Proceedings

of the

Idaho State Bar

VOLUME XXXVI, 1962

Thirty-Sixth Annual Meeting

SUN VALLEY, IDAHO
July 12-13-14, 1962

Proceedings

of the

Idaho State Bar

VOLUME XXXVI, 1962

Thirty-Sixth Annual Meeting

SUN VALLEY, IDAHO
July 12-13-14, 1962

Past Commissioners

Western Division

JOHN C. RICE, Caldwell, 1923-25
FRANK MARTIN, Boise, 1923-25
JESS HAWLEY, Boise, 1927-30
WM. HEALY, Boise, 1930-33
JOHN W. GRAHAM, Twin Falls, 1933-36
J. L. EBERLE, Boise, 1936-39
C. W. THOMAS, Burley, 1939-42
E. B. SMITH, Boise, 1942-48
CLAUDE V. MARCUS, Boise, 1949-51
T. M. ROBERTSON, Twin Falls 1951-54
WILLIS E. SULLIVAN, Boise, 1954-57
SHERMAN J. BELLWOOD, Rupert, 1957-60.

Eastern Division

N. D. JACKSON, St. Anthony, 1923-25
A. L. MERRILL, Pocatello, 1925-28
WALTER H. ANDERSON, Pocatello, 1928-34
E. A. OWENS, Idaho Falls, Pocatello, 1934-40
L. E. GLENNON, Pocatello, 1940-43
PAUL T. PETERSON, Idaho Falls, 1943-46
R. D. MERRILL, Pocatello, 1946-49
RALPH LITTON, St. Anthony, 1949-52
L. F. RACINE, Jr., Pocatello, 1952-55
GILBERT C. ST. CLAIR, Idaho Falls, 1955-58
J. BLAINE ANDERSON, Blackfoot, 1958-61

Northern Division

ROBERT D. LEEPER, Lewiston, 1923-26
C. H. POTTS, Coeur d'Alene, 1926-29
WARREN TRUITT, Moscow, 1929-32
JAMES F. AILSHIE, Coeur d'Alene, 1932-35
A. L. MORGAN, Moscow, 1935-38
ABE GOFF, Moscow, 1938-41
PAUL W. HYATT, Lewiston, 1941-44
E. T. KNUDSON, Coeur d'Alene, 1944-47
E. E. HUNT, Sandpoint, 1947-49
ROBERT E. BROWN, Kellogg, 1949-53
RUSSELL S. RANDALL, Lewiston, 1953-56
CLAY V. SPEAR, Coeur d'Alene, 1956-59
MARCUS J. WARE, Lewiston, 1959-62

Present Commissioners and Officers

GLENN A. COUGHLAN, Boise, President
WESLEY F. MERRILL, Pocatello, Vice President
ALDEN HULL, Wallace, Commissioner
THOMAS A. MILLER, Boise, Secretary

Local Bar Associations

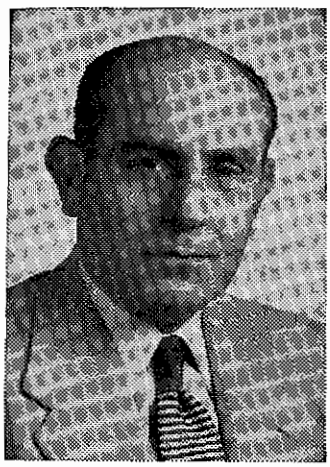
Shoshone County (1st District)—William Tuson, President, Kellogg
Clearwater (2nd and 10th Districts)—James W. Givens, President, Lewiston
Third District Bar—Eugene C. Thomas, President, Boise
Fourth and Eleventh District—John Hepworth, President, Buhl
Fifth District—Archie Service, President, Pocatello
Sixth District—Hartley P. Kester, President, Arco
Seventh District—C. H. Higer, President, Emmett
Eighth District—Thomas Morris, President, St. Maries
Ninth District—E. W. Pike, President, Idaho Falls
Twelfth District—Nels Sahl, President, St. Anthony
Thirteenth District—Ben B. Johnson, President, Preston

SPEAKERS

Lionel Campbell
Los Angeles, Calif.

Philip E. Peterson
Moscow, Idaho

Charles C. Scott
Kansas City, Mo.



B. E. Witkin
Berkeley, Calif.

Sun Valley, Idaho
July 12, 1962, 1:50 p.m.
Annual Meeting of the Idaho State Bar Convenes

MR. WARE: Ladies and Gentlemen. It is my privilege as President of the Idaho State Bar Association to call the meeting to order. (Rapping gavel.) This is the 1962 meeting.

Someone observed a little earlier that lawyers pay about as much attention to attending a bar meeting as they do to a note of issue in a case, in connection with a court. At this time, I will call upon Bishop Floyd W. Dorius of Hailey of the Church of Jesus Christ of Latter Day Saints, for the Invocation. Bishop Dorius.

BISHOP DORIUS: Our Father which art in heaven, author of logic, justice and compassion, this group have assembled themselves here today in the capacity of an annual convention of the Idaho State Bar. We thank Thee Father in heaven for the opportunity of such meetings where ideas and opinions can be exchanged. We thank Thee that we live in this land of opportunity, this land of freedom, where the individual is yet recognized. We thank Thee that Thou has set this land of America as a land of liberty to those who keep thy commandments and serve Thee. We ask Thee to bless those who take part in this convention and this meeting and those to come. We ask Thee to temper their thinking and their decisions that the freedoms that our forefathers fought for may be preserved and yet, that the rights of the group may also be considered. Bless them that they may put justice and logic ahead of personal gain. Bless them that their ears may be opened, that they may grasp the new that is presented to them, preserve this nation, the freedoms we have fought for, and yet give discernment to these men that they will recognize that subversive element, which, under the guise of freedom, will destroy that which we love.

We now present this meeting unto Thee and ask Thee to bless those who take part again with inspiration, with sincerity in all that they do and that they do it in the name of the Lord, Jesus Christ. Amen.

MR. WARE: Thank you, Bishop Dorius for that splendid invocation and the challenging and encouraging remarks connected with it, which should motivate the lawyers of this State to a high degree of service in their profession.

One of the first duties of the President of the Bar Commission when an annual meeting convenes is to appoint a canvassing committee, because each year a new commissioner is elected from one of the three divisions in this state. This year, the northern division elects a commissioner and to the canvassing committee I would appoint Ray McNichols, Don Bistline, and Bruce Bowler, so each division will be represented on that canvassing committee. At the first coffee break, you may report to Tom Miller who will give you the sealed ballots and necessary instructions.

I believe that we have here with us this afternoon a distinguished and prominent member of the Bar of the State of Idaho, who happens to be the governor of our state. I would appreciate it very much if His Excellency, Robert E. Smylie, would come forward at this time so that we might have a word or two from him. (Applause)

GOVERNOR ROBERT E. SMYLIE: Members of the Bar, Ladies and Gentlemen. I think first I should express my appreciation of your invitation to be with you. There have been so very many people these last months who have seemed to want me to engage once again in the active practice of the law that it's a pleasure to have an invitation from lawyers and to have it carry no particular strings with it. I noticed it, with your President, that there aren't very many scholars here this afternoon and this is faintly reminiscent of a conference that I just got back from of the Governors of the United States, and the very distinguished Governor of Ohio said, I think, the best thing about that conference, rather he said two things, he said that he thought the world would little note nor long remember what we said there and that seldom had so very much been said about so little by so many.

This is a little bit like Bar Conventions, but I think I finally solved one of the problems that seems to be a recurring theme at these meetings and Marc Ware doesn't know that I have done this but I have sent runners to the Lodge just before I entered the hall to tell them that in fifeen minues I would be finished and then I think that you should have a crowd about.

I don't want to burden you with any partisan comments on this occasion, although this is that sort of a year. I gather there will be enough of that for one weekend in Eagle Rock, which is mid 19th century for Idaho Falls.

I spoke with the judges this morning and made to them some suggestions which I think I might make to you. There had ought to be something serious said in a little address of welcome like this. I am always loathe to make substantive suggestions to an audience of barristers and judges, largely because I don't suppose there is any segment of American opinion which can manage such a complete diversity of opinion as the members of our profession can, and this perhaps is because we are more individualistic than most. One of our learned and distinguished members suggested to me at the door that he didn't know what there was about Bar Conventions that kept people away from meetings. He said that when doctors had a convention that the bell rang and they came pouring in the door and they sat and listened to all of the oratory and when it was over they went away, but not until. I said I thought that it would be simple. All we would have to do is have Mr. Kennedy introduce a bill and that we would probably come to meetings too, you know.

I would like to mention two things: One by way of congratulations and one by way of a suggestion. I had the temerity to suggest to the judges this morning that in the last decade there have been sixty-seven proposals in the Legislature for amendments to the Constitution of Idaho, and this suggests, if nothing else, the fact that there are provisions in that basic doctrine of our government which at one point or another in the economic, political and social light of the State, are beginning to press in on someone someway. In this election this fall, we will submit to the people four different propositions having to do with amendment to their basic doctrine of government. I dare say that the wording of the questions which will be presented to the electorate and the substitutive content of those propositions plus the absolute absence of public discussion of that important problem will have a tendency to get us a relatively uninformed disposition of an important public question.

I suggested to the judges that in our Constitution we imported the amend-

ing process from the old Field code which had been brought to California from New York, but that, unfortunately, by the time we had adopted that provision in our Constitution in 1889, the New Yorkers had already found it to be deficient and had changed it and they ask the people every decennial election whether they want their Constitution to be subjected to the scrutiny and attention of a Constitutional Convention which has the full powers of revision or re-writing for submission again to the people for ratification. Twice in the years since 1880, the people of New York have answered that question in the affirmative, two new constitutions have been drafted; one was adopted, the other wasn't; but at least the view-point of the people themselves with respect to their doctrine had been invited and a decision had. Basically, that Constitution doesn't belong to the Bench, the Bar, to any political party, to any group of candidates; it belongs to the people themselves, and the very fact that sixty-seven different times in the last ten years we have somewhere in our body politic felt the need to suggest change would indicate to me the desirability at least of asking the people about what is essentially, peculiarly and properly their own property as an element of our government. For that reason, I have suggested to the judges and I now suggest to the organized Bar that the Bench and the Bar have a peculiar responsibility and specific talents which can be brought to bear on studying the question of whether or not constitutional revision—at least asking the question as to whether the people would desire it—had ought to be pursued.

I, myself, think that there is no danger in asking as mature and intellectual an electorate as the Idaho electorate the question that I propose. The history of the situation is that in 1949, Judge Budge, who was then in the Legislature prepared a resolution such as I discuss. On that occasion it didn't pass the House of Representatives but on three occasions since, it has; and has, in each of those three occasions, not been defeated in the Senate, but has died there for want of action.

The history of Constitutional change in the past would seem to indicate then, that the Legislative climate, looking to attention to his problem, is beginning to be increasingly favorable and for that reason I would like to suggest that the Bar give consideration with the Judicial Conference to the appointment of a joint committee which might study some of the hazards involved, some of the benefits that might flow from a thorough-going study of our basic doctrine of the government with suggestions to the next Legislature or the next succeeding one, of how that desirable matter of achieving a resolution of public opinion could be approached.

The second serious note I would like to sound is this: I think it's five years now since the organized Bar of the State began to make an official celebration of Law Day on May 1st and I, for one, would not want this moment to pass without adding my bit to the approbation that is now quite general for the rapport of individual members of the Bar, the Bar organizations in the several Districts, for the emphasis they place on the function of law in the conduct of a free society and the importance of public understanding, not only of law's function, but of our institutions of freedom and their foundation. This, I think, is work in the highest tradition of our craft as perhaps the ultimate guarantors of freedom and individual human dignity in the English speaking world and I think this is important now and will grow increasingly

important simply because of the fact that, as time passes, it becomes manifestly and abundantly clear that sometime in the generation now in being, mankind will make its decision as to which of two roads it will travel. One, the right and sunlit road to liberty and individual human dignity with freedom under law; a system that cherishes all of the values that we have been taught to hold dear through the sweep of two thousand years of western Christian history; and on the other hand, the road that would ultimately subject mankind to the indignity of a conspiracy that exists, so infamous a conspiracy, and subjects the individual human being to the dark and violent slavery of his communistic self. And, for that reason, every voice that is raised, every heart that sings, every organization that rejoices freedom of liberty and individual human dignity as we know it, as we have loved it and as we should be willing to support in every way, including ultimately, those who need our support, our continuing approbation and last of all, our vocal evocation.

This is a task that lawyers can do, this is a task that we now are doing quite well. Not as a Governor, but as an individual citizen who loves not a lone miracle but freedom and human dignity itself, I salute your Commissioners, every individual among you who has worked in this endeavor and I salute the truly magnificent results which your efforts now begin to achieve.

It's a pleasure to be with you, albeit briefly, and I do salute the profession of which I am proud to be a member.

PRESIDENT WARE: We're glad to have you here as a member of our Bar and as Governor. The statement that you have made with reference to the duty of attorneys in connection with the Rule of Law and our obligation with reference to the Constitution of our State, I hope is something that we will not shrink individually and as a Bar. I am certain that we will give the matter consideration and what you have suggested to us will be taken on.

At this time I will ask Sidney Smith and Mr. Scott to come forward here. I don't know, we probably have other distinguished guests here and I don't wish to overlook anyone, I do notice one and probably he will permit me to at least introduce him, although I am afraid I cannot at this late hour develop a writ which will require him to speak. I would like to call on my good friend, the Honorable Fred M. Taylor, United States District Judge, to at least stand. I will add that the floor is open to you as a member of the Bar if you wish to come forward.

JUDGE TAYLOR: Thank you, Mr. President. I appreciate very much your recognizing me as a distinguished guest, but I would rather be recognized as a lawyer.

PRESIDENT WARE: I am now going to ask that Mr. Sidney Smith, attorney of Coeur d'Alene, introduce the speaker for the afternoon.

MR. SMITH: President Marc and fellow members of the Bar. Sometimes in our meetings we have been criticized for the type of program that would merit our attention and attendance at the Bar Convention, with the thought of bringing home something that we could put into everyday practice, and it is a pleasure today, to introduce a program that I think you will find very interesting and informative. The individual, and I give you his first name, Charles C. Scott, as you have noticed in The Advocate, he is a member of the

Missouri Bar, he presently is teaching at the University of Kansas City Law School and he is teaching the very subject about which he is going to instruct us this afternoon. What he is attempting to do this afternoon is compress into a three-hour seminar the information that he transmits in his law school courses. Now, there is available for those of us who do not get the full import of his remarks, and we can refer to his books. He authored a book in 1942, the only book on this subject, that is known as "Photographic Evidence." It was brought up to date in 1955 with a supplement and he informs me that he now has in progress a compilation of works enlarging his original books, which amounts to a set that will include not only photographic evidence but also the matter of questioned documents. I don't know whether you particularly run into this problem in your own practice. Recently, I think it is a matter that is increasingly becoming evident. It so happens that in our own District we have had two that have actually been tried since the first of the year.

Mr. Scott has been lecturing and has indicated, perhaps not in The Advocate, but he has been doing this before all of the Bar Association in some twenty states from Arizona to Vermont and from Idaho to West Virginia.

He is going to talk to us on "Photographic Evidence and Question Documents," and I remind you again of the fact that he does have the books and the books that will be forthcoming. Interesting enough, our friend, Erle Stanley Gardner has used these same books as a reference book and I give you at this time, Mr. Charles C. Scott. Mr. Scott.

MR. CHARLES C. SCOTT: Good afternoon, Ladies and Gentlemen. It's a real pleasure to be here. I think that Sun Valley is certainly world-famous and interesting to everyone and a unique opportunity.

The thing that impressed me most was this auditorium itself. I expected that we would hold this meeting this afternoon in a sort of log cabin without lights. If we had lights, I thought perhaps we wouldn't have a projector itself such as this and I can tell you frankly that this set-up is as good as I have ever encountered. It's virtually ideal and it's particularly important with this subject that we have this afternoon, because to talk about this subject you must illustrate and you can only illustrate to an audience by means of pictures, and when these pictures cannot be presented effectively the impact is lost.

That's exactly what happens in many courtrooms. Although lawyers realize the importance of photographic evidence, too often when the time comes to present that evidence, they are not adequately prepared to see that the trier of fact gets the full impact of the evidence itself.

We are trying here, this afternoon, to cover what actually is used in a two-hour course, a two credit-hour course in law school. We are not particularly trying to be interesting, but we hope that it will be interesting. Primarily this is an attempt, at least, to interest you in this not new subject, but very much abused subject, photographic evidence. In three hours we will attempt to show you every type, virtually, of photographic evidence that is used in courts today. We will show you and demonstrate traffic accident scenes, crime scenes, identification pictures, medical-legal pictures, fingerprints, firearms identification, questioned documents. We will devote a considerable length of time to the subject question documents and the final part will be a series of pictures that

emphasize the importance of color photography in courts today. A new, vastly important field.

Photography can actually be thought of as a language. You may not have thought of it in that way but actually a photograph is a means of communication, sometimes referred to as non-verbal communication and there are many analogies between the language of photography and the spoken or written language. Many analogies. There is even analogy between the oral word and photography and the written word and photography. Any time you take an exhibit into court in the form of a photograph on paper, that is analogous to use of the written word because it is a record. It can be introduced as evidence, it can be examined by the jury in some jurisdictions in the jury room. It can be made part of the record on appeal and studied and evaluated in connection with the weight of the evidence by the Appellate Court. So, the photograph on paper is somewhat like the written word.

The screen picture, whether it be a slide or a motion picture, is somewhat like oral language. Its impact is there only as long as we project the picture on the screen, just as the impact of the witness on the stand is there only as long as he speaks and from then on, the trier of fact must try to remember what he said. So that, in effect, is a disadvantage of the projected picture, be it motion picture or still picture. It is like oral language, it must be remembered and to that extent it does not have the impact of a written word or the photograph on paper.

There are also many analogies between photographs and witnesses. Photographs are sometimes referred to as "silent witnesses" by the appellate courts. "Mute witnesses who speak more elegantly than any words." Such phrases are frequently found in appellate court decisions, in effect, personalizing a photograph, referring to it as a witness itself as if the photograph itself spoke. Now this analogy is an important one to remember because in cross-examining photographs, in effect, you must understand them. Actually, there are many analogies between the witness on the stand and the photograph, the photographic witness, the silent witness.

Let us consider some of the things that the human witness, the witness who takes the stand, can do. It is not often, at least we hope it is not often, that he is a downright perjurer. But, for various reasons, his testimony may not be the truth, the whole truth and nothing but the truth. He may have delusions. This is not often the case, but sometimes his mental faculties may be set, that he is not able to convey to others by means of oral language, what he saw and sometimes he does not see what he thinks he saw. But photographs are subject to the same connotations as we shall see in a few minutes. In photography, we can have optical illusions and these optical illusions can render a photograph very misleading in a court of law.

A human witness on the stand also may exaggerate. He may have been a witness to an accident and he may say that the car was going forty miles an hour when, as a matter of fact, it was only going twenty-five miles an hour.

Photographs, too, as we shall see, can exaggerate. They can stretch distances, make them look greater than they are in fact and this can be done unintentionally as well as intentionally. The human witness on the stand can also minimize, depending upon which side of the case has called him and this

too, he frequently does. He may say that he thinks the car was going twenty miles an hour when, as a matter of fact, it was going forty miles an hour. And he may almost talk himself into believing that. Photographs can also minimize. They can collapse a subject, telescope it as it were, flatten out, and so in this respect they are also somewhat like a human witness.

The human witness may leave things out. He may tell the truth as far as he goes but he may fail to tell all the truth and every photograph, in effect, is only a segment. In all photography we are dealing with what we call the frame, whether it's a motion picture or a still picture and all that is without the frame is only suggestive at best. So like a human witness, a photograph may mislead or distort because it doesn't show the entire scene.

The human witness very often is subject to the difficulty that he tells too much. We all know of the witness who wants to volunteer information, he wants to go on and on and on and even in that respect a photograph may be misleading. It may just literally show too much by failure to come close enough to the subject or by use of what we will call the wide-angle lense. The photograph may be in effect even that respect, in that perhaps only the center of the field is interesting or important.

The human witness can turn things around. He can say that the skid mark was on the left side of the road when it was on the right side of the road and it seems that poor human beings sometimes, or very often at least, do not even know their left from their right hand. Photographs can turn things around. Anyone interested in photography will know that it is very easy to reverse a photograph so that which is really right, appears to be left. So in that respect, photographs and human witnesses are very much alike.

But, photography has many advantages over the human witness. A photograph is generally considered more reliable than the testimony of any witness because of the fact that photography is based upon science and that generally speaking a photograph records accurately all that is before the lense. Generally speaking, not always. At least it is less apt to be deceptive than is a human witness. Also, the language barrier no longer exists when we have a photograph. It is a universal language. It can be understood by anyone. It needs no interpreter. So, in that respect, photography is superior.

There are many ways in which photography and photographs are superior to the human witness and it is easy to realize why photography is becoming more and more important in the courts today.

Let's first consider some of the basic rules of photographic evidence. First, there had to be a precedent upon which to base the use of photographs in court. We lawyers know that virtually every new thing must be brought in under some old rule or precedent. The precedent for use of photographs in court was the use of maps and diagrams. From time immemorial, lawyers had perhaps used hand drawn pictures and maps as evidence. Such cases are recorded from the very beginning of American jurisprudence and it was logical, therefore, that the courts should reason that the photograph was merely a light printed picture drawn by the subtle influences of sunlight, as some of the early cases say, rather than by hand and map. By means of this analogy, it was possible to, from the very beginning, to have decisions that held that photographs were admissible

in evidence. The general rule, regarding the admissibility of photographs in evidence, can be stated as this: A photograph is admissible in evidence whenever it is relevant and material to some issue in the case and whenever it is verified as a fair representation of the subject.

Logically, the relevancy of the photograph must be established first, for if the photograph is not relevant, there isn't any use wasting time on establishing its fairness or its truthfulness. There are several tests that we can apply to determine the relevancy of a photograph. One test that could be a good test were it not for the fact that there were certain restrictions, would be this: A photograph may be used whenever it would be proper for a jury to view the subject itself, if it were practical for them to do so. Now, this test would make us think of jury view, but the trouble with jury view is that there are certain restrictions about it in many states. In the first place, it usually isn't practical to take a jury to a scene. The scene may have changed and even if it hasn't changed, the possibility that the jury will be influenced by outsiders is greatly increased if you take them out of the courtroom. Another disadvantage to jury view is that it is not available to the appellate court. That which the trier sees at the jury view, the appellate court cannot see, so we have nothing in the record. Jury view is often not even considered as evidence, so this test is not as good as it first seems. Actually, it has practical importance. Testing the relevancy of a photograph, not testing it by jury view as we consider jury view legally, but just considering it from the practical standpoint would be proper if it were practical for the jury to view this subject if they could do so.

Applying this test, for instance, would eliminate much of the objections to gruesome photographs. That, probably, is the most written-about subject today in photographic evidence. Should gruesome photographs be admitted in evidence? Well, we would have to agree that if a murder trial could be tried at the scene of the crime immediately thereafter, if it were practical to do so, no one, I am sure, would say that it would be improper for the jury to view that scene, regardless of how horrible it might be. It just wouldn't be logical to say that if a murder trial could be tried immediately thereafter in the same spot that we would have to keep the repulsive scene from the sight of the jury. No, you would say, it's right here, it just happened, the jury can view the scene. Now, all photography does is preserve it, put it on ice so that we can view it at any time later and yet there are many objections to gruesome photographs on the grounds that they may prejudice or influence the mind of the jury. Until recently, such objections usually were not considered valid, but in many of the recent cases, more attention has been given to this objection.

In my mind, the gruesomeness of a photograph should not affect its admissibility at all, if the photograph is relevant and material. Of course, if the photograph is gruesome and is offered for the mere purpose of influencing a jury, that is an entirely different thing, and there are various grounds then for excluding a photograph or for considering it prejudicial error to use such a photograph.

Another test that we can apply to determine the relevancy of a photograph is this: Does it assist the trier of fact, judge or jury in understanding any issue in the case? If it does, then it should be admissible. As some courts put it, a photograph should be practically instructive and of course, instructive on the issues. If a photograph can meet that test, then it has passed a very good test of relevancy and materiality.

Another test that we can apply is whether the photograph assists a witness in explaining or illustrating his testimony. There, of course, the important thing is whether the witness's testimony is relevant.

But, sometimes, photographs are admitted much as maps or diagrams or plats, primarily to illustrate what a witness has testified about. This, then, is another test of relevancy. Now, if the relevancy of a photograph is established, the next thing that should be either established or conceded is the, well, we shouldn't say accuracy of the photograph because no photograph is actually accurate or few photographs are accurate at least, actually, most photographs are just representations of a subject. We cannot take a large scene, a three-dimensional scene, and reduce it to a flat photograph measuring 8 x 10 inches and speak of it as being accurate, but it is or it can be either a fair or an unfair representation of a subject. It seems that when the courts speak about the accuracy of a photograph, what they are really talking about or what they really mean, is the *relative* truthfulness of the photograph. Does it fairly represent the subject? That is all that is required. It is asking too much, even of this marvelous scientific process, to say that it must be accurate; but it should be, what we would describe as a good picture. This should either be shown by the testimony of a witness or should be conceded or waived.

In other words, a photograph must have what Wigmore calls a "testimonial sponsor," in the form of some witness who will say or can say that that photograph is a fair representation. If it does not have that testimonial sponsor or if its accuracy is not conceded or waived, then it should not be admitted.

I have found in actual practice today that the accuracy of a photograph, using that word loosely again, is almost always conceded. That it is relatively infrequent that it is necessary to clarify pictures because counsel usually get together and agree that the pictures can be used. Usually both sides are glad to have pictures in evidence. Often they can see things for their side even when the pictures are introduced by the other side. Sometimes though, the verification may be waived. You waive the accuracy of your opponent's pictures if you make use of them yourself, for example. That's worth remembering because frequently that happens. A lawyer will not object to pictures when they were offered in evidence but he will make use of them himself and perhaps later try to go back and attack the accuracy of the picture. Well, he has waived it. He has made use of it and he can no longer attack the accuracy of the picture.

Let's began the visual part of our afternoon. We will have a large number of pictures covering virtually every type of photograph used in court. We will not have to stop very often to change the slide magazine and if we do, it will only be momentarily. That's another advantage of modern gadgets and so we can go right through to the coffee break and if there is an interruption before that, please bear with us as it will only take a second or two to correct it. If we can have the lights off, we will begin the visual part. (Ed. Note: Following were shown two or three hundred slides, both black and white and color, of forged documents, scenes of accidents and crimes, etc., narrated by Mr. Scott. Without the slides the narration is substantially meaningless and therefore has been deleted.)

(SECOND DAY, IDAHO STATE BAR CONVENTION)

MR. WARE: Gentlemen, the meeting will come to order. (Rapping gavel.) Bruce Bowler, are you prepared to come forward at this time and make the report of the canvassing committee?

MR. BOWLER: Yes, sir. Mr. President, pursuant to your appointment the canvassing committee, consisting of Ray McNichols, Don Bistline and myself, received the ballots from the Secretary, Tom Miller, made the canvass, counted the votes and found that Alden Hull was elected Commissioner from the Northern District. Thank you. (Applause)

MR. WARE: Alden, will you come forward. Congratulations. The microphone is yours.

MR. HULL: I want to express my thanks to the members of the Bar from the Northern Division, and also thank you my very good friend, Sid Smith, for the campaign which you conducted in the highest traditions of the Bar, and it is with considerable humility and with some awe that I stand before you now as one of your servants, but more so because I succeed a fine person and wonderful lawyer, Marc Ware. Thank you very much. (Applause).

MR. COUGHLAN: Ladies and gentlemen. It is a distinct pleasure that I have this morning of introducing our speaker. I know that most of you are well acquainted with Lionel Campbell. I was in law school with Lionel, although he was a little ahead of me. I have known him for a great many years and I was so pleased when he accepted our invitation to come and discuss with us this problem on medical negligence or whatever term you may wish to give it. I am sure that we couldn't have obtained a finer man for this job. Lionel was an outstanding student in college, in law school, and after that a practitioner for some years at Twin Falls with the firm of Chapman & Chapman. After that, he had experience in the service and then, since that time, he has practiced in California.

Lionel has an outstanding record in California in his particular field. I am sure that what he will tell us here will be of great help to us in our own state.

Without further ado, I give you Lionel Campbell. (Applause)

MR. CAMPBELL: Thank you, Glenn. President Ware, fellow members of the Bar, Ladies and Gentlemen. It has been over twenty-one years since I resided in this wonderful state. California is now my state but I still think of Idaho as my original home base. In the intervening years I have been back a number of times on business and to see my family. My mother and my brothers, Bob and Bill are still in Boise. But this visit has afforded me great satisfaction because it has enabled me to renew some friendships that have dated back, well, I don't like to think how long, but clear back to grade school days. Some men I have not seen in the practice for some twenty-one years and I was telling the boys at the Idaho alumni breakfast this morning, that so many of my contemporaries are now judges that when I meet anyone whom I knew twenty or more years ago, I say "How are you, Judge," to make sure that I am calling him by the right name.

As Glenn has pointed out, I have practiced for about the last fifteen years

in the Los Angeles Metropolitan area, which I think now has about six million people, but I still consider myself a small town lawyer and I look back to the three and one-half years that I practiced in Twin Falls before I went on active duty with the Army as probably the greatest training that I ever had in the practice of law. I look back, think of and appreciate the training, guidance and sharpening that I received in practicing before men like Judges Jim Porter, T. Bailey Lee, and with the Chapmans and against Jim Bothwell, Frank Stephan, Pat Parry and Harry Benoit, to mention only a few.

It might be of interest to you to know that in my experience in the Los Angeles area, whenever I have prepared my cases with the same thoroughness that was required to practice in the Twin Falls Bar, I have had little trouble and good results. I have always been grateful and thankful for that training.

As Glenn pointed out, I have practiced for about fourteen years in the Los Angeles area, specializing in personal injury and civil trial and appellate work and particularly in the field of medical negligence. Now, when I was asked to address you a few months ago, I told him I would be happy to do so if we could place these remarks on a bread and butter level rather than any academic discussion of malpractice generally, because I feel there are a number of books, and I am going to hand you a bibliography here before I finish, which you can consult at your leisure if and when you get one of these problems. But I have long believed that no speaker at a Bar meeting of any kind, is justified in taking the collective valuable time of a large number of lawyers unless he can give them some message to help them in their day-to-day practice. I suppose it is my Scotch background that makes me feel this way, but as I was commenting to Mr. Merrill here before we started, as we mature as lawyers it becomes more and more apparent that time itself is our most precious and valuable commodity in the practice of law. Thus, I hope that my comments as to what we are trying to do in the Los Angeles area to promote better understanding between the medical and legal professions, may assist you in similar efforts that you might be having in your local communities in Idaho and also I wish to share with you some of my experiences and observations in the course of evaluating several thousand of these cases and the actual handling of probably five hundred or six hundred of them in the past twelve years. If it is done, gentlemen, only in the hope that some thought or some suggestion that I have found helpful might be of some assistance to you when you undertake one of these cases.

Certainly, I don't pose as an expert in this field. Let us say I have had an unusual exposure to it. As I was driving down the San Diego freeway yesterday morning from my home in Van Nuys to International Airport and had the radio on, I heard a comment which I thought was quite apropos of experts. It seems that Joe who ran a small grocery store, was not used to big chain methods, and he had a cracker barrel type philosophy. A customer came in to him and said, after he had purchased a four-cent stamp, a small purchase, he said, "Joe, what's wrong with the world today?" Joe settled back and put his pipe in his mouth and said, "You know, there's too many experts." He said: "The experts are so busy telling us how to do things, that there's no one left to do the things that must be done." So, I hope you will not feel that I am trying to pose as an expert here, but only to share with you some experiences.

Now, some of you may have wondered, and Glenn touched on it in the

introduction, why I chose the title "The Handling of the Medical Negligence Case" rather than "The Handling of the Medical Malpractice Case." Well this was done with deliberation.

We have found in the Los Angeles area that the word "malpractice" carries a connotation of misconduct. It is sometimes felt, particularly by jurors, that it carries the meaning of criminal conduct or that the doctor has committed a willful act or that he probably will lose his license to practice medicine or will be kicked off the hospital staff. Now, this connotation is unfair, both to the plaintiff and to the doctor himself. So it is our belief that from the time of filing of the action, you should entitle and treat your case as an action for Medical Negligence. Now it should be pleaded, handled and discussed at all stages as a medical negligence case and to bring out—and I will touch on this in more detail a little later—that this is simply a species of negligence to which the law has ascribed the word malpractice, but essentially it is substantially like all other negligence cases.

If the word malpractice is eliminated, then you will remove the sting and stigma of guilt or misconduct, as it rightfully should be removed. We are making an effort in California to eliminate this word from the Book of Approved Jury Instructions, which I am sure some of you are familiar with. It is a standard book put out by a committee of judges and lawyers in Los Angeles County and used throughout the State of California. Some of those instructions on malpractice still use the word, "Malpractice," and we are going to try to see if perhaps the word cannot be eliminated, so that when the judge gives the jury instructions, he will be talking about negligence rather than malpractice.

As a sidelight, when I take a deposition of a doctor, at the time when I am asking him about his understanding of the nature of the proceedings, that is, if he knows what a deposition is, I usually ask him something like this: "Now doctor, you understand that this is not a criminal proceeding or not a disciplinary proceeding or anything of that nature?" and he will have to answer, "yes" and I then tell him, "You understand that this is just a simple negligence case where the plaintiff has alleged medical negligence on your part and you have denied it in your pleadings?"

Now, you might wonder why you would ask that in your deposition at all. Sometimes you may have occasion to read the part of or the whole deposition in evidence. We have a right to do so under California practice and, of course, if you do so, this is one more chance for you to bring home to the jury that this is not a quasi-criminal or disciplinary proceeding but only a negligence case.

Now throughout this whole discussion, ladies and gentlemen, I think that the theme of the presentation of one of these cases is that you've got to make the jury feel that this is not a prosecution and it is not a disciplinary action. You have got to dispel the idea that the doctor is being picked on, so to speak, and to bring forth the idea that this is just another kind of negligence case. I am going to advert to this more a little later.

Keeping in mind the bread and butter theme, ladies and gentlemen, I am going to try to break this presentation down, and I am sure that I will not be able to finish in the time that has been allotted to me, into three parts. First: The evaluation of the medical negligence case, or, should the case be in your

office at all? Second: The preparation of a medical negligence case. Particularly how it differs from the preparation of your ordinary automobile accident or other type of negligence case. And third: The trial of the medical negligence case, with particular emphasis on the differences and distinctions between the ordinary personal injury case. I am sure you will forgive me if time does not permit the discussion of the trial aspects, because I think that this phase will not be as vital to you because all of you, I am sure, have had considerable trial experience. There is a wealth of printed material and seminar discussions that are available to all of us on trial techniques and the practice of handling negligence cases generally. So, if I get time, I will point out a few of the major differences between handling the medical negligence case and the automobile, slip-and-fall, and the other well recognized types of cases.

I.

EVALUATION OF MEDICAL NEGLIGENCE CASE

It's an understatement that the medical negligence case is still the most difficult of the personal injury cases to evaluate, prepare and win. Likewise, it is the most expensive case to handle from the standpoint of the pure expenditure of time. I think there is no field in the law where more careful analysis and evaluation before undertaking a case should be made, at least before you are committed to trial. The problem is becoming more acute nation-wide because of the great increase in the number of malpractice cases that are filed, particularly in the large metropolitan areas such as Los Angeles.

It might be interesting to you, however, to know that really this is not a new problem at all. Back in 1881 a gentleman named Elwell, in a medical-legal treatise on medical malpractice, wrote these words—I am going to quote them because you will think you are hearing someone speak today: "So common an occurrence is that for the surgical treatment from the oldest and best physicians and surgeons in general practice to be called and questioned and overhauled in Courts of Justice, that there is, at this time, a general feeling of uneasiness and conviction that the business is, at best, very dangerous so far as property and reputation is concerned. The result is that some of the most thoroughly qualified medical men utterly refuse to attend surgical cases, confining their practice to that of medicine alone. They say, the compensation usually attending the practice of surgery does not warrant a man of property in exposing himself to the probability of having, sooner or later, to defend his treatment in an action for malpractice." Thus it is seen that the problem is not novel, but only an old one magnified by the fact that there are more people and more doctors and more litigation.

I haven't any reliable figures, and I doubt that anyone could find any completely accurate figures, but it's estimated that a total of approximately 500 of these cases will be filed in Los Angeles County in the year 1962. Excluding Saturdays, Sundays and holidays, that would be about two cases a court day. That, of course, does not include cases settled without filing suit, concerning which no figures would be available, which would be an estimated additional 300.

Some of these cases are not meritorious and should never have been filed. They will be settled for peanuts or be voluntarily dismissed later when the

attorney finds out there is no case, or on motion of defendant for lack of prosecution after a two-, three-, or five-year period.

A.

Reason for Increase in Malpractice Cases

Much of this points to poor evaluation at the outset. Now, why is evaluation so vital in this field? Why has there been such an increase in these cases? I think it is a known fact, and this is not only my opinion, that the medical schools have not kept pace and turned out graduates in proportion to the population explosion we have had after World War II. As a result of the demand, there are still too few doctors to take proper care of all the patients in any given community. To try to meet this demand, many doctors have become commercial and put the dollar sign ahead of the best interests and care of their patients. They try to handle too many patients and take on too big a volume of practice. Sooner or later, in doing that, the doctor either won't take or won't be able physically or time-wise to take the necessary time to examine, diagnose, care for and treat his patients properly. He rushes them in and rushes them out, seeing 40 to 50 patients a day. In the course of several years with this volume, because of human limitations, not because the doctor may not be competent, not because he may not be properly trained and with the skill and knowledge that he should possess as a practicing physician, but simply because he takes on too much work, he'll overlook some phase of a patient's history, examination or treatment, which will result in injury and a lawsuit. Until there are more doctors (and I think this is the heart of the problem) who can take more time with each patient and can establish better doctor-patient relationships, concerning their bills and untoward results or complications, and discussing the same frankly with the patient instead of turning the bill over to the collection agency, or evading and covering up concerning a bad result, I think we can expect no decrease but probably an increase in medical malpractice litigation.

Let me tell you, gentlemen, parenthetically, that the doctors are not going to be the only ones on the malpractice totem pole. I predict to you that in the coming years, you will see more and more *legal* malpractice cases. Heaven forbid, but I think it is coming, particularly where an attorney attempts to handle a case in a specialty field without proper qualifications, experience and training.

B.

Size of Community as a Factor

Insofar as the size of community is concerned, I think it is even more important that you properly evaluate the case in the smaller communities than in the large urban community. Ordinarily, when a case is filed in a community the size of metropolitan Los Angeles County, there is very little publicity given to the case. Very few people hear of it, unless there is a plaintiff's verdict and a large award. As a result, only the court personnel and the defense fraternity are aware that the doctor has been sued and what the outcome of the suit was. In smaller communities in California, and I presume the same would be true in Idaho, a malpractice case against a local doctor will usually get local publicity regardless of the outcome, usually when it is filed.

Then during the course of the trial, publicity will be given day to day, as

well as the final outcome. Sometimes the news stories may be slanted to help the doctor defendant. There is no way you can stop a juror from reading the paper.

C.

Economic Considerations in Evaluation and Selection

Now, the third reason why I suggest that you be selective in these cases, is purely economic. My daily time charts, that I keep religiously on all cases, show that for every hour that I customarily spend in preparation and trial of the average automobile or slip-and-fall cases, I will spend from two to three hours on an average medical negligence case. Now this is due partly to the fact that customarily considerable medical research is involved in a medical negligence case, as well as the extra time that you have to expend in interviewing doctors and medical experts, plus the customary length of time in an average case, which is usually never less than ten court days. I have seen them go up as high as twenty-five to thirty court days on a substantial case. With a maximum of fourteen effective working hours in a day, you can't afford to handle a borderline medical negligence case in your office.

I would say after you have evaluated the case, if it does not have a potential of at least $10,000, you should look it over very carefully and probably not undertake it. I will discuss more of this later.

Furthermore, you've got to check to see whether the doctor has any insurance coverage, because obviously, if you go the whole route and get a good result and find out the doctor has no insurance and has no attachable assets, no property to satisfy the judgment, you've got another job on your hands collecting what you have earned. So this is something that should be ascertained as early and quickly as possible. Sometimes you contact the doctor and he will give you the name of his insurance carrier and the carrier may give you the limits of the policy. Under California law, and I presume the same is true in Idaho, we are now entitled to ask in discovery procedures through interrogatories and depositions, the name of the carrier, the limits of liability and who has custody and possession of the policy.

Formerly, until about ten years ago, carriers were writing policies as low as $2500.00. I think Medical Protective used to write in multiples of $2500.00, to a maximum of $7500.00. However, there has been a gradual trend upwards in the last ten years and more often than not, especially for surgeons in all fields and radiologists and other high exposure specialties, the coverage will be at least $100,000.00 for one occurrence and $300,000.00 for more than one in one year. I have a pending case where some of the doctors involved carry $300,000-$900,000, and a large medical center defendant has at least $500,000, so in this particular case we have over $1,500,000 worth of coverage which is in excess, I assure you, of what I ever hope to recover in this case, even though this man does have a serious injury, evaluated at between $150,000 and $200,000.

Now, generally, if they have a small policy, they are quite willing to tell you about it if you have a good liability case, in order to attempt to get the case settled within the policy limits.

But I urge you, one way or another, to contact either the doctor himself or his carrier or his attorney and try to find out what the coverage is. If he hasn't any insurance and there appear to be problems of collecting any judgment, I would say you had better give it a second look.

D.

Evaluation of Potential Plaintiff

Another reason why these cases should be evaluated very carefully is that you must remember that your potential client is a person who is unhappy with another professional man. If you don't get him a fairly good recovery, something within what you have forecast (and you shouldn't forecast the moon) and he has to be satisfied with a minimum settlement or the case may be dismissed, then you may have a disgruntled client on your hands. I will later discuss with you how to protect yourself against such contingencies in the Attorney's Retainer Agreement when you sign the client up.

E.

Refusal By Another Attorney Not Always Conclusive

Because another attorney has turned down a case (and I think you will run into this more often in malpractice cases due to the reluctance of many attorneys to handle a case against a doctor), doesn't necessarily mean that it's not meritorious. If the claimed injuries are serious and in the event of a successful outcome, substantial recovery is expected, and if it appears that some aspects of the case have not occurred to the previous attorney, it might be worth undertaking. I might point out just a couple of cases that will illustrate what sometimes can be done here, taken from my own experience, if you will pardon me.

One was a case involving a thyroid surgery which resulted in injury to the left recurrent laryngeal nerve and causing a vocal chord paralysis in a 34-year old accountant. Now this case had been turned by about five very competent and highly qualified personal injury lawyers in the Los Angeles area, on various grounds, but mainly they felt it would be too difficult to get a medical expert to testify as to proximate cause and there was a possible defense of the statute of limitations. I thought that it was a res ipsa case in part, but I did not think we could safely proceed to trial without an expert doctor on causation. After contacting by actual count fourteen qualified surgeons (and you may well imagine how much time this took) I finally found a board-certified general surgeon down in the Long Beach area who was willing to testify on the question of proximate cause, that is, that the injury to the vocal chords, the paralysis of the vocal chords, did result from the injury to the left recurrent laryngeal nerve which had in fact been injured during the thyroid surgery. This case resulted in a jury verdict of $138,000.00, which happened to be the largest on record in the United States for this particular type of injury. You will find this case recorded in *Modern Damages* by Belli, 1961 Supplement (pocket part) Vol. I, page 18, and Vol. II, page 183. I was told afterwards that if I had turned down the case the client was going to abandon his claim, because he had been refused by so many competent counsel.

Another instance where seven or eight attorneys turned down a case which was brought into my office, involved a staphylococcus infection that had broken

out on the back of a 35-year old woman following a laminectomy surgery which had been done by one of the leading neuro-surgeons in the State of California. This doctor was well known in the community and some of the refusing attorneys knew him personally and furthermore felt it would be impossible to get another neuro-surgeon to testify against this particular doctor. But, in any event, it looked too difficult to most of them, because of the difficulty in proving that the staphylococcus was due to any break in sterile techniques. Now, it occurred to me that the real negligence in this case was not in the failure to maintain sterile techniques, but was in doing a laminectomy surgery at all where there was evidence that she had a urinary infection when she came into the hospital for which she was treated, among other things, with antibiotics, and the day before surgery she had a white blood count of 15,300, which would be some indication of presence of infection and on that basis surgery would be contra-indicated.

I was able to find a doctor, a board-certified neuro-surgeon, who said that in his opinion this thing happened as follows: That there were some dormant staphylococci bugs lying in the pelvis of the kidney and that upon the laminectomy being performed that the resulting lowering of the resistance of the patient from the surgery caused these bugs to flare up and to get into the blood stream, and then break out in abscesses on the patient's back. This case resulted in a settlement of about $40,000 after a couple of weeks of trial. The defendant hospital was let out of the case, because we were unable, as I am going to point out later, to establish that the staphylococcus infection was due to any break in sterile techniques by hospital employees. It is virtually impossible under present law, to get to a jury in that type of a case without proving specific acts of negligence on the part of the hospital employees or agents. In short, res ipsa loquitur does not ordinarily apply to a table infection during surgery, although it may apply to an infection from an IV or an IM injection in the hospital.

F.

Credibility of Plaintiff—Conversations With Doctor

In the weeding and sifting out process in these cases, I think it is most important to evaluate your client. Presentability and believability of your plaintiff in this type of case, I think, is more important than any other type in the law. In almost every medical negligence case there will be material conversations between the patient and the defendant-doctor, going to the heart of the matter. Such conversations may actually establish admissions which will get you to a jury and it might be the patient's word against the doctor's word. You should determine whether the potential plaintiff is believable when you have your initial interview. If there are certain conversations and you feel that the patient's version does not meet the test of reasonableness and the jury will probably not give them much weight, then this may be another reason why you shouldn't take the case. But it is important, because in the case of *Walter vs. England*, 130 Cal. App. 676, 24P. 2d 930, there was a statement made by the defendant-doctor that he made a mistake and the needle should be inserted on either side of a cartilage, which was admittedly not done, and that was held to be admissible evidence of fault or negligence.

I am going to give you a couple or more illustrations because this is the type of thing you might look for when you take your initial history to evaluate the case.

In another case in my office one of the defendant doctors came to the patient's room after a surgical procedure by two other defendant doctors at a hospital, and said to the patient's wife, thinking the patient was asleep (but he happened to be awake) and within the patient's hearing: "Well, the boys goofed again." This will be offered as evidence to indicate an admission against interest against the hospital of whom each doctor was an agent.

In still another case, it is contended by plaintiff that a neuro-surgeon poked a hole in the esophagus of one of my clients during an esophagoscopy, which most of you know is a procedure where a tube is inserted down through the throat into the esophagus to visualize the condition of the esophagus and to see if there is anything wrong there. It is merely a diagnostic procedure. Well, after this particular procedure, the doctor came up to the patient's room some days later, put his head in the room and said to the patient, in substance: "Well, I guess you would like to shoot me, wouldn't you?" This is another instance of evidence admissible on the issue of negligence to show that the doctor felt that he had done something wrong.

Another example is found in the case of *Scott vs. Sciaroni*, 66 Cal. 577, 226 P. 2d 827 (1924), where a family member testified that the doctor said that, "It was his fault that she was in the condition she was in." Held: This statement if believed by the jury, was equivalent to an admission of negligence sufficient to take the case to the jury, although the doctor denied making the statement, it being a question of fact for the jury.

In the case of *Wickoff vs. James*, 159 Cal. App. 2d 664, 324 P. 2d 361 (1958), the plaintiff testified that he heard the defendant-doctor make the following extrajudicial admission while walking down the hall in the hospital, "Boy, I sure made a mess of things." That was the only evidence presented as to the defendant's negligence and it was held on appeal by our Appellate Court that this was sufficient to establish a prima facia case and warranted submission of the case to a jury, and that a non-suit was improper.

So, that's something to look for, both in the statement of your own client and also in taking the statements of the members of the family or others who may have spoken to the doctor.

C.

Avoid Crusading in Malpractice Cases

Now, if the client shows some undue animosity toward the doctor, beyond the fact that he claims to have been injured, such as being disgruntled over the amount of the bill or some slight inattention by the doctor, or there is some kind of a personality clash, I think you should look at such cases with close scrutiny. Unless you have some good elements of negligence and the case is otherwise meritorius, it is better to pass these cases up as the client may give you trouble.

You may have some client come in to you and say, "I have been hurt by this doctor. I want to go in and teach him a lesson, so he won't hurt someone else." Ordinarily this is a red flag. I assure you, gentlemen, that this is not an area to become a crusader, even if the client offers to pay you on a time or per diem basis for your efforts, because unless there is a good, sustainable case on the merits, the case should not be taken.

II

PREPARATION OF THE MEDICAL NEGLIGENCE CASE

Once having decided to take the case, the next step is the execution of the Attorney's Retainer Agreement, a specially prepared document, copies of which I will make available to you at the close of this address. The model Agreement containing three pages, based on a number of years of practical experience, is designed to anticipate the most commonly recurring problems arising out of the attorney-client relationship in a malpractice case. Among other things, you will see that it reduces to writing some of the major difficulties in this type of case, the fact that the attorney does not guarantee to get an expert witness, and that the attorney has the right to withdraw if after discovery procedures he feels that the case is not sufficiently meritorious to justify further time and expense. There are other protective provisions in the contract which speak for themselves, and which, if time permits, I will later discuss with you. Suffice it to say now, that I make sure the client reads all three pages, usually in my presence, and is given a chance to ask questions concerning the meaning of any of the provisions, and then he signs the same in two places.

I should like now to consider with you some of the key points in the preparation of one of these cases for deposition and trial, as well as evaluation.

A.

Detailed History Mandatory

Insofar as the history is concerned, I would say nowhere in the personal injury practice is it more essential and important to get a full and detailed history as in the medical negligence case. I suggest that this never be entrusted to an investigator, because the investigator does not know the nuances and refinements in getting at the truth and judging the client that you will know after some experience with this type of litigation. I suggest that you do not entrust this important function even to a junior in your office, unless he has had some experience, because the taking of this statement is vital. It is not uncommon for me to take five or six hours on an important case for a client's history. You should get all the medical history, the surgeries and prior complaints that he has had and prior hospitalizations, all documented, dated and recorded. You can be sure in the average medical negligence case that *all* the past health and injury problems and complaints and hospitalizations of this client will be gone into fully by opposing counsel. You had better find out about all of them before he gives his deposition, and certainly before you get to trial. After the history is transcribed in duplicate, double-spaced, I have the client go over it again at home carefully and make any corrections or changes or additions in ink, initialing the same. Then I have the client sign this statement below the words: "I have read the above statement, know the contents thereof, and the same is true to the best of my knowledge and belief."

You may wonder why go to all this bother with your own client. The answer is not only for thoroughness and proper preparation, but also for self-protection. Several years ago I had a client who in answer to my inquiry on the initial history, my specific inquiry, denied having any subsequent injuries to the part of his body involved in the lawsuit after the injury complained of was done by the

defendant surgeon. At the time of the trial I learned through channels as sometimes we learn, extrajudicial channels, that the other side intended to introduce a doctor who had indeed seen and treated the plaintiff for a subsequent injury to the same part of the body, and the doctor was prepared to testify that the proximate cause, or at least a major contributing cause, to the plaintiff's present disability was this subsequent injury and not the initial surgery.

Upon confirming these facts to be accurate by direct conversation with a referring doctor, I confronted my client with the situation, pointing out that he had denied to me in writing that he had ever had subsequent injuries. He was very willing and agreeable to accept a reasonable settlement below my estimation of what we should have received, except for this surprise evidence—and we bailed out by the skin of our teeth. Otherwise, that case probably would have been lost and it would have been a great loss of time and expense for both client and me.

B.

Hospital and Medical Records

If, before you file, you can get copies of the hospital and medical records, that is very essential. It may sound elementary to some of you, but in this type of case, if any hospitalization is involved, you must know what went on there, and for the further reason that you must have copies of the hospital records to show to your own expert doctor when you are asking him later for an opinion. Additionally, of course, in a death case, you obtain copies of the autopsy report, if any, and copy of the death certificate.

Ordinarily, a doctor won't let you look at his own records because he'll call up his carrier and tell him that there has been a claim asserted. The first thing he is told is, "Don't show your records to anyone until we tell you or give you permission." The same will be true in a great majority of cases with regard to hospitals. I don't know what luck you have up here in getting copies of records, but hospital personnel have been well indoctrinated and oriented down in our area so that anytime anyone comes in and asks for a record, why the first thing they say is they will have to get the doctor's permission and they will give any kind of excuse to keep even the patient from seeing his own records. Ordinarily you can't get them without a subpoena duces tecum re deposition.

The Legal-Medical Relations Committee of the Los Angeles Bar Association, of which I happen to be chairman this year, and which is part of a joint committee composed of members from the Bar and a committee from the Los Angeles County Medical Association, is working on a plan now to see whether through some voluntary cooperation with the insurance carriers of hospitals, plaintiff's attorney will be able to obtain copies of the hospital records at the time the attorney is evaluating the case and before the suit is filed, with the thought that there may be cases where, after the hospitals records are obtained, the attorney will find he doesn't have a case and save everyone a lot of time, trouble and expense. It so happens that Farmers' Insurance now carries probably 75% or 80% of all hospitals in the Southern California area, and so we have usually only one carrier and one firm of attorneys to deal with on hospitals. As a matter of fact, my committee is in the process of trying to work out a plan, I

think this was mentioned in my first discussion with Glenn and I want to touch on it if time allows, where we will set up a panel of doctors and lawyers, who will sit voluntarily and go over some of these cases before we file them, a pre-filing type of panel. The attorneys for plaintiff and defense attorneys will come in and present their records and argue their respective positions. Probably the client and the doctor will not be there, but the attorneys will present their case and defense. The panel, composed of lawyers experienced in the field and doctors experienced in the specialty involved, will then give an opinion as to whether there was probable negligence or no negligence or doubtful negligence. It might, we think, help the plaintiffs' attorneys weed out unmeritorious cases and save a lot of time and trouble. Whether we are going to be successful in setting up such type of panel, I don't know. It's in the mill right now and I am in favor of it, because I feel that if sincere and competent men on this panel (and you might give this consideration in your own communities) find probable negligence, probably the case can be settled which will save considerable time and expense, as well as blood, sweat and tears.

Here is one method I have found helpful sometimes in getting copies of hospital records. If your client has an industrial accident case or disability insurance, he may request his own carrier to obtain copies of the records for purposes of his own insurance or industrial accident case. The hospital sometimes will release them to the other carrier and then you get them photostated and you have them.

C.

Discussion of Case with Doctor

There is some difference of opinion about discussing the matter with defendant-doctor before you file your case. I personally do not feel that this will gain you anything in most instances. In the smaller communities where all the attorneys know all the doctors, perhaps this might have some merit, where you go to the doctor and explain to him what the asserted claim is and ask to see his records, and maybe he'd show you his records and from his records you'd find that perhaps the case doesn't look as good as you were led to believe, assuming the records were properly kept. Ordinarily, very little is accomplished except, as I say, to find out whether the doctor is insured. There's been only one or two cases in my experience where matters have been settled by contacting the doctor and without filing suit. One in particular comes to mind and you will see why we were able to do it.

This particular doctor had done some surgery on this man and he'd written a report to the employer of the injured party explaining the surgery and commenting on when he would be able to resume his full duties. I will read you just one paragraph here that enabled me to get a substantial settlement without filing suit. "On July 9, 1957, in order to clear a long-standing sciatic neuritis in the left sciatic nerve, the left sciatic nerve was exposed beneath the gluteal and a neurolysis performed. In the course of freeing dense adhesions just below the sciatic notch, the nerve of the gluteus medius muscle was inadvertently severed. Shortly thereafter the patient started walking, a distinct gluteus medius limp was noticed, particularly at the moment of full weight carrying." Well, of course, upon this letter being presented to the insurance carrier, we sat down and had a con-

ference. The case was settled, but that's the exception. I don't think you will accomplish much by talking to the doctor other than as I have mentioned.

Occasionally when I think I have a fairly good case, I will send him a demand letter. I usually get a short paragraph letter back from his carrier saying, "We are investigating the matter and will let you know just as soon as our investigation is completed." About three months later I will get another even shorter letter advising, "We have investigated the matter and find there is no merit to the claim." In the meantime, the carrier has built up a good investigation file and I may have delayed some of my investigation, hoping the case will be settled without additional expense. Thus, I have lost two or three months in getting the case on the calendar. Hence it is ordinarily best to file and start your own discovery as early as possible. You can always talk settlement later.

After the prospective client has given you the history and you have obtained as many records as you can, then of course you have got to make judgments as to whether or not you are going to take the case or at least to file and then to further evaluate the matter. Then you must, of course, make a thorough check of all the medical aspects of the prospective case, and thoroughly research and read and digest every medical article on that case that you can find. I mean this seriously, gentlemen, because when you are cross-examining, (and this is no news to you) in a medical negligence case, a doctor in a specific field in surgery, diagnosis, care and treatment, you must know at least as much, and probably more, than that doctor does on this particular phase of medicine. In the heat of either deposition or trial, when he throws something back at you on cross-examination, you've got to know whether it's medically correct and sound, and if it isn't, then confront him immediately with what is correct and proper.

D.

Bibliography of Texts and Publications

In your evaluation and preparation of the case, there are certain texts relating to what is proper medicine, and errors in surgery, and so forth that will be very helpful for you to have available. As you no doubt know, doctors haven't published too many treatises concerning their mistakes, but strangely enough there are a few, and those will be of great assistance to you.

Rather than my reading these to you, I have prepared and mimeographed about 120 copies of what I have titled, "Bibliography of Suggested General References in the Evaluation and Preparation of the Medical Malpractice Case." I will have someone pass them out to you now. You will find in here such references as, "Surgical Errors and Safeguards" by Max Thorek, an excellent book. This book was written for doctors, telling them what to avoid in surgery and what are the pitfalls, where they may make a mistake. If your particular case deals in any area of any of those references, you've got it made right there because it is all written down and explained, including the anatomy involved and drawings. Thorek was a tremendous man, a true humanitarian, and he wrote this to help doctors help their patients, and not to promote malpractice suits. Nevertheless, if Thorek says a certain error will customarily be made if you don't move a nerve away in cutting in a certain area and a doctor cuts the nerve instead of moving it away, as sometimes occurs in hernia surgery, for example, you may

have some evidence as a starting point that the standard of practice has not been met.

There are a number of others in this Bibliography that are found in most medical libraries. Probably doctors you know can arrange to let you have some of them. I notice frequently in doctor's offices this book by Thorek, "Surgical Errors and Safeguards." Also, number two on that list, "Surgical Clinics of North America, Pitfalls and Errors in Surgery" is excellent. "Anesthetic Accidents" is another one if you have an anaesthesia case, or a cardiac arrest case resulting from improper administration of anesthesia. You'll get a lot of help out of that text. Also, "A Study of Deaths Associated With Anesthesia and Surgery" by Beecher & Todd is another well-written book of high quality.

Drug cases, as you all know, are getting to be more and more prevalent. Administration of antibiotics can result in serious injuries. I have two cases pending in my office now for serious injuries allegedly due to the administraton of a drug called MER-29, used in treating high cholesterol cases. It is supposed to keep your cholestrol count down. Incidentally, I understand the Merrill Company has now withdrawn the product from the market. Complaints were received that women were losing their hair, and suffering damage to their eyes and so forth. Well, I just cite that as one of the areas involving new drugs.

If you get a copy of "New and Non-Official Drugs," put out by the A.M.A., and the "National Formulary" published by the American Pharmaceutical Association, you will have, ladies and gentlemen, a long list which gives you purity standards in drugs, together with the United States Dispensatory, which contains references to the actual uses of drugs, and which will tell you what dosage and what action is expected from a drug and the complications. Another standard book is "The Physician's Desk Reference," a red book with which I am sure some of you are familiar. You see it in practically every doctor's office. It is put out by Medical Economics, Inc. That book will tell you all about the manufacturers' brochure, the uses, indications and contra-indications of the most commonly used drugs.

Another good book, a little hand book, a quick reference to various diseases and how to diagnose them and their regular treatment, both by drugs and otherwise, is the "Merck Manual." And then, finally, if you want a scholarly as well as practical discussion of negligence of professional men generally, there is a fine book called, "Professional Negligence." It came out of the Vanderbilt University School of Law, edited by Thomas G. Roady and William H. Anderson, first as a law review, then as a book. It contains articles written by a number of other lawyers and doctors and covers discussions on negligence pertaining to all of the professions, including accountants and pharmacists, as well as doctors and attorneys. This reference will be very helpful to you also in handling a medical negligence case, since it contains a worthwhile article by my good friend and able attorney from San Francisco, Mr. Fitzgerald-Ames, Sr.

In the time limit we have here I can't present the limitless number of factual situations which you might meet. There is another reference that I didn't include in this bibliography, which is A.L.R. and A.L.R. 2d, where you will find many excellent annotations on malpractice. Also in 38 California Jurisprudence, Sections 65-109, you will find a number of different factual situations summarized.

Now I would like to point up for you a few highlights on the three main

areas where negligence usually occurs, namely, diagnosis, treatment and surgery to give you a few suggestions as to what you might look for in evaluation and preparation.

E.

Errors in Diagnosis

Errors in diagnosis are generally the most difficult to establish. Since medicine is not an exact science, certain complaints and symptoms may imply several types of disease or pathology. In some instances it may be difficult to make a differential diagnosis, so where due care and diligence has been exercised, failure to diagnose correctly does not ordinarily render the practitioner liable. On the other hand where we have a positive picture of several symptoms, and you will have to check your medical references on this in each case and discuss it with your own doctor, which present a classical picture of any type of disease, pathology, or condition in the body, and if the doctor fails promptly to recognize and diagnose it, then he may be held liable, if injury results from the failure to correctly diagnose. Now let's move along here and look at some of the recurring types of cases which you might see in your office.

1.

Pregnancy Cases

A woman may come in having missed a period or more with a presenting lower abdominal swelling. The doctor takes a history, does a pelvic and checks the area of the uterus and ovaries. Then he frequently, to rule out pregnancy, orders what we refer to as the Aschheim-Zondek test, usually shortened to the AZ test. But, at any rate, this is a test that is done on frogs. The patient takes a urine sample to the laboratory and the test comes back negative for pregnancy. The doctor tells the woman she is not pregnant and that she probably has a fast growing tumor and recommends exploratory surgery to find out the cause of the swelling. So either he, or a surgeon he may call in, does an exploratory laparotomy on the woman and finds no tumor and nothing except a normal pregnancy, perhaps three to five months along. The woman is sewed up, and as a result of the trauma of the surgery, a miscarriage may result or the woman may suffer some other consequential injury. Obviously there has been an error in the diagnosis. The stock defense to these cases is: "Well, I sent it over to the lab and the lab brought back a negative frog test." That's a pretty persuasive argument, because the doctor, or his expert, will get on the stand and say that the AZ test is around 95%. (I had one of them say 98%) reliable. Therefore, when a doctor gets a negative AZ test, he is justified in ruling out pregnancy and performing exploratory laparotomy.

The answer to that, I suggest to you, is that you explore to determine whether all the prerequisites to a reliable test have been met. You may find that the patient was not properly instructed as to taking the urine specimen. You may find that it wasn't this lady's urine at all that had been examined, and someone mixed up the bottles at the laboratory. You may find furthermore that the frog used in the test wasn't in good health. The frog must be in proper health to insure reliability of the test. The doctor defends on the ground that he is justi-

fied in relying on the accuracy of the lab report. Thus, it is necessary in these cases to join the laboratory and the owners of the laboratory, and try to establish by deposition that the frog wasn't in good health or that they ran only one test on one frog without rechecking, which is not considered to be reliable.

Don't give up if you get one with a negative AZ test, because somewhere along the line you may be able to show that even if negligence was not committed in the taking, there was a culpable error in reporting the test and getting the report back to the doctor, reporting or recording it as negative when it was actually found to be positive.

2.

Cancer Cases

Another recurring field, of course, is in the area of cancer. Failure to diagnose cancer is one of the most difficult cases to sustain and these ought to be screened very carefully. Even where symptoms may be present, we know cancer can look like many other diseases in the body. The contention will be made that: Well, even though had I diagnosed it properly, the result would have been the same—the patient would have died eventually anyway.

In view of the exhaustive public campaign on cancer recognition and prevention, and the tremendous amount of research that has taken place since World War II, there are certain types of symptoms and complaints that would be diagnostic which I think would justify a complaint against the doctor.

For example, where a woman has a lump in the breast, as happened in one actual case, which the doctor discounted as a benign tumor without taking a biopsy. It seems as if this would be a grossly obvious case, but it actually happened without a biopsy being taken. Later, with metastasis the malignancy spread into the lymph glands and the chest of the patient, and she died. The case was settled on the failure to take a biopsy and remove the growth when at least there would have been some probability that she would have survived. I think you can say now that any unusual swelling in any part of the body in any patient should be diagnostic to the general practitioner or any doctor and he should consider cancer as one of the possibilities, thereafter making sufficient examination and diagnostic tests to either rule it in or out.

For example, I have a case (and I hope you will pardon me again for drawing on my own experience), where a 63-year old man was treated by an osteopath with medication and manipulation of his back for about six to eight months, when the man actually had cancer. The malignancy had started to invade the bone when he first went to the osteopath, and it was discovered shortly before he died that he had cancer which was too late for any treatment, heroic or otherwise.

3.

Subacute Bacterial Endocarditis

There are certain other diseases which are less common, but have classical symptoms. For example, there is a condition known as subacute bacterial endocarditis. That sounds like a medical lecture, but it's a disease where a bug gets into the blood stream and attaches to the endocardium in the heart producing

inflammation. It may multiply and grow, a piece of it chip off and get into the blood stream and go to the brain, plug up a blood vessel and you are in trouble. This is not a common disease, but it is a disease that can be easily diagnosed if the doctor remembers his basic training and knows what to look for. There are certain classical symptoms, such as, rise and fall of fever at night and morning, a characteristic tiredness and swelling in the toes and so forth. Any competent doctor who knows his business can diagnose it.

Several years ago I had one of these cases, involving a man who had all these classical symptoms of subacute bacterial endocarditis, right out of the textbook, one, two, three, four. Yet, for seven or eight weeks a medical group treated the condition as virus and common cold and did not give him proper penicillin therapy or order bed rest, which was the recognized treatment. Finally in desperation he went down to the Long Beach Naval Hospital and within two hours a resident at that hospital, a youngster who had been out of medical school only about two years, made a tentative diagnosis of subacute bacterial endocarditis and immediately started the penicillin therapy and bed rest. But it was too late. The patient suffered a clot on the brain as large as a baseball, requiring performance of a frontal lobotomy to remove it. The patient ended up with a partially disabling paralysis, where he drags one leg slightly. I was able to settle that case for $49,500.00 in the midst of trial.

The defense attorney told me afterwards that one of the motivating factors in settlement of this case was the reluctance of the principal doctor to take the stand when I was about to call him under rules of cross-examination, and explain to the jury why certain changes had been made in the office records after suit had been filed. Moral: "Doctoring up the records" does not pay.

4.

Appendicitis—Pneumonia

Failure to diagnose such recognized diseases as pneumonia or appendicitis are usually meritorious. A doctor should be able correctly and promptly to diagnose appendicitis. Likewise, he should be able to recognize pneumonia. Injuries resulting from a failure to meet the standard in either of these respects are usually compensable.

I had an appendicitis case involving a 45-year old woman, where the doctor who was treating the patient was away and she was referred to another doctor. The second doctor examined the patient but he failed properly to report everything he found. The original treating doctor thereafter for several weeks failed even to follow up on what was reported to him. Thus woman suffered a ruptured appendix and an overwhelming abscess and peritonitis, requiring three subsequent surgeries, which resulted in a substantial settlement. No diagnosis of appendicitis was ever made until after the patient became an emergency, although the common symptoms were present.

5.

X-Rays

You may still occasionally run into cases of failure to take an X-ray where the history indicates a possibility of a fracture, although certainly these are not

as common as they were some years ago. It is established in California, and I am sure it is the same in Idaho, that failure to take an X-ray is negligence almost to the point of the court taking judicial notice. One of the leading cases is *Agnew vs. Larson,* 218 97 Cal. App. 2d 557, P. 2d 66. If there is any indication of an injury that might cause trauma, or injury to the bone, and the doctor fails to take an X-ray, and damage occurs, you've got a case and you don't need an expert. I happened to try the *Agnew case* on the third retrial and we got a judgment of about $38,000.00 for an untreated fractured hip, which was appealed and sustained.

F.

Negligence in Treatment

I am going to have to go fast here. Usually more meritorious cases arise in this category than in the diagnostic type of cases. If a doctor fails to recognize a certain type of condition which requires a certain treatment he may also be liable in failing to institute the correct treatment.

1.

Burn Cases

You'll meet a lot of burn cases of varying nature and cause. Many of them result from a hot water bottle and hot compresses while the patient is helpless or unconscious, or from X-ray, infra-red lamp or diathermy. If those cases can be correctly appraised as to value of the injuries, ordinarily they can be settled.

I recall an interesting case recently where a woman, who was suspected of having amoebic dysentery, was treated in a hospital. She had to use a bedpan about fifteen to twenty times a day because of dysentery. The hospital had used a caustic disinfectant on this bedpan, but they did not properly remove all of the disinfectant after each use. As a result she sustained a burn in the shape of the bedpan on her lower anatomy. Since it was not a disfigurement ordinarily exposed to the public, the damages were lessened considerably, but nevertheless we got a settlement of several thousand dollars. That was called the Hot Bedpan case.

2.

X-ray Burns

Over-exposure to X-rays or an overdose of X-rays is a recurring type of case. These should be checked very carefully because a stock defense is that there is a calculated risk in administering the therapy, particularly in cancer therapy. This is a very persuasive argument to a jury, because the defense will say, "Well, we had to give this dosage of X-ray, because if we hadn't cancer would have taken over and the patient may have had an even worse result." Unless there is some other thing going for you in one of those cases, you should look it over very carefully.

I will give you an illustration. Not long ago I turned down a case where there had been a diagnosis of adenocarcinoma in the ovaries of a lady which had spread to the pelvic gutter and descending and sigmoid colon areas. The patient was

given treatment for three months with powerful multi-million volt cobalt. In an effort to pinpoint the area where the radiologist thought it had spread he burned a hole through the rectum of this lady. She later died. But in the opinion of the treating doctor and also the medical expert with whom I checked, this lady had a very poor prognosis and whether or not the cobalt therapy had been given her, she probably would not have survived. While the radiologist was probably careless, proof of proximate cause was so tenuous that I turned it down.

3.

Staphylococcus Cases

I want to mention just one or two highlight types of cases that frequently recur whether in connection with diagnosis, treatment or surgery. One is the staphylococcus case. I am sure that some of you have run into this bug. Staphylococcus is as old as history. It is the organism that gets into body wounds and cuts and is found practically everywhere, including in your nasal passages, on the back of your hand, in the bedclothes, in the curtains, in the air, on the wall, and, it is sometimes claimed, practically everywhere. When you see in a hospital lab culture report the words "staphylococcus aureus, hemolytic, coagulase positive," you know there is evidence of serious infection in the area where the culture was taken. Even boils and carbuncles frequently have the staph bug as the causative factor. Unless you are able to show some break in sterile technique somewhere along the line, ordinarily these cases are very difficult to uphold in court. Before you take one of these cases where a person goes into the hospital infection-free and has had surgery and comes out with a staph infection along the incision, or in the area of the surgery, or even somewhere else in the body, you had better be able to show that somewhere along the line a contaminated needle was used or the doctor failed to properly scrub or some other non-sterile conduct or specific act of negligence. I say this because there have been a number of these cases that have been taken and lost or settled for a very small sum because they were not properly evaluated. The stock defense, particularly from the standpoint of the hospital, is that no matter what degree or amount of precautions are taken by the hospital in sterilizing and autoclaving all the instruments used in surgery and the surgery room, it is very difficult to prevent staphylococcus from entering a surgical wound or through some scratch or abrasion on the patient's body.

Some hospitals have even installed air-conditioning equipment to sterilize the air in the surgery room. Doctors are cautioned to change their face masks two or three times to prevent the organisms from dropping from their nasal passages into the surgical wound. There are some thick books on this subject and if any of you ever get one of these cases, and you are interested, let me know and I will give you the references. Results of some of the studies were published by the United States Department of Health, Education and Welfare. These pamphlets of H. E. W. have the whole bit in them, telling you what should be done in the surgery room to maintain sterile precautions and techniques. But my worthy brothers of the defense fraternity will usually contend that all the standard precautions and techniques were observed, but nevertheless and nothwithstanding, the staph bugs floated through the air or tiddly-winked off the floor and fell into the surgical wound without anyone's fault. On discovery by deposition, interrogations and inspection it will be your duty to ferret out some specific element of negligent omission or commission in the surgery room.

You should look at the by-laws and rules and regulations of the Committee on Accreditation of Hospitals. This reference is number 12 on the bibliography, "Model Medical Staff By-Laws, Rules and Regulations of the Joint Commission on Accreditation of Hospitals." Now if the hospital you are dealing with is an accredited hospital, you will find that there are certain sterile techniques that should be followed in surgery and so forth. If the hospital has not followed them, then you can introduce these Model Staff By-Laws and Regulations in evidence and show that this hospital was negligent in not complying with the same.

4.

Infections and Injuries from Injections

The Wolfsmith Case

This is a case you ought to read, *Wolfsmith vs. Marsh*, a 1959 case found in 51 Cal. 2d, 832, 337 P. 2d, 70. It has some interesting features on infection or other injury resulting from injections. Our Supreme Court held that it was now a matter of common knowledge among laymen that injections in the arm, as well as any other portion of the body, do not ordinarily cause trouble unless unskillfully done or there is something wrong with the serum. That is pretty strong language. I think it is good authority for a case where an infection or other damaging condition occurs in a doctor's office after he has given an injection of an antibiotic, vitamin or any other kind of drug or fluid. The Wolfsmith case, I think, would enable you to get to the jury without an expert.

5.

Hepatitis Cases

Hepatitis cases are still tough to sustain. We haven't made a complete breakthrough in these cases. Among others, where hepatitis arises, is the situation where the blood of a donor has been contaminated by a needle or syringe in extraction, is sent to the blood bank and is later transferred to the receiver of the blood, who then comes down with hepatitis. This disease, as you know, affects the liver, is very serious and has a rate of death I think of 15%. We have not been able to show that enough reliable tests can be taken to discover the presence of the bug in the blood or that there are any reasonably priced methods to remove the bug, if present, before transferring it to the beneficiary, that would support a claim of negligence in the usual case. In other words the doctrine of res ipsa loquitur has not to my knowledge been applied to hepatitis cases, and some specific act of negligence must be established.

6.

Failure to Warn Cases

I have already exceeded my time, Marc, and there is so much more here that I would like to discuss with you. An important new doctrine was opened up by the case of *Salgo vs. Stanford University*, 154, Cal. App. 2d 560, 317 P. 2d 170, on the duty of a doctor to warn of the risks, hazards and dangers of a procedure or treatment.

Perhaps one of the most interesting recent developments in the field of medi-

cal negligence is expressed in the *Salgo case*. In this case a 55-year old man suffered a permanent paralysis of his lower extremities, as a result of an apparent injury to spinal cord during a diagnostic procedure known as aortography. In this procedure a radio-opaque dye or contrast material is injected into the aorta and some of its branches for purposes of taking X-ray pictures and visualizing and diagnosing any pathology, disease or obstruction in the arteries. There are certain known and recognized risks, hazards and dangers in this procedure, including damage to the artery itself and reaction to the dye material. In the *Salgo case* none of these risks and hazards had been properly explained to the patient. After a jury verdict and judgment in favor of the plaintiff in the sum of $250,000.00, the upper court reversed because of an error in the giving of one of the instructions. In the opinion, however, the court made this statement, "A physician violates his duty to his patient and subjects himself to liability if he withholds any facts necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise, the physician may not minimize the known dangers of a procedure or operation in order to induce his patient's consent." The court then went on to say, however: "At the same time the physician must place the welfare of his patient above all else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action. One is to explain to the patient every risk attendant upon any surgical procedure or operation, no matter how remote; this may well result in alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk; it may also result in actually increasing the risks by reason of the apprehension itself. The other is to recognize that each patient presents a separate problem, that the patient's mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.

Hunt v. Bradshaw, 1955, 242 N.C. 517, 88 S.E. 2d 762 ff;

Simone v. Sabo, 1951, 37 Cal. 2d 253, 231 P. 2d 19;

Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N.E. 92, 52 L.R.A., N.S., 505.

"The instruction given should be modified to inform the jury that the physician has such discretion consistent, of course, with the full disclosure of facts necessary to an informed consent."

Whether the theory of the cause of action under failure to warn set forth in the *Salgo case* would be absolute liability, or whether it would be considered an assault and battery for an unauthorized procedure, or whether it would be another species of malpractice for failure to obtain proper consent is not clear. Since this rule of law has opened up a new field of professional liability, particularly applicable to most surgical procedures and also to certain types of ordinary treatment that carry special risks and hazards, it will be very important to the Bar to watch the development of this doctrine. To my knowledge there have been no subsequent cases in the appellate courts interpreting the *Salgo case*. If this were deemed to be some kind of absolute liability no expert testimony would be necessary. Likewise, if the theory is assault and battery the planitiff would need only to establish that he had not been sufficiently warned and had not therefore given an informed, free and intelligent consent which again would be a

factual question for the jury to determine without intervention of expert testimony. If the duty becomes one of proving negligence, however, then whether it would be *a res ipsa* case or whether expert testimony would be required to show whether the doctor had given the patient sufficient information and facts upon which to base an intelligent consent would be very significant. The committee of the Superior Court of Los Angeles County which edits the standard Book of Approved Jury Instructions, which I referred to earlier, has attempted to resolve this problem by the following proposed instruction which is now found in the 1962 pocket part of B.A.J.I.;

> "In determining whether the plaintiff consented to the (treatment) (operation) here involved, you should have in mind and apply the following rule of law:
>
> A physician and surgeon has a duty to make reasonable disclosure to his patient of all significant facts under the circumstances of the situation which are necessary to form the basis of an intelligent and informed consent by the patient to the proposed (treatment) (operation). This duty, however, is limited to those disclosures which a competent medical practitioner would make under the same or similar circumstances, having due regard for the patient's physical, mental and emotional condition. The failure to disclose in all instances does not necessarily suggest a neglect of duty."
>
> B. A. J. I. No. 214-6, Pocket Part, 1962.

Thus it will be seen that this instruction uses neglect of duty in failing to warn, a species of negligence, to determine whether plaintiff consented to the treatment or operation, which would then be an assault and battery. The law of this instruction would require the testimony of an expert witness to establish whether in the particular case the particular doctor gave the patient sufficient information or withheld any information necessary to inform an intelligent, free and informed consent. I personally do not agree with some of the language of this instruction and understand other plaintiff's attorneys do not feel that this proposed instruction correctly and properly in all respects reflects the law of the *Salgo* case. I am inclined to the view that probably the matter should be treated as a species of negligence, but that it should be a jury question based upon expert testimony as to what are the recognized risks and hazards of the particular procedure. It would then seem to be a matter of common knowledge for the jury to determine whether there had been an informed consent. The development of this doctrine will be closely watched by all attorneys interested in personal injury litigation. I say this because conceivably the doctrine of the *Salgo* case, whatever it means, might logically be extended to almost any type of surgery, since there are always risks and hazards, even death, in any surgery. But I feel that more likely it will be confined to those types of procedures or treatments that carry special risks and hazards that would not ordinarily be known to the layman. Certainly such diagnostic procedures as *aortography* or similar procedures, *venograms*, (involving dye in the veins) or *angiograms* (involving dye in vessels and within the heart), *gastroscopy* (introduction of a gastroscope into the stomach), *esophogascopy* (introduction of a esophogascope into the esophogus area), *cystoscopy* (introduction of a cystoscope into the urethra and bladder) and other similar diagnostic procedures which carry special risks and hazards would probably come within this category.

I have now exceeded my time for which I apologize to you. Marc, and to you all, and to the next speakers, Dean Peterson and Bernie Witkin, my good friend and fellow lawyer and author from California, whose authoritative works and treatises on California law are legend and cited by the California courts. He is Mr. California Law himself.

Time has not permitted me to cover a number of other recurrent types of cases regarding care and treatment, as well as surgery which alone accounts for an estimated 30 to 40% of all cases. Some of those are wrist drops (from negligent injury to the radial nerve); injuries from diagnostic procedures such as esophagoscopy, cystoscopy, gastroscopy, myelography, etc.; thyroid and hemorrhoid surgeries; hysterectomies; bladder surgery and fulgerations; cystoceles and rectoceles; orthopedic cases involving errors in diagnosis, care, treatment and surgery on bones in all parts of the body; diagnosis, and treatment of injuries to the eye; and many others. I also wanted to discuss with you the taking of the doctor's deposition, probably one of the most important stages in the whole proceeding, and the statute of limitations in medical negligence cases and my model Attorney's Retainer Agreement. Just a highlight word in passing re depositions. One of the main objectives in your deposition is to secure an admission from the doctor that, assuming certain facts to be true (your facts and your contentions), such conduct or omissions as appear in this case with respect to those particular facts would constitute a violation of the standard of practice (even though the doctor may not agree with, but deny, your facts). Then if the jury finds favorably on your facts, you have a built-in expert as to the standard of practice, namely, the defendant doctor. For example, if the defendant doctor claims he injected pantopaque for a myelogram in the spinal canal of the plaintiff at the L-3-L-4 interspace, a usually safe and proper place below the end of the spinal cord, but there is some evidence in the case which if believed by the jury would support a finding that he actually injected at the interspace level of T-11-T-12, a usually dangerous and improper place where the spinal cord is still present and subject to injury, then you will probably be able to get an admission from the doctor, if he has an ounce of integrity, that assuming an injection was made at T-11-T-12, under the circumstances of this case, it would be bad practice and not in conformance with the standard. Copies of the Retainer Agreement are here on the table which you may pick up at the close if you are interested.

Perhaps, if time and opportunity and space permits, when the transcript of these proceedings is prepared, I will try to supplement my remarks today in an appendix, but I won't make any promises.

In the next few minutes, and out of chronology, I would like to leave with you a few questions on your voir dire of the jury which I have found helpful and effective in medical negligence cases.

On the voir dire, these questions, I think, would be distinct from what you ordinarily ask on your automobile accident and other negligence cases. You may, of course, put it in your own words and re-phrase it as you think best. "Do you believe the plaintiff has a moral right as well as a legal right to sue a doctor or a hospital whom he thinks may be negligent and has caused him injuries? Do you have any feeling against a plaintiff who sues a doctor or hospital in court and has the question, whether the doctor has been negligent and has proximately caused injuries to the plaintiff, passed upon by a judge and jury under our American system? You understand that this is not a disciplinary proceeding or

criminal proceeding in the law? You understand that this is simply a negligence case like any other negligence case, such as a slip-and-fall case or an automobile accident case except that it involves a physician and surgeon as defendant? Do you believe that a doctor, simply because he is a doctor, should be treated any different in a court of law than any other citizen of our community? Would you give him the same equal treatment as if the defendant was the butcher, the baker, truck driver or any other member of our community?" (laugh) I understand the reason for your reaction to that, but you will find that there are a lot of jurors who don't give doctors the same treatment. Some jurors still place the doctor on one level near God and the rest of us humans on this level down here near earth. You've got to implant in the juror's mind that doctors should be answerable under our rules of law like any of the rest of us. Now, more on the voir dire: "Because he happens to be a professional man do you feel that puts him on a different level from the rest of us so-called laymen? In other words, you don't feel that the doctors as a class are to be treated any differently in the eyes of the law than any other person, worker, tradesman or professional man? If the doctor is operating a motor vehicle, goes through a red light and hits a pedestrian you understand he would be exposed to the same legal liability as the plumber or a secretary, the housewife who went through the same red light and injured someone? The law calls such conduct negligence. If, instead of driving an automible carelessly, it was shown under the evidence and the courts instructions that this doctor treated his patient negligently and proximately caused injury, would you have any hesitancy in returning a verdict for the plaintiff for money damages for such conduct? Do you understand that this suit is nothing more than a suit for professional negligence and do you further understand that the law uses a term malpractice in referring to this type of case, but this is nothing more nor less than saying carelessness or negligence? You will not attach any undue significance to the word malpractice in the court's instructions or otherwise in this case? This word does not carry any meaning to you of any criminal conduct or intentional or unprofessional conduct? You understand that it is simply a term used to describe a special type of conduct and applies to the professional man such as physicians and surgeons, lawyers, engineers and so forth? It means no more nor less than negligence. Will you keep this in mind throughout your deliberation? You understand the doctor's right to practice medicine, his medical license is in no way involved in this lawsuit? You understand that because a doctor may be found to be negligent and a money verdict returned against him, that does not mean that he will lose his license to practice medicine or be kicked off the staff of any hospital or be disciplined by any medical society? Will you keep these considerations in mind in your deliberation? Will you treat this solely as a negligence case?"

Now, some of your judges may not permit you to go as far as some of these questions, but I certainly think that you should try to indoctrinate a jury to your voir dire that you are dealing here with just another particular type of negligence. More questions: "Do you feel that doctors are required to obey the laws of this state the same as the rest of us and if they fail this in treating a patient, thereby proximately causing injury and damage under the law and the court's instructions, do you feel that the mere fact that he is a medical doctor should permit him to escape his proper responsibility under the law? You would not give this doctor any special consideration or privilege merely because of the nature of his profession, but you would give him the same fair and square consideration that you

would give any other citizen who was sued as a defendant? The contention of the plaintiff in this case is, and I think the evidence will show, that Doctor AB was negligent in his diagnosis, care and treatment of the patient. As a proximate result, he sustained a serious and permanent injury. Now, you understand that under the laws of this state each of us is responsible to another if we negligently injure him without fault on his part, whether the place is on public intersection, in a department store, or private premises or in a theatre or in the supermarket or in a doctor's office or hospital operating room or ward room? I am sure you understand that the important part is not the status of the defendant or where he acted but whether his action was negligently done so as to cause harm to another. Would you be able to keep these considerations in mind in evaluating the evidence and relative positions of the parties in this case?"

Thank you very much for your patience and attention. (Applause)

ADDENDUM TO MR. CAMPBELL'S TALK

BIBLIOGRAPHY OF SUGGESTED GENERAL REFERENCES IN THE EVALUATION AND PREPARATION OF THE MEDICAL MALPRACTICE CASE

(Prepared by Lionel T. Campbell)

1. Surgical Errors and Safeguards; Max Thorek, M.D., L.L.D.; J. B. Lippincott Company (1960).
2. Surgical Clinics of North America, Pitfalls and Errors in Surgery (1958).
3. Anesthetic Accidents; V. Keating, M.D.; Yearbook Publishers, Inc., (1962).
4. A Study of Deaths Associated with Anesthesia and Surgery; Beecher and Todd (1954).
5. Autopsy Diagnosis and Techniques; Otto Saphir, M.D.; Hoeber-Harper (1958) 4th Edition.
6. Manual of Differential Diagnosis; William C. Matousek, M.D.; Yearbook Publishers, Inc., (1959).
7. Physical Examination in Health and Disease; Rudolph Kampmeier, M.D.; F. A. Davis Co., (1950).
8. Diagnosis in Daily Practice (Office routine based on incidence of various diseases); Benjamin B. White, M.D. and Charles F. Geschickter, M.D.; J. B. Lippincott Co. (1947).
9. Anatomy and Physiology for Nurses; W. Gordon Sears, M.D.; Williams and Wilkins (1958) (3rd Edition).
10. Applied Anatomy for Nurses; Evelyn Joan Bocock and K. F. Armstrong and R. W. Haines; Williams and Wilkins (1959).
11. Quick Reference for Nurses; J. B. Lippincott Company.
12. Model Medical Staff By-Laws, Rules and Regulations of the Joint Commission on Accreditation of Hospitals. 660 North Rush St., Chicago, Illinois.
13. New and Non-Official Drugs, an official publication of the American Medical Association.
14. United States Pharmacopeia.

15. National Formulary; published by American Pharmaceutical Assn. (Purity of Drugs).
16. United States Dispensatory. (Contains references as action and uses of drugs).
17. Physicians Desk Reference. (To Pharmaceutical Specialties and Biologicals); Medical Economics Inc., Oradell, N. J. (Yearly Editions).
18. Trial of Medical Malpractice Cases; David W. Louisell, L.L.B. and Harold Williams, M.D. and L.L.B. (1960); Matthew Bender & Co. Inc.
19. Standard Nomenclature of Diseases and Operations, published by the American Medical Association.
20. The Merck Manual (of diagnosis and therapy); published by Merck & Co., Inc., Rahway, New Jersey.
21. The Recovery Room (Immediate post-operative management); Max S. Sadove, M.D., and James H. Cross, M.D.; W. B. Saunders & Co. (1956).
22. Directory of Medical Specialists; Marquis–Who's Who Publications; (10th Edition) (1961).
23. Law of Hospital, Physician and Patient; Hayt; Hospital Textbook Company, 99 Wall Street, New York 5, N. Y. (1952).
24. Professional Negligence; edited by Thomas G. Roady, Jr., and William R. Andersen, Vanderbilt University School of Law; Vanderbilt University Press (1960) (Includes discussion of negligence of medical doctors, lawyers, architects, engineers, pharmacists, accountants and others).

ATTORNEY'S RETAINER AGREEMENT

THIS AGREEMENT, made this_____day of_____19___,
at _____ California,
by and between _____
_____
hereinafter known as "Client," and_____
_____
hereinafter known as "Attorney," Witnesseth:

Client retains Attorney to represent h____as h____ attorney at law in a
_____
_____
_____
regarding _____
_____
_____
and empowers him to effect a compromise in said matter, or to institute such legal action as may be advisable in his judgment, and agrees to pay him for his services
*_____% of the amount recovered, if settled without suit, or
_____% of the amount recovered after suit is instituted
_____
_____

_____ costs and necessary disbursements are to be advanced by_____

Attorney is hereby given a lien on the said claim or cause of action, on any sum recovered by way of settlement, and on any judgment that may be recovered thereon, for the sum and share hereinbefore mentioned as his fee; and it is further agreed that Attorney shall have all general, possessory, or retaining liens, and all special or charging liens known to the common law.

It is agreed that Attorney may retain his share out of the amount finally collected by suit or settlement or judgment in full of his services.

Client agrees that he will make no settlement except in the presence of Attorney and with his approval, and should he do so in violation of this agreement he agrees to pay Attorney the sum and share above indicated.

Client agrees not to substitute attorneys without the consent of Attorney, except for misconduct or incapacity of said Attorney to act; and if substitution is effected in violation hereof, Attorney shall be entitled to the full share and fee hereinabove stated.

If the said cause of action be one not assignable at law; Client expressly assigns to Attorney, pro tanto to the extent of his fees and disbursements, any sum realized by way of settlement or on any judgment obtained thereon.

It is agreed that Attorney has made no guarantees regarding the successful termination of said cause of action, and all expressions relative thereto are matters of his opinion only.

Attorney accepts said retainer on the conditions hereinbefore enumerated.

IN WITNESS Whereof the parties have set their hands the date first above mentioned.

_____
Client

_____
Attorney

SUPPLEMENT TO ATTORNEY'S RETAINER AGREEMENT,

DATED THE ___DAY OF _____, 19___, BETWEEN_____ NAMED THEREIN AS CLIENT___ AND LIONEL T. CAMPBELL NAMED THEREIN AS ATTORNEY:

PROVIDED, HOWEVER, IT IS FURTHER UNDERSTOOD AND AGREED:

1. If material facts as represented to the attorney by the client___ are found not to be true, then the attorney shall be paid by the client___ a reasonable fee for his time and services, allowing credit thereon for any retainer fee paid by client.

2. Client___ hereby expressly admit___ that the attorney has clearly and definitely advised _____ that proof of alleged malpractice of a physician and surgeon or dentist, with the exception of proof of cases under the

doctrine of res ipsa loquitur, (the thing speaks for itself) must be established by the testimony of a duly qualified physician and surgeon, or dentist, who is familiar with the standard of practice of reputable doctors, or dentists, in similar cases at that time in the particular community.

3. Client___ hereby admit___further that the attorney has advised client___ that for the foregoing reasons, and since the attorney is not a physician and surgeon, he frequently cannot render any opinion whether or not the client___ ha___ a meritorious malpractice injury (or wrongful death) case against the proposed defendant doctor, until the attorney gets an opinion from a duly qualified doctor to the effect that there was malpractice and that the injuries or death were proximately caused by said malpractice, and frequently this may not be possible until after suit is filed, depositions and/or other discovery or investigation completed and doctor's and hospital records are inspected.

4. Client___ admit___ that the attorney has not contracted or agreed to secure and produce a medical expert or experts (i.e., medical or osteopathic physicians or surgeons or dentists) who will appear and can qualify in court in client___ case. Client___ therefore agree___ to cooperate with the attorney and they together shall try to secure qualified medical expert or experts, and if it has not been possible to secure qualified medical expert or experts who will appear and testify for client___ by the time of trial and the same are needed in order to sustain client___ burden of proof, then attorney will have no obligation to proceed with the trial of the case.

5. Client___ further admit___ that the attorney is a specialist of long experience in personal injury trial work and in the handling and trial of medical, dental and hospital malpractice cases and has acquired a reputation therefor. Client___ admit___ that such cases as this are very difficult and require an unusual amount of time, skill, care and ability to handle and win same. Client___ realize___ the value of the attorney's time, effort and skill and is (are) therefore willing to pay a retainer fee. Client___ realize___ that frequently the attorney is required in such cases to do a great amount of work and expend much time, skill and care, including depositions and other discovery procedures and investigation, and inspection of hospital and doctors' records, before he can determine if client___ ha___ a sufficiently meritorious case to justify going forward with the same. Thus client___ realize___ and agree___ that a substantial retainer fee is a reasonable requirement and that said retainer fee may and should be retained by the attorney, though the case is settled without filing suit, or filed and thereafter settled, dismissed, won, or lost, whatever the outcome, subject only to credit being allowed client___ for said retainer in the event of recovery in the manner and under the terms herein set forth. If the attorney's share of any recovery, as computed in accordance with the terms of this Agreement, is less than the amount of any retainer fee or fees paid by client___, then the retainer fee or fees will become the attorney's share of the recovery.

6. Client___ ha___ retained attorney for and this Agreement extends only to services for one trial in the Superior Court of Los Angeles County, and in the event an appeal is taken either by client___, or by the defendant from any judgment in the said Superior Court, then attorney is under no obligation or duty to represent client___ or to perform any further services in connection with said appeal unless client___ agree___ to pay a reasonable retainer fee or further rea-

sonable retainer fee for said further services, subject to credit being allowed client___ for said fee as herein provided.

7. In the event of a mistrial not due to the fault of attorney and a retrial, or in the event of a new trial being granted either party after verdict of the jury or decision of the court, attorney is under no obligation to represent client___ at a second trial unless client___ agree___ to pay a reasonable retainer fee, or further reasonable retainer fee, subject to credit being allowed client___ for said fee as herein provided.

8. Upon the completion of depositions or other discovery procedures and investigation, if attorney in his sole discretion feels that the case is not sufficiently meritorious and the chances of a successful result thereof are such as not to justify further expenditure of time, effort or expenses, then attorney may at his sole option upon ____ days written notice to client___, given at least ____ days before date of trial, withdraw as attorney without further obligation or duty to client___, and in such event client___ will be free to retain other counsel in the case without further obligation or fee to attorney except to pay any unpaid portion of any retainer or investigation fee and any upaid costs or expenses that may have been advanced or incurred by attorney.

IN WITNESS WHEREOF the parties have set their hands on this ____ day of _____, 19____.

_____

_____
Client

_____
Attorney

MR. WARE: Thank you very much for that most excellent talk, Lionel. I know we haven't had one like that for many years and we are extremely grateful for it and for your courtesy in delivering it to us.

MR. COUGHLAN: Yes, Lionel. Many thanks for that wonderful address. I'm sure it will be long remembered. By the way, Lionel has volunteered to come back this afternoon and continue in this vein for any of you who are interested. I am sure it will be easily worth your while and I am sure that we couldn't find such expert knowledge anywhere else or in any other Bar. We are all very grateful to you and your fine talk, Lionel.

MR. WARE: Alden Hull, will you come forward and introduce our next speaker, please.

MR. HULL: Last night, our next speaker took advantage of me and made me promise not to deliver any introduction. However, his biographical sketch is included in the last issue of The Advocate. He comes an experienced lecturer and teacher, particularly in the field of civil, criminal and appellate procedures. At this time it is my privilege to introduce to you, of the San Francicso and California Bars, Mr. B. E. Witkin, who will address you on, "What's New in Torts?" (Applause).

B. E. WITKIN: People who are here on time and other late comers, the strange part of this affair is that so many of you can spend so much in this field without showing signs of trauma and this properly introduces my apology; I left two words off the title of this talk and I would like to amend it, with your permission, to read: "Some of What's New in Torts." If my apology is accepted I ask you to disclaim it.

The first concern is the notion widely held by laymen and not a few lawyers, with some fuel added by Lionel this morning, that torts is composed of equal parts of crushed automobiles, busted limbs, whiplashes and demonstrative evidence with a sprinkling of X-ray burns and surgical instruments abandoned in the abdomen.

More than one American magazine has pictured the medical profession and the insurance fraternity cowering in abject fear before his baleful, satanic majesty, Melvin Mouron Belli, King of Torts.

But the picture is false to the fearless physician, to the intrepid insurers, to the law and to the man who would be king.

Mr. Belli's quite extraordinary talents as a trial lawyer and his undoubted mastery of the field of forensic medicine, do not place him on such a lofty throne that he may look with condescension upon the humble visages of Prosser, Seavey, Harper and James, and medical malpractice and automobile accidents take up more time of the courts than space in the law books in the field of torts.

My second disclaimer concerns the materials which I have brought for your inspection. I am sure no one here agreed to my coming this great distance, taking up a full hour or more, if the chairman is still in his liberal mood, of your time to discuss Iowa, Idaho?, statutes and decisions. Indeed, my title precludes this because none of that would be new to you. So, I have something here which I hope will be more appropriate as well as more useful. A gift package from that great state of superlative climate, weather-wise and verdict-wise: Sunny California.

In its district courts and ten district courts of appeal, thirty-seven Supreme and Appellate Justices turn out thirteen volumes of reported decisions every year and as elsewhere, a good part of them are tort cases.

It is expectable that this giant, legal mill will grind out much that is commonplace and repetitive. It is equally predictable that it will produce much that is new and startling and from that latter grist I have selected fragments which I believe contain substantial elements of both novelty and significance. Moreover, since this is not exclusively a bread and butter meeting of lawyers who want specific decisions that will win cases next week or not later than next month, but a leisurely and philosophic gathering of intellectual, elite of your bench and bar, I shall not confine myself to a recital of the facts and findings of particular cases. Instead, throwing caution to the winds, I shall adopt the critical approach, looking inside each opinion to discover its motivations and implications. This will become painfully obvious in the illuminating heading which I have given each of the topics to be covered. And so we begin with topic number 1 of our prize package of torts from California courts.

I. *The Unexpected Demise, Discordant Interments and Temporary Legislative Resurrection of Sovereign Immunity.*

In this, our first case, we observe the doctrine of stare decisis at its best and at its worst, according to which side of the fence you sit on. Sovereign immunity or non-liability of the state and state agencies for the torts of public officers and employees has been under critical attack for generations by most writers and many courts. Although its origin is something of a mystery, it was probably based on a misunderstanding with the common law. The numerous legislative and judicial extensions throughout the country have established large areas of liability and have left the areas of immunity shadowy, inconsistent and possibly unfair.

In particular, the semantically absurd distinction between governmental and proprietary activities has resulted in an appalling waste of judicial time in attempting to define the inherently undefineable. So, the defense of sovereign immunity had to go. And since it had a lengthy, if not exactly an admirable history, it seemed appropriate in California that the legislature deliver the death blow. But, despite many nudgings from responsible quarters, the legislature in a surprising display of independence didn't, and attempts to get the courts to do the legislative job were summarily rejected. In 1958, in Vater vs. Glenn County, 49 C. 2d 815, 323 P. 2d 85, and in Talley vs. North San Diego County Hosp. District, a few years before [41 C. 2d 33, 257 P. 2d 22], the court said flatly and unequivocably, that abrogation or restriction of this doctrine is primarily a legislative matter. In both cases the court was virtually unanimous, that is to say with only my good friend, the late Justice Carter, dissenting.

A few years ago, however, Louisa Muskopf, a patient in County Memorial Hospital was injured through the negligence of the hospital staff. The members of that staff were, by grace of generations of decisions, public employees of a hospital district, which was a governmental agency exercising a so-called governmental function. Her counsel, Goldstein, Barcelo and Goldstein, had developed a habit of suing hospital districts and losing, hoping at some time to needle a court into recovery. One District Court of Appeal Judge told me that they had seriously considered holding Mr. Goldstein in contempt for re-litigating a point so well settled. But then in January, 1961, his long shot paid off in Muskopf vs. Corning Hosp. Dist., 55 C. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457, and this decision was described by the dissenting Justices as follows:

"Today's majority apparently impatient with the legislature's failure to act as speedily and comprehensively as they believe it should, usurped the legislative function, refused reasonable respect for the doctrine of stare decisis and sweepingly announced that, "after a re-evaluation of the rule of governmental immunity from tort liability, we have concluded that it must be discarded as mistaken and unjust." Yes, sir, that's just what they did. But, how did this come about? What happened in the three years after the Vater case when Muskopf was decided?

We look at the dissent again; a dissent is a very fine place to find out what happened. It is unfortunate that a court's reversal of itself on a point of law, which it has recently and repeatedly considered, should appear to depend upon a change of personnel. A change of court personnel is not, in my concept of judicial duty, properly to be regarded as carte blanche for the judiciary to

effectuate either a constitutional amendment or a legislative enactment. Well, is this disparagement of the majority justified? Only if we ignore the common effect of change in personnel on the policies of business organization, educational institutions, churches, legislative bodies and other public and private institutions. And only if we think that the respectful precedent is more important than the formulation of desirable rules of law. Stare decisis, the scholars have told us, is not an inflexible command and there may be good reasons for departing from precedent. This is how the majority justifies its decision.

Only the vestigial remains of such governmental immunity have survived. Its requiem has long been foresheltered. For years the process of erosion of governmental immunity has gone on, unabated. The legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, in holding that the doctrine of governmental immunity for torts, for which its agents are liable, has no place in our law, we make no startling break with the past, but merely take the final step that carries to its conclusion an established legislative and judicial trend. But, alas, the legislature, placing the public purse above principle, issued a temporary restraining order to maintain the status quo as follows:

Section 22.3 of our Civil Code. The doctrine of governmental immunity from tort liability is hereby re-enacted as a rule of decision of this state, and shall apply to matters arising prior to its effective date as well as those arising on and after that. Also, it's to remain in effect, this restraining order, until the 91st day after adjournment of the 1963 Legislature.

Now, there are many lawyers who think the legislature cannot, by this declaratory statute, operating retroactively, overcome the obstacle of the due process courts. They think, with some reason, that the law as declared in the Muskopf case, gave rise to vested rights of action while it was the law and that these rights of action cannot be abrogated. This issue was presented to the Supreme Court of California in *Corning Hospital District vs. Superior Court*, in April, 1962, and not decided. [57 C. 2d 211, 20 Cal. Rptr. 621, 370 P. 2d 325] The court found a way out for the present, by taking us back on a juridical tour of the depression, the last one. The Justices dusted off *Home Building and Loan Association against Blaisdell*, the famous Minnesota Mortgage Moratorium case. Then comes through this California statute as merely sustaining, not destroying, existing causes of action. From then on, it was easy.

If you can validly place a reasonable moratorium on contract causes of action, as in the mortgage cases, you can just as reasonably place a moratorium on tort causes of action and this one, the court says, is reasonable.

Suspension of the rule of liability declared in the *Muskopf* case, for two years with automatic reinstatement with the rule of governmental liability unless the legislature acts differently in 1963. This, says the court, will give the legislature time to review the many statutory provisions enacted on the basis of the law existing prior to 1961 and determine what, if any, legislation may be necessary in this field. In addition, public entities will be afforded time to prepare for bearing burdens of defending the actions and to provide for the satisfaction of possible judgments.

II. We come now to topic number two, *Domestic Peace, It's No Longer So Wonderful.*

For this topic, we come to a more intimate locale, the bosom of the family. Here, domestic bliss, daily exposed to the destructive rage of the divorce lawyer, is jealously guarded by the law of torts. We all know that if a child sues a parent or a wife sues a husband for damages in a tort action, the insurance carrier springs to the defense of the connubian, holding the Dove of Peace firmly in its actuarial hand. But peace is no longer so wonderful.

If the tort is intentional, the notion that litigation shatters domestic bliss doesn't worry the courts any more. In California in the *Emery* case in 45 C. 2d 421, 289 P. 2d 218, the court said, "It may seem repugnant to allow a minor child to sue his parents, but we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason by his parent's willful or malicious misconduct and where siblings raise their pretty teen-age heads and bare their sibilant teeth, down with domestic peace." In the *Emery* case, a father allowed his son to drive a car and his two daughters were injured. In this action by the sisters against their brother, the defendant contended that to allow the action would, and I quote so that you will believe me, "It would disrupt the family harmony, encourage fraud and collusion, impair the parents' exercise of their disciplinary functions, result in an uneven distribution of family resources and encourage useless litigation, since there is a possibility that the minor dependent will live to inherit the money recovered from him by the minor plaintiffs." The court rejected all of the arguments and answered the main complaint, collusion, as follows: "The argument assumes that the action is not in reality directed against the minor brother or sister of the plaintiff, but is in fact directed at his liability insurance. If this assumption is correct, maintenance of such a tort action would not disturb the family peace and harmony. It might even promote it."

One more point should not escape notice in the *Emery* case. The exception to the immunity rule which allows suit by a child against a parent was developed in a number of cases throughout the country, involving excessive brutality in chastising. They were intentional torts of an extraordinary sort. But, peace still reigns supreme in the negligence field, except as between brothers and sisters. A parent still cannot sue a child for negligence or for a negligent tort, but, again the *Emery* case gives us an angle.

In one of the causes of action, the plaintiff daughters wanted a judgment against their father for an automobile tort, he being the owner and the son, the driver. The court said the plaintiffs were entitled to maintain the action against their father. Why? Because they alleged willful misconduct instead of mere negligence. Is that so hard to do?

III. Topic number three is entitled, *Is a Labor Union Liable in Tort For Negligence?* For decades, the unincorporated labor union has stoutly maintained a split personality in the courts. When its collective rights have been threatened, it has come boldly into court, demanding specific performance or damages like any other individual or corporate entity. When its obligations have been involved, it has just as boldly maintained its non-existence as a legal entity and its consequent immunity, both from service of process and substantive liability.

In the latter situation, it sometimes likens itself to a fraternal or benevolent society with purely social purposes. At other times, it argues that like any other unincorporated association, it's just a great, big partnership. And everybody knows that a partnership is not legal entity.

These fantasies have lately been dissipated in a number of cases in which third parties have sued unions for breach of contract or tort. They've also failed to stem the tide of suits by union members, to enforce membership rights or recover damages for breach of the union contract. But in one situation, a curious relic of the old thinking seems to be almost universally followed in America. A member of the union cannot sue his union for an ordinary negligence tort. The theory is that the union, not being an entity, but an aggregation of individuals, is engaged or these individuals are engaged in a joint enterprise. The members are co-principals and mutual agents and the negligent act or omission of a union employee or agent, cannot be the basis of an action by one of the member-principals because the negligence of the agent or employee is imputed to each and every principal under the doctrine of respondent superior. This theory is widely followed, but it doesn't make any sense. If the negligence of an agent or employee is imputed to each member of the union to bar his individual recovery against the union, then it should also be imputed to make him individually liable to a third person injured through the negligence of a union employee or agent. But, the courts don't go for that. They generally hold that the members are not liable for the negligent torts of agents or employees unless the particular member participates in or authorizes the wrongful act.

Well, if we want to be logical, one of those two inconsistent propositions has to yield. Since there is no good reason to make an ordinary union member liable in tort for the negligence of an agent or employee, it's the other rule we want to discard. The California Supreme Court did just that on June 4, 1962, in *Marshall vs. International Longshoremen's, etc., Union,* 57 C. 2d. 781, 22 Cal. Rptr. 211, 371 P. 2d 987. The defendant union employee had negligently maintained a parking lot and the plaintiff member was injured there. The court reversed a summary judgment for the defendant and said that the joint enterprise doctrine of mutual agency and co-principals was proper enough when applied to a business enterprise, but could no longer be justifiably applied to the relationship between unions and members. "It is our conclusion that a member of a labor union is entitled to sue the union for negligent acts which he neither participated in nor authorized, and that any judgment he may recover against the union can be satisfied from the funds and property of the union alone." In a final footnote the court answers your unasked question as follows: "We limit our holding to labor unions only, leaving to future development the rules to be applied in the case of other types of unincorporated associations."

IV. Topic number four is entitled *A No Man's Land Between Tort and Contract.* In *Ward vs. Taggart,* in 51 C. 2d 736, 336 P. 2d 534, defendant Taggart, a real estate broker, falsely represented to the plaintiff's agent that he, Taggart, was exclusive agent for the sale of S Company's land and he said that S would not sell for less than $5,000 an acre. Plaintiff offered the sum, whereupon defendant Taggart purchased the land from S for $4,000 an acre, using the plaintiff's money to pay S, making a nice piece of change for himself and

concealing his fraud and secret profit by using an associate as escrow holder. The plaintiff in this action was allowed to recover both the property and exemplary damages. It took a little doing.

First, in the fraud aspects of the case, the California Real Estate Sharper's Ace in the Hole, otherwise known as The Out of Pocket Loss Rule of Damages, said to be the majority rule in America, completely barred any recovery in tort for fraud. The only evidence on damages showed that the property was worth $5,000 an acre, what the plaintiff paid for it. The plaintiff couldn't invoke the exception, which allows a principal to recover a secret profit made by his own agent or trustee, because defendant Taggart was not the plaintiff's agent. He was a free-lance crook. Nevertheless, the court says that there is a basis of recovery and it goes out with a dragnet to pick up code sections all over the place. There is a provision in the fraud damage statute that other remedies are not disturbed. There is a statutory provision that says that no one may take advantage of his own wrong. There is a whole law of quasi-contract involving unjust enrichment and recovery for it, and so, the court concludes, in a giant burst of insight, the defendant-broker, by fraud, received money that the plaintiffs would otherwise have had. A difference between $4,000 and $5,000, so he is a constructive trustee for plaintiffs of that sum on quasi-contract principle.

So, all right, the plaintiff recovers the secret profit and hurdles the limitation of the fraud damage, out-of-pocket loss rule, by carefully avoiding any tort theory of recovery, and resting it on something like contract. So, now, Taggart, the crook, says in injured tones, $72,000 of compensatory damages is enough. How about this $36,000 of exemplary damages? If the action isn't tort for the measure of compensatory damages, how can it be tort for the imposition of exemplary damages and if it isn't tort for contract, how can exemplary damages be awarded in a contract case? Well, sir, the court got around that one, too.

There is no simple tort contract line of demarkation as a test for interpreting our statute which allows exemplary damages for a breach of, and I quote "an obligation not arising from contract." Contract, the court says, means an agreement, not an obligation imposed by law or quasi-contract. And so, the court concludes, since Taggart's obligation for his fraud does not arise from contract, but is imposed by law, the judgment for exemplary damages clearly falls within the statute. I buy it all but that word, clearly. The late Justice Preston once said, "When he felt weak, he wrote it strong." But, at least, they know that we are wrong in thinking that exemplary damages are confined to tort cases. They may be awarded in any case where the breach is of an obligation not contractual.

Topic number five, and I rise to a point of order, Mr. Chairman, this is the one I would have omitted if you had limited my time.

MR. CHAIRMAN: We want it.

MR. WITKIN: I hope the package is worth the price.

V. Again we are on the borderline and the title is *"Optional Rules of Construction Produce Flexible Rules of Res Judicata."* It was Confucius, Jr., the old man's number one son, who said, "If the words don't fit, find a rule of construction which will make them fit." And he was probably thinking about

Exchange Casualty and Surety vs. Scott (and Gorman and Standard Acc. Ins. Co.), 56 C. 2d 613, 15 Cal. Rptr. 897, 364 P. 2d 833.

This was a culmination of two actions arising out of a very simple event. Sebastian drove his car onto the premises of Quik-Way Car Wash, paid and left. Quik-Way's employee washed the car, then negligently put it in reverse, backing it in the polishing stall where it struck Garmon, who was polishing another car. Garmon is the "good guy" in this case, watch him. The car pinned Garmon against the wall and Garmon, naturally, sued both the negligent driver-employee and Sebastian, the owner of the car under our statutory driving-with-permission law.

The judgment below, of course, went against the negligent driver, but was in favor of the owner and the District Court of Appeal affirmed it on the theory that the permission granted by Sebastian, the owner, to the employee of Quik-Wash was the anticipated movement of straight ahead, from the wash rack to the usual place of parking washed cars, and that the jury was justified in its implied finding that the employee exceeded Sebastian's permission by engaging it in the backward instead of the forward movement. This tremendous contribution to the logistic of the law of deviation or to the law of appellate laissez faire, it's hard to say which, was made by a unanimous Appellate Court and the hearing in the Supreme Court was denied.

Case number two comes up in the meantime. Before the District Court of Appeal had affirmed that judgment in the suit on the merits, the two insurance companies got into the act because of this fact. Exchange injuring, insuring, maybe I should have left it that way, injuring and insuring the negligent driver-employee, had an "other insurance" clause, that was the injury part, which it successfully asserted made its liability secondary to any other insurance coverage. The "other insurance" coverage was by Standard which insured Sebastian, the owner, under driving with permission clause, its omnibus clause, which took care of his liability under the statutes where someone drove his car with permission.

So, Garmon, the injured party, with a judgment against the negligent driver-employee, quite properly sued the owner's insuror on that judgment, because if it was liable at all its liability was primary.

Now, in this second action between the insurors, the court found that the negligent driver-employee had not exceeded the scope of his permission and therefore Standard, the insuror of the owner was liable on its policy insuring against driving with permission.

What about the prior judgment? Well, said the trial Judge, it wasn't res judicata, because it was then still pending on appeal. But appeals eventually get decided and as we have seen, this one was decided in favor of the owner.

So, in the second case, when it was appealed, the District Court of Appeals said, "We have two lower court judgments reaching inconsistent results on the issue of whether the employee exceeded the scope of his permission. In such a case, the rule is that the first final judgment is res judicata and if it becomes final while the other one is pending, it may be brought to the attention of the court and relied on as res judicata, if it is res judicata." Well, was it res judicata? The causes of action, one in tort to recover damages, another in contract to determine rights and liabilities under the insurance policy, were different. So,

the first judgment is not a complete bar to Garmon's suit against the insuror. But, even when the causes of action are different, an issue once litigated between parties or persons in privity will be binding on the subsequent action, even on a different cause of action, under what we sometimes call the secondary aspects of res judicata or the doctrine of collateral estoppel. Standard, the insuror of Sebastion, was in privity for the purpose of applying the doctrine and the first suit involved the precise issue and the only issue on which the liability of Sebastian, the owner, could rest, whether the negligent driver-employee exceeded the scope of his permission.

So, the District Court of Appeals concluded, in the second case, that the first final judgment in favor of the owner, operated as a conclusive determination of that issue of permission for that second action and that in consequence, Standard, the owner's insuror, could not be liable under its policy because the first suit had determined that it was not being driven with his permission. And, I think most lawyers would have agreed on the common sense basis that the omnibus clause of the insurance policy carried out the statutory mandate of the driving with permission law and that therefore the word permission should have the same meaning and scope in the policy as in the statute.

And then, the Supreme Court got into the act, and using the same words, wrote new music. They declared that there was no single issue as to whether the negligent driver-employee was driving with permission. The issue in the first case was whether he was driving with permission within the meaning of the term permission as used in the *statutes*, and the issue in the second case was whether he was driving with permission within the meaning of the term as used in the *insurance policy*. So the issues were different and there was not even a collateral estoppel.

Well, all right, already we get rid of res judicata, but we still have semantics. Can the same word, used with the same intended meaning, in furtherance of the same public policy, be given two completely contradictory meanings in the same transaction involving the same parties? Yes, if you sit on the Supreme Court Bench. Yet, if you understand the difference between the processes of finding the meaning intended for words and ascribing a meaning to words. In brief, somewhat loosely, the difference between interpretation and construction.

So, let us now, freed from the fetters of dictionaries and common speech usage and armed with these mighty tools, the rules of construction, let us proceed to construe. It's easy. First, we invoke the discredited rule repudiated by express statute in California, that where a new law creates a new kind of liability, it must be construed strictly against imposition of liability in a particular case. We ignore the decision holding that the rule of construction is untenable under the statutes of our State, and by that process we justify the decision in the first action, holding that there they construed the statute and gave the scope of permission a restricted meaning.

But, the insurance policy is a horse of a different color. By development in jurisprudencial's segregation, for which the insurance companies have only themselves to blame, they do not get a fair shake in the interpretation of their policies. As the court says, it is well established that uncertainties in such contracts must be construed in favor of imposing liability on the insuror and the injured party. Garmon had the right to rely on that principle and to take advan-

tage of the rules of strict construction applicable against Standard. And that wraps it up. If permission can be given any meaning you choose in an action against an insuror, the trial judge's determination of this issue of fact is supported by substantial evidence and won't be disturbed on appeal.

VI. Topic number six is a short one. *Intentional Interference With a Lawyer's Contract or Don't Fool Around With John Wynn Herron.*

Whenever I mention that name outside San Francisco, I get politely blank looks, but I tell you a young man with his imagination is going places and should be remembered.

The case was *Herron vs. State Farm Mutual Insurance Company*, 56 C. 2d 202, 14 Cal. Rptr-294, 363 P. 2d 310. John had a personal injury suit on a contingent fee contract. The defendant was the insurer of the negligent driver and according to the allegation in John's complaint, they told his clients they didn't need him and his clients obligingly discharged him and settled with the insurer. John was more surprised than pleased. He didn't take the easy and traditional course of suing his clients for one-third of the settlements, as he can in California under his contingent contract. Why not? He sued the insurer in tort for inducing breach of contract and the amount of his damages was one-third of the settlement plus $25,000 punitive damages which you can get in a tort action if you can make it stick.

The court held that a cause of action in tort for inducing breach of contract was stated. Well, this was a pleading case and there's a catch. The insuror contended that its duty to the insurer, the defendant tort feasor, to settle made this a privilige interference and the court said, "yes, maybe." A typical appellate process. If privilege had been affirmatively pleaded and proved, but the mere fact that the defendant was the insuror of the defendant tort feasor, did not make it privileged.

All right, what will give rise to this privilege to induce breach of a lawyer's contract with his personal injury client? This appears in a way by indirection from the following comment: "There is no indication that State Farm could not have protected its interests and obtained a satisfactory settlement without interference with the contract." From this triple negative, we get the inference that if they had negotiated with John first and found him obdurate or difficult, then they would have been privileged to go on to negotiate directly with the plaintiff. But this is only an inference from that very vague suggestion thrown out.

VII. Topic number seven, *MacPherson Protects the Intangile Interests.* Here we find the incidental beneficiary rejected by the law of contract finally making the grade in tort with the aid of a dumb Notary. Until recently, California followed the traditional view that no tort action arises out of a negligent breach of contract unless there is privity of contract between the plaintiff and the defendant. *Buckley vs. Gray* in 1895 was a leading American case coming out of California where an attorney drew a bad will and the court thought that the injury to the intended beneficiary was not compensable because he was merely a remote beneficiary and there was no privity for a tort action. The duty was to the dead testator and he was the one to complain.

In *Biakanja vs. Irving*, 49 C. 2d 647, 320 P. 2d 16, the Supreme Court over-

ruled the *Buckley* case. The defendant was a notary public who had negligently prepared the will of plaintiff's brother, leaving the entire estate to plaintiff. The will was no good, improperly attested; plaintiff got one-eighth of the estate instead of all of it. He sued the notary and the court said he was entitled to get the difference. (Wealthy notaries in our State.)

Now, there was very little question about the breach of duty. The defendant was negligent, totally unqualified to draw wills and illegally practiced law. But, the real question was, whether the duty existed as to the plaintiff. The court overthrew the incidental beneficiary theory and concluded that the intended beneficiary of a will is a real or express beneficiary of a contract between a testator and the lawyer draftsman. But, the main impact of the case is in tort. The court took the *MacPherson vs. Buick* line of cases, which developed the modern law of tort liability of manufacturers and suppliers for tangible injury to person or property without privity, and said that doctrine is also applicable in a proper case to intangible injury, such as the loss of this expectant share of the estate.

The court was careful to declare that it did not have in mind an unlimited scope of liability in favor of anyone who might be injured by the negligent performance of a contract. That would be going quite a distance. The court said it was perfectly clear in this case, because the plaintiff was the only person who could possibly be benefited by that contract and the injury to him was clear.

As to other cases, you have to weigh the factors and here is the easy rule of thumb the court gives you to determine and advise your client and make your conclusions as to whether to sue in a case of negligent performance of a contract where the plaintiff is not the other contracting party. The determination whether in a specific case the defendant will be held liable to a third person, not in privity, is a matter of policy. It involves the balancing of various factors among which are: the extent to which the transaction is intended to affect the plaintiff, the force or ability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct and the policy of preventing future harm. The moral is, never turn down such a case, but don't bet too heavily on it.

VII. Now, for a brief, suspense-filled interlude involving an illegitimate offspring of the *Biakanja case*, topic number seven, *Honorable Ignorance*, or *What an Attorney is Not Expected to Know*.

Those of you who saw that British movie thriller last night [Ed. "The Death Penalty," a B. B. C. documentary film] will recall the gleam on the face of the solicitor when he explained that liability for negligence will not remain if you have the foresight to take advice of counsel. Well, we have here in California another gimmick, not quite as palatable but just as useful, if you can make it stick.

In *Lucas vs. Hamm*, 56 C. 2d 583, 15 Cal. Rptr. 821, 364 P. 2d 685, the defendant attorney drew a will improperly, the court followed the *Biakanja* case in holding that a cause of action existed in favor of the injured, intended beneficiary, if the defendant-attorney was negligent. So, Mr. Hamm was liable to Mr. Lucas if Mr. Hamm was negligent towards Mr. Lucas. What Mr. Hamm did

was to draw a will which violated both the rules against perpetuities—the rule against suspension of the absolute power of alienation and the rule against remoteness of vesting. And he did it in the face of a California decision squarely in point. A silly decision, but nonetheless a decision which held that if the time of commencement of a trust is the time of final distribution in probate, who knows when probate will take place and be completed. It might be a year and it might be more than lives in being or twenty-one years.

Mr. Hamm either didn't know about the case or forgot about it, the trust failed, the plaintiff had to settle and lost $75,000 and he wanted Mr. Hamm to pay that. The court said, "nothing doing," and this is its answer. See how poetic. "Of the California law on perpetuities and restraints, it has been said that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman, that members of the bar," watch this progression, "that members of the bar, probate courts and title insurance companies make errors in these matters. In view of this state of the law and the nature of the error, it would not be proper to hold the defendant failed to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly exercise." And when they asked Confuscious, Jr., to comment on this case, he said "Hard case make bad law and worse public relations."

VIII. Topic number eight moves into a field both sentimental and esoteric, *Nuances in Attractive Nuisances.*

Each year, the California courts have become increasingly concerned with legal devices to protect the impulsive, wandering youngster who is attracted to dangerous contrivances maintained by surly landowners. In these cases, as you know, the landowners are the bad guys. A doctrine of irresistible impulse so uniformly rejected in the law of homicide, finds a hospital reception in the law of the child trespasser. But, there are limits to the doctrine, are there not? It was only yesterday that it seemed that here were two fixed stars in this admittedly turbulent area of liability. Once was that an attractive nuisance was something artificial which turned or twisted or buzzed or in some other manner attracted. And you found out that it was or was not, by going to the digest and looking it up under its category of turntable, pushcart, trailer and so forth. In California, that approach is dead.

In *King vs. Lennen,* in 1959, Cal. App., 342 P. 2d 459, the question of liability must be decided in the light of all the circumstances and not by arbitrarily placing cases in rigid categories on the basis of type of condition involved.

The other fixed star was that if a danger was so common and familiar that even children should realize it, it could not come within the class of attractive nuisances. In starting with ponds and reservoirs and passing on to swimming pools, a whole line of cases was decided excluding bodies of water from that classification. And, on similar reasoning, delivery trucks, buildings and building equipment were ruled out. In California, that approach is also dead. The process was begun in *Courtel vs. McEachen,* 51 C. 2d 448, 334 P. 2d 870, where the attraction was burning debris on a lot. It was continued in *Garcia vs. Soogian* [52 C. 2d 107, 338 P. 2d 433] where the attraction was a stack of glass window panels, and it was brought into full flower in *King vs. Lennen,* supra, where the attraction was a dirty swimming pool.

The court said "It seems obvious that the common nature of a danger, such

as that of drowning in a pool, should not bar relief if the child is too young to realize the danger." Somebody asked me, "Does it make any difference whether the pool is dirty or clean?", and my answer was one which was so useful in teaching days, "It's put in to make it harder."

And, again, when Confucius, Jr., was interviewed on this case and was asked, "What is the practical solution to swimming pool liability?" he said "Obviously, an underground lake."

IX. Number nine is entitled *Palzgraff Rides Again*, or *Unlocked Vehicles and the Intervening Juvenile Delinquent.*

It has been reliably reported, I think it was in the Defense Law Journal, that each Yuletide in every insurance defense law office the staff gathers around the tree and sings the company's Christmas song, "Oh, What a Pal was Palzgraff." The melody escapes me, but you all know the lyrics of the *Palzgraff* case.

Conduct is negligent only when it creates an unreasonable risk of harm to some particular class of persons. If the plaintiff is not within the class towards whom the defendant is negligent, the injury does not give rise to liability. There is no negligence in the air, says Mister Justice Cardozo. The important, practical effect of the *Palzgraff* theory is that liability for unforeseeable consequences is avoided by limiting the scope of the duty rather than by the application of restrictive rules of proximate cause.

So, the admonition of modern writers is, look for the duty before you talk causation. There is no duty to an unforeseeable claim.

Now, the typical case of the automobile left unlocked with the ignition key in the lock, stolen, driven negligently by thief and injuring the third person, tests this theory. Many older cases treat it in the following manner: The defendant is negligent in leaving his car unlocked with the key in the ignition and the plaintiff is injured and would not have been injured, but for that negligence—cause in fact. But, the intervening, criminal act of the thief supersedes and therefore the defendant's negligence is not the proximate cause. This reasoning, of course, is silly because proximate cause depends on foreseeability and the only thing that made it negligent to leave the key in the lock was the foreseeable, intervening, independent, criminal act of a thief taking it.

Now, if we analyze the problem in terms of legal duty under the *Palzgraff* approach, we can reach either result, liability or non-liability, on a rational basis. In *Richards vs. Stanley*, 43 C. 2d 60, 271 P. 2d 23, the plaintiff alleged the defendant left his key in the lock, that the thief stole it and injured the plaintiff. The court said that this particular case involved a local ordinance on key removal and the purpose of the ordinance was to protect against theft. Since the purpose of the ordinance was that, the defendant was negligent toward her own property interest and her husband's community property interest and that is the sole extent of her duty, to safeguard the automobile against theft. Under that statute, she had a duty to keep her automobile away from thief-negligent drivers. The court threw in this helpful suggestion, which I am sure will make some hair here stand on end. "That considerations suggest that the basic problem is really not one of negligence on the part of the owner, but rather whether or not the hazards inherent in the use of automobiles are so great that liability should be imposed

on the owner without fault for any damage done by the operation of his vehicle." Maybe that will make *all* the hair stand on end.

Now, we compare *Richardson vs. Ham*, 44 C. 2d 772, 285 P. 2d 269. In the *Stanley* case, if we had found a duty, modern liberal rules of proximate cause would have allowed recovery. Here, in the *Richardson* case, we find a duty and proximate cause is no problem. The vehicle left unlocked and able to be moved with a 26-ton bulldozer on a mesa and three intoxicated young men, it says here, managed to start it, drove around causing damage, lost control, went for about a mile and went through plaintiff's house and injured plaintiffs. The court held that the bulldozer owners and operators were liable. They distinguished the *Richardson* case automobile case, by pointing out that a bulldozer is not like an ordinary automobile. Curious persons are known to climb on them, hence (this pedantic way of putting it is very impressive) there was a reasonably foreseeable risk that defendant's bulldozer might be tampered with when left unattended. But, then, the Court quite poetically, to give some strength to its conclusion said, "Moreover an intermeddler who starts a bulldozer accidentally or otherwise, may not be able to stop it, and the potentialities of harm from a 26-ton bulldozer in uncontrolled motion are enormous, particularly when it is left on top of a mesa." Well, since you have a duty, causation is easy, the very thing that made it negligent, to leave it in that fashion was a realizeable likelihood that some unauthorized person would come in and move it.

My tenth case falls within the no-man's land again where tort and contract meet. Here a tort background and tort psychology create a contract liability. That is, an absolute liability.

X. I had a little trouble with the title of this topic and I am going to list all of my attempts: *Fault Without Negligence; Privity Dies Again; Jury Practice of Law Judicially Approved; New Belli Building Plan.* The case as you probably recall is *Gottsdanker vs. Cutter Laboratories*, 182 C. A. 2d 602, 6 Cal. Rptr. 320.

Cutter Laboratories manufactured Salk polio vaccine, supposedly with only inactivated virus. Actually it contained some live virus. The vaccine was sold to pharmacies and by them to doctors and the doctors injected the vaccine in children. So, the injured parties, the children, were not the buyers and they were not in privity with the defendant, Cutter. There was substantial evidence that the infected virus caused the disease in the child-plaintiffs. The jury in this case undertook a test beyond their call of duty. Instead of returning a simple, general verdict for the plaintiff, they, in the language of the court, drew a thoughtful and careful statement, and if you are ever a defense lawyer, beware of a thoughtful and careful statement by any juror, let alone all of them.

In that statement they concluded that the defendant was not negligent, but was liable for breach of warranty. This unsolicited, special verdict in the form of an advisory legal opinion was not completely satisfying on the part of the plaintiffs, because on the negligence issue the law was strong but the evidence was weak, and on the warranty issue the evidence, causation, was strong, but the law was weak because of the privity rule. So, the plaintiffs also appealed and the District Court of Appeal affirmed the judgment solely on the warranty ground, and the successful plaintiffs, after a number of huddles, decided to quit while they were ahead and they didn't petition for a hearing and so the District Court of Appeal's decision became final. Under it, Cutter was presumptively

free from negligence, but it was liable without fault on the theory of implied warranty which sounds like contract but sounds in tort, if that double talk means anything. Actually all it meant was $2,000,000.00 in settlement. There has been an avalanche of legal literature exploring and on securing the legal implication of this decision.

I will conclude with my two-bits worth in less than two minutes. Products liability is well on the way to becoming absolute liability because the privity requirement in actions for breach of warranty is on its way out. In progressive jurisdictions like California it has been eliminated in the case of food and drugs. It has also been eliminated in a number of express warranty cases. In *Peterson vs. Lamb Rubber Co.,* [5 Cal. Rptr. 863, 353 P. 2d 575], it was virtually, though not literally, eliminated in the case of sale of a dangerous instrumentality, but this case requires a little background.

MacPherson vs. the Buick Motor Company in 1916, as you know, imposed a duty of care on the manufacturer of a potentially dangerous instrument to a remote buyer or user and that was a great advance in its day. As time wore on, it became less and less of an advance. Manufacturing processes became so elaborate and testing procedures so common, that defendants were able to bring an army of experts in to overcome the meager evidence or inference of negligence and so some of the plaintiffs lost and that is that.

It therefore became apparent that if products liability were to be shifted from the typical small retail dealer to the typical large wholesale manufacturer, the manufacturer would have to become liable on the same basis as the seller, on warranty, irrespective of negligence. The *MacPherson* duty of ordinary care would have to be replaced by an absolute liability as a part of the cost of doing business. To accomplish this within the frame-work of existing legal theory, the privity rule has to go. The maufacturer has to be treated as if he actually sold the article directly to the user. Now, food and drugs is one thing, but to extend this rule to all potentially dangerous industrial products is a mighty extension and a small wonder that the California Supreme Court approached the problem with caution and decided it with equivocation.

In the *Peterson* case, the defendant manufacturer sold an abrasive wheel to the plaintiff's employer, and plaintiff, while using it, was injured when it disintegrated. The jury gave a verdict for defendant on the grounds of no negligence and the trial judge sustained a demurrer to the warranty count, on the grounds of no privity and the Supreme Court reversed the judgment on demurrer on the warranty count. And, what did it hold? The *Peterson* case has been cited for the proposition that the privity requirement no longer applies to sale of a dangerous instrumentality and that may well be the effect of the decision.

But, the language of the opinion is somewhat less abrupt. Slyly reaching into the fields of domestic relations and common law of real property, the court picked up a couple of unrelated concepts and cemented them into the law of sale. Since you are so far from law school, I wil identify them for you. First, and I quote, "In modern industry, employees should be considered members of the industrial family of the employer" (how expert!) "and to thus stand in such privity to the manufacturer as to permit the employees to be covered by warranties made to the purchaser-employer." That was from the field of domestic relations. The second one is more abstruse. "The term 'privity' has been defined as succession. Thus,

in the present context, the employee had the successive right to the position and use of the grinding wheel handed over to him by his purchaser-employer, and we believe, should fairly be considered to be in privity to the vendor-manufacturer with respect to the implied warranty." That could very well fit into any old, common law case on covenants running with the land.

So, the privity requirement is eliminated. Not by abolishing it, but by redefining it and reshaping it so that the kind of privity which emerges is actually non-privities. To laymen this is no mean feat but it's almost standard operating procedure for appellate courts.

Well, this somewhat confusing travelogue must end sometime and I will close as I began, with the doctrine of stare decisis at its best and worst.

XI. The eleventh topic, *Hitaffer Hovers and Flies Away.* It would be hard to find in the law any subject or proposition in which the courts are more under attack by law writers than this. The wife's right of consortium or interest in the non-economic aspects of the marriage relations, I'll explain that later, is not entitled to legal protection when the husband is rendered connubially ineffectual but the husband's similar right is an established basis of damage where the wife is so injured.

Nearly all the courts support this rule. Nearly all the writers have denounced it as a common-law hangover from the days before the new matriarchal jurisprudence and in *Hitaffer vs. Argonne Co., Inc.,* 183 F. 2d 811, the District of Columbia Court of Appeals joined the writers and recognized the wife's cause of action. The *Hitaffer* bird joyously took to the air and made successful landings in Georgia, Iowa and Arkansas and dropped into the welcoming arms of Dooling, J., in *Deshotel vs. Atchinson, etc. Ry. Co.,* in 156 AD CAL APP, P. 2d, just as Dooling flapped his own arms with great vigor. The discriminatory majority of view was established, he said, with a sturdy disregard of logic, which made some judges feel uneasy. As for others, it was too strong meat for mental digestion. He approved the strictures of the commentators, the analysis and conclusions of the *Hitaffer* case and held that the wife's complaint stated a cause of action. Then, to the great surprise of the scholars, it turned out that there were two sides to the question and that the critics were indulging in much the same kind of misleading conceptualism as the judges. The ultra-progressive Supreme Court of California granted a hearing and rejected the innovation, mainly on the ground that the husband's award for his own injuries usually involves compensation for impairment of his ability to participate in a normal married life and a separate award to the wife would be based on conjecture and would well result in double recovery.

To preserve its membership in the Association of American Courts not Unduly Opposed to Plaintiffs and Married Women, the Chief Justice threw out this suggestion: The legislature, if it found this type of suit to be desirable could define the extent of the liability, designate who may maintain the action and provide safe-guards against the danger of double recovery such as a requirement that there be a joinder of the person directly injured, the husband, and the one consequently harmed, the wife, The legislature didn't.

Now, a couple of years ago that would have concluded this topic but we now have an epilogue. When this was a law school problem, the more alert

members of the class were quick to perceive the absurdity of this restriction on the wife's recovery. But what really bugged a serious student was the view taken by some courts that this discrimination has got to go and a way to get rid of it and to make things equal is to abolish the husband's right as well, by abbrogating the common-law rule.

Well, the ultra-progressive California Supreme Court has just joined this group. In *West vs. San Diego* in 54 CAL 2d, (6 Cal. Rptr. 289, 353 P. 2d 929), the wife was so seriously injured as to preclude any possibility of normal marital relations. She recovered a substantial verdict for her injuries, $57,000, and her husband received $5,000 for loss of services and consortium. The Supreme Court reversed the judgment, holding that, of course, he could recover for loss of her dishwashing, cooking and other such wifely services, but that the element of loss of society was not compensatory.

Now, note the husband's right was recognized by common law. It's the majority American rule. It was reaffirmed in California in 1955 in *Gist vs. French* (136 C.A. 2d 247, 288 P. 2d 1003) and loss of consortium is an element of recovery in wrongful death cases. What suddenly triggered the California Supreme Court, six to one, to kill the rule? The answer is obvious. The *Deshotel* case had left the Judges out on a limb and they couldn't find a logical way back. That is, they couldn't see any modern difference between the right of the wife and the right of the husband and having passed the buck to the legislature on the right of the wife, they had to do the same with the husband. To which, the dissenting Justice, Peter, J., said, "artificial, absurd, unsound, contrary to public policy," and some other things I can't mention. And, so we say aloha to the Hitaffer bird as it resumes its weary journey, like an air-borne Flying Dutchman, still looking for a jurisdiction where sex is sex and not a wreath of legalisms. (Applause).

(MR. WARE congratulated Mr. Witkin on his fine talk, and then introduced Philip E. Peterson, Dean of the College of Law, University of Idaho, Moscow. Unfortunately, Mr. Ware's exact words were not recorded and transcribed).

DEAN PHILIP E. PETERSON:

JURISDICITION OF IDAHO COURTS OVER NONRESIDENTS

I.

The problem of jurisdiction over nonresidents is simple. Do we want to expand our jurisdiction, can we do it and how far have we gone in accomplishing this objective?

First, is extension of jurisdiction of our courts over nonresidents desirable? Will it benefit the people of this state? A company from New Jersey puts a new sprinkler system on your lawn and guarantees its utility, then leaves. Later you find it doesn't work. You can hardly sue them in New Jersey and, unless our courts have jurisdiction, our resident is going to get no relief. It is only the very large suit that is exportable. Obviously, we want to protect our citizens and the only method of achieving this objective is by expanding judicial jurisdiction over persons from outside the state dealing with or injuring our residents.

We also know that many companies with nationwide operations tailormake their organizational structure with two objectives in mind: Avoiding state taxes and avoiding judicial jurisdiction. In the past they have been pretty well able to

achieve both ends with the same kind of operation. The ability of nonresidents to achieve these objectives has been rudely impaired in recent years by reinterpretation of constitutional limitations by the United States Supreme Court.[1] The motives of reputable companies in achieving these ends are not evil. The administrative cost of compliance with state tax systems is high and the cost of defending law suits in distant states not inexpensive. The expansion of judicial jurisdiction gives rise to the rather obvious danger of nuisance litigation.

By expanding the jurisdiction of our courts and our taxing statutes to the maximum, are we going to drive business out of the state? If so, I would suggest a long, hard look at our statutes to see if they really are worthwhile. Reputable organizations, and we shouldn't be particularly concerned about any others, frequently achieve the desired end by accepting orders by mail or telephone at a point outside the state and shipping f.o.b. a foreign state. There will be no offices or distributing centers in Idaho. Possibly the organization will have a couple of people located in this state whose assignment involves talking up their product, answering questions, possibly placing some advertising in the state, but not making any sales directly. In view of this fact, I think the answer is obvious. As the boundaries on state taxation of interstate commerce and state court jurisdiction over nonresidents break down, commercial activity in the state such as Idaho, could increase. There will no longer be any point in the business staying out. The nonresident companies need the business and to deal with Idaho residents they might as well be here where they can operate more efficiently since fewer tax or other advantages will accrue from avoiding greater contacts with Idaho. Location of offices and distribution facilities within Idaho would create economic advantages for our state.[2] I believe that the expansion of jurisdiction will not deter business.

Thirdly, will this expansion put too heavy a burden on our judicial system? Though, unquestionably, more suits will be capable of institution in this state, it would seem that any risk involved in overburdening our judicial structure with its concomitant increase in state expenditures will be more than offset by other factors.

I don't believe there is much question but that it is in the best interest of the people of this state to expand the jurisdiction of our courts to the maximum limits. In the process, however, we must avoid injustice to the nonresident. One incidental aspect should involve a review of that section of our statute which excludes times spent outside the state from the calculation of the limitation period in application of the Statute of Limitations.[3]

II.

Can we do it? How far can we go in extending judicial jurisdiction over nonresidents? Our ability in this respect is limited by three factors: Federal court jurisdictional notions which have been a part of due process since the days of *Pennoyer v. Neff*, the injunction against imposing undue burdens on interstate commerce, and any limitations which our court may find in our own constitution. the first of these, federal court notions of due process, has been the real obstacle to state expansion in past decades. The other two, for purposes of this talk, can be disregarded.

Ideas represented by Holmes' classic statement, "foundation of jurisdiction is physical power,"[4] have long been the foundation of judicial power. The case

which became the trademark of this concept was *"Pennoyer v. Neff.*[5] Jurisdiction over the nonresident was also exercised if his property was found in the state. This *in rem* or *quasi in rem* jurisdiction was theoretically based on ability to dispose of property within the judicial ambit and furnished a convenient fiction permitting action against nonresidents in the absence of physical power over them. Jurisdiction to determine the status of domiciliaries in family relations as an incident of this power, has been part of our system since ancient times.

Corporations presented an anomaly to the courts for they had no being over which physical power could be obtained. Initially, jurisdiction was limited to the state of incorporation, that state which gave birth to the legal entity which was the corporation. Jurisdiction over foreign corporations was obtained by forced consent statutes requiring registration and consensual submission as the price of doing business in the state. If consent was absent, the courts soon fictionalized an "implied consent" or "presence" in the state as a convenient device to square extension of jurisdiction with traditional notions of physical power. The touchstone of both these fictions was an attractive but illusive phrase, "doing business in the state."

The theoretical consequences of choice of the applicable fiction were considerable. If a state indulged in "implied consent," a foreign corporation was subject to suit in the state without regard to its activities at the time of commencement of the action but only claims arising out of its activity in the state could be asserted against it. On the other hand, the "presence" theory demanded corporate activity in the state at the time of commencement of the action but permitted claims to be asserted against the corporation without regard to connection with state activity.

Recent decades have witnessed fantastic progress in communication and transportation and a tremendous growth of interstate business activities. The system that suited the horse and buggy, when most people stayed home and business was local, was inadequate to meet the demands of the rocket era with national businesses the vogue and state lines being crossed as easily as streets. Coincidentally, the progress in communication and transportation and the development of modern deposition and discovery practice has lessened the burden of suit before a foreign tribunal.

We had a pattern on which development could be molded. It has long been a basic principle of French and German law that jurisdiction always exists over domiciliaries and attaches to foreigners when a contract is made or a tort is committed within the country.[6]

In some social areas, changes may be rapid. We stop doing something and start something entirely new and different. This is not the way of the law. Law is conservative, resistant to change, and change, when it comes, usually carries with it ancient notions as an integral part of new ideas. Often, as we have seen, this is accomplished by legal fictions, particularly evident in the field of judicial jurisdiction. The past remains part of the present. Without regard to their utility, old notions of jurisdiction will not be abandoned for decades. Recent cases do not mark abandonment of ancient theories of judicial jurisdiction.

We have had progress. The first major development came in 1940 when the United States Supreme Court in *Milliken vs. Meyer,* approved the exercise of

jurisdiction over their domiciliaries by states without regard to physical power over them at the time of institution of the action.[7] In 1945, the first of a trilogy of Supreme Court cases enunciating further doctrinal development was decided. In *International Shoe*[8], the court took pains to pronounce a new development in its approach to the problem of state court jurisdiction; Justice Stone wrote:

> Historically, the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

It remained for *McGee*[9] *and Denckla* [10] to develop further this thesis.

Two constructions of the language of *International Shoe* were possible. Either that an entirely new and different theory of jurisdiction had replaced the traditional physical power notions or that *International Shoe* simply extended the doing business touchstone of earlier cases, liberalizing it in the process. *McGee* led many to believe that ancient concepts had been abandoned; however, *Denckla* used language which would appear to have placed the *International Shoe* langauge in its proper context:

> As technological progress has increased the flow of commerce between states, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. State of Washington.* But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. *Those restrictions are more than any guarantee of immunity from inconvenient or distant litigation.* They are a consequence of territorial limitations and the power of the respective states. *However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that state that are a prerequisite for its exercise of power over him. Hanson v. Denckla,* 78 Sup. Ct. 1228, 1238 (1958). (Emphasis added).

The first alternative would have replaced the physical power theory with a concept of "fairness" and would have required the court in each case to answer a single factual question: Is it reasonable to try this case?[11] The standard finally approved in *Denckla* compels a limited adherence to traditional notions in that "minimal contacts," perhaps symbolically giving rise to physical power, must exist.

The "minimal contacts" standard will vary depending upon the nature of the action to be tried. If the claim is one arising out of activity within the state, pre-

sumably less contacts will be demanded than if the claim is one unconnected with state activity.[12] The *Perkins* case [13] and others like it indicates clearly that a state may have jurisdiction over a nonresident and unregistered foreign corporation doing domestic business without regard to the nature of the claim if the corporation has engaged in a continuous line of state-connected activity. Other cases have permitted jurisdiction to attach to state-connected claims on the basis of single acts.

It would also appear that fewer contacts will be required in cases where protection of the state citizen is a primary concern, i.e., where the state has a legitimate interest to protect. The Supreme Court was willing to go to extreme lengths in permitting jurisdiction over insurance companies in the *McGee* case and presumably will be willing to permit considerable expansion in nonresident motorists and other tort cases.

In addition to "minimal contacts," the enunciated doctrine would appear to require a rule of reasonableness. This will require a balancing of interests between plaintiff and defendant. The burden of requiring the defendant to appear and defend in the domestic jurisdiction must theoretically be balanced and weighed against requiring the plaintiff to institute his action in some other jurisdiction, whether the relative financial positions of the respective parties can be considered in this process remains to be decided, presumably, however, the location of witnesses and other evidence would be important in the final determination. Some of the cases considering this problem contain overtones which suggest that this factor of "convenient forum" may be part of the constitutional requisites in this area.[14]

In any event, it would appear that this extension of jurisdiction should compel a more widespread adoption of the rule of *"forum non conveniens."* This rule permits the trial court to exercise its discretion and dismiss an action if it believes the forum in which the action is being pursued is inconvenient for trial. The judge, in making this determination, normally looks to the availability and cost of witnesses, the location and transmissibility of evidence, the need for the court or jury to view local premises, the burden placed upon the local judicial system by institution of this suit, whether or not other suits pending in the jurisdiction will be unduly delayed and, finally, the availability of another forum to the plaintiff. Some of these factors will be important in application of any rule of "reasonableness" that may finally be developed. However, note that the availability of modern deposition and discovery devices should mitigate many of the evidentiary problems which formerly existed and permit trial in a forum which, without these devices, would be unreasonable. The requirement of adequate notice and an opportunity to be heard exists in any case and recognition of difficulties created by expanding judicial jurisdiction has led to increased stress and insistence on adequacy of notice.[15]

One might question the application of the rule developed in these cases, each of which dealt with a foreign corporation, to individuals, partnerships and other business associations. The language used by the court in *McGee* particularly indicates that no distinction was seen by the court.[16] None of the three cases, since each concerned a corporation engaged in interstate commerce would have been able to rely upon ability of the state to exclude the corporation from doing business. As a consequence, subsequent case law has assumed that this jurisdictional

expansion is equally applicable to individuals and other business organizations.[17]

International Shoe and its descendents do not provide an easily read jurisdictional handbook. Indeed, one can visualize chaotic uncertainty in a rule which depends upon "contacts" and "natural justice." However, this will not be the first time our courts have evolved a practical, knowable rule from such conceptual generalities.

In summary, we find today that a state may still entertain jurisdiction over any person served within its territorial limits. It may entertain any action against its domiciliaries, corporate or individual. It may entertain jurisdiction against nonresidents, corporate or otherwise, in actions arising out of state activity upon a finding of minimal contacts. Lastly, it may entertain claims against nonresidents unrelated to state activity upon a finding of contacts substantially greater and probably consisting of regular and continuous business contacts with the state.

III

How far has Idaho gone in jurisdictional expansion? Long ago we got expansive notions about public utilities.[18] In the new rules we permit substituted service on domiciliaries and have expanded the situations in which process may be served upon the partnerships and business associations.[19] We require foreign corporations doing business in this state to register and designate a statutory agent upon whom process may be served in any action without regard to state connection.[20]

We have long provided for actions against foreign corporations, without regard to registration, which are doing business in the state and have not designated agents or do not have agents residing in the counties upon whom process can be served.[21] There would appear to be no limitation on the nature of the claims which may be asserted under this section. However, it should be noted that this statute, since it fails to require notice to the nonresident corporation, may be subject to constitutional attack.[22]

In 1951, Idaho adopted the Unauthorized Insurers Process Act.[23] The provisions of this act are liberal and, combined with the recently adopted Single Act statute, should carry the jurisdiction of our courts over insurance companies to the full extent constitutionally permitted. Presumably, attorneys, given a choice, will prefer to proceed under the Unauthorized Insurers Act since it allows recovery of attorney fees in proper situations.[24] The last session of the Legislature adopted a provision extending jurisdiction of state courts in tax collection suits against foreign residents. This statute permits the state to proceed in any case in which taxes are due by a person not presently residing in the state and specifically provides for the exercise of *in personam* jurisdiction.[25]

IV

SINGLE ACT STATUTE

The Legislature, in its last session, adopted an act patterned on the Illinois Single Act statute which now appears as sections 5-514 to 5-517 of the Idaho Code. The important section of this Act reads:

> Any person, firm, company, association or corporation, whether or not a citizen or resident of the state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person,

firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state *as to any cause of action arising from the doing of said acts*s

(a) the transaction of business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association, or corporation;

(b) the commission of a tortious act within the state;

(c) the ownership, use or possession of any real property situate in this state;

(d) contracting to insure any person, property or risk located within this state at the time of contracting.

Not only does this statute pose difficult questions of statutory construction for our courts but also they will be faced with the problem of constitutional application. The intent of the legislature would appear to be to go to the fullest extent permitted by constitutional limitations. I would, therefore, suggest that the statute will be purposively construed in the light of this objective and without undue narrowness. It has received such a construction from Illinois, the state which formulated its progenitor.[26]

One of the early questions which would arise under this statute is its application to claims arising before the statute went into effect or growing out of transactions which occurred before the statute was enacted by the legislaure. This question has been before many courts and they have generally held that its retroactive application to claims in either category is constitutionally proper.[27]

Of extreme importance in applying this statute is the fact that it demands state-connection for all claims; claims not connected with the various activities described may not be asserted under this Act.

A. TORTS

In considering this section, I will commence with its second part and proceed from this to a discussion of the other portions. Here we find that we can maintain an action for any claim arising out of the "commission of a tortious act within the state."

We might start out with the simplest case in which a nonresident individual or corporation enters the state and negligently injures someone, whether or not the injured party is an Idaho resident. The actor committed the act in the state of Idaho. Even though this is the only contact of the defendant with the state, jurisdiction can be constitutionally exercised.[28] If we go further and assume that the tortious act is committed by an agent, there again would be little doubt about the propriety and constitutional validity of application of the statute to the nonresident principal though he has never been in the state.[29]

If someone stands across the state line and throws a rock, intending to cause injury to a person in this state, the Idaho courts should have *in personam* jurisdiction. If the defendant, never having been in the state and having no other contacts with the state, negligently manufactures or packages something, shipping it into our state where it causes injury to someone, there would also appear to

be sufficient contacts present for Idaho to exercise jurisdiction over the nonresident defendant.[30]

At this point a problem of construction is raised. The literal language of the statute requires "commission of a tortious act within this state" before any claim may be maintained under this act. In this situation, it is possible to conclude that, since no actual act or omission by the actor occurred in the state, the statute is inapplicable.[31] However, if the statute is to be carried to the constitutional limits apparently intended,[32] a much broader construction is necessary. In a more extreme case than this one, the Illinois Supreme Court applied the statute. In *Gray v. American Radiator and Sanitary Corporation*,[33] the defendant corporation had manufactured a valve in the state of Ohio which was shipped to a purchaser in Pennsylvania who there incorporated it as a part of a radiator which which the purchaser manufactured. The radiator was shipped from Pennsylvania to a buyer in Illinois who was subsequently injured in that state, allegedly as a result of a defect in the valve. He sued the Ohio corporation under the Illinois single act statute and, over the defendant's objection, the Illinois Supreme Court held the trial court had jurisdiction.[34] The court applied the place of effect theory, familiar as a solution to choice of law problems, and held the act was committed in Illinois where the injury occurred.

This situation presents a basic constitutional problem in solution of the "minimum contacts" requirement of *International Shoe* and *Denckla*. The case law discloses disagreement.[35] The Illinois court found sufficient contacts in the expectation of the defendant that its products would be ultimately used in the state of Illinois and the indirect benefit derived from business done in that state. This approach would presume expectation and benefit but would allow the defendant, on a motion attacking jurisdiction, to prove that it had no expectation that its products would be used in the state and that no continuing benefit was realized from ultimate sales in the state.

Finally, we could assume an extreme case in which a California mechanic repairs the brakes on a Michigan tourist's car. As the Michigan tourist travels through Idaho, these brakes give out and someone in this state is injured. Application of the place of effect theory would locate the tortious conduct in Idaho and result in application of the statute. One could also argue that a mechanic servicing cars on a national highway could expect the product of his labor to be carried throughout the nation. Nevertheless, it would seem that under the *Denckla* decision the necessary contacts between the California mechanic and the state of Idaho are missing and that the Idaho court could not constitutionally exercise jurisdiction. Recognizing the problem that here exists, the National Conference of Uniform Law Commissioners has, in its first tentative draft of the Uniform Interstate and International Procedure Act, separated two situations. This Act provides that jurisdiction always exists for any claim arising from tortious action with the state causing injury. If tortious injury in the state is caused by an act or omission without the state, jurisdiction exists only in the event the actor regularly solicits business or engages in any other persistent course of activity in the state.[36]

The language used in the Uniform Act does not carry notions of contacts and jurisdiction as far as the opinion in the *Gray* case. The *Gray* decision would appear to be based on reasonable expectations of the defendant. The Uniform Act

stresses "fairness" and prejudges this issue by concluding that it is "fair" to require the out-of-state actor who frequently does things in the state to appear and defend and "unfair" to require the defendant who engages in no in-state activities to appear without regard to expectations as to use of his product.

In any case though "minimum contacts" may be satisfied by expectations and indirect economic benefit from the state, a constitutional requirement of "fairness" or "natural justice" may also exist. This will be solved not only by looking to the in-state activity, which would indicate the presence or absence in the state of facilities to handle the litigation, but also by balancing the ultimate burden of appearance imposed upon the defendant against the injustice of denying our courts to the plaintiff. Perhaps most of these cases will be "products liability" cases and, in turn, plaintiffs, in many of these cases, rely upon *res ipsa.* Utilization of this doctrine will compel proof of the manufacturing process and the defendant, to satisfy this burden, will normally have to produce witnesses from his plant. This factor should have some bearing on the determination of jurisdiction since the location of the defendant's business may well be the "convenient forum."

B. DOING BUSINESS

Now, I would like to turn to a discussion of the first provision of this statute which reads:

> The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation.

The language used in this section is considerably more extensive than is that of its progenitor, the Illinois statute, which tersely says "the transaction of any business within the state." The definitory language is extremely broad in its application to any act resulting in pecuniary benefit or enhancement of any business purpose or objective.

There seems to be no doubt that a definition other than that previously employed by our court in construing the provisions of I.C. 30-502 and 5-507/3 is intended. The key language would appear to be "doing of any act." Construing this language to require the presence of the actor or his agents in the state would be unduly restrictive. On the other hand the doing of any act without regard to the location of the actor would permit application in extreme situations and generate constitutional difficulties. The section could be construed in the fashion adopted by the Illinois Supreme Court and in effect read as: "The doing of any act which satisfies the requisite minimal contacts set forth by *International Shoe, McGee* and *Denckla.*"

Acting upon the assumption that such a construction will be adopted, I will approach this problem by inquiring into the sufficiency of various contacts in satisfying general due process demands. Perhaps the initial situation visualized would be one in which an offer emanates from this state and is accepted by an offeree in a foreign jurisdiction. The connection with the state in such a situation would appear to be too tenuous and would not meet minimal standards.[37] Acceptance of the offer in this state coming from without is equivalent to execution of the contract in the domestic jurisdiction and would offer a more substan-

tial basis for imposition of jurisdiction. However, this also has been held to be too remote a connection and must be accompanied by other action before jurisdiction will attach.[38] Though the contact is slight and there is contrary authority, acceptance of the contract accompanied by in-state negotiations has been held sufficient.[39] If the contract is actually performed in this state, there would seem to be little question about the sufficiency of the contacts and if the contract contemplates performance within the state this would also appear to be sufficient.[40]

Turning to the problem of selling and buying activities, sales without the state to in-state customers with delivery to be made in the foreign state and without solicitation in the domestic jurisdiction should not subject a nonresident to suit.[41] Sales outside the state with delivery in the state presents a closer problem and, at least if accompanied by any other activity, however slight, will create jurisdiction though considerable diversity is evident in the cases.[42]

We have long recognized the "solicitation" and "solicitation plus" rules, the one generally being considered insufficient and the other sufficient without great emphasis being placed on the weight of the "plus" factor.[43] The relation of solicitation to the "minimal contacts" rule presents one of the more aggravating problems and has complex variations. Solicitation by advertisements in national magazines or on television with orders accepted and filled outside the state or sales made within the state by independent distributors will not furnish the necessary contacts.[44] Solicitation by mail would appear to fall into the same category. However, solicitation within the state accomplished by agents maintained in the state with orders accepted and filled by shipment from outside the state, without regard to where delivery is made, will probably permit the constitutional assertion of jurisdiction.[45] Jurisdiction will also exist though solicitation is accomplished by mail or other means and the agents maintained in the state are merely engaged in efforts to promote the seller's product or answer queries about it.[46] There is contrary authority in this area.[47] If solicitation is accompanied by the giving of technical advice or the agreement to do so, servicing property sold, gathering credit information in the state, accepting or making payment in the state, or the maintenance of an office in the state, the activity would appear to be clearly sufficient under the decisions.[48]

Not surprisingly, where the buyer is located outside the state and the seller within the state, solicitation by the buyer will not subject him to jurisdiction of the state court.[49] In this area, courts are reluctant to extend jurisdiction. This may be desirable for in theory we do not want to discourage out-of-state buyers and buyers will normally not expect to be subject to suit as a result of making a purchase in the state. On the other hand, should the buying be a persistent activity of the defendant, continuing over a period of time and accompanied by substantial economic benefit to him, the result might well be different.

C. PROPERTY

The third section of the statute allows jurisdiction incidental to ownership, use or possession of real property.[50] Statutes similar to this one have been utilized largely to extend jurisdiction over the nonresident in torts incidental to some connection with the real property.[51] Presumably, however, this section would permit *in personam* action against the nonresident for the collection of taxes,[52] assessment of penalties, damages arising out of breach of covenant, and a multitude of other situations incident to his connection with the real property.

There would seem to be little doubt that the contacts are sufficient for application of this portion of the statute. An interesting question might arise in this area if the statute permitted jurisdiction of any claim against the nonresident with such property connections with the state, i.e., did not demand that the claim be "state-connected." Conceivably, the ownership and continued maintenance of property in the state, since it gives rise to considerable state activity for the benefit of the nonresident, might be considered a contact of a continuing nature and such as to give rise to "minimum contacts" sufficient to sustain jurisdiction without regard to the relationship of the particular claim to the state. However, no statute has yet been extended this far.

D. INSURANCE

The last portion of this section concerns insurance contracts and imposes jurisdiction in any case in which the person, property or risk is located within Idaho at the time the insurance contract is executed.[53] Though not literally covered, domicile in the state at the time of execution of the insurance contract should be sufficient for imposition of jurisdiction under this section wtihout regard to accidental location at the time of execution of the contract. Again, the legislature must have intended to reach as far as possible.

In conjunction with the Unauthorized Insurer's Process Act, this section provides a comprehensive blanketing of situations involving insurance companies. The Unauthorized Insurer's Act[54] relies upon activity of the insurer within the state such as issuance or delivery of contracts of insurance, solicitation of applications, collection of premiums or the transaction of any other insurance business by the insurer as a foundation for jurisdiction.[55] The two acts are complementary. The Unauthorized Insurer's Act, since it imposes other burdens on the insurer-defendant such as the payment of attorney's fees in proper situations, is in this sense more advantageous than the single act statute.

Insurance is an area in which the state has a legitimate interest in achieving an extreme expansion of jurisdiction. In addition to this factor, insurance companies are cognizant of the necessity of defending suits in all sections of the country and in some situations obligate themselves to defend actions wherever they may be brought. In view of the nature of the insurance business, it would appear that the extra burden placed upon them by requiring appearance in a local forum to defend actions arising out of their operations is justified.

The Supreme Court has already indicated the extreme lengths to which it is willing to go in permitting the exercise of jurisdiction over insurance companies.[56] Other courts have been even less considerate of insurance businesses. A recent decision sustained a statute extending jurisdiction over a nonresident insurer based solely on location of the risk in the state at the time the insurance claim arose.[57] Sufficient minimal contacts were found in failure of the insurer to exclude the state from policy coverage at the time of execution of the contract.

CONCLUSION

Expansion of jurisdiction over nonresidents will aid our citizens and will not block commercial traffic. Our statute poses many difficult problems of construction for our court. The Wisconsin statute is phrased in more specific terms than is ours and as a consequence presents fewer problems of construction and more certainty in predictable application. Nevertheless, such a statute is less flexible

and therefore less adaptable to constitutional construction. On balance it would appear that a generally phrased act is preferable.

FOOTNOTES

1. In the tax field, Northwestern States Portland Cement Co. v. Minn., 79 Sup. Ct. 357 (1959) and Scripto, Inc. v. Carson, 80 Sup. Ct. 619 (1960) have extended greater latitude than formerly to the states in their ability to reach receipts derived from interstate commercial activity. Congressional action has in turn limited the exercise of this jurisdiction. The judicial jurisdiction cases are considered *infra.*
2. It should be noted that federal legislation adopted to meet the impact of *Portland Cement* upon corporations doing extensive interstate business maintains the situation that formerly existed here.
3. I.C. 5-229. Since jurisdiction will exist in our courts in most instances in which the claim arises out of action in this state, there would seem to be little point in excluding time spent outside the state. The reason for the section depends upon inaccessibility for suit during the period spent outside the state.
4. McDonald v. Mabee, 243 U. S. 90 (1917).
5. Pennoyer v. Neff, 95 U. S. 714 (1877).
6. Wolff, Private International Law, 67-73 (1945); Code de Procedure Civile, Art. 59 (1), (2-12); Art. 420 (1) (2-3).
7. Milliken v. Meyer, 311 U.S. 457 (1940).
8. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
9. McGee v. International Life Insurance Co., 355 U.S. 220 (1958).
10. Hanson v. Denckla, 357 U.S. 235 (1958).
11. Note that this alternative would have required the trial court to answer a factual question which, as a practical matter, would have meant only limited review by appellate courts.
12. Note that *Denckla* involved a claim not arising out of the contacts and *McGee* involved a claim resulting from state contacts.
13. Perkins v. Benquet Consolidated Mining Co., 342 U.S. 357 (1952).
14. Latimer v. S/A Industrias Reunidas F. Matarazzo, 175 F.2d 184, 186 (2d Cir. 1949); Kilpatrick v. Texas Pac. R.R., 166 F.2d 788 (2d Cir. 1948); Hutchinson v. Chase and Gilbert, 45 F.2d 139, 141 (2d Cir. 1930); Lau v. Chicago and N.W. Ry. Co., 111 N.W. 2d 158 (Wis. 1961). It should also be noted that the problem of unduly burdening interstate commerce remains in this area.
15. Mullane v. Central Hanover State Bank, 339 U.S. 306 (1952); Walker v. City of Hutchison, 352 U.S. 112 (1957).
16. "Looking back over this long history of litigation, a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations *and other non-residents.*" McGee v. International Life Ins. Co., 355 U.S. 220, 78 Sup. Ct. 199, 201 (1958).
17. Smythe v. Twin States Improvement Co., 80 A.2d 664 (Vt. 1951) cited in

McGee; Davis v. St. Paul Mercury Indemnity Co., 294 F. 2d 641 (4th Cir. 1961); other cases have relied upon regulatory powers instead of the minimum contact theory. Wein v. Crockett, 195 P. 2d 222 (Utah 1948); McDaniel v. Textile Workers of America, 254 S.W.2d 1 (Tenn. 1952).

18. I.C. 5-513.

19. I.R.C.P. 4 (d) (1), 4 (d) (3).

20. I.C. 30-502.

21. I.C. 5-507/3; Boise Flying Service v. GMAC, 55 Idaho 5 (1934). In two important cases, the Idaho Supreme Court has discussed the extent of business in this state necessary for the exercise of jurisdiction by our courts. State v. Winstead, 66 Idaho 154 (a case nearly identical on its facts to *International Shoe* but decided a month before that decision was handed down by the Supreme Court) and the *Boise Flying Service* case. In the latter case, at page 17, the court indicates its acceptance of the "presence" fiction. It should also be pointed out that, in a host of cases, the court has considered the problem of doing business in relation to the power of the state to exclude foreign corporations from our courts. Perry v. Reynolds, 63 Idaho 457. Perhaps these cases should be evaluated in the light of a recent United States Supreme Court decision, Eli Lilly Co. v. Sav-on-Drugs, 81 Sup. Ct. 1316 (1960).

22. The statute specifically provides that the failure of the County Auditor to forward notice to the foreign corporation will not vitiate the judgment. I.C. 5-507/3. Boise Flying Service v. GMAC, 55 Idaho 5 (1934). This should be contrasted to the notice requirements of due process enunciated in recent cases. Mullane v. Central Hanover Bank, 339 U.S. 306 (1952); Walker v. City of Hutchison, 352 U.S. 112 (1957).

23. I.C. 41-3701 et seq.

24. I.C. 41-3704.

25. I.C. 63-3065A.

26. Nelson v. Miller, 143 N.E.2d 673 (Ill. 1955); Gray v. American Radiator Co., 176 N.E.2d 761 (Ill. 1961); Hass v. Fancher Furniture Co., 156 F. Supp. 564 (E.D. Ill. 1959).

27. McGee v. International Life Ins. Co., *supra;* Pugh v. Oklahoma Farm Bureau Ins. Co., 159 F. Supp. 155 (D. La. 1958); Nelson v. Miller, *supra* note 26; Dauphin Deposit Ins. Co. v. Commercial Co., 171 N.Y.S.2d 906; *cf* Davis v Jones, 78 N.W.2d 6 (Iowa 1956).

28. Smythe v. Twin State Improvement Co., *supra* note 17.

29. A recent case considered this problem in a nonresident motorist setting. The plaintiff sued a defendant car owner whose son had allowed a friend to use her car. The friend became involved in an accident in North Carolina. The Court, applying *International Shoe* found it could constitutionally exercise jurisdiction. Davis v. St. Paul Mercury Indemnity Co., 294 F.2d 641 (4th Cir. 1961). See also: Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654 (D. Md. 1950); Cosper v. Smith & Wesson Co., 346 P.2d 409 (Calif. 1950). The agency doctrine has been applied to corporations acting through subsidiaries. United States v. Buffalo Weaving and Belting Co., 155 F. Supp. 454 (S.D.N.Y. 1956).

30. Atkins v. Jones and Laughlin Steel Co., 104 N.W.2d 888 (Minn. 1960).

31. Hellreigel v. Sears Roebuck, 157 F. Supp. 718 (D.Ill. 1959).

32. Note the very broad definitory language used in subsection (a).

33. Gray v. American Radiator and Sanitary Co., 176 N.E.2d 761 (Ill. 1961).

34. A case advancing alternative theories in a similar situation is W. H. Elliott and Sons v. Nuodex Products Co., 243 F.2d 116 (1st Cir. 1957); *cert. den.* 355 U.S. 823.

35. Erlanger v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956); Putnam Triangle Publishing Co., 96 S.E.2d 445 (N.C. 1957). The libel cases provide a particularly productive source of litigation in this area. Some hold jurisdiction exists though the defamation emanates from without the state, Jenkins v. Dell Publishing Co., 130 F. Supp. 104 (W.D. Pa. 1955); Gearhart v. WSAZ, 150 F. Supp. 98 (E.D. Ky. 1957); aff'd 254 F.2d 242 (6th Cir. 1958), and others that it does not, Putnam v. Triangle Publishing Co., *supra;* Insul v. N.Y. World Telegram, 273 F.2d 166 (7th Cir. 1959). See also: Moss v. City of Winston-Salem, 195 S.E.2d 445; Collar v. Peninsular Gas Co., 295 S.W.2d 88.

36. Uniform Interstate and International Procedure Act, Sect. I.03 (a) (3) (4) (First Tentative Draft). Wisconsin has adopted a similar provision. Wis. Statutes (1959) Sect. 262.05 (3), (4).

37. Conn v. Whitmore, 342 P.2d 871 (Utah 1959).

38. Rosenberg v. Andrew Weir Ins. Co., 154 F. Supp. 6 (D. Md. 1957); Grobark v. Addo Machine Co., 158 N.E.2d 73 (Ill. 1959). It should be pointed out that Grobark evoked two dissents and is a questionable decision in view of later cases emanating from the Illinois Supreme Court in view of the fact that the action of defendant involved a continuous line of activity with Illinois residents.

39. Rosenberg v. Andrew Weir Ins. Co., *supra* note 38.

40. Minn. Statute, (1959) Sect. 303.13 (3); Wis. Statutes (1959), Sect. 262.05 (5) which reads as follows: Local Services, Goods or Contracts. In any action which:

    a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

    b. Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or

    c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value; or

    d. Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction; or

    e. Relates to goods, documents of title, or other things of value actually

received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

41. Grobark v. Addo Machine Co., 158 N.E.2d 73 (Ill. 1959).

42. Howe's Co. v. W. P. Milling Co., 277 P.2d 655 (Okla. 1954); Shealy v. Challenger Mfg. Co., 198 F. Supp. 157 (W.D.S.C. 1961); Harrington v. Croft Steel Products Co., 94 S.E.2d 803 (N.C. 1956); Jahns v. Superior Court, 323 P.2d 437 (Cal. 1958); Gordon Armstrong Co. v. Superior Court, 325 P.2d 21 (Cal. App. 1958).

43. In State v. Winstead, 66 Idaho 504, our court approved the "solicitation plus" rule.

44. Dowd v. Boro Drugs, 176 A.2d 13 (N.J. 1961).

45. State v. Winstead, 66 Idaho 504; Eli Lilly Co. v. Sav-on-Drugs, 81 Sup. Ct. 1316, 1324; Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654 (D. Md. 1950); Tauza v. Susquehanna Coal Co., 115 N.E. 915 (N.Y. 1917); American Asphalt v. Shankland, 219 N.W. 28 (Iowa 1928); Lau v. Chicago & N.W. Ry., 111 N.W. 2d 158 (Wis. 1961); Huck v. Chicago Ry. Co., 90 N.W.2d 154 (Wis. 1958).

46. Eli Lilly Co. v. Sav-on-Drugs, *Supra;* Boise Flying Service v. GMAC, 55 Idaho 5. There are cases to the contrary on solicitation.

47. In a Utah case, the defendant advertised over a local television station, the station accepted orders and forwarded them to the defendant who filled them from outside the state. This was held to be an insufficient contact with the state. McGriff v. Chas. Autell, 256 P.2d 707 (Utah 1953). The decision would appear to be unduly restrictive.

48. International Harvester Co. v. Kentucky, 234 U.S. 579; St. Louis R.R. v. Alexander, 227 U.S. 218; Perlman v. Superior Distributing Co., 151 N.E.2d 116 (Ill. 1957).

49. Conn v. Whitmore, 342 P.2d 871 (Utah 1959). The Utah buyer, subjected to what was deemed an unconstitutional exercise of jurisdiction by the Illinois court, had sent agents to Illinois and made partial payment there.

50. Courts, without the benefit of this section, will have jurisdiction of an *in rem* or *quasi in rem* nature over property sufficient to handle many disputes growing out of its ownership.

51. Ownership, Possession or Use of Property as a Basis for In Personam Jurisdiction, 44 Iowa Law Rev. 279 (1954).

52. If the landowner has personal responsibility.

53. The Wisconsin statute deals with insurance contracts thus: In any action which arises out of a promise made anywhere to the plaintiff or some third party by the defendant to insure upon or against the happening of an event and in addition either:

    a. The person insured was a resident of this state when the event out of which the cause of action is claimed to arise occurred; or

    b. The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person insured resided. Wis. Statutes (1959) Sect. 262.06 (10).

54. I.C. 41-3701 et seq.

55. I.C. 41-3702.

56. McGee v. International Life Insurance Co., *supra* note 9.

57. Pugh v. Oklahoma Farm Bureau Ins. Co., 159 F. Supp. 155 (D. La. 1958). The Louisiana Statute, L.S.A.R. Sect. 13:3474, extended their nonresident motorist and direct action statute by permitting action directly against the insurer in any claim arising out of operation of vehicles in the state of Louisiana. This case was decided before the decisions in *McGee* and *Denckla* were announced.

Saturday Morning, July 14th.

MR. WARE: I call to your attention the fact that our reporter for this meeting is Bob Miller, Boise reporter of Judge Hamer Budge's court. We appreciate your presence, Bob, and your diligence here in our behalf.

I should call your attention to the fact that there will be a Fourth Annual Tax Institute at Idaho State College, October 12 and 13, Friday and Saturday. Those institutes have become pretty much an institution in this state and are certainly valuable to attorneys and accountants.

Again, in November, I am not certain of the exact date, but it will occur coincident with a football game, we will have another Law Institute at the University of Idaho at Moscow.

I don't know of any other announcements at this time, do you, Glenn or Wes? Of course, the President's report is unnecessary. It has appeared in The Advocate so we can dispense with any further reference to it. I believe the Secretary's report has not appeared in The Advocate and I will ask Tom Miller at this time to make that report. If Jack Hawley, Parliamentarian, would approach this part of the Opera House so that I can rely on him when it becomes necessary.

MR. HAWLEY: I am not dressed properly.

MR. WARE: Well, that's all right. Incidentally, we should have the Judicial Conference report. Is there any Judge here to present it? Tom, do you have a report?

MR. MILLER: Yes. The Advocate, while it is not sailing along any too well, at least has its head above water and it is due to the excellent cooperation of the District Bar Associations in sending in two or three dollars for each member. I think this shows that the lawyers of the state want a paper and they are willing to support it. Perhaps more permanent arrangements will have to be made, but at the present time we certainly want to thank all of those who have been instrumental in getting these contributions to The Advocate so as to sustain it.

MR. WARE: Is Myron Anderson here? Myron, would you come forward for a moment or two. I have before me here, the report of Myron Anderson who is the Idaho State Bar representative I want to be sure of the title here) to the Western States Liaison Committee to the Internal Revenue Service. I might say that this report is one of several that he has made during the year. It would probably be difficult to go through the entire report at our meeting here.

I think it should be digested and summarized in our Advocate, but Myron, I would like to introduce you and have you make a few statements in connection with the report.

MR. ANDERSON: Mr. Ware and members of the Bar, this is a tax committee and of course it's pretty dry for all of you. I was appointed to this committee about a year and a half ago and they had already had one meeting. They have semi-annual meetings and I have attended three since that time.

This is kind of a grievance committee with one member from each state in the Ninth Circuit and we meet with the Regional Officers of the Internal Revenue who are stationed in San Francisco. The purpose of the committee is to confer with the people in the Internal Revenue Service on problems of practice and procedure and its primary function is to meet twice a year and then we have an agenda that we follow and in the past I have tried to get word to The Advocate, for the members, of any grievance or any information they wanted to pass on. I haven't been very successful, I mean the last time I didn't get any grievance and the first time, I had five or six. However, there is quite a bit of information that comes up in our meeting which usually lasts a day. They cover quite a number of subjects and I would kind of like to just go over the different items that we have and if any of you have anything that you want to pass on here, I would be glad to take it and in presenting the questions, I would be glad to answer.

We have a regular procedure called 6018 and it deals with procedures to expedite the disposition of tax court cases and I will just mention that. I don't know whether you are familiar with it or not, but I explained that in The Advocate and then the next item on that meeting was the policy of Regional Counsel office with respect to stipulation of facts and the desirability of compressing the record by stipulating the substance of legal documents instead of setting them forth as Exhibits, and avoiding entrapment of counsel.

And then there was another item taken up which is a step-up of Taxpayer's Information Service by the Office of the District Director in smaller communities.

Here, in 1953, Idaho had about nineteen offices in which you could get information and they dropped it down to fifteen and it got to a point where you couldn't get very much information and this committee had been working on that and we have been assured now that during the period of January 1st to April 15th, that they are going to get the information and have assistance for taxpayers in filing their Income Tax Returns.

Another item we took up was to educate the field agents in the functions of power of attorney and the impropriety of ignoring attorneys-in-fact and dealing directly with the taxpayers themselves. They recognize this was an administrative function and they figure that they could iron that one out, but I don't know. I have run into quite a few cases where they still are ignoring the power of attorneys.

Another item we took up was renewed steps to remind field and appellate staff members that rules and procedures do not permit them to hold out on issues where the government is wrong in order to force the taxpayer to make concessions on other issues. This was another administrative problem and they promised us to work on that. We often find that happens with the newer agents,

that in order to try to get you to agree to something, they stick something else in there.

We had quite a little discussion on conference procedures with the Internal Revenue Office and the present procedure has not worked out too good and we are changing now and doing away with the conference with the group chief and having a conference coordinator who will, we hope, work out better. So far, it hasn't worked out too good because you usually have to go on anyway.

Then, another item we took up was the examination of federal and state tax returns, the need for improvement in receiptings which would expedite the audit. It's a policy of the Revenue Service to try to audit the estate tax returns within an eighteen months period. In our discussion it came out that there is sometimes an income tax advantage there and it isn't always good to try to hurry the audit.

Another item was the difference in policy and in the interpretation of the law regulations by related field officers of the Internal Revenue Service. Of course that is something that has been going on for a long time and I don't suppose they'll ever be able to right it.

Another item we took up was the pre-trial rules in tax court. The tax court does not provide a pre-trial procedure. This meeting adopted a resolution urging the court to adopt a broad form, pre-trial procedure including use of discovery proceedings. I attended a meeting in Seattle on the 1st of June and we took up some items there that have not yet got into The Advocate, but I will mention those.

One of our troubles with Internal Revenue is to get hearings beyond the Internal Revenue and there are occasions where it isn't too costly for a taxpayer to take his case on up and we have been trying to get the Regional Consul's Office and the Appellate Division to go into other districts. Idaho, at the present time, is under the jurisdiction of the Portland Appellate Division and also the Regional Consul has an office at Portland. The only town that they will come to in Idaho so far is Boise and we are trying to get them to go to other towns. I have suggested or am going to suggest Coeur d'Alene, Lewiston, Twin Falls, Pocatello and Idaho Falls.

Another problem along that line is they are trying to push the concurrent jurisdiction of tax deficiencies, not only with the Tax Court, but with the District Court. We feel that if the United States District Court could get jurisdiction of tax deficiency, it would be much less costly for the taxpayer and also for the Internal Revenue Service. Of course, we kind of like to pick on them and one of the representatives of the Bar suggested that it would be some improvement if they would cut the cost of the travel for the taxpayer and Idaho has been neglected for so long it is getting used to it, and I urge that there is great need to afford the smaller taxpayer reasonable opportunities for hearings and that the public image of the service would be improved and the self-assessment system supported if the agents acted more like salesmen seeking to sell the tax system to the public rather than seeking to exact taxes. Another member overheard my sentiments and said the agents were too cold and austere in their approach to taxpayers and there was a great need for educating the agents in recognition of their responsibility for the taxpayers. Another member sensed that some of

the more experienced and matured personalities of the Internal Revenue Service are now inclined to believe that what is being sought is the young, aggressive agent who set up deficiencies rather than the agent who seeks to make a more critical and sound audit. It was a general agreement with the committee that the audit program should contain substantial elements of taxpayer education and further compliance as, in the long run, these are the elements that will support the self-assessment as to reflect a good public image of the Internal Revenue Service.

Another member suggested that the image might be improved if the Revenue Agents were encouraged to participate in community activities. However, it is generally agreed that the instances of abuse by the service personnel were not too many, but the consequences of even a single unpleasant experience serves to jeopardize the vigor of the self-assessment system.

The representative of the Northern California District brought up a number of problems relating to bankruptcy and insolvency field which were both brought to his attention by the practitioners in the Central Valley of California. To solve these particular problems which appear to be localized, it is agreed that the conference would arrange between the members of the Regional Consul Office and local practitioners and the Referee in Bankruptcy and see what could be ironed out.

Another item we took up was in trying to get rules from the District Director before you entered into a transaction. As it is they only will issue rules on completed transactions.

The committee also took up and considered tax court procedure, particularly with proposed amendments to tax court rules and report calenders and in enforcing compliance with stipulations, provisions of rule 31B. Rule 31 provides for evidence and submission of evidence and sub-section B1, the court expects the parties to stipulate evidence to the fullest extent to which complete or qualified agreement can be reached, including all material facts that are not or fairly shall not be in dispute. What they are trying to do there in changing the rules is to force more stipulation and they are good by motion but the trouble we run into here in the Districts like Idaho, is that the tax court only meets about once every two years and they will not hold motion calendars here and you either have to go back to Washington for the hearing on your motion which becomes quite expensive or you would have to do it by brief.

Another problem that came up, this came up with me particularly, was that I had a dissolution of a pension plan and it involved twenty or thirty taxpayers and the deficiencies were all small. Under rule 20 of the Federal Rules of Procedure, I could have joined them all in one issue. Under the rules of the tax court you have to file a petition in each case and so we went on record of and in fact, passed a resolution to see if we could get the tax court to adopt this procedure.

The District Commissioner also brought out about quality audits. It is something that they have adopted here recently, but he said that his agents were taking the thing in the wrong light and he was trying to stop them. It didn't mean that they were to make a full blown audit or CPA audit. They were not to go out and contact third parties and so forth but the agent was supposed to

use good judgment if he walked in on a case and it appeared that an audit is not necessary he would not have to make what they call a quality audit. He could quit or make just a short audit.

We took up the transition to automatic data-processing and the effect on taxpayers and attorneys in the region. But that is so new, in fact the automatic machinery is not put in in all parts of the region yet, and they think it is going to work out good but I have my doubts. I think we are getting farther away from the taxpayer all the time and there will probably be more trouble come up over that than we anticipate.

The next item we took up was need for some kind of form of binding agreement with the Appellate division and the taxpayers referred to can enter in with respect to years not then pending in Appellate division. That comes up as a result of you might have a problem and settle it for one year but you can't get them to agree that it will be the same for the following years.

We had the honor of having with us at that meeting the Chief Consul, who is Crane C. Houser, and he was very interesting. The thing I like about it was he appeared yet to be on the taxpayers' side and he gave a short talk and said that he was aware of the misuse of depreciation in the collection of tax and he hoped that the new rules would help.

Another item, the Administration came out and said that they were going to examine inventories very thoroughly and found out if taxpayers were consistent, that you only antagonize the people if you go in and fool with their inventory and that they were thinking of dropping that.

There would be something come out soon for technical advice about the problem they were having on an exempt organization.

I think that's about all, Mr. Ware.

MR. WARE: Thank you, Myron, for your good work which we hope you will continue because of its importance.

MR. ANDERSON: It's a nice paying job.

MR. WARE: Thank you so much. It's a link between the Bar and public. In the past we've been asked, a public service by the Information Committee of the Fifth District Bar Association. You know the strength of our Bar is in the local association and I hope the time will come when the Commission will see fit to award some kind of award of merit to a local Bar Association for its accomplishments. I think the Fifth District is in that category.

Now, Wes, will you make a brief report on the Physician-Lawyer's Committee situation?

MR. WES MERRILL: In the proceedings of the State Bar in 1956, there was adopted a statement of principles affecting the attorneys and their physicians in the State of Idaho. Part of that resolution was the suggestion that each association appoint a committee to further the work to adopt effective principles and to assist in the promotion of liasion between the two professional groups.

As a result of that mandate and in anticipation of perhaps additional work in this field, a committee was formed consisting of Marc Ware, Glenn Coughlan

and myself. Immediate contact was made with the Medical Association requesting that they form a like committee and in the meantime we have gathered together the end product of fifteen different states respecting these types of protocol or governing principles. We understand that on the local level, the Clearwater Bar has accomplished what the State Committee has been unable to accomplish and this, we encourage, for local bars.

The Medical Association has not formed a committee and therefore, this committee is as a continuing committee under the State Bar and will continue to work to establish the type of relationship that we are aiming for. Thank you.

MR. WARE: Thank you, Wes. Now, before we get to the Resolutions Committee or a report, are there any other committee reports that should be made at this time?

VOICE: Yes, the report of the Prosecuting Attorneys' Section.

MR. WARE: I am sorry. Will you please come forward and give the Prosecutor's report? I thought I had a note of that, but somehow I overlooked it.

BILL NIXON: We met three times during the convention and before submitting our report, I would like to, on behalf of the association, thank the Idaho State Bar for allowing us to hold our meeting in conjunction with the integrated Bar meeting. Also, I would like to thank Mr. Scott of Kansas City, Missouri, for including in his fine talk a portion of the talk aimed at Prosecuting Attorneys, and Tom Miller, our Secretary, in assisting me in having this accomplished.

The three meetings held by the Prosecutors, first of all, included a business meeting, which included the appointment of a salary committee headed by Steve Bistline of Sandpoint. We feel that the economics of the individual Prosecutors, as members of the Bar, is as important as the general economic condition of Bar members as a whole.

In addition to handling general business matters, it included appointment to the National District Attorney's Association of a State of Idaho Director and I was appointed as Director for the State of Idaho and the Association recommended membership by individual prosecutors in the National Association. The membership is very reasonable, the publication an excellent one and that alone, I think, justifies the membership in the National Association. It is felt that the expense of belonging to the National Association is justly a county expense as part of the Prosecutor's budget.

_____(Inaudible)_____ was appointed to assist any committee brought about for the revision of the criminal procedure and Professor Berman of course, has been on the committee which has heretofore been appointed and has been a lot of help to the Prosecutors.

A comment was submitted this time that many members are interested in protecting the rights of the accused or defendant. We feel that as a corollary, the vast number of the public is also entitled to protection and Prosecutors represent this public number. So it is a dual responsibility and we would note also that in the 1961 session here at Sun Valley, Resolution 7 was passed, which urged, by which the State Bar's passage of a legislative appropriation of the sum of $8,000.00. This will be called to the attention of the Legislative Com-

mittee of the State Bar and the Prosecutor's Association would be willing to assist in any way that we could.

Also, the Prosecutors call to the attention of the State Bar Association, the need for a mobile crime lab, possibly two of them, located in the south-central portion and the north portion of the state. It's called to the attention of the small town Prosecutors frequently when a need for adequate investigation occurs and could be money well spent and is as necessary as perhaps, liquor law enforcement personnel with all their expense.

It was pointed out again, in the talk given by Mr. Scott, the need for scientific procedure, equipment and investigation by experts, when many of our Sheriffs and local law enforcement officers, one: do not have the equipment, two: are not trained and again it is called to the attention of the Bar and perhaps the Sheriff's Association, that no minimum standard of any kind is required for a Sheriff or law enforcement officer. For that reason, we urge that local law enforcement people attend national crime laboratories as conducted oftentimes by state associations or by the FBI.

At our afternoon meeting yesterday, we had a fine talk and a very objective presentation of gambling, or legalized gambling, as presented by Bill Raggio of Reno. We took a tape of that and the association could make a tape available upon request, as many fine statistics are presented. Our comment was fairly given because advantages of the system as well as disadvantages were outlined.

The legislative committee, consisting of myself, Gene Bush and members to be appointed, was named and will be available in the 1963 legislative sessions for recommendations perusal of hastily submitted bills which affect the Prosecutors or people of the state and for general advice and assistance to any matter.

Future meetings will be held at I think, the continuing Legal Education Institute. In the event one is held at Moscow this fall, a Prosecutor's session will be held at that time, in principally a legislative matter and then, of course, a winter meeting will be held in Boise, either the last part of this year or the first part of 1963. Thank you.

MR. WARE: Thank you, Bill, for that fine report. It will be filed with the Secretary and appear in our annual proceedings.

We come to very important work of this assembly this morning, namely the report of the Resolutions Committee.

MR. THOMAS: Mr. President, the Advisory Fee Schedule Committee this year, has prepared two resolution which will be presented. One has to do with the revision of the Advisory Fee schedule. This revision will aim primarily at the reorganization of those materials so that they are in more useable form. It will lend itself to inclusion of a loose-leaf notebook which may be kept alongside your code behind the attorney's desk. In addition the revised schedule carries a more complete coverage of the materials with which we deal, covering matters which have heretofore been omitted and we trust, clarifying other matters in which there is ambiguity. The schedule has been proposed and is drawn, it will be submitted to you in full with a resolution, this morning, which has, incidentally, been approved by the entire committee and is recommended by the Resolutions Committee. We have also gone into the matter of federally regulated and con-

trolled fees and have concluded and reported that, in many instances, the federal regulation of attorney fees prohibits a claimant against the government from retaining an attorney because of the usually low fee which is permitted. Therefore, this committee has found and recommended and will present a resolution to this effect, that the federal regulation of attorney's fees in these federal matters should be studied by a committee of the American Bar and by the Congressional delegation from Idaho, with a view to revising the applicable regulations, practices and statutes that permit the retention of counsel for a reasonable fee and therefore the prosecution of legitimate claims in these federal areas.

That is the substance of our report. Thank you, Mr. President.

MR. WARE: Mr. Thomas, I wish to thank you and through you your fine committee for its work during the past year.

Tom Feeney, are you ready to come forward with the resolutions?

MR. FEENEY: President Marc, Ladies and Gentlemen of this convention, the Resolutions Committee annually consists of the Presidents of the local Bar Association or its designees. This year's committee consisted of Alden Hull of Shoshone County Bar, Gene Thomas of Third District Bar, John Hepworth of Fourth and Eleventh, Archie Service of the Fifth, Fred Snook of the Sixth, Jim Donart of the Seventh, Tom Morris of the Eighth, Jack Voshell of the Ninth, Jim Givens of the Clearwater Bar, Nels Sahl of the Twelfth District and Ben Johnson of the Thirteenth. In addition, the three Commissioners attended all sessions of this committee. The committee met at 1:00 o'clock on Wednesday afternoon and worked until almost 6 o'clock that evening, met again at 9 o'clock the following morning and to some of us the resolutions were smitten back a little bit, but we persevered until almost 1:00 o'clock p.m. Thursday. This committee was a working committee and I think did a tremendous job.

I would like to say that one of the first problems we encountered was the question of whether the committee would vote according to the unit rule that is, if we vote the number of members in the District, or whether each committee member would have a single vote; and very graciously I believe, Gene Thomas (who, of course, represents by far the largest number of votes), suggested that the group vote a single vote, a vote for each President and I, individually, at least, would like to suggest that something be done to make this a permanent rule for that committee. It seems to me that, at least in that committee, it should be on that basis.

I would also like to say that, while a great number of the men worked overtime preparing resolutions, we especially thank Nels Sahl and Alden Hull in this regard.

We have nineteen resolutions to present to the group. While I know most attorneys are very retiring and loathe to talk on their feet, I think that some of them will inject a little conversation, so we'll try to move along.

RESOLUTION NO. 1

WHEREAS, members of the Bar are aware of the background and historical origin of Article VI, Section 3 of the Idaho Constitution as now written, which

prohibits Chinese or persons of Mongolian descent not born in the United States to either vote, serve as jurors or hold any office and,

WHEREAS, It is the opinion of the Idaho State Bar that such Constitutional provision of the Idaho Constitution is in derogation of the Constitution of the United States of America,

NOW, THEREFORE, BE IT RESOLVED, By the Integrated Bar of the State of Idaho at Convention at Sun Valley, Idaho, this 14th day of July, 1962, that this organization go on record as favoring and encouraging the approval and passage of the referendum for the Constitutional change to be placed upon the ballot at the Idaho general election in 1962 deleting that portion of Article VI, Section 3 with reference to Chinese or persons of Mongolian descent being Senate Joint Resolution Number 1 of the 1961 Legislature.

Mr. President, I move the adoption of this resolution.

MR. WARE: Is there a second?

VOICE: Second.

The chair believes that that resolution affecting the Constitution comes within the purview of our rules with reference to proposals relating to statutes which would require us to vote by Local Associations. Is that correct? Should I read the vote for each Bar Association? I will read this and I hope you will make a note of it. The Shoshone County Bar Association has 16 votes; Clearwater Bar Association, 67; Third District Bar Association, 184; Fourth and Eleventh Bar Association, 82; Fifth District Bar Association, 59; Sixth District Bar Association, 18; Seventh District Bar Association, 54; Eighth District Bar Association, 48; Ninth District Bar Association, 42; Twelfth District Bar Association, 19; Thirteenth District Bar Association, 10; making a total of 599. Tom, will you keep track of the votes as cast and call the roll?

VOICE: Mr. Chairman, perhaps we should caucus by Bar Associations having a brief recess and get together . . . .

MR. WARE: I believe we will proceed to call the roll and if an Association wishes to pass, fine.

Shoshone County Association—Votes for adoption.
Clearwater Association—Votes for adoption.
Third District Association—Third District votes yes.
Fourth and Eleventh Association—Votes yes.
Fifth District Bar Association—Votes yes.
Sixth—Yes.
Seventh—Seventh votes yes.
Eighth—Eighth votes yes.
Ninth—Ninth votes yes.
Twelfth: Twelfth votes yes.
Thirteenth—Yes.
The chair declares that Resolution Number 1 is unanimously passed.

MR. FEENEY:

RESOLUTION NO. 2

BE IT RESOLVED That the Idaho State Bar Association favors the amend-

ment of Section 3-406 of the Idaho Code, so that the first sentence thereof shall be as follows:

"Nomination to the office of commissioner shall be by the written petition of not less than five nor more then ten members of the Idaho State Bar in good standing" and

BE IT FURTHER RESOLVED, That appropriate legislation be prepared and presented to the next Legislature by the Legislative Committee of this association.

MR. WARE: Are you ready for the question, or any discussion? Very well, I think this again should be by association.

Shoshone County for adoption—Vote for adoption.
Clearwater Bar Association—Vote for adoption.
Third District Bar Association—Vote yes.
Fourth and Eleventh Bar—Yes.
Fifth—Yes.
Sixth—Yes.
Seventh—Yes.
Eighth—Yes.
Ninth—Yes.
Twelfth—Yes.
Thirteenth—Yes.
The chair declares Resolution No. 2 adopted unanimously. Tom.

MR. FEENEY:

RESOLUTION NO. 3

WHEREAS, The Advisory Fee Schedule Committee of Idaho State Bar has found and reported that fees set or regulated by Federal Law or authority in such areas as Federal Employees' Compensation Act cases, Social Security claims, tort claims actions, and in connection with foreclosures of G. I. loan mortgages, frequently constitute unreasonably low fees which impose such a hardship on retained counsel as to preclude representation of such parties in many meritorious matters, and that the same constitutes an injustice to such parties seeking the aid and counselling of an attorney, in many instances rendering such parties helpless to enforce their rights for lack of counsel; and

WHEREAS, It is the opinion of this Bar that the Committee's criticism of existing Federal Law is well taken;

NOW, THEREFORE, BE IT RESOLVED That the Commissioners are authorized and directed to communicate the said findings and criticism of this Bar to the Congressional Delegation of the State of Idaho, and to the appropriate officials and committees of the American Bar Association, with the recommendation that a study be made of Federal control of attorneys' fees in Federal matters, and that appropriate changes in Federal Law and regulations should be made consistent with the demands of justice in the premises as to permit such litigants and potential parties to retain the assistance and counselling of competent legal counsel for a reasonable fee.

MR. WARE: Are you ready for the question or any discussion? Again this will be by Association.

Shoshone County Bar Association–Votes yes.
Clearwater Bar–Yes.
Third District Bar–Yes.
Fourth and Eleventh District Bar–Yes.
Fifth District Bar–Yes.
Sixth District Bar–Yes.
Seventh District Bar–Yes.
Eighth District Bar–Yes.
Ninth District Bar–Yes.
Twelfth District Bar–Yes.
Thirteenth District Bar–Yes.
The chair declares Resolution No. 3 unanimously carried.

MR. FEENEY:

RESOLUTION NO. 4

WHEREAS, New York and other states have enacted into law a requirement that before any such legal document be entitled to be recorded, it must have endorsed thereon the name of the scrivener of the document; and

WHEREAS, Such a law may tend to prevent or discourage the drafting of legal documents by untrained laymen, and thus protect and benefit the public;

NOW, THEREFORE, BE IT RESOLVED That the Idaho State Bar go on record as favoring the adoption of Legislation requiring that any legal documents entitled to be recorded or filed must have endorsed thereon the name of the individual or scrivener preparing the same and that this resolution be submitted to the Legislative Committee of the Idaho State Bar Association for preparation of an implementing bill by said Legislative Committee.

MR. WARE: Any discussion, gentlemen? If not, this relating to statute and proposed legislation, we will vote by District Associations.

Shoshone County–Vote yes.
Clearwater Bar–Votes yes.
Third District Bar–Yes vote.
Fourth and Eleventh District Bar–Yes.
Fifth District Bar–Yes.
Sixth District Bar–Yes.
Seventh District Bar–Yes.
Eighth District Bar–Yes.
Ninth District Bar–Yes.
Twelfth District Bar–Yes.
Thirteenth District Bar–Yes.
Declare Resolution No. 4 unanimously passed.

MR. FEENEY:

RESOLUTION NO. 5

WHEREAS, The Uniform Commercial Code has been promulgated by the National Conference of Commissioners on Uniform State Laws, which said

Code has been approved by The American Bar Association and The American Law Institute;

AND, WHEREAS, The Uniform Commercial Code covers the whole field of commercial transactions which have not been revised and codified; and

WHEREAS, The Uniform Commercial Code has now been enacted in eighteen states, to-wit: Pennsylvania, Massachusetts, Kentucky, Connecticut, New Hampshire, Rhode Island, Wyoming, Arkansas, New Mexico, Illinois, Ohio, Oklahoma, New Jersey, Oregon, Georgia, New York, Michigan and Alaska; and

WHEREAS, It appears that uniformity in commercial transactions among the several states is of great advantage in facilitating and expediting commercial transactions of all types, and that within a reasonably short time the Uniform Commercial Code will be enacted in most states of the Union.

NOW, THEREFORE, BE IT RESOLVED, That the Idaho State Bar Association, in convention assembled, urges and requests the enactment by the 37th session of the Idaho State Legislature of legislation providing for the appointment of an interim committee to make a thorough study and analysis of the Uniform Commercial Code, including comparison with existing Idaho law for the purpose of determining the effect of such code and the determination of the desirability of enacting the Uniform Commercial Code as the law of the State of Idaho; such legislation to further provide for an adequate appropriation for the purpose of providing legal advice and analysis and such other professional consultants as may be required to the end that the interim committee may be fully advised in the performance of its duties and functions.

AND, BE IT FURTHER RESOLVED, That a copy of this resolution be transmitted to the Governor of the State of Idaho, the Speaker of the House of Representatives, and the President of the Senate of the 37th Session of the Legislature of the State of Idaho.

MR. WARE: Are you ready for the question? Do I hear a motion that this resolution be accepted? (Motion made). Do I hear a second? (Second). Any discussion, gentlemen?

MR. ST. CLAIR: Mr. President?

MR. WARE: Yes? Mr. St. Clair of Idaho Falls.

(Whereupon Mr. St. Clair addressed the convention out of the hearing of reporter.)

MR. WARE: Gentlemen, on this Resolution No. 5 with reference to the Uniform Commercial Code, I rule again that the vote should be by Bar Association. Is there any further discussion? Are you ready for the question?

Shoshone County Bar Association—Yes.
Clearwater Bar Association—Yes.
Third District Bar—Yes.
Fourth and Eleventh District Bar—Yes.
Fifth District Bar—Yes.
Sixth District Bar—Yes.
Seventh District Bar—Yes.
Eighth District Bar—Yes.

Ninth District Bar—Yes.
Twelfth District Bar—Yes.
Thirteenth District Bar—Yes.
The chair rules that Resolution No. 5 was passed unanimously.

MR. FEENEY:

RESOLUTION NO. 6

WHEREAS, An Administrative Procedure Act known as Senate Bill No. 95, setting out rules and regulations governing the procedure of hearings before administrative agencies of the State of Idaho was presented to a committee of the Idaho Legislature at the last Legislative session, said act failing to be released of committee, and,

WHEREAS, One of the purported reasons for the failure of said act was the provision "only persons who are authorized to practice law in Idaho shall be qualified to practice before such agencies" which provision was designated in the Senate bill title as "providing the qualifications of persons to practice before such agencies," and

WHEREAS, It is deemed necessary for the protection of the rights of individuals appearing before such committees that rules of procedure be prescribed in determining their rights and regulations, and

WHEREAS, It is deemed that an individual may represent himself before such agencies without constituting the unauthorized practice of law, but that a layman who represents individuals before such agencies for the determination of rights and regulations may be guilty of the unauthorized practice of law and may be dealt with accordingly by a proper committee of the Idaho State Bar Association.

NOW, THEREFORE, BE IT RESOLVED That Senate Bill No. 95 be presented to the Idaho State Bar Legislative Committee for deletion from the title of said bill "providing the qualifications of persons to practice before such agencies" and deleting from the context of said bill "only persons who are authorized to practice law in Idaho shall be qualified to practice before such agencies" and inserting as an addition to the context of said bill the provision "an individual may appear before agencies of the State of Idaho for himself to determine rules and regulations affecting his rights."

I move for the adoption of Resolution No. 6.

MR. WARE: Is there a second? (Second). Gentlemen, in discussing resolutions or proposals from the floor, we would appreciate it if the individual would give his name and residence so that the reporter can get it and the record will be complete. Is there any discussion of this resolution number 6 relative to the Administrative Procedure Act. Again this should be by Bar Association.

Shoshone County Bar—Votes yes.
Clearwater Bar—Yes.
Third District Bar—We pass.
Fourth and Eleventh District Bar—Yes.
Fifth District Bar—Yes.
Sixth District Bar—Yes.

Seventh District Bar–Yes.
Eighth District Bar–Yes.
Ninth District Bar–Yes.
Twelfth District Bar–Yes.
Thirteenth District Bar–Yes.
Third District Votes yes.
The chair declares that Resolution No. 6 is passed by unanimous vote.

MR. FEENEY:

RESOLUTION NO. 7

WHEREAS, Section 45-1506, Idaho Code, provides the manner in which a trust deed may be foreclosed, and provides, among other things, that at any time within 115 days of the recording of the notice of default under the deed of trust, the obligor may pay to the beneficiary or their successors in interest, respectively, the entire amount then due under the terms of the deed of trust, and the obligation secured thereby including costs and expenses actually incurred in enforcing the terms of such obligation and trustee's or attorney's fees actually incurred, not exceeding $50.00 in case of sale under a trust deed, other than such portion of the principal as would not then be due had no default occurred, and thereby oure the default theretofore existing, and thereupon all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust shall be reinstated and shall be and remain in full force and effect, the same as if no acceleration had occurred, and

WHEREAS, The members of the Fifth District Bar Association are of the opinion that $50.00 is not a reasonable fee for the work done in the foreclosure of said trust deed and that some provision should be made whereby, in case of payment of delinquencies prior to sale, the obligor would pay a reasonable attorney's fee for services rendered in said matter;

NOW, THEREFORE, BE IT RESOLVED, That the said Idaho State Bar Association refer the same to the proper committee for study and for the purpose of recommending to the Legislature of the State of Idaho that the said provisions of the Code be amended in order to provide that an attorney foreclosing said trust deed may receive a reasonable fee for services rendered in the event the trustor or his assigns pays the delinquencies prior to the sale of the trust property. I move that Resolution Number 7 be adopted. (Seconded).

MR. WARE: Very well; this again will be a vote by Bar Associations? Is there any discussion?

MR. WEBB: President Ware, Lloyd Webb of Twin Falls. We have had several problems in our District recently, or not several, but two or three on the same line with mortgages where no suit has been filed but some action has been taken and when the attorney who has taken the action has claimed his fee there has been no fixed set fee. It would be my motion that this Resolution be amended to also encourage a study of the problem of mortgages in such situations. So moved.

MR. WARE: Is there a second to the motion to amend? (Second). There being a second to the motion to amend, which is to include or amend Resolution No. 7, relative to fees involved in redemption in trust deed foreclosure, the

motion to amend is to include a study in proposed legislation relative to fees in mortgage foreclosures on a similar situation. Is there any further discussion or any discussion on the motion to amend? If not, we will vote by Bar Association.

MR. ST. CLAIR: President Ware, Gilbert St. Clair.

MR. WARE: Yes, Mr. St. Clair.

MR. ST. CLAIR: I don't see how you would have anybody set a particular fee in that case. After all it is a matter of attorneys getting together, or parties, and agreeing to drop it and accept what fee they wish, so who would they appoint to set the fees? I hate to say it isn't necessary. It's like any other suit where you come to some agreement and set your fee. You've asked for so much in your complaint and you can settle it on a basis less than that, I don't see where there would be any problem to it.

MR. MOFFATT: Willis Moffatt, Boise. It seems to me that these are two distinctly different things. What the Resolution provides, in my opinion and partly so from the amendment is a specific statute covering a specific situation. Now, perhaps there is a problem that Judge Webb has brought up that requires study and how this could be accomplished and I don't think that is in order for the legislative committee to make a study of how the statute or what kind of mechanics might be arranged for the determination of a fee in a circumstance that he raises. It seems to me that it is certainly strange to the purpose of the resolution and should not be made a part of this resolution.

MR. MERRILL: R. D. Merrill, Pocatello. The difference between these two, is this: That under the Trust Deed Statute, the legislature has fixed a set fee of $50.00 and no more, whereas under the mortgages, there is nothing set at all and that, of course, is conducted in negotiations, but under the Trust Deed, there is no negotiation at all. They pay you $50.00 no matter whether you have done three or four or five hundred dollars worth of work, that's it and that is the difference between the two. I am like the previous speaker, I don't see where the two items are similar at all.

MR. WEBB: As much as I hate to be reversed before I even go on the Bench, I am going to relent. I think, probably, the point is good and this does not relate too closely to the particular resolution but is something that ought to be studied by the resolutions committee, perhaps in the future, because I think there is a problem where it has not been filed and where the suit is filed, of course, the court can fix the fee.

MR. WARE: Mr. Webb, you are withdrawing the motion to amend then?

MR. WEBB: Right.

MR. WARE: Perhaps I should have said Judge or Judge-elect, that is. Very well. I think the objections are well taken and I think it is proper to withdraw the motion and I think it is something that should be submitted to the resolutions committee next year. We will now go back to the original motion, which I hope, the members remember without the necessity of restating it. I will read, pick it up at this point: The resolution is that the State of Idaho Bar Association refer the same to the proper committee for study and for the purpose of recommending to the Legislature of the State of Idaho that the said provision of the Code be amended in order to provide that an attorney fore-

closing said trust deed may receive a reasonable fee for services rendered in the event the trustor or his assigns pays the delinquencies prior to the sale of the trust property. Are you ready for the question?

Shoshone County Bar—Yes.
Clearwater Bar—Yes.
Third District Bar—Yes.
Fourth and Eleventh District Bar—Yes.
Fifth District Bar—Yes.
Sixth District Bar—Yes.
Seventh District Bar—Yes.
Eighth District Bar—Yes.
Ninth District Bar—Yes.
Twelfth District Bar—Yes.
Thirteenth District Bar—Yes.
The chair declares Resolution No. 7 unanimously passed.

MR. FEENEY:

RESOLUTION NO. 8

WHEREAS, A Judicial Selection Committee has heretofore been appointed by the commissioners of the Idaho State Bar,

AND, WHEREAS, Said Judicial Selection Committee has studied exhaustively questions of selection, tenure and removal of judges;

AND, WHEREAS, It is the opinion of the Judicial Selection Committee that the Board of Commissioners of the State Bar continue a Judicial Selection Committee of the Idaho State Bar to study plans, make recommendations to the next annual meeting, and if appearing desirable, to draft appropriate constitutional amendments and implementing legislation to carry such plan into effect.

NOW, THEREFORE, BE IT RESOLVED, That the Board of Commissioners of the State Bar continue a Judicial Selection Committee of the Idaho State Bar to study plans, make recommendations to the next annual meeting, and if appearing desirable, to draft appropriate constitutional amendments and implementing legislation to carry such plan into effect.

I move that Resolution No. 8 be adopted.

MR. WARE: Is there a second? (Response) Gentlemen, is there any discussion on this motion? The chair will rule, in this instance, since it calls for a study and not for specific legislation at the next session; it calls for a study and report for our next annual meeting; it will rule that we will vote as members. All in favor say aye? (Response) Opposed, the same? (No response). Resolution No. 8, again is unanimously adopted.

MR. FEENEY:

RESOLUTION NO. 9

It appearing that corporate status is not objectionable for the practice of a profession as a means of obtaining corporate benefits not otherwise available, provided there can be preserved to the client, patient, patron and the public

generally, all of the traditional obligations and responsibilities of the persons practicing the professions;

THEREFORE, BE IT RESOLVED, That the Idaho State Bar sponsor the enactment of legislation in the State of Idaho authorizing the practice of professions through corporate form, preserving, however, to the client, patient, patron, and the public generally, the benefits of the professional relationship, based upon personal confidence, ability and integrity; and, the implementation of such legislation by codes of ethics and integration rules which will preserve the traditional obligations and responsibilities of the professions;

BE IT FURTHER RESOLVED, That the State Bar Commission appoint a committee to draft and present to the next legislature of the State of Idaho, a proposed legislative enactment to carry this resolution into effect.

I move the adoption of Resolution No. 9.

MR. WARE: The adoption of Resolution No. 9 has been moved. Is there a second? (Response). Is there any discussion of this important resolution?

MR. W. W. NIXON: Bill Nixon of Bonners Ferry. I personally am very much against putting corporate name on the practice of law for the reason I think the practice of law is one of the last frontiers of individual rights in the State and society. I can't see forsaking our traditional relationship between attorney and client for a corporate tax gimmick and I am very much opposed to this type of resolution.

MR. GEE: Mr. President, Merrill Gee of Pocatello.

MR. WARE: Yes, Mr. Gee.

MR. GEE: I rise to opposition of the motion upon the ground that we are passing to the legislature a function which belongs, specifically, to the profession. I think that the legislature has no business attempting to regulate the practice of law and how it shall be done. This function should be kept within the professional ranks itself. The State of Colorado has satisfactorily met this question and by resolution of the Court, Supreme Court of the state, has adopted a program which is far more effective, at least in my opinion, than that of any legislation that can be gotten through. In addition to that, you always have the difficulty of attempting to get a type of legislation that would be satisfactory to all professions under one act. I feel we would have more difficulty with the legislators than we should probably want to undertake. Take it from me, the proper approach is for the Bar Association to ask the Supreme Court of Idaho to make a study similar to that of Colorado and if it feels it appropriate, to adopt this by Rule of Court and not by law of the State of Idaho. Therefore, I respectfully suggest, that as far as relates to other professions, and with respect to our own profession, we don't need to ask farmers to regulate lawyers' practice.

MR. WARE: Any further discussion, gentlemen?

MR. ANDERSON: Mr. President?

MR. WARE: Myron Anderson of Boise?

MR. ANDERSON: Yes. In the last news of the American Bar Association they have this under study and I just want to quote one paragraph . . .

MR. WARE: Talk louder, if you can, Myron.

MR. ANDERSON: The Committee on Professional Ethics of the American Bar Association has already considered the ethical phases and its opinion 303, announced last December. The committee expressed "grave doubts about the wisdom or feasibility of lawyers adopting, as a form of organization for the practice of law, the professional association or the professional corporation." However, the committee went on to say "a corporate form might or might not be in violation of one or more canons if appropriate safeguards are used." I just thought I might bring that out.

MR. WARE: Thank you, Mr. Anderson. Is there any further discussion on this subject? Mr. Eugene Anderson of Boise.

MR. ANDERSON: I am Chairman of the committee which was appointed and delegated to study this particular problem. The committee did study it. The committee found that fifteen states had adopted legislation last year, enabling acts, authorizing the practice of certain of the professions—some of them, all of the professions— in corporate form. The committee also examined into the feasibility of following the method suggested by the gentlemen who recited the occurrences in Colorado. In Colorado, the practice of law was authorized in corporate form by the rules of the Supreme Court, but the State of Colorado does not have the statute such as we have prohibiting the practice of any profession in corporate form. The committee also found that the various professions in Idaho, the dentists, the doctors, the engineers and others were vitally interested in the same problem. I think the dentists we met here earlier this week, adopted a resolution favoring the enactment of such legislation. The committee also examined into the feasibility of the legislation authorizing the single practitioner to do business in corporate form states have adopted such legislation. Two states have adopted legislation permitting the single practitioner of a profession to do business in corporate form. Frankly, the benefits that accrue from this type of legislation are the benefits tax-wise. I don't think there is any other substantial benefit to doing business in this manner. The committee has strongly urged and does strongly urge that your resolution committee present this and we strongly urge that you adopt this resolution.

MR. WARE: Is there any further discussion, gentlemen? Does anyone else wish to speak on this subject?

MR. KAUFMAN: Sam Kaufman, Boise. I wonder if Mr. Anderson would point out to the other members present here, what the personal relationship between attorney and client will be or remain under this proposal. It might clear up some questions.

MR. WARE: Yes, Mr. Anderson.

MR. ANDERSON: I doubt that this is the place to go into the intricacies of this type of legislation. However, the committee has had before it model forms of articles of incorporation and the acts of other states and the committee did make a suggested draft of a professional corporative act. That draft contains two provisions, among others. "No corporation organized and incorporated under this act may render professional services except through its officers, employees and agents who are duly licensed or otherwise legally authorized to render such professional services within this state. Provided, however, this provision shall

not be interpreted to include in the term employees as used herein, clerks, secretaries, bookkeepers, technicians and other assistants who are not usually and not ordinarily considered by custom of practice to be rendering professional services to the public for which a license or other legal authorization is required. Nothing in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state of the professional relationship and liabilities between the persons furnishing the professional services and the persons receiving such professional service and to the standards for professional conduct. Any officer, shareholder, agent or employee of corporation organized under this act shall remain, personally and wholly liable and accountable for any negligent or harmful acts or misconduct committed by him or by any person under his direction or supervision or control while rendering professional services on behalf of the corporation to the person for whom these professional services were being rendered. The corporation shall be liable up to the full value of its property for any negligence or wrongful act or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of this corporation in rendering their professional services." Those two provisions contain features which are spread through the suggested act which was drafted. This suggested act was not drafted with any idea of having it adopted here; it was merely to get a study. Does that answer your question?

MR. MERRILL: I wonder if Mr. Anderson would point out the small, insignificant benefits a lawyer would get by incorporating under this Code.

MR. WARE: Do you wish to do this, Mr. Anderson?

MR. ANDERSON: I would be happy to do it. Counsel says that they are small. To some they may be small, to others appreciable. Primarily, it will permit lawyers to set up in their own offices, for their employees, for themselves, pension plans in which they can be included. The pension plan can be suited to the lawyer as well as the employee. Deductions can be taken from income for purposes of the pension plan to be paid out and taxed later. That is the most fundamental benefit. Profit sharing plans in connection with the Internal Revenue Code can also be set up in which the lawyer will participate. Beyond that, there is the group insurance that can be adopted to include the lawyer. Those are the benefits that accrue tax-wise to the men of the profession. Now, we are going to have, we do have other professions in Idaho, vitally interested in this type of legislation. We can end up in Idaho with a separate act which will be applicable to all professions or we can have each profession going its separate ways with a separate act. Other professions are just as much interested as lawyers, Sometimes, I think, more so.

MR. WARE: Does anybody wish to speak either for or against it? Are you ready for the question? Your name please?

MR. MAX PARRISH: Max Parrish from Pocatello. The objection seems to be that for the Supreme Court to adopt this by order, that there is a statute currently on the books which prohibits the practice of a profession in a corporate set-up. Would we be wise to get around this setting a precedent in letting the legislature get more and more control over the practice of law? Would we be wise to let this occur? If the dentists and if the medical profession and the architects and the other professions are going to take this up, would we be wise to wait until such a statute has been passed which would then eliminate any ob-

jection to the Supreme Court passing on order and we would then have the advantage of the corporate status, if advantages there be, without the disadvantage of allowing the legislature this additional control over the legal profession and we would then retain and be retained under the Supreme Court and properly as officers of that court and instead of having the legislature tell us what to do, be able to have the Supreme Court tell us what to do. For this reason, I am suggesting we should oppose the adoption of this resolution. That if, in fact, the statute is passed upon recommendation of the other professions, our Supreme Court could then, by order of the Court, allow the corporation of a legal office and we would not be subjected to the control of the legislature, which is one of the points we are trying to get out.

MR. WARE: The question having been called for, the pros and cons of this resolution, the adoption which has been moved, having been discussed, I will now call for the question to the Associations voting as Bar Associations.

Shoshone County Bar—Votes yes.
Clearwater Bar Association—Yes.
Third District Bar—Yes.
Fourth and Eleventh District Bar—Yes.
Fifth District Bar—Let's pass.
Sixth District Bar—Yes.
Seventh District Bar—Seventh District Bar depends on vote of its Association and therefore votes no.
Eighth District Bar—Eighth District Bar votes no.
Ninth District Bar—We pass.
Twelfth District Bar—Votes yes.
Thirteenth District Bar—Yes.

Fifth District Bar passed? (Yes response). Are you ready? (Give us one more moment). Fifth District Bar voted no. There was one other Bar that passed. (Mr. Chairman, that was the Ninth District. The Ninth District bar votes no). Votes no. Is there any other Bar Association that passed? Mr. Merrill, do you have a tally of the votes?

MR. MERRILL: 203 No. The total vote is 599 so the majority passed it.

MR. WARE: The chair will declare the Resolution adopted on a vote of 203 against the motion to adopt the Resolution to 396 in favor of it.

MR. FEENEY:

RESOLUTION NO. 10

WHEREAS, The Uniform Rules Committee of the Idaho State Bar has studied the Uniform District Court Rules and other local rules in effect and has prepared proposals for changes in those rules involving the State Rules of Civil Procedure and whereas the proposals of the Committee appear to be beneficial and desirable and should be adopted;

NOW, THEREFORE, Be it resolved that the recommendations and proposals of the Uniform Rules Committee, as set forth in and attached Exhibit "A", are hereby approved and I move for the adoption of Resolution No. 10.

MR. WARE: Is there a second to the motion? (Second). Duly moved and

seconded that Resolution number 10 be adopted. Is there any discussion?

MR. WEBB: Lloyd Webb, Twin Falls. I can see a lot of things wrong with these things. We discussed it at length at the Judicial Conference and I am still a lawyer and of the contention that I might still have some judicial ax to grind on these. There are several things that I would like to proposition to the group on that I think might be improved and deleted.

For one thing, it calls here for motions to be called up only on written notice and it occurs to me that the Third District's system of the court automatically putting everything on the calendar is a wise thing. It keeps the calendar current. We have a provision here in Section 4 of the Rules which says that if the court requires briefs on motions that they must be served on all parties. It would be my suggestion that all briefs ought to be served on all parties. We have a firm in Twin Falls that has a real sneaky habit of putting in a brief just before the motion, maybe five or ten minutes before, and handing it to counsel and things aren't just quite right. I think it would be in the interest of justice if all briefs be used in any case, would be served within a certain period of time.

Another Rule here, Rule 5, provides for minutes of proceedings in chambers, which requires the attorney preparing the minutes. This is, for instance in Twin Falls County where you have a Jerome County matter, you will hear the matter in Twin Falls and the attorney will prepare the minutes. It provides here that the clerk prepare the minutes. Now, I don't know how the clerk in Jerome is going to prepare the minutes for those meetings held in Twin Falls. He is hardly able to prepare the minutes for those held in Jerome. So, I think that this departure is probably not justified.

Rule 9 provides for the dismissal of inactive cases on a year's inactivity. It is a good rule but it has no provision for notice. It seems to me that there ought to be some provision in that for notice so the attorneys can come in, if they like, to keep it alive.

An interesting provision of Rule 15, relating to jury instructions, provides that any opposing party has the right to waive objection to proposed instruction if there is no objection to the proposed instruction, it shall be given, whether the court likes it or not, and then it is thus stipulated to, it is not reversible error, the giving of instruction. I think this is not good law. I know a lot of situations that I am in, where I agree to instructions because I'm just a hell of a nice guy and then I find out that it is as objectionable as all get out. I don't think this is a good rule, that if you allow an instruction to go in by default, so to speak, that you ought to be prevented from raising that and besides I don't think it is a sovereignty rule which I think ought to be given more thought.

There is another thing on jury instructions, we, in Idaho, never serve. It occurs to me that they ought to be served so the other parties will know what is going on.

MR. WARE: Doesn't the proposed Rule provide for service? I thought it did, but I can't guarantee that my recollection on these Rules is perfect.

MR. WEBB: Oh, you're right. That is before the time of filing. You're correct. That is my mistake. Perhaps there ought to be something in there on the length of time ahead of the time they are given.

Another provision which provides and raises some kind of adversity is on Notes of Issue provided no case may be set for trial unless a Note of Issue is filed. Generally speaking, of course, this is good, but again, it appears to me that where both attorneys have some knowledge of the case neither one of them are anxious to have heard, the court wants to get the calendar current, the court ought to have the right to set this. I think, perhaps, it ought not be required to set it unless a Note of Issue is filed, but I think it ought to have the right.

Another question which I don't understand at all, despite Mr. Burke's beautiful argument in favor of it, is on pre-trial procedure, Rule 19. Rule 19 provides that no case be tried less than twenty days following the entry of or settlement of a pre-trial order except on stipulation of counsel. I don't understand the principle of this. It seems to me the court ought to be able to set these cases for trial when it's ready for trial. I don't know any reason why you should have to wait . . .

MR. WARE: Maybe that's to avoid judicial ramrod. Pardon me, the chair shouldn't comment.

MR. WEBB: I don't know what the purpose was. Otherwise, these Rules occur to me as good rules except for those few minor academic objections, but, I don't know if the appropriate thing for me to do would be to make a motion on this basis. It occurs to me that perhaps these things need some more study. I don't know. I am personally opposed to them in their present form unless some of those additions are made.

MR. WARE: Mr. Thomas? Gene Thomas of Boise.

MR. THOMAS: Mr. President, this Committee has reported and recommended the Resolution today. The committee is made up of Carl Burke, Chairman, and a number of members that, I think the membership would be of interest to this group in order that we may judge the type of people who have worked and the type of product they have come up with. Carl Burke has chaired this committee; Hugh Maguire was a member of it. John Daly of Twin Falls was a member of it; Vern Kidwell of Idaho Falls was a member of it; Paul Keeton of Lewiston was a member of it, and I am a member of it.

The proposals presented here today have been discussed at length by the membership of the committee and the final analysis, which you have, is a unanimous recommendation by this committee. I think that a full reading of the lengthy document will be disclosed that the committee recognizes that we have not reached a final draft, but the committee does not recognize that we are still in the study stage. The committee feels that if you view that we are still in the stewing-about stage of this matter, it is not good, because it just means we are going to lose a lot of our time. I would like to point out to you that the committee and Bar Presidents, being the Resolutions Committee, went over this entire matter, word for word, and met with Mr. Burke and it was the unanimous vote of Resolutions Committee that this come up and it was given a compliment by the Committee there. I heard this morning, with much interest, this report described by the Fourth Judicial Conference as an excellent report. I point this out, because we haven't elected to read the entire document. I'm in favor of that document. I think it is a little misleading to start down the list and tell what's wrong. I think what's important is what's right. What's important beyond that is that this report is so worded that it is flexible. It is still in form,

it leaves room for work and polish and take care of the details of it that are recognized as we proceed.

Now, in the first instance, this committee—and by the way Mr. Chairman, I am speaking for Mr. Burke, who couldn't be here today. He had some business in Idaho Falls—I would like to point out that our primary concern in this committee was to eliminate the terrible confusion that exists because of the lack of uniformity in the rules of the various District Courts. Not calling names and not to point fingers at any set of rules, but simply stressing that they are not uniform and it is almost impossible for an attorney to practice in the various courts in the state and do it well, because of the tremendous variances that exist. By this proposal, all rules will be uniform with the exception of truly local matters, which local rules will be relegated no later than November 1 of this year by rule of the Supreme Court where they will be approved by the court and then published and they will not take effect until distributed to members of the Bar so that every lawyer will have a complete and thorough set of applicable rules under which he will practice in whatever court he will practice. I might say that the judges have expressed an appreciation for this, because many of them have had the experience of traveling district to district and been in confusion as to the various rules between the various districts. Well, that was point one.

Point two was the recognition that in 1952, rules were adopted to be Uniform District Rules. Subsequently, State Rules of Procedure, identical with the Federal Rules, were adopted. Our '52 rules are not amended and they are in conflict.

And then to add to the confusion, subsequently, many of the District Courts have gotten Rules of their own. They are involved with the District Rules and the State Rules in some cases and in other cases, they modify them substantially. We found that this problem of not knowing the rules in the Districts was even so serious as to involve many attorneys with respect to their own Districts in spite of conscientious efforts to maintain court form.

Now, in going through these Rules, we tried and tried diligently to come up with sound, sane proposals for the administration of these cases and we have concluded in both instances we are simply talking about addition to the Idaho Rules of Procedure.

I am sure that I can speak for the members of this committee when I admit to you that we expected to give and take in the final polishing of the draft of these proposals in becoming applicable law. However, there are some matters that I might comment on and these are pertinent criticisms and I think you are entitled to some answers.

One, briefs in the lower court. I might point out that the existing State Rules of Procedure require that all briefs and all other papers you can file must be served on opposing counsel. That's the requirement that now exists. We didn't deem it necessary to repeat that one. The reason that we dealt with the three-day matter was that in some courts it is the practice requiring the brief before hearing or trial. We felt a uniform provision of three days in advance of that hearing or trial was required since it is conceivable today you might have five cases around the State of Idaho and have fifteen day appointments one place a week and so forth and so that is the import of that. I think the existing rule does cover the point you mentioned.

The Rule 9 comment had to do with inactive cases. It is not a resolutionary matter though. It is basically, a continuation of what has been for over ten years the uniform District Rules of the State of Idaho and beyond that I think the notice could be consideration. That idea of the attorney being given notice before the case is dismissed was considered by the committee and was rejected and I think I can say considered seriously, but it was the feeling of the committee in the final analysis an attorney is responsible for his case and committee's conclusion was that if we try to pass the buck to a clerk or to a Judge or another attorney to maintain our docket then we are in the wrong and we are asking somebody to do our own work.

The committee had considered in each drafting proposal on this notice that it was adverse and decided it was not desirable. The group disagreed in committee but we ironed it out and of that, I am pleased.

On the Note of Issue, the committee did not recognize under the point you brought out, that it is a conceivable case of great public moment, perhaps for reasons that are extraordinary could and perhaps should be moved up a step in advance of the period of schedule. I would judge that this might be a power of the court under extraordinary circumstances, but I am certain the committee would be in sympathy with the provision that the court could, in extreme public interest, make an exception to that rule that the note of issue has to be filed before the case can be set. This is simply a matter that wasn't brought up. I know there is no reason on that.

The other point brought up was pre-trial conference and twenty-day period. I saved that for last because this has been much discussed by the Judges. I was pleased they described this recommendation as excellent, but I know—and let's be honest about this—some of them have misgivings about this twenty-day provision. The reason for that, as concluded by the committee (and the members here can correct me if I am wrong) the reason was that attorneys seem to agree that you need a period of twenty days to get your witnesses rounded up, to get them subpoenaed. You need a reasonable number of days to find out if perhaps a witness may be subpoenaed and must be deposed. You need a reasonable number of days to tell a doctor, for example, that he must appear in court. These men schedule surgery, they schedule office appointments and it is not possible for the practicing attorney to group everybody out and get them in court in three, five or seven days, unless, in special case, there is no hardship and as long as we provide for that, stipulation or agreement to Notice would be in order. But, it was the feeling of the committee that a guarantee of at least twenty days is a reasonable thing for an attorney to line out his case and get his witnesses in. This is not, as you suggested, should be ready for trial at a pre-trial conference. It's just that an attorney be ready. The witnesses aren't necessarily, and after much discussion and completed reasoning, it was thought that such a safeguard was in order.

Now, there is no great problem here. This committee is not asking that everybody hang and cling to every misspelled word, every misworded clause, but this principle is the work of this committee and I think, therefore, it is a point that we, as a Bar, must stress because I don't believe the majority of you, as you go over them, appreciate the real problem we had in this committee. This is basically, the proposal of our committee and these—I stand corrected if Vern Kidwell has a correction to make—but these are our comments on your criti-

cisms in court. Basically, and speaking as an individual, I feel that this is a much needed piece of work. I feel it is important to the Bar and I feel that we should, by all means, not resist this terrible burden we seem to have in judicial matters, we should avoid resistance in delaying another year and run it right through the hopper with study. I think the spirit of this report, as written, which recognizes the give and take and polishing it needs as such to take care of these points that are raised. I know the Bar members and the court, in going over the final draft of this, intend to be reasonable and sensible to the open and the ultimate execution of this proposal.

MR. WARE: Gene Thomas, may the chair ask a question? For the benefit of the members and to clear the chair's thinking, you have expressed a statement that, I assume that even though, assuming for the sake of argument that this resolution were adopted on the motion made, the Rules themselves still involve a give-and-take situation, they would be referred, could, of course, not become effective until the Supreme Court had approved them and undoubtedly the Supreme Court would desire recommendation or opportunity for the District Judges to submit suggestions, so that even—am I correct?—that even though this resolution were adopted, the Rules, of course, would not become effective until the Supreme Court had determined the propriety and the desirability of them?

MR. THOMAS: President Ware, that is absolutely correct. They are written with express language that there is give-and-take in the offing prior to formal acceptance by the Court. Yes, this is definitely so. I personally have a question in my mind whether the final vote on these Rules is in order without a full report being read. Now, I know it is lengthy and I hope everybody's in accord that we can forego it, but I certainly hope everybody will want to hear about it before they vote it down.

MR. WEBB: Excuse me, just a minute. I didn't want to give the impression that I was against Uniform Rules. I don't think anyone did. I think there are some things objectionable, but if we are still going to study them and maybe iron some things out, then, this is good. Certainly, I didn't want to cast any doubt on this distinguished group of insurance counsel who prepared it.

MR. WARE: I have just been advised by the Parliamentarian, that this is not a debatable question. The question has been called for so we will discontinue the debate on the matter.

MR. PARRISH: Max Parrish, Pocatello. According to Robert's Rules of Order, the question has not been called for until there has been a vote of the previous question. Simply expressing the question indicates the eagerness for the person to vote but does not call the previous question.

MR. WARE: Does the membership wish to vote on the question? (Response). The question having been called for, is there a second? (Second). We will not vote on the previous question, Not by Bar. We will vote on whether or not debate is ended, that is, if a majority so votes. All in favor of the motion for previous question, say aye (Response). Opposed (Response). The chair is in doubt. We will have a show of hands here. All in favor of the previous question, hold up their hands. Opposed? 23 to 35. Doesn't it take two-thirds to have a debate? (Response). Very well, debate will continue, gentlemen. The chair is prepared to recognize the gentleman in the red shirt.

MR. DALE MORGAN: Dale Morgan, from Boise. I listened with interest to Mr. Thomas. However, it occurs to me that what is being asked here is that this convention give its approbation to the draft of Rules. Now, there are many things which are right with the Rules but in the present form of accepting this report, we are also giving our approbation to the things that are wrong with it. Now, many of these things that are in the Rules are extremely important in litigants, far beyond the members of us who are attorneys. It occurred to me that we should not, without the careful study of each Bar Association, permit these Rules to the District Court or the Supreme Court as having the majority approbation of the Bar. For one thing, one of the things that is wrong, I think is the provision for multiple physical and mental examinations among litigants. Now, that is a great departure, which I think, we should go beyond the personal injuries which our individual practice might call for and we must think as a Bar Association in terms of studying for the administration of justice. Among other things here, we should not just make note of things that are wrong in the manner which Mr. Thomas suggests. I believe that this does call for specific action and should not leave this convention with the approbation or stamp of approval of the State Bar Association.

MR. GREENFIELD: Mr. President, a number of us read these over very carefully. I think, probably, the greatest objection to them arises out of the fact that the committee went beyond its task of attempting to promulgate Uniform District Court Rules and went beyond its task of conforming District Court Rules to Idaho Rules of Procedure. They have attempted to make some steps or amendments to the Idaho Rules of Procedure themselves. I believe if the amendments to the Idaho Rules of Procedure were deleted from the report, that if the report were to confine itself to conforming the District Court Rules or present Rules of Procedure and making the District Court Rules especially uniform, it would be a far more acceptable report. May I ask to have read back the motions before the house? I agree with Dale Morgan, that the matter does not conform, as far as I am concerned, to be a step forward with the approval of the Bar Associations. Certainly, the areas of substantial amendment change in the Idaho Rules of Civil Procedure should be deleted and I think that Mr. Morgan is correct in having the matter referred to the various Bar Associations of the state for their study at their convenience.

MR. JOHN HEPWORTH: John Hepworth from Buhl. I want to say to Mr. Thomas, that I was impressed by the makeup of the committee, however, I am prepared to vote for it in spite of this. One thing that seems to me to be overwhelming. We are all in favor, at least give voice to the proposition that we want Uniform Rules. Now the voice is being raised that we are not all in favor of these particular Rules. Well, I defy any one to suggest that after ten years of study, the Rules would be suggested that everyone in this Bar Association would be in favor of. This simply isn't the make-up of attorneys to begin with. Secondly, if we have Uniform Rules, let's submit them. They have been studied by competent men. Let's get them there. They can be revised if necessary, but it will get something done. We can study them for twenty years.

MR. KIDWELL: Vern Kidwell of Idaho Falls. I think probably we are overlooking that the rule making power in Idaho is not in the Bar Convention. It is in the District Court Judges and in the Supreme Court at this time and the committee discussed this at considerable length and it was our thought that the

only way we could get uniformity in Rules, would be to have some type of control by the Supreme Court. We feel that, to a large extent, the dilemma in which we find ourselves today is because the Supreme Court has not acted on some of these specific Rules. As a result, many Districts had and it had created a wide divergence among the Districts. For instance some Districts would have the filing of trial brief that are confidential with the Court. Some Districts had requested instructions five days in advance of the trial. Some Districts call for them at the start of the defense case and in view of this wide divergence among the Districts, we thought that the only way we could get any uniformity would be to recommend adoption of what, in substance of normal honesty, is a Uniform Rule. We also want to point out that these Rules are intended to supplement existing Idaho Rules. For instance the point that Mr. Webb brought up about violating the service of briefs. It's covered by an existing Rule but it is also violated and many cases there are conflicting local court rules so that by the adoption and provision of the District Court Rules we feel it eliminated all this problem that has arisen.

Very briefly then with respect to the brief instruction aspect. I certainly concur with Mr. Webb that if I am a good guy and stipulated on the floor of that courtroom that I am a loser, I am bound by it and I don't see where my client is taking any greater risk by committing me to agree to an instruction. If I want to stipulate that an instruction can be used without objection, I certainly will not be taking on any more obligation or latitude than I have as trial counsel out in the arena.

With respect to this multiple examination, I think all of us have bumped into the type of aspect where an individual is contending internal injuries, possibly bone damage, maybe eye damage and brain damage and we defy any one individual practitioner to make a competent physical examination that can adequately evaluate his injuries. We certainly feel that it is subject to control by the court and it was not the committee's intent to subject anyone to order of examination. We did feel that in the interest of properly appraising a claim for personal injuries, that it might be helpful to have him examined by a specialist in internal medicine or an orthopedic surgeon or a neuro surgeon, depending upon the type of claimed injuries. But, in retrospect, we are not trying to jam anything down anyone's throat. This was the result of what's achieved after studying, Rule by Rule, every Rule of every District and it is amazing the variation between the different Districts and where we are practicing today in one District, tomorrow in the next one and the Rules of Court are very often not even available, so that it was the thought in mind of having at each lawyer's desk a uniform rule that was furnished annually and in that same publication would be the trial calendar, the call for calendar and any modification of these so that every lawyer would know what the rules were statewide and still protect the adoption of local rules by the local Judges.

MR. ELAM: Laurel Elam of Boise. I just want to mention once more what one of the speakers has mentioned and that is that this, if you will notice in the resolution, is a recommendation not for the absolute adoption of these Rules, but after we recommend, then it passes then on to the rule-making body who pass on these Rules along with any objections that Mr. Webb or any others pass on to the rule-making organization. I think the only sensible thing, really, is to adopt this resolution as recommended, then it may be passed on by our Supreme Court and

then if we agree or disagree with what they finally adopt, next year we may make recommendations for further changes. Let's get a Uniform set of rules set up and the only way to do it is by passing on this and then having it left open for further suggestions, for further changes if the Supreme Court thinks it should be different or if we, coming here next year, think some things should be changed.

MR. WARE: Is there any further discussion?

MR. SMITH: Laurence Smith, Caldwell. I would like to ask why these Rules, proposed changes were not submitted to Districts. We were given ample time to determine whether a Chinaman should be given the right to vote or not, but we are asked to make substantive changes in our Rules of Procedure without ever having seen a copy of the Rules. It took me until 10:00 o'clock this morning to get a copy. I think there are only six or seven copies here. I think they should go back to the Districts so that we would have a chance to go over them and see just exactly what substitive changes there are involved.

MR. THOMAS: I believe Mr. Smith's question should be answered, but I think he probably anticipates the answer, for he has served on many committees himself. This item has not been swept over by the committee lightly, but this committee is like most others, it has been pressed and pressed hard to get this drawn up and completed. Now, of all the important committees had, I can't remember of any that has a broader scope than this one has and we have gone to the extent of having the committee come in from all parts of the state and meet in one place. We have gone through a voluminous set of minutes in hope it would be a preliminary draft and source on this thing. Then we went back (this is fourth draft) and we recognize there are some commas misplaced in this one and finally, not the least of our problems, was getting the darned thing mimeographed, an Act of Congress to get the judiciaries over with. I want to assure the convention, particularly Mr. Smith, that this has not been an attempt to slip something through hurriedly or to keep it from the members, but we have had problems in our own practice, a few of us, that wouldn't permit us to devote all of our time to it. I think all of us feel we could do a little more than perhaps we knew we could and that's really the answer to the question. We are sorry we couldn't get it out sooner.

MR. SMITH: I would like to say one thing more, If I could. I realize the problems of the committee in the state. I have worked on some and I know what you are up against. I also know having read them briefly here today that there are matters which are as objectionable to me and I would have to vote against all of them because of that, because once we recommend, the machinery is put in motion which will carry this through and there will be no stopping it because it will go to the Bar and then to the Supreme Court and the Rule will be put out and we'll be bound by it and we need to have some of the things that are in here, I think, have a little more study than what time we have devoted to it today. Again, I don't think this committee has tried to put anything over, I am sure that they have worked hard and as fast as they could but when you begin to change the Rules which took so many years and so many fights to get together, and change them in such a substantial way as they are changed here, I think we are doing it too rapidly and I think we should go back to the Bar Associations so that we can have some ample time to study them and return here next year with them.

MR. MILLAR: Z. Reed Millar, Boise. I, as some of the other attorneys, in fact, some of the other Districts, am very much concerned about the different Rules, local Rules in different Districts. I think this is important if it does nothing more than to call attention to the judiciary of a necessity of some Uniform Rule System in local Districts it is sufficient to justify its approval, whatever difference there may be, it may be as George points out that it should be separated in two different parts and the emphasis placed on this Uniform System of Rules. But in my estimation, that's why I voted for continued debate because I didn't have full information on it and I wanted it, the adoption of the Resolution is justified, if nothing further, for in the future of getting something uniform in our local District courts.

MR. KAUFMAN: Sam Kaufman of Boise. Mr. President, I am in order with the spirit of the committee. I think we need Uniform Rules in the District Courts and they have done a lot of hard work on this and it should be appreciated by all of us, however, I don't feel as Mr. Millar does that whether I am in Canyon County, Ada County, Bingham County, Bannock County or wherever I might be, that the proposed change in, say number 15 or number 20 has got anything to do with Uniform District Rules. Those are substitutive changes in the Idaho Rules of Civil Procedure and he's never run up against any difference in the county in those two, for instance. I think there are some things here, as Mr. Smith does that are objectionable to myself, only one or two, but when I vote for a Resolution I expect to include the things that I object to and I don't know, I have no assurance, that these revisements are going to take care of the things that I raise the objection to. Now in view of debate here today and some of the feeling that has been expressed and without any attempt to chop these up and do away with them, in fact, in the spirit of trying to get the job done, I would offer a substitute motion, that motion being:

The Bar assembled here today approve, in principle, the suggestions of Uniform Rules for the District Courts and that this proposed set of Rules be submitted to the various districts for their individual approval and recommendations and that thereafter the Committee send them to the Idaho State Rules on Civil Procedure Committee and work with them and that thereafter they be submitted to the Supreme Court.

MR. WARE: Gentlemen, you have heard the motion to amend, I mean motion to substitute.

MEMBER OF THE BAR: If this is a substituted motion it must be a main motion and therefore out of order as there is already a main motion before the house.

MR. WARE: It is not out of order if it is considered an amended motion, an amendment to the motion.

MEMBER OF THE BAR: If it can be amended it does not change the spirit of the motion. If it is a substituted motion, it is out of order. If it is an amendment it is proper and in order, but if it is a substituted motion, then I submit it is out of order. * * * *

* Intervening discussion.

MR. WARE: Gentlemen, the Chair, and of course, the Chair, like the

Supreme Court, cannot commit error, the Chair will treat this in spirit as a Motion to Amend. Therefore, unless there is an overwhelming objection, I will ask for a vote on the Motion to Amend. It can be discussed so we will discuss the Motion to Amend. Mr. Thomas?

MR. THOMAS: Mr. President, I will be brief. I don't mean to overdo this but I oppose this Motion to Amend, although I appreciate the good spirit in mind and good intent, because this today, makes the fifth year that our best body has been acting on these Uniform Rules. This is the fifth year that we have tried to do something about this. I don't sincerely believe it will do anything more or less than a repeat performance next year of what we are doing here today. I think we're almost assured little, if no progress in this extremely important field will be gained. It seems to me we should pass the main motion.

MEMBER OF THE BAR: I am opposed to the Motion to Substitute. Even bad rules, and I think in some respects some of these are bad, are better than no Rules at all. I am with Mr. Thomas, I think we ought to have some Uniform Rules.

MR. KIDWELL: Doesn't the Substitute Motion do, in effect, what we are proposing by the Primary Motion? It seems to me that the Bar group here today is speaking for the Bar group. That was my understanding as the purpose for the Convention and the representatives here for the Ninth District, it was my understanding, vote for the Ninth District and it seems to me, what, in substance, we are doing is go back and talk it over with the crew and then refer it to the Supreme Court. It concurs to me that that is what the main motion presupposes that District Bars, the Idaho State Bar here today suggest it be referred to the Supreme Court.

MR. WARE: Any further discussion? The question having been called for, we will now vote on the Motion to Amend alias "Substitute".

Shoshone County Bar—No.
Clearwater Bar—Yes.
Third District Bar—Pass.
Fourth and Eleventh District Bar—No.
Fifth District Bar—No.
Sixth District Bar—Yes.
Seventh District Bar—Yes.
Eighth District Bar—No.
Ninth District Bar—No.
Twelfth District Bar—Pass.
Thirteenth District Bar—Yes.

Is the Third District Bar prepared to vote? (The Third District Bar voted yes.) Is the Twelfth District Bar prepared to vote? (The Twelfth District voted no.) Where do we stand, Mr. Merrill? The vote on the Motion to Amend, 333, yes; 266, no. The Motion to Amend carries. Now, do we vote on the main motion as amended? (Response of no.) That's the picture, very well. I am sorry that your Chair is so wobbly on parliamentary matters. Next Resolution, Tom.

MR. FEENEY: Mr. President, that's about the last of Resolutions.

RESOLUTION NO. 11

BE IT RESOLVED, That the Idaho State Bar Commission appoint a committee to make a study of the advisability of creating two additional divisions of the Idaho State Bar and appointing two more commissioners, or the advisability of determining a formula for rotating the Commissioners within the existing districts, with the number of Commissioners to remain the same; and that the committee's findings be submitted to local Bar Associations for their consideration.

I move for the adoption of Resolution No. 11.

MR. WARE: Resolution No. 11, relative to a study for adding two Commissioners or a rotation among districts among the present three Commissioners, the adoption of that Resolution has been moved and seconded. Is there any discussion?

MR. ST. CLAIR: Gilbert St. Clair of Idaho Falls. Is there not another Resolution that has something to do with the same matter? Has that been eliminated by the Resolutions Committee?

MR. WARE: The Resolution submitted by the Resolution Committee . . .

MR. ST. CLAIR: I mean the one for raising the annual dues. Is that through now?

MR. WARE: No, that comes later.

MR. ST. CLAIR: Doesn't that have something to do with leaving the present Commissioners at three . . .

MR. WARE: Well, it's a study.

MR. ST. CLAIR: If it does, I would suggest the other one be read at the same time. I think it would throw some light on it and it might . . .

MR. WARE: I think we will have to go just one at a time and this is just a study anyhow and is moved by Mr. Jim Donart of Weiser in the Resolutions Committee and I suppose . . .

MR. DONART: Jim Donart of Weiser. The idea of this is to bring to the attention of the entire State Bar, not merely the convention, but as much of the membership as is possible, the proposition of better representation and it might mean greater participation by a greater number of lawyers in the state. As an illustration of this, the Seventh District, which has within it Canyon County, I believe the second largest area, population-wise, in the State of Idaho, has not been represented on the Bar Commission for thirty years. Now, looking at the entire situation realistically, it is pretty difficult to escape the proposition that ultimately there are going to have to be more Commissioners in order to give representation to all the lawyers in the state. It is our belief that if we have this, we will have a stronger Association and to say nothing of the fact that we will be better represented. There is nothing in this, as I am sure the members of the Commission know, that is any reflection on any particular member of this or any past Commission. That is not the question at all. The question is providing representation to all of the lawyers in the state. To try and give better representation. The sad facts are that we have a few large communities at the present time, that, because of their numbers, can either elect from their own District

or county, members of the commission. Now, realistically, this is probably not as wrong as it looks, because they are, after all, of a very considerable number of lawyers. We feel that the only real solution to this, to give representation to all of the lawyers of the state, is to increase the number of Bar Commissioners. Now, Mr. St. Clair mentioned, and I think it might be well to mention here, there is a cost factor involved. Now, we, in the Seventh District, are, at least, and I think this would be true, if given a little thought, all over the state, we, in the Seventh District, are perfectly willing to pay the price for these additional Commissioners. I don't think as a matter of fact, I realize this, we do have to pay for them. We are going to have to raise our annual license in order to do it, but to say the cost of it in itself is an argument against this thing you just as well say that we might as well abolish the whole Commission because what we have now, costs some money. We are perfectly willing to pay this additional price, it is a small price indeed, for what would be a profit. At this time, however, all we are asking for is a study, to have it brought to the attention of the various District Bars in the hope that we can figure out one way or another, a solution to this problem.

MR. WARE: Mr. Donart, as I understand the Resolution which is submitted here, which was moved or introduced by you, it involves a study in either an increase in number or an assurance or development of some system of reasonable rotation which will result in adequate representation under the existing system.

MR. DONART: It would probably be better to say that it calls for a study of both of these methods at arriving at a solution.

MR. WARE: Thank you, Jim. This is a matter, I believe, that can be voted on by the membership as a whole rather than by Bar Association. All in favor of the Motion to adopt this Resolution, for this study on the number of Commissioners or system of rotation, say aye. (Response). Opposed? (Response). The Motion is carried. Resolution is adopted.

MR. FEENEY: I will say to waive confusion in the area to which you are now coming, that the Bar Commission Resolution which covers three matters, substantially, one, which we have just discussed which, in regards to the Commission, there was no change and the increase bills and the general counsel, the Bar Commission Resolution was superseded by three separate Resolutions. The first we just acted upon. The Resolution Committee passed two Resolutions on the same subject. Now this area covers an increase in dues. With your permission I will read the first Reslution and then read the second.

RESOLUTION NO. 12

WHEREAS, The work load of the Commissioners of the Idaho State Bar Association, its Secretary, its Committees and Committee Chairmen, has increased to such an extent that the necessary Bar Association work cannot be accomplished without great personal hardship on the part of those involved, and

WHEREAS, If the affairs of each integrated bar are to progress, even greater effort will be required in the future, and

WHEREAS, The necessary work of such integrated bar cannot hereafter be properly accomplished by the voluntary effort of individual members alone, without curtailment of needed activities and services,

NOW, THEREFORE, BE IT RESOLVED, That the yearly dues of those lawyers who have practiced for at least five (5) years, be increased to the sum of $100.00 per year.

BE IT FURTHER RESOLVED, That the Bar Commission either directly or through appropriate committees of the Idaho State Bar, shall prepare and present to the next session of the Legislature such Legislative bills as are necessary and proper to effectuate this resolution.

MR. WARE: Do you desire to have the second one read now?

RESOLUTION NO. 13

(Read by Mr. Feeney)

BE IT RESOLVED, That the annual lawyers' license fees provided by Section 3-409, Idaho Code, shall be changed and set at the following levels:

1. $15.00 for the year of admission and for the first calendar year thereafter;

2. $30.00 for the second, third and fourth years following the years in which the attorney is admitted; and

3. $50.00 a year for each attorney who has been admitted more than four years; and

BE IT FURTHER RESOLVED, That the Bar Commission, either directly or through appropriate committees of the Idaho State Bar, shall prepare and present to the next session of the Legislature, such legislative bills as are necessary and proper to effectuate this resolution.

MR. WARE: Gentlemen, of course, the first Resolution, Resolution Number 12, the one that is before you on motion by Mr. Feeney and seconded for adoption is what I will refer to as the "$100.00 Resolution." It is now open for discussion.

MEMBER OF THE BAR: Mr. President, I move that the first Resolution be tabled. (Second)

MR. WARE: I believe that that is not a debatable Motion. We will vote on the first Motion by Association. The Motion to table.

Shoshone County Bar--Pass.
Clearwater Bar--No.
Third District Bar--Yes.
Fourth and Eleventh District Bar--No.
Fifth District Bar--Yes.
Sixth District Bar--Yes.
Seventh District Bar--No.
Eighth District Bar--Yes.
Ninth District Bar--Yes.
Twelfth District Bar--Yes.
Thirteenth District Bar--Yes.

MR. WARE: Shoshone County did not vote. (Shoshone County votes yes).

MR. WARE: The Motion to Table carries. The Resolution is on the table. Resolution Number 13; it has been moved and seconded to adopt this Resolution.

MR. NUNGESTER: William Nungester of Buhl, Idaho. I would like to amend that Resolution by striking the word $50.00 and inserting therein, $100.00. (Second.)

MEMBER OF THE BAR: Clarence Higer of Emmett. I think this matter going a Motion that has just been defeated. We have already defeated this and now to bring it up this way, I don't think it is correct parliamentary procedure and you can't make a Motion to correct a Motion that has already been defeated.

MR. WARE: It has been tabled, not defeated so we will rule that the Motion to Amend. Is there further debate on the Motion to Amend?

MEMBER OF THE BAR: I move to amend the amendment by excluding the $100.00 and re-inserting the $50.00. (Second.)

MR. WARE: I understand that that is a proper Motion, too? Do you wish to debate that?

MR. THOMAS: Gene Thomas of Boise. The Resolutions Committee brought this to the floor for the reason they felt the $50.00 figure did not provide adequate funds to finance the operations of this Bar. I don't think the Resolutions Committee favored one over the other. That was the reason for it and I think the reason we had a $3,000 deficit last year and a proposal for increased expense this year influenced the Resolutions Committee to bring this $100.00 proposal to the floor. I think it is advisable for the floor to apply some thought here.

MR. WARE: I believe the only expeditious way we will get this taken care of is to vote on this last Motion and at this time, unless there be objection, we will vote on the Motion to substitute $50.00 as the amount at which the dues should be fixed. I will call the roll of the Bar Associations.

Shoshone County Bar—Yes.
Clearwater Bar—No.
Third District Bar—Yes.
Fourth and Eleventh District Bar—No.
Fifth District Bar—Yes.
Sixth District Bar—Yes.
Seventh District Bar—Yes.
Eighth District Bar—May I inquire, are we voting for $50.00? (Yes) Votes yes.
Ninth District Bar—Yes.
Twelfth District—Yes.
Thirteenth District Bar—Yes.

I don't know the total but I would assume the Motion to Amend has carried. 450 yes, 149 no. Now, the Motion to Amend the Motion to Amend has been adopted. Now, we will vote and that puts us back to the original Motion which was $50.00. I believe parliamentary procedure will require us to vote on the original . . .

MEMBER OF THE BAR: Mr. Chairman, I ask you if it can stand that the roll call just used on the amended Motion be now used on the original Motion.

MR. WARE: Are there any objections?

MR. PETERSON: Mr. President, Phil Peterson from Moscow. I believe the vote on this District Bar would be changed on the original Motion. I am opposed on the amendment. I would suggest a roll call again.

MR. WARE: I will call roll and we will do it very fast. This is on the original Motion the original Resolution which calls for a $50.00 license fee.

Shoshone County Bar—Yes.
Clearwater Bar—Yes.
Third District Bar—Yes.
Fourth and Eleventh—Yes.
Fifth District Bar—Yes.
Sixth—Yes.
Seventh—Yes.
Eighth—Yes.
Ninth—Yes.
Twelfth—Yes.
Thirteenth—Yes.

Gentlemen, you have adopted Resolution No. 13 for your $50.00 license fee.

MR. FEENEY:

RESOLUTION NO. 14

WHEREAS, The work load of the Commissioner of the Idaho State Bar Association, the Secretary, the Committees and Committee Chairmen, has increased to such an extent that the necessary Bar Association work cannot be accomplished without great personal hardship on the part of those involved and

WHEREAS, If the affairs of such integrated bar are to progress, even greater effort will be required in the future, and

WHEREAS, The necessary work of such integrated bar cannot hereafter be properly accomplished by the voluntary effort of individual members alone without curtailment of needed activities and services,

NOW, THEREFORE, BE IT RESOLVED, That the Commissioners of the Idaho State Bar Association be authorized from time to time to retain legal counsel at its discretion; provided that the primary responsibility of such retained counsel shall be handling and processing of grievances and unauthorized practice of law matters; and provided further that nothing herein shall be deemed to preclude the appointment of individual members of the Bar to serve with or without compensation in such matters.

I move for the adoption of Resolution Number 14. (Second.)

MR. WARE: Gentlemen, you have heard Resolution Number 14, the adoption of which has regularly been moved and seconded. Is there any discussion? In this vote, we will not need to call the roll of the Association. All in favor say aye (Response). Opposed, the same. (No response.) Motion unanimously carried.

MR. FEENEY:

RESOLUTION NO. 15

WHEREAS, The Advisory Fee Schedule Committee of the Idaho State Bar has convened and acted on proposed revisions of the Advisory Fee Schedule, and has unanimously agreed that the same should be amended and revised as set forth in Exhibit "A" which is attached hereto and incorporated by this reference, being the Committee's proposed Fee Schedule as amended; and

WHEREAS, The Advisory Fee Schedule Committee unanimously recommends that said Schedule as amended at Convention in July, 1961, be further amended in keeping with said attached Exhibit "A";

NOW, THEREFORE, BE IT RESOLVED, That the Idaho State Bar in convention at Sun Valley, Idaho, on July 14, 1962, does amend the Advisory Fee Schedule of this Bar in accordance and in keeping with said attached Exhibit "A", and does hereby approve and adopt said Exhibit "A" as the official Advisory Fee Schedule of the Idaho State Bar.

EXHIBIT "A"

GENERALLY:

In cases of financial hardship where justice requires representation by counsel, a lawyer is at liberty to deviate from or ignore the following recommendations:

It is unethical for an attorney to represent a client for an unreasonable fee. In cases of unreasonably low fees amongst other things, an attorney is guilty of unethical solicitation of practice.

The basic consideration in setting a fee should be a fair evaluation of the service rendered and the skill and efficiency of the lawyers in the representation of his client.

TIME RATES: Normally an attorney should, regardless of other considerations, fix a fee at least consistent with the following recommended hourly rates:

0 to 2 years practice--$10.00 to $20.00 per hour.
2 to 5 years practice--$15.00 to $25.00 per hour.
5 to 10 years practice--$20.00 to $35.00 per hour.
10 years practice and over--$25.00 to $50.00 per hour.

Higher hourly rates should be set in consideration of particular experience, unusual skill or practice within specialties.

Where representation requires absence from the office for entire day, a per diem of six to eight times one's hourly rate is advised. Where service is required during night hours, week ends or holidays, attorneys are advised that hourly rates should be adjusted to 150% to 200% of the normal rate consistent with circumstances surrounding such service.

EXPENSES: Costs and expenses actually and reasonably incurred in rendering legal service should always be charged over and above the fee charge. They should normally be obtained in advance as retainer.

RETAINERS: Clients represented on a retainer should be charged a reasonable fee generally consistent with the rates represented by this schedule, though it is recognized that this will be a matter of general evaluation by the individual

attorney. It remains unethical, whether representing a client on a fee or retainer basis, to charge unreasonably low fees for services rendered.

SPECIFIC FEES AND MATTERS: Introduction: The following attorneys' schedule is advised subject to the condition that where an attorney's charge on a time basis would exceed the recommended figure, the higher fee should be charged. The figures hereafter set forth contemplate only the customary or ordinary activities and where extraordinary requirements are encountered, additional fees should be charged.

I. U. S. COURT OF APPEALS:

Appearance, brief and oral argument	$1,500.00

II. STATE SUPREME COURT:

Appellant: Taking appeal, briefs and argument	750.00
Respondent: Appearance, brief and argument	500.00
Petition for rehearing	150.00
Petition for rehearing and argument	250.00
Original proceedings	350.00

III. STATE AND FEDERAL DISTRICT COURTS

A. Drafting pleadings	
Drafting complaint	$ 150.00
Drafting defense appearance	100.00
B. Motion Practice	
Drafting ordinary motions	100.00
Drafting motion for summary judgment and supporting documents	200.00
Drafting motion for new trial, amended findings and conclusions, or judgment notwithstanding the verdict	150.00
Court attendance–contested–on any motion, exclusive of drafting and research	100.00
Court attendance–uncontested–on any motion, exclusive of drafting and research	50.00
C. Change of venue	
Drafting motion on defendant's residence	100.00
Drafting motion on convenience of witnesses	125.00
D. Discovery practice	
Oral depositions (exclusive of preparation, notices, etc.)–attendance and participation	75.00
Written interrogatories–drafting questions or answers	40.00
E. Pre-trial conference	
Drafting required memoranda, if any, with Court appearance and participation in conference (exclusive of general preparation to be billed at no less than time charge) minimum	200.00
F. Third party practice	
Same as original proceedings.	
G. Trial	
For day or part thereof–Court or jury	200.00
H. Dissolution of partnership or corporation	225.00

I. Divorce

Default without custody or property provisions	175.00
Default with custody and/or property provisions	225.00
Defense–negotiating settlement time charge or at least	125.00
Contested case–either party–per diem and time charge and not less than	400.00
Modification of decree	225.00

J. Foreclosures

Chattel mortgages and Mechanic's lien: (default)

first $1,000 or part	20%)	or $150.00
next $1,000 or part	15%)	whichever
next $1,000 or part	10%)	is greater
all over $3,000	5%)	

Real estate mortgage (default)

first $10,000 or part	10%)	or $250.00
second $10,000 or part	7%)	whichever
third $10,000 or part	5%)	is greater
all above $30,000	3%)	

(Deficiencies shall be collected as retail collection accounts and as an additional matter)

Trust deed, foreclosure by action:

first $10,000 or part	10%)	or $250.00
second $10,000 or part	7%)	whichever
third $10,000 or part	5%)	is greater
all above $30,000	3%)	

Conditional sales contract

(Same as contingent fees–damage cases)

K. Condemnation

50% of net recovery over amount offered by condemning authority.

IV. JUSTICE'S AND PROBATE COURT PRACTICE

Appearance	$ 25.00
Trial, per diem	100.00
Preliminary hearing, per day	100.00
Drunken and reckless driving and non-traffic misdemeanor cases, with or without jury, per day	150.00
Insanity proceeding (except by court appointment)	75.00
Youth Rehabilitation Act, appearance and hearing, per diem of	100.00
Appeal, perfecting (civil or criminal)	75.00

V. PROBATE COURT MATTERS

A. Adoptions: Related	100.00
Non-related	125.00
B. Guardianship	100.00
Annual account	50.00
Minor's compromise settlement	100.00

C. Decedents' Estates

(1) Probate: To be based on all the separate property, all the

community property up to $10,000, and one-half the remaining community property.

first $1,000	7%
next 4,000	5%
next 5,000	4%
over 10,000	3%

The probate of any estate shall be subject to at least $300.00 attorneys' fees.

(Additional charges shall be made for extraordinary services or when estate must be probated over an extended period of time)

(2) Short form procedures: Determination of heirship after two years, and community property upon wife dying intestate.
¼ regular fee or $200.00, whichever is greater.

(3) Inheritance tax determination 150.00

VI. ADMINISTRATIVE PRACTICE

Federal, State, County or City conference or hearing, per diem 200.00

VII. BANKRUPTCY

A. Voluntary

1. Uncontested, no assets and not in business 250.00
2. Uncontested, in business or with assets 350.00
3. If wife included, add 50% of regular charge.

B. Involuntary

1. Petition and first meeting of creditors 300.00
2. Additional, on per diem or hourly basis.

C. Petition for Reorganization

1. Petition and first meeting 300.00
2. Additional, on per diem or hourly basis.
3. Litigation on District Court basis.

D. Preparing, Filing and Presenting Creditor's Claim ..... $ 25.00

E. Preparing, Filing and Presenting Objection to Discharge 200.00

F. Defending Objection to Discharge 150.00

G. Wage Earners, Special Proceedings 250.00

VIII. COLLECTIONS CONTINGENT FEES

First $5,000–without litigation	25% to 33⅓%
First $5,000–with litigation	33⅓% to 50%

Fees on collection in excess of $5,000 subject to arrangement between counsel and client.

IX. DAMAGE ACTIONS–CONTINGENT FEES. CLAIMANT'S COUNSEL

Settled without action being filed	25%
Settled after action, but before trial	30%
Settled during or after trial	33⅓%
Settled upon appeal	40%

X. WORKMEN'S COMPENSATION PROCEEDINGS—CONTINGENT FEES

Claimant's attorney:

No offer—settlement prior to day of hearing ..... 15% to 25%

No offer—settled on day of, during or following hearing, or by Board ruling ..... 20% to 30%

Offer made—settled prior to day of hearing ..... 25% of recovery in excess of offer

Offer made—if settled on day of, during or following hearing or by Board ruling ..... 33⅓% of recovery in excess of offer

Note: Contingent fees charged should take into account all payments enforced against employer, including payments of compensation and of hospital, medical and related expenses.

XI. OFFICE PRACTICE

A. Corporations:

Organizing, through first meeting of stockholders and directors—existing business	350.00
Organizing, through first meeting of stockholders and directors—new business	300.00
(Note: Add $5.00 to the organization's fee for each $1,000 of capital or assets to be employed in excess of $5,000.	
Dissolution	225.00
Amendment of articles	100.00
Merger	500.00
Annual meetings and minutes	75.00
Qualifying to do business in another state	75.00

B. Drafting instruments (exclusive of consultation time)

1. Deed—simple	10.00
2. Bill of sale	10.00
3. Assignment of contract and deed	40.00
4. Lease	50.00
plus 1½% of total rent over $6,000	
5. Trust deed including note	25.00
6. Power of attorney	
Special	35.00
General	15.00
7. Lien, preparation and filing	25.00
8. Mortgage and note	25.00

9. Contract of Sale—realty or otherwise $50.00 or ½ of 1% of the purchase price, whichever is greater, or, if representing party but not drafting papers, $25.00 or ¼ of 1% of the total purchase price, whichever is greater; and if no licensed real estate broker participates in transaction, then $50.00 or 1% of purchase price, whichever is greater, or, if representing party, but not drafting papers, then $25.00 or ½ of 1% of purchase price, whichever is greater. If transaction involves in excess of $100,000, the fee should be subject to

negotiation consistent with responsibility, time and skill required of counsel.

10. Bulk sale compliance ---------- 65.00
11. Will: Simple ---------- 25.00
    (Additional charge if trust, life estate, remainder, tax planning or other additional matters involved)
12. Partnership Agreement
    (a) General Partnership—simple ---------- 125.00
    (b) Limited partnership—simple ---------- 250.00
    (note: Add to the above fees the sum of $5.00 for each $1,000 of assets involved in excess of $5,000.)
    If a buy or sell agreement is included, or if special tax or other problems are involved, the fee should be increased.

C. Consultation . . . incidental or brief.

1. Telephone ---------- 3.00
2. Office—under 20 minutes ---------- 10.00
3. Home—under 20 minutes ---------- 20.00

D. Trust Deed—foreclosure by Notice and Sale (without litigation)
½ to ¾ of the fee for probate of decedent's estate in amount of balance due, or $200.00, whichever is greater.

I move that Resolution Number 15 be adopted. (Second.)

MR. WARE: Gentlemen is there any discussion on the Motion for Adoption of Resolution Number 15? I will submit this to a voice vote. All in favor of Motion to Adopt Resolution 15, say aye. (Response) Opposed, the same. (No response) Motion carried. Resolution adopted.

MR. FEENEY:

RESOLUTION NO. 16

BE IT RESOLVED, That the Idaho State Bar express its sincere and grateful appreciation to the employees of Sun Valley for their efficient and courteous service to the members of the Idaho State Bar, their wives and guests, during the annual meeting at Sun Valley.

I move for the adoption of Resolution Number 16. (Second)

MR. WARE: All in favor say aye (Response). No dissent, Resolution passed. Excuse me, go right ahead.

MR. FEENEY:

RESOLUTION NO. 17

WHEREAS, The Bender-Moss Company, the Bancroft-Whitney Company, the Caxton Printers, Ltd., The Commerce Clearing House, Incorporated, the Bobbs-Merrill Company, and West Publishing Company have generously donated various legal publications for door prizes at this annual meeting,

BE IT RESOLVED, That the Idaho State Bar extend its thanks and appreciа-

tion to these companies for their generous prizes which contributed to the interest of those attending this meeting.

I move that this Resoltion No. 17 be adopted.

MEMBER OF THE BAR: I move that that Resolution be amended by inserting the name of The Voter Publishing Company for its contribution. (Second.)

MR. WARE: All in favor of the Resoltion as amended, say aye (Response). The motion is carried.

MR. FEENEY:

RESOLUTION NO. 18

BE IT RESOLVED, That the Idaho State Bar extend to the Honorable Robert E. Smylie, the Honorable Charles C. Scott, the Honorable Lionel T. Campbell, the Honorable B. E. Witkin ,and the Honorable Philip Peterson, our most sincere thanks and grateful appreciation for honoring us by their personal appearance at our annual meeting and delivering to us their inspiring, interesting and instructive addresses. I move that this Resolution be adopted. (Second).

MR. WARE: All in favor say aye. (Response). Unanimously carried.

MR. FEENEY:

RESOLUTION NO. 19 and the last:

BE IT RESOLVED, That the Idaho State Bar express its appreciation to the Commissioners and Officers of the Bar who have served during the past year, for their contribution of time and effort, which has resulted in accomplishment of an active and productive year of Bar activities.

I move for the adoption of this Resolution.

MR. WARE: I will ask you to put the Motion since it involves the Commission.

MEMBER OF THE BAR: Any discussion? All those in favor say aye. (Response.) Motion carried.

MR. WARE: Gentlemen, I believe that this substantially concludes the work of this annual meeting.

I do have one announcement and comment. If Bruce Bowler would come forward. Is he here? I believe it was the desire that the vote on the election of Commissioners in the northern division, be announced. The vote was yesterday, but I mean the actual vote of the two candidates. Would you make the announcement?

MR. BOWLER: Mr. President, the Canvassing Committee, in going over the ballots and making the tally found that there were 52 votes in favor of Alden Hull, there were 44 votes in favor of Sidney Smith. One thing we should perhaps mention, that there were 110 votes turned over to us. That means that there were 14 votes that were not counted. The reason that those 14 votes were not counted, is that in the ballot themselves, as you will all recall, it requires

that in order to be a valid vote, the envelope in which the ballot is included, bear the handwritten signature of the voter. These 14 envelopes had no such signature on either side, which, of course, disqualifeid them under the Rules. I would further say in full explanation that the system used by the Canvassing Committee in opening the envelopes, they were opened so that none of them saw who voted for whom. They were placed upside down and then later counted. For your information as who was on the Committee, Ray McNichols was acting as Chairman, he too, had important business in Idaho Falls and Don Bistline. That, Mr. President, is the detailed report of the Canvassing Committee and it was unfortunate that 14 people could not sufficiently read instruction to cast a valid ballot.

MR. WARE: Thank you, Bruce Bowler. I might add that if you will look at your Commission Rules, you will find that the Canvassing Committee is bound to remove the ballot, improper ballot, without any effort of identification. The signature is for the protection of the ballot in order to make sure that lawyers within the division affected are the ones who cast the ballots. Might I add, so that the lawyers of the Northern Division will not feel too chagrined, that a year ago at the election, when the Eastern Division voted, there were 11 ballots that could not be counted. Our illiteracy or inattention is only slightly greater than that of the Eastern Division.

(After final drawings for door prizes, the meeting was adjourned sine die.)

APPENDIX

PRESIDENT'S REPORT

As I come to my final report to the Bar of Idaho as its President, I share in my own way the mixed feelings of those who have preceded me. There is a deep sense of appreciation at having had the privilege and opportunity of serving as President of my State Bar during the past year and as Bar Commissioner for the last three years, a feeling of satisfaction in some things which have been accomplished, and a realization that few things are really finally solved. The work of the Bar Commission in many respects is a continuing process in which many problems are recurrent ones. On more than one occasion a problem thought to have been solved must be re-examined in the light of changed conditions.

Among the objectives of the Commission is the important one of keeping our profession on a high level in which fidelity to the client, respect for the courts, and a sense of public responsibility are so combined as to make our profession of greatest possible service and significance to the people of our state. We must not lose sight of the fact that the Bar is one of the instrumentalities by which justice and the rule of law is established and maintained among men.

I am grateful for the fidelity with which chairmen of the several state committees and their members have performed their assignments during this past year. The devotion and sincerity animating those who have had to deal with intricate and involved matters such as ethics, disciplinary problems, unauthorized practice of the law and the examination and grading of applicants, have been outstanding. We are fortunate to have so many fine members of the Bar who have been willing to give of their time and talents to help keep our profession on a high plane and to protect the real interests of the people of the state from imposition.

I consider a report in detail to be necessary. The issues of The Advocate have given a full account of the activities of our Bar. A reference, however, to immediate Past President J. Blaine Anderson's sixteen points in the June, 1961, issue of The Advocate and some comments thereon may not be amiss.

(1) High admission standards have been maintained.

(2) Bar examinations have been conducted fairly and impartially.

(3) Disciplinary proceedings of which, alas, each year seems to have its measure, have been handled with care, discretion, reasonable dispatch, and a sense of responsibility to the public and the members of the Bar.

(4) Improvement in the administration of justice is evident from our concern about, and efforts in behalf of, reform of inferior courts. It is in these inferior courts where justice touches and affects the lives of our people most often.

(5) Efforts to protect the public from the unauthorized practice of the law have been continued throughout the year and must not be relaxed. We are at a point where we ought to secure recognition within our state of the principles laid down recently by the Supreme Court of Arizona (see State Bar v. Arizona Land, Title & Trust Co., 366 P. 2d. 1).

(6) The tax institute at Pocatello last September and progress toward the publication of Doctor Brockelbank's book on Community Property in Idaho evidence the concern for continuing legal education.

(7) Public relations are matters in which the individual Bar member can well play a most vital part, by the role he is willing to undertake in the affairs of his city, county, and state. It is here that the individual lawyer has a great opportunity to improve the standing of his profession in the eyes of the public.

(8) The survey on the economics of the law practice shows that the profession needs improvement in this area. However while seeking to better ourselves here, we must never forget that ours is a profession in which we are called to contribute to the realization of justice and the rule of law among men, and in part our reward must be a sense of duty well done.

(9) The advance of communism we all deplore and oppose and now armed with the information and material made available, through the American Bar Association, we must not hesitate to back in this state, a sound, sensible educational program on this subject.

(10) Redistricting of Judicial Districts does not appear to be of serious concern in the north, but if problems exist anywhere in the state in this respect, change should be made with consideration of the situation in the state as a whole rather than on a piecemeal basis. This is all a part of the major problem of court reform and should be undertaken by a coordinated effort of Bench and Bar, rather than by letting the matter drift to a point where it is approached from a local view only.

(11) Any proposed comprehensive legislation for reform of the inferior courts will have significance only if the people adopt the pending constitutional amendments which will be on the ballot in November. The favorable influence of each lawyer in the state as well as that of the State and Local Bar Associations must be made felt among the electorate if these amendments are to pass. The adoption of these amendments may well hinge on our ability to develop and present an acceptable plan of inferior court reform at our annual meeting in July.

(12) The publication of new Supreme and District Court Rules, Rules and Regulations of the Bar Commissioners and Ethics Opinions is highly desirable. In this connection, however, it might be well to consider the experience of the State of Washington where a loose-leaf code has been tried and seems to have developed into something of doubtful value. One never knows whether one's copy of the Washington Code is up-to-date and one is always concerned as to whether some significant parts are missing. A bound Washington Code is now being issued. Perhaps in the light of Washington's experience, we should consider whether or not the Bar would be better off with a book like our Idaho Rules of Civil Procedure, with adequate space for pocket parts.

(13) Some consideration has been given to the matter of legislation permitting attorneys to incorporate, and it is probable that such a bill will be submitted to the next legislature. However, I am still personally in great doubt as to the desirability of such legislation. I think that any economic gains are likely to be offset by the loss which will be sustained by the Bar generally from the corporate image of the law practice that such legislation will implant in the minds of the public.

(14 and 15) The matter of the employment of general counsel for the Idaho Bar has been of concern to the Commission. A special committee composed of three eminent Past Presidents, J. Blaine Anderson, Sherman Bellwood and Russell Randall has made a report to the Commission on this subject. In a resolution adopted unanimously at the April meeting of the Clearwater Bar Association, the necessity and desirability of employing a general counsel was unanimously endorsed and the willingness of the Clearwater Bar to have the annual license fee increased to as much as $100.00 was approved by all the members present. The recommendations which are being submitted by your Bar Commission, cover this subject and involve an increase in license fees to $50.00 annually.

(16) Bar integration by Supreme Court Rule is a fine idea and ideal. However, integration by legislation is an accomplished and successful fact here in Idaho. Further study should be given to this matter.

To Blaine's points and again without intending to be exclusive or limiting in any way, I would suggest the additional five points:

(17) Adoption of the Uniform Commercial Code should be backed by the Bar, inasmuch as neighboring states like Oregon and Wyoming have adopted this code and the larger industrial states have adopted it with other states pressing for its adoption so that it will in the very near future become one of the most important overall improvements in Uniform Law in the several states.

(18) Reapportionment of the State Legislature at the next session of our legislature on a fair and proper basis should be encouraged by the Bar in order that our state need not become the object of federal decision at the district, appellate or Supreme Court levels.

(19) The pressure for constitutional revision is mounting. The Bar should take the initiative in exploring this area and the methods of bringing about the proper study and planning for any comprehensive fundamental change in our basic law. The Oregon Constitutional Revision Commission initially could well be a pattern for us to follow.

(20) The advisability of forming an Idaho Association of Professions such as the Michigan association of Professions should be explored. I have before me a letter from Arthur Van't Hul, President of the Northern Chapter of the Idaho Society of Professional Engineers, expressing the interest that the engineers, the doctors and the dentists in this state have in such an orginzation, and stating that the incoming presidents of their respective associations expect to appoint members to a committee to consider the desirability of such a project. The Bar should not be hesitant in doing its bit in inter-professional relations, and I think that we might well take the lead in bringing engineers, doctors, dentists and similar professional groups into an association with the lawyers for the mutual benefit of professional men throughout the state. I had occasion as President of your Bar in January to address the Northern Idaho Chapter of Idaho Society of Engineers at Lewiston on the subject and keen interest in this subject of professional unity was expressed at this meeting.

(21) During the past year the Commissioners have constituted a special committee for the study and development of a code for doctors and lawyers. The Clearwater Bar Association has under consideration such a code at the present time. While it is too early to predict just what final form such code should have,

the Commissioners have had under consideration those used by Bar Associations and doctors in several different states and in the very near future it is hoped that a code can be drawn up for submission to doctors and lawyers which will be acceptable to the members of these two professions.

(22) Lastly, I believe that we should maintain an open mind toward the matter of establishing a Clients' Indemnity Fund. While our Bar at present apparently has no interest in this subject the fact that the bar associations of our neighboring states of Washington and Oregon have established such funds should persuade us to observe and consider their experience in this matter. If the value, significance and importance of such a fund is proven in these states, we should not be slow in taking measures to establish a like fund in Idaho.

In conclusion, may I express my satisfaction and pleasure at having served my Bar as President during the past year. Old friendships have been cemented, enduring new friendships have been formed, pride in the mission of my profession has been instilled and strengthened in my mind. My appreciation and debt to those many splendid individuals who have served their Bar unselfishly and with devotion during the three years that I have been on the Commission cannot be measured.

The work of our Secretary, Tom Miller, has been outstanding in his capacity as Secretary of our Bar. The able and devoted work of Mrs. Olive Scherer has contributed immeasurably to the successful functioning of the Secretary's office. I close my last report to you as your President with every confidence that your new President, Glenn Coughlan, Wesley Merrill and the new Commissioner to be elected from the North, will serve your best interests during the coming year with enthusiasm, energy and success.

MARCUS J. WARE,
President, Idaho State Bar

SECRETARY'S REPORT

It is customary for the Secretary to prepare an annual report covering the financial condition of the Idaho State Bar, membership statistics, bar examinations, disciplinary matters, and other matters. It is generally printed in THE ADVOCATE or read at the Annual Meeting, and then included in the appendix of the Proceedings for permanent reference. The following report covers the period from June 1, 1961 to June 1, 1962.

Financial Report:

BAR COMMISSION FUNDS

The account books maintained in the Secretary's office which are regularly audited by the State Auditor, reflect the following receipts, expenditures and balance in the Bar Commission Fund, a dedicated fund subject to State appropriation and control:

EXPENDITURES
June 1, 1961 to June 1, 1962

Personal Services	$ 6,620.75
Travel Expenses	7,143.07
Other Miscellaneous Expense	5,028.58

Capital Outlay	49.50
Social Security Transfer of Funds	196.29
General Fund Transfer	328.33
Refund for Licenses	60.00
TOTAL	$19,426.52

RECEIPTS, BALANCE

Balance on June 1, 1961	$16,444.01
Receipts, June 1, 1961 to June 1, 1962	16,155.31
TOTAL	$32,599.32
Less Expense	19,426.52
BALANCE June 1, 1962	$13,172.80

Personal Services covers salaries of a part-time Secretary, a full-time stenographer, bar examination monitor and occasional part-time clerical help.

Travel Expense includes all costs of transportation meals and lodging for out-of-town travel of the Commissioners, the Secretary and other persons engaged in bar activities including Bar committees and attorneys required to travel in connection with discipline investigations and prosecutions. It also covers a portion of the travel expense of the Idaho State Bar Delegate attending meetings of the House of Delegates of the American Bar Association.

Other Expense includes the cost of printing the Proceedings of the Annual Meeting, that portion of the cost of printing and distributing THE ADVOCATE which is attributable to disseminating official Bar information, the cost of preparing and mailing notices and other materials to Idaho lawyers, office expense such as rent, telephone, postage, stationery and other supplies, and other miscellaneous Bar expenses.

The Social Security Transfers represent the State Bar's payments as the employer of the above-mentioned personnel.

The General Fund Transfers refer to the charges against the Bar Commission Fund by the State Auditor's Office for bookkeeping and auditing services rendered to the Bar.

The Refund for Licenses account is set up for the purpose of refunding license fees paid in duplicate or paid in an excessive amount. It involves merely transferring from Other Miscellaneous Expense to the Refund account and payment out of the latter.

TRUST FUND:

The trust Fund is a special fund not controlled by the State for the reason that the receipts are collected from sources unrelated to official funds. The status of that fund is as follows:

Cash on deposit, The Idaho First National Bank, Boise, as of June 1, 1962	$1,882.46
Adjustment for sums presently due	479.05
ADJUSTED TOTAL	$2,361.51

This compares with $2,277.28 in said account on June 1, 1961.

Membership

BY DIVISIONS:

The membership of the Idaho State Bar at this time as compared with a year ago is:

	1961	*1962*	*Change*
Northern division	126	131	3.9% increase
Western Division	321	320	.03% decrease
Eastern Division	148	148	---
Out of State	21	18	14.3% decrease
TOTALS	618	617	

Attorneys admitted and currently licensed in Idaho and who are not under disbarment or suspension, and all Idaho Supreme Court Justices and District Judges and U. S. District Judges for the District of Idaho, are members of the Idaho State Bar, I.C., 3-405.

BY LOCAL BAR ASSOCIATIONS:

	1961	*1962*	*Change*
Shoshone County	15	16	.07% increase
Clearwater	69	67	.03% increase
Third District	187	184	1.06% decrease
Fourth and Eleventh	83	82	1.6 % decrease
Fifth District	59	59	None
Sixth District	18	18	None
Seventh District	51	54	5.9 % increase
Eighth District	42	48	14.3 % increase
Ninth District	43	42	2.3 % decrease
Twelfth District	19	19	None
Thirteenth District	(None)	10	Organized July, 1961
Out of State	21	18	14.3 % increase
TOTALS	618	617	

Rule 185(e) provides that at the Annual Meeting each local bar association shall be entitled to the number of votes represented by its total membership, and that ". . . the members of any local (bar association) present at such annual meeting shall cast the entire vote of the members of such local (bar association)."

DEATHS OF ATTORNEYS:

Since the last Secretary's report, we have learned of the following attorneys' deaths:

Name	*Place of Death*	*Date of Death*	*Adm. to Bar*
Carl A. Burke	Boise, Idaho	July 22, 1961	June 7, 1921
Clarence T. Ward	Boise, Idaho	July 28, 1961	Sept. 5, 1917
Joshua T. Evans	Idaho Falls, Idaho	Aug. 10, 1961	June 9, 1922
George Van de Steeg	Nampa, Idaho	Sept. 6, 1961	In 1910
L. Ivan Jensen	Idaho Falls, Idaho	Sept. 27, 1961	Sept. 16, 1912
George Donart	Weiser, Idaho	Oct. 1, 1961	March 30, 1915
John R. Keenan	Twin Falls, Idaho	Oct. 14, 1961	Jan. 22, 1917

James L. Boone	Boise, Idaho	Oct. 16, 1961	Oct. 3, 1916
Orville P. Cockerill	San Mateo, Calif.	?	May 22, 1920
Wm. L. Langroise	Boise, Idaho	Oct. 29, 1961	Oct. 25, 1955
Walter L. Budge	Salt Lake City, U.	Dec. 10, 1961	Jan. 22, 1940
Arthur S. Guerin, Jr.	Los Angeles, Calif.	Jan. 12, 1962	June 7, 1924
F. W. Reed	La Mesa, Calif.	Jan. 15, 1962	March 15, 1909
Ben F. Delana	Boise, Idaho	Feb. 22, 1962	Dec. 4, 1912
William Healy	San Mateo, Calif.	Mar. 15, 1962	Dec. 1, 1918
Edward A. Walters	San Diego, Calif.	Mar. 30, 1962	Dec. 9, 1899
Samuel E. Blaine	Boise, Idaho	May 5, 1962	May 21, 1904
Hampton Taylor	Grangeville, Idaho	May 11, 1962	Oct. 1, 1900

BAR EXAMINATIONS

There were two bar examinations given since the last Annual Meeting, one in September, 1961, and the other in April, 1962, both in Boise. Fifteen applicants took the September, 1961, examination and eight passed. Twelve applicants took the April, 1962 examination and eight of these were admitted, one upon petition to the Supreme Court.

DISCIPLINE MATTERS

Formal Complaints: There was one formal discipline complaint pending before the Board of Commissioners on June 1, 1961. By its amended recommendatory order of June 23, 1961, the Board recommended that the Supreme Court disbar the accused attorney, Kenneth G. Bell, and the Supreme Court made and entered its order of disbarment of Bell on October 23, 1961.

Five other formal discipline matters have been instituted during the period of this report. Formal hearing has been had in one involving Max "R" Woodall, and the Board has recommended suspension for not less than one year; the matter is pending before the Supreme Court. The other matters have not yet been heard by the Board of Commissioners.

Informal Complaints: There were eight informal complaints pending and being investigated by the Commission on June 1, 1961, all of which have been dismissed for lack of grounds. Twenty-six other informal complaints have been filed since that time, and twenty-one have been dismissed after investigation disclosed no grounds for formal discipline proceedings. The other five are still pending.

THOMAS A. MILLER

SPECIAL BAR COMMISSION REPORT

TO THE MEMBERS OF THE IDAHO STATE BAR:

Gentlemen:

Reference is hereby made to Resolution No. 5 adopted by the Idaho State Bar at its Annual Meeting on July 15 at Sun Valley Idaho. Said resolution was drafted by the Resolutions Committee of the Idaho State Bar, which consists of the President or other designee of each District Bar Association. Resolution No. 5 was a substitute for three separate resolutions which had been submitted to the Resolutions Committee prior to the 1961 meeting recommending:

1. The employment of a full-time General Counsel and/or Secretary by the

Association, for the purpose, among others, of investigating and prosecuting unauthorized practice of law complaints.

2. For increased membership on the Bar Commission.

3. For an increase in the annual license fee for lawyers in Idaho.

The Resolutions Committee did not adopt any of said resolutions but instead adopted and submitted for vote at the regular business meeting a resolution calling for a study of these matters by the Bar Commission prior to the 1962 Annual Meeting. This substitute resolution was duly presented and adopted at the regular business meeting of the Idaho State Bar as Resolution No. 5 (see 1961 Proceedings of the Idaho State Bar, pp. 54-55).

Pursuant thereto the Commissioners, at their first meeting following the Annual Meeting in 1961, appointed Sherman J. Bellwood as Chairman, and J. Blaine Anderson and Russell S. Randall, as members of a Committee designated as the "Bar Organization Committee," and requested that that committee study the matters covered by Resolution No. 5, and to report back to the Commission their findings and recommendations.

The Bar Organization Committee has submitted a very excellent report, and the Bar Commission has carefully considered the same, and has itself given the matter further independent study and consideration. The following report is the result of the combined study of the Bar Organization Committee and of the Bar Commission.

As can be seen by a review of the Secretary's report contained in the Proceedings of the Idaho State Bar each year, the number of members of the Idaho State Bar, resident within the state, remains fairly stabilized at about 615. At the present time this includes twenty-one State District Judges, five Supreme Court Justices and two Federal District Judges who are exempt from paying the annual lawyers' license fees. The lawyers' license fees are statutory, being $15.00 a year for the year of admission and for the three calendar years thereafter, and $25.00 per year for the fifth and subsequent calendar years.

Receipts into the Bar Commission Fund for the past five years have averaged less than $16,000.00 annually, mainly from license fees. Expenditures for the same period have averaged over $17,000.00 per annum. Because of the static level of receipts and increasing expenditures, particularly during the last half of that five-year period, we are presently incurring a deficit at the rate of about $2,000.00 per year. On December 31, 1961, there was a surplus in the Bar Commission Fund of about $6,000.00, after deducting for receipts of 1962 lawyers' license fees. At the present rate of expenditures, that small surplus will be exhausted at the end of 1964.

There has been an increased cost of Commission meetings during the past year, due to the Commission's policy of arranging certain of its meetings in various localities throughout the state, so as to have a closer working contact with the individual lawyer and with the local bar associations. The Commission feels that this policy is sound and is more than worth the added expense incident thereto; if it is to be continued, however, it must be considered in preparing future budgets and in contemplated lawyers' license fee increases.

There are three statutory Commissioners. They receive no compensation but

are reimbursed for their necessary travel expenses. Subsistence, lodging and transportation expenses of the Commissioners vary considerably from year to year, depending upon their places of residence and the situs of Commission meetings. Three thousand dollars is a fair estimate of the present total annual requirement for reimbursable expenditures by the three Bar Commissioners.

The Bar Commission employs a part-time Secretary with an annual salary of $3,300.00, together with $480.00 annual rental allowance and approximately $400.00 additional allowance annually for telephone and other miscellaneous expense. Necessary travel expenses are also allowed the Secretary. The Commission employs a stenographer at an annual salary of $3,240.00, and maintains a central office equipped with electric typewriter, mimeograph machine, verifax copier, files, and similar fixtures. The Commission contemplates the necessity of a salary increase for the Secretary, and hopes that in the near future our finances will permit the Secretary to attend regularly the meetings of the National Conference of Bar Secretaries and of the Western States Bar Conference.

As noted by the Committee in its report: "Disciplinary matters are investigated and prosecuted before the Commission by lawyers impressed into service by the Commission. Usually these lawyers receive no expense money, and they are paid no compensation. This is generally considered an obnoxious burden," although attorneys have uniformly served conscientiously and faithfully when appointed. Unauthorized practice matters are likewise investigated, and occasionally prosecuted in the courts, either by the members of the standing Unauthorized Practice Law Committee or by special committees appointed for this purpose. Complaints against lawyers for purported misconduct and complaints against laymen for purported unauthorized practice of law appear to be accelerating at an ever increasing rate, as indicated by the annual reports of the Secretary and by the minutes of the Commission meetings.

The Commission must meet on the average of at least two days a month to handle its work effectively, and still there is considerable correspondence and other paper work by the Commissioners as well as by the Secretary between the monthly meetings. Committee work grows every year, but many committees never meet for the sake of economy. In most cases, this naturally leads to a delay in the work of the committee, or a result that is less satisfactory than the case would be if the committee were able to meet at a central location at least once or twice a year. A public relations program is non-existent for all practical purposes, due to lack of funds. Participation by the Secretary in the National Conference of Bar Secretaries is limited to occasional appearances every few years. The growing number of discipline and U.P.L. problems are virtually beyond the capacity of the Bar to handle on a volunteer basis, with the natural result that they are often handled less thoroughly and promptly than might be desired. There is no participation in the National Conference on Unauthorized Practice, although by reason of its proximity our State U.P.L. Committee will attend the Regional meeting of the A.B.A. and U.P.L. Symposium, on June 2nd in Salt Lake. The engagement of outstanding programs for annual meetings is hampered by lack of funds. The continuing legal education program during the last three years has been largely self-supporting, but in order for it to be continued, some definite salary provision for at least a part-time director must be made, and this will require additional funds.

Estimates of the cost of a full-time general counsel vary widely. Based on a

salary of $8,400.00 per year, and moderate estimates for stenographic, rental, supplies, telephone and travel expenses, it is expected that the cost of such general counsel would be about $15,000.00 per year. This, alone, would require an increase of nearly $25.00 in the annual lawyers' license fee. If the general counsel's salary were increased to a more realistic level of about $10,000.00 per year, it is quickly seen that a $25.00 license fee increase for each lawyer in the state would not defray his salary and expenses.

Based on the foregoing premises and some acquaintance with the experience in other states, the Commission is convinced that the employment of a full-time General Counsel in Idaho, separate and apart from the office of Secretary, is not feasible. While undoubtedly having a full-time General Counsel would be of great value, it is felt that we can have a greatly invigorated program aimed at curbing the unauthorized practice of law by laymen, and the prompt processing of charges of misconduct against attorneys, with the assistance of a part-time General Counsel.

RECOMMENDATIONS:

1. That the Board of Commissioners not be enlarged.

Reasons: The Commission feels that while an increased membership on the Commission might give certain geographical areas of the state closer representation on the Board, a larger Bar Commission necessarily would lead to difficulties in arranging Board meetings, possibly longer and more expensive meetings, and greater difficulty and expense in reaching decisions by telephone or correspondence between meetings as it is frequently necessary to do. Furthermore, it is the experience of the present and past Commissioners that geography is seldom a significant factor in the day-to-day decisions and functions of the Bar Commission, and where it does become significant in committee work and studies, the Board appoints lawyers from many different areas and from both rural and urban communities. To appoint two additional Commissioners would cost about $2,000.00 per annum, and the Board strongly feels that these funds could be utilized more advantageously in other bar programs and activities.

2. That a part-time General Counsel be employed on a salary or fixed fee basis dependent upon matters actually handled by him.

Reasons: We need such counsel to handle the ever-increasing number of unauthorized practice of law complaints and complaints against attorneys. The Commission feels that such counsel could, on a part-time basis, very adequately investigate and prosecute such matters and that the anticipated expense of such counsel is reasonably within the means of the Bar of this state, although it would require an increase in annual lawyers' license fees. The Commission feels that a full-time counsel is neither necessary nor presently feasible.

As mentioned before in this report, the Board strongly believes that the office of Secretary should be maintained as it now is constituted, on a part-time Secretary basis, and that it would be a grave mistake to combine in one person the functions of Secretary and General Counsel.

3. That the annual lawyers' license fees be increased and set at the following levels:

a. $15.00 for the year of admission and for the next calendar year:

b. $30.00 for the second, third and fourth calendar years following the year of admission; and,

c. $50.00 for subsequent years.

Reasons: License fees will have to be increased by $5.00 in order to maintain the present level of activities which are, to say the least, very minimal in most respects. If we are to have a General Counsel even on a part-time basis, an estimated $10.00 minimum additional increase is necessary. Furthermore, as hereinbefore mentioned, committee work and our continuing legal education program are severely hampered due to lack of funds, and if they are to be strengthened and maintained at proper levels there will have to be a similar increase in the lawyers' license fees.

As the Committee has succinctly stated: The prime question is this: Where should the Bar place the emphasis in its activities? This, of course, is a question of policy to be determined finally by the Commission, after sensing the opinion of the Bar. The active pursuit of the various responsibilities of its committees for continuing legal education, rules of criminal procedure, economics of law practice, judicial selection, legislation, professional ethics, public relations, reform of courts, uniform district court rules and unauthorized practice of law, and many others; the prompt investigation of unethical conduct charges, the speedy prosecution of worthy cases of unethical conduct, and vigorous action in unauthorized practice of law matters—all are important. The contributions of the Bar to the society of which it is a part, the protection of unfairly accused lawyers, and the public interest—all are served by vigorous activity in these and other areas not mentioned. There is a limit to the funds available. However, it is the considered opinion of the Commission, after having discussed the matter with attorneys throughout the State, and having noted the resolutions emanating from various local bar associations, that the majority of attorneys are most willing to subscribe to an increase in lawyers' license fees to defray reasonable and necessary expenses of the Bar in broadened activity notably in the area of unauthorized practice of law, public relations and continuing legal education, to name but a few.

We commend these thoughts to your most earnest consideration.

BOARD OF COMMISSIONERS OF THE
IDAHO STATE BAR
MARCUS J. WARE, President
GLENN A. COUGHLAN, Vice President
WESLEY F. MERRILL, Commissioner

Report of
JUDICIAL SELECTION COMMITTEE

This special committee was appointed by the Board of Commissioners of the Idaho State Bar in August, 1961. Its members are all past presidents of this Bar. The appointment of the committee was deemed imperative for three compelling reasons: (1) a growing dissatisfaction among lawyers and laymen alike, with past practices and procedure indeed, if any existed at all) in the areas of state and local bar recommendations of, or support for, judicial candidates, both appointive and elective; (2) the defeat in the Resolutions Committee of the Annual Meeting, 1961, of a resolution dealing with this subject and which many lawyers favored at least as an interim remedy or program; (3) and certainly

not last in importance, the comments and remarks of Governor Smylie at the opening of the 1961 Annual Meeting (See 1961 Idaho State Bar Proceedings, p. 6) placing the onus (where it should be) squarely on the organized Bar, especially in the field of judicial appointment.

A short quote from the Governor's remarks will set the stage for what is to follow:

> "I do hope that the members of the Bar will instruct the Commissioners to do some serious, well thought out work about the procedures by which the lawyers of the state make their sentiments known to the Governor in the matter of appointment of judges from time to time. It's been my privilege now to have appointed a total of fourteen judges; and I suppose, I have accumulated a greater degree of experience than most with the strength and the weakness of the existing procedures, and I don't suppose there is anyone in the room who would argue with me when I say that they could be improved upon; *and I think the Bar owes it to themselves, to the administration of justice and to the people of the State to devise a machinery* which will more adequately and with less abrasion and less possibility of hurt to professional pride and careers, make it possible for Governors to have the advice *and perhaps even the consent of the organized profession.* . . . certainly no one suggestion will meet with total approval, but I do think that the hour is late enough that the Bar Association had ought to perfect its procedures in this regard and thus obviate some of the rather vastly unbecoming popularity contests which have attended some of these enterprises in the past."

These are rather startling words when considered in light of the belief of many people that the power of gubernatorial judicial appointment is jealously guarded against any encroachment by the chief executive officer. The organized Bar, and even eventually, if not now, other groups interested in the administration of justice, should not miss this invited opportunity to cooperate fully with present and future governors.

The task assigned to the committee was one principally of study and recommendation. The question assigned can probably best be stated as follows:

> "Should the Bar association, either state or district, take an active part in the *appointment or election* of judges; and if so, what part should it take, and how should its actions be governed?"

Your committee's effectiveness was greatly reduced by the inability to meet together. All business was handled by correspondence. A great mass of material furnished by the American Judicature Society, the American Bar Association, and our Secretary's office dealing with judicial selection ideas, programs and reforms was studied by the committee.

In answer to the first part of the issue posed to us, there is unanimous and unwavering agreement. The lawyers of this state, individually and collectively, owe a clear and unmistakable duty to society, the executive branch of government, the judiciary, the profession, and to judicial administrative processes in general, to take an active, unified and vocal part in the appointment and election of judges in this state. This duty devolves from the top levels of the judiciary to the lowest. The duty should be performed in an atmosphere of solemnity, dignity and detached impartiality and with all of the moral courage we as professionally

trained human beings are able to muster. The duty requires for its successful discharge some form of effective organization at both the state and district bar levels. These principles are recognized in all of the Anglo-Saxon jurisdictions.

How these principles, aims and purposes can best be accomplished and governed is quite another matter. Any plan finally adopted will require more steadfastness of purpose and moral courage than often has been heretofore shown. Frankly, your committee has not been able to reach any common ground of unanimity. Nevertheless, it is felt that the following proposals and recommendations meet with the approval of a majority of the committee:

JUDICIAL APPOINTMENTS

1. The Board of Commissioners should forthwith appoint a standing State Bar committee to study and make recommendations to the Governor of this state in cases of judicial appointments to both Supreme Court and District Court vacancies. This group should also be assigned the task of investigation and recommendation for appointment when federal appointments to the bench are imminent. It should cooperate with the American Bar Association and other investigative groups in this endeavor. This group should be not less than 3 nor more than seven eminently qualified and respected lawyers spready equally among the three Bar divisions. A qualification that should be considered would be active practice for not less than ten years within this state. The term of appointment should be not less than three years and should be staggered terms to provide continuity. The manner and method of investigation and subsequent recommendation should be left largely to its discretion, but clearly these should be done in utmost confidence and secrecy. Recommendations to the executive authority should be in such language as "exceptionally qualified", "qualified" and "not qualified", and nothing more.

2. The Board of Commissioners should recommend to each District Bar president and officers the appointment of a similar committee with similar functions at that level. These district committees should work closely with and be a part of the investigative and recommendatory procedures of the state committee when Supreme Court and District Court appointments of a candidate or candidates from their District are being considered. The district committees when formed should forthwith advise the appointing authority at the county, precinct and municipal levels that its services are available. At this level also, recommendations should be couched in such language as "exceptionaly qualified", "qualified" and "not qualified". The committee's existence, purpose and function should be brought to the attention of the governor and succeeding governors and cooperation solicited.

JUDICIAL ELECTIONS

1. The same committees heretofore recommended could and should function in much the same manner as in the judicial appoinment field. The committee at the state level should probably confine its recommendation or endorsements to candidates for the Supreme Court and the district commmittee to District and Probate Courts.

In the case of judicial elections some public announcement of the Bar's opinion is required. If the incumbent is running unopposed and he is found "qualified",

the work is done. If he is opposed and is found "qualified" the electorate is entitled to know, and the same is true of his opponents. Results should be published, but again only in the terms of reference heretofore indicated.

This is a general outline and plan. The mechanics can be worked out, and may vary somewhat from bar to bar. Balloting at the district level may well be considered as to the terms "qualified" and "not qualified", but if done, should be by secret ballot.

Any plan, of course, depends entirely on the committee members. They must be chosen carefully for the required qualities of courage, judgment, experience, integrity and willingness to do the job.

Several of the members are convinced that any plan similar to the foregoing is at best an interim or "stop-gap" affair. Public opinion now, as never before, seems to be awakening to the evils and inadequacies of our present judicial appointment methods and non-partisan judicial election statutes. Judicial *selection, tenure and removal* are a most important part of court reform. We therefore believe that this Bar should investigate and advise itself fully as to the merits of a judicial selection plan similar to the so-called Missouri plan. This is basically a constitutional or statutory nominating commission, usually composed of a high ranking state judicial officer as chairman, an equal number of responsible lawyers and laymen, with the lawyers being elected by the Bar members and the lay members being appointed by the governor. The plan preserves the executive appointment prerogative but eliminates it from the political "spoils" system. It provides the electorate with well screened candidates who must run thereafter for election unopposed on a separate ballot "on their record." This plan, or modifications of it, has been adopted in five states, and Iowa and Nebraska are conducting referenda to the electorate this year.

With all of the foregoing in mind, it is recommended that the Board of Commissioners continue a judicial selection committee of this Bar to study such plans, make recommendations to the next Annual Meeting, and if appearing desirable, to draft appropriate constitutional amendments and implementing statutes to carry such plan into effect.

Respectfully submitted,
JUDICIAL SELECTION COMMITTEE
J. Blaine Anderson, Chairman
Sherman J. Bellwood
Hon. Clay V. Spear
Gilbert C. St. Clair
Robert Brown
Willis E. Sullivan
Members

Report of the Committee on the Unauthorized Practice of Law

It is customary for the Chairman of the Committee on the Unauthorized Practice of Law to make an annual report, to the Bar, of the activities of that Committee.

It is possible that the following report will seem to some members to be more an editorial than a report of committee activities.

It may also seem, to some, that the writer is unduly impressed with the importance of this Committee's work, and, perhaps over-emphatic as concerns its problems.

To those attorneys I can only say that a great number of highly intelligent and dedicated lawyers, who have been engaged in the fight against unauthorized practice for many years, both in the American Bar Association and in the various State Bar Associations, are convinced that the fight is one for the survival of the legal profession.

Unfortunately, it has been my observation at least in this State, that the fight is being carried by from five to ten per cent of the attorneys.

The attitude of the remaining attorneys ranges from apathy, or inaction for fear of alienating a client or potential client, or inaction by reason of a complete failure to understand the seriousness of the problem, to those attorneys who, in their eagerness to placate or promote a corporate client, are actually aiding and abetting the unauthorized practice of law.

Unfortunately, too, throughout the country, some members of the judiciary, through a failure to understand the scope and severity of the problem, and the basic issue at stake, have adopted a "slap on the wrist" policy towards admitted offenders, and have engaged in ivory tower semantics in U.P.L. cases where, it is respectfully submitted, a tough and realistic policy should have been adopted.

The result, in many cases, have been decisions which hamper and frustrate the efforts of the bar to combat this activity.

To those attorneys who might question whether the problem is as critical as this report might indicate, I would quote briefly from the report of the Standing Committee on Unauthorized Practice of Law of the American Bar Association, as adopted by the House of Delegates at its meeting in February of 1962.

> "The unauthorized practice of law, is one of the most, if not the most, serious and critical problem which now confronts the legal profession." ". . . it is said that in these fields where corporations and laymen have become so-called 'specialists' the lawyer is in fact a drag and hindrance rather than a guide and counsel in accomplishing results. And it is finally said that it adds little glory to the Bar for us to contend that this is not in the public interest. The argument always comes back to the proposition that the Bar is simply being selfish. We must not be misled by these spurious arguments nor deterred in our efforts to preserve the legal profession by accusations that we are simply trying to protect our pocketbook. *Nor should we underestimate the number, the power and the determination of those who would undertake to destroy the idea that the legal affairs of the public should be handled by duly licensed lawyers.*"
>
> "The education of the individual lawyer with reference to unauthorized practice of law principles and our justification based upon the public interest, in resisting the practice of law by laymen and corporation, is basic and essential for the unauthorized practice of law cannot be successfully resisted

unless the individual lawyer not only refuses to cooperate with the unauthorized practice of law, but is also willing, *even to the point of personal embarrassment and sacrifice of gain,* to be outspoken in his opposition to unauthorized practice of law whenever and wherever he finds it." (Emphasis mine.)

May I also quote from a speech given by Mr. Raymond Reisler, a member of the American Bar Association Standing Committee on the unauthorized practice of law, which appears in the Ohio Bar, publication of the Ohio Bar Association, in its February 26, 1962, issue.

"As I have indicated, the proposition that the unauthorized practice of law is a challenge to the continued existence of the profession is *res ispa loquitor.* To permit competition, unhampered by the rules of ethics, canons against solicitation, admission requirements, the summary disciplines to which the Bar is subject, and permit it from all sides, not merely from the relatively small number of quacks and pseudo lawyers, but from real-estate brokers, architects, accountants, title companies, trust officers, insurance brokers, labor consultants, tax consultants, pension and estate planners and a host of other so-called 'consultants', and worse still, 'counsellors,' with its legal connotation, in fact, even from undertakers, not to mention builders and jewelry credit shops, *mirabile dictu;* means the death knell of the Bar."

"As F. Trowbridge vom Bauer, (then) Chairman of the American Bar Association Standing Committee on Unauthorized Practice of Law puts it, 'the terrible weapon of solicitation,' which our adversaries have, makes competition by the lawyers hopeless. This is one of the greatest contributing factors to the relative impoverished condition of the Bar when compared with the lush times for business and other professions today."

and Mr. Reisler continues,

"Next we must make the public aware that this is their fight; that the preservation of the legal profession is not a matter of selfish monopoly, of financial benefit to a limited few, but a goal as fundamental to our liberties, our form of government, our way of life; in fact, all we hold dear, as the Bill of Rights and the Constitution itself. Both of these depend upon our judiciary system for their enforcement, and our judiciary system in turn depends for its effectiveness and significance, if not its very life, on the existence of the free and untrammeled American Bar; on the dauntless, unregimented, independent, yes, even stiff-necked, if you will, American lawyer."

A few statistics concerning this Committee's activities may point up the problem in Idaho.

In addition to matters which were minor, and classified under a miscellaneous heading, and further in addition to matters which were handled by local associations, the State Committee processed approximately twenty-seven matters during the previous year. Of these, ten have been disposed of and closed and seventeen are pending.

These cases, without attempt at complete enumeration, included "Will-Kit" advertisements in national magazines, real estate agents drawing contracts, estate planning bulletins and counseling by various organizations, the use of simulated

legal process as a collection device by various companies, a contract prepared by a banker, a complaint concerning a corporation purporting to prepare complete village codes, the question of collection agencies filing collection suits in *pro per*, individuals representing themselves to be licensed attorneys for one purpose or another, the preparation of legal instruments by trust and title companies, the preparation of a contract by the credit representative of a large corporation, the question of debt pooling by corporations, alleged practice of law by governmental agencies, trust forms prepared and disseminated by banks and savings associations, complaints of out-of-state lawyers practicing law in the State of Idaho without a license, and so forth.

In addition, the Committee answered various questions posed by the Commissioners in this field, and fulfilled other tasks as requested by the commission. For example, the Committee has just completed and submitted to the Commissioners a form of admonition against the drawing of contracts and the unauthorized practice of law, which we hope will be sent by the Secretary of State to all persons receiving Notary Public Commissions in Idaho.

This year's volume of business has trebled or quadrupled over previous years. These figures become more significant in light of the fact that only a small percentage of the attorneys in this State are filing U.P.L. complaints. The great majority are ignoring the unauthorized practice of law when they find instances thereof.

If all the attorneys in Idaho were cooperating, the case load would, I feel, be increased ten-fold.

The Committee consists of one member in each Commissioner District as follows:

L. Charles Johnson, 303 Spalding Building, Pocatello, Idaho.
James Cunningham, P. O. Box 426, Twin Falls, Idaho.
Thomas W. Feeney, Lewiston Professional Building, Lewiston, Idaho.

This year it was found necessary to give each Committee Member a Subcommittee consisting of one member from each local Bar Association in his district.

Even so, despite tireless efforts on the part of the Committee members, Chuck Johnson and Jim Cunningham, the Committee is finding it virtually impossible to keep up with the case load. This is going to get worse.

In addition, it is often difficult to secure assistance from attorneys, particularly in smaller, close-knit areas, who are very reluctant to process a claim against a local business man, realtor, banker or title company.

It is unrealistic to expect a job which is assuming this proportion, to be adequately handled by attorneys volunteering their time, often at the expense of their private practice.

To help alleviate this situation I would recommend the following:

1. A part-time, or preferably full-time salaried General Counsel for the Idaho State Bar Association, to handle the investigation and prosecution of U.P.L. and Ethics Committee matters, to aid the work of other committees as needed, and to assist the Commissioners of the Bar Association as directed. A

number of the following recommendations would be rendered unnecessary by the appointment of such General Counsel.

2. That funds be provided to allow a working budget for the Committee. The Commissioners have recently authorized the Committee members to attend an A.B.A. Symposium on the Unauthorized Practice of Law in Salt Lake City. To my knowledge, this is the only money, other than suit costs, which has ever been expended by the State Association in relation to U.P.L. work, since the inception of the Committee under the original chairmanship of Sherm Furey.

3. That the Committee meet on at least a biannual basis, and more frequently, if possible. To my knowledge, the U.P.L. Committee of the State Bar Association has never met. The difficulties in reaching and disseminating opinions representing the thinking of the entire Committee is obvious.

4. All future opinions of the Committee should be issued after deliberation of the Committee, and should be formalized and numbered, in the same general manner as the opinions of the Ethics Committee.

5. A great deal of literature, a number of briefs, a source book promulgated in 1937, and a large amount of loose-leaf material constitutes the source book material available to this Committee. The American Bar Association has no other compilations. Every effort should be made to compile and work out some reasonable indexing system for such source material. This would obviously be best accomplished under a General Counsel.

6. Every effort should be made to educate the Bar and the Bench to a full realization of the scope and severity of the problem faced by our profession. If both the Bar and Bench in the United States do not face up fully to this fight, I am convinced, as are a number of attorneys who have had experience in this area, that the practice of law as we have traditionally known it, is extinct.

7. As a part of the next preceding paragraph, every effort should be made by means of The Advocate and any other available media to bring home to the Bench and the Bar a realization of the problem which we face.

8. Finally, and perhaps more importantly, the general public must, in some way, be made to realize that if the American Lawyer, as we have traditionally known him, disappears from the scene, they are the real and ultimate losers, not the individual practitioners who will merely evolve to some other form of gainful employment.

May I close with the story, no doubt known to many of you, of the man with the salami. If a man should steal a very small slice of this large salami, this, surely, would not be worth fighting over. If another man should then steal another very, very small slice, this, of course, would not be worth fighting over either. And, if this should continue until nothing is left but the string, it is obvious that there is no use fighting over a string.

Respectfully submitted,
THOMAS W. FEENEY
Chairman

Report of Committee on Economics of Practice of Law

FUNCTION OF COMMITTEE

It would appear that this committee should concern itself with all factors

which concern the economic position of attorneys in Idaho. This would include working with the Fee Schedule Committee and the Unauthorized Practice of Law Committee. It should also include studies on how the practice of law can be more efficiently conducted so that the lawyers' income can be increased and, at the same time, the service to the client increased.

This is the first year for this committee to function separate and apart from the fee schedule committee and the commercial practice committee. Lack of funds has prevented the committee from having a meeting. Your Chairman believes the practice of law in many fields is being taken over by other professions and groups to the economic detriment of lawyers, but little, if anything, can be done until adequate funds are available to allow the committee to properly function. Your Chairman further believes that the committee's work in the future could be much more effective if a full time general counsel for the Idaho Bar Association were employed to have, as one of his functions, better public relations for the entire Bar Association. The public, as a whole, is unaware of the many reasons why lawyers should write their contracts and draft other legal documents. This public unawareness directly affects lawyers' incomes and helps destroy respect for the profession and the courts where the inevitable law suits result.

It would appear that another function of this committee should be in the field of proposed legislation. That is, legislation which better defines the practice of law and topics such as the expert witness fees, proper costs to be allowed, and the serious problem of costs to litigants and its effect upon administration of justice.

Yet another possible function of this committee should be in the field of law office management with programs for the District Bar Associations and State Bar Associations on the subject.

Making money should be secondary to the great traditions and responsibilities of the legal profession, but we have a duty to maintain and preserve the strength and independence of the legal profession. This cannot be done in the absence of reasonable financial rewards. There has been an increasing recognition of the relationship between adequate salaries and a strong bench. This same problem must be realized so far as the practice of law is concerned. Freedom under law can only be maintained with vigorous and independent bench and bar.

The Idaho State Bar cooperated with the American Bar Association in a survey of lawyers' incomes in Idaho last year. A questionnaire was sent to every lawyer in Idaho. This totals approximately 615. Three hundred six lawyers completed the same. The results are somewhat shocking to your Chairman because of the low average income reported in the various groups. One of the reasons for the shock is that it is suspected that those with the "better" incomes were the most diligent in completing the questionnaires.

The report indicates the following:

1. Lawyers with 5 years or less practice have an average income of $6,687.00.
2. Lawyers with 5 to 9 years practice average $10,122.00.
3. Lawyers with 10 to 14 years practice average $13,325.00.

4. Lawyers with 15 to 19 years practice average $11,324.00.

5. Lawyers with 20 to 29 years practice average $15,858.00.

6. Lawyers with 30 to 39 years practice average $15,604.00.

7. Lawyers with 40 years or more practice average $12,172.00.

The report further indicates that the lawyers in cities of 10,000 to 20,000 average the most income.

Furthermore, lawyers practicing as full-time partners average more than do sole practitioners, and in this case, the bigger the city the more the income. Law firms of four partners, or partners and associates, average more than any other firm. The highest paid lawyers in the state would appear to be full time, corporate counsel.

The average two-man office has an overhead of 23% of the gross. The more lawyers, the greater the percentage of overhead, generally. Overhead percentages were highest in the five-man firm where the average overhead was 49.2%.

The lawyers who maintain photo-copying machines, dictating equipment, electric typewriters and other similar equipment, together with reference files of previous work products, have the highest average incomes.

Attorneys keeping time records average $2,000 per annum more than those who do not.

Among those lawyers indicating their practice was somewhat specialized, the domestic relations and bankruptcy lawyers were on the bottom of the income list. Those topping the list were corporation lawyers, utility lawyers, and negligence defense attorneys.

The full report of the American Bar Association is in the offices of Tom Miller, Secretary of the Bar.

In spite of the handicaps this committee has operated under, the committee wishes to express its thanks to the commissioners and to Tom Miller for the interest they have shown and the considerations extended. Your Chairman extends thanks to the cooperation and considerations of the committee members, Bill Kennedy, Dick Anderson and Pat Arney.

Respectfully submitted,
DOUGLAS KRAMER
Chairman,
Economics of Law Practice Committee

Report of Uniform Commercial Code Committee

Your committee on Uniform Commercial Code has considered the problems submitted to it and makes its report.

The Uniform Commercial Code which has been adopted in eighteen states covers eight extremely important subjects, not including the effective date and repeal provisions. These subjects are sales; commercial paper; bank deposits and collections; letters of credit; warehouse receipts and bills of lading; investment

securities; secured transactions; sales of accounts, contract rights and chattel paper. These subjects affect a substantial portion of commerce and industry which is presently affected by well established Idaho law.

The literature provided by the National Conference of Commissioners on Uniform State Laws, various industries in states which have adopted the act and bar associations, is very voluminous and requires a great deal of study. It would appear to your committee that there would be considerable merit and advantage to the adoption of the Uniform Commercial Code, however, your committee does not feel that with the limited time of the members it is possible to make an outright recommendation as to passage. Your committee further believes that it would be equitably proper and practically necessary that the major elements of commerce and industry be consulted and advised on the code before its adoption is attempted.

This matter has been brought before the Idaho State Bar Association in its conventions on several previous occasions without special action. We believe that the subject is of such importance and of such magnitude that it deserves attention by a committee who would have the benefit of the services of lawyers able to devote the time and energy to review and analysis of the code for compensation. We therefore recommend the passage of the resolution submittd by this committee. (See Resolution No. 5, these Proceedings).

INDEX

– A –

ADDRESSES
CAMPBELL, LIONEL T., Los Angeles, California
"The Handling of the Medical Negligence Action" ---- 14
PETERSON, PHILIP E., Moscow, Idaho
"Jurisdiction of Idaho Courts Over Nonresidents ---- 58
SCOTT, CHARLES C., Kansas City, Missouri
"Photographic Evidence and Questioned Documents" ---- 9
SMYLIE, GOVERNOR ROBERT E. ---- 5
WITKIN, B. E., Berkeley, California
"(Some of) What's New in Torts" ---- 43

Administrative Procedure Act, resolution re ---- 85

Advisory Fee Schedule
Report of Committee on ---- 79
Resolution adopting ---- 82

Attorneys fees in trust deed foreclosures, resolution re ---- 86

Attorneys fees limited by federal law, resolution re ---- 82

Anderson, Eugene H. ---- 90, 91

Anderson, Myron ---- 74, 89

– B –

Bar Commission (see "Reports" and "Resolutions," this Index

Bar Commissioner, election of Alden Hull as ---- 14, 114

Bistline, Don ---- 5

Bowler, Bruce ---- 5, 14, 114

– C –

Campbell, Lionel T., address ---- 14

Canvassing Committee ---- 5, 14, 114

COMMITTEE REPORTS
Advisory Fee Schedule ---- 79
Canvassing Committee ---- 14, 114
Economics of Law Practice ---- 133
Internal Revenue Service ---- 74
Judicial Selection ---- 126
Physicians–Lawyers ---- 77
Resolutions Committee ---- 80
Unauthorized Practice of Law ---- 129
Uniform Commercial Code ---- 135

Corporations, law firms incorporating, resolutions re ---- 88

Coughlan, Glenn A.
Introduction of Lionel Campbell ---- 14
Installation as new President (not reported)

– D –

Donart, Jim ---- 103, 104

Dorius, Bishop Floyd–Invocation ---- 5

– E –

Elam, Laurel ---- 99

Economics of Law Practice Committee, report of ---- 133

– F –

Fee schedule (see "Advisory Fee Schedule," this index)

Feeney, Thomas W.–Chairman of Resolutions Committee ---- 80

– G –

Gee, Merrill ---- 89

General counsel of the Bar, resolutions re ---- 107

Governor's address ---- 6

Greenfield, George ---- 98

– H –

Hawley, Jack–Parliamentarian ---- 73

Hepworth, John ---- 98

Hull, Alden
Acceptance remarks ---- 14
Election of as Bar Commissioner ---- 14
Introduction of B. E. Witkin ---- 42

– I –

Institutes, mention of ---- 73

Invocation ---- 5

– J –

Judicial Selection
Report of Committee on ---- 126
Resolution re ---- 88

– K –

Kaufman, Sam 90, 101
Kidwell, Vern 98, 101, 102

– L –

Lawyers' license fees, resolutions re 105, 107

– M –

McNichols, Ray 5
Merrill, R. D. 87
Merrill, Wes 77
Millar, Z. Reed 101
Miller, Thomas A.—Secretary's Report 119
Moffatt, Willis 87
Morgan, Dale 98

– N –

Nixon, W. W. 78, 89
Nungester, William 106

– P –

Parliamentarian 73
Parrish, Max 91
Peterson, Philip E.
Address 58
Remarks 107
PRESIDENT'S REPORT 116
Prosecuting Attorneys Association, Report of 78

– R –

REPORTS
Bar Commissioner, election of 14, 114
Bar Commission, special report 122
Committee reports (see "Committee Reports," this Index)
President's Report 116
Prosecuting Attorneys Association Report 78
Secretary's Report 119
Treasurer's Report 119

RESOLUTIONS

No. 1–"Mongolian Exclusion" constitutional amendment ---80
No. 2–Bar Commissioner nominations ---81
No. 3–Federal statutes and regulations limiting attorneys' fees ---82
No. 4–Scrivener bill–recording act ---83
No. 5–Uniform Commercial Code ---83
No. 6–Administrative Procedure Act ---85
No. 7–Trust deed foreclosures–attorneys' fees ---86
No. 8–Judicial Selection Committee ---88
No. 9–Incorporation of law firms ---88
No. 10–Uniform District Court Rules ---92
Amended resolution (adopted) ---101
No. 11–Additional Bar Commissioners, etc. ---103
No. 12–Lawyers' license fees ($100.00)–tabled ---104
No. 13–Lawyers' license fees ($50.00)–adopted ---105
No. 14–General counsel of the Bar ---107
No. 15–Advisory Fee Schedule ---108
No. 16–Appreciation to Sun Valley ---113
No. 17–Appreciation to law book publishers ---113
No. 18–Appreciation to speakers ---114
No. 19–Appreciation to Bar Commissioners and Officers ---114

– S –

St. Clair, Gilbert ---87, 103

Scott, Charles C.–address ---9

SECRETARY'S REPORT ---119

Bar examinations ---122
Deaths of attorneys ---121
Discipline matters ---122
Financial report ---119
Membership of the Bar ---121
Trust fund ---120

Smith, Laurance ---100

Smith, Sidney–introduction of Charles C. Scott ---8

Smylie, Governor Robert E.–address ---6

– T –

Taylor, Judge Fred ---8

Thomas, Eugene C.
Remarks ---- 79, 94, 97, 100, 101, 102, 106
Report of Advisory Fee Schedule Committee ---- 79

Trust deed foreclosures, resolution re ---- 86

– U –

Unauthorized Practice of the Law, report of Committee on ---- 129

Uniform Commercial Code
Report of Committee on ---- 135
Resolution re ---- 83

Uniform District Court Rules, resolution re ---- 92, 101

– W –

Ware, Marcus J.
Presiding ---- 5 et seq.
President's Report ---- 116

Webb, Lloyd ---- 86, 93, 94, 97

Witkin, B. E.–address ---- 43