes his professional liability insurance or just as he furnishes any other insurance which he may have in his office.

I think I should read this to you, if I may be forgiven, because it is very interesting. One of our title guaranty companies in the State of Nebraska sent me this letter:

"I have just been thinking about your special report on title insurance for the State Bar Association and I thought that you would be interested in a series of correspondence which I have had with the Attorneys' Title Guaranty Fund, Inc."—that's the Colorado company—"The problem is the fact that it is under-capitalized with too little capital and surplus, and their sizable policies are not accepted. For some reason or other they are having great difficulty in obtaining reinsurance, which of course considerably reduces their value. I didn't wish to burden you with these details. However, I was concerned with the indication in your report that the Colorado plan was being used as a model.

"Very truly yours"

That is what a prospective competitor has to say, and I can see where there are some problems. The correspondence attached to this indicated that they had an opportunity to write a \$200,000 policy and they couldn't write it because they just weren't accepted for that big a risk and they couldn't get reinsurance. I suppose that one of the reasons they might not have been able to obtain reinsurance from private companies was because they were a bar enterprise and the private companies weren't going to help them out.

Then I would like to say, and I hope I may be forgiven because this may sound immodest, but there is an American Bar Association Committee on Title Guaranty Funds and they have been pressing Nebraska particularly, and I suppose all other states, for action and they want to be kept informed and advised as to what has been going on. After our report was published they got a copy of it, and shortly after that I received this letter from the President of the Lawyers Title Guaranty Fund of Colorado, who is also the Secretary of the ABA Committee on Lawyers Title Guaranty Funds.

He says this: "Your report shows such a clear-cut understanding of the problem as it has been approached by our trustees and by the ABA Committee on Lawyers' Title Guaranty Funds that I have taken the liberty of reproducing it for their benefit, and a copy of the medium by which this reproduction was made is en-

closed for your information. It will be deeply appreciated by those working at the national level if you will keep us informed as to the progress in Nebraska. Sincerely."

Now the fact of the matter is that when all is said and done our report sums up the following: We recognize the perils, if I may use that word, at least the encroachment upon the legal profession by the activities of title insurance companies and people in allied fields; we recognize that that situation exists and that it is hurtful. We feel in general that something should be done, that perhaps something in the nature of the Colorado plan is desirable. However, we have two caveats: One is getting the proper manpower to run it, because any association we form will be wholly valueless unless we have somebody skilled in the field, who knows the ropes, and can run it for us; and, second, we have the question of the ethical problem involved which goes back to this situation, that many lawyers will not be accepted into the fund, which in turn means that many lawyers will say, "Oh, well, if that is the case why should the Bar Association, why should I sponsor something that I won't be accepted in"; and, second, you have this continuing problem of a lawyer dealing with his own client.

Summarizing, our report then is in effect that the committee be continued and that further study be given to the problem. I am not prepared, and at the last meeting our committee was not prepared, to go any further at this time. We welcome any questions that anyone may have.

To make the record, Mr. President, I will ask you to preside at this point and I will move the adoption of the report which is simply the continuance of the committee and further study.

PRESIDENT SVOBODA (In the Chair): Do I hear a second?

THOMAS M. DAVIES, Lincoln: Mr. Chairman, I notice, Herman, that you have in here that on principle we accept the idea of this plan. Have you abandoned that?

CHAIRMAN GINSBURG: No. I am going to do the same thing that was done by one of the other committees, and this was my intent, Tom, that the continuance of the committee would indicate acceptance of the principle of the scheme.

PRESIDENT SVOBODA: Any other discussion?

C. RUSSELL MATTSON, Lincoln: I'll second the motion.

PRESIDENT SVOBODA: Mr. Mattson seconds the motion. Any other discussion? Ready for the question? All in favor say "aye"; opposed. Carried.

Resume the Chair, Mr. Ginsburg.

[The report of the committee follows.]

Report Of The Special Committee on Title Insurance

Those lawyers engaged in the real estate practice, particularly in the larger urban centers in Nebraska, have in recent months become well aware of the increasing use of title insurance in real estate transactions. The need for title insurance can be well recognized. Every real estate practitioner knows that there are many matters existing outside the records and which are not shown by an abstract of title, which may adversely affect the ownership of a particular piece of property. An attorney, in rendering a title opinion, can only base his opinion upon the record as shown by the abstract; and he has no means of judging the actual state of the title as the same may be affected by matters not appearing of record. As a matter of fact, even matters appearing of record may not be wholly relied upon, for such record is quite often subject to impeachment. A purchaser or a lender who is investing in an expensive piece of property wants assurance that he has good title; and he is willing to pay for such assurance if he can get it. The title insurance company has been brought forward to meet this need, but at the same time title insurance companies have gradually taken over the field of real estate practice in many metropolitan centers. As previously mentioned, the lawyers in the State of Nebraska are now beginning to feel this encroachment in many places.

Experience in other localities has indicated that title companies very often appear to do practically all of the real estate law business. In part this is due to the very nature of title insurance itself, and in part it is due to the default of the bar. Similarly, liability insurance companies have in large measure taken over the control of tort litigation through the very nature of the contracts which they write; but because the liability insurance company can only represent one side in litigation, the other side at least is free to obtain independent legal service. The nature of title insurance, however, is such that it is very easy for the title insurance company to represent both the seller and the buyer. As lawyers we know that the buyer and the seller must each have independent advice and legal guidance; but the neglect of the bar in advising the public of this has resulted in real estate practice being taken over by lay agencies, such as realtors and title insurance companies. In large measure this is due to the neglect of the bar in failing to advise the public of this fact, and that independent advice and assistance is necessary in all real estate transactions; and in failing to educate the public to a knowledge of the fact that it is extremely dangerous and hazardous to have the same party represent the interests of both the buyer and the seller.

It must be recalled that a title insurance policy does not in itself guarantee as against any and all defects. Some policies are written in such a manner as to exclude indemnification for unmarketability of the title. Most all policies are written with numerous exceptions. Even where the parties rely upon title insurance the services of the attorney to examine and explain the policy, and to inform the client as to just what he is getting are nevertheless essential. As a matter of fact experience indicates that a good many of the people who acquire title insurance policies are unaware of the fact that there are limitations and exceptions therein contained.

Because of the foregoing situation there has become increasing agitation among the bar to take some action to counteract these lay encroachments. In many states lawyers have decided that the bar should undertake the title insurance business, so as to keep such title insurance as a part of the law practice. However, the handling of title insurance by lawyers can present a serious professional ethical problem. The Committee On Professional Ethics of the American Bar Association has promulgated its opinion, Number 501, to the effect that

“A lawyer may not ethically act as an agent for a title insurance company on a fee basis.”

In order to avoid the ethical problems, it would appear that about the only safe way a lawyer can furnish title insurance is on much the same basis as the lawyer provides professional negligence insurance. Thus the lawyer may deal with his client as a lawyer and render a statement for services performed. As a part of such services the lawyer may back up his opinion as to the title by a title insurance policy, but no separate charge for this title insurance policy can be made to the client. The lawyer may furnish this service as a part of his overall service and may himself pay the title insurance company for the title policy. If, on the other hand, the lawyer includes the premium for the title policy as a separate item in his bill to his client, then he runs into a number of ethical problems, including the matter of personal dealing with his client and the obtaining of a commission upon a service rendered to the client. These ethical problems have presented a substantial deterrent to many organized bars in entering into the furnishing of title insurance by the bar.

A survey of the experience in other states indicates that there are different methods being pursued by the various bar associations in this field. In some states the lawyers have organized title insurance companies which operate in much the same manner as other title insurance companies in the field, the only distinction being

that the lawyers may own the stock in the particular company. This situation does not answer the ethical problems which exist. In other states the lawyers have set up a title guaranty fund. The best known of these is the Lawyers Title Guaranty Fund of the State of Florida. This is created in the form of a common law trust. Any qualified lawyer may apply for membership; and if approved, the lawyer then becomes a member of the fund and as such can issue a policy backing up any opinion as to title which the lawyer may give. The fund does not charge a premium as such, but charges the lawyer an underwriting risk charge, which the lawyer himself remits to the fund. The lawyer may charge his client whatever fee the lawyer establishes for his services, and this fee includes the title policy. The Florida arrangement has worked very satisfactorily, but could not be used in Nebraska unless a change in the statutes could be procured. A similar difficulty existed in the State of Minnesota; and in that case the lawyers procured legislation to authorize the formation of such a fund. Pursuant to such legislation, a Lawyers Title Guaranty Fund has now been established in the State of Minnesota. This Fund has now circularized the members of the bar as follows:

"By your own signature you will be able to issue title insurance policies."

Another plan now in operation is the Colorado plan. The Colorado Bar Association has established the Attorneys Title Guaranty Fund, Inc., which is a corporation which issues shares of stock only to lawyers. All shareholders of the company will be authorized to issue commitments or title insurance policies, subject to the rules and regulations of the company. The participating lawyer, however, will charge his client a total fee for his services, which will include the title policy which will not be billed for as such. The lawyer will himself remit to the company a so-called contribution to pay the company for its expense in underwriting the policy. The contribution must be paid by the lawyer from his own funds and may not be a direct charge against the client. The shares in the company were of course sold to lawyers deemed to be competent in the title practice.

It will be noted that the Colorado plan is an attempt to meet the ethical problems involved in the lawyers issuance of title insurance, and yet at the same time to comply with the insurance code of the state. It would seem that if the Nebraska Bar decides to go into the title insurance field, the Colorado plan and experience would be most useful.

It must be realized that no title policy would be of any value unless purchasers and lenders were willing to accept the entity

which furnishes the policy. Therefore, it will be necessary that competent and skilled underwriting be procured. Secondly, it must be noted that no lawyers fund can operate which will cover every lawyer, irrespective of his competency, in the title practice. Any fund will necessarily have to reserve the right to decide whose opinion would be accepted as the basis upon which policies may be written. No one could contend that any plan could long exist which would not thus discriminate.

We believe that the statement made by the committee of the Minnesota Bar Association on this subject is most pertinent:

More and more, title insurance is becoming a definite requirement in the real estate business, a service that must be provided. You (the attorney) are in a position to choose now whether your clients will receive this service from you . . . or from another source, which unmistakably will tend to reduce the extent and value of your service to clients, and equally to reduce your income potential.

In view of the problems which necessarily exist, it is submitted that further study is required before any definite action can be taken. It would seem, however, that the Nebraska Bar Association should go on record as favoring the establishment of a lawyers title guaranty fund in principle; and this committee so recommends. If this recommendation is accepted then a committee should be appointed to implement this recommendation and report back with a specific program.

Herman Ginsburg, Chairman
Robert D. Baumfalk
John R. Fike
Henry A. Gunderson
Willis R. Hecht
Fred P. Komarek
Clement B. Pedersen
Albert T. Reddish
Edmund R. Sturek

CHAIRMAN GINSBURG: The next order of business is the report of the State Advisory Committee. Mr. Adams will make that report.

REPORT OF ADVISORY COMMITTEE

Charles F. Adams

I am Charles Adams, a member of the committee. I am making this report for our venerable and honorable chairman, Ray Young, who sits over here in our room, but he prefers that I do this for him because he has a bad cold.

This report is not in the printed program. For that reason I shall read it to you. I think you will find it of considerable interest.

The work of the Advisory Committee, the Committees on Inquiry, and the disciplinary activities may be summarized as follows:

Meetings

All members of the Advisory Committee attended and participated in a two-day meeting on May 25 and 26. On September 8, a hearing, attended by all members and by the investigator appointed by the Association, was held upon charges which originated in District 17. The Committee on Inquiry deemed its members, regular and alternate, to be disqualified. The Advisory Committee sustained the claim of disqualification, took original jurisdiction, and upon hearing found that reasonable cause existed and prepared and filed complaint which is now pending in the Supreme Court.

Reviews

One matter referred from District 11 was reviewed and the dismissal by the Committee on Inquiry was sustained.

Charges from District 9 were considered and dismissed for want of merit.

Supreme Court

In the Supreme Court there were two reinstatements, and one application for reinstatement is pending. One member surrendered his license after conviction of an income tax violation. One member surrendered his license after conviction of felony. In each case in which permission was given to surrender license to practice, waiver of disciplinary proceedings was filed. Complaint has been filed and is pending in a case which originated in the 17th District.

Advisory Opinions

Out of the large number of opinions, either formally or informally expressed, and declarations of policy stated by the com-

mittee during the year, the following items have been selected as most likely to be of general interest:

1. The Canons do not proscribe the giving of testimony by a lawyer-defendant who appears pro se.

2. The inquirer represented the husband who was awarded a divorce. The wife was given custody of the children and an award for their support. After several years the wife seeks to employ the inquirer or his partner to act for her in an effort to collect the delinquent installments of the support money. The employment may not properly be accepted. Canons 6, 37.

3. The question was: To what extent may I, as a candidate for State Legislature, mention, in my political advertising, my profession and my legal experience and training? The committee expressed the opinion that a candidate for the legislature may indicate on his stationery or by other appropriate means of publicity, that he is a lawyer, the period of his practice, that he holds or has held public office such as county attorney or attorney general or that he is or has been an officer of a legal professional organization. He should not "augment by artificial stimulus the publicity normally resulting from what he does" for the purpose of advertising himself as a lawyer. He should refrain from self-aggrandizement. His publicity is limited to his campaigning for public office. Within these bounds he may use effective media of publicity. (Canon 27; A.B.A. Opin. 74, 197; Drinker, 218, 228, 287)

4. A candidate for the office of county attorney may properly state on his announcement cards the name of the law firm of which he is a member.

5. Publicity in connection with a lawyer's candidacy for political office may be conducted in such a way as to violate Canon 27. (A.B.A., Informal, 64, p. 631) An announcement card submitted to the committee was disapproved.

6. A lawyer may not properly cause his professional card to be published in a county atlas. (N.L.R. 1961, p. 243)

7. Neither a county attorney nor his partner may properly accept private employment in matters connected with the taking of land by the State of Nebraska for the Interstate Highway.

8. The committee is of the opinion that a county attorney may not represent a complaining witness in a child-born-out-of-wedlock case.

9. A justice of the peace is a judicial officer. Canon 30 provides as follows:

While holding a judicial position he should not become an active

candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his official position to promote his own candidacy or the success of his party.

I repeat, the committee felt that a justice of the peace was a judicial officer.

10. Query: My term as a member of the legislature expires at the beginning of 1963. Can my law firm properly be employed by the county, under Section 23-1203, (1) to represent it in litigation relating to tax assessments or exemptions; or (2) in tort matters against or on behalf of the county; or (3) to assist the county attorney in prosecution of felony cases (Section 23-1204.01), assuming that no such action involves a statute passed or amended during my term or within one year thereafter? Also, (4) can I, my firm, or one of my partners properly, under court appointment, represent indigent defendants charged with felonies who have filed a poverty affidavit and requested the appointment of counsel for them?

The committee finds no ethical bar to the employment of the inquirer, his firm or his partner in any of the situations described. There might be a question in case of defense of a defendant, charged with a felony in Situation No. 4, where the constitutionality of the statute may be attacked by the defendant or where a statute is involved in which the inquirer may have been interested or involved as a state senator. However, Opinion No. 26 of the American Bar Association would seem to allow his employment even in that situation. Reference is made also to A.B.A. Opinions 128, 136 and 192, and to Drinker, p. 119.

Matters of Policy

1. It is sometimes difficult to draw the line between (a) a question of law as to disqualification, and (b) a question of ethics involving conflicting interests. If the committee finds the question to be essentially one of law, it will decline to render an opinion. Its function is to interpret the rules of professional conduct (Rule VIII, 14) expressed in the Canons (Rule X). It will not render opinions on questions of law. (N.L.R., Jan. '61, 254; A.B.A. Opin. XIII)

2. The Advisory Committee declines to express an opinion as to whether proposed activities of a suspended lawyer would be in violation of the court's judgment. (N.L.R., Feb. '62, 242)

I think that has happened twice, where a lawyer who had

been suspended wrote to our committee and said: "What if I do this? What if I do that?" We felt that that was not within the scope of our activities.

3. It is the view of the committee that Rule XI, 14, does not contemplate the rendering of advisory opinions upon or the interpretation by the committee of the Canons of Judicial Ethics.

4. The committee declined to express an opinion in a case in which it seems likely that the conduct complained of may come before it for review or decision. (N.L.R., Jan. '61, p. 254)

5. The session of May 26 was devoted to consideration of the difficult subject of the extent to which county attorneys, city attorneys, and village attorneys are ethically restricted in their private practice by reason of their official positions. By invitation Mrs. Anne Carstens, City Attorney of Beatrice, Mr. Paul Douglas, County Attorney of Lincoln, and Mr. Robert Richards, President of the County Attorneys Association, appeared and presented their views. At the conclusion of the formal presentations, they were requested to formulate and submit in writing statements and recommendations which might be taken as representing the thinking of their respective groups. This they undertook to do, it being understood that considerable time, perhaps several months, would be required for the completion of studies in process and preparation of the statement.

The committee resolved that the rendition of advisory opinions in such matters be deferred awaiting the receipt of the recommendations and until the committee shall have opportunity for further study in the light of the materials so to be submitted.

Committees on Inquiry

The districts in which no matters have required action by Committees on Inquiry are 1, 6, 8, 9, 11, 12, 13, 18.

In District 3 (Lincoln) six matters were disposed of without formal hearing. One is under investigation.

In District 4 (Omaha) nine matters were disposed of, five of them by formal hearings, four informally through investigation. Five are pending.

Minor disputes were settled amicably without formal action as follows: One in District 2; three in District 5; one each in Districts 7, 10, 14, 15 and 17.

In District 10, committee action on formal charges has been deferred, awaiting disposition of civil and criminal litigation.

The success of the Committees on Inquiry in effecting amicable

adjustments of minor differences, without formal proceedings, is significant and efforts in that regard are to be commended.

Canon 27

The members of the profession should be mindful of Canon 27 which prohibits indirect advertising. The use of a newspaper as a medium for announcing the opening or removal of a law office, the formation of a law firm, the admission of a partner or associate and like matters is a violation of the Canon*. The appropriate method is to send by mail a simple, dignified announcement card which complies with the restrictions prescribed by the Canon and by the opinions and decisions of the American Bar Association.

Respectfully submitted,
Raymond G. Young, Chairman
Charles F. Adams
Raymond M. Crossman
Lester A. Danielson
George B. Hastings
Lloyd L. Pospishil
Frank D. Williams

Mr. Chairman, in view of the fact that this report contains no recommendations but is advisory and informative merely, on behalf of Chairman Young I move that the report be received and placed on file.

CHAIRMAN GINSBURG: This report, requiring no action by the House, is automatically ordered received and placed on file.

Now I would like to refer to item No. 32 of the printed agenda, our calendar for the day. At this time I would like to have the report of the Committee on the Merit Plan of Judicial Selection, which is probably *the* most vital thing we have before us.

*A.B.A. Decisions, App. A, 140, 142, 146; Drinker, "Legal Ethics", 232, 240; N.L.R., 1960 Report, 254 C-447, Amer. Bar Assn. JI., Aug. 1961, p. 777.

REPORT OF COMMITTEE ON MERIT PLAN OF JUDICIAL SELECTION

Tracy J. Peycke

Mr. Chairman, Members of the House of Delegates: Lest there be any misunderstanding or unnecessary disappointment after the announcement which was made this morning about this speech, let me say that my oratorical training, I think, would be inadequate to meet the specifications, and the only eloquence you will hear will be merely the reflection of a sincere interest and concern about this matter.

The report here is printed and reports the doings of this committee. It has been a very active committee. I see Dick Shugrue standing by the door. He has been working like a nailer on this matter for months and we have been doing the best we could. Flavel Wright has devoted a tremendous amount of attention to it and, as was reported this morning, he is making a talk today at Falls City and he asked me to represent him here.

It is only a few days until this election. We have had varying degrees of activity from the bar. I would have no doubt that a sampling of this group here would show quite a variation in the amount of effort that has gone into the promotion of this enterprise, and some specific references are made in the report to that matter.

Let me suggest to you that in the next few days anything that you do and any time you make your voice heard it will be much more effective than anything you have done in months passed. We have all been talking and writing and having meetings and what-have-you, and there has been time for much of it to go in and go out again; but in the next few days the investment of your time and efforts that you make will certainly pay dividends beyond anything that you did last July or August or any previous time.

I don't know whether this matter is in trouble or not; I don't think it is. I don't think it is in Douglas County. I hope not. There is no real organized, aggressive opposition to it of any sort at all. I think our problem is not opposition but apathy and lack of understanding, and that ought to be easy to deal with. This matter has been up in Kansas and successfully dealt with, and just last spring it was successfully dealt with in Iowa. In both of those states, for instance, there was very active and formidable opposition to it.

Now if the Nebraska Bar, which has had this thing as a project for years and years and has devoted attention to it over all this period of time, some of it coming to futility and some of it now we hope coming to something, if we can't deal with the thing here

on this occasion with nobody really standing up and saying: "You ought not to vote for this because it's bad," for heaven's sake it seems to me we would stand convicted of a pretty futile undertaking. So I say to you, let's get busy on this thing in the next few days and make a project out of it. I am talking to a group here from all over Nebraska. I think it is not out of order to suggest that, just as Flavel Wright's report does, we really personally take some responsibility and get busy on this thing. That is in terms of persuading people; it is in terms of raising money. I haven't had any recent report on our financing but I am sure we need more than we have. So that is my message here.

Our formal recommendation, Mr. Chairman, is "that the committee be continued for the purpose of consummating its effort for adoption of Constitutional Amendment No. 6—the Merit Plan for Judicial Selection—and for the purpose of evaluating the results of the election, the efforts made for the promotion of the Plan, and future action, if any, that may be required by the Association.

I move the adoption of this recommendation, Mr. Chairman.

CHAIRMAN GINSBURG: You have heard the recommendation and report. Is there a second?

ALFRED G. ELLICK, Omaha: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion?

PRESIDENT SVOBODA: Only this, that the speaker has just proven himself eloquent.

CHAIRMAN GINSBURG: Well, we know he really has his heart in it.

Are there any questions or any discussion of any kind? I hate to keep usurping the floor but I wonder whether Mr. Peycke's reference to the fact that there doesn't seem to be any organized opposition may be hurtful to us rather than helpful. There being no organized opposition, I wonder whether there is any organized pro-activity. It seems to me I get so many reports—I shouldn't say "many" because I don't want to give any misconstruction—but I have had people tell me that they were opposed, and it turns out they were opposed for lack of knowledge.

I want to show you an item that appeared in the Lincoln paper the other evening; I think it was Monday evening. This came from some lawyers in Seward, I don't mind telling you, and can you imagine anybody saying this with any knowledge of the bill: "This plan would automatically disqualify and render ineligible for appointment many of the well-qualified, active practicing lawyers."

Now how in God's name could you get that out of the bill? I

am convinced that these gentlemen who signed this letter to the Public Pulse didn't know what they were talking about. I wonder if the message has been getting out. As Mr. Peycke has said, I think the most important thing of all now for this next week is that we in this group have got to spread the message and get the friends of this Plan busy, to get people to know what the Plan is because all it takes is a few things like this: "This plan will automatically disqualify well-qualified lawyers," and the person who doesn't know anything about it will say, "Well, what's going on here?"

I am sorry, I apologize for taking the floor at this time but I think this is a subject we can't afford to pass by.

Is there any further discussion? I see Mr. Shugrue here in the room. He has been our active helper and worker on this Plan. Is there anything you would care to say, Mr. Shugrue?

RICHARD SHUGRUE, Lincoln: No.

CHAIRMAN GINSBURG: Is there any further discussion on this report?

THOMAS R. BURKE, Omaha: Mr. Chairman, here in Omaha we have building chairmen who are responsible for seeing each law firm in our major buildings to see to it that they write individual personal letters to as many of their clients as possible. Mr. Bruckner here in Omaha is in charge of it and I understand he is doing a tremendous job. The letters are all going to be mailed, or have been mailed, this week to the clients of the various lawyers. Some offices are mailing out as many as a thousand letters—out of one office. If everyone would follow suit we could certainly amass a lot of favorable votes which would overcome any apathy there might be among the electorate.

CHAIRMAN GINSBURG: Is there anything further before we let Mr. Peycke go? Are there any questions of him or of the committee? Any suggestions that anyone has?

ALFRED G. ELLICK, Omaha: Mr. Ginsburg, I would kind of like to hear maybe from you or Mr. Shugrue or Mr. Peycke what is now being done here in the last few days as far as advertising or TV time is concerned. Could Mr. Shugrue maybe give us a brief report on what is going to happen just before the election or do you think we all know that?

RICHARD SHUGRUE, Lincoln: I would be happy to. First of all I think that the astounding factor in this, contrary to some opinion, is that lawyers in many areas of the state have gotten tremendously busy on this thing, and thanks to the good graces of the members of the Committee for the Merit Plan of the Bar

Association a great deal of work has been done throughout the summer in educating the public.

I would like to say that down in Lancaster County and here in Douglas County plans are now in the final stages for having poll workers distribute a new fly leaflet (which we will have available throughout the convention) to every voter coming to the polls next Tuesday. Now this is just one facet of the final stages of the campaign.

Many of you may have already seen the television ten-second spot commercials. We have gotten some objections to the little bewigged judge who is rapping the gavel and the message that says, "Merit choice means outstanding judge." There really isn't too much you can say in ten seconds besides getting the people's attention and then giving them a substantive message. We feel, in the research on this thing, that this is a good message.

Every television station in Nebraska has gotten coverage on the Merit Plan spots, and we have also been fortunate enough in covering not only Lincoln and Omaha with radio spots (and these include 30-second and 60-second spots) but also many areas in out-state Nebraska have written in to us. For example, Tom Colfer from McCook said, "We can use a ten or fifteen-minute program. Can you present one to us?" We got one out to him right away. He gave it back to me today and said it wasn't any good so we will have to give him another one. Anyway, this is an indication of the type of state-wide action that we are getting in these last few days.

With regard to these letters that are going out—and I might also add that Jim Bruckner here in Omaha is doing a tremendous job. Flav Wright wrote a letter to each practicing attorney in the state and suggested to them that we would be happy to multilith for them any letter that they would like to send to their mailing list of clients. As a consequence of that, on the very first day we got over a dozen letters back which represented about 10,000 letters which ultimately are going out; and along with these letters we are sending the Merit Plan flyer to the voters.

One final phase of this thing that I think is very important for all of us at the Bar convention here, particularly because there will be so many of us on the streets, and particularly also because you will probably see (those of you from outside of Omaha) on the buses the large "No. 6" with the words "Merit Choice Means Outstanding Judges, No Increase In Taxes. Vote for Amendment No. 6 on November 6."

We will have available at the convention tomorrow these

buttons with the blue No. 6, which is the same color blue that the constitutional amendment ballot is. When people see the 6 they recognize it on the ballot and I think in view of all these facets of the campaign, the letter-writing campaign conducted by the attorneys, the tremendous number of attorneys who have spoken to service clubs all over the state, the television, radio campaigns, the newspaper advertisements being placed on a local basis not only by county bar associations but by individual attorneys, and the last-minute efforts being conducted to reach every voter as he goes to the polls in the metropolitan areas, I think we should have, and we will have, with the cooperation of all the members of the Bar Association, a very successful election day.

Thank you, Mr. Chairman.

CHAIRMAN GINSBURG: Thank you, Mr. Shugrue.

Is there any further discussion? If not, we will call for the question. All in favor of the recommendation to adopt the report of the Committee on Merit Plan of Judicial Selection say "aye"; contrary. Carried unanimously.

[The report of the committee follows.]

Report Of The Committee on Merit Plan for Judicial Selection

The Special Committee for adoption of the Merit Plan for Judicial Selection has met on at least six occasions since the last annual meeting. Several of these meetings have been combined meetings with citizens' committees, which have been organized for promotion of the Merit Plan; and one meeting included a joint meeting with the Executive Council of the State Bar Association.

Chairmen have been designated to head up the program in each judicial district.

The committee has enjoyed excellent cooperation from members of the bar with two notable exceptions. The exceptions are Clay County, and the Eighth Judicial District which consists of Cedar, Dakota, Dixon and Thurston Counties.

It has been determined that approximately \$25,000 will be required to conduct the campaign and, at the time of dictating this report, about half of these funds have been raised by voluntary contributions from lawyers and their clients, and by contributions from some foundations.

Joyce Ayres & Associates, of Lincoln, Nebraska, has been employed and has retained Mr. Richard Shugrue, one of the members of the bar, to devote full time to promotion of the Plan until the election.

The time, until the election on November 6th, is short and each member of the bar should consider it his personal responsibility to assure favorable consideration of the amendment by participating in the following manner:

1. Contribution of a minimum of one year's Bar dues, and such additional amount as he desires.
2. Wearing the campaign emblem button "No. 6" at all times.
3. Making special effort to advise his friends and clients of his interest in the amendment by letters and conversation and personal appearance on programs of service groups and other organizations.
4. Distribution of Merit Plan literature in advance of election day and at the polls on election day.

The time is short and it is suggested that you consider November 6, 1962, as "LAW DAY, Nebraska" and make the adoption of Constitutional Amendment No. 6—the Merit Plan for Judicial Selection—your No. 1 project.

It is recommended that the Committee be continued for the purpose of consummating its efforts for adoption of Constitutional Amendment No. 6—the Merit Plan for Judicial Selection—and for the purpose of evaluating the results of the election, the efforts made for the promotion of the plan, and future action, if any, that may be required by the Association.

Flavel A. Wright, Chairman

CHAIRMAN GINSBURG: The next item of business will be the report of the Trustee of the Rocky Mountain Mineral Law Foundation.

REPORT OF TRUSTEE OF THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Paul L. Martin

Mr. Chairman, the Rocky Mountain Mineral Law Foundation is now in its eighth year, and with the admission of the University of Kansas to membership last fall the Foundation now represents ten bar associations, nine industry associations, and eleven law schools within a twelve-state area.

I am not going to try to give you a resumé of the activities of the Foundation the past year; they are set forth in the report, but I might tell you that we now have a budget of over \$100,000, so you can get an idea of the growth of the organization and the extent of the activities.

Last year the annual institute was held in the new law center of Denver University. Denver has every reason to be proud of the new facilities at the law school and the excellent representation attending the institute was more than pleased with the hospitality offered.

The institute for the year 1963 will be held the latter part of July on the campus of the University of Colorado in Boulder, and we hope that the State of Nebraska will continue to send an excellent representation. The Nebraska State Bar Association can be proud to be an integral part of the Rocky Mountain Mineral Law Foundation.

[The report of the Foundation follows.]

Report Of The Trustee of the Rocky Mountain Mineral Law Foundation

The Rocky Mountain Mineral Law Foundation, now only in its eighth year, is unique in the breadth of its regional representation, the diversified scope of its activities and attainments, and in its capacity to draw upon the collective creativity of many, extremely able though busy men. With the admission of the University of Kansas to membership last fall, the Foundation now represents ten bar associations, nine industry associations and eleven law schools within a twelve state region. Its institutes have visited five schools and four states, thereby serving a wider range of lawyers, industries, and interests and bringing into its activities a more diversified group of public spirited men than any other foundation or institute of its kind in the past. It was conceived as, and has truly become, a regional activity of national significance.

One of the principal activities of the Foundation, in which its trustees take special pride, is the publication of the Gower Federal Service and the Gower Outer Continental Shelf Service, the only available loose-leaf services recording decisions of the Director of the Bureau of Land Management and the Office of the Solicitor of the Department of the Interior, current statutes and regulations on public land leasing, and current forms and instructions of interest to public domain lessees and their attorneys. The most recent publication is entitled *Gower Federal Service—Mining*. It contains public land decisions of the Solicitor, Director of the Bureau of Land Management, and the Hearing Examiners on mineral location and patent questions, together with reports on current court cases. A final extension is being accomplished by the reprinting of all past decisions reported by the Gower Federal Service from 1948

to the present time. This will permit new and existing subscribers alike to complete their services for reference purposes.

The Foundation has completed this year about five hundred pages of text material that is not included in the first publication of the *American Law of Mining*. This will supply subscribers with the new and current material on public domain locations, tort liability problems, capital gains transactions, valuation data, and contest proceedings. Our research director is supervising the preparation of the first pocket part supplement for the entire publication and with the cooperation of the authors hopes to have this data in the hands of the printer soon.

This past year the Rocky Mountain Mineral Law Foundation has been making an analysis for the American Mining Congress of state mining laws to the end of finding areas in which greater uniformity of practice might be attained. An analysis was prepared by the Foundation staff and comparison questionnaires were distributed to mining lawyers in the Rocky Mountain West. A draft of a uniform law will soon be prepared.

The principal new publication program of the Foundation involves the preparation of a treatise on Oil and Gas Law of Federal Lands which will examine the problems of oil and gas leasing on federally owned or controlled lands. An association of twenty-six authors is writing the text. The book will be published by Matthew Bender and Company, Inc., in loose leaf form. Copy deadlines have been set and it is hoped that the manuscript will be delivered to the printer by the end of the year.

The Mineral Law Scholarship program was continued with the stipend increased to \$200 per grant. A scholarship advisory committee of the Foundation worked with the deans of the several law schools in publicizing the scholarships and the awarding of grants. Ten scholarships were awarded this year.

Research grants were made a year ago to the Universities of Denver, Wyoming, and Colorado for special projects in mining and oil and gas law. The Foundation continues to collect unpublished memoranda and briefs on significant problems and cases involving oil, gas, and minerals and makes these available to registrants of the institute and to Foundation members at cost. An index to these publications was published and distributed last summer. This program will grow stronger with use.

The annual institute of the year 1962 was held in the new law center of Denver University, Denver, Colorado. Denver has every reason to be proud of the new facilities at the law school and the excellent representation attending the institute was more than

pleased with the hospitality offered. The institute for the year 1963 will be held the latter part of July on the campus of the University of Colorado in Boulder, Colorado. It is hoped that the State of Nebraska will continue to send an excellent representation to the institute. The Nebraska State Bar Association can be proud to be an integral part of the Rocky Mountain Mineral Law Foundation.

Paul L. Martin

CHAIRMAN GINSBURG: The report, requiring no action on the part of the House, will be ordered received and placed on file.

The next item of business is the report of the Committee on World Peace Through Law.

Report Of The Special Committee on World Peace Through Law

This Special Committee was appointed October 1, 1962, by President Ralph E. Svoboda.

The purpose of the Special Committee is to study world peace through law and cooperate with the committee of the American Bar Association.

We will have speakers available for engagements to address any group throughout the state on this very important endeavor.

It is the recommendation of this Special Committee that it be continued in order to work in unison with the committee of the American Bar Association.

Joseph C. Tye, Chairman
Wilber S. Aten
Rev. LeRoy E. Enders, S. J.
Margaret R. Fischer
Robert G. Fraser
Frank C. Heinisch
Norman M. Krivosha
Francis J. Melia
Joseph R. Seacrest
Lawrence I. Shaw
V. J. Skutt
Harry A. Spencer
Antonia F. Tavaréz
Joseph T. Votava

CHAIRMAN GINSBURG: That, then, completes the formal consideration of reports. At this time I will ask President Svoboda to make a recommendation concerning, I understand, certain special committees that have not reported and the continuance thereof. Mr. Svoboda.

PRESIDENT SVOBODA: Mr. Chairman, I will make it as a blanket motion: That all committees, including the Committee on Legal Education and Continuing Legal Education, and the committees which have not made formal written reports but which have been recently organized and approved by the Executive Council, the approval having been given to the whole group at the Executive Council meeting this noon, be continued.

CHAIRMAN GINSBURG: Is there a second to the recommendation?

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

CHAIRMAN GINSBURG: You have heard the motion and second that all special committees which have not made formal reports be continued. Any discussion? If not, we will call for the question. All in favor say "aye"; contrary. Carried.

Now is there any new business to come before the House?

PRESIDENT SVOBODA: Yes, Mr. Chairman.

The Executive Council at its meeting this noon unanimously adopted a recommendation that the rules be altered by recommendation to the Supreme Court, that is, the rules creating this Bar, to add as officers three vice presidents, somewhat after the manner of my discussion with you this morning. The three vice presidents would be appointed according to region, comparable to the new congressional districts that we have in this state.

The vacancies that would be thus created if the court approves our recommendation would be first filled by the Executive Council; thereafter the offices would be filled by the same nomination and election process that is followed with respect to the president-elect.

I took the burden of making this recommendation to the Executive Council based on my own experience and on what I visualize will be the burdens of the executive officers of this Association forwardly. I can assure you that I could have used help during this past year.

Therefore, Mr. Chairman, I make a motion that, as the rules require, an amendment be recommended to the court that the rules be amended to provide for such three vice presidents.

CHAIRMAN GINSBURG: You have heard the motion that this House go on record as recommending to the Supreme Court

that the rules of this Association be amended to provide for the election of three vice presidents. Is there any second to this motion?

ROBERT D. MULLIN, Omaha: I second the motion.

CHAIRMAN GINSBURG: Is there any discussion on the motion? Is there any discussion on the motion, anyone care to be heard? If not, are you ready for the question? All in favor say "aye"; contrary. Carried.

Now, Mr. Adams, I believe you wanted the floor.

CHARLES F. ADAMS, Aurora: Mr. Chairman, this isn't a matter of earth-shaking importance but I believe it does present a problem that perhaps can be solved. I remind the delegates that we have the rules creating our Association which are adopted and promulgated by the Supreme Court and then we, as an Association, may adopt our own bylaws. I would like to propose an amendment to our bylaws that has to do with the make-up of our committees. The bylaws prescribe two types of committees, standing and special.

Some of us were a little disturbed this morning, after considering the report of the standing Committee on Procedure, because it seemed to some of us that they were becoming involved in an area which should be taken care of either by the Committee on Federal Rules or in the area which is now presently being served by the Judicial Council.

Now the Judicial Council, contrary perhaps to a somewhat prevalent belief, is not a part of the Nebraska State Bar Association although it is a creature of the Supreme Court because the Supreme Court is admonished by constitutional provision to recommend legislation tending to improve the administration of justice.

Because of these things it is our thinking that, unless a particular need arises for a special committee, the Committee on Procedure should be abolished as a standing committee. For that reason I offer a motion that Article III, Section 1, of the bylaws of the Nebraska State Bar Association be amended by striking subparagraph (i) thereof, that being the subparagraph creating a standing Committee on Procedure. Mr. Chairman, as I interpret our rules on amendments, this House may amend its bylaws by a majority vote at any annual meeting. I would like to retain the rostrum long enough to make a second motion after this motion has been considered.

CHAIRMAN GINSBURG: You have heard the motion. Is there any second? The motion is to the effect that Article III, Section 1, be amended by the elimination of subparagraph (i) thereof.

THOMAS F. COLFER, McCook: I second the motion.

CHAIRMAN GINSBURG: You have heard the motion. Is there any discussion? Are there any questions? Are you ready?

THOMAS M. DAVIES, Lincoln: Mr. Chairman, I have a question. Isn't this sort of a slap at the committee and its chairman, the Committee on Procedure?

MR. ADAMS: I think not at all, Mr. Davies, because I think the committee was functioning as they understood they were to function, to make recommendations to this Association in two areas: one, rules of procedure, and the other, possible legislation. If you will note the report of the committee, it does not recommend direct legislative action but recommends that their proposals be submitted to the Committee on Legislation, and by that committee considered and perhaps offered as legislation.

Now our Legislative Committee functions in many areas other than that of the procedural phase of the administration of justice. So I feel that the committee did a very splendid job by taking the assignment given to it and trying to do the best they could with it.

The motion which I propose to make if this one prevails is that our present Special Committee on Federal Rules be enlarged to be a Committee on State and Federal Rules. Then we will have a committee that will deal with procedural matters so far as the rule-making power goes, which will not be encroaching on the area of the Judicial Council, which is primarily legislation.

ROBERT D. MULLIN, Omaha: One of the things that that committee concerned itself with was conflicting assignments, at the same time, and I know the members of that committee were very concerned with that problem. I am wondering if these remaining committees would have jurisdiction over such a problem as that.

MR. ADAMS: It was my thought that a motion to enlarge the scope of the Federal Rules Committee, making it a committee on rules generally, state and federal, would perhaps answer that problem.

I might add this additional thought: I think the Bar Association could be considerably embarrassed by a situation that has not happened but could easily happen if the Judicial Council should be undertaking a study of a particular problem, arrive at a legislative proposal, submit it to the Committee on the Judiciary of the legislature, and at the same time another bill might come in from the Bar Association Committee on Procedure through the Bar Association Legislative Committee, working without any knowledge of the other. You know what the Judiciary Committee would say. "Well, if the lawyers can't agree on what they want, why should they bother us?"

It seems to me there is a definite conflict in the function and in the area of operation of the Judicial Council and the Committee on Procedure as it is now set up.

MR. DAVIES: Mr. Chairman, I move that the recommendation be amended to delete all reference to the committee having overstepped their authority and to commend them for the work that has been done and then go ahead and abolish the committee.

CHAIRMAN GINSBURG: Mr. Davies, I appreciate your point. However, I must take issue with you. I do not understand the motion as in any manner, in and of itself, criticizing the Committee on Procedure. My understanding of it is simply that there is a motion before the House that this particular subsection (i) be removed from the list of standing committees.

I quite agree with your intent, Mr. Davies, but I don't think that we should say we are amending something in the respect that there is no reference to that. I think when the motion is through, if you want to make a motion to commend the Committee on Procedure I would certainly rule that in order and be in favor of it, but as of now, I don't think your amendment is in order.

THOMAS R. BURKE, Omaha: Mr. Chairman, could I ask Mr. Adams if any discussion has taken place between you and Mr. Mueller, the Chairman of the Procedure Committee?

MR. ADAMS: There has not. This matter was discussed informally, not as an Executive Council formal matter, but while a group of us were together and were discussing it, including the chairman of the House of Delegates, but we have not discussed it with Mr. Mueller.

MR. BURKE: The reason for my question was that this morning we voted to continue Mr. Mueller's committee for an additional year.

MR. ADAMS: That's right.

MR. BURKE: And without any suggestion that the committee be abolished.

MR. ADAMS: Of course that motion was clearly out of order because you don't continue a standing committee anyway.

MR. BURKE: Well, perhaps I am in error.

MR. ADAMS: No, I think as a matter of fact that was in the committee report, but technically a standing committee does not need to be continued, it is a standing committee.

MR. BURKE: In any event the issue was not raised when he was here. I was wondering what his reaction would be.

CHAIRMAN GINSBURG: For the clarification of the House, I have referred to my notes. The issue was raised. The committee's recommendation reads that the committee be continued, and when that report was made I personally expunged that from the recommendation for the reason that it was out of order. Being a standing committee it had no place in their recommendation so that was not acted upon.

MR. BURKE: That wasn't the issue I was referring to. I was referring to the issue to do away with the committee. That was not brought up when the chairman was here and I am curious as to what his reaction would be.

MR. ADAMS: May I reply, Mr. Chairman?

CHAIRMAN GINSBURG: Certainly.

MR. ADAMS: Well, I have in mind if this motion and the amendment prevail, to offer another motion, that the duties of this committee be continued in an enlarged committee on Rules on State and Federal Procedure so far as the rule-making phase of their activity goes, and that was a great deal of the function of the committee this past year as disclosed by their report, in the area of rules rather than legislation.

KENNETH H. ELSON, Grand Island: I would like to oppose the motion made by my good friend Charlie Adams of Aurora. I think I am the only member of the Committee on Procedure present to defend its position.

We feel there is a very definite need for this committee, Charlie, and I think Point 2 of the recommendations of the committee is the most important point made: "That the members of the Association be requested to submit to the committee for study and action any problems arising in connection with procedural matters," meaning in our state courts.

There were many items discussed at the committee meetings that are not in this report that were laid aside to be studied at a later time. You have some problems mentioned above, the "third party practice" in Nebraska. We don't feel that a committee handling federal rules of civil or criminal procedure could adequately handle Nebraska procedural problems of our own state courts. There are many, many areas of procedure that might be improved, made more competent, more efficient, for better administration of justice.

I feel this committee, as a standing committee, has a place as a permanent committee and is a liaison between your trial lawyers and this Association so that the trial lawyers can come to this Association, to the House of Delegates, and present proposals, as was

done today for your consideration, your action, and then if they are adopted, to be passed on to the Legislation Committee for action through the State Bar Association itself and not through the Judicial Council. I think there are going to be times when we have differences of opinion between practicing lawyers and trial judges of appellate courts, and certainly this question of changing instructions may be an area where the trial lawyers are not in agreement with the district court judges. I think we need a committee of the Association to act as a liaison between trial lawyers and the Association, to come to our annual meetings and present suggestions for changing our procedure, amending it, or making it more competent, more efficient. I think this committee has a definite need and I would be opposed to the motion.

CHAIRMAN GINSBURG: Mr. Elson, and I hope I will be forgiven. I don't mean to pick on you, but where do you draw the line between the Committee on Procedure, when you say that lawyers should write to that committee on suggested subjects, etc., and the Committee on Legislation which has also dealt with these problems?

MR. ELSON: Well, I think the purpose of the Committee on Procedure is to study *procedural* laws in Nebraska as opposed to *substantive* laws. In other words, it is a specialized committee. It could be an adjunct or a part of the Committee on Legislation, but that committee is already loaded down with enough questions not to load on it questions of procedure. I think there is a definite place for the Committee on Procedure as a part of the standing organization of this Bar.

MR. ADAMS: May I reply only to this extent, Kenny. What you have said applies with equal force to the Judicial Council, which is created by the Supreme Court; and the Judicial Council continuously is admonishing the lawyers of Nebraska to submit to it any suggestions they may have for improvement in our procedural phase of the administration of justice. It seems to me that the two committees here are charged with essentially the same duties. I think there could be a considerable amount of confusion in the minds of the members of our Association, and certainly in the minds of the legislature, particularly the Judiciary Committee, if two groups come in and say, "We represent the lawyers of Nebraska."

CHAIRMAN GINSBURG: Just a moment, Kenny, I gave Jack the floor. I'm sorry.

JOHN J. WILSON, Lincoln: I just wonder if that could ever happen, Charlie. My experience in having served on some sub-

committee with the Judicial Council is that, when there is an area involved in which there is a subject belonging to a special committee, that chairman may not be made a member of the subcommittee, but he is notified by the chairman of the Judicial Council that there will be a subcommittee appointed and he should get in touch with him and work with him. I believe the Judicial Council has protected themselves in any area being covered by two different creatures.

MR. ELSON: I don't see how we are going to have a conflict, Charlie, if you have the Bar as such having a committee to study procedural problems. Many of the problems may be resolved in committee and their study may show that we don't need a change in that field or that we don't have a need for a new law procedurally, but I don't believe we are going to have a conflict there when this committee has to go through this House of Delegates and then on to the Legislative Committee. I don't think it would be too bad if we disagreed once in a while with the court on some of their procedural ideas.

CHAIRMAN GINSBURG: Is there any further discussion? You have heard the question. Are you ready for a vote? All in favor say "aye"; contrary. The motion is lost.

Is there any other business? Any other new business? Does anyone have anything further to submit?

PRESIDENT SVOBODA: I would like to take the floor, Mr. Chairman. I happened to be presiding over the meeting of the Executive Council, from which you departed in order to reconvene this meeting, consequently I didn't hear the report of the Committee on Public Service of which Mr. Rist is chairman and is doing an excellent job.

I did want to call to the attention of the House of Delegates the fact that the Committee on Public Service you might say extended its proposals or its ideas in the *Nebraska State Bar Journal* in, I believe, the last issue; yes, October, 1962. It seems to me that there is a very important area that the Bar Association must do something about. We have tried to help out the Public Service Committee. The Executive Council authorized the employment on a temporary basis, true, of a public relations council, call them an advertising agency if you will, but with a view to improving the image of the profession—and I think it needs improvement.

Tomorrow I expect to address the General Assembly and tell them why I think so. Do you know that we have become a third-rate profession financially? The doctors and the dentists are ahead of us. Do you know that in polls taken in scattered places we have lost ground in public estimation?

Somebody said we have no organized opposition to this Merit Plan. I'll tell you what I am scared of. It is that silent opposition that won't come to the surface. Even though Dick Shugrue tells us everything looks rosy, I hope he is right, but I am running scared.

Now what are we going to do about it? I think we have to improve our public image. I think that when the Public Service Committee put in its extended report its program or proposal for the State Bar Association, I think we ought to pay some attention to it because certainly this Association exists, and has for one of its purposes the elevation of the honor and dignity of the profession; and I am afraid it has been slipping a little bit.

Among their recommendations—and I want to refer to two of them—first there is the public relations education of lawyers. One of the recommendations they make is to select for recognition at each annual meeting banquet the Nebraska lawyer who has done the most to contribute to a favorable public image of the profession. We have lawyers like that. You saw one address you today. I am not going to name him. But we do have outstanding lawyers who give a good image to this profession, to our Association, to our lawyers in the Association; and I think we could not only stimulate more activity of that kind by lawyers, but I think that a program of that kind does a great deal to raise the level of appreciation of our profession. I have seen it now in two places, in other bar associations, and, believe me, it was very heartening. I think that the Public Service Committee could give some thought to it, encouraged by this House of Delegates and encouraged by the members of this Association.

Paul Raddo, for instance, did a magnificent job. The man who was selected honestly didn't know a doggoned thing about it in advance. He was called out of the crowd. The press coverage was wonderful. The extolling of the activities which he had indulged in to elevate the image of the profession received good publicity and I am sure was of great value to the Association. I commend the Committee on Public Service for having advanced that idea and I think it has much merit.

The other one is under the category of work with the press. There their recommendation is that we provide an annual award to the Nebraska journalist or radio or television man who is responsible for the outstanding feature on law or any of its related subjects during the year. How glad we are when we pick up a newspaper or we hear a radio editorial comment! We have editorials now by radio, you know, or on television that speak well of some accomplishment in our field which gives greater credit to the profession.

And yet, what do we do about it? We grumble against one certain editor whose name keeps cropping up all the time because he keeps panning us all the time. He is always wanting to trade Canon 35 for something else. We've got to do something about that to discourage such tactics. Why don't we? It costs nothing but a citation. Why don't we recognize those gentlemen of the press, those individuals, those gentlemen in the radio and television field who do speak well of our membership, of our Association, or who pay a salute to some signal thing that the Association or its members individually or collectively have done?

Again I wish to commend for your serious consideration that proposal, too, and I hope that you will support the Public Service Committee in at least those two proposals. They have many more that have merit and that we ought to give them backing on.

CHAIRMAN GINSBURG: As I understand it, the report of the Public Service Committee has been adopted. You are not making any further motion, Mr. Svoboda?

PRESIDENT SVOBODA: No, I'm not; I merely wanted to emphasize it.

CHAIRMAN GINSBURG: I notice we are honored with the presence of our Attorney-General, Mr. Clarence Meyer. He deals with the Bar Association quite often. May I take advantage of my position to ask Mr. Meyer if he has anything to offer for the good of the order.

REMARKS

Clarence A. H. Meyer

Mr. Chairman, I thank you very much. I didn't come in here for this purpose, I hope you all realize that. I did want to look in for a little while. As far as politics are concerned, I've got to confess I'm about to leave for Rosalie. If any of you want to go up there and have dinner with us, Mrs. Meyer and I are leaving shortly for there.

I did want to get up here earlier today but I didn't have the opportunity. I wanted to listen to several of the reports especially. We do a lot of work with the Bar Association. We do some work for them. George and I have had some discussions only recently about some of the matters that we handle for the Bar Association. We didn't agree at first but we wound up in complete agreement, meaning that we're going to do the work, aren't we?

I do appreciate the opportunity of standing up here and saying

"hello" to you. I am interested in the work that the House of Delegates does. Herman, thank you again for this opportunity.

CHAIRMAN GINSBURG: Is there any other business? There is one thing, then, before we adjourn. We always have a problem with this so I want to repeat. Remember, our final meeting is Friday at 4:00 o'clock P.M. I hope you will all be here and be prompt because there is always a great deal of business to transact at that time.

If there is no further business to come before the House at this time, I will declare the House in recess until Friday, November 2, 1962, at 4:00 o'clock P.M.

[The Wednesday afternoon meeting adjourned at 4:00 o'clock.]

**NEBRASKA STATE BAR ASSOCIATION
THURSDAY MORNING SESSION**

November 1, 1962

The opening session of the eighty-third annual meeting of the Nebraska State Bar Association, convening at the Hotel Sheraton-Fontenelle, Omaha, Nebraska, was called to order at 10:15 o'clock by President Ralph E. Svoboda of Omaha.

PRESIDENT SVOBODA: The eighty-third annual meeting of the Nebraska State Bar Association will please come to order. If you will all rise, the invocation will be given by the Right Reverend Monsignor Daniel E. Sheehan, Chancellor of the Roman Catholic Archdiocese of Omaha. Monsignor Sheehan.

INVOCATION

Monsignor Daniel E. Sheehan

O God whose mercies are without number, the treasurer whose goodness is infinite, we ask You today to bless our deliberations which are to be given in Your name.

In this world of turmoil and anxiety we ask You to assist us so that our efforts may be fruitful in bringing about an orderliness and tranquility that will effectively promote the common good and welfare of all our citizens. Since our land represents a social and political effort to serve the individual person and to make the perfection of human personality the norm of good society, make us ever faithful to this principle canonized in the idea that the moral worth of any activity is to be discerned in its effect on the person of the least of Thy brethren. May the sacredness of the individual person always be our own and the law's prime concern.

Knowing that Thou dost ever grant the petitions of those who ask Thee, we implore the grace and courage to work diligently and to obtain with Your help these lofty ideals. May our efforts ever serve You well so that we can share Your strength and integrity. Never forsake us but lead us always to be dedicated to our profession and faithful to Thy ways. Amen.

PRESIDENT SVOBODA: Thank you, Monsignor Sheehan.

The next item on the calendar is the address of welcome, and I present to you the Honorable Alfred G. Ellick, President of the Omaha Bar Association.

ADDRESS OF WELCOME**Alfred G. Ellick**

Mr. President and Fellow Lawyers: On behalf of the Omaha Bar Association I want to extend to each of you a warm and hearty welcome. These annual meetings serve a three-fold purpose:

First, they are of course necessary in order to carry out the business of the Association—the consideration of committee reports, the President's review of the year's happenings, the report by our Treasurer and Secretary, and so forth.

Second, they give us a chance to improve our legal knowledge. Witness the fine program which will be presented during the sessions by the Section on Tort Law!

Third, they give all lawyers of the state a chance to become better acquainted, to renew old friendships, to exchange ideas, and in general to enjoy the feeling of satisfaction that comes from knowing that ours is a great profession made up of men whom we admire and respect. As Mr. Shakespeare said, "Adversaries in law strive mightily, but eat and drink as friends." And it is this aspect of our annual meetings that those of us who live in Omaha particularly enjoy. It is so easy to become enmeshed in the business or mechanics of practicing law. I think occasionally we should stop, step back, and seek a better perspective of our profession and of the things that make being a lawyer really worth while.

So we hope you will enjoy your stay in Omaha, that you will return to your homes refreshed and revitalized and with a deeper feeling of pride in our fine profession. Thank you.

PRESIDENT SVOBODA: Thank you, Alfred.

The response will be by the Honorable Thomas F. Colfer, member of the Executive Council of your Association.

RESPONSE**Thomas F. Colfer**

Mr. Ellick, President Svoboda, Distinguished Guests, and Members of the Nebraska State Bar Association: I am charged with the pleasant task of responding and speaking for all the members of the Nebraska Bar who reside outside Douglas County and responding to the cordial and gracious welcome by the President of the Omaha Bar Association.

I was reminded, in listening to Al Ellick's gracious address this morning, of a little anecdote my father used to tell to illustrate the beauty of the virtue of gratitude.

It is told that one Thanksgiving Day they were having a testimonial meeting in a small church up in northern New Hampshire. The minister was calling upon various members of the congregation to get up and tell the assembled group what they had to be grateful for.

It is said that the banker got up and thanked God profusely for the fact that the interest rate was 12 per cent, that he had made a lot of loans in his bank, and things were going along famously.

He was followed by a very prosperous farmer who got up and thanked God for the fact that he had lots of fat cattle, that his barns were full, that his sons were stalwart and his daughters fine women.

And so it went through the congregation until a small frail lady in the back of the hall asked to be recognized. When she came to the front her dissertation was a little like this: "Well, I ain't got no health and I ain't got no wealth, and I just got two teeth, but thank God they meet!"

So I would like to express to President Ellick and the members of the Omaha Bar Association the sincere gratitude of us who come from out-state, not only for the efforts that the Omaha Bar puts forth year after year to see that we are entertained and made comfortable, but even more so for the efforts that their ladies put forth every year to see that our wives are adequately entertained and made comfortable here.

ADDRESS OF THE PRESIDENT

Ralph E. Svoboda

Fellow Members of the Nebraska State Bar Association: It is perhaps well to recall that our Association was formed, according to the preamble of the rules creating, controlling, and regulating it—and I am quoting the Supreme Court's own words in the rules:

... for the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar

As the indefatigable Christopher Columbus recorded daily in his log book on his discovery journey to the New World—"We sailed Westward" despite the constant mutinies of his crew and the ominous rumblings of hostility—we also lay claim to having made progress during the past year despite interruptions and difficulties.

In the field of the advancement of the administration of justice, for instance, this Association is culminating some thirty-one years, the last eleven years intensively, of effort to present to the citizens of Nebraska the Merit Plan of Judicial Selection in a great forward step to insure and maintain a continually improved judiciary, measured by the quality, the integrity, the experience, the temperament, the competence—in a word, the high merit—of its membership. One of our past Presidents will shortly address you, exhorting you to the final effort to secure adoption of this measure by the voters.

Our Committee on the Merit Plan and all of its members, aided by other committees of the Association, have put in months, weeks, days and hours of effort to educate the voters on this vastly improved means of assuring the very best qualified incumbents on the bench. The contribution thereof to a superior judicial system for our state is immeasurable in its impact. It is now for each of us individually to convince our clients and our friends to vote for it. Let us, therefore, run out the mile successfully to cap this all-consuming effort and project.

In the area of the advancement of the honor and dignity of our profession, we started with the sorely-acknowledged fact that we were, indeed, now a third-rate profession, ranking behind our brothers in the medical and dental sciences, not merely with respect to monetary standards but, according to scattered polls, in popular estimation.

How could such a development come about in a nation dominated throughout its existence, at its highest levels, by the members of this profession? But it has come about. However, we can already lay claim to some success in arrest and alleviation in that direction.

Commencing with the passage of a long-coming and reluctant Keogh Bill, our profession at long last has been accorded equality with other employments in retirement benefits; but more, we are now pressing for proper recognition in the long-uncompensated federal field of defense of the indigent, the criminally indigent; and more, we are studiously examining the potential of equal treatment with corporations and business firms in the matter of income taxation; and more, a newly formed Economics Committee is vigilantly studying how our income dollar has somehow become cheaper and lesser than the other man's dollar, and how to restore its pristine worth and volume. But even more, our Unauthorized Practice Committee is also attacking the invasion of our profession by others not schooled, not certified, not experienced as we are—especially we who are subject to the rigid canons which surround our every

activity, for the protection of the honor and dignity of our profession and hence for the protection of the public, upon which the public in the final analysis relies.

But still more, our continuing legal education program, with institutes sponsored by our Taxation Section, our two magnificent Colleges of Law, our Junior Bar Section—I couldn't possibly name them all—has contributed in larger quantum than ever to the improvement of our knowledge of the developments in contemporary law and practice. We never cease studying and rendering ourselves more capable to serve our clients. We yield to no other profession in our pursuit of knowledge through study, research, dissemination and mental improvement. We are, indeed, a learned profession and we will stay that way, come what may!

As to cordial intercourse among our members, I don't need to remind you that our camaraderie is, as always, of the highest. In one moment contending mightily as adversaries; in another meeting in fraternal association and warm fellowship. And the Association itself truly becomes an alembic that transforms and refines our mutual relationships. Here we meet on common ground to study and consider our mutual problems, to raise the level of our profession—aye, even to succor each others' wants.

Have we improved the service rendered the public by the bench and bar? Our Committees on Legislation, on American Citizenship, on Crime and Delinquency Prevention, on Legal Aid, and on Public Service itself have been acutely active—for instance, in drafting more modern legislation (we have two special committees on the Uniform Commercial Code and on the Revision of Corporation Law which alone have done a monumental job on bills to present to the next session of the legislature); in equipping our youth against the blandishments of communism, in combatting the rise in crime and in juvenile delinquency, in aiding the indigent in their, to them, important legal matters, and in helping to evolve safety practices on our streets and highways. These are but a few. Indeed, our very Committee on Public Service devotes itself to a campaign of education of the public in matters legal, in observance of our sacred institutions through Law Day U.S.A., and Career Day in our schools, and in other matters too numerous here to mention.

Accordingly, have we been examined and found wanting? I say "Decidedly not!"

The credit for this performance is due to the yeoman, unselfish, and devoted work of our officers, and particularly our knowledgeable Secretary-Treasurer, our Executive Council, our committees and their chairmen and members, and our Association's staff and

allied and retained agencies. My own profound and heartfelt thanks to each and all of them! Thank you.

We will now have the report of our Secretary-Treasurer, the Honorable George H. Turner.

REPORT OF SECRETARY-TREASURER

George H. Turner

Mr. President and Members of the Association: The books of the Association have been audited by Peat, Marwick and Mitchell of Lincoln, Certified Public Accountants, and found to be in order.

Our receipts during the year were approximately \$45,000; expenditures, due to the early beginning of the campaign for the Merit Plan, have exceeded receipts by about \$3,000. The books were closed as of August 31, which the Executive Council has determined shall be the end of our fiscal year. The generous contributions to the Merit Plan campaign did not begin to come in until after the closing date of the audit. We have now received some \$12,000 or \$13,000 to further this campaign. Dues for 1963 are also coming in and I am very happy to report to you that the Association is entirely solvent; that the books have been audited and found to be in order.

PRESIDENT SVOBODA: The next order of business under the bylaws of this Association is the report of the Executive Council. The bylaws in Article I, Section 3, require that there shall be included in the order of business a report of the Executive Council, which Council substantially wields the power of the House of Delegates in its administration of the Association in the annual intervals between meetings of the House. Therefore, as its presiding officer, I give the report of the Executive Council.

REPORT OF EXECUTIVE COUNCIL

Ralph E. Svoboda

We had five or six meetings during the year. Now, I should be a little more certain about how many meetings we had, but actually we had so many meetings on the Merit Plan that I got a little lost between what was a meeting of the Executive Council and what was a meeting on the Merit Plan, so you will excuse my uncertainty in that respect.

The Executive Council did some forward and constructive things. For instance, during this past year the American Judicature Society printed an excellent *Handbook for Judges*. We thought maybe our judges would appreciate the book even if they actually

didn't need it. At any rate, the Executive Council authorized *Handbooks for Judges* to be distributed to each of our district and Supreme Court judges, I believe; wasn't it, George? The Supreme Court, too?

SECRETARY-TREASURER TURNER: By the publishers to the Supreme Court judges and by the Association to the trial judges.

PRESIDENT SVOBODA: We also tried to improve our public image by retaining a public relations agency, the Carroll Company of Lincoln, which has been serving in that capacity during almost the last six months, and our Secretary-Treasurer tells me that they are doing a good job and they are a great assistance to him.

As you all know, Bert Overcash's Committee on the Revision of our Corporation Law has been doing a monumental job, a really magnificent job in fashioning a new Model Corporation Act for Nebraska. He did it tremendously well. He divided it up into sections and distributed it to subcommittees on his committee, and they came up with a very fine result. Those revisions, that complete proposed act which, by the way, is still subject to amendment—if any of you have any thoughts just let Mr. Overcash know—that model act has been published and has been distributed to each of you as members of the Association.

I also want to call your attention to the regional meeting of the American Bar Association—the American Bar Association holds regional meetings every year now in two places in this country; this year it will be at Little Rock—but between May 7 and May 9, 1964, it will be held here in Omaha. A general chairman will be appointed from this Association to be in charge of that regional meeting and he, in turn, will appoint committee members to assist him in a great project.

We have kept pace with an improvement of our group insurance program and separately in this session this morning we will receive a report thereon.

We instituted a "Bridge-the-Gap" program. Let me explain that. That is for the law student who comes out of law school. He knows everything in the books but he doesn't know his way to the courthouse. So the Junior Bar Section has put on what they call the "Bridge-the-Gap" program at the Kellogg Education Center in Lincoln and it was received very well this year, and we propose to repeat that program.

You, of course, know about our Tax Institute. This year it will be slightly modified from what it was last year. This year it will be held once in North Platte and once here at

Omaha in successive weeks. It has been a great aid to the members of this Association, as testified by its good attendance.

Our two law colleges have done a splendid job in holding general institutes, both the Nebraska University College of Law and the Creighton College of Law. The Creighton College of Law right this season is holding a tax institute in the field of corporation law.

I want to report to you, too, that because of the increasing volume of work of this Association, all in your interest, we have created several new committees. With your permission and indulgence I want to list them.

We have had a splendid group of past Presidents who attended an annual dinner and said "Hello" to each other, and then they had nothing else to do. We changed that this year. They are now an official branch of this Association as a Past Presidents Advisory Council, and I will repeat what I told them last night at the dinner, that they are having a meeting at 2:00 o'clock in Room 115 this afternoon under the chairmanship of Past President Laurens G. Williams.

We have a Committee on World Peace Through Law, a little startling. Perhaps the Monroe Doctrine should be made into law but that was not quite the idea of the Honorable Charles Rhyne, a past President of the American Bar Association, who started the movement. It is a very worthy movement. He has asked us to collaborate in this Association and we have complied and formed a Committee on World Peace Through Law, of which the Honorable Joe Tye of Kearney is chairman.

The Engineers Society of this state, which numbers some 500—startling to me that there were that many—approached us and asked us to form a Committee on Joint Conference between Lawyers and Engineers. We did that, and it happens that our lawyer member is also an engineer so at least he will be able to talk their language. He is chairman of the committee and that committee will start functioning as soon as the Engineers Society names their counterpart committee.

We have formed a Committee on Lawyer Referral. That is an activity that is being widely carried on in the rest of the country. President Ellick of the Omaha Bar Association is starting Monday with a local Omaha Bar Association Committee on Referral, and, as I remarked yesterday, we are learning to walk before we run. After it gets going here we are going to extend it out into the state, and I think to the benefit of the members of our Bar.

We have formed a Committee on the Economics of the Bar and Professional Incorporation. As I mentioned in my address,

there is the Keogh Bill; there is a suggested annual legal check-up program; there is the matter of professional incorporation whereby you can benefit in your income taxes; and then, of course, there is always the question of how to raise the level of our fees as the doctors did, so that they are driving the Cadillacs now and spending Thursday afternoon or Wednesday afternoon at the golf course and reading the *Wall Street Journal* every day. We would like to get up to their level.

We have also formed a Committee on Title Guaranty Insurance, and that is principally defensive. We find that the title guaranty insurance companies are gradually eroding our field in real property law. Startling, but it is so. The bar generally over the country is starting to take measures to offset that erosion, that invasion. In order to keep it on a basis whereby lawyers only will participate, Chairman Ginsburg is making studies now; in fact, he has progressed quite far in his studies and probably by next year we will have a definite recommendation of what we can do in this field whereby we can recapture or at least hold our real property business. I know a lot of you don't want to examine abstracts; neither do I; but the trouble is if you give up the examination of abstracts you lose a lot of the other incidents of real property transactions.

Just within the past month—and it was kind of an offshoot from the Committee on Economics—I found out that here in Omaha members of firms, the younger members, the office managers of firms, were meeting impromptu over the luncheon table and for the first time, to my amazement, were revealing their trade secrets—what they paid their secretaries, what they paid associates, how they handled time sheets, how they made their charges—freely. Well, I had an inquiry from one of the out-state lawyers and he said: "Could this Association help me? I would like to know what standards to follow. What are the general standards that are followed in the profession?"

So we formed a new Committee on Law Office Management and we have an excellent chairman and I am sure you will be hearing gratifying things from that committee.

Then, of course, we have our very, very important Committee on the Merit Plan of Judicial Selection. Is Flavel Wright in the room? Good! You know, he couldn't even come to the meeting of the House of Delegates yesterday because he was down at Falls City at two or three different meetings plugging for votes, as he should have been. The rest of us were sitting in easy chairs here listening to speeches. He was working, but he is here today.

Now for the second time we have held a midyear meeting at

Lincoln along in June. This year the Nebraska Appraisers Society asked if they could have the privilege of putting on a panel, a demonstration of the evaluation process in condemnation and estate and other cases. They did a fine job; they sent seven or eight gentlemen down there who conducted a very instructive panel and I think really contributed something to our knowledge in that area of practice.

I have kept myself busy this year responding to the invitations of our sister state bar associations adjoining Nebraska. I have been in Kansas, Missouri, Iowa, South Dakota, Wyoming, and Colorado. Is Lloyd Karr here? The President of the Iowa Bar Association is reciprocating at our invitation. Is Mr. Janicke here, the President of the Kansas Association? Mr. Janicke! Mr. Heck of the South Dakota Bar? There he is! Mr. Millett of the Wyoming Bar, is he in the room? There he is! George, glad to see you. Where is Mr. Swanson of the Missouri Bar? I met him this morning. He probably will be here before the day is over.

I have attended the Judicial Conference of the Court of Appeals of the Eighth Circuit. That has become an annual event and they want the presiding officers of state bar associations to participate.

I have attended two meetings of the National Association of Bar Presidents, one at Chicago and one at San Francisco, where there is a two-day rather vigorous session. All bar presidents meet. They exchange views and they are given instructions and they are given lectures and histories of work that is done by various bar associations, from which we, of course, borrow if the ideas have merit.

I have attended meetings of local bar associations, including our own Omaha Bar, as well as section meetings, and some of these section meetings are really sort of capsulated association meetings. They get pretty vigorous, like the meeting in Fremont of the Probate, Trust and Real Property Section.

We think we will continue the practice of our *Legislative Bill Digest* because there are so many of you who tell us it is valuable to you, but we do find that there are many who don't use it. So this year we are going to vary it to the extent of first circularizing to find out how many *Digests* you would want weekly and in what number. For instance, a larger law firm like, well, that of my friend sitting in front of me here, the Fitzgerald office. They wouldn't necessarily want one for each member; maybe two or three would suffice for their firm. I know it would be true in my own firm, because the work is pretty hardy and the cost of course

is in proportion. We may make a slight charge to those who want to continue to get that service.

This year, parallel to last year, we have turned over the educational phase of this annual meeting, commencing with this afternoon, to one of the sections, and this year I think you will have an institute by the Section on Torts that should delight each and every one of you. "Duke" Schatz, its chairman, has put together a very fine group of panel speakers who will address you on various phases of what all of us participate in, namely the personal injury action, the manufacturer's liability action, anything you wish in the general field of torts.

We do have one other feature this year. You remember last year one of our active members couldn't come. He lived in the State of Washington, so at those doors out there he deposited boxes of apples. You remember? Well, he didn't send them this year. I don't know where he is, maybe he is here, but this year we are going to have attendance prizes. Here is one. We will have a curly-haired girl—no, I guess it will have to be a boy from the Junior Bar Section—pick them by lot. I think we will have four or five at the end of each session. It might be law books, attaché cases—not briefcases any more, attaché cases, high-toned—and boxes to the hockey game. We are going to make this interesting even if we have to appeal a little to your avarice.

I couldn't close this report of the Executive Council without referring again to the Merit Plan effort. There is Flav Wright, its chairman. He has been working veritably like a horse on this thing. He has just been going up one side of the state and down the other, managing it in every phase, the advertising, the publicity, the letter writing, the solicitation of funds. Flav, you do me honor if you would take the rostrum and inspire these boys to get out the vote on Amendment No. 6 on November 6. Flav, will you take the rostrum?

FLAVEL A. WRIGHT, Lincoln: I think all of you have heard so much from me that you are reluctant to hear any more, but right now we are running sort of scared. We sometimes get to thinking this thing is sold but we have still a lot of work to do and we've got a very short time to do it.

I think there is still money to come in. We are getting demands for additional TV time that we hadn't planned on because of problems we have had in the Merit Plan campaign, one of the biggest of which is the problem we have in Omaha at the present time because of the confusion between the Merit Plan campaign and the Juvenile Court campaign. That has, I think, hurt us in Omaha.

At any rate we have to make a real effort to separate the thinking of the Omaha voters on the Juvenile Court from their thinking on the Merit Plan. We have a lot of fine people, like Tracy Peycke and Eleanor Knoll Swanson, who are favoring the candidate that these people who are trying to confuse the two issues are favoring, and we want to work through those people. They are also doing tremendous work on the Merit Plan. Jim Bruckner is doing a tremendous job on the Merit Plan.

The President of the Iowa Bar told me last night that, in analyzing the results of their campaign, almost without exception where the Bar was strong in the campaign for their Merit Plan—they didn't call it that—but wherever their Bar was active and strong they got a good favorable vote; where the Bar was weak they did not get a favorable vote. So I think it is up to the lawyers. I know all of you have been working hard. I have had tremendous cooperation from all of the Bar.

There are a few problem areas in the state. I think some of these areas indicate that they are areas where the Bar Association needs to do a little spade work to get the lawyers in that area more interested in the state Bar. One of those areas is the northeast part of the state. There are a few counties that are not as active as others, but by and large I would say 90 per cent of the lawyers are doing a tremendous job as far as I can see.

But the thing we need to do now—I have found that these buttons that I am wearing and have been wearing are very valuable because at least they give people the opportunity to make an inquiry about them or ask you what the button is. Just this morning my wife had some pictures framed by a little fellow who does that type of work in Lincoln and I stopped by to pick them up. He inquired: "What about this judges' plan? Is it something I should be in favor of?" Well, if he had not seen that button he never would have inquired.

We have about four days, I think, and the time for letter writing—if you haven't sent out letters you can still send some out or get them moving—but it is probably the time for telephone calls, the time for wearing the button, the time for personal solicitation in groups that you happen to be associated with. You still have time for your wife to hold a coffee to sell for friends on it.

At the polls, I don't know. Jim Bruckner is going to have one thousand poll watchers to hand out this material at the polls in Omaha. There was some speculation he wasn't going to get quite a thousand, but there wasn't any doubt in Jim's mind that he would. I don't know whether he has made his thousand yet or not, but at

any rate he has done a tremendous job of getting people lined up to hand out literature at the polls. We have people in Lincoln who will be handing out this literature, and we are keeping our fingers crossed hoping we can sell this thing. If we don't, we have wasted a lot of time and a lot of money and we have certainly been set back quite a way in our program, which has been going on since 1932 at least, when the State Bar Association started talking about doing something to improve the method of selecting our judges. Now, thirty years later, we have a chance to do something and if we all work I am sure we can get it done. If we sit on our hands I don't think we will get it done. So all I can say now is, I just hope you all get in there and work for the last four or five days. Thanks very much.

PRESIDENT SVOBODA: Thank you very much indeed, Flav, especially for your hard work.

Mr. Wilson, will you come to the podium? We will next hear a report of the American Bar Association Delegate from this Association, the Honorable John J. Wilson of Lincoln, Nebraska.

REPORT OF AMERICAN BAR ASSOCIATION DELEGATE

John J. Wilson

President Ralph, Members of the State Bar Association, and Guests: So that you all know how our state bar is represented at the American Bar, I will start out by telling you that there are two members of the House of Delegates from Nebraska: One is George Turner, who is elected by the members of the American Bar living in Nebraska; and I am the other member elected by the members of the State Bar Association. That gives us two representatives to the House of Delegates of the American Bar Association.

In looking over the crowd I see the Honorable Sylvester C. Smith, President of the American Bar Association, here, and I am sure this noon he will tell you more about the American Bar Association than I can tell you in a few minutes, so my remarks are going to be brief, but I do want to let you know of some of the work of the American Bar Association this past year.

There is a new peak membership of 112,000 members and a new record high registration at the San Francisco meeting of 6,700 members.

The House of Delegates approved the creation of a Section of General Practice, designed to broaden the base of American Bar Association services to the largest single segment of the profession. If you have not joined, you can join by paying \$5.00. If you will get

in touch with either George H. Turner or myself we will help you get enrolled in this section. This section should be of interest to all of you.

The House of Delegates approved formation of a new Special Committee on Professional Corporations, whose purpose will be to make a comprehensive study of problems raised by recent state legislation in some states authorizing lawyers to form corporations or associations with related tax benefits for the practice of law.

At the House of Delegates a heated debate consuming an entire afternoon session was had on the proposal for recognition of specialization in law practice. Final action on the matter was postponed until the midyear meeting next February.

The House of Delegates approved committee reports pointing to strong and continued programs to combat unauthorized practice and to improve the economics of law practice.

To assist the continuing drive for new members, West Publishing Company will continue to provide complimentary copies of *The Lawyers Handbook*, which is a guide on law office management and economics, to lawyers joining the American Bar Association through November 30, 1962.

The House of Delegates authorized the Committee on Unauthorized Law, in conjunction with representatives of insurance companies, to create a National Conference of Lawyers and Insurance Companies writing liability insurance. The conference acts in an advisory and cooperative capacity with a view to eliminating misunderstandings as to what may constitute proper insurance company practices in furnishing legal counsel for their insureds under liability policies, and what may constitute unauthorized practice of law in such respects.

Plans were discussed for participation by the American Bar Association at the World Fair to be held in New York in 1964.

The President of the National Conference on Uniform Laws reported that six uniform acts had been approved by the Conference and filed with the Secretary of the American Bar Association. Two of these acts were considered to be of immediate importance: The Uniform Federal Services Absentee Ballot Act, and the Uniform Act for Voting by New Residents in Presidential Elections. These were referred to the Board of Governors for action at its October meeting. The House directed that the remaining acts be referred to the Committee on State Legislation for report at the midyear meeting of the House of Delegates in New Orleans. These are the Uniform Interstate and International Procedure Act; the Uniform Foreign Money-Judgments Recognition Act; the Uniform

Federal Tax Lien and Registration Act; and the Revised Uniform Principal and Income Act.

PRESIDENT SVOBODA: We are glad to have such an efficient and active member representing this Association on the rolls of the American Bar Association.

We will now hear a report of the House of Delegates by our revered Chairman Emeritus of the Committee on Legislation, who served in the vineyard many, many years and now is, and continues to be, the Chairman of the House of Delegates—the Honorable Herman Ginsburg of Lincoln, Nebraska.

REPORT OF HOUSE OF DELEGATES

Herman Ginsburg

Thank you, Mr. President. Members of the Nebraska State Bar Association: I bring you this report on behalf of the House of Delegates and may I say that of necessity my report will be meaningless if you have not read the reports of the various committees which have been printed in the program. To any members who haven't read the program so far and are not familiar with the committee reports, may I request that you do familiarize yourselves with the committee reports just as quickly as possible. It would be manifestly impossible for me in the short time at my disposal to summarize all the committee reports. I only call your attention to the fact that the committee reports, when adopted by the House of Delegates, constitute the official position and the actions which this Association would take and will take, and it is therefore highly important that every member be familiar therewith.

The House of Delegates met as scheduled Wednesday, October 31, 1962, and all business as set forth in the agenda was disposed of.

All committee reports were considered and approved as submitted with the following exceptions:

The recommendation of the Committee on Legislation with reference to a proposed change in the method of giving jury instructions and the making of exceptions thereto was rejected. Subsequently, upon consideration of the report of the Committee on Procedure, which report likewise contained a similar recommendation to that made by the Committee on Legislation, it was decided that the instruction procedure be amended in line with the recommendation of the Committee on Procedure, except that that portion of the recommendation providing that no party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires, be eliminated therefrom.

I request that each and every one of you therefore read the report of the Committee on Procedure, and you will see that the action of the House amounts to the approval of that report except for the last six lines of the recommendation.

Accordingly, the House went on record in favor of a change in the jury instruction procedure, but not to the extent recommended by the committee. It must be noted that the Nebraska District Judges Association has gone on record as desiring the adoption of legislation to provide that the giving or refusal to give any instruction must be objected to before the jury retires; and the District Judges Association had requested the State Bar Association to join with them in sponsoring such legislation before the next session of the State Legislature. The action of the House amounts to a rejection of this request of the District Judges Association.

The report of the Special Committee on Joint Conference of Lawyers and Accountants was amended to the extent that the committee was authorized to furnish advice when requested as to whether or not designated services in designated situations by a member of one of the professions would amount to an invasion of the area of the activity of the other profession. It was reported by the committee that it had been rendering such services but without specific authority from the House. Such authority was granted.

Considerable interest was expressed in the report of the Committee on Lawyer Referral. This committee reported that a local committee had been placed in operation in Omaha and that so far it was operating very satisfactorily. The House will await with considerable interest an evaluation of the results in Omaha.

Contrary to usual practice it may be interesting to observe that one of our committees recommended itself out of existence and this recommendation was approved by the House. I refer to the Committee on Attorney Fees in Governmental Matters, which stated that the field was now being otherwise taken care of and that there was no further need for this committee.

A special report was made by the Committee on Merit Plan for Judicial Selection. Great emphasis was placed on the part which the members of the bar must play between now and election in spreading the word relating to the merits of this proposal and in creating public interest. It was reported that there was no organized opposition so far as known; and that it is principally a case of arousing public interest and avoiding apathy.

During the past year the President, for special reasons, was required to appoint a number of special committees. Several of these committees were so recently appointed as not to have had an oppor-

tunity to make any report. However, it was unanimously agreed that all of these special committees so appointed be continued for another year.

On the recommendation of President Svoboda, a change in the rules was unanimously recommended to be submitted to the Supreme Court for adoption. This change is to provide for the appointment of three vice presidents for the Association, in addition to the presently existing officers. President Svoboda pointed out the need for help in the executive department of the Association because of the large volume of work which necessarily is presented to the President for disposition.

The House noted with regret the serious illness of Mr. William Lamme and unanimously passed a resolution submitting to him our sympathy and expressing our best wishes for his speedy recovery.

There were no resolutions offered from the floor by members of the Association and therefore no committee to consider resolutions was appointed. Perhaps the attention of the membership should be called to the fact that this procedure exists and that all members are not only welcome but are invited to appear on the floor of the House to submit any resolution relating to the welfare of the Association. It is hoped that in future years members will take advantage of this opportunity so that the wishes of the membership may be duly noted and considered.

The House completed its business at 4:00 o'clock P.M. and recessed to meet in its final session on Friday, November 2, 1962, at 4:00 o'clock P.M.

PRESIDENT SVOBODA: The next order of business is the report of the Judicial Council which is allied and supported by the Nebraska State Bar Association although, as you know, its origin is with the Supreme Court itself. That report will be given by the Honorable Edward F. Carter, Associate Justice of the Nebraska Supreme Court, who is its Chairman.

REPORT OF JUDICIAL COUNCIL

Edward F. Carter

Mr. President: The Judicial Council has met from time to time as needed throughout the past year. It will probably convene at least two more times before the closing day for the introduction of bills in the legislature.

Six proposals have been agreed upon for submission to the

Supreme Court and the legislature. Briefly, they deal with the following subjects:

1. A bill to adopt the Uniform Extradition Act.
2. A bill providing for a uniform appeal from administrative agencies.
3. A bill providing for notice to the county attorney in guardianship proceedings.
4. A bill amending Section 24-608, changing the words "thirty days" to "sixty days." If I remember correctly, that is giving additional time in which a guardian can file his report. Many of them seem to feel that thirty days is too short a time.
5. A bill amending Section 24-611 to change the time of mailing notice from three days to five days in certain proceedings.
6. A bill amending Section 24-321, making changes in obtaining service of process against the state.

The matters pending before the Council are:

1. A bill to provide a method of appeal from the quasi-judicial acts of city councils, county superintendents, and the like.
2. A bill to provide for district court procedure in the county courts, including the use of depositions, admissions, interrogatories, and summary judgment.
3. A bill to amend the search and seizure statutes of this state.
4. A bill to amend the procedural provisions of the Workmen's Compensation Act.
5. A bill to extend the area to which a subpoena may be issued.
6. Proposals to amend Sections 30-1101 to 30-1145 and Sections 38-601 to 38-643.
7. A bill to amend Section 25-1207 regarding privileged communications.
8. A bill to amend Section 33-139 regarding the mileage and fees of witnesses.

The work of the Judicial Council has been increasing, due largely to the increased interest of members of the bar in calling our attention to suggested changes. The council has continued the practice of calling upon lawyers who are not members of the council to serve on subcommittees to do research and make recommendations to the council. This method of handling has worked well. When we have called upon members of the bar for such work they have performed valuable service. We express our gratitude to these

men for their contributions to the improvement of the practice and procedure in the courts of Nebraska.

The work of the Judicial Council in expediting and improving legal procedures is intricate and time-consuming. The over-all work sometimes appears to be slow but results have been produced. The accumulative result has, we feel, been productive of a more expeditious handling of the case load in the various courts of the state. The cost of litigation has been an important consideration in all proposals made by the council.

We urge members of the bar to contact us when they find outmoded statutory provisions or provisions that should be clarified or simplified in the public interest. We call your attention to the fact, however, that the work of the council is limited to procedural matters.

Mr. President, if you could spare me two or three minutes I would like to make a little statement about the work of the Judicial Council. As you know, we have on that council one member of the Supreme Court selected by the Court, two district judges selected by the District Judges Association, one county judge selected by the County Judges Association, six members of the bar from each Supreme Court judicial district elected by the bar, the chairman of the Judiciary Committee of the State Legislature, the assistant revisor of statutes, and two lay members.

When we get these matters that are very complicated, like revising the search and seizure statutes of Nebraska, we have so many opinions come in before the council that the council simply doesn't have time in its meeting to take them up. We have pursued the practice, where possible, of appointing one of the members of the council as a subcommittee chairman and putting on four members of the bar who are not members of the council. They get together and do the research work, and they have produced for us in similar cases a very professional job in dealing with procedures in these areas over which we assume some jurisdiction to present them to the legislature on behalf of the Bar Association. Many of these changes that have been made appear trivial, but over the years they have simplified some of the complicated statutes; they have simplified procedures; and these lawyers who are giving this aid to us are men who are down in the court dealing with those things and they understand what the procedures ought to be and where these corrective changes can be made.

We find it impossible to call upon the members of this council who reside all over the state to come into Lincoln and meet too often. I am surprised that they have the time to spend on this

work that they are doing already, but the idea of getting members of the bar who are not members of the council to assist in the work has helped us out a lot and has relieved the council of the tremendous amount of research that would have to be done by that small group. I want to say, too, that I have never had a lawyer so appointed reject the opportunity to participate in the work. I think it is commendable of the bar. I think they are doing a grand job. They are giving us a lot of help and I think the over-all result is that we are improving the practice and procedure in this state much more than any of you realize.

PRESIDENT SVOBODA: Thank you, Judge. We are really gratified that you are doing such a good job on behalf of the whole State of Nebraska, not merely the lawyers but the whole State of Nebraska.

We now have an announcement from Mr. George W. W. Bodenmiller of the John Hancock Mutual Life Insurance Company as to our group life insurance program.

ANNOUNCEMENT AS TO GROUP LIFE INSURANCE

George W. W. Bodenmiller

I will say this parenthetically—in the five years that I have had the privilege of working with the Insurance Committee and George Turner and the other members of the Bar I have become increasingly impressed with the caliber of men in this august body. I observe the dedication and the seriousness with which you take your profession, and of recent days the perseverance and hustle of some of your Bar members around the state on this Point 6 program which is coming up. If I could find men just like that I think I could find an opening in our company for selling insurance. If you have a suggestion, let me know.

First of all, our group life insurance program for members initially became effective on December 1, 1957, and we have insured an average number of members since that time approximating 780 annually. The Executive Council has promoted the program through word of mouth and periodic mention at various meetings, and they have over the years endeavored to broaden the program wherever feasible. Only this year they have adopted as a part of the policy provisions a full complement of settlement options. More and more attorneys, I am sure, will be utilizing this greater flexibility, you can be sure. This was requested by your council and was approved.

Recently, in commemoration of five years on a successful group

life insurance program, the Executive Council embarked on a new open enrollment period whereby nonparticipating members under age sixty could acquire the protection without submitting evidence of insurability, provided we got at least one hundred new applications to spread the risk. If the enrollment requirement is met, coverage will be effective for the new applicants on December 1.

I will say here that we have had a number of requests; they are already coming in; and a letter which was delayed has probably reached your hands in the last few days. We had three or four phone calls. The application card which has the rates on it and a place for your signature was inadvertently left out of a number of those letters. We don't know which ones. So we have cards at the registration desk, or you can call our office in Omaha or Lincoln or drop a note to us, or to George Turner, and we will see that you get an application card.

It is interesting to note that since the plan was adopted almost fifty members have died, and approximately another fifty have either voluntarily discontinued the program or did not get their premium in and thus automatically were lapsed, but in spite of these reductions in the number of insured members, there are today almost one hundred more attorneys participating than were initially insured.

As of the end of the last policy year, December 1, 1961, paid claims during this same four-year period totaled \$373,000. Additionally, dividend payments totaled \$12,653, which was returned to the individual members. The total return was in excess, of course, of the paid premiums, leaving a deficit which, at the end of the policy period, including all expenses, totaled \$65,000.

It was deemed desirable in June of 1962 to adjust the premium charges by 20 per cent and it was felt at that time that this could be considered as a temporary adjustment. I can assure you that that is a temporary adjustment, and it will be reduced in the future as experience justifies. This year, barring untimely deaths for the balance of this month, we should have a very healthy experience record, which will tend to offset the rate adjustment, and you can expect to see some dividends in the future.

I believe that is the main part of the report. I would like to urge all of you who are not members of the plan to sign up for this thing. You can sign up without evidence of insurability. There are three reasons why it is important that you do: First of all, you are getting good life insurance protection for your family at rates you cannot get as an individual; second, as more members of the Bar sign up for the plan, it will make the plan more sound for the

rest of the members; and, third, since this is a vital, official part of your Bar Association program, you can help the whole association by urging your friends to sign up, too. You have just one other thing to say to other fellow members: "Here is another advantage you have in being a member of the Nebraska State Bar."

PRESIDENT SVOBODA: Thank you very much, Mr. Bodenmiller.

We now have the announcement of new officers by our Secretary-Treasurer, the Honorable George H. Turner.

ANNOUNCEMENT OF NEW OFFICERS

George H. Turner

Mr. President and Members of the Association: As provided in our constitution the members of the Executive Council met in June and made nominations for the principal offices of the association. A notice of those nominations was also, in compliance with the constitution, mailed to every active member. There being no petition candidates filed in opposition, those nominated by the council will automatically become your officers at the close of this annual meeting.

Nominated for the position of President-Elect is Floyd E. Wright of Scottsbluff.

Nominated for Member-at-Large of the Executive Council, Mr. John C. Mason of Lincoln.

Renominated for Nebraska State Bar Association Member of the House of Delegates, representing this Association in the House of Delegates of the American Bar Association, Mr. John J. Wilson of Lincoln.

PRESIDENT SVOBODA: We come now to the sad part of our program. The report of the Committee on Memorials will be given by George L. DeLacy.

REPORT OF COMMITTEE ON MEMORIALS

George L. DeLacy

It appears that thirty-nine of our brethren have departed this life since November of '61. The President has ordered the report of the Memorial Committee reduced to printed form so it will be available to the families of the deceased and to the Bar Association. May I read it to you. It is very brief:

Memorial to the Deceased Nebraska Lawyers since November, 1961.

To each of you we salute, in the words of Horatio to Hamlet: "Good night, sweet prince; and flights of angels sing thee to thy rest."

The thoughts, the dreams, the aspirations, the principles, the deeds of charity, the friendly personalities, the kindnesses, and the words of love of those we mourn today compose an identity which the flesh no longer prisons and which the grave cannot destroy.

Death has once again extended its awesome dominion. Once more we stand beside the invisible sea in which the stream of every life is lost and wonder where they are who, within the year, presided at our trials, battled with us in the courts, objected to our questions, presented to juries the rights of their clients with earnest and persuasive argument, whose word was their bond, and who were our friends and associates in our common profession.

Time and space will permit only the mention of each of our departed brethren. Those that love them should know that we shall miss them in the courts and in the gatherings of our Association. We know that they appreciated their manifold relations to the profession, to the church and to the state and performed with commendable diligence the duties of the spheres in which they respectively lived and moved. We know of their love of family, love of fellowman and love of God. They have fought the good fight. The profession of law, indeed, gained new luster by their lives.

From the inspiration of these our departed brethren, let us come to see that the practice of our common profession is something more than food and drink—something transcending a mean and petty scramble for individual gain and advantage.

We hope you will believe that it is a divine purpose in history which calls us to serve—a purpose of good for all mankind. We hope we will come, above all things, to desire to be the servants of that purpose to do all we can in our years upon this earth to help those about us, ever promoting the ends of justice, mercy and truth.

Let us cry from the heart: "Thy Kingdom come, Thy Will be done, on Earth as it is in Heaven."

* * * *

Let us stand in silent prayer while the roll of our departed during the past year is called.

Members Deceased Since 1961 Annual Meeting

John Adams, Sr., Omaha
Ernest F. Armstrong, Auburn
Otto L. Bremers, Omaha
William G. Bruning, Omaha
George F. Cogan, Omaha
T. A. Engles, Auburn
Everett H. Evans, North Platte
Hubert F. Favinger, Hastings
Frederick H. Free, Sioux City, Ia.
Samuel E. Gallamore, Fairbury
Edward L. Gleisberg, Seward
Leonard A. Hammes, Omaha
Alden E. Henry, Pawnee City
Charles E. Hughes, Imperial
William N. Jamieson, Omaha
J. H. Kemp, Fullerton
Fred B. Laux, Omaha
William E. Lovely, Omaha
R. E. Lunner, York
Merle E. McDermott, Omaha
Joseph C. McReynolds, Lincoln
Paul L. Martin, Omaha
Herbert F. Miller, Estes Park, Colo.
James W. Miller, Fremont
Earl J. Moyer, Madison
George A. Munn, Ord
T. F. Neighbors, Scottsbluff
Glenn R. Orr, Omaha
William R. Patrick, Papillion
Ernest B. Perry, Lincoln
William Raab, Omaha
Robin R. Reid, Lincoln
Clarence L. Stone, Columbus
Amos Thomas, Santa Barbara, Calif.
John T. Trout, Portland, Oregon
James A. Wagner, Yankton, So. Dak.
Robert J. Webb, Omaha
H. G. Wellensiek, Grand Island
Homer G. Wiltse, Falls City

PRESIDENT SVOBODA: Thank you, Mr. DeLacy and the members of your committee.

Is Mr. Nick Caporale in the audience? Will you come to the podium. Mr. Caporale, as chairman of the Junior Bar Section, will

now conduct a Fifty-Year Recognition Ceremony for those of our members who have completed, from 1911-1912, fifty years of service in our profession.

PRESENTATION OF FIFTY-YEAR CERTIFICATES

Nick Caporale

Will the following gentlemen please step forward:

John N. Baldwin, Jr., Omaha
 Merton O. Bates, Lexington
 Robert T. Cattle, Seward
 Raymond M. Crossman, Omaha
 Charles W. Dobry, St. Paul
 Allen W. Field, Lincoln
 Yale C. Holland, Omaha
 J. Carl Hollman, North Platte
 W. Ross King, Omaha
 Frank V. Lawson, Omaha
 Sterling F. Mutz, Lincoln
 Isaac J. Nisley, North Platte
 Carl P. Rohman, Lincoln
 Branson W. Stewart, Beatrice
 T. R. P. Stocker, Lincoln
 Joseph T. Votava, Omaha
 John C. Barrett, Omaha
 Robert H. Beatty, North Platte
 James L. Brown, Lincoln
 Raymond T. Coffey, Omaha
 Anthony Z. Donato, Omaha
 W. A. Ehlers, Omaha
 Glen T. Gibson, Gibbon
 George Doane Keller, Omaha
 J. Gerald MacVeigh, Bethesda, Md.
 Fred W. Messmore, Lincoln
 Frank H. Mize, David City
 Ralph S. Moseley, Lincoln
 John C. Mullen, Alice, Texas
 Frank J. Munday, Red Cloud
 John F. Hohn, Fremont
 Carroll O. Stauffer, Omaha
 Walter A. Vasey, Beatrice

It is too often in the rush of living our every-day lives that we fail to pause and pay honor to those who have earned honor through long years of faithful and diligent service. It is entirely fitting,

therefore; that we pause a few moments here to pay tribute to those who have served in the profession of law for half a century or more, who have, for a longer period than many of us have lived, grappled with the delicate balance of powers involving the rights of individual litigants and the interest of the society which they compose. These gentlemen have in a very real and substantial measure helped preserve the free and well-ordered society in which we live. Sixteen were admitted to practice in 1911; seventeen were admitted to practice in 1912. This would represent 1,666 years of learning, of experience, and of wisdom. No one can doubt the value of this contribution to the development and preservation of our law.

With the simple act of handing you these certificates of recognition of your contribution and service go the heartfelt thanks of each member of this Association.

[The certificates were presented.]

PRESIDENT SVOBODA: To the fifty-year veterans who are not present, as Chairman Caporale announced, their recognition certificates will be mailed.

[The Thursday morning session adjourned at 11:45 o'clock.]

THURSDAY LUNCHEON SESSION

November 1, 1962

[The annual association luncheon was held in the Ballroom, President Svoboda presiding.]

PRESIDENT SVOBODA: May I first introduce our guests at the head table. On my left, John Millett, President of the Wyoming State Bar, of Laramie, Wyoming.

The next gentleman is Harry "Omar"—he'll kill me for using that "Omar"; his wife uses it—Janicke from Winfield, Kansas, President of the Kansas State Bar.

Lloyd Karr of Webster City, Iowa, President of the Iowa Bar Association.

Leo D. Heck, President of the South Dakota State Bar.

Our old friend, Roy Willy of Sioux Falls, South Dakota.

Mr. Roy Swanson of Kansas City, Missouri, President of the Missouri Bar.

Now, among you you will find the elderly solons of our bar wearing yellow roses. They are the golden anniversary veterans of our bar. Shake hands with them.

Our speaker this noon is the President of the American Bar Association, a delightful conversationalist, as I can attest. In private life—if you want to call it private life, because he is practically divorced from his private practice for one year—he is General Counsel of the Prudential Life Insurance Company of Newark, New Jersey—the Honorable Sylvester C. Smith, Jr.

ADDRESS

Honorable Sylvester C. Smith, Jr.

Mr. President and Presidents of the other State Bars, Distinguished Judges, and Gentlemen: I am kind of in the same position as the minister who was trying to buy a secondhand car down in Georgia. He was trying to get a lower price and he finally said to the secondhand car salesman, "Remember, I'm a poor preacher."

The fellow said, "Yes, I have heard you before."

I have had the opportunity of speaking before your association, which I have enjoyed, but I want to tell you that throughout the years my association with the members of the Nebraska State Bar in the House of Delegates and in the American Bar Association has been really very, very pleasant.

I always like to tell the story of how one's family takes one down. My grandson, now ten years of age, liked to telephone when he was six. One day he called me at the office of the Prudential. I recognized his voice. He said, "Who is this?"

Thinking I would be smart, I said, "This is the greatest man in the world."

He said, "I'm sorry, I've got the wrong number."

Now I don't like to fight with things but every now and then I find somebody making a comment about my favorite subject, the lawyer and his position in America.

The Right Reverend James A. Pike, Bishop of the Episcopal Diocese of California, in the Julius Rosenthal Foundation Lectures at Northwestern last year asserted that in the eyes of the American public the lawyer is losing his former prestige. Dean Pike, whom some of you probably know, was once a government attorney, a graduate of Drake Law School. He had a few years of practice, a couple with a big firm in New York, and about five years with the New Deal. Then he got religion and entered the church, and he is a very able bishop. But I disagree with him. Dean Pike advanced five reasons why there was this deterioration:

First, because in controversy one side loses, and the lawyer, who is in the middle, is always blamed.

Second, he said there was an increase in specialization in practice.

Third, the unwillingness of lawyers—and I am sure he was thinking of lawyers in big firms—to take positions on public issues because of their clients' interests.

Fourth, he said there is a public lack of understanding of law and its processes.

Fifth and last he said, and I quote, "The progress in the development of codes of legal ethics—good thing in themselves—has tended to encourage a notion that the minimum is the maximum of the lawyer's responsibility."

While some of these reasons may have validity in part, I just differ with the good Bishop and I come to a different conclusion. Lawyers have always been used "too little and too late." While there has been some specialization, particularly in taxation and perhaps in trust law and antitrust law, the great majority of lawyers are general practitioners rendering broad service to their communities and their fellow citizens. The emphasis has changed, Bishop Pike—and I have said this to him—from corrective legal action to preventative legal counsel. We don't get into court quite as often because of this shift.

At San Francisco the members of the House of Delegates clearly demonstrated widespread opinion against specialization as such. The House of Delegates also created a new Section of General Practice, which I predict will become the largest section of the American Bar Association in a very short time. I recommend to those who are members of the association that they become affiliated with the Section of General Practice.

May I say to you gentlemen of the Nebraska Bar, Mr. President, that we have a House of Delegates and I just had an analysis of the membership. Much to everyone's surprise 49 per cent of the members come from communities that I would say are cities and small towns, and 49 per cent come from small firms, not over seven members; many of them are individual practitioners, and they represent the grassroots of America. In the House of Delegates we need that, because I have always thought that the significant thing about the grassroots lawyer—and I am one of those myself because I used to practice in a community of 16,000—was his common sense, and we need that in the House of Delegates, and I think we can be proud that we have that element. So I think that the proposition of Bishop Pike is not sustained by the figures.

It is hard to justify the statement that lawyers fail to take a position on public issues. Look what you are doing here on this Referendum 6, this great bar association, in carrying out the program of improving judicial selection. I know that very few lawyers, no matter what their clients' position, would fail to take a position on that. But actually the number of lawyers in the Congress, in state legislatures, and in the executive branch of the government is on the increase, not decrease. There are thousands of lawyers throughout the country who are actively engaged in civic work and community work, making decisions on public questions daily. Among the leading lawyers assuming civic responsibility I suggest two very prominent examples: One is Arthur Dean, a Republican, Sullivan and Cromwell, who is serving the President of the United States, a Democrat, in connection with the control and inspection and limitation of armaments; and John J. McCloy, a distinguished and very great lawyer with one of the big firms who is taking a position in connection with these matters on Cuba. I don't believe that lawyers take positions on political questions or refrain from taking positions on public questions solely because their clients may have a different opinion or interest. It makes no difference whether they come from a big firm in New York City or the larger cities of the country, or whether they come from the small communities; I have found that lawyers stand up and are willing to be counted. We learn how to differ with one another.

While one must admit the law is becoming more complex and federal statutes are particularly long, prolix, and confusing—and I might suggest that Bishop Pike was one of the drafters of one of those laws when he was in the public service—the public relations activities of the organized bar have in large measure improved the knowledge of the public as to the legal process and how we work. That has been one of the programs which we have been trying to put over through the American Bar Association, state and local associations, and which we can do. The lawyer referral service and public relations programs of state and local bar associations are educating the public in what the lawyer does and can do, and the lawyer explains, not individually but through the association, how this is done.

However, it is on the fifth reason stated by Bishop Pike that one must take serious note, and I object to it. The implication in his statement, you will recall, with reference to the Code of Ethics, was that the lawyers Code of Ethics condoned conduct which is morally wrong but legally correct. This is quite contrary to the whole spirit and language of the Canons of Ethics. A typical illustration is Canon 32, "The Lawyer's Duty In Its Last Analysis":

Correspondingly, he [the lawyer] advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance *with the strictest principles of moral law*.

And the last sentence from that Canon:

But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

I say and suggest that the good Bishop is not familiar with this Canon. I think it is observed by lawyers; I do not think it is breeched by lawyers. I would like to suggest that he might come up with an improvement on that Canon because it has not been changed since it was first adopted by the American Bar Association.

One does not wish to gloss over or underestimate the deficiencies in the profession. There is still much to be done. However, on the basis of what I have seen and heard in my travels in the United States and other countries I have reached the conclusion that respect for the legal profession and the American lawyer has been on the ascendancy in the last ten years.

Down through the ages there has been misunderstanding about the legal profession and the important part it plays in our rule under law. Accusations of dishonesty or selfish motives on the part of the bar may be found again and again in our literature. Authors, both ancient and modern, have selected the lawyer as a target for their satire. You will recall Shakespeare in his *Henry VI* saying through the voice of Dick the Butcher:

"The first thing we do, let's kill all the lawyers."

And Sir Thomas More in his *Utopia of Jewels and Wealth*, saying:

"They have no lawyers [in Utopia] among them for they consider them as a sort of people whose profession it is to disguise matters."

Benjamin Franklin in *Poor Richard's Almanac* expressed his views in six simple words—we must take this with a sense of humor—"A good lawyer, a bad neighbor."

Carl Sandburg pitched a very low curve in his poem, "The Lawyers Know Too Much," when he wrote:

Why is there always a secret singing
When a lawyer cashes in?
Why does the hearse horse snicker
Hauling a lawyer away?

Similar aspersions have been cast on the profession by the writings of Dr. Johnson, Samuel Taylor Coleridge, and many others. Our modern novelists—and this is something you might take note of—are no kinder or more accurate than their predecessors. To satisfy the prevailing appetite for sex thrills in current fiction, contemporary writers are picturing members of the bar as ardent, immoral, or amoral philanderers. In an amusing but provocative article in the *American Bar Journal* in 1959, Mr. Bander of the Massachusetts bar chides our contemporary novelists and asserts: "It is getting so that a female who takes her novel-reading seriously will consider it ill-advised to be examined by a lawyer without a nurse being present."

Of course, the lawyer has always been a target for the barb of the jokester, and we find these definitions of a lawyer:

1. A fellow who is willing to go out and spend your last cent to prove he's right.

2. A learned gentleman who rescues your estate from your enemies and keeps it himself.

3. A man who induces two other men to strip for a fight, and then runs off with their clothes.

4. He who is summoned when a felon needs a friend.

5. The only man in whom ignorance of the law is not punished.

Those lawyers who take themselves too seriously ought to remember the adage: "Don't take yourself too seriously; you'll never get out of this life alive."

For example, ours isn't the only profession that is being attacked. Of course you remember the doctor who has been defined as "a practitioner who diagnoses your ailment by feeling your purse." Also, "one who kills you today to prevent you from dying tomorrow." And of course the doctors are always alleged to bury their mistakes.

Then we have that old chestnut about the first lawyer saying, "You're a low-down cheat!"

The second lawyer, "You're an unmitigated liar!"

Then the judge says, rapping, "Now that the attorneys have identified each other we will proceed with the case."

To all this sarcasm I find comfort in the words of Justice Brewer of the Supreme Court:

While it is cheap wit for many to say sneering things of our profession, yet if you strike from Anglo-Saxon history the thoughts and deeds of her lawyers you rob it of more than

half its glory. Blot from American society today the lawyer with all the work that he does and all the power that he exerts, and you leave society as dry and shifting as the sands that sweep over Sahara. For the mystic force that binds our civilization together and makes possible its successes and glories is the law, and they who minister at its shrine and keep alive its sacred fires are you and I and that vast multitude of co-workers who boast no higher title than that of lawyer.

That's my view!

The misunderstanding of the public, which has prejudiced the legal profession in the past, stems from many causes. Some of the misunderstanding may be attributed to the fact that litigation customarily involves a conflict between individuals, each of whom feels that his cause is just. Hence, when the lawsuit is over there is likely to be one who believes that the result was a miscarriage of justice. The successful litigant, on the other hand, is not particularly impressed because he thinks he got his just due and he had to pay a lawyer in order to get that.

Another aspect which is difficult for the layman to appreciate is the way in which lawyers fraternize with one another even though representing adverse interests.

One of the most difficult things for a man who represents union labor is to get over the fact that lawyers must fraternize. They are very, very difficult clients. That is also true of management. Yet remember that Shakespeare understood that, because if you will recall in the "Taming of the Shrew" he concludes that "like adversaries they strive mightily and sit down and sup together." Such fraternization is to the uninformed layman an indication of insincerity on the part of his advocate, if not downright dishonesty.

Then there are those who do not understand—and this is the most difficult thing—the high duty of a member of the profession to act as counsel for defendants in criminal cases or represent litigants in other unpopular causes, some of which are really revolting.

In order to determine whether progress is being made, we ought to look back and see what has happened in America. Dean Pound, in a book which we published in the Survey of the Legal Profession, points out that in Puritan days, for instance, they practically forbade lawyers to receive fees. Then beginning in the middle of the Eighteenth Century there was a revulsion because they found that people couldn't be their own lawyers; they couldn't settle things by various arbitration groups. Then they followed

the English system of admissions to the bar, and many of the men in America went to the Inner Temple and were called to the bar at the Inns of Court, particularly the Middle Temple in America. Then, of course, we proceeded to have a greater respect for the members of the bar. You remember, that went too far and John Adams said that the practice of the law was "grasped into the hands of deputy sheriffs, pettifoggers, and even constables who filled all the writs upon bonds, promissory notes, and accounts, received the fees established for lawyers, and stirred up many unnecessary suits," all of which we ought to take note of in our unauthorized practice committees.

By the end of the Eighteenth Century reform had set in and there was a new picture. Remember, twenty-five of the fifty-six signers of the Declaration of Independence were lawyers, and thirty-one of the fifty-five members of the Constitutional Convention were members of our profession. It was in the 1830's, the Jackson era, when lawyers again lost out. Pound characterizes this as the worst period of the profession. He attributes the decline to a breakdown of organization, education, and professional training.

A revival of the profession commenced in the 1870's and has continued to date. This renaissance may be attributed principally, if not entirely, to the development of our modern type of bar association, dedicated to uphold the integrity of the bar—and I want to emphasize this—and to the fulfillment of the public responsibilities of the lawyer. This new era has been said to have its genesis in the organization of the Bar of the City of New York in 1870. That was when a great New York lawyer undertook and successfully prosecuted the Tweed ring and formed the Association of the Bar of the City of New York.

The organization of the American Bar Association in 1878 provided nation-wide momentum to this revival, which has continued down to this very day. It is my understanding—I hope I am right—that your state bar was first organized in that very year (1878), reorganized in 1900, and integrated—I believe they call it "incorporated" down in North Carolina because of that word "integrated"—in 1937. During the year following the organization of the American Bar Association the records would indicate that the Omaha Bar Association was organized. Included in the group of distinguished lawyers who brought about the formation of the Omaha Bar Association was James M. Woolworth, Esq., who later became President of the American Bar Association.

The public image of the lawyer is a composite of many impressions. The most important single influence is the individual

lawyer's professional performance and conduct. No paid advertising or program of public service can be a substitute for sound attorney-client relationships. Improving the attorney-client relationship has always been a cornerstone of the bar's public relations effort. However, it is chiefly the day-to-day contacts of each lawyer with his own clients that will in the final analysis determine how much faith and confidence the public will repose in the legal profession, and certainly the great intimate image of the lawyer is reflected in that relationship.

Another important factor in the building of the image of the lawyer is the impression which the public receives of the manner in which the bar as a whole discharges its professional responsibilities. It is in this sphere that bar associations have a primary duty to interpret the profession to the public.

There are distinct differences—and I speak as one with knowledge because of my relationship with my company—between the public relations activities of business organizations and professional associations. A business strives to build up public acceptance of its product. This product is usually something tangible, the benefits of which can be extolled—sometimes, in my opinion, over-extolled—through all forms of modern advertising media. A professional man, on the other hand, has simply an intangible to sell—his services, his time. Because of ethical considerations, the professional man must carry out his work without the benefit of advertising. The public relations activities of a professional organization, the national, the state, and the local bar association, must therefore be aimed at acquainting the public with the profession's services, its functions, and its philosophy.

Another important difference involves autonomy. A business corporation is usually able to control strictly its personnel, its business policies, the prices of its products, the nature of its work. A professional society cannot do this. Professionals are individuals, each uniquely responsible for his own public relations. Even bar associations are autonomous. It is true that through the House of Delegates, the American Bar Association, lines of professional authority are laid down for the guidance of the organized bar. Without the cooperation of the state and local bar associations there could be no accomplishment of those purposes and objectives. Yet a state or local bar association is not strictly bound to adhere to any policy of the House of Delegates where it disagrees.

I want to say it is with a great deal of pleasure that I find in this program of improving judicial selection that this great bar association is fighting so hard for this referendum question, No. 6.

I hope, and I am sure, that the people of Nebraska are going to have confidence in your leadership and will vote for this very important progressive step in improving judicial selection. I think we are going to look upon this as we are looking on the referendums on court reform in Illinois and North Carolina. It is a great performance of its public responsibility on the part of the bar.

By reason of the very nature of the practice of the law with its adversary system, lawyers have never ranked high in popularity polls. But there is something more substantial and more important than individual popularity which a lawyer does strive for, and that is public understanding and respect. The image he seeks, speaking of the individual lawyer and the profession as a whole, is that of a trained, competent, honorable and trustworthy professional performing a service without which freedom as we know it would not exist and without which no citizen's rights or property would be secure.

Well, there is an increasing activity on the part of bar associations in the performance of a public work. For instance, let me just briefly review some of them. Let's take up the activity of the American Bar Association and the state and local bar associations in promoting legal aid, the legal defender system, the improving of the administration of justice, the activity of the American Bar in trying to bring about fair procedure for the citizen in the administrative process, the activity we are conducting in behalf of the individual lawyer for the economic condition of the bar, our lawyer referral program which I hope will be taken up by your association.

Yesterday I spoke before the Allegheny Bar Association, and it is perfectly astounding the results that have come about from their lawyer referral program. A person calls up and says, "I'm buying a house and I don't know a lawyer," and they pick a lawyer from the panel.

One of the things that is apparent in all of these local associations where this has been adopted is dispelling the view that lawyers' services cost too much. The result has been that many of the lawyers, the younger and other lawyers, are finding their time occupied better, are being paid and being used and advanced because the lawyer referral service explains to the public through its programs the services that can be rendered.

Then there is the annual legal check-up. How many of us think of drawing a will and have forgotten that we should have kept in touch with our client and suggested there might be a change in his circumstances; new children may have been born

and no clause entered. A review of the annual legal check-up is a program which I suggest is worthy of study by your association and the local associations. It can be presented by the association, in my opinion, and we have some aid and assistance from our Public Relations Department of the American Bar Association over the radio, and I am sure it would be very good.

I want to say this: In my opinion the last ten years have seen an improvement in the standing of the American lawyer in his community largely through, I think, the organized bar acting together. I think it was Elihu Root who said, "Alone, people can do little in America, but through association we can accomplish much."

That, in my opinion, is what we owe to the profession of which we are members. We should take part in it locally, state-wide where you have your incorporated bar and you have to belong, but principally in the American Bar Association as a whole. I can't see how a young lawyer, or a lawyer who has any relationship to the national program, can avoid membership in the Association. The *Handbook for the Lawyer* which we are giving to the new members through the courtesy of the West Publishing Company is merely an illustration of how we can help young lawyers and new lawyers to improve their methods in conducting their practice.

We have done much about television, too. The American Bar Association has a committee—a man experienced in connection with television and other representations through the media in Hollywood. I said to them after the meeting in San Francisco, "We are not a censoring body. What we do is offer to these producing media advice on how to represent accurately the judges, the lawyers, and the judicial process." Of course not everyone avails himself of it. There was recently a program in connection with personal injury in which there was no consultation with the committee. The fact is that it is an important work and we are gradually making improvement. Of course, it is very hard, you know, for a district attorney on television to win a case, particularly when you have the best lawyer, Perry Mason, on the other side.

I might say that I read the other day the story of a fellow in Nome, Alaska, who said he didn't want a lawyer, he was going to follow the advice of the best lawyer he knew. So while he was confined he got all the books about Perry Mason and after he had tried his own case for three days and the jury found him guilty, he said, "You know, I guess I didn't understand Perry Mason's methods."

Finally, I want to come to one other thing, the program of World Peace Through Law and the international aspects of it. I have just returned from England where I spoke to the Law Society and heard a very fine address by Sir Edwin Herbert on the Common Market. Being in business I want to say that it is one of those things which I don't think lawyers who have small or large businesses as clients can avoid learning about. You should know what the Treaty of Rome which created the European Community does, how it sets up its organization. The Undersecretary of State, before he became that, said very frankly that the Treaty of Rome called very much upon the American system of balanced powers in setting up the European Community. They have a court of justice which deals with the problems there. They have a legislative commission and of course they also have Euratom and the coal and steel communities which are governed by it. Then they have just enacted rules with reference to what we would call here antitrust legislation for the European Community, and an American company doing business in Europe should certainly have advice on what those regulations provide.

The fact is that the Common Market has a greater population than either Russia, which is the other common market, or the United States of America. If Great Britain becomes a member of that Common Market it will be the greatest market in the world. It is something which businessmen in America and businessmen in other parts of the world need legal advice on, because it has a great many legal aspects to it.

Next is World Peace Through Law. We are going to have a world conference, I hope, if there is no conflict, and we are going to invite to that, under the American Bar Association's aegis, lawyers from probably 111 countries. The program is always indefinite, but we hope to find what the lawyers of these nations of the world feel can be accomplished in developing some code of international conduct which civilized governments could follow, and perhaps we can find some way of having world peace through law. It is a great ideal, and we are going to conduct this as lawyers and not through governments or with government support.

I am always reminded about this because every now and then my friend Roy Willy and others say, "Well, this is a great ideal"—but we have to be for ideals. It reminds me of the story of Mrs. Flannigan who went over to see her friend Mrs. Donovan to have tea with her. She said, "Mrs. Donovan, I want to tell you that my husband, Pat Flannigan, is one of the finest gentlemen in the world."

She said, "Well, that's very nice. And how do you make that out, Mrs. Flannigan?"

She said, "I'll tell you. Every Saturday I am sitting in this rocking chair, rocking back and forth, and my husband, Pat, comes in and he throws his pay envelope in my lap. Of course there's not a darn cent in it, but it's the principle of the thing."

We may not be able to win, but I suggest that the image of the lawyer is improved by going for these ideals. They can't be accomplished overnight. So I say that I think the image of the lawyer is improving and it will continue to improve so long as the organized bar and we individually perform our public responsibility.

PRESIDENT SVOBODA: Thank you so much, President Smith, for that inspiring and stimulating address. I think we need it.

We will now stand adjourned until 2:00 o'clock.

INSTITUTE ON TORT LAW

THURSDAY AFTERNOON SESSION

November 1, 1962

[The Thursday afternoon panel session on depositions was called to order at three o'clock by President Svoboda.]

PRESIDENT SVOBODA: I think we can start now. I am turning over the meeting to Albert G. Schatz, familiarly known as "Duke" Schatz, who will open the Institute on Tort Law.

CHAIRMAN SCHATZ: Members of the Bar and most welcome Guests: The members of the Tort Section certainly welcome you all to the opening session which, as you know from your program, is on discovery procedures in the State of Nebraska. We have endeavored to have three lawyers address you in three different sessions, three lawyers at each session. The sessions will each last about two hours; this one might be a little shorter now. We hope that the information and the techniques of discovery and discovery procedures that they will tell you about will enable us all to make more use of this particular judicial machinery that we have in our state.

Just briefly, prior to the adoption of discovery statutes in Nebraska, as most of you know, the means by which parties to litigation could narrow the issues and could discover evidence or get information leading to the discovery of evidence was almost

exclusively by the pleadings. During that era each side of the lawsuit was protected to a great extent against any disclosure of his own case.

The feeling was in Nebraska, as in most other jurisdictions where discovery statutes similar to ours have been passed, that a judicial battle should be a little bit more of a search for the truth, to exact justice at the end of the hearings, rather than to be exclusively a battle of wits by the two attorneys. Therefore the discovery procedure as now adopted in our state, as in most other states, is used mainly for that purpose. The purpose is to obtain evidence, to obtain information leading to the discovery of evidence, and to narrow the issues during the trial.

As you further know, there is little case law in Nebraska by our appellate court on discovery procedures or techniques or on just how far discovery can be taken in this state. So far as our trial judges are concerned, the basic philosophy seems to be that each party to civil action at least is entitled to the disclosure of all relevant information in the possession of the other side, unless the information is privileged. I think in the main that our trial judges applying the discovery statutes in this state have gone along with that theory and with that rationale and probably have leaned somewhat on the decisions that have come down in the federal rules decisions or by the federal district courts or courts of appeals in that regard.

I think it can be generally felt that the discovery process in procedures and technique in our state has been welcomed by most of the lawyers and I feel, and the section which worked with me feels, that if we know more about it, all of us, we can put it to better use. We sincerely hope that this program will do just that.

At this time I wish to thank the members of my section who worked with me: Bob Mullin of Omaha; Dan Stubbs of Alliance; Fred Stiner of Lincoln; Jim Lane of Ogallala; and Bernie Smith of Lexington. Also working with us—I wish to thank John North from the Committee on Continuing Legal Education, which committee proposed this particular subject, a subject which we of the Tort Section felt would be very appropriate for our particular section to bring to you at this time.

This afternoon our schedule calls for a discussion on the general use and techniques, and the use to which you can put depositions in general. The three speakers who are all familiar with this subject and who will address you are James Doyle, Dean of the Creighton University School of Law here in Omaha, who is to my immediate right; and to his right, the man who will follow

Dean Doyle, is Mr. Harry Welch; and following Mr. Welch and to his right is Donald P. Lay, both of whom are also from Omaha.

DEPOSITIONS

James A. Doyle

Mr. Chairman, Mr. President, Ladies and Gentlemen of the Nebraska Bar, and Guests: In introducing this subject Mr. Schatz has already given a great deal of my speech. I am here primarily to deal with some very elementary principles on this subject and to provide what I think is the necessary and desirable and appropriate background for the presentations to be made by the two distinguished trial lawyers here at my right, who are doing this kind of work every day.

At the risk of boring you a little bit I am going to repeat, perhaps in a little different context, some of the statements which Mr. Schatz has made about the purpose and function of discovery in Nebraska. In doing so I would like to recount for you, and beg your indulgence in so doing, a little of the history of the development of the rules of civil procedure which go back some twenty years. I do this because I feel very much that the effective and full use of statutes relating to depositions and discovery depends upon an understanding of their background and their purpose.

To place them in the proper perspective it seems desirable to trace a little bit of the history of these statutes because I shall point out one or two instances along the way in which the statutes we adopted, which are the counterpart of Rules 26 through 37 of the Federal Rules of Civil Procedure, seem to raise questions or to depart a little bit from the remaining rules which we follow in connection with pleadings and other aspects of development of a case for litigation.

Back on June 5, 1939, some of you will remember and others who are younger will not, the legislature of the State of Nebraska directed the Supreme Court to promulgate general rules of practice and procedure and report them to the legislature.

Pursuant to that direction and also pursuant to appropriate constitutional provisions, the Supreme Court on October 10, 1939, established an Advisory Committee and charged it with the preparation of such rules.

This committee, established by the Supreme Court, consisted of twenty-five leading members of the bar, with John W. Delehant as chairman. I don't think it would be amiss at this point to invite

your attention to the eminent lawyers—and many of them are now judges—who constituted that commission. As many of you have had occasion to say in court, “Your Honor, please, I will try to connect this up a little bit later,” so you will see the significance of some of the remarks I want to make.

This commission consisted of:

Frank Anderson	Ernest Kroger
Max Beghtol	Earl Moyer
Charlie Bongardt	Sterling Mutz
Paul Boslaugh	T. F. Neighbors
J. C. Cook	Reed O'Hanlon
Julius Cronin	Lester Orfield
John W. Delehant	Bert Overcash
Robert Flory	Charles Reed
C. C. Fraizer	Harry Shackelford
William C. Fraser	C. A. Sorensen
William Grodinsky	Varro Tyler
William Hotz	Joseph T. Votava
Emerson Kokjer	

I think you will agree with me that it was a very distinguished commission established by the Supreme Court to review and promulgate new rules of civil procedure in Nebraska.

This committee went to work promptly, established a great number of subcommittees, and after a great deal of work they submitted their final draft to lawyers, distributed it among the lawyers, in the fall of 1941.

On December 8 of 1941 there was a public hearing on these rules. On January 28, 1942, twenty years ago, the Judicial Council approved them, and on April 20, 1942, the Supreme Court unanimously adopted the rules and ordered them to be printed. They were submitted to the West Publishing Company, which published them on May 19, 1942, in a very nice red-bound volume here which says on the front of it “Adopted April 20, 1942, Effective Ninety Days After the Adjournment of the Fifty-Sixth Legislature.”

This did not take into account the possibilities of the legislature, and in the 1943 session the legislature disapproved the rules by approving a bill introduced by the Committee on Judiciary. These rules followed in substance, and very closely, the federal rules of civil procedure which were adopted by the Supreme Court of the United States in 1938.

I happened to hear at that time a number of the arguments that were addressed against these rules. I had a chance to do so

because I was associated in a very minor capacity with the Nebraska Statute Commission, and I think the arguments boiled down largely to these three:

Some of the lawyers in the legislature or to the legislature said, "Don't make me learn my procedure all over again." This is quite a familiar cry. "I have been practicing twenty or thirty years; I am familiar with these rules, don't make me do it all over again."

Another very familiar argument, addressed primarily to the rules of discovery which we are here concerned with today, ran something like this: "I'll prepare *my* case; and you prepare yours. I am satisfied with that type of approach to the development of the litigation process." That I heard frequently.

So there was a concerted drive against these rules; they were defeated; and we went back to the Code of Civil Procedure originally adopted in this state in 1855.

It is in the background of that occurrence twenty years ago that we have endeavored since that time to upgrade our procedure at least in part by piecemeal legislation. We began that in 1951 when we adopted in the legislature the statutes relating to discovery and depositions which are the counterpart of Rules 26 through 37.

The same legislature adopted the provisions relating to summary judgment which are segments of the federal rules which I think perhaps mark some of the most significant advances in civil procedure that we have made over the years. That about sums up the piecemeal legislation that we have adopted since that time.

The Supreme Court in the State of Nebraska, as you well know, has provided by rule for pre-trial hearings. Although we have adopted by rule or by statute some of the very significant provisions of the federal rules relating to discovery, and these three are exceedingly important because they have a significant bearing upon our whole approach to the litigation process, as Mr. Schatz has indicated, we have departed in the adoption of these rules at least in part from the picture of a lawsuit as a distinctly adversary proceeding in which technicalities frequently were the disposing factors. This in many respects has been responsible for the criticism which many lay people have had of the judicial administration.

If we are to follow these rules relating to deposition and discovery in discharge of the purposes for which they were incorporated in the federal rules, and for which I presume they were adopted by our legislature, we should take a distinctly different attitude toward the function of pleadings in the formulation of

the issues in a lawsuit because, under the federal rules, the pleadings have been downgraded; they serve primarily the purpose of conveying to the defendant a very generalized notion of the nature of the claim in terms of identifying it, in terms of time and place, and the simple operative facts involved, and the nature in general of the relief sought, leading it to the rules relating to depositions and discovery, to bring to the surface all of the facts which both parties, through effective use of depositions, interrogatories, admissions, production of documents etc., can dredge to the surface and shake out, so that there should be, at the conclusion of an effective use of these discovery techniques, no unknown factors involved, no element of surprise possible to either side, and when coordinated with an effective pre-trial hearing, results in a pre-trial order which would supplant the pleadings for the purpose of formulating the issues to guide the judge in administering the trial when it reaches that point.

I do this because I think you have to consider not only the remarks which will be made by my colleagues this afternoon in the application of these rules relating to depositions but the subsequent programs of this convention relating to discovery, not as isolated provisions of our statutes, but in their total relation to the function which pleadings should serve and the function which the pre-trial conference and the pre-trial order should serve in narrowing the issues and defining those issues for the court.

It has already been pointed out that we have few, if any, precedents in the State of Nebraska upon which to draw an interpretation of these statutes. Since these rules have been borrowed—the statutes have been borrowed largely from the federal rules—it would be appropriate of course to consider federal cases bearing upon their interpretation or cases in other jurisdictions in which the federal rules have been adopted. I might suggest to you something with which I think you probably already are familiar, that all of the states bordering upon Nebraska have adopted or revised their rules of civil procedure in the light of the federal rules of civil procedure, so that we are—if you wish to say it—the white spot in this area with respect to the revision of civil procedure generally.

I might also add something with which I am sure you are already familiar, that New York has just finished a complete and thorough-going revision of its rules of civil procedure, and they have been adopted and published and will go into effect next July.

I think with that background of twenty years of history we might wish sometime soon to consider the possibility of taking an-

other look at our general rules of civil procedure. There are still some gaps. I think particularly of the fact that we do not have any provisions in our statutes relating to impleading, an extremely valuable and useful technique that has developed through federal rules and has found adoption in many states.

Now getting back to the purpose and function of these statutes, I want to read a short quotation from probably the leading case on the interpretation of federal rules, the case of *Hickman v. Taylor*, the noted case dealing with the work product of the lawyer in which the Supreme Court made these significant observations, which I think are equally pertinent here:

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

. . . the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

As I pointed out, depositions are simply one of the varied arsenal of techniques and devices to achieve these ends which

the Supreme Court has described in the *Hickman* case, so they are to be considered as a part of an integrated program calling for the effective use of all of these techniques if you are adequately to perform your job in preparation for trial. I should add at this point that use of the deposition effectively does not preclude but invites contemporaneous effective use of all of the other techniques. They are correlative instruments designed to dredge up all the facts and leave nothing to chance.

Our experience has indicated that the deposition-discovery procedure does result in a number of very significant benefits in the course of judicial administration. They contribute to the ascertainment of truth and the prevention of perjury, the exposition of false, fraudulent, and sham claims and defenses. They promote a better evaluation of the merits of the case, as well as facilitating its trial upon the narrow issues defined by the pre-trial order. They eliminate surprise and prevent delay, and undoubtedly encourage many settlements that would not otherwise be made.

Getting down to the more mundane provisions of the statutes, that segment of the statutes which I am to discuss: When may depositions be taken? And here at one point I shall endeavor to connect up some of the history that I have given you.

Under the statute which we have adopted, which is Rule 26 amended in 1946, depositions for discovery purposes or for the attention of evidence are equally governed by the same rules. The defendant may take a deposition for either of these purposes or for a combination of them without leave of court as soon as the action is commenced.

The original rule provided that the depositions could not be taken except by leave of court until after jurisdiction had been obtained over any defendant, or without such leave only after the answer had been served. Before 1946, the draftsmen reviewing the experience of the courts concluded that some liberalization could be made so that the defendant is free upon service of process to take a deposition immediately without any notice.

The plaintiff may take without leave of court also, except that leave must be obtained to take the deposition within twenty days after the filing of the action. Now what is the purpose of this so-called twenty-day rule? The federal courts and the draftsmen have said that the reason for the imposition of this twenty-day limitation on the plaintiff so far as taking depositions without leave is concerned is to afford the defendant an opportunity to hire a lawyer. I suppose in some instances that is realistic but I suspect also in the field of personal injury litigation that is less than

realistic in view of the fact that the defendant, the real defendant of the case probably, is on the ground much earlier than the plaintiff's lawyer. But in any event the twenty-day rule, coincidentally or otherwise, conforms to the time within which the defendant is permitted to answer under the federal rules.

In proposing these statutes for adoption by the legislature, I don't know of course what consideration was given to the twenty days. We adopted these rules, I can say safely enough, without much reference to their relationship to the answer period in our Nebraska practice, because in Nebraska answer day is the third Monday after the return day of the summons, and the summons is returnable the second Monday after the day of its date—provisions which I abhor but nonetheless they are there.

Now what relation, if any, does the twenty-day limitation have to the filing of a responsive pleading? I suggest that it probably has none. It has been suggested that the purpose of the twenty-day rule in the first place was to assure that the pleadings would be formulated, the issues would be defined by the pleadings, before depositions should be taken. However, it is apparent in many cases, of course, under the federal rules that the answer will not necessarily be filed in time if the twenty-day period would permit that after the expiration of twenty days the depositions could be taken. Here is an instance, immaterial though it may apparently be, where the rules we have adopted are not necessarily geared to other provisions of our statute.

Of course, under the prior statutes, which were rather sketchy, there was little opportunity, if any, to use depositions for discovery purposes in Nebraska. You had to resort to a bill of discovery in equity if you wanted to discover evidence for purposes of filing a responsive pleading or otherwise. So this rule was, in effect, a rather radical departure from existing practice.

If the plaintiff wishes to serve notice of his intention to take a deposition within twenty days after the filing of his action, and the commencement of his action is the filing of his complaint, he must seek an order of court. The court can grant it with or without notice to the defendant. There is, of course, as I have indicated, no restriction upon the defendant in that connection. This limitation applies to the service of the notice for the taking of depositions and it can have the effect of insuring the plaintiff who files the notice of taking the deposition early a priority in the order of taking depositions, because ordinarily the right to take depositions is determined in the order of the filing of the notice. But in any event, the deposition itself cannot be taken until after the expiration of the twenty-day period.

The next minor item assigned to me is: Whose deposition may be taken? Elementary, of course. The testimony of any person, including a party, may be taken by deposition, either upon oral examination or upon the basis of written interrogatories. With respect to a corporation which is a party, it may be examined through an officer, director, or managing agent. A corporation cannot be examined through a person who is not an officer at the time of taking the deposition, although that person could be interrogated as any other ordinary witness could be examined.

A party, of course, may take his own deposition; he may wish to anticipate absence from the trial or some other reason, and clearly his deposition may be taken.

An attorney for a party may be examined, and of course this led to the famous *Hickman* case in which the Supreme Court considered whether or not memoranda and other statements which he had personally taken could be the subject of production.

So it comes down to this, that any person who has information which is relevant to the subject matter of the controversy, including the existence of books, tangible things, identity and location of persons having knowledge of relevant facts, can be examined and interrogated. A person in prison or in an insane asylum can have his deposition taken upon order of the court.

Going on rapidly, I have already indicated that the party who first serves the notice to take depositions ordinarily has priority in the taking of depositions in the absence of special circumstances. This is a matter which the court, upon proper showing, can control and can alter. It is not a fixed, inflexible rule.

Now we come to the compelling of attendance and the production of documents. Under the statutes we are considering at this institute there is one, the counterpart of Rule 34, which specifically provides for the production of documents and other objects, tangible objects, photos, etc., for the purpose of examination and photographing. Good cause need be shown and an order of court obtained to proceed under that rule.

I think you are probably very familiar with the fact that in the taking of a deposition you may coordinate it with a subpoena duces tecum to require the witness or the party to bring with him instruments, objects, photos, statements, and the like which under the federal rules at least need only be relevant to the subject matter of the inquiry. I am coming to another minor point in connection with our own statutes here that may raise a query on that point, because, when we adopted these statutes on depositions and discovery in 1951, we did not see fit for some reason or another to do

anything about the statutes relating to subpoenas and subpoenas duces tecum, which are covered in Rule 44 of the federal rules and are carefully coordinated with Rules 26 through 37. Whether we have a problem on this point or not, I shall leave to you. But in any event our statutes on subpoenas and subpoenas duces tecum are simple, brief, unamended, have been on the books for many, many years. A subpoena, of course, may be issued by the clerk of the court or by an officer authorized to take the deposition.

If the party giving the notice fails to serve a subpoena on a witness, the court may order payment of reasonable expenses of the other party and his attorney if the witness does fail to appear. The witness, of course, is not required to give the deposition out of the county where he resides or where he may be when the subpoena is served upon him—all elementary principles. A witness may demand traveling fees and witness fees for at least one day.

Failure to obey a subpoena, or refusal to be sworn, or answer as a witness, or to subscribe a deposition is punishable as contempt of the court or of the officer by whom his attendance or testimony is required.

It surprised me years ago when I discovered that in this state a notary public may commit for contempt for refusal of a witness to answer. That seems to be very well established in this state. Early cases on the point have been cited with approval as late as 137 Neb.

The punishment for contempt is defined specifically by statute Section 25-1231. In the event of the failure of the witness to appear the penalty is limited to a fine not to exceed \$50.00. However, if he appears but refuses to answer or refuses to subscribe to the deposition, the court or the notary may either fine him up to \$50.00 or confine him to jail. I have no reason whatsoever to offer for the difference in penalty between failure to appear and the failure to testify after appearance.

With respect to the depositions of parties, I presume you probably are well aware that a subpoena is not required to compel the attendance of a party as a deponent. On willful failure of the party to appear, the court may strike all or a part of that party's pleading, dismiss the action or a part thereof, or enter judgment by default against that party. The notice is sufficient in and of itself when directed to the party himself.

If the subpoena is not required to compel the attendance of a party, I think it should follow normally that a subpoena duces tecum likewise is not required, that you have complied sufficiently if you have designated in the notice, the documents, the objects, the photos, the statements, etc., which you want that witness to produce.

One final point and I shall be through. I pointed out that Rule 34 of the federal rules, which we also adopted, provides that upon motion of any party showing good cause, the court may order any party to produce and permit the inspection and copying of any designated documents, etc.

Our statute 25-1224 provides for the issuance of subpoenas duces tecum directing a witness to bring with him any book, etc., which he is bound by law to produce as evidence. This statute does not say anything about good cause or anything else, and it does restrict it. I call your attention to the fact that the restriction is to writings or other things under his control which he is bound by law to produce as evidence.

Under the deposition technique, where you take a deposition and issue a subpoena duces tecum, the federal cases clearly indicate that the scope of inquiry is anything that is relevant to examination under Rule 26—that is the statute defining the use of depositions for discovery—and, namely, for the purpose of discovery of, or for use as, evidence.

So in this piecemeal attempt to patch up our statutes, I wonder if there is any limitation in our old statute relating to subpoena duces tecum which should not be there in the light of the over-all objectives for which subpoenas and subpoenas duces tecum used in conjunction with the notice to take a deposition are intended to cover, where relevance to the subject matter of the case is the only limitation upon inquiry.

Does our statute, which says that it is limited to books or writings which he is bound to produce as evidence, mean evidence admissible at the trial? I suspect perhaps that the answer is found in the last sentence of Section 25-1267.02, which is not related in any way to our subpoenas, where it says, "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of evidence." I would suppose, when you use the subpoena duces tecum in connection with your deposition procedure, that the overriding purpose of the deposition for discovery purposes should also cover the subpoena duces tecum. I should caution you that valid notice of the taking of the deposition is a prime prerequisite to the punishment for contempt for failure to comply, which I have already mentioned.

I suggest, in conclusion, that you keep in mind the basic over-all purposes for which these rules originally were adopted—the fact that they have been inserted into the structure of the old code

practice adopted in 1855, because there may be some significance in that.

In conclusion may I ask that you address all of your questions on this subject to my eminent colleagues over here.

CHAIRMAN SCHATZ: Without further ado I now present Mr. Harry Welch, who will take the ball from Jim and proceed with our discussion.

DEPOSITIONS

Harry L. Welch

Mr. Chairman, Honored Guests, and Members of our Bar: I shall continue in the discussion that Dean Doyle has started directing it principally to the matter of depositions.

Some wag once said that the real purpose of depositions is to augment the court reporter's income. I shall not direct my remarks toward that field but to something I think perhaps is a little more in order.

When we approach this subject we must first, of course, look to what you might call the primary rule or the basic rule on the scope of examination by deposition. That rule provides that "Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." That last sentence, as you will see as we progress, has great significance and is highly important.

The scope of a discovery examination under Rule 26 (b) is much broader than an examination at the trial, particularly in view of the second sentence which I just referred to. To the extent that an examination develops useful information it functions successfully as an instrument of discovery even if it produces no testimony directly admissible. The objection that an examination is a "fishing expedition" is no longer valid.

The provision that "the deponent may be examined regarding any matter, not privileged, which is relevant to the

subject matter involved in the pending action, *whether it relates to the claim or defense of the examining party or to the claim or defense of any other party*" is in accord with modern legislation which has largely abandoned the old chancery practice which limited discovery to facts supporting the case of the party seeking it.

The scope of the examination, however, may be limited by the court upon motion and notice by any party or by the person to be examined as provided in the rules.

Aside from the matter of privilege and the question of inquiry into information obtained in preparation for trial, the only restriction placed upon the matters which may be gone into upon discovery examinations is that the matter be relevant. The language of the rule and the appropriate corresponding statute is that the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the pending action.

The appropriate statutory counterpart also provides the similar provision.

Subject to the provisions of the rule, objections may be made at the trial or hearing to receive in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

Relevancy alone is the test most commonly found in the discovery provisions in most jurisdictions.

The same rules concerning relevancy govern discovery examinations, but the rule is not as well defined in a deposition as it would be at the time of trial. The matters in dispute at the time the depositions are taken may not be as defined as they would be after pre-trial hearing and at the time of trial, and as a result the scope of examination by deposition should not be limited unless the information sought is clearly privileged or irrelevant. Inquiry should not be limited to matters relevant only to the precise issues presented by the pleadings if inquiry would tend to elicit information which might lead to relevant matters.

This is not to say that inquiry on purely collateral issues would not be denied. For instance, the inquiry should be permitted to matters affecting the credibility of the deponent or to facts which might be used in impeaching or cross-examining the witness at the trial. Inquiry is permitted to ascertain whether certain persons are proper and indispensable parties to the action, or to ascertain and determine the nature and extent of an adverse party's purported representation of a "class" in a class action if it is so brought. Venue

and jurisdiction may be inquired into and may be an important element, of course, in the trial of the case. Discovery is not necessarily limited to occurrences within the limitation period, as prior acts may affect the time when the statute began to run. Questions as to acts subsequent to the date of the filing of the complaint may be proper as they may ultimately become relevant.

The rules contemplate that ordinarily the deponent shall answer all questions except those to which he objects on the grounds of privilege, but all other objections shall be saved until the actual trial. Rule 30 provides, and our counterpart in the statute, that evidence objected to shall be taken subject to the objections, and its statutory counterpart provides a similar waiver. The party taking the deposition may likewise certify to the court the questions that the deponent refuses to answer. The rule provides that the proponent of the question may apply to the court in the jurisdiction where the deposition is being taken to require the deponent to answer the questions. Provisions under those circumstances also are made for extensions and penalties in the event of failure or refusal to answer.

Since discovery is based upon its own unique theory, the reasons supporting the rules of evidence as hearsay rule, the rule against opinions, should not be rigidly applied to discovery. Hearsay evidence and opinion evidence given without foundation may lead to other relevant evidence. Since there is no way to determine beforehand whether the deposition is solely for the purpose of discovery or proof, there seems to be no basis upon which to ground limitations of the examination other than provided in the rule itself.

The principles as to the propriety of allowing discovery by deposition on questions of damages were first discussed by the Supreme Court in *Sinclair Refining Co. v. Jenkins Petroleum Process* case in which they rejected the theory that damages were not part of the issues in a lawsuit, and held that the measure and amount of damages was clearly a matter which is relevant to the subject matter involved in the action. On the other hand, where the action is a simple suit for damages and where a jury trial has been demanded, there is usually no reason not to allow discovery as to damages prior to trial.

The rules expressly provide that discovery may be had concerning the identity and location of persons having knowledge of relevant facts. One purpose of this provision is to allow all parties equal access to the relevant facts; and the second purpose, when this provision is considered under the other pre-trial and discovery rules, is to allow the parties to obtain the names of trial witnesses.

Since the right of discovery is mutual and equal, no party is favored over any other party in achieving this purpose. It is, of course, immaterial that the information as to the identity and location of persons with knowledge of relevant facts was obtained from hearsay sources. There is authority that an attorney may assert a claim of privilege against disclosure of names of witnesses which he obtained directly from his client. This is usually held to be unsound, since persons having knowledge of relevant facts do not belong to any party and since the client, as a party to the action, would have to divulge such information, and this disclosure to his attorney in no way hampers free and proper attorney-client relationship.

The rules, taken together, give the courts broad powers to simplify litigation and to avoid surprise. Since a party clearly can ascertain the names of all persons who might be witnesses under the specific provisions for discovery, no good reason is seen why he should not have the right to learn at some reasonable time before trial which of these persons will be witnesses. This is not to say that the adverse party is bound to use all of the witnesses nor to preclude the use of other witnesses if their existence or the relevancy of their testimony is discovered and notice is given of their identity.

The rules provide for discovery of existence, description, nature, custody, condition, and location of books, documents, or other tangible things. The examiner, in his deposition, may inquire of the deponent only as to documents or other tangible things which are relevant. This portion of a deposition inquiry is only supplemental to the production rule and leads up to ultimate requests for production of documents.

The inquiry into facts of the discoverer's own knowledge has been somewhat of a contentious point. Knowledge of facts is one thing. Proof is another. Superficially it may appear wasteful to permit examination as to facts within an examiner's own knowledge. However, in the terms of the deposition discovery procedure such an objection is untenable. Thus the object of the rules relating to deposition and discovery is to permit the widest latitude in ascertaining before trial facts concerning the real issues in the controversy. Parties are to be allowed interrogatories in connection with any relevant matter in order to make available the facts pertinent to the issues to be decided in the trial.

The rule expressly provides that the deponent may refuse to disclose privileged matter. Thus, if an objection on the ground that the matter is privileged would be proper at the actual trial, it is a proper one at the discovery stage. A party cannot, however, claim

privilege against the disclosure of certain information at the discovery stage and then defeat a motion for summary judgment on the allegation that he may choose to produce the evidence at trial.

We are of course all well aware of our privilege statute on the grounds of self-incrimination and the other grounds that provide the refusal and the grounds of refusal to answer under the privilege statute.

Somewhat similar to the privilege statute—when I say “similar” we have no statute on it, either federal or state—but a similar protection that the courts have given is in connection with trade secrets. There is no definite privilege against discovery of trade secrets and secret processes, but the courts will normally hesitate to require disclosure of such matters, and the rules provide that the court may order that secret processes, developments, or research need not be disclosed. The nature of the lawsuit, however, may require such information for a proper presentation of the case. Under these circumstances the court may impose special conditions to protect the party’s trade secrets. Provision is also made for the protection of these secrets in advance. A party may move for a protective order under the rules, in order to foreclose any inquiry into privileged matters.

Since the officer before whom the deposition is taken has no authority to compel testimony or to punish for contempt in the final stages, the final disposition of the matter must be made to the court. This is not true in all jurisdictions. In some jurisdictions where the court appoints a commissioner or other official to preside, the ruling is made by the commissioner. However, an appeal may be made to the court in those jurisdictions. Where there is a refusal to testify, it may be treated accordingly.

By far the most contentious and litigated point in discovery has been given consideration by the Supreme Court in this particular field. I of course refer to the case that Dean referred to and that is *Hickman v. Taylor* which, of course, was the landmark case in the United States Supreme Court on our discovery proceedings. I want to touch briefly on that case at this time because of its importance and because I say it is landmark position in our field of discovery.

This case arose out of the drowning of five seamen in the capsizing of a tug. The action was brought under the Jones Act by the widow of one of the seamen. A number of interrogatories were filed by the plaintiff, of which the crucial one read as follows:

State whether any statements of the members of the crews of the tugs J. M. Taylor and Philadelphia or of any other vessel

were taken in connection with the towing of the car float and the sinking of the tug John M. Taylor.

And then in addition:

Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.

It appeared that the statement of the surviving members of the crew had been taken by the attorney for the defendants, pursuant to the instructions from the defendants and their insurance carriers. The attorney had also interviewed other persons believed to have some knowledge of the various matters relating to the accident, and in some cases had made memoranda of what they had told him. Litigation had not commenced at the time he took these statements and made these memoranda, and he had some communication with some of the anticipated litigants. Plaintiff's suit, the only one to be brought, was filed some eight months later. The contention generally, and I don't mean to epitomize this case which, of course, as you know, is of great consequence and considerable length—but the contention that the statements were protected from discovery by the attorney-client privilege was given short shrift by the Supreme Court. The Court drew no distinction between the signed statements and memoranda by counsel of statements of fact made to him, saying that the liberal scope of discovery under the rules displaces any concept of proprietary or quasi-proprietary interest which, under private practice, a party to a suit may have claimed in the fruits of his investigation. It was recognized, however, that discovery should not be abused to become an instrument for obtaining knowledge of the opponent's theories of the case or of the opinions, impressions, or record of mental operations of his attorney.

The Court directed, in the *Hickman* case, that the attorney's memoranda containing notations of mental impressions, opinions, legal theories or other collateral matter should be submitted to the court which would direct disclosure of those portions of the memoranda containing statements of fact obtained from the witnesses, which it considered to be within the proper scope of discovery. The Supreme Court was unanimous in affirming the decision of the circuit court of appeals in the *Hickman* case. However, some of the reasoning in the United States Supreme Court was somewhat at loggerheads with the decision of the circuit court of appeals.

The Court in its opinion, of course, was mindful of the necessity under the rules that good cause must be shown in any efforts to obtain certain of these documents. One other—and my last aspect

in this connection on depositions for discovery purposes is discovery of the adverse party's expert witnesses and their opinions.

The *Hickman* case did not touch on this. There is some dicta in there that might serve some purpose. There are a number of cases that hold both ways in the various jurisdictions in the federal judiciary. I wouldn't say unfortunately, but we do know that a great, great, great majority of the decisions on discovery are decisions from the district courts. That isn't to say that they are not good law and aren't well written, but they are not by appellate courts in the main. But we do get much information and help from these district court decisions. It is my impression that generally, in connection with the taking of the adverse party's expert witnesses' testimony, courts will permit the taking of an expert witness' testimony if it refers to relevant facts which he has obtained in his investigation or in his perusal of his work as an expert witness; and they are of somewhat divided authority depending upon the relevancy as to whether or not his final opinions are material or not.

Gentlemen, I have attempted to brief it up somewhat because of our time lag. I have attempted to give you my segment and section of the discovery by depositions that has been assigned and allotted to us. I hope what I have given you will be of some help, but I do hope that in the future you don't use this against me.

CHAIRMAN SCHATZ: Without any further ado I now present Donald P. Lay, who is the concluding speaker on our program this afternoon. Please keep in mind that Mr. Svoboda will conduct a drawing of some kind of a door prize or prizes at the conclusion of this session.

DEPOSITIONS

Donald P. Lay

I don't know whether this microphone is going to help you with my nasal twang, which I have developed since the pheasant season started last Saturday, but I will do my best, and I am sure you will be able to hear me a little better anyway.

The area that I am to cover concerns the use of depositions. I have not prepared any case law because I frankly feel there is so little that it would be of no avail. The statements that are set out in the statutes in Nebraska and in the Federal Rules of Civil Procedure are somewhat similar, but I will attempt to point out some of the distinctions to you and then perhaps spend most of my time on some practical ideas or suggestions at least that I have tried to

follow—sometimes at least—in the practice as far as use and taking of depositions are concerned.

I might say one of the reasons I picked this subject matter, when the Dean and Harry and I drew lots as to who was going to take what, is that it talks about depositions in foreign countries. Now Harry has had an opportunity to do that and he wanted to do it. However, his witness didn't show up when he got over there and I know that internal revenue is investigating that right now. For myself, I got as far as New York one time going to Paris, but they settled the case before I got on the plane; and the other time I was going to Hawaii and the court granted me \$750 to go there; the other side brought in the airline records to show that I could travel much cheaper if I went tourist, but I insisted because I had gone tourist last summer and I wanted to go first class this time. The court gave me \$750 and they went out in the hall and settled the darn case again. Anyway I thought it might be fun to *read* about depositions in foreign countries.

Just briefly, and I really don't intend to spend much time on it, you can take a deposition in a foreign country in the same manner that you can take a deposition here. There is a little more formality. You can serve a notice just as we do here, or in some countries they require that the person who takes the deposition—that is, the court official, the person who will actually swear the deponent—must be appointed by a commission, and there are provisions for that. In some countries they require a court to take a deposition, and this is under what they call letters rogatory. So there are these three forms, but I think in most instances you can get by with just a simple notice and some type of stipulation. There are procedures by which the courts of the other countries can issue subpoenas to bring these witnesses to the court. In fact, in the federal rules, the federal court here, in issuing letters rogatory, may require a citizen of the United States at least to appear before a court in a foreign land.

Very briefly, I want to touch on two or three other points before getting into the actual use of depositions. One phase of discovery practice that is seldom used—but it is one that I think you should remember because it can be used in some instances—is on a deposition taken by written interrogatories. We have a provision very similar to Rule 31 in the Federal Rules of Civil Procedure which says that you may serve written interrogatories to be taken upon a deponent. Say you wanted to take a deposition of a deponent in California or in a foreign land; you didn't want to travel; it wasn't that big a case to go out there and get your testimony. You can do this by serving the interrogatories with a proper

notice as to the day that that deponent will appear before a certain qualified notary or court reporter. You can serve the notice and the interrogatories upon your adverse party and he has ten days in which to supply cross-written interrogatories; then you have five days to come back with some redirect interrogatories; and then he has three more days to come back with some re-cross. But this is a good thing to use if you want to get testimony as to a particular point.

Let's say you wanted to get the testimony of a garage repairman in Salt Lake City and you wanted to find out the estimate of repairs as far as he is concerned. I think you would all agree that you could perhaps work out a short form of written interrogatories to serve on that individual without having to go out to Salt Lake City or send your file out to some attorney out there.

We have used it effectively, I think, in a case here where the woman was deaf and she could not hear us as we would talk to her. We would have to talk through her sister who had a broken, foreign dialect and it was very difficult to understand, so we worried how we were going to get this done. It didn't amount to a lot. She was a witness and we wanted to get one particular point across. So we submitted some written interrogatories and in this manner were able to obtain the necessary proof.

One statement in regard to the use concerns the notice and procedure. I think you will find the federal rules merely state a reasonable time; our rules state three days plus the day of service, so it is four days actually under our rules that you can serve and take a deposition.

There is quite a bit of discussion in some of the federal cases as to orders relating to expenses, when you can request the other side to pay your expenses or pay your client's expenses coming to and from. I think you will find a split of authority on this. The federal cases say it lies squarely within the discretion of the court as to whether or not they will pay the expenses of a defendant who may live in New York for coming to Omaha; or in some instances they will pay the plaintiff's expenses to come here when he lives in New York. Most of the cases require, at least under the federal rules, that the plaintiff who lives outside the jurisdiction may be required to pay simple service of a notice to come to the jurisdiction of the form which he chose to be deposed. There are some instances, however, where they have given expenses to the plaintiff. So I think it is just a matter of submitting it to the court if you can't come to some agreement. I have never seen anything where we have actually had a fight about it. Usually everyone around here

works pretty much together on these things. I have never had to go to court on an order relating to expense.

One other area that is within this, before I get into the actual use of depositions, is the question of perpetuation of testimony. We have this provision in our state statutes; we have it in our federal rules; but actually I think it is a very rare occasion when this would come up because the rule is that if the subject matter is such that you can file an immediate cause of action or actually file a lawsuit on it, then you can't perpetuate your testimony and you don't hold any surprise for the deponent, the adverse party, or the witness by not filing a lawsuit because, when you want to perpetuate testimony prior to the time of lawsuit, you are still required to file a petition setting out the facts as you know them, the party that you intend to sue, and the reasons you haven't started a suit. So there are some instances, perhaps, where this might become involved, but I have never had the experience of it. Harry and I were talking about it the other day. Actually you now have situations where, under our declaratory judgment statute, you can go to court on things which may be justiciable issue, controversy, but still the damages haven't accrued. There is still a remedy, and therefore there is an action available so you don't have to resort to the perpetuation of testimony. In most of the cases that come up on this they deny the request on the ground that the cause of action may be commenced.

There is in conjunction with both the state and federal rules the rule which protects the parties as to many things. I think there are about ten things in our state statutes that you can apply to the court and be protected upon: One may be perhaps the order in which depositions may be taken, the time or place if you can't agree; you might apply to the court for a rule limiting a deposition in a foreign land to be taken simply by written interrogatories on the ground there is harassment or something; you might limit the scope of the deposition. There are many things, secret processes, etc., that you can go to the court for protective order on before the taking of the deposition.

Dean Doyle mentioned a notary's being able to commit a party to jail or fine. I think you will find most of the notaries, at least in Omaha, will not go quite that far; and when we come to a question that involves a refusal to answer, it is usually certified to the court and taken to the court on agreement of all the parties; and the court then rules one way or the other. Then if the witness persists in failing to answer it can be contempt; proceedings can be started by the court; and of course this gives you an appealable order. The one case I know of is *Rice v. State* that went to the

Supreme Court, and the Supreme Court held that the witness did not have to comply with the notice and the subpoena because of the failure to give a *proper* notice. It has been done but very rarely. But I think as a practical matter the best way to handle this situation when you come to a question of whether a witness should answer or shouldn't answer is to certify it to the court and let the court make a ruling one way or the other and then that will be it in most instances.

As to the use of depositions, I think the use of depositions is somewhat misunderstood. In taking depositions I have heard objections in taking a deposition that you have now made this man your witness and you can't ask him leading questions, etc. Actually both the state and federal rules specify that in taking a party's deposition or a witness' deposition you do not make him your witness by the mere fact of taking the deposition. In fact, one case that perhaps is a sidelight of this here in Nebraska is the one which holds that you do not waive the Dead Man's Statute by taking discovery procedure by use of depositions. The federal rules and our statutes state specifically that a party shall not be deemed to make a person his own witness for any purpose by taking his deposition. Now the introduction in evidence of the deposition or any part thereof for any purpose other than contradicting or impeaching the deponent makes the deponent the witness of the party introducing this deposition.

What is the significance of making a person your witness? I know that the courts say that you are bound by his testimony, and to that extent I think they mean that you cannot impeach that witness. However, it does not mean that you cannot contradict that witness; it does not mean that you cannot put on evidence to the contrary. I think in this conjunction I should also state that the federal rules and the state statutes both set forth that a party may use any portion of a deposition offered into evidence under certain grounds, as Al specified here; however the other party has a right to require that person to read anything that is relevant, or if he does not read it then to offer it himself.

There is a distinction here as to the use by an adverse party of a deposition of an officer, managing agent of a public or private corporation, or of an individual who is an adverse party, and the deposition of just an ordinary witness. I would like to point that out. First of all, in the federal rules as well as the state statutes I think there is no distinction or difference here. It states that any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness. I think most of you know this. You can certainly use any extra-judicial

statement that is made by any person for impeachment in a court proceeding, and a deposition is no different. Keep in mind that a deposition taken outside the court and prior to the trial is an extra-judicial proceeding. It is not binding upon the party; it is not binding upon the witness; and the witness may actually vary or change his testimony from that deposition or that statement. We have had many cases that have been in the Supreme Court, in fact, on this where a person has testified in a deposition to one fact and the adverse party has moved for a summary judgment and the same deponent then files an affidavit changing her testimony from her deposition saying, "I was mistaken, it is to the contrary." Our Supreme Court has said that the deposition is not a binding judicial statement; it is an extra-judicial statement made out of court and therefore the statement that is used in a deposition may be changed. So any deposition may be used for purposes of impeachment by any party.

There is a difference, however, when you come to an adverse party, that is an individual or a corporation. Thus a deposition of an officer, director, or managing agent of that private corporation or partnership or association, this person's deposition, may be used for *any* purpose. This means that you can use it for an admission in the courtroom.

Let's take a witness to an accident. If I take that person's deposition, unless that witness is either dead, in the federal court at a distance greater than a hundred miles from the place where the trial is being held, or in the state court outside of the county, or unless that witness is unable to attend because of sickness or age or some other type of infirmity—unless you can show to the court that you cannot get attendance by a deposition, then, unless one or more of these provisions are met, you cannot use that witness' deposition in the courtroom. So if there is Witness A in Omaha, Douglas County, and I take her deposition, I cannot use her testimony by means of that deposition in the courtroom if she is still residing in Douglas County at the time of the trial.

But let's assume Witness A is the adverse party or the defendant to an action. Then regardless of the fact, whether she is here, or in Douglas County, or sitting right at the counsel table, I can read any portion of her deposition at the time of trial. This is the meaning of the rule that says that an adverse party may use the deposition of a party for *any* purpose. This is very important, and I might point out that it is important because it says "an *adverse* party." Now co-defendants are not adverse parties unless you have a cross-claim; but if you sue two defendants in an automobile accident who are joint tortfeasors, one defendant cannot

read the deposition of the other defendant as an admission because they are not adverse parties.

Now, under the federal practice, if there is a cross-claim filed or an impleader filed bringing them in as a third party and they become adverse parties, then clearly you comply with this rule in using them for admissions.

This rule, I think, becomes very important to you as a lawyer in preparation of your case. Of course, I think it depends a great deal on whether you are taking the deposition as a plaintiff or as a defendant. Most of the time when you are taking the deposition as a defendant and adversing the plaintiff, you will probably take that deposition for discovery purposes. Probably 90 per cent of the time you will be taking that deposition will be spent on discovery purposes. Say, in a personal injury action you want to find out what the medical background has been of this witness and you have no knowledge of that. You want to find out what is wrong with her, what happened to her, what her expenses are; in other words, you are in for discovery.

But when you are the plaintiff and adversing the defendant I think that your deposition is more for the purpose of evidence in the form of admissions, and very seldom will I take a deposition for discovery purposes of a defendant. I say that because I think that your file is inadequate if you don't know what that defendant is going to say before you even begin to depose him. You should know because of your investigation, confining this for the moment to a personal injury matter which perhaps takes up 80 per cent of our practices in litigation; but you should know what that defendant is going to say by the official police investigation, for one thing. You should know by your own investigation, perhaps because in 50 per cent of the cases you should be able to get the defendant's statement. You can find out from other witnesses what this defendant is going to say. You can find out from the defendant's pleadings what he is going to say; so why go in and clutter up a record to find out something you already know. It is not going to help you, so my suggestion from a plaintiff's viewpoint is that you should be sure in a deposition to get admissions and once you get them, go home.

As a result, I think a short deposition is much more effective, not only for yourself in preparing the case but in the use in the courtroom. I might give you an illustration. For example, in a guest case we were trying to prove that the driver was intoxicated. Of course, if he is intoxicated and the plaintiff knows about it, that is not so good; in other words, if they had drink for drink. But if

the defendant had a few drinks before and your man didn't know about it at the time he got into the car, then this becomes important.

How do we prove it? Well, we had heard from some people that the defendant had been in a certain bar. We investigated the bar. We couldn't get anyone to verify that he had been there so we took his deposition. Now I knew from the police report, and I knew from the defendant's answer, what they were going to say as to the facts of the accident, and it was kind of against me so I didn't want to discover that. I knew what our proof was going to be. So I took the deposition and I asked him only the particulars as to his drinking before he had met up with the plaintiff that day, and he admitted he had had four or five highballs prior to meeting my man, when they again engaged in a couple more drinks.

We asked this and we stopped the deposition. We asked nothing about the facts of the case. During the trial we read the deposition. There wasn't anything in the deposition that harmed us.

Another example is the situation where we had an individual from whom we had taken a statement prior to the trial, a court reporter's statement, and we felt it was very good as to certain points. This individual was making a left-hand turn off Dodge Street, out in the country, into a farm driveway. His claim was that he had come up and stopped with a very gradual stop, put out his arm, turned his signal light on, had been waiting there about 30 seconds to a minute before our man came around and hit him and hit the fellow coming from the other way. We actually represented the fellow coming from the other way as well as the passenger in this car that came around behind and hit them.

In his statement to us he had stated that he at no time had seen this car directly behind him that we knew had been following him for over a mile, and of course the statement of the driver of the car behind was that the fellow had stopped suddenly with no signal. We went to take his deposition. Now in discovery I suppose you could go in and say, "What happened to you?" and he would tell you that he had put out his arm, had put the signal light on, had been sitting there thirty seconds, etc.

We asked him a few perfunctory questions and then asked him, "Isn't it a fact that at no time you saw the car that came from behind?"

He said, "That's right. I never saw them."

That's all. Now we read that complete deposition in court. This case was tried two times, once for the fellow coming this way and once for the guy coming the other way. We read his complete deposition to the jury. There was nothing in that deposition what-

soever that we were afraid of. If we had asked him all of the questions so he could have described how careful he was by putting his hand out, by turning his signal on, by making a slow stop and stopping there, I think the effect of it would have been to detract or take away from the main point that we felt was so important in the case, and that was that this man made a movement on the highway without looking for traffic in the rear, and this was the point we wanted to establish.

So I think in depositions, rather than going in for discovery, particularly if you are on the plaintiff's side, I think you should have something in mind, know what you want, try to find it, and once you find it, leave.

In this regard I would offer the following suggestions on the use of depositions and the taking of depositions. I would not take a deposition of a friendly witness unless it was absolutely necessary. You are just putting ammunition in the hands of the other side later on to perhaps impeach him or confuse him. However, if you have a situation where there is only one witness to prove your case, and if that witness were to go away or die or have something happen to him, then I would say that you should take that individual's deposition. You hate to do it, but I would do it because I have seen situations where an only witness to an accident has died and so has a good lawsuit.

We had a situation out on Dodge Street. Harry was on the other side with me where the only witness that we had that could prove our case was a police officer who happened to be going by. This car had gone off into a ditch, at least we alleged it had, and gone across the road, and a milk truck hit it. At first everybody said it was just an unavoidable accident, but our investigation showed that actually they were building a service station over here on the right, and the contracting crew had dug a ditch along the side of the road, and there was no barricade or anything, at least according to our allegations.

Well, we had to prove that this driver hit this ditch to throw him out of control. There was only one witness. We hated to take his deposition but we did. It was about two years later that the case actually came to trial and this deposition was used in some part to try to impeach this witness, but I was so afraid that something might happen to him that would ruin our entire lawsuit, and these were very serious injuries.

A couple of other suggestions—and I don't take any pride in these things, maybe they are not any good at all, but they are things that we have found in our experience. You have a right to

cross examine your own witness in a deposition if you so choose. I think it is a mistake to do so, even if he is mixed up, unless you have some particular point that is necessary that you want to get across. But take the situation when the individual becomes confused. Let's say he is confused as to distance. Let's say he has stated that something is 1,300 feet away and you know he only means 200 or 300 feet away, or at least he should mean 200 or 300 feet. We just had a situation where a witness actually thought a city block was 1,300 or 1,400 feet away and he had always spoken to us in terms of a block, yet in his deposition he said 1,300 or 1,400 feet.

I think that you get into a situation such as this, and if you try to do something with him on cross examination without having an opportunity prior to that time to point out to him what is an obvious mistake, or at least what you hope is an obvious mistake, sometimes these witnesses can dig their holes a little deeper. Therefore, unless it is something that is so important that you don't dare try to change it, I think it is better to take that witness, point out the error of his ways, and then in court he can testify with enlightened understanding.

Sometimes I think it wise to use cross examination if you want to inform the other side of serious injuries that they have overlooked in their direct examination. This has happened on occasion where the other side is examining as to perhaps a person's leg injury and he has overlooked the fact that the person also had a very serious disability to his arm. I think it is wise to point that out on a cross examination. However, I do not like to go into the facts of an accident on cross examination. Why inform the other side of something that perhaps they don't know about?

One other thing, and then I will bring this to a close. I think it is a mistake to make unnecessary objections in a record. Both the federal rules and the state statutes provide that objections may be reserved until the time of trial and made at that time, with the exception of those objections which might be obviated at the time. This goes as to the question as to motions to strike, the form of the question—say it is a leading question—or an objection that you might make as to foundation. Obviously objection as to foundation might be corrected at that time, or the form of a question might be leading, but it would be a simple thing to correct it. These things I think you should make at the time if you want to insist upon them. In fact, our court has held that the form of a question in a deposition, if the objection is made for the first time at the time of trial, will not be good if justice is served by the substance of the answer. That is in 162 Neb. 288.

Many times I have been in depositions where to every question an attorney makes a long objection, and you take all day when something should have been done in two hours, and many times these objections are waived at the time of trial. I don't think we accomplish anything by harassing one another with long objections unless there is something that really has some meat in it. I might say that several district courts have stated in opinions that they feel it has been highly improper to make long objections in the form of a deposition.

One other point, a point that we all perhaps fail in, and that is, in taking depositions, many times when we are taking them for evidence we use terms that do not have any meaning to a jury or a court. Many times you will be examining a witness and you have a picture and you will say, "Now, Mr. Witness, over here on the right in this picture do you see this?" or "Where do you mean, over there?" You and the witness perhaps are understanding one another but it means very little to the court or to the jury at a later time.

Another point is on the use of the deposition in the court room. I have been asked many times, and frankly I don't know other than just from our own experience, but I think it is unnecessary and actually improper to mark the deposition itself and offer it into evidence. Say you take a deposition and you read the testimony; you are merely substituting that testimony in the record under the rules in the absence of the witness according to law. The deposition itself is not a proper exhibit; it means nothing; and I don't feel that you have to offer it. Actually the testimony is in the hands of the court and the jury. One of the cases that talked about this, *Elliott v. Swift & Company* in Nebraska said you are merely encumbering the record by so doing. That is 39 N.W.2d, 617.

I think that is about all I have. Again I would use Dean Doyle's term, if you have any questions I defer to the other two gentlemen on the panel.

CHAIRMAN SCHATZ: Are there any questions, gentlemen, before we conclude the meeting for today? If not, I certainly want to express my appreciation to all of you for your patience and indulgence in waiting while we got the microphones in order. We appreciate it very much. On behalf of myself and my section, I want to thank Dean Doyle, Harry Welch, and Don Lay for the time and effort they have put in to try to bring you some things that we all hope will help all of us in our practice.

Please be with us in the morning if you can at 9:30. We will go on with interrogatories, privileges and demands, and requests

for admissions. The speakers for tomorrow morning will be Dean Dow from the University of Nebraska, Flav Wright, and Russ Mattson from Lincoln, who will address you at that time.

- [The Thursday afternoon session adjourned at 4:50 o'clock.]

ANNUAL BANQUET SESSION

November 1, 1962

[The annual banquet of the Nebraska State Bar Association was held in the Sheraton-Fontenelle Ballroom, President Svoboda presiding.]

PRESIDENT SVOBODA: Thank you, Ernie Preeceman. If I might run in a small commercial, ladies and gentlemen, Ernie Preeceman was kind enough not only to contribute the organ that he is playing over there but also to give us the organ music. Ernie, without using the name of the firm, is a member of one of our law brief printing firms. We are very grateful to you, Ernie, for the fine music.

I have quite an introduction list here and I hope I get it right. I would like to introduce those at the speaker's table and those at the table in front of me:

On my far left the Honorable Robert Van Pelt, Judge of the United States District Court of Nebraska.

The Honorable Robert C. Brower, Associate Justice of the Nebraska Supreme Court.

The Honorable Harry A. Spencer, Associate Justice of the Nebraska Supreme Court.

Floyd E. Wright, President-Elect Nominee of the Nebraska State Bar Association.

Our good Senator, Carl Curtis, United States Senator from Nebraska.

You know we are fortunate. Both of our United States Senators are lawyers and members in good standing of the Nebraska State Bar Association. Senator Hruska was with us earlier in the evening at a reception but he had to attend a fund-raising dinner at Weeping Water, of all places.

The next gentlemen is his Excellency, Governor Frank B. Morrison, Governor of the State of Nebraska, and also a member in good standing, an active member of the Nebraska State Bar Association.

On my far right, the Honorable John W. Delehant, Senior United States District Judge for Nebraska. You know, he is retired

but I never saw a judge who was so busy. He is still working every day, not only here in Nebraska but in many of the other states of the Union plus some of our possessions, Puerto Rico for instance.

The Honorable Leslie Boslaugh, Associate Justice of the Nebraska Supreme Court.

The Honorable Robert G. Simmons, Chief Justice of the Nebraska Supreme Court. And, Chief Justice, we are glad to see you so well. You're looking fine.

Mr. George A. Healey, President-Elect of the Nebraska State Bar Association.

Next is the gentleman who regaled us at our luncheon this noon, Sylvester C. Smith, Jr., President of the American Bar Association.

I will pass the next gentleman to my right because I will introduce him a little later. I now want to introduce those at the table in front of me, and starting on my far left is Mr. George J. Millett, President of the Wyoming State Bar Association.

The next gentleman is Harry "Omar"—his wife likes to have me to do that; he doesn't—Janicke, President of the Kansas State Bar Association.

The next gentleman is Lloyd Karr, President of the Iowa State Bar Association.

The next is Roy E. Willy, Representative of the American Bar Association, an old friend of this Association.

The next gentleman is John J., familiarly known as "Jack", Wilson, Nebraska Bar Association Delegate to the American Bar Association.

The next gentleman is "Mr. Bar Association" himself, George H. Turner, State Delegate to the American Bar Association and our Secretary-Treasurer of this Association.

The next gentleman is Herman Ginsburg, the only gentleman who holds an emeritus office in our Association. He is Chairman Emeritus of our Legislative Committee and Chairman of the House of Delegates of the Nebraska State Bar Association.

Dr. O. A. Kostov, President of the Nebraska State Medical Association.

Mr. Roy P. Swanson, President of the Missouri Bar Association.

Next, Judge Paul W. White, President of the Nebraska District Judges Association.

The next gentleman, who came all the way from Washington

to attend this meeting, Laurens Williams, Chairman of the President's Advisory Council of the Nebraska State Bar Association.

I had better say the name last because they clap before I can even identify them.

The next one is the President of the Omaha Bar Association, Alfred G. Ellick, also a member of our Executive Council.

I would now like the members—these are my bosses—the members of the Executive Council of the Nebraska State Bar Association and their ladies to all rise.

Now I would like the ladies who are the wives and the daughter of the gentlemen whom I have introduced at the two head tables to please rise.

If I may claim the personal privilege, I would like to introduce the members of my family: Mrs. Svoboda, will you please rise and remain standing until I release you.

My three sons: James, Joseph, and David, please rise.

My daughter, Susanna May, and my two daughters-in-law, Helen and Sheila.

And the lady who has suffered with me all year doing state bar association work, my secretary, Mrs. Ryer, and her husband. Now you may sit down.

Ladies and gentlemen, because of the influence of Jack North, who is chairman of our Committee on Legal Education and Continuing Legal Education, these annual meetings have become more educational all the time, so in picking our speaker for tonight we thought, instead of having him discuss Cuba or foreign relations or the attack of China on India, we thought we would keep this on a high plane and contribute some more to the education of our lawyers, the members of our profession.

We journeyed south to get our speaker. Actually he has some forebears in this state. In 1886 his grandfather came from Pennsylvania to Lincoln and traveled through western Nebraska as the superintendent of a large cattle company. He lived in Loup City, in Edison, and in Columbus, and as our speaker says, he still has kinfolks who are ranchers up around Scottsbluff.

He is a young man. He wishes that they had the Merit Plan for District Judges in Kansas because he is flying back; he has a campaign to be re-elected next Tuesday. He is located—now, you know, the program on that is wrong: it says "Pittsbug." He said that if I wished I could leave it "Pittsbug," but it isn't, it is Pittsburg in the southeast corner of Kansas—the coal mining country of Kansas. What did you call it? The Balkans of Kansas.

He is a graduate of Pittsburg State College, and he brags a little bit here because he says that is the home of the national small college football champions; and then he proceeded to rub it into me by saying "and we beat Municipal University of Omaha last year." He said, "Why don't you put this meeting on November 10th and I would come up and see them beat 'em again because they play Omaha U on November 10th."

He got his law degree from the Washburn University Law School of Topeka. He practiced in Pittsburg as an active trial lawyer, by the way, plaintiff lawyer—he would like our National Association of Trial Attorneys, I think. He was elected judge and, as I stated, he is a candidate for re-election.

To indicate his profound knowledge, he is a member of the Law Science Academy and Foundation.

In order to carry our educational effort forward, and to keep it, as I stated, on a high level, he will deliver a lecture tonight which he entitles "An Exposition on the Preparation and Use of Expert Testimony." I give you Judge Don Musser!

AN EXPOSITION ON THE PREPARATION AND USE OF EXPERT TESTIMONY—A SATIRE

Honorable Don Musser

Mr. President, Ladies and Gentlemen: If I should get off the mike and you can't hear me in one of the corners just raise your hand. These microphones are like spittoons—they are no good unless you hit them.

I am glad that the President pointed out who these charming ladies are here in front and around the room, because if he hadn't told me I would have sworn this was a father-daughter banquet, after looking at the ladies.

Before I get down to the subject about which I am going to talk, I would like to mention just one thing, and that is something I—oh, every now and then you pick up something you just want to shout from the rooftops and this is one of those things. It has a very good connection with Nebraska. It is an article that appeared in the August, 1962, *Journal of the American Judicature Society*, by Roscoe Pound. It is entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." It is a brilliant article about what is wrong with justice in this country as it is administered, and what we ought to do about it. The amazing thing was that it was written in 1906, and if you haven't read it, do so. It is a brilliant

article. The society that was founded at that time is now fifty years old and is doing a great deal about improving the administration of justice. One of the things they are doing is the very thing you are trying to do here, something about the tenure and selection of judges. I merely mention that in passing.

I just arrived here about 2:00 o'clock so I don't know exactly how the Nebraska Bar conducts its conventions, but apparently, from the men I have met and observed, they are a lot different from those in Kansas. Let me give you a few examples.

One of our lawyers was getting ready to go to the annual bar convention up in Kansas City, Kansas, last year or so, and when he was coming out to his car with his brief case his wife hollered at him and she said, "Say, Pete, what hotel are you going to stay at in case I have to call you or something?"

He turned around and said, "What do you mean stay at a hotel? I am only going to be there three days."

This is the fellow who believes that when he goes to a bar convention he is never drunk as long as he can lie flat on the floor without holding on. He believes it is not how you won or lost but how you play around.

Of course no bar convention is complete without a bunch of the old classmates getting together and discussing old times. Along about midnight or maybe a little later, after a little imbibing, they always decide, "Well, we ought to call the fellows who aren't here." So they start putting in long distance phone calls. Maybe some of you have received them in past years.

One of the fellows I remember down at the Kansas convention who had had a few too many picked up the phone, and he got mixed up in the cord, so he called up the phone company at 2:00 o'clock in the morning and he said, "Our phone cord is too long. Would you pull on your end?"

Before I talk about expert testimony, perhaps I ought to bring up a legal problem that I *may* have; I don't know whether I will or not; but I may have a legal problem which I will need Nebraska counsel for. When your President wrote me a letter inviting me up here, he said in the letter, and I quote: "This is black tie at the head table."

Well, I didn't know; I am a boy from down in the coal fields in Kansas; I didn't know what that meant. So I went to our local undertaker and I asked him about it. He said, "Well, that means you have to wear a tux."

So I read on down in the letter and it said, and I quote: "The

Association will reimburse you for all your expenses." So, I thought this bears a little checking up on from the contract angle. I went to our county law library and got the volume we have there of ruling case law on contracts and I read that. Then I checked all the later cases in the first *Decennial Digest* that we also have.

I wrote a reply along these lines, after reading those cases, to the effect, "I accept your offer." Now I don't know yet if they're going to pay for the suit, and if they don't, I will probably need Nebraska counsel.

As I say, these affairs are very dignified. I think this is the first time—bear in mind of course that I come from down in the Balkans of Kansas—this is the first time I ever tried to eat chicken with a knife and fork. We pick it up and eat it down there. But I suppose that that is part of being up here at the head table.

I would like to discuss briefly the subject of the tort law institutes. I understand you have been having them here. This is an excellent program in which lawyers learn more about their business. I have attended a lot of them, and they usually are headed by what they call a leading trial counsel or a leading trial lawyer, usually from the big cities, and they try and teach us country boys how to try lawsuits. However, I have noticed this. They all seem to suffer from a sort of psychosis wherein they can't remember anything but cases they have won. They can remember with remarkable clarity a JP case they very cleverly won thirty-five years ago but they forget the \$50,000 case they lost last week.

This is not unusual and was investigated by a panel of New York doctors, and they said it was an ego-erotic tendency of all lawyers, and they said you couldn't cure it even with Carter's little liver pills.

Another thing I have noticed about the law institutes is that the leading trial lawyers always let you know a little bit about their backgrounds, which they should, and they let you know that they usually do enough defense work so that they can maintain this aura of respectability that all defense lawyers seem to have about them, but they also do enough plaintiff's work to make some money. If you happen to be from out here in the boondocks somewhere and have a good plaintiff's lawsuit with good liability and total disability and \$100,000 coverage and you can get service in the big city, they'll be glad to try it for you.

But seriously NACCA and NATA are organizations that have contributed greatly to the enhancement of the stature of advocacy in this country. Those of you who are interested in being trial lawyers—and all of you should—ought to take advantage of their pro-

grams, because what little I learned about trial law I certainly learned from those fellows.

To get down to the subject, so I can fulfill my part of this contract, I want to talk about the preparation and presentation of medical testimony. I feel that for the lawyer to be able to better prepare his case he should know how the doctor prepares a medical-legal case. When I talk about medical-legal now, I mean a personal injury case where there is litigation involved. So what I did was to go to a leading doctor in our area who specializes in medical-legal cases and testifies in court on both the plaintiff and the defendant sides. I said, "Doctor, tell me, what do you look for, what do you want to know when a case like this is presented to you?"

So we thought the best thing to do was to take a typical case, so he took out of his files a typical medical report, and he went over it with me and told me the various things the doctor considers and why.

The first thing, and, incidentally, this is the case that he took as an example—I think he said the case was 897 in his file. He said, "This is a case that was referred to me by defendant's insurance counsel of one of their fair, impartial, and objective examinations." He said, "The thing the doctor wants to know first when the case comes in the office if it is a medical-legal case, he wants to know who sent the case in. Was it the defense counsel or was it a plaintiff's case? He would also like to know the jurisdiction involved in this case. He would like to know, if it is a good plaintiff's case, the policy limits, so what are we playing with here, you know."

Let me give you an example now of how this will affect the medical examination and report. For example, in Kansas we are still back in the dark ages down there procedure-wise. We can't take a discovery deposition in Kansas. So if this is a defense examination, the jurisdiction is Kansas, a medical expert will take the deposition of the plaintiff on his history. There are other examples I will talk about later where it will differ in the way we go about taking the history, etc.

The first thing the medical expert does, when a patient is sent to his office for an examination where there is litigation involved, is take a history. For those of you ladies who are not familiar with it, the history is where the doctor determines what happened to this individual. How was he injured and what was his history? Now I have the actual report here and I am quoting from it, and the history is as follows:

"This white male subject dates his symptoms from an accident." Now here the doctor points out something again where there is a

little difference here if this is a defense or plaintiff's examination. Down in Kansas we are still one of those states where they say if it is an accident you can't recover because nobody is at fault, which is a stupid rule and finally our Supreme Court is coming around to saying it is, but we still have that, so if this doctor is doing a defendant's history for defense examination he will put this word in "accident," "accident," "accident," as often as possible so the jury can hear it. If it is a plaintiff's case he says "collision"; he doesn't say "accident."

Now we go on with the history: "Plaintiff states that while crossing an intersection on a green light he was struck by a fifty-ton truck. The driver was in an intoxicated condition, said he failed to see the red light because he was talking to his girl friend."

Offhand you would probably say that this was a case of liability, unless you happen to have to file your suit out in Keith County or somewhere like that. Understand, that's no joke, if you've ever tried one out there, like some of our rural counties.

Now this is the history part of the examination. The second part we take up is on the complaints. This is where the doctor finds out what the patient complains about, and there is also a little different approach here in the two examinations. If it is a plaintiff's examination, the doctor inquires in great detail to bring out all the possible complaints. If it is a defendant's examination he just sort of casually asks him, "Well, is anything still bothering you," and makes a new note from that.

In this case the plaintiff had evidently talked to his lawyer before he came to the doctor's office because here are the complaints quoted from the report which this plaintiff gave to the doctor: "All of my bones, muscles, ligaments, tendons, vessels, nerves, tissues and attachments of my head, neck, spine, back, arms, hands, fingers, feet, body, and all parts and members thereof were bruised, contused, sprained, strained, concussed and malaligned, and all of my injuries are excruciatingly painful, permanent, and progressive in nature." This then, gives the doctor the information about what he has to examine to find out what is wrong with this man.

The next step then in the medical examination is the physical examination. Here is where the doctor does the various tests. If this is a defense examination he does all these tests that are going to be negative. For example, the doctor points out, "In this case under consideration this fellow had lost a leg, he had fractures of the spine and the other bodily members. He was able to move very little, so here is our physical examination report. 'Laseque's

sign, Patrick's sign, straight leg raising, were negative.'" The fellow couldn't move.

"There is no limitation of motion, inflection, extension, abduction, or rotation of the first phalange of the right hand." In other words, the guy can move this finger very well, but he's got trouble everywhere else.

No examination, of course, is complete without X-rays, and the doctor confided in me. Maybe I shouldn't give out a doctor's trade secret here but I'll pass it on. The doctor said, "Now if this is a good plaintiff's case or we've got an insurance company, we really like to make hay on these X-rays. We've got 59 cents worth of film we get rid of for ten bucks a throw. So we like to take AP's—anterior-posteriors, posterior-anteriors—laterals, and they've got a whole new system of angles called 'obliques' now. There's no limit to those."

Here is the X-ray report from the radiologist: "X-rays reveal old well-healed fractures of a great number of the bony members of the body, but there is good apposition, alignment, and excellent callous formation of all the bony injuries. No evidence of dislocation, erosion, infection, or destructive joint disease."

The good doctor allowed me to bring along some examples of the X-rays that are currently being used, and if I could show these—most of you won't be able to see them, I fear—but the obliques I have talked about—this is the right oblique X-ray here and this is the left oblique. Here we have an X-ray demonstrating curvature of the spine; here we have an X-ray demonstrating a fracture of a bone; and the last one here—the doctor said they do now what they call a spot film where they get a little narrow segment. This is a spot film.

Now we have covered in our medical report the history, the complaints, the physical examination, the X-ray examination. All that remains is the conclusion. And here is the conclusion of this fair, impartial, objective insurance company examination:

"This patient apparently sustained multiple injuries." The doctor tells me the reason he says this is to show how fair and objective he really is. Continuing, "from which he has recovered. We find no objective basis for his bizarre subjective complaints." Thus the doctor is able to throw some doubt on the veracity of the plaintiff without actually calling him a liar. "He has sustained multiple fractures which have now healed. Because of the additional callous formation these bony areas are much stronger than before the injury. The enforced rest and diet occasioned by the patient's long stay in the hospital under traction has benefited him

by causing a much needed loss in weight. This man is better off because of the loss of his right leg, as there are now far less arteries to harden in old age."

The examiner concludes with this: "We noted that when the patient got back in his wheel chair he did so easily without apparent pain or disability."

That is the conclusion of the medical report.

Now there are other experts in many other fields, and I will just briefly call your attention to some of these. We have the auto collision expert, or as he sometimes calls himself, the "accidentologist." When you have witnesses who are dead or you can't find them, you call in this expert and he will put the defendant on the wrong side of the road for the plaintiff if he is retained by the plaintiff; or if he is retained by the defendant he puts the plaintiff on the wrong side of the road.

We had a case tried down there where one of these fellows testified and he said that his qualifications, among others, were that he held a B.S., an M.S. and a Ph.D. degree. The lawyer didn't cross-examine him about his qualifications, but when he argued the case to the jury (and this was a jury of farmers and coal miners) he commented on the qualifications thusly: "You fellers all know what B.S. is. There is lots of that around your barnyards. Well, let me tell you, M.S. is more of the same. And this Ph.D. is piled up higher and deeper."

We have the expert real estate appraiser which is indispensable in condemnation cases of various kinds. I don't know this to be a fact, but some of the trial lawyers that try these cases tell me that if the appraiser is tactfully informed of the approximate desired value before he appraises, the appraisal comes out a lot better sometimes.

The Kansas Supreme Court has opened a whole new field in experts. They have held, in a number of recent cases, that you have to be prejudiced when you get up in the Supreme Court if there has been any error down below—maybe it is the same way up here, I don't know—but even though there might be some error down there, if you aren't prejudiced and you don't show prejudice, you are not entitled to a reversal, which is a logical rule. But the defense lawyers now have banded together and they are thinking about introducing expert testimony that they have been prejudiced on the motion for a new trial. So they are getting prejudice experts now who will testify in certain instances that they have been prejudiced. This hasn't gone up to the Supreme Court so I don't know what will happen there.

Our Supreme Court recently held in the case of *Caylor v. The Santa Fe* on rehearing that you can't use a blackboard in Kansas to argue pain and suffering, which is one of the most ridiculous, stupid, asinine rules that I ever heard of. And, of course, we follow the strictly minority holding—I think there are three or four other states—but to deny a trial lawyer the right to argue with a piece of chalk in his hand is, to me, denying him part of his constitutional rights. I don't know whether that has come up here but if it does, my goodness, I hope they still let a trial lawyer argue his case a little bit.

Now there is just one other type of expert that I want to tell you about, in closing. This is a rather unusual case. You don't see this very often. This was a slander case down in our county and the words alleged to be slanderous were that the defendant had called the plaintiff "a thieving, lying . . ."—and because you ladies are present I'll just use the initials—" . . . s.o.b."

Well, the defense lawyers were pretty sharp fellows, as most defense lawyers are, and they got to researching this question, how to defend this case, and they decided there were only two defenses: The first is that you didn't say it; and the second defense is that it is the truth if you did say it. So they went around and investigated and they found out that their client had told these slanderous words to just about everybody in town, so they felt that this first defense was out, that he did say it, because everybody knew he had. So they thought, "We'll try and prove it's the truth."

They started investigating and they found that this plaintiff, at times, when he was a young man, had stolen some watermelons and he had lied about his age to get into burlesque shows and making excuses, etc., so they thought they could probably get some witnesses that would testify as to the thieving, lying part, but how are they going to prove he is an s.o.b.?

They thought and they thought and they finally said, "We'll get an expert." So they went up to Topeka, which is our state capital, and they thought, "We'll find a lot of them up there." Incidentally, Governor, it was in the control of Republicans at that time. And sure enough they found a fellow they thought would qualify as an expert s.o.b. Here are some of his qualifications: He had graduated from the University of Kansas, he had been an M.P. in the army, he had been an officer, he had been a district judge, and last but maybe most important of all he had been an adjuster for State Farm Mutual.

Well, they thought he was their boy so they took him down and qualified him thusly, and the judge decided he was qualified all

right as an s.o.b. So they said, "Can you recognize others of this type?"

He said that he could. So they presented him with this long hypothetical question outlining all of these factors and they said, "Would you, in addition to considering these hypothetical facts, would you please turn and carefully scrutinize the plaintiff."

He did. They said, "Now would you give us your expert opinion."

The fellow looked at the plaintiff and he said, "That man is an s.o.b. if I ever saw one," and the defense won the case.

What I have tried to give you is a little idea about how you can properly prepare and use expert testimony.

PRESIDENT SVOBODA: Well, you can see where we have advanced our education tonight in a serious field on the preparation and use of expert testimony.

On a more serious note, especially for you ladies, you might think this is the way we try cases, but actually it shows what a jollification we get out of a serious subject when we have somebody like Judge Don Musser to burlesque it for us a little bit. That is why we brought him here.

Now I have a serious subject, come to think of it. George Healey, come forth! You are going to need this, George. I am presenting you with the gavel, the official knocker-downer of the State Bar Association, and I hope that you have a great deal of success with it.

With that, I think we have concluded the evening performance. We stand adjourned.

FRIDAY MORNING SESSION

November 2, 1962

[The second session of the Institute on Tort Law was called to order at 9:30 o'clock by Section Chairman Albert G. Schatz.]

CHAIRMAN SCHATZ: Gentlemen, we welcome you here again to the institute that the Section on Tort Law is presenting during your annual Bar convention. This morning, as you have noticed from your program, the topics to be discussed will be "Interrogatories, Privileges, and Demands and Requests for Admissions."

One thing I forgot to mention to you yesterday, although I am sure most of you have already got your copy, at the registration desk is a pamphlet containing outlines of the various sessions that we are conducting here, and they have purposely been made up so that they will fit in that green *Lawyer's Desk Book* that we all have and keep on our desks all the time.

This morning we are fortunate to have addressing us David Dow, who is Dean of the College of Law at the University of Nebraska; Flavel A. Wright, and Russ Mattson, all from Lincoln.

Without further ado I would like to have David Dow address you on the portion of the program that has been assigned to him.

DISCOVERY PROBLEMS CONCERNING PRIVILEGE

David Dow

Mr. Moderator, or whatever it may be, Fellow Members of the Nebraska Bar Association, and others who might be here: I would like to start with just a few simple opening remarks in connection with the outline which you have in front of you. I had hoped that when this was printed these statutes would be all in front of you so they could be looked at as you were listening to what was being said, but I think perhaps we all have basically in mind the statutes that specifically refer to the problems of privilege in connection with discovery.

The citations which you will see, at least in the part for which I am responsible, are certainly not intended to be exhaustive in any sense of the word. They are merely intended to lead you to other cases which do discuss the various problems. I have referred from time to time to McCormick's work on Evidence. I think this is one of the best works on the law of evidence, and I suspect many of you have this rather than one of the other works, such as Wigmore; also McCormick's work does refer you specifically to the

West key numbers and also to the sections of Wigmore which are important.

So far as case law is concerned, as has already been mentioned and we know, there is practically no case law in the State of Nebraska on many of the problems which deal specifically with discovery. However, in the area of privilege we are dealing with a group of other cases which apply to privilege during the trial of the action, and consequently we do have some cases in this particular area.

We start out with a very simple proposition that each of the sections which deal with the various kinds of discovery—that is, depositions, interrogatories, demands for admissions, and demands for the production of documents—do specifically say that you cannot get by way of discovery that which is “privileged.” The difficulty, of course, is not only to find out what is privileged in the sense of the privileged statutes in the common law rules of privilege, but to find out eventually whether or not that word “privilege” has any additional meanings. For that reason I have included a number of rather closely-related areas which many text writers do refer to as being covered by the concept of privilege, although as a lawyer in the trial of an action you perhaps would not specifically make that kind of objection; you would think of it rather in terms of incompetency—that is, incompetency of the evidence.

With this start I also call your specific attention to the major problem in the area of discovery that has been referred to several times already, and which I trust will be referred to later by Mr. Mueller when he talks about the production of documents. That is the case of *Hickman v. Taylor* in which we do have a differentiation drawn by the Supreme Court of the United States between the concept of privilege, which the Supreme Court of the United States talks of in terms of common law privilege in *Hickman*, and the concept of work product of the attorney, which the Supreme Court of the United States said simply is not considered as discoverable under the broad concept of discovery which is presented in the federal rules. Often it is exceedingly difficult to apply that particular distinction in practice, and therefore you will find the federal courts, at least, making conflicting decisions in this particular area of work product of the attorney.

I start out by discussing the privilege against self incrimination. Here again I am somewhat at a loss to talk about Nebraska law. We do not have a substantial body of law covering the privilege against self incrimination in the Nebraska cases. Therefore I have referred you to the constitution which says that no person shall be compelled in any criminal case to give evidence against himself;

and everybody knows that the privilege against self incrimination does not mean what the constitution says at all. When it says "in any criminal case" it means anywhere, judicially at least.

This is then supplemented by Section 1210 of Chapter 25 which says: "When the matter sought to be elicited would tend to render the witness criminally liable . . ." and again we are talking, not about criminal cases necessarily, but all cases, and we have then a phrase which is not quite peculiar to Nebraska, but we do not find it in very many other states, ". . . or to expose him to public ignominy, he is not compelled to answer, except as provided in Section 25-1214," which says that if you can prove he has been convicted of a crime, to impeach a witness you may do so.

This is within what I would suppose to be the concept of privilege, this phrase "or to expose him to public ignominy," and I would suppose therefore that you could not, on the ground of privilege, go into past misconduct of a witness or of a party unless you could prove it. Here I am in complete doubt. I am suggesting that if you can prove that the past misconduct is related to the particular area of crime, or whatever it is that you are talking about, you *might* be able to go into it because it would be otherwise relevant, but the statute indicates that you should not.

There is no question in Nebraska that privilege against self incrimination does apply to the "privilege" in the discovery statutes. *State ex rel. Beck v. Lush* specifically so held.

We also must remember that the privilege against self incrimination must be raised at the time that the question is asked. This is a standard rule with respect to the trial of a lawsuit, whether it be a criminal lawsuit or whether it be a civil lawsuit. The cases here are civil cases or quasi-civil cases at least. Query in my mind, at least, whether or not you can raise the privilege at the time of the discovery under *State v. Barlow*. I think you can. The rule generally speaking, so far as privilege against self incrimination is concerned, however, does say that if I waive my privilege against self incrimination in Trial 1, that waiver does not carry over to another trial. This is generally the rule with respect to preliminary examinations or grand jury proceedings. So even if the witness (it might be a witness or a party) does testify without objection at the deposition stage of the proceeding, it does not necessarily follow that he thereby waives this objection at the time the deposition is read or sought to be read into evidence at the trial of the action.

We have some problems with respect to corporations. The case law is federal, but I believe that it is almost unanimously followed

by those states which have decided the problem, and, of course, the leading cases are *Hale v. Henkel* and *Wilson v. United States*, which basically point out that under the federal constitution the privilege against self incrimination, the Fifth Amendment, refers to persons, and this means persons in the personal sense. Therefore impersonal entities, such as corporations, have no privilege against self incrimination. Consequently, that part of the Fifth Amendment does not apply, and you may get books, records, etc., of corporations even though they do disclose that the corporation was guilty of some criminal action.

Furthermore, *Wilson* holds that the specific officers of the corporation may not raise their own privilege against self incrimination with respect to the books and records which are the property of the corporation. Finally, this was modified to some extent at least in the last case which is cited there, *Curcio v. United States*, in which the Supreme Court held that if the books and records of a corporation are in the personal control of an officer or ex-officer, it is true that he may be subpoenaed to bring those in, and he may not raise his own privilege against self incrimination. But if he comes in and says, "I don't have them any more"—period—the state or whoever is trying to get them cannot say to him, "Well, where are they?" That, you cannot do because that is seeking evidence or links in the chain which would eventually lead to his perhaps criminal liability. Also, of course, *United States v. White* held that the privilege against self incrimination, at least the federal privilege, will not apply to the quite impersonal labor union, for the same sort of reason.

Whether it applies to partnerships or not we have an amazing paucity of decisions all over the country. I have referred you to two. I believe there are not many more cases specifically covering this particular question of the privilege against self incrimination of partnerships. The two cases to which I refer you happen to hold that the privilege against self incrimination did protect the partners in these particular areas.

Then we have some problems with respect to documents which belong to third persons. I am going to postpone that particular section until I get to the question of attorney-client privilege in a very few moments.

I also have referred you to the case of *Shapiro v. United States*, which deals with the proposition that if the government within its regulatory police powers requires an individual to keep records of a particular kind, then the government or anybody else can go after those records and get them even though they do incriminate,

because they are not within the privilege that a man could choose to enter that business or not enter that business, and so there is an implied waiver. There are some other theories but perhaps this is the one which is most meaningful.

Then I have at the end referred you to a series of problems and the cases and discussions referred to in McCormick about an individual in Nebraska who is brought into a Nebraska court and discovery is sought against him of certain documents, of certain records, or he is asked certain questions and he says, "But what I say will incriminate me, not under the laws of Nebraska but under the laws of Iowa or under the laws of the United States." Of course it is the latter provision which you will find yourself probably more associated with than under the laws of another state.

Generally speaking, the majority rule is that it is only incrimination under the law of the sovereign which is forcing the disclosure that is applicable. There are only a few states which hold that I, Nebraska, will protect Smith from incriminating himself under the laws of Iowa or under the laws of the United States. I know of no Nebraska decisions on this. This of course is a Nebraska problem, however, because the Supreme Court of the United States did hold that it was not a part or parcel of the concept of due process, or at least they have so far held that on some questions.

To get to the attorney-client privilege, this of course is a common law privilege. It was a common law privilege which started back prior to 1600. It was a privilege of the attorney at that time. Since 1600 it has slowly and quite clearly developed into a privilege belonging to the client. It says, in effect, that no disclosure by the client to the attorney necessary to get the attorney in a position to advise the client with respect to a legal problem and which was intended to be confidential, may be got out of the client nor out of the attorney.

Most cases that have decided the problem have also pointed out that we have a similar protection with respect to statements made by the attorney to the client, because they are interwoven with disclosures from the client to the attorney. These, of course, are clearly stated, I think, in the Nebraska decisions. I have cited for you the three later decisions which clearly lay out the Nebraska law in this area. *Short v. Kleppinger* is a case which settled a rule which had been thought, at least by some of us, to be otherwise under some old Nebraska decisions.

The proposition simply is, if a client and attorney are discussing a problem and there is a third person in the room, does this mean that there is no attorney-client privilege involved in that

particular relationship? In *Short v. Kleppinger* the Supreme Court of Nebraska said, "No, there is not, because if there is a third person present not necessary to the business of the client, then it is not intended to be confidential; therefore we have no attorney-client privilege.

I have also referred you to the case of *Radiant Burners, Inc. v. American Gas Association*. This was a case which was just decided within the last couple of months by the United States District Court for the Eastern District of Illinois. It is significant because it is quite an amazing decision, holding specifically that there is no attorney-client privilege when the client is a corporation. So far as I know, this is the only decision that has come out that flatly. There have been some indications in previous decisions that this was a debatable proposition, but I had supposed that most attorneys had thought otherwise. There is, generally speaking, agreement that the discussions between the officers of a corporation and the attorneys for the corporation must refer to legal problems, and if what is asked is business advice or something of that nature, then obviously you are not talking about the attorney-client privilege. This much was clear before, but in this particular case the judge said, "The attorney-client privilege is a part and parcel of the concept of the privilege against self incrimination." And that has always been held to be a question which had to be a person rather than this entity, and consequently he held the same thing with respect to a corporation—no privilege against self incrimination. I don't know, I suspect that this will go up to the Seventh Circuit, and if so and the Seventh Circuit affirms then we will have ten or fifteen years of interesting litigation around the country trying to find out whether this really is the law or whether it isn't. I think it could have major repercussions, particularly in the insurance industry, if this were held to be the law. I have cited you also to the only law review discussion that I know of that clearly talks about these particular problems, and that is Simon's articles.

I'll get back to this again in a little while.

We have now some problems as to whether or not the attorney-client privilege applies to will cases; that is, cases in which a will is attacked either on the ground of the execution or undue influence. Of course the Nebraska law which was laid down, *In re Estate of Coons*, holds that the mouth of the attorney for the testator is sealed even after death with respect to what he learned in confidence from his client unless he was a witness to the will, and this refers back to *Lennox v. Anderson*. Of course *Coons* does indicate that with respect to the facts of execution this would not be within the at-

torney-client relationship because there were third persons present and it was not intended to be confidential, certainly not after death.

I do point out to you that Nebraska's decision in *Coons* is considered to be the minority rule. Most states which have handled this problem have held otherwise on the ground that it was intended to be waived after death with respect to the will; this would not necessarily follow with respect to other communications involving business that did not refer to the will execution itself.

The *Joint Retainer* case holds that the standard rule is, if two people come in to discuss a common problem with an attorney, then they have an attorney-client privilege with respect to third persons who want to litigate with them; but as between themselves, if they get into an argument, there is no attorney-client privilege.

Now I come to a couple of cases which represent at least new departures, if not new law, new departures and new discussions in the law of attorney-client privilege, particularly *United States v. Kovel*, which is a Second Circuit case. This, to my mind, has some very interesting collateral possibilities. In *United States v. Kovel* we have a client going to an attorney and asking for advice on tax problems. The attorney says to the client, "I am a nice guy. I know what the law is, but when it comes to auditing your books and figuring out what the score is, I am not qualified to do that. I do, however, have in my employ a certified public accountant and I am going to ask him to take your books and records and go over them, and I am going to ask you to discuss with him the problems with respect to the facts, so that between you, you can get the facts in such shape that I can give you advice on the legal problems that you have in your tax case."

This was what happened. The United States then went after the client criminally and they tried to get the conversations, letters, etc., that had passed between the client and the accountant. The Second Circuit in this decision held that there was a privilege for those communications. They said that if the client had been talking Greek and the attorney didn't know the Greek language, it is reasonable to think that he could go out and get an interpreter to help him, and that is just exactly what the accountant was in this particular situation. This was a person who was necessary for communicating the ideas, facts, and so forth that the client had in order to put the attorney in the position to act intelligently as an attorney, and therefore the attorney-client privilege applies. This, as I say, has some interesting possibilities.

They relied on *City & County of San Francisco v. Superior Court*, and *State v. Kociolek* in New Jersey, which held similarly

but not with respect to tax matters. The California case, a personal injury action, was a case in which the client had gone to the attorney, the attorney had said, "Go see such-and-such doctor and have him examine you so I can find out what your physical condition is, and we can go on from there." They wanted to go after the doctor's report to the attorney, and the Supreme Court of California eventually held that they had no right to go after the report of the physician because the physician was acting as an agent of the attorney.

This was necessary in California because, as you see if you look on the next page, I have laid out the California physician-patient privilege statute, and in that statute California specifically waives the privilege of personal injury cases and as of the time the action is commenced, for treating doctors; but this, of course, was not a treating doctor, this was an examining doctor.

Kociolek was a similar case involving mental capacity in a criminal action in New Jersey.

We do have a series of problems in connection with documents which are the property of a client, quite often a business client, and the client has turned them over to the attorney in order to get the attorney in a position to give him legal advice or litigate, or whatever it might be. I have cited here to you the most recent decision, *In re Colton*. I have given you the district court case, and just two weeks ago that case was affirmed by the Second Circuit. The citation is 306 Fed.2d 633. The affirming decision is, I believe, an even better decision than the one which I have given you here.

In any event, let me suggest to you the situation in *Colton*. What happened in *Colton* was that there was a tax problem with respect to some clients, the name escapes me at the moment, and Colton was an attorney. They started out by an administrative subpoena, Colton asking for books, records, etc., etc., etc., from the attorney. The attorney appeared and declined to answer on the ground of attorney-client privilege. What we were talking about here was a net worth problem, among other things, so the tax administrator brought an action directly in the district court to enforce the subpoena, as, of course, he has a right to do under the federal statutes.

After some interesting bickering back and forth, in which each side gave in a little, we end up with these holdings in the *Colton* case which do illustrate the laws as I think they are with respect to documents. In the first place they said that the attorney, of course, can be required to disclose that he acted as an attorney. This we will require you to do. It is only in a very, very rare case

that the fact of being an attorney, the disclosure of the name of the client, fees, etc., can then be kept under cover. There is one case out of the Ninth Circuit, *Baird v. Kerner*, which you may be familiar with and in which the very peculiar circumstances indicated that they would not require the attorney to disclose for whom he was acting.

Second, they said that the attorney does not have to disclose papers which are specifically prepared by the client and given to the attorney, and which, of course, are necessary to the relationship of attorney and client. This would include letters, memoranda, etc., specifically prepared by the attorney or agents of the attorney and given to the client. There is no difference so far as a communication is concerned, in other words, between oral communication and written communication, and this, of course, is standard law.

Then anything that the attorney himself wrote down after having talked with the client, which are merely memoranda or disclosures made to him, would also be within the privilege. I don't think there is any question about that particular holding either—assuming one thing, and that is that when the disclosure was made to the attorney it was not intended that the facts of this disclosure be communicated to third persons. That may cut across, and you may have problems with respect to tax matters on that particular issue. And I think that is a debatable issue, depending upon whether or not you said to the attorney, "Here it is, disclose what you think is necessary to disclose." That, I think, should come within the privilege.

Then they held that the attorney has to disclose in a general way the nature of the papers which he has in his file; in other words, it is reasonable to put the judge, the court, in a position of deciding whether the papers fall within that class which is covered by the privilege, or whether they fall within that class which is not covered by the privilege, because the books and records of the client which were not prepared specifically for giving information to the attorney but were simply a part of the general way in which he conducted his business or whatever he was doing, are not covered by the attorney-client privilege. This has been the general rule I think all along, but it is interesting to see it restated here in this context. If the rule were otherwise it would be very simple for a client simply to bury evidence against himself by handing it over to his attorney and saying, "Well, now you can't get it."

It is true, they said, and this is by way of dictum—and this is an interesting, debatable proposition—"The attorney when he is subpoenaed with a *duces tecum subpoena*" or however else his

records are sought "when he is subpoenaed to produce the books and records of the client which are in his possession, he, the attorney, is entitled to raise the privilege against self incrimination which belongs to the client."

This seems to be the majority rule at the moment, although there is a substantial minority group of federal cases which have held otherwise and require the client specifically to come into the hearing and say, "I wish to raise the privilege against self incrimination in this connection."

The general rule is, leaving out attorney and client, that if Smith has papers belonging to Jones, Smith cannot raise either his own privilege against self incrimination or Jones' privilege against self incrimination. That is the general rule. But here we see the attorney-client relationship washing out a part of that proposition.

To get on to physician-patient, very quickly—we do have Nebraska cases on physician-patient privilege and I expect most of us are familiar with them. I have cited the *O'Donnell* case which held that if a doctor is privileged his records are privileged and the records of the hospital where he acted are privileged.

Culver v. Union Pacific held that nurses who necessarily are acting in conjunction with a doctor come within the physician-patient privilege. The *Culver* case actually held that this particular nurse in question was not acting in conjunction with the doctor and consequently was not privileged.

In re Estate of Gray is an old case holding that in a will contest after the death of the patient either side may call the doctor. The theory may be one of a waiver by the heirs or by the executor or administrator, or it may be that the privilege was not intended to outlast death. It may be one or the other. Very definitely there is a problem as to whether or not that old case is affected or overruled by the *Coons* case which dealt with the same problem in connection with attorneys, because the cases which are cited, discussed at length in *Coons*, are cases which you see also in connection with the physician-patient privilege in *In re Estate of Gray*. It can be distinguished, there is no question about that, but one raises a very major question as to how our court will hold when and if the case eventually gets to it.

There is another case which I did not put in and I should have, *Leeds v. Prudential Insurance Company*, which is 128 Neb. 395, which held that if a patient takes a friend along to go to the doctor, this does not destroy the physician-patient privilege. Now I raise again a question as to whether or not that decision may be by

analogy overruled, or indicate that it will be overruled, by the case of *Short v. Kleppinger* which held that if this were the case in the attorney-client relationship, the attorney-client privilege is knocked out.

Then we have cases of waiver by contract, and again, perhaps, I should have cited another case, *Walski v. National Life and Accident Insurance Company*, 135 Neb. 643. I suspect that both *Walski* and *Scott* should be read together.

I will skip over—well, no I won't. *Shepherd v. Castle* raises, I think, a very, very interesting question. Can a defendant get medical reports and information acquired by the plaintiff's workmen's compensation carrier after the plaintiff has had his workmen's compensation and sues the third party, of course naming the employer as defendant under subrogation—can the records of the insurance company be secured? Now this, so far as I know, is the only case on it. It comes out of, I believe, a Missouri federal district court and they said, "No, we think that federal Rule 35 dealing with discovery of physical reports, etc., should be followed," although it is pretty darned hard to figure out any reason why since this was an examination not for treatment, consequently no physician-patient relationship. But it does perhaps give you a peg to hang your hat on if you want to object.

Then we have a couple of interesting decisions. In New York where their statute is like our statute in that there is a waiver of the physician-patient privilege but only after the patient puts in evidence at the time of trial, you see. That is our rule; that is our statutory rule anyway. The New York, not the court of appeals but one of the appellate divisions, held, "Well, I'll tell you what we'll do, Mr. Plaintiff. While we agree that you don't have to disclose the reports of your treating physicians until the time of trial, we aren't going to try your action until you do disclose them." The *Autry* case was a federal case in New York relying on the New York law. There are other interesting cases in the federal court applying similar—let's call them gimmicks. I give it to you for what it is worth; it may be worth trying.

I have set out the California statute here showing you how California has answered the discovery problem in connection with the physician-patient privilege.

Priest and penitent, I think there is little new in this. There are practically no cases anywhere in the country. The case which I cite, *Hills v. State*, is one of the few that is interesting. This was a case in which a criminal defendant called in his priest and in effect told him about the crime which he had committed. The priest

was required to disclose this. The court said this was all right because when the penitent disclosed his criminal activities to the priest he asked him to disclose it to the county attorney; therefore, it was intended to be transferred specifically to the opposing side in the lawsuit and consequently the normal priest-penitent privilege was specifically waived by the penitent.

So far as the husband-wife is concerned, this is an exceedingly rough problem to handle. I have suggested here that there are two different ideas that we have to distinguish, and, with deference, I am not sure we find our courts always distinguishing them. We have Section 1203 of the statute, which is set out there at the top of page 9, and this says, "A husband or wife"—the word "can" should be inserted there—"in no case be a witness against the other," and then there are a whole slew of exceptions. Now this simply says that in a criminal case or a civil case I cannot call the other fellow's wife, nor can I call the other person's husband if it is that sort of situation.

We have another statute, the following statute, 1204, which says that in no case can confidential communications—and I have inserted the word "confidential" because the Supreme Court of Nebraska along with every other court has in this context inserted the word "confidential", in the *Stocker* case—any confidential communication between husband and wife at any time, and then goes on specifically and says, furthermore, after the marriage ceases you cannot require the disclosure of confidential communications between husband and wife.

Now we have some problems as to what is a communication. Is it only words or can it be acts or combinations of words and acts, etc.? Our Supreme Court, in the *Blohme* case, I think confuses these two different ideas, and if you go back to *Buckingham v. Roar*, 45 Neb., you will see the court clearly setting out these two quite different ideas.

The question which I then ask is: Can one party ever take a deposition of the other party's wife in any civil action? Or can the person, the other party, simply say there is a privilege and the statute says you cannot depose with respect to privileged matters, or you cannot interrogate if you are asking the party.

In the first place, Section 1203, which says that a husband or wife can in no case be a witness against the other, is not couched in terms of privilege. It is couched in terms of incompetence. You simply cannot call the wife, even, as a witness, and that our discovery statute, 1267, does not specifically cover. There is nothing in the discovery statute which says I can't go after a witness who

would be incompetent at the trial as long as I am seeking relevant matter. This is an issue which remains to be decided by our Supreme Court. And I think it is a major issue as to whether that particular statute would be covered by the word "privilege" in 1267.02. Then, of course, you can get into some interesting collateral discussions if you multiply the parties in a lawsuit if both husband and wife sue; if they sue separately or sue together; and if they sue separately, of course, the one can be deposed in one action and not in the other and vice versa, so maybe you want to watch out.

I also suggest to you that the divorce action is a peculiar statute. It says "In a divorce proceeding either party may be a witness as in other civil cases," and, of course, in other civil cases either party cannot be a witness because it is a plain and strict violation of Section 1203. I don't believe any court would so hold, but the statute certainly clearly says this.

I suggested husband and wife relationship as raising questions in which the concept of privilege in the discovery statute may be expanded a little or may not, I don't know.

We do have some other privileges, and very roughly I have suggested them to you here with simple citations. We have the privilege for official information. Again, Nebraska, in Section 1208, is one of the few states with a statute like this. It is practically never referred to that I know of, but there it is on the books.

Then, of course, we do have a whole group of special statutes which say that particular kinds of information disclosed to public bodies cannot be disclosed to third persons—police reports, etc., of which *Styskal v. Brickey* is typical.

Tax returns: I have cited to you probably the leading case, the *Sultana Case*, and then, of course, the case in the Nebraska court in which Judge Van Pelt held, along with the great weight of authority, that you can force a taxpayer to disclose his federal tax returns for past years, even though the federal tax statute says that this is confidential. The confidentiality is simply as between the taxpayer and the government, that's what the holdings are, and not between the taxpayer and anybody else who wants the information and has a good reason for getting it, as of course defendants have in lawsuits involving past wages or as they may affect future earnings.

Political votes, trade secrets, communications to grand juries, and some others which I didn't put down here. You can't go into religious beliefs unless it is specifically and clearly relevant in the case; you can't go into it just because it may bear on his credibility, that is. And of course the privilege of jurors with respect to matters

which inhere in the verdict could be put in there, too, and identity of informers. I happen to like that beautiful name of that beautiful case *Centoamore v. State*. That is why I put it in, I guess.

Then we get into a group of situations in which we are not sure whether we are talking about privilege or something else. In this particular context Mr. McCormick, who is the author of the book on evidence which I have referred to here, has specifically suggested that they be talked of in terms of privilege rather than in terms of incompetence. He likes that because it is easier to waive it than get it in.

Statements by one employee to another: Now there are, as you probably know, a large group of cases across the country dealing with reports by one agent to another agent. A truck driver gets into an accident, he reports to his boss. This happens all the time in industry and the standard rule has always been that these reports from one agent to another are not admissible at trial against the principal, or technically the master—because we are talking about master-servant problems rather than principal-agent problems—they are not admissible against the master unless of course they are part of the *res gestae*, and they never are.

Now, is this simply an incompetency in the sense of not being admissible, or should it be thought of in terms of privilege, because if it is the latter we come into whether or not you can discover them, and that discovery would be specifically prohibited by 1267. If it is not privilege, then there is nothing which says that you cannot get them. You would have then to talk about the concept of relevance, and of course most of them are not only relevant but they are highly relevant, or you would have to talk about some concept of work product, and this, of course, is what all attorneys and lawyers have tried to do, to bring agents' reports of accidents, etc., into the work product concept by having the house counsel say, "Now we will set down a set of rules in case of accidents. I tell you that for my part of this business this is the way we have to work it out, so it should come within the attorney-client privilege or work product concept," but generally speaking they usually don't get away with it.

Here again the English courts adopt a clear privilege concept, at least insofar as the reports are specifically connected with anticipated litigation. That happens to be the line that McCormick asks us to draw, and that is why I put it in here because I think this is going to be part and parcel of litigation in this area for a number of years to come.

Compromise negotiations are another problem which many text

writers have suggested should be included within the concept of privilege. There are three theories, really, which have been advanced to support the rule that compromise negotiations are not admissible at the trial. One is the idea that there is an implied contract. The other idea is that it is not relevant because this is not intended as an admission at all, it's just a "let's get rid of the lawsuit for whatever it is worth." The third is clearly set on the concept of privilege. It is hard to see how this idea would get involved in most litigation, but every once in a while you have other parties to an accident who have settled or tried to settle and maybe you would like to find out what the score is. Here you are going to have to fight out the problem of whether or not this is privilege under 1267 or whether it is a horse of a different color.

Repairs after an accident, again you have the same kind of problem and you have the same kind of different ideas which have been advanced. The *Pribbeno* case in Nebraska talked about this as simply being a question in relevance. Since they repaired the floor after the accident this is no relevance whatsoever, and, of course, on that theory you could object to it in discovery because it would have no relevance to the lawsuit.

Lindley v. Wabash talks in terms of privilege, however. They say "humanitarian doctrine"; we don't want to inhibit the wrong or the alleged wrongdoer from repairing his defective machines, and therefore this is his idea of privilege, and again McCormick talks in these particular areas.

I have included at the end the problem of whether or not the fact of insurance or the insurance limits should be discoverable, not that I intended to talk about it, but I just happened to have the case there of *Johanek v. Aberle*, which was the last case I know of and which contains practically the entire history of the problem. *Jeppesen v. Swanson* is probably the leading case saying you cannot get this, and *People ex rel. Terry v. Fisher* in Illinois is probably the leading case saying you can.

CHAIRMAN SCHATZ: Just very briefly, in connection with Dean Dow's comments on the physician-patient privilege which now exists in our state, as he pointed out, it also exists in the State of New York, and that is, briefly, that the privilege is active and exists until the time of trial when the patient or plaintiff patient puts his or her physical condition into evidence. Of course then you are faced with the practical problem that it is too late for the other side to take the time to get the information necessary to prepare his defense without asking for a continuance, which some of our district courts have granted from time to time.

The Committee on Procedure this year, and this may interest you gentlemen, has recommended to the Legislative Committee of our Bar Association that our privilege statute be amended to follow substantially the pattern of the California statute and other states which hold that the privilege exists until such time only as the case is filed or the counterclaim is filed, whichever it may be. What, of course, will happen to that in our Legislative Committee or before a legislature none of us knows, but it is interesting to point out to you that that has been considered and has been recommended to the committee.

Our next speaker, gentlemen, and without any further ado, will be Mr. Flavel Wright of Lincoln, Nebraska, who will address you at this time.

INTERROGATORIES TO PARTIES

Flavel A. Wright

I might say with reference to the last comment you made, the Judicial Council is also drafting an amendment to Section 25-1207 which will, in effect, make the filing of the action or the placing of the matter in issue constitute the waiver of the physician and patient privilege. This is an area where we have an overlapping of the Bar Association Legislative Committee and the Judicial Council, but the Judicial Council has approved this tentatively, and a draft of the bill has been made, and I think the Judicial Council plans to introduce it or cause it to be introduced at the next legislature.

The subject assigned to me is "Interrogatories to Parties." The outline appears beginning on page 11. I have attempted to set forth a number of cases, not with the idea of setting forth what the rule is or what it should be but what some courts have stated the rule to be. I think this is an area in which there is a great deal of work still being done and a great deal of work to be done in crystallizing what the law is and what it should be in the field of interrogatories. Most of us have been familiar with interrogatories in the federal practice but interrogatories are now being used quite extensively in the state practice, and I think it is a matter that every lawyer should be familiar with and should use in the interest of doing what he is supposed to do in the interest of his client.

On page 11 I have set forth the various statutory requirements to show the differences, if any, between the state and federal rule. As you will note, there is practically no difference as to who may serve the interrogatories: Any party—that is, any party of the

litigation—may serve interrogatories and they may be served upon any adverse party. That is the same in the state and the federal practice.

The time of service is any time after the action is commenced, but if served by the plaintiff within ten days after the action is commenced it is necessary to obtain leave of court. That is again the same in both the state and federal practice. I think the purpose behind that was that a defendant should not be required to answer interrogatories before he has had a chance to retain counsel and know a little more about what is going on unless some reason exists. There have been cases in Nebraska that I know of where leave of court has been given but I do believe it should require some showing to the judge, and it should not be done just automatically because the persons who worked out the federal rules and the Nebraska statutes indicate that it is not a matter of right, and leave of court is necessary.

Time for objection in interrogatories: Ten days in each case, ten days under the federal rule and ten days under the state rule; however, if the interrogatories are served by mail you get to add three days on to that period. That is an area which I think is sometimes not considered. It might save you, if you got into a crack some time, to look at that section of service by mail.

The form of objection: They must be in writing both under the state and the federal law, and the state law says "served upon the party or his attorney." Now this is an area where there is some difference, and it may be a distinction without a difference. The federal law says "served on the attorney." The interrogatory statute was again a statute that the Judicial Council considered and I don't believe there was any intention to make a real distinction between the federal and the state practice in this regard, but there is that distinction. It might possibly be material in some case.

The time for answer of the interrogatories in each case again is fifteen days and the three days additional if they are served by mail.

The form of answer under both the state and federal law is the same. Interrogatories must be answered separately; they must be answered fully; they must be answered in writing; and they must be answered under oath.

The question as to who should sign the interrogatories—neither the federal rule nor the state statute indicates who should be the person to sign. As I will discuss a little later, the question as to whether an attorney can sign them is one of the problems that comes up.

Finally, the scope of the interrogatories: Under the state law it says merely "any relevant matter not privileged." The federal rule provision sets the matter out much more extensively, as you can see by the outline. The state statute was adopted after the federal rules had been amended, I think in 1948, and a question could arise as to whether or not there is a distinction under our state practice and under the federal practice as to the extent of the scope of the interrogatories. I hope to cover that a little later, too.

Use at the trial: Both the state and the federal law provide that the interrogatories to parties may be used to the same extent as testimony taken by deposition.

Limitations as to number: The rule is substantially the same. There is no limitation "except as justice requires" is the state rule, and the federal rule is "none except as ordered under Rule 30 (b) to protect against annoyance, expense, embarrassment, or oppression."

Finally, as to sanctions: The one difference between the federal and the state practice in that regard is that the federal rules do include a requirement or a possible requirement that attorneys' fees be taxed as costs. The state statute says nothing with regard to attorneys' fees. So there again may be an area where there is some distinction.

At the outset I think you should realize that I am talking about interrogatories to parties. I am not talking about interrogatories to witnesses, which you can serve for answer by witnesses under the deposition statutes. I am not talking about motions for production of documents, and I am not talking about requests for admissions. I am talking specifically about the Rule 33 interrogatories or the comparable statutory interrogatories which are interrogatories to parties or adverse parties in the litigation.

Now as to whether an attorney can sign the answers, I have set forth one case that indicates that an attorney can sign the interrogatories served upon a party which is a corporation. Moore, in *Federal Practice*, indicates that that is a correct rule.

As to individuals, *Barron and Holtzoff* says it is "incorrect for an attorney to sign in behalf of an individual" party. I don't know that I want to accept that as the law. I think it will ultimately develop that attorneys should be able to sign interrogatories on behalf of individuals. The courts have held that if his attorney does sign the interrogatory, the party is bound just as he is bound by stipulations that his attorney enters into in his behalf.

They have held that a party cannot refuse to answer the interrogatories on the ground that the information is solely in the hands

of his attorney, and they have held that an attorney cannot refuse to answer the interrogatories on the ground that he can't find his party, or he can't suppress the interrogatories on that ground. So it seems to me that it doesn't serve any real purpose to require the interrogatories to be signed by an individual party. That is my own personal view on it. I suspect and I know there will be courts that undoubtedly will take a contrary view, but in the present practice of law in any of these areas where you can simplify the practice, it seems to me you should, and as long as the party has an attorney, the attorney is affecting him in many ways including stipulations and matters of that type, and it seems to me that in answering interrogatories the attorney should be able to sign them, even though the party interrogated is an individual as distinguished from a corporation.

Now there may be another area in this, though. Maybe an attorney doesn't want to sign them, and there have been some questions as to whether an attorney can be required to sign them. I think the answer on that, as indicated by Moore, is probably not, and certainly as far as a corporation is concerned, unless he is an officer or a managing agent of the corporation, he shouldn't be required to sign the interrogatories if he doesn't want to.

With reference to interrogatories, the next question that is set forth in the outline on page 13 is, "Whose knowledge are they seeking?" Sometimes I think the parties play footsie-footsie and have the interrogatories answered by an agent who maybe doesn't know anything about this and he comes in and says, "I don't know." Is that proper procedure or practice? Well, I think obviously it is not. It is pretty generally regarded that it is the composite knowledge of the party that is sought. So the party has some obligation. If he doesn't know what the facts are that are being sought he has some obligation to ascertain what the facts are. Certainly he has an obligation to ascertain the facts in the knowledge of any person he controls. A corporation, if its agents have this knowledge and the employee is still an employee of the corporation, have an obligation to ascertain what that information is and answer the interrogatories in good faith in the light of that information.

I have indicated again that you cannot refuse to answer the interrogatories on the ground that the information is solely in the hands of the attorney. Again that gets back to the information in the hands of a person who is controlled by the party. *Hickman v. Taylor* is cited in that regard, which reminds me that at one time George Boland and I argued a matter before Judge Delehant in which we both discussed at great length *Hickman v. Taylor*. Judge Delehant commented when we got through that neither one of us

had indicated that we knew exactly what *Hickman v. Taylor* held and that if either of us indicated to him that we did know, we would be the first persons he had ever run into that could tell what *Hickman v. Taylor* said because he himself didn't know what it said. So when you get into *Hickman v. Taylor* and you get confused, remember you have lots of company in that regard.

Another problem that arises is: What duty is there on a party to make an investigation or to acquire knowledge? I have indicated already that where sources of information are under his control I think clearly he does have that duty. He also, I think, has a duty to acquire knowledge, any knowledge of facts which is normally necessary for him to acquire in order to prepare his case for trial. If it is ordinarily part of his case to have that information I don't believe he can come into court and object in good faith and say that it is going to require him to spend some time and trouble, if it is time and trouble he obviously should be spending to present his case to the court. There is great variance as to exactly what the courts require of a person in this regard, but the rule should be a rule of reason. If it is investigation and research which is reasonable that the party should have or that he should prepare, or if it is investigation and research that the court should have and he can reasonably present it much better than the other party, then I think he has some obligation even at the risk of incurring expense and time and trouble to develop that information and present it in answer to the interrogatories.

As will be considered later, there are areas of obtaining protective orders. I have had cases where the court has indicated that he would require the party to present it, but the expense of the same would be held in abeyance to determine how important this information was in connection with the trial of the case. If it was a very expensive process and the plaintiff has required it to be prepared and presented, and it develops that it is without merit, or no purpose has been served, again the courts have authority to tax the cost of that against the party asking it when it develops it hasn't been done in good faith, possibly.

The courts have stated many times that you are not required to prepare the other party's case for trial. I think that is a good rule, but it should not be taken to modify the rule if you are not prepared to present facts which are in your possession or facts which it is reasonably necessary for you to prepare for trial in your behalf, even in cases where you have the information and can obtain it much more simply than the other party can.

What happens when you have answered the interrogatories and another year goes by before trial, or six months, and the situation

is changed? What responsibility is there on a party, having answered the interrogatories, to keep his answers up to date or to correct the answers if it develops they are not right? I have cited you one case in which the court has said there is a duty of a party to correct the answers. I have also cited you another case, a Missouri case, where they said there is no duty in that regard devolving upon the party.

It seems to me the proper rule should be that a party answering interrogatories ought to have some responsibility to see that those interrogatories are correct at the time of trial. If they are not, it seems to me that the interrogating party could have the right to assume that if these interrogatories have narrowed the issues, that the issues will not be any broader than the interrogatories have indicated unless the adverse party comes in and corrects his interrogatories. So while this is an area where I don't believe anyone can say exactly what the law is, I believe the law should be that the answering party should have a duty and responsibility to make certain that the answers are correct as of the time of trial, and if there is any reason that they are not, it should be just like his correction of a pleading; he can get permission of the court possibly to make the corrections.

Another area in which there has been quite a lot of conflict in this field, particularly in the federal practice—actually all of these cases are federal cases, since we don't have any state decisions of consequence on these problems, at least on most of them—another area is: Can a party be required to specify what his contentions are? In this regard this gets down to how much importance the court places on interrogatories as a means of narrowing the issues. There have been some cases saying that interrogatories should relate to facts or even to ultimate facts, but that the party should not be required to answer conclusions or give his contentions. On the other hand there have been cases that go the other way. As I have indicated in the outline, Barron and Holtzoff has indicated there are many cases to the contrary, and this work says that "the latter seems preferable since one of the purposes of interrogatories is to narrow and crystallize the issues."

I think that would be my own view of it in the federal practice, for example; in the state practice you can narrow the issues pretty well by the motion procedure but you do not have that available in the federal courts. Our federal judges frown on motions unless they are motions with a real specific purpose in an unusual situation, but ordinarily motions aren't considered as an area where you narrow the issues in federal court. I believe it is to the benefit of the court, for the benefit of the parties themselves, and certainly for

the benefit of the jury if everybody knows what the specific issues are in that case at the time the case goes to trial, and it seems to me that the interrogatory is certainly an area where that does serve that purpose. Our court has indicated in the *Chenault* case, which I think was Judge Delehant's opinion, that you can narrow the issues in that regard.

With reference to the purpose of interrogatories, the courts have stated many different purposes, as I have indicated in the outline. Generally this *Purdome* case pretty much summarizes them. They are to ascertain facts, to procure evidence, to secure information as to where pertinent evidence exists, and to narrow the issues. It seems to me that final one is certainly one of the important areas of the purposes of interrogatories.

Rules of construction with reference to interrogatories: Generally I think the rule is that the rules should be interpreted broadly, construed liberally, but nevertheless the court has a responsibility to see that a party is not imposed upon, that he is not put to undue burdens, and that the right to serve interrogatories is not an absolute right that can be exercised without control by the courts.

With reference to objections, and this is an area where I think there is some sloppiness in the practice, and maybe my views on this get to the sloppiness in my own practice, in my own thinking on it. First of all, if you have objections to interrogatories the burden is upon the objector to demonstrate the objectionable features and the objections must be specific. I have cited cases in the outline that say that this is oppressive, or this is vexatious, or this matter is privileged, or you have insufficient information. You must set forth what the facts are so the court can determine whether your objection is valid.

The most important rule is that if you have any objection you must state your objections timely, and that is within this ten-day period, or possibly the extension if they are served by mail. But if you do not object to the interrogatories timely, you are then required to answer them. You can't come in at the time of answer and say, "I object to answering this." The rules and the case pretty definitely indicate that the burden is upon you to see that your objections are started within the time required by the rule or the statute, so if you don't have time to make your objections you certainly should get an extension of time, and if you get an extension of time to answer and you haven't had time to look at the interrogatories, certainly include in the extension the right to answer or to object to the interrogatories within a certain time. Otherwise you may find yourself in a position of having to answer an objec-

tionable interrogatory and one which might be very damaging to your case.

I have cited one case where they have held that conditional objections were good. That was a case where they said, "Well, until we have the information developed by these depositions we can't answer this, and when that information is developed we will further answer them." In that case the court said they indicated good faith and that was sufficient.

Now as to what types of objections are available, I have set forth a number of instances where objections have been held to be good. I have set forth a number of them where they have been held to be no good. As you can tell, sometimes it is hard to tell the difference. That gets back to the question that different courts take different views on this. It was held to be a good objection, the fact that they had served a second set of interrogatories on a party before he had a chance to answer the first set. I think in that case it was probably objectionable, and it might be conceivable, it might be a case where the party could make a showing to the court that it was not objectionable under that situation.

In the early development of the federal rules there were some courts that went quite a way in holding that if the interrogatories were too detailed then the burden was upon the party to get this information by deposition. After the amendments of 1948 they pretty clearly spelled out that this was a procedure to supplement the deposition process and you had just as much right, except in a rare instance, to get the information by interrogatories to the party as by deposition.

One of the areas that causes some concern is requesting the names of the witnesses who will be called at the trial or the names of the witnesses who will testify as to certain specific acts. There have been some courts that have indicated that that is not a proper interrogatory, although you can inquire as to the witnesses who observed the accident. But to require or pin down who you are going to call at the trial, particularly on a defendant who may not have, for sure, all the information he is going to have to have, the courts have indicated this is not an area of proper interrogatory. I recognize that lots of times in these jurisdictions the federal judges, particularly, require you to set forth a list of the witnesses you propose to call at the trial, usually at the time of the pre-trial, and I think that serves some purpose but if it were enforced as a hard and fast rule it probably would lead to an injustice in some cases. Certainly you should not be required to set forth exactly what these witnesses are going to state at the time in advance of trial.

I don't believe I will take the time to cover the objections which have been held to be not good; you can read them as well as I can. Generally if there is a real purpose to be served in expediting the trial or developing the evidence, objections should be overruled; if the annoyance or difficulty involved is so great and the purpose to be served is relatively minor, that I think gets back again to the rule of reason and what a party should reasonably be expected to do under the circumstances. As you can tell by a rule of that type, you will get quite a variance on what a particular court thinks in a particular situation.

Protective orders: Both the state and the federal rules provide, I think, adequate authority for the court to enter protective orders either in enlargement of time or in making certain requirements as to how this information is to be furnished or in taxing costs or things of that type. One type of protective order that I have mentioned there that might not mean anything to you as you read through—the *Sutherland Paper Co. v. Grant Paper Co.* case was a patent case in which it was quite material who had first used this particular process, and one party served on the other party an interrogatory, "When did you first use that?"

The court in that situation gave a protective order and said, "Both of you will come in here and simultaneously say when you first used this, and then the person filing the interrogatory will not have the chance to make up his case after he finds out what the date is that he has to meet."

With reference to annoyance, expense, embarrassment, or oppression, again the rule is substantially the same in the federal courts as in the state courts and I think in substance should get down, and does in most cases, to a rule of reasonableness.

As to scope and whether there is a difference in the scope of interrogatories in the state courts and the federal courts, the federal courts have held that interrogatories should be very broadly interpreted.

The rule was amended in 1948 to specifically set forth that not only does it relate to matter which is relevant at the trial, it is not ground for objections that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. That language appears in the federal rules. It was in the federal rules at the time the State of Nebraska adopted its rule. I will leave it to you, you will undoubtedly have some cases coming up when you can point out that distinction to the state court, and if it is possible I think that our state court could say that that indicates there was an intention

that there be some distinction. In state practice relevancy relates to relevancy at the trial, while in federal practice it relates to relevancy either in producing that evidence or other evidence at the trial.

If I had to guess I would guess our court would probably come up with pretty much the federal rule on it, but I suspect there will be some litigation in that regard and I am not sure but what I might raise it myself sometime if the occasion arises.

You are not limited to ultimate facts in the federal practice. Your interrogatories can relate to your case, they can relate to your adversary's case. Again I have set forth specific areas of inquiry. The names and addresses of known witnesses is a proper interrogatory, but when we try to pinpoint it as to witnesses to be called at trial, that is an area where distinction has been drawn.

Insurance policy limits: There are a number of cases holding that that is a proper interrogatory, and there are a number of cases holding that it is not a proper interrogatory. I think there is a case pending in the Eighth Circuit on it now. Also I think you can't just take one of these cases and say that is the rule, it is settled, because sometimes you find it is a rule in a state where they have a rule relating to punitive damages and different rules as to damages, so I think it is certainly an unsettled question and should be settled as to the law in each jurisdiction, taking into account the variances in other jurisdictions. Again it should get down to the point as to whether it serves a useful purpose in expediting the trial.

In using interrogatories, there was a change in the amendment of '48 so you have to be careful that you don't get an old case, but they are used to the same extent as depositions, and they can be used as though the party himself had testified in that regard. However, they cannot be offered by a party himself who has answered the interrogatories. When I say they are used to the same extent as depositions, that is not an accurate statement because he can't offer his own self-serving statements which he has answered by way of interrogatories as evidence. He has to go through the deposition process and permit cross-examination before he can claim that right. Of course that is not present in the interrogatory situation.

Interrogatories, of course, have been used both in the state and federal practice as a basis for summary judgments.

At the trial, the thing you need to remember for sure is that just because they are in the pleadings it does not mean they are in the case, and you must offer the interrogatories into evidence the

same as you would a deposition or any similar matter, so don't get caught on that possible difficulty.

The outline, again, does not purport to set out a statement of what the law actually is; it really purports to give you a source of some materials. I don't know what the law will be on this five or ten years from now but it certainly is an area where there will be some further developments in law and I think it is an area where, again, we should be using this in our state practice to the same extent and effect as we do in the federal courts.

CHAIRMAN SCHATZ: Thank you, Flavel, very much for your talk. Our next speaker will be Mr. Russ Mattson of Lincoln who will address you at this time.

ADMISSIONS AND SANCTIONS RELATED TO ADMISSIONS AND INTERROGATORIES

C. Russell Mattson

Mr. Chairman and Fellow Members of the Bar: I am sitting over on this side alone to demonstrate to you that the area of admissions is not an area of discovery. You can see on the face of it that you are not out to discover anything when you are using the request for admissions; you are out to get the truth established of something you already know or should know. Hence there is a distinction, and the request for admissions is not in the area of discovery.

My personal feeling is that when the legislature handed us the request for admissions it gave us one of the finest tools to work with that we have in trial procedure. I want to bring home to you that the underlying and overriding factor in relation to admissions is the expedition of trial and the saving of the court's time, because when I get over into the area of sanctions I think you will recognize that a good deal of the court's discretion in exercising a sanction is going to be based upon your conduct in reference to whether you have been entirely fair with the court and with your adversary in the preparation of your action in the use of the request for admissions.

The authority for the request is contained in Rule 36 of the Federal Rules of Civil Procedure and is in 25-1267.41 and .42 of our statutes. The statute expresses that what is sought by the request is the genuineness of any relevant documents described in, and exhibited with, the request, and this covers matters which may already be in the hands of your adversary, in which instance you do not have to exhibit the same with a request, or, and this is

extremely important, the truth of any relevant matters which you set forth in the request.

In the outline we have pointed out that the purpose is to expedite the trial of the action and to relieve parties of the cost, the labor, and expense of proving facts which will not be disputed at the time of trial. As is true with the other, what I call new areas of discovery, there are few Nebraska citations to support the various elements, but I think in the main the trial courts of Nebraska follow the decisions under the federal rules. The *Kissinger* case, of course, you recognize as the one in which one of our good brethren at the bar, when the requests were served upon him, in effect said, "The answers are over there in the records in the courthouse, go get them yourself." Of course the court said that his actions were an admission of the truth as contained in the requests, which of course is the effect of the statute.

I have pointed out this federal rules decision—that the purpose is not for discovery but to force the admission of facts about which there is no real dispute.

In the outline, under 4 (a) and (b), there can be some misunderstanding in the statement that either party, at any time following ten days after commencement of the action, may serve the request, and in that the outline is in error, in that the same situation applies with reference to the defendant as it does in the area of depositions. After the commencement of the action, and before the ten days, the defendant has the right to serve these requests for admission. He must give the adversary the ten-day limit within which to answer them even though they have been served prior to the ten days following commencement.

If the plaintiff desires to serve request for admissions within that first ten days, the statute and the rule provide that leave of court, either with or without notice, must be obtained to lay the foundation for the plaintiff to proceed.

As in the case of interrogatories, the request for admission must relate to facts which are relevant to the action, and of course you cannot obtain privileged information.

The statements indicate, and this is, I think, a wise precaution, that the request for admission should be specific and not so broad that it affords your adversary the opportunity to get off home base and furnish you with a lot of opinions and matters which are not confined strictly down to the truth that you are seeking so that the number makes no difference. Following the suggestion contained in these citations, it is my belief that your request should be a specific request confined to the one thing you want in that request

and not a lengthy request, as I say, which would afford the opportunity for getting away from home base in what you are trying to seek.

Again, regardless of who has the facts, whether they are in your possession or that of your adversary, you can use the request for admission to obtain the truth from your adversary. I have cited as an example this *Long* case in the federal rules decision where the action was for balance due on notes with interest. The defendant filed a general denial, and the court recognized that the request for admission was certainly an appropriate use to get at the truth with regard to the notes and interest.

Here I might deviate slightly. I had intended to discuss this over in the area of the use of the admissions, but believe that here are some examples in connection with this, and I am suggesting them to further the ability to get at the truth where you are confronted with a general denial in the answer.

One instance in particular is this bothersome situation of agency where you have sued both the master and the servant, of course recognizing that the servant cannot testify as to the relationship. If you are confronted with a general denial the easiest way to prove the relationship against the co-defendant master is simply to serve upon him a request for the admission of the truth of their relationship.

This, for instance, can be used on the family purpose doctrine. We were confronted sometime back with a situation where the defendant's automobile, ultimately established to be used for family purposes, was registered under the name of the father in a trade name. After searching the records we found no corporate existence. We found the title of the vehicle in the trade name, as I suggested. We served, I think, seven requests as to the situation wherein we had pleaded the family purpose doctrine and elicited the relationship, the fact that it was a family purpose vehicle and was being used at the time of the incident in the family purpose. The requests were served and they went unanswered. There, by that very easy method of serving seven requests, we overcame that somewhat difficult situation with which we are sometimes confronted in proving the family purpose doctrine or this other doctrine of the relationship of your co-defendants. I cite those simply as examples in which their use is most effective.

The statute prescribes, as does the rule, that the requests must be answered in the period designated in the request, but not less than ten days after the service. In this area upon a motion and

notice the court may either shorten the period or enlarge the period as provided in the rule.

The effect is that each matter on which you seek a request for admission is taken as admitted and as true unless these factors enter in: The party upon whom the request is served serves upon the other party a sworn statement denying the requests, or sets forth detailed reasons why he cannot truthfully admit or deny the matters, or presents written objections that the requests are privileged, irrelevant, or otherwise improper in whole or in part, and with this he must serve a notice of hearing on the objections at the earliest practicable time.

The citations hold, as set forth in the outline, that the response must be under oath, but it has been held in this one Nebraska case that the court may permit the oath to be filed later if it has been overlooked.

A complete failure to comply strictly with the requirements cannot be waived. The party cannot answer that he does not know if the information is available to him. That is the situation in the *Kissinger* case where the records of the school district were over in the courthouse.

You are confronted with a situation that a bad response is treated as no response at all and hence an admission of the truth, so there is an area in which you must be very careful in answering the requests.

If objections are made to part of the request the rule requires that those portions of the request against which no objection is made must be answered and answered within the time specified in the original service. It is held that the denial must fairly meet the substance of the requested admission and, when good faith requires it, you are entitled to deny only a part you shall specify such as is true and then deny the remainder. As pointed out in the *Dulansky* case, this is a principle that runs through the entire area of admissions, and that is you must act in good faith. Here again insufficient answers—these aren't bad responses but insufficient answers—are subject to motions to strike.

It has been held that it is proper for you to deny on a lack of information if the subject is solely in the adversary's knowledge and possession.

Of course the statute and rule provides that the use is for probative value on relevant matters in the pending action only. That is the distinct statement in .42; the one section following the general section simply says "it is for the purpose of the pending

action only and cannot be used against the party in any other action or proceeding.”

Of course, one of its primary and important uses is in the support of a motion for summary judgment. Here I will digress again from the outline and discuss at least one area in which I think the request for admission, as well as the interrogatory, has a most important part in our procedure. You will recall that yesterday Don Lay discussed the situation in the use of a deposition wherein, having taken the deposition of your adversary, there are some of the answers to the questions that you can and may use as admissions against interest in your case in chief. But here you run smack into the Nebraska transaction statute, and if you use the answers in the deposition that *you* have selected, there may be other answers and questions in the deposition which are relevant, and under the transaction statute the adversary can use them in his later case. They may be, as Flav pointed out, self serving and could not be used by him unless you have opened the door by using answers in the deposition which you have selected as admissions against interest.

Now having taken the deposition of your adversary and being confronted with that situation wherein you have answers that you know and realize will be extremely helpful to you in your case in chief through the use as admissions against interest, you are confronted with the danger of the transaction statute. Then the thing to do is to pick out those specific things and serve either a request for admission of the truth or a specific interrogatory directed to that answer. Here, you see, when you come to trial you can isolate out of your interrogatories the simple question and answer, or out of your admissions the request and the response and you are not confronted with the transaction rule.

Here I also want to interject—I don’t know what time will permit but I was surprised yesterday following the entire panel discussion that there were no questions. I am hoping to engender discussion here. If there are any questions, and within the limitations of the young lady’s ability to get the questions from you, I welcome any observations or questions through this discourse that might be of help to all of us.

It is provided under the case situation that upon request with a showing of reasons a party has the right, upon leave of court, to amend these answers. There is the one caution that if the motion is made after the period for answering the requests, it will be granted only if failure to file proper response was the result of excusable neglect.

Now I come to some general questions and here, at least under

(b), I am going to throw out for consideration something which I believe is contrary to a matter discussed by Flav. Under the request for admissions sections, I raise the question as to who is meant by "party," particularly with reference to corporate defendants. This portion of our rules is not specific, as it is under the interrogatory portion where, in the reference to parties as it relates to corporate entities, it covers specifically in the language of the rule "officers and agents," and the request for admissions rule is silent in that area.

I come now to this matter about the attorney for the party swearing to the answers. My own feeling is that first he should not swear to the answers. My further feeling is that he could run into the difficulties about participating as attorney in the matter if he has sworn to the truth of things that relate to the merits of the action.

I think there is a Nebraska holding that we are not the agents of our clients. We deal at arm's length in our relationships with our clients. I think the case comes from up in Valley County, but at least it is my memory that the Nebraska law is that we are not agents, hence we are not, as lawyers, included in this definition of agent.

But the more important problem, to me, is the one that might lead to disqualifying the lawyer from acting as the attorney in the case. We are all acquainted with the very recent decision arising in Gage County where it is just flatly held, and I think for some of my fellow and more elder members of the bar the old conception that you are disqualified from arguing the case to the jury is not true. That, I think, was the understanding of the rule when I started practicing a good many years ago, but I think the case law is very specific that from the time you take the witness stand as an attorney and testify to the merits, from that point on you are out the window. I think in a firm it means that your associates are out the window and your client has to get new counsel to proceed in that action.

So in that area I caution that somewhere along the line, either in the interrogatory field or in the admissions field, if the lawyer has sworn to the truth of things that relate to the merits, when they become evidence in the action he may have disqualified himself to act as counsel for his client. This is my own feeling. I have nothing to support me except my belief in the matter and these cases which start with the premise that we are not the agent of our client.

Now in the area of sanctions, both as to admissions and inter-

rogatories, these are contained in Rule 37 (c) and in 25-1267.44 on admissions under subparagraph (3) and on interrogatories under subparagraph (4).

The first thing that you run into under the rule, if you have denied something and put your adversary to the burden of proving it, the first sanction is that you are going to be faced with paying reasonable expenses to your adversary for having proved that point, and under the federal rule that includes a reasonable attorney fee. I would assume that under the statute the reasonable attorney fee would be included under that broad language requiring the payment of reasonable expenses. I have cited down in the outline later this *Akins* case in which \$3,500 was considered a reasonable sanction. So it is a cautious move to make sure that if you know the truth you had better admit the truth or be faced with the consequences of this sanction.

This again is in the area of good faith, and the limitation is that if the denial is not made in good faith then you are faced with the costs. Here the area is within the discretion of the court. That brings me back to my caution in the beginning, that the court is interested in the court's time and if the court feels, as Flav says, you are playing footsie you may be confronted with a rather serious sanction.

There is one interesting case there where the lawyer himself was the party and the court held that he wasn't entitled to an attorney fee under these circumstances because he was his own counsel.

Of course if these are rather trivial in nature and of not too great consequence, the sanction isn't going to be applied. But it behooves us, I think, to be extremely careful of the manner in which we treat the responses.

In the matter of interrogatories we are confronted with these sanctions. If there is a failure to answer after the proper service of the request for interrogatories, the court on motion and notice—and this is the wording of the new section—has these powers: The court may strike out all or any part of the pleading of the defending party; the court may dismiss the action; and the court might enter judgment by default against the offending party. Or under the *Fisher* case, when you come to trial you might be precluded from offering any evidence on that subject.

The court is not strict to the point of endangering the party's rights if some of these things occur. The court can give you time to answer if you make a sufficient showing. Again, the court can award costs and attorneys' fees under this holding in the federal

courts; and if it is willful—in the *Austin Theatre* case they held that the party can be compelled to pay these fees and costs which are similar over in the admissions area, and an order can be entered that the action is just stayed until there is the response.

As pointed out in this *Independent Productions* case, the dismissal by default—and it has to be by default, not summary judgment—is drastic and is applied only in extreme cases.

I conclude the outline that it is discretionary with the trial court and, again, with a caution to remind you that you are dealing with the court's time. In the exercise of discretion I think the court is going to consider seriously the effect on the time and expense to the court.

Now, briefly, in this area—and I am using this only as an example because I have had some experience with it—where the request is made either by interrogatory or by deposition about the names of your witnesses, “What witnesses do you have or what witnesses are you going to call at the time of the trial?” here are some of the sanctions that I think can be applied if your client is not careful in answering. Here, of course, I think the greatest danger is in the deposition area, and it is one in which I have had some experience in what I am going to call, probably to the offense of some counsel, the impersonal relationship which exists between some of you and your client defendant under a situation where an adjuster has completely investigated the matter and laid the file in your hands. You may have a client who doesn't know anything at all about all the witnesses that adjuster dug up. When the deposition is taken the plaintiff's counsel says, “Give me the names of the witnesses you are going to call at the trial,” and he says, “I have none.” And the file may be full of witnesses' names. So here I caution my brethren at the bar that they had better advise their clients, if they are confronted with that situation, as to who the witnesses are because if the client says, “I have no witnesses I am going to call,” when you get to trial his lawyer may be confronted with the situation of an objection to Joe Doakes being called as a witness because in that deposition he told me he didn't have any witnesses.

So here it is under the discretionary power of the court, the court may say, “Well, you weren't fair in this situation. I am not going to let that witness testify.” There is the first thing you are confronted with. The court may, and this hasn't happened but it's been indicated, the court may say, “Well, I am going to grant a recess and I am going to give counsel the right to interview that witness before you put him on, and I am going to charge the costs of his appearance to you regardless of the outcome of this suit.”

These are some of the sanctions which I think are within the discretionary power of the court. Now here is the danger. I think if the court finds that your client has willfully stated that he has no witnesses in an effort to cover it up, you have a client who later on might be facing contempt of court.

FRIDAY AFTERNOON SESSION

November 2, 1962

The third and final session of the Institute on Tort Law was called to order at 2:00 o'clock by Chairman Schatz.

CHAIRMAN SCHATZ: Members of the Bar and Most Welcome Guests: We are about to proceed to the conclusion of our program, the third session in our Institute on Discovery and Discovery Procedures in the State of Nebraska.

To address you this afternoon on the subjects of physical examination, production of documents, and also a general assessment of how our discovery procedures are working in Nebraska is Mr. Fred Deutsch from Norfolk, Nebraska, and Mr. Bill Mueller from Ogallala, Nebraska. I should add that our good friend and fellow at the bar, Bill Lamme of Fremont, was scheduled to speak along with Fred and "Rocky" Mueller, but Bill, as you know, has been seriously ill. I think he just went home from the hospital here, back to Fremont, yesterday. Bill Mueller is going to give that portion of Bill Lamme's address on this over-all subject.

I know it will also be interesting to you to hear both Mr. Mueller and Mr. Deutsch comment on their ideas and their assessment of how the discovery procedure is working in Nebraska, what parts of it are lacking, and what new statutes we perhaps should have to even broaden the purpose of discovery in our state.

Without any further ado I would like to introduce to you at this time—most all of you know him—Mr. Fred Deutsch of Norfolk, Nebraska.

PHYSICAL AND MENTAL EXAMINATION

Frederick M. Deutsch

Mr. Chairman and Gentlemen: There is one advantage about being along toward the end of a valuable session like this, and that is that the crowd thins out and the hazard of having a brick thrown at you is minimized proportionately.

Since I started practicing law I have thought it was convenient, advisable, and so on to try out on able lawyers my theory of the

case to see how they reacted, with the idea that probably the court would react the same way. With that in mind I have tried out my theories and I did so in this job. Almost universally they have looked out the window after looking at me as though thinking "He's old, he's harmless; if we just change the subject he won't get riled up."

The discovery matter on physical and mental examinations was turned over to us, and we asked whether it should be limited to this new statute or whether we should go into the broader field of the equitable rights of discovery and we were told to cover the field.

In the course of these programs here a statement was made that the use of depositions for discovery did not exist in Nebraska until 1951 when the statute was changed. I think as early as 1904 in *Almstead v. Edson*, in an opinion by Judge Barnes, he stated that the deposition was our substitute for a bill of discovery. In Raglan on "Discovery Before Trials" which preceded the federal rules, he used Nebraska as a pattern and stated that it was quite common to serve a notice to take depositions with the petition and use that process for discovery. It is my recollection that when the rules were first promulgated along about 1939 when the different volumes came out, such as Edmonds on "The Federal Rules", the reporter's notes indicated that the deposition rules for discovery were largely taken from the Nebraska practice.

Through my years of practicing law I have had quite a lot of experience along those lines. In my opinion, the various statutory provisions for the various types of discovery add nothing so far as the district court is concerned and probably so far as the county court as a court of probate is concerned, except that the discovery under the ancient bill of discovery and in suits in equity was taken out by the adoption of the code in 1868.

Perhaps the statutory provisions for equitable discovery, or the results of equitable discovery, take away some of that twilight zone known as "discretion." I take it that it would be the duty of our district court, for instance, as a court of equity and as a court of law, to pretty well follow the law regardless of which slot you would put it in.

At the time of the adoption of our code of civil procedure all distinctions between suits in equity and actions of law were abolished, but all legal and equitable remedies and defenses were included in a single civil action, and the substance of both was retained. Hence from the adoption of the code in Nebraska the district court had all of the equitable powers, including the powers of discovery in the single civil action without the necessity of an ancil-

lary bill of discovery in aid of an action at law, and of course the court of chancery, through the medium of a cross bill, always could require discovery in the same proceedings. It would be absurd to say that there had been a suit in equity but we would have to bring a separate bill and separate proceedings for discovery. The equity court had that power; the law court did not have it. And only in reference to actions at law was a separate bill of discovery used.

Our district court as a court of general jurisdiction became a Janus-like object, a Siamese twin so to speak. Instead of the Holy Trinity it became a sort of human devil—a court of equity, a court of law in one body.

In this regard it must be remembered that the federal district courts were not created by the federal constitution but were constituted by Congress, and that their jurisdiction has always been limited, and until the adoption of the rules in 1938 the action at law and the suit in equity were entirely separate proceedings. Except for the federal equity rules, the only method of discovery in the federal courts was by a separate bill in equity known as a bill of discovery.

On the other hand, the district court of Nebraska was created by the constitution of this state and it has frequently been held that full equity jurisdiction was vested in our district courts and that this jurisdiction was beyond the power of the legislature to limit or control. Hence, as recently as last June, in the *Frontier Airlines* case, where it was urged that a fine for contempt was limited by statute to \$200 a day while the court fined it \$1,000 a day, it was held that this inherent power of the district court was beyond the power of the legislature to limit or control and that the district court in the exercise of its discretion had power to assess that \$1,000 fine for contempt.

In this regard the federal rules expressly take away incarceration for failure to submit to a physical examination, but I do not believe that that would apply in the district court as a court of equity. The legislature cannot limit its powers.

It has been frequently held in Nebraska that the county court as a court of probate and of guardianship likewise has full equity powers in matters relating to its exclusive jurisdiction, and I rather suspect that this, in the county court, would include all aspects of discovery. It is therefore suggested that except where an adequate remedy of law is now furnished, the district court, and probably the probate court, has full power to provide discovery.

Having in mind the wide range of equitable relief, I see no reason why a stranger to a civil action could not be brought in as

an additional party and be required to furnish discovery of facts necessary for the case in order to furnish complete relief, including a physical examination.

For instance, if a husband were to sue for loss of services and consortium of his wife, she is not a party. Remember this statute says you may have an examination by a physician of a party in an action. In *Fischer v. Sklenar*, 163 N.W., they hold that matters of probate are not civil actions.

You are trying to get a guardian appointed for a person whom you charge to be an incompetent person. It is not a civil action; it is not an action. I don't see how this statute can apply. The rules were built for the federal district courts, and we have attempted to apply them to our statute, and it is my opinion that they can only partially operate, and to a marked extent you will be relegated to the general principles that I am trying to talk about.

The husband sues for damages for injuries to his wife. She is not a party. This statute would give you no right, no provision for a physical examination. The father sues for injuries to his child. The child is not a party. This statute doesn't cover it. You might think of a good many other instances where a similar situation would arise.

I take it that a criminal case is not an action, and yet you know and I know that there have been applications in criminal cases requiring the young girl who claimed she was criminally molested to submit to a medical examination. The district court ordered that because of its inherent power, because it was not only a court of law but because it was a court of equity and had those powers.

Some of the authorities suggest that the ancient court of chancery did not, in response to a bill of discovery, require a physical examination even of a party; but this contention is denied by Wigmore and the other authorities cited in the outline. I think that under the ancient bill of discovery and with the consolidation of the two forms of actions in our district court, that you always could have any kind of discovery that was reasonable, that equity would meet the exigencies of the case. But there seemed to be some sort of thing in the early decisions about the sanctity of the human body. Bearing in mind that the court of chancery in some ways descended from the ecclesiastical courts, there may be something to it. But Wigmore claims that as early as 1629 physical examinations were required in England in response to a bill of discovery.

It would appear from reading the decisions that Nebraska has assumed the power of the court to require physical examination in-

dependent of any statute. Whether this power grows out of those general equitable powers of discovery or out of some other inherent power of the court would seem to be a matter of nomenclature. In 1915 the matter was squarely presented to our court when a district court in Douglas County dismissed a plaintiff's decision because she disobeyed the order to appear for a physical examination. The plaintiff brought an original action in mandamus to compel the district judge to reinstate the case, and in a lengthy opinion it was held, independent of any statute, that the district court had inherent power to require a physical or mental examination, and, as an incident to enforcing its order, the power to prescribe sanctions. That case made the selected case system and is cited in the outline.

I might say in that case among the things advanced by the plaintiff's counsel was that she was a delicate woman and it was indelicate for her to go to some strange doctor and submit to a sensitive examination. That decision says this, without any statute, without any authority except the inherent powers of the court: "It is possible that in some instances a delicate and sensitive lady may suffer and endure a great wrong and injustice rather than present her cause to any court for a public investigation which would require her to allege in her petition and detail in her testimony facts in regard to the condition of her person which her sense of delicacy would forbid her doing. In such case she must elect before bringing her action whether she will bear the ills she has or fly to others that she knows not of. In bringing her action she must declare in public fashion the conditions to be investigated. The law requires that in any legal investigation of facts the best evidence available must be produced. She may decline to present such conditions for investigation, but if she does bring them before the court she cannot dictate the means of investigation by selecting such expert witnesses as she may have reason to suppose have opinions favorable to her cause and rejecting those that might form contrary expert opinions upon ascertaining the facts."

I repeat, that was in 1915. In 1951 the statute Nebraska adopted provided for mental or physical examination of a party in an action and to some extent adopted the federal rules. Bear in mind that probate proceedings have been expressly held not to be actions or civil actions, so that a physical examination could not, under this statute, be required in any proceeding involving matters of probate or of guardianship. And yet the very issue in a guardianship matter might be the mental competency of the suggested ward. I think in that case the inherent equity powers of the county court would reach out, independent of any statute, and require such an examination.

In workmen's compensation cases there is a statute for physical examinations and, of course, providing for sanctions. In the federal courts, before the adoption of the rules, it was held in 1891 that there could not be a physical examination required by a federal court in a personal injury action unless the state law provided for it. And in 1900 it was held that where the state law did provide for it, the federal court had power to require such an examination although the proceeding would be on the law side and not on the equity side of the case.

The federal rule for physical and mental examinations was approved by a divided United States Supreme Court in 1941, some of them talking about the sanctity of the human body. But finally, in 1962, the Court of Appeals from the Second Circuit held that the trial court had inherent powers to require a physical or mental examination on its own motion, and it would seem that the circle at that time had largely been squared.

Back before the adoption of the federal rules, the handling of discovery in the federal courts, and it appears on page 27 of the outline, might be summarized something like this: In the *Sinclair Refining Company* case, Mr. Justice Cardozo, in a suit in equity for discovery as ancillary to an action of law, states as follows:

Help for a solution of problems of this order is not to be looked for in restrictive formulas. Procedures must have the capacity of flexible adjustment to changing groups of facts. The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role. The rationale of the remedy, where used as an auxiliary process in aid of trials at law, is simplicity itself. At times cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance. When this necessity is made out with reasonable certainty, a bill in equity is maintainable to give him what he needs.

In the *Preston* case, which was a suit in equity, they sought by cross bill to have discovery, and they claimed that they had to go in in a separate suit in equity in respect, not as ancillary to an action at law, but as ancillary to a suit in equity. The Court of Appeals of the District of Columbia floored that with these statements:

Discovery is not limited to aid of a suit pending or to be brought, but is an original and inherent power of a court of equity, which may be enforced directly and as a part of an action for equitable relief, there being a distinction between

discovery incident to a bill for equitable relief and a bill to obtain evidence to be used in another suit, which distinction is not affected by equity rule 58, authorizing the filing of interrogatories with a bill in equity.

In the course of that opinion it is stated: 'Nor is the contention sound that discovery can only be had in aid of a suit pending or to be brought. It may be invoked for that purpose in aid of an action at law; but being an original and inherent power of a court of equity, it may be imposed directly and as a part of an action for equitable relief.

I simply mention these cases because our district court is a two-headed being. It is a court of equity and a court of law combined. All remedies, all defenses of each were preserved in the one civil action.

In the *Indianapolis Gas* case, which was back, I think, in 1898, it was stated as follows:

The power of a federal court of equity to entertain a cross bill for discovery in a suit of equity has not been abridged by any act of Congress or rule of the Supreme Court, and is not superseded by statutory methods provided for obtaining facts in actions at law.

It is not sufficient reason for a corporation to refuse to answer a cross bill against it for discovery that its officers and employees are made competent witnesses for either party by the federal statutes, such testimony not being the exact equivalent of a discovery by the corporation itself.

It is stated in the course of that opinion:

While bills of discovery in aid of the prosecution or defense of actions at law have practically fallen into disuse, owing to the simpler methods provided by statute for obtaining the same facts which might have been originally obtained by such cross bills, still it seems to be certain that courts of equity have not been deprived of their original and inherent jurisdiction to entertain bills of discovery by reason of such statutory provisions. The most that can be said is that these statutes have provided a cumulative remedy for obtaining evidence of facts which, before the enactment of such statutes, could only be obtained by a bill of discovery. The court knows of no statute enacted by Congress, nor of any rule promulgated by the Supreme Court, which abridges or denies the original jurisdiction of courts of equity to entertain bills of discovery.

Now I never was an educator and don't like to be professorial, or try to be—I couldn't be if I tried—but I think that that back-

ground, together with more particularly the case of *State ex rel. Parmenter v. Troup* that made the L.R.A. 1915 E series, gave us the full power, except in the discretion of the court, to require a physical or mental examination. That discretion, of course, would depend to some extent at least upon the whim or caprice of the trial judge. If he had never heard of this being done he probably would have a dim view of it. If he was familiar with it you would probably have no trouble. In that regard the statute would probably make it somewhat mandatory upon him so far as the statute is applicable, but in my opinion the statute is a long way from covering the field.

In the application of these rules I found a number of early cases dating back to the *Sioux City & Pacific Railway Company* in 1884. They recognized the power of the district court to order a physical examination but said in this case "no" because you didn't ask for it until after the trial started and the Supreme Court said that that was in the discretion of the trial court. There are several of those cases. They held inferentially that you had a right to a medical examination but each time ducked around it by saying it was in the discretion of the trial court.

One or two of them waxed oratorical and said, "You are not entitled to name your expert. If you do and the trial court in its discretion denies your application, why it had a right to."

If I am talking to plaintiffs' lawyers who specialize in that, they turn purple; and if I talk to fellows who are ordinarily defending cases, they gleam. You people, every one of you, have been in cases where the attending physician, the attending experts, perhaps specialists down here in Omaha, have taken care of a patient, and not one of them was called to testify in the trial for the plaintiff. The obvious reason for that is that they wouldn't go strong enough on the injury so they went around, and there is nothing to prevent them from going around and shopping until they find an expert who will really build up the damages. If I were representing a plaintiff I would have no hesitancy in trying to find somebody who would toot my horn the loudest. But match that up with the theoretic, impractical statement—oh, terrible!—you must have a disinterested party examine the plaintiff at the instance of the defendant. If you name anybody, even though you know this expert is going to be available, you know he is qualified in the layout—if the court now follows some of these old-timers they would say that was ground for refusal of an examination on behalf of the defendant.

I had this experience years ago, gentlemen. I went in and

applied for the appointment of an examiner, following this *Troup* case, and I named what I thought was a very competent doctor in our town and, incidentally, thought he was a little inclined to minimize the pains and sufferings of the plaintiff. The court said, "You haven't got any right to name your doctor. I'll name him."

He named a nice old gentleman. This involved the fracture of three transverse processes. He named a nice old gentleman who hadn't even practiced medicine for ten or fifteen years. He was the editor of the *Nebraska Medical Journal*. He came in with a report that I privately knew was written by the doctor that I wanted to have examine this woman and who, incidentally, had treated her. It involved a bunch of X-rays. We put this court-appointed gentleman on the witness stand and I said, "Doctor, of course you are experienced in the interpretation of X-rays?"

He said, "No, I never interpreted one in my life."

I would say that probably that would get to the range of being an abuse of discretion, but the defendant has to pay for this expert. The defendant has got to arrange for him to go on the witness stand at the trial. It would certainly seem to be highly theoretic to say that you should have an impartial doctor for the defense, that the defense has nothing to say about who is appointed, whereas the plaintiff has the wide open opportunity to go where and as he pleases.

In the *Troup* case it was held that the necessity of the examination must be shown, and I think that is the same thing under the federal rules. I presume that if somebody came in here, and he was bruised and contused and had sustained fractures and was permanently and totally disabled, and is damaged to the tune of \$100,000, that the petition on its face might suggest the necessity of a physical examination; but until we know what to do and what not to do it would be a good idea in your application to say that he is claiming a lot of damages and say what he is claiming.

I haven't attempted to go into the federal rules very much. They are cited in the outline. I haven't attempted to take this statute. "Rocky" Mueller is going to do that. I want to act learned, I guess, gentlemen, and talk about ancient chancery courts and so forth, but I honestly feel that the wide fields of discovery have always been here, that the district courts in particular, by application, can provide just about any kind of discovery that you need, and it is much more elastic than what you have under the federal rules. The federal rules, of course, are for a limited jurisdiction court. These statutes are fine; they fix a rule to be followed instead of that twilight zone of discretion. But when you get your-

self into a position where you can't fit into that statute either because you don't have an action or because you want an examination of a person who is not a party, I think that the principles of discovery are there for you.

CHAIRMAN SCHATZ: Thank you very much, Mr. Deutsch. I feel that Fred has opened up a certain field here that certainly all of us can benefit by if we do run into a situation where the statutes in question, particularly the state statutes of Nebraska, don't quite fit a certain job that we need to fill. In that connection, if there are any questions that you have after any of these gentlemen finish their speeches I certainly would welcome them. I know Fred would also.

If not, we will move along, and the last and final topic for discussion is the production of documents under our rules of discovery and also a general assessment of how the statutes, and how the various applications of these statutes, are working here in Nebraska. If they need amending, or if they need help, or if some of them go too far, I have asked "Rocky" to give you what his thinking is in that situation. I would like to have you step forward now, Mr. Bill Mueller, and give us your thoughts on it.

PRODUCTION OF DOCUMENTS

William P. Mueller

Mr. Chairman, Members of the Bar and Guests: As Mr. Schatz told you at the commencement of the program, I apparently was elected to fill in for Bill Lamme who, as you all know, is quite ill. Personally I have looked forward to hearing from Bill and I know all of you were certainly looking forward to that experience. I am afraid in that regard I am a very poor substitute.

As you can all see from the earlier programs, the question of discovery, the discovery statutes, and the federal rules form a situation that you can't merely take on a piecemeal basis but you have to consider them in their entirety. The purpose, of course, is to reduce surprise at the time of trial to the very minimum. It make it possible for us as attorneys to have an opportunity to thoroughly prepare before we come into the courtroom. We have had the opportunity to prepare thoroughly not only our own case but also we should be pretty well advised as to the case of the adverse party.

The last topic happens to be the production of documents. I think, when you analyze the statutes, you will be able to note and see that it is not possible at all to utilize this particular section

for the production of documents unless you have fully and adequately covered in its entirety, by use of the other sections, all of the preliminary matters to determine just exactly what documents exist, who has possession of the particular documents, so that you know fully just exactly where you stand, so when you do go into court you can comply with the requirements as set forth in the federal rules and as set forth in the statutes before the court may order these particular items produced.

The statute provides that before you can ask for the production of documents you have to serve a motion on the opposing party and you have to notice it for hearing. In that regard the depositions can be taken of any witness, but when it comes to interrogatories, and when it comes to the production of documents, they can only be utilized insofar as another party, a party to the lawsuit is concerned, and this is provided in the statutes and in the federal rules.

Before the court may order the production of documents it is necessary first of all at the time of the hearing to make a showing of good cause. This particular question is a matter that is left pretty much to the discretion of the court, but this particular requirement of good cause is something in which the judges I have come in contact with have required that there be a definite showing. It is not something where you can merely walk into court and say, "I want the statement of a particular party; I want the statement of a witness," or whatever it might be, accident reports, things such as that. You have to make a showing of good cause.

In that regard, the case of *Margeson v. B. & M. Railroad Company* pretty well sets forth one particular view, at least as to what is required as the showing of good cause. The citation on that case is 16 F.R.D. 200.

I might say that as you analyze and study all of the federal cases concerning discovery, and I think particularly on the production of documents, you can find a case holding pretty generally for anything you want. You can find some courts that are very strict and it is virtually impossible to force the other party to disgorge whatever information they may have; on the other hand, you can go into some courts and they are very liberal with their interpretations. So when you are involved in this subject it is a pretty good idea not to stop at the first case or the first several cases merely because they don't seem to be in support of your position, because, if you just keep looking a little further, you are bound to come across a case that will hold you. It is rather ridiculous, but I think as you can all see on the term "good cause" and what good cause may be it is a matter that is entirely dependent

on the particular situation, and it is most certainly dependent upon what that particular trial court feels constitutes good cause.

In the *Margeson* case Judge Aldrich said,

The adoption of the civil procedure rules was not a denial of the concept that the court is the forum, and the trial the procedure best calculated to uncover the truth. The enthusiasm which greeted the discovery provisions of the rules when carried, as it has been to the extent here advocated that the truth should be known before the trial and nobody be surprised, seems calculated however to weaken the efficacy of ordinary trial procedure. There is a vast difference between surprise and unfair surprise. The one is as beneficial as the other is harmful. Not merely may too many rehearsals in the form of too much discovery take the bloom off the opening night, but this absence of freshness may make the performance sterile. A certain amount of surprise is often the catalyst which precipitates the truth. Alternatively, it may serve as a medium by which the court or jury may gauge the accuracy of the account. If every witness consistently told the truth and none cut his cloth to the wind, little possible harm and much good might come from maximum pre-trial disclosure. Experience indicates, however, that there are facile witnesses whose interest in knowing the truth before trial is prompted primarily by a desire to find the most plausible way to defeat the truth. For this and other reasons I believe the requirement of good cause for compulsory pre-trial production should mean more than mere relevancy and competency, or ordinary desirability from the standpoint of the movant and should be something in the nature of special circumstances.

That particular case happened to be a situation where the railroad had obtained the plaintiff's statement shortly after the accident and plaintiff's counsel was requesting the court to produce that particular document. Judge Aldrich is one of the judges and a member of one of the courts that states good cause means just exactly what it says, that it is not something you merely come in and request.

On the other hand, we have Judge Holtzoff who has written quite an extensive article on this subject of discovery in 15 F.R.D. 155, and he says, "One of the questions that is sometimes confronted is whether in a negligence action a statement obtained by the defendant's representative from the plaintiff should be subject to inspection by plaintiff's counsel. It would seem that as a matter of fairness a party's lawyer should be entitled to see any statement that his client has signed."

So you can see there are two eminent authorities that take diametrically opposed positions.

Judge Delehant, in a case here in this particular district, *Walla v. Burlington Railroad*, 19 F.R.D. 352, has more or less taken the position that good cause means just exactly that, that you must first show good cause. He is talking generally concerning the production of a plaintiff's statement. However, in that particular situation, what plaintiff's counsel was trying to do was obtain the court reporter's transcript, which was taken at a county court proceeding, and the plaintiff's counsel was trying to get the particular transcript, and defense counsel, who paid for the reporter, said absolutely not, "This is a matter where I paid for the reporter and I made the necessary preparations to have him present and you will not have the statement." In that particular situation Judge Delehant did say that plaintiff's counsel could, upon payment of the necessary amount, receive a copy of the transcript, but that most certainly as to the general statement, merely because it was the plaintiff's statement, he didn't necessarily go along with that.

In that regard Judge Delehant stated, "What emerges seems with assurance to be a situation in which plaintiff's counsel desire to scrutinize and in their discretion to copy the transcript of plaintiff's testimony as a bulwark against possible surprise on his cross-examination in the trial of this action or as a pattern to which his direct examination may be tailored. Such a purpose appears generally to this court to be beyond the proper objectives of Rule 34. The rule facilitates the pursuit of evidence or of matter out of which evidence may emerge, not the erection of a program of insurance against some of the familiar hazards of the production of testimony in any trial. This is not to say that the plaintiff may not by his own effort and at his own expense have the right to procure a copy of his earlier testimony. In fact, it appears from his attorney's affidavit that he tried to do so."

In that particular situation, Judge Delehant certainly did not go along with the idea that merely because it was the plaintiff's statement that it should be produced. In fact, it would appear from his language that he was against that particular proposition because good cause in that particular situation had not been shown; still, because it was a court reporter, who of course is not an officer of that particular court where it would be a matter of record, he did say they could obtain a copy of that particular statement.

Judge Van Pelt, in a case in *Carpenter-Trant Drilling Company v. Magnolia Petroleum Corp.*, 23 F.R.D. 257, when he was discussing the possibility of the production of certain experts' reports, stated,

"In the case at bar the defendant has not alleged anywhere that it needs these documents to prepare for trial, much less has it produced any underlying facts to show wherein it will be prejudiced if it doesn't get them. For aught that appears, and this is in no manner critical of counsel, the defense is merely asking for the materials to use as a check list so that it won't miss anything."

As was stated in *Houger v. Rock Island*, "production of documents will not be ordered merely to help counsel to prepare himself to examine witnesses and to make sure he has overlooked nothing."

So you can see that when you are discussing this particular proposition of good cause so much depends upon the particular facts of your case, it most certainly depends upon the trial court that you are appearing before, because each court, each judge, has his own ideas and when you are submitting yourself to the discretion of the court you can certainly come to many different conclusions.

I see Judge Thompson in the room and I can recall a situation where a man's statement was obtained shortly after he was run over by a streetcar. A court reporter's statement was taken from him at the hospital shortly afterwards. His counsel came in and had certain affidavits, had an affidavit of several of the nurses to the effect that the man really was not in the greatest condition at the time the statement was taken. Judge Thompson, in that particular situation, ruled and held that we would have to produce the plaintiff's own statement because of the circumstances. Then Judge Thompson went on and stated, "As to the statements of other witnesses, of witnesses to the accident whose statements had been taken, they were available and counsel was most certainly capable of going out and obtaining statements from them himself if he so desired, so that he could proceed and take their depositions, and that, as to those particular items, no good cause had been shown, and therefore there was no necessity for producing the documents."

Another particular problem which I think you should recognize is that when you are asking for the production of documents the statute and the federal rules provide that it is as to designated documents, that you don't come into court and merely say, "We want all of defendant's file" or "We want all of plaintiff's file." There are specific cases on that particular point, that the use of the word "all" is bad, and that there is nothing in effect that the court can rule upon. How can the court determine what is "all" and what should properly be produced? In that regard, as I am sure you can see, it is quite apparent that it is absolutely necessary, absolutely essential, that you first have exhausted the other discovery processes, interrogatories, depositions, so that you know just exactly

what documents it may be that you are trying to have produced, so that the court does have something specific to rule upon.

Another point is that they have to be in the possession of the party before the court can order them produced.

Another possible way of obtaining documents in that particular situation where it is not a party is by use of the subpoena duces tecum, and in that particular situation the burden is upon the objecting party rather than the burden being upon the moving party. When it comes time for the production of documents under Rule 34 and Section 1267.39, the burden is upon the movant, upon the person who is trying to obtain these particular documents; but when you follow the other procedure and go under the subpoena duces tecum method, objection must be made that there has been no showing of good cause as to why those particular documents should be produced, and, at least under the federal cases, the court will say that you cannot circumvent Rule 34 by going under the subpoena duces tecum.

There are no cases in Nebraska, at least that I have come across, where this particular situation has come up, but our statutes, of course, are based upon the federal rules and I think you can reasonably anticipate that our district judges would most certainly follow that same reasoning, that you can't circumvent this requirement of showing good cause by going under another process of obtaining these particular documents.

About the only other test insofar as obtaining these documents is concerned is that they must contain matter which is relevant to the subject matter of your litigation, which is awfully broad of course. In fact it is a situation where I would say it would be virtually impossible for the court, at least at this preliminary stage, to rule or to determine absolutely. The tendency would be that if you have designated the documents with particularity, if they relate in any form or fashion to the accident, and assuming that you have shown good cause, the court may in his discretion order the production of those particular documents.

The order of the court—exactly what he can specify and require is set forth in the statute and there would be no necessity of covering that particular matter. He can force you to take the documents to opposing counsel's office; he can require the matters to be produced in the court room; or he can do whatever he feels is just in that particular situation.

The court also has the power to order and allow opposing counsel to come onto your property, to inspect it, to survey it, take measurements, take photographs, do whatever is necessary in order

to properly prepare for trial. I think that that really is the underlying thought behind all of the discovery procedure, that it does give us a way in which we can prepare for trial, where a person can't say, "No, you can't come on my property," "No, you can't come into my streetcar company property and inspect or photograph busses or streetcars"—well, I guess streetcars are gone now, but we have had several situations where they did come up. They would want to examine and see a metal plate, as an example, on either the front entrance or the back entrance, and obviously the defendant would not allow them to come on just because they wanted to; but still the statutes require and do provide a way in which you can obtain this information which is necessary for you to properly present your case to the court and to the jury.

One of the primary objections towards the production of statements, of documents, is that it constitutes the work product of the attorney. This all comes from the case of *Hickman v. Taylor*, a United States Supreme Court case where the attorney, rather than produce these particular documents, was cited for contempt and he went to jail. The case was appealed to the Supreme Court, and in that particular case the Supreme Court—although it was a situation where plaintiff's counsel was not following the proper procedure for the production of documents; he was trying to utilize interrogatories and at the same time was saying, "Produce whatever documents you have"—the Supreme Court went on and in effect covered this entire matter of production of statements. The Supreme Court gave particular reference and importance to the factor of an attorney being forced to produce his file. In that particular case they held that the work product of an attorney was something that should not be produced unless there were actually special circumstances.

Here again we get into the situation where in some federal courts special circumstances are nothing other than that you just want the particular document. So even that has been interpreted liberally and strictly, so it is rather hard to come to any definite conclusion one way or the other. All you can do is take into consideration the particular facts with reference to your case, submit it to the court, and frankly the court can go either direction.

Judge Van Pelt in this *Carpenter-Trant* case, which was a situation where they wanted to obtain the report of experts, held, and he cited from the *Hickman v. Taylor* case: "This court is aware that the facts in the *Hickman* case were not the same as in the case at bar. In that case request was made for the production of signed statements taken by counsel, plus counsel's recollection of oral statements made to counsel, plus all other records, memo-

rand, etc., which had been prepared relative to the case. This court, however"—and this is Judge Van Pelt speaking—"feels that when experts in an extremely technical field have been retained to advise counsel in the case as to proper technical interpretation of certain facts and of the state of technical information, this partakes of the counsel's work product and the same protection accorded that lawyer's other work as necessary to 'prepare his legal theories and plan his strategy without undue and needless interference' must be accorded to his technical information and strategy in the use of experts."

So you can see that the two words "work product" do not apply solely to the attorney's work. There are many cases where the court has held that even though the attorney was not the individual who had obtained the statements, he had an investigator working for him, an insurance investigator or any other type of investigator; still the court would apply this same term "work product" to that individual's work even though it was not specifically an attorney.

I think about the only distinction you can draw is that of course when you are asking a lawyer to produce his file we all look upon that with abhorrence. I think the court equally looks upon it as such, and as a result, generally speaking, it is very difficult to obtain statements and information at least that are obtained by the attorney himself. However, again it is a situation where the court has to look at the over-all situation. How can justice best be served? Are they trying to hide behind something? Just exactly what is the situation? Is it a situation where perhaps the statement was taken immediately after the accident and here it is some three, four, or five years later, which we all know quite often is the situation, and where perhaps that witness' recollection, his memory, may not be quite as sharp; in fact, as a general statement, it probably isn't at that late date. In a situation such as that, the court once again has this discretion, has this power wherein he can force these particular matters to be produced.

I have covered generally the particular materials which are subject to production, the statement of witnesses, the statement of the plaintiff himself or the statement of the defendant himself. The particular requirements, the designated documents, good cause shown, are all matters and information which you can be forced to produce.

Photographs, maps or drawings—it is a situation where once again the court in its discretion, if it is a situation where the entire picture has changed, or perhaps one side or the other has obtained their photographs, their maps or drawings immediately after the

accident, which as we all know does frequently happen, and where you cannot reproduce it—there again the court can force these particular matters to be produced.

The defendant's accident reports that would have relation to where, say, a bus driver is involved in an accident, and immediately after the accident he is required to make out a report, and almost always it will be his own wording. It won't be a situation where he has the benefit of counsel when he is preparing this accident report. He is merely putting it down as he recalls. Those are matters which can be produced, and I am sure that as you look at this overall picture you can see the tremendous importance and the large volume, the vastness of the information that you can obtain. Many times there is a lot of difference. A man will merely sit down and write out what he thinks happened and perhaps after he has had advice of some outside person his recollection and his views are somewhat different from what he originally put down. Here is a way and a manner in which you can go behind this, wherein you can find out just exactly "What did this man think? What was his impression immediately after? What did he say happened in his own words, not in somebody else's words?"

It is even possible under some cases to force the production of the insurance policy itself. Usually that problem comes up in a situation where they will go under interrogatories. Now Nebraska has not ruled on this. I think under some of the cases of our Supreme Court—I can recall offhand the charitable cases where the court said that merely because it was well known that hospitals and charitable institutions, eleemosynary institutions, did carry liability insurance, that that didn't change the law. The law was the same; they were not responsible; they had immunity; and the absence or the presence of insurance didn't make any difference.

Well, it is equally possible, I think, to argue and use as an analogy the situation in automobile accidents. What difference should it possibly make what the coverage might be or what the name of the insurance carrier might be? But there are other cases in other courts where they say, "Well, that does enter in; that is relevant. Surely it is not admissible at the trial, but it is a situation, and it is matter which would have great bearing on whether or not this lawsuit can be settled. Are we talking about a \$10,000 lawsuit or are we talking about a \$100,000 lawsuit?" I think that the court probably assumes that in cases where there are injuries of a very serious nature, and if the coverage is minimal, there is absolutely nothing that can be served by prolonging the situation, by forcing the trial to get a large verdict, a large judgment, and then it is not

collectible. And many times the case can be disposed of or could be settled by knowing what the coverage is.

To my knowledge at least, there are no Nebraska cases, and I know that I would protest vehemently before I would produce any information along that line; but still it is matter which you can and should consider, and there is a possibility of getting it in certain courts. In one court you may get it and in another court the judge might throw you out on your ear.

As far as the report of experts goes, I think Judge Van Pelt has pretty well set forth what the situation is, or at least what his views are in that regard, but there are situations where at least you can get the report from the expert as to his observations but not as to his conclusions. When you get into his conclusions there, again, you are entering into a different situation in which you are getting what one side or the other side has paid to obtain, his expert opinion, his conclusion. But regarding his observations and what he saw, what he saw with his own eyes, he should be no different from any other witness. Rather than forcing the production of his report, which quite possibly could include all of these conclusions, the court can force you to submit this witness for examination by deposition, and you can determine the same matter, his observations, what he saw, what he will say the condition is; but the court can limit the deposition and stop you prior to the time that you ask for the conclusion. Of course this is up to you to make the objection at the proper time and make the proper instructions to your witness. Here, again, is another field where there is a possibility of obtaining those particular items.

Income tax returns—Judge Van Pelt, in the case of *Bush v. C. B. & Q. R. R.*, ordered that they produce the income tax returns of the plaintiff, that it was a proper subject of discovery.

Medical reports—there is a situation that I think Mr. Deutsch touched on. Under the federal rule, if counsel cannot get together by agreement as to who will conduct the examination or as to whether or not any examination will be conducted, and the court orders an examination, if plaintiff's counsel asks for a copy of the defendant's medical report at that time, he then has to submit and produce for the inspection of the defendant *all* of the medical reports that he has in his file. If he doesn't ask for it, however, the privilege has not been waived, the defendant doesn't have to give him a copy of his report, and he can keep his reports in his own possession.

Under the Nebraska rule, for some reason our legislature did not see fit to adopt those particular provisions, and as a result you

can't say one way or the other. Generally speaking, it is a matter that you can agree on almost all the time. Where you can't there is a possibility that you could come in and show good cause, and perhaps the court would force those particular items to be produced.

I think something we have to keep in mind is that under the Nebraska law, even though suit has been filed, the privilege has not been waived, and as a result, if plaintiff's counsel sees fit to raise the privilege at the time he tried to obtain hospital records by deposition, at least as the law now exists, you are stopped and there is nothing further you can do. In federal court, at least Judge Delehant has indicated that if plaintiff refuses to allow you to examine the hospital records, to obtain them by use of the deposition method, the subpoena duces tecum, if a proper record is made at that time, if you make a record at the time the deposition is taken at the time of trial the moment any evidence is submitted concerning the physical condition of the plaintiff, the defendant will ask for a continuance at that time until such time as the defendant and any medical expert that he so desires has had an opportunity to examine adequately and examine fully the hospital records. Judge Delehant, as I understand it, has indicated that in his opinion (and certainly I don't mean to bind the court but at least I think this has come up) it could be a proper situation where a continuance would be granted until such time as you have had that opportunity.

Throughout the federal cases it also comes into effect many times that where a privilege is raised, the court has held that if you want to hide behind a privilege as to those particular matters the court will not allow any evidence to be produced in that regard. So you can see that under these rules the court does have widespread power, and that he can make, in effect, any order to see that justice prevails, that justice takes its course. He can make an order that the contents of the paper shall be taken to be established for the purpose of the action in accordance with the claim of the party, an order refusing to allow the disobedient party to introduce in evidence designated documents. Those are particular documents which, if you refuse to produce them in compliance with the court order, and there is pretty much no limitation as to what his particular authority is, he can even go so far as to dismiss the lawsuit.

I think you will recall the particular recent case of Judge Sidner. This did not have to do with the production of documents. The party failed to appear at a pre-trial conference, and the court, on his own motion and under the statutes, under the authority given

to him, dismissed the action without prejudice for failure to appear at a pre-trial conference. He dismissed it without prejudice, but as a matter of fact the statute of limitations had run and I would say that would be quite prejudicial regardless of how the order read.

I think in that particular case the authority for the decision came from Section 25-601, which says that an action may be dismissed without prejudice to a future action by the court for disobedience by the plaintiff of an order concerning the proceedings in the action. I am quite sure that that certainly would apply to the defendant.

Regarding the general assessment of how the discovery situation is working in Nebraska, when you analyze the cases you can see that really, as a matter of fact, there isn't too much really said on this particular subject, although it does appear from time to time, particularly in your cases where a summary judgment will have been granted upon the depositions, upon photographs, and things such as that.

Our court has held that the taking of the deposition of a witness does not constitute a waiver of disqualification of the witness under the Dead Man's Statute. Before the trial the deposition was taken, and our courts specifically held that that was not a waiver of that particular objection.

In *State v. Troup* our court dismissed for failure to comply with an order permitting an examination. The court dismissed the action.

Just recently, and it was shortly after I went to Ogallala, I have been working on a case wherein a man was killed in a train accident. As the case approached trial, a motion was filed by the defendant requesting the physical examination of the deceased's mother who was quite an elderly person. The court granted the order, as this of course would have to do with the damages. The court granted the order but this lady refused to submit to an examination. A motion was filed to dismiss the action. It was never taken up, but the case was settled immediately because I am quite sure that plaintiff's counsel felt that, after all, the court had ruled and this lady for no reason at all refused to comply. The case was settled, so there was no recent determination at least in that regard, but the authority is there, the power is there for the court to do whatever justice may require in that particular situation.

Under pre-trial conference, I think the most recent has to do with Judge Sidner's case, but under the rules of the court providing for pre-trial conference I think you can all see how it is virtually impossible to have a good pre-trial conference unless you have utilized effectively and fully all of the discovery procedures. You

should know before you go into the pre-trial conference who the witnesses are, what statements are available, what documents are in existence, what reports, what maps, plats, things such as that. This check list I obtained from the Omaha Bar Association which prepared this particular document in 1958. I can't say that it is followed right down the line, but at least it does give you an idea of the things that can be covered at the time pre-trial conference is held, and most certainly you couldn't cover these particular matters, you wouldn't have knowledge of their existence, if you hadn't fully utilized the discovery procedures.

I think Mr. Deutsch, talking about motions for summary judgments, has probably had as great success as anyone in having summary judgments sustained. In situations where he had taken the deposition of the plaintiff, he had an affidavit of the defendant and photographs of the automobiles, and upon that information the court affirmed the granting of a summary judgment. So you can see that all of these documents are not things that you can just walk up to someone and ask for. If he doesn't want to produce them he doesn't have to, but at least you have a procedure, at least you have a way in which you can go at them.

Prior to coming here I wrote to all of the state judges, the district judges, asking generally for their opinions or their views as to the utilization of the discovery procedures in their particular districts. It was quite amazing to me to know that in certain districts apparently the lawyers are not familiar with these particular sections of the statutes. At least none of the procedures had been utilized. I can't believe that we as lawyers are that agreeable. I know that if I have something in my file that is harmful to me I am not about to produce it just upon the request of somebody or voluntarily. Yet it was quite often the reply of the particular judges that the lawyers in their districts were agreeable, they knew pretty well what the court would force to be produced or what should be produced, and as a result motions for the production of documents had never been submitted to the court. I can't really believe, as I say, that we are all that agreeable. I know we certainly aren't in Omaha, and I can't believe that it is any different in any other section of the state.

On the other hand, I think it is primarily true in the Omaha area and I think probably in Lincoln, that it is utilized extensively because the lawyers—I suppose there are more cases for trial—but perhaps it is that the lawyers aren't agreeable, I don't know. But here the courts and the lawyers most certainly are familiar with all of the discovery statutes and utilize them extensively and effectively.

I note that we apparently have discussed the question of "Do we need changes?" In that regard the first thing that comes to mind is: Should there be the removal of the medical privilege upon the filing of the action? Many states have passed statutes to the effect that upon the filing of the litigation the physician-patient privilege is waived, and that both sides are entitled to move in, take the depositions of the doctors, or obtain whatever medical information is necessary.

I think for a full usage of the discovery statutes as they now exist, in my own opinion at least, I feel that justice could be served by changing the particular statute in that respect. As to whether or not it is good or bad I think it depends pretty much on what side of the fence you are on. But usually if you can find out long before the trial whether or not there is something wrong with the plaintiff, it just seems to me that it could certainly go a long way toward the clearing of the docket and toward the disposition of the lawsuit at an earlier stage, rather than requiring you to proceed with the trial and then perhaps after you are into it a day or so you find out what you are dealing with; then for the first time the parties can sit down and discuss the case. It just doesn't seem possible for you to properly discuss a settlement unless you know all about the case.

Another point was the possibility of the adoption of several sections of the federal rule concerning the medical examination. I think I have touched upon that and there would be no necessity of going into that at any greater length.

Several years ago there was a movement under way seeking to remove from the federal rules the requirement of showing good cause for the production of documents. At that time there was a great deal of discussion about it and there was a tremendous dispute, and apparently it was decided that the requirement would not be removed. I think we as lawyers can certainly see the danger in being faced with a situation where, merely because a lawsuit has been filed, that means we go immediately to the other attorney's office and say, "Here is my file and you can have mine," because many times it takes into consideration not necessarily the details or the facts of the accident but it brings in your own conclusions, your own theories of the case, your own opinions. This, at least in my opinion, is something that should not be eliminated from the statutes.

Regarding the problem of the expense and the cost, it would seem that if your lawsuit is worth filing it would most certainly be worth preparing, regardless of what the expense might be. Of

course, you always have to exercise your discretion. If you have someone who doesn't have any money there is a limit to what you can do, of course; but still the expense is not so great but that before you proceed to trial you should know what the plaintiff or defendant will testify to, and what documents, what items, are in existence. I think that the good that the statute accomplishes far outweighs any expense, whatever it might be. I think perhaps, rather than worrying about expense, the attorneys I have heard use that as an excuse really don't want to expend the effort, their own time and effort, to find out, to know fully just exactly what both sides of the case are about.

An interesting point, and this again relates to some of the information which I obtained from the district judges, one of the judges stated, "One is the discovery processes in general which are utilized by the more capable and industrious members of the bar. They are not tools for the aid of the lazy lawyer who is trying to have someone else do his work for him. The younger lawyers appear most often, but that might be partly due to the fact that the senior members are apt to place the brunt of preparation on junior associates."

I don't know, I would certainly hate to think that was the situation, but at least that was one judge's view.

In conclusion, I would like to cite and quote from the concurring opinion of Justice Jackson in the *Hickman* case in the Supreme Court wherein Justice Jackson stated: "Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses to make sure that he overlooked nothing. He bases his claim to it in his brief on the view that the rules were to do away with the old situation where a lawsuit developed into 'a battle of wits between counsel', but a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its function either without wits or on wits borrowed from the adversary."

CHAIRMAN SCHATZ: I would urge you again, each of you, to get one of these outlines, mainly because they are so well annotated with both federal and state cases, and make them a part of your working library.

At this time, gentlemen, our program is concluded, and on behalf of our section and the speakers we certainly appreciate your attention and your attendance, and your patience yesterday afternoon. Thank you very much.

SECRETARY-TREASURER TURNER: The House of Delegates will now reconvene.

[The Friday afternoon session adjourned at 3:25 o'clock.]

FRIDAY AFTERNOON SESSION

November 2, 1962

The final session of the House of Delegates was called to order at 3:30 o'clock by Chairman Ginsburg.

CHAIRMAN GINSBURG: The third session of the House of Delegates is convened. You will please come to order. The first order of business is the report of the Section on Real Estate, Probate and Trust Law, which will be presented by Mr. George A. Skultety, chairman.

REPORT OF SECTION ON REAL ESTATE, PROBATE AND TRUST LAW

George A. Skultety

At the midyear meeting of the Nebraska State Bar Association held in Lincoln on June 1, 1962, the Real Estate, Probate and Trust Law Section elected officers for terms commencing on November 3, 1962, as follows:

Chairman	—	George A. Skultety
Secretary	—	Albert T. Reddish
Vice Chairman	—	C. M. Pierson

The continuing members and newly elected members of the Executive Committee and the expiration of their terms are:

C. M. Pierson	1963
Lowell C. Davis	1963
John R. Fike	1964
Fred H. Richards, Jr.	1964
Albert T. Reddish	1965
George A. Skultety	1965

At the midyear meeting Albert T. Reddish gave a discussion on conservatorships and Herman Ginsburg talked on lawyers' title guaranty funds. Both were excellent and useful presentations.

On July 21, 1962, all the committees of our section and the newly-appointed special committee of the Association on Title Guaranty Insurance met at Fremont. This meeting was well attended and very successful. Considerable progress was made in the

work of the various committees. We are indebted to Fred H. Richards, Jr., for planning and hosting this seminar.

This concludes the formal part of our report. I will now present the recommendations of this section that request action of the House of Delegates.

The 1961 legislature changed the fees of the Register of Deeds to provide that where photographic processes are used the fee is \$1.50 per page. This is Section 33-109 of the Supplement. The new forms of deeds that the Bar Association has approved all have the recording data on the back of the instrument. This requires photographing two pages at a cost of \$3.00. At the midyear meeting of the Section on June 1, 1962, we recommended that all the deed forms that have been approved by the Bar Association be reprinted with recording data on the face of the instrument at the top of the page. Samples of the form have been distributed to you.

Mr. Chairman, I move that the House of Delegates approve this method of handling the recording data.

[The motion was duly seconded.]

CHAIRMAN GINSBURG: You have heard the report of the chairman of the Section on Real Estate, Probate and Trust Law and you have heard the recommendation. Is there any discussion? Are you ready for the question? All in favor say "aye"; contrary. Carried.

MR. SKULTETY: The Real Estate, Probate and Trust Law Section recommends a revision of the Survivorship Warranty Deed Form 4.2. *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. The right of survivorship in the contingent remainder cannot be destroyed by partition or other voluntary act of one of the co-owners. The Real Estate, Probate and Trust Law Section recommends to the House of Delegates the adoption of a new Joint Tenancy Warranty Deed Form 4.3 which we believe will safely create a true joint tenancy. Samples of this form have been furnished to you.

I move the adoption of Form 4.3.

CHAIRMAN GINSBURG: Is there a second?

[The motion was duly seconded.]

CHAIRMAN GINSBURG: It has been moved and seconded that the House of Delegates approve the revision of the Joint Tenancy form of deed previously presented by the Section on Real Estate, Probate and Trust Law. Is there any discussion? Any

question? If not, we will call for the vote. All in favor say "aye"; contrary. Carried.

MR. SKULTETY: The remaining recommendations of this section pertain to new legislation. We recommend that Section 38-903 be expanded to provide that all of the provisions of the law for managing an estate under guardianship shall apply with equal force to conservatorships.

The present conservatorship act relates only to the general powers of the guardian, accounting of the guardian, and mortgaging or sale of real estate by the guardian. This proposed amendment would encompass oil and gas leasing by the conservator, which is in Section 57-210 and following. It would encompass condemnation, which is in Section 76-724, and also borrowing with a pledge of personal property in Section 30-1207 and following.

I move that this proposal be referred to the Committee on Legislation.

CHAIRMAN GINSBURG: Any second?

[The motion was duly seconded.]

CHAIRMAN GINSBURG: It has been moved and seconded that there be referred to the Committee on Legislation a proposal to amend Section 38-903 of the revised statutes so as to extend to cases of conservatorships all provisions applicable to guardians generally. Is there any discussion? Any questions? Are you ready for the question? All in favor say "aye"; contrary. Carried.

MR. SKULTETY: Another proposal on legislation is a bill to implement Section 21 (g) of the Bankruptcy Act, which is 11 U.S.C.A. S. 44 (g), and the request that the introduction of this proposed bill be sponsored as a Nebraska Bar Association bill at the 1963 session of the legislature of the State of Nebraska.

This pertains to federal liens and pertains to the filing, the recording, of federal court orders for example in counties that do not have federal courts.

CHAIRMAN GINSBURG: As I understand your motion it simply is that we propose to the Legislative Committee that it prepare legislation to comply with 11 U.S.C.A. S. 44 (g). Is that correct?

MR. SKULTETY: Yes, that is correct. I move that it be referred to the Committee on Legislation.

[The motion was duly seconded.]

CHAIRMAN GINSBURG: You have heard the motion. Is there any discussion? Any questions? If not, we will call for a vote. All in favor say "aye"; contrary. Carried.

MR. SKULTETY: The section recommends the adoption of a

condominium law to establish a statutory system of ownership in fee of individual units in a multiple-unit building.

I move that the House of Delegates refer this to the Committee on Legislation.

[The motion was duly seconded.]

CHAIRMAN GINSBURG: It has been moved and seconded that there be referred to the Committee on Legislation the preparation of legislation concerning the creation of the estate in condominium. Any discussion or any questions? I am very happy to know that everybody here knows what condominium is. Are you ready for the question? All in favor say "aye"; contrary. Carried.

MR. SKULTETY: We have two new title standards in the works. One of them is a proposal pertaining to the mailing of copies of a published notice. When the lawyer examines an abstract and finds in the abstract the name of a person who does have a direct legal interest in the subject of the notice and the abstract shows that a copy of the published notice was not mailed to that person, or fails to show that it was mailed to that person, it is not necessarily a defect in title.

The other proposed standard is also with reference to the mailing of a published notice and in particular the failure to mail to creditors a copy of the published notice. That is not necessarily a defect in title according to this standard.

We aren't going to ask you to adopt these standards. As we understand it, there hasn't been enough discussion about them to satisfy everybody in the Real Estate Section, so they will be carried over to the midyear meeting. They have been passed out here. We ask you to consider them and talk to some of the fellows in the Title Standards Committee about them or write them a letter.

CHAIRMAN GINSBURG: The report of the Section on Real Estate, Probate and Trust Law, with the recommendations which have now been adopted by this House, will be accepted and placed on file.

The next item of business is the report of the Section on Corporations.

SECRETARY-TREASURER TURNER: Mr. Chairman, Members of the House: The chairman of the section, Mr. Bert Overcash, is unable to be here and has asked me to make this report for record purposes only.

At the midyear meeting of the Association the Section on Corporations renamed Bert L. Overcash and Ralph Nelson to the

Executive Committee and designated Bert L. Overcash as chairman and Ralph Nelson as secretary.

CHAIRMAN GINSBURG: The report of the Section on Corporations will be received and ordered placed on file.

The next item of business is the report of the Section on Tort Law, Mr. Albert Schatz, chairman.

REPORT OF SECTION ON TORT LAW

Albert G. Schatz

Mr. Chairman, we had two meetings in our Section on Tort Law, mainly for the preparation of the program to which you have all now been exposed for two days, or a day and one-half, and our year's activities were directed at the preparation and presentation of this program.

I would like to announce that the new officers of the Tort Section for the year 1963 are Robert D. Mullin of Omaha, chairman; and Bernard Smith of Lexington, whom Mr. Mullin has asked to be his secretary. So I would submit those two names to you.

We have nothing further to report, Mr. Chairman.

CHAIRMAN GINSBURG: The report of the Section on Tort Law will be received and placed on file.

On behalf of the House I think I will not be overstepping due bounds when I submit to the chairman and the members of that section our thanks for a very fine institute. Thank you, Mr. Schatz.

The next order of business is the report of the Section on Taxation, Mr. Frank J. Mattoon, chairman.

REPORT OF SECTION ON TAXATION

Frank J. Mattoon

During the preceding year your Section on Taxation has participated in numerous activities. Among these are the 1961 and 1962 Institutes on Federal Taxation, the Great Plains Tax Institute, coordination of the Bar Association with the Internal Revenue Service, and various other related activities.

The Annual Institute on Federal Taxation was held during the month of December, 1961, in Alliance, Grand Island, and Omaha, Nebraska. We regret to report that the attendance at the annual institute was not satisfactory, in that only 141 lawyers were registered in attendance at the three sessions: Alliance—33; Grand

Island—47; Omaha—61. A complete study was made concerning this situation by the Executive Committee on Taxation.

It was difficult to ascertain whether the low attendance was caused by the selection of subject matter, the weather, or a general lack of interest of the members of the bar in the annual institute. We report that a great amount of time and effort was expended by the Executive Committee and the members of the panel in the presentation of the institute. It was carefully planned and well presented. However, upon reflection, the Executive Committee determined that certain modifications would be made in the presentation of the 1962 institute.

The plans currently formulated for the presentation of the 1962 institute include the following:

(1) Sessions will be held on Friday and Saturday, a week-end basis, December 7 and 8, 1962, at North Platte, Nebraska, and on Friday and Saturday, December 14 and 15, 1962, in Omaha, Nebraska.

(2) The sessions will take place all day Friday and through early afternoon on Saturday.

(3) The program will be devoted to tax problems encountered by the general practitioner in the administration of estates; the twenty question series panel, and new developments in the field of taxation with some emphasis on the "Keogh Bill", H.R. 10, with which you are all familiar.

(4) For the first time members of the bar will have an opportunity to obtain the 1962 income tax forms at the institute.

The Executive Committee feels that the Annual Institute on Federal Taxation is an integral and important part of the continuing legal educational program of the Bar Association. Every effort is being made to insure its continued success. The modified program should reduce the expenditure of the Bar Association by approximately one-half the former cost.

At the midyear meeting of the Nebraska Bar Association held in Lincoln in June, Albert T. Reddish and Robert R. Veach were elected members of the Executive Committee of the Section on Taxation. The terms of office of these members will commence January 1, 1963, and will continue for a period of three years. The present members of the committee whose terms end at that time are Warren K. Dalton and Frank J. Mattoon.

At the midyear meeting the Executive Committee also considered a resolution of the Committee on Federal Taxation of the Chicago Bar Association relating to the qualifications of support

allowance or award to surviving spouses for marital deduction purposes. The committee unanimously approved the resolution, and it will be submitted, I think, Mr. Ginsburg, a little later. Mr. Miller was to have discussed this with you.

A subcommittee composed of Roger Dickeson, Keith Miller, and Warren K. Dalton was appointed to participate in the planning of the Great Plains Tax Institute, sponsored by the Nebraska State Bar Association and the Nebraska Society of Certified Public Accountants, for presentation to lawyers and accountants. The institute will be held in May of 1963 at the Nebraska Center for Continuing Education in Lincoln, Nebraska. The subject matter will be tax problems of small corporations and other small businesses. A registration fee of \$25.00 will be charged.

On behalf of the Nebraska State Bar Association, Mr. Warren K. Dalton has served as a member of the Committee on Lawyers' Liaison with the Regional Commissioner of Internal Revenue Service for the Omaha Region of the Internal Revenue Service. His comprehensive report is found on page 34 of the program of the 63rd annual meeting of the Nebraska State Bar Association. The Nebraska State Bar Association is requested to appoint one delegate and one alternate delegate to this committee annually hereafter.

This report is submitted by the Executive Committee of the Section on Taxation:

Frank J. Mattoon, Chairman
Warren K. Dalton
Roger V. Dickeson
Richard E. Hunter
Keith Miller
John W. Steward

SECRETARY-TREASURER TURNER: Your new officers?

MR. MATTOON: The new officers have not been selected for the section. They will be selected immediately after the Federal Tax Institute.

CHAIRMAN GINSBURG: You have heard the report of Mr. Mattoon. May I ask, with reference to the suggestion that was made that the State Bar Association appoint members for this liaison committee, were you making that as a motion or is that something that your section will automatically take care of?

MR. MATTOON: As I understand it, that is a matter that the section itself will take care of at a later time after the annual institute.

CHAIRMAN GINSBURG: The report of the Section on Taxation will therefore be received and placed on file.

The next item of business is the report of the Section on Practice and Procedure, Mr. Robert A. Barlow, chairman.

REPORT OF SECTION ON PRACTICE AND PROCEDURE

Robert A. Barlow

Mr. Ginsburg, Members of the House of Delegates: The following is the report of the Section on Practice and Procedure.

At the midyear meeting of the Nebraska State Bar Association held on June 1, 1962, at the Cornhusker Hotel, Lincoln, Nebraska, a business meeting of the Section on Practice and Procedure was held. Complete minutes of that meeting were prepared and filed with the Secretary of the Nebraska State Bar Association.

In accordance with the rules for programing the annual State Bar Association meeting, this section did not prepare a special program for this meeting. At the midyear meeting Hammond McNish of Sidney and Charles E. Wright of Lincoln were elected to the Executive Committee of this section to replace John E. Dougherty of York and Robert A. Barlow of Lincoln, whose terms expire at the close of this meeting. Officers of the Executive Committee of the section were also elected.

The members of the Executive Committee and officers of the Executive Committee for the year 1963, and the year each person's term expires, are as follows:

Frederick M. Deutsch, Norfolk, Chairman	1963
Warren K. Urbom, Lincoln, Vice Chairman	1964
Donald P. Lay, Omaha, Secretary	1963
Robert Mullin, Omaha	1964
Charles E. Wright, Lincoln	1965
Hammond McNish, Sidney	1965

CHAIRMAN GINSBURG: The report of the Section on Practice and Procedure will be received and ordered placed on file.

The report of the Junior Bar Section. I have been informed that Mr. Caporale has delegated Mr. Jim Knapp to make that report.

REPORT OF JUNIOR BAR SECTION

James M. Knapp

On October 5 and 6 the Junior Bar Section, according to Mr. Caporale's report—Mr. Caporale could not be here because he was enticed to Lincoln by one of the members attempting to test the

virtues of the fine program with reference to discovery procedures we have had—presented its sixth annual institute for practicing attorneys, sponsored in cooperation with the University of Nebraska College of Law. This was the first of our institutes presented at the Nebraska Center for Continuing Education, located on the Agricultural College Campus of the University of Nebraska. The institute discussed various evidentiary problems encountered in proving various elements of agricultural damages, automobile accidents, and crimes.

The first "Bridge-the-Gap" program was conducted for recent graduates following the bar examinations last year. This program was also conducted in cooperation with the University of Nebraska College of Law. Many of the practical problems encountered in organizing a corporation, in effecting collections, in the criminal practice, in closing real estate transactions, and in handling workmen's compensation cases were discussed. Many and various useful forms and detailed outlines were prepared and presented to each person who attended. The University of Nebraska plans to contact those who attended to determine whether the program has proved useful to them and solicit their suggestions concerning other such programs.

A similar program is planned for June of 1963. However, to assure adequate planning and arrangements for the 1963 program, the Junior Bar Section requests the House of Delegates to recommend to the Executive Council that the Nebraska Bar Association underwrite the actual expenses of the "Bridge-the-Gap" program next year. The Junior Bar Section has, as you know, no funds of its own from which the expenses of the program can be met. As a matter of fact, last year, or this year, I do know that through charging a nominal sum of \$15.00 the program itself did end up in the black, but in order for the Junior Bar to adequately plan for this program it is necessary that we be able to know that someone will back us up if we end up a little bit in the red.

Therefore, Mr. Chairman, I move that this body recommend to the Executive Council that the Nebraska Bar Association underwrite the Junior Bar Section with reference to the "Bridge-the-Gap" program insofar as covering the actual expenses is concerned.

[The motion was duly seconded.]

CHAIRMAN GINSBURG: You have heard the motion. Is there any discussion? Are there any questions? Do you all understand what this "Bridge-the-Gap" program is? We will call for the question. All in favor say "aye"; contrary. Carried.

MR. KNAPP: Distribution of the "Law Career" pamphlet dis-

cussed in last year's report has been continued by the Junior Bar Section in the hope that competent high school graduates will be attracted to the study of law.

The annual meeting of the Junior Bar Section was held on October 5, 1962, at which Mr. Howard E. Tracy of Grand Island, and Mr. Harold L. Rock of Omaha were elected to the Executive Committee. Messrs. Tracy and Rock replace D. Nick Caporale and Alfred W. Blessing whose terms have expired.

The new Executive Committee held an organizational meeting on Thursday, November 1, 1962, and elected Jerrold L. Strasheim of Omaha, chairman; James M. Knapp of Kearney, vice-chairman; and Howard E. Tracy of Grand Island, secretary-treasurer.

CHAIRMAN GINSBURG: Thank you, Mr. Knapp. The report of the Junior Bar Section, with the recommendation approved by the House, will be ordered received and placed on file.

Is Mr. Miller in the room?

MR. MATTOON: No, he isn't, Mr. Ginsburg, but I can talk for him.

CHAIRMAN GINSBURG: O.K.

MR. MATTOON: Mr. Chairman and Members of the House of Delegates: In the report which I just concluded a few moments ago I alluded to a resolution which was submitted to the Executive Committee of the Section on Taxation by the Chicago Bar Association, recommending that the Nebraska State Bar Association go on record as approving and supporting a bill in Congress relating to the qualification of support allowances or awards to surviving spouses for marital reduction purposes. Under our present Internal Revenue Code this is defined as a terminable interest which does not qualify for the marital deduction.

This resolution, which has been considered by the Section on Taxation, relates to curing that particular defect to the end that these awards will qualify for marital deduction purposes on a federal estate tax return and in determining the federal estate tax.

We move the adoption and approval of the resolution of the Committee on Federal Taxation of the Chicago Bar Association. If you desire, I shall read the entire resolution. I didn't know whether you would want that read at this time or not, Mr. Ginsburg.

CHAIRMAN GINSBURG: Does anyone care to have it read in extenso or do you understand the general scope of the resolution, that allowances for support during pendency of the administration of an estate be allowed as a part of the marital deduction? Unless

someone wants the resolution read in detail we will not read it, we'll just proceed with the summary.

VANCE E. LEININGER, Columbus: I don't care to have the resolution read in detail. I would like to be advised, if I may, what the status of these payments are from the standpoint of income tax.

MR. MATTOON: Of course, as far as the deductions for support allowances are concerned, I understand that they are deductible for income tax purposes on the fiduciary return and charged directly as taxable income to the spouse if they are paid out of income. Of course that goes to the matter of how the decree establishing the award is couched. If it is provided that it is paid out of income then it is treated in that manner. If no reference is made to its treatment in the decree making the allowance, then of course a different conclusion can be reached.

This particular resolution though, Vance, goes to the matter of the qualifications of the support allowance itself as a part of the marital deduction for federal estate tax purposes only.

CHAIRMAN GINSBURG: Are you saying, Mr. Mattoon, that if the allowances are actually paid out of income they couldn't be a part of the marital deduction then?

MR. MATTOON: That is possibly correct in this, but the resolution doesn't go that far.

MR. LEININGER: There is no real interaction between this resolution and income tax.

MR. MATTOON: No, no, that is correct. The first part of it probably should be read here. The latter part goes in more detail to the actual section numbers that must be amended to implement the resolution, and it reads in this manner:

RESOLUTION OF COMMITTEE ON FEDERAL TAXATION OF CHICAGO BAR ASSOCIATION

RELATING TO THE QUALIFICATION OF SUPPORT ALLOWANCE OR AWARD TO SURVIVING SPOUSE FOR MARITAL DEDUCTION PURPOSES

Resolved, That the Internal Revenue Code of 1954 be amended to state that an allowance or award paid to a surviving spouse shall not be considered a "terminable interest," and shall be considered an interest passing to the surviving spouse, for purposes of the Federal estate tax marital deduction to the extent the allowance or award is in fact paid to the surviving spouse or to the estate of such spouse;"

That is the substance and the heart of the resolution which is urged upon us by the Chicago Bar Association.

[continuing resolution]

Be It Further Resolved, That this result be effected by adding a new paragraph (7) to section 2056(b) and a new paragraph (8) to section 2056(e) of the Internal Revenue Code of 1954; and

Be It Further Resolved, That the following amendments or their equivalent in purpose and effect be brought to the attention of the proper committees of Congress and the appropriate officers of the Government.

Sec. 1. Section 2056(b) of the Internal Revenue Code of 1954 is amended by adding at the end thereof the following new paragraph:

(7) ALLOWANCE OR AWARD TO SURVIVING SPOUSE.

For purposes of this subsection, an allowance or award made after the decedent's death pursuant to the laws of the jurisdiction under which the estate is being administered, for the support of the surviving spouse during the settlement of the decedent's estate, shall not be considered as an interest which will terminate or fail to the extent that the allowance or award is in fact paid to the surviving spouse or to the estate of such spouse before the expiration of the period of limitations for assessment of estate tax provided in section 6501(a).

Sec. 2. Section 2056(e) of the Internal Revenue Code of 1954 is amended by deleting the word "or" at the end of paragraph (6) thereof; by substituting a semicolon followed by the word "or" for the period at the end of paragraph (7) thereof; and by adding at the end thereof the following new paragraph:

(8) such interest is an allowance or award pursuant to local law for such person's support during the settlement of the decedent's estate.

Sec. 3. **Effective Date.** These amendments shall apply only with respect to estates of decedents dying after the date of their enactment. The determination of the tax treatment of an allowance or award to a surviving spouse prior to the effective date of these amendments shall be made without any inference drawn from the enactment of this legislation.

CHAIRMAN GINSBURG: Is there a second to the motion?

[The motion was duly seconded.]

CHAIRMAN GINSBURG: It has been moved and seconded that the resolution presented by Mr. Mattoon be adopted, that we support the recommendation of the change in the federal statute to provide that allowances to the widow may be taken as a part of marital deductions. Any discussion on the question? If not, we will call for the vote. All in favor say "aye"; contrary. Carried. The motion is adopted.

MR. MATTOON: Thank you.

CHAIRMAN GINSBURG: Does any other member of the House or any member of any committee or section have anything further to submit?

MR. SKULTETY: Mr. Chairman, with reference to the recommendation that was made by the Real Estate Section about implementing the bankruptcy law, I would like to add some more statement on that to make sure the Committee on Legislation will understand what we are getting at. If it is all right with the Chair, I will ask Walter Huber to make that explanation.

CHAIRMAN GINSBURG: Mr. Huber!

WALTER G. HUBER, Blair: Thank you, Mr. Chairman. Gentlemen, I am on the Correlation Committee of the Nebraska Title Association with a special committee of this association, and of course we have been trying for several years to get the Carmack amendment implemented as far as the State Title Association is concerned. I was at the Fremont meeting and as I understand it this action that you have taken is the same thing, but the way we understand this, it would allow a person checking real estate records to check the records of his own county and to check the records of the federal court that has jurisdiction of his county, and if these records were checked you would know that you were in the clear with respect to bankruptcy. It would not allow you to rely simply on your own county. I was under that impression.

To illustrate, as far as Washington County is concerned, I would have to check Washington County and I would have to check the records of the federal court here in Omaha. But the benefit of this implementation, if it is implemented by what we call the Carmack amendment, which I believe is the same thing and which I am told is the same, is that you wouldn't have to worry about somebody's being bankrupted at Dallas for example. They would have to file a record in Washington County if they had Washington County land involved.

We are one of the slow states to get this implemented. The federal law has been on the books for quite a while. I wanted you

to understand that, just exactly what it would do. As far as I know, I don't believe it would allow you to simply rely on the records in your own county, but it would be a wonderful thing as far as I am personally concerned because I could do as we used to do, check Washington County, send down to Omaha for a record on the bankruptcy here and not worry about the rest of the world.

Of course with all these nonresidents owning real estate, especially in the cities, we are getting into quite a problem bankruptcy-wise. Thank you.

CHAIRMAN GINSBURG: As I understand, the present status of the matter is that it has been referred to the Committee on Legislation to prepare legislation. You understand that it just has particular reference to the field of bankruptcy.

Is there any further business that anyone has to submit?

I would like, if I may, since we started just a little bit early, to make a suggestion that actually doesn't originate with myself. Mr. Skultety mentioned it to me this afternoon. It seemed to me that it might be very worthwhile.

We know that this final session is always a sort of hit or miss deal and everybody is anxious to get away. Mr. Skultety pointed out that originally this session had to be because of the fact that there was no way of getting reports from the section until after the close of the meeting. He called my attention to the fact that, now that the sections do have their midyear meetings, their reports could therefore be included in the printed program and perhaps even brought up at the opening session of the House of Delegates, thus saving a great deal of time. And certainly it would mean that they could be treated with more respect and more deliberation than we probably accord to them now.

I wonder if anyone has any particular suggestion on that point?

PRESIDENT SVOBODA: I think it is a splendid suggestion. Does it take a motion, Mr. Chairman?

CHAIRMAN GINSBURG: Well, it probably does, doesn't it, George?

SECRETARY-TREASURER TURNER: Actually it is only a matter of custom and is not a requirement. As long as each section meets at the midyear and is thus able at the opening session to report the new officers, which is perhaps the most important phase of it, I think it would be well to incorporate it in the first session on Wednesday.

CHAIRMAN GINSBURG: In the absence, then, of any objection—perhaps I am just doing this, not that I am expecting every-

body to go along with me, but I am doing this perhaps just to save time. If there is no objection we will rule that for the next year the reports of the sections will be included in the program for the transaction of business by the House in the first session.

Is there any further business that anyone cares to bring up? Are there any resolutions by anyone, any other business? There being no other business, the House of Delegates—just one moment. I just happened to think we had better give our President a chance to close the meeting.

I now present to you President Svoboda who will deliver his swan song.

PRESIDENT SVOBODA: And the swan song is "Hallelujah!"

George Healey, will you come forward. I am hereby handing you my gavel but it's got my name on it so you are going to have to use your own. I will hand you that gavel. That is it! You are the new President!

I will entertain a motion for adjournment.

HERMAN GINSBURG: I so move.

PRESIDENT SVOBODA: I declare it adopted by the multitude present.

[The House of Delegates and the sixty-third annual meeting of the Nebraska State Bar Association adjourned sine die at 4:10 o'clock.]

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements

Year ended August 31, 1962*

Receipts:

Active members' dues	\$39,370
Inactive members' dues	5,185
Reinstatements	59
Bridge-the-Gap program	239
Interest	128
Institute on municipal corporations and government subdivisions	67
	<u>45,048</u>

Disbursements:

Salaries	\$ 7,129
Payroll taxes	448
Printing and stationery	760
Office supplies and expense	681
Telephone and telegraph	97
Postage and express	1,570
Directory	1,015
Officers' expenses	1,747
Executive council	1,492
Judicial council	310
Nebraska Law Review	7,144
Bill digest	38
Nebraska State Bar Association Journal	\$2,113
Less receipts for advertising	662
	<u>1,451</u>
Public service	5,815
Less receipts for pamphlets and racks	315
	<u>5,500</u>
Mid-year meeting	30
American Bar Association and House of Delegates meetings	5,023
Annual meeting	4,757
Less reimbursements and exhibit space	240
	<u>4,517</u>
Committee on inquiry	285
Commission on uniform commerce code	33
Committee on cooperation with American Law Institute meetings	289
Advisory committee	948
Committee on unauthorized practice	375
Real estate, probate and trust law section	315
Committee on revision of corporation laws	810
Corporate law section	156
Aid to local bars	27

NEBRASKA STATE BAR ASSOCIATION

NEBRASKA STATE BAR ASSOCIATION

Statement of Cash Receipts and Disbursements, Continued

Junior bar section	11	
Tax institute	2,100	
Taxation section	140	
Committee on judicial selection	230	
Merit plan	\$8,932	
Less reimbursements	5,700	3,232
Careers day junior bar	51	
Insurance	87	
Maintenance expense	195	
Auditing	225	
Dues and subscriptions	110	
Purchase of typewriter	235	
Miscellaneous	28	48,834
Excess of disbursements over receipts	3,786	
Cash balance at beginning of year	4,739	
Cash balance at end of year deposited in the First National Bank & Trust Company of Lincoln		\$ 953

*Note: The cash balance at August 31, 1962, is stated exclusive of United States savings bonds, owned by the association, at cost and maturity value of \$4,000. These bonds were redeemed September 1, 1962, for \$3,934.

NEBRASKA STATE BAR ASSOCIATION

Daniel J. Gross Nebraska State Bar

Association Welfare and Assistance Fund

Schedule of Cash Receipts and Disbursements

Year ended August 31, 1962 (note 1)

(Unaudited)

Balance at beginning of year	\$ 2,431
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Receipts:

Interest	\$ 244	
Dividends	727	
Proceeds from bond redemption	5,388	6,359
		<u>8,790</u>

Disbursements:

Purchase of securities	5,544	
Accrued interest purchased	38	
Welfare and assistance disbursements	250	
Safe deposit box rental	4	5,836
		<u>2,954</u>

Balance at end of year (note 2)	<u>\$ 2,954</u>
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Balance at end of year consists of:

Cash in bank	\$ 1,896
Deposit with First Federal	
Savings & Loan Association of Lincoln	1,058
	<u>\$ 2,954</u>

Notes:

- (1) The board of trustees shall have the right, power and authority to disburse and distribute for welfare and assistance purposes, from either income or principal or both, such amounts, on such occasions and to such active practicing Nebraska lawyers, their wives, widows and children, as they in their sole discretion, determined by a majority vote of the members of said board of trustees, may determine.
- (2) The cash balance at August 31, 1962, is stated exclusive of securities, owned by the Daniel J. Gross Nebraska State Bar Association Welfare and Assistance Fund, at cost \$25,453 and market value at August 31, 1962, of \$27,938.

NEBRASKA STATE BAR ASSOCIATION

ROLL OF PRESIDENTS

1. 1900	*Eleazer Wakely	Omaha	33. 1932	*Ben S. Baker	Omaha
2. 1901	*William D. McHugh	Omaha	34. 1933	*J. J. Thomas	Seward
3. 1902	*Samuel P. Davidson	Tecumseh	35. 1934	*John J. Ledwith	Lincoln
4. 1903	*John L. Webster	Omaha	36. 1935	*L. B. Day	Omaha
5. 1904	*C. B. Letton	Fairbury	37. 1936	*J. G. Mothersead	Scottsbluff
6. 1905	*Ralph W. Breckenridge	Omaha	38. 1937	*C. J. Campbell	Lincoln
7. 1906	*E. C. Calkins	Kearney	39. 1938	Harvey M. Johnsen	Omaha
8. 1907	*T. J. Mahoney	Omaha	40. 1939	*James M. Lanigan	Greeley
9. 1908	*C. C. Flansburg	Lincoln	41. 1940	E. B. Chappell	Lincoln
10. 1909	*Francis A. Brogan	Omaha	42. 1941	Raymond G. Young	Omaha
11. 1910	*Charles G. Ryan	Grand Island	43. 1942	Paul E. Boslaugh	Hastings
12. 1911	*Benjamin F. Good	Lincoln	44. 1943	*Robert R. Moodie	West Point
13. 1912	*William A. Redick	Omaha	45. 1944	George L. DeLacy	Omaha
14. 1913	*John J. Halligan	North Platte	46. 1945	Virgil Falloon	Falls City
15. 1914	*H. H. Wilson	Lincoln	47. 1946	Paul F. Good	Lincoln
16. 1915	*C. J. Smyth	Omaha	48. 1947	Joseph T. Votava	Omaha
17. 1916	*John N. Dryden	Kearney	49. 1948	Robert H. Beatty	North Platte
18. 1917	*F. M. Hall	Lincoln	50. 1949	*Abel V. Shotwell	Omaha
19. 1918	*Arthur C. Wakely	Omaha	51. 1950	*Earl J. Moyer	Madison
20. 1919	*R. E. Evans	Dakota City	52. 1951	Clarence A. Davis	Lincoln
21. 1920	*W. M. Morning	Lincoln	53. 1952	George B. Hastings	Grant
22. 1921	*A. G. Ellick	Omaha	54. 1953	Laurens Williams	Omaha
23. 1922	*George F. Corcoran	York	55. 1954	J. D. Cronin	O'Neill
24. 1923	*Edward P. Holmes	Lincoln	56. 1955	John J. Wilson	Lincoln
25. 1924	*Fred A. Wright	Omaha	57. 1956	Wilber S. Aten	Holdrege
26. 1925	*Paul Jessen	Nebraska City	58. 1957	Barton H. Kuhns	Omaha
27. 1926	*E. E. Good	Wahoo	59. 1958	Paul L. Martin	Sidney
28. 1927	*F. S. Berry	Wayne	60. 1959	Joseph C. Tye	Kearney
29. 1928	*Robert W. Devoe	Lincoln	61. 1960	Flavel A. Wright	Lincoln
30. 1929	Anan Raymond	Omaha	62. 1961	Hale McCown	Beatrice
31. 1930	*J. L. Cleary	Grand Island	63. 1962	Ralph E. Svoboda	Omaha
32. 1931	*Fred Shepherd	Lincoln			

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	Frederick Shepherd	Lincoln
			23. 1917-17	Frank M. Hall	Lincoln

24.	1917-18	Anan Raymond.....	Omaha	90.	1941-45	B. F. Butler.....	Cambridge
25.	1918-18	A. C. Wakely.....	Omaha	91.	1943-46	Frank M. Johnson, Lexington	
26.	1918-22	Fred A. Wright.....	Omaha	92.	1944-49	Floyd E. Wright.....	Scottsbluff
27.	1919-19	R. E. Evans.....	Dakota City	93.	1945-50	John J. Wilson.....	Lincoln
28.	1919-22	Geo. F. Corcoran.....	York	94.	1945-48	Robert B. Waring.....	Geneva
29.	1919-20	L. A. Flansburg.....	Lincoln	95.	1944-46	George L. DeLacy.....	Omaha
30.	1920-20	W. M. Morning.....	Lincoln	96.	1945-47	Virgil Falloon.....	Falls City
31.	1920-27	Anan Raymond.....	Omaha	97.	1945-49	Leon Samuelson.....	Franklin
32.	1921-21	Alfred G. Ellick.....	Omaha	98.	1946-48	Harry W. Shackelford	
33.	1921-23	Guy C. Chambers.....	Lincoln				Omaha
34.	1922-24	James R. Rodman.....	Kimball	99.	1946-48	Paul F. Good.....	Lincoln
35.	1923-26	E. E. Good.....	Wahoo	100.	1947-48	Joseph T. Votava.....	Omaha
36.	1924-26	Robert W. Devoe.....	Lincoln	101.	1947-48	John E. Dougherty.....	York
37.	1924-24	Fred A. Wright.....	Omaha	102.	1947-55	Lyle E. Jackson.....	Neligh
38.	1925-28	Paul Jessen.....	Nebraska City	103.	1948-49	Robert H. Beatty	
39.	1925-27	Clinton Brome.....	Omaha				North Platte
40.	1927-29	Charles E. Matson.....	Lincoln	104.	1947-50	Frank D. Williams.....	Lincoln
41.	1927-28	Fred S. Berry.....	Wayne	105.	1947-50	Thomas J. Keenan.....	Geneva
42.	1928-29	Robert W. Devoe.....	Lincoln	106.	1948-51	Laurens Williams.....	Omaha
43.	1928-30	T. J. McGuire.....	Omaha	107.	1949-51	Joseph H. McGroarty	
44.	1928-34	Harvey Johnsen.....	Omaha				Omaha
45.	1929-31	E. A. Coufal.....	David City	108.	1949-54	Wilber S. Aten.....	Holdrege
46.	1929-29	Anan Raymond.....	Omaha	109.	1948-49	Abel V. Shotwell.....	Omaha
47.	1930-32	Paul E. Boslaugh.....	Hastings	110.	1949-55	Paul L. Martin.....	Sidney
48.	1930-30	J. L. Cleary.....	Grand Island	111.	1949-55	Joseph C. Tye.....	Kearney
49.	1931-33	W. C. Dorsey.....	Omaha	112.	1949-51	Earl J. Moyer.....	Madison
50.	1931-31	Fred Shepherd.....	Lincoln	113.	1950-60	Harry A. Spencer.....	Lincoln
51.	1932-34	Richard Stout.....	Lincoln	114.	1950-56	Paul P. Chaney.....	Falls City
52.	1931-32	Ben S. Baker.....	Omaha	115.	1950-59	Paul Bek.....	Seward
53.	1933-35	Barlow F. Nye.....	Kearney	116.	1950-52	Clarence A. Davis.....	Lincoln
54.	1933-33	J. J. Thomas.....	Seward	117.	1951-55	Barton H. Kuhns.....	Omaha
55.	1934-36	Chas. F. McLaughlin.....	Omaha	118.	1952-57	Thomas C. Quinlan.....	Omaha
56.	1934-34	John J. Ledwith.....	Lincoln	119.	1951-52	George B. Hastings.....	Grant
57.	1935-35	L. B. Day.....	Omaha	120.	1952-53	Laurens Williams.....	Omaha
58.	1935-37	James M. Lanigan.....	Greeley	121.	1953-54	J. D. Cronin.....	O'Neill
59.	1935-38	H. J. Requarte.....	Lincoln	122.	1954-57	Norris Chadderdon	
60.	1935-38	Raymond M. Crossman					Holdrege
			Omaha	123.	1954-56	John J. Wilson.....	Lincoln
61.	1935-40	F. H. Pollock.....	Stanton	124.	1955-56	Wilber S. Aten.....	Holdrege
62.	1935-41	T. J. Keenan.....	Geneva	125.	1955-58	F. M. Deutsch.....	Norfolk
63.	1935-39	Walter D. James.....	McCook	126.	1955-	Clarence E. Haley	
64.	1935-37	Roland V. Rodman.....	Kimball				Hartington
65.	1936-36	J. G. Motherhead.....	Scottsbluff	127.	1955-58	R. R. Wellington.....	Crawford
66.	1936-36	James L. Brown.....	Lincoln	128.	1955-	Alfred G. Ellick.....	Omaha
67.	1937-39	David A. Fitch.....	Omaha	129.	1954-55	Jean B. Cain.....	Falls City
68.	1937-39	Raymond G. Young.....	Omaha	130.	1955-57	Hale McCown.....	Beatrice
69.	1937-41	M. M. Maupin.....	North Platte	131.	1956-62	C. Russell Mattson.....	Lincoln
70.	1937-41	Golden P. Kratz.....	Sidney	132.	1956-58	Barton H. Kuhns.....	Omaha
71.	1938-42	Sterling F. Mutz.....	Lincoln	133.	1957-59	Paul L. Martin.....	Sidney
72.	1938-42	Don W. Stewart.....	Lincoln	134.	1957-60	Richard E. Hunter.....	Hastings
73.	1940-46	George N. Mecham.....	Omaha	135.	1957-	John R. Fike.....	Omaha
74.	1940-42	Abel V. Shotwell.....	Omaha	136.	1957-	Thomas F. Colfer.....	McCook
75.	1940-42	Frank M. Colfer.....	McCook	137.	1958-	William H. Lamme.....	Fremont
76.	1941-43	Virgil Falloon.....	Falls City	138.	1958-61	Carl G. Humphrey.....	Mullen
77.	1941-43	Joseph C. Tye.....	Kearney	139.	1958-60	Joseph C. Tye.....	Kearney
78.	1941-47	Earl J. Moyer.....	Madison	140.	1959-	Charles F. Adams.....	Aurora
79.	1937-37	C. J. Campbell.....	Lincoln	141.	1959-61	Flavel A. Wright.....	Lincoln
80.	1938-38	Harvey Johnsen.....	Omaha	142.	1959-60	Thomas C. Quinlan.....	Omaha
81.	1939-39	James M. Lanigan.....	Greeley	143.	1960-	Hale McCown.....	Beatrice
82.	1940-40	E. B. Chappell.....	Lincoln	144.	1960-	Ralph E. Svoboda.....	Omaha
83.	1942-45	Fred J. Cassidy.....	Lincoln	145.	1960-	Herman Ginsburg.....	Lincoln
84.	1941-41	Raymond G. Young.....	Omaha	146.	1960-	James F. Begley	
85.	1942-48	Max G. Towle.....	Lincoln				Plattsmouth
86.	1942-42	Paul E. Boslaugh.....	Hastings	147.	1961-	George A. Healey.....	Lincoln
87.	1942-45	John E. Dougherty.....	York	148.	1962-	Lester A. Danielson	
88.	1942-49	Yale C. Holland.....	Omaha				Scottsbluff
89.	1943-45	Robert R. Moodie, West Point		149.	1962-	Floyd E. Wright.....	Scottsbluff
				150.	1962-	John C. Mason.....	Lincoln

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