

CONTENTS

THE AMERICAN LAW INSTITUTE

The PRACTICAL Lawyer

THE MAGAZINE FOR THE GENERAL PRACTITIONER

Editor

Paul A. Wolkin

Editorial Board

Jahn E. Mulder, Chairman

S. Samuel Arsht, John G. Buchanan, Jr.,
Peter F. Coogan, Paul B. De Witt, Joseph
Ford, III, Wilfred R. Lorry, Henry C. Smith,
Joseph H. Twiss, Harrison Tweed, Herbert F.
Goodrich.

Committee on Continuing Legal Educa-
tion of the American Law Institute
Collaborating with the American Bar
Association

Harrison Tweed, Chairman

Herbert F. Goodrich, Secretary

Harold F. Birnbaum, Herbert W. Clark,
Marvin K. Collie, Paul B. De Witt, Arthur
Dixon, Jefferson B. Fordham, Robert P.
Goldman, George P. Hoke, Edward H.
Jones, Charles B. Levering, Arthur Littleton,
Lowell S. Nicholson, Emory H. Niles, Alfred
P. O'Hara, T. Hartley Pollock, Payne H.
Ratner, Jr., Thomas N. Tarleau, Laurens
Williams, Loyd Wright. John E. Mulder,
Director; James E. Brenner, Director West-
ern Area; Charles W. Joiner, Director
Mid-Western Area.

Advertising Director

Elizabeth G. Kalkstein

Circulation Manager

Walter A. McLaughlin

January 1955

Vol. 1-No. 1

The Practical Lawyer	11
<i>George Wharton Pepper</i>	
In the Matter of Oral Argument	12
<i>United States Court of Ap- peals for the Third Circuit</i>	
Settlement of a Personal Injury Claim	19
<i>Wilfred R. Lorry</i>	
Informal Procedure before the National Labor Relations Board	31
<i>Ruth Weyand and Norma Zarky</i>	
The Client's Invention and Its Patenting	53
<i>Arthur H. Seidel</i>	
When the Named Insured Dies	67
<i>Arch M. Cantrall</i>	
How to Conduct a Bulk Sale	78
<i>Frank W. Miller</i>	
Authors and Articles	3
CLE Around the Country	9
Concurrences and Dissents	87

The Practical Lawyer is published by the Committee on Continuing Legal Education, monthly, October through May. Subscription Rates: 1 Year-\$6.00; single issues-\$1.25. Publication office 1601 Edison Highway, Baltimore 13, Md. Correspondence concerning editorial contents or articles should be addressed to The Practical Lawyer, 133 S. 36th Street, Philadelphia 4, Penna. Copyrighted 1955 by The American Law Institute, Committee on Continuing Legal Education. Application for second class privilege pending at Baltimore, Md.

The views and conclusions expressed in articles herein are not necessarily those of the Editorial Staff or Board, or sponsors of The Practical Lawyer.

To "The Practical Lawyer"

IN INITIIS
TUIS, TE
SALUTAMUS

BON VOYAGE

Lawyers Title Insurance Corporation

Home Office ~ Richmond, Virginia

TITLES INSURED THROUGHOUT 42 STATES

NATIONAL TITLE DIVISION OFFICES

Chicago New York

BRANCH OFFICES IN:

Akron, O.	Columbus, O.	New Orleans, La.	Savannah, Ga.
Atlanta, Ga.	Dallas, Tex.	Newport News, Va.	Springfield, Ill.
Augusta, Ga.	Dayton, O.	New York, N. Y.	Washington, D. C.
Birmingham, Ala.	Decatur, Ga.	Norfolk, Va.	White Plains, N. Y.
Camden, N. J.	Detroit, Mich.	Pittsburgh, Pa.	Wilmington, Del.
Cincinnati, O.	Freehold, N. J.	Pontiac, Mich.	Winston-Salem, N. C.
Cleveland, O.	Miami, Fla.	Richmond, Va.	Winter Haven, Fla.
Columbus, Ga.	Newark, N. J.	Roanoke, Va.	

REPRESENTED BY LOCAL TITLE COMPANIES IN MORE THAN 175 OTHER CITIES

Authors and Articles

GEORGE WHARTON PEPPER

George Wharton Pepper symbolizes the practical lawyer, the Philadelphia lawyer, and The American Law Institute.

The Practical Lawyer is honored to have its admission to the Bar of the Country moved by Mr. Pepper, a former president of the Institute and its present Chairman of the Council.

JOHN BIGGS, JR., ALBERT B. MARIS, HERBERT F. GOODRICH, GERALD McLAUGHLIN, HARRY E. KALODNER, AUSTIN L. STALEY, AND WILLIAM H. HASTIE

Some courts read briefs only after argument. Not so in the Third Circuit of the United States Court of Appeals. This Court may and probably does examine briefs after argument. But its invariable practice is to have read briefs carefully before a case is argued. What then is there left for counsel to do on argument? One thing counsel must never do before this Court is to read from his brief for he is then likely to be informed that the Judges can read and have read the briefs. *In the Matter of Oral Argument* tells counsel what the Court thinks is the function of oral argument. This delineation necessarily

points out what oral argument can and should do that a brief cannot.

Chief Judge Biggs practiced law and served as a Referee in Bankruptcy in Wilmington, Delaware, before his appointment to the Court in 1937. The titles of two early novels by the Judge, "Demigods" (1926) and "Seven Days' Whipping" (1928), evidenced a premonition of future appointment to the judiciary.

Judge Maris, a Philadelphia lawyer, was the editor of the *Legal Intelligencer*, a daily-must for practicing lawyers in Philadelphia, before being appointed to the United States District Court for the Eastern District of Pennsylvania. Since then he has specialized in judgeships going to the Court of Appeals in 1938 and, while on that Court, serving as Judge and later as Chief Judge of the United States Emergency Court of Appeals. Judge Maris also does some law teaching.

Judge Goodrich was the dean at the University of Pennsylvania Law School before his appointment to the Court in 1940. This position apparently left him with some time on his hands and a yearning for his former scholarly pursuits. For while on the bench he undertook the directorship of The American Law Institute and managed new

editions of casebooks on conflict of laws, his authoritative text in that field, and numerous law review articles and law lectures.

Judge McLaughlin is the New Jersey representative on the Court having been appointed to the bench in 1943. Before that he practiced law for almost a quarter of a century in Newark, New Jersey.

Judge Kalodner's antipathy to wordiness is due by his own account to early experience as a reporter on the staff of the old Philadelphia North American newspaper. He later became the financial and political editor of another former newspaper, The Philadelphia Record. He was a Philadelphia County trial Judge and a United States District Judge prior to his appointment to the Court of Appeals in 1946.

Judge Staley was a Pittsburgh trial lawyer before appointment to the Court in 1950. He has been on the legal staffs of the City of Pittsburgh and the Commonwealth of Pennsylvania and an administrator of that State's workmen's compensation system. He may be described as the "sporting" member of the Court—he is an avid fisherman and hunter.

Judge Hastie is by date of confirmation the junior of the Court. He is also its youngest member but that did not deny him a crowded professional career. He has been a Judge of the District Court of the Virgin Islands. He went on to become Dean of the Howard School

of Law and civilian aide to the Secretary of War. Before "retiring" to the bench he served as Governor of the Virgin Islands.

WILFRED R. LORRY

Settlement negotiations in a personal injury case can and should consist of something more than the trading of arbitrary figures. A plaintiffs' lawyer tells in this issue what that something more should consist of. *Settlement of a Personal Injury Claim* develops the steps that should be taken prior to the entry into negotiations, how and at what level those negotiations should be conducted, and what the plaintiff's lawyer should do after he has submitted and justified his idea of a settlement figure. In the next issue a defendants' trial lawyer will have words of advice for those of us who are for the defense.

Wilfred R. Lorry, a member of the Philadelphia bar, has been responsible in recent years for five and six figure plaintiffs' verdicts in personal injury suits and does not foreclose the attainment of a verdict in seven figures. If asked, he might be able to make out a case attributing his jury successes to his earlier experience as an F.B.I. agent. In that capacity he got his facts and his men. He was in on the 1934 capture at Chicago of "Doc" Barker and in 1942 and 1943, as a member of the Foreign Service Division of the F.B.I., he was sleuthing for spys and sabo-

teurs in various parts of South America.

RUTH WEYAND AND NORMA ZARKY

Reported labor law cases do not show how many labor disputes which can become the subject matter of formal opinions may be settled through informal procedures. How a lawyer can avail himself of such procedures and save temps, time, and money is the subject of *Informal Procedure before the National Labor Relations Board*.

The authors are two young ladies who practice law in the District of Columbia while fulfilling marital and maternal duties. Ruth Weyand has argued labor law cases in every Court of Appeals in the United States except the First and Tenth Circuits. Her absence in these two Circuits has not been due to exclusion on account of sex—she just never had a case there. In nine labor law cases argued for the NLRB in the Supreme Court of the United States, she has a batting average of .888, including the landmark cases of *Medo Photo Supply v. NLRB* and *Republic Aviation Corp. v. NLRB*. As can be gathered from these statistics, Miss Weyand was employed at one time by the NLRB and was in charge of its litigation in the Supreme Court of the United States for eight years.

Norma Zarky is a member of the bars of Wisconsin and the District of Columbia. She, too, is a former government lawyer having been an enforcement attorney at various

times in the Department of Labor, the Railroad Retirement Board, and the Office of Price Administration. It is appropriate for her, being a woman, to have been Chief of the Apparel Enforcement Section of the O.P.A. She has also traveled the circuits of the Courts of Appeals and has prepared many a brief for submission to the Supreme Court of the United States.

ARTHUR H. SEIDEL

Very few if any lawyers who do not practice in the patent specialty field would hazard the undertaking of preparing and following up an application for a patent. The practice followed is to refer a client with an invention to a Patent Attorney. *The Client's Invention and Its Patenting* is not an attempt to encourage general practitioners to mend their patent ways. It tells what a patent specialist does in the preparation, filing and following up of a patent application. It also tells a general practitioner how to protect his client's idea pending referral to a patent specialist.

Arthur H. Seidel is by Patent Office nomenclature a "Patent Attorney" as distinguished from a "Patent Agent." This means he is a member of the bar (District of Columbia) since he was admitted to practice before the Patent Office under its 1938 standards for admission. His early education resulted in degrees in chemistry (A.B. and A.M.), and he was dissuaded from attaining a doctorate because the

Continued on page 6

**TO
INCREASE
LAW
OFFICE
INCOME**

*Keep daily time sheets
Analyze the data thus obtained*

The DAILY LOG for LAWYERS, 1955 edition, makes it possible for you to learn complete facts about the business side of your practice. Designed for lawyers by a lawyer, there's a place for everything—time, charges, receipts, expenses, payroll, roster-of-business.

You will have new information, too . . . about fees per hour, ratio of overhead to receipts, total productive time, progress in acquiring and completing business, etc. The LOG returns its modest cost many times over. Write for full information, or send your order today.

PRICES: 1955 DAILY LOG
for LAWYERS, insert fits any
3-ring 8½" x 11" binder, com-
plete for 1955 \$6.50
Attractive vinyl plastic binder
\$3.95

**COLWELL PUBLISHING
COMPANY**

**113 West University Avenue
Champaign, Illinois**

AUTHORS AND ARTICLES
Continued from page 5

acid holes in his trousers made that pursuit too expensive. He spent some years in the patent department of the Gulf Oil Corporation and now apparently stakes out the patent claims of his clients while commuting between his Philadelphia and New York offices.

ARCH M. CANTRALL

Death and insurance immediately suggest to lawyers life insurance problems. *When the Named Insured Dies* is a forceful reminder that if the decedent was a normal individual he carried fire, liability and surety policies which present as many, if not more, problems to those handling the affairs of his estate as do his life insurance policies.

Continuing legal education is not a new venture for Arch M. Cantrall of West Virginia. Indeed, his early activity as Chairman of the Committee on Institutes of the newly integrated West Virginia State Bar in 1948 was so effective that it led to his later becoming its President and also to membership on the sponsor of this magazine, the Committee on Continuing Legal Education. He is the author of an article in the November, 1952 issue of the AMERICAN BAR ASSOCIATION JOURNAL entitled, *Is Legal Education Doing Its Job?* He has been a frequent lecturer for the Committee. He has also found

Continued on page 7

AUTHORS AND ARTICLES

Continued from page 6

time to serve as the President of the West Virginia Tax Institute.

FRANK W. MILLER

Bulk sales is the shortest article of the Uniform Commercial Code prepared by The American Law Institute and the National Conference of Commissioners on the Uniform State Laws. But when each of the articles in the Code was discussed at a continuing legal education series of lectures in Philadelphia upon enactment of the Code in Pennsylvania, that article evoked the greatest number of questions. This clearly was not attributable to the draftsmanship of the Reporter, Professor Charles Bunn, of the University of Wisconsin. The subject itself appeared to be shrouded in mystery. *How to Conduct a Bulk Sale* should dispel some of the mystery about bulk sales.

Frank W. Miller assisted Professor Bunn in the drafting of the bulk transfers article of the Commercial Code. That does not account for the fact that the bulk sales laws discussed in his article do not include the bulk transfer provisions of the Code—rather, the Code since its official promulgation in 1952 has been enacted in one state. He is a member of the bar of Wisconsin, although not a practicing lawyer. He is on the faculty of the Washington University School of Law.

THE EDITOR

The PRACTICAL *Lawyer*

will carry advertisements of products and services of interest to the practicing lawyer.

We hope you will read the advertising and find it helpful.

If you have a client with something to offer the general practitioner, please invite him to advertise in

THE PRACTICAL LAWYER

133 S. 36th St.
Philadelphia 4, Pa.

LET US SHARE YOUR TRUST and ESTATE PROBLEMS

Now, without cost or obligation on your part, you can get expert investment advice in the administration of trusts and estates for your clients.

Our Investment Advisory Committee can help you on such matters as:

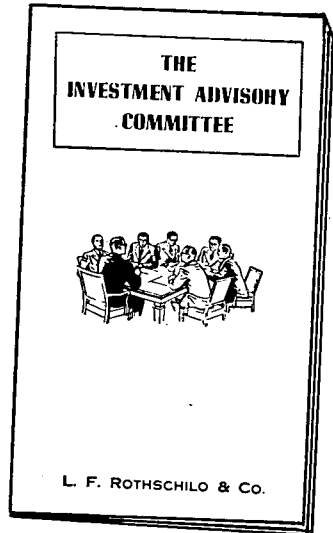
The most suitable investments for carrying out the aims of a trust;

The importance of selection, whether it be tax-exempt bonds or common stocks;

Which holdings to liquidate to meet the expenses of an estate;

How best to dispose of a family business or blocks of publicly-held corporations.

These — and many other problems — are apt to come up in the handling of estates; our many years of experience in investments and our detailed knowledge of all security markets enable us to serve you as expert consultants in the faithful performance of these responsibilities.



Write today for your copy of our pamphlet, telling you more of our Investment Advisory Service.

L. F. ROTHSCHILD & Co.

ESTABLISHED 1899

Member

N. Y. Stock Exchange, American Stock Exchange and other leading Exchanges

120 BROADWAY, NEW YORK 5, N. Y.

TEL:—RECTOR 2-4600

BOSTON • CHICAGO • ROCHESTER • MONTREAL

CLE Around the Country

This column is about continuing legal education around the country. "CLE" is short for continuing legal education. It is contemplated that this will be a regular department of *The Practical Lawyer*. It will probably be the only department not directly devoted to telling the general practitioner how to do something in his practice of the law. But it will have to do with continuing legal education.

With considerable flexibility, there will be set forth here from time to time information about the following:

1. *The Work of the Committee on Continuing Legal Education*—what it is doing and what it proposes to do to help make practical training available for lawyers in every nook and cranny of the country;

2. *What Other Organizations Are Doing in the Field of Continuing Legal Education*, independently of the Committee;

3. *Something about Educational Literature for the Legal Profession*, including but by no means limited to the "how-to-do-it" handbooks of the Committee; and

4. *Brief Profiles of Lawyers Making a Significant Contribution to Continuing Legal Education*.

* * *

First, a word about *The Practical Lawyer* itself. It is not a hastily-

conceived brain child, nor is it intended to be an ephemeral product. Almost from its inception early in 1948, the Committee on Continuing Legal Education deliberated over the prospect of producing a periodical as an implement of post-admission legal education. The idea was debated, tabled, re-debated and re-tabled time and again.

A law review with long, scholarly articles was rejected as mere duplication of what law schools already do well. A current events bulletin met the same fate. Meanwhile, the Committee concentrated on basic, "how-to-do-it" institutes and lecture courses and the publication of its practical handbooks, and its status in this respect approached stability and maturity.

So evolved naturally the thought of a magazine to implement, supplement and complement the Committee's other activities. That will be the function of *The Practical Lawyer*—another step toward the fulfillment of complete continuing training for the general practitioner.

The articles in these pages will stress a practical approach. They will be short. Where one aspect of a handbook needs further treatment, it will be so done as an article. Where a change in the law occurs, it will be discussed in these pages, until the book can be re-

Continued on page 84

ANNOUNCING

A New Book
**THE MODERN PRUDENT
INVESTOR**

(How to Invest Trust Funds)
December, 1954

By
CHARLES P. CURTIS
of the
Massachusetts Bar



Practical, modern advice to the fiduciary and
counsel on the investment of trust funds.



\$2.50 per copy



Another in the series of "how-to-do-it" handbooks
of the Committee on Continuing Legal Education.

COMMITTEE ON CONTINUING LEGAL EDUCATION
OF THE
AMERICAN LAW INSTITUTE
COLLABORATING WITH THE
AMERICAN BAR ASSOCIATION

133 South 36th Street

Philadelphia 4, Penna.

The PRACTICAL *Lawyer*

SOMEbody, with a flair for sarcasm, has defined a jurist as a man familiar with the laws of all countries except his own. If there is an element of truth in this definition it is because the student of foreign law is apt to conceive of it as a field for intellectual exercise rather than as a body of principles and rules for the guidance and control of every-day human life. On the other hand, the lawyer in active practice knows that the law is something to *do* as well as something to know. He is a fortunate man if he can maintain a just balance between these two aspects of his profession. The practitioner whose chief interest is in the library is at as great a disadvantage as his brother who thinks entirely in terms of the mechanics of law and depends more upon his familiarity with judges, jurors and clerks of courts than upon his own grasp of legal principles.

This distinction between the *Why* and the *How* is in need of emphasis and illustration because some of its implications are less than obvious. Thorough preparation may have supplied the advocate with all necessary ammunition but his argument may be totally ineffective if he is deficient in the tech-

nique of advocacy. Capacity to comprehend the practical operation of his client's business may be essential to sound advice on legal problems arising in the course of it. Even the conduct of a negotiation for settlement may be made more effective if the negotiator can take the measure of his adversary and determine whether he is more interested in spot cash than in vindicating the justice of his client's claim. He may even need to be reminded that in a negotiation for settlement everything is relevant except the merits.

It is with a view to continual emphasis on the importance of the *How* that the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association has determined to publish a periodical devoted to the practical aspects of the lawyer's daily work. There is an ample field for exploration and it may turn out that the contemplated periodical will prove itself an educational instrument of real value. A confident prediction is hazarded that this will prove to be the case.

GEORGE WHARTON PEPPER

In the Matter of

ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

By BIGGS, *Chief Judge*, and MARIS, GOODRICH, McLAUGHLIN, KALODNER,
STALEY and HASTIE, *Circuit Judges*

GOODRICH, *Circuit Judge*.

A good lawyer asked me the other day, "What is there to say in oral argument when I have put everything I have to say in my brief, and said it as carefully and clearly as I can?" A good question, which deserves a thoughtful answer, especially since every now and then an appellate judge will tend to deprecate the value of oral presentation of appeals.

Here is one quick answer. Some people get ideas better by hearing than by reading. President Eisenhower is said to be one of them. Statistics are lacking to show how prevalent this preference is among judges; likely on the whole they tend to be bookish men. But an appellate judge who has had trial court experience has of necessity learned to understand law points

made orally often unaided by a brief. So oral argument gives counsel a chance to appeal to the ear-minded judge.

Furthermore, oral argument plus brief gives the lawyer a chance to make both eye and ear attack for his case. Surely two weapons are better than one. Advertising people know that; note the skill with which a television commercial is presented. You may not like the style, nor the article. The extravagant claims for it may make you sick. But you are left in no doubt of the advertiser's position about what the advertiser wants you to do.

A brief can do something that oral argument cannot, if, as in most courts, the time given counsel for oral argument is limited. The brief can develop points in detail; it can marshal authorities; it can quote

from court opinions and text writers—it constitutes an argumentative text book—on the particular points involved.

Oral argument, to be good, must be much less detailed. No judge's memory is good enough to remember a lawyer's minute and detailed line of decisions, and the distinctions among them. A great deal of appellate time is wasted because lawyers do not seem to believe that judges, unlike elephants, can forget.

The same caution goes for detailed discussion of facts. The judge may know some of the precedents of his own or other courts if the field is one in which litigation is frequent. He certainly will not know the factual history of a particular case which he is learning about for the first time on appeal.

The first thing for the advocate to accomplish is to bring the court to understand the problem. This may be simple, as it is in many tax cases. Is a given expenditure by a taxpayer to be given a deduction as a business expense, or is it to be regarded as capital? Is a payment to a retiring pastor of a church to be treated as a gift or taxable income? One could put a dozen instances as fast as he can write. The fact that the problem can be simply stated by counsel and easily grasped by a judge does not, of course, indicate that the answer is clear, simple or easy. It may be, or it may not. But if the problem can be simply stated, it certainly should be, for

such a statement lets a court move at once to the suggested answer.

But often facts are complicated. Patent cases are a notable instance of this. A court must be made to understand what the claimed invention does, itself a hard thing to comprehend in the case of devices with the technique of which the layman is wholly unfamiliar. Radio and television patents are examples. The court must understand both the presently claimed invention and the prior art before it is in a position to pass any judgment at all. An oral explanation of his case by a skillful patent lawyer is a beautiful thing to listen to. And by skillful is meant, of course, not skill in engineering techniques or in framing an application for the patent office, but skill in so stating a complicated problem that a court, hearing about it for the first time, can understand what the problem is which must be solved to decide the case.

Assume, then, that counsel's skill has brought to the court a comprehension of his case. What then? An oral argument can hardly win a case, unless it is so clear that it is apparent that there is everything to one side and nothing to the other. But successful argument can make the court want to decide the case counsel's way. Here is the chance for the advocate to use his own personality to impress the court with his case. He certainly should not read to the judges either from his brief or a prepared paper. He

should refer to his notes only when he must. He should refrain from histrionics. They will bore or maybe disgust his hearers. But straightforward talk to the bench by a man who knows his record and can tell why the court should decide for him may go a long way to win the appeal.

McLAUGHLIN, *Circuit Judge* (concurring).

Since, as of now, in oral argument advocates are facing a condition which more and more has become the order of the day for all appellate courts, it might just as well be so accepted and dealt with accordingly.

This does not make it an un-mixed blessing for lawyers. Generally speaking it is of no help to a really weak contention for if the other side fails to break through the thin spots chances are the court will. Even so if the attorney has lived up to the sine qua non of this top branch of his profession, meticulous preparation, he won't do bad. He will make his argument in the best possible fashion. He will know and discount its weaknesses and not evade the inevitable queries regarding them. He will not let his case down or run from it; far more desirable that he give a substitution if for whatever the reason he is unable to function sincerely and zealously on behalf of his cause.

On the other hand a sound case can hardly be ruined by oral argument. Nor will the latter ever be

overwhelming unless justified by the facts and law behind it. Assuming that the brief is adequate or at least that the right of the appeal can be ascertained from the record, the appellate court as a rule will be able to dredge it out.

It is when the question is confusing or close or both that oral presentation can be of prime value to the parties, the advocates and the court. A direct incisive presentation of the particular position does assist amazingly in not only clarifying the view urged but in bringing alive its strength. It is worthy of note here that on occasion problems and their answers seemingly outstanding in briefs fade to insignificance under close discus-sional scrutiny.

Therefore, necessarily accepting the proposition that oral argument is with bench and bar as a fact, let the advocate never forget that the merit of the cause is the sole interest of the court. Prominence or power of the lawyers, personal quarrels, enlargement of difficulties are unimportant. Overargument, facile or otherwise, is a mistake and exhausting to a tribunal completely concentrated as it is on the appeal at bar. Emphasis should be placed on the fewest possible valid points and this benefit retained by ruthlessly eliminating weak issues.

The advocate should be dedicated to his case; saturated with a thorough knowledge of it. He should make an adult lawyerlike argument; accurate, fair, in good taste.

And if he does, though because of the nature of basic questions involved he may not be able to persuade the court finally, he can rest assured that he will be listened to closely and with respectful regard.

KALODNER, *Circuit Judge* (concurring).

Oral argument is the seasoning to the brief. Effectively presented it makes more palatable to the judge the dish of controversy served to him by the opposing parties. Like all seasoning it must be discriminately used.

As far as I am concerned, oral argument and the brief are "indispensable parties." Briefs read prior to the oral argument serve to acquaint me with the nature of the controversy, its factual phases and issues of law. Oral argument serves to bring into sharper focus the critical aspects of the case. In a sense, oral argument is a "close-up" view of the controversy. It makes more intimate and personal the case itself and all of its facets. It brings into sharper outline the more impersonal aspects of a brief. It serves too, to stimulate both counsel and judge. It enables counsel to parry and to thrust with respect to the brief and oral argument of his adversary. Additionally, it affords counsel an opportunity to present their respective views anent any question which may trouble the judge.

Because they are traditionally cautious, lawyers all too often in their briefs go a-huntin' with a shotgun

loaded with buckshot. In oral argument they could more profitably use a single chamber rifle and direct their fire to the vulnerable part of their target.

Oral argument is most effective when it succinctly states the critical facts, the issues of law and the impact of legal principles on both. The statement of facts should be brief—the issue or issues should be pin-pointed—and the discussion of legal principles or precedents should always be relevant. Questions from the bench should be answered when they are asked and not met with the answer "I'll come to that later." "Later," alas, too often proves to be too late!

STALEY, *Circuit Judge* (concurring).

I have only two notions to add to those of Judge Goodrich.

The first springs from the obvious fact that a brief is impersonal and formal, while oral argument is personal and less formal. At oral argument judges and counsel are face to face. In a loose sense, counsel has been admitted to the conference room. Assuming that the court reads the briefs before the argument, as our court does, I think one real advantage of oral argument is that it gives counsel the chance to discover what are the important issues *in the judges' minds*. This is no small matter, for the judges are the ones who are going to decide counsel's case, and, while his brief may be otherwise excellent, its whole thrust may bear

on a matter on which the judges are already convinced. They may be bothered by an issue not mentioned or not fully developed in the brief. Pointed questions from the bench will show counsel where he should direct his argument, thus giving him a chance to resolve doubts in the minds of the judges, a chance that is too often forfeited by evading the question or seeking to postpone the answer. Of course, counsel may think that the point on which the judges are bothered has nothing to do with the case, but unless he can make the irrelevancy clear, his case is in jeopardy. Oral argument gives the opportunity to do this. Furthermore, this works both ways. Oral argument gives counsel the chance to exploit those gaps in his opponent's brief that he may have overlooked but that have been brought out by the court.

Finally, I think that the fact that only a limited time is allowed for oral presentation is itself a blessing. There is no doubt in my mind that that argument is best that goes to the jugular of the case. The time limitation forces a verbose advocate to restrain himself and stick to the vitals. He must squeeze into those minutes allowed only those points that are really worth telling the court about. An intelligent selectivity on this score insures presentation of what is really important by both eye and ear attack and leaves the relatively minor matters for the brief.

HASTIE, *Circuit Judge* (concurring).

It is my observation that oral argument on appeal is a very important aid to judicature.

This is not to deny that there are all too many arguments of the type which led one Justice to note how often "It is only when argument ends that search for truth begins." Then too, there are many cases in which it is so easily determined what the decisive issues are and how they should be decided under our regime of law that the best argument does not much facilitate, nor the worst much confuse judicial inquiry into the merits of the matter in controversy. In this category I would place almost all of the thirty per cent of our appeals which result after argument in summary per curiam disposition, and some others as well. But over-all, to the extent that individual experience is a criterion, it seems a reasonable approximation that at least half of the time appellate judges hear competent advocacy in cases which are sufficiently difficult to analyze and analogize, and seem to present troublesome enough conflicts of relevant considerations, so that argument time is not wasted.

The characteristic values of oral advocacy are familiar. That argument is particularly useful which clarifies, simplifies, or selectively emphasizes the written presentation of the appellate brief. Briefs, belying their name, tend to contain everything the lawyer thinks it may be useful to place before the court.

But in effective argument counsel, having decided which is his best foot, puts it forward. He stresses the considerations which should be decisive in his favor and hammers away at what seem to him the essential weaknesses of the opposing presentation. It is this selectivity which simultaneously focuses attention on the matters counsel would have the court appreciate and makes the essence of his position clear.

In addition, we should not minimize the importance of the opportunity which argument gives the court to cause opposing counsel to join issues squarely. Opposing briefs often do not discuss the same things. The oral argument is the court's one chance to invite counsel to meet head on what seem to be the strongest opposing contentions. It is noteworthy that this can most effectively be done when judges themselves come into court with such over-all comprehension of the case to be argued as is afforded by the reading of briefs and the scanning of records in advance.

The oral argument certainly influences me in many cases and enables me to be more confident thereafter that the matter is being decided correctly.

Briggs, *Chief Judge* (concurring).

If I had to decide between eliminating written briefs or oral argument I would be hard put to reach a conclusion. Fortunately, such a dilemma does not face me for like

most courts we employ both briefs and oral argument as essential court-room tools. It is the practice of our very efficient Clerk to have in the hands of the judges comprising the panel—or in those of the court en banc—the briefs of the cases to be heard from ten to five days prior to the day of argument. Appendices which are part of the briefs set out the essential evidence. It is the custom of our judges to study the briefs, and in many instances the appendices as well, some time prior to argument. It follows that when the judges comprising the panel come into court they know—or think they know—what the issues are.

But oral argument enormously sharpens those issues and sometimes develops new ones. If, for example, a judge thinks that counsel has missed the point of the case the judge can discuss what he thinks is the point and get counsel's immediate reactions or answers, and, if necessary, another brief.

So many of the issues which come before the United States Courts these days present original or, to commit an Irish bull, nearly original questions. The ramifications of some of these are extremely difficult to grasp. Without the aid of oral argument the difficulty in resolving such questions would be very great indeed.

Without oral argument the work of an appellate tribunal would be deadly dull. One would never see counsel or enjoy the clash of minds

and wits. We like to think that the attorneys enjoy arguing before us. Certainly we like to hear members of our bar. If oral argument were dispensed with I personally should have the feeling that I was sitting in the rear of those dispensing slots in a cafeteria, dispensing some kind of cafeteria justice. I hope the day will never come when oral argument is dispensed with.

MARIS, *Circuit Judge* (dissenting in part).

I am not one of those judges referred to by Judge Goodrich who gets ideas better by hearing than by reading them. To me the well prepared brief is much more useful than the best oral argument unless, indeed, the latter is taken down stenographically and thus made available for later reading and study. Accordingly if I had to choose between having briefs and oral argument for the decision of a case I would unquestionably choose the former. And during my earliest days upon the court before we adopted the practice of reading the briefs in advance of argument I must confess that to me the oral argument was in most cases almost completely a waste of time. It was extremely difficult for me to follow

the oral presentation of complicated facts with which I had no prior familiarity and when, a month later (as our practice then was), we came to conference and the preparation of opinions the oral argument had gone almost completely out of my mind so that my reliance had to be on the briefs alone in most cases.

The present practice of our court to read the briefs in advance of oral argument and to hold a conference each afternoon upon the cases heard during the day does, however, give the oral argument a vital function in assisting me in the process of decision. This is not so much in its presentation of a resume of the issues and points of argument which I have already read in the briefs although it does help to fix them in my mind. Its primary value to me is to afford an opportunity for the judges to pose to and secure from counsel answers to the questions which have arisen in our minds after the preliminary consideration which we have given to the briefs. This is of real help to me in getting down to the basic issues between the parties and in bringing out the points which may prove decisive. Oral arguments which thus in effect have become conferences between court and counsel have many times proved extremely helpful.

A judge's opinion on forensic oratory: Clarity and brevity are the most admirable qualities of oratory; they are most eloquently expressed in silence.

PIERO CALAMANDREI, *Eulogy of Judges*
Princeton University Press, Princeton, 1942, p. 36.

A plaintiffs' attorney discusses some of the considerations involved

Settlement of a Personal Injury Claim

*By Wilfred R. Lorry
of the Philadelphia Bar*

PLAINTIFF was injured on January 1, 1950 at which time he was 32 years old and earning \$5,000 yearly. Counsel's investigation indicates liability can be established. Plaintiff was in a hospital for 3 months, confined to bed at home for the next 3 months, and continued convalescing, though ambulatory, for 6 more months. During most of this period he suffered acute pain. His injuries have left him with a permanent physical impairment. He was unable to return to work until January 1, 1951 and since then has earned only \$2,500 yearly because of his physical disabilities. He is still working at the same rate and has received no in-

crease although the wage rate in his industry increased 10% in 1951, 10% in 1952 and 5% in 1953.

Our problem is the planning and carrying out of a course of action which will result, if at all possible, in reaching a satisfactory settlement in behalf of the plaintiff.

TIMING—INSTITUTION OF SUIT AND SETTLEMENT DISCUSSIONS

At the outset, once the case is in the office and the initial facts have been developed, the question arises whether settlement discussions should be attempted before or after the commencement of suit.

As a general proposition, the institution of suit should not be deferred because of settlement discussions. The same discussions can be had, probably on a more effective

This is the first of two articles discussing settlement negotiations. The February issue will present the views of a defendants' trial counsel.

level, after suit has been started and your case is meanwhile approaching closer to a trial listing. Prompt institution of suit effectively demonstrates your intentions to the insurance company, reveals what is involved, and should assist in reaching a settlement, if the defendant is seriously considering such a disposition. If your action has been brought in the federal court, you will frequently find that diligent use of discovery procedures results in strengthening your case as well as the value of the claim at the settlement stage. We shall assume that a timely suit has been instituted in our case.

Whether or not suit is started immediately, plaintiff's counsel must promptly, diligently and thoroughly develop his case. This aids materially in the ultimate trial of the case. It also facilitates the holding of settlement discussions at the earliest possible moment. There should be an immediate approach to defendant's representative as soon as you are armed with adequate data. Your opponent will generally welcome this opportunity as soon as he has had a medical examination of your client by a doctor chosen by the defendant. It is desirable and practical from his point of view to make every reasonable effort to dispose of the case promptly.

ON PREPARING FOR THE SETTLEMENT CONFERENCE

Determination of the settlement value of a personal injury case re-

quires initially an analysis of the damage sustained by the victim. All aspects of such damage—economic and physical, past, present and future—must be calculated on a monetary basis. The variety of types of injuries, as well as the diverse nature of the circumstances and personality of the injured, does not readily lend to a uniformity which would provide the assistance of comparative figures. Although some cases may present difficulty in setting forth demonstrable calculations of damages, generally the request for money damages can be supported by an arithmetical accounting which readily totals the value of the claim—and either counsel can add the figures. That the traditional claim bureau method of determining settlement value by multiplying the amount of special damages by some arbitrary figure—generally below five, is valueless and neither just, logical, nor sensible, has long been recognized and repeatedly demonstrated by the decisions of courts and juries throughout the land in thousands of trials.

Just as no case can be properly tried without extensive or detailed preparation, so likewise there should be no discussion relating to the value of a case until a careful and exhaustive survey has been completed. If, as may infrequently occur, you cannot resist the importuning of the defendant's representative to give him a figure of value on the case, and you haven't yet completed your investigation and analysis, it is important that you calculate the

maximum possibilities for damage in arriving at your total. Otherwise you may later discover that the maximum figure you should have submitted was correct and that in proposing an arbitrary lower figure you have underestimated the value of the claim to your client's great prejudice. You will find it more desirable to decline to set any value on your case until you have gathered all the necessary information and analysed it. Certainly it is essential that you know all the factual aspects of your case as well as the applicable law of the jurisdiction.

Determine Plaintiff's Injuries

It is axiomatic that no settlement discussion can be properly considered until counsel has fully determined the nature and extent of his client's injuries and their effect upon the victim. This requires at least a report from the hospital and doctor and generally a conference with your client's doctor so that he can acquaint you with the medical aspects of the situation. If from the client's continuing symptoms it is apparent that he is still suffering ill effects, counsel should promptly arrange for examinations by specialists who may then find that further or different treatment is required and so advise. Expert medical advice must be secured where the physical condition of the client is the issue, and counsel should be reinforced with medical reports detailing the injuries, extent of disability and prognosis.

Consider Plaintiff's and Witnesses' Personalities

You should recognize that the personality and appearance of your client, as well as of each witness, may have a bearing on value. The way in which he talks as well as the poise, mannerisms and general bearing your client displays, if they be pleasantly compelling and persuasive characteristics, may well enhance the value you put on the case. They are among the intangibles which prevent the creation of a table of comparative values. In this era of practical realism we can admit that an articulate and intelligently impressive individual can be expected to secure more nearly the full value of his case than one not so fortunately endowed. Counsel should be aware of these aids to his cause and use them. A thorough investigation and analysis will generally reveal the weaknesses in your case as well as the strengths in the defendant's case, and afford you the opportunity to seek the necessary answers and arrive at proper conclusions. The results of this study should be weighed carefully in arriving at the final decision as to the value of the case.

Arrive at a Settlement Figure

At the settlement conference, plaintiff's counsel should be prepared to submit a figure representing the sum he is asking for in settlement.

In broaching this figure of valuation, counsel should predicate

it upon the physical and economic damage his client has sustained without diminution because of questionable liability. Counsel should be prepared to show how he arrived at the figure he submits. Individual plaintiffs' attorneys work out their own methods of calculation. The simpler the more effective.

By way of illustration, let us revert to our hypothetical case stated at the outset.

To July 1, 1953 plaintiff's damages could be calculated as follows:

plaintiff's suffering and the value of each such unit of time. Simple multiplication then provides the answer. If it is determined, therefore, that the nature of plaintiff's injuries and the suffering he was caused to undergo, warranted an award of \$10.00 for each day of suffering, and further that plaintiff was in pain for a total of 100 days, the total for the element of pain and suffering would be \$1,000. If in the hypothetical case set forth each week of suffering is valued at approximately \$55, and the plain-

PAST DAMAGES

Loss of earnings:		
1950.....	1 year at \$5,000	\$5,000
1951.....	\$5,500 less \$2,500	3,000
1952.....	\$6,050 less \$2,500	3,550
1953 (to July 1).....	\$3,176.25 less \$1,250	1,926.25
		\$13,476.25

Pain and Suffering

Plaintiff's lawyers frequently lose sight of the considerations involved in determining the value of the item of pain and suffering. Obviously, thought must be given to the nature and intensity of the pain, the length of time during which the plaintiff suffered and will suffer in the future from his injuries and their effects, and the reasonable value to be ascribed thereto. A ready formula presents itself which affords plaintiff's counsel a means of estimating this item of damage for inclusion in his calculations for settlement consideration. The formula requires a finding of the extent, in units of time, of the

tiff suffered continuously from January 1, 1950 to July 1, 1953 or a total of 182 weeks, we arrive at the sum of \$10,000 for past pain and suffering. Of course varied types of injuries, and differing extents of pain, will cause variances in the unit value. From the client, counsel can determine how long pain was present as well as the degree of such suffering. In this connection, assistance and corroboration can frequently be supplied by the daily nurse's notes in the hospital file and by the treating doctor. If pain was experienced for a short period of time, the unit chosen may be one hour. It is noted that an award of \$40,000 for pain and suffering experienced during a 10-hour pe-

riod between injury and death was held by the trial judge not to be excessive [*Naylor v. Isthmian S.S. Co.*, 94 F. Supp. 422, 424 (S.D.N.Y. 1950)]. Upon appeal the case was reversed on other grounds, but the

provement and will be physically impaired, to his present extent, for the rest of his life. He has, therefore, a substantial impairment in earning power as demonstrated by his greatly reduced earnings:

Working expectancy—30 years (based on a life expectancy of 35 years)	
Annual loss of \$3,852.50 x 30 years—\$115,575.00 ((\$6,352.50 less \$2,500)	
Present Value of \$115,575 at 3%	\$77,050.00
[Computing present value at 2% totals \$86,296.00]	
[" " " " 2½% totals \$80,632.83]	
[There are cases supporting present value calculations at each of these percentages.]	
Pain and suffering and bodily damage	20,000.00
Past damages	\$13,476.25)
Past pain and suffering.. \$10,000.00) supra	23,476.25
	\$120,526.25

Court of Appeals for the Second Circuit specifically rejected the claim of excessiveness. [187 F. (2d) 538, 541 (C.A. 2, 1951.)] Although it is not suggested that your client's period of pain be evaluated at \$4,000 per hour, it is pointed out that this may be a substantial item of damages in your calculations. When compromise of your original total figure is appropriate, it is this element for pain and suffering which affords the possibility of reduction more readily than the fixed and certain earnings losses.

We, thus, have in our case for pain and suffering \$10,000.

Future Damages

The medical evidence reveals that although plaintiff is in much better physical condition than he was when he left the hospital, he has now reached the plateau in im-

You have, therefore, determined the value of your client's case to be \$120,526.25 on a mathematical basis.

At this point it may be well to point out that no desirable purpose can be achieved by placing unreasonably high and unsupported figures in your settlement calculations. You will learn that whatever figures you set forth will be so characterized by the defendant's representatives and their attitude cannot be seriously considered as any criterion. But settlement negotiations involve a considerable amount of sound business judgment and practical problems. Professional ethics and the inevitable conditioning which results from years of practice will maintain the high level of this aspect of a lawyer's work, particularly if the negotiations are conducted by counsel for both sides. (It must be added that the writer

has found many underwriters' and carriers' top representatives to be men enjoying perceptivity and a real sense of social consciousness, with whom it has always been a pleasure to negotiate.) If you calculate arbitrarily unjustified high amounts for the various elements of damage you cause a loss in respect and needlessly create an attitude which may be prejudicial to that and all subsequent cases. Fairness to your client, to your obligations and to the general situation requires a rather close adherence to the factors upon which damage is predicated.

The same procedure suggested above for developing the value of your case is applicable whether the case be one involving a \$500 claim, or a \$500,000 claim. Naturally, the large bulk of personal injury cases are those involving claims under \$10,000. The use of the same methods will be equally effective regardless of the size of the claim.

THE NEGOTIATORS

Plaintiff's Attorney

One of the imponderables affecting the value of a case is the personality of the plaintiff. This has already been noted.

There are also certain factors involving the personality of counsel which may affect evaluation of a claim and deserve mention here before discussing the settlement conference.

The conditioning and mental

outlook of the attorney will certainly influence his analysis of his client's case. It is the function and the obligation of plaintiff's counsel to secure for his client the largest sum he can. He need have no fear that he will obtain more than is proper in the circumstances. A dollar-conscious claims manager will assure against that danger and, in the event of trial, honest and fearless courts afford whatever protection might be necessary. Certain it is, however, that unless the injured victim's attorney is convinced of the merit and validity of his client's claim, he cannot fairly evaluate the damage suffered. As an advocate he must resolve all doubts in favor of his client and resist any weakening influence. Nobody has yet developed the crystal ball which foretells exactly what amount constitutes a just award for any type of injury. The variables inherent in the valuation of pain and suffering, damage to the body, impairment to earning power, offer, in three instances among many, illustration of the difficulty of placing any exact limits on the worth of a personal injury claim. Plaintiff's counsel must have the fullest appreciation of the value of human life and how serious is injury to and impairment of that life. Lacking in such quality he must inevitably underestimate the damage his client has suffered.

Sensitivity to another's pain and its effect upon and damage to the human body and personality is an-

other attribute necessary to a plaintiff's attorney, if he is going to represent the injured man with fidelity and as an advocate. Such understanding, bulwarked by a sincerity of conviction, and strength of purpose, will help to develop an immunity to the typical cynicism of the claims adjuster or defense attorney; a cynicism bred from and nourished by the constant requirement that he pay as little money as he is compelled to regardless of the injuries involved or the nature of the claim.

Defendant's Representatives

The question as to with whom settlement is to be discussed is determined for you by the defendant's insurance company. If the claims manager is experienced and has acquired wisdom, he will respond promptly to your letter of representation and invite you to explore settlement possibilities as soon as you are in a position to do so. The claims man to whom the case is assigned will call you frequently to determine whether you are prepared to discuss the case. Do not conclude from this conduct that the company is afraid of you or of your case, or that the claims man is impatient to settle the case. This is intelligent claims procedure; no harm can result to the company and it may assist the claims man. Plaintiff's counsel may divulge information which is lacking or he may indicate weaknesses. Certainly

the insurer will ascertain whether from the plaintiff's view it is a big case or a small one, and will learn the extent of the preparation by plaintiff's counsel. This will substantially influence the claims manager in his determination of value of the case. Nor should counsel hesitate to discuss settlement because of these considerations. But it is at this point that it becomes necessary to know your adversary and his attitude and approach.

Obviously it can serve no purpose for the plaintiff to engage in discussion with a man who, impressed with the desire to restore the "good old days," calculates settlement values on 19th century economic levels. Nor are you doing anything other than wasting your time and building up to frustration when you discuss a case which has a \$25,000 potential value with an adjuster whose limit of authority is \$250. It is of the utmost importance, therefore, to ascertain at the start by a direct question how far the claims man is authorized to go. If your case exceeds his authority, you must find the person in the company's hierarchy who is authorized to deal at the level which you propose to discuss.

Of course, similar factors may be present if your discussion is with defendant's counsel instead of the company's claims representative. Frequently, however, defense counsel are retained only for trial and have no authority which would en-

able them to engage in any effective settlement discussions. Negotiations with counsel so limited are meaningless and a waste of time. It is desirable, therefore, to inquire of counsel if he is in a position to make recommendations which would be received by his principal with favor.

THE SETTLEMENT CONFERENCE

We have discussed preparations preliminary to a settlement conference and the factors which will affect judgment at the conference. We are now ready to meet with the insurance company's representative, claims man or counsel.

If your conferee is a man of practical common sense and intelligence, and you approach him on that basis, there is no reason why frankness, reason, and a fair consideration of all the circumstances should not lead to a settlement which both sides can recognize as proper. It is too much to expect that during this generation we will advance to the point where claims representatives will regard themselves as trustees of a fund created to meet certain contingencies to the extent that they will act as such when the contingency arises. Insurance companies do not employ men with such social consciousness because they do not yet completely regard themselves in that position. The negotiations, therefore, must still be handled on the non-humanitarian business basis that you have

something to sell which they want to buy and perhaps the parties can arrive at a more mutually favorable price by discussing it around the table rather than by letting a group of strangers set the price.

Over the course of time and countless thousands of settlement negotiations, claims agents and defense counsel have developed a *modus operandi* which should be understood, even though not accepted by plaintiff's counsel or permitted to guide the proceedings. Evidently one of the fundamental instructions in basic training of an insurance company representative is "Never make an initial offer!" As rare as the dodo bird is the situation where the adjuster opens the negotiations by stating "We have analysed this case thoroughly and are prepared to offer you \$5,000 in settlement." This would be a violation of the negotiating principle "Make 'em come to you" which apparently is the top-ranking of the adjusters' commandments. Since plaintiff is asking for money there is some logic to the defendant's position that he is entitled to know how much, particularly since it can be assumed that plaintiff's counsel has ascertained the full extent of his client's physical and economic disabilities. However, the fact that defendant may also have acquired all of this information, and even has more data than has plaintiff, does not affect the situation in this specific instance. Traditionally,

plaintiff is required to mention a figure first. This is no great hardship since plaintiff has already determined the value of his case and states his figure "\$120,526.25."

Standard operating procedure for defense representatives, when you inform them of this figure is variously: to laugh uproariously, to ask you if you're serious, to talk contemptuously about astronomical figures, and finally to warn you that you are effectively eliminating the possibility of any settlement by submitting such grossly excessive figures. (Regardless of the nature and extent of the injuries, and the disability of the plaintiff and impairment of his earning power, the same general reaction may be expected.) Another traditional defense practice *is to confront you with a case* involving possibly somewhat similar injuries wherein the claim was disposed of for a fraction of the total you calculated. Obviously each case must be considered on its own facts and comparisons serve no purpose. You will find the defendant agrees with you on this when you cite him another case wherein a substantially larger sum was recovered. Advanced living standards, incomes, profits, costs of living and the like are present considerations defendants prefer to ignore. That our forward moving thinking and advanced civilization has placed an increased value on the human body and recognized the value of its productivity apparently never fails to

come with shocking surprise to the claims representative's attention.

You will then be asked what you will really take for the case. You now have two alternatives. On the above facts, the figures closely approximate the true value of the case. However, the obvious advantages of a prompt settlement have some value, and the certainty of a settlement warrants some compromise also. Plaintiff's personality and that of his witnesses will influence your judgment here. You can, therefore, as one alternative arbitrarily determine what such factors are worth and submit the reduced figure. Rest assured this also will be regarded as the fantasy of a disordered mind and at best will be considered as a starting point for further negotiation. The other and more sensible alternative is to point out that you have calculated the value of your case. You assume the defendant has done likewise. No negotiations can be intelligently pursued when one side merely rejects the proposition of the other without making counter-offers. It is now up to the defendant to indicate what it believes to be the fair settlement value of the case. Remember the commodity you have to sell is not one which the defendant can buy or reject as he sees fit. It is something he may be compelled to pay for at a figure he may and usually does deem unreasonably high, if he chooses to submit the case to a jury verdict.

The atmosphere of the settle-

ment discussion will be established by plaintiff's counsel. With but rare exceptions, he will be the moving party and his initial attitude will determine the climate of the conference. He should dominate the proceedings and so move as not to lose control. This requires an intelligent aggressiveness, thorough knowledge of the case, and precludes any defensive, retiring approach. The difficulties faced in a settlement discussion, where you are dealing with an individual conditioned to non-receptivity and disbelief, and who faces you as an adversary and an opponent, are much greater than those you will experience in facing a jury which is impartial, eager to hear the evidence, and generally sensitive to the damage suffered by another human whose body has been seriously wounded. Any weakness in your armor will be readily perceived by defendant's representative, and the breach will be penetrated and widened. Each retreating step you take reduces the possibility of securing for your client the amount to which he is entitled. And so, with no apologetic reserve, you must explain to the claims man what your client experienced. You may find he is not interested in details. He may counter—"So your client broke his femur. What do you think a busted leg is worth?" The answer to that query can only be reached by showing what the injuries suffered did to your client; its effect

on him physically and economically, the residual disability which may be expected. These are the terms upon which the injuries must be considered and impressed upon the adjuster. He must be made to see what your client went through, the pain he suffered, the damage to tissue, to muscle and ligaments, to bone he experienced. You must describe these things graphically and in a manner he cannot fail to understand. This will help him to appreciate the dangerous potentials his company faces at trial and will compel him to make a more accurate evaluation for the protection of his principal and himself. He must be made to appreciate the fact that the best return the plaintiff can get is inadequate; he can only get money damages; he cannot get a new body, new limbs, or new organs; he cannot erase the horrors of his painful experiences. In these particulars you will be supported by medical records and reports.

Proceeding to economic considerations, you should then point out your client's excellent working background; the years of reliable service without loss of time, the regular income and increases in salary. The impairment in earning power is demonstrable both physically and economically and should be spelled out in detail. With this background, you can then submit your calculations of damage and rest. The burden has now shifted to your opponent. The suggestion

that you submit your "low" or "rock-bottom" take figure should be rejected. Any such figure you propose will then be the starting point for negotiations—downward—and will be highlighted in the defendant's file to haunt you. Rest assured that if he refuses to discuss the matter further because your figures total too large a sum, and retreats to the seclusion of his office, he will then have to face the fact that your calculations are proper and supported by the evidence. His problem is now to so act as to save his company from paying out the sum you submitted, plus expensive preparation and trial costs, and counsel fee. The only way he can do this is to come to you and he will.

CONCLUSION

Large verdicts are dramatic proof of an inadequate and ineffective claims department which no insurance company can afford to maintain. Advancing social trends and the recognition of the value of human life has rendered the shortsighted adjuster, who insists on proof that courts and juries alike have so developed, an expensive luxury. He is rapidly becoming obsolete. And it is a responsibility of counsel representing plaintiffs to present his cases to the claims representative fairly, thoroughly and fully so that those acting in good faith may recognize that they are serving their principals, as well as

fulfilling their obligations, by effecting adequate settlements.

REMINDERS FOR PLAINTIFFS' COUNSEL

Plaintiffs' Counsel Should Have, in Preparation for Settlement Conference:

Sincere conviction in merit of client's case;

Recognition of human values; extent of damage and suffering involved in bodily injury;

Complete and thorough knowledge of case;

Complete and thorough knowledge of nature and extent of client's injuries and their effect upon him; supporting medical reports;

Knowledge of attitude of adjuster or defense counsel, and extent of his authority, to determine whether settlement discussion with him is warranted;

Total of damage calculations with detailed breakdown.

Plaintiffs' Counsel Should, at Settlement Conference:

Dominate and retain control;

Exert firm and dignified approach; lead from strength;

Maintain constant, intelligently aggressive advance;

Detail graphically client's injuries, his physical damage and pain;

Detail economic effects of client's disabilities;

Submit total of damage calculations with breakdown;

Indicate receptivity to defendant's settlement offer.

Cautions:

Do not be apologetic, retiring or defensive.

Have a basis and support for all calculations.

Do not submit compromise figure before defendant responds to your damage calculations with offer.

Do not submit "rock-bottom" figure.



I am afraid this is too flattering a description of our other way to justice, that parties settle their disputes privately and at their own expense; and yet there is a great deal to be said for settlement as a way of administering the law, granted, of course, that a judgment after a trial is a constant alternative. It might even be said that one of the great functions of our courts is to be just that, no more than a constant alternative, to make it certain that the discount in the discounted law which is applied in settlements shall be figured on true value and not on some arbitrary sum. Certainly a great many more cases are settled than tried. No one knows how many because there is no way of defining a case that has not been brought.

Negotiations for settlement are themselves judicial proceedings. Each attorney sits in judgment on the contentions of the other, comparing them with his own prophecies of what a judge would do, as the judge in turn would prophesy what the court of appeal will do. The evidence consists in the claims of each attorney discounted to the prophecy of the other. The negotiations are, indeed, the proceedings of a court of preliminary instance; and they have the virtue of being conducted in private, with each party less committed to his own contentions, and less embittered by the other's. A settlement ends, if it is successful, in a compromise instead of a judgment. Compromise is as often the better part of justice as prudence is the better part of valor, more often than we who are used to the adversary processing of justice are likely to think.

CHARLES P. CURTIS, *It's Your Law*

Harvard University Press, Cambridge, 1954, pp. 4, 5.

*When and how to use the speedy non-formalized services available
at the NLRB*

Informal Procedure before the National Labor Relations Board

*By Ruth Weyand
of the Illinois Bar
and
Norma Zarky
of the District of Columbia
and Wisconsin Bars*

LITIGATION has traditionally been conducted in a spirit of combat. Differences, whether of substance or of procedure, are accentuated. Parties in the fervor of the contest increase their personal animosities. Labor relations improve if differences can be minimized and mutual good will encouraged. Accordingly, the National Labor Relations Board, wherever it is possible to do so, uses numerous short cuts to eliminate the usual processes of litigation.

The lawyer experienced in practice before the Board plans strategy with an eye to the agency's informal procedures. He weighs the relative

advantages of consenting to, as compared with contesting, the holding of an election; of settling complaint cases as against decision by the Board. He often resorts to telephone calls and letters to appropriate Board officials instead of filing formal motions or appeals. Familiarity with the personnel structure of the Board's staff, the division between General Counsel and Board, and their mode of operation is advantageous. Unfamiliarity may lead to the choice of wrong procedures with concomitant delays and even occasion unfavorable comment in speeches or bulletins issued to employees.

TYPES OF INFORMAL PROCEDURES

It is not possible to catalogue all of the Board's informal procedures. The word procedure connotes formality and our use of the term "informal procedures" suggests a contradiction in terms. An appreciation of this seeming contradiction is basic to successful practice before the Board. For the informal there is in itself a procedure; a procedure which represents an approach to governmental protection of legal rights by non-legalistic methods.

The best known and most used of the Board's informal procedures is the "consent election." This is an election conducted with the consent of all the parties without the holding by the Board of any prior hearing, and hence is to be contrasted with a Board directed election, in which the Board, after a formal hearing, has found that an election should be held. In both instances the election is conducted by the Board among employees to determine whether they wish to bargain collectively with their employer and if so, which union they desire to represent them. The cases involving elections are popularly known as representation cases, a name derived from the language of Section 9 (c) (1) of the National Labor Relations Act, as amended [29 U.S.C.A., 1953 Supp., 159 (c) (1)], which requires the Board to resolve all questions of "representation" by conducting an election by secret ballot.

Almost as well known and used

is the "settlement" agreement. This is an agreement by which the parties settle in whole or in part an unfair labor practice case, often called a complaint case. These are cases instituted by the filing with the Board of charges that an employer or a union has engaged in the unfair labor practices listed in Section 8 of the National Labor Relations Act, as amended (29 U.S.C.A., 1953 Supp., 158).

Less well known, but equally well used by the regular practitioner before the Board, are "informal appeals" and "oral advice."

SOURCES OF INFORMATION ABOUT INFORMAL PROCEDURES

Provisions for the consent election are found in each the Board's *Rules and Regulations* (Sec. 102.54) and its published *Statements of Procedure* (Sec. 101.18). The settlement of unfair labor practice charges is similarly treated in the Board's published *Statements of Procedure* (Secs. 101.7 and 101.9). Appropriate printed forms may be obtained from any office of the Board in the field or in Washington.

The Board's elaborate "confidential" loose leaf *Manual of Practices, Procedures and Policies for the Guidance of the Board's Staff* is probably the most valuable and elusive source of information. It contains step-by-step instructions on almost every conceivable point which has arisen in consent elections or settlements. The *Manual*

is not available to the public. But staff members when questioned, often consult the *Manual* and within certain limits are usually quite free in informing any inquirer of their instructions, sometimes even reading aloud pertinent portions. The outflux of former Board personnel to industry, labor unions and the private practice of law has also afforded another source of information about its contents. More astute practitioners before the Board can give a reasonably accurate estimate as to Board policy or procedure on any phase of consent elections and settlement agreements.

Some dozen judicial decisions confirming Board practices, contain unusually detailed descriptions thereof.

A book by the Board's Director of Information, Louis G. Silverberg, *How to Take a Case before the NLRB* (Bureau of National Affairs, 1949), lists steps to be followed and contains copies of forms.

For other informal practices, no source of information, except the Board staff and the experienced practitioner, is available. But once a lawyer has caught the spirit of the Board's informal, and non-legalistic, methods of expediting results in a practical fashion, he should have no hesitancy in exploring with the other parties and the Board's staff the possibility of any reasonable, even if novel, device for eliminating red tape, hearings, formal appeals, or building on errors which could be corrected at the outset.

WHICH OFFICIAL TO DEAL WITH AT THE BOARD

Of primary importance to fast effective utilization of the services available at the Board is the ability to deal with the proper official. This is especially true in informal matters where reliance upon the authority of the official dealt with may be crucial to the finality of the informal settlement. Knowledge of the jurisdiction of the respective officials is the first prerequisite here. Jurisdiction may be dependent upon power to make decisions or on supervision of personnel.

The Regional Director, as the highest official in each regional office, has authority over all cases which originate within his region, including both representation and unfair labor practice cases. In Washington there is a sharp division of authority between representation and unfair labor practice cases.

Whom to Contact in Complaint Cases

The Taft-Hartley Act [29 U.S.C.A. 1953 Supp., 153 (d)] divided jurisdiction over the prosecuting functions, which are placed in the General Counsel, from the quasi-judicial functions, which are committed to the Board. As a result the Regional Director and the General Counsel have charge of complaint cases, that is cases involving charges of unfair labor practices, until they reach the stage of a trial examiner's intermediate report. After the in-

intermediate report issues the matter is completely out of the hands of the Regional Director and the General Counsel and in the hands of the Board until a Board decision issues. While in the hands of the Board all inquiries about the case are directed to the office of the Executive Secretary. Once the Board order issues, the case reverts to the Regional Director and the General Counsel to effectuate compliance or to seek court enforcement.

Whom to Contact in Representation Cases

The Taft-Hartley Act confers no power over representation cases on the General Counsel except insofar as it vests the General Counsel with supervision of all attorneys and of all field personnel. The Board has further increased the General Counsel's power by delegating to him the processing of all representation cases through hearing. Though representation cases do not involve any prosecuting function and the General Counsel makes no substantive decisions affecting such cases, because of his supervision of personnel, he regularly responds to informal appeals in representation cases where he may correct the situation by an exercise of supervisory power without intruding upon policy. Thus, a complaint about a delay or obvious mistake in the processing of representation cases through the hearing stage is properly directed to the General Counsel. Because all policy decisions in representation cases are made by the Board, formal

appeals from dismissal of a petition or the denial of status to a party to participate in prehearing conferences in a representation case, are to the Board.

After hearing in a representation case and while the case is before the Board for decision the matter is completely out of the hands of the Regional Director and all inquiries with respect thereto are directed to the office of the Executive Secretary. If the Board directs an election the case reverts to the Regional Director to conduct the election in the course of which the Regional Director operates under the supervision of the General Counsel.

PRINCIPLES UNDERLYING CONSENT ELECTIONS AND SETTLEMENTS

The Board's informal procedures in both the consent election and the settlement of unfair labor practice cases are based on the same principles as the consent judgment at common law. The consent judgment analogy must be applied in terms of administrative law in order to determine who must sign the consent election or settlement agreement to make it binding, what notices, hearings and other procedural steps must be waived, and what issues must be resolved by agreement as to facts or law.

There is one difference between the Board's position and that of common law courts, namely, that the Board because of its duty to protect the public interest in securing compliance with the National

Labor Relations Act, need not approve, and is not bound by, any private settlement which does not, in the Board's opinion, afford sufficient protection for the public. *NLRB v. General Motors Corp.*, 116 F. 2d 306, 311-312 (C.A. 7, 1940).

The Board will not approve any agreement which compromises the basic principles of the National Labor Relations Act. The agreement must therefore be negotiated with an awareness of the allowable areas for compromise—fact issues, novel legal points, and form of remedy. Staff members normally participate in these negotiations and keep the parties informed of applicable Board policy. Each agreement is carefully scrutinized by superior members of the Board's staff to assure that it is fully consistent with that policy. The Board will disapprove and either send back for further negotiations or set down for formal hearing any case in which the parties agree to dispose of a legal issue contrary to its established policy. Hence, in practice the greatest leeway which parties have in settling cases is in resolving factual disputes in unfair labor practice cases by compromising on the extent of affirmative relief. In consent elections parties are largely confined to an application of previously determined Board rules.

CONSENT ELECTION AGREEMENTS

The Taft-Hartley Act accords employers and unions the right to

a quasi-judicial proceeding, including the holding of a hearing in which evidence is received, and the issuance of findings by the Board, prior to the election. The first issue to be determined is whether an election shall be held. If it is determined an election should be held the Board must next determine whether "the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof" [29 U.S.C.A., 1953 Supp., (b)]. The unit determination fixes the group of employees in terms of job classifications on whose behalf any union chosen in the election will bargain. The unit determination is analogous to the fixing of the boundaries of an election district in a political election. And just as presence in an election district on election day does not necessarily entitle one to vote in a political election, so also presence in the unit on election day does not guarantee a right to vote in a Board election. Eligibility must be fixed on the basis of relationship to the unit, as for instance those permanently on the payroll of a given date including those temporarily absent that day. In addition the time, place and details of the election must be specified by the Board.

A formal hearing and determination by the Board of the foregoing issues would in most instances be an idle gesture, as the Board rules are now so well established for all except the most unusual situation that

any person who reads the Board decisions can apply them. As a result consent election agreements are extensively used. Last year's statistics show that 65% of the elections conducted by the Board were held under consent agreements rather than under Board directions. Examination of the Board directions in the remaining 35% indicates that if all parties had been sufficiently aware of applicable Board precedent, only a small portion of these would have necessitated Board hearing and determination. In industries and occupations where Board precedents are not well established or where the Board's policy may be in flux there is more need for Board determinations than in fields where the rules are settled. Express approval of the consent election is contained in the Taft-Hartley Act [29 U.S.C.A., 1953 Supp., 159 (c) (4)].

Two standard types of consent elections are available. The usual consent election agreement provides for a final and binding determination by the Regional Director of any issues of eligibility, and any challenges or objections to the conduct of the election. (See Appendix, Form 1.) In contrast the so-called stipulation for certification after consent election reserves the right of any party to appeal any finding of the Regional Director to the Board for decision. (See Appendix, Form 2.)

How to Obtain a Consent Election

Before the Board will conduct an election a formal representation pe-

tion must be filed with the Board in every respect identical with the petition filed when a Board directed election is sought. If the parties have determined that they desire a consent election, the usual procedure is for the union seeking representation to file the petition with the full agreement and assistance of the employer. If more than one union is claiming to represent employees, any one or more of the unions may file the petition.

Unions sometimes prefer that the employer or another union file the petition, as the petitioning union must within 48 hours after filing the petition show to the Board's field examiner, but not to the other parties, that 30% of the employees in the appropriate unit support it. Such showing may be made by current membership cards, dues records, specific authorizations, or other documentary evidence. Where the employer or another union files the petition, an intervening union needs only establish that it holds the current or recently expired contract covering the unit or that it represents 10% of the employees therein.

Consent elections often result when the parties learn, after a petition is filed, that no issues exist which necessitate a hearing. The Board's field examiner as a routine matter telephones all parties, as soon as a petition is filed, to determine the issues. He uses his persuasive powers to help the parties iron out their differences or to convince them a hearing would be useless because the issues which they believe exist

have only one answer under a long line of Board precedents. If he is successful in this, a consent election agreement is signed.

When to Consent to an Election

A consent election can only take place when the parties can agree upon the holding of an election by the Board; the appropriate unit (or that the unit shall be established by a self-determination election); which employees shall be eligible to vote; and the time and place of the balloting. If the parties are all in agreement on these matters there is no legal justification for a Board hearing prior to the election, with its added expense and time. The saving in time is substantial. The most recent figures showed an average of 24 days between filing of petition and holding of a consent election whereas the average elapsed time is 64 days for a Board directed election.

Not only is there no legal justification for the formal Board hearing, but the party insisting on it without pointing to any substantial area of disagreement invites charges of bad faith and stalling which, when publicized by its opponent, may well have serious repercussions with the electorate against the insisting party.

A party uncertain that the employees' vote will support it usually wants time to campaign for a change in employee sentiment. Often such a party tries to hide its true motive by taking such a position on some issue as to make agree-

ment to a consent election impossible.

Aside from time to campaign for a change in employee sentiment, there is nothing to be gained by refusing to consent to an election in any strictly routine case. The use of the second of the two standard types of agreement, the stipulation for certification on consent election, which provides for an appeal to the Board from the Regional Director's determination of any post-election issues and Board issuance of the certificate, assures all parties exactly the same procedural as well as substantive safeguards on any issues which may later arise as if the election had been Board directed.

Parties to the Consent Election Agreement

To assure that the election will take place as contemplated and the results certified have binding effect, all parties who would be entitled to be heard by the Board should sign the agreement. For the absence of the signature of any party who is entitled to a hearing means that party's rights have not been waived and may still be asserted with the possible setting aside of the agreement and whatever has been done thereunder. In practice this permits either the employer, the union holding the current or a recently expired contract, or any union showing representation of 10% of the employees in the unit, to block a consent election. Unless they all sign, the Board will not approve a consent election.

The unions which must sign are normally fixed at the outset of the case by a determination of the "parties to the prehearing conferences." The Board's form of representation petition requires the petitioning party to list the name of the union or unions, if any, holding the contract covering any or all employees in the unit which it is claimed is appropriate, and any other unions claiming to represent any of the employees. The Board at once notifies all these of the filing of the petition and directs them to respond immediately with respect to their interest in the proceeding. Usually this is done by showing the Board's field examiner evidence of interest, such as a current or recently expired contract covering the unit or representation of 10% of the employees therein. There is, however, no need to establish any representation of specific employees within the unit where a union seeks a larger unit, as for example where the petition is for a craft unit and the "intervening" union represents or claims to represent production and maintenance employees and opposes severance of the craft. On the other hand if the would-be intervenor seeks to establish a smaller unit when the petition is for a larger unit, in order to be admitted as a party the union must show either a current or recently expired contract covering the smaller unit or representation of 30% of the employees therein.

No union will be allowed to file

a petition or to appear on the ballot unless it is in full compliance with the non-Communist affidavit and other filing requirements of Section 9 (f), (g) and (h) of the Act [29 U.S.C.A., 1953 Supp., 159 (f), (g) and (h)]. A non-complying union holding a current contract covering the unit may be a party to prehearing conferences and may block the signing of a consent agreement where under the Board's usual contract bar rules the Board would hold that the existence of a contract precluded the existence of a representation issue.

Upon the response of each union notified, the field examiner makes an oral ruling as to whether it will be admitted as a party to the prehearing conferences. If the field examiner rules unfavorably, unless he is reversed upon an informal appeal to the Regional Director or the General Counsel or a formal appeal to the Board, there is no status to participate in the conferences or to be heard on whether or not there shall be a consent election agreement or what it shall provide.

For psychological reasons any union entitled to intervene but excluded from prehearing conferences which may result in a consent election agreement, and desirous of blocking the agreement, should appeal at once to have itself admitted before the agreement is signed. Legally, of course, after the agreement, it can still properly appeal to have the agreement set aside because of the lack of its signature.

Issues to Be Covered by the Consent Election Agreement

Once it is agreed there is to be a consent election in a given unit on a specified date the parties must decide which of the two types of consent election agreement, already described, they prefer. The Board has two separate printed forms of agreement appropriate to each type.

When it is decided which form to use there is usually left only to fill in on the appropriate blank spaces which unions are to appear on the ballot, the order in which they appear, the wording of the names, the payroll period for eligibility, the date, hours and place of election, the description of the appropriate bargaining unit and the facts showing the employer is engaged in commerce (the jurisdictional prerequisite to utilization of the Board's services). While a union which fails to show that it holds the current or recently expired contract or that it represents 10% of the employees in the unit cannot block an election, any showing of interest entitles it to a place on the ballot. The Board will not approve an agreement unless it provides that all unions having an interest are to be on the ballot, with the right to any non-signing union to notify the Regional Director within 5 days if it does not desire to appear on the ballot.

In some cases the agreement may need to be much more elaborate and detailed than the Board's forms suggest.

The appropriate collective bargaining unit may be described as excluding supervisors, leaving to resolution by the Regional Director or the Board, as the case may be, of disputes as to which specific employees are supervisors, should there be challenges at the polls raising this issue. Indeed the Board normally does no more than this in Board directed elections. Of course, if the parties are in irreconcilable dispute over the supervisory status of specified employees any one of them may quite properly insist on a Board decision of the issue prior to the election in the hopes that thereby all representation issues will be finally settled when the election results are announced. Or they may all be willing to take a chance that the election results will be so conclusive that it will never be necessary to resolve any challenges. If the election results prove inconclusive without resolution of the challenges, the issue of representation will remain open until the Regional Director, or the Board, as the case may be, resolves the challenges. Where more than one union is on the ballot, this would open the possibility that the resolution of the challenges could necessitate a run-off election, and that accordingly the campaigning activities among employees might persist until the challenges are resolved.

The appropriate collective bargaining unit also may be made to turn upon the results of the election itself, as for instance, that one or

more craft units shall be severed if a majority in any craft vote to be represented by a union seeking merely craft representation, otherwise the craft group shall be merged in the larger unit.

Eligibility to vote is usually defined by appearance of the employee's name on a payroll of a given date. While it would eliminate disputes if an agreed eligibility payroll could be attached to the consent election agreement, and this is sometimes done, usually there would be such a delay in getting up the proper payroll that the parties sign the agreement and get the notices of election posted without waiting for the payroll to be prepared. In both Board directed and consent elections it is regular practice for all parties to go over the eligibility date payroll a day or so before the election, to iron out differences and if possible agree on a payroll which they all initial.

However, eligibility may be tailored to meet a nonstandard situation, as for example, in a seasonal industry, it may be agreed that those eligible to vote shall include all employees who worked as often as upon 30 different days during the six months preceding the signing of the agreement, leaving to resolution by the process of challenges to ballots and subsequent decision by Regional Director or Board, any factual issues as to whether specific employees fall within the stipulated formula for eligibility.

It is obvious that the greater the

number of details on which there is specific agreement in advance the less room there will be for future disputes and consequent resolution by either Regional Director or Board, whichever the agreement provides.

The Board will not conduct an election in what it regards as an inappropriate unit or allow ineligible persons to vote, even if all the parties to the proceeding are in agreement.

Use of Regional Director as Arbitrator Instead of as Government Official

When the parties sign a consent election agreement providing for the decision of all issues, and the issuance of the certificate, by the Regional Director, waiving all right to appeal, hearing or decision by the Board, they are agreeing to utilize the Regional Director as an arbitrator rather than as a government official. In suits attacking the conduct of a Regional Director acting pursuant to such an agreement the courts have refused to hold the Regional Director to standards applicable to government officials. Rather they have judged him solely as an arbitrator is to be judged, namely, that his decisions are final and binding unless it can be proved he was motivated by fraud or bias or acted capriciously or arbitrarily. *NLRB v. Capitol Greyhound Lines*, 140 F. 2d 754, 758 (C.A. 6, 1944), certiorari denied, 322 U.S. 763 (1944). Neither the Board nor

the courts will either directly or indirectly review the merits of the Regional Director's rulings or the fairness of his procedures even though the certification issued by the Regional Director is accorded by the Board and the courts the same effect as any valid certification issued by the Board, which is, of course, subject to indirect review (in subsequent unfair labor practice proceedings based thereon) in both these respects, whether issued after a consent election or after a Board directed election.

In deciding whether to accept the Regional Director as an arbitrator or to reserve a right of appeal to the Board the following elements must be considered:

If the Regional Director is used as an arbitrator the extent of a hearing, if any, on objections to the conduct of the election or on challenges to ballots rests in his uncontrolled discretion. Usually the Regional Director holds no formal hearing. On the other hand if there is an appeal to the Board, a formal hearing before a hearing officer may be accorded by the Board, and usually is if serious disputes as to facts exist. If the Regional Director is used as an arbitrator there will almost certainly be a speedy final resolution of all election issues, usually within a week's time, whereas if the right of appeal to the Board is reserved, the matter may drag on for weeks or months.

Both the degree of confidence reposed by the parties in the particu-

lar Regional Director, and their estimate of the types and kinds of issues which are expected to arise from the election, will govern which type of agreement the parties will sign. If only trivial factual issues are contemplated, probably both parties will be willing to accept arbitration by the Regional Director. But if complicated mixed issues of fact and law seem probable, as for instance, as to the proper scope of pre-election campaigning by either employer or union, one party may prefer to retain the greater protection involved in the right to appeal from the Regional Director's rulings to the Board.

The Board does not want its Regional Directors to decide novel legal issues. So in any situation where a novel legal issue appears likely the Board will not approve an agreement making the Regional Director the final arbiter.

SETTLEMENT OF UNFAIR LABOR PRACTICE CHARGES

The Board has the duty of enforcing the Act's prohibitions against unfair labor practices by unions and employers. When the parties by agreement are able to dispose of charges of unfair labor practices in what appears to be substantially the result the Board would probably reach, without utilizing the Board's quasi-judicial processes of hearing and decision, they are able to reduce the average elapsed time between the filing of a charge and decision by the Board of 330 days to less

than 100 days between charge and settlement. All administrative agencies are enjoined by the Administrative Procedures Act [5 U.S.C.A. 1004 (b)] to offer parties the opportunity to settle cases where "time, the nature of the proceeding, and the public interest permit."

Settlements may be partial in character. That is some issues may be settled and others reserved for decision by the Board and courts [*NLRB v. Hudson*, 135 F. 2d 380, 383, 384 (C.A. 6, 1943), certiorari denied, 320 U.S. 740 (1943)] or only by the courts [*NLRB v. Draper Corp.*, 159 F. 2d 294 (C.A. 1, 1947)]. The most usual reservation is of the issue of jurisdiction. The parties agree on the order to be entered by the Board and the courts, if the Board has jurisdiction. They stipulate the jurisdictional facts, reserving the right to request oral argument and file briefs before Board and court on the legal conclusions to be drawn. Sometimes they stipulate that the Board's conclusions would be that it has jurisdiction but reserve court review. Almost any part of a case may be settled with one or more issues of fact, law, or remedy left for litigation at one or more of the usually available levels of procedure.

Considerations in Settlement Negotiations

As in settlements generally, the basic issue in determining whether to settle an unfair labor practice charge is how, considering the un-

predictability of the decisional process, its delays and expenses, the proposed settlement measures up to the probable outcome after a full dress contest before the Board and possibly also before a court or courts. Of perhaps controlling importance is an appraisal of the psychological impact of the totality of the settlement as contrasted with the processes of litigation, upon labor relations, certainly of the employees of the employer involved, possibly of a community or industry. Face saving may be more important than the content of the settlement.

In considering whether to make or accept a settlement, the position of the Regional Director in advising for or against should carry weight primarily in terms of the extent to which his judgment reflects an appraisal of what the Board will probably do with the case if it is litigated. The fear that making or rejecting an offer will prejudice the outcome of the case if it is not settled and goes through litigation is usually not justified. Aside from a possible slight effect on the Regional Director's decision on whether or not to issue the complaint, settlement negotiations have little, if any, effect on the Board's staff or Board members in the subsequent processing of the case through formal procedures.

In guiding settlement negotiations the staff member may feel under some pressure to get the parties to agree to anything that insures a prompt disposition of the case.

Nevertheless, he will realize that the Board must live with the parties over the years and that one case disposed of wrongly will lead only to more cases in the future. So the first objective is to secure a settlement which will stop pending, and prevent future, violations of the law. This motivation is so strong that a great many settlements (particularly in first-time cases which do not involve discharges) consist of little more than promises not to violate the law, coupled with provisions for the posting of a notice by either employer or union informing employees that the posting party agrees to obey the law.

Second only in importance to reducing the infringement of the law is the objective of increasing the number of employers and employees covered by collective bargaining agreements. Hence, a settlement which provides for collective bargaining between employer and union is one greatly favored by the Board.

Third, is the making whole of victims of the unfair labor practice. Whether a discriminatorily discharged employee is to be reinstated with back pay is decided more in terms of the effect upon the freedom of other employees to exercise their rights than as a rectification of the injury to the immediate victim.

Parties to a Settlement Stipulation

The General Counsel of the Board has an uncontrolled discre-

tion as to whether to issue a complaint. He has delegated to the Regional Director power to issue complaints in most types of cases. The only parties necessary to a settlement before complaint has issued, therefore, are the Regional Director and the party charged with unfair labor practices. Neither the charging party nor the victims of the unfair labor practices need be parties. The Regional Director tries to obtain their acquiescence and signature to the agreement. Their refusal to agree carries considerable weight with him. But under established practice their agreement is unnecessary, unless the agreement provides for a Board or court decree. (See Appendix, Forms 3 and 4.)

The Regional Director's decision to settle a case without issuing a complaint is subject to appeal by the charging party to the General Counsel in the same manner as any other refusal of the Regional Director to issue a complaint.

After a complaint has issued, since the aggrieved party has a right to review both before the Board and in court of whatever disposition is made of the complaint, the charging party, as well as the charged party and some representative of the General Counsel, either the Chief Law Officer or Regional Director, must all sign the agreement. *MEBA v. NLRB*, 202 F. 2d 546 (C.A. 3, 1953), certiorari denied, 346 U.S. 819 (1953). If the Regional Director or some other

representative of the General Counsel should proceed to settle a case without the signature of the charging party the proper procedure for the charging party is to file with the Board objections to the settlement, treating the settlement for procedural purposes as an intermediate report of a trial examiner and following the time limitations and other procedural steps provided in the Rules and Regulations governing exceptions to intermediate reports.

Where the settlement provides for entry by the Board of an order, Board approval is obviously necessary. However, in the absence of objections, the Board approves and enters its order almost as a matter of course.

Issues to Be Covered by a Settlement Stipulation

The Board has well prepared forms of settlement stipulations and when the parties reach a settlement the Board types up a proposed stipulation for signature by the parties. The agreement contains elaborate recitals of procedural steps taken, waiver of procedural steps not taken, recitals of jurisdictional facts and conclusions, and consent to entry of orders by Board and court, where these are contemplated. The Board can be relied upon to include all the requisite technical provisions. (See Appendix, Form 5.)

In the total settlement the attention of the parties can usually be confined entirely to the content of the provisions for remedying the unfair labor practices. Where a Board order is contemplated these all appear in the proposed order which is set out in haec verba, just as the Board is expected to enter it.

In the partial settlement there must be a clear statement as to what proceduralwise and substantive is waived, what not waived. The case may be split either horizontally or vertically. The evidence on the whole case may be stipulated with the right to be heard by the Board on the findings, conclusions, and order reserved. The findings, conclusions of law and order to be entered by the Board may be stipulated with the right to review thereof by the court preserved. Or one issue may be singled out for full pleading, trial before trial examiner and decision by the Board and courts with all other issues fully settled by agreed findings, conclusions and order without a right of review before either Board or court.

In the interests of securing a settlement the Board allows the parties to include in the settlement agreement all sorts of face saving statements, such as what the agreement does not include. Settlements are usually carefully worded so that no admission of wrong doing can be implied.

Remedial Devices Available in Settlements

The Board's procedures permit settlements which are followed by formal orders of the Board and enforcement thereof by court decree, thus according the aggrieved parties, when the charged party is willing to grant it, every remedy which they could possibly obtain by the fullest victory before the Board and in the courts.

The extent to which the Board will accept settlements either substantively or procedurally less than the maximum possibly obtainable by full proceedings will depend upon the nature of the alleged offenses, the extent of the alleged injuries inflicted by the alleged offenses and the availability of evidence to establish either offense or effect.

Substantivewise, the Board's agents disclose considerable ingenuity in tailoring remedies to conform to any compromise the parties can reach. Proceduralwise, there is usually only the decision of whether to insist the provisions for a remedy be embodied in a Board order and court decree. If the charging party is willing to accept less than a Board order and court decree, the Board's agents rarely insist upon these unless they have reason to believe the offending union or employer does not intend to carry out his part of the settlement.

INFORMAL APPEALS

An informal appeal is the resort by telephone, interview or letter to a higher official, to check on the correctness of some procedure or policy being applied by a subordinate Board official. These appeals often are taken at the suggestion or with the active cooperation of the subordinate. They normally occur at the very time the questionable action is taken, and may be acted upon often within the matter of minutes or hours. Such expeditious action prevents prejudicial error from being compounded.

The more experienced and up-to-date on Board decisions and policy the lawyer is, the more he is apt to meet with invitations from subordinate members of the staff as soon as a novel issue arises, that one or the other or both, at once consult higher members of the staff for advice and decision of the issue. And once such a course of dealing between the lawyer and the subordinate has been initiated, a polite question from the lawyer as to whether any given issue is not one needing such immediate recourse up the line, usually meets with cooperation. If the subordinate knows the policy is well established and his superiors would only be annoyed at being bothered to go into it at this point, he will tell you. If not, he will usually help you check on the views of his superiors.

This practice obviously has great advantages. An improper position

by a member of the Board's staff, if conveyed to employees, may have effects hard if not impossible to undo. And even where there is no immediate impact upon employees to consider, a wrong step early in the case may be costly to undo in terms of proceedings set aside, and new elections or new hearings ordered.

Thus, in a fast moving, informal agency like the Board, the higher staff members, whether in the Regional Offices or in Washington, seem to treat as proper and routine telephone calls or conferences to check upon novel points on which subordinates seem uncertain or admittedly are interpreting law or policy in a new fashion instead of applying well established rules.

ORAL ADVICE

The Board's staff, both field and Washington, are uniformly cooperative in expounding Board policy or decisions, to anyone calling on the telephone or in person. Here there are only two problems. Whom to call for what. And not to call too often where the answer is obvious and easily obtainable by checking the publications of any of the standard labor law services, such as the Bureau of National Affairs' *Labor Relations Reporter*, Commerce Clearing House *Labor Law Reporter* or Prentice-Hall *Labor Law Service*.

A staff member who specializes on a particular point will be glad to display his knowledge, cite you

cases, tell you the history of the rule, delimit its exceptions and moot with you how the Board will view as yet unsettled cases fringing upon the settled. But one who does not so specialize will of necessity give you generalities of not much help. It is worth the time in the first instance to find out who, if anyone, is the "expert" on a particular problem.

Likewise in a rush situation, if you explain the emergency, almost any member of the Board's staff will be happy to give you an answer to an obvious question. But staff members will justifiably get pretty short and uncooperative with anyone who persists day in and day out on using them to look up all the law he could look up for himself by using any of the specialized services in the labor law field.

In an important situation, written responses, in the nature of advisory opinions, can be obtained. Because these may become public, they are often so limited or hedged in language as not to be worth much. In the usual case, the less committal character of an oral communication favors much fuller information. If the matter is one on which you wish case citations, sometimes it is well to phone ahead of time, indicating your problem, and suggesting a full conference either by telephone or in person at the staff member's convenience. This gives the staff member time to "bone" up with other staff members or to get out his memorandum or cases and

have them ready to cite to you by volume and page.

The Board is not bound by any opinion issued by a staff member. Nor do staff members consider themselves bound by any opinions rendered either orally or in writing. Nevertheless, such opinions, if given by a responsible staff member, will generally reflect accurately the policy or law which will be applied if an actual ruling ever becomes necessary in a formal case.

COMPLIANCE

"Compliance," that is seeing that orders, whether of the courts or the Board, or settlement agreements, in unfair labor practice cases, are carried out, is almost entirely effected by informal procedures. Except for the rare contempt of court proceeding, the Board uses no compulsory writs of execution, but rather rou-

tine business methods in getting compliance and "closing the case."

CONCLUSION

The National Labor Relations Board, throughout its nineteen-year history, has taken great pride in the fact that the vast bulk of the matters brought before it are handled informally. The advantages to all concerned—better labor relations because of greater mutual agreement—better government because of fewer unwanted government edicts—official neutrality in potentially bitter disputes—savings in time and cost to parties and government—are so obvious that no changes in the political affiliation or industrial viewpoint of Board or staff have dimmed the ardor for the informal. Practice before the Board is a continuing challenge to inventiveness in advancing legal rights by simple direct action.

APPENDIX

Form 1. Agreement for Consent Election on Which Regional Director's Decision Is Final — p. 48.

Form 2. Stipulation for Certification upon Consent Election — p. 49.

Form 3. Settlement Agreement between Employer and Charging Party — p. 50.

Form 4. Settlement Agreement between Union and Charging Party — p. 51.

Form 5. Stipulation for Settlement of Unfair Labor Practice Charge When Complaint Has Been Issued — p. 52.

AGREEMENT
PAYROLL

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AGREEMENT FOR CONSENT ELECTION

Present to a Publicly Held, under Section 9 of the National Labor Relations Act as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby waive a hearing and AGREE AS FOLLOWS:

1. ELECTION—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the named Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of the undersigned labor organization(s)). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the Employer shall have the right to propose and to defend any and all questions, including questions as to the eligibility of voters, raised by any party hereto during the election. The Employer shall have the right to request rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be filed.

2. ELIGIBLE VOTERS—The eligible voters shall be those employees included within the Unit described below, who appear on the Employer's payroll for the period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military service of the United States who appear in person at the polls, but excluding any employees who have since quit or been discharged, or who have been laid off or discharged for cause, or who have been laid off or discharged for cause on strike who are not entitled to reinstatement. An affidavit filed by the Regional Director, listing the names of all employees on the Employer's payroll for the period indicated above, together with a list of the employees, if any, specifically excluded from eligibility.

3. NOTICES OF ELECTION—The Regional Director shall prepare a Notice of Election and promptly copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. OBSERVERS—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the non-unionary employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. TALLY OF BALLOTS—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director in the presence of the Employer and the Employer's authorized observers. The Regional Director shall furnish a Tally of Ballots to each of the parties. When necessary, the Regional Director shall issue to the parties a certification of representatives or certifiers of results of election, as may be indicated.

6. OBJECTIONS, CHALLENGES, REPROIS THEREON—Objections to the conduct of the election, or conduct affecting the result of the election, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties at the time of filing with the Regional Director. The Regional Director shall investigate and may in his report include a recommendation as to a course of action. If objections are sustained, the Regional Director shall conduct a new election under the terms and provisions of this agreement on a date, time and place to be determined by him. If the challenges are determined to be without merit, the Regional Director shall investigate the objections and issue a report thereon. The method of investigation of objections and challenges, including the outcome, which hearing shall be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final.

7. RUN-OFF PROCEDURE—If the vote more than one labor organization is signatory to this agreement, and in the event the majority of the valid ballots cast, the Regional Director shall proceed in accordance with the Board's Rules and Regulations.

8. COMMENCE—The Employer is engaged in commence within the meaning of Section 9 (a) (7) of the National Labor Relations Act.

9. WORDING ON THE BALLOT.—Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot.

- First.
Second.
Third.
Fourth.

- 10. PAYROLL PERIOD FOR ELIGIBILITY.—
11. DATE, HOURS, AND PLACE OF ELECTION.—
12. THE APPROPRIATE COLLECTIVE BARGAINING UNIT.—

If Notice of Representation Hearing has been issued in this case, the approval of this agreement by the Regional Director shall constitute withdrawal of the Notice of Representation Hearing heretofore issued.

By (Employer) (Name and title)
By (Union) (Name and title)
Date executed
Recommended:
Date approved

Case No.
National Labor Relations Board
National Labor Relations Board

Form NLRB-4190
(7-53)
(Formerly
NLRB-551 & 552)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

Case No.:

SETTLEMENT AGREEMENT

The undersigned employer (herein called the Employer) and the undersigned charging party (herein called the Charging Party), in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE--Upon approval of this Agreement, the Employer will post immediately in conspicuous places in and about its plant, and maintain for a period of at least sixty (60) consecutive days from the date of posting, copies of the Notice to All Employees attached hereto and made a part hereof.

COMPLIANCE WITH NOTICE--The Employer will comply with all the terms and provisions of said Notice.

BACK PAY--The Employer will make whole the employees named below by payment to each of them of the amount set opposite his or her name.

WITHDRAWAL--The Charging Party hereby requests the withdrawal of the charge in this matter, such withdrawal to become effective when the Regional Director is satisfied that the provisions of this Agreement have been carried out.

REFUSAL TO ISSUE COMPLAINT--In the event the Charging Party fails or refuses to become a party to this Agreement, then, if the Regional Director in his discretion believes it will effectuate the policies of the National Labor Relations Act, he shall decline to issue a Complaint herein and this Agreement shall be between the Employer and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within ten (10) days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review.

PERFORMANCE--Performance by the Employer with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, in the event the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Employer of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE--The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Employer has taken to comply herewith. Such notification shall be made within five (5) days, and again after sixty (60) days, from the date of the approval of this Agreement, or, in the event the Charging Party does not enter into this Agreement, after the receipt of advice that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

_____	_____
(Employer)	(Charging Party)
_____	_____
(Name and Title)	(Name and Title)
Date executed _____	Recommended _____
	Field Examiner, National Labor Relations Board
_____	Date approved _____
Regional Director, National Labor Relations Board	

GPO 53-841418

Form NLRB-4191
(7-53)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

Case No.:

SETTLEMENT AGREEMENT

The undersigned labor organization (herein called the Union) and the undersigned charging party (herein called the Charging Party), in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), **HEREBY AGREE AS FOLLOWS:**

POSTING OF NOTICE--Upon approval of this Agreement, the Union will post immediately in conspicuous places in and about its offices, including all places where notices to members are customarily posted, and maintain for a period of at least sixty (60) consecutive days from the date of posting, copies of the Notice to All Members attached hereto and made a part hereof. The Union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for a period of at least sixty (60) consecutive days from the date of posting.

COMPLIANCE WITH NOTICE--The Union will comply with all the terms and provisions of said Notice.

BACK PAY--The Union will make whole the employees named below by payment to each of them of the amount set opposite his or her name.

WITHDRAWAL--The Charging Party hereby requests the withdrawal of the charge in this matter, such withdrawal to become effective when the Regional Director is satisfied that the provisions of this Agreement have been carried out.

REFUSAL TO ISSUE COMPLAINT--In the event the Charging Party fails or refuses to become a party to this Agreement, then, if the Regional Director in his discretion believes it will effectuate the policies of the National Labor Relations Act, he shall decline to issue a Complaint herein and this Agreement shall be between the Union and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within ten (10) days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review.

PERFORMANCE--Performance by the Union with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, in the event the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Union of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE--The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Union has taken to comply herewith. Such notification shall be made within five (5) days, and again after sixty (60) days, from the date of the approval of this Agreement, or, in the event the Charging Party does not enter into this Agreement, after the receipt of advice that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

(Union)	(Charging Party)
(Name and Title)	(Name and Title)

Date executed _____	Recommended _____
	Field Examiner, National Labor Relations Board

_____ Regional Director, National Labor Relations Board	Date approved _____
---	---------------------

GPO 53-681413

What counsel should do for a client with an invention prior to referral to a patent attorney and procedures following referral

The Client's Invention and Its Patenting

*By Arthur H. Seidel
of the District of Columbia Bar*

A CLIENT walks into your office with blueprints of an invention which he wishes to manufacture. He wants your aid in helping him realize a monetary gain.

Your problem: What to do, and how to go about it?

THE BASIC FACTS

A salient consideration regarding any invention is always the following:

Query—Did your client invent it? If he did not, does he have a relationship to the inventor of the device entitling him to an assignment, license or other rights to the invention?

Under our patent law, only the actual inventor, or inventors in the

case of joint inventors, for a single invention, may execute an application for a patent (except in the relatively rare cases where the inventor is insane, dead or otherwise unavailable, in which event his legal representative may do so). The oath required for every patent application includes the phraseology "he (or they) verily believes himself (or themselves) to be the original, first and sole (or joint) inventor."

Thus, an invention turned up on a shopping trip outside the United States could not be patented by the shopper, even though it was not known in this country. Similarly, an invention not being used today, that had been unearthed from an old catalog or elsewhere, could not be patented.

This is the first of a series of articles concerned with the patent specialty.

In most cases your client will be the actual inventor or the employer of the actual inventor.

The latter situation may present difficulties. A clean-cut and eminently desirable arrangement for your client is presented when the employer has a contract with the inventor specifying the relative rights to any inventions made by the latter during the period of employment. It is quite common, particularly in the employment of scientific personnel, to require each employee as a consideration for his employment to assign to his employer all rights to any invention made by him during his term of employment in the employer's field.

Where no such contract exists the status of the employee should be ascertained. Was he hired to invent and develop new products? Did he invent the device on his employer's time, using his employer's facilities?

If the answer to both of these questions is "Yes," then your client, if the employer, has at least a "shop right" in the invention, and maybe more, depending on a variety of complex circumstances. A "shop right" is a non-assignable right to use the invention without payments to the patentee. If the answer to both questions is "No," then barring exceptional factors, your client has no rights to the invention.

ACTION PRIOR TO CONSULTING PATENT COUNSEL

Assuming that your client is the inventor, or has the rights to the

invention, you should ensure that certain safeguards have been taken.

Has your client had the invention written up in detail, including the assembling of sketches, drawings, and models, and has he had the resultant "disclosure record" read by at least one person capable of understanding it? The disclosure record should be dated and should contain a sketch of the invention, a brief description of it, and the intended uses to which it is to be put. (See Form I.) The person reading the disclosure record should insert the notation "Read and understood by me," his signature and the date at the bottom of each page of the disclosure record. In the case of disclosures which you can understand you will make an excellent witness. However, unless you are an engineer you should not attempt to act as the main witness for complex mechanisms, chemical compositions, or the like. In the latter case, you can qualify as a good additional witness by dating, signing and preserving a copy of the disclosure. This will enable you to testify that it has not changed.

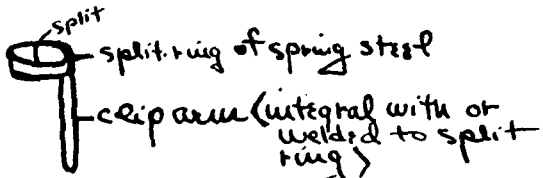
The reason for having a witness is that the Patent Office does not regard the inventor as a sufficient witness. Thus, in proceedings to determine the first inventor, where two or more patent applications are claiming the same invention (a form of proceeding known as an "interference"), the Patent Office will not permit the proof of any date not corroborated by more than

January 7, 1954

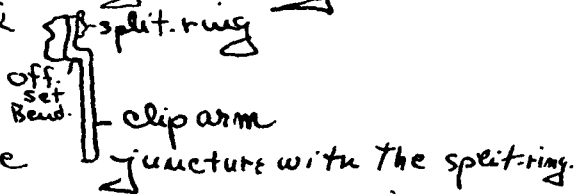
Invention of John Doe

My invention comprises a movable and removable clip for pencils, round shafted tools, etc. to permit such pencils and tools to be carried in the pocket at varying heights dependent upon the wishes of the user.

My clip includes a split collar or split ring of spring steel which embraces the shaft of the pencil or tool, the split permitting various diameter shafts to be embraced therein.



The clip arm may be welded or integral with the split ring, and may include an offset bend



John Doe

Read and understood by me.

Richard Roe.
January 8, 1954.

the inventor's testimony or evidence dependent upon his testimony.

While it is a salutary rule when dealing with inventions to be secretive, over-secretiveness has probably hurt more inventors than lack of caution. The holding back of information from a disclosure record or from patent counsel may hinder or prevent the obtainment of patent protection.

If much developmental work has been done on your client's invention, then he should also collect all invoices, diaries, order-sheets, and other records tending to show work on his invention, and assemble them with his disclosure records.

You should also obtain from your client any information that he may have relating to competing or related devices, and request that he endeavor to secure catalog sheets or other literature references showing such devices. This will greatly aid patent counsel in assessing the status of your client's invention.

One of your most important functions at this stage should be to urge diligence. Without it, even proved priority of conception may be insufficient.

CONSULTATION WITH PATENT COUNSEL

When the preliminaries have been completed you are ready to have your client consult with patent counsel.

The designation "Patent Attorney" is somewhat ambiguous. A

"Patent Attorney" admitted to practice before the Patent Office since November 15, 1938 is an attorney-at-law registered to practice before the patent examining divisions of the Patent Office. It is to be noted that he need not be admitted to practice before the bar of your state, and many patent attorneys to ensure their status as specialists are admitted solely in the District of Columbia and before the federal courts. As the Patent Office permits lay practitioners who are not members of any bar to practice before it, the designation "Patent Agent" is used for persons registered to practice before the Patent Office since November 15, 1938 who are not members of any bar.

However, any person admitted to practice before the Patent Office prior to November 15, 1938 whether or not a member of a bar, was designated a "Patent Attorney." Lay practitioners having this designation have not been forced to surrender it. Counsel should be informed as to the qualifications of the "Patent Attorney" or "Patent Agent" to whom he would refer a patent matter.

Where your client has a going business in which the invention fits into a larger picture, it is advisable to attend the first consultation between your client and patent counsel. You may apprise patent counsel of certain strategic considerations which your client may overlook. If your client is contemplating the manufacture of the invention then patent counsel should be informed

of this fact. Under such circumstances every effort to secure some patent protection for the invention may be justified even if ultimate success seems doubtful.

Such efforts might not be justified in the doubtful case if your client is merely contemplating selling his patent rights. The marketability prospects of an invention possessing little novelty is normally minimal.

On the other hand, any protection that can be accorded a manufacturer introducing a new item is advisable.

There is an even more cogent reason for apprising patent counsel that a client contemplates manufacturing a new item, namely the possibility of infringing the patents of others. Particularly will this be true if your client is entering a field undergoing a rapid state of development, such as the manufacture of antibiotics or electronic equipment.

Other items of information which you can furnish to patent counsel to ensure that the over-all job of protecting your client's interests is properly launched include the state of the industry, how the item is to be sold, and how competitive items are sold. This will aid patent counsel in drafting any patent applications that may ultimately be filed, and keying them to the best business advantage.

Your client should, of course, turn over his disclosure record to patent counsel and furnish patent counsel with any technical information that may be required.

While there are advantages to a

face-to-face joint consultation with patent counsel, as predicated above, disclosure through the mails is satisfactory and may even be preferable. The use of the mails not only furnishes written records, but leads to conciseness and accuracy. Having both your client and yourself prepare memoranda to patent counsel, which you may transmit under your own cover, may prove the most expeditious manner of handling the matter.

When the invention is simple and your client's proposed undertakings are simple, such as merely to patent his invention and attempt to market the patent, then consultation by mail is the least costly and the preferred method.

STEPS TAKEN BY PATENT COUNSEL

Patentability Search

After patent counsel has been apprised of the invention he will institute a patentability search by forwarding a description of the invention to his Washington, D. C., associate and request the latter to search the appropriate search classes in the Patent Office Search Room. Alternatively, as is frequently the case with patent counsel located within several hours of Washington, he may effect the search himself.

In the Search Room (an enormous hall, one city block in length and two stories in height) the almost 2,700,000 patents are arranged according to *subject matter* in more than 300 search classes and 45,000

search subclasses. While a number of libraries possess numerical collections of United States patents, the only collection arranged by subject matter is that within the Patent Office.

The searcher will attempt to locate the closest United States patents to the invention. He may find a complete anticipation, that is a prior patent showing all the inventive features of your client's device; but if he does not, he will normally forward the most pertinent patents to assist patent counsel in evaluating the technology in the field of the invention.

A patentability search is rarely exhaustive. It is not economically justifiable to extend the search to cover every possible search class, although as a result, the search may occasionally fail to uncover an anticipatory reference.

If all that is desired is a patentability search, patent counsel will review the disclosures of the patents found on search, comparing them with the invention. After this review he will prepare a patentability report containing his recommendation as to whether a patent application should be filed. The patentability search not only permits a decision to be reached as to the advisability of filing a patent application, but it also permits patent counsel to prepare a better patent application if the invention is patentable. It advises him as to where his strengths and weaknesses lie, and the extent of the inventive con-

tribution. In the case of chemical inventions, patent counsel may request further research to clarify distinctions between the invention and the patents found on search.

Infringement Search

Returning to our hypothetical situation where your client wishes to manufacture the invention, the knowledge as to whether he can manufacture it without infringing any unexpired patents of others is at least as important to him as learning whether it is patentable. Very often an invention which is patentable infringes one or more patents of others. For example, assume that six new radio tubes are developed and each is separately patented. Within the seventeen-year life of these patents your client invents a novel radio circuit employing each of the tubes. The patentability search will fail to reveal any analogous circuits, and your client's circuit is clearly patentable. However, by manufacturing it he will be infringing each of the six tube patents, unless he obtains the tubes from the patent owners.

Information as to infringement is obtained by an infringement search. In this search, which is normally more costly than the patentability search, the searcher, preferably patent counsel, reviews all unexpired patents relating to the field of the invention. While in the patentability search prior patents of any vintage, such as patents issued a half-century or more ago, are reviewed,

in the infringement search only unexpired patents are studied.

There is a further important distinction between these forms of searches. In the patentability search, the prior patents are studied for their disclosure or descriptive content. For all practical purposes, in this type of search, each patent may be considered as a literature article, disclosing a new invention, and the disclosures, per se, of these prior patents are compared with your client's invention.

In the infringement search the prior patents are reviewed as legal instruments. At the end of each patent are one or more "claims" in which the patentee defines the metes and bounds, or scope of his invention. In an infringement search, these claims are evaluated and a determination as to whether the claims are infringed by your client's invention is made. In complex cases such searches may prove very prolonged and costly. The author recalls participating some years back in a search of this nature where an infringement study of a contemplated refinery necessitated the full time services of three attorneys for over four months.

It is not necessary that your client contemplate manufacturing an invention before recommending an infringement search. Any new manufacturing venture into a rapidly developing industrial field should be prefaced by such a search, as the patent picture may represent

an important cost item in the venture.

Interpretive and Validity Study

If the infringement search reveals that your client's structure infringes the prima facie scope of one or more claims of another's patent, then patent counsel may advise an interpretive and validity study. This normally includes two parts: First, a review of the file history and prosecution of the claim under study before the Patent Office achieved by a study of the history of prosecution of the patent application containing such claim. This will unearth any estoppels, limiting interpretations, and the like. Second, a thorough search of far greater detail than the patentability search to determine the presence of any anticipating references. An exhaustive validity search may include a review of *all* pertinent United States patents, literature references and also foreign patents. It is, thus, much more extensive than the examination or patentability search made in the Patent Office and is apt to uncover references not found by the Patent Office.

In unusual cases, such as where there is a suspicion of public use of an invention, or fraud, patent counsel may request an appropriate investigation to determine these facts.

Under our law an invention is not patentable if publicly used in this country more than one year prior to the filing of a patent application for it. Nor is it patentable

if it has been described in a printed publication or patent published anywhere in the world more than one year prior to the filing of the patent application, or used in this country, or described in a printed publication prior to its invention by the patentee. Accordingly, the procedures outlined above may furnish a basis for invalidating the allegedly infringed claim or claims.

THE PATENT APPLICATION

Assuming your client's invention is found to be patentable, patent counsel will prepare one or more patent applications covering it. Frequently it is not possible to cover an invention within a single patent application. For example, with chemical inventions, the newly developed chemical composition, its use, and the process for its manufacture may each require separate patent applications. With mechanical inventions, different embodiments of a fundamental form of machine may require individual patent applications.

Drawings

A patent application includes drawings, a specification, claims and formal papers. In chemical patent applications, drawings may not be necessary, while with other types of inventions they are almost always required. The Patent Office has established rigid standards regarding patent drawings, making them a unique form of pictorial illustra-

tion, differing greatly from blueprints and other conventional methods of illustration. (See Illustration "A.") Patent Office drawings should therefore be prepared by a patent draftsman under patent counsel's supervision, and your client should not attempt to have his own draftsman prepare such drawings.

Specification

The specification, as its name implies, constitutes the descriptive body of the patent application, and includes the objects accomplished by the invention and a detailed description of the invention, keyed in patent applications for mechanical inventions to the drawings. (See Form 2.) A prime purpose of the specification is to act as a lexicon for the claims, providing a basis whereby others may ascertain what was intended to be covered by the claims. The drafting of a patent application requires a high degree of skill, and failure to adequately define the applicant's invention may result in the loss of applicant's entire rights. Hundreds of court decisions constitute tragic support for the maxim that a "poorly drawn patent is no better than no patent."

You can help your client immeasurably, if, along with patent counsel, you insist that he review the specification and drawings with a great degree of care. The time to correct errors in a patent application or add subject matter thereto is before a patent application is filed in

Date of Issuance *March 16, 1954* Inventor *M. BRAUER* Patent No. *2,672,162*
 APPARATUS FOR PLUGGING HOLES IN PIPE LINES — Title
 Filed June 24, 1949 — Filing Date

FIG. 1.

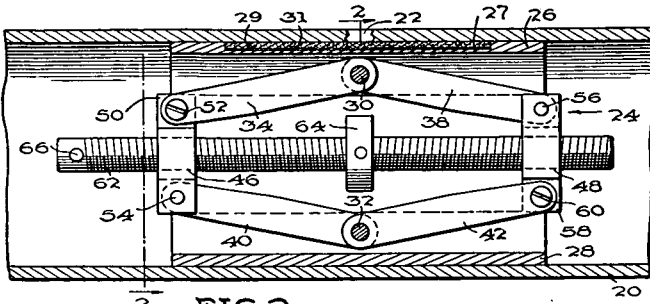


FIG. 6.

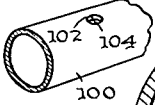


FIG. 2.

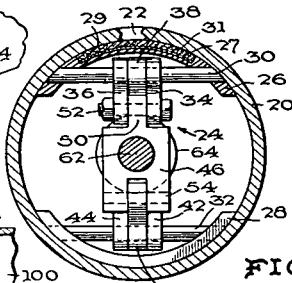


FIG. 4.

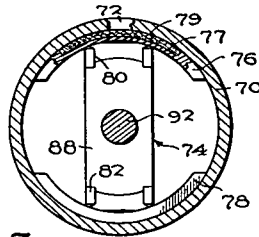


FIG. 7.

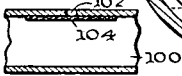


FIG. 3.

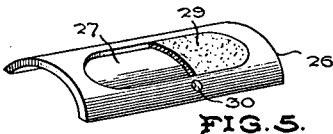
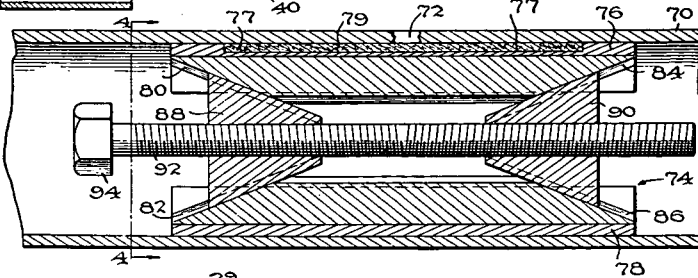


FIG. 5.

INVENTOR.
 MORRIS BRAUER
 BY
Arthur Seidel
 ATTORNEY

Patented Mar. 16, 1954.

Patent monopoly expires Mar. 16, 1971

Patent No. 2,672,162

UNITED STATES PATENT OFFICE

2,672,162

filing date of application

APPARATUS FOR PLUGGING HOLES IN PIPE LINES

Inventor and his residence

Morris Brauer, Jersey City, N. J.

start of specification

Application June 24, 1949, Serial No. 101,162

Application Serial No.

3 Claims. (Cl. 138-97)

Official Class 2

statement of invention

discussion of problem

statement of invention

description of drawings

This invention relates to apparatus for plugging holes in pipe lines, and more particularly to the repairing of boiler tubes, chemical pipe conduits and other high temperature and/or high pressure conduits.

This application is a continuation-in-part of my earlier U. S. application Serial No. 95,017, filed May 25, 1949.

Among the most serious difficulties concomitant with boiler operations is the lack of adequate methods and apparatus for boiler tube repair. Thus when a puncture results in a boiler tube, the sole recourse available is to plug the ends of the tube wherein the leak is, and thereby remove this tube from operation. This involves turning off the boiler fire and having a repairman creep into the fire box to plug one end of the tube, after which the other end is tapped in. Not only is the tube useless for further heat transmission, but the very act of repairing due to the hammering required to jam in the plug is apt to disturb the surrounding area and thereby induce further leaks in surrounding tubes. In addition, this type of repair affords only temporary relief in that safety requirements will entail the necessity of retubing shortly thereafter. This latter operation is exceedingly costly and moreover prevents the utilization of the boiler for lengthy periods.

There have been attempts in the past to create boiler plugs and patches which could be inserted within the tube to seal up punctures, but until the present date these have not proved to be successful. Due to the great heat differential between the temperature at which the plug is tightened, and the temperature at which the boiler tube is on-stream, the skeleton of the plug is affected thus preventing adequate seals, and the patches have proven incapable of withstanding the boiler's normal operating conditions.

The present invention provides the first method and apparatus for successfully repairing permanently a boiler tube puncture. By the utilization of the present method and apparatus it is not necessary to reduce the boiler pressure while the repairs are being effected, and the hammering and jamming present with earlier methods is completely eliminated. The utilization of the boiler tube may be continued immediately after repairs, and retubing is unnecessary.

Therefore, this invention has as an object the provision of a method of permanently repairing punctured pipe lines.

A further object is the provision of apparatus for the permanent repair of punctured pipe line. A still further object is the provision of a

Objects of present invention

method for effecting permanent patches on punctured pipe line.

These and other objects are accomplished by the device of the present invention which comprises a pipe line device for plugging a pipe hole comprising a pair of transverse shoes, at least one of said shoes having located on its distal surface an indentation, and means for distending said transverse shoes.

The method of my invention which comprises a process for repairing a pipe hole in pipe which normally carries a fluid, is accomplished by inserting into said pipe a collapsed distendable means, said means including a shoe having a distal surface conforming to the shape of said pipe, said shoe having on its distal surface an indentation portion containing a composition of matter adapted to create a permanent plug, manipulating said distendable means so that the indentation portion of said shoe covers said pipe hole, and distending said distendable means so that said indentation portion of said shoe seals off said pipe hole.

Figure 1 is a vertical section through a punctured pipe showing my invention applied thereto.

Figure 2 is a transverse section taken on line 2-2 of Figure 1.

Figure 3 is similar to Figure 1 but shows a modified form of my invention.

Figure 4 is a transverse section taken on line 4-4 of Figure 3.

Figure 5 is a perspective view of a rigid transverse shoe utilized in my invention.

Figure 6 is a perspective view of a pipe hole that has been patched through the use of my invention.

Figure 7 is a transverse section through a repaired pipe.

Referring to Figures 1, 2, and 5, 20 represents a pipe such as a boiler tube or pipe conduit having a hole or puncture 22. My pipe line device is indicated by 24 and comprises a pair of rigid transverse shoes 26 and 28. The outer or distal surfaces of shoes 26 and 28 conforms to the inner surface of pipe 20. The central portion of shoe 28 which is the shoe covering hole 22 contains an indented portion 27. In the preferred form of my invention, this contains a suitable composition of matter 29 adapted for plugging said pipe and forming a permanent plug capable of withstanding the temperatures and/or pressures normally found within pipe 20. This composition of matter 29 is shown in a cut-away perspective view in Figure 5. In addition to being a suitable composition for plugging hole 22, it is preferable

[Author's Note: Columns 3 and 4 omitted]

2,672,162

5 removed from the device after it has formed a plug. As indicated heretofore, this may be achieved by the use of a binding means, coating, foil separator, etc. which has previously been placed between the plug composition and the indentation portion of the shoe. During the course of the conversion of the composition to a permanent plug and/or during the course of the resumption of flow through the tube following the sealing off of the puncture by the device, the detachable binding means is burnt or melted away, thereby permitting the device to be separated from the formed plug and to be withdrawn. On withdrawing my device the reduction in cross sectional area is negligible.

Figures 6 and 7 show a pipe 100 whose puncture 102, has been repaired by permanent plug composition 104, and from which the pipe line device has been removed.

Using 24 or 74 as illustrative of devices capable of being utilized in my process; these devices would be inserted into a pipe having a puncture so that the indentation portion 27 or 77 of shoe 26 or 76, containing a composition of matter adapted to form a permanent pipe plug and being attached to the indentation portion by means of a detachable binding means, would cover the puncture. Pin 68 or nut 94 would be rotated so that indentation portion 27 or 77 of shoe 26 or 76 sealed off the puncture. Suitable conditions for converting the plug composition to a permanent cemented plug and detaching it from the indentation portion would then be effected such as by placing the tube onstream and permitting the composition and detachable means to come in contact with high temperature fluids. Following the formation of the permanent plug, and detachment of same from the device, device 24 or 74 is withdrawn from the tube.

The apparatus and process herein described may be modified somewhat. These modifications which are readily apparent to one skilled in the art constitute part of my invention. They include modifications in the shape of the various members utilized in my invention, and the different conditions which may be utilized for effecting the plug-cementing and detaching from the device of my process.

I claim:

1. A pipe line device for plugging a pipe hole at the internal pipe wall comprising a pair of transverse shoes having distal convex surfaces, at least one of said shoes having its distal surface conforming to the inner surface of said pipe, and having located on its distal convex surface an indentation for containing a composition of matter adapted for plugging said hole, and means for distending said transverse shoes comprising angularly raised cam ways located on the inner surfaces of said transverse shoes, cam nuts

6 adapted to conform to said cam ways, a threaded shaft having oppositely threaded sections, said cam nuts mounted on said shaft's oppositely threaded sections and arranged so that when said shaft is rotated the cam nuts move upon said angularly raised cam ways.

2. A pipe line device for plugging a pipe hole at the internal pipe wall comprising a pair of transverse shoes having distal convex surfaces, at least one of said shoes having its distal surface conforming to the inner surface of said pipe, and having located on its distal convex surface an indentation, said indentation containing a detachable patch comprising a composition of matter adapted for plugging said hole, and means for distending said transverse shoes comprising angularly raised cam ways located on the inner surfaces of said transverse shoes, cam nuts adapted to conform to said cam ways, a threaded shaft having oppositely threaded sections, said cam nuts mounted on said shaft's oppositely threaded sections and arranged so that when said shaft is rotated the cam nuts move upon said angularly raised cam ways.

3. A pipe line device for plugging a pipe hole at the internal pipe wall comprising a pair of transverse shoes having distal convex surfaces, at least one of said shoes having its distal surface conforming to the inner surface of said pipe, and having located on its distal convex surface an indentation, said indentation containing a detachable patch comprising a composition of matter adapted for plugging said hole, and means for distending said transverse shoes comprising angularly raised cam ways located on the inner surfaces of said transverse shoes, cam nuts adapted to conform to said cam ways, a threaded shaft having oppositely threaded sections, said cam nuts mounted on said shaft's oppositely threaded sections and arranged so that when said shaft is rotated the cam nuts move upon said angularly raised cam ways, and a fixed collar separating said threaded shaft's oppositely threaded sections.

MORRIS BRAUER.

References Cited in the file of this patent
UNITED STATES PATENTS

Number	Name	Date
581,209	Hughes	Apr. 20, 1897
719,817	Kunze	Feb. 3, 1903
1,189,714	Hall	Apr. 25, 1916
1,182,737	Bartz	May 9, 1916
2,068,722	Merrill	Feb. 2, 1937
2,199,552	Watson	May 7, 1940
2,487,991	Stephens	Nov. 15, 1949

FOREIGN PATENTS

Number	Country	Date
16,443	Great Britain	July 25, 1903

Patents made of record and cited against claims of application

start of claims

End of specification

End of claims

the Patent Office. The Patent Office is unswerving in its insistence that new matter cannot be added to a patent application.

Claims

Client should also review the claims, but here he is largely dependent on patent counsel's skill. Claim drafting is so highly technical that entire chapters have been written in reference works distinguishing words such as "comprising" from "consisting." (See Form 2.)

The formal papers consist of a standardized oath and power of attorney normally constituting a single paper which is executed by the inventor. (See Form 3.) If the inventor is assigning the application to your client, patent counsel will have him execute an assignment simultaneously with the execution of the oath, and ultimately record the executed assignment in the Patent Office. There are technical advantages in not recording the assignment until just prior to the issuance of the patent application, although this risks the protection for which recording is provided.

Official Fees

There is a \$30.00 filing fee (\$1.00 more for each claim over twenty) payable to the Patent Office when the patent application is filed.

A similar fee is payable after the application has been allowed to obtain its issuance.

THE PROSECUTION OF THE PATENT APPLICATION

All patent applications are preserved in secrecy during their pendency in the Patent Office. Incidentally, assignments of patent rights are open to the public so that one advantage in delaying the recording of an assignment for a patent application is the preservation of secrecy. The normal course of prosecution is, first, the granting of a Serial Number by the Patent Office. This is followed some six months to a year later by an "Office Action."

The Office Action normally states that the application has been examined, lists any formal defects, and cites the most pertinent prior references which the Examiner has located after a search resembling the patentability search. Normally, on the first Office Action, all or substantially all of the claims are rejected. This should not be viewed with alarm as it is almost standard practice, based on the desire of having arguments as to the patentability of the claims in the record.

Patent counsel must respond to the Office Action within six months. This takes the form of a written "amendment," which may amend certain or all of the claims, cancel or add claims, or merely constitute an argument that the claims, as filed, are patentable.

Some six months to a year later there is a second Office Action and then a further amendment. This

THE CLIENT'S INVENTION AND ITS PATENTING 65

FORM APPROVED
BUDGET BUREAU NO. 41-7847

PO-20
(7-17-47)

Sole

OATH, POWER OF ATTORNEY, AND PETITION

Being duly sworn, I, John H. Doe
depose and say that I am a citizen of United States of America residing at
7777 Lister St., Philadelphia, Philadelphia County, Pa.; that I have
read the foregoing specification and claims and I verily believe I am the original, first, and sole
inventor of the invention or discovery in RETENTION CLIPS

described and claimed therein; that I do not know and do not believe that this invention was ever known
or used before my invention or discovery thereof, or patented or described in any printed publication
in any country before my invention or discovery thereof, or more than one year prior to this applica-
tion, or in public use or on sale in the United States for more than one year prior to this application;
that this invention or discovery has not been patented in any country foreign to the United States on
an application filed by me or my legal representatives or assigns more than twelve months before this
application; and that no application for patent on this invention or discovery has been filed by me or
my representatives or assigns in any country foreign to the United States, except as follows:

none

And I hereby appoint Arthur H. Seidel, Esq., 295 Madison Avenue,
New York 17, N.Y.

Registration No. 15,979, my attorney or agent with full power of substitution and revocation, to
prosecute this application and to transact all business in the Patent Office connected therewith.

Wherefore I pray that Letters Patent be granted to me for the invention or discovery described
and claimed in the foregoing specification and claims, and I hereby subscribe my name to the foregoing
specification and claims, oath, power of attorney, and this petition, this

20th day of February, 1954.

Inventor _____
First name Middle initial Last name

Post Office Address { 7777 Lister St.
Philadelphia 15, Pa.

State of Pennsylvania }
County of Philadelphia } SS

Before me personally appeared John H. Doe,
to me known to be the person described in the above application for patent, who signed the foregoing
instrument in my presence, and made oath before me to the allegations set forth therein as being under
oath, on the day and year aforesaid.

S E A L

Notary Public

This form may be executed only when attached to a complete application as the last page thereof.

Approved Single Signature Form
Sole Inventor

FORM 3.

process is repeated until an issue is reached, the latter most often occurring on the third to fifth Office Action.

At that time some, all or none of the claims are allowed, and the rejected claims are "finally rejected."

If claims are finally rejected an appeal may be taken from the final rejection to the Patent Office Board of Appeals, at which time the applicant may be represented by patent counsel in an oral hearing.

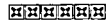
If the Examiner's final rejection is affirmed by the Board of Appeals, the applicant may take a further appeal to either the Court of Customs and Patent Appeals or to the United States District Court for the District of Columbia, from which a further appeal to the Court of Appeals for the District of Columbia is possible. In the Court of Customs and Patent Appeals (C.C.P.A.) the

appeal is limited to a review of the Patent Office record.

Appeals to the District Court have an advantage where fact questions are in issue, as witnesses may be introduced and facts disputed. In both forms of appeals the Patent Office is represented by its Solicitor.

About five percent or so of the patent applications become involved in an Interference. As heretofore noted, this is a highly technical contested proceeding before the Patent Office to determine the first inventor when two or more separate applicants are claiming the same invention.

The granting of a patent is not an overnight affair. The Patent Office examining corps is overworked, underpaid and understaffed, and at the present time it takes normally from one and a half to four or more years to obtain a patent.



The law is the last result of human wisdom acting upon human experience for the benefit of the public.

SAMUEL JOHNSON, *Mrs. Piozzi's Anecdotes*, 1786.

This inscription appears above the door of the Federal Court House in Philadelphia. Judge Learned Hand says it is nonsense unless the words "the last result" mean the "latest result." And he says further that if that is all that is meant, "the saying amounts to no more than that the law is the latest effort made to put order into human experience, and that amounts to nothing."

But does it amount to "nothing"? The man who picked out the inscription for the architect thought it was pretty good.

H.F.G.

The duties and responsibilities of counsel regarding a decedent's fire, liability and surety policies, in determining the insurable interests in decedent's properties which arise at once on his death, and in securing adequate insurance protection for the new owners, including the executor or administrator.

When the Named Insured Dies

*By Arch M. Cantrall
of the Clarkburg, West Virginia, Bar*

WHEN the Named Insured dies—what are the duties and responsibilities of counsel regarding the decedent's insurance policies?

Lawyers generally understand what needs to be done about a decedent's life policies and his health and accident policies. Usually the insurance agents who sold those policies will take care of the proofs of claim, and the lawyer's task is often confined to a general supervision of that process and to getting a record of the policies and payments for tax purposes. Fire, liability and surety policies present entirely different problems.

FROM THE LAWYER'S VIEW

The decedent no longer owns the properties or business in question,

and it is counsel's responsibility to secure the endorsements necessary to protect the new owners and, frequently, to urge the purchase of additional policies essential for adequate protection.

This is a job for counsel. It cannot be left to the insurance agent. Property always has an owner and upon the death of a decedent his property at once has new owners. Who they are is a legal question, to be determined by the will or by the laws of descent and distribution, and sometimes by other areas of the law. Occasionally complicated litigation is required to determine the new ownerships and, pending the litigation, insurance protection is essential. No one else is in as good a position as counsel

Author's Note: (a) No mention is made in this article of the policy forms used by mutual insurance companies. In some states such forms differ considerably from those used by stock companies.

(b) No attempt is made to mention the many changes currently taking place throughout the whole insurance field. New forms of package and combination policies, and of endorsements, are coming into use, but the basic rules of insurance are not affected by these innovations.

to determine the insurable interests in the decedent's property which arise on his death.

As to fire insurance, it is essential that the named insured have an insurable interest at the time of loss. And when a loss occurs after the death of the one who originally bought the policy, that original named insured is no longer available to establish insurable interest and to collect on the policy. The property then belongs to someone else—to his heirs, devisees, legatees or distributees, or to his executors, administrators or trustees. Often there are life tenancies, remainders, dowers, trusts, and other interests. Usually there are creditors to be considered. And sometimes the decedent's interest terminated at his death, as when he had only a life interest, or was a trustee or other fiduciary. Perhaps he owned only a partial interest. If he was a partner, did the partnership dissolve on his death? All these are legal questions, requiring for their solution knowledge of the facts and the pertinent instruments and of many fields of the law.

As to liability policies, it is obvious that the decedent can no longer become liable for damages. Some one else owns the property or runs the business, and needs insurance protection. A workmen's compensation policy will need particular and prompt attention.

Likewise, the decedent is no longer the employer of those whose fidelity is covered by his surety poli-

cies. The new employer is the one to be protected.

All this is elementary, of course. But the point is that something needs to be done, promptly, and the lawyer is the one to do it.

The lawyer cannot expect and wait for the layman to ask his advice in these matters. He will have to insist upon possession of the policies and upon making such changes as may be necessary.

FROM THE LAYMAN'S VIEW

The layman will seldom think of counsel as having a necessary function in connection with a decedent's fire, liability and surety policies. Laymen have a firm belief that the insurance covers the described property, rather than the interest of the named insured. And they have an equally firm belief that the insurance agent can and will do what is necessary.

Both of these ideas are completely erroneous, at least in the situation being discussed. An insurance policy is a personal contract between the insurer and the insured, and does not follow the property; and while the insurance agent will be glad to write the required endorsements, he is not a lawyer and cannot be expected to solve the questions of title even if he is given all the necessary information. He should not be asked to assume that responsibility.

Because of the belief that the policy insures the property, a home is often insured in one name only

when it is actually owned by several members of the family. As often it will be insured in the name of the life tenant only. Insurance companies have in many instances paid in full under such policies, as a matter of good faith. But there is always the chance that an adjuster may feel that the insured is being unreasonable about the amount of the loss, or some circumstance may excite his suspicion. In any such case the adjuster usually takes advantage of any technicality he can find. And there have been cases where insurers have successfully denied liability for more than the interest of the named insured. [See, for example: *Michigan Fire & Marine Ins. Co. v. Magee*, 218 S.W. 2d 151 (Kansas City Court of Appeals, 1949); and *Currier v. North British and Mercantile Ins. Co. and Atlas Assurance Co., Ltd.*, 101 A. 2d 266 (N.H. 1953)]. It is quite possible that this practice may become general. After a loss it is too late to add other named insureds to the policy. Counsel, at least, cannot afford to take this chance.

AND FROM THE VIEW OF THE PERSONAL REPRESENTATIVE

An interesting point is raised in Henry W. Brockenbrough's article, *The Executor Looks at the Will* [93 *Trusts & Estates* 536 (1954)]: Being a contract personal to the insured, insurance does not pass with the properties insured, unless there is a specific direction in the will. As insurance is an intangible, in many

instances it will not pass in the same manner as the property to which it relates. In such cases it may well be the duty of the personal representative to terminate the policies promptly and treat the return premiums as intangible property, rather than to turn the policies over to the taker of the insured property.

The personal representative is confronted with many other interesting questions: If a will contains a direction or power in the executor to sell real estate, is the wording sufficient to vest title in the executor? Where are the titles to the real and personal properties between death and probate of the will, and between death and qualification of the executor or administrator? These questions may not be too important unless there is delay in probate or in qualification, but they should not be ignored.

IMPORTANT PROBLEMS FOR THE LAWYER TO RESOLVE

Insurable Interest

The first problem is to determine the insurable interests in each property, and to endorse the applicable policies to protect the people who have those interests.

What is an *insurable interest*? Here are three simple tests:

(i) Does the person stand to lose by the happening of the event against which the policy insures?

(ii) A person has an insurable interest in property, when he would

suffer monetary loss by its damage or destruction, and would be benefited by its continued existence.

(iii) If you would include a person as a plaintiff in a suit to collect on a policy, make sure that the policy names him as an insured.

The *Fire, Casualty and Surety Bulletins* (published by The National Underwriter Company, 420 East Fourth Street, Cincinnati 2, Ohio) state these general rules for insurable interest under the 1943 New York Standard Fire Policy (now standard in almost every state):

"1. The interest of the insured need not be unconditional and sole ownership of the property.

"2. The interest of the insured need not be explained in the policy or by endorsement. It may change while the policy is in force without any change being needed in the way insurance is written—unless, of course, this requires a change in the amount of insurance or perhaps the addition of another insured.

"3. At the time of loss, the insured must prove his interest in the property.

"4. Two or more parties having varied interests in the property may be named as insureds. No naming of their capacity or other explanation is necessary. Again, of course, such interests must be established at the time of loss, but not before.

"5. A party who is not named as insured cannot recover directly under the policy, no matter what his interest may be. . . .

"6. Liability of a party for loss of property which he does not own, appears to be sufficient interest to be insured under the standard fire policy without explanation or endorsement. . . .

"7. Just how loss to an insured having only a fractional interest in property shall be determined is, unfortunately, still an unanswered question.

"8. Because of this, the only sure way to avoid argument in settling losses now appears to be to name all parties having an interest in the property, either as insureds or as loss payees."

While it is not necessary to state in the policy the nature of the interest of an insured, there are cases in which it is advisable, as when a person is to be insured in an unusual capacity, or in more than one capacity. If a policy names "John Jones in his own right and as executor under the will of Richard Roe," there is no question whether John Jones is insured in both capacities. If he paid the premium as executor, and the policy does not name him as an individual, a question might be raised whether the intention was to insure him in both capacities.

With these tests and rules in mind, counsel should list the persons having an insurable interest in each property, real and personal, and then secure the proper endorsements to name those persons as insureds in each policy on each property.

Insuring Partial Interests

The old form fire policy provided that the policy was void if the interest of the insured was other than sole and unconditional ownership.

The new 1943 New York Standard Fire Policy does not contain the sole and unconditional ownership clause, but it does state that recovery is restricted to the interest of the insured, which means the interest of the named insured existing at the time of loss.

While it is theoretically possible under this provision to insure a partial interest, it should not be attempted unless there is no way to avoid it. For no answer has yet been found to the question of how to determine the amount of a partial loss to an insured who has only a partial interest.

The difficulty arises out of the policy provision which limits recovery to "the interest of the insured." For example, four heirs own a house. One of them buys insurance in his own name, and the others do not. In the event of loss, what does that one insured recover? At first blush you would say that he should recover one-fourth of the loss. But is he not entitled to the use in common of the whole house? Precisely what is the cash value of his interest?

Another example: A home is left to a widow for life, who insures in her name only. The home suffers a partial loss. Then there is the nice question, whether the loss falls entirely on the insured

life tenant, or wholly or partially on the uninsured remaindermen.

Incidentally, if in such a case the widow is guardian or trustee for infant remaindermen, is she under a duty to protect their interests? That duty might support a surcharge against her, but it will not take the place of naming the remaindermen as insureds.

Also, the life tenant's right is only to use the property for the rest of her life. If she is seventy-two years old, what is that right worth?

And, is a lessee's insurable interest, in improvements and betterments to the demised premises, confined to the value of the right to use them for the rest of the term during which he installed them?

Until the courts or the legislatures work out the answers to these and other partial interest questions, the only sure way to avoid this difficulty in settling losses is to name in the policy, as insureds, all parties having any interest. If you cannot arrange this, be sure to avoid co-insurance in insuring partial interests.

Unidentifiable or Numerous Owners

Once in a while a situation is so complicated that the new owners cannot be identified at once. Or they may be so numerous that it would not be practical to name them all on the policy. In such instances this method may be tried: Identify one of the heirs who will look after the property and be the

natural one to settle a loss. Let's call him Tom Brown. Then have each policy endorsed as follows (changing "heirs" to devisees, legatees, distributees, etc., when appropriate):

"It is mutually agreed that the name of the assured is changed to read:

'HEIRS OF WILLIAM ROE'

instead of as originally written.

"It is agreed that any loss under this policy shall be adjusted with and paid to Tom Brown, agent of the Heirs of William Roe, deceased, subject to all other terms and conditions of this policy."

If loss occurs, under such an endorsement the insurance company deals only with Tom Brown. As a part of his proof of loss Tom has to establish who the heirs are, and prove their respective insurable interests at the time of loss. Insurance companies will usually accept such an endorsement.

If the company should object to the issuance of such an endorsement, counsel can write a letter to the company, spelling out the complications and explaining why it is desired to handle the insurance in this manner. Give the letter to the agent, with a copy for his file. Tell the agent, in forwarding your letter, to ask the company, if it still objects, to suggest a more practical solution. At the worst, you may have to get the heirs to give Tom a power of attorney to handle the

property for them, including the procurement of insurance, the settlement of losses, and the collection of the proceeds. Tom should have such a power, anyway, for his own protection.

*Policies Naming the "Estate"
as Insured*

Do not accept, under any circumstances, a policy insuring the estate of a decedent. "Estate" means property, not people, and insurance contracts should always be with and payable to the actual owners, the ones who can establish insurable interest in the property.

We recently had a good example of this in our office: A fire policy was written in the name of a life tenant, Mary Jones. Mary Jones died. The policy was renewed in the name of the "Estate of Mary Jones." Then the house burned down.

Who can sue on that policy? The Estate of Mary Jones cannot. In the first place, there is no such entity as the "Estate of Mary Jones" and, in the second place, Mary's interest ended with her death. The remaindermen were not named on the policy, and cannot sue on it.

The insurance agent cannot be blamed for renewing that policy in the name of "Estate of Mary Jones." All he knew was that Mary was dead. No one took the trouble to tell him that the property was then owned by the remaindermen. The former policy was expiring and he did the best he could to keep the

insurance in force. He issued the renewal policy and sent it to Mary's former address. Whoever received it should have returned it for a corrective endorsement.

But there we run into that laymen's belief that the policy insures the property, regardless. The policy came all folded up, and on the outside it said that it insured against fire the property at 110 Smith Street for \$10,000. So, still folded up, it was put away for safekeeping.

Some insurance companies are now refusing to accept a policy naming as insured the "Estate of Mary Jones." They can see the difficulties that will arise and, no doubt, feel that in good faith they cannot accept the premium for a policy so defective.

Much of the foregoing is stated in terms of fire insurance, but the same ideas apply to other types of insurance.

Continuation Clauses

As to all varieties of insurance, when a named insured dies, the only safe practice is to endorse all of his policies at once in the names of all the new owners. Under some policies and in certain circumstances, a temporary advantage may be gained under the continuation clause. See, for example, the second paragraph of the discussion below under the heading "The Family Automobile." But that decision should not be made and the policy put aside without giving notice, if required, within the specified time,

and without arrangements for a renewal to be written in the names of the new owners.

Some policies will insure, in specified circumstances and on stated conditions, the "legal representatives" of the named insured, but only an examination of the particular policy in the light of the facts will determine whether reliance can safely be placed on such a clause. It should particularly be kept in mind that wide differences exist between the continuation clauses of the various forms of liability policies, and each policy should be carefully examined. While the term "legal representatives" has in some cases been defined to include heirs, devisees and others, it is so easy to endorse the policy properly that reliance should not be placed upon the hope of securing a favorable judicial interpretation. And there are cases where the new owner is by no stretch of the imagination a representative of the deceased. Thus, a surviving spouse who takes by survivorship is sole owner under the original grant, and does not take as a representative of the deceased. Remaindermen take under the original grant and not as representatives of a deceased life tenant.

Continuation clauses ordinarily require notice to the "company" (not the agent) within a stated time, and a copy of the notice with a note of the manner in which it is given should be attached to the policy.

A warning: a continuation clause

operates at the most only until expiration of the policy in effect on the date of death; and a renewal must be in the name of the new owner of the property or business.

Insurance for the Family

The decedent was free to take the risk of inadequate coverage as to properties, hazards and amounts. But the lawyer who is advising the decedent's widow and children does not have that same freedom. Often the decedent could, or thought he could, afford to take the business risk of inadequate insurance so he could use elsewhere the dollars not spent for insurance. Just as frequently, the widow or child does not have the other assets or the earning power that justified the decedent's risk. In such cases counsel should consider the need for additional coverage. The test should be, not what did the decedent do, but what is required in the circumstances of the widow, or of the child.

It is not uncommon for a widow to be largely dependent on the rent from a property for her income. Counsel will think of Rent Insurance, which will pay her the rent she does not collect because of a fire or other specified occurrence. Other special coverages should also be considered, such as Rental Value or Additional Living Expenses.

The Family Automobile

Automobile insurance presents a real problem. Who is now the owner of the family automobile?

Who will actually be using it? The executor or administrator will not want to run the risk of being personally liable as owner, without liability insurance, especially when, as is usually the case, he has little real control over its use. The widow and children will need liability protection when they use the car. Counsel should without delay get the facts on the use to be made of the automobile, and then discuss the problem with the insurance agent. In these days when premium rates depend on the use of a car and on the age of the user, the premium may be more or less, but those owning and using the car must have protection.

What is said above, under the heading "Continuation Clauses," applies here. Most standard personal automobile liability policies provide that if the named insured dies during the policy period, the policy, unless cancelled, shall cover: (1) the named insured's legal representative as a named insured; (2) with respect to the coverages for bodily injury and death and for property damage, any person having proper temporary custody of the automobile, as an insured. This coverage lasts for sixty days after the date of death, and after that time only if notice is given to the company within that time. And sixty days can pass very quickly.

Insuring the Fiduciary

While the decedent was free to insure as he pleased, the personal representative, trustee or guardian

does not enjoy that privilege, certainly not at the expense of the estate. The fiduciary runs the risk of being personally liable for a loss if he has failed to insure against it. His counsel should keep that risk ever in mind.

Edward C. King's article, *Pitfalls in Trust Practice* [93 *Trusts & Estates* 364 (1954)], emphasizes two rules of law that must be kept in mind:

(1) A fiduciary is personally liable to third persons for torts committed in his administration, and to the same extent as if he owned the property in his own right. This is true whether he committed the tort intentionally, or negligently, or without fault, and whether or not he acted in accordance with the terms of the instrument under which he acts.

(2) It is the duty of a fiduciary to procure such insurance on the trust property as is customarily taken out by prudent men with respect to their own property.

As Dean King points out, under these rules recovery has been had against an executor personally after the estate had been closed, the executor discharged, and the assets distributed to a trustee, despite the facts that the executor had acted within his powers in continuing the operation of the garage business whose employees committed the tort, and that he was not personally at fault. Dean King adds: "It would appear—although this is not in the decided case—that his [the executor's]

failure to take out adequate liability insurance to cover the garage constituted a breach of trust and that, therefore, he was at fault and would not be able to recover from T, the trustee to whom the estate was distributed." (King, *supra*, at 364.)

Since a fiduciary cannot always pay a loss from the assets of the estate or trust, or recover his payment from the distributee, the fiduciary may well need greater liability protection than the decedent carried, both as to amount and as to perils covered. In considering this point, it should be kept in mind that the fiduciary cannot use estate or trust assets to settle a loss as freely as the decedent could have. Another consideration in favor of full coverage of hazards is that the insurer pays the costs of investigation and litigation of claims within the hazard definitions of the policy.

Another rule stated by Dean King is "that a fiduciary is personally liable upon contracts made by him in the administration of his trust, unless the contract expressly stipulates that he shall not be so liable." *Ibid.* When securing liability insurance for the fiduciary, it is important to include adequate contractual and products coverage.

Broad liability coverage is essential. If decedent owned a dog, for example, his executor or administrator becomes its owner and can become personally liable for damages if the dog bites someone.

Preservation of Records

When a doctor dies, it might be well to secure the consent of the insurer on his malpractice policy before permitting his case history records to be turned over to the doctors whom his patients select. Even then, receipts should be taken from the new doctors, undertaking to preserve the files and to return them on request. Similar precautions could be valuable in the case of a lawyer, and of decedents who had other occupations. Once the decedent's records are scattered or destroyed, the defense of a claim can be indeed difficult.

The decedent's family seldom understands the importance of preserving all of his records until the various statutes of limitations have run against any claims which might be asserted (including tax liabilities), and counsel usually has to be very definite on this point.

Counsel Should Hold the Policies

It is advisable for the lawyer to hold all the policies. If he does so, he can conveniently secure and attach the proper endorsements when values increase or decrease, when the estate is distributed, and on the numerous other occasions when changes are necessary. And when a property is sold or a lease surrendered, he can terminate the policies or sell them to the buyer. At the time of distribution, he can secure endorsements in the names of the new owners, and then de-

liver the policies to them, if that is proper.

Termination of Unnecessary Policies

Policies no longer needed, such as a doctor's malpractice policy, or the office liability policy after decedent's office has been vacated, should be promptly terminated and the unearned premiums collected. It is better to terminate by endorsement (bearing written acceptance by the personal representative) or by notice to the insurer, so that the policy can be retained, than by surrender of the policy, when there is even a remote possibility of a claim being asserted later.

Counsel Should Keep Himself as Well as His Clients out of Trouble

The well-advised lawyer will protect himself against financial loss by carrying a Lawyer's Liability Policy, but such insurance will not protect against the loss of a client or against damaging criticism.

Whenever the client looks to the lawyer to "*Keep him out of trouble,*" the lawyer must, for his own protection, make sure that the client is properly covered by insurance or, if the client refuses to buy adequate protection, he must present to the client, by letter, the need for each policy, explaining the hazards, the cost per day or, if a business, in terms of units of product, and the comparative coverages and costs of

different policies. Then, if the client does not buy adequate protection, he cannot later complain that he was not well advised by counsel.

This suggestion is highly important. Once the matter of insurance has come up between lawyer and client, it will be extremely difficult, after a loss, for the lawyer to explain why the client was not adequately insured. For the safety of the lawyer-client relationship, the lawyer must make sure the client is adequately insured, or make his explanation *before* the loss. You may be sure that if your client has a loss not covered by insurance, he is going to blame someone, and you do not want to be that one.

How to Do It

1. List *all* of the decedent's properties, real and personal.
2. Identify and list the *present* owner or owners of each property.
3. Get in your hands all of decedent's insurance policies and sort them by properties.
4. Taking one property at a time, unfold and read the policies. Study

the continuation clauses and decide whether you can safely rely on them. If you do, be sure to give any required notice. Without waiting to complete your study, ask the agents for endorsements substituting the new owners as named insureds.

5. Still considering one property at a time, note for each property the coverages and limits of protection afforded by existing policies, the gaps that need to be filled, and the questions that need further study.

6. With the agent, inspect every property.

7. Discuss these gaps and questions with competent agents and improve the policies until you are satisfied that the coverages are complete and that the policy limits are adequate.

8. Do not accept renewals in the name of decedent or of his estate.

9. *Don't hesitate to ask questions of agents and adjusters.*

10. Remember the basic rule of insurance buying: The time to adjust the loss is when you buy the policy.



CITATION ?

1. Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him.
2. I am as sober as a judge.
3. Time whereof the memory of man runneth not to the contrary.
4. For a man's house is his castle, . . .
5. The first thing we do, let's kill all the lawyers.

See page 88 for answers.

How to Conduct a Bulk Sale

By *Frank W. Miller*

Associate Professor of Law,

Washington University

MORE than one lawyer has suggested that the best way to comply with a bulk sales statute is to ignore it. No judgment is here passed on the merits of that suggestion, but it obviously cannot be adopted or this author will have nothing to write about. So this paper proceeds on the assumption that the buyer's lawyer—it is perhaps unnecessary to mention that this paper is directed at lawyers representing buyers, for it is they who are primarily interested in complying with the statute—has decided to comply with at least some of the provisions of the statute, and that that "some" is at least enough to make the deal a safe one for his client. A further assumption, and a warning as well, is that readers will not neglect to note carefully that the variants in bulk sales statutes are numerous indeed, and so will realize that what is said here is not equally applicable to all jurisdictions.

THE ROUTINE BULK SALE

Though bulk sales statutes are in many other respects filled with vagaries, the procedure to be followed in order to effect compliance is ordinarily set out with remarkable clarity. And it is a simple one. There are, in essence, four basic requirements: (1) procurement of an inventory of what is to be sold, (2) procurement of a list of the seller's creditors, (3) notification of those creditors, and (4) waiting a certain number of days before consummating the sale. These will be discussed in the order indicated.

The Inventory

The usual requirement is that the buyer obtain from the seller a ". . . full detailed inventory showing the quantity, and, so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included. . . ." I have found no cases which were

concerned with the details of that inventory. The statutes, however, seem clearly to demand a detailed quantity listing of items, for the "reasonable diligence" standard is in terms applicable only to the necessity for listing the cost price to the seller, and not to the enumeration of items. No hard and fast rules can be laid down in a situation such as this. Principles of common sense and practicality must be considered. On the whole the best guide I can offer is that the attorney make certain that the inventory is a fair one, and that it is an honest representation to the seller's creditors of the extent and value of the merchandise. Whether or not the applicable statute requires it, a copy of the inventory should be retained at least during the period of the running of the statute of limitations—but that is only good office practice in any event.

The List of Creditors

Most statutes require simply that the buyer demand of and receive from the seller a complete list of the latter's creditors. But the courts have made clear the meaning of the word creditors. In short, a creditor is anyone to whom the seller owes money. The word means not merely lien creditors or judgment creditors, or even merchandise creditors; it means all creditors. The job of the buyer's lawyer, therefore, is to make certain that the list supplied by the seller is not merely a list of "business

creditors" or "lien creditors," and, most important, he should make certain that the list contains no statement that "no one else has any claim to the goods being sold." The latter phraseology has meant to several courts that there are unlisted non-lien creditors and that the buyer should have realized this and so was chargeable with notice that the list was an incomplete one. And the statement holds true in spite of the fact that in general a complying purchaser is protected against creditors omitted from the seller's list.

Several of the statutes require notification, in addition to the creditors on the list, to all creditors ". . . of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge. . . ." Clearly some duty is imposed by that statutory language to do more than merely accept blindly the seller's list, at least under some circumstances. Yet, considerations of practicality and common sense are implicit in the reasonableness limitation, and so limit the necessary scope of the inquiry outside the list.

Then, too, many statutes state a requirement of good faith in procuring the list of creditors. Here too obliviousness to patently obvious facts would seem to be a possible basis for upsetting a transaction. Once again the area under consideration has received little attention from the appellate courts. My only suggestion is that the attorney must view with some skepti-

cism seemingly unusual representations of the seller, and investigate the accuracy of such representations in at least the routine places. Good faith and common sense are again appropriate criteria.

Notification of Creditors

Although a few of the statutes require filing in a public place as the means of notification of creditors, most of them require that some notice be communicated directly to the known creditors. The simple and practical way to accomplish this is to send the notices by registered mail, return receipt requested. If that is done, there can be no doubt that the notice requirement has been met. Here it is well to stop for a word of warning. Send the notices! Do not merely send a check to each listed creditor for his proportionate share of the proceeds of the sale, even though the seller is willing that you should, unless the buyer has complete confidence in and knowledge about the honesty and solvency of the seller. For there is some case law which suggests that notification and waiting are in and of themselves requirements designed to protect *unlisted* creditors, and that the failure to take those steps may result in the sale's being upset.

The statutes vary as to the contents of the notice. Several of them require, and conservative practice dictates anyway, that the notice should contain (1) a list of the

names and addresses of the seller's creditors, (2) a copy of the inventory, and (3) a full disclosure of the terms and conditions of the sale. I suggest, even in the absence of a specific statutory requirement, that those things be included, principally because such a transaction involves, beyond its technical legal aspects, the necessity for convincing the seller's creditors that the transaction is just what it actually is—a fair and honest business deal.

Waiting

The final requirement is merely to wait for the statutorily prescribed period, usually between five and ten days. It is during that period that creditors may attack the transfer on *independent* legal grounds. For example, they may choose to try to have the transaction's consummation prevented on the ground that it is a fraudulent conveyance. The reason for strict compliance with the waiting period is simple. So long as the transfer is not actually consummated, it cannot serve as a basis for bankruptcy proceedings, for a sale made in compliance with the bulk sales statute does not, independently of other factors, constitute an act of bankruptcy. Of course, practical considerations may enter the picture here too, and confidence in the solvency and honesty of the seller may influence the buyer and his attorney to bypass the waiting requirement. The job

of the lawyer is to impress his client with the seriousness of the situation should that confidence prove unfounded.

THE "PENNSYLVANIA FORM" STATUTE

Several bulk sales statutes, modeled on the former Pennsylvania statute, impose still an additional requirement on the buyer. They require that the buyer be responsible for the application of the proceeds to the prorata discharge of the seller's debts as disclosed by the verified list of creditors. The practical answer in such a jurisdiction is to pay the proceeds into the hands of the statutorily designated official if there is any question at all of who is entitled to receive them. Thus, the red tape attendant on compliance is reduced considerably.

SOME SUGGESTIONS AS TO ALTERNATIVES

In addition to out-and-out non-compliance with the statute based on confidence in the seller's honesty and solvency, other alternatives are worthy of some consideration. Three principal ones are (1) obtaining a waiver from the seller's creditors, (2) posting a bond, and (3) using an escrow device.

Waiver

Here it is essential to distinguish between those statutes which have an application-of-proceeds requirement and those which do not. For

in the absence of such a requirement, the waiver device is a useful one only if the seller has done the job of obtaining the waiver in advance; otherwise all of the steps will have to be gone through anyway. Thus, it will be necessary to get the details of the transaction into the hands of the creditors before they will be willing to waive, and the length of time involved in obtaining waivers will almost inevitably be as long or longer than the statutory waiting period. So it would seem that an attempt on the part of the buyer to obtain waivers at that late date does no more than put on him an added and unnecessary burden. Although it may be argued that a waiver will mean continued agreement on the part of the creditors to let the transaction be completed, they cannot stop it in any event unless there are some additional factors for, as has already been stated, a bulk sale in compliance with the statute is not improper. If there are other factors present, it is unlikely that the waiver could be obtained.

On the other hand, if the statute places a duty on the buyer to see that the proceeds are applied to the payment of the seller's debts, the waiver device may be a useful one. Frequently in the case of a sale on an installment or other deferred basis, or in situations where it is commercially sound and unobjectionable with the application-of-proceeds retention of at least some part of the proceeds by the seller, compliance with the application-of-proceeds re-

quirement would not be commercially sensible. In such a situation the proper procedure is to comply with the statute through the notification stage, and then call a meeting of creditors for the purpose of getting them to waive the application-of-proceeds requirement. If some of them are unwilling it may be possible to pay them off with the consent and knowledge of the other creditors; or, in many instances, to point out to them that they stand to lose in the long run by refusing to go along, because of the unlikelihood of the seller's being able to make other arrangements which would eventually give them as much.

Bond and Escrow Arrangements

Although express statutory authority for the use of a bond or escrow device is rare, there would seem to be no reason why their use should not be satisfactory. If a bond is used, the buyer should make certain that it may be sued on by creditors either for the benefit of the individual creditor bringing suit or for the benefit of the creditors as a group. The choice is, obviously, dependent on the law of remedies generally applicable in bulk sales situations in the particular jurisdiction. Secondly, the bond should remain in force for the period of the applicable statute of limitations, whether that period be found in the bulk sales statute itself, or in more general provisions of the code, as is usually the case. Similarly the es-

crow arrangement may serve the same purpose and be handled in about the same way. Of course some additional expense is involved in the use of these devices. Probably the escrow device is less expensive, particularly if the seller's financial position would render the cost of bonding unusually high. Certainly it is true that both devices are more useful in jurisdictions which have a short statute of limitations.

CONCLUSION

There is no "best way" to comply with a bulk sales statute in the sense that any one procedure is best for all situations. No set of guides or ponderous pieces of advice will eliminate the need for common sense and sound judgment on the part of the lawyer as he is called on to solve a particular bulk sales problem—a problem which is always just a little bit different from all other bulk sales problems. Nevertheless it may not be amiss to suggest a few general guideposts which should always be kept in mind:

Don't just think or suppose your client's seller is solvent and honest before you recommend noncompliance in part or in full. Be sure of it!

Remember that there are several ways of skinning this particular cat. Use the one which is best adapted for the specific problem before you, even though other techniques might be more satisfactory in most cases.

You cannot avoid making judgments. Practicality must be weighed

against maximum caution. The best criterion here is full disclosure to and fair treatment of the creditors of the seller, of the seller himself, and, of course, of your client. Remember that your client presumably wants the deal to go through, not to fall through. That requires cooperation on the part of creditors.



BIBLIOGRAPHY

Billig, Bulk Sales Laws: A Study in Economic Adjustment, 77 U. of Pa. L. Rev. 72 (1928).

Billig, Article 6—Order Out of Chaos: A Bulk Transfers Article Emerges, 1952 Wis. L. Rev. 312.

Billig and Branch, The Problem of Transfers under Bulk Sales Laws: A Study of Absolute Transfers and Liquidating Trusts, 35 Mich. L. Rev. 732 (1937).

Billig and Smith, Bulk Sales Laws: A Study in Statutory Interpretation, 38 W. Va. L.Q. 309 (1932).

Billig and Smith, Bulk Sales Laws: Transactions Covered by These Statutes, 39 W. Va. L.Q. 323 (1933).

Harris, The Bulk Sale as a Vehicle for Effecting Out-of-Court Settlements with Creditors, 55 Com. L.J. 317 (1950).

Miller, The Effect of the Bulk Sales Article on Existing Commercial Practices, 16 Law & Contemp. Prob. 267 (1951).

Miller, Bulk Sales Laws: Businesses Included, 1954 Wash. U.L.Q. 1.

Miller, Bulk Sales Laws: Property Included, 1954 Wash. U.L.Q. 132.

Miller, Bulk Sales Laws: Meaning to Be Attached to the Quantitative and Qualitative Requirements Phrases of the Statutes, 1954 Wash. U.L.Q. 283.

Weintraub and Levin, Bulk Sales Law and Adequate Protection of Creditors, 65 Harv. L. Rev. 418 (1952).

Legis., 82 U. of Pa. L. Rev. 856 (1934).

Note, 2 Brooklyn L. Rev. 247 (1933).

CLE AROUND THE COUNTRY

Continued from page 9

vised. Also, there are innumerable topics not covered by the handbooks, and not sufficiently comprehensive to justify a book, which will be treated in the form of articles.

The Committee feels that the format and size of *The Practical Lawyer* are appealing. It will be a "commuter's digest," or something to be easily absorbed in spare moments.

* * *

We call your attention to two features in this issue, *Authors and Articles* at page 3 and *Concurrences and Dissents*, at page 87. Both will appear regularly. *Authors and Articles* will be a brief "Who's Who," with biographical materials and sidelights about contributors to *The Practical Lawyer*. *Concurrences and Dissents* will include constructive, critical, and supplemental comments about the principal articles, by those requested to review them prior to publication, and by readers on a voluntary basis.

* * *

It is now well known that the Committee has participated in more than 350 institutes and lecture courses in 44 states. Less known is that the Committee never functions as a sponsor. One of the first policies adopted was that the project should be of the "grass roots" variety. The wisdom of this has been many times proved.

The real sponsors are state and local bar associations, law centers,

law schools and other lawyer organizations. The Committee encourages these groups to organize and conduct their own projects, and to do so on a long-range basis.

The Committee is, therefore, a co-operating agency for the local sponsors. The amount of cooperation is commensurate with the amount the sponsor desires. In one instance, it may be limited to supplying one or more speakers from its panels which now include more than 1,000 lawyers from all parts of the country. Or it may be confined to supplying lecture outlines or handbooks.

At the highest level, which is the most typical, it can be said that the Committee does the bulk of the work. Only local administration is left for the sponsor. The subject for an institute is mutually agreed upon—the Committee (1) supplies the speakers, subject to local approval, (2) prepares circulars and publicity, (3) furnishes lecture outlines, and (4) supplies its handbooks.

Naturally, the enactment of the Revenue Code of 1954 created an unprecedented demand for institutes. The Committee responded, and collaborated in programs in such widely divergent points as Idaho, North Dakota, Ohio, Michigan, Georgia, Pennsylvania and Connecticut. Some of these were one-day affairs, merely highlighting the changes. Others were comprehensive in nature.

In the long pull, however, it is the ordinary garden variety sub-

jects which have appeal. It is gratifying to see lawyers "go back to school." It is more so to see them studiously attend institutes on such commonplace subjects as Basic Accounting for Lawyers, The Drafting of Partnership Agreements, Organizing Corporations and even Law Office Management.

It is likewise satisfying to see institutes thrive in small communities in the hinterland. Lecturers give of their time to audiences as small as ten. The North Dakota State Bar Association, through its Committee Chairman, Floyd Sperry, of Golden Valley, and its Executive Director, Ronald N. Davies, of Grand Forks, has reason to look with pride on its project—at least one or two institutes at its annual meeting, an annual tax school, and, to meet an emergency, an elementary and an advanced coverage of Oil and Gas Law and Practice.

Clyde Williamson, of the upstate community of Williamsport, Pennsylvania, provided the impetus for successful programs since 1950. George Turner, Executive Secretary of the Nebraska State Bar, and Laurens Williams of Omaha have spearheaded a long list of projects in their State. Others will be mentioned in this column in the future. While the state or local sponsor may function through a committee or independent and sometimes complicated organization, it is usually found that one or two individuals are the driving forces. And that is a lesson that should sink in

—someone must take the bull by the horns.

In future issues there will be comments about specific programs in specific communities, large and small. It is the hope that these comments will have a contagious effect.

* * *

The above remarks were about communities in which the Committee on Continuing Legal Education has been an active participant. But there are many others where it has not. The Committee has no monopoly on post-admission legal training, nor does it seek one. It may be stated without fear of contradiction that there are throughout the country more independent programs than there are those in which the Committee cooperates.

The Committee knows of some of these, but not of others. It would like to have current information about *all*, to function better as a clearing house of information.

In this column we shall be glad to give advance publicity to all institutes. This may be considered as a standing invitation to all sponsors to send us the material for publicity purposes. Any institute, large or small, is important.

* * *

The Modern Prudent Investor—How to Invest Trust Funds is the newest of the Committee's practical handbooks—off the press at Christmas time, 1954. Not strictly legal in nature, it will be of inesti-

mable value to attorneys who act as trustees or as counsel for fiduciaries, to fiduciaries themselves, even to trust companies, and to anyone facing the problems of how to invest and reinvest trust funds. For it contains understandable practical advice as well as the legal limitations of the prudent investor rule.

The author—a scholarly but practical lawyer from Boston—is Charles P. Curtis. Mr. Curtis is a former member of the Committee on Continuing Legal Education, whose interests are broad. He also authored the recently published work entitled *It's Your Law*. The price of *The Modern Prudent Investor* is \$2.50 per copy and orders are taken by The Committee on Continuing Legal Education, 133 South 36th Street, Philadelphia 4, Pa.

Hot off the press in January, 1955 is *A Civil Action—The Trial*, (\$2.50 per copy) by Wilfred R. Lorry, a prominent Philadelphia trial attorney and lecturer. This publication, a most handy guide to both experienced and inexperienced trial lawyers, completes Series III of the Committee's works on The Preparation and Trial of a Civil Action. Others in the Series are:

Preparation for Trial, by Eustace Cullinan and Herbert W. Clark of the San Francisco Bar—\$2.50

From Pleadings to Opening of Trial, by Hubert Hickam of the Indianapolis Bar—\$2.50

Basic Problems of Evidence, by Professor Edmund M. Morgan of Vanderbilt University

School of Law and formerly of Harvard Law School—2 volumes—\$5.00

A Case on Appeal, by Honorable Herbert F. Goodrich of the U. S. Court of Appeals for the Third Circuit, Ralph M. Carson and Honorable John W. Davis of the New York Bar—\$2.50.

The entire series sells for \$12.00. To provide uniformity from state to state, the books in this series are built around the Federal Rules of Civil Procedure.

In preparation also are eight new books for the general practitioner in the tax field. All will incorporate the Revenue Code of 1954, and all are scheduled for publication at intervals commencing as early as possible in 1955. Included will be separate works on the Taxation of Individuals, Partnerships, Corporations, Fiduciaries, Farmers, Associations and Charitable Organizations, Pension and Profit Sharing Plans and Tax Fraud Cases. They will be discussed in greater detail in future issues of this column.

* * *

It is the earnest hope of the editors that they will in the months and years to come, have a constant flow of fresh, stimulating materials for *The Practical Lawyer*. Voluntarily contributed articles of an acceptable nature will be welcomed. Also, please send the editors suggested subjects for articles which will be of value to the bar.

JOHN E. MULDER

Concurrences and Dissents

IN RE: INFORMAL PROCEDURE
BEFORE THE NLRB,
pp. 31-52.

*Wm. B. Spann, Jr. of Atlanta,
Georgia:*

At page 37 the authors discuss the time-saving value of the consent election procedure, and suggest that one party or the other may, where there is no legal issue and, therefore, no legal justification for a formal Board hearing, insist upon such a hearing in order to obtain time to campaign for a change in employee sentiment. They further suggest that the party seeks to hide its true motive by taking a position on an issue to make a consent election impossible. They suggest that a charge of stalling by the other party "may well have serious repercussions with the electorate against the insisting party."

I believe that the authors are, in these suggestions, overlooking the principal fact that the vast majority of election petitions are filed by unions when they consider their timing exactly right and that frequently an employer is faced with an election petition when that petition is the first knowledge that the employer has of the extent of union organization. In the days of the "prehearing election" prior to the

Taft-Hartley law, the Board would expedite an election to such an extent that the employer found the election over before he could even crystalize his own thinking. Primarily because of this attitude of the Board those prehearing elections were abolished and only the consent election procedure remains.

I am not suggesting that the long delay required by a hearing is advisable or justifiable from a moral or practical point of view where there are no issues to be determined by a hearing. However, the general practitioner should understand clearly that he is entitled to this delay as a matter of right if he insists upon a hearing, and I do not believe he need "conceal his motives." In a consent election agreement the parties must consent to all details of the election, including the date and time of the election, and it is entirely proper for a party considering a consent to insist that the election be held at a date which would give a reasonable opportunity to reply to the other party's position, or as the authors put it, "to campaign." If the other party refuses to permit such reasonable time in the consent agreement, in lieu thereof the first party may simply insist upon a hearing. I believe this a most practical consid-

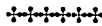
eration which is ignored by the authors, perhaps due to their former close association with official agencies. . . .

Please note that I am not suggesting any subterfuge as the au-

thors propose, but simply a very frank statement to the other party and to the Board staff as to the need for a reasonable time properly to inform the employees participating in the election.



EDITOR'S NOTE: *The Practical Lawyer* invites its readers to submit comments on articles. It will be pleased to publish such comments, either by way of agreement or dissent, as will contribute to a better understanding of problems discussed in published articles.



ANSWERS TO "CITATION"? on page 77

1. John Selden, Table Talk, Law.
2. Henry Fielding, Don Quixote in England, Act III, Sc. 14.
3. Sir William Blackstone, Commentaries, Vol. 1, Book 1, Ch. XVIII, § 472.
4. Sir Edward Coke, Third Institute, p. 162.
5. William Shakespeare, King Henry VI, Part II, Act IV, Sc. 2, Line 86.

With thanks to *Bartlett's Familiar Quotations*, Little, Brown and Company, Boston, Twelfth Edition, 1951.

INTERNATIONAL PRINTING COMPANY
236 Chestnut Street, Philadelphia 6, Pa.
Speed - Service - Accuracy - Since 1895
Haig Pakradooni - Dikran Pakradooni - Aram Pakradooni
LOmbard 3-3851

CLASSIFIED

Rates: 20 cents a word. Minimum charge \$2.00.

M. A. NERNBERG, EXAMINER OF DISPUTED DOCUMENTS. Thirty years' experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. 1728 Grant Building, Pittsburgh, Pa. Phone ATlantic 1-1911.

For Sale
Law Books Bought and Sold
Inquire Box 23 *Practical Lawyer*