PROCEEDINGS

of the

IDAHO STATE BAR

VOLUME XXVI, 1952

Twenty-Sixth Annual Meeting

SUN VALLEY, IDAHO

July 10, 11, 12, 1952

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Past Commissioners

WESTERN DIVISION

JOHN C. RICE, Caldwell, 1923-25.
FRANK MARTIN, Boise, 1925-27.
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, 1948-51.

EASTERN DIVISION

N. D. JACKSON, St. Anthony, 1923-25.
A. L. MERRILL, Pocatello, 1925-28.
E. A. OWENS, Idaho Falls, 1928-34.
WALTER H. ANDERSON, 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.

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.
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ROBERT E. BROWN, Kellogg, 1949-53.

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T. M. ROBERTSON, Twin Falls, Vice President
L. F. RACINE, Jr., Pocatello
PAUL B. ENNIS, Boise, Secretary

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Third Judicial District — C. Stanley Skiles, President, Boise; Joe Imhoff, Jr., Secretary, Boise.

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Seventh District — Mary Schmitt, President, Nampa; Arnold Beebe, Secretary, Nampa.

Eighth District — James W. Wayne, President, Coeur d'Alene; Eugene L. Miller, Secretary, Coeur d'Alene.

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Shoshone County — John J. Peacock, President, Kellogg; Richard G. Magnuson, Secretary, Wallace.

Proceedings

Volume XXVI

TWENTY-SIXTH ANNUAL MEETING

of the

IDAHO STATE BAR

1952

COMMISSIONERS OF THE IDAHO STATE BAR

RALPH LITTON, President, St. Anthony
ROBERT E. BROWN, Kellogg, Vice President
T. M. ROBERTSON, Twin Falls
PAUL B. ENNIS, Secretary, Boise

THURSDAY, JULY 10, 1952
1:30 P. M.

PRESIDENT LITTON: The meeting will please come to order. Members of the Idaho State Bar and guests, I take great pleasure in welcoming you to the twenty-sixth Annual Convention of the Idaho State Bar Association. We have arranged what we feel is a very interesting and instructive program.

Joe McFadden of Hailey is Chairman of the Arangements Committee, so I shall call upon him at this time to tell us what we can expect in the way of entertainment while at Sun Valley. (applause)

JOSEPH McFADDEN: Ladies and Gentlemen: The situation again this year is that all of our problems are solved by the efficient management of Sun Valley. The arrangements, through the cooperation of your Secretary, Paul Ennis, have been well taken care of again.

One item I wish particularly to call to your attention at this time is that at 2:30 this afternoon there will be a ladies' coffee hour. It is a little bit out of schedule on your programs, but I believe if you look at the program you will all see it there. That is going to be at the Lodge Terrace, and all of the ladies and guests who wish to participate are welcome over there.

Paul has arranged for a prospective trap shoot for Saturday afternoon and a golf tournament. Further details on that can be worked out through your Secretary, Paul Ennis, or at the desks.

If you will just look at the bulletin boards in the Lodge and the Challenger Inn, you will find information on where the meals and banquets will be held.

There is a special attraction set up for this evening, and that is the reconvening of the Morey O'Donnell Vandal Booster Club. That has become a well established bit of fun for the members of the Bar. Anyone who wants further details on that should see Morey O'Donnell this evening.

I know all of you are going to have a good time here at Sun Valley, and we all welcome you. We can at least be thankful that we are not going to have the wrangling at this convention that has developed in a convention held elsewhere. (applause)

PRESIDENT LITTON: Thanks very much, Joe. And I know you are very modest in saying that Sun Valley and the Secretary made all the arrangements.

This year we elect a new Commissioner from the Eastern District. He is to replace myself upon the Commission. Alfred Cordon and Louis Racine have been nominated as candidates for this office. I wish at this time to appoint a Canvassing Committee to canvass the votes of that election, and upon this Committee I shall place Ray McNichols of Orofino, Harry Benoit of Twin Falls and Frank Meek of Caldwell. As soon as the meeting is adjourned, I will appreciate it if this Committee will get the ballots from the Secretary and count them at their convenience. We will call upon the Committee to report sometime tomorrow.

As we all know and deeply regret, our former Secretary departed this life last fall, and we feel at this time we should pay a fitting tribute to him. Mr. E. B. Smith of Boise was well acquainted with him and worked with him, and I feel knew him well, and he has kindly consented to do that at this time. Mr. Smith. (applause)

MR. E. B. SMITH: Mr. President, members of the Idaho State Bar Commission, members of the Idaho State Bar, distinguished guests and ladies and gentlemen:

SAM S. GRIFFIN

Sam S. Griffin was born January 3, 1892, at Tekamah, Nebraska. He attended the University of Nebraska, receiving his LLB degree therefrom during the year 1914. He came to the State of Idaho during the year 1912 and made this State his residence continuously thereafter until the time he passed away October 18, 1951. He was admitted to Idaho's bar September 22, 1914.

May 22, 1917, Mr. Griffin was married to Marguerite Jack of Tekamah, Nebraska. Besides his widow he is survived by three sons: Sam J. Griffin, Frederick B. Griffin and Charles J. Griffin.

In addition to his continuous practice of the law, Mr. Griffin engaged in many varied activities and public services. He served on numerous civic committees and performed outstanding services having for their objectives the betterment of Boise's school system. He served on the council of the City of Boise commencing during the year 1936, becoming president of the council during the year 1942, continuing in that office until November 1, 1945, when he became mayor of the City of Boise, in which capacity he served until April 1, 1946, when he retired because of ill health. The following are but a few of the instances wherein Mr. Griffin performed outstanding public service.

Misappropriations of Former City Clerk:

A former clerk of the City of Boise misappropriated funds during a period of ten years, or more, prior to 1933. The loss, mainly affecting bondsholders, ultimately was fixed in excess of $200,000.00 of which the city had but $14,000.00 bond coverage. The Supreme Court ruled that the City of Boise was responsible for the defalcations by its decision in the case of Cruzen vs. Boise City, 55 Idaho 406, 74 P. (2d) 1037. When Mr. Griffin took office on the city council (1936) the city was faced with repayment of those defalcations. The city did not have funds to repay the losses; also it was seriously doubted whether the city could levy the heavy assessments required to pay such losses and at the same time maintain the general functions of the city. Mr. Griffin devised a plan whereby as a bondholder's claim became due the claim could be reduced to judgment against the city. Levies to pay such judgments were thereby spread over a considerable period of time. As a

result, the bondholders suffered no loss, the city was able to maintain its normal functions, and taxpayers were not excessively burdened at any time by repayment of the losses.

Boise City—Cemetery Perpetual Care Trust Fund:

Boise City had for a number of years been accumulating a trust fund designed to be invested by the city council in solid securities, the income therefrom to be used for perpetual care of the city cemetery. At the time Mr. Griffin became a member of the city council this fund approximated $80,000, with only about $35,000 invested in "tag end" warrants of defunct or insolvent special improvement districts, largely inactive, the city's prior policy having been to thusly absorb liabilities of such special districts. On Mr. Griffin's recommendation such type of investment of trust funds was stopped. He caused an ordinance to be adopted requiring the council to invest such funds in suitable securities; also, he instituted a program to salvage the prior investments. At the end of three years the total investments had been increased to over $75,000 and unsound investments reduced from approximately $15,000 to $5,000. During the following years unsound investments were practically wiped out and the total fund in an investment status increased to approximately $90,000. Mr. Griffin, by his instituted search among the funds of the city, ascertained that considerable amounts represented unappropriated taxes. He procured the council to appropriate those unapportioned funds to the districts in which existed the bad investments, and thus paid off such obligations and closed out the special improvement districts without delinquencies.

The increased income to the trust fund materially benefitted the care of the city cemetery and the fund was restored without additional burden to the taxpayers, and uselessly unapportioned funds were put to work in the public interest.

Boise City—Bonded Indebtedness:

Boise City had been issuing bonds payable in twenty years but subject to call after ten years. The city's charter required a levy after ten years to create sinking funds with which to pay bonds on final maturity. On taking office (1936), Mr. Griffin discovered that the city was some $90,000 "in the red" for failure to levy for sinking funds. At his insistence, a levy was made and the sinking funds were brought up to date.

The policy of the city had been to refund bonds and not pay them off. Some bond issues required payment of interest as high as 6% per annum. Mr. Griffin, upon taking office, introduced the principle of amortization based upon the theory that the refunding of each issue of bonds be made upon a plan requiring annual payment on principal as well as the annual interest. Under such plan, each issue of bonds as called, was replaced by refunding bonds bearing sharply reduced interest rates and requiring annual increasing payments of principal, with resulting debt reduction. Amortizations of the various issues of bonds were "fitted" to amounts which the city could without excessive tax burden pay.

It was Mr. Griffin's further idea that at the end of World War II enlarged improvements, requiring bond issues, would be called for and, that therefore the maturities and constant decrease of the total city-bonded debt must be kept in mind in order that future required bond issues could be financed.

During April, 1945, when Mr. Griffin left office as mayor, the city's bonded indebtedness, which was $631,000 in 1936, had been reduced to $336,000, and interest requirements of 4% to 6% had been reduced to less than 2% per annum.

Boise City—Tax Committee:

When Mr. Griffin became a member of the council of Boise City (1936), there was no budget control worthy of the name, nor was it possible to ascertain the status of the city's finances with any degree of accuracy. Mr. Griffin instituted a taxpayer's committee appointed by the Chamber of Commerce to have full access to proposed budgets and financial records. A complete copy of departmental requests for appropriations was furnished each member of such committee, giving all details of expenditure objectives with previous expenditures during the two years preceding for the same objectives, with explanation of extraordinary requests. The suggestions of such committee were solicited. The committee members gave intensive study to such budgetary requests over a considerable period of time, and thereby secured first hand knowledge of municipal demands for finances. As a result the relations between businessmen, taxpayers and municipal officers improved, and so continues, with minor criticisms of budgets and appropriations now based upon knowledge and not rumor or speculation.

Charter of Boise City:

When Mr. Griffin became a member of the council of Boise City (1936) there existed no budget system nor proper accounting system designed to control the finances of the city. Finances were under the supervision and control of the mayor and a financial chairman, and little consideration thereof was had or action taken by the city council. The accounting system did not provide for classification of expenditures for purposes of future comparison and regulation, nor did it show constantly the city's financial condition.

Mr. Griffin caused to be instituted a budget system and a machine accounting system for classification of expenditures so that costs could be constantly checked, compared and ascertained.

Mr. Griffin was the moving spirit for the modernization of the charter for Boise City. After experimentation for a period of two years, the 1939 Legislature (1939 S.L., chap. 213) adopted the budget system and "cleaned up" the charter in instances where it had proven faulty. The 1941 amendments to the charter (1941 S.L., chap. 37) was a continuation of that program.

Mr. Griffin was instigator of the 1945 amendments to the city charter (1945 S.L., chaps. 3 and 10) which dealt with amortization of bonds. The 1947 amendments (1947 S.L., chap. 226), dealing primarily with the sewage disposal, sanitation, initiative, referendum and recall, and increase of taxing powers all essentially completed the program of charter amendments.

Boise Junior College:

Mr. Griffin recommended and assisted in drafting, in securing the legislative passage of, and amendments to the junior college law enacted by the 1939 Legislature (1939 S.L., chap. 32) under which the present Boise Junior College operates.

Largely through Mr. Griffin's recommendations and efforts, the former downtown city airport site of over 100 acres was donated by the city to the college, and on this site the present college, now with an attendance of approximately a thousand students, was constructed, and is being enlarged constantly. By Mr. Griffin's foresight also, the city's interest in Boise River improvement and River Park Drive was retained to the city by his insistence on retention of a 100-foot road strip bordering the river and college campus.

Boise City—Future Equipment Fund:

The charter of Boise City does not provide for anticipatory accumulation of

funds to be used for replacement of old equipment and acquisition of new equipment.

The City of Boise, during the period of World War II, could not secure equipment. During that time the city's maintenance machinery and other heavy equipment was deteriorating and becoming worn out; the replacements which would become necessary at the end of the war indicated the requirement of a heavy extra tax levy. Mr. Griffin inaugurated a plan which made unnecessary the levy of a burdensome tax at the end of the war, with the Mayor, City Council, taxpayers committee of the Chamber of Commerce, and businessmen kept fully advised.

The plan provided for the accumulation of funds year by year to be used for replacements, and was accomplished by initially budgeting, levying taxes for and appropriating $25,000 for equipment which could not then be purchased. The following year $50,000 was so budgeted and appropriated, against which was credited the $25,000 unexpended during the prior year, and again levying and collecting the $25,000 balance. This was continued each year until the end of the war, at which time the city had on hand sufficient cash to purchase replacements of all kinds, from typewriters to fire engines, without sudden imposition of any heavy tax burden at any time.

Boise City—Parking Meters:

Mr. Griffin opposed the installation of parking meters for revenue purposes, but approved them for traffic regulation and police administration. The City of Boise did not have sufficient finances to pay for parking meters in any one year in the ways usually resorted to and required to be met by the provisions of Idaho's Constitution (William v. City of Emmett, 51 Idaho 500, 6 P. (2d) 475). The installation of parking meters would require over $35,000. No one knew how much revenue would be obtained from them.

Mr. Griffin designed the system and contract by which the meters were legally obtained, installed and paid for out of their earnings (see Foster v. Boise City, 63 Idaho 201, 118 P. (2d) 721. This he accomplished as follows:

The city contracted with a meter company for purchase and installation of meters for $35,000, to be paid for by allocation to that account of 75% of the revenue from the meters. If at the end of one year (the constitutional limit) the meters were not thusly paid for, the obligation of the city and the contract, ended and the meter company could remove the meters, provided, however, the city had an option, wholly voluntary on its part, to enter into a new contract for an additional fiscal year for the same meters, on the same terms, with credit for all prior payments made. That type of contract, new in Idaho, was held to be lawful. The budget of the city provided for an appropriation of the price of the meters, offset by estimated revenue from them. The revenue did in fact pay for the meters within the legal contract period of one year, and no taxes or other indebtedness was incurred for them.

Since that time the city has more than doubled the number of its initially installed meters, has had better traffic regulation, and has produced revenue of over $80,000 a year at an expense of less than $4,000 a year.

Boise City—Zoning:

A number of years ago the City of Boise adopted a zoning plan. Shifting of activity and rapid growth indicated that the city was outmoded and commercial developments became hampered. Little property remained within city limits with access to trackage or truck highways or otherwise desirable for warehouse and light

manufacturing, for which there was large after-war demand. Areas formerly zoned as residential had decreased in value as such, but could be used commercially. Mr. Griffin directed the attention of the planning commission, zoning commission and Chamber of Commerce to the needed changes of zones and to increases in taxable values within city limits. As a result, several areas were re-zoned and much building and industry has been attained.

Boise Air Terminal:

The City of Boise originally had made considerable expenditure in acquiring and semi-improving a comparatively small airport within a few blocks of the main business section. As the size of airplanes increased, it became apparent that safety, convenience and size required larger municipal airport facilities. The city acquired by purchase and lease of state lands, an unimproved area about one mile by one and a half miles in size within three miles of the center of the city and commenced its improvement, largely through sponsoring of Works Progress Administration projects, which were slowly and often inefficiently executed. The airport plans ambitiously called for a main runway of 8,400 feet and of two others of 6,000 and 4,000 feet, one of the largest projects in the United States. At the time Mr. Griffin became Councilman (1936), levelling operations had commenced.

It was depression time; valuations of property subject to taxation by the city had dropped from approximately 21 million dollars to approximately 15 million dollars, and the tax limits imposed by the city's charter resulted in less revenue available to the city than in the 1920's for essential municipal operations, such as fire, street, police and executive. The cost of airport construction was beyond the capacity of the city, except through comparatively minor WPA projects designed only to secure levelling and light oiling. United Airlines at the downtown airport had erected a small ticket office and hangar, which was to revert to the city after 25 years. A contract was negotiated (with terms largely formulated by Mr. Griffin) under which United Airlines surrendered this hangar to the city and assisted financially its removal to the new airport. A WPA project was sponsored and an enlarged administration building at the terminal resulted, housing airport officials, weather bureau, United States government airport officials, two airlines, covered passenger loading hangar and other facilities.

When the initial defense program was initiated prior to World War II, the army desired to obtain use of an airfield of the character, size and location of that at Boise. Boise's merchants were insistent that city officials spend sums (then estimated as high as 2 million dollars) to secure army airport status, even if necessary to give the airport to the government. The sum contemplated was beyond the city's bond issue legal limits.

The government desired the city to build heavy bomber type runways and cement warning aprons, and to finance power, water, telephone, rail spur connections, off-port radio site, truck roadways and town control operations, and surrender all civilian runway rights. Mr. Griffin was largely responsible for devising a plan whereby the city retained, and after the war acquired, a vastly improved airport. By negotiation with power, telephone and railroad companies, facilities of those companies were assured without city cost; water for all purposes was obtained by wells on the premises; tax title lands for a radio site cost the city only a few dollars; WPA projects were initiated for roads and warming aprons whereby city

and county owned trucks were used in lieu of sponsoring funds. The army later built approved roads and approximately 40 acres of cement warming aprons. The city leased off-runway space to the army for barracks, hangars, and other building sites, but retained its runways, subject to equal army use with the city, and civilian control of landings and take-offs. Those intricate arrangements, contracts and counter-contracts, whereby the city retained its air facilities and the government obtained adequate use and benefit through lease payments of $1.00 per year for its defense and, later, war purposes, were largely the result of Mr. Griffin's legal knowledge and practice, ingenuity and forsight.

At the end of the war and cessation of army and air force needs, the country had been well served by the Boise air terminal, yet its civilian uses had been preserved for the city and its facilities had been greatly improved by the use of government monies, and which facilities the local community could not have financed under any circumstances.

Admittedly, Mr. Griffin could not have forseen this result, but by not being emotionally stampeded and by some measure of foresight and ingenuity, a number of interests were self served,—the United States and its defense and war efforts, the improvement of civilian flying facilities, and the city's business and other interests dependent on and resulting from aviation. The Boise air terminal now has reverted to the city, with paved parallel 8,000-foot runways and 1,000-foot compacted end areas (equivalent to 10,000-foot runways and among the largest in the United States), 6,000-foot and 4,500-foot cross runways, adequate hangar and warming space for air units, warehouses, fire department, water service, railroad facilities, civilian hangars, factory sites (several already built upon), civilian tower control of landings and take-offs, sewage disposal, paved approach roads, and other facilities, all valued at several million dollars and ready again, if need be, for the service of the nation.

Boise City—Planning Commission:

In 1935 a planning commission for the City of Boise had been organized, made up of uncompensated citizens of high caliber; but, as in the case of most busy citizens, without too much real knowledge of citywide needs, viewpoints, finances, legal restrictions, day by day operations, maintenance requirements, and municipal affairs generally. Consequently, unless their attention was directed by someone to specific problems practically nothing had been accomplished except some effort toward sewer disposal facilities (rejected twice at city elections), and a municipal auditorium, the need for which was highly questionable.

Mr. Griffin became mayor by succession on November 1, 1945. Within a few days he called the planning commission together and found that it was not seriously planning anything. By November 14, 1945, he had outlined a number of projects needing attention. The commission immediately became active and has so continued to date, its approved projects and those now under study having originated from Mr. Griffin. The commission is closely coordinating plans with financial studies for both construction and maintenance.

Among those projects which Mr. Griffin suggested the following have been approved, constructed, or are in immediate prospect:

Equipment purchased through accumulated surplus fund (See herein, Boise City—Future Equipment Fund);

All streets in downtown congested area (Idaho Street, 7th to 13th; Bannock, 11th to 13th; Jefferson, 10th to 13th; 9th, 10th, 11th and 12th from Main to State; 7th from Main to Bannock) have been widened (in greater part from 40 feet to 52 feet, allowing full parking areas, and 4 traffic lanes) and paved;

Parking eliminated on State Street, 8th to 17th, and 4 traffic lanes established;

Widening of 16th Street as a "get away" street; new river bridge at 16th Street in cooperation with Ada County; alternate truck traffic roads taking through traffic around congested areas off of Warm Springs Avenue, Fairview Avenue and Main;

Complete new traffic signal system installed;

Metered area doubled;

New City Hall acquired and jail plans being formulated;

Rehabilitation of oiled streets completed;

Julia Davis Park drives rehabilitated;

River Drive along Boise Junior College grounds (see Boise Junior College) widened, lighting installed, and planned to be hard surfaced;

Extension of fire hydrants and mains planned, additional building and equipment planned;

Street Department building plans prepared;

Sewage disposal plant, and rehabilitation and extension of sewage system; maintenance by service charges studied and charter amended to permit it;

Improvement in garbage and trash disposal;

Study of city tax system instituted,—probability of charter amendments permitting realistic approach to, and execution of, the problem.

Mr. Griffin, in addition to his intensive practice of the law, which included serving as Assistant United States District Attorney for the District of Idaho during the years 1926-1933, devoted much time and engaged in various activities having for their purpose the improvement of the Bench and Bar generally. He was a member of the American Bar, Idaho State Bar, and Third District Bar, Associations. For many years he served the American Bar Association as a member of its committee on admissions and on committees relating to the survey of bar examinations and admissions to the practice of law. He served on important committees of the Idaho State Bar during all the times he engaged in the practice of law, including all state bar legislative committees, its judicial councils, and committees relating to the exercise of the Supreme Court's rule making powers, and on various committees relating to examination and standards of examination of abstracts of title. He served as secretary of the 1943 Idaho Code Commission and as advisor to the 1947 Idaho Code Commission. He was responsible for the legislative plan of a continuing Idaho Code Commission and the plan for maintaining Idaho's Code up to date by re-publication of its volumes as required, and its being supplemented by pocket parts.

Mr. Griffin served as secretary of the un-integrated Idaho State Bar Association during the years 1917 to 1923, inclusive, and thereafter continuously, to the time of his passing, as secretary of the integrated Idaho State Bar.

Idaho State Bar—Integrated:

In 1919 Mr. Griffin initiated the study by the then Idaho State Bar Association of the so-called Goodwin Model Act, promulgated by the American Judicature Society, having for its purpose the enactment of an appropriate law designed to integrate the Bar into a statutory body politic. At that time no state had adopted

the plan. The Idaho State Bar Association, at its 1921 meeting, considered the matter and recommended the organization of the Bar of Idaho under the Goodwin integrated plan, modified to meet Idaho conditions and law, and referred it to the legislative committee of the Bar for action.

The plan of the integrated Bar was enacted into law by the 1923 Idaho Legislature (S.L., 1923, chap. 211). The constitutionality of the Act was tested and upheld in the case of Jackson v. Gallett, decided July 23, 1924 (39 Ida. 382, 228 Pac. 1068), except the method of appropriation, which feature was cured by the 1925 Legislature, S.L. 1925, Chap. 89).

The constitutionality of the Act was further tested and upheld in the case of In re Edwards, decided March 3, 1928 (45 Ida. 676, 266 Pac. 665), relating to disciplinary procedure.

Mr. Griffin was responsible, more than any other attorney in this state, for the enactment and subsequent declaration of the constitutionality of the act creating the integrated Idaho State Bar. At the time Idaho adopted the plan (1923), only one other state had adopted it.

Standard of Admission to the Practice of Law in Idaho:

Upon enactment by the Idaho Legislature of the act creating the Idaho State Bar as a body politic (since 1923), the matter of standards of examination and admission to the practice of law was stransferred to the Idaho State Bar Commission, and has continued in its hands, except during the time (1923-1925) while the enactment was in litigation relating to constitutional questions.

The first bar examination given by the Idaho State Bar Commission was during June, 1925. The type of examination shortly after that time changed from questions based upon statute, or requiring memory work, to the essay or problem type designed to test, by fair standard, whether the applicant was possessed of a legal mind; the number of questions was reduced and the time allotted increased; also the anonymous average grading system was introduced.

From time to time thereafter the educational requirements were increased, with the intention that ultimately the highest standards of the American Bar Association be required, and the Bar cooperated with the College of Law of the University of Idaho, in increasing its standards for admission to the college and a degree.

Idaho now has most progressive, although somewhat rigid examinations for admission to the Idaho Bar.

Mr. Griffin at all times urged and worked toward adoption and observance of increased standards by the Idaho State Bar.

Bar Convention Programs:

Practical and social aspects in program presentations were commenced during the year 1937 at the instance of Mr. Griffin, and have continued to date. The central idea has been to develop and present a program of practical benefit to Idaho lawyers, with public relations kept in mind and the social aspects of annual conventions given due consideration.

During the last twelve years attendance has increased at annual conventions of the Idaho State Bar from some 40 to 50 lawyers to in excess of 175 lawyers, who, with their wives and guests, constitute an annual gathering of some 350 or more. The type and character of such programs resulted in marked increase of interest by lawyers in Idaho and elsewhere.

Mr. Griffin's remarkable skills are well reflected in the many fields of endeavor in which he so actively engaged. He possessed an unwavering will and determination to carry on in spite of physical illness. He demonstrated great courage and determination to perform services for his professional brothers and his community.

A resolution was presented by Mr. Griffin's Third District Bar Association and adopted by the District Court of the Third Judicial District of the State of Idaho, which aptly portrays Mr. Griffin's character in the following words:

> "As a practitioner, an outstanding characteristic was his full and complete observance of professional ethics; never was there occasion to question his word when given to anyone; never did he attempt to win litigation by any appeal to prejudice or passion. To him the practice of law was an honorable profession – not merely a means of livelihood; he believed that he owed a high duty to his clients but he realized that the administration of justice is more important than a passing victory; that in performing his duty to his clients he was not called upon to bring dishonor or discredit to himself or to the courts. Never did he attempt the perpetration of any semblance of fraud upon a court or condone any deception of a court. He recognized at all times that, as a lawyer, he was an officer of the court. His inherent objective in the performance of his professional duties was the administration of equal and exact justice and he did not, in his professional capacities, resort to any of what are commonly known as 'tricks of the trade'.
>
> "He gave most generously of his time and talents in helping aid and assistance of his colleagues and especially lent his helping hand to younger members of the Bar. He was unselfish in the true sense of the word.
>
> "In addition to a sound, fundamental knowledge of the law he possessed a keen analytical mind which stamped him as a lawyer of exceptional ability. Had the strength of his body equalled the strength and keeness of his mind his attainments undoubtedly would have been far greater.
>
> "Wherever lawyers gather hereafter, these attributes, and the memory of him, will live in their hearts."

Mr. Griffin's great wisdom and supreme sense of justice are indelibly impressed upon the minds of all who knew him. In addition, he was our colleague and our friend, whose delicate humor entertained us, whose ready kindness and understanding drew us to him, and whose humanity made him a man to all men.

PRESIDENT LITTON: Thank you, Mr. Smith. I think that was a fine and well deserved tribute. I might say that Mrs. Griffin was invited to be a guest of the Association this year, but she was unable to attend.

I think at this time I will appoint the Resolutions Committee. That Committee will consist of Russell Randall, Judge Donald Anderson, Ralph Breshears, Frank Martin, Jr., and Willis Sullivan. Some two or three resolutions have been handed to the Secretary, so if the Committee will ask for them, the Secretary will be glad to give you the resolutions already submitted. I would also like to ask the cooperation of anyone having a resolution in getting them to the Committee as soon as possible, because that will make the work of the Committee much easier, because they will have time to deliberate and discuss them.

At this time we will have the report of our Secretary, Paul Ennis.

SECRETARY ENNIS: Mr. President and members of the Commission and members of the Bar and guests:

I'm sure it seems strange to you, as it does to me, that I am appearing here before you in Sam Griffin's place to make the Secretary's report. Reporting to you is a simple matter but otherwise attempting to serve in the capacity of Secretary as successor to Sam with equal efficiency and effectiveness is no easy task, a fact I know all of you fully realize.

It is only in the last few months that I have acted as Secretary to the Board that I have come to a full appreciation of the very great contribution Sam has made to the Bar of this State during more than a quarter of a century that he served you so ably and devotedly.

I see no reason why I should not follow the pattern of my predecessor in giving you a concise report with the usual statistical material without the embellishments of an address of any kind.

First, as to our financial condition:

EXPENDITURES—June 1, 1951 to June 1, 1952:

Personal Services	$ 3,750.43
Travel Expense	1,649.46
Other Miscellaneous Expense	1,968.83
Social Security Fund	45.86
	$ 7,414.58

RECEIPTS—June 1, 1951 to June 1, 1952	$ 10,673.00
Balance June 1, 1951	11,272.09
	$ 22,035.09
Less Expense	7,414.58
Balance June 1, 1952, in Fund 47	$ 14,620.51

This balance checks with the State Auditor's records.

As you know, years ago a trust fund was established from which certain expenses, principally some of those in connection with our annual meeting and which are not directly related to the official activities of the Bar, are paid. The status of that account is as follows:

REPORT OF TRUST FUND
IDAHO STATE BAR COMMISSION

Assets:	6/1/51	6/1/52
Accounts Rec. (Due from State)	$ 45.08	$ 85.04
Deposit in First National Bank	1,330.02	1,457.06
Cash	2.00	10.00
	$ 1,377.10	$ 1,552.10
Gain	175.00	
	$ 1,552.10	

Gain:

Sale of Nixon-Schooler Abstract of Title	$ 50.00
Unexpended Bar Registration Fee — 1951 Meeting	120.00
Sale of books	10.00
	$ 180.00

Expense:

Secretary's Bond Premium	$ 5.00
	$ 175.00

The figures showing membership in accordance with Divisions of the Idaho State Bar are as follows:

	1951	1952	Increase
Northern Division	125	131	4 %
Western Division	301	304	1 %
Eastern Division	132	142	7½%
Military Service	5	15	50 %
Out of State Members	24	30	25 %
	587	622	5½%

The distribution of the membership in local bars and the basis for determining the voting power of each local bar under Rule 185 at this meeting is:

Shoshone County Bar Association	25
Clearwater Bar Association	60
Third District Bar Association	155
Southeastern Idaho Bar Association	96
Seventh District	62
Eighth District	51
Ninth District	43
Eleventh (And 4th) District	85
	577
Military Service	15
Out of State	30
	622

Since the last Annual Meeting of the Bar the following deaths have been reported:

DEATHS Since 1951 (July)

Wilbur L. Campbell, Grangeville	Chas. A. Sundulin, Los Angeles, Calif.
Jack Baker, Boise	Guy (W. G.) Bissell, Gooding
H. W. Tyer, Seattle, Washington	McCready Sykes, New York City, N. Y.
John R. Becker, Portland, Oregon	John H. McEvers, Kansas City
Ray E. Durham, San Francisco, Calif	E. M. Wolfe, Twin Falls
Sam S. Griffin, Boise	Fred E. Adams, Boise
Donald Callahan, Wallace	Herman R. Cooke, Reno, Nevada

The Board of Commissioners of the Idaho State Bar, consisting of Ralph Litton, President, Robert Brown, Vice President, and T. M. Robertson, Jr., has met six times since the last Annual Meeting. The members of the Board have served as

members of the examining committee in preparation and grading of examinations for admission to the Bar. Two examinations have been given since July, 1951—thirty-six applicants took the examination in August, 1951, thirty-three of them passed, three failed; on the April examination sixteen were examined and all but one applicant passed. In addition to the three Commissioners, six others, two from each Division, are on the examining committee. On behalf of the Board and the general membership I express our sincere appreciation to Kent Naylor, L. F. Racine, Jr., Joe McFadden, Willis Sullivan, Russell Randall, Clay Spear, Kenneth O'Leary and Allen Cameron who have served on that committee. Needless to say, these men, together with the Commissioners, have worked hard and long in preparing questions and grading papers. These services took them away from busy practices to their financial sacrifice.

With respect to the activities of the Board and the Secretary's office I would like to mention briefly a few items which may be of particular interest to you.

At the meeting held January 8th and 9th, 1952, the Board adopted the following resolution under authority of Rule 108:

> RESOLVED, that time spent or credits earned by any person who applies for permission to take the State Bar examination at any law school which was not at the time such person was enrolled therein or at the time such credits were received fully approved by the Council on Legal Education of the American Bar Association shall not be considered by the Board in determining or passing upon the eligibility requirements of applicants as contained in Rule 108 of the Supreme Court and Commissioners Governing Admission to Practice Law.

This resolution represents an extension of the policy of organized Bars throughout the nation to raise the standards of eligibility for admission. The members of the Board believe that a policy of high as well as fair and reasonable eligibility requirements will ultimately reflect in improving the standards of ability of members of the legal profession—to our own credit and to the benefit of those we serve.

The Commission has authorized the creation of a Junior Bar Section of the Idaho State Bar with the hope that it will conduct its activities as an integral part of the activities of the State Bar—not as a separate or distinct organization, but in furtherance of the program and objectives of the State Bar. Through that section younger members of the Bar will be afforded an opportunity to supplement their participation in the activities of the Bar.

Commencing last February issue No. 1 of Volume I of the Idaho State Bar News Bulletin was published by authority of the Board. Issue No. 6 was handed to you when you registered at this meeting today. Your Secretary as self-appointed editor makes no claim to being a qualified journalist in any sense of the word, but I do hope that you find the Bulletin readable and that at least some portions of it are interesting. Looking ahead, the Board anticipates that from modest beginning in mimeographed form eventually a printed Bulletin, similar to that published in numerous other states by the State Bar, can be published. An attempt is made to keep you informed of the activities of the Board and the local bar Associations by means of the Bulletin—all for the obvious purpose of creating and maintaining your interest in and support of your Bar and its projects. If some small measure of success in this endeavor has been realized, the expense of publishing can be justified and I feel better about taking the time to edit it. May I stress the necessity for regular monthly reports from the Secretaries of local bars so that items of interest may be included in the Bulletin.

The Board has considered two reported cases of unlawful practice in the past year. Investigations were immediately carried out and in one case the investigation itself brought about a cessation of activities complained of. The other matter is still pending before the Board awaiting further report.

Six formal complaints against attorneys alleging improper conduct have been filed in the year last past. Three complaints filed prior to the last annual meeting were dismissed by the Board after investigation showed that no cause of action existed, with one complaint being withdrawn at the request of the complaining party. Of the six complaints mentioned one was dismissed, three are ready for consideration at the meeting of the Board to be held during this meeting and the remaining two are still being investigated. The Board now has before it petitions of two persons who were suspended from the practice of the law praying for reinstatement and action will likewise be taken on these at this time.

In addition to the matters I have mentioned I could tell of many other things which have concerned the Board but you have probably read about them in the Bulletin and it would serve no purpose to repeat them at this time. Making arrangements for the Annual Meeting is, of course, a real job requiring a lot of planning. The routine office work of the Secretary in answering correspondence, preparing records of applicants to take the bar examination and numerous other incidental tasks take more time than you might imagine.

I have certainly enjoyed acting as Secretary during the unexpired term of Mr. Griffin and I can see that there is a great deal the members of the Bar could and should do to make the association a stronger and more cohesive unit and to bring about those improvements which are constantly being made in the administration of justice. Perhaps the most gratifying aspect of the work of the Bar is the ready willingness of each of you to assume and discharge the responsibilities assigned to you by the Board—which you have repeatedly demonstrated.

PRESIDENT LITTON: Thank you, Paul. Are there any questions anyone would like to ask concerning this report? If there are no questions, I shall declare the report accepted and ask that it be filed in the proceedings of this convention.

PRESIDENT'S REPORT

When I first received a copy of the printed program I was very much surprised to notice that I was scheduled to give an "Address" at this time. While I would be very happy to do so, I realize that we have much important work to do and many far better and more interesting speakers than myself. As what I consider a fair compromise, I shall give only a brief resume of the year's activities supplementing the Secretary's Report.

I mention with regret that our good friend and secretary, Sam S. Griffin, was prematurely taken from our midst. We all miss him very much. We relied upon him for good counsel and for wise guidance in the handling and directing of the bar activities. Sam, as we all called him, had been the secretary of the Bar Commission since its organization, and we might well say that he has done far more for the Idaho Bar Association than any other person.

To replace Mr. Griffin as secretary, the Commission appointed Paul B. Ennis, of Boise, Idaho. Paul is a good lawyer, an energetic person, interested in his new work, and we feel he is doing everything possible to make a good secretary, and I am sure he will become one of the best.

The Bar Commission is now cooperating with the Supreme Court and District Courts of our State in the preparing and printing of the rules of these Courts, and

the Cannons of Ethics, all of which will be combined in one small booklet. This publication is now in the hands of the printer and will soon be made available to all attorneys. It will make it possible for a lawyer to have a case in any judicial district of the state and have before him the rules of that particular court. On behalf of myself, the other commissioners and the secretary, I wish to thank the Supreme Court Justices and the District Court Judges for their interest and hard work which has made this accomplishment possible.

It was called to the attention of the commission by one of our members that some states are issuing the members of their Bar identification cards. We thought this a good idea, and soon our Bar Association will be furnishing each lawyer an identification card which can be carried in the wallet. It is planned, as soon as possible, to give each lawyer such an identification card at the time his or her annual license is issued.

Since becoming a member of the Bar Commission I have attended, whenever possible, every Bar meeting of importance and for which I was eligible. I am impressed with the institute type of program and feel that it is becoming more popular and valuable each year. I, as well as other members of our Bar, attended the Regional American Bar Association meeting at Canyon Hotel, Yellowstone Park last month. Here, as at the meeting of the American Law Institute in Washington, D. C., last May, I happily observed that most lawyers like to combine work with pleasure and study some particular branch of the law while attending a convention. The institute affords this opportunity.

Utah and Montana held their state conventions in conjunction with the Yellowstone Park American Bar Association regional meeting. The Association furnished most of the programs for these state conventions, thus saving the states considerable money. One secretary estimated that his state had saved approximately $900.00 by holding their annual meeting in conjunction with this regional meeting. In addition to this, he stated that it was by far the best program that they have ever had. It is definite that the American Bar Association is interested in holding a Regional meeting in Idaho in 1954 or 1955. I wish to recommend that our Bar Association give this matter serious thought and consideration.

Idaho, like every other state bar, has many problems. However, I do not feel that we have any more, or any bigger problems than the other states. I do believe and recommend we continue to improve our public relations. This, I think, in our State has been neglected.

The referral plan is doing a lot in this field, particularly in the more populous areas. Under this arrangement a person needing legal advice has a medium through which he can obtain the services of a competent lawyer, for a fixed time and for a definite fee. With this assurance many people consult a lawyer for the first time and continue to do so in most every instance when their needs require it. They also direct others to the proper place for the obtaining of legal service. I am delighted to hear that the Pocatello Bar has inaugurated this plan, and that it is working out well. The public should realize that practically every successful business and every successful person knows the value of, and has legal advice in business matters of importance.

To render the services now required of lawyers, it is necessary that their education be a continuing one in order that they may keep abreast of the changing laws and rules governing our businesses and every day life. There are, as we all well know, many new fields of law, new boards are constantly being created, and the rules of procedure and administration are endlessly being changed and amended.

The American Bar Association, the American Law Institute, and other organizations are rendering an invaluable service to the busy lawyer in helping him keep informed and up-to-date in his practice.

One of the criticisms most common among laymen of the courts and lawyers is that the legal processes are too slow. We have, I think, in this state eliminated much of the unnecessary delay. It is generally believed, and I share this opinion, that the adoption of the federal rules of procedure, or a modified form thereof by the State Courts, would aid the administration of justice and shorten the time and costs of litigation. This, I am informed, has been the experience of other western states which have made the change.

Time will not permit me to discuss many other ways in which I think our public relations can be improved. However, I will briefly mention in this field, free legal advice for those unable to pay and needing it, public appearances of lawyers at meetings where they are needed, discussion panels, through which the public becomes acquainted with the lawyer, his problems, and the necessity of the work he is doing; also the entering into agreements with accountants, banks, real estate dealers, etc., as to what services they will render and as to what acts will be considered the practice of law.

I am convinced that lawyers should assume more responsibilities in civic affairs, the enacting of legislation, and the doing of many other vital things for which their training makes them best qualified.

I regret to say that each year seems to become more critical than the last, and that there is more uncertainty, chaos, and disorder in the world than possibly ever before. We are perilously threatened from both within and abroad. I feel that in restoring order to the world that the lawyers, as in all other times of crisis, must assume the leadership. It is not enough to say that we believe in the American form of Government and institutions, we must diligently work to preserve and maintain our freedom and way of life. It has truthfully been said that the preserving of liberty is as difficult as the obtaining of it in the first instance.

In all countries where dictators have taken over, one of their first acts has been to abolish the free bars and courts of justice where they existed. If we are to remain a free nation and preserve our institutions and form of government, our courts, and the legal profession, must remain independent and unshackled, free from political influence, special interest, or pressure groups. In the eyes of true justice all people are equals receiving equal protection and equal rights. The members of our profession are entrusted with the preservation of these sacred rights.

In conclusion I wish to state that the other members of the commission, the secretary, committees, and various individuals have worked hard and faithfully upon their respective assignments to the neglect of their businesses, in order that they might be of service to our organization. I wish to thank them and also thank those who have assisted in the preparing of the bar examination questions, and the grading of these examinations. Any success that I have enjoyed during the last year is due to the fine support and cooperation which I have received from my fellow lawyers. May I also say that I have enjoyed being president of the organization for the past year, and I shall always regard it as one of the very outstanding honors ever conferred upon me.

At this time we are going to have an address on pre-trial conferences. We are fortunate to have with us our Federal Judge whom I feel is very, very well prepared to give it. At this time it gives me great pleasure to introduce Honorable Chase Clark, U. S. District Judge. (applause)

JUDGE CLARK: Mr. President, members of the Commission, Justices of the Supreme Court and District Judges, members of the Bar and guests: The subject that I was called upon to speak to you about today is a very unusual subject and has very little emotion in it. It would be as simple to implant the breath of life into a beautiful wax model in a department store window as to put any emotion in the talk that I am supposed to give today.

I have labored hard to try and outline to you the pre-trial operation. I understand that my remarks were just to be preliminary to an actual demonstration of a pre-trial conference here today. A pre-trial is a very simple matter. I look down and I see my wife. She has held many a pre-trial with me the subject of it. (laughter) And no doubt you gentlemen to whom I am speaking have had such pre-trials conducted at your homes. Police officers in traffic accidents sometimes hold a pre-trial at the scene of the accident. (laughter)

There is a story about a Rabbi that brought a very powerful automobile, and he spent his time trying it out and breaking all speed records and racing up and down the streets. A Priest that was a neighbor of his became somewhat jealous of the Rabbi's performance. So he went to a dealer and asked him to sell him a car that was more powerful and faster than the one owned by the Rabbi, and he purchased such a car. That made two cars racing up and down the streets.

One day the Rabbi pulled out just ahead of the Priest and had his foot heavy upon the gas pedal, and the Priest took in after him. They were both going very rapidly until they aproached the Holland Tunnel, and the Priest was having a little difficulty overtaking the Rabbi, so he placed the gas to the floorboard. And just then the Rabi slowed down for the Holland Tunnel, and there was a crash.

A good Irish policeman was on the scene and came down, and he looked the situation over and saw the Priest, and he said, "Father, how fast was this fellow backing up when he hit you?" (laughter)

So you see before pre-trial was adopted by the legislature, there were pre-trials going on all over the country.

I am going to make this very short and snappy. I don't want to refer to my family too much, but one time my daughter told me, "Pop, when you get up to talk, if you haven't too much to say, make it short and you will get the acclaim of the audience. Just tell them what is on your mind and don't try to see how long a speech you can make."

The subject of my short talk to you today concerns another effort on the part of litigants to contend with undue and unnecessary delay and expense in the handling of cases in the various Courts.

It is a relatively simple procedure and the purpose is to prepare the case for an effective trial by formulating the issues. This is the Pre-trial practice.

Before the Pre-trial rule was adopted by the legislature it was used by some Courts for the purpose of reducing the time and expense involved in the trial of cases and it was felt, from those experiments, that it had some advantages and should be called to the attention of the Advisory Committee appointed by the United States Supreme Court to draft the Federal Rules of Civil Procedure. After a thorough study by this committee Rule 16 was drafted and approved by Congress. At first it was more or less in an experimental stage but now it is regularly

established feature of the administration of Justice in many jurisdictions.

RULE 16 provides: Pre-trial Procedure; Formulating Issues.

In any action the Court may, in its discretion, direct the attorneys for the parties to appear before it for a conference to consider:

1. The simplification of the issues.

2. The necessity or desirability of amendments to pleadings.

3. The possibility of obtaining admissions of fact, and of documents which will avoid unnecessary proof.

4. The limitation of the number of expert witnesses.

5. The advisability of a preliminary reference of issues to a Master for findings to be used as evidence when the trial is to be by jury.

6. Such other matters as may aid in the disposition of the action.

The method of conduct for pre-trail varies somewhat but the one generally established is as follows: The Court, when counsel request it, confines the discussion to voluntary agreements. In cases that I have had before me I have only gone as far as I felt proper under stipulation of counsel. However, some Courts, I have been advised, go considerably further and insist on counsel taking a position but I don't think this is the general practice, nor do I think it is a good practice. The general rule is that the Judge asks counsel for the plaintiff to state the substance of his case and then for the defendant to do the same. The Court may inquire if there are any amendments to the pleadings that should be made, by that time a number of questions may be disposed of; it may be agreed that certain exhibits may be admitted without the formality of laying the foundation for their admissibility thereby saving the expense and time of the witnesses which would be required to lay the foundation for their admission. The question of the number of expert witnesses, if any, may be determined,—this too saves time and expense. The Court may go so far as to ask counsel whether there is a prospect of settlement. However, at the close of the pre-trial hearing I think the better rule is not to say too much about the prospect for settlement lest Counsel may feel that there is some suggestion that a settlement is advisable and that the Court has some impression, gathered from the pre-trial as to which party should prevail. At the conclusion of the hearing an order is made containing the results of the conference.

These conferences can be held in open Court with all the formality of a trial or the Court may invite counsel to hold the conference in Chambers and the Court and counsel have a round-the-desk meeting and talk the different questions over.

I have in mind one pre-trial conference which I held, at the suggestion of counsel, recently, where a man and wife lost their lives in an accident. If the man died first then children of the wife, by a former marriage were entitled to the insurance, and on the other hand, if the wife died first the children of the husband (also by a former marriage) were entitled to the insurance. All questions of heirship and other matters were disposed of at the pre-trial conference, leaving only one issue, that was, who died first? Considerable time and expense was saved by the pre-trial, which only took a few minutes, and the one issue was not discussed so that the Court had no facts which might tend to influence it before the trial.

I think it can be readily seen that it is necessary to have complete cooperation of counsel in a case to secure good results from a pre-trial session.

I have just generally covered the procedure, however, I understand that you are going to have a demonstration of its workings. You, no doubt, will see from that

demonstration that the Judge will obtain an intimate knowledge of the problems and difficulties confronting the trial lawyer and help them in their endeavor to properly present their case.

The lawyer who practices before the Federal District Court here in Idaho is faced with a different situation than lawyers in the more populated states where there are two or more Judges. In these larger districts the Chief Judge (and I am only referring to Federal Courts) when the case is filed and comes up for the pre-trial conference, either hears the pre-trial himslf or assigns it to another Judge; in either event, the Judge hearing the pre-trial and making the order then steps out and the trial is assigned to another Judge. This I cannot do in the District of Idaho, and it raises a serious question as to whether a Judge who has presided over a pre-trial, where, — if it is properly conducted, — the lawyers make a complete and free statement and the Court and counsel enter into a general discussion of the disputed issues, does not have a strong impression at least, not only as to the issues but as to which party should prevail in the final outcome of the case.

You always excuse a member of a jury panel who has become acquainted with the facts before trial. Is a Judge in a different position? This may not raise a serious question if the Court, — where it is not able to assign the case to another Judge, — limits the matters in pre-trial to a stipulation of counsel and draws the Order on the stipulation alone without entering into too full a discussion on the merits.

I will say in conclusion that no fixed rule should be made to apply to cases in general but each application for a pre-trial should be decided upon the circumstances in each particular case.

I have covered only generally the pre-trial rule; I have tried not to burden you with its operation in too much detail. However, it has been a pleasure to appear before you.

PRESIDENT LITTON: Judge Clark, we appreciate most highly your fine talk. I know it is a form of procedure that some lawyers are more familiar with than others.

We are now ready for our pre-trial conference demonstration, and since Paul Ennis has been instrumental in making the arrangements, I will ask him to take over.

INTRODUCTION

In this demonstration of pre-trial conference, for which provision is made in Section 5-380 i.c., an effort is made to show you how each attorney and the judge can use pre-trial conference to the advantage of all concerned, including the jury.

You will see that both of the attorneys have examined their files and know their facts before engaging in the conference. In view of this, benefits in the saving of time—and time is the lawyer's saleable commodity. It is believed that it will be of economic benefit to the bar.

You will notice in the following demonstration that the judge does not attempt to bludgeon either of the parties into an unsatisfactory settlement and that it is up to the Court also to know what the issues are and the particular problems of the respective parties. When these elements are present the history of pre-trial conferences show that even trial lawyers agree that the saving of time in proving the authenticity of documents, photographs and plats, accounts and other items is well worth while if nothing further is accomplished.

Mr. John J. Peacock of the Shoshone County Bar is, on short notice, substituting for the Honorable Albert J. Graf as Judge; Mr. Clay V. Spear of the Coeur d'Alene Bar represents the defendant and Mr. Robert Elder of the Coeur d'Alene Bar represents the plaintiff.

We believe that this demonstration, coupled with Judge Clark's remarks, will be enlightening and of assistance to the members of the bar in the future.

DEMONSTRATION OF PRE-TRIAL CONFERENCE

DOLAN v. DESMOND, et al

Judge Peacock: Gentlemen, this conference has been called to pre-try the case of James Thomas Dolan against Joseph Desmond and Robert H. Smith. Mr. Elder, I believe you represent the plaintiff?

Mr. Elder: That is right.

Judge Peacock: Mr. Spear, do you represent both defendants?

Mr. Spear: No, I just represent Mr. Desmond.

Judge Peacock: Who represents Mr. Smith:

Mr. Elder: I don't believe it will be necessary for Mr. Smith to be represented at this conference. We've reached a settlement with him and it's my intention to amend, or take a nonsuit and dismiss as to him.

Judge Peacock: Well, I don't see any point in taking a nonsuit just to get one defendant out of the case. One of the main purposes of pre-trial is to get any amendments out of the way. Did you give notice to Mr. Spear?

Mr. Elder: Yes, aproximately twelve days ago.

Judge Peacock: Are you going to offer any objection to the amendment, Mr. Spear?

Mr. Spear: Well, I don't know. Mr. Elder has some peculiar theories about this case, and unless we can reach some pretty definite agreements today about the way the thing happened, I think I'm going to object to everything he does.

Judge Peacock: I'm not too familiar with the pleadings in the case, but from the cursory examination I gave them a little while ago it seems to be an ordinary personal injury case that happens every day. Correct me if I'm wrong, but I gather from the pleadings that in the early morning hours of November 28, 1951, at about 2:30 a.m., Mr. Dolan, the plaintiff, started to walk across Sherman Avenue in Coeur d'Alene from the northeast corner of the 4th street intersection to the northwest corner. Just about the time he reached the first streetcar track in the center of the street, the defendant, Smith, who was driving north on Sherman Avenue, struck him and knocked him over on the pavement on the west side of the car tracks where he was struck again by the defendant, Desmond, who was driving south on Sherman Avenue. Is that about what happened?

Mr. Elder: In general, that's it, Your Honor.

Judge Peacock: Well, what is the difficulty?

Mr. Spear: I think Mr. Elder contends that because two cars were involved there were two separate accidents. If I perceive correctly the sequence of his argument, he next contends that since there were two separate accidents, his client is entitled to recover separately from each defendant.

Judge Peacock: Is that right, Mr. Elder.

Mr. Elder: That's about it, Your Honor.

Judge Peacock: Why did you join the defendants in the first place then?

Mr. Spear: I think the theory just occurred to him after the nice settlement he got out of Mr. Smith.

Mr. Elder: When I first got into the case the suit had already been filed against Mr. Desmond and Mr. Smith. After investigating the facts I concluded that it was rather obvious that two accidents occurred. Mr. Smith and his attorneys saw the facts as we did and we reached a settlement on a covenant not to sue. I therefore propose to amend and dismiss as to Mr. Smith.

Judge Peacock: I don't see anything wrong with that if there were really two separate and distinct accidents.

Mr. Spear: That's just it, Your Honor, whether there were two separate and distinct accidents, or just one accident involving two cars with resulting injuries to the plaintiff, is a question of fact for the jury. If the jury finds that there was only one accident, then the defendants were joint tortfeasors and the amount paid Mr. Dolan for his covenant not to sue Mr. Smith becomes very important.

Judge Peacock: That seems reasonable enough. Certainly there is no need, however, for plaintiff to proceed against Mr. Smith if he has already given him a covenant not to sue. On the other hand, if there was only one accident it wouldn't seem that the plaintiff has any right to complain if the amount he received from Mr. Smith for the covenant not to sue is taken into account on the overall damages.

Mr. Spear: We have no objection to amending the complaint as to Mr. Smith, if plaintiff will agree to trying the case to the jury on both theories and letting the jury consider the amount received from Mr. Smith if they decide that only one accident occurred. We're going to insist on trying it on that theory anyway, and it would help considerably if we could agree now on some of the matters involved. It's going to be complicated enough as it is – since this new theory of two accidents occurring within the space of a few seconds came into the case.

Mr. Elder: On the basis of the facts I don't see anything complicated about the theory. We're willing to go to the jury on both theories and let them decide on the basis of the facts. If they determine that only one accident occurred, then of course they should deduct from the total damages the small amount my client received from Mr. Smith. We'll agree to proceed on that basis.

Mr. Spear: That's satisfactory with me.

Judge Peacock: Then you may amend the complaint. Have you prepared it already?

Mr. Elder: Yes, Mr. Spear received a copy about twelve days ago. Here is another copy.

Judge Peacock: Any objection to the amended complaint, Mr. Spear?

Mr. Spear: No, Your Honor. I'll need some time, however, to prepare my answer to the amended complaint.

Judge Peacock: Ten days?

Mr. Spear: I think that will be sufficient.

Judge Peacock: All right. File it within ten days. Are you going to come up with any new theories in your answer?

Mr. Spear: No, Your Honor, just about what I've said before. One new theory per case is enough, I think.

Judge Peacock: Shall we proceed today then and see if we can agree on how

it happened, and let the jury decide what happened?

Mr. Elder: We're ready to proceed, Your Honor.

Mr. Spear: We're ready.

Judge Peacock: Who owned the car which struck the plaintiff?

Mr. Spear: We admit that Mr. Desmond owned the car, Your Honor.

Judge Peacock: Do you admit that Mr. Desmond was driving?

Mr. Spear: Yes, Your Honor.

Judge Peacock: Does the defendant admit that the automobile driven by him struck the plaintiff?

Mr. Spear: We admit that there was contact. There may be some question as to just how, and on what part of his body contact was made.

Judge Peacock: Any question as to the time and place?

Mr. Spear: We admit that the time and place as alleged in the complaint is approximately correct. I think there is considerable difference of opinion as to the interval of time which elapsed between the time plaintiff was struck by Mr. Smith's automobile, and the time he was struck by Mr. Desmond's car. That would seem to be an issue for trial.

Judge Peacock: All right. What about the condition of the streets, weather, visibility, speed of the cars, and so forth?

Mr. Spear: Well, we're going to contend that plaintiff was contributorily negligent. Sherman Avenue at that corner is plenty wide, visibility and view were good, both cars were traveling at reasonable speeds in opposite directions, with their lights on and in good order. It is inconceivable that plaintiff could have been other than careless for his own safety in putting himself in a position to get hit — and by two cars at that.

Mr. Elder: We have a map or plat here showing the location. I had an engineer prepare it. I would like to inquire of Mr. Spear whether he will let this map be introduced in evidence, as far as all questions, admitting foundation, concerning grade, width of the street, location of the street car tracks, profile.

Mr. Spear: Who prepared it?

Mr. Elder: Mr. Johnson, of Johnson and Doolittle, Consulting Engineers.

Mr. Spear: Did Mr. Johnson himself prepare it?

Mr. Elder: Yes.

Mr. Spear: I know Mr. Johnson. He is very capable. I will admit the map.

Mr. Elder: Please note the indicated location in the street where plaintiff was when struck by Mr. Smith's car, and the indicated location when struck by defendant Desmond's car. Will you admit those as being approximately correct? I doubt if anyone knows the exact location?

Mr. Spear: (Examining map) Yes, I'll admit those marks represent the approximate location of plaintiff in relation to the street profile when he was struck by the two cars. However, I don't admit anything as to the vertical or horizontal position of plaintiff's body when hit — that is, as to whether he was stooping, standing, sitting — or lying.

Mr. Elder: Very well, It is our contention that on the morning, and at the time in question, the weather was clear, visibility good, and the street pavement dry

– are you going to require proof of that, other than by testimony of the ordinary witnesses to the accident?

Mr. Spear: If you mean weathermen, street cleaners, and people like that – no. I'll admit generally that at that time, on that date, in that section of Coeur d'Alene, the weather was generally fair, visibility good and the streets dry. However, conditions at that particular intersection and at that particular moment would seem to be subject to testimony and proof by those present. After all, your client may have jumped at the wrong moment to avoid a Coeur d'Alene bus!

Mr. Elder: Well, I didn't want to have to call any more witnesses than are necessary.

The Court: Gentlemen, what about the sequence of events at the time of the accident, any change of agreement on any of those so as to simplify the issues?

Mr. Spear: Well, Your Honor, I think we're pretty well agreed that for some unknown reason the plaintiff started across this particular street at that particular time. That in some way he was struck by Smith's automobile and then, in some way came into contact with Mr. Desmond's automobile on the other side of the car tracks. I think that exactly what happened during that period of time, and how it happened, and whose fault it was are all matters for the trial. I don't see how we can admit anything from the time the plaintiff departed from the safety of the northeast curb. We do admit, of course, already, that contact was made in some way between plaintiff's body and Mr. Desmond's car.

Judge. Peacock: All right. Those matters are for trial then. How about the nature and extent of injuries, have you had a physician examine plaintiff yet?

Mr. Spear: Yes, our physician has examined the plaintiff while he was in the hospital. Mr. Elder and I have discussed the hospital and clinical records and I waive foundation as to them.

Judge Peacock: Good. How about hospital bills?

Mr. Elder: Mr. Spear has seen them also.

Mr. Spear: That's right. There will be no objection to admission of the hospital bills.

Mr. Elder: One thing we didn't discuss, Mr. Spear, and one I'd like to ask about now; I had these X-rays taken by Dr. John Sexton during an examination of plaintiff. Will you admit them?

Mr. Spear: Well, I haven't seen them and would want Dr. Davids to see them but I don't expect there will be any difficulty about the X-rays.

Judge Peacock: Will you make the X-rays available to Mr. Spear, Mr. Elder?

Mr. Elder: Yes, Your Honor. He can have them now.

Mr. Spear: (Taking large brown envelope from Mr. Elder) I'll let you know within the next few days whether or not I'll admit them.

Mr. Elder: Another thing, Mr. Spear; regarding the deposition of James Blake, will you require further foundation than the mere offering of it?

Mr. Spear: You mean – will I concede that Blake is beyond the jurisdiction of the court? Yes, I'll concede that. Now I have something I want to ask you about. I have here a statement taken shortly after the accident from Joseph Doaks, who was a passenger in the car with Mr. Desmond at the time of the accident. Since that time, Doaks has been drafted and is now in Korea with the infantry. I can't get his deposition until he gets back in the rear areas away from the front

lines. We don't know when that will be, but sooner or later we can get his deposition.

Mr. Elder: What do you want me to do, go up to the front lines in Korea and get his deposition for you?

Mr. Spear: Not if you charge your usual fee! I'm wondering if you will admit the written and signed statement of Doaks without further foundation?

Mr. Elder: I don't see why we should do that. The statement isn't admissible, is it?

Mr. Spear: Not unless you consent to its admission. However, unless you do consent, I'll have to ask for a continuance until I can get Mr. Doak's deposition, and that may take some time – the way things look right now.

Mr. Elder: Well, we don't want to seem unreasonable, and my client is anxious to get to trial on this case and get it over with, but unless the court indicates that the continuance would be granted, I won't consent to the admission of the statement.

Judge Peacock: Why do you consider this witness to be important enough to warrant a continuance, Mr. Spear?

Mr. Spear: Well, he was the only passenger in the car with Mr. Desmond. He was an eye witness to what transpired at the time of the accident. His testimony is material, and unless Mr. Elder will admit the statement as that of a witness waiving his right to cross-examination, I think I can show sufficient ground for a continuance, and will certainly do so.

Judge Peacock: Have you been diligent in attempting to obtain the witness's deposition?

Mr. Spear: We certainly have, Your Honor, and I can show that also – to your complete satisfaction, I think.

Judge Peacock: The court certainly would not be disposed to compel you to go to trial without the testimony of a material witness, provided you can make a satisfactory showing of such materiality, due diligence, and that there is a reasonable chance of obtaining the witness's deposition.

Mr. Elder: In view of the court's statement, and my client's wish that we proceed as expeditiously as possible with the case, I won't object to admission of the statement but will reserve the right to object to the relevancy, materiality and competency of that which the witness says in the statement.

Judge Peacock: That is entirely proper and the court will rule on such matters when objections are made. Would you gentlemen prefer to go over the statement in conference prior to trial and have the court rule on the parts it considers admissible?

Mr. Elder: I would prefer that, Your Honor.

Mr. Spear: I have no objection.

Judge Peacock: Very well. Now, what about proof of injuries? I take it that since Mr. Elder contends that there were two separate accidents and you, Mr. Spear, contend there was only one, there will be expert medical testimony on both sides as to the nature, extent and cause of the various injuries sustained by the plaintiff. Is that correct?

Mr. Elder: Since the plaintiff suffered a number of different injuries, some internal, it is important, under our theory of the case, to prove by expert testimony the nature and extent of those injuries resulting from the blow by Mr. Smith's car,

and the nature and extent of the separate and additional injuries resulting from the blow by defendant Desmond's car.

Mr. Spear: Ordinarily, I would not require much in the way of expert testimony, but if plaintiff is going to call in the Idaho Medical society to try to prove plaintiff's red corpuscle count after contact was had with each automobile, then I'll have to try to meet his efforts at proof in that regard. I think, however, that a case of this kind would be one in which the Court might properly restrict the number of expert witnesses for plaintiff.

Mr. Elder: Well, I desire to call only those that I consider absolutely essential to make out my case. I expect to call the intern, Dr. Ramsey, who first examined Mr. Dolan and rendered first aid when he reached the hospital. Then I expect to call Dr. Osborn, the surgeon who operated shortly thereafter and maintained a consulting interest in the case throughout. Of course, it is necessary that I call Dr. Rayburn, the internal medicine man who was the attending physician, and two orthopedists, Doctors Johnson and Hazelton, who have treated Mr. Dolan. Then, it would seem essential that I call Mr. Dolan's family physician, who is familiar with his condition prior to the accident; that is Dr. Fitzgerald, and I have one expert, Dr. Walker, a psychiatrist, who has not seen Mr. Dolan, but will testify as to the permanent, temperamental and personality dislocations usually resulting from successive blows by two different automobiles within a short space of time.

Mr. Spear: I withdraw my remark about calling the Idaho Medical society—make it the American Medical association.

Judge Peacock: Of course, Mr. Elder, you are entitled to expert testimony, but the court cannot permit you to proceed beyond reasonable limits. I realize that knowledge, expert knowledge, in the field of medicine is highly specialized, but we cannot cover the whole field in one trial, on one case. I think you are entitled to call the family physician, the surgeon who operated, and the attending physician who is different from the family physician. Ordinarily, that should be sufficient to cover all aspects of the case. However, if you prefer, you may substitute one of the orthopedists for either the family physician or the attending physician. Three ought tc be enough.

Mr. Elder: I will call the family physician, the surgeon and Dr. Johnson, the orthopedist.

Judge Peacock: Very well, that gives you a general practitioner, the operative surgeon and a specialist. They should be able to cover it. Anyway, I understand that Dr. Johnson, the orthopedist, makes a good jury speech, and it's the jury that will decide the issues.

Mr. Elder: Dr. Johnson may have laryngitis the day of the trial. I would like to ask if I am bound by the designations I have made?

Judge Peacock: No, you may call any three. How about your side, Mr. Spear?

Mr. Spear: Well, I'd like to call as many as the plaintiff – three.

Judge Peacock: That would make six experts in all. That's too many for one jury.

Mr. Spear: That only gives me two in addition to Dr. Jones who examined the plaintiff in the hospital. The plaintiff has two in addition to the operating surgeon.

Judge Peacock: The surgeon didn't attend the plaintiff all the way through.

Besides, plaintiff is entitled to the family physician in any event. You may have two.

Mr. Spear: Do I have to designate them?

Judge Peacock: No. Now, gentlemen, we have limited the number of experts, we have settled the pleadings, we have agreed upon the admission of some matters about which there is no serious dispute, and we have pointed up some of the issues for trial. How about this matter of plaintiff's settlement with Mr. Smith for a covenant not to sue; that seems to be a matter that will assume some importance at the trial.

Mr. Spear: It will.

Judge Peacock: Mr. Elder, do you care to divulge the amount of your settlement with Mr. Smith?

Mr. Elder: No, Your Honor.

Mr. Spear: I don't see how we can get very far until it is divulged. I am entitled to an instruction to the jury that if they find from the facts as presented that only one accident occurred, then in arriving at the total amount of damages plaintiff can recover in this case, they shall consider the amount received by plaintiff from Smith and deduct it from the total damages resulting from the entire accident. How can the jury be properly instructed if we don't know the amount you have already received?

Mr. Elder: I don't admit that you are entitled to any such instruction. If the jury knows the amount plaintiff received for one accident, it obviously will influence their thinking in determining the amount he should recover for the second accident.

Judge Peacock: You mean that even though the jury finds that two accidents occurred, with separate and distinct injuries, that they will tend to lump the recoverable damages together as though resulting from one accident?

Mr. Elder: That is exactly right, Your Honor. I remember one case almost identical to this one where the evidence proved almost conclusively that two accidents occurred. A settlement had been reached with one defendant who was not involved in the trial. Because of the nature of the evidence presented, it was expected that the jury would reach their verdict in short order. As it turned out later, they did, but they couldn't agree on the amount of damages recoverable in the case submitted to them. After the jury had been out about eight hours, and after several inquiries from the court as to whether they were near a verdict, they came back in and the Foreman said, "We're almost agreed, Your Honor, but what we want to know is, how much did the plaintiff get when he settled with that other guy."

Judge Peacock: I can see the difficulty. What of Mr. Spear's contention that he is entitled to an instruction as to the amount?

Mr. Elder: I don't think he is entitled to any such thing. It would prejudice my client's interest in this case, which is the only lawsuit being tried.

Mr. Spear: If only one accident occurred, then the defendant is entitled to have the amount of the settlement taken into account. That's settled law.

Mr. Elder: That is true. But the court can see that the plaintiff receives but one satisfaction. If the jury determines that one accident occurred then they should find the total damages resulting therefrom. When the verdict is returned the court can then deduct the amount of the settlement and enter judgment for the

remaining amount, if any. The defendant is fully protected by the court.

Judge Peacock: Gentlemen, I am in some doubt about this matter, and the right of the defendant to the instruction claimed. In order to save time at the trial, would you care to submit briefs on the point about a week before trial so I will have a chance to study them?

Mr. Elder: That will be all right with me, Your Honor.

Mr. Spear: It is satisfactory with me.

Judge Peacock: Will counsel exchange briefs?

Mr. Elder: Well, Your Honor, I don't mind saying that if I have to submit the brief to Mr. Spear it will be different than it will if I don't.

Judge Peacock: You mean you don't want to advise Mr. Spear as to your authorities?

Mr. Elder: That's right, Your Honor, I do not want to divulge all of my authorities to Mr. Spear at this time.

Judge Peacock: Frankly, Mr. Elder, that's a new one on me. It isn't expected that you divulge any facts of your case to the other side, but the court will certainly require that you furnish them with a copy of the brief. A confidential brief filed with the court by one side would not be of much value to the court. Sooner or later the question in dispute, which is one of law as to whether a particular instruction should be given, must be decided by the court. It is a question on which the court is in doubt. The proposed procedure of submitting briefs on the sole question of law will in no way jeopardize your presentation of the facts of the case to the jury at the trial, nor prejudice the interests of your client. Counsel will be required to exchange briefs.

Mr. Elder: Do I understand, Your Honor, that the question to be briefed is confined solely to the giving or refusing to give an instruction to the jury embodying the amount received by plaintiff in the settlement of the other accident, and not to include other instructions that may be pertinent to the case?

Judge Peacock: That is correct. The court is in doubt on that one point. There may be others. If your contention on this question of amount – that the jury would not be able to divorce the amount from the overall damages – is correct, then an erroneous ruling on the point would probably be sufficient grounds for reversal and a new trial. That we want to avoid if possible. I will rule on the other instructions when the time comes and they are presented. A correct ruling on the amount question would seem to be essential if we wish to avoid a second trial.

Mr. Elder: I will furnish Mr. Spear with a copy of my brief on that question.

Judge Peacock: Good. Then I shall expect briefs from both of you to be filed with me at least seven days before trial call. Is there anything else?

Mr. Spear: In order to avoid a possible controversy later over the amount received by plaintiff from Mr. Smith on the settlement, it might be well to stipulate as to the exact amount received. I know the amount paid him.

Judge Peacock: Do you have any objection to stipulating now as to that amount, Mr. Elder.

Mr. Elder: No, Your Honor. We will stipulate now that plaintiff received $5,800 from Mr. Smith, in return for plaintiff's covenant not to sue Mr. Smith.

Judge Peacock: Is that your understanding of the amount received, Mr. Spear?

Mr. Spear: Yes, we will agree that that is the amount paid by Mr. Smith and received by plaintiff.

Judge Peacock: That's settled then. Is there anything else?

Mr. Spear: I have nothing else to discuss at this time.

Mr. Elder: That seems to take care of all that I have in my notes.

Judge Peacock: When do you want to try this case?

Mr. Elder: In view of the concession made in the case of Mr. Spear's witness in Korea, Mr. Doaks, we'd like to get at it as soon as possible.

Mr. Spear: After Mr. Elder's admission of Doak's statement, I can't very well ask for delay.

Judge Peacock: Well, there are still some matters to be done -- examination of the X-rays by Mr. Spear, submission of briefs, and arranging for the expert witnesses to be available. The notice to them should not be too short. Suppose we set the calling of the Jury two weeks from next Tuesday. That will be Tuesday, the 29th of July.

Mr. Elder: That will be satisfactory with us.

Mr. Spear: That is all right with me. I hope we can wind it up within two days. I have a hearing in Lewiston on the 31st.

Judge Peacock: With the matters settled here today I'm sure that we can. How do you feel about it Mr. Elder?

Mr. Elder: It shouldn't take long now. Not over a day and a half.

Judge Peacock: Good. July the 29th it is then. Gentlemen, there is one thing that we haven't discussed, and it should be mentioned before we finish. It seems from our discussion here today that you are agreed on most of the matters involved in this case. Of course, there is the difference in theories as to whether one or two accidents occurred, but I take it that the main question involved there is the period ot time between the first contact and the second. I don't know what that period of time was, and I imagine there will be a difference of opinion among witnesses. At least an issue is involved and that will be for the jury to decide. Then there is the question of damages, which will also be for the jury. I suppose you both have a fairly definite idea as to what can be shown on the trial?

Mr. Elder: I think so, Your Honor.

Judge Peacock: May I ask then if you have discussed settlement?

Mr. Spear: Yes, Your Honor, we have had some discussion along that line. We didn't get very far.

Judge Peacock: That is all right. The court has no desire to urge you to settle unless it seems to be for the best interests of your clients. I always urge counsel to consider the possibilities, especially, as here, in a case where the areas of disagreement have been narrowed considerably from what they were when we started. If, after evaluating the interests of your clients, you think that further discussion in that regard might be in order, then I hope that you will not hesitate to contact counsel on the other side.

Mr. Elder: Thank you, Your Honor. I will get in touch with Mr. Spear if my study of the conference today, and the agreements reached, seem to indicate that further possibilities are present.

Mr. Spear: I will do the same, Your Honor.

Judge Peacock: Thank you, gentlemen. Is there anything else?

Mr. Elder: Nothing else.

Mr. Spear: Nothing further here.

Judge Peacock: Then I will dictate the pre-trial conference report:

PRESIDENT LITTON: I wish to take this opportunity to thank you fellows for a very fine discussion.

(Whereupon a number of announcements were made, and the convention was recessed until 9:30 a.m., Friday, July 11, 1952).

FRIDAY, JULY 11, 1952,

9:30, A. M.

PRESIDENT LITTON: The meeting will please come to order. Russell Randall has asked me to announce that the Resolutions Committee will meet immediately following Mr. Belli's address in room 233A of the Lodge. We are going to try to keep these matters of importance on the bulletin board, so if you will consult the bulletin board, you will find that it will help you in finding your various committees and in following the program.

We are very fortunate this morning to have a speaker with a national reputation and outstanding in his field. I am going to ask Mr. Robertson, Commissioner of the Western Division, to introduce him.

MR. T. M. ROBERTSON: Gentlemen: During the course of the past twelve months, your Bar Commission has given considerable thought and study to the problem of continuing legal education. The Commission generally felt that the institute type of annual meeting might prove very beneficial to the members. The principles of justice, I take it, are ancient and immutable, but there are certain facets of the problem that from time to time become more prominent. We engaged in some correspondence with the American Law Institute, which is a branch of the American Bar Association, and we found that there were available for meetings of this type quite a large panel of members of the American Bar Association who were willing to come and give their time to conduct institutes for the benefit of the profession generally.

Out of the men who were recommended to us by the American Law Institute, we selected a man who we thought looked like a good "single package" for the discussion of a large number of questions. We wrote to Mr. Dobrzensky, and he accepted our invitation to come up and address this meeting.

Mr. Dobrzensky is a practicing attorney from Oakland, California. He is a former teacher of law and has been very active and generous, I think, in giving the profession generally and Idaho in particular today, the benefit of his skill and experience. I was gratified to learn this morning, when talking to Mr. Dobrzensky, that he is a graduate of the University of California in the School of Jurisprudence, and I was able to tell him that I too was a fellow alumnus of his. So for that reason, personally, I feel it is a very great honor at this time to introduce to you Mr. Milton W. Dobrzensky.

MR. MILTON W. DOBRZENSKY: The first thing I think I should tell you is that it has been a great pleasure to come here as the guest of the Commission and to accept this invitation and not only to accept, but to enjoy, your very generous and your very friendly hospitality. And on my own behalf, and on behalf of Mrs. Dozrzensky, I would like to express, not only to the Commission, but to the many members of the Bar and of the Judiciary and their wives whom we had the sincere pleasure of meeting during the occasion of our visit here.

If you are going to build a house, the first thing you have to do is clear the building site. There are probably boulders and scrub trees that have to be cleared away, some excavations to be filled and some leveling to be done, and I think that we might well start by doing just that thing – in effect, clearing the building site.

I must tell you that whereas we are dealing with the topic, "The Organizational Problems of Small Businesses" you should not be mislead into believing that we are going to deal exclusively with tax matters. Tax matters, of course, are very important matters which you must consider as members of the Bar and in your every-day practice. But there is an accumulation of other items that you must consider. You older practitioners have encountered them time and again. You younger practitioners will encounter them. So some of you older practitioners will have to bear with me if I seem, on occasions, to be referring to things well within your knowledge – not only well within your knowledge, but well within your knowledge for many years.

When I started the practice of law, I went green out of law school into an old and established firm, and I learned many surprising things in the first two or three years of practice that weren't in the law books and they were new and novel. But since they were based upon the long and favorable experience of successful and ethical practitioners, I found I was getting a magnificent supplementary education. There is a great deal that you learn in law school. But there is a lot you learn in the good old college of hard knocks where they issue not diplomas but scars. Sometimes the scar is on the client. (laughter)

I think it is fair, in starting a presentation of this sort, to ask a few questions. Just exactly what can be expected that I can accomplish in making a presentation of this sort, and exactly what can you expect to get from listening to a presentation of this sort?

I think the answer is reasonably clear to most of you. You who are lawyers have studied law, and I know that you didn't learn all about the law of corporations in two hours or all about the law of negotiable instruments or trusts or torts or constitutional law or any of the other things that you studied in so short a time. You found that the harder you worked, the more you studied, the more you learned. And when you supplemented that with what you necesarily learned in the practice of law, you eventually developed a well rounded knowledge of these several subjects. So it necessarily follows that merely because you listen to a presentation such as I am making here, the good that it will accomplish for you depends perhaps less on me than it does on you. There is a bit of study that has to be done. The most that I can expect to do, I think, is to bring to your attention, to the front of your minds, a check list that will alert you to certain things that you must be watching as you go about your job in assisting your clients in forming business organizations.

Now, we have a few aids for you. Commerce Clearing House was good enough to furnish about 125 copies of their 1952 edition of their pamphlet "Which is Best Taxwise – Corporation? Partnership? Sole Proprietorship?" If you haven't received one of these, they are here and available. This is a reprint of what appears in their federal tax service, and you will find material of this sort not only in their tax service but in Prentice Hall and others as well. You should take away from this meeting a copy of this pamphlet.

The other thing I think is a "must" if you are genuinely interested in this subject is a copy of the American Law Institute's copy off "Organizational Problems of Small Businesses" which was written by Mr. Leonard Sarner of the Philadelphia

Bar. I think that Mr. Sarner has done the profession a genuine service in putting together this pamphlet. It is 189 pages long, but it is packed with a lot of very important information. I hope that you will not only buy this book, which is not a long one and which is very readable and does contain a lot of very useful, practical information, but also that you will study it. It contains a valuable check list that will enable you to check yourselves in your work upon problems of this sort.

Now, when you read this book, read it as I did. Read it with a red pencil. There are a lot of things in here you will want to mark. There are references to the sections of the Internal Revenue Code, regulations, decisions of the Tax Court and Circuit Courts of the United States as well as to those of the Supreme Court that will stand you in good stead. I do urge every one of you to acquire Mr. Sarner's book. You can buy a book on the law of corporations, and it will talk about corporation law, and you can buy a book on the subject of partnerships, and it will deal with that subject, but here you will find the tax and practice aspects that bear upon the problem well put together, well organized, and I can guarantee that the time you spend in reading this book will be time well spent. And I am sure that once you read it, you will read it several times. It will repay you well if you get no more than one good tax idea or business or practice idea from the book.

Now I think it should be borne in mind that so far as tax law is concerned: There is nothing static in tax law. It is a very dynamic subject. It is changing from day to day. If you look at the administration of our whole federal tax system, look at the internal revenue agents in the field, the men who are permanent members of the staff Office of the Internal Revenue Agent in Charge, members of the Appellate Staff, you will find that those men are thinking, eating, drinking and sleeping taxes, and their minds work in certain channels. One of them may say, "George, I have been thinking about Section 117 J of the Internal Revenue Code, and do you know what I think? I think you can interpret that to mean so and so." So you go to the office of the Appellate Staff with a problem under Section 117 J, and you think you have everything under control. Bang! The agent has a brand new idea, and he thinks that Section 117 J should be intrepreted in the light of the Bogg case, and this case and that case means so and so. You disagree with him heartily, and you wind up making no settlement. Then you have the alternative of accepting his findings or going to the Tax Court, and lo! and behold!, the Tax Court agrees with the agent. And thus we have a new principle of law.

True it is that Congress enacted Section 117 J, but the Tax Court interprets the section, and the interpretation may put something new in your hands. No matter how much you feel you may know about tax law upon the basis of what you read up until today, when a problem comes up, bear in mind that before you commit yourself, you should take a look at the last sheets that came in on the tax service and take a look at the publications which you read from day to day or week to week just to make sure there haven't been changes.

Don't depend on what you *knew* the law to be. It may have changed last night or yesterday. If it changes tomorrow, of course, you have done the best you can, and you can only hope that your client hasn't operated too quickly.

If you are intersted in the ever changing organizational problems of small business, you must keep in touch with the literature, primarily with the tax literature. If you subscribe to a service like Commerce Clearing House of Prentice Hall, you will find that changes and additions come in with report sheets, and if you look over those report sheets, your attention will be directed from time to time to important changes in the law.

There is one journal that I read regularly — "The Tax Barometer." It comes

weekly and keeps you in touch with the recent decisions. There is the publication "Taxes," which is a publication of the Commerce Clearing House. There is the "Tax Fortnighter," which is a relatively new publication. There is the "Tax Law Digest," also a relatively new publication. And there is the "Tax Law Review," which is a very valuable law review which relates exclusively to problems of taxation.

But always remember that eternal vigilance, which comes from regular study, is the price of tax safety.

So much for this matter of clearing the building site. Let's approach more directly this business of the organizational problems of small businesses.

As lawyers, you are accustomed to defining the terms you use. What is an "organizational" problem and what is a "small" business? The answer to what is an "organizational" problem you will probably find in Webster's Dictionary. The only comment I would have to make at this point is that we are concerned not only with "organizational" problems, but also with certain "operational" problems which we shall have occasion to avert to as we go along.

You ask what is a small business, and the answer is that I don't know. You can go from there with reference to other items. A small business is a small business. It is a business which eventually will be larger if it doesn't fail. You recognize a small business when you see one. But the thing you must remember is that mighty oaks from tiny acorns grow. And a small business that you organize or assist in organizing, if it is well organized and if it is well managed, can grow into a very large business. And the service that you render to your clients in assisting them in organizing a business is very important not only to them, but also to you, because you look forward to seeing your clients more than once, and as the business grows, it needs legal assistance from time to time. So when you organize a small business, give it all the attention that a large business should receive bearing in mind that one day it may be a large business and you look forward to seeing your clients from time to time as they require constructive legal service over a long period of time.

One of the first things the lawyer must think about when he is called upon to render assistance in connection with the organization of a small business is the answer to this question. Who is my client? Whom do I represent?

In comes your client, Joe Smith. Joe says, "Bill, I am going to form a business, and I want you to meet Pete Brown and George Struthers. We are going to be partners or something. You will have to tell us what it is going to be. We are going to need your assistance." Well, there is one thing you must seriously consider at the very beginning and that is whether or not, at that stage of the game, you may represent all of them. You may represent the business until *after* it has been formed, but there may be a difference of opinion between them. There may be certain things with respect to which the man who has been your client and still is your client may need for his protection. At the very beginning you should stop to consider this question: Can I represent them all at this stage of the game, or is there any diversity of interest between or among them that might make it necessary for me, before a partnership agreement is signed or before articles of incorporation are drawn, to say to these men, "I would like you to see independent counsel in order that you may have independent advice with reference to some of these matters that we are going to have to talk about?" There isn't any rule of thumb that will determine the answer. You are conversant with the Code of Ethics of the American Bar Association. You may run into a possible conflict of interests, so you must ask yourself at the beginning of your consideration of the problem whether or

not you may represent them all in the organizational state, although you may be able to represent the business until after they have resolved whatever differences exists between them. That is a very important point to remember as you approach the organizational problem of a business.

The next point you must consider is this: What is your relationship to other businesses and professions – your relationship to accountants, to appraisers, to engineers, patent attorneys, title companies, insurance counselors and the like. We draw a line between the functions that may be performed by an attorney and certain functions which, if not performed by a person who is a licensed attorney, would constitute the improper practice of the law. I think it is a good idea for the shoemaker to stick to his last, and I don't think it is a particularly good idea for an attorney, particularly the general practitioner, to endeavor to perform the services of all this diverse group, members of which he may desire to call upon to assist him in putting a business organization together. I will have a little bit more to say about that later.

Bear in mind that there are people that you may need to advise you with respect to certain matters. There isn't any reason why you should improvise the advice of a good insurance counselor or a surveyor or a title man, if title insurance is in order, and it is proper to expect your clients to bear the reasonable expenses necessarily incident to the employment of the services of these persons to assist you.

Time and again, when a corporation is formed, the client says, "George, why don't you be a director?" Well, there is a problem. Should the attorney be a director? His first impulse is that this gives him a closer contact with the corporation, and that means that there is a greater probability of being retained as counsel for the corporation. But there is another point involved. The minute you become a director, you become involved with all of the business decisions that have to be made, and being a director not only *do* you participate in them, but *must* participate in them. I have always felt that a person who is participating in the transactions that give rise to the problem is not necessarily the best man to give the legal advice. You are strongly in favor of a certain course of action, and unconsciously you will endeavor to sustain it by your legal opinion. I don't think you are able to dissociate yourself quite sufficiently from your functions as a director – for example participating in the making of business and policy decisions – to give the independent advice which is often so necessary in connection with the operation of the business. That is something I think you should consider very carefully.

Another point I think you must think about is this: How far should the lawyer go in giving business advice? When I joined the firm of which I am now a member, our senior partner once cautioned me: "You are a lawyer, and you should confine yourself to giving legal advice. The minute you start to give business advice, you are in difficulty."

A man says to you, "Do you think I should buy the lot?"

And you say, "No, if I were you, I wouldn't buy it." Someone else buys it and turns it over at a huge profit, and you are blamed for giving bad business advice. And if you advise your client to buy it, and he does so, and he loses money on the transaction, you are still blamed for giving bad business advice. In all probability you can't win. And I think the thing to do is to let the client arrive at his own business conclusions and his own determination as to the form of a business organization to be employed for the purpose of carrying on his business after he has been fully advised of the consequences, probabilities and so on. In other words you may hear an attorney in a conference say, "I won't let my client do so and so."

My theory is that my clients are free, white and twenty-one, and they are going to do what they want to do anyhow. And so far as I am concerned, they should be permitted to do it. But the attorney should give very sober consideration to the question of whether or not he shall give business advice.

What is the attorney's real job in connection with this problem of organizing a small business? His first job is, of course, a job of exploration. He needs to find out *what* the parties propose to do, *how* they propose to do it, *why* they propose to do it and acquaint himself with the facts in the same way he acquaints himself with the facts when he undertakes to go into court with a piece of litigation. Unless you know what the parties are thinking about, planning to do, how they are going to do it, how much money they expect to make and so on and so forth, in all probability you are not going to be in a position to advise them. You must explore for them the risks to which they might be exposed. And those risks are not necessarily insurable risks. They are not necessarily legal risks. They are not necessarily tax risks. Very frequently they are practical risks. In any event, your job is to acquaint yourself with the facts. It usually takes a bit more time than you think to find out all of the things you need to know about a contemplated business project before you are in a position to advise as to the form of business organization most suited to its accomplishment. Of course, the risk element is one of the first things that confronts you. After all is said and done, if a man is going to go into business, he is going to invest his capital, and some risk is always involved.

It is hardly necessary for me to tell you, as lawyers, the classical differences between a corporation and a partnership. A corporation, on the one hand, is an entity apart and distinct from its members. A partnership is an association of individuals. Nor do I need to tell you about the liability that attaches to each. Where a corporation has been lawfully formed for a lawful purpose, ordinarily you don't pierce the corporate veil. The corporation has the liability and the share holders do not — that is for a corporate act. Whereas, once a partnership is formed, the partners are putting all of their assets behind the risks of their enterprise, because they are usually jointly and severally liable, with rights against each other in the event one pays more than his share. That is something with which you are all fully acquainted.

Bear in mind that there are two types of risks to be involved. One is a legal risk. The other is a business risk. The man who estimates the *business* risks is the *business* man. The risk with legal implications may look as large as an elephant to you, but to the experienced business man, it may look small as a mouse.

I had the pleasure of working for many years with a good friend who, I think, was the most intelligent business man I ever met. He was a business man who had a good concept of how a business man should use a lawyer. He would say, "I have a problem in my business. You are a lawyer. You can tell me 99 reasons why I *can't* do a certain thing. I want one good reason why I *can.* If there is a risk, tell me the risk. Don't tell me I can't do it because it is risky. Let *me* evaluate the risk."

Remember, when you are advising on the subject of risks, to point out the *legal* risks. Let the client evaluate them from a *practical* point of view. On the other hand, if he proposes to do something that is contrary to law, that is illegal, and involves a penalty, you necessarily must tell him this is something that the law prohibits.

Now, as between those items, bear in mind that a client rather than the lawyer should be the ultimate judge of the risk involved. By that I don't mean you should encourage him to violate the law. Let him use his ingenuity, so far as that ingenuity permits him to accomplish something that can be accomplished within

the law, although behind it you see the possibility of legal risks.

When you are thinking of legal risks, bear in mind that you are faced with the problem of insurable risks. Again this is not the job for the lawyer. That is a job for the experienced insurance counselor. Let the man who can analyze exposure to risks point out those risks that are probable risks in the business tell you and your client what insurance can be had with respect to those risks and buy for your client as much insurance as he may need to protect himself against those risks and no more. The average business man buys insurance in a peculiar way. He and his friend, George, the insurance agent, play golf every Wednesday. George is a good golfer. He goes around in 71, but he doesn't shoot 71 on the insurance course. He might sell you a *policy,* but you might not buy *protection.* What is needed is a thorough going analysis of the exposure to risk and the purchase of insurance accordingly. When you are considering risks, you must necessarily advise your client with respect to those risks that are insurable.

One of the next problems that you encounter and have to consider in organizing a small business is the question of control. I mentioned at the outset the question of who is your client. You may say to your friend George, who *is* your client and has brought in an associate, "Now, look George, you are going to put up the money in this case, and this man, for the most part, is going to run the business. Who is going to make the decisions, he or you?" And there may be an occasion when the associate or associates need the assistance of independent counsel, because your client is making a heavy financial commitment in the business, and he may find it necessary for a variety of reasons — some of which I will advert to presently — to say that when policy decisions have to be made, they are going to be made by him, and they are not going to be made by any two or three of the associates. With reference to many miscellaneous matters it may be otherwise but one of the things you must definitely consider and analyze and evaluate, in the light of the business facts before you, is this question of who is going to make *policy* decisions. I will have more to say on that later.

Another problem that arises at the outset is the question of money. As you may know, the statistics that have been compiled by the U. S. Department of Commerce and various economic organizations show that most businesses, most small businesses that fail can attribute their failure in most instances to the fact that they started out with inadequate capital. The amount and sources of capital is a matter, I think, of primary importance and concern for the new business man. How much does he need?

I remember that I formed a partnership for some gentlemen once, and after it was formed, from time to time I would see them. How is business? Business is wonderful. One day — it was the 15th of March, the day you file your income tax returns — they came storming into my office.

"What did you do to us?" "You certainly got us in one fine mess."

"Wait a minute. What is the trouble about?"

They said, "We have been doing a good business all year. We thought we were making a lot of money, and now we have to go to the bank and borrow money to pay income tax. What kind of a mess did you get us into?"

I thought I had explained the situation of liability and responsibility for income tax as partners. I had cautioned them that I thought they were a bit low in their capital. They had been plowing their profits back into inventory, and when tax day came around, they didn't have enough cash to pay the income tax, and

they were outraged because they thought I got them in a "mess" that made it necessary for them, after having done a good year's business, to go out and borrow money to pay income tax. Finally, with the aid of their accountant, they calmed down, and agreed, after all, that they were under capitalized and were short of cash. They had plenty of assets, but the assets were in inventory and not cash.

The question is, how much money do you need and where are you going to get it? I have a client who has built a lot of houses, and we formed some corporations recently, and he had a new associate. The new associate said, "This is wonderful. The corporation will sign."

My client said, "My friend, I want to tell you something. I have been building houses through the instrumentality of corporations for four years, and in this business you sign both sides of all the papers. You sign the front and the back. If you are coming in with me, you be prepared to sign both the back and the front."

We are still concerned with this question "where are we going to get the money?" Are we going to sell securities to the public? That is another myth, so far as the average small business is concerned. The public is rather slow to buy securities, and when you are permitted to sell such securities to the public, the sale is usually surrounded by so many protective devices by the Corporation Commissioner under the Blue Sky laws that the sale is very difficult. And aside from the fact that the sale may be difficult, from a practical standpoint, there is the further factor of costs. If you must pay 20c to raise one dollar and thus get only eighty cents, maybe it is not such a good idea. So you must of necessity counsel and advise with your client and let him make the decisions as to *how much* money he is going to need, *where* he is going to get it, *how* he is going to get it.

He may say, "Wait. I have a friend over here, and he is the representative of an insurance company, and I am going to get an insurance company loan." If you haven't already had a close look at insurance company loans and loan agreements, don't be over optimistic about insurance company loans. I am not trying to criticize insurance companies. They are lending other people's money. The point is that since they are lending other people's money, they must necessarily surround that loan with a whole host of restrictions. I had occasion to see such an agreement recently that involved a loan of five million dollars. The loan agreement was about as long as a trust indenture that you customarily see behind an issue of bonds, and there was a multitude of restrictions that were related to the operation of the company. You must always maintain so much working capital. You can't do this, and you can't do that and so on and so on. Remember that although your client may *need* and may *obtain* an insurance company loan, be sure to have him review the loan agreement so that he understands the restrictions under which he will operate, and make sure that he doesn't inadvertently get himself in default because he never bothered to read the agreement. The average client will not read the agreement. He expects you to read it. You better read it and brief him thoroughly on that subject.

The next point you will have to consider when you consider this overall question of how you go about setting up a small business, and particularly as related to taxation, is what compensation and bonuses are contemplated. By the way, Commerce Clearing House, as a part of its "Handy Book" service, has a 1951 pamphlet entitled "Reasonable Compensation." They will be happy to send you gratis the one entitled "Reasonable Compensation." After all is said and done, a business may deduct, as a business expense, reasonable compensation. The client probably wants to draw as much as he can from the business in form of salary. He would like to

have the salary a fluctuating one that goes up and down as the corporation's net income goes up and down. There are many pitfalls I will mention later that are involved here. But part of your survey involves this question of compensation.

When you are dealing with a partnership, you must remember that a partner can not be an employer of a partner. Whereas partners do receive what is sometimes called a "salary" and do also receive sometimes what is called "interest" on their capital contribution, these are not true salaries or true interest payments in the ordinary sense of the word. For example, if a partnership had carried on its year's business at a *loss*, a net operating loss, and had paid a partner $6,000.00 as "salary" the $6,000.00 which he received he would probably not report as income at all, because it was paid out of partnership funds *other* than current net earnings.

When partners talk about salaries, what they mean is this: There will be three of us. We are each going to have an equal interest – one-third. But George is going to devote all of his time to the business, so we want him to have a "salary" of $6,000.00 a year. What they mean is that in determining the net income of the partnership for division among the three partners, there shall first be subtracted and paid to the one, $6,000.00 a year, with the rest divided equally among them. So if one-third of the net, thus computed, amounted to $10,000.00, the partner receiving the so-called salary would report $16,000.00 as his share of the partnership net income. None of that would be salary. None would entail any withholding for federal tax purposes nor federal social security deductions.

The next important point that comes along is what assets, if any, are proposed to be transferred to the business other than money. There may be real property, machinery and equipment, a patent. Now there are some important questions that arise at that point, and the first one which seems usually to be overlooked by the participants is: *Who has the title?* Very frequently it happens that whereas you *think* one person has the title, someone else *has* the title or an *interest* in the title. So your first question is: Who has the title and *is the title clear?* Because if you are going to start with a new business organization, it should *own* its assets, and its ownership should be free and clear of liens and encumbrances.

Next is with reference to the value of the property. What is it worth? Usually the parties will arrive at the value of the property themselves, and if they are hard headed business men, experienced in their respective fields, you need have relatively little concern about the value which they attach to their contributions of property except as it may relate to income tax problems. I don't know what your practice is in Idaho. In California all of our real property acquisitions are handled through title companies and covered by title insurance. In other words, if my client is going to buy a piece of property, the first thing I do is order a preliminary report from the title company. If the report shows it to be clear, I put the money in escrow with escrow instructions. The other party puts his deed in with instructions, and the matter is closed there. But in any event, give consideration not only to the question of *title* but to *title insurance* as well, which are important factors in those cases where real property is transferred.

One other important caution is this: It's a piece of property? Certainly it is a piece of property. Where is it? Well, it is Lot 16 in Block B in Tract so an so in such and such a city. Anybody knows where that is. They do, *of record.* You look at the map, and the lot is marked there. But the next question is *where does it lie on the ground?* And that is an entirely different question. Whenever the acquisition of real property is involved, get it surveyed. I know it takes five or six weeks to get a licensed surveyor to lay out the lines, and it may cost you $50.00 to get it done, but usually a survey is invaluable.

One large corporation, which I have done work for from time to time, is particular about surveys. If they own a parcel of property and are buying an adjoining parcel, the first thing they want is a perimeter survey, that runs completely around the whole of it and then a certification from the title company that there is no intervention of title between the property they own and the property they are about to buy. I thought that was an extraordinary thing, and we worked it out for them several times, but the last acqusition showed an eight inch gap between the two parcels of property. An eight inch strip of someone elses land running through the middle of a manufacturing plant could be a very expensive problem for the owners of the plant.

When you get a survey and map, be sure to check the map against the description and, if a title company is involved have him check the survey against the *record* description. Even surveys and engineers make mistakes sometimes.

We come next to another very important consideration. We are going into the question of the formation of a new business venture, and necessarily we must consider the business arithmetic, at least pro forma. The arithmetic question is important. What will be the source of the business arithmetic? I have committed myself almost irrevocably to the policy that I want that arithmetic to be prepared and put together by an accountant and preferably by a certified public accountant who is tax conscious. If I have filed data with the bank on behalf of the client and the banker rings up and says, "I notice that your statement under assets says ——— "

I break in and say, "You get hold of Mr. So and So, who is the accountant. When you and he come to an agreement, that will be satisfactory with me."

I don't think a lawyer should assume the responsibility of compiling the business arithmetic necessary to assist him in working out a proper organizational plan for a new business. In the first place, I think the client needs the independent assistance of a competent accountant if he doesn't already have one. It he doesn't have one, he should be advised to get one. He will find that the reasonable costs of employing the services of a good accountant will repay him time and time again. There isn't any reason why the lawyer should undertake to defend his client's business arithmetic beyond the task of defending it after it has been compiled by someone who is experienced in doing such matters and who has undoubtedly done the best that a competent person can do to put it together. I think that it is important to suggest to younger members of the Bar to look about in their community, to find a man who is a good and careful accountant and to work cooperatively with him. Time and again you will have a little problem arising in the field of accounting and you may need some accounting advice. You don't want to pay for it, and you ring him up and ask him, and he will tell you. Conversely the accountant may need to know something about the liability of a partner, and he may ring you up and ask you for some legal advice, which you will give him without charge. Very frequently that interchange of professional information pays off in many ways. Also I think it is a legitimate means of expecting to get business. The accountant with whom you work, from time to time may be called upon to recommend an attorney. He may recommend you. Conversely you may recommend him.

I do suggest to you that if you want a proper form of operating statement, let the accountant prepare it. He will think of a host of items you haven't thought of to be considered. And in a pro forma balance sheet, he will think of a host of items of reserves available that you haven't thought of from an accounting point of view that should be set forth. Bear in mind that when you are considering the best form of business organization, you are concerned with question of taxes, and

the decision should be based on arithmetic emanating from the accountant. Of course, this should be worked over by the lawyer, and I think that the lawyer should be the man, in a sense, for whom the accountant works, the lawyer will endeavor to tell him what he wants and will insist on getting it.

Another impotant preliminary consideration in forming a new business is the question of whether the intended business rests upon some lease or license or franchise or similar agreement. Here can be a very dangerous pitfall. Here is a man who is a distributor for this electrical device, this tractor, this what-not. He has a franchise, and the franchise usually states that it may be terminated on 30 days notice and the manufacturer reserves the right to repurchase the inventory on a certain basis. This man who has been carrying on this business as an individual desires assistance. He needs more capital. He wants to take in an associate. He may want to form a corporation or a partnership. The minute that happens you come face to face with the question of the transferability of a number of items. How about the lease of the premises? Old man Smith owns it, and he is a cantankerous gentleman. He says, "Sure, give me $500.00 and I will sign a consent to the assignment of the lease." So if there is a lease to be assigned, find out whether it is assignable. Find out whether there are any defaults under the lease, and find out if the lease has an adequate period yet to run. That is an important business consideration.

When you are dealing with a business franchise, for instance, you will find that many companies are very, very fussy about the assignment of their franchises to new business organizations, particularly if they feel that their former franchise holder is getting ready to unload at a profit and ultimately expects to withdraw from the business. Time and time again I have seen not only delay but very great difficulty involved because there had not been made a preliminary survey to determine whether an underlying lease or license or franchise or similar agreement was in good standing, whether it was transferable and whether it was fair and formed a proper working basis for the new business. Sometimes there isn't very much you can do about it, but nevertheless I think it is highly important that every effort be made to avoid the usual pitfalls.

Again adverting to this question of who is your client. Whom will you represent? Should some of the associates be referred, at some stage of the proceedings or another, to independent counsel? You say to your client, "George, you are going into this business. Now what do you know about it?"

He says, "Henry, I don't know a thing about it, but I have a man here that is really a seven day wonder. He knows all about it. He can go out and do this, and he can do that, and I want to make it easy for him to get in. I am going to give him one-third interest in the business, and I am going to let him pay me off out of his share of the profits. That is how much I think of him."

I have in mind four similar cases that developed some rather serious results. I will give you case history number one. This man took in his friend and let him come in and pay for a third interest out of his one-third of the profits. Three years later he bought out his associate for $145,000.00, because the tail was very vigorously wagging the dog. The man who put up the money originally found he was slowly but surely being elbowed out of the business. We came to a crisis in the matter of buy or sell, and my client bought back what he gave for a very large sum of money.

Now, it is very, very important that you sit down and counsel very seriously with your client, if he is going into a business that he knows nothing about and is

going to rely on the know-how of someone else, who has contacts with suppliers and distributors and so on and so forth. There is at least the possibility that your client will be at the mercy of the other party. This may be a case in which you may want to sit down and talk very frankly to your man and perhaps draw a form of agreement that will require you to say to the other man, "I have known George here for many years, and I have drawn an agreement which you see contains these clauses, and I would like you to have independent business advice before you sign it." That point very, very frequently comes to the fore, where one man supplies the money and the other man supplies the know-how.

Closely related is another question. Your client comes in, and he tells you that he and his associates are going to incorporate or they are going to form a business organization of some kind, and they want your advice. Maybe all three of them come to you originally, and none of them is your client. To me there is one very important thing which is basic in a business organization. If the business associates do not each repose full confidence in the other, the business is doomed to fail sooner or later. You have to find out if it is desirable for these people to associate at all.

Recently I had the situation arise, and I said to one of these men, "Look, let's suppose you are taken suddenly ill and the doctor says you are going to be in bed flat on your back for six months. You will not be able to attend to business. Are you going to be content to have these two other men sign the checks and carry on the business?"

He said, "I don't know."

I said, "You better find out before we form this business organization. Unless you know, you better not form this association at all. It is like marriage. You better be as sure as you can be at the beginning. You are flat on your back. These men are running the business and taking in all the cash and signing all the checks, are you going to be satisfied with that?" This man was *not* sure and, as a matter of fact, did not form the association.

I think that each man should necessarily know – and you may be the means of helping him finding out – the business background of the men he is to associate with. That investigation involves a lot of things, and direct questions have to be asked right out in the open meeting. Have you judgment liens against you? What about your tax returns? Have they been audited up to and including this year? Any judgments against you? Any contingent obligations? Any litigation pending against you? *You* need to know these things, but primarily *your client* needs to know everything that can be reasonably found out from the usual sources of information. He should know everything that can be learned of the business background of the proposed associates.

Some of these things may seem to you to be trivial, but I can assure you that they are not. What about the health of the business associate? Sure, we are going to have this wonderful insurance program. But one of them is not an insurable risk. One might have predisposition towards an ulcer, and a business associate with an ulcer is not necessarily a good one, and I think after all is said and done – the health of the parties who contemplate entering a business enterprise is a very important consideration for all to consider wholly apart from the question of life insurance and insurability.

You have yet another question that is on a rather delicate subject. How is this man getting along with his wife? It sounds funny, but I remember a case in which, fortunately, there was a delay in signing up the articles of copartnership. On the

day before signing, the wife of one of the proposed business associates filed a divorce complaint and tied up every piece of property this man had. There would have been an endless amount of difficulty involved in this partnership, had it been formed, because this was a long and protracted piece of divorce litigation.

My man said, "Next time, we'll have to look at that." And I said to myself, "The next time I will be looking for those things myself."

Remember that there may be many things lurking in the background. It may be that a man's wife has social ambitions, and she is very much concerned about her husband's future, and she says at the bridge party, "Do you know that George does all the work, and he only gets half of the income, and I just don't think it is right." And George hears about it too, and in due time there is disharmony in the partnership. If you don't believe that this can happen, remember that I didn't read this out of Anderson's Fairy Tales. These things can happen and do happen, and it is legitimate for you to know, and for the people you are advising to know, something about the domestic background of your client's associates and about any social aspirations of the family that might be detrimental to the business.

In this connection there is another matter of importance and this again is not mythical. Long years ago, before the days of the automobile, my father was in the livery business. He owned a large livery business in the San Joaquin Valley in California. His father, my grandfather, was yet alive. My father would never buy a horse for use in his livery stable unless the horse was led up past grandfather, first at a walk and then at a trot. Grandfather would either nod approval or disapproval. One day someone said to my father, "What does the old man mean by this nod or shake of the head?"

My father said, "Only one thing. Can the horse stand prosperity? What will happen when you bring the horse in off the ranch, put him in a box stall, groom him, feed him hay and grain? Will he kick the dashboard off the buggy or will he go straight ahead?"

There are a lot of people who can't stand prosperity. A friend of mine who is a sales manager in a large business organization said that one of his major problems was the problem of their franchise holders who made a lot of money. Every year he made what he called a "swing around the circle," and he visited only two classes of his dealer-distributors — those who were very prosperous and those who were not. Those who were very prosperous he was visiting for the purpose of some rather strong talk.

When a successful business man gets to the point where he says "Lord, I don't know how I am going to keep up with this work. I have to relax and play golf a couple of times a week. This strain is getting me down. I have got to have some more help around this place. I am expanding so rapidly I can't give the business the time and attention I should," watch out for squalls ahead. The barometer is falling. The ability to stand prosperity is a very important thing. Many a business has gone to pot because one or more of the associates find that they have just got to have more time away from the business for rest and recreation. "It just wears a man out, you know." And the first thing you know the creditors are worn out too. It is something for you to consider and you should say to your client, "Now, you are starting a small business, and one day income may be very good, and in the event one of you becomes very prosperous, remember that prosperity, to be continuing, requires a continuity of business effort. You can't take two afternoons off every week to go to the races or spend your time fishing in Canada or taking trips to Europe." This is something that should be given very serious consideration by each business associate. The question is: Can he stand prosperity?

There is another matter I might have mentioned before when I asked the question "What is the source of the business capital?" Where is the money coming from? In California we have a Corporation Commissioner. I assume you have a Blue Sky Law of some sort here and that when you form a corporation and issue securities, whether for sale to the public or not, you must obtain a permit or some similar instrument from a state regulatory body. There are many problems that arise when a corporation is being formed when you must go to your state Blue Sky authority, when you must go to the SEC. You must consider the various restrictions which they impose, first upon the raising of money, the offer that is made to the public, the impounding of funds and all of those other considerations which may be found to be burdensome. In other words, these matters must not be approached blindly. They must be approached with your eyes open.

Another important matter which you may or may not have considered is whether the new business involves the use of a patent. How is the patent to be brought into the business organization? Is it going to be transferred? Is there going to be a license? I would like to give you the names of two articles you might well read. The first may be found in 5 Tax Law Review 361. The second is entitled "Patent Royalties as Capital Gains Under IRC Section 170A" which is in 50 Michigan Law Review, page 991.

Here is the point. I own a patent. You want a license. The law of patents says – and the tax law follows it – that if I grant you an exclusive license for the three unities of your patent, to *manufacture,* to *use* and to *vend,* either over the entire area covered by the patent or within a portion of that area, that, in the eyes of the patent law, is tantamount to a *sale,* notwithstanding the fact that what you undertake to pay me is a royalty rather than a purchase price. The transaction, in the eyes of the patent law, is a sale, and if you have held your patent for over the six months contemplated for the holding of a long term capital asset, the return on that transaction is not taxed as ordinary income but as a long term capital gain. You know the effective rate for a long term capital gain is 26% whereas in the case of ordinary income it would be your top bracket for surtax purposes. So if you represent the owner of a patent, very careful consideration should be given to the form of the agreement – whether he is a vendor or a licensor, so-called, whether he will transfer the title absolutely, lock stock and barrel, or whether he will license. This is important where your business organization rests upon the use of a patented device owned by one of the participants.

The next item that needs to be considered is another preliminary matter. It is the formation of a business organization to carry on a regulated business.

Let's suppose you have a transportation business, insurance brokerage business, real estate business, contracting business, real estate subdivision business, the sale of oil, gas and mineral rights business or a business which is otherwise regulated by the state. At the very outset you need to know *what* you can do.

For example, recently two clients came in and said, "We are going to go ahead and enter the contracting business."

"You are? Neither of you gentlemen is a contractor. What about a license?"

Well, they had been over to see the contractor's licensing division, and were advised if they employed regularly a man who was licensed by the department, that would satisfy the requirements for the operation of that partnership.

And if you are going into the insurance brokerage business, your Insurance Commissioner has certain rules and regulations that must be complied with.

All I am trying to say can be summarized by saying, be very sure that you have whatever permits and licenses that may be necessary for the purpose of transacting business. If the Public Utilities Commission must issue a certificate, be sure that the necessary foundation has been laid for its procurement.

Now, there is another little item that may not appeal to you -- zoning laws.

If an enterprise is to be carried on in a given location that is zoned for a particular use, be sure that your operations fall within the permissions of the zoning ordinance.

Another question that is very frequently a "sleeper" is this: Here is a man in the dairy business, and he needs a little more capital, and he is going to expand, so he is taking in an associate in this operation, a Mr. George Smith. He says, "You know, Smith is really an experienced man in the dairy field. He knows all the angles." And so on and so forth. It so happens that Mr. Smith was once in the dairy business and sold his dairy business, including the good will there, and agreed that so long as the purchaser of the good will or anyone acquiring title to the good will from him carried on a like business in the area, he would not compete. So your business associate turns out to be a man who is bound by a restrictive covenant not to carry on the business. It is very important, in your check list of items, to make sure that one or possibly more of the intended business associates is not covered by a restrictive covenant that would prevent him legally from carrying on the business. By that I mean that he could be enjoined from doing business. That has happened and it must be one of the items that goes onto your check list.

Another item which I am going to advert to for a moment is that you must look at the age of the people you are dealing with. After all, insurance companies write policies based upon the life expectancy of the applicant. Here is a man that is going into business. It so happens that he is 69 years old, and next year he will be 70, and five years later he will be 75 years of age. What about his life expectancy? What about the nature of this business as related to his life expectancy? He may be only 55, and his life expectancy may be low.

I mention this question of life expectancy only for this reason: What happens to a business, if it be in the form of a partnership, if the partnership be dissolved by death of a partner? The usual answer is the survivor either will be obligated to buy or the survivor will have an option to buy, and in any event all that is normally contemplated is that the survivor or survivors will acquire the interest of a deceased partner. The point to be remembered in that connection is this: If you will take the amount of money that will be derived by the estate of a deceased partner and endeavor to produce income from it, you will produce for the widow and children only a fraction of the income that was derived from the partnership. So, we shall presently have occasion to see, considerable thought must be given to the question of what will happen to this business enterprise in the event of the death of one of the partners. This becomes a problem not only in connection with the partnerships but in connection with corporations as well. We will have more to say about that later.

Now, these problems that I have been discussing with you, thus far have had relatively little to do with the subject of federal taxation. I can assure you, however, that each and every one of them is of significant practical importance. They are items that can make or break a business organization. They should be a part of this check list of yours when you are giving consideration to the formation of a new enterprise. You have these in the back of your mind or on a sheet of paper, and you run down your check list to make sure your survey has been a

comprehensive one and that you haven't overlooked any of these items, because each item is important as related to organizational problems of small business.

This brings me to this breaking point in this discussion: Is the tax problem necessarily the controlling problem? There is no fixed answer to the question. Sometimes it is, and sometimes it isn't. I recently had occasion to counsel and advise with a client, who wound up by saying that he didn't care two solitary hoots about the tax matters. He had a wife and he had a daughter and he had a son, and he was intent upon setting up his business in a certain manner, having in mind certain family relationships that might exist after his death. He thought that the daughter might be jealous of the son, because the son would be the one upon whom he would depend primarily for the operation of the business. He didn't want him interfered with, and he wanted an arrangement set up that made it necessary for us to use a corporation. It was not the best business form taxwise, but it was the one best suited and best calculated to achieve a certain result that he wanted to achieve within and for the benefit of his family. So, it very frequently happens, that if you take the tax problem and throw it out the window and go ahead and give consideration to items of paramount importance in the mind of your client, you are rendering him the service he expects and wants.

Of course, in our classical differentiation between a corporation and a partnership, we always advert to personal liability. That may or may not be a practical problem, because, as I told you a few moments ago, a client of mine had occasion to say, "Well, in my business, when you go ahead an incorporate, you are going to sign the papers on both sides anyhow, so let's use the corporation." Or you may use the partnership, as we have used it in some cases, because from the point of view of liability, it doesn't make much difference which you use, because the new corporation usually has no credit, and the individual participants usually sign as co-partners or as unconditional guarantors.

Sometimes a contemplated gift situation arises. A man says, "I have a sizable estate, and I have estimated what my federal estate tax will be in the event of my death, and I know that transfers made in contemplation of death are taxable. I would like to commence to parcel out an interest in this business among certain members of the family or among certain employees of the business whom I feel must be kept close to it in order to give it the degree of continuity that it should have after my death. Whereas you tell me that it would be more economical taxwise for me to set up a partnership, I want a corporation, because I can't accomplish the things I want to accomplish by any other means." Stock is a very convenient thing to have, if you are parceling out portions of the business for purposes of division of ownership. And it very frequently happens that a consideration related to management control and gifts intended and contemplated to be made for the purpose of legitimately reducing federal estate taxes will require the use of the corporate form.

There is another point that I must mention. I call it the brother-in-law complex. "And furthermore," says my client, "when I am dead, I don't want my wife's brother in here messing around in this business. He talks to her, and she talks to me, and we are constantly having trouble. I want to keep my brother-in-law out." If you are trying to keep the brother-in-law out, you may not be able to acomplish it by having an individual proprietorship or by having a partnership that would terminate upon the death of a party. Sometimes you need a coporation in order to assure continuity of operations on the one hand and control on the other.

You must consider one other thing which involves the use of your ingenuity. Sometimes you can provide continuity upon the termination of a general partner-

ship by means of an agreement to convert it into a limited partnership, binding upon the estate of a deceased partner. That is, a new partnership agreement, will be entered into with the concurrence of the widow, let us say, binding the executor of the deceased partner's estate whereby the estate and the widow, who will take under the will, become a limited partnership, with the business carried on by the general partner. The widow participates without having management or control. And that happens also to be one way of solving the brother-in-law complex by providing for a shift from the general partnership to a limited partnership, or, if need be, to a corporation, upon the death of a partner. You can readily see that you can accomplish this by agreement and that a contract could be drawn binding upon the estate that would make it possible to convert the business enterprise from a general partnership to a limited partnership or from a general partnership to a corporation.

One thing must be remembered and that is whereas the interest in the assets might remain the same, 50-50 or 60-40, where one partner dies and the responsibility for management vests on the other, the other ordinarily is entitled to receive, and frequently does receive, a larger share of the income of the partnership, if it be a partnership, or a larger percentage of stock that would provide a larger percentage of income, or classified stock, in order to compensate him for the additional responsibility of management. That has to be considered.

All of these matters I have adverted to here are matters of general consideration. Let them be a part of your check list as you proceed to evaluate a form into which you cast your new and proposed business.

I don't think it is necessary to tell you anything at length about the tax advantages and disadvantages of business forms in a generalized sense. As far as partnerships are concerned, you will find an interesting article in 5 Tax Law Review, page 35, entitled "The Strange Nature of the Partnership Under the Income Tax Law." There is a brand new book by Paul Little published in 1952 which is entitled "Federal Income Taxation of Partnerships." And there is a publication of the American Law Institute you might be interested in having. It is entitled "The Drafting of Partnership Agreements," which gives consideration to tax factors.

As you know, in law, a partnership is not an entity, and so far as actual taxation is concerned, under the federal income tax laws, a partnership, as such, pays no tax. It files, form 1065, which is, as you know, an information return, and the tax is paid by the individual partners. Whether or not they actually receive distribution from the partnership in the year in question to the full amount of their share of the partnership net income, they are chargeable in their individual income tax returns, as you know, with their respective shares of the partnership income. If that income is made up in part of capital gains and in part of ordinary income, they are entitled to report the items accordingly and to take advantage of long term capital gain limitations where applicable.

The corporation, of course, is a separate entity. It is taxed as such. It pays its taxes at ordinary and surtax rates. Since 1951 we have had a new item that you are all familiar with, the excess profits tax law. From the point of view of a small business, if its net income is under $25,000.00 a year, the excess profits tax does not come into play. As you know, there is a $25,000.00 exemption for excess profits taxation purposes, so the corporation would pay no tax in that respect.

I think you will find everything you need on tax comparisons in this pamphlet distributed to you this morning, this Commerce Clearing House Handy Book, "Which is Best Taxwise — Corporation, Partnership, Sole Properietorship?" When

you get down to the brass tacks of actual comparison, you will find it charted there. The comparisons are set up in two columns, and practical considerations involved are, I think, very carefully discussed. My only admonition is this: This is a case for your accountant, working under your direction, to produce the arithmetic upon the basis upon which the comparison will be made. After the tax comparison has been made, remember that your client or clients may be least concerned with taxes. There may be more important considerations, or at least considerations more important to them, that will cause them to want to adopt one business form in preference to another. But I do seriously urge that you give proper consideration to having an acountant put that arithmetic together.

There are some further matters that must be in the front of a lawyer's mind when he is counseling with respect to the form of a business organization. There are certain serious tax risks involved as related to a corporation. I hope that each of you will buy a copy of Mr. Sarner's book which is entitled "Organizational Problems of Small Businesses" and which demonstrates quite conclusively that you can shape or tailor your business organization in such a manner as to produce a minimum of tax liability and risk.

The first thing on your corporation check list is this: You must be sure that your corporation doesn't wind up as a personal holding company. In Mr. Sarner's book, at pages 66 to 69, you will find a brief and concise summary of the situation with reference to a personal holding company commonly known as an incorporated pocket book. A man buys a yacht, and he incorporates this yacht and carries on the business of operating this yacht. That is he did before they enacted Section 500 and the following setions of the Code. Or he puts all of his securities and some of his rental property into a corporation. His idea is to accumulate the income and then distribute it in the form of dividends when that seems most propitious from the point of his other income. Suffice to say, there is a very heavy penalty surtax upon undistributed personal holding company income. It is very definitely a penalty tax. The purpose of that penalty tax is to compel distribution.

You need to know that there are two requirements that must be satisfied with respect to each taxable year of such a corporation to determine whether it is a personal holding company. The first of these is stock ownership. And that requirement is satisfied where more than 50% of the value of the outstanding stock is owned by five or less individuals. That term "five or less" involves the element of constructive ownership and includes ownership by a family. And the second requirement is based upon the type of gross income. Mr. Sarner says, "Primarily this includes dividends, interest, royalties other than mineral, oil and gas, annuities, gains, commodities and securities transactions, amounts received under personal service contracts and rents and mineral, gas and oil royalties, if either constitutes less than 50% of the corporation's gross income."

I am not going into a dissertation of the subject of what constitutes personal holding company net income in each case. I call your attention to this one thing in the nature of a warning. Be sure that the nature of the operation is such that you don't wind up as a personal holding company faced with personal holding company penalty taxes. A very peculiar situation might result, as I shall point out to you in a moment in connection with Section 45 of the Internal Revenue Code.

Suppose you had a corporation that has income of certain types that falls within the category of personal holdings company income. Let's suppose that but for the fact that you are outside the percentages of income that you would be a personal holding company and that your stock ownership requirement is satisfactory. You have three corporations involved in the picture, and they are controlled cor-

poration, and one corporation is renting real property to or from another. Now, you will note here, that in this definition of what constitutes personal holding company income, the fact that either of these classes constitutes *less than* 50% of the corporation's gross income. In a recent case my clients who were shareholders of a corporation, pointed out to me that although their company had a large rental income, it was substantially more than 50% of the corporation's income."

I asked, "how did you arrive at the intercorporate rentals? Were they fixed in arms length transactions?" They replied, "No, we fixed them ourselves."

In a moment you will see, when we come to Section 45 of the Internal Revenue Code, that if two years later the Commissioner comes along and reallocates the rental income so instead of having *more* than 50% you had *less* than 50%, two years later you might discover you had a personal holding company, and then you might run into a penalty for not filing a personal holding company tax return.

So the question is: Is our company *actually* or *potentially* a personal holding company? That is number one on your black-list of corporate possibilities.

Next we should consider Section 102 of the Internal Revenue Code which imposes a penalty tax on unreasonable accumulations of surplus beyond the reasonable requirements of the business. Here the lawyer and his client must be realistic. There is no point in making fine theoretical plans for the future, such as that we are going to need this money to put up a new plant (that we never expect to build) and we are going to need this money for expansion (which we never expect to make). Don't set up a lot of theoretical plans for the future which may never be consummated. Where you have bonafide plans for the future and those plans are consummated and the money that you have withheld in your surplus account has been used for the purpose contemplated, then you get somewhere with the revenue agent. But there is no use to sit down and make plans and write letters to your client telling him that in your opinion there is not the remotest possibility of him being liable under Section 102 for surtax because of his plans to do so and so. Revenue agents are realists. If you have real, genuine and legitimate plans, if they come to fruition, -- well and good.

There are many contingencies that can result in a corporation not paying out dividends. I recently advised a client not to pay dividends because there was, in fact, a serious question whether his contract with the government was renegotiable. There was a very substantial profit in the enterprize and a very substantial surplus. It was not until sometime in mid-1950 that the government conceded that the contract was not subject to renegotiation under the law then in force. Then congress passed the Renegotiation Act of 1951, and it was not until October of 1951 that we ascertained that we were free from renegotiation under the Act and actually got a letter from the Renegotiation Board saying so. Meanwhile we had some very great risk problems. We analyzed them very carefully with a very careful and competent firm of accountants, and we have not yet paid out the surplus account in the form of dividends, because our clients are operating in a dangerous area for which they can get no insurance. Under the circumstances, there is a very heavy element of risk that is uninsurable. If we paid the money out in the form of dividends, we could find ourselves in a serious situation with creditors.

But the lawyer and his client must be realistic, and keep Section 102 in mind, particularly in the small closely held corporations where the tendency is to withhold surplus funds which might otherwise be distributed. I am not going to discuss Section 102 at great length. Here is a citation which I think you should look at. There is a tax publication that some of you may know

"Rabkin & Johnson," which to me is a very valuable publication. I use it for purposes other than the purpose for which I use Prentice Hall and Commerce Clearing House. Rabkin & Johnson have put together some excellent summaries of tax law that give the lawyer a quick, accurate and concise picture of the field that he is exploring. If you will look in Chapter II of "Rabkin & Johnson," "Federal Income, Gift and Estate Taxation," you will find, I think, a satisfactory discussion of Section 102.

We started with Section 500, personal holding companies. Item number two is Section 102 of the Internal Revenue Code aimed at forcing distribution of surpluses by heavy penalty surtaxes. Now we come to item 3, the silent watch dog of the Treasury, Section 45 of the Internal Revenue Code that relates to controlled organizations. Mr. Sarner discusses that subject very adequately at pages 108 to 114. I must necessarily refer to Mr. Sarner, because there simply isn't enough time to go over the entire field. Also see 4 *Tax Law Review P.* 131, an article entitled "Section 45."

Section 45 of the Internal Revenue Code says – and this is irrespective of an attempt at fraud or of tax evasion–the Commissioner of Internal Revenue, in dealing with controlled organizations, may, if he feels there will be either evasion or avoidance of taxes, reallocate income between the controlled corporation and those controlling it.

Let's take an illustration. Here is a partnership. The partnership owns real property. The two partners also own all of the stock in a corporation. They desire to rent a piece of real property to the corporation, and they say, "Here's what we'll do. We'll fix a high rental. That will give the corporation, which is in a bad excess profits bracket, a good deduction on account of rental, and the burden won't be too much on us as individuals." You can do this, but remember that under Section 45 of the Internal Revenue Code, the Commissioner can come along and give you a complete real location of income. That being true, the lawyer has a task. What do you do when an individual who owns most of the stock in a corporation wants to rent a piece of real property or wants to sell a piece of real property to the controlled corporation? The practice I have followed in rental cases is to get two experienced appraisers and say, "I want you to give me an appraisal of the fair rental value of this property under the terms of a lease, for example, under which the lessee pays all the taxes, all the insurance and is responsible for all repairs, including structural repairs." This is a so-called "net" lease.

One appraiser says, "I think it is worth $1,675.00 a month." And the other one says, "I think it is worth $1,962.00 a month."

I usually add the figures, divide by two and say, "There is the average result of two independent appraisals." That is the basis for the rental. That is the way you could approach it for the dual purpose of developing an arms length transaction and arriving at a fair rental value.

When you are dealing with controlled companies – they may be partnerships as related to individuals, corporations as related to individuals, corporations as related to each other or partnerships and individuals – be sure whenever you have a transaction between them in the form of a contract, a lease or sale or what not, that it is sustainable as having been arrived at on an arms length basis in order to protect yourself against Section 45, which, as I have said, is the silent watch dog of the Treasury.

A fourth point you will find mentioned by Mr. Sarner at pages 63 to 66 in his book is the thin corporation. Why do you want a *thin* corporation? What is a *thin* corporation?

Well, we are going to form a corporation. The corporation needs $100,000.00 in capital. You put the $100,000.00 of capital into the corporation, and the corporation is prospering, so how do we get the $100,000.00 out? You get the $100,000.00 out in the process of a liquidation procedure, and that involves tax considerations.

"So," says the lawyer, "why don't you consider putting in $50,000.00 as your permanent capital and lend the corporation $50,000.00?"

Someone else says, "Why don't we put in $25,000.00 and lend the corporation $75,000.00?"

At the inception of the enterprise you can approach that in almost any reasonable manner, having in mind that the money is lent to the corporation and the repayment of that money, plus interest, results in no tax except on the interest, which you know is income. Now, where you endeavor, *after* a corporation has been formed, to withdraw your equity security, your stock, and to substitute a bond or debenture or something else, you encounter difficulty, as Mr. Sarner points out. In any event consider the possibility that part of the capital needed by the business might be lent to the business, that the business contemplated will prosper, will be able to repay, and your people can then withdraw the amount they have lent. Or you may want to use some variety of preferred stock which can be called and redeemed, from time to time, to enable a withdrawal of funds with a minimum of tax risk.

There is a fifth item that has been attracting a great deal of attention in the last few years as related to Section 129 of the Internal Revenue Code which is intended to strike down acquisitions for the avoidance of tax. You may have heard of the case known as the Alprosa Watch case. You will find this discussed in Mr. Sarner's book pages 69 to 73. It happens that there is a loophole in Section 129 of the Internal Revenue Code, and whereas Section 129 is operative on individuals who might make acquisitions for the purpose of avoiding their tax, there is nothing apparently in Section 129 that deals with the lessening of tax by the unit that is acquired. The Alprosa Watch case was a case of a corporation that had a substantial accumulated deficit. The shareholders sold their stock to a new group of shareholders who changed the corporation name, changed the business and proceeded to carry on a profitable business and to offset the gains of that business by carrying forward the accumulated deficit of the corporation acquired. So the loss corporation has been very much on the minds of tax men and accountants and business men for the last few years. We are told that a Congressional Committee has called upon the Commissioner of Internal Revenue for a factual survey relating to the activities of loss corporations and the amount of revenue that has been lost, and it is not unreasonable to suppose that this loop-hole in Section 129 of the Internal Revenue Code may be plugged by forthcoming legislation.

A sixth matter of great concern in connection with corporations is the matter of restricting transferability of interest. Why do you want to restrict transferability of interest? There are usually two reasons. *First,* is the practical reason that a man who is in a corporation rather heavily wants to be sure that his fellow shareholders holding a large block of stock will sell to him in the event that they want to get out. In other words, he desires an option to purchase during the lifetime of the other owner, if the other owner wants to withdraw or in the event of his death. *Second,* you sometimes find men who are close personal friends closely associated with the transaction of the business and who as a small group, own all of the stock in a corporation. They are men of substantial means. They are concerned with the question of federal estate tax. They want to keep the federal estate tax down. They

know that if a valid contract has been drawn between them which requires the estate of the one dying to tender his stock to the survivor or survivors and affords them the option to purchase, that the option price will probably control. You will find Mr. Sarner's discussion of this subject an adequate discussion, because he points out the limitations that must exist with respect to those agreements.

You will find a good article in 65 Harvard Law Review, March 1952, page 773, entitled *"Restrictions on Transfer of Stock in Closely Held Corporations — Planning and Drafting."* That frequently is a matter of very great importance, and you will find this article in the Harvard Law Review a very useful and valuable one. The objective is to prevent outsiders from being brought in, on one hand, and to minimize federal tax, on the other.

Here I must pause briefly to mention a matter that applies to both corporations and partnerships. A partnership agreement may contain an option which provides that upon the death of one partner, the other partner may purchase his interest, exactly the same as in the case where, upon the death of a shareholder, his interests are under option to his fellow-shareholders. How are you going to arrive at the price? This is a very difficult subject.

One says, "Why don't we take book value?"

I have two clients who are partners. One came to my office and said, "Will you look at this document our accountant drew up. We think it's good. If either I die or my partner dies, the survivor can buy him out at book value."

I said, "I would like to see a partnership balance sheet." At first, they were unwilling to show me one, and I told them I couldn't advise them unless they did. Finally, they showed me a balance sheet. I already had an idea what was in it. There were a few items that classified as "hidden assets." I said, "I think the first that *dies* is going to be a generous man. You have one item of realty carried at $22,000.00. You told me you wouldn't sell it for less than $75,000.00, and the one who dies first, is going to give his partner the opportunity of buying a half interest for $11,000.00. I think that is very generous."

He said, "Wait a minute. What did you say?"

So I said it all over again and he said, "Let me have these papers."

Away he went, and six weeks later he came back and said, "Take a look at this."

They had attached to this agreement a schedule six pages long, which told you exactly how you would evaluate every item on the balance sheet. Suddenly he had awakened to the fact that "book value" and "fair market value" can be separate and distinct things. The partners bought a piece of realty many years ago for $22,000.00 and it is now worth $75,000.00.

So when you are talking about these options to buy or sell upon the death of a partner or upon the death of a fellow shareholder, be sure you have adopted both a fair and a realistic basis of valuation and pricing that will enable you to assure each that upon his death no inequity will be done to his estate or to the survivor.

As usual in a presentation of this kind, we have more material than time, and one of the things that this convention has accomplished is to begin and end on time. It is now two minutes to 12:00, and 12:00 is ending time. I have said to you people that if you want to consider more of this on Saturday, I will be available. Unfortunately these matters are lengthy ones. They are made up of a whole host

of small items, and each small item is important. If you leave out too many of the small items, you might just as well leave out the whole. In any event, I thank you for your very courteous attention. (Mr. Dobrzensky's address is continued on page 102.)

PRESIDENT LITTON: Mr. Dobrzensky will have a little time tomorrow morning on the program, and he is going to leave entirely up to the members of our Bar what we wish him to do. I thought perhaps some of you will come with questions, and if you do, I am sure he will be very happy to answer them. The remainder of the time he will take to cover the remaining part of his address in a brief manner.

PRESIDENT LITTON: Mr. Brown, Vice President of your association, has been instrumental in bringing the next speaker, Mr. Belli here to day, and he will introduce him at this time.

VICE PRESIDENT BROWN: Members of the Bar and guests: It doesn't seem to me that it is proper, in a sense, for me to be here to introduce the next speaker on our program. Last August our good friend, Justice Paul Hyatt, started to bombard me with letters about once a week to go to Yakima, Washington, to hear a fellow he considered had something to offer to the people in our profession. As a result I went to Yakima on December 15th thinking that Paul would be present to hear Mr. Melvin M. Belli. I am a defense attorney primarily – what I have of it (laughter) – but I was so tremendously impressed as a result of Mr. Hyatt encouraging me to go there to hear Mr. Belli from 9:30 in the morning until 5:00 o'clock in the evening, having missed an hour and one-half the evening before, that I invited him here with the approval of the Bar Commission in advance.

While you will not all agree with him, I am certain that he will provoke among the members of our profession a considerable discussion, because he has some ideas that I think are new to the younger lawyers and to many of us. It worries me that I have missed them before. They seem so simple.

He is a grand guy, and he is one of the finest and greatest personal injury lawyers in the United States today. And whether you agree with him or not, I am certain that he has something for every member of our profession and certainly something of interest for every one of you here. I am pleased to introduce Mr. Melvin M. Belli of the San Francisco Bar. (applause)

MR. MELVIN M. BELLI: May it please you, Mr. Chairman and ladies and gentlemen, Mr. Justice and Mr. Judges: I hope you will, when I am through talking this afternoon, agree with the modus operendi that I give you in the trial of a law suit and what I think is a new method of procedure.

The key note of this method of procedure is that a law suit is a *race of disclosure.* We want a *verdict of fact and not a verdict of confusion.* The old days of pulling a rabbit out of a hat or the surprise witness are gone.

And, ladies and gentlemen, the laymen do not come to these Bar Association meetings, and the laymen look askance at some of our legal procedure. And when he has an injury – and these injuries happen to the people who can least afford them – and is told that he must wait four years, as they do in New York, before he can get to trial, he doesn't have very much respect for the law. Even in California we have to wait a year before we can get to trial.

Under our procedure, we try to settle as many cases as we can, and when the insurance man comes to our office, or the insurance adjustor, he is treated as a friend. He is the man we try to sell our case to in the first instance. We give him

every fact we have got. We give him a brochure, which I am going to talk about later. It contains all our pictures, law, facts, our elements of special damages. If he sees it is a case of absolute liability, and if he sees it is a case that evokes no new procedure in law, he is going back to his principal, the insurance company, and he is going to become your advocate. He is going back and will tell his principal that this is a case that they are going to lose and that they shouldn't go into court and stand up there and take a beating of an award of $100,000.00 or $150,000.00 or $200,000.00.

I mention those figures at the outset. I think they are probably higher awards than have ever been given in this state, and I hope that when I am through talking, ladies and gentlemen, that I will not have talked to you in an academic manner but that I will have talked to you in a practical manner: I am going to try to interpolate pain and suffering and loss of wages, the loss of a husband, the loss of a wife into *cold dollars* and *cents.*

You who are trying these personal injury cases must remember that the ultimate, the end result, in a personal injury case is a dollar award. You don't go in and get an equity judgment, a decree wherein the jury or the judge says, "Let the plaintiff have credit at the corner grocery store or have nurses around the clock or have a doctor and we'll see how he is ten years from now and then we will re-evaluate." Ladies and gentlemen, you have got to interpolate pain and suffering in all these beautiful emotions of life, laughter and tears and everything else, into one award of dollars and cents. You have only the one time in court, and that is why, at the very beginning, in the opening statement, put on the blackboard the amount that we ask in that prayer. When we go into court, we are sincere if we write on that blackboard $150,000.00 or $200,000.00 or $250,000.00. And we are prepared, when we go into court, to interpolate those dollars conversely into damages to that plaintiff.

Remember, under our tort system, the only thing you can achieve in a personal injury judgment is dollars and cents, and you have only the one time, the one day in court. The Pennsylvania courts have gone so far from what the end result in a tort case is that if you mention how much you are suing for or the prayer in your complaint, they immediately order a mistrial as they would do if you were to mention the subject of insurance.

You may have a lot of conversation about how you tried to settle this case, the things you did in court and your demonstrative evidence and everything else, but remember that the foreman of the jury signs his name to a verdict for one sum of dollars and cents, and that must stand as a just and adequate award in that particular case, and it must be fair to both sides. That is what you try to achieve when you are settling a case.

Ladies and gentlemen, this procedure of demonstrative evidence is available both to the defendant's side and the plaintiff's side. I think that you will agree with me today that we must demonstrate to a jury in a court room what actually happened in a particular case. Don't forget that we choose our jurors because they know nothing of law and nothing of medicine. It has taken that judge on the bench seven years in law school and probably ten or fifteen years of judicial and trial experience, and it has taken the doctor who has to come to court eight years in school and probably ten or more years in practice before he can evaluate or prognosticate or give a prognosis of the injury.

You have a combined experience of some 30 years from the experts that the jury must be instructed upon by the judge at the end of the case, and yet in three

days — that is the average of one of these cases — you are asking the jury to evaluate the law and apply the applicable law to the facts. If you and the insurance adjustor haven't been able to settle your case and have not been able to determine what the facts were, you then ask the jury to determine all of this cumulative experience of the lawyers and judges and tell what law is applicable to that case, and then you ask that jury to determine the questions of medicine, the prognosis, the permanency of the injuries and evaluate all of the medicine on both sides of that case and then return a verdict in dollars and cents for personal damages! There is only the one sum and the one time to try the case in court.

So in fairness to the jury — and it is one of the greatest fact finding systems ever devised by the minds of men — you should give them all of the aids that are available to them to show what these obscure rules of res ipsa loquitur, last clear chance, proximate cause, concurrent negligence and all of those things are. Take time to put them on the blackboard and illustrate and give them homely examples of what the law is, in keeping with the dignity and decorum of the court room.

Then too, you must bring in these visual aids that the doctors use in medical schools in determining what the injuries are to the human body — in learning physiology and anatomy. In other words, it is anatomically necessary to bring into the court room a skeleton.

You have to bring in a neurological skeleton, for instance, when you have a matter involving a ruptured disc. Your doctor is on the stand, and he qualifies himself. He graduated from a University in Vienna, has done post graduate work and has practiced over here for some time, and he is an expert. He gets on the stand and says, "I find there is an area of anesthesia over the right big toe, and consequently I know at L-4 there was an impingement of the nerve root due to a herniation of nucleus pulposis."

The jurors would be too gracious to laugh at that, but they might just as well unless you break it down so they can understand it by the use of a skeleton, by the use of diagrams, by the use of the blackboard. If you don't, then ladies and gentlemen, this law that you deem most predictable and most certain and that laymen look upon with respect is going to come out of the jury room in a verdict of confusion. You can not take issue with me when I say that what we want is a verdict of fact and not one of confusion.

Further you can't take issue with me if I say that now a trial is a race of disclosure to get everything out of that brief case and to the jury as fast as you possibly can. We try these cases in about three days. We make an opening statement that I will try to explain to you later and put everything on the blackboard there. There is no criticism by our trial courts. Every court in California has at least two blackboards to use during the course of that trial. If there is any question in this state with reference to the use of the blackboard — and I say this with due respect — the appellate judges and the trial judges are entitled to be educated on this new procedure as well as are the plaintiffs' lawyers and the defense lawyers.

If you say that this new procedure is something that you are not going to follow in this state, then ladies and gentlemen, look at the decisions that are coming out of the United States Supreme Court and the decisions of the other states where they recognize that you should use a blackboard in court to tell a jury that is unlettered in the law and unlettered in medicine the facts of the particular case.

Oregon is a jurisdiction that refused to affirm any verdict over $35,000.00. There were a number of cases that went to the appellate courts that were over that

figure, but the courts up there, through pure arbitrariness, refused to affirm anything over that amount until recently. (*1*) Concomitant with the more adequate awards now being affirmed is the use of this evidence and the recognition by one of the Oregon justices that this procedure is proper in the State of Oregon, one affirmed a verdict over $100,000.00.

It is significant to me that now they have almost said in Oregon you can't try a case without the use of the blackboard, and they pointed out to the trial lawyers that when you put anything on that blackboard in the trial court, be sure and photograph it at various stages of the proceedings and introduce your photograph into evidence looking forward to your appellate record. That is a new procedure whereby you protect your record when you go up on appeal. Oregon, by the use of demonstrative evidence, the blackboard and all these visible aids, has now seen that these awards must go on up to keep pace with the cost of living. In Oregon $35,000.00 was the highest award. In California we have now gone beyond $225,000.00.

I mention that later absolute figure to you, and you say you can't conceive that a human being would be worth $225,000.00!

Well, ladies and gentlemen, in a case that I tried in which there was a verdict of $225,000.00, the State Compensation Insurance Fund put in a lien of $90,000.00. In other words, before anything would go for general damages over and above the "comp" scale, there had to be a lien payment for $90,000.00! If an insurance company — in this case a state insurance company — was able to sit down and in cold, hard figures, and with their actuarial tables, figure $90,000.00 under the decreased scale used in "comp" cases, what do you think of these cases of an injury that is comparable in other states where the courts won't affirm a verdict above $35,000.00?

I recall the highest verdict in Wisconsin was around $60,000.00. When they went upstairs with this verdict of $60,000.00, ladies and gentlemen, the Supreme Court said, "We will multiply out this man's life expectancy of 40 years times the care that is going to be required to keep him each year, and that will far exceed $60,000.00 that has been awarded by the jury. Consequently we won't touch that verdict." In other words, they multiplied it out mathematically, and they found out, from the actual facts in that case, that the figures were far in excess of the verdict, and they held that verdict like that was not "excessive" and therefore adequate in a case of personal injury.

I don't say that you are ever going to have perfect personal injury law. I was reading the NACCA Law Journal coming up to Sun Valley in the plane. A court said that the reason we have a problem in a personal injury suit is that pain and suffering is not a readily ascertainable commodity. (I think I said something like that in "The More Adequate Award.") You will never have a system of law whereby you have the same broken leg under the same amount of liability. It's not like a cigarette machine where one puts in an identical coin each time and gets out an identical package of cigarettes. They will vary from $60,000.00, $70,000.00 or even $100,000.00. But when those verdicts of amputated legs stay down in the vicinity of $20,000.00 or $30,000.00 or even $50,000.00, I say you have an inadequate award. I say that because we can take the cost of living as I have done in the study that I first did in the California Law Review, "The Adequate Award" in Volume 39, several years ago (and later brought it up to date) — and we can see that of all the commodities that lag behind in this spiraling cost of living, the cost of pain and suffering has been awarded in the most niggardly amounts. Our

(1) See Berks v. Eastside etc., 241 P. (2) 120.

hospital beds, our doctor bills, our bread and butter and everything else went on up and up and verdicts went up about one-third to one-fourth of that.

My contention, in the study I did – and if you look at it, I think you will appreciate it – is that if there is any one commodity that lags, it is the commodity in the field that we are all concerned with, *justice*. The adequate award hasn't been reached and still hasn't even been appreciated in some states. I come back to this case where $90,000.00 was evaluated by an insurance company. They were able to do it. Judges should too.

Take a death case for example. It is an incongruous thing that if a man were flying in an airplane from Chicago to San Francisco and was killed in Colorado, the limit that he could be awarded in a case like that was $5,000.00, recently raised to $10,000.00. I am speaking in general tort law and not in the "comp" field. If he were killed in Utah or California, the award could go up as high as $200,-000.00 as it did in a recent California case.

Why this limitation in this field of law where we, the lawyers as well as the judges and justices and jurors, are supposed to be the priests of justice? Why should we limit it arbitrarily to $5,000.00 or $10,000.00 in Colorado? The insurance company can go in there and compute the man's life as an *ascertainable commodity*, and if he is insured for $500,000.00, they will pay $500,000.00. It is a brutal anomaly that there is a limitation on these wrongful death actions as between the several states.

If you will go back to some of these cases I have cited in these several pamphlets, you will see that just after the turn of the century, when the cost of living started to go up, some of the awards for a double amputation were $2,000.00, and the appellate courts ordered $1,000.00 to be remitted! In other words, $1,000.00 was sufficient for a double amputation! We who should be most concerned with justice have overlooked it in our own field in not appreciating that an adequate award must keep pace with the cost of living, with justice.

We don't have to argue to juries any more that the cost of living is going up. It is a point that need not be belabored. Jurors appreciate the fact. The housewife knows the cost of bread and butter and all of these commodities have gone up. But the appellate justices for some reason – again coming back to Oregon – can not appreciate that bread and butter and these other commodities cost the same in California as they do in Oregon. Yet you can step five feet over the California line, where certainly the threshold of pain must be the same as in California, and these commodities of suffering and loss of husband or wife must be the same as they are in California, yet they have kept them down to $35,000.00. Now, with the use of this demonstrative evidence, they have, in that state, begun to recognize that we must, in our own field, raise these awards until they approach the point of *adequacy*.

Demonstrative evidence is a procedure that is just as available to the defendant's side of the case as to the plaintiff's side of the case. I surmise, from what your Vice President, Mr. Brown, said today, that he is already beginning to see the light of day. He is beginning to yearn, perhaps, to be a plaintiff's lawyer. (laughter)

I am going to tell you about the biggest case I ever had. It was only three or four days ago, but before I do that, I want to give you four lines of poetry that someone sent me the other day which certainly is one of the arguments why the plaintiff's lawyer wants to see an adequate verdict backed up by a healthy, private insurance company. I feel that if you start making inroads on the jury

system, if you do, as I think unwittingly the American Bar Association did, put a bill in Congress to put all FELA cases under commissions as was done in New York 14 years ago, (put all automobile accident cases under a commission like the Workmen's Compensation Commission), if you do, you are going to put seven out of ten cases that are tried on the civil side of court into the hands of a commission and seven out of ten cases will no longer be jury cases. Seven out of ten judges will be commissioners or referees. I think that is one inroad we must, as lawyers, watch to preserve the right of trial by jury.

The poetry:

> The attorney with an adequate verdict in mind,
> Is practically always certain to find
> The saddest words of tongue or pen,
> Are, "I'm only insured for five and ten." (laughter)

It may be that opposite sides of the pole are represented when the defendant comes into court and the plaintiff comes into court and they are so far apart and so distant that the jury must, through the use of demonstrative evidence on both sides, evaluate between these two contrary theories – one that the plaintiff was badly injured and the other that there was no injury at all. One side may insist there is absolute liability and the other side may insist there is contributory negligence. One doctor comes to the stand and swears he has a permanency of disability. The other doctor says that as soon as the case is over this litigation neurosis will leave and the plaintiff will be back to work. The jury does not necessarily cut down the middle, but the jury will evaluate these claims and these people coming into court if they are given everything in your brief case in this race of disclosure.

I don't entirely agree that there is such a thing as a defendant's doctor or a plaintiff's doctor. I think that under apt cross examination, rules of discovery, pretrial depositions and the like you can get the facts out of any doctor. Here is a deposition taken of a woman in Oklahoma who certainly knew her definition of a defendant's doctor. It is an actual deposition. I will read you four or five lines.

"Q. You didn't learn his name?

"A. No, sir, I don't even know. I wasn't even acquainted with him or anything. I couldn't tell you his name at all.

"Q. Who told you, then, that he was the insurance company's doctor?

"A. Well, I just judged he was the insurance doctor just the way he handled me. He never did give me a damn thing. He came in and looked at me and said, "How are you feeling?" I told him my hip was about to kill me, and he said, "Well, you can go home in a day or two." And, hell, he never gimme a drop of medicine or nothing. The son of a bitch wanted me to die and that's the reason I figured he was an insurance company doctor." **(laughter)**

Ladies and gentlemen, let me tell you about the biggest case I ever tried. There was no question of liability. There was no question that the defendant, over the double line, going 75 miles an hour, was intoxicated. And if I forget to mention this and we have a question period afterwards, I will give you some citations. (When a man is intoxicated, in a civil case, you may plead exemplary damages.) I think it is a salutary thing. When a man goes out and gets intoxicated and drives an automobile, the law recognizes that he should be held criminally responsible. On the civil side there should be something more than mere damages. That is true in some of the Arizona cases. The California courts are not

quite sure. But you should be able to use exemplary damages. In another decision that I will give you later on, you will find that when you plead exemplary damages you may use the word "wanton" instead of "wilfulness" and then you don't void the insurance policy. The company is not able to come in and say that this is a wilful tort. When you have exemplary damages, you go into the wealth of the defendant. You can show how the accident happened even though liability is admitted, and what is more important, contributory negligence is no defense. I think we have overlooked the pleading of exemplary damages. We have overlooked the pleading of wanton in place of wilful torts. (When we do plead correctly, we get by the defense of contributory negligence.)

Now, we had a case of absolute liability. We had a man who weighed 682 *pounds!* He had fallen off his chair down in Long Beach one time, and it took the fire department and five men to get that man upright again. He was the most amazing individual I had ever seen. The day after the accident he began to have a slow, creeping paralysis. He was working prior to the accident. There was no question of his prior health being good. I thought there was a herniated disc without any question, but we couldn't take a myelograph or pantopaque. I noticed on the hospital records that they said, "Our X-ray won't penetrate all this obesity." And on a note attached to the hospital records by the manufacturer's representative that made the X-ray table, "We advise against tilting the table with this ponderous person on it. It would break the table." So we were in a quandary because we were not able to *demonstrate* anything.

But Dr. Peter Lindstrom, who has been in the papers in other regards, went in and did a piece of herculean surgery. He couldn't take the man to the operating room, because he would fall over the sides of the operating table like butter on a hot day. When I first went to see the fellow, I asked the nurse if they had him in bed, and she said, "We have him in *two* beds." And sure enough, they had him in two beds that were tied together with wire. The doctor did an exploratory, and the incision was a foot and one-half long. It took eight hours, and the man was under a local anesthesia during that whole time, sitting up, because they couldn't lay him down on the operating table. When Dr. Lindstrom got in there, it was just as though he was down in a mine, and he was scared because he didn't think he could shore up any more and might have to bail himself out. He had operated against the advice of the staff of the hospital, and perhaps that Swede was never scared before, but he certainly was scared in this case. But it was a success, and when he came out, he thought he saw a cord that gave evidence of glioma or a possible malignancy.

The case was sent to me, and we had an offer of $1,400.00 in settlement, so we went on to trial. I was criticized rather severely in the newspapers, and I give you this story to show you that as far as I was concerned, I was going to make an impression on that insurance adjustor and the court that this fellow really weighed the full 682 pounds. The logistics were like landing on Okinawa. We couldn't get him there in an ambulance.

We had to get a moving truck. So we got a big truck and put the nurse and all the equipment and the bed pan and everything else in the moving truck. We got to the court house, and the insurance adjustor saw the truck coming around the corner and reached into his brief case and said, "My God, how much have we offered?"

I said, "$1,400.00. You only have a $10,000.00 policy."

He said, "We'll give you $3,500.00."

I said, "Nothing doing."

About five minutes later the moving truck was there at the front steps, and the moving men lifted him out and took him up to the front steps. (I think there may be pictures on this.) Anyway they were there. But the moving men couldn't get him any farther. About this time a crane with a 50 foot boom came around the corner – this is all fact – and the $3,500.00 was immediately raised to $7,500.00. There was a limit of $10,000.00 on the policy, and they said "We can't give you any more than $7,500.00. We have to save something on the policy."

The next fellow that showed up was an architect for the city who had the plans for the court house, and he started measuring the elevator and came back and found that we couldn't get this fellow in the elevator, because it wouldn't carry that much of a load and he was too big for the elevator. So we got the crane boom going. The fellow was on the bed, and they had just given the signal to raise him up, and the insurance adjustor came running over there and said, "Here's your $10,000.00. Let me go home." (laughter)

Now, in a case like that, ladies and gentlemen, this fellow was entitled to an award of $200,000.00, because he is going to be taken over to the Nafzinger Service at the U. C. Hospital, and they are going to have to do another exploratory.

You must appreciate that you have to be sincere when you try these cases on the plaintiff's side. You have to be sincere within the dignity and the decorum of the court and within the ethics of your profession. A verdict of $200,000.00 wouldn't be adequate. I don't know whether he is going to come out of the next surgery. It was inconceivable. This man was lying there with an active mind and 682 pounds of flesh. You couldn't see where his face left off and his shoulders began. He was just a big mass of flesh. I talked to the doctors, and they said, "Well, many of these cases learn to take adversity."

The boy told me, "I just don't want to lie here and die. I am imprisoned within this body."

I told him that I wanted to do something, that I thought there was liability, and I had to get that meagre, niggardly $10,000.00 on that basis. And I think I was justified in doing what I did to point that out.

That brings me to the subject of humility in the trial of one of these cases. I have as much respect for dignity in the court room as anyone practicing. I don't bring in a skeleton and make a chamber of horrors out of it. If it is a question of a fractured humerus or a dislocated patella or something like that, I only bring in as much as necessary to prove that case. But as I shall show you later, if it is a fellow that has multiple injuries to the whole human body, I am going to bring the skeleton in and show the jury what is meant when the nomenclature of the doctor is given.

Humility, in the trial of these cases, ladies and gentlemen, is something that must pervade the chambers of the appellate judges and the chambers of the trial judge when he sits on a motion for a new trial when there is a question of the excessiveness of the award. If you go before your jury and your judge and hope to achieve an award of $200,000.00, you are going to abash your trial judge and your appellate judge and the jury with the absolute figure and the novelty of that figure unless you start from scratch and break this down into dollars and cents and pain and suffering and minutes and hours of the day and find out what it adds up to. When the case gets up to the appellate court, you may run into the problem of stare decisis.

The appellate justices may go to those leather bound volumes and get stare decisis, and that is the problem in this field now – stare decisis of the inadequate award. But he won't find in the law books that line the walls of his office any of these humble, daily factors that you must take into consideration to determine what pain and suffering is or how you can evaluate a new award that has come to your state and an award that is higher than anything else that has been granted.

Here is an excerpt from an opinion of a Judge down in Florida, 35 So. 2nd 1, a $50,000.00 award.

"The verdict in a case like this is at best a feeble attempt to place the injured person back in the shoes he wore before the injury. In many cases, as in this one, it cannot be done. If it were possible to do so, none of us would be willing to step into the appellee's shoes and take his judgment with his handicap on condition that he step into our shoes as physically normal as we are. The elements that enter into a judgment like this are so diverse that it often requires more of humility than it does of law properly to assess them. The Judge who overlooks the fact that the lineman, the yardman, the plumber and the cook are made of the same common clay that he is, is not equipped so to do."

Ladies and gentlemen, think of all the material things created in this world by man, yachts, violins, paintings, and think how much higher the price of those things is than the highest awards that have ever been allowed in this country for the loss of a human life. It is not unusual for a baseball player to get $80,000.00, $90,000.00 or $100,000.00 a year. In half our states today that is more than the most adequate award from the beginning of jurisprudence in that particular state no matter how horribly injured the person is. And there, I say, lies inadequacy.

Here, from the other end of the country, is Judge Mathies on the same problem. It appears in Maxey v. Southern Pacific Company, a federal case tried in California. Here was a case where there was the traumatic amputation of two legs above the knee, and the award was $165,000.00.

"Assuming that Maxey, instead of being a railroad worker, was a bum. He is one of those thousands of human beings who are sort of peculiar, at least to the rest of us they are peculiar – perhaps we are peculiar to them – who do not work. They just walk up and down the highways and the railroad tracks – wanderers, hoboes. He comes into court. His legs have been cut off through the negligence of the defendant. He says, 'My legs are cut off. I want to be a hobo the rest of my life with my legs on. I enjoy it. I have no earning power. *All I do is live!*' "

Ladies and gentlemen, you who are plaintiffs' lawyers in the personal injury field have to evaluate the infringement and deprivation of that guarantee to every one of us to live out the rest of our lives free from pain and suffering.

This, compared to the speaker this morning, is a much more volatile field. The talk this morning was on readily ascertainable commodities, and you can use figures of taxation, and you can use arithmetic in setting up a business or corporation. But if the law does not give us an adequate award in a personal injury case, then I think the law has failed us, as it has in the past, in a field where it should be most predictable.

I think this is the set-up on the study which I did – and I say this with all humility – on the more adequate award. It tells you what has been done in the various states, and it will give you the philosophy of the appellate courts through-

out the United States where we are beginning to raise the awards to adequacy. And adequacy means compensation comparable to the cost of living – hospital beds and doctor bills and wages and all the rest – and insurance premiums, if you will.

Let's go into some of these actual procedures of demonstrative evidence. Ladies and gentlemen, if I give any of these things to you in a hurry and they don't seem to be clear, let me preface this again by telling you that there is nothing that smacks of being a smart Alec in court. I learned long ago that if you are guilty of anything like that, and if you lack humility and sincerity in trying these cases or presenting your cases, the jury is going to find it out. I have the utmost respect for the jury system, and I have that respect when I go in and put on the blackboard the figure $150,000.00.

I know that if I have overquoted that figure, and if I am not able to back that up, not only to the jury but to the trial judge and the appellate judges, the jury will find me out. At least that is the premise under which I operate.

Ladies and gentlemen, one of the first cases I would like to tell you about and illustrate is the case of Jeffers v. Ciyt and County of San Francisco. You may think this is a histrionic appeal to the jury, but evaluate it in line of what I said. And if you will, some of these articles that we have been doing and the procedure that this organization of NACCA is using – before I forget it, may I recommend for your consideration this NACCA Law Journal. There is now an organization of over 2,000 of the top trial men in the United States on the plaintiffs' side. We put out a journal twice a year. I think it is the best law book you can get. You can send for it to 6 Beacon Street, Boston, Massachusetts.

These books are available to the plaintiffs' side and the defendants' side. If you want to join on the plaintiffs' side, you may join for $10.00 and you get the book. If the majority of your work is on the defendants' side, you are not eligible to join, *but you may see all of the tools that we use on the plaintiffs' side.* You may subscribe to this book and get every procedure we have used and keep right up to date!

I tried the Jeffers case in San Francisco. It involved the traumatic amputation of the leg of a young girl, a Commander's wife. There are four street car tracks on Market Street. She got off on the inside of the tracks, and as she was going to the outside, a car came by and ran over her leg. (An interesting question in regard to that is the question of exclusive control of the instrumentality in res ipsa loquitur.) There was no question in this case even though the two lines were operated by different people. In this case the first verdict was for $65,000.00 for the amputation of a leg. It was set aside – excessive! I retried it. And like my friend, Mr. Brown, the lawyer who was trying it against me was the chief trial deputy in the city attorney's office, John Moran. He too has seen the light of day, and he is now in our office on the plaintiff's side. (laughter)

John came up to me at the second trial, and he said, "Mel, I have got you on this one." This was at the time that Life came out with all those studies of the boys that came back from overseas with arms and legs off, and they were putting out these prosthetic devices that enabled amputees to swim, play golf, drive cars and all these things that an ordinarily equipped person can do. He considered that there was no difference between a person fitted by science and the limb that the Lord gave him. And he made that argument. He told me this beforehand.

So three days before the end of the trial I had a big long object brought into

court wrapped in yellow butcher paper. It was never introduced into evidence, but I had it there on the desk before me. And when it came time to argue, I took this thing, and rolled the contents out. It was one of these prosthetic devices, one of these limbs. I gave it to the first man in the jury and asked him to handle it and pass it on. I asked them to "feel the fine texture of the flesh, to feel the warm blood coursing through the veins, to move the noiseless joints, to compare them with the articulating parts of their own knees." I said, "Compare that with the argument my friend has given you that this will suffice for this woman the rest of her life." She had one with those straps that go around and come up over the body that were common before the newer limbs were developed.

They took half an hour to look at that. The verdict in that case was $100,000.00. And what was more important in that case was that after the twelve jurors saw it, I took it up, and I showed it to the trial judge and put it on his desk, and he examined it, and it convinced *him*. In the first trial I didn't use demonstrative evidence. In the second trial I did.

Was I wrong? Was I ethical in doing that? I think I was derelict in that *first* trial, because I didn't show that jury what I was asking for. I was asking for $100,000.00 in that case, and in the first trial I got $65,000.00, and the trial was set aside by the trial judge, because he had never seen an artificial limb. But in the second trial the jury saw the *commodity* I was asking for, if you want to put it bluntly, and we must do so to interpret these things into dollars and cents.

On the voire dire examination the defendant's counsel may say, "Do you know my friend is asking for hard, cold cash from my client?"

I bring it on at the very beginning, and I tell them that we must interpolate this in dollars and cents.

In the second Jeffers case the trial judge saw that artificial limb. He saw what I was asking for, and he sustained the verdict of the jury.

I don't know if you have this problem in Idaho. In California, in one case, we had to file a claim against the municipality before we could come into court. (2) We had a claim filed for only $50,000.00. The verdict was $100,000.00. It went upstairs, and one of the grounds for appeal was that the claim being for $50,000.00, we were limited to $50,000.00. But the appellate court said that the claim would not limit us, and I think that is now the general rule in the United States. I don't know what your particular situation is in your state.

We come to the Reckenbile case: There the award was for $225,000.00. If you tried that case here the way I tried it down there, I don't think your trial judge would have given the defendant a new trial, and I don't think it would be touched upstairs, if you pointed out what this man had to face for the rest of his life. You should see the appellate brief! (*1*)

It was a case involving a traumatic psychosis. If that man had a 30 year life expectancy, it would cost 30 years times $400.00 a month to keep that man in a private institution for the rest of his life! And that is what you start with. The argument was made in this case that they could put him in a state institution, and Judge Griffin said, "No, he is entitled to a private institution and the best care available." He added up those figures up there, and he sustained, on a motion for a new trial, an award for $225,000.00.

I want to tell you about the demonstrative evidence on the question of

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Sullivan vs. San Francisco 95 Cal. A. (2) 745.

liability. We had the situation of a street intersection in this case where a fire truck was coming in this direction (indicating) and a private truck going in this direction (indicating). There were stop and go signals on all four corners. The signal was against the fire truck. It was red. If it were an ordinary or commercial vehicle, the fire truck would have to stop at that intersection, and the private truck would have had the right of way coming through.

But the siren was blowing, the red light was showing, and in this case the emergency vehicle may usurp the right-of-way, and it did. It went into the intersection, and the private truck that had the green light with it didn't pay any attention to the siren and red light. It also went into the intersection and there was an accident. The plaintiff was thrown from the fire truck and suffered severe injuries. I had the burden of showing that the siren was blowing. Once I established this and showed that I had the right-of-way, there was complete liability, and then it was only a question of damages.

I happened to be driving home during the trial of that case, and I went across Van Ness Avenue from Sutter. I pulled out into the intersection, because the green light was with me, and I had just time to slam on my brakes while a fire truck went in front of me. I was negligent in going out there, and it occurred to me that perhaps some of the jurors had had the same experience.

You must never overlook the fact that jurors are human, and they have these experiences in their daily walks of life. I thought that the jury might feel that the siren was not blowing as loud as it should.

I had 35 witnesses to come to that witness stand to prove that the siren was blowing. I went around and canvassed that neighborhood. I had "Jones" and "Smith" and "Adams" and the others to come to the witness stand so that I could ask them, "At 9:15 in the morning did you hear the siren blowing? How long did it blow? Did it blow right up to the time of the crash?"

I would have had three or four of those witnesses, and then the Judge would call for the cumulative rule on proof. He would say, "Your other witnesses are going to be the same as these witnesses. It will be stipulated they heard the siren." I would then have appealled *only* to their sense of *hearing*.

I got an airplane, and we went above the intersection. Can you see the photograph here? The fire truck was coming in this direction (indicating) and the other truck was coming in that direction. I took about 30 or 40 of these other pictures on the ground to get the skid marks and the positions of the trucks. Then I had this picture blown up to this size. I called the pilot who took the picture and asked the elevation he was flying. These things are interesting to the jury. There may be amateur photographers on that jury. One of the traits of human nature is the desire to show how much we know and to be leaders. And the amateur photographer may go in the jury room and attempt to show what is wrong with the pictures.

So I called the pilot and the camera man who took the pictures and got the shutter speeds and everything else. Then I introduced the picture into evidence. Here is the intersection, and here is where the fire truck was going, and here is where the other truck was going. (indicating)

I called the first witness: "Mr. Jones, will you look at that picture and find your home on the picture?" He found his home over there, and I told him to keep his finger on there until I got a piece of paper and pasted it on the spot. "Mr. Jones, did you hear the siren blow? How long? What time?"

"It blew continuously in a fluctuating sound until it wound out, and there was a crash at the same time."

Then I called the next witness. Another piece of paper. Then another witness and another piece of paper. When I was through, 35 witnesses had pasted pieces of paper all around there. Some of them were way out here half a mile. You almost had concentric zones of sound. And then you had something to argue. It could be seen that this private truck actually went through a zone of sound to get into the intersection to cause that accident.

After we did that, ladies and gentlemen, there was no question of liability in that case. We had absolute proof that the siren was blowing.

The demonstrative evidence procedure is available in any number of other types of cases. I will show you pictures here we have used, aerial photographs, we have used to indicate intersections and cross walks and the like. We photostated the picture we used with the pieces of paper on it that had been introduced in evidence, and after that was done, we incorporated it into the appellate brief so the appellate court could see the demonstrative evidence we used and see without any question that the siren was blowing. All of these witnesses having heard it, there was no question but what the defendant was wrong.

Then we went into the subject of damages, and there was no compromise verdict. The jury was ready to evaluate this question of damages in a case of completely proven liability.

I wonder if you use this in Idaho. It didn't occur to me until I saw it. (indicating) I had always used negative X-rays (ordinary X-rays) in the court room and a shadow box. That is a cumbersome method to use in showing X-rays, and jurors don't take them into the jury room. Many judges won't allow them in the jury room. I will hold this negative up, and you can't tell me whether its a fractured humerus or a piece of skull taken out.

Now, you would never think of taking pictures and then posting the negatives in your album. You have them developed. So now, in our X-ray cases, we have our X-ray negatives developed, and there is positive proof. In this print of an X-ray negative you can see that a part of the skull has been carried away, (indicating) and there is demonstrative evidence of the bony injury to this man's skull. There is no question about that.

Someone phoned me at about 3:00 o'clock the other morning from Manitowoc, Wisconsin, and said he was trying to introduce *positive* X-rays. He had read about it in the brochure I had done on demonstrative evidence, and he asked if I had any authority for it. I told him that I didn't.

It occurred to me then that a number of these procedures in demonstrative evidence depend upon the good common sense of your trial judge. Prove to him its advisability in the first instance. Don't attempt to spring any surprises in the court room. Talk to the judge beforehand. Tell him what you want to show and what you want to demonstrate.

I told this fellow that phoned me to tell his judge that if he had any question about it, just phone down to Mayo Brothers. I was there the other day taking a deposition, and I subpoenaed all their X-rays. They didn't send me the negative X-rays. They sent me out a complete set of *positive* X-rays. You don't need authority from an appellate court decision for a thing that evokes common sense like that.

Here is another point of procedure in demonstrative evidence. When the clerk puts his stamp and exhibit number on a picture or diagram, don't have him shove it aside. That exhibit should be on the blackboard. Why? So that when the witnesses testify, the jurors can look at that picture or that diagram, and they can see what that witness is talking about. Or you can have the man come over and draw on the various pictures, but let him choose the picture which is most peculiar to his knowledge, and let him put his diagram or mark on that.

Very often we have 15 prints of pictures or diagrams made and give one each to the jurors, one to the trial judge, one for ourselves and one for the other counsel so that when the witness is testifying the jurors may look at these little diagrams without craning their heads or squinting over there and looking at the big diagram, the one on the blackboard.

We used all these (indicating) pictures in the Duval (*1*) Case. We put the captions in when they went up on appeal, and we incorporated all of these pictures in the *appellate* brief. I think the pictures with the brief captions indicate liability. We did 50 pages of writing, but the pictures told the story.

How are you going to show damages to the appellate court? This is what we did: Here are our pictures showing the skeletal architecture of this woman's pelvis. How are you going to show the jury what a terrible thing it is? You have the testimony of your doctors, but that is not as clear as if you showed that woman to the jury and showed that pelvis pulled clear over to the side and show why she has pain. You may not be able to do an actual demonstration of the woman in the court room or the judge's chambers completely disrobed, but you can take a picture. Here (indicating) is a picture of her husband, heels together, buttock horizonal, hands horizontal. And here we come to his wife. It has the same landmarks, heels together, but when you come to the buttock note how this one is dropped way down to this side. That is demonstrative evidence of what has happened inside of that woman's pelvis.

That whole skeletel structure has been completely distorted. These pictures went into the briefs when the case went upstairs. We did about 50 pages on argument, but first we went to our brochure that we prepared before we went to trial, and we got these diagrams (indicating) of two skeletons for illustration of the human body. These illustrations were cut down and were made a size that would fit into a brief. They had to be folded over. One of these went into each brief.

Think of how much time it saves the judge merely to pick up this brief and see all the pictures you are relying on, both on the question of liability and the question of damages, rather than making that judge wait until he comes back to court to sign out for the exhibits, if he wants to take the brief home and study it. Everything pertaining to that case is within the brief.

In this case we have a diagram of the human body, and we have arrows pointing to the parts of the human body that were injured. Here we have summarized the injuries — traumatic crushing of the lumbar sacral disc impairing nerve control and the page number where this testimony can be found in the reporter's transcript. And on this diagram of the skeleton of the husband, we show every element of damages — "Mr. Duvall, married, earning $232.00 a month before he was totally disabled, reporter's transcript 182."

All that the judge had to do was look at this illustration to find summarized every injury that happened to this man. If there was any doubt in the judge's mind about what was said in the appellate brief, he could refer to the reporter's

(*1*) 98 Cal. App. (2) 106.

transcript under the page cited. The prognosis is on here, the operations are on here, all the elements of damages. We didn't have to write about them in our brief. These two diagrams, one for the husband and one for the wife, told the whole story.

Is there anything in the use of demonstrative evidence on appeal that is not proper if done in this fashion? All of the judges in the United States have more of a burden than they can handle. Is it proper then to cut down that burden and prove to them the award you got in the trial court should be sustained?

Sometimes the use of demonstrative evidence even points out to a lawyer the liability he has on a particular case. We had a case up in Yolo County in California, and the highest award up there was a verdict of $30,000.00. (We have "low verdict centers" in California as well). In this case we had a truck going up the highway, and two cars ran into the truck on a narrow bridge. There were very serious injuries in this case. We went up there to try the case, and I wouldn't say that the old gentleman who was sitting on the bench was lying in wait for me, but he had the feeling that if I was going to go into that court room and lug in a skeleton and all the rest of the stuff needed for demonstrative evidence, I was just going to be left in the court room with the skeleton. As a matter of fact, I had to have a trailer to bring all of the stuff I needed for demonstrative evidence in that case. And, ladies and gentlemen, I couldn't prove that case without all of the paraphernalia I had there.

The reason that I knew I couldn't prove it without all of that equipment was that I had gone out and had a diagram done, and here you can see the bridge and the curve and all the rest of it. (indicating)

All the distances were double checked. But I had a feeling, as did the highway patrol, that there was something wrong in this case in the way the defendant was driving the truck. But we just couldn't prove it. We had gone over the highway, and the obvious just didn't occur to us. We had 70 pictures that were brought into the court room. (When we try a case in California, we generally lump the defendant's pictures and the plaintiff's pictures together and anyone can use them, because we are not trying to get a verdict by surprise.) The 70 pictures showed a lot of detail, the back of the truck, the tongue of the trailer, gouge marks and tires and everything else. The next thing I did was take an aerial photo showing the direction from whence the truck had come. Here is the bridge. And here is the direction the private cars were going.

But the obvious still escaped us, and I still thought there must be something to explain why this accident happened on the bridge and why the highway patrol had that feeling there was something wrong, but I couldn't get that "feeling" into evidence. (I refer you to the case of Zelayeta v. Pacific Greyhound. (1) Now they are allowing a number of conclusions of highway officers into evidence. But I couldn't get the highway officers' conclusions into evidence.

So I finally got a model maker to make me a model of that bridge and highway, and it cost about $500.00. When he was done he had the trucks, bridge, curve and everything else to scale. He drew the little truck and the little car around that bridge, *and you could see that they wouldn't clear each other.* I said, "You must have made a mistake. I can't introduce that into evidence without you qualifying every inch of that ground."

He said, "I went over every inch of that ground, and I am prepared to back it up."

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(1) 104 Cal. App (2) 716.

I said, "Before I put you on the stand and have you vouch for the correctness of that model, you go up there and go over that highway again."

He came back and said, "Mr. Belli, I have gone over that curve, and that truck cannot go around that curve without touching that car as it goes around there."

We didn't have models of the truck and the car drawn to scale before. But now we had proof. It was obvious.

I explained to the judge why we had to have the model. We introduced the aerial photos, the 70 pictures, the diagram and the model, and then we went to the skeleton to show the jury the various injuries these people suffered. And the judge allowed every bit of it into evidence in a court room that he never allowed the blackboard to be used before! He had never allowed pictures like this aerial photo much less a mock-up like this model. We settled the case, after two or three days of the trial, for $70,000.00.

Here is something that is provocative, ladies and gentlemen. I ran into it as I was doing this book I am working on. There is no question but that in a criminal case you can use all the demonstrative evidence available. I have seen cases where a foetus has been brought into the court room. The defense counsel screams of inflaming the jury, but the judge allows it into evidence. (You'll see all of this in my book on Demonstrative Evidence.) In a homicide case the body of the deceased, even a decapitated one, may be put in evidence. Some of the most gruesome and most horrible pictures are allowed in evidence in criminal cases. We have a rule in California that you can't introduce the picture of the deceased in a civil case.

Now there are two results without any reason or rhyme whatsoever. You can allow all this demonstrative evidence in criminal cases, yet on the civil side, for some arbitrariness of reason, these things are not allowed on the civil side. When a lawyer comes out of the district attorney's office and gets over on the civil side, he forgets all the demonstrative evidence he has learned on the prosecutor's staff, and he doesn't use the same procedure to point out to the jury what actually happened in a particular case.

Here is a case in which we used demonstrative evidence. The point was so obvious that it was overlooked on the first trial. It happened in California in Fernandez v. Consolidated Fisheries. (*1*) It involved a street cleaner whose duty it was to see that boxes and debris weren't placed or dropped on the street. The street cleaner went to a truck that stopped at an intersection, put his hand on the door, and just as he told the driver that the truck had dropped a fish box about ten lengths in back of the truck, the driver started up the truck and threw him under the wheels, and he was badly injured.

In the first trial the court instructed on the old law of trespass and held plaintiff to be a trespasser. The jury came back for the defendant because there was testimony that the box was this big and that big and that big. But there was no box ever introduced in evidence to show just how big the box was or what it looked like — the box this man saw back of the fish truck.

So when we tried the case the next time, we went down with a subpoena duces tecum, and we got them to bring in a fish box like this truck carried. We introduced that box into evidence. We put it right in front of the jury. My friend who was defending made a lot of remarks about a smelly fish box, but as long as

(*1*) 98 Cal. App. (*2*) 91.

he pointed up the fish box which was the motivating fact, I was unconcerned. We carried that case through with demonstrative evidence. We introduced the box into evidence and photostated it and brought the photostat upstairs on appeal.

If this piece of demonstrative evidence had been used the first time, there would have been no verdict for the defendant. At the first trial no juror knew the size of the box. But here was the box, and all twelve jurors knew the size of the box the second time. There was a verdict in the second trial of $58,000.00!

A pin had to be put in the femur of the plaintiff, so we took a picture that shows the right side of the hip, and the surgical incision shows on the picture, so we did not have to exhibit the fellow to the jury. The jurors could see from this picture introduced in evidence what the injury looked like, and the doctor explained, with the aid of this picture, how that incision was done and how the pin was driven in there. I think most of the courts will at the present time allow a picture such as this in evidence and will certainly allow the physician or surgeon to explain the procedures of the various operations.

(Whereupon a ten minute recess was taken.)

MR. MELVIN M. BELLI: I keep all of my trial notes in bound volumes, and I index them in the front so that I can go back for the last 10 or 15 years and find the procedure used in any particular case. A rule of law may come up that you will not remember, and the illustrative case may be out of place in the digests, but you will remember the name of your case in which that rule was used. If you keep bound volumes of your trial notes with an index, you can then go back to any procedure that you used in a particular case.

On the first page of any case we have this list that shows everything that has to be proved in fact and law in that particular case. And we also do, for our own use, a skeleton like we have done in this one that is being passed around, and that shows everything that has to be proved in that respect so when we have our doctors on, we won't overlook any medical testimony on any particular part of evidence, and we check that off as we go along. After we have concluded our case, we take a 15 or 20 minute recess and run through the book and check every exhibit sequentially to see that every one is "in evidence" and not merely "for identification" so that when we get upstairs we won't run into the problem presented when your main exhibit wasn't introduced and only offered for "identification." Or you may have some rule of notice or forget to introduce a claim or something else. If you check them over before closing, you don't have a problem on it.

I have been asked about settling the transcript on appeal. By the end of the case we have had photographed the blackboard and the various articles of demonstrative evidence, and these pictures are used by the trial judge in settling the transcript. They are admitted in evidence, and they go up as exhibits. You have your own negatives, and you make copies of those pictures for your brief, and in that way there is no question that they are part of the evidence, settled and all ready for the appellate court.

I was asked our method of presenting evidence in, for instance, a disc case. There is a very serious problem of explaining a disc case to the jury. The doctor is on the stand, and he says there is an area of anesthesia over the big toe. Have him step down to the blackboard and explain what he means by a diagram. He has secured his knowledge of medicine in medical school by the use of the blackboard and the use of these visual aids.

You are asking the jurors to put a dollar sign on what the doctor determines

is wrong with that person, so the jury has got to make a diagnosis. The only way you can help them do it is to show the skeleton and the various anatomical parts. We have one in the office that can be separated. The outer layer comes off and all the internal viscera. You can take out the various parts of the body, and you can show the damages to the jury and show the proximity of one organ to the other. If you write to Clay Adams Company of New York or Chicago, they will send you their catalogue showing what is available to take into court to aid the doctor's testimony.

You don't necessarily introduce those in evidence. Those are offered only for the purpose of illustration.

If your doctor gives you, as I gave you at the beginning, an area of anesthesia around the big toe, have him go to the blackboard and explain what he means and how he knows there is this area of anesthesia resulting from an injury at L-4. It is diagramatic and as simple as though there was a pipe-line with water flowing in it. (Illustrated by a sketch on the blackboard). Here are the nerves that specifically come out between these vertebral bodies and go back and innervate that big toe. It is as diagramatic as if you had water flowing through the pipeline. You have an impediment or break there, and the water is not going to flow, so you look for the place of the break.

In this case we have our pantopaque studies and the X-rays, and they show the break or impingement of the nerve at this particular area of L-4 where that telephone wire or pipeline comes out. Here is L-4 on the human body, the vertebra (indicating), the telephone bell rings down here at the big toe on that telephone line. If you get a short-circuit or an impediment here (indicating), you are not going to get that bell to ring here. That is the area of anesthesia.

You explain it to the jury in that fashion. And as I give you the illustration, you can think of any number of examples. Doctors are adept at drawing these things, because they had to do it in order to learn their medicine in school.

You may also take a picture out of any of the anatomical books and have it photographed and blown up. Put that on the blackboard and have the doctor point out what he is talking about with a pointer. That, of course, is not a picture or an X-ray of the party before you, but you may have the doctor illustrate the normal human body and the functions of the various parts of the human body and show where the disc is.

Or, if you have a case where they have done a laminectomy, and you want to show how they produced a graft and fused the bones, have one of the students at the teaching centers draw a pathological picture. He can then come into court and say that he has looked at the X-rays and that this picture is an exact reproduction of the X-rays only enlarged to show the grafts in place. There you can explain to the jury just what has been done. And you have this piece of bone that came out of the back to show the herculean task of the surgeon in doing that.

You can do that, because it is for illustrative purposes, and that is explained to the jury. It shows the anatomy of the human body, what happened and what the facts are in a particular case.

A citation for you with reference to the use of the blackboard is Birks v. East Side Transfer, (*1*) the Supreme Court of Oregon, February, 1952, Rossman, Justice. That case gives a number of citations for the use of the blackboard. Here he says, "Before closing this opinion, we revert to a fact which is mentioned in preceding paragraphs — the use of the blackboard evidence. Such method of

(*1*) 241 P (2) 120.

examination is permissible, for, as stated in Wigmore on Evidence, 3rd Ed. Sec. 789, 'Man does not communicate by words alone.'"

241 P 2nd 120(2).

We have been adding up two and two in the atmosphere for so long, and we have been talking about two and two, yet we haven't gone to the blackboard and added up two and two to interpret the damages and put the dollar sign on them. Put them down and draw a line under them and add them up so that the jury can see all of the various amounts of damages. I think this citation will give you all the authority you need for the use of the blackboard from a respectable court of the United States.

We have another procedure that is used in California, and I recommend it to you for your consideration. I don't know if you have it here, but we had it before the federal rules of discovery. I notice on your program that you had a talk on pre-trial procedure. I think that the best aid for pre-trial is thorough deposition procedure. In California we file a complaint, and with the complaint we file deposition papers to take the defendant's deposition. No case is settled in California until we have the deposition of the defendant. The defendant has a deposition of the plaintiff and a medical examination without the necessity of going to court and getting an order for that examination. We can take a deposition of anybody in that case. With the exception of the expert witnesses, we take a deposition of all the material witnesses.

We used that procedure in a malpractice case. At Stanford University Hospital there was a woman who had a caudal anesthesia, and upon the Caudal anesthesia was superimposed a spinal, and the spinal was so strong that it caused the area of the skin at the point of induction of the anesthesia to slough off.

I went out and told her that if we had to go to trial that I didn't know if we could preserve that mark on her back where the spinal went in. I told her that if she felt any embarrassment about it, she shouldn't consider going to trial, because I felt we would have to take a picture. I told her that if the hospital wouldn't allow it, we would get a court order to take the picture. Otherwise I couldn't do justice to the case, because the demonstrative evidence in that case was the site of the induction of that anesthesia showing how the skin sloughed off. If it sloughed off that much on the outside, you can imagine what it did to the spinal cord. We took depositions of everyone, and we had a book of depositions that thick (indicating). We then sat down with the insurance company, and we settled the case for $128,000.00 before the case was on the "ready calendar."

Here is a picture that shows how the skin sloughed off. Without that picture I would have felt that I was not equipped to go into court. Here are some other ones here. This is a picture taken in the hospital after the accident. Pictures should be taken at the various stages of recovery and introduced into evidence.

Certainly in plastic surgery cases you should perpetuate the condition of the human body at these various stages of plastic procedure so that you can show the jury the sequential steps in surgery from the time this person was brought into the hospital all scarred up until the time they have done everything they can through the use of plastic surgery.

Compare these two pictures. You will note one is in color. I say that you are more fair in introducing a colored picture than you are when you introduce one that is black and white. In this black and white picture you can't tell what is on this man's leg – whether it is ointment, soil from bandages or what it is. You don't get a factual representation. You have to rely on oral testimony. Notice

this picture of a girl with burns. This might be jelly or something else that has been placed on there. How much more factual if you were to go in and take one of these colored pictures where you can see the keloid formation and get an actual portrayal of this man's condition as he was.

We have had no trouble at all in getting these colored pictures into evidence.

Here is a malpractice case where a woman had plastic surgery done on her breast. I also took an intra red picture. You have an actual picture of the human body, but the infra red goes beyond the skin and shows the blood vessels. I took this to show the distortion of the blood vessels. These were in aid of a diagnosis as to how deep the surgery was done in that particular case.

Let me talk just briefly on the question of the brochure. That is something that is an aid in the settlement of a case. We take depositions of the witnesses on the other side, and they take our depositions before trial, and then we prepare a brochure, that I briefly mentioned, of all the facts, *all* the law and *all* the special damages. We add them up and take that to the insurance company or show it to the adjustor if he comes to the office, and we try to settle the case. We don't think of going to trial before we have a brochure or something that is tantamount to a brochure.

We had a case not long ago in which we gave the brochure to the insurance company. We gave everything to the insurance company that they asked for. We gave them encephalograms. We gave them doctors' examinations. Then we found out that one day, when the wife was not at home, the insurance company had gone over and had taken our plaintiff out of the house and into an automobile and had him do a lot of mathematics and figures and tell about his future plans and all the rest of that sort of thing, because they just didn't believe the evidence was as bad as portrayed by their own doctors and our doctors. When the fellow was brought back to the house, he was in a state of hysteria, and we had to put him in the hospital.

So, we went to the Superior Court, and we named the insurance company, and we named the defendant's attorney, and the court *enjoined* by name the lawyer for the defendant and the insurance company from further molesting or bothering or taking any further pictures or taking any further evidence of this particular plaintiff in this case. (*1*)

We have a procedure now in California that I recommend to you. It is found in Superior Insurance Company v. Superior Court. Our office was amicus curiae. I have never seen any advantage to the insurance company in refusing to give the limits of its policy. We now have the right, by deposition procedure against the defendant and the insurance company, to have them bring into our office before a notary and a reporter the actual insurance policy involved, and we find out the policy limits and we know just exactly how much there is in that particular case. A decision just came down from the Minnesota Supreme Court saying that they are going to follow the same procedure. I think the Nevada Court is going to follow the same procedure. It is court law. It is not statutory law. I think it is in aid of settlement of these cases.

The active practitioner who is trying these cases must settle a great proportion of these cases, and you can't settle them unless you have a full and fair disclosure on both sides. You must have the amount of insurance on the defendant's side and the amount of injuries and special damages and all the rest of it on the plaintiff's side.

(*1*) Gilmore v. Superior Court.

Let's take up briefly the use of the blackboard. I think the blackboard is the most important thing in demonstrative evidence in the trial of a law suit at present. In every one of our courts, as I say, we have at least two blackboards. I have gotten in the habit, when I try a case, of always having a piece of chalk in my hand. If a witness is on the stand and she says she is a nurse and there was a "spike temperature" at 3:15 in the morning and the doctor wasn't called until 7:00 o'clock in the morning, I make a note on the blackboard that there was a "spike temperture" at 3:15 in the morning and the doctor wasn't called until 7:00 o'clock in the morning. That testimony is admissible. There is no question about when it is by word of mouth, and if the jurors hear it, they can take it into consideration.

I can see absolutely no quarrel with putting that on the *blackboard.* There is no confusion. There was a "spike temperature" at 3:15 and no doctor was called until 7:00. The jurors can refer to that. They can use that during the trial. There is no question but that the jury gets the full representation.

If the witness says there were 30 feet of skid marks while you are examining him, put 30 feet down on the blackboard. He is confronted with it. I have seen witnesses time and time again, when they are on cross examination, change that 30 feet to 20 or 15 or 10 and say that the reporter misquoted him when his former testimony was read back. But if you *write* that down and he can see it and the jury can see it and the other side can see it, then you get a factual representation of what was said.

We never allow a jury to take the blackboard into the jury room with them unless it is introduced into evidence or unless both sides stipulate that that which they have put on the blackboard and that which we have put on the blackboard may go to the jury room.

Let's come to the *opening statement.* I think that an opening statement should be as full as you possibly can make it and cover everything in the case on damages, liability and all of the witnesses without getting into argument. An opening statement in our average case runs about an hour.

When we come to that opening statement, we have our brochure and we have our trial procedure set. We know what we have in that brief case, and we start the *race of disclosure.* We get that stuff out of the brief case as fast as we can. As soon as that jury is impaneled, we go to the blackboard and mark a column down here for the names of the witnesses. We put down "Mr. Jones." Mr. Jones, ladies and gentlemen, is going to testify that he was coming home from work. He is a school teacher by profession. He was riding on the front end of the street car. The evidence will show, and he will testify, ladies and gentlemen, that the green light was "go" for the vehicle of the plaintiff. And you continue with any other testimony that you are concerned with.

Then you continue with all the rest of your witnesses and give a summary of what these witnesses are going to testify to. And over here you have your statement of liability. You are not going to *argue* law, but if you are relying on any particular code section, you are going to state, "Ladies and gentlemen of the jury, we are going to prove to you by Section ____ of the California Vehicle Code that you may not make a right turn at this particular point in the business district." You give a *factual expose* and *no argument.*

When you come to the question of damages, you put down the names of your doctors. On your voir dire examination you are going to ask the jurors if they know the doctors. "We are going to call Dr. Jones. Dr. Jones is a graduate, we

will show you, from this school and that school and he is a leading orthopedist. He has his office at such and such an address. He has been there for a number of years. He saw the person first on the 15th of July, 1951." And you put on the blackboard the names of the other doctors who are going to testify, and then the nurses who are going to testify. And there you have part of your formula.

These witnesses are going to testify to factual situations. Those factual situations, added up with the law, the code sections, are going to show that the defendant is wrong.

And after we have shown that, we are going to have the doctor testify who first saw him or her right after the accident. He will tell you how he appeared, whether he was given morphine, what the injuries were, what hospital he was put in. Then we are going to call these specialists, and they will testify and give you a prognosis of what happened in this case. We have had the plaintiff examined by Dr. Smith who is a specialist in orthopedics. And we have Dr. Jones who examined the plaintiff at the request of the defendant.

So you take these two parts of the formula, and you add up this part of the formula, and you have liability plus damages. Then you come over to this side, and you then must fulfill your duty to interpret all of this into *dollars and cents.* The way we have done it is to start in at the very beginning.

If we have a case involving a traumatic injury to the head, for example, we have $150,000.00 *as a minimum prayer,* because the life expectancy of this man is 30 years and he has been earning around $300.00 a month. The man will have to be put in an asylum or will have to be kept, because he is unable to keep himself or take care of his family and will not be able to do so the rest of his life. Any case you have involving traumatic head injuries is going to run into figures like that or exceed them.

Now you go to this side of the blackboard. These are all factual things that we have in our brochure. This is all in aid of getting these facts out of the brief case and to the jury and having them evaluate it. This is all given to the insurance company prior to trial. It is *fact* not *argument.*

By the time we get to trial, we know how much our doctor bills are up to the time of trial. We are going to say $2,000.00 past doctor bills, $2,000.00 past hospital bills – and you are never going to get a case involving traumatic head injuries where you will get that poor soul out of there with something like $4,000.00 for his medical expense up until the time of trial. You put down his future hospital bills, his future doctor bills, expense for private care and so on. We put down his wages – $300.00 a month, twelve months, 30 years. Then we are going to ask $25,000.00 pain and suffering that first year. Those are the figures we have down there and what we are going to ask for when we get through with the trial and we come to the final argument.

We put that all down on the blackboard during the opening *statement.* It takes about an hour to put it all on there. You may need another blackboard when there are complex questions or code sections or other matters involved. When you come to the final *argument,* then you start multiplying these things out, and you start getting the answers, the conclusions from this formula, and you show why a prayer for $150,000.00 is justified. You add all this up in your closing argument. You don't do this in your opening statement, because that must be factual, without argument.

I think that this is something that speeds up a trial from one to two days,

if you have all of these things on the blackboard at the beginning of the case. If there is anything we have overlooked, or if some expense that we are claiming is too high, the witnesses will come to the blackboard and put their figures on it.

When we come to the final argument we add these up, and we get $36,000.00 for these figures here. If it develops that the plaintiff was getting $235.00 per month, you will have $90,000.00 for loss of wages over the 30 years!

Now in a majority of the federal decisions and in some of the states, they say that if you are going to give a present sum of money that you must *discount* that and not give that $90,000.00. They also say that the man is not going to work for those full 30 years. He is only going to work for 20 years, and during the last ten years he will just "coast along." Therefore we should cut that sum down to something like $45,000.00.

To be realistic in an argument like that, take the cost of living from the U. S. Chamber of Commerce, and you will find that from 1900 up to the present time the cost of living has gone up. What you are giving that man now has to last him for 30 years. Rather than discount this amount, it should be *raised*. The man who is getting $300.00 a month now will be getting $600.00 per month ten years from now. Ridiculous? Go back ten years and you will find that the man who is getting $300.00 a month now was only getting $150.00 a month. So I say that this figure should be raised instead of being discounted.

Now you come to this question that we overlook so much — *pain and suffering*. There we have the difficult job of interpreting pain and suffering into *dollars and cents*. Some one asked me the other day how you interpret pain and suffering into a physical thing that you can *see* in the court room. I will give one illustration: I had a case involving a subluxation of cervical disk. When you run into those cases, don't let the doctors tell you that a subluxation cannot cause head pains. You can find authority that you can suffer a multiplicity of pain under those circumstances.

In this case there was a lot of testimony with reference to this woman's pain and suffering and that she was taking prescriptions of codeine, empirin and aspirin, and the doctor said he had given her prescriptions a number of times over a period of years.

I called in a chemist to tell what empirin was, what codeine was, and what the other drugs were. I called in a druggist to tell what these drugs would do and a doctor to testify about how these things are used, that they alleviate pain and suffering somewhat. Then I subpoenaed the woman's druggist, and he brought into the court room every prescription that was filled for that woman. We put the dates of the prescriptions down on the blackboard, and sure enough twice a month regularly throughout the year prior to the trial these prescriptions were being refilled one after the other. There we had an actual physical showing of the prescriptions, papers that you could look at, to show the jury the physical pain and suffering this woman went through for that last year. We introduced them into evidence, and they went to the jury room with the jurors. We had a stack of prescriptions there for what? For pain and suffering.

We keep a blackboard in our office, and we go over these things before trial and final argument. It helps to evaluate the case for yourselves as you confer with your client and your witnesses. The jury must evaluate the pain and suffering in our state, and how are they going to do it unless you have it displayed there for them in black and white.

Another component of the award is ridicule and embarrassment. How are you going to turn that into dollars and cents? I know of no other way than to use these examples, and if you find a quarrel with the examples I give you, I wish you would write to me and tell me some other way this can be done so that I can incorporate it in my book. I have talked to lawyers all over the United States, and we run into this problem again and again – how do you measure pain and suffering by dollars and cents?

If you start out with $80,000.00 for pain and suffering and just throw that figure at the jury, you allow the jury and the appellate court to wonder if the $80,000.00 shouldn't be $10,000.00. It may depend upon a juror who has experienced similar suffering himself or another one who had someone in his family that suffered, or it may be that three or four of the jurors never had a sick day in their lives. If this procedure does nothing else, it gets the jurors thinking in terms of *finite* periods of time. Time is a continuous thing. It runs on from the time that man was born to his life expectancy – his life span. How do you interpolate that into terms of dollars and cents, day by day, minute by minute, hour by hour, weeks upon months and on into years?

These doctors have testified that the man is going to have pain and suffer for the rest of his life. That pain is going to be with him. He is not going to have it until 11:59 in the morning and then stop between 11:59 and 12:30. It is a continuous thing. This pain is going to last all during his life expectancy of 30 years. You may ask the jury, "Shall we give him $1.00 a day? $2.00 a day?" There is respectable authority for making such an argument. (*1*) Of course you can't say to the jury, "If I were to lay $10,000.00 in greenbacks on the table in front of you, would you pick them up and take on an injury like that?" A majority of the judges would stop you right there. But you have to *bring home* what pain and suffering is. You have got to make them realize what it means to have traumatic arthritis where you lie in bed and get in one position and you are not able to move.

A client came into my office and said, "For the first month I laid in bed and would get in a position and couldn't move, and I heard the clock strike the hours. The next month I heard the half hours. The next month the minutes. And for the next six months after that, until I would take a pill to knock me off, I could hear the grandfather clock tick back and forth the seconds. With every tick I lay there in pain. I couldn't sleep."

Pain and suffering is a real and actual thing, and you are asking that jury to interpret it in dollars and cents. So you start with *finite* periods of time and not $80,000.00. And you start with a dollar a day or two dollars a day or whatever is a reasonable sum.

I have a friend, Jim Dooley of Chicago, one of our great trial lawyers today, who went at it this way. He said, "Ladies and gentlemen of the jury, it has been testified, without question, that this man has an irreparably injured back, and he is going to have it for the rest of his life. You are asked to evaluate in dollars and cents what pain and suffering is. This honorable court will instruct you that a man of his age has a life expectancy of thirty years. Let's put it to you bluntly. What's pain and suffering worth? You have got to answer this question. You have got to award for this as well as the special damages and loss of wages. Let's take Pat, my client, down to the waterfront. He sees Mike, an old friend. He goes up to him and says, 'Mike I've got a job for you. It's a terrific job. You're not going to have to work any more for the rest of your life, and the best part of this job is

(*1*) Wren v. Burch 236 SW (*2*) 924.
Emery v. So. Cal. Gas 72 Cal. App. (2) 821.

that once you agree to take it, you'll never lose it. As a matter of fact, you can't lose it. You don't have to do any work, and you get five bucks a day for the rest of your life. You don't have to work even one second. All you have to do is to trade me your good back for my bad one, and I'll give you five dollars a day for the rest of your life. Do you know what five dollars a day for the rest of your life is? Why that's $60,000.00! Of course, I realize that you are not going to be able to do any walking, or any swimming or drive an automobile or be able to sit in a moving picture show. You're going to have *excruciating pain and suffering* with this job, *thirty-one million seconds a year,* and once you take it on you'll never be able to relieve yourself of this, but you get $60,000.00' "

Make a homely example like that. Take five dollars a day times 365 days and then multiply that times the life expectancy and then you come to a figure of something like $60,000.00. You don't start with $60,000.00, but you break it up into finite periods of time.

And again we come to this example: *All he does is live,* and he has a right to live out his life free from pain. If you start with the smaller figures and build it up, the jury will see what you are asking for and the appellate judges and the trial judges will see what you are asking for, and then you will have an award of *adequacy* and not an award of *confusion.*

It is unfair to go in and use some of this oratory that they were using in Chicago the other night with bombasts on everything from George Washington to Roosevelt. You don't need all this eloquent rhetoric, and you don't need to drown the stage in tears. You are not going to get an award that expresses fact if you do that.

How about ridicule and embarrassment? Break ridicule down to $1.00 a day, embarrassment $2.00 a day. Multiply it out and you get $10,000.00 for one and $20,000.00 for the other.

I have tried a number of malpractice cases, because I feel very strongly about medical malpractice. Some of my best friends are in the medical profession. As a matter of fact, each year I give a lecture to the graduating class at the University of California Medical School.

But I am curious and I am boiling at the medical profession for setting themselves aside as being immune to suit. Suppose someone would come before your legislature and say, "We are going to have a holiday on law suits against architects, plumbers and doctors. You can't sue them." How far would he get? Yet that is practically what has happened in the medical malpractice case.

I say to you, ladies and gentlemen, that there must be a procedure *within the law* to take care of these malpractice cases. I have had cases of some young kids in that office of mine that would make your hearts bleed, and I can't get a doctor to testify on those cases. I spoke to a bar association in one of the southern states, and the chief justice of that state came to me afterwards and told me that his wife had a malpractice suit, and he thought there was complete liability. But no doctor would testify!

Now, if something isn't done, you are going to have penalty legislation like they recently passed in the State of Massachusetts. They passed a law in Massachusetts whereby the plaintiff may rely upon medical textbooks to achieve against non-suit. If you can't get a doctor, all you have to do is submit to the other side ten days before trial a standard medical treatise indicating that there was malpractice, and that can be your expert, and the jury can weigh that medical

treatise introduced on your side against all the doctors that come in on the other side. You are going to have penalty legislation like that if something isn't done. Enough on malpractice, No, one other:

I had a case up in one of the neighboring communities of San Francisco in which a doctor called me, and he said, "We have a case for you to try against a doctor, and we want you to use all your demonstrative evidence and everything else. We are going to drive this doctor out of the community."

"Well," I said, "wait a minute. I want to get my partners on the phone. I guess you have taken my words to heart, and we are going to see a new day in the relations between doctors and lawyers."

The doctor said, "Oh, yes, we are going to drive this *Osteopath* out of town. We are going to finish him off." (laughter)

I say this in all seriousness – and I am deeply appreciative of the privilege of talking to you on both sides, the plaintiffs' side and the defendants' side and the insurance people – I think that had this case been one of another M.D., if he had come into the operating room with a rusty knife and a pair of overalls on, from past experience I can truthfully say that there would have been dignified and adequate testimony that "Old Joe" had made a slip, that is was standard practice, that he had gotten an untoward result in a tough job and that the patient shouldn't have complained. (laughter)

Coming back to this question of how to interpret this ridicule, pain and suffering in dollars and cents: You have got to get that plaintiff or defendant in and go over the complete case. Shut off the phone. Go over the case with him so that you yourself are satisfied with that particular case.

I recall a client that came into the office after she was in a Greyhound bus accident. It was a case of complete liability, and someone had sent her to the office, and I had gone over the case with her, and I had gotten her a settlement of $4,500.00. I told her that she "was crazy" if she didn't take that.

She said, "Maybe I am, but I am not going to take it."

So she went around town and went to a number of other lawyers, and they called me up. One nice thing about the practice in San Francisco is that among the personal injury offices, and I think NACCA has a lot to do with it, if a client goes over to another office, we vie with each other to send over as much of our file as we have to the other office so that the client will get the combined consultation and judgment of several lawyers. She went around to some other offices and came back some months later. She talked about seeing snakes in the bathtub and being poisoned and everything else. This woman had a full blown traumatic psychosis, and it was one of the few cases in which I have seen electric shock administered successfully on a traumatic psychotic patient.

We settled that case for $78,000.00! How terrible it was for me not to have taken sufficient time in the first instance to go over the case. She might have taken my advice and settled for $4,500.00.

You have got to go over those cases with the plaintiffs when they come into your office or you are going to run into trouble.

Here is an incongruity in this personal injury field. I enjoy going out and seeing surgical procedure. I would never think of arguing a case or examining a doctor unless I had seen that surgical procedure. The first two or three are pretty

rough. I remember seeing recently some of these prefrontal lobotomies. They are about as rough as you can get. The last one I saw the nurses even turned around from the operating table when they put on the electrodes to give him the electric shock and he went into convulsions. Lou Ashe was with me, and I said, "Look how few instruments they have." And Lou was down on the floor. (laughter)

Before you go into any of these cases, it is incumbent upon you to go out and get a doctor friend and see these operations being performed so that you know what you are talking about when you get out there and argue the case. An architect wouldn't go out before a jury and with the utmost aplomb walk back and tell them how to draw plans for a house if he hasn't done it himself.

When the client comes to us from the family physician, we must know all the most modern methods of medical technique. We have to know if gold salts have been given. If a rash appears, we have to stop giving gold salts.

We must take the client and send him to various doctors, physicians and surgeons and get their reports back in our offices. For we lawyers, with no formal medical training, must help evaluate these injuries to the jury in that particular case. And you can't do that unless you have had some medical experience picked up in college or out at the hospitals.

Apropos of that, Dr. Hubert Smith, who is both a doctor and a lawyer, is going to give a course in medical-legal jurisprudence in San Francisco next month. You will start at 8:00 in the morning and go until 11:00 at night, so he will cover a lot of ground. And I think you would find it a great aid in your work with cases of this type.

Now, how are we going to turn ridicule and embarrassment into dollars and cents? You must do this. The defendant must compensate in *dollars and cents* the plaintiff for ridicule and embarrassment. Unless the lawyer shows the jury how to do this, he is derelict.

Let us take the case of a woman who had an ineptly performed hemorrhoidectomy. The defendant doctor severed the sphincter muscle in three places. It will never regenerate. Thorugh the rest of this woman's life she will have no control over her rectum.

I shall take this woman into my office and ask her to describe her living day. I shall ask her to describe what she does when she gets up in the morning, her breakfast, her duties about the house in the morning, her lunch, her afternoon, her evening, her going to bed. I shall ask her to describe her intimate life with her husband and family. I shall ask her if she goes to church, if she drives an automobile, and if she does not, why? On the stand I shall have her give to the jury a minute description of her life after this operation and her life before the operation.

What does it mean to have a husband and to have children, to be an active and intelligent and attractive woman in the community, and what does it mean to have an operation like this and then be subject to this embarrassment. You can't go to the moving picture show. And more, you can't go automobile riding, and let her tell you, and then you ask her the questions when it comes up to trial. What does she do when she gets up in the morning?

"I get up at seven in the morning. I have to do this mechanical operation of evacuating my bowels."

And you must in detail show what she goes through each second, minute and hour of the day. How shall I ask payment for embarrassment and ridicule in dollars and cents?

I shall ask my jury to give one dollar a day for ridicule, times 365 days, times thirty years, and I achieve a figure of $10,000.00. I shall do the same for embarrassment. And by that time the jury realizes that they have before them a *person*, a *human being*, even as they are. The jury knows what that person is going through and what she has to look forward to until the sunset of her life. You must do that to achieve an *adequate award*. I think this one added up to about $206,000.00

I recall trying the case of Sullivan v. City and County, and I noticed that one of the jurors wasn't paying too much attention. So I deliberately made a mistake on the blackboard. Instead of adding it up to the correct amount of $125,000.00, I deliberately added it up to $110,000.00.

I had hoped that this mistake would wake a juror up or someone would nudge him and make him pay attention. (Some of my jurors fall asleep, too.) I was looking at the blackboard and waiting for something to come out of the jury box, and I heard someone walk behind me, and it was His Honor that had come down from the bench and was looking over the computation. He said, "Mr. Belli, I am surprised you can't add. Your damages in this case should be $125,000.00." (laughter)

He was the last guy in the world that I wanted to hear from at that particular time. If that had been on a motion for a new trial, I wouldn't have objected at all. But believe it or not, we went upstairs on that, and the defendant argued that the judge had directed a verdict for $125,000.00. But the California Supreme Court said, "No, we take judicial notice that there are some of our more learned trial judges who have gone to school and can add and have had mathematics, and if the occasion arises where they can apply this elemental science, they should be allowed so to do on the blackboard." (laughter)

Ladies and gentlemen, there are refinements upon refinements of the use of the blackboard in showing pain and suffering and all the rest. "The More Adequate Award" is done in this brochure, and the "Use of Demonstrative Evidence" was a talk I gave before the Mississippi State Bar Association.. I hope I will be able to elaborate in this book what we are doing.

May I give you just one further thought before leaving. I would like to close on this thought because I think it permiates all of this new procedure of the *race for disclosure* and trying these cases as fast as you can, this attempt to unclog the calendar not only by trying the cases in a speedy manner but in trying to settle these cases when you can. I want briefly to talk about the case that comes into the office with a prior existing condition.

Illustrative of this is Aliam v. City and County. In this case a woman had sprained her ankle on a street car, and one month later she was in an insane asylum. She was 55 years of age. There was no question of menopause. I had two sets of doctors. One set wanted to go all out that there must have been ketechial hemorrhages in the brain. (There was vomiting afterwards). But they couldn't convince me on that. They were sincere, so I let them give their testimony on that without relying on it.

But I was impressed with the other set which said, "One: You have a predisposing condition. Two: You have got to have the trauma in order to put the plaintiff in condition number three."

In other words, the street car company takes a person as it finds him, and

this woman happened to have a predisposing condition. We went into her background, and there was a certain amount of mental aberration. She was able to run the family, do the cooking and everything else. She had taken care of herself. There was no thought of sending her to an institution. She had never had psychiatric care. But she was on the *borderline.* When she received that sprained ankle on the street car, the embarrassment of it in those unfamiliar surroundings precipitated her into condition number three — insanity.

The truth of that became obvious after we went to trial. In that case there was an offer of $2,500.00, and that case didn't go to a verdict. The city attorney's office settled that case after we had been in the trial for six days for $52,000.00, because we convinced them that this was not just a case where a crazy woman had sprained her ankle. That was ridiculous. My doctors testified that the trauma to her ankle in unfamiliar circumstances, the embarrassment thereof, and the pain was enough to precipitate the psychosis, and I'll prove this to any medicine man!

The same thing applies for intoxication, and an article should be done on it. One Supreme Court has said that a drunken man is as much entitled to a safe street as a sober man and twice as much in need of it. (1) That is the law of intoxication.

As a matter of fact I remember of a street car case where the judge instructed that the company had to use the "utmost care." And when we define utmost care in a case involving a common carrier we mean the *highest degree of care* "of which there can be no higher." Yet we found decisions that say when you have a drunken person you have to use more care. So they *practically* become an "absolute insurer!"

We tried a case not long ago where the plaintiff was a sea captain that had just gotten out of the state asylum.

Not all my clients are crazy people, but a majority of them are! (laughter)

He had gone to a hotel, and he picked the hotel that was the headquarters for alcoholics anonymous. It was full of drunks. Defendant's counsel naturally thought we were going to play down the drinking. But we showed that the owner of this hotel had this dangerous elevator there and he certainly should be held to use a higher degree of care knowing that all of these people fighting liquor were living there. My client had walked to the elevator door, had stepped in and fell four floors. He said he woke up down there, and the first thing he thought was "Oh, boy. Overboard again." He thought he had been torpedoed. (laughter)

They got him to the hospital and amputated one leg and a complete ankylosis of both articulating lower joints in the other leg resulted.

In my opening statement I said, "There is absolutely no question but that this man was addicted to the use of alcohol. But, ladies and gentlemen of the jury, I am going to try and keep him sober during the trial. He should be on his good behavior, but he may show up with a load on board." About the fourth day I was going to put him on in the new blue suit I had bought him, and I said, "Andy, are you ready to go?"

He said, "Sure and we'll knock 'em over." He was drunk as a Judge — I mean Lord!

I got up in front of the jury, and I said, "Ladies and gentlemen, that which I foresaw at the beginning of the trial has come to pass. It should be obvious to you

(1) Robinson v. Pioche, 5 Cal. 460.

in the front row that we are having a little difficulty. My client has succumbed to too much liquid analgesic on account of pain. But if you think he is in a bad situation, I could think of a worse situation. Suppose his lawyer came to court drunk but the plaintiff was sober!" So we proceeded on with another witness. When we finished up the case, there was a settlement of $62,000.00 in that case.

We had a very kind judge on that case. He saw Andy's plight, and we went into his office during one of the recesses. Everybody has their own pick-me-up, and the judge had one. He made lemonade mixed with baking soda, and he gave this to Andy, and Andy downed it all in two gulps. After downing it, he came out and sat next to me at the counsel table, and he leaned over, and he was "spitting cotton." His mounth was dry as could be, and he said, "The judge mixed a salty drink."

I said, "As a matter of fact, Andy, I have had one of those myself on occasion, and I thought they were pretty good."

About that time I saw the bailiff come out of the judge's chambers, and he went up to the bench, and I saw the judge convulsed, and his face got red, and he started laughing and declared a recess.

We went back into chambers, and we found that the bailiff had filled the baking soda glass up with salt. There, at least, was an indication that Andy was telling the truth at this particular time.

Well, we have run to 4:30 and still there is much left unsaid. There are many citations that I haven't given you. They are available, and if you want these citations, I will try to give them to you. I do recommend to you, and I sincerely recommend them to both plaintiffs' counsel and defendants' counsel, these NACCA Journals. They can be purchased by writing to 6 Beacon Street, Boston, and asking for them. You will be able to find just what we are doing to keep abreast of all the different changes in this field of law. There is no field of law in which there is a more rapid or volatile change than in the personal injury field.

The law of negligence is all about you. It is as varied and as active as the lives of men and women — the bug in the Coca Cola bottle, slipping on a banana peel, the man in the airplane. It is in seven out of every ten cases.

In conclusion let me say that I do think it behooves us who talk so much about justice to give justice. Just and adequate are synonymous. Thank you very much for the privilege of talking to you. I appreciate it very much. I'll try to have done my book, *Manual of Demonstrative Evidence*," about 1500 pages and 400 photographs and illustrations by the first of next year. (applause)

VICE RESIDENT BROWN: Mr. Belli will answer any questions that you may have. He is a demon for punishment.

MR. MELVIN M. BELLI: That is like the fellow who said, "My father and I will answer any question you put to us." A difficult question was asked, and he said, "All right, that one is for my father."

There was a pause, and someone said, "Why doesn't he answer the question?"

The fellow said, "Because he is in Africa on a hunting trip." (laughter)

PRESIDENT LITTON: Thank you very much, Mr. Belli, for that most interesting and instructive address. I am sure we are going to get better verdicts in Idaho as a result of it.

At this time we will have a report of the Canvassing Committee:

MR. HARRY BENOIT: Mr. President and delegates to this meeting: I want to say first that this is a unanimous report. There will be no minority report, no roll call, no change of votes. (laughter)

Your Committee appointed by the President to canvass the votes of members are Frank Meek of Caldwell, Ray McNichols of Orofino and Harry Benoit of Twin Falls. We met yesterday afternoon with the Secretary. The ballots were all there in sealed envelopes with the name of each person who voted on the envelope. So cautioned with that sacred right of the secret ballot, the members of your committee know for whom each member of the Eastern Division voted. (laughter)

The result of the balloting is as follows: Alfred C. Cordon, 36; Louis Racine, 50; Kent Naylor 1 write-in vote. I want to assure you that I particularly looked at that envelope, and Kent did not vote for himself.

Mr. President, if it is in order, I move you that Louis Racine be declared to be the Commissioner from the Eastern District to succeed you. (applause)

PRESIDENT LITTON: Thank you, Mr. Benoit. Would Mr. Racine please stand up? (applause)

Whereupon a number of announcements were made and the meeting was recessed until 9:30 a.m., Saturday, July 12, 1952.

SATURDAY, JULY 12, 1952,
9:30 A. M.

PRESIDENT LITTON: We will please come to order. I will turn the meeting over to the Vice President, Robert Brown, who will introduce the new lawyers.

VICE PRESIDENT BROWN: Good morning. It has been a year since our last meeting. We have had 49 new members admitted to the bar of Idaho. If any of them are present, I would be pleased if they would stand so that we can acknowledge them. Finding none – Mr. President, I should have said those present having stood for the purpose of the record. But had they been present, I would have extended a welcome, on behalf of the Bar Commission, to a profession in which I consider it a privilege to belong. The Commission and the members of the Bar certainly would commend to them an interest and participating activity in their Bar Associations. The changes that we all wish for, the foreward looking ideas that each of us might have for in some manner improving the judicial processes, are in fact done through the agency of our Association. The time we devote to it, our interest and our sincerity are the actions which bring the fruits we hope for in improving the judicial process. Were they here, I would welcome them again. Thank you. (applause)

PRESIDENT LITTON: We are privileged at this time to hear the report of the Prosecuting Attorneys Section. This will be given by Mr. Adkins.

MR. HOWARD ADKINS: The Prosecuting Attorney's Section of the Idaho State Bar convened for its regular semi-annual meeting in the Redwood room of the lodge, Sun Valley, Idaho, July 9, 1952 at the hour of 10:00 a.m., and concluded at 5:00 p.m. that day.

A report can well include some of the resolutions adopted by that group. Namely:

1. Whereas we wish to asknowledge the courtesies extended to us by Paul Ennis and the other officers of the Idaho State Bar as well as the management of

Sun Valley. Now therefore be it resolved that we go on record as commending Secretary Ennis and the Bar upon the circulation of the News Bulletin; and expressing our thanks to the Bar and the management of Sun Valley for the facilities provided for our meeting.

2. Whereas the office of the Prosecuting Attorney is commonly prevailed upon to effect prosecutions for the purpose of collecting checks, Now therefore be it resolved that prosecutions on check cases be instigated only after the complainant has signed an affidavit setting forth

(a) That the check was presented as a valid instrument.

(b) That the maker was not intoxicated.

(c) That the check was not post-dated.

(d) That the check was not given for pre-existing debts.

and (e) That the affiant is not prosecuting the action for the purpose of collecting the check.

3. Whereas there appears to be confusion as to the nature of the action to be instigated in the recently adopted Uniform Reciprocal Support Act, Now therefore be it resolved that when the action is initiated in the State of Idaho the matter be treated as a civil case and refered to an attorney of the petitioner's choice, except in those cases where the prosecutor's office is required to recover a sum for the State of Idaho.

4. Whereas our association in cooperation with the Office of the Attorney General has compiled a booklet of forms for the use of prosecuting attorneys, and whereas a request for same has been made by the University of Idaho.

Now therefore be it resolved that the Law Library of the University of Idaho be presented with two volumes of the same.

5. Whereas the last legislature has endowed the office of Prosecuting Attorney with the esoterical qualities of a learned pedagogue and required of them that they conduct a school for judges of elections preceeding the general election and

Whereas it appears that the casting of the new form of ballot at the primary election may tend to be more confusing

Now therefore, as a public service, be it resolved that the Prosecuting Attorney's of the various counties conduct also a school for judges of elections prior to nominating election and that the opinions written from the Attorney General's office be adopted in effecting general uniform procedure on election matters.

May I join with Attorney General Robert Smylie in saying that we feel that the cooperation which is developing between the Prosecuting Attorneys and the Attorney General's office marks the beginning of a new era in relationships which will best serve the interests of the people of Idaho.

May I acknowledge on our resolutions committee the services of Vice-President J. Morey O'Donnell, Hugh McGuire and Secretary Robert McLaghlin.

Thank you for your courtesy.

PRESIDENT LITTON: Thank you for your report, Mr. Adkins. I am sure we have a fine Prosecuting Attorneys organization and that they are doing a lot of valuable work in the right direction. Having had some experience, I know that the check law is certainly taken advantage of at different times by different operators.

At this time we are very happy to have Judge Jack McQuade present the report of the Judicial Committee. I want to say that the Judges are always on the job. They came a day ahead of us and worked as an organization of their own and then assisted us in every way possible with the general convention. I am very happy to present Judge McQuade. (applause)

Apparently the Judge has stepped out, so I will ask John Black to continue his report on group insurance for lawyers in the State of Idaho.

MR. JOHN BLACK: It is my pleasure to report to you, as Chairman of the Idaho State Bar Group Insurance Committee, that during the past year, your committee, consisting of H. William Furchner of Blackfoot, Wesley Merrill of Pocatello, and myself, have devoted considerable time and study to various forms and plans of group insurance which may be placed in force for and on behalf of the members of the Idaho State Bar. We have received volumes of correspondence from various insurance companies engaged in writing group insurance, and have in addition had personal meetings with representatives of several companies. From all the various plans suggested, your committee has determined to recommend one plan which they feel will give the members of the Idaho State Bar the most general broad coverages, at the least expense.

This policy is proposed to us by the Continental Casualty Company, and consists of two plans, with the possibility of a third plan being subsequently placed in force, should there be a sufficient demand for it among those eligible to receive it. Plan A is available to male members under the age of 60, and pays a weekly indemnity of $75.00, with a principal sum of $1,000.00 payable in the event of accidental death, and upon which the annual premium is $113.00 and the semi-annual premium is $57.00.

Plan B is available to all members, both male and female, under the age of 70. This carries a weekly indemnity of $50.00, with a principal sum payment of $1,000.00 in the event of accidental death, with an annual premium of $76.00 or a semi-annual premium of $38.50.

Both of the plans mentioned above, insure the member for full weekly indemnity, beginning with the first day, and payable up to life, during the period of total disability, where the disability arises from an accident. Likewise, this policy provides for a payment for total disability of full weekly indemnity, beginning with the first day of hospital confinement, or the 8th day of such disability, if not hospital confining, whichever occurs first, where the disability arises from sickness, and is payable up to a period of 2 years, or 104 weeks. These benefits are available for each period of disability.

The only exclusions from the policy are disability caused by pregnancy, suicide, private flying, or war. The policy pays in the event of partial disability, one-half the weekly indemnity, up to a period of 6 weeks, where the disability is caused by accident. Where an accident causes non-disability injuries, all medical or surgical expense incurred within 30 days of the accident, will be paid up to the amount of 1 week's indemnity.

A new feature has been added this year, which we think has a great deal of merit under this policy, which pays a minimum indemnity for specific accidents. In other words, when injury results in any of the specified losses, the company will pay the weekly indemnity for the period of total disability, up to 5 years. However, in no event will such payments be made for less than the number of weeks, according to a schedule appearing in the policy. For illustration, suppose that by accident there results a complete dislocation of the hip joint. The policy will pay

not less than 12 weeks, even though the member may only be disabled for a period of 6 weeks. For another example, suppose that a member suffers a fracture of the collar bone. The policy will pay a minimum of 6 weeks, even though the member may be back at work within a week. There is a complete schedule of these minimum indemnities for specific accidents contained in the policy.

Certain optional coverages are also available to individual members under the age of 60. One of these is the hospital indemnity which provides for the payment, during hospital confinement, up to 70 days per disability, of $7.00 per day, plus all hospital charges for X-ray examinations, anaesthetics, laboratories, operating room, drugs, dressings, and other necessary miscellaneous hospital expenses, and for ambulance service to and from the hospital, not exceeding, however, $70.00. The annual premium for this is $13.30 additional, and the semi-annual premium is $6.65.

The surgical indemnity provided for in the policy, covers injury or sickness which causes the insured to undergo an operation, listed in the schedule of operations, and the policy will pay the actual expense incurred, up to the amount shown in the schedule, not exceeding the maximum surgical indemnity of $225.00, as a result of any one accident or sickness. The annual additional premium for this indemnity is $9.00 and the semi-annual is $4.50. In this connection, all operations are covered, whether the surgery is performed in a hospital or elsewhere, and the insured has a free choice of any legally qualified physician or surgeon.

Accordingly, your committee has adopted the following Resolution for presentation to the Idaho State Bar and Convention assembled at Sun Valley, Idaho, on July 12, 1952.

RESOLUTION

"BE IT RESOLVED by the Idaho State Bar Association, that it does hereby adopt a plan for group insurance, as proposed by the Continental Casualty Company, and hereby and herewith authorize the representative of said company to proceed to obtain the necessary 50% of the Idaho State Bar members, in order to put in effect the master policy for the benefit of the insuring members of said Bar Association, immediately, and BE IT FURTHER RESOLVED That the Idaho State Bar Association and Convention assembled, recommend said plan to the individual members of said Association, and urges those eligible to take advantage of this opportunity to obtain group insurance at substantial savings, by virture of the mass purchasing power of the entire group."

Mr. President, I move the adoption of the foregoing Resolution.

PRESIDENT LITTON: Is there a second to the motion?

FROM THE FLOOR: I second the motion.

PRESIDENT LITTON: Any discussion?

MR. FRANK MARTIN: Mr. Black, I noted that there is a 60 year provision in there. What is the effect on those members who approach the age of 60 but have not reached it yet. Do we have to drop that at 60, or does it carry on?

MR. JOHN BLACK: No. For those who take it before the age of 60, once you become a member of either class A or class B, you continue until you reach the age of 70. At the age of 70, once a year they send you a questionnaire, and you can continue to be a member of the plan providing you can answer these questions to their satisfaction.

1. Are you now, to the best of your knowledge and belief, in good health and free from any physical impairment or disease? Give details of all exceptions.

2. Have you had any injury, sicknes or physical condition in the past ten years requiring a doctor's care or surgical operation? If so state the nature, dates and duration of disability.

3 Have you ever been advised to have a surgical operation which has not been performed? If so when and for what?

4. Do you understand and agree that if you are not on active, full time duty on the effective date of this insurance, it shall not become effective and this application shall be void?

The difference between this and the regular plan, as I understand it, is that there is no underwriting to our regular plan. Anyone below the age of 60, a male member, is entitled to the benefits of plan A, and anyone below the age of 70, whether they are male or female, is entitled to the benefits of plan B without answering any questions or making applications. The only requirement is that at the time when the policy takes efect, you must at that time be on active duty practicing law. That is the only qualification. There is no other underwriting attached to it.

FROM THE FLOOR: John, on this hospital insurance that you can add, do you take the whole family in on the deal?

MR. JOHN BLACK: Not at present. I am advised that the State Medical Association, for example, has adopted the same plan we propose, although they are not quite as good an insurable risk as lawyers, and they pay a little more for it. They pay about $5.00 a year more for their coverage. So far their plan has been in effect for aproximately a year or a year and one-half. After they have had about three years experience so they know what the loss ratio is, if the loss ratio is good, then they are willing to extend coverages to members of your family, and, as one company did, offer to extend coverages to employees of attorneys. Presently, without any experience table, Continental refused to do that on this basis. They said that we have, in the Idaho Bar, approximately 600 members. They would have to have 300 of them insured before the policy goes into effect. But assuming that we had 500 of them insured, if we had one permanent disability, someone injured in an accident, it would cost us, if he was under plan A, approximately $300.00 a month or $3,600.00, which would be charged against a total premium income of in the neighborhood of $30,000.00. And if this person suffered a permanent disability over a period of years — suppose one of us should lose our eyesight and be permanently disabled — that coverage extends for life. Each year we would be taking $3,600.00 off the top of our $30,000.00 before we started. By the time we had three or four in that boat, you can see that your loss ratio would be up to where there would be diminishing returns.

Rather than get our plan into that situation, as they explained it to me, we should try it for two or three years. They will make us an annual report which will show the amount of premiums taken in, what the money was spent for, how much was paid in claims and how much is deducted for their profit on the transaction, and the balance remains in a trust fund for our benefit. So that as time goes on, and if we create a reserve, if our loss experience is good, eventually we will be able to take on additional benefits at no increase in the premium. That is the way they explained it to me.

PRESIDENT LITTON: Any other questions? Are you ready for the question?

(Whereupon the motion was put to a vote and carried unanimously.)

(Whereupon Mr. MacIntyre of the Continental Casualty Company spoke briefly to the members present.)

PRESIDENT LITTON: At this time we will have the report of the Committee on Judicial Selection and Tenure. Robert St. Clair of Idaho Falls is Chairman of this Committee. He made the report last year, and Resolution Six was adopted in which was stated that the report be further considered at this time.

REPORT OF COMMITTEE ON JUDICIAL SELECTION AND TENURE

MR. ROBERT ST. CLAIR: Mr. President and members of the Idaho State Bar Association:

By Resolution No. 11 of the 1950 annual meeting of the Idaho State Bar (1950 Proceedings, p. 83) this Committee was directed to fully study and consider the methods for the selection of Justices of the Supreme Court and District Judges and to make a report at the 1951 convention.

Acting pursuant to the directions contained in the above Resolution this Committee prepared two Bills; copies of these Bills were mailed to each and every member of the State Bar thirty days before the 1951 meeting.

Of the Bills prepared and submitted at that meeting one Bill met with your approval — this Bill had to do with the separation of the offices of Supreme Court Justices and District Judges.

BILL NO. 1:

At the 1951 meeting, in Resolution No. 5, this Committee was directed to prepare a new Bill amending Sections 34-701 to 34-707, Idaho Code, both inclusive, and Section 34-906, Idaho Code, where necessary to conform to the Bill as to separation of offices which was adopted at the 1951 convention.

This has been done, and copies of this Bill were mailed to each and every member of this Bar thirty days before the opening of this meeting, and if you have these Bills as mailed to you by the Secretary you will find that the title of this Bill No. 1 begins:

"AMENDING SECTION 34-701, 34-702, AS AMENDED, ETC."

The Committee in this report prefers to take up the matter of Section 34-906 separately, and as a separate bill, notwithstanding you copies of the report mailed you show this section to be a part of Bill No. 1. And we want it understood that we have not changed this section in any respect.

We have removed from this Bill No. 1 all the objectionable material to which objections were raised at the meeting last year, namely:

First: That incumbent Justices of the Supreme Court wishing to file declarations of candiancy to succeed themselves need not file a nominating petition with their declaration of candiancy; and

Second: That the nominating petition of a non-incumbent filing for Justice of the Supreme Court had to have, among the signers on such petition, at least 150 licensed attorneys at law signers of the State of Idaho, and that not more than 25 of such attorney signers could be residents of the same county.

Although the Resolution No. 5 of the 1951 convention did not specify in what manner this defeated bill was to be amended or redrawn, we want all of

you to know that the committee has removed every single objection that was made, and has drawn the new bill in conformity with the Bill that was approved by the 1951 convention, and as directed and desired by that convention. Further, this Bill is absolutely proper and necessary to carry out the wishes of the 1951 convention in providing for the separation of judicial offices on the non-partisan Ballot.

AN ACT

AMENDING SECTIONS 34-701, 34-702, AS AMENDED BY SECTION 5 OF CHAPTER 86 OF THE SESSION LAWS OF 1949, 34-704, 34-705, 34-706, 34-707 AND 34-906 OF THE IDAHO CODE, RELATING TO THE NOMINATION AND ELECTION BY NON-PARTISAN JUDICIARY BALLOTS OF CANDIDATES FOR OFFICES OF JUSTICE OF THE SUPREME COURT AND DISTRICT JUDGE: PROVIDING THE FORM AND FILING OF DECLARATION OF CANDIDACY AND NOMINATING PETITIONS: ALSO PROVIDING FOR CERTIFICATION OF NAMES OF CANDIDATES AND NOMINEES, THE FORM OF BALLOTS AT NOMINATING ELECTIONS AND THE ELECTION AT THE NOMINATING ELECTION OF ANY CANDIDATE WHO RECEIVES A MAJORITY OF THE VOTES CAST FOR THE OFFICE FOR WHICH HE IS A CANDIDATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Section 34-701 of the Idaho Code be, and the same is hereby, amended to read as follows:

SECTION 34-701. NONPARTISAN NOMINATION AND ELECTION: *Candidates for the offices of justice of the Supreme Court and district judge shall be nominated and elected by nonpartisan ballots at elections to be held at the time and as a part of the elections at which candidates of political parties are nominated and elected. The names of candidates for said judicial offices shall appear upon a separate judicial ballot* without any political party designation — *or* statement of any affiliation whatever of any candidate named thereon.

SECTION 2. That Section 34-702 of the Idaho Code as amended by Section 5, Chapter 86, Session Laws of 1949, be, and the same is hereby, amended to read as follows:

SECTION 34-702 DECLARATION OF CANDIDACY — TIME AND PLACE OF FILING — CONTENTS: Each candidate for the office of justice of the Supreme Court and for the office of district judge shall make and file his declaration of candidacy in the office of the secretary of state at least thirty-one days and not more than sixty days prior to the date fixed by law for holding the nominating election, in substantially the following form, to-wit:

"I, the undersigned, being a qualified elector of__________________ precinct, __________________County, State of Idaho, a duly qualified and licensed attorney at law in the State of Idaho, do hereby declare myself to be a candidate for nomination to the office of________________________*to succeed Justice or District Judge (strike inapplicable words)*__________, *present or last (strike inapplicable words) incumbent,* to be voted for upon the judicial ballot at the nominating election to be held on the____________day of____________________, 19____, and certify that I possess the legal qualifications to fill said office and that my post office address is____________________________________.

____

Subscribed and sworn to before me this________day of_____________, 19____.

____

(*Title of Officer*)"

All blank spaces shall be properly filled in with the necessary information, *the inapplicable words shall be stricken* and the declaration of candidacy shall be subscribed and sworn to before an officer authorized to administer oaths.

Said declaration of candidacy, before the same shall be filed in the office of the Secretary of State, shall have appended thereto a petition or petitions in substantially the following form, to-wit:

"I, the undersigned, being a qualified elector of________________*County, in the State of Idaho, do hereby certify and declare that I am engaged in the occupation and reside at the place set opposite my name; that I join in the petition for the nomination of*_________________________, *a resident of*_________________ *County, State of Idaho,* as a candidate, on the *nonpartisan judicial ballot,* for nomination to the office of______________________, *to succeed Justice or District Judge (strike inapplicable words),*____________________ *present or last (strike inapplicable words) incumbent, to be voted for at the nominating election to be held on the*__________*day of*________________, *19*____; *that I intend to support said candidate for said office; that he is* legally qualified to hold *said office and that I have signed no other petition for a candidate for the same office.*

Name of Petitioner	*Occupation*	P. O. Address	Date Signed
____________________	_________________	____________________	______________

Said nominating petition shall have attached or appended thereto an affidavit, duly signed and sworn to before some officer authorized to administer oaths, in substantially the following form:

"STATE OF IDAHO,)
) ss.
County of ___________________)

I do solemnly swear (or affirm) that I am a qualified elector of the State of Idaho and a legal resident of the County of_______________________________; that each of the persons whose name is affixed to the *foregoing nominating petition* signed the same personally and endorsed thereon *his occupation,* his post office address and date of signing; ____*that each of said subscribers is a qualified elector of the State of Idaho and a legal resident of said*______________*County, and that each subscriber who stated his occupation to be that of "Lawyer" or "Attorney at Law" is a duly licensed attorney at law of the State of Idaho.*

____

Subscribed and sworn to before me this______day of ______________, 19____.

(*Title of Officer*)"

SECTION 3. That Section 34-704 of the Idaho Code be, and the same is hereby, amended to read as follows:

SECTION 34-704. CERTIFIED LIST OF CANDIDATES. At least twenty days before any nominating election the secretary of state shall forward to each county auditor within the state a certified list containing the name and post office address of each candidate for nomination to the office of justice of the Supreme Court and *of each candidate for nomination to the office* of district judge entitled to be voted for at such nominating election within their respective counties and the office for which he is a candidate, including and to be identified by the name of the present or last incumbent whom he seeks to succeed, as appears from the declarations of candidacy filed in the office of the secretary of state; *provided,*

however, if subsequent to the filing of any such declaration of candidacy, another be appointed to succeed the person named in such declaration of candidacy as present or last incumbent, the secretary of state shall insert in such certificate or in amendment thereto the name of the appointee in the place of the name of the person named in such declaration as present or last incumbent.

SECTION 4. That section 34-705 of the Idaho Code be, and the same is hereby, amended to read as follows:

SECTION 34-705. PUBLICATION OF NAMES OF CANDIDATES AND NOTICE OF ELECTION. The county auditor of each county shall cause to be published notice *of such nominating election* containing the names and addresses of all persons whose declarations of candidacy for nomination to such judicial offices are shown by the certificate of the secretary of state *setting forth before the name of each candidate the office for which he is a candidate to be identified by the name of the present or last incumbent of the office* which notice may be included in and made a part of the notice provided by law in the case of other candidates in general nominating elections, provided, however, that the portion of such notice showing such candidates for nomination to such judicial offices shall not appear under or be accompanied by any political party designation.

SECTION 5. That Section 34-706 of the Idaho Code be, and the same is hereby, amended to read as follows:

SECTION 34-706 BALLOT-FORM. Upon receipt of the certified list of candidates for nomination to such judicial offices, the county auditor of each county shall prepare a separate form of ballot to be entitled "Judicial Nominating Ballot"—*in large type in the center and near the top of said ballot. The ballot shall be divided by a heavy line into two major columns if both justices of the Supreme Court and district judges are to be nominated at the ensuing nominating election. At the top of the first or left-hand of such major columns shall appear the words "Justices of the Supreme Court" and at the top of the second or right-hand of such major columns shall appear the words "District Judges." Each of said major columns shall be divided into as many sub-columns as there are justices of the Supreme Court and district judges, respectively, to be nominated at said nominating election.*

At the top of said sub-column of the major column under the heading "Justices of the Supreme Court" shall appear the words "To succeed Justice ------------------," inserting the name of one of the present or last incumbents of the office of Justice of the Supreme Court whose successor is to be elected in that year, followed by the words "Vote for One" below which shall be set forth the names of the candidates who, as shown by the certificate from the secretary of state, have filed declaration of candidacy to succeed the justice whose name appears at the top of such sub-column.

At the top of each of such sub-columns of the major column under the heading "District Judges" shall appear the words "To succeed Judge------------------" inserting the name of one of the present or last incumbents of the office of district judge of the judicial district in which such county is located, whose successor is to be elected in that year, followed by the words "Vote for One," below which shall be set forth the names of the candidates who, as shown by said certificate from the secretary of state, have filed declarations of candidacy to succeed the district judge whose name appears at the top of such sub-column.

The name of no candidate shall appear in more than one place, or as a candidate to succeed more than one present or last incumbent, on said ballot . . . No voter shall be entitled to vote for more than one candidate to succeed any justice

of the Supreme Court or district judge. The order in which the names of candidates for the same office appear on said ballot shall be changed as provided by law for change in order of appearance of candidates for party offices.

SECTION 6. That Section 34-707 of the Idaho Code be, and the same is hereby, amended to read as follows:

SECTION 34-707. CANVASS – CERTIFICATION – RETURN OF ELECTION–*The board of county commissioners shall canvass the returns of the judicial nominating election at the time the returns of the general nominating election are canvassed, shall determine, and cause the county auditor to certify to the secretary of state, the result of said judicial nominating election. In such certificate the auditor shall set forth, following the name of each justice of the Supreme Court and each district judge for whom a successor is to be elected at the general election in that year, the vote received by each person who had declared himself to be, and who had been voted for as, a candidate to succeed such justice or district judge.*

The returns so made to the secretary of state by the county auditor shall be canvassed by the state board of canvassers at the time the other returns of said nominating election are canvassed.

If it appears to the state board of canvassers upon the official canvass that at such nominating election any candidate received a majority of all the votes cast for candidates to succeed a particular justice of the Supreme Court or district judge, said board shall certify to the secretary of state as duly elected *to such office* the name of the candidate who received–*such* majority–and such candidate–whose–*name is* so certified shall receive *and the secretary of state shall issue and deliver to him* a certificate–of election to such office and *he* shall not be required to stand for election at the general election following.

In the event no candidate–*received* a majority of all the *votes cast for candidates to succeed a particular* justice of the Supreme Court *or district judge, the two candidates receiving the greatest number of votes cast for all candidates to succeed such justice of the Supreme Court or district judge shall be and* shall be declared to be the nominees *to succeed such justice or district judge* and their names *as such nominees* shall be placed on the official *Nonpartisan Judicial Ballot* at the general election following. *The secretary of state shall certify the names of such nominees, including with each the name of the present or last incumbent when he was nominated to succeed, to the county auditors at the time he certifies the names of candidates for other offices certified by him; Provided, however, if another be appointed to succeed the person named on such Judicial Nominating Ballot as a present or last incumbent, the secretary of state shall insert in such certificate or in amendment thereto the name of the appointee in the place of the name of the person named on such Judicial Nominating Ballot as present or last incumbent.*

Mr. President, I move this portion of the report relating to Bill No. 1 be adopted.

MR. ROBERT ELDER: I second the motion.

(Upon a roll call vote of District Bar Associations, 43 No, 534 Aye).

MR. ROBERT ST. CLAIR: This Bill, and you all have a copy of it, further amends Sec. 34-612 as amended by Chapter 253 of the 1951 Session Laws of this State, to provide the special form of judicial ballot which is to be atached to the partisan ballot so that the voters may tear off the judicial ballot along the perforated line. This is a simple change in the machinery of preparing the ballot and unless this Bill is adopted great uncertainty and confusion will prevail and the

County Auditors will have no specific guide in preparing the ballot and having it printed.

This Committee had nothing to do with the enactment of Chapter 253 of the 1951 Session Laws, and this proposed Bill No. 2 merely amends the law as amended in 1951 to clarify the situation and give the County Auditors specific instructions as to how to prepare the ballot.

The Committee does not know what the 1951 Legislature had in mind when the Amendment was enacted, but believes that it was adopted as an economy measure since the separate judicial ballot, being a separate ballot on separate paper and of different color from the partisan ballot, involved a great printing expense.

The Committee also thinks that the vote would be more inclined to vote for judicial offices if the judicial ballot is printed on and made a part of the partisan ballot. Hence, the 1951 amendment, in our opinion, is a good one, as far as it goes. But it does not go far enough to accomplish the job as far as the non-partisan judicial ballot in both nominating and general elections are concerned.

In other words the 1951 Amendment does not direct or describe just how, or in what manner, the non-partisan judicial ballot should be attached to, or made a part of, the partisan ballot. The Committee in this Bill has attempted to amend this Section to supply such deficiencies.

We will take up Section 34-906, relating to non-partisan judicial election ballots in general elections.

BILL NO. TWO

AN ACT

AMENDING SECTION 34-612, IDAHO CODE, AS AMENDED BY CHAPTER 253, 1951 SESSION LAWS OF THE STATE OF IDAHO, PERTAINING TO THE FORM AND SUFFICIENCY OF BALLOTS IN NOMINATING ELECTIONS BY PROVIDING THAT THE BALLOT SHALL BE PERFORATED BETWEEN THE COLUMNS OF EACH POLITICAL PARTY AND JUDICIAL NOMINATING BALLOT, AND PROVIDING THAT THE VOTER SHALL TEAR OFF ALONG THE PERFORATED LINE THE PARTY TICKET HE HAS VOTED AND THE JUDICIAL NOMINATING BALLOT, AND SHALL DEPOSIT IN THE BALLOT BOX ONLY ONE SUCH PARTY TICKET AND SAID JUDICIAL NOMINATING BALLOT AND SHALL DEPOSIT THE REMAINING TICKETS IN A BLANK BALLOT BOX.

Be it Enacted by the Legislature of the State of daho:

SECTION 1. That section 34-612 of the Idaho Code, as amended by chapter 253, 1951 Session Laws of the State of Idaho, be, and the same is, hereby amended to read as follows:

SECTION 34-612. BALLOT – FORM AND SUFFICIENCY. As soon as possible after the time has expired for filing declarations of candidacy in his office, and after the receipt of the certified list of candidates from the secretary of state, the county auditor of each county shall prepare a form of ballot showing each political party which has qualified as hereinbefore provided and which has candidates who have declared their candidacy for office *and a Judicial Nominating Ballot.* The names of candidates for each office shall be arranged thereon alphabetically according to the first letter of the surname of each candidate. The official

nominating ballot *and the official Judicial Nominating Ballot* shall be printed therefrom in the following manner: The names of candidates under headings designating each official position shall be alternated thereon in the printing in the following manner, namely:

The form shall be set up with the names of candidates in the order in which they appear upon the form of the official ballot prepared by the county auditor; in printing each set of official ballots for the various election precincts the position of the names shall be changed in each office division as many times as there are candidates in the office division or group in which there are the most names; as nearly as possible an equal number of ballots shall be printed after each change. In making the changes of position the printer shall take the line of type at the top of each office division and place it at the bottom of that division, moving the column so that the name which was second before shall be first after the change. After the ballots are printed before being cut, they shall be kept in separate piles for each change of position and shall then be piled, taking one from each pile, and placing it on the pile to be cut; the intention being that every other ballot in the pile of printed sheets shall have the names in different positions. After the piles are made in this manner, they shall be cut and placed in blocks of fifty ballots in each block; every other ballot in such blocks to have the names in different positions as nearly as practicable. For each party *and for said Judicial Nominating Ballot* a separate ticket, uniform in size and printing, white and printed in black ink, shall be placed on the same side of the same sheet of paper with *the other ticket.*

Following the names of candidates for nomination to county offices, there shall be two blank spaces at the top of the first of which shall be printed in small type "For Justice of the Peace. Vote for two." And one blank space in which shall be printed in small ytpe "For Constable. Vote for one." Following this shall be a space at the top of which shall be printed in small type "For Precinct Committeeman. Vote for one." The names of candidates for precinct committeemen shall be printed in alphabetical order with spaces to the right sufficient to permit the voter to place a cross (X), the purpose of the blank spaces being to permit the voter to write in the names of two electors of his precinct whom he desires to nominate for Justice of the Peace, and one elector of his precinct whom he desires to nominate for constable, and to vote for each of said persons by placing a cross (X) after his name.

Across the top of each ballot shall be printed in plain type:

1. The words "Official nominating ballot."

2. The name of the county in which the ballot is to be used *and the following instructions to the voter*: "Select the party ticket you desire to vote and vote only on that party ticket. Tear off your *party* ballot *without separation from the Judicial Nominating Ballot if the two be joined* and *after voting your party ballot and the Judicial Nominating Ballot* deliver *both* to election judge along with remaining blank ballots."

Each ballot shall be divided by—perforated *lines* into as many equal columns as there are parties having qualified and filed—tickets as provided by law. *Said Judicial Nominating Ballot shall be placed on said ballot as hereinafter provided.* On each party ticket shall be printed the names of all persons certified to by the secretary of state or filed with the county auditor, commencing with the candidate for United States senator, including all state offices as well as candidates for the legislature and all county offices.

A blank space shall be provided under each official heading *on party tickets* in order that a voter may write in the name of a candidate for any office *on such*

tickets. On the same line with the official designation of the office shall be the instruction: "Vote for__________," giving the number of candidates to be voted for in case there is more than one officer (*candidate?*) of the same official designation to be nominated.

**A Judicial Nominating Ballot, in such form as may be prescribed by law, shall be printed on said ballot and so placed that one party ticket shall appear to the left of and one party ticket to the right of said Judicial Nominating Ballot. Said Judicial Nominating Ballot shall be separated from such party tickets by perforated lines but capable of remaining attached to either and capable of being detached with either from the unused portion of said ballot.*

To the right of the name of the candidate, and in the blank space and on the same line therewith, shall be a suitable square wherein the choice of the voter may be marked. When an elector offers to vote he shall be given a ballot with all party tickets *and said Judicial Nominating Ballot* printed thereon. He shall select in private which party ticket he will vote. He shall vote for persons on one party ticket only *and on said Judicial Nominating Ballot* and if the elector shall vote or mark opposite the name on the ticket of more than one party his vote shall be void as to that particular office.

Each voter shall, upon receiving the ballot, retire to one of the booths and, without delay select the ticket he desires to vote and shall mark such ticket *and the Judicial Nominating Ballot* on the Ballot received by him and shall detach—*said party ticket and said Judicial Nominating Ballot* from the remaining tickets and fold—so that—the faces shall be concealed. The remaining unvoted tickets attached together shall be folded in like manner by the elector. He shall immediately thereafter deliver said voted ballot, *including said Judicial Nominating Ballot,* to one of the judges of election, and it shall be deposited by said judge in the ballot box for votes. The remaining tickets attached together shall be by the elector delivered to one of the judges of election who shall deposit said remaining tickets in a separate ballot box to be marked and designated as the blank ballot box. In the event a voter shall soil or deface the ballot he desires to vote ,he shall at once return it and get a new one, and the election officer shall place the ballot returned in the box provided for blank ballots.

Mr. President, I move this portion of the report relating to Bill No. 2 be adopted.

MR. ROBERT ELDER: I second the motion.

(Upon a roll call vote of District Bar Associations the motion carried unanimously.)

MR. ROBERT ST. CLAIR: Now as to the matter of the non-partisan Judicial Ballot form in general elections, which also was not covered or affected by the 1951 amendment just mentioned:

In the opinion of this committee, by implication, the 1951 Act repealed the provision that has always existed for a Judicial Ballot at primary elections, wholly detached and separate from the partisan ballot, but it did not amend or repeal the general Judicial Election laws, which appear in section 34-906 of our Code. Consequently, in this Bill, No. 3, we have amended section 34-906 to conform to the 1951 enactment relating to the Judicial Nominating ballot.

AN ACT

AMENDING SECTION 34-906 OF THE IDAHO CODE, PROVIDING FOR THE FORM OF THE NON-PARTISAN JUDICIAL BALLOT AT GENERAL

ELECTIONS, AND CONFORMING THE SAME TO THE FORM OF THE NON-PARTISAN JUDICIAL BALLOT USED IN NOMINATING ELECTIONS.

SECTION 34-906. ELECTION OF NON-PARTISAN JUDICIAL OFFICERS. —When candidates for the office of justice of the Supreme Court or district judge are to be elected at any *general election*, the names of such candidates nominated in the manner provided by law shall be printed upon a separate ballot to be known and designated as "Judicial Ballot," *attached to the ballot on which appear the names of party candidates but without any political party designation or affiliation of any candidate on said Judicial Ballot.—Said Judicial Ballot, except for designation, shall be in the same general form as the "Judicial Nominating Ballot" and shall be prepared from information contained in the certificate from the secretary of state following the nominating election. Notice of the election shall be given in the manner and for the period required by law of candidates of political parties but candidates whose names appear on said Judicial Ballot shall not appear under or be accompanied by any political party designation.*

All provisions of law relating to voting, canvass and return to election contained in the general election laws, including provisions for issuance and delivery of certificates of election to successful candidates, shall, so far as applicable, apply to the election of justices of the Supreme Court and district judges.

Mr. President, I move this portion of the report relating to Bill No. 3 be adopted.

MR. ROBERT ELDER: I second the motion.

(Upon a roll call vote of District Bar Associations the motion carried unanimously.)

MR. ROBERT ST. CLAIR: Said Resolution No. 4 adopted at the 1951 meeting also directed this Committee to prepare:

> "FIRST: A Bill providing for the filling of vacancies on the non-partisan Judicial Ballot occurring subsequent to a Primary Election and before the next general election."

We have accomplished this by amending Chapter 7 of Title 34 by adding thereto six new Sections which relate to the filling of vacancies after nomination of candidates for the office of Justice of the Supreme Court and office of District Judge providing for the appointment of qualified persons to fill such vacancies; filing of certificates and declaring effect; payment of filing fees, etc.

This Bill provides for the filling of vacancies after the nomination of candidates for the office of Justice of the Supreme Court by the Idaho Bar Commission, and if the vacancy shall occur ten days before the general election the Commission shall name the one for whose appointment it received the greatest number of requests by petition or otherwise signed by the greatest number of members of the State Bar residing in the State of Idaho.

If the vacancy occurs less than ten days and more than three days before the general election the Commission itself may fill the vacancy.

If a vacancy occurs in the office of a nominated candidate for the office of District Judge the Commissioner of the Idaho State Bar for the commissioner's district in which such judicial district is located shall ascertain the sentiment of the members of the Bar and fill the vacancy.

An effort has been made to leave the matter of naming the appointee in the

hands of the lawyers so far as it can be done. It seems to us any procedure for holding a formal bar primary would involve too much time to permit the method of selection unless the vacancy should occur soon after the primary. An effort has been made to require the commissioners, in case of vacancy in nomination for the office of justice of the Supreme Court, and the bar commissioners, in case of vacancy in nomination for the office of district judge, to follow the direction of the members of the interested bar expressed in informal manner but in writing. The commissioners themselves are given the right to select the appointee to fill vacancy in nomination for the Supreme Court only in the event the vacancy occurs not more than ten nor less than three days before the election. We suspect sufficient time would be allowed to determine the sense of the attorneys if the Bar were given the right to name the appointee in case of vacancy not less than seven (instead of ten) before the election. The bar commissioner is under no circumstances authorized to fill vacancy in nomination for office of district judge. You will observe that in both cases a vacancy occurring within three days of the election shall not be filled and shall not be filled if a majority of the interested attorneys so request.

The details of the manner are set forth fully in the Bill, copies of which Bill you now have.

At the present time there is no method provided for the filling of such vacancies.

AN ACT

AMENDING CHAPTER 7 OF TITLE 34 OF THE IDAHO CODE BY ADDING THERETO SIX NEW SECTIONS, TO BE NUMBERED AND DESIGNATED AS SECTION 34-709, 34-710, 34-711, 34-712, 34-713, and 34-714, RELATING TO FILLING OF VACANCIES AFTER NOMINATION OF CANDIDATES FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT AND FOR THE OFFICE OF DISTRICT JUDGE PROVIDING FOR: APPOINTMENT OF QUALIFIED PERSONS TO FILL SUCH VACANCIES, FILING OF CERTIFICATES AND DECLARING EFFECT, PAYMENT OF FILING FEES, CERTIFICATION OF NAMES TO COUNTY AUDITORS, AND PRINTING OF NAMES OF APPOINTEES ON OFFICIAL BALLOT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Chapter 7 of Title 34 of the Idaho Code be, and the same is hereby, amended by adding thereto six new sections to be numbered and designated as Section 34-709, 34-710, 34-711, 34-712, 34-713 and 34-714, inclusive, and respectively to read as follows:

SECTION 34-709 VACANCIES AFTER NOMINATION OF CANDIDATES FOR JUDICIAL OFFICE — GENERALLY. Vacancies, after nomination of candidates for the office of Justice of the Supreme Court and for the office of district Judge, however caused, may be filled by the appointment in the manner provided in the following sections numbered 34-710 to 34-714, inclusive, of some person who possesses all the qualifications prescribed by law of candidates for such office.

SECTION 34-710 FILLING VACANCIES AFTER NOMINATION OF CANDIDATES FOR OFFICE OF JUSTICE OF THE SUPREME COURT. The Commissioners of the Idaho State Bar are directed to fill vacancies, however caused and occurring more than ten days prior to the general election, in the office of nominated candidate for justice of the Supreme Court by naming and appointing

the qualified person for whose appointment requests, by petitions or otherwise, signed by the greatest number of the members of the Idaho State Bar residing in the State of Idaho are filed with the secretary of the Idaho State Bar within fifteen days after such vacancy occurs but not later in any event than five days prior to such general election. In the event such vacancy occurs not more than ten days but not less than three days prior to such general election, said Commissioners of the Idaho State Bar are authorized and empowered to fill such vacancy by the appointment of some qualified person named by them. The president and secretary of the Idaho State Bar shall make and file with the secretary of state certificate of appointment within the time and setting forth the information provided for in Section 34-712; provided, however, that such vacancy shall not be filled if it occurs within three days of the general election or if petitions requesting that such vacancy be not filled signed by at least a majority of the members of the Idaho State Bar residing in the State of Idaho be filed with the secretary of the Idaho State Bar at any time before such certificate of appointment is filed with the secretary of state.

SECTION 34-711 FILLING VACANCY AFTER NOMINATION OF CANDIDATES FOR OFFICE OF DISTRICT JUDGE. In the event of vacancy, however caused, and occurring more than three days prior to the general election, in the office of nominated candidate for the office of district judge, the commissioner of the Idaho State Bar for the commissioner's district in which such judicial district is located shall name and appoint to fill such vacancy the qualified person for whose appointment petitions signed by at least a majority of the members of the Idaho State Bar residing in such judicial district shall be filed with the secretary of the Idaho State Bar within fifteen days from the date upon which the vacancy occurred but not later in any event than ten days prior to the general election. Said commissioner and said secretary shall make and file with the secretary of state certificate of such appointment within the time and setting forth the information provided for in Section 34-712.

If petition or petitions signed by a majority of the members of the Idaho State Bar residing in said judicial district requesting the appointment of one qualified person are not filed within the time hereinbefore fixed, the said commissioner shall call a convention of the licensed attorneys residing in such judicial district to be held at a place in such judicial district named by said commissioner and after notice for the period and in the manner fixed by him shall have been given, for the purpose of naming a person to fill such vacancy. At such convention no proxies shall be permitted except by and in favor of members of the same firm of attorneys or associates in the same office. Said convention shall by majority vote of those present and so represented name and appoint to fill such vacancy some qualified person residing in such judicial district. Said commissioner and the secretary of said convention shall make and file with the secretary of state certificate of such appointment within the time and setting forth the information provided for in Section 34-712; Provided, however, that if at any time before appointment is made by such convention, petitions signed by a least a majority of the members of the Idaho State Bar residing in such judicial district, requesting that a particular qualified person be named to fill such vacancy be presented to said commissioner or filed with the secretary of the Idaho State Bar, such convention shall not be held or fill such vacancy but said commissioner shall appoint such person to fill such vacancy and, with the secretary of the said Idaho State Bar, shall make and file with the secretary of state certificate of appointment within the time and setting forth the information provided for in Section 34-712; Provided further that such vacancy shall not be filled if it occurs within three days of the general election or if petitions requesting that such vacancy be not filled signed by at least a majority of the members of the Idaho State Bar residing in such

judicial district be filed with the secretary of the Idaho State Bar at any time before certificate of appointment is filed with the secretary of state.

SECTION 34-712. TIME OF FILING AND CONTENTS OF CERTIFICATE OF APPOINTMENT. Any certificate of appointment to fill vacancy made pursuant to the two preceding sections shall be filed in the office of the secretary of state on or before the expiration of thirty days from the date on which the vacancy occurred but not later, in any event, than three days immediately preceding the general election and shall set forth the name of the nominated candidate, the office for which he was nominated, including the name of the present or last incumbent whom he was nominated to succeed, the cause of the vacancy and the name and address of the person named to fill such vacancy.

SECTION 34-713. FILING FEES – EFFECT OF FILING CERTIFICATE. At the time of filing such certificate with the secretary of state there shall be paid to him by or on behalf of the person so named to fill such vacancy the same fees as are required of candidates for such office. The filing of said certificate shall constitute an acceptance of the appointment by the person named and shall have the same effect as certificate of nomination following declaration of candidacy and nomination at nominating election.

SECTION 34-714. CERTIFICATION TO AUDITORS – PRINTING OF NAME ON OFFICIAL BALLOT. If at the time of filing any such certificate of appointment to fill vacancy the secretary of state shall not have forwarded to the various county auditors certified list of names of nominated candidates to be certified by him, he shall insert in his certificate as the nominated candidate the name of the person so appointed to fill vacancy. If at the time of filing any such certificate of appointment the secretary of state shall have theretofore certified to the various county auditors the names of the nominated candidates to be certified by him, amendment to such certificate shall be forwarded by him to the proper county auditors either by mail or telegraph. If at the time such amendment is received by any county auditor, the official ballots have been printed, he shall cause the name of the candidate appointed to fill such vacancy to be printed on gummed paper perforated so that slips filling the space on the ballot and containing the name of the appointed candidate may be detached readily from said sheets and placed over the name of the nominated candidate. The auditor shall deliver or cause to be delivered to the election officers of each election precinct in his county such gummed sheets containing slips in number at least equal to the number of registered voters in such precinct. The distributing clerk, before delivering ballot to a voter shall place one of such gummed slips containing the name of the appointed candidate over the name of the nominated candidate.

Mr. President, I move this portion of the report relating to Bill No. 4 be adopted.

MR. ROBERT ELDER: I second the motion.

MR. JOHN CARVER: One question. What is the status of write-in votes? In that old case of Budge v. Gifford, they printed stickers and put them on the ballot where the candidate died before the general election. Is there any provision covering that situation here?

MR. ROBERT ST. CLAIR: I don't think so.

MR. FRANK MEEK: Do I understand that to mean that if there are two candidates running for the Supreme Court and one of them should die before the election, then they would nominate someone? Is that what you mean by vacancy?

MR. ROBERT ST. CLAIR: This, of course, is after the primary, after the

nominee has been determined. You know that our law is now that any candidate who receives a majority of the votes at the primary is elected. Now, in case three candidates are running for the office of Justice of the Supreme Court, and one is eliminated in the primary, and two are running in the general election, and if one of the two should die between the nominating election and the general election, you would just naturally vote for the one who survived. Should that man be an incumbent, we have no provision for that, and I don't know exactly how that would be done unless an appointment would be made by the Governor. He might appoint someone to take his place during the interval between the time of death and January 1st or whenever they take office.

MR. FRANK MEEK: I don't believe you get the question. Say two of them are running in the general election. One of them dies. Does that mean that you have this method to select someone to run against the one still living?

MR. ROBERT ST. CLAIR: Of course it would be up to the attorneys, if they wanted to supply one. They don't have to. If they did nothing, it would mean that the one who didn't die would probably be elected.

MR. FRANK MARTIN: Don't the attorneys as a whole have the privilege of requesting that no candidate be put in the place of the one who died?

MR. ROBERT ST. CLAIR: They do under this bill as drawn. Does that answer your questions?

MR. FRANK MEEK: No.

MR. ROBERT ST. CLAIR: Will you restate it?

MR. FRANK MEEK: Suppose there are two candidates and they are the ones who get the majority of the nominating committee (election). They are both on the ballot in the general election. In the interim one of these dies. Does that mean that the State Bar Commission can go out and select a candidate to run against the one who is lucky enough to still be alive?

MR. ROBERT ST. CLAIR: It would look like that. Under this bill as drawn, it would look as though the filling of that vacancy could be provided for according to the way this bill is drawn.

DEAN HOWARD STINSON: Is that a vacancy?

MR. ROBERT ST. CLAIR: That is the vacancy referred to, yes. I don't believe we have drawn the bill in a way in which it would cover a case where there were two running and one died and in that event there couldn't be any filling of the vacancy of the one who died.

MR. JOHN CARVER: There is no situation where there is only one candidate on the general election ballot. That can't be, because then he is elected at the primary. There has to be two names on the general election ballot, or there isn't any.

MR. ROBERT ST. CLAIR: Correct. But the gentleman wanted to know what would be done as far as one of the two candidates dying is concerned.

Are there any other questions?

(Upon a roll call vote of District Bar Associations, 82 No, 515 Aye).

BILL NO. 5

MR. ROBERT ST. CLAIR: The 1951 meeting of this Association had before it for consideration a Bill which provided that an incumbent Supreme Court Justice

need not file a nominating petition, and likewise provided that a nominating petition for a candidate for the office of Supreme Court Justice, who was not an incumbent, must have 150 attorney subscribers.

This Bill was rejected.

However, by Resolution No. 6 adopted at the 1951 meeting this Committee was directed to prepare and submit thirty days before this meeting a Bill along the following lines:

"ONE: That the portion of said Bill pertaining to an incumbent not being required to supply a nominating petition be deleted; and

"TWO: That the number of attorney subscribers to nominating petitions be reduced from 150 to 75."

Copies of this Bill were mailed to you thirty days before this meeting, and we have conformed with the directions of last year's convention, and this Bill provides that Section 34-703, Idaho Code, be amended to read as follows:

"SECTION 34-703. NUMBER AND QUALIICATIONS OF PETITIONERS – FILING FEES. The petition of a candidate for nomination to the office of Justice of the Supreme Court shall have affixed thereto the names of not less than 200, nor more than 300, electors of the state, *of whom not less than 75 shall be duly licensed attorneys at law of and residing in the State of Idaho; provided, however, that not more than 15 of such attorney at law subscribers shall be residents of the same county.* The petition of a candidate for the office of district judge shall have affixed thereto the names of not less than 100, nor more than 200, electors of the state, who are residents of the judicial district for which said candidate is proposed.

"A fee shall be paid by or on behalf of each judicial candidate for nomination at the time of filing his declaration of candidacy, which shall be one per cent of the annual salary for such office, and the name of no candidate shall appear upon the – *Judicial Nominating Ballot* who has not complied with this and the foregoing section."

AN ACT

AMENDING SECTION 34-703 OF THE IDAHO CODE RELATING TO THE NUMBER AND QUALIFICATIONS OF SIGNERS OF NOMINATING PETITIONS OF CANDIDATES FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT AND THE OFFICE OF DISTRICT JUDGE AND FIXING THE AMOUNT AND TIME OF PAYMENT OF FEES FOR FILING DECLARATIONS OF CANDIDACY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Section 34-703 of the Idaho Code be, and the same is, hereby amended to read as follows:

SECTION 34-703. NUMBER AND QUALIFICATIONS OF PETITIONERS – FILING FEES. The petition of a candidate for nomination to the office of justice of the Supreme Court shall have affixed thereto the names of not less than 200, nor more than 300, electors of the state, *of whom not less than 75 shall be duly licensed attorneys at law of and residing in the State of Idaho; provided, however, that not more than 15 of such attorney at law subscribers shall be residents of the same county.* The petition of a candidate for the office of district judge shall have affixed thereto the names of not less than 100, nor more than 200, electors of the state, who are residents of the judicial district for which said candidate is proposed.

A fee shall be paid by or on behalf of each judicial candidate for nomination at the time of filing his declaration of candidacy, which shall be one per cent of the annual salary for such office, and the name of no candidate shall appear upon the — *Judicial Nominating Ballot* who has not complied with this and the foregoing section.

Mr. President, I move this portion of the report relating to Bill No. 5 be adopted.

MR. ROBERT ELDER: I second the motion.

(Upon a roll call vote of District Bar Associations, 43 No, 534 Aye).

TRIAL MOTION

MR. ROBERT ST. CLAIR: Mr. Chairman, Mr. President, I move that the Idaho Bar Commission be requested to immediately have placed in proper form, complying with the rules of the Idaho Legislature, those proposed Bills which we have approved today, and also the Bill providing for the separation of offices which we approved and adopted last year; and immediately submit the same to the Governor of the State of Idaho, in order to comply with his request in legislative matters relating to Bills to be presented to the Legislature, with the request that he recommend their passage; that further that our Bar Legislative Committee, and each member of the Idaho Bar, be requested to devote every effort toward the passage of those approved Bills.

MR. ROBERT ELDER: I second the motion. (Motion carried)

MR. RALPH LITTON: By popular request Mr. Dobrzensky has consented to come back and answer any questions and also develop another subject or two. Mr. Dobrzensky. (applause)

MR. MILTON W. DOBRZENSKY: Mr. Chairman, members of the Commission and delegates at this convention: You are fortunate in that it is now 20 minutes past 11:00 and we end on time.

Someone asked me yesterday afternoon a question about the employment of a corporate officer for a long duration of time. In other words, beyond the annual period. You are familiar with the general rule of corporation law that the shareholders ordinarily can't usurp the power of the board of directors, and the board of directors has the power to employ the corporation's officers — for example a president for the period between the annual meetings of the shareholders. If you look at Mr. Sarner's book, you will find Mr. Sarner has suggested the answer to the question of how you can assure a degree of permanency in the employment of a corporate officer without usurping the powers of the board of directors.

That can be accomplished in this manner: An agreement signed by all the shareholders, to which the corporation has been made a party, that a member shall be employed by the corporation for a specified period at a specified salary whether or not he serves as an officer of the corporation would seem to be entirely unobjectionable. The citation is to an article in *47 Yale Law Journal, page 1079.* And you will find this material at page 43 of Mr. Sarner's book.

There is one point that perhaps I didn't sufficiently emphasize yesterday although I think it is clear to most of you, and that is this: It is far more important to *detect* the potentiality of the tax problem than it is to *solve* it. You may not be able to solve a problem which you detect, but the fact that you have detected it is the important thing, because without detection, it might have gone unsolved. Many problems of this general type to which I refer will be found lurking in the background.

I have in mind a client, a man and his wife who operated a business as community property. It was a very profitable business, and it prospered during the war period, and this man was very interested and anxious to sell an interest in the business to his brother. He came to me suggesting that he and his wife would each like to sell to his brother a 5% interest in the business and that they had decided to sell that to him at book value for $100,000.00. I was also familiar with the general condition of the business, and I suggested that the proposed sale might involve a serious gift tax problem, because the fair market value of the interest to be sold very greatly exceeded the price.

In any event, that was four years ago. We solved the problem this year. The point was that he and his wife had exhausted their lifetime gift tax exemption of $30,000.00 each. All of the real property of the corporation had appreciated very greatly in value, and the value of the business over and in excess of book value was such that the gift tax would have amounted to just short of $57,000.00. That is something you must look for when people are talking in terms of book value. Book value is a very dangerous and a very deceptive thing in certain types of businesses.

If, in a particular business, you have no assets likely to appreciate in value and which are not held for a long period of time, as for example inventory which is continually turning and being replaced, if no securities are held and the like, you may be reasonably safe in using book value. But book value can really be a trap if you are not alert to it.

There is one other thing I would like to mention in connection with Section 102 of the Internal Revenue Code which relates to corporations which accumulate surpluses in excess of the reasonable needs of the business. The most vulnerable corporation, of course, is the corporation having one or a few shareholders. There you must be very vigilant to see, *first,* that the corporation does not make investments in outside enterprises. For example, they may say, "We have $100,000.00 on hand, and we don't want to pay it out as dividends, because the shareholders surtax would be too high and so on and so forth. Why not go out and buy government bonds or buy some stock or otherwise invest it?"

Immediately the Internal Revenue people say, "If you have money that you can invest in *outside* enterprises, it is obvious that your surplus is in excess of the reasonable needs of the business."

During the war period a corporation had invested in government bonds the sum of at least $1 million. We were quite prepared to prove that they had to make large purchases of raw materials, and when the time came to make these very heavy purchases, they would use these government bonds as collateral for bank loans which were made in order to build up inventory. And after the business cycle of the year had been completed, after the inventory had been received and processed and sold and the loans paid off, the security remained for another year's use. The Internal Revenue passed that, because they recognized the fact that those securities were needed in order to enable the business to carry on its regular financing and trading.

In another case, a corporation lent $600,000.00 to another corporation, all of whose stocks was owned by the same man. We approved it, and the accountants approved it upon this theory: The original corporation, corporation A, had a contract. In order to fulfill that contract, corporation A needed certain types of ingredients which were not readily obtainable in the open market. Corporation A's contract contained a rather substantial penalty clause, and in order to insure

continuity of supply of ingredients, it was necessary to lend corporation B, the other corporation, $600,000.00 with which to build a plant. A contract was entered into with corporation B and corporation A, whereby corporation B agreed to sell all of its output to corporation A at prevailing market prices in order to get away from the difficulty of Section 45 of the Internal Revenue Code.

The very great danger, you will observe, in small, closely held corporations, where the surplus is building up, is the danger of the single shareholder, or one or two shareholders desiring to borrow money from their corporation. That is very dangerous, and the revenue people say immediately, if the corporation had money which it could lend to the shareholder, that money obviously was not needed for the purpose of the business, and that Section 102 penalty surtax is appliable.

There is one matter which, in Mr. Sarner's book, I suggest you read with a great deal of care, because sooner or later you will come face to face with the practical problems mentioned there. This material appears under the caption "Acquisition of a Going Business."

This is an excellent contribution that Mr. Sarner has made. It is a discussion of the various items that one should consider for including in the agreement between the buyer and the seller, — the covering agreement. Mr. Sarner raises the question: If you represent a man who is going to acquire a business, what should he buy? If he is dealing with a corporation, should he buy the corporate stock, or, should he buy the assets of the corporation? This, like most of the questions which we have been considering, is not a question which can be answered by any rule of thumb. For example, if your clients were considering the purchase of a business, and if the business had had no tax liability or were operating at a loss for a period of two or three years, if you and your accountants can assure yourselves that the business is "clean," so far as liability is concerned, it might be very desirable, for a variety of reasons, to buy the stock of the corporation. Because the corporate structure remains intact, the deficit can be carried forward to offset anticipated future net income. You enjoy all of the benefits of continuity in insurance programs and contributions to state funds, experience rating and the like, that old corporations might enjoy. Conversely, if the corporation has outstanding against it claims not covered by adequate insurance with responsible companies and if there were a risk of contingent liability, you might decide that you would like to buy the assets.

Usually a question arises between a buyer and a seller of a business. Sometimes the seller may be a corporation, and sometimes it may be a single proprietorship, and sometimes it may be a partnership. You are familiar, I think, with Section 117 of the Internal Revenue Code which, in its various subdivisions, provides for the alternative long term capital gain tax with certain deductions on account of capital losses. Capital gains and capital losses are important. Capital gains are important particularly because of the reduced effective rate of a long term capital gain. You take into account only 50% of your gain, and the effective tax rate now is 26%. The difficulty which sometimes causes a difference of opinion here arose from the decision of Judge Learned Hand of the Second Circuit who said that when you sell a business, you must list the assets and ascertain which classify as "capital assets" for capital gain purposes. First is cash. Cash is not a capital asset and probably wouldn't be transferred anyhow. Accounts receivable, we know, are not a capital asset, and if they are not a capital asset, and if the accounts receivable were sold by the seller at a profit, he would have to pay tax on ordinary income at the customary normal and surtax rates rather than capital gain. And now you come to land. Land does quality as a capital asset.

Machinery, fixtures, equipment and the like would qualify. So, said Judge Hand, you must break down your assets into their several categories, and the seller's gain or the seller's loss and the nature of the income as ordinary income or capital gain will depend upon whether or not the item fits within the category of a capital asset. It now appears to be settled that a partner's interest in a partnership is a capital asset.

A few years ago a client, a manufacturing concern, received a very attractive offer from an eastern concern to purchase its business. Everything went along well until the attorney for the intending purchaser came along and said, "This price is so many hundred thousand dollars which we desire to have allocated as follows: It was obvious that what he wanted to do was allocate the largest portions of the purchase price, which was a substantial one, to those assets with respect to which depreciation deductions could be made. Plant and equipment he wanted to carry at a very high price. But he wanted to buy the accounts receivable at a discount. It appeared to us, when we analyzed the entire break-down before us, that the apportionment was unrealistic and would be disadvantageous from the sellers tax standpoint and the deal fell through on that account.

The point I am empasizing is this: It sometimes happens in the negotiations between a buyer and seller that you are faced with a problem of allocating your purchase price among many categories. The most important thing to bear in mind is that you must be realistic. If you have worked up an allocation of price on units that is not realistic so that it is quite evident to a revenue agent you have made merely what you consider to be a tax advantageous allocation, your plan may break down entirely. You must remember that revenue agents are experienced, and they are not easily fooled by arbitrary allocations which are made purely for the purpose of technical tax advantage. I mention that because it comes up almost every day.

There is another matter mentioned in Mr. Sarner's book that I should call to your attention. That is, the provisions of Section 117 of the Internal Revenue Code, the sale by a seller of the property used in trade or business.

If you are the seller of property used in trade or business (other than the property held previously for the purposes of resale to customers,) you may treat the sale of the items of property in question as capital assets and take advantage of capital gain rates. For example, here is a man who operates a large grocery store. In the grocery store is a stock of merchandise. The stock of merchandise is held primarily for sale to customers in the ordinary course of business. Any gains which result from that sale will necessarily be ordinary income. But in this store there are so many scales, so many cash registers, so many refrigerators, so many trucks, adding machines, your store fixtures and equipment, and so far as those items are concerned, they qualify under the provisions of Section 117 (j).

A problem has arisen under Section 117 (j). I may settle it in the Circuit Court where I have cases pending. Here is a man who is a builder. He has been building houses for sale, and now he desires to build some houses for rental. So he goes to the appropriate governmental agency—(this was during the war period)—and he procures priorities for the purpose of enabling him to construct houses for rent. He does construct houses for rent. He puts them at rental, and they remain at rental for a substantial period of time. The evidence in our particular case showed that about 18 months later, when an application was made by this concern, a partnership, to its bank for additional funds, the banker suggested — and it was somewhat more than a mere suggestion — that they proceed to sell some of the houses to take advantage of the profit available from their sale and the then

market. The record shows that thereafter, as houses became vacant, some houses were sold. The position of the tax payer was that those of the 95 rental houses that he sold came within the provisions of Section 117 (j). They were used by him in a trade or business, being the business of renting houses. The houses were not held previously for sale to customers. They contend that when they sold the houses, they were doing nothing other than what was contemplated by Section 117 (j) – selling property used in trade or business and not held primarily for sale to customers – and that, accordingly, they are entitled to have the benefit of Section 117 (j) and have the gain treated as capital gain. The government said, "No, that is not true. In the first year you sold 14 houses. Therefore, because of the number and frequency of sales, you were holding these houses for sale to customers in the ordinary course of business and they lost their qualification under the provisions of Section 117 (j)."

Now this is the situation which confronts us. Section 117 (j) is a relief measure, intended to afford the benefit of capital gains to people who sold property used in trade or business. Under Section 117 (j), we have a host of cases which are best typified in this manner. You have foreclosed a mortgage and have come into the ownership of a piece of land. You didn't want the land, but there was nothing that you could do about it. You had to take it, and you got it upon the foreclosure of a mortgage. It may have been subdivided into 15 or 20 lots, or you may have it subdivided, and in the course of the year you sold it. Most of the Circuit Courts, and particularly including the Ninth, have held, in a series of cases, that the number and frequency of sales transactions put the seller into the business of selling houses, and that the houses which he sells, therefore, he must have held primarily for the purpose of sale to customers in the ordinary course of his trade or business, and therefore he must treat the income as ordinary income. The Court sustained us when we argued the matter before it and vacated the four decisions against us, but for some unknown reason, referred the case back to the Tax Court to make additional findings as to a matter upon which the Tax Court had already found. So we are now appealing the matter again upon a simple principle. The principle is this: Section 117 (j) of the Internal Revenue Code contemplates that a man in trade or business may sell the property used in trade or business, other than property held primarily for the purpose of sale to customers. We have argued to the Circuit Court that there is nothing in this relief measure, Section 117 (j), that indicates that the seller, in order to take advantage of the section, must make the sale of whatever he had for sale in a single transaction, that the section contemplated "sale," and that if it took 14 sales or 18 sales or 20 sales to accomplish the purpose, the relief should still be available.

The illustration was this: Here are two men in the same community. One man owns a large apartment house in which there are 40 dwelling units, and he sells it after having operated it as a rental business, for $400,000.00 Here is another man, who has fifteen separate duplexes, and he has been renting them as a business. His doctor tells him his heart is in bad shape and he should get out of the rental business and relax. So he endeavors to sell his fifteen houses without success, but he is finally able to sell them, one at a time, and in the course of the year he has made fifteen sales. Does Section 117 (j) mean that because he had to make fifteen sales to complete his liquidation he is not entitled to capital gain, whereas the man who accommodated 40 families in his single unit and sold it in a single transaction *is* entitled to the benefits under Section 117 (j)? All that the latter man could do was sell it as one unit. He couldn't sell in parts. Still he was entitled to the benefits under the Section. The Court agreed with us before, and when you read the case

of McGah v. Commissioner in the Ninth District, you will know what the answer is and so will we.

But be careful in selling assets used in trade or business not held primarily for sale to customers. If you have to liquidate, do so in one or two or infrequent transactions, in order to avoid the position that the government is now taking.

I think I told you yesterday something about the matter of licensing of patents, that if a patent license agreement were properly drawn, it might qualify as a sale entitling the seller to receive royalties, even if they be denominated as such, and pay taxes thereon at capital gain rates. The thing to remember is that the government now does not acquiesce in the decision of the Tax Court, in the Myers Case, 6 T.C. 258. As you know, if the Tax Court renders a decision, the Commissioner can acquiesce. That, in effect, tells all the people that you may follow this case. If there is no acquiescence, then he says, "We don't follow the Tax Court." But the Commissioner acquiesced in the Myers case, which is reported in 6 Tax Court, 258, and subsequently withdrew his acquiescence. So if you are involved in such a problem, you still have a problem with the Commissioner of Internal Revenue even though the Tax Court decisions are clear.

There is still another section of Mr. Sarner's book that I suggest you read with considerable care. Here again is an excellent check list. There are many partnerships in existence, and sooner or later you are going to be faced with the problem of drawing an agreement on the basis of which the partners have agreed among themselves for a purchase, either optional or obligatory, of the interest of a deceased partner. This usually comes about in connection with an insurance program. The plan is for each partner to take out insurance on the life of the other, and with the proceeds of the cross insurance, plus the possibility of participation in partnership profits by the estate of the decedent after his death, to continue certain income payments to the widow of the deceased in liquidation of the partner's interest.

Now, there is a host of problems that have arisen in that connection, and they relate to such things as this: Do you include in the estate of the deceased partner the insurance on his life? Do you include in the income of the surviving partners income of the partnership continued after the death of a member and paid to his estate? Or is that considered an income payment to the estate alone?

There has been, I think, a vast confusion in the authorities, but I think you will find them quite accurately summarized as they stand today, in Sarner's book. Rabkin & Johnson, Federal Income, Gift & Estate Taxation, Ch. 14, Section 14-08, 14-09 and 14-10, which is a most accurate and detailed summary and will give you a reference to the cases.

I recommend you read very carefully this summary in Rabkin & Johnson as well as the one in Sarner, in order to see, first, that the application for insurance is properly made. Partner A should apply for the insurance on the life of partner B, and partner B should apply for the insurance on the life of partner A. Then you have a true case of cross insurance.

Now, in the case of a professional partnership as for example an accounting partnership, a law partnership, where tangible assets and good will are not factors concerned, the question is: Are you buying something? If it is provided in the agreement that the estate of the deceased partner shall continue as a member of the partnership entitled to receive a portion of income and not bear losses, and if it transpires that the payment that is to be made by the survivors, who continue the business, to the estate of the decedent, for the purpose of buying an interest, then

that interest must be evaluated for federal estate tax purposes, and that portion of the partnership income which would be used by the surviving partners to make the payment is chargeable to them for income tax purposes.

On the other hand, if the arrangement is a true arrangement whereby an attempt is made to enable the estate of a deceased partner to participate in income in order to pay off the income that he might normally have received had he lived, to some degree, then the surviving partners are chargeable for income tax purposes only with the share of income that they receive, and the estate of the decedent, or the widow, the recipient of the portion of the income to be paid, is chargable with his or its share. If you get yourself involved in any of those agreements, be sure to read what Rabkin & Johnson and Sarner have to say, so you will follow the basic principles involved.

Bear in mind one further thing. It does not yet appear that we have come to a point of complete rest in judicial decisions upon this point and can only base our conclusions upon what we know as of today.

There is one other subject that I want to mention, and this again goes back to the subject of partnerships. When you draw a partnership agreement, how long should it be? I have seen many partnership agreements, and some lawyers seem to think they must make them long and detailed. If you want a very interesting activity some day, ask yourself this question, after laying the Uniform Partnership Act before you: A and B are partners, and this is the partnership agreement. "A and B hereby associate themselves as partners under the general partnership law with equal interests, each contributing the sum of $5,00.00 to carry on the business at Pocatello," and sign their names. What are the terms of the partnership contract? If you type them out on legal paper, they probably would cover over ten pages. The terms will be found in the Uniform Partnership Law. If you are drawing these agreements, read the Uniform Partnership Act. You will find that it recites in many sections "except as otherwise agreed" and you ought to find out whether you want to "otherwise agree." But remember that as simple an agreement as the one I spelled out for you is still a very comprehensive agreement under the partnership law, and it is a whole lot wiser to make your partnership agreement as short and distinct as possible, because in spelling out too fully, you may get yourself into unintended difficulty.

I am sure that all of you well know, as I have suggested to you during the progress of my remarks, that it is hardly to be expected in so short a time as has been available to us here that you could obtain any thorough-going knowledge of the field of Federal taxation as related to the organizational problems of small businesses.

This, necessarily, is a matter that requires continuous study on your part.

I also want to make clear that I do not even pretend to have covered the numerous items which have been so ably set forth in Mr. Sarner's book. That book is something for you to read carefully and to study. It is an excellent framework for all of your knowledge on this important subject.

Read what he has to say, read his references to the Internal Revenue Code, to the Regulations, to the decisions of the courts, and provide yourself with a framework of knowledge which you can continually supplement by your reading and from your practice and experience.

I hope I have stimulated your interest in the importance of this subject and have suggested to you the possibility of laying out constructive organizational

programs, within the law and the regulations, whereby you can assist your clients in organizing their businesses and minimizing tax liability.

And, by the same token, I hope I have impressed upon you the importance of being able to discover the existence of a tax problem in a business transaction, having in mind that it is far more important to be able to DISCOVER a tax problem than to SOLVE it. If you have discovered it and *can't* solve it, you can find someone to assist you in solving it, but if you haven't *discovered* it, great harm may be done.

Thank you very much. (applause)

PRESIDENT LITTON: I certainly want to thank you on behalf of the Bar Commission and the members for those splendid addresses. From what I have heard during this convention, I am certainly glad I don't practice law in California. (laughter)

Judge McQuade is now in the audience. Would you come forward and give your report?

JUDGE McQUADE: Judicial conferences were held in January and July again this year but will be called only once a year hereafter. Rules of practice and procedure received much attention at both sessions this year. We realize that our task on rules is both complex and monumental and consequently are proceeding cautiously but persistently. Through the efforts of numerous committees of both lawyers and judges, satisfactory progress *is* being made. We are certain that in due time the courts, the bar and litigants will benefit substantially by all this work.

As required by Article V, Section 25 of the Idaho Constitution, the district judges are calling to the attention of our legislature defects in the laws. The indeterminate sentence law, the 1951 insanity and inebriety law, laws relative to utility franchises, priority of farm laborer liens and others in which our courts have noted defects were discussed in our conference. Appropriate recommendations will be forwarded through the Supreme Court and Governor's office to the Legislature. The courts merely point out apparent defects and suggest possible remedies as the Constitution requires.

We considered at some length the power and duty of trial courts to *supervise* the conduct of trials. No particular changes in the past exercise of these powers and duties need be anticipated by members of the bar.

Our conferences have been well attended by both Supreme Court and district court judges. The program of improving the administration of justice is making rapid progress in Idaho, thanks to the cooperation of bench and bar.

PRESIDENT LITTON: Thank you, Judge. That was a very fine report.

We will now have the report of the Resolutions Committee. Willis Sullivan will make the presentation.

MR. WILLIS SULLIVAN: Mr. President, the Resolutions Committee wishes to propose the following resolutions.

RESOLUTION NO. 1

RESOLVED That the Board of Commissioners of the Idaho State Bar be, and it is hereby authorized to investigate and determine the feasibility of holding a Regional Meeting of the American Bar Association at Sun Valley, Idaho, in 1954, and in the event arrangements can be and are made for such meeting, the Board is hereby directed to schedule the Annual Meeting of the Idaho State Bar for that year at the same time.

Mr. President, I move the resolution be adopted.

MR. RALPH BRESHEARS: I second the motion.

(Whereupon the motion was put to a vote and carried unanimously.)

RESOLUTION NO. 2

MR: WILLIS SULLIVAN:

BE IT RESOLVED, that this Association express its appreciation for the quarter-century of devotion and duty, and excellent and tireless service rendered to this Association and the Bench and Bar of Idaho by our late Secretary, Sam S. Griffin.

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

MR. MARCUS WARE: I second the motion.

(Whereupon the motion was put to a vote and carried unanimously.)

RESOLUTION NO. 3

MR. WILLIS SULLIVAN:

BE IT RESOLVED, that the Idaho State Bar Commission is hereby directed and authorized to cooperate with the Idaho Association of Certified Public Accountants for the purpose of putting into effect the principles relating to the practice in the field of Federal Income Taxation promulgated by the National Conference of Lawyers and Certified Public Accountants.

Mr. President, I move the resolution be adopted.

MR. FRANK MARTIN: I second the motion.

(Whereupon the motion was put to a vote and carried unanimously.)

RESOLUTION NO. 4

MR. WILLIS SULLIVAN:

WHEREAS, the Idaho State Bar Association is cognizant of the fact that the salaries being paid to Justices of the Supreme Court and District Judges of the State are far below the average salaries being paid throughout the United States —

NOW THEREFORE BE IT RESOLVED, that it is the sense of this convention that the Bar Commission and the individual members of the Bar cooperate to the end that appropriate legislation be adopted at the forthcoming session of the Legislature to increase the salaries of Justices of the Supreme Court and Judges of the District Courts to the end that our judiciary may be adequately compensated for the services that they are required to render, not only to the Bar but to the public at large.

Mr. President, I move the resolution be adopted.

MR. FRANK MARTIN: I second the motion.

(Whereupon the motion was put to a vote and carried unanimously.)

RESOLUTION NO. 5

MR. WILLIS SULLIVAN:

BE IT RESOLVED, that the quality of the judiciary is a paramount obligation of the Bar Association and because the peculiar experience of attorneys particularly qualifies them to exercise judgment on the qualification of candidates, therefore the perpetuation in office and selection of qualified replacements for vacancies is an obligation of each member of the Bar and a vital function of the local associations.

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

MR. JOHN CARVER: What does it mean?

MR. WILLIS SULLIVAN: Shall I reread it?

MR. JOHN CARVER: I heard it all right.

FROM THE FLOOR: I second the motion.

(Whereupon the motion was put to a vote and carried unanimously.)

RESOLUTION NO. 6

MR. WILLIS SULLIVAN:

BE IT RESOLVED, that the Idaho State Bar and the members hereby extend to Mr. Milton W. Dobrzensky and Mr. Melvin M. Belli our sincere thanks for honoring us with their personal attendance at our annual meeting and delivering to us inspiring and dynamic addresses. We hope that the warmth of our appreciation may equal the warmth of their personalities.

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

(Whereupon there were numerous seconds from the floor.)

MR. FRANK MARTIN: Mr. President, I call for a rising vote.

PRESIDENT LITTON: It will be granted. (applause)

(Whereupon there was a unanimous vote in favor of the motion.)

PRESIDENT LITTON: Thank you very much, gentlemen. I know that is appropriate and a fine recognition for these splendid and outstanding lawyers.

RESOLUTION NO. 7

MR. WILLIS SULLIVAN:

WHEREAS, the success of any Association such as ours depends upon the diligence and ability of our officers and the members of our various committees;

NOW, THEREFORE, BE IT RESOLVED, that the Idaho State Bar hereby extend its sincere thanks and appreciation to our officers and the members of each of our committees who have served us so well since our last annual meeting, and especially to the members of the arrangements committee for securing for our use and enjoyment the accommodations and facilities of Sun Valley.

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

MR. JOHN BLACK: I second the motion.

MR. HARRY BENOIT: I may be unduly alarmed, but that couldn't be construed as an endorsement of Averill Harriman, could it? (laughter)

MR. WILLIS SULLIVAN: It is not supposed to have any political implications.

(Whereupon the motion was put to a vote and carried unanimously.)

RESOLUTION NO. 8

MR. WILLIS SULLIVAN:

BE IT RESOLVED, that it is the sense of this convention that the Bar Commission appoint a Committee for the purpose of making a complete study and submitting to the Bar for approval, a program that will result in increasing the efficiency of our Probate and Justice Courts, together with such legislation and proposed constitutional amendments as may be deemed desirable to effect the objects and purposes of this resolution.

Mr. President, I move the resolution be adopted.

MR. FRANK MARTIN: I second the motion.

(Whereupon the motion was put to a vote and carried unanimously.)

MR. MARCUS WARE: I would like to make one observation. I think this is a very timely resolution. If any of you have any PTA committee work, you will be amazed at the variety of amendments and alterations they have in mind in our judicial procedure in relation to juvenile delinquency along with new courts of all kinds and personnel. I think it is very timely that we have this resolution.

RESOLUTION NO. 9

MR. WILLIS SULLIVAN:

BE IT RESOLVED, that the Commissioners of the Idaho State Bar are hereby authorized to cooperate in their discretion with the accountants in promulgating an Annual Tax Institute.

Mr. President, I move the resolution be adopted.

MR. FRANK MARTIN: I second the motion.

(Whereupon the motion was put to a vote and carried unanimously.)

RESOLUTION NO. 10

MR. WILLIS SULLIVAN:

BE IT RESOLVED, that the Idaho State Bar hereby extends its sincere appreciation to the officials and employees of Sun Valley for the kind and efficient service given us during our stay here and hereby congratulates them upon the excellence of such service, the accommodations and entertainments furnished.

Mr. President, I move the resolution be adopted.

MR. FRANK MARTIN: I second the motion.

(Whereupon the motion was put to a vote and carried unanimously.)

MR. WILLIS SULLIVAN: Mr. President, that completes the resolutions proposed by your committee.

PRESIDENT LITTON: Are there any resolutions to be presented from the floor? If not, I want to thank the committee for its splendid work. I think that was a fine set of resolutions and in keeping with the principles and practices of our organization.

At this time it is my distinct pleasure to announce that the Commission has met and reorganized. I am indeed very happy to present these new officers.

First I want to say that Paul Ennis will continue as Secretary. (applause)

Our good friend T. M. Robertson will be Vice President. (applause)

And it gives me indeed great pleasure to present our new President. He is aggressive, a fine fellow, and he will work hard, and I know you will have a good year. I am very happy to introduce the new President of the Bar Association, Mr. Robert Brown. (applause)

PRESIDENT BROWN: Members of the Bar and guests: I am a little overcome with something — humility or inadequacy — in acknowledging this responsibility and honor. I hope I may serve you well. It has been a considerable privilege to serve with Mr. Litton, and I trust and hope that I may in some degree give the same sincere and responsible work to this office that he has.

Is there any further business? If not I will entertain a motion to adjourn.

MR. E. B. SMITH: I move we adjourn.

(Whereupon there were numerous seconds from the floor. The motion was put to a vote and carried unanimously.)

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