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University of California
Berkeley, California

Pillsbury, Madison & Sutro Oral History Series

Noel J. Dyer

LAWYER FOR THE DEFENSE: FORTY YEARS BEFORE CALIFORNIA COURTS AND COMMISSIONS

With an Introduction by
Dudley A. Zinke

An Interview Conducted By
Carole Hicke
1986-1987

Since 1954 the Regional Oral History Office has been interviewing leading participants in or well-placed witnesses to major events in the development of Northern California, the West, and the nation. Oral history is a modern research technique involving an interviewee and an informed interviewer in spontaneous conversation. The taped record is transcribed, lightly edited for continuity and clarity, and reviewed by the interviewee. The resulting manuscript is typed in final form, indexed, bound with photographs and illustrative materials, and placed in The Bancroft Library at the University of California, Berkeley, and other research collections for scholarly use. Because it is primary material, oral history is not intended to present the final, verified, or complete narrative of events. It is a spoken account, offered by the interviewee in response to questioning, and as such it is reflective, partisan, deeply involved, and irreplaceable.

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NOEL DYER

1985

ILLUSTRATIONS

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Charles F. Prael, Litigation and the Practice of Labor Law at Pillsbury, Madison & Sutro: 1934-1977, 1986.

John A. Sutro, Sr., A Life in the Law, 1986.

Albert J. Brown, Building the Corporate-Securities Practice at Pillsbury, Madison & Sutro: 1942-1987, 1988.

John B. Bates, Litigation and Law Firm Management at Pillsbury, Madison & Sutro: 1947-1987, 1988.

Francis N. Marshall, Looking Back: A Lifetime Among Courts, Commissions, and PM&S Lawyers, 1988.

Harry R. Horrow, A Career in the Practice of Tax Law at Pillsbury, Madison & Sutro: 1944-1987, 1988.

Noel J. Dyer, Lawyer for the Defense: Forty Years Before California Courts and Commissions, 1988.

Wallace L. Kaapcke, "General Civil Practice" - A Varied and Exciting Life at PM&S, 1988. In Progress

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PREFACE

The history of Pillsbury, Madison & Sutro extends more than 100 years. Its founder, Evans S. Pillsbury, commenced the practice of law in San Francisco in 1874. In the 1890s, Frank D. Madison, Alfred Sutro, and Mr. Pillsbury's son, Horace, were employed as associates. In 1905, they and Oscar Sutro became his partners under the firm name Pillsbury, Madison & Sutro.

In serving thousands of corporate and individual clients over the years, the firm helped to write much California history. It played a leading role in landmark litigation in the Supreme Court of California and other courts. In its offices, a number of California's largest corporations were incorporated and legal arrangements for numerous major transactions were developed. In addition to its services to business and other clients, the firm has a prominent record of services to the legal profession and to the community, charitable, and other endeavors.

In March 1985, with the firm approaching 400 attorneys situated in multiple offices, the Management Committee approved the funding of an oral history project to be conducted by the Regional Oral History Office of The Bancroft Library of the University of California, Berkeley. The purpose of the project is to supplement documents of historical interest and earlier statements about the firm's history with the recorded memories of those who have helped build the firm during the past fifty years. It is our hope that the project will preserve and enhance the traditional collegiality, respect, and affection among the members of the firm.

George A. Sears
Chairman of the Management Committee

May 1986

INTRODUCTION

Noel Dyer's oral history begins and ends in San Francisco. He is a native of the City -- one of the handful of such lawyers practicing at Pillsbury, Madison & Sutro, which now selects its beginning lawyers from the entire nation and even some from overseas. Noel's history is an entertaining account of his more than forty-five years of law practice at PM&S. For almost forty of those years, he has been not only my teacher and respected professional colleague, but also my close friend.

In his professional career, Noel has been and is first and foremost a trial lawyer -- talented, effective and esteemed by lawyers both within and outside our firm. In his history, which follows, his remarkable versatility immediately strikes the reader. Unlike many successful trial lawyers, he has not limited himself to one field of litigation. He has tried cases not only in the state and federal courts, but also before state and federal administrative agencies. His cases have involved such diverse issues as personal injuries, trade secrets, contract and product liabilities, utility rates, water rights and civil liberties, among others.

Starting with workers' compensation cases, Noel soon assumed responsibility for the defense of suits for injuries resulting or allegedly resulting from toxic and explosive substances produced at plants operated by the firm's clients, the ingestion of prescription drugs manufactured by clients, the consumption of food products sold by clients, and the use of agricultural pesticides produced by clients. That litigation required him to know much about both the human anatomy and its functions and chemical and medicinal characteristics of many complex pharmaceutical and chemical products. His trial of utility rate cases before the California Public Utilities Commission required his intimate familiarity with the principles of finance and accounting. His handling of water rights cases involved a knowledge of the highly complex water law of California -- a field to which specialists often devote their entire professional careers.

Noel's success as a trial lawyer has come not only from his mastery of the facts and thorough knowledge of the law, but also from his friendly manner, pleasing to judges and juries alike. It is indicative of his careful preparation that even as a senior trial lawyer in the firm, he was frequently found in the library reading cases -- a task often delegated by others to younger associates. His manner is low-key and down to earth, but as an adversary he is tough and unrelenting.

Although his cases were matters of serious concern both to himself and his clients, he was quick to appreciate the humor in situations found in them, as is apparent from his history.

My professional association with Noel has been chiefly in the practice of public utility and common carrier regulatory law. In that association he has always been helpful. Whenever I faced a thorny problem I generally consulted him, because he would always take time from his busy schedule to discuss the problem and his advice was invariably sound.

Except for his forebears, Noel mentions his family only in passing. He has a delightful wife, Eleanor, and two fine sons, Paul and Larry. One can tell from the warmth and pride with which Noel speaks of them elsewhere that they have given him the support and inspiration necessary to his productive and successful career.

Working with Noel has been a privilege for me and knowing him as a friend has been among my happiest associations.

Dudley A. Zinke
Pillsbury, Madison & Sutro

April 8, 1988

INTERVIEW HISTORY

Noel J. Dyer was interviewed as part of the series of oral histories being done with twelve advisory partners at Pillsbury, Madison & Sutro. Mr. Dyer was an active litigator responsible for a great many matters of interest and significance.

Mr. Dyer joined PM&S in 1940. In the course of his career he became particularly expert in the field of medical injuries and pharmaceutical product liability cases. Silicon Valley trade secrets, California water rights, agricultural chemicals and paint, guns, and computers were all matters on which he litigated. He also handled public utilities matters, representing Pacific Telephone & Telegraph Co., Railway Express Agency, Western Union, and other utilities companies on rate cases before the Public Utilities Commission.

Four tape-recorded interview sessions took place in Mr. Dyer's Russ Building office in the San Francisco financial district. The interviews were done on March 18 and 31, May 20, and June 22, 1987. An outline of topics to discuss and copies of legal opinions furnished by the interviewer provided the starting point for his oral history. His enthusiasm for his work and his colleagues is clearly apparent in the recollections of his career at PM&S.

After the tapes were transcribed, Mr. Dyer carefully corrected the edited transcript and added more information that he considered pertinent. He was helpful in assembling the photographs and other illustrative materials.

Carole Hicke
Project Director

July 1987

Regional Oral History Office
486 The Bancroft Library
University of California, Berkeley

Regional Oral History Office
Room 486 The Bancroft Library

University of California
Berkeley, California 94720

BIOGRAPHICAL INFORMATION

Your full name NOEL JOHN DYER

Date of birth DEC. 25, 1913 Birthplace SAN FRANCISCO, CA.

Father's full name JOHN DYER Birthplace SAN FRANCISCO CA

Occupation OWNED GROCERY STORES.

Mother's full name HAZEL NUGENT DYER Birthplace OAKLAND, CA.

Occupation HOUSEWIFE.

Family

Spouse ELEANOR O'BRIEN DYER

Children PAUL DYER AND LAWRENCE DYER.

Where did you grow up? SAN FRANCISCO, CA.

Education ST. IGNATIUS HIGH, UNIV. OF SAN FRANCISCO AB '36 J.D. '39

Areas of expertise LITIGATION (PRODUCT LIABILITY, TRADE SECRETS ETC)
PUBLIC UTILITY LAW, WATER RIGHTS.

Special interests or activities ELEANOR AND I ACQUIRED A SMALL APPLE ORCHARD AND A HOME AT SEBASTOPOL CA ABOUT 16 YEARS AGO WE SPEND CONSIDERABLE TIME THERE WORKING ON THE PLACE AND ENTERTAINING FAMILY AND FRIENDS. I ALSO ENGAGE IN PRO BONO ACTIVITIES FOR THE STATE BAR, S.F. BAR ASSOC AND USF LAW SCHOOL AS WELL AS VARIOUS CHARITABLE ORGANIZATIONS.

I BACKGROUND

[Date of Interview: March 18, 1987]##*

Family History

Hicke: I wonder if we could just start this afternoon, Mr. Dyer, by getting some of your recollections of your family. Perhaps we could start with when and where you were born.

Dyer: I came into this world on Christmas day in 1913, and I was born in San Francisco, the second of four children, one of whom survives besides me. My parents were John and Hazel Dyer, both of whom were also natives of this city.

Hicke: Oh, that's interesting. Kind of a rare situation to find a true native.

Dyer: My mother's parents were born in the U.S. of Scots and Irish antecedents. They were in this city many years before my birth. They died while quite young, and thus, of course, I did not know them.

Hicke: How did they happen to come to San Francisco?

Dyer: They initially came from Chicago and New York, and I think they came to San Francisco because my great-grandfather was a Scots sea captain who arrived here in the earlier 1850s. I think the lure of California, so the story went, had more attraction than skippering a

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* This symbol, ##, indicates a tape interruption or the beginning or end of a tape side.

sailing vessel from the British Isles to the United States. The story may be apocryphal; I'm not sure. But it is that he left the ship and settled in California, and then eventually brought his family, which was my mother's family, to San Francisco.

Hicke: So this is your maternal great-grandfather.

Dyer: My great-grandfather. My grandfather died rather tragically due to a shooting incident in San Francisco in which he was an innocent victim when he was about twenty-nine or thirty years old. And my maternal grandmother also died quite young, and that left my mother to be raised by a maternal aunt.

My father, by the way, was the youngest of four children, and the other children were quite senior to him. My grandfather came to San Francisco in the early days, and it was in, I think, the 1850s. He was one of five brothers that lived in Beverly Farms, Massachusetts. Basically I think they were Irish; I think the name initially was Mac-Dyer. He came -- one of five brothers -- to San Francisco, I suspect because he was the unsuccessful one of the five, and like a lot of earlier settlers in San Francisco, why he came here to seek a better fortune.

Hicke: He was the youngest, you said?

Dyer: He was the youngest of the brothers.

Hicke: So he had a few hard acts to follow.

Dyer: That's right. I never knew my grandparents. My grandmothers and my maternal grandfather died many years before my birth. The other grandfather died soon after I was born.

One of the interesting, to me, at least personally, memos that I came across after the death of my brother a few years ago was a baptismal certificate of my aunt Mary, who was an elderly lady, maiden lady. She died in 1946, and the baptismal certificate showed that she was born on August 12, 1863, in San Francisco and was baptised at Old Saint Mary's Church on California Street about ten days later. That gave me an interesting insight into the antecedents in my family.

Growing Up in San Francisco; Some Prominent Figures

Hicke: Was there an Irish community here that they were part of?

Dyer: I did not know an Irish community as such. My parents, of course, were both born in San Francisco, and thus I was not the child of immigrant parents. And as a matter of fact, my grandparents -- my maternal grandparents -- were born in the United States. My mother was part Scottish, but the rest of them were pretty much Irish.

And so I was not the child, nor were the children in my family, obviously, the children of immigrant parents. We were quite a bit removed from that, even as long ago as that, so I never had any sense that we were living in other than an American community. It was mixed, with a fair number of Italians and Germans and so forth.

One of the marked differences between that time and now in San Francisco was, with the exception of the Chinese, the presence of any minority community. Of course, now I understand that San Francisco is probably more than 50 percent minority residents; in those days they were all Caucasians, with the exception of the Chinese, who were in Chinatown.

Hicke: What part of the city did you live in?

Dyer: I lived in the Mission District, which was an old district, now largely occupied by the Hispanics, but I left there, oh, very early; in the early 1930s I moved from there.

Hicke: Did you ever see James Rolph?

Dyer: I remember him very well. James Rolph lived at 29th and Guerrero Streets, and at that time we lived at 19th and Guerrero; there was a hill there. James Rolph was a consummate politician and a very affable guy; he wore striped pants, a black coat similar to formal wear, a wing collar, a high silk hat, cowboy boots [quiet chuckle] and a white carnation, and he was always on the lookout to glad-hand somebody. I remember he had a chauffeured Pierce Arrow limousine, and he would come over the hill, and if there were enough people around and he saw, say, an old lady crossing the street, Jimmy would always get out, and if he didn't offer her a ride, help her across the street. He was just a tremendous politician, and didn't have much problem in getting re-elected in San Francisco.

Hicke: No. He was mayor for a long time.

Dyer: He was mayor for many years, and then, of course, became governor, and that was in the early '30s. But as a small boy around town, I remember him. He was very prominent and, indeed, a very interesting character.

In connection with the past generations in San Francisco who were prominent, I recall some of the lawyers who practiced in town who were

quite colorful. One of them was Garrett McEnerney, a very towering figure, a huge man physically, who wore a long black coat and a string tie and boots. He was very prominent when I was a boy in many major litigated cases.

He always had two or three younger lawyers accompany him to court. I remember him going into Judge Julian Goodell's court one day, and one of the young men had a little wooden stand which he placed on the counsel table so that McEnerney, who was quite tall and a very impressive-looking gentlemen with long white hair, could use it. He prefaced his remarks to the court, saying, "Your Honor, my age and eminence at the bar entitles me to this extra piece of furniture." [quiet chuckle] That's just one little incident about the interesting people that we had at the bar at that time.

One of the people, also, that I remember was old Judge [Matthew] Brady, who was district attorney here and afterwards a judge. He was a very colorful and interesting guy and an able politician.

Also I recall Judge [Adolphus] St. Sure, who was a very stern U.S. district judge. He ran the U.S. District Court, and in the early days when I first was in practice, there was Judge Roche.

Hicke: Is that Theodore or Michael?

Dyer: That's Michael Roche. I was later involved in a case before Judge Roche involving leases at the San Francisco airport.* TWA had obtained a very favorable lease, which allowed it to land and fly off its planes at charges much less than the rates subsequently fixed by the Public Utilities Commission, and the city claimed that the lease was void for various reasons. We tried that case before Judge Mike Roche.

Mike had an interesting background. I don't know if he had ever gone to law school, he may have, but his initial working antecedent was that he was a labor union official; I believe he was an officer of the Moulder's Union. I remember in that case the city claimed that the lease was void for, among other reasons, something called commercial frustration, because TWA had brought into use very large, four-engine planes, which it claimed busted up the airport runways, and it was incumbent on us to show that in those early days multi-engined planes landed there.

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* Trans World Airlines v. City and County of San Francisco (1956) 228 F.2d 473

I asked TWA to get us a witness to prove that such planes were in use at that point at that time, and it produced a --

Hicke: By other airlines?

Dyer: By TWA and other airlines. And it produced an old aviator, who seemed to me at the time to date almost from the Wright brothers. He had maintained a book in his own handwriting showing the planes that he had flown and where he had flown them. When I started to question him, he told how he had flown these twin engine planes, very early bi-planes, into and out of San Francisco, and he said, "As a matter of fact, in the early days," describing his experiences, "I used to make money by exhibition plane flights from union picnics" -- in those days unions had huge picnics at various picnic grounds in and around points in San Francisco -- he said, "I used to do that."

Mike interjected into the testimony, and he said to me, "Now young man, when I was an officer of the Moulder's Union, I used to arrange for such things. I want to put some questions." And he said to the witness, "Do you remember flying for the Moulder's out of Idora Park in Alameda County?" The fellow looked through his book, and he said, "Oh yes, on a certain Sunday I remember I did fly for the Moulder's, and they paid me." [quiet chuckle] And Mike said, "Tell me, where did you fly to that day?" And he looked at the judge, and he said, "Your Honor, that day I didn't make it over the fence." [both laugh] Which was a sort of amusing incident in an otherwise not too exciting case.

Getting back to my early background, my father died when I was quite young, when I was twelve. I continued on in San Francisco and went to local schools. I attended St. Ignatius High, which was and still is a prep school in San Francisco that more or less prepares people for college. And after that, why I went to the University of San Francisco both as an undergraduate and to its law school.

Hicke: Before we get there, let me ask you a little bit about other members of the family. Who had strong influence on you, would you say?

Dyer: Well, certainly my mother did; she was a grand lady. She lived to be quite elderly, well into her eighties. She, of course, had the greatest influence on me. And I had an uncle, I guess an uncle by marriage, who was a physician and was chief of staff at St. Joseph Hospital and quite a skilled surgeon; I remember him very well. He was a substantial guy and, I think among the male members in my family, had some influence on me.

Also I think the fact that I went to a high school where the classics and rather solid subjects were emphasized led me to want to go to college and ultimately to law school. And I found out early in

high school that I did have somewhat of a knack for public speaking and that sort of thing and an ability to write reasonably well. I certainly did a lot better in the literary and writing subjects than in the math courses. I did fine in the latter, but it was plain to me I wasn't fit to be any genius engineer or anything remotely approaching that. Then I went on to the university.

Hicke: What did you major in?

Dyer: In political science, with a minor in economics. We were a relatively small school in those days, and I came to know a lot of people. Most of them were local people, although by no means all, and I've carried over that acquaintanceship for many years subsequent to that.

Interest in the Law

Dyer: Let's see, let me think now. Where do you want me to go from here?

Hicke: Well, I'd like to know why you decided to be a lawyer. You've given me a slight indication, but what really did it?

Dyer: Well, I think the reason I became interested in law was that, first of all, I put out the local paper in the high school; I did the prosaic things like debating on the debate team and that kind of thing. I more or less gravitated towards that. Also in my political science courses I took some, oh, I don't whether you'd call them elementary law subjects, but subjects that touched on law subjects, such as getting somewhat into Blackstone's works and that sort of thing, and that was quite interesting. To this day I don't know what use it is to know what the corporeal hereditaments are [both laugh], but they were subjects that I was interested in and wanted to go on in.

Also at that time the legal profession certainly didn't have the numbers of people that are in it now, although of course there wasn't anything like the volume of practice that exists today, but it seemed to me that it offered an area of opportunity that was not as apparent in other fields. This was in the Depression days; I graduated from college in 1936 and times were not as --

Hicke: That was undergraduate?

Dyer: Undergraduate -- as easy as they might be. Also -- and I don't want to appear to be puffing or anything -- I was the valedictorian of my high school and my college classes. I belonged to the various honor societies and that kind of thing, and that also more or less gravitated me towards the law profession.

Also I had a good friend in school whose father was the city attorney at the time, and we would study at the city attorney's office. I did a little work occasionally -- not legal work, but the type of work where we gathered evidence and documents for the city attorney. It didn't amount to an awful lot.

I remember one case was the so-called One-Man Streetcar case in San Francisco.* There were two major streetcar lines in San Francisco: the Municipal Railway, which still exists, and the Market Street Railway, which competed. There were in those days a motorman and a conductor on the old iron streetcars, and the Market Street Railway proposed to operate its cars simply with a motorman who would also take the fares as they more or less do today, and there was a big lawsuit about that.

##[telephone interruption]

I gathered some material on that for the city attorney's office. That was one of the minor incidents, I guess, that more or less persuaded me that law was an interesting field to look into.

Hicke: Was it the union --

Dyer: Well, I think the union filed an action to enjoin the implementation of the one-man streetcar plan on various grounds, and the city was in favor of the one-man arrangement, so I did some work on that. And I saw the lawyers around there, and the people about the City Hall who were trying cases, and it seemed to me a very active and an interesting profession.

Hicke: Did you always plan to be a litigator?

Dyer: Yes. I never had much desire certainly to be a tax lawyer, although I by no means want to downgrade any other field of the law, because they all are essential and have very fine people in them. But I was always interested in appearing before boards and commissions; of course, that was the type of law I saw in my early days in City Hall and the U.S. Courthouse and places like that.

Also, later on my wife Eleanor's father was a very distinguished man connected with the United States Court of Appeals for the Ninth Circuit, and he had written --

Hicke: What's his name?

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* City and County of S.F. v. Market St.Ry.Co. (___Cir. 1938) 98 F.2d 628

Dyer: His name was Paul P. O'Brien. He had written books on appellate procedure and that sort of thing, and I remember he told me to visit the courthouse where there was to be an argument in what was known as the Thirty-Six case.* This was Section Thirty-six, I believe, of Elk Hills, although I'm not sure as to that. In any event it was known as that case, and it concerned ownership between Standard Oil and the government as to that very valuable section. This was some years before I was married or admitted to the bar, and I had never heard -- oh I had heard of, but I had no connection with PM&S at the time and had never heard of Gene Prince. Gene Prince was a very fine and able partner of PM&S for many years, and he was counsel in that Thirty-Six case. Associated with him on the case was Donald Richberg, who was a nationally known lawyer at the time. I heard their arguments before the court of appeals, and I was impressed by the performance of the lawyers there.

This was just another little example of the influences on a youngster growing up in San Francisco at the time. The Bar wasn't as big then.

I participated in the usual activities in college. I was the editor of the paper and that kind of thing.

Hicke: This is undergraduate?

Dyer: Undergraduate. Then I entered law school in 1936 and graduated three years later. As I say, there was a relatively small Bar in San Francisco at the time, and there weren't that many people that were attending law school. You have to remember it was the Depression, and a lot of people didn't go to college, and many fewer went on to professional school.

I remember when I took the Bar examination in 1939 there were about 750 took it, and about 250 passed, and there wasn't another examination given for a full year. So that year in California, there were only 250 new lawyers from law schools that were admitted to practice. Today, I believe, the number is in the thousands. That gives you a little contrast to see the differences that existed.

Hicke: That's an interesting perspective, indeed.

Dyer: When I got out of law school --

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* Standard Oil Co. of Calif. v. U.S. (1939) 107 F.2d 402

Hicke: Let me back up just a minute. Does anything come to mind when you were in law school, as far as professors, courses, some things that were particularly important to you?

Dyer: No. I have nothing that really sticks in my memory as particularly memorable. I know they flunked a lot of us. I suspect maybe that was due to the fact that the qualifications of the people that entered were not quite as high as the achievements and qualifications of the people that enter the schools nowadays, and again I think that was a function of the fact that then the major criteria of entering a professional, any professional school was whether one had the economic means to do so.

Hicke: And a high school diploma.

Dyer: A high school diploma and a college degree.

Hicke: Yes. College degree.

Dyer: I know there were drastic cuts in the class I was in, and probably they should have been made. As I recall, Hastings [Law School] and other schools in the area also had pretty decided attritions in those days.

II EARLY DAYS AT PILLSBURY, MADISON & SUTRO

Joining the Firm

Dyer: When I got out of law school, I was admitted in December of '39, and came to PM&S in February of 1940.

Hicke: Can you tell me that story?

Dyer: Well, I had applied to PM&S, and I came down and saw Alfred Sutro, who was John Sutro's father and was then a gentleman well into his seventies.

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Dyer: He interviewed me and said that they interviewed quite a few people from law schools, and hired a few, and of those they hired some of them were, as I remember his expression was, "Soon squeezed dry." [both chuckle] I don't know what he meant by that, but I was a little bit apprehensive.

Hicke: It doesn't sound too promising.

Dyer: I was also interviewed by Gene Prince, who left a somewhat gentler impression on me. But Alfred Sutro, of course, was a fine gentleman and I realized that at the time.

Hicke: What attracted you to PM&S?

Dyer: Well, I had one or two prospects from much smaller firms. I wasn't too sure of the nature or extent of their practice. PM&S, of course, was markedly smaller then than it is now, but even then, it was the largest firm in town with quite substantial clients, and I knew this. I think mainly it was a relict of my Depression upbringing that I knew this was a fine and substantial firm.

So a month or two after I was interviewed, why I got a call from Alfred Sutro one day, and all he said on the phone was, "If you want, you can come to work Monday morning." [both laugh] There was, of course, no employment committee at the time. I think that year there were five or six lawyers that were hired. I'm the only one that remains from those that were hired that year.

Early Partners and Clients

Dyer: The firm then was oh, I think they had seven partners; Jack Sutro was one of them.

Hicke: Felix Smith.

Dyer: Felix Smith was a very prominent partner at the time. He, of course, handled the Standard Oil [Company of California] matters, and worked with Renato Capocelli and Henry Hayes. He absolutely controlled that account; every letter that was written, no matter how inconsequential, that touched Standard's affairs, had to have his scrutiny and comments and indeed, he commented on them.

We had the telephone company [Pacific Telephone & Telegraph Company] as a client, and Mr. Alfred Sutro, I think, was in charge of that client at the time. Sam Wright, who was a very affable guy I always thought, did most of the telephone work, and seemingly handled most of that business by himself.

And then we had Del Monte as a client -- it was known as California Packing Corporation -- and that was handled by Marshall Madison; he also had Pacific Lumber, The Bank of California, and other clients. Gene Prince handled the Borden Company and Railway Express Agency.

Railway Express Agency, which had its demise a few years ago -- it went into bankruptcy -- was a historic and interesting client. It initially had been Wells Fargo, and I think had its genesis in the stagecoach days. It transported nationally, had tremendous certificates of public convenience and necessity that were unique. It handled all sorts of commodities -- live animals, precious jewels, as well as the more prosaic types of transportation articles -- and transported them in trucks and by plane. I worked on that business for Gene Prince, and as a matter of fact, succeeded to representing that client when Gene retired years later.

I did all the regulatory work for Railway Express over a period of many years.*

##[tape interruption, phone rings]

The Bullpen

Hicke: I want to hear about your work with them in more detail. But before we do that, I'd like to ask you what you did when you first started; I know you went into the bullpen first. But what happened the first day when you came to work?

Dyer: Well, when I first came here, Larry Kuechler showed me around. The firm was pretty much housed on the nineteenth floor of the Standard Oil building. The library was on that floor also, where the business office is. But there were younger people, most of the associates -- not most of them, but a good number of the associates -- on a portion of the twentieth floor, and then the so-called bullpen, where they had about five lawyers, was located on the twentyfirst floor.

Hicke: Was it the five newest?

Dyer: The five new ones were there. The bullpen existed, at least, up until 1942 when I left for the navy, and I don't recall whether it was still in existence when I returned in '46, but it had been an institution, I believe, at PM&S for some time.

I did some minor work when I first came here; I worked for Jack Sutro. I also did some work on the road. We had a road person who was a lawyer in those days, and we filed papers, obtained briefs, and information from the courts, and presented minor matters to the courts, and it was more or less of an apprenticeship and viewed as such in those days.

Hicke: It was called a roadman then.

Dyer: Called a roadman in those days. I did that work and also did some probate work with Harold Boucher.

Hicke: Who decided what work you did, or how was that worked out?

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* Railway Express Agency Inc. rate cases: 8/14/51 51 Cal.P.U.C. 59; 2/26/52 51 Cal.P.U.C. 471; 5/24/49 48 Cal.P.U.C. 693; 8/29/50 50 Cal.P.U.C. 131; 2/3/61 58 Cal.P.U.C. 466; 4/2/63 60 Cal.P.U.C. 722.

Dyer: I don't know who decided how the young lawyers were assigned in those days, but the partner to whom you were assigned was the person that decided what you were to do. Also, they had a firm meeting, I sure -- I don't know often it was held then -- of the partners, and since the firm was quite small -- there were only seven partners -- I think it's a reasonable conclusion that a lot of these things, even though they weren't by any means major decisions, were decided by the partners.

Hicke: What was it like working in the bullpen?

Dyer: Well [chuckles], the bullpen was kind of fun in a way, because we were all very young, and there was a lot of cross talk back and forth as to what was going on and who was doing what. Although the physical accommodations were [quiet chuckle], I think by present-day standards, not very good. There was a camaraderie among the young lawyers, and I know that it fostered friendship and also added to knowledge of what other people were doing and how they were doing it, and I think on the whole it contributed somewhat to our training.

Hicke: So you knew what other things PM&S was doing?

Dyer: Oh, yes. I knew of the big cases that were going on, of course. I remember Francis Kirkham had the Philippine case at the time that involved, I believe, ownership of shares of Benguet Mining Corporation.* Tom Caldwell, who afterwards was a clerk to Chief Justice Phil Gibson and later a judge, was one of the other residents of the bullpen, and he was working on that case and kept us advised of its progress.

John McComish was another man in the bullpen along with Larry Kuechler. Ralph Kleps, who also was law clerk to a justice of the Supreme Court when he left PM&S, oh, several years after I joined the firm, was there, and he subsequently became administrative director of the courts.

##[tape interruption]

As I said, there were only seven partners when I joined, but soon thereafter Francis Kirkham, [Maurice D.L.] Del Fuller, and Norbert Korte were made members of the firm.

Norbert was the first labor lawyer in the firm that I recall. That branch of the law was just getting under way at the time, as was the securities practice. Norbert practiced in the firm, I believe, until about 1947, when sadly he incurred cancer and passed away.

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* Perkins v. Benguet Consol. Mining Co. 90 Cal.2d 845

As I mentioned, Sam Wright did the telephone company work, Gene Prince did the Railway Express work, and he also did the Borden Company work, and I did a great deal of that some years later when I returned from the navy in 1946, and then in subsequent years. The Borden Company had a very large dairy in town with about 400 trucks, and other dairies in northern California, and there was a continuing flow of litigation from that client that afforded us much business and resulted in many court appearances for the younger lawyers.

Naval Service in World War II

Dyer: I remained with the firm until 1942, and after Pearl Harbor, why, people commenced leaving for the service. And in 1942, with very little notice from the navy -- I recall that on a Friday they told me that I was expected to be in naval training school in Arizona the following week, and it was with mixed emotions I came back to the office and was happily able to solve all of the questions that I didn't have ready answers to [both chuckle] by leaving them for other people.

Hicke: Is there some reason why so many people from the firm went into the navy?

Dyer: I don't know of any particular reason. Of course there was a naval recruiting station in San Francisco -- I don't know whether that's the proper term -- but it was an office where the navy was obtaining officers for the service at that time, and it may have just been the availability of the office, which was up at Third and Market Street, and people might have just gravitated there. I really don't know the answer to that question.

In any event, I never did apply to any other services, I just --

Hicke: You just went down there and put your name in?

Dyer: -- made an application. I didn't hear from them for a few months after Pearl Harbor, and then in '42 I heard, and I was in the navy for three and a half years.

Hicke: Where were you?

Dyer: Well, I had an interesting job as an operations officer on a staff called Operational Command Pacific Fleet. It was based in San Diego, but we also had to do with ships -- combat ships -- that operated with the fleet, and many of us on the staff had to ride with them during their fleet operations.

The basic task of that group, which was composed of many senior and very experienced officers, was to train the new destroyers and cruisers basically as they came out. We trained them in gunnery and in torpedo and CIC [Combat Information Center] and radar, and all that type of thing, and my job was to work on the operations and the scheduling of the training. This staff was a satellite or subgroup of the major command at Pearl Harbor.

We scheduled many operations of these new ships that came out, and I had the opportunity of working closely with people who had major combat experiences and major commands in the fleet. Although it was rigorous and they were very demanding people in a way; they were professional officers, and I thought some of them very competent, and it was an interesting place to be. I remained there until December of 1945, and then returned to the office in January of 1946.

III POSTWAR YEARS

Growth

Hicke: What did you find when you came back after the war?

Dyer: Well, I found the firm was quite a bit larger. The tempo of the place had picked up. There were more boards and commissions that the clients had to contend with. And the firm then really started to grow. Whereas before the war -- at least in the very few years that I had been with the firm -- the firm hired maybe five or six lawyers, as I recall, it now markedly increased that number, maybe doubled it in the first years afterwards. And also, happily, it started to make more partners.

The history of the firm had been, I think, that relatively few partners were made before the war, and there were long intervals -- years at times -- between the making of partners. But that changed after the war, and it also brought in one or two people to fill needed slots in the firm, such as Harry Horrow in the tax department.

Hicke: So there were a lot of price regulation problems?

Dyer: There were antitrust problems then that arose. I remember we had a case involving the glass producers and manufacturers. Standard Oil always seemed to have a major antitrust case or two, and I know Francis Kirkham was closely connected with the defense of those matters that were important. And then the business of the clients seemed to increase.

NOEL DYER THROUGH THE YEARS

around age 5 years, ca. 1918

age 14 years, 1928

graduation from high school, 1932

one year after joining PM&S, 1941

Workers' Compensation Cases

Dyer: When I first returned, I did some compensation work -- we no longer do that work in the firm; it's handled by Tom Harbinson and his people -- but our clients, such as Standard and Pacific Telephone and Cal Pack and Borden Company, were self-insured, and there was a large volume of those cases involving injuries to workmen. I did that work in 1946 and for a portion of 1947, when I started to do some work before the Public Utilities Commission. The compensation work, however, I was responsibile for many years after that, although I didn't actively try those cases. But I always thought it was worthwhile to have handled them, because they involved many medical issues. We were constantly dealing with medical issues and with doctors, and willy nilly, through exposure, not by other means, we got a very good grounding in the basics of forensic medicine, which stood us to good stead later on when we had to try cases involving prescription drugs. I think at least a rudimentary grounding in medicine is valuable in the lawyer's arsenal.

Hicke: Can you give me an example of one of these compensation cases? Or sort of a general idea?

Dyer: Well, yes. We, for instance, had the genesis of the asbestos cases, which are now at the forefront. In those days, one of the claims was that diotomaceous earth, which was handled by some of our asbestos company clients at the time, could not cause asbestosis. That was an argument that went round and round among the physicians and among the compensation referees and judges for a long period of time until it was settled medically. It was finally demonstrated that there was some causal connection, but that required much study and a lot of looking into the nature of the pulmonary function in man, and the effects of diotomaceous earth and asbestos particles, et cetera, on the human lung.

We also had a great number of run-of-the-mill back injury cases -- it seemed to me at the time that almost everyone claimed a back injury -- and those could result in very substantial awards in monetary terms.

Also at the time, the law developed so that injuries, such as emotional traumas leading to suicide due to stress on the job, were compensable. Those were legal as well as medical issues that were interesting and the type of thing that we handled.

Also, many people that sustained heart attacks would claim that due to the conditions of their work, the coronary infarct was brought on by industrial causes. Of course, the evidence almost always showed that there was long-standing arteriosclerotic conditions that were

90 percent responsible for whatever occurred. But due to the liberal way that the compensation laws were construed, more often than not there was an award made in favor of the employee, but not always so. I think the point I want to make here is that these cases did involve medical specialists and a lot of things touching on those subjects, and it all added to the education that I had at the time.

Hicke: So you needed expert witnesses?

Dyer: We needed expert witnesses. We were constantly out there producing people that were expert, and trying these cases. They were relatively short; they were not extended trials, although some of them went on for some time, but I went from one case to another, and from one pathology to another, and it was well worthwhile.

Hicke: Where were the cases tried?

Dyer: They were tried before what was then called the Industrial Accident Commission; it's now the Workers Compensation Appeals Board.

Hicke: And why were these companies self-insured?

Dyer: Well, they were self-insured for various reasons. Number one, if a company is big enough to institute and maintain a good safety program so that the incidence, the severity, and the frequency of its accidents are relatively low, it can save a lot of money in premiums. Workmen's comp premiums, particularly in the more dangerous occupations, tend to be high as a percentage of the wage of the worker. And a second reason was that self-insurers can more closely monitor and administer claims of their employees, and this tends to good employee relations. That was something that particularly the telephone company was very much interested in. And even to this day, those major companies are self-insured for those reasons.

Public Utilities

Pacific Telephone & Telegraph Company

Dyer: But I more or less graduated from that field in, oh around 1948, when other people took over, and then I went into the public utility area. At that time, the firm had a substantial public utility practice before the Public Utilities Commission of California, which of course regulated the rates and service of public service companies, such as the telephone company, Railway Express, and Western Union.

In those days we, for instance, tried the rate cases of the telephone company, which were very important, both to the telephone company, to the public and, of course, to the firm. They were major cases and were handled in the main, as I recall, by Francis Marshall.

I tried a good number of what were called foreign attachment cases for the telephone company. The telephone company then had a tariff or rule which stated that the telephone company owned the telephone instrument, and that it was contrary to the rules of the company to attempt to attach anything not owned by the company to the telephone instrument or the telephone system.

There were attempts at the time, many attempts, to hang devices such as dialers and answering machines, and alarm systems and telephone locks and all sorts of things on the telephone system. That tariff at the time was basic to the telephone company, because it felt that if the tariff was not upheld, why it would more or less lose control of the system. I think that was borne out some years later in the Carter-Phone decision in Texas, which allowed an attachment to the telephone system, and that led in turn to individual ownership of telephone instruments and of telephone answering devices and of telephone locks, and whatever.

Hicke: The tariff was what the person paid to the telephone company if he wanted to --?

Dyer: No. The tariff was a rule of the telephone company on file with the Public Utilities Commission that said that no facility or device not owned by the telephone company could be attached to the telephone instrument or the telephone system. And it was considered basic and essential to the telephone system. I think that was borne out, as I've stated, by the Carter-Phone decision which thankfully we did not try; it was tried in Texas, and which led eventually to the bursting of the dam.

I tried the Dial-a-Phone case,* which was an automatic dialing device invented by a very clever man named James Kilburg. He was represented by the McCutchen firm that asserted that the tariff was unreasonable, and that this device, which they claimed was very efficient, should be attached to the telephone system. Eventually we prevailed in that case. Really what it amounted to was that we made a very satisfactory arrangement with Kilburg whereby we were able to take over his system and own it and operate it pursuant to the filed rules of the telephone company. But that case was very bitterly

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* James Kilburg Inc. v. Pac.Tel.Co. Decision No. 46652 (1952) 51 Cal.P.U.C. 410.

fought and tried with many experts and many tests by the Stanford Research Institute for Kilburg, and tests by the Bell Laboratories on our part.

I remember one incident: we had a test set up in the Bell Laboratories in New York at which all of the parties and their engineering representatives, as well as the representatives of the California Commission -- their engineering representatives -- were to attend, and everybody had traveled to the East coast. The night before the tests were to start, their people admitted that they -- Kilburg's people -- weren't ready for the test. That led to a motion for dismissal on our part, which was not granted at the time by Harold Huls, who was a liberal commissioner. But it certainly hurt Kilburg's case and, I think, led later to the satisfactory arrangement that I mentioned.

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Hicke: The Telelarm case was --

Dyer: -- also a foreign attachment case involving an alarm system and lots of engineering testimony.* And we had various answering device cases -- answering machines, such as the Hush-a-Phone -- and other cases in that general field.**

Hicke: I assume that you must have won all of them up until then.

Dyer: Yes, we won all those cases. As I say, happily we weren't the lawyers who lost the first case. It appeared to me though that with the number of devices that were being offered at the time, and the increasing strength of the opposition asserting that the tariff was basically unreasonable, at some point, some commission somewhere was probably going to find that a device that did not degrade the efficiency of the system and provided service to customers should be allowed. That's eventually what happened.

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* Telelarm Corp. v. Pac.Tel.Co. Decision No. 42813 (1949) 48 Cal.P.U.C. 655.

** Doehart Corp. v. Pac.Tel.Co. Decision No. 46237 (1951) 51 Cal.P.U.C. 124.

Sale of the Telegraph System

Dyer: Also there were other cases for the telephone company involving hotel rates. I remember another case that lasted a long time involved sale of the telegraph system.* At that time it was known as the Pacific Telephone and Telegraph Company, and it sold the telegraph system to the Western Union Telegraph Company, and on short notice I was told to go to Washington, D.C., and appear for the telephone company before the FCC [Federal Communications Commission]. The advice I received was that there wouldn't be much opposition.

But when I got there, why, counsel for the Common Carrier Bureau of the commission showed up in opposition, and there was a representative from the antitrust division of the Department of Justice in opposition, [quiet chuckle] along with lawyers from the Communication Workers. That case lasted for weeks in Washington, and we had to show that the service that Western Union would provide would be equal to that heretofore provided by the Pacific Telephone & Telegraph Company.

One of the little amusing aspects of that case was Western Union had provided what amounted to a sort of a personalized telephone system that it proposed to abandon. From the standpoint of technical efficiency it was very poor, because there was a lot of noise on the line, but few customers. All the customers knew each other by name. They were usually people in certain circumscribed businesses, such as flower dealers and that kind of thing; they could call up and say, "Hello, Joe. How are things this morning?" and talk back and forth. It was a great personalized service, and they were indignant when it was about to be abandoned. But clearly from an economic standpoint, why it just didn't make sense to continue with it.

Also, after that I represented the Western Union Telegraph Company in their rate matters, and did so for about twenty years before the Public Utilities Commission of California.** The usual procedure was that the Federal Communications Commission would grant an interstate rate increase, and then the company would have to obtain similar increases in each state covering the intrastate communications. It

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* In the Matter of the Joint APP.of AT&T, the Western Union Tel.Co. and Pac.Tel.Co. (4/1/50) Docket No. 9235 ___F.C.C.___.

** Rate cases: Western Union Telegraph Co., Decision No. 46661, 51 Cal.P.U.C. 411 (1952); Decision No. 50938, 53 Cal.P.U.C. 763 (1955); Decision No. 57660, 56 Cal.P.U.C. 688 (1958); Decision No. 61058, 58 Cal.P.U.C. 229 (1960); Decision No. 65500, 61 Cal.P.U.C. 85 (1963); etc.

would send a team out -- a rate man and a financial man and a businessman -- to testify in the various states. I came to know those people quite well, since they would come out every year, and we would prepare and then would put them on as witnesses in presenting the Western Union case to the commissioners in California.

Hicke: These were federal government people?

Dyer: No. These were company people. It was a team of people who would act as witnesses from the Western Union headquarters in New York.

They told some amusing incidents. I don't know whether you'd want to put this in a history or not, but they considered the California Commission the most sophisticated commission and the toughest to convince. We, of course, had to present very comprehensive data on the results of our operations showing depreciation, et cetera, and we'd have to put in what are called separation studies, and go through a full-blown rate case here in California.

They compared the type of work that they and we had to do out here with some of the other states. They talked laughingly about how they had been in Mississippi on one of their safaris around the country, and they had this old farmer-type commissioner there who listened to them with his feet on the desk. They thought he was asleep, and all of a sudden he came to and said to them, "Now listen here," he said to the witness, whose name was O'Neil, "You just said that last year you sustained a deficit in the state of Mississippi, and not five minutes ago, I recall you saying that you had sustained a loss. Which one is it?" [both laugh]

Hicke: Appearances were deceiving. He was paying attention.

Dyer: So those were the types of experiences that they would relate.

One of the regulatory matters for Western Union that was out of the ordinary concerned the provision of communication facilities to the Jet Propulsion Laboratories at Pasadena and from those laboratories to the enormous satellite dish or antenna located some miles distant in the desert at Goldstone, California. The laboratories were affiliated with Cal Tech [California Institute of Technology] and had supervision over the operations of the deep space probes. The satellites would be sent to outer space and the data to and from them would be transmitted by the dish at Goldstone and via the communication facilities, sent through the computers at JPL, where the scientists would interpret and analyze the data.

Western Union was awarded a contract to provide the communication facilities or lines between the dish and the computers. The local telephone company filed a complaint to enjoin our provision of those

facilities and the service connected with it. There were extensive hearings before the PUC, at which various scientists testified. It was quite entertaining. Jim Krieger, a substantial lawyer from Riverside, represented the local telephone company that sought the restraining order.

I recall that he cross-examined a young space scientist from JPL about the nature of the communications, and he concluded his cross-examination with a question: "Mr. So-and-so, you really don't understand completely the nature of those space signals, do you?" And the young man replied: "No, I don't, but don't hold your breath because in our business, the future catches up to us quickly."

We eventually prevailed in that case and were able to provide the facilities.*

Railway Express Agency

Dyer: Also, I tried the rate cases for the Railway Express Agency in California for a long period of time, almost up to the time that it went out of business.**

Hicke: Which was?

Dyer: I think it went out of business, it must be fifteen or more years ago now. Railway Express Agency was also, as I've said, a historic client. It had a rather unique arrangement in that it was owned 100 percent by the railroads, and the railroads provided the underlying transportation. Most of the transportation at that time was by rail, and although the Railway Express owned the express cars, the underlying transportation, the locomotives and so forth, was provided by the railroads. We not only had to prove the costs of Railway Express, we had to prove more or less the costs of the railroads.

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* The Western Union Telegraph Company, Decision No. 65557 (1963) 61 Cal.P.U.C. 127.

** Rate cases: Railway Exp.Agency, Decision No. 65160, 60 Cal.P.U.C. 722 (1960); Decision No. 61429, 58 Cal.P.U.C. 466 (1961); Decision Nos. 44718 and 44719, 50 Cal.P.U.C. 131 (1950); Decision No. 42903, 48 Cal.P.U.C. 693 (1949); Decision No. 46799, 51 Cal.P.U.C. 471 (1952); Decision No. 46083, 51 Cal.P.U.C. 59 (1951); etc.

One of the interesting incidents, I thought, historically, was that in our applications to the PUC for rate increases, we always excepted three commodities; newspapers, milk and cream, and corpses. The Railway Express Agency assured me that those exceptions were historically grounded and that we should not attempt to raise the rates on them, even though they were very much below the cost of operation. I think the history behind them was that the necessity of transportation of corpses in days when California was sparsely settled for people in almost any circumstances -- was obvious. The milk and cream transportation was important to the dairy farmers, who seemed to have some impact on the utilities commission, and I think the influence of the newspapers was apparent.

Hicke: Probably school kids needed the milk and all that.

Dyer: Right. Right. In later days, when finally we did ask that the newspaper rates be raised, the newspapers were indignant, and I remember both the [San Francisco] Chronicle and the Hearst papers appeared in opposition.

Railway Express Agency also had many transportation cases not involving its rates. As I've said, it carried all sorts of commodities -- and precious jewels and live animals. I remember we tried a case in which the issue was the valuation of sixteen mynah birds, four parakeets, and two ocelots. [quiet chuckle]

Also, we represented Coast Counties Gas & Electric Company, which previously had been owned by Standard Oil. It provided gas service in Solano County, and both gas and electric service in Santa Cruz County.*

Hicke: I looked for that case in the files, and I couldn't find anything about them.

Dyer: Yes. Well, we did a lot of work for them for years. The company was later sold to the PG&E [Pacific Gas & Electric Company].

Another old client that we represented in the regulatory field was J. C. Freese Company.** It operated a barge line on San Francisco Bay, hauling mainly petroleum in barges to Sacramento and up the river

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* Coast Counties Gas & Electric Co., Decision No. 47963 (1952) 52 Cal.P.U.C. 223 (electric rate case); Decision No. 45653 (1951) 50 Cal.P.U.C. 580 (gas rate case), etc.

** River Lines, Inc. v. Public Utilities Commission (1965) 62 Cal.2d 244.

to Stockton. Later the S. P.[Southern Pacific] Pipe Line Company extended its pipeline to Sacramento, and we, in conjunction with the Harbor Tug and Barge and United Towing Company and River Lines, opposed the extension of the pipeline. That case eventually went to the California Supreme Court, and the S. P. prevailed, but we at least kept the barge lines in business for about three years. That was also an interesting client.

Hicke: I think I do have that opinion, but I didn't bring it along.

Dyer: Yes.

Also, for a long period I advised the transportation people of Standard Oil, now Chevron, in regulatory matters. Standard, of course, had many trucks and hundreds of tank cars that operated both intrastate -- within California -- and between the various states. It had trained and knowledgeable transportation people, and I enjoyed working with them and in representing Standard before the California PUC and Interstate Commerce Commission.

One of the major matters that we attended to for Standard involved an attempt by the State of California to declare the petroleum pipelines in California common carriers subject to regulation. These pipelines exist mainly in the oil fields in the southern San Joaquin Valley and bring crude oil to the refineries and various other points. The California legislature appropriated funds to retain a special counsel who initiated a proceeding before the California PUC to declare the pipeline subject to regulation. All the petroleum companies in California that operated pipelines were also named defendants. One of them eventually gave in and agreed to regulation. However, the rest of us carried on with the case and developed much data to show that the pipelines had never been dedicated to public service.

After three or four years of proceedings before the PUC, the money to continue the retention of the special counsel gave out. The legislature did not appropriate new money; so the case was dismissed and the pipelines remained private carriers. There wasn't much glamour in that case, but it was quite important to the oil companies, took a great deal of time and work, and we eventually had the satisfaction of seeing the PUC dismiss it.*

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* Investigation on commission's own motion into rates, rules etc. of every person, corporation or the transportation of crude or refined petroleum within the state of California Cal.P.U.C. Case 9893 (1977).

Another transportation matter that we handled for Chevron had a little more human interest. It involved an oil company headquartered at Ponca City, Oklahoma. Its general counsel and traffic manager came to San Francisco and inquired about the leasing of dozens of tank cars by Chevron from that company. We produced the leases on the forms of the lessor. To us everything appeared in order. We were regularly paying the leasing charges.

It seems that the former traffic manager of the Ponca City company had indeed leased these cars to Chevron, but through some devious manipulation of the books and records he received the leasing charges from Chevron and pocketed the money. This amounted to hundreds of thousands of dollars and came to the attention of the Ponca City company only when it ran short of tank cars. That matter did not require a great deal of work on our part, since it was perfectly obvious that all of our acts had been bonafide and in reliance on the plain authority of the Oklahoma traffic manager to make the leases. Again, quite obviously he had no authority to pocket the money. He went to the federal penitentiary and Chevron retained the use of the cars under the leases until their expiration.

I want to mention that one of the PM&S lawyers who did very fine work in the regulatory field and who was associated with me in many of these matters was Dud Zinke. He handled numerous REA cases including some involving closing of REA express offices towards the end of that company's corporate existence. An office closing required permission of the regulatory authorities, and often we would receive vigorous protests from local people and local shippers.

I recall one case where we applied to discontinue service at a small point in southern California near the Mexican border and on the line of what was then called the San Diego, Arizona, and Eastern Railroad. The commission heard the case in an old building called "The Old Stone House" that wasn't much more than a barn. The local people consisted of cattlemen and cowboys who more or less drifted into the area and stated their views. It was an extremely informal hearing, something like a local town meeting. The cattlemen and cowboys would stand up and opine that service had to continue because it was the only means whereby they could get medicines and other necessities to dose their horses and cattle. It was a minor case but one that was different from the run of the mill hearing and brought us out of the usual routine. I think all of us including the commissioners enjoyed it.

Noel and Eleanor at time of wedding, 1940

Dyer family in 1956: Paul, Eleanor, Larry, Noel

1965, Noel and Eleanor with nephew Tom Casey in Rome

Noel and Eleanor on cruise, 1972

IV MORE CLIENTS AND CASES

Heaven and Hell Case

Hicke: I do have your Lexis list, which lists at least some of the cases that you were involved in.

Dyer: One of the cases that I noticed on your list is the Heaven and Hell case.* I represented, pretty much on a pro bono basis for some years, the University of San Francisco. It was one of the beneficiaries of a bequest in the will of an alumnus, who also left a bequest to other Catholic entities in the city of San Francisco.

Vincent Hallinan, who was an alumnus of the university and a well-known and aggressive lawyer, filed a petition claiming that the bequest was invalid. He filed that petition on behalf of collateral relatives of the testator, and it was known as the Heaven and Hell case, because the basis for Hallinan's petition was that the testator in his youth had been educated in Catholic institutions that had taught that a heaven and a hell existed, and this was demonstrably false and a fraud on his clients and on the public. He said that the beliefs in a heaven and hell were simply emanations of the dreams of prehistoric men that later were carried forward by religious institutions, and this was basically a falsity and a fraud.

Well, of course, our constitutions, both federal and state, provide that one has an absolute right to believe what one wishes. There were United States Supreme Court decisions that said just that. So it

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* Hallinan v. Roman Catholic Archbishop of San Francisco (1967) 389 U.S. 820. Also, Estate of David Supple. Terence Hallinan v. The Roman Catholic Archbishop of San Francisco (1966) 247 Cal.App.2d 410.

seemed, on the face of it, that demonstrably Hallinan had no case. The case had a lost of publicity in the papers and was called the Heaven and Hell case. So we filed a motion for judgment on the pleadings.

Hallinan argued fervently that it was high time that modern man recognize that all religions were simply frauds on the people, there could not be any such thing as a heaven or a hell, and that we, among other institutions, had misled and defrauded the testator, and that the court should recognize and declare this.

Hicke: I can see this would all make good headlines.

Dyer: Oh, yes, and it did. In any event, the court granted the motion for judgment on the pleadings, and Hallinan then took an appeal to the court of appeals. During the course of that argument Hallinan repeated that theme before the appellate judges, and one of the judges said to him, "Well, Mr. Hallinan, you know what the Supreme Court decisions are. Here they are, and they say that one has an absolute right to his religious beliefs, that no matter what somebody may think of them as to whether they're true or false or whatever, that he has an absolute right to believe what he will, and it seems to us that he could implement that belief by making bequests to religious institutions."

As for Hallinan's response, I must say, it didn't faze him in the least. He came right out and said, "Well, I suggest that it's high time for this court to tell the Supreme Court of the United States [both laugh] that it's wrong."

I never had much doubt as to the outcome of that case, but it was interesting listening to the assertions and the position declarations of Mr. Hallinan, who didn't seem to have any doubts. It was an interesting case, although not by any means the most substantial one we had in the office.

Trans World Airways, Borden Company, and Milk Control

Dyer: Also, I've mentioned the City and County against Trans World Airline case; that was the case involving the City and County of San Francisco that questioned the validity of our lease at the San Francisco Airport. That case was tried before Judge Roche, and afterwards reversed in the court of appeals to our favor, and certiorari was denied by the U. S. Supreme Court.

Hicke: What did that mean for the rest of the airlines in the airport?

Dyer: Well, it meant that we continued to enjoy more favored rates than the other airlines for the period of the lease. It was an important case at the time, and meant a lot to the airline.

I might also mention -- oh, by the way, that Heaven and Hell case was the estate of David Supple case that I note here in the list that you have.

Also, about this time and over a long period of time, I defended many cases for the Borden Company. I've mentioned that it had dairies and many trucks that made deliveries of dairy products, and we had many accident cases and other cases. We had few product liability cases for the Borden Company. People occasionally would drink milk that was sour or rancid or something like that, but the medical fact is that, I understand, sour milk does one more good than harm. [both chuckle] Even though there were claims made from time to time, just due to that inherent fact of the product, I can't recall whether we ever -- and the same thing is true of spoiled cheese or rancid cheese -- I can't recall that we ever lost a product liability case for the Borden Company.

We also had various matters concerning the pricing of milk in California before the Milk Control Board, and that was important to them.

Hicke: This was in the '40s?

Dyer: No. This would be in the '50s and '60s, and we had numerous matters in that field.

Antibiotic Drugs: Chloromycetin

Dyer: Also, I might mention the antibiotic cases that we handled. Antibiotic drugs came into wide use, as I recall, sometime after the war, and then in the late '50s.

Hicke: I think they actually produced them for the first time during the war for the military.

Dyer: Yes. Penicillin, I think, came in there. They were preceded by the sulfur drugs, and then there were investigations after the war into other antibiotics. We had a client, Parke, Davis & Company, that had brought to development the drug Chloromycetin. Its chemical name is chloramphenicol.

It was initially discovered by a botanist from Yale* who took samples from a mulched field in Venezuela and developed the organisms and grew them. He found that those organisms were destructive of a wide range of bacteria that were harmful to man, particularly the rickettsiae, rod-shaped organisms that caused typhoid, typhus, Rocky Mountain spotted fever, and many other diseases. It was also found that that antibiotic had a very broad spectrum in that it -- without many side effects, such as diarrhea or nausea, et cetera -- would kill many organisms, and it was thus very useful.

It came into wide use and was an almost universally prescribed drug when it first came out. It was used in foreign lands, and almost did away with typhoid and typhus and other bad diseases in South American countries and Near East countries; tremendous utilization.

The doctors started using it in the United States, and it was widely prescribed, because it was a broad-spectrum drug and would kill many organisms without many side effects. But it had one bad side effect, although happily it didn't occur often, and that was that it had a tendency when taken orally to depress the bone marrow. The bone marrow produces the formed blood elements -- one of which is the platelets -- and it would kill the platelets, or kill the platelet-forming capacity of the bone marrow, and that would lead to something called aplastic anemia, resulting eventually in internal hemorrhaging and death.

There started to come reports of this phenomenon of aplastic anemia, pancytopenia, and then the lawsuits started to come. We had a number of them involving Chloromycetin, but the major lawsuit that we tried was the Carney Love case.**

Carney Love was a housewife in her early forties who went to a physician in Redding, California, for a minor gum infection. Chloromycetin was a drug which could cause, in a few cases, aplastic anemia, and it was only to be used for serious pathology -- serious diseases. He gave it to her for the minor gum infection, and she developed aplastic anemia.

She was attended by a hematologist at Stanford Medical School, who afterwards was an aggressive witness for her in the trial of this case. Her lawyer was Jim [James] Boccardo, who was a well-known

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* Paul R. Burkholder, in 1947.

** Love v. Wolf (1967) 249 Cal.App.2d 822.

MEDICINE

Those Risky Side Effects

Carney Love was 42, a slight and pretty woman, with two grown children and a record of generally good health; it was nothing more than bleeding gums from a recent tooth extraction that led her doctor, John Wolf of Redding, Calif., to give her the potent antibiotic Chloromycetin. She got the drug again six weeks later for bronchitis—eight prescriptions in all, counting renewals.

Now Mrs. Love's face is beet-red and scarred with acne, and she has to shave daily. She has muscles like a male athlete's. Doctors warn that because Mrs. Love has a tendency to bleed heavily, she cannot risk a cut or undergo ordinary surgery. A fortnight ago, a jury awarded her $334,046 in damages from Dr. Wolf and Parke, Davis & Co., the drug's manufacturers. Her case, the first of its type to go to a jury, dramatized what are laconically called the "side effects" of many valuable drugs, and the problems of balancing a drug's usefulness against its dangers.

CARNEY LOVE (BEFORE)

CARNEY LOVE (AFTER) & ATTORNEY

The benefits to the many come at a high cost to the few.

A few months after she took Chloromycetin late in 1958, Mrs. Love felt weak and went to another doctor, who diagnosed aplastic anemia, in which the bone marrow fails to make enough blood cells. Her husband sold his business, the Beer Barrel Tavern outside Redding, to pay for her care, including 60 transfusions. At Palo Alto-Stanford Hospital Center, the transfusions and vigorous treatment with cortisone and testosterone kept Mrs. Love among the 25% of patients who get aplastic anemia and survive, but the hormones produced their own side effects. Though Chloromycetin causes these severe reactions in only one of an estimated 10,000 patients, Mrs. Love's attorney charged that Dr. Wolf had been negligent in prescribing it for such minor ailments. Dr. Wolf replied that many physicians were using it at the time for a wide range of infections, and he had not been sufficiently warned about its dangers.

Pros over Cons. The governmental bulwark against dangerous drugs is the Food & Drug Administration, part of the Department of Health, Education and Welfare. It is a relatively small bureau (2,423 employees, current budget $21,854,000), and two-thirds of its inspectors police purity of food products; the rest work on drugs and cosmetics. Its main power over drugs comes from a 1938 law (passed after an early version of sulfanilamide in a poisonous solvent killed 107 people) that authorizes FDA to require satisfactory prelicensing proof that a drug is safe.

Chloromycetin, which is Parke, Davis' trade name for the potent antibiotic chloramphenicol, got FDA approval in 1949. It attacked many bacteria against which penicillin was useless, notably the typhoid bacillus; equally important, it was the first effective drug against psittacosis (caused by an unusually large virus) and against such diseases as typhus, scrub typhus and spotted fever (caused by related microbes called rickettsiae). Not until 1952, when hundreds of thousands of patients had had the drug—often for viral respiratory infections against which neither it nor any other antibiotic is effective—did evidence arise that it had caused a dozen or more cases, several fatal, of aplastic anemia.

The FDA got the National Academy of Sciences to set up a committee of top-flight experts to study Chloromycetin. Their conclusion was that its pros outweighed its cons: it should be left on the market, but with a warning to doctors not to use it unless the illness was so severe as to justify the risk. Sales of Chloromycetin slumped, then gradually picked up until 1960, when a new flurry of alarm set off a second re-evaluation. Once more, the FDA's expert advisers concluded that to take the drug off the market would bring death to more people than to leave it on. But they called for still stronger warnings, which Parke, Davis put out a year ago. The chief recommendation is that doctors using Chloromycetin for long-term or repeated treatment should keep close check on their patients' blood-cell counts.

Investigational Testing. The hard fact is that any potent drug is almost certain to have some dangerous incidental effects in some proportion of patients after it is widely used. To keep these backfires to a minimum, FDA first provisionally licenses a new drug "for investigational use only" (after testing in animals), whereupon most manufacturers get research physicians to try their product on 1,000 to 3,000 patients. It was this step-by-step procedure that fortuitously kept thalidomide, the sleeping pill now suspected of causing many malformations in babies in Europe and elsewhere (TIME, Feb. 23), off the U.S. markets. A sharp-eyed woman doctor on the FDA staff was not satisfied with a detail in the evidence submitted by the manufacturers with their application for a license. FDA asked for more information. While it was being gathered, the epidemic of malformations was reported in Europe, and the application died aborning.

Once a drug is licensed, if doubts about its safety arise the FDA must go through a complex, time-consuming procedure to get it off the market. Usually, in such cases, the drugmakers cooperate more or less voluntarily, since they have as much stake as anyone in weighing a drug's side effects against its advantages. Last week the Upjohn Co. withdrew Monase, a "psychic energizer," after reporting to FDA that widespread use since June 1961 had produced seven cases of aplastic anemia, four of them fatal—though the drug was tested in 3,500 patients, with no sign of damage to their blood-cell mechanisms, before it was marketed.

And 48 Other Drugs. With the aim of getting maximum benefits for patients at a minimum cost in illness and death from side effects, the American Medical Association's Council on Drugs keeps a running score of aplastic-anemia cases and related blood disorders attributed to drugs. Its latest compilation, just issued, shows that in the first half of 1961 there were 138 such cases reported and probably more unreported. By far the biggest offender was Chloromycetin, with 56 cases charged against it.

But the impossibility of achieving 100% freedom from side effects is shown in the council's listing of 48 other drugs that have, in at least a few patients, caused blood-cell damage. They include many of the most widely used sulfas and invaluable drugs universally prescribed for diabetes, arthritis, heart failure, epileptic seizures, tuberculosis, thyroid disease and emotional disorders. Even such old reliables as quinine and the painkillers phenacetin and aminopyrine are on the list.

plaintiffs' attorney from San Jose. The claim was that we didn't properly label the drug, although it did say it could cause aplastic anemia.

We tried that initial case in Redding, California, in 1962, and there was a plaintiff's verdict of about $330,000. The difficulty in the case was the advertising. I think if we had not had the advertising, we would have had a fair shot at defensing the case. I found that it always has been the most difficult part of a product liability defense. And the advertising in this case, in the AMA [American Medical Association] Journal and in other journals, said such things as, "In no case have we seen any evidence of toxicity," which is a hard thing to defend before a country jury -- or any jury for that matter.

So it gave this verdict against us in light of the fact that the woman required constant care and medical attention and was going to die. She was a very sad sight; she was losing her hair and had acne the size of fists on her face. It was tough when she testified, because obviously she was an object of great sympathy. But Boccardo, who I think is too aggressive a lawyer in some ways, although a very good one, over-tried the case; he was hoping for, he told me, a million dollars. He indulged in a lot of misconduct. In fact, the misconduct was characterized by the court of appeal in Sacramento, when it wrote the decision reversing the case, as the most egregious that had come before the court. So the court reversed, and sent it back for another trial.

On the second trial of the case, because of the contentious nature of the first trial -- and it was a donnybrook -- the Judicial Council of the State of California assigned a judge not from Redding, but Judge Ray Lyon, who was in San Luis Obispo and about to be retired. Boccardo had received the message from the appeal court and didn't engage in the misconduct that characterized the first trial.

Our difficulty in the second trial was with the judge. Lyon hated our case and he didn't do too much to conceal his feelings, and he was constantly interjecting remarks that we didn't think were indicated. Believe it or not, at the end of the testimony of Mrs. Love, who indeed evoked a lot of sympathy, and perhaps this was the reason for it, but in any event, at the end of her testimony, and in full view of the jury, Lyon got off his --

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-- bench and went over to the witness and shook her hand and wished her good luck. We thought that even in the light of the plaintiff's circumstance, that was going a little far for a trial judge.

But in any event, in that second case there was a verdict for about half the amount of the first verdict, and it went up on appeal and was sustained. That case was good to try because it involved an interesting subject matter. We had some fine hematologists testify in the case. We utilized Dr. Hugh Fudenberg, who was a professor of hematology at U. C. Medical [University of California at San Francisco], and Dr. William Kerby from the University of Washington Medical School. The plaintiff used her attending physician, Dr. William Creger of Stanford, who was an able witness, and he testified fervently on her behalf.

After that I handled other Chloromycetin cases.

Hicke: Let me ask you: did the judge's action have any effect on the jury?

Dyer: I think the judge's action did have an effect on the jury. As a matter of fact, some of the jurors remarked after the trial that they thought he had gone too far. They also said that they thought it was a good drug, that it should be prescribed in certain circumstances, but that the advertising motivated them to give a verdict in that case.

Hicke: What can you do with a judge who's being difficult?

Dyer: Well, we had a real problem. As I say, from time to time, he would make remarks. For instance, Dr. Creger referred to a study involving giving, I think, thirty-four Oklahoma State penitentiary prisoners one drug whose name I don't recall, and others Chloromycetin, and they were comparing the toxicities. He referred to that study as showing the toxicity of Chloromycetin without mentioning the other drug, and I happened to have the study in my bag, which was no great feat, because it was routine to have all of the materials on the subject. I pulled it out and started to cross-examine Dr. Creger on this subject, pointing out to him that what he had neglected to tell the jury was that an equal number of prisoners had been given this other drug, with the result that it was more toxic, and that the conclusion of the study was that Chloromycetin was relatively nontoxic, was beneficial, and had few side effects, and should be prescribed.

Creger, of course, was on the defensive, because he couldn't deny his omissions, and when we started to get into that and to make some hay on that subject, the judge interjected and said to me, "Counsel, discontinue that line of cross-examination." I asked him why, pointing out that it was precisely pertinent to Creger's direct testimony, and he said, "The reason is, I don't want you to hurt this fine doctor's testimony."

Hicke: Oh, my goodness.

Dyer: Well, you see that presented us with a dilemma, since we knew from the way the jury was attentively listening to this case, that it was a good jury, certainly about the best we could get in Shasta County, and we didn't want to lose the jury.

At the same time, the rule is if you don't object to misconduct, and assign it, and make a motion for mistrial, why you waive it, and I was fearful that if we pointed this out to Lyon -- he was an experienced judge -- he might grant a motion for mistrial, and we might be much worse off on a third trial. So that was the dilemma that we were in, and it was a trying experience to have a plaintiff with those injuries and a judge that was that one-sided. Of course, he did it from sympathy, and indignation that this poor lady was in that situation.

Hicke: Well, did you finally point it out, or did you let it pass?

Dyer: Oh, we pointed it out to him. We pointed it out to him, but we didn't make a motion for mistrial, because of the reasons that I've stated, and I think the eventual outcome of the case indicated that probably our estimate was correct.

Hicke: But, anyway, it was in there for the record for the upper court.

Some Useful Naval Experiences

[Interview continued: March 31, 1987]##

Hicke: I think you indicated that you'd like to backtrack a little bit this morning and go back to some things that we touched on last time.

Dyer: Right. You asked me earlier about the various things that had influenced me in getting into this profession and the particular fields that I've been in, and it occurred to me that during the years that I was in the navy, as extra duty -- it wasn't something that I was assigned to as such -- I got considerably into what I guess would be called now the trial of cases, although I didn't consider them so much that at the time. As I indicated, I was on a staff with a lot of combat ships' crews, most of them were fairly new, and things happened. They would be in training and in fleet operations, and there would be collisions and failures of machinery or of weapons and sometimes people would be hurt or killed.

Hicke: This would be during ship maneuvers on the open sea?

Dyer: Yes. The chief of staff somehow or other learned that I was a lawyer when I was a civilian, and he considered it an easy thing when something happened and the navy was required to institute a court of inquiry to give me orders and we would, in effect, go to hearing and to trial, usually with only a few hours notice.

Hicke: Would these cases involve civilians?

Dyer: No. They would all involve navy operations, but let me give you an example. We had a fleet submarine operating with us, and it was on the surface and streaming a sound buoy which was a gizmo that the sonar people pinged on for practice. The signal to dive was sounded, and it went down, and when it got down a hundred feet or so and they counted noses, there were three men missing. Of course, it surfaced immediately. It came up, but those men were lost and were never found.

Well, the sub was operating with us at the time. So the chief of staff gave me orders to pick up two senior officers. I was usually -- almost always -- the junior officer on those boards. As I say, it was extra duty, which was just added work for me. But the sub had to operate. So we had to rendevouz with it and go aboard, and for about a week we tried that case in a tiny wardroom, and eventually made a record just as in the trial of a case, with no previous preparation, and came out with findings and conclusions as to what happened and the recommendation.

I mention that because there were a lot of those things that happened and I had the occasion, as I said, to question many witnesses and to go into a lot of happenings. Some were fairly complicated. For one of them I got orders, oh, about 8 o'clock in the morning, and the order directed that a court be formed to inquire into and make findings, conclusions and recommendations concerning the failure of the main engine, high-pressure turbine, of the USS Block Island.

So I got a boat and went downstream and picked up the two other members of the board, who were commanding officers of ships. We went aboard the Block Island. It was an aircraft carrier. I asked the officer of the deck where this main engine, high-pressure turbine was, and we followed him down umpteen ladders and saw this thing that looked as big as a house, and there we were. I didn't know what to do at the moment. I had a brilliant flash to go up to the wardroom and have a cup of coffee with the other members of the board and talk it over.

I sent a signal for a very experienced warrant officer named Skoniecki, who knew all about naval propulsion machinery. He told me about a book, MEI, Mechanical Engineering Instructions, which contained all there was to know about navy turbines. So he came over

with the book -- or later got the book -- and for the next two or three weeks he educated me out of it as we sat there and questioned, I don't know, maybe thirty or forty officers and men as to the failure of the main propulsion machinery of this carrier. We were able with that help to make findings and conclusions. They seemed to be acceptable to the reviewing people, although it made the skipper of that carrier pretty angry.

I'll mention one or two others. I don't want to spend a lot of time on this, because it's pretty old hat now, but again, I emphasize that it did give me much experience, unwittingly and not realized by me at the time, in getting thrown into cases on short notice. Another one we had was --

Hicke: Let me go back to that first one for just a second. You said you had a trial. Was it an adversary proceeding?

Dyer: No. It wasn't an adversary proceeding in the sense that anybody was suing anybody else. Under the navy regulations, as I recall, when there was a ship collision or a grounding or something of that nature happened, then the navy initiated a board of investigation or a court of inquiry. It's all set forth in navy regulations. There's a book called Naval Courts and Boards, which is a very stratified type thing which sets out each step that you have to take.

We weren't suing anybody. But these proceedings often did result in findings and conclusions that went on somebody's record, and when this concerned naval academy officers, it was a serious thing to them if a court of inquiry made an adverse finding. So in that sense it was adversary. And, as I recall, they were entitled to counsel of their own, although I don't recall many, if any, occasions where they availed themselves of that right.

Hicke: And does this court have the same authority as a court of the United States?

Dyer: No. It's a naval court. As such, it's part of the internal administration of the navy. But it's an old and long-recognized method of inquiry and internal regulation of the navy. Court martials are in the same category. Deck courts are also in the same category, and that's a summary proceeding for minor infractions. The captain will hold the deck court, or mast as they called it, which is something else, too, in which summary sentences are meted out. These courts of inquiry concerned more serious matters such as collisions and the things that I've mentioned.

Hicke: Would there be appeals from these?

Dyer: The appeal would be reviewed by our commanding officer and then would be forwarded on to Washington where it would be reviewed, I think, by the Judge Advocate General's office if it involved a penalty against any individual. That was the only review.

I'll mention one or two others to give you some indication of the scope of the cases that required a lot of questioning. I had to make up the records in these things and make the findings and conclusions, because these senior officers that constituted the remainder of the board were uninterested in making up a legal record.

Hicke: Did you have access to all the naval regulations?

Dyer: Oh yes. Yes, that was a book that was available every place at the time.

Hicke: Just one book?

Dyer: Well, the navy, as I say, didn't believe in a lot of preparation. People were busy at the time, and they had a job to do that was to inquire into various problems. When something happened, immediately the order was made constituting the court, and it went to work, and then you made your findings and conclusions. Of course, that isn't the way you proceed in civil life. But as I say, one was thrown into the arena very quick, awfully soon.

One other thing that may be interesting, to give you an idea of the scope of the cases that the chief of staff assigned to me. There was a patrol craft named -- I'll never forget it -- it was called PC 815. 815 had eighty men and four officers and a 3-inch-50 gun forward. It was proceeding south one time and was not far off the Mexican coast when the commanding officer decided to have gunnery practice. There was a heavy fog at the time. So he didn't know it, but his navigation wasn't that good, and he was headed towards the beach. The gun laid one 3-inch-50 shell, which weighed about 80 pounds, on the side of a Mexican hotel and another shell on the other side -- and this was live ammunition -- and the Mexicans took off out of the hotel and went over the hill. And then, of course, there was all hell raised, because the Mexican ambassador complained.

Our command -- we had command of that ship at the time -- got a directive right from the chief of naval operations, and that doesn't happen very often -- he was head of the whole navy. Something had to be done, so a court of inquiry was formed.

We went aboard that ship and it was amazing. There was a popular captain there, and these young sailors liked him. There was a silent conspiracy that nobody would testify against the captain. We told him to navigate his ship to where it was that morning, and we went down

the coast. The court convened at the forward gun, and we spoke to the sight setter. There are two prism-type glasses on each side of a gun -- the setting mechanism and the pointing mechanism, one horizontal and the other vertical -- training the gun. And we told him, "Look into your glass there." He looked in, and we said to him, "Now what do you see?" We also looked in the glass and there was the hotel staring us in the face, but he said, "I don't see noth'n, sir." [hearty laughter] Of course, the senior officers went purple at that kind of thing. I think we questioned about fifty people. We got our record eventually, and the captain, unfortunately, was disciplined. But that gives you a little insight as to the type of work we did.

We also had collision cases. I had one involving the Pavo and the Situla, two troop transports that were ordered to operate in company throughout the night. During the night one crashed into the other and knocked a big crack in the side. It didn't sink; the hole was above the water line. We had to go into that. The reviewing court said that the real fault here was in the officer that ordered them to operate in company, because the captains were two ex-merchant seamen. And so that's what happened.

Also there were cases where people would be killed or injured. We had a case where three sailors were on the fantail of a destroyer when it made a high-speed turn -- a nine turn -- and the three of them went into the drink. Well, it was warm water and two of them just laid on their backs. The destroyer made a wide circle and came back to pick them up. The third fellow, for some reason or other, died. We had a court look into that.

When something like that happened, when somebody was killed or injured, we always had a medical officer. He said the fellow probably just died of heart failure -- saw that big ship in that big ocean going away from him and he turned up his toes and died. So that's the end of the war stories.

Hicke: That gives me a good opportunity to ask you a question. You've really experienced two kinds of trials: one of the adversary system and one of what you might call interrogatory or --

Dyer: Yes. Yes, it was that.

Hicke: -- which is more like what they have in France and Germany.

Dyer: I suppose. These were more investigatory trials rather than, as you point out, adversary trials. But they did involve a myriad of issues. If something happens aboard a ship, the captain is always responsible, even if he isn't on the bridge at the time. He is concerned that there not be an adverse finding. So sometimes there had to be examinations that would be conducted at length in an attempt to get at the

real facts. Of course, it was much more summary; we weren't as concerned with the rules of evidence, obviously, as one is in a full-blown civil trial or criminal trial.

Hicke: What would you say are the advantages and disadvantages of the two different methods of trials?

Dyer: Well, we were in a military climate at the time, under military discipline. To that extent it was a completely different setup. But at the same time, we were trying to get at the facts. We were attempting to come to conclusions, to make recommendations much as you do in a civil case, such as a judge would do in a civil case. Here, of course, we were the court but at the same time we were the prosecutor.

As a junior officer, I was something called the judge advocate, which really is a third member of the court but is the guy that has to do the questioning and do all the work. As I say, this was all extra duty to me, and it was a lot of additional work. I don't think I appreciated at the time that it was giving me quite a bit of experience. To me it was just a lot of hard work and a lot of extra duty, because I also had to do my own work. But it was interesting and on retrospect I think I was fortunate in getting things involving many different situations.

More on Chloromycetin: Defending Parke, Davis

Dyer: Let me return to the drug cases. I told you about the background on the Chloromycetin cases and the Love case that was tried twice in Redding.

Another case we had, and an unfortunate one, was Aiken against Parke, Davis.* Ben Aiken was the son of a lawyer in Oakland and a member of the varsity basketball team at University of Pacific. He stood 6'2" and weighed about 200 pounds -- very strong, fine-looking boy, twenty years old. A certified internist in Oakland prescribed Chloromycetin for his acne. It never should have been prescribed for that superficial condition. Acne is staph and the chloro could address it, but tragically he was one of the few people that was vulnerable to this drug -- it depressed his bone marrow. He developed aplastic anemia and eventually hemorraged internally and died, and there was a lawsuit by his parents against Parke, Davis and against the certified internist.

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* Alameda Superior Court, No. 311746

Hicke: I was wondering if the doctor wouldn't come in for some share of the blame.

Dyer: In that case he did. He was a certified internist who certainly knew all about the drug, and we established that. The case was eventually settled and he paid a very substantial sum and we paid a minor amount. I don't recall what it was at the time. But there, as contrasted to the Love case where the doctor was a general practioner in a rural setting, we had a big-city, board-certified internist who couldn't deny that he knew all about the drug and simply took a chance. With that situation we had a good defense. We were ready to try that case but the physician's insurer eventually made a payment that brought the case to settlement.

Hicke: How do you arrive at the process of settlement?

Dyer: Oh, I think it's much the same for almost any litigated case. You look at the exposure, pull from the facts, and the facts are the most important. You examine the law, of course, and you gauge your exposure from a damage standpoint. Here we had an attractive, strong, twenty-year-old varsity basketball player in the prime of his youth who was simply killed by the effects of this drug. He had a bright future, big potential to earn money. Obviously that exposed the doctor, and us I suppose, to substantial damages.

The doctor in this case, from the liability aspect, had serious problems. He took a chance and administered a drug that never should have been prescribed for that purpose with a terminal result. We had a man who was completely knowledgable about the drug, and despite the fact that on the label it said don't prescribe it for minor purposes, he did, and there we were. Those are some of the factors that are basic and that I think every lawyer looks to in determining his exposure.

Another Chloromycetin case was Bruce McLean against Parke, Davis.* It was a death case. Mr. McLean's wife, Margaret McLean, had sustained a fall and was put in Childrens Hospital, was given Chloromycetin and tetracycline and developed a thrombophlebitis. Ultimately, according to the hospital records, she died of a respiratory condition and an infarction, which is a heart attack. We paid some money on that case but it was less than $100,000. I think we paid somewhere in the area of $40,000 in that case.

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* Bruce McLean v. Parke, Davis & Company (1969) Supreme Ct. City and County of San Francisco No. 541482.

Our defense was a medical one. It was that the Chloromycetin was not the causitive factor leading to her death. The physiological mechanism in the chloro cases was a depression of the bone marrow leading to suppression of the platelets, which are one of the formed elements of blood and which enables it to clot. If platelets are surpressed or not produced in the marrow, why, internal bleeding results leading to death.

Although there was some contrary medical evidence, in that case we developed medical evidence of our own from the depositions of the attending physicians and the records and so forth, and the experts said that more probably than not, her death was due to conditions not directly related to Chloromycetin. On that basis, we were able to settle the case fairly favorably.

Really, in all of those chloro cases, with the exception of the Love case, we never paid much money. And in the Love case, as I previously stated, we were fortunate to be able to cut the first verdict in half due to the egregious misconduct of plaintiff's counsel. Maybe on the whole, the angels were on our side in those series of cases, although I'm not sure they should have been.

Hicke: How would you go about deciding how to defend these cases?

Dyer: Well, of course you investigate the facts, and particularly you look very hard at the medical records. You find out what medications were prescribed, the diagnosis, what the side effects are of all the medications that were given and, ultimately, what the findings were as to the cause of death or the cause of the injury. Then you defend on that basis.

Hicke: Do you go into this yourself or do you get help?

Dyer: Oh, you have to go into it yourself, every lawyer has to go into it himself. He has to understand the medicine; he has to sit down with the experts; he has to be advised; he has to be prepared to cross-examine. For instance, one of my experts in the chloro cases was Dr. Hugh Fudenberg, who was chief of hematology at the University of California Hospital, San Francisco, and a very astute and excellent doctor. Of course in those cases I was cross-examining hematologists on the other side.

For instance, William Creger, as I mentioned, was the chief of hematology at Stanford and a real advocate for the plaintiff. Fudenberg furnished me, as did Parke, Davis, with all of the literature -- this is something you do routinely in defense of these cases -- on Chloromycetin and its effects, and advised us on the medical record in the case and whether or not it was properly given -- given at the proper times and all that sort of thing.

This has to be done. For instance, I mentioned that Creger, in his testimony against us -- and he was a very fervent witness against us -- mentioned this study of Chloromycetin with the Oklahoma State prisoners. He left out a lot that he should have mentioned, and Fudenberg and Parke, Davis had given me that study and I knew it was in my briefcase. Now, it wasn't any great move to pull that out; it was just routine preparation.

Hicke: Now, would you have to then sort of educate the court?

Dyer: Oh yes. You have to educate the court and you must educate the jury, and that's always a problem in cases like this. For instance, in the first Love case we had a jury. I wasn't too impressed with it. One juror had a sleeveless shirt and he was tatooed from his shoulders down to his wrists. That didn't give me much confidence that he would understand the ins and outs of hematology and the effect of Chloromycetin on the bone marrow and in causing pancytopenia. But the second jury listened very closely and so, as I say, I never tried for mistrial in the second one, because I knew I'd never get a better jury than that one. The first one was not a jury, however, that I had much hope in.

Hicke: Do you give a little lecture? Or do you try to do this educating more informally.

Dyer: Oh, you have to educate them right from the start, in questioning. Of course, the other side tries the same thing. In your opening statement you tell them about it. For instance, I told them about the discovery and the development of the drug and the fact that it was used in South America on the altiplano where typhus, a severe infectious disease, was endemic among the native people, how it almost wiped that disease out. The same was true of typhoid in a lot of the Oriental and Near East countries -- it saved thousands of lives.

For instance, we referred to the director of health of the state of California. He testified on deposition that that drug and other antibiotics had saved more lives than had been lost in all the wars and all the automobile accidents in the United States. That's the kind of thing that you bring to the jury in the opening statement and testimony. As you say, that's the kind of educational material to set before them.

Both of those juries, even the first, were convinced that the drug was a highly therapeutic and worthwhile agent and should remain on the market. Of course, that was our big argument: don't penalize this medication to the detriment of hundreds of thousands of people. All of the doctors took the same view, even the ones that were against us. Their position, of course, was that it wasn't used in the way it should have been.

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Dyer: The real problem in those cases, as I've said time and again, was the advertising. The plaintiffs had ream after ream of excerpts from the AMA Journal and the New England Medical Journal saying in effect that "in no case have we seen any evidence of toxicity." Whereas the statistics of the AMA showed one death in every 50,000, or something of this nature. It was was hard to defend against.

But we did have a big plus in the great capabilities of the drug. In cases where the doctors couldn't combat an infection with other drugs, they used this one. For instance, in cross-examining the doctors, you posit to them the case of the leukemic child. As you know, in leukemia the big problem is the development of infections due to the suppression of white cells. So you must have something to knock down that infection. Every one of these doctors -- even the ones that were against it, such as Creger -- said that if they had a case of the leukemic child that developed an infection, they wouldn't hesitate for a second to use it, even though they knew it had this side effect that one in 50,000 cases it could probably kill the patient. So I found those cases very trying, tough to defend, but interesting.

Endo Laboratories Pharmaceutical Litigation: Simmetrell, Percogesic, Coumadin

Dyer: I want to talk about some other drugs, too, for other clients. We represented Endo Laboratories. We represent them -- still do -- in their pharmaceutical litigation. One of the drugs that they have is a drug called Simmetrell. It's a drug that is utilized in the control of Parkinson's disease and has other uses, such as purported control of influenza. There was a doctor in town named Dr. August Stemmer, who was a maxillo facial surgeon, which meant that he reconstructed the faces of people, not for cosmetic purposes so much, but those who were congenitally deformed or had sustained serious traumas to the face and to the facial bones.

There was influenza going around at the time, and he took Simmetrell as a prophylactic to ward it off, because he worked close to the faces of people. One of the side effects of Simmetrell is that it can, in certain instances, cause hallucinations. He lived by himself in the Richmond District, and at the time another doctor was visiting him for a day or two. That doctor had been a colleague of Dr. Stemmer's when they were both on the faculty of the Northwestern Medical School in Chicago. This doctor had come to visit Stemmer, and they had prepared a medical paper which they were to give at a medical convention to be held in the next few days in Reno.

Well, during the course of the night when this other doctor was staying there, Stemmer said he had this profound hallucination. He jumped out of bed and opened the window -- the bottom of the window was about three to three-and-a-half feet from the floor -- and he climbed over that sill and jumped out the window. He went down about twelve feet or so onto a concrete walk and broke both of his legs.

The bizarre part of the story was that his colleague, who was a qualified physician, heard this, got up and ran down. He looked at Stemmer, and he never touched him, and he didn't help him or attempt to help him. He went back to the apartment, put his clothes on, got in his rented car and went to the airport and flew back to Illinois. When I took his deposition later, he absolutely refused to say anything about it.

I don't know what his relationship with Stemmer was, and I don't want to comment on it. It wasn't necessary for us to bring it up during the course of that case, but it certainly was a bizarre aspect of the whole thing. In any event, Stemmer sued Endo* and he was represented by John Herron, who was a very good -- now deceased -- plaintiffs' lawyer in San Francisco. We tried that case and we got a judgment. One of the jurors remarked, "After all, he did jump out the window." That was somewhat of an interesting case.

Hicke: And there were no damages?

Dyer: There were no damages assessed.

Hicke: Yes.

Dyer: And so that case turned out pretty well. But again, there we had favorable facts. I mean, here we had a knowledgeable doctor, and the label stated that it can cause hallucinations. He certainly understood that it could when he took it. In addition, there was the unusual circumstance of opening a window and climbing over a three- or four-foot sill and jumping out. Good facts always help in the defense of a case.

Hicke: If nothing else, I'm learning you'd better always read the label --

Dyer: Right.

Hicke: -- if I didn't know it before.

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* August Stemmer v. Endo Labs. Inc. (1979) In San Francisco Superior Court No. 743048.

Dyer: Another Endo case we had involved a drug called Percogesic, and that case was McPeters against Endo.* Mrs. McPeters was twenty-one years old, lived in the Mission District in San Francisco, and was attended by two or three physicians. I won't mention their names, but they hospitalized her at St. Luke's Hospital. She had some liver complaints. She exhibited jaundice and a lot of symptoms indicative of liver problems. Eventually she was diagnosed as having hepatitis. She was given, among other things, Percogesic.

Now, Percogesic is the same as Tylenol. This was given by prescription. But as you know, Tylenol is an over-the-counter drug. The active ingredient is acetaminophen and it's used widely. But she developed symptoms; she was hospitalized a couple of times. She was also given Butazolidin, which is a powerful and an effective drug but has side effects much worse than acetaminophen. It is an ethical -- a prescription drug.

Well, that case proceeded on, and unhappily Mrs. McPeters died due to massive liver necrosis -- massive liver damage. The makers of Butazolidin and Percogesic and the doctors were all sued.

Hicke: Who made the Butazolidin?

Dyer: I don't recall who made it. But in any event, in that case, the doctors' records were very poor, and they made the cardinal mistake of physicians who are sued for malpractice, and that is that they erased some of their records and substituted other things. And that came out.

We, of course, had a good defense. Acetamenophin or Tylenol or Percogesic or whatever is used by literally hundreds of thousands of people all the time, but in massive doses it can cause liver damage. As a matter of fact, in England, they tell me, it's one of the more common methods of suicide to take a massive dose of acetamenophin. But those are very large doses and not the one or two or three pills that people normally take.

Hicke: How did you find out about the records erasure?

Dyer: We got the records and scrutinized them closely and had them looked at and then took the depositions of these doctors, and they, of course, couldn't deny that after the lawsuit arose they had changed the

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* McPeters v. Endo Labs, Inc. In San Francisco Superior Court, No. 737574

records. This involved the administration of the drugs, and so we had a good defense and we didn't pay anything, I recall, on that case. That was fairly interesting.

And then I'll get into the Coumadin cases, also made by Endo. We seemed to have a fair number of those from time to time. I think that's due to the fact that Coumadin is a widely used and beneficial drug. Its use is recommended and it is the subject of instruction in all the medical schools, and it's used in all the hospitals. It's a basic drug that's been around, I guess, for twenty or thirty years, and it's an anticoagulant.

It has the purpose of breaking up blood clots -- doctors call them thrombi and emboli, and an emboli is a traveling clot. People that get phlebitis, for instance, which is a fairly common malady -- an inflamation of the veins -- are inclined to develop emboli, and an emboli can travel. If it travels, it goes through the right side of the heart and up into the pulmonary artery, which takes blood to the lungs. If it sticks there, you sustain what is called a pulmonary embolism and you die. It's a common cause of sudden death in people who are bedridden and are apparently getting along well. All of a sudden they die, and it's due to the embolism. So certain types of patients, people that have phlebitis and who have had injuries and who go home -- it can be taken orally -- are prescribed Coumadin.

Hicke: Just as a preventative?

Dyer: Just as a preventative, to prevent this blood clot, this emboli, from forming. As I say, it's used routinely in literally thousands of cases throughout the world by doctors. However, Coumadin, like practically all drugs, has some side effects, although not very many.

One of the cases I'll mention is the Rogers case.*

Hicke: Is this also Endo?

Dyer: This is also Endo. Mrs. Rogers was a lady in her sixties who was standing on a ladder in her garage attempting to reach something, and she fell off and sustained a fracture of her leg. She went to Brookside Hospital and was prescribed Coumadin. She developed tremendous, raised, scar-like tissues on her thighs and on her back and on her arms. They were called eschars. Pictures of those things were really something to see -- the colored pictures -- tremendous raised, tissue-like growths on the limbs and the back. She sued us.

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* Rogers v. Endo Labs, Inc. In Contra Costa County Superior Court No. 164016

Hicke: Were they permanent?

Dyer: No, they went away after a while. But they remained for quite a while, and they were disfiguring and painful. They raised to half an inch or so, maybe a quarter of an inch.

So we defended that case . We went right up to the time of trial and I remember the lady judge in Martinez told me I'd better settle the case. I asked her why, and she came right out -- I've never heard a judge put it this plainly -- and said, "Because this is more or less a rural county." She said, "You are a big company. You are the deep-pocket defendant, and they're not going to let you out without paying something."

So I think we paid $25,000 or $30,000 in that case. I thought when the judge put it that plainly I'd better tell the client about it, which, of course, we would do in any event. The client thought it would be the better part of wisdom [chuckles] to settle that case.

Hicke: Let me just stop you there for a minute. When this sort of thing comes along and you advise a client, have you ever had it happen that they don't take your advice?

Dyer: Oh sure. I mean, clients are people. Some of them are very flexible, consider everything, and then make a decision. The bigger clients, particularly those with sophisticated legal departments, understand the risks. Companies like DuPont and Chevron have lawyers who are savvy in those fields, and you can talk to them and they'll come to a decision. Usually you just routinely discuss with them the exposure, the risks of the litigation, and how much you think it's worth. We did that all the time with the Borden Company and the Express Company and all the others for whom we tried cases.

Hicke: Do they usually take your advice?

Dyer: Well, yes, most of the time. Once in a while an executive or a house counsel will be adamant and say, "No, this is one we want tried," or, "We won't pay this much." That happens and, of course, that's fine, that's what we're in business for. I believe if you tell the client the risk and then it wants you to go on and try it to the end, why, that's fine. That's what we're for: to defend the company and do all we can. As long as it knows what the risks are, why, then you let the chips fall where they will.

Hicke: So your job is to assess the risks as the best you can.

Dyer: Oh, of course, yes. You do that all the time; that's just routine.

I want to talk now about the Coumadin Moore case -- Kristian Moore case.* Here I want to preface what I'm going to say by stating that Steve Stublarec, a younger partner, is the lawyer in the office who tried this case and did most of the work on it, although I did a considerable amount of work and attended the trial and depositions and so forth in the case, and took depositions. Steve did a fine job and I want to make it plain that he was the one that put in the laboring oar in the case.

Hicke: Did he work with you quite a bit on these cases?

Dyer: No. I was just about to become an advisory partner at the time, or maybe I had already become one. I had worked before with Steve on some cases, and it seemed to me he was a capable, younger lawyer who should take over. It was about time that a lawyer in that age group should get some exposure to cases like this. So he did and, as I will show you, had a fine result.

Mrs. Moore was a nurse married to a young man who was the son of Arthur J. Moore. He was the head of a defense law firm in Oakland. I knew him very well and had been on the same side and against him in a number of cases. So that made the case a bit delicate for me because the person that was injured in this case was Jay Moore's grandson.

This lady, a nurse, had phlebitis and was on Coumadin when she became pregnant. She was on it for the first trimester of her pregnancy, or until about the end of March. As I recall, the record said that the pregnancy commenced sometime in December.

One of the characteristics of Coumadin is that it has a rather small molecule which can penetrate the placental barrier (the placenta is around the fetus and is formed during pregnancy), and adversly affects the fetus. The effect is it retards the child mentally and also can cause a flat face, a flat nose, and clubbing of the fingers, et cetera.

Well, Mrs. Moore, as I said, was on Coumadin and stopped it at the end of the first three months of her pregnancy. Then the succeeding August, when she came to term, the child was born -- Kristian Moore. The child was retarded and had exhibited the other physical effects that I've mentioned.

Kristian Moore and the parents sued Endo on the ground that the drug was defective and wasn't properly labeled -- the usual grounds in pharmaceutical cases. The case was tried in the United States

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* In U.S. District Court Nos. 83-2527 and 83-2545 (1984).

District Court but was not defended by this firm but by counsel designated by the Hartford Insurance Company [Hartford Accident and Indemnity Co.], which was Endo's insurer.

After about two weeks of trial, the case didn't seem to be going too well I understand, and a settlement was entered into for $500,000. At that point, Hartford, which had provided the defense of the case, refused to indemnify Endo for the settlement payment on the ground that the policy, which covered Endo's liability, expired at the end of March or about the time the Coumadin intake was terminated, and as a further ground that the policy provision was that the company would pay on behalf of Endo all amounts which it became legally obligated to pay because of bodily injuries sustained by any "person," occurring during the policy period. The insurer said that a fetus is not a person within the meaning of the policy, and that no person was in existence until the mother came to term in the succeeding August, and thus there wasn't any coverage under the policy.

Well, when Hartford took that position, I advised Endo that it should bring an action against Hartford for declaratory relief and an action on the policy in United States District Court seeking to recover the amount paid. We did so and the case came before Judge Bill Ingram who sits, usually, in San Jose.

We had a very tough discovery session with Hartford, because it was reluctant to produce its records. We had to have two or three orders of court or of the magistrate directing production of documents before we got those that showed that its own claims manager had recommended payment of this claim on the ground that the injury was to the fetus, which probably was a person under the policy. We also showed that in other cases in which it would have been to Hartford's advantage to claim that a fetus was a person, such as in the thalidomide cases, it had taken that position.

Also, one of the things that was prominent in that case, on which both the trial court and the court of appeals later on relied, was an old code section in our California Civil Code which provided that a child conceived but not yet born is to be deemed an existing person so far as may be necessary to protect its interests at its subsequent birth (Civ.Code, § 29). The lower court pointed out that Kristian Moore, the child, obviously was a person with respect to the action that he brought against Endo, that he was injured when a fetus and that under the code section, he could bring an action against Endo because Civil Code section 29 said that a child conceived but not yet born is to be deemed an existing person.

The court decided that it would be incongruous to say that Kristian Moore was a person for the purposes of the lawsuit but not a person for the purposes of the policy insuring Endo against precisely

that exposure. So the case was of considerable interest and was tried in a full-blown trial before Judge Ingram -- court case -- and we received a favorable judgment.

In 1984 the circuit court unanimously upheld the judgment of the lower court citing Civil Code section 29.* That was one of the more interesting cases, both from a legal standpoint and also from a factual standpoint that we've had involving drugs.

Hicke: Wouldn't that statement in the Code affect abortion situations?

Dyer: I don't think so. The status of a fetus is a convoluted subject. For instance, the U. S. Supreme Court in Roe v. Wade** held that a fetus was not a person for the purposes of due process under the Fourteenth Amendment. That was the avenue that it went down in allowing abortions during the first six months of pregnancy.

The criminal statutes, for instance, stating that there shall be a penalty for a homicide, manslaughter, or murder of a person usually do not extend to the killing of a fetus. You must look to the particular setting or context that you address at the time. Here we were addressing a situation where there was an injury to an unborn person, and then a civil action, and the application of an insurance policy concerning the word "person." That is in a different context than the criminal statutes or the abortion situation in Roe v. Wade.

As I say, it's an extensive subject, one that is hotly debated now, but it became clear to us in our research that one had to look to the particular situation to determine the status of the fetus as a person or not.

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Dyer: We've had other Coumadin cases that came up from time to time, and I don't think it necessary to go into them at length. One was in Southern California, Kirch & Alcarez v. Santa Ana Hospital and Endo.*** As I recall, we came out of that case either making no payment or a minimal payment. Again, it was a situation where Coumadin was administered by a knowledgable physician who knew all about it.

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* Endo. Labs. Inc. v. Hartford Ins. Group (1986) 747 F.2d 1264.

** 410 U.S. Rpt. 113

*** In San Francisco Superior Court No. 765396

I want to stress, without going into it at length, that Coumadin, as I say, is an old, well-known, beneficial drug and much easier to defend than, for instance, the chloro cases. Chloromycetin was new at the time, and doctors didn't know much about it and were prescribing it in situations where they should not. Now if you have a Coumadin case and it causes damage, usually you find that either the damages are not referable to the ingestion of the drug or it has been wrongly prescribed. I think that completes the Coumadin story.

Hicke: Let me ask you just one more thing. How did Endo Labs come to PM&S?

Dyer: Endo Labs is a subsidiary of E.I. Du Pont Company. Du Pont has sent us its business for a long period of time. Endo was run as a separate corporation although I understand the quite recently its corporate headquarters have been merged into Du Pont's at Wilmington, [Delaware].

It had separate counsel at the time and separate laboratories. As a matter of fact, its laboratories and its headquarters were in Long Island, New York. I think Coumadin was developed and the patent obtained by that company, which as I recall was a family corporation, and then eventually was acquired by the Du Pont Company.

Hercules Powder Co.

Dyer: I want to mention now a Hercules case that took a lot of time. It was in the middle 1950s, a tough case.*

Hicke: I have the opinion for that, if it's of any value.

Dyer: Yes. Yes.

Hicke: [looking through papers] 1957 was when the --

Dyer: Yes. [also looks through papers] I think the first thing I ought to say about the case, so that I don't leave any misimpressions, is that it is a case that we lost. The jury verdict was nine to three.

Hercules Powder Company had a plant at Pinole, California where it made explosives: dynamite, black powder, ammonium nitrate, and other explosive products.

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* Hercules Powder Company v. Automatic Sprinkler Corporation of America (1957) 151 Cal.App.2d 387.

I might preface my remarks by saying that I've found that the defense of explosive cases is difficult, because juries and judges seem to feel that if one makes a highly hazardous product such as explosives, one should take all the precautions that could conceivably be taken in its manufacture and handling. If anything happens that you don't have a clear and definite explanation for, why, the presumptions go against you.

I've thought about the reasons for losing this Sprinkler case, and I think, on retrospect, that probably entered into it. Although there were other reasons that I think are clearer to me now.

The facts of the case were that Hercules Powder Company made ammonium nitrate at its plant in Pinole. Ammonium nitrate is a fertilizer -- it's coated ammonium nitrate -- and is also a relatively low-grade explosive. But when it goes up it can cause a tremendous bang.

I don't know whether you've ever heard of the Texas City disaster. But that disaster, sometime after the war, was one of the greatest accidental catastrophies in the history of the United States. It involved two ships that were loaded with ammonium nitrate in the port at Texas City, and both of them blew up. The explosions destroyed the whole waterfront -- not only the ships but the whole waterfront of Texas City -- and even knocked a plane out of the air that was about a thousand feet in the air, or whatever. But it was a tremendous disaster. Our research into this product showed that there had been similar disasters in the past -- and I won't name them -- in Europe and in other places.

Well, Hercules was making this ammonium nitrate, and by the way, ammonium nitrate is not only used as fertilizer -- you can buy it in nurseries and so forth in bags. In that form it really isn't a dangerous product. It's only when you get it in unusual circumstances, where heat is applied or in tremendous quantities such as in the hold of a ship, that it causes trouble. But farmers also use it as a cheap source of explosive to blow out stumps, or they put it in a hole with some fuel oil and then set it afire -- put a small cap in there and up she'll go.

In any event, Hercules was making it in what was called the dope house when a fire occurred. There was an explosion, a tremendous explosion that killed twelve men and injured, I think, thirty-three people and blew down all the buildings in the vicinity. It was sort of a disaster.

This was a long case. It was tried before a jury in San Francisco; Judge Herman van der Zee was the judge. I might say that in the trial of this case I had tremendous help from Mike [Harlan M.] Richter, who is now one of our partners and tried part of that case,

although I shouldered most of the burden. He did a fine job. Cyril Appel and George Lieberman, very experienced trial counsel, represented the interests of the individuals.

After the rubble was cleared away in the dope house, it was found that the sprinkler valve -- they had automatic sprinkler heads in that dope house that were supposed to go off at 165 degrees Fahrenheit -- after the explosion, the sprinkler valve was found intact with the top down. The sprinklers had never gone off. So we sued the Automatic Sprinkler Corporation, saying that the sprinkler system should have gone off and if it would have gone off, why, it would have put the fire out. Well, it was a tremendously hot fire, but it didn't last long before there was an explosion, and these sprinkler heads were just blown all over the place.

We had a lot of experts in that case, a lot of witnesses. I remember one of the employees who was in that vicinity testified as to what he saw and did. I asked him what he did when the explosion came, "Mister," he said, "when she blew, I flew." He ran out the gate and never came back to work [laughter].

But the jury felt that there may not have been fire long enough there to fuse those heads and activate the sprinkler. I think they also felt, as I've indicated, that we hadn't taken enough precautions in that dope house to prevent that explosion from happening and it just shouldn't have happened at all. In any event, it was nine to three against us.

That was a hard-fought case and a tough one. I think it points up the fact that when you're in this business you certainly don't win them all, and this was a fairly big one that we lost. It went up on appeal and we reversed it the first time but then it appeared we couldn't develop any more favorable evidence.

One of the problems, too, was that we had to try that case on a straight negligence theory. We had to show lack of care on the part of the Automatic Sprinkler Company, and the law of strict liability, product liability, which has evolved so much since then, hadn't developed at that time. We never could show any actual defect in the valve as such. It just was on the basis that here was the sprinkler system that should have gone off and it didn't; had it gone off it would have put the fire out, and there it was. But that was a difficult, hard-fought case. I think it lasted six or eight weeks, and there it was.

Hicke: How does it feel to lose a big one like that? How do you feel about winning and losing?

Dyer: Well, I think you feel you want to jump out the window. But I think that if you go into those kinds of cases, and certainly if you continue to go into them, all you can do is prepare the best you can and then not be afraid to lose, because if you're afraid to lose you will never try them. There it is.

How you feel? Well, particularly when you're younger, as I was in those days, you feel as I have stated. On the other hand, when you win one, you think you're God the Father. It isn't quite that way anymore [laughs]. I think you realize that inevitably if you remain in this business, you will win some and lose some. I suppose there are some people who win all of them, but I listen to those who say that and I just wonder; I don't think it's in the cards. If you take cases with any hazard at all, you inevitably will lose some.

Hicke: How did the clients feel?

Dyer: Oh, they were disappointed -- sure, they were disappointed, but they were fairly sophisticated people. I think they realized that it was a tough case. It's not like having a criminal client. I've never been in the criminal field, except to try some cases early on when I was appointed by the court. But I suspect in the criminal field, when you have a client that's facing a prison term, that must be difficult. But if you lose a civil case, why, it may mean a lot of money but it doesn't mean somebody's life or liberty.

Hicke: Would you say, in general, in your experience that there's too much emphasis on winning?

Dyer: Well, of course that's what they hire you for.

Hicke: And that's probably what our system is all about.

Dyer: That's what our system is all about. You certainly try awfully hard. You don't cut any corners. When a client retains a firm like this and pays its fees, it's entitled to all its time and to a complete, all-out effort in an ethical way. I think that's why, and I'll mention this later on, I think that's one reason why IBM [International Business Machines] is so successful a company: it wants all your time, will expend whatever is necessary on the case, but expects results. Sometimes it doesn't get it, sometimes you lose cases even for IBM, although we never have that I can recall. When you get into cases like explosion cases and you have people killed and blown up and you put that before a jury, as I say, I think those are difficult cases to handle. But simply because they're difficult doesn't mean that you don't give it an all-out try.

Hicke: You mentioned the egregious conduct of Mr. Boccardo --

Dyer: Well, that was in the Chloromycetin cases, not in the explosion cases.

Hicke: -- is that an example of too much emphasis on winning?

Dyer: Well, I think so. Boccardo was an able, aggressive, experienced lawyer. He wanted a million-dollar verdict in that case; he told me that. He was going all out, and I don't think he had to, because he had a really good situation there. This poor woman was a housewife with a family that had taken this drug for a minor gum infection, and she was going to die. She was in a terrible condition at the time. I was glad when she was off the stand. He didn't have to go into all the misconduct that he did and that is recited in that case.

Hicke: Okay.

Loyalty Oath at Cal Berkeley

Dyer: I want to mention another big case, one that I was not by any means the lead counsel on, but one that I was involved in. I helped Gene Prince. It was a prominent case at the time, and that was the loyalty oath case. It was in the mid-1950s and was in the State District Court of Appeal, Tolman v. Underhill.*

Gene Prince was one of our major partners at the time. He was asked by the Regents of the University of California to represent them. This was at a time when fears of communism were prominent in the country, and Congressional and other investigations were under way. The regents had passed a resolution that provided that as a condition precedent to continued employment at the university, the employees, including the professors, should execute an oath stating that they were not members of the communist party or any organization which advocates the overthrow of the government by force or violence.

Hicke: This was the time of the [Senator Joseph] McCarthy hearings, wasn't it?

Dyer: Yes, I think it was about that time. The law had not developed on the subject of loyalty oaths, and the regents, who were fairly conservative, felt that one should be required. John Francis Neylan, who was a regent and a prominent lawyer, came to the office and asked Gene to take the case for the university.

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* (1952) 39 Cal.2d 708.

The professors, including Edward Tolman, who I believe was a noted professor of psychology -- I'm not sure on that, but that's my impression -- and other professors brought a writ of mandamus to compel the regents to issue to each of them a letter of appointment designating them a professor in their particular field without the taking of the loyalty oath. There was never a trial of that case, since it was simply a legal issue as to whether the additional oath, which was in addition to that required of all state employees, whether this anticommunist oath could be required of the professors and employees.

Hicke: Were there just hearings held or something like that?

Dyer: There were briefs that were written by Gene Prince, and I helped him on that and with the other aspects of the case and went with him to the state district court of appeal in Sacramento, where Gene argued the case. Stanley Weigel, who is now a U. S. district judge, was the lawyer for the professors. It was interesting [light chuckle] that when our argument started in the court of appeal, why, there were obvious boos and hisses from the audience composed mostly of eminent faculty of the university, which was rather unusual. That brought a strong and stern response from the presiding justice, who told them that if they didn't keep quiet they would be ushered out of the courtroom.

The court decided that the oath required of all employees was all that was required and that the --

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-- regents could not require an additional could not require an additional oath which oath specifically directed against communism.

Of course, the law has developed markedly since that time. That, I believe, was about the first case in California on the subject. I think the Supreme Court of the United States has taken it from there and that law has developed. But that was a prominent case in its day, widely reported in the newspapers, and one that evoked considerable emotion, particularly on the part of the faculty of the university.

Hicke: You don't happen to have any clippings around?

Dyer: I'm sure there are some but I don't have any, no. But I'm sure that the files from the newspapers would contain some.

Hicke: Okay. We might be able to find some of those.*

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* See pages 56a, 56b, 56c, 56d.

CB&I Corporation

Dyer: Another good company from the standpoint of litigation that we represented for many years is the CB&I Corporation. It was known as the Chicago Bridge and Iron Company. It's a constructor of tanks and iron structures and so forth. I don't think it's built a bridge in fifty years but it makes tanks and tank forms and that kind of a thing.

I've known their general counsel, I guess, for more than thirty years. I've known three or four of them; Dick Barton is the most recent. He recently retired. There was Walker Davis, who was also its counsel and a very fine man. They headquartered in Chicago, and referred to us a good number of litigated cases.

Hicke: How did they happen to find PM&S?

Dyer: I don't know how they initially came to us. I think we already were representing them when I took them over. I suspect that it probably came through Standard Oil [Company of California] since CB&I did a great deal of work for Standard in constructing tanks on Standard Oil tank farms. That's their business, as well as chemical plants, water tanks, and that kind of thing. It is a good company with qualified engineers and it does work worldwide.

One of the interesting cases we had involved a space chamber at the Lyndon Johnson Space Center outside of Houston. That case was The United States v. The Bechtel Corporation and CB&I in the United States District Court in San Francisco.

At the time that the Russians put Sputnik into orbit, there was great popular and political pressure for the United States to put a man into space.

Hicke: The early sixties.

Dyer: Right, and Congress appropriated money to do that. One of the things that had to be done was to build a space chamber to train the astronauts in conditions of space and also to test various components of space vehicles.

So there was this space chamber that was built at the Lyndon Johnson Space Center. It was a stainless steel shell. Oh, I think it was sixty, seventy feet high. It simulated the conditions of outer space, including almost absolute vacuum. It had solar panels with infrared rays simulating the effects of the sun in outer space and all these conditions. We went there during the course of this case to take depositions of various space people and members of the corps of

The California Oath

A writ issued by J. Peek, P. J. Adams, and J. Van Dyke

Of District Court of Appeal for the State of California
In and for the Third Appellate District

THIS IS AN ORIGINAL PROCEEDING for a writ of mandate to compel the Board of Regents of the University of California and Robert M. Underhill, as Secretary and Treasurer thereof, to issue to petitioners herein letters of appointment to positions as members of the faculty of the University for the academic year of July 1, 1950, to June 30, 1951.

The petition alleges that petitioners are members of the faculty of the University of California of Academic Senate rank; that respondents are each members of a public corporation known as the Regents of the University of California; that the Regents, in accordance with authority granted to them by the State Constitution, have established an Academic Senate vested with certain powers relating to appointment, tenure and dismissal of faculty members; that the Regents on April 21, 1950, adopted a resolution (more particularly set forth hereinafter) carrying out certain recommendations of the California Alumni Association relative to the signing of a so-called "Loyalty Oath" by the faculty of the University; that each of the petitioners (all of whom are nonsigners thereof), pursuant to the resolution, petitioned the President of the University for a review of his case by the Committee on Privilege and Tenure of the Academic Senate; that each petitioner appeared before the said committee which, after full investigation, recommended the appointment of each petitioner to his regular post on the faculty of the University; that on July 21, 1950, upon the recommendation of the President of the University, the Regents by resolution appointed each of the petitioners to his respective post; that notwithstanding their appointments, respondent Underhill refused to transmit letters of appointment to petitioners; that subsequently on August 25, 1950, the Regents refused to recognize the appointment of petitioners; that if respondent Underhill is not ordered by this court to transmit the letters of appointment, irreparable injury to both petitioners and the people of the State of California will result; that petitioners have no plain, speedy or adequate remedy at law.

To this petition respondents filed their general and special demurrer and answer. This court on September 1, 1950, ordered that respondents take no action to enforce any resolution with respect to the nonappointment of petitioners or termination of their posts and that the ten-day period granted petitioners by respondents should not expire until ten days following any further order of this court specifying that such period shall commence to run.

Before discussing the facts of the dispute which culminated in the filing of this petition it is important to note by way of background that the Regents of the University in 1920 by resolution provided "that appointment as associate or full professor carries with it the security of tenure in the full academic sense." At no time prior to the present controversy was that resolution superseded or modified. It further appears that since 1920 the Regents and the faculty of the University have considered professors of the designated rank as not subject to arbitrary dismissal and entitled to all the incidents of tenure as it is commonly understood in American universities.

The record further discloses that for approximately a year and a half prior to April 21, 1950, the Regents, the faculty, and the Alumni Association had considered the question of ways and means to implement the stated policy of the Regents of barring members of the Communist Party from employment at the University by means of a "Loyalty Oath." These discussions culminated in a meeting held on April 21, 1950, at which the Regents passed a resolution providing that after July 1, 1950, the beginning date of the new academic year, conditions precedent to employment or renewal of employment at the University would be (1) execution of the constitutional oath required of public officials of the State of California, and (2) acceptance of appointment by a letter which contained the following provision:

> Having taken the constitutional oath of office required of public officials of the State of California, I hereby formally acknowledge my acceptance of the position and salary named, and also state that I am not a member of the Communist Party or any other organization which advocates the overthrow of the government by force or violence, and that I have no commitments in conflict with my responsibilities with respect to impartial scholarship and free pursuit of truth. I understand that the foregoing statement is a condition of my employment and a consideration of payment of my salary.

The resolution further provided that,

> In the event that a member of the faculty fails to comply with any foregoing requirement applicable to him he shall have the right to petition the President of the University for a review of his case by the Committee on Privilege and Tenure of the Academic Senate, including an investigation of, and full hearing on the reasons for, his failure so to do. Final action shall not be taken by the Board of Regents until the Committee on Privilege and

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Tenure, after such investigation and hearing, shall have had an opportunity to submit to the Board, through the President of the University, its findings and recommendations. It is recognized that final determination in each case is the prerogative of the Regents.

Some thirty-nine professors at the University who refused to sign the affirmation set forth in the Regents' resolution accepted what they apparently believed to be the alternative to the signing of the oath as set forth in the resolution and petitioned the President of the University for a hearing before the Committee on Privilege and Tenure of the Academic Senate. The hearing resulted in favorable findings and recommendations by that committee as to each of the professors. On July 21, 1950, the Regents met and by a vote of 10 to 9 accepted those recommendations and appointed the nonsigning professors to the faculty for the coming academic year. Following the passage of the resolution one of the Regents gave notice that he would change his vote from "No" to "Aye" and move to reconsider at the next meeting. At the next meeting of the Regents, on August 25, 1950, a motion to reconsider the matter of the appointments was passed by a vote of twelve to ten (one absent member stated by telegram that he would vote "no" if he were present), and the resolution adopting the recommendations of the Committee on Privilege and Tenure and appointing the professors to the faculty was defeated by a like vote of twelve to ten. Following this a motion was unanimously carried granting the nonsigning professors ten days in which to comply by signing the statement prescribed in the resolution of April 21.

Petitioners herein were among those professors who refused to sign the so-called "loyalty" statement. All the petitioners are scholars of recognized ability and achievement in their respective fields. Additionally it should be noted that it is conceded that none of the petitioners has been charged with being a member of the Communist Party or in any way subversive or disloyal.

Article IX of the Constitution which declares the policy of this state as to education provides at the outset in Section 1 thereof that education is "essential to the preservation of the rights and liberties of the people. . . ." Section 9 of that article establishes the University of California as a "public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds." Thereafter follow detailed provisions relating to the membership of the Board of Regents and their powers and duties. The Section concludes with this provision: "The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs. . . ."

It is evident therefrom that the Constitution has conferred upon the Regents broad powers with respect to the government of the University. It follows that this court may not inquire lightly into the affairs of the Regents, and should exercise jurisdiction only where the Regents have acted without power in contravention of law.

The validity of the action taken by the Regents on August 25, 1950, is first challenged by petitioners on the ground that the affirmative statement demanded as a condition to their continued employment is a violation of Section 3 of Article XX of the Constitution which prescribes the form of oath for all officers, executive and judicial, and concludes with the prohibition that "no other oath, declaration or test, shall be required as a qualification for any office or public trust."

Respondents' answer to this argument is that the constitutional provision is not here applicable because members of the faculty of the University do not hold office or positions of public trust. In support of their position respondents place great reliance on Leymel v. Johnson, 105 Cal. App. 694. There it was held that Section 19 of Article IV of the Constitution, which provides that "No Senator or member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided, that this provision shall not apply to any office filled by election by the people," did not preclude a member of the legislature from also holding a position as a teacher in the public schools of the city of Fresno. The court's holding was that the position of instructor in a public school was not an "office, trust, or employment under this State," as those terms are used in Section 19 of Article IV of the Constitution.

That the decision is limited to the particular provision of the Constitution therein questioned is indicated by the fact that the court gave serious consideration to the purposes of the people in adopting that section of the Constitution. This court held that the intent and purpose of said section was that "those who execute the laws should not be the same individuals as those who make the laws."

There is nothing in . . . any case cited by respondents which is conclusive of the status of petitioners with respect to the constitutional oath of office as set forth in Section 3 of Article XX. Furthermore, it is necessary in this case, as it was in the Leymel case, in dealing with another provision of the Constitution, to consider the purposes and intent of the people of California in adopting said Section 3 of Article XX. While the courts of this state have had no occasion in the past to discuss specifically the purposes behind this section, the history of the English and American peoples in their struggle for political and religious freedom offers ample testimony to the aims which motivated the adoption of the provision.

A similar provision is found in Clause 3 of Article 6 of the Federal Constitution where it is stated that all legislative, executive, and judicial officers, both of the United States and of the several states, shall be

bound by oath or affirmation to support the Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States. Speaking of this provision, Chief Justice Hughes . . . said:

> I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience. . . . To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government.

Again, Justice Holmes said, ". . . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

In the Girouard case, which was the last in this line of cases involving aliens who had been barred from naturalization because their then religious beliefs would not permit them to bear arms to defend the country, Justice Douglas, speaking for the court in approving the views expressed by Hughes and Holmes and holding that such aliens were not barred from citizenship, succinctly stated: "The test oath is abhorrent to our tradition."

This basic principle was also discussed by Justice Jackson in the last of the "flag salute" cases where, in speaking for the court he said:

> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

At this late date it is hardly open to question but that the people of California in adopting Section 3 of Article XX also meant to include in our state Constitution that fundamental concept of what Chief Justice Hughes referred to as "freedom of conscience" and Justice Holmes called the "principle of free thought." Paraphrasing their words, we conclude that the people of California intended, at least, that no one could be subjected, as a condition to holding office, to any test of political or religious belief other than his pledge to support the Constitutions of this state and of the United States; that that pledge is the highest loyalty that can be demonstrated by any citizen, and that the exacting of any other test of loyalty would be antithetical to our fundamental concept of freedom. Any other conclusion would be to approve that which from the beginning of our government has been denounced as the most effective means by which one special brand of political or economic philosophy can entrench and perpetuate itself to the eventual exclusion of all others; the imposition of any more inclusive test would be the forerunner of tyranny and oppression.

It is a well-established principle of constitutional interpretation that the meaning of any particular provision is to be ascertained by considering the Constitution as a whole and that the duty of the court in interpreting the Constitution is to harmonize all its provisions. A strikingly analogous application of this principle of construction is found in West Virginia State Board of Education v. Barnette, where Justice Jackson said:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with principles of the First, is much more definite than the test when only the Fourteenth is involved. *Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard* (italics ours).

In the problem of interpretation with which we are at present confronted, we find in the specific mandate of Section 9 of Article IX of our Constitution, providing that the University shall be entirely independent of all political or sectarian influence, a standard by which to decide the question of whether the petitioners herein are to be included within the term "office or public trust" as used in Section 3 of Article XX. It goes without saying that in the practical conduct of the affairs of the University the burden of so preserving it free from sectarian and political influence must be borne by the faculty as well as by the Regents. Hence, if the faculty of the University can be subjected to any more narrow test of loyalty than the constitutional oath, the constitutional mandate in Section 9 of Article IX would be effectively frustrated, and our great institution now dedicated to learning and the search for truth reduced to an organ for the propagation of the ephemeral political, religious, social, and economic philosophies, whatever they may be, of the majority of the Board of Regents of that moment.

It must be concluded that the members of the faculty of the University, in carrying out this most important task, fall within the class of persons to whom the framers of the Constitution intended to extend the protection of Section 3 of Article XX.

While this court is mindful of the fact that the action of the Regents was at the outset undoubtedly motivated by a desire to protect the University from the influences of subversive elements dedicated to the overthrow of our constitutional government and the abolition of our civil liberties, we are also keenly aware that equal to the danger of subversion from without by means of force and violence is the danger of subversion from within by the gradual whittling away and the resulting disintegration of the very pillars of our freedom.

It necessarily follows that the requirement that petitioners sign the form of contract prescribed in

the Regents' resolution of April 21, 1950, was and is invalid, being in violation both of Section 3 of Article XX and Section 9 of Article IX of the Constitution of the State of California, and that petitioners cannot be denied reappointment to their posts solely because of their failure to comply with the invalid condition therein set forth.

Subject to such reasonable rules of tenure as the Regents may adopt, the appointment and dismissal of professional personnel of the University is a matter largely within the discretion of the Regents. Nevertheless, in the event of proof of an abuse of discretion the "propriety of the remedy . . . is clear." Thus in the present case the imposition of the oath in question being violative of the applicable constitutional provisions, the abuse of discretion is clear, and hence this court may compel the reinstatement of petitioners to their respective positions.

In view of the foregoing it is unnecessary to consider the further contentions of petitioners that the resolution of July 21, 1950, constituted an irrevocable appointment of the petitioners, and that the action of the Regents constituted an arbitrary dismissal in violation of petitioners' tenure rights.

Therefore, since the letters of appointment issued to petitioners following the Regents' resolution of April 21, 1950, were subject to the condition that the petitioners sign letters of acceptance of appointment containing the affirmative statement, the requirement of which we have held to be invalid, it is the order of this court that the writ issue directing respondents by their secretary, respondent Underhill, to issue to each of the petitioners a letter of appointment to his regular post on the faculty of the University, whi appointment shall not be subject to the aforementione invalid condition. Provided that, if any of petitione has not yet executed the constitutional oath of offi as provided in the said resolution of April 21, 195 the respondents may require that such petitioner, a condition precedent to his appointment, execut said constitutional oath.

Let the writ issue.

THE following resolution on the University of Cali fornia "oath" was passed at the annual meeting o The American Physiological Society on May 2, by ratio of 4:1.

RESOLUTION: The American Physiological Society, the professional organization of physiologists in this country, expresses its deep satisfaction with the decision of the Appellate Court of California (Third District) entitled, "Concerning the Special Loyalty Declaration of the University of California." It feels justified in so commenting on a judicial matter because of the explicit and wise recognition by the Court of the issue of academic freedom and of the overriding importance of such freedom for the continued intellectual health of educational institutions and of the communities they serve.

The Society further urges its members, if offered appointment at the University of California, to accept only when convinced that the Board of Regents is prepared to function in accord with the tradition of academic freedom long established at this outstanding institution.

Newsweek
10/27/52
NATIONAL AFFAIRS

LOYALTY:

California's Oath

Up-in-arms Californians had argued bitterly for two years: Did the regents of the University of California act properly when they fired eighteen professors who refused to sign a special loyalty oath? Last week, in a Solomon-like decision, the state's Supreme Court handed down a ruling which vindicated the recalcitrant professors but placed them on the horns of another dilemma.

Unanimously, the court declared the university oath unconstitutional because it singled out one class of citizens; it ordered the regents to reinstate the eighteen professors. Then, by a vote of 6-1, the court upheld the Levering Act—passed subsequent to the university case—which required all state, county, and municipal employes to sign loyalty oaths. It thereupon set as a condition to the reinstatement of the professors that they sign the state oath.

▶Fired from a Veterans Administration clerk's job four years ago, James Kutcher—a legless veteran of the second world war—carried his case to the Federal courts. Kutcher was an avowed member of the Socialist Workers Party, a minuscule anti-Stalinist Communist group. The party was on the Attorney General's subversive list and, under loyalty rules, membership in it made Kutcher's firing mandatory. Last week, the Federal Court of Appeals ruled that (1) membership in an organization listed as subversive by the Attorney General was not, alone, grounds for firing an employe and (2) that a specific finding on Kutcher's loyalty was required. This suspension was upheld until the VA's loyalty board looked into the case again.

engineers. It was interesting to see people floating around in that thing.

In any event, this stainless steel shell I think cost $15,000,000 or $20,000,000. CB&I was the design engineer. We designed it and did some of the construction, but the major construction was by the Bechtel Corporation. There was a lot of pressure to get it under way and finished because of urgencies of the space program.

Came the day when they closed the door and they pumped the air out of the space chamber, brought it down to so many millimeters of mercury indicating almost absolute vacuum in the chamber. The door warped and wrinkled and in effect almost collapsed. It was a fiasco.

Hicke: Didn't you say they had gathered a crowd?

Dyer: Yes. There were people gathered there -- the politicians and public figures and so forth -- and there was a lot of hoorah about it. It was an embarrassing situation.

In any event, the government sued the Bechtel Corporation and CB&I, and that led to a long course of depositions and discovery at the Space Center and other places. I think that the Bechtel engineers were partially at fault. Probably our people, as I will indicate later, were also at fault. The corps of engineers and the space people, who were also involved -- it was a joint effort -- also. And all these engineers I think were trying to save face. Of course we were pounding away at them on discovery.

One of the problems that I ran into was that documents turned up -- and my own people confirmed it -- indicating that one of the things that led to the failure and wrinkling of this door was that one of our design engineers had made a mistake in mathematics in calculating something called the moment about the door; he omitted a factor which was rather crucial in his equation, and that led to a lesser stiffening than should have occurred. So that was a difficult case. Finally after many months and a lot of contesting with the government -- the Department of Justice handled that case directly from Washington and a special prosecutor was appointed.

Hicke: Who was he, do you recall?

Dyer: He was a younger man, a fellow about thirty-eight years old -- good lawyer named Bruen. But in any event, after three or four years and a lot of motions, the case ended up in a settlement conference before Judge Wollenberg. He was a fine judge. He had been --

Hicke: Albert Wollenberg?

Dyer: Yes. Well, it was the elder Wollenberg. There's another one that's now a judge on the Superior Court.

Hicke: Oh, I see.

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Dyer: This man had been on the superior court and later was on the U.S. district court, and he held a settlement conference in which he knocked our heads together. It would be probably a judge-tried case, and he indicated we'd better come to some [chuckles] conclusion on the thing. So Bechtel paid some money and we paid some money too, although the government was fairly reasonable on it. I don't recall what we paid -- maybe a million dollars or so.

Hicke: And then did you have to rebuild the door?

Dyer: Oh the door had to be rebuilt, yes, and in a hurry. They didn't wait. I mean, they went right ahead and rebuilt the thing and it worked fine after that. But that was a case with an unusual subject matter. We had many qualified people in it: engineers from all the defendants and from the government, from the corps of engineers, and the space people, all pointing the finger at somebody else. Sort of a face-saving operation.

Hicke: Was this mathematical error discovered in rebuilding the door or did it come out earlier?

Dyer: It was discovered after the failure. I remember going to Chicago and sitting down with the chief engineer of CB&I. He had all the papers out there and he had spotted it. He was not the one that made the mistake; it was a design engineer on his staff. He pointed this out to me. He said, "This is what we are up against," and that was bad news to us. So that was an interesting case and another one that presented problems.

Hicke: Yes, indeed.

Dyer: We've also had other cases for CB&I, cases involving tanks it built for a wine company that purportedly collapsed. A recent case was the Loretto wine case.*

Hicke: What happened with that?

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* Loretto Winery v. CB&I In Alameda County Superior Court No. 108266-7.

Dyer: That litigation is in limbo now due to the bankruptcy of the Loretto Wine Company. It had a claim against CB&I that will be eventually resolved.

There've been numerous other cases for CB&I. Oh, one we had arose out of a purchasing agent, or storekeeper really, at its Fremont yard who was manipulating the computer and purportedly purchasing materials from suppliers that were bogus. CB&I had a system whereby purchasing orders would go directly to the computer at Oakbrook. Then the checks would go out. The storekeeper would designate a post office box in Fremont for the checks to go to. He got away with about half a million dollars, and was buying Mercedes automobiles and that kind of thing. Eventually he was convicted of grand theft. We received some of it back, but not all.

Hicke: It doesn't seem too smart to go around driving a Mercedes, does it, when you --

Dyer: No, but he lived pretty high for a purchasing man for a long period of time.

Hicke: [chuckling] That's what I mean. It might look pretty obvious.

Dyer: Eventually they caught him.

Fairchild Instrument Company

Dyer: I want to mention another case that had a criminal aspect to it, and that involved the Fairchild Instrument Company that makes computer chips. It had a plant at Cupertino and also a plant in Palo Alto. This I think was in the 1960s. There was a man named [James] Tooke who was a former assessor in California and was expert in local property assessments and in the taxes to be paid on local property. He held himself out as an expert in this field, and indeed he was. This involves various local regulations. National and international corporations such as Fairchild are not experienced in local assessment of property matters. Usually there's a fair amount of politics involved, so it behooves them to hire local assessment people to take care of that for them.

Tooke had a lot of experience, and he hired himself out to numerous corporations. He did it on a percentage arrangement whereby when he saved them so much money over previous taxes paid, why, he would get a percentage of that.

Well, Tooke undertook to just make arbitrary assessments without any investigation or evaluation of the company's property. He would report to the local assessment people that the valuation of this property based on his findings and on his studies was thus and so, and it was a complete figment of his imagination. Of course it was always lower, and he was making a lot from this. As a matter of fact, in the Fairchild assessment on the same plant in Palo Alto he reported one set of figures on the identical property to the city and another set of figures very much different to the county. And he pocketed all these savings.

Well, this didn't apply only to Fairchild, it applied to numerous other companies, and it was a scandal in Northern California. There was much publicity on it, and Mr. Tooke was indicted. Then of course the attorney general's office and the local district attorney in Santa Clara County looked into it, and they wanted to know what the company was doing in reporting this, because our local comptroller, named Larry Lanset, had signed these reports as a true and correct valuation of Fairchild's equipment, which was in the millions of dollars. Of course the taxes weren't in the millions of dollars, but they were a substantial sum. All Mr. Lanset could say was that he depended on Mr. Tooke. Well, it was a nice question as to how much he knew, because if he knew much, he would be indicted. I remember sitting there at midnight with a representative of the attorney general's office and the local district attorney's office and an investigator for the state and Lanset, and we both were sweating hard trying to convince those people that they should not bring the matter before the grand jury. Finally, I think about 12:30 at night, they made a decision that they didn't believe there was quite enough there to do so and we --

Hicke: To indict Mr. Lanset?

Dyer: -- indict Mr. Lanset. So we walked away with a great sigh of relief. Later on I had to appear with Lanset before the Knox Committee, which was a committee of the state legislature --

Hicke: John Knox?

Dyer: Yes, I think so, yes -- investigating this matter. We looked stupid in not knowing what was going on in our company by way of valuations and so forth. But we were able to convince them that we weren't crooked.

Hicke: And obviously you had plenty of company.

Dyer: And we had a lot of company. I told the company at that time we just had to be absolutely forthright on this thing and lay it all out. I said we would look awfully dumb, but that's how we're going to get out

of it. The committee eventually didn't do anything further. I don't know what happened to Mr. Tooke. It was an incredible story when we got into it.

Hicke: That is amazing.*

The Dresser Company

Dyer: Another client that I tried some cases for was the Dresser Company. It's a large company based in Houston that makes oil well drilling and other equipment. This case was in 1975 and was known as Cornwell v. The Dresser Company.** The Dresser Company at the time had some surplus money and wanted to expand its activities, and it was looking around for inventions to acquire and other fields to go into.

I might preface what I'm going to say in this case by stating it was referred to us by Art Conley of the firm of Conley, Bove & Lodge of Wilmington, Delaware, which is a patent and copyright firm, basically, and a large and very good one. Art has referred a number of cases to us from time to time.

Hicke: Do you refer cases to them or how does this work?

Dyer: No, I knew Art Conley, and he comes here occasionally. He has a national practice. He travels all over the country, although he's getting elderly now; I don't know whether he still does. But he would try these patent cases and technical cases -- trade secret, patent cases -- and, lord, he'd be in New York one day and then Chicago the next and a couple of weeks after that trying a case somewhere else. He's done that during much of his professional life. But he needed help on the West Coast from time to time on trade secrets. He knew me and knew certainly of this firm and would refer matters to us. He was a good lawyer.

Dresser had a man named Cornwell who was a very aggressive, arrogant sort of person. It used him as a person who would look for new ideas and new inventions that Dresser could acquire. Cornwell came across this inventor who had something called a smog carburetor for automobiles. The idea then was that the elimination or control of smog was a great thing, and automobiles were the orginator of much of

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* See following pages.

** Cf. pg. 62 for cite.

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Independent Journal
SERVING ALL OF MARIN COUNTY

PHONE: 454-3020 SAN RAFAEL, CALIFORNIA, TUESDAY, SEPTEMBER 28, 1965 $1.50 A M

Supervisors Overrule Fairchild Tax Bill

Fairchild Semiconductor Corp. will not have to pay a $7,377.12 penalty for underpaying property taxes to Marin County, the County board of supervisors decided today by 3-2 vote.

The slim majority of the board was convinced by the argument by Noel J. Dyer of San Francisco, attorney for the company, that Fairchild should not be held responsible for errors or possibly fraudulant acts of tax consultant James C. Tooke.

State law requires the penalty assessment of the property owner or his agent willfully gives false figures, County Assessor Bert W. Broemmel claimed. He said he felt Tooke was an agent.

Dyer countered that Tooke's firm was an independent contractor. Tooke signed the property statement given to the county, but no member of Fairchild signed the statement.

Broemmel said new forms will require the owner's signature in the future.

Supervisor Byron W. Leydecker moved that Broemmel be upheld in levying the penalty.

Otherwise, he declared, any taxpayer could hire a tax expert and then hide behind his contractor's actions.

Supervisor Ernest N. Kettenhofen called for a substitute motion to overrule Broemmel and cancel the penalty on the grounds that the company had no control over what happened.

Dyer claimed figures given Fairchild by Tooke were not the same as the figures Tooke gave the county. He said, therefore, there was no way for the firm to check up on Tooke, who has been a major figure in property tax scandals throughout the state.

Leydecker was supported only by Supervisor Thomas T. Storer in his vote. Storer said Fairchild should be able to get the penalty money back from Tooke, and that if the county was incorrect in levying the penalty, there was always recourse to the courts.

Board Chairman Peter H. Behr said he agreed with Dyer that Tooke was not an agent as defined by law. He said he felt a penalty should be assessed against someone, though.

Supervisor William A. Gnoss, said Tooke should bear the penalty.

County Auditor - Controller Michael Mitchell reported that mere late payment of taxes would cause the firm to owe the county $3,347.55 in late payment penalties, but County Counsel Douglas J. Maloney said this could not now be collected.

Friday, Nov. 19, 1965 San Jose Mercury

JAMES TOOKE AT WORK

Probers Told How Firm Got Tax Value Cut Here

By LOU CANNON
Mercury Staff Writer

"Negotiations" between tax consultant James Tooke and the Santa Clara County assessor's office produced substantial reductions in property valuation for Fairchild Semiconductor Corp., the firm's controller testified Thursday.

L. A. Lanset, the controller, told the Assembly Municipal and County Government Committee that Tooke's $36,000 fee was based solely on obtaining a lower property tax assessment on Fairchild inventories.

He said he thought such negotiation was "an old custom."

County Assessor Dwight L. Mathiesen, testifying after Lanset, objected to the word "negotiations." But he said that the county assessor's office, which he has headed only since Feb. 1, "listened to the presentation of tax consultants."

The committee asked Mathiesen to return this morning at the conclusion of the two-day hearings and answer questions about county audit procedures. Specifically, the committee wants to know how many firms represented by Tooke escaped audits.

Fairchild, which has offices in Mountain View and Palo Alto, has had property in the county since 1958 and has never been audited.

These were other highlights of the hearing:

● Dan Gee, state attorney general's investigator, said Tooke's activities resulted in a $7,589,480 property devaluation for Fairchild over the three-year period from 1962-65. This cost the county $211,178 in taxes, Gee said.

● Additional devaluation cost Palo Alto $13,437 in escaped taxes.

● Marshall S. Mayer, deputy attorney general, said a copy of Tooke's report to Fairchild had been turned over to the county district attorney's office. Deputy District Atty. Robert Webb said he already had a copy and had seen nothing in the report which "in itself" would lead to prosecution.

● Mayer said that Tooke indulged in "falsification" in reporting Fairchild's book values to the county. The assessments were then "arbitrarily" lowered he said, allowing a double escape from taxation.

● Gee said that 404 different large corporations were entirely segregated from other firms in the county for purpose of audit. Many of these firms have escaped audit, he said.

Gee said the files for these 404 firms were kept under lock and key by Roger C. Vaggione, chief personal property assessor.

He said Vaggione each year selected the businesses to be audited and assigned the jobs to various auditors.

"In the event it is impossible to complete the audits of all businesses subject to audit during the year, the balance of the audits are abandoned and a new list is compiled at the beginning of the year," Gee's report said. "It is quite possible that a firm whose name is at the bottom of the list will never be audited."

Committee Chairman John T. Knox (D-Richmond) said after the hearing that he had never heard of a similar system of audit in any other county.

(Concluded on Page 2, Col. 2)

ASSESSMENT REDUCED

Probe Bares Tooke Tax Efforts Here

(Continued from Page 1)

Knox subjected Lancet to a careful cross-examination, but both the Richmond legislator and Assemblyman Alfred E. Alquist (D-San Jose) concentrated most of their questions on possible legislative solutions to present assessment practice problem.

Much of the committee's attention during Lanset's testimony focused on the report from Tooke to Fairchild.

Discussing the lower assessment which Tooke said he obtained for a new Fairchild building on Whisman road in Mountain View the tax consultant wrote:

"This year was an opportune time for us to press for a major concession on this structure. Confidentially, and quite frankly, it would be almost impossible to substantiate through valuation arguments the low assessment that we finally obtained."

Lanset, accompanied by his attorney, testified at length about the retention of Tooke as tax consultant. Tooke was hired, the Fairchild official said, because he was presumed expert in his field and indicated he could obtain considerable savings for the company.

"How did he indicate he would achieve the savings?" Knox asked.

"By knowing the law and knowing what was negotiable and then negotiating it," Lanset replied.

Lanset said he "didn't recall" whether or not Tooke had mentioned the names of anyone in the assessor's office. And he said he "didn't know" if the contingent fee arrangement with Tooke was unusual.

Knox called to Lanset's attention a memo by the Fairchild controller of Jan. 13, 1964, which said that a rival firm of Tooke's was "out of favor with certain county assessors in the state." Lanset then testified that he thought it was important for the consultant to have a "good relationship with public officials."

"We certainly didn't give him (Tooke) license to do anything illegal," Lanset said.

Mathiesen said the 404 corporations segregated under lock-and-key in the county assessor's office were kept that way because of the need for "security." The county assessor said Vaggione determined which firms belonged in the "security" file.

A previous report that none of the electronics firms in Santa Clara County had been audited was untrue, Mathiesen said. He said that 15 of the 30 firms in this category had received audits.

Mathiesen said he will meet with Lanset next week to discuss back taxes with Fairchild and possible penalties on the escaped taxes.

In other testimony Marin County Assessor Bert W. Broemmel told the committee that his county moved immediately to audit Fairchild facilities there after reports of a tax escapement. Escaped taxes of $29,508 were discovered, he said.

Three other firms represented by Tooke in Marin were also audited, Broemmel said. All of these were found to have accurate assessments.

In response to a question by Alquist, the Marin assessor said he favored more frequent review of county assessor offices by the State Board of Equalization. Alquist has suggested legislation requiring such reviews, which are now left to the discretion of the board.

On another matter, Mayer told the committee that the Irvine Ranch in Orange County paid $1,491,418 in taxes on 83,000 acres with an estimated valuation of $500 million.

This property, if assessed at the usual rate of 25 per cent, would yield taxes of $10,625,000, Mayer said, and reduce each Orange County homeowner's tax by nearly $36.

the smog, and the thought was that if there was a carburetor that would cut down on the smog emissions, why, it would be a great thing for the automobile companies.

This inventor had what he claimed was a smog carburetor on which he had the patent, and he thought it was a sure shot to be taken over by the automobile companies. I don't think it eventually ever was, for a lot of reasons, but at the time it seemed to be a hot property. In any event, Cornwell went to him and made a deal, and it was that the Dresser Company would buy the rights to this patent and would manufacture this carburetor. It paid a lot of money for it.

Well, Dresser found out later on that Cornwell was really self-dealing, that he made a deal with this inventor whereby he paid an inflated price -- more than he had to -- in turn for a piece of the action, so-called, in which Cornwell would get a percentage of the purchase price and also would receive a percentage of any royalties that Dresser thereafter would pay to the inventor. So it was a blatant type of situation, and the Dresser officers were incensed when it came to light, because they paid a lot of money for this carburetor -- for the rights to it.

Hicke: He was a company employee?

Dyer: He was a company employee and being paid a substantial salary by the company. In any event, when it came to light, Cornwell, who lived in Hillsborough at the time and had retired, was quite ill in bed. As I say, the company was very indignant -- felt that it had been had. Art Conley, who had done a lot of work for the Dresser Company and was advising it on this matter since a patent was involved, and the chairman of the board of the Dresser Company and another officer of the Dresser Company went to Cornwell's house in Hillsborough and asked him to sign a statement setting forth the facts of this transaction with this inventor.

There was a row at the time, even though Cornwell was quite ill. He refused to sign, and this ended up in a lawsuit that Conley brought against the inventor to rescind the transaction and also against Cornwell.*

Cornwell cross-complained for intentional infliction of emotional damage against Conley personally, the chairman of the board of Dresser personally, and against this other officer who was a vice president. He may have been a member of the patent/legal office in Houston -- I'm

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* Dresser Industries Inc. v. R.E. Cornwell & James F. Eversone U.S. District Ct. Northern Dist. of Ca. Civil Action No. C-73-1887 SC.

not too clear on that at the moment. In any event, the case was tried before a jury and Judge Samuel Conti. Art Conley tried the patent aspects of the case against the inventor, and I defended Art Conley, who was also a lawyer trying that case. He was the defendant along with the chairman of the board and the other gentleman.

The jury voted against the Dresser Company on the patent issue, but gave us a unanimous -- as they would in federal court -- verdict on the claim against the individuals, against Conley and the Dresser chairman and the other gentleman. Although the company wasn't happy with the outcome on the patent aspects, Conley and the chairman and the other man were certainly pleased, because they were asking a lot of money for this so-called outrageous conduct in shoving this agreement before this man who was quite ill at the time and eventually died. He was asking for punitive damages in that case too, which made the thing a bit chancy.

We were able to defend that case on a medical basis. We, of course, obtained all the records about Mr. Cornwell and subpoenaed the doctors to testify at the trial, and there wasn't any question that Cornwell had all kinds of things wrong with him. I don't recall them all, but he had multiple pathologies, heart problems, diabetes, and lord knows what else. We were able to bring in voluminous records showing that all of these things that Cornwell said happened to him after the visit by these three gentlemen really weren't due to it at all but to pathologies and conditions that were demonstrable in the testimony of the doctors and in the medical records. So the jury didn't have much problem in coming to a conclusion that Cornwell wasn't entitled to the money that he was seeking against our people.

Hicke: And then the patents case?

Dyer: They lost the patent case; they weren't able to rescind the deal. I don't know what happened to it after that. This firm was never involved in the patent aspects. It was a specialized matter that was handled by Art Conley.

Allied Chemical

Dyer: Another matter that I want to talk about is the Allied Chemical cases. Fred Hawkins, who is since deceased, was a partner here and more or less looked after Allied Chemical that had a plant over on the shore of San Pablo Bay and manufactured chemicals. He asked me to defend an injunction and a damage suit that was brought by a unlettered but a very smart Italiano named Ming Danno. At the time, Allied Chemical had a plant employing about 300 men making various chemicals.

One of the chemicals was fluorspar, which was something used in the production of steel and aluminum. The real chemical involved was fluoride, and fluoride is a poisonous, toxic chemical. Particulates would come out of the stacks of the plant, would float around and be deposited on the grasses of adjoining ranches. This was a prominent type of litigation in various areas at the time. It involved, oh aluminium companies I think in Oregon and the Fontana Steel Mill. They all had the same problem.

Well, these fluorides were deposited on the grasses of Danno's ranch where he was running his bulls. The bulls would eat the grass, and the fluoride would build up in their long bones, and they would go into a decline and eventually die. They would die of fluorosis. Well, Ming was pretty smart and when he saw the condition of his bulls, why, he loaded one or two of them into trailers and brought them to U.C. Davis, where the veterinarians X-rayed them and the diagnosis was fluorosis. So Ming brought an action to shut the plant down; he asked for an injunction, also damages for loss of his bulls and damage to his land.

So we had the case and tried it in Richmond. It was in the superior court, which had a branch there. Mike Richter also helped me on this case and did good work on it.

I remember this with amusement, in a way. One of the things that happens [laughter] to people that ask questions is they think they're going to get certain answers, and sometimes they're surprised. We knew we had a problem. But the Allied Chemical people said that there were various other things that were probably in those grasses or could happen to those bulls not directly related to fluorosis that we might show, and that the key was to elicit from Ming the various symptoms shown by his bulls. If we could show that there were a series of symptoms that did not comport with those usually produced by the fluorides, we might be able to come out with a defense to this case.

They gave me a list of these symptoms, and the idea was to elicit from Ming all of them, one after another, that he noticed in his bulls. So when Ming got on the stand -- this old Italiano with his boots and his old army shirt, but he was a smart fellow -- I said, "Well, now Mr. Danno, you noticed something wrong with your bulls in March of this year, I think it was." He said, "Yes." I said, "Where was the first bull that you noticed something wrong with?" He says, "Well, he was down in my lower pasture." I was then going to obtain from him all these different symptoms. I said, "Well now, when you looked at that bull -- you did notice him, didn't you?" He said, "Yes." I said, "What was the first thing you noticed wrong with him?" And so help me he said, "My God, the first thing I noticed wrong with that bull was that he was dead." [hearty laughter from both].

I think it took me a full two minutes to think of the next question [both continue to laugh]. But we were able to go on with that case. Ming had very poor experts, people that purported to be experts and really were not. We were able to make a lot of hay with them, and eventually we settled that case. There wasn't any injunction. We paid Ming for the bulls that he had lost and a little bit in addition to that. So eventually it turned out all right. But Ming turned out to be a pretty tough customer to handle [chuckles] on the stand, I can tell you [both laugh].

Trade Secrets Cases in Silicon Valley

[Interview continued: May 20, 1987]##

Ampex Corporation

Hicke: Let's begin this afternoon with some of the cases that you haven't covered so far.

Dyer: All right. The field of trade secrets became important particularly with the advent of the electronic companies on the San Francisco Peninsula. They were important to those companies because they would expend large funds and time and talent in the investigation, research, and development of various electronic devices involving video machines, computers, and other devices of that nature.

It was much to the benefit of their competitors to learn what was going on and to acquire that information so that without any effort or expense on their part, they could develop and market competitive devices. In other words, they were stealing the research and the time and the talent and the development money of our clients.

One of the first cases that I happened to handle in that field was for the Ampex Corporation in Redwood City. That company was founded by Alexander Poniatoff, who was a white Russian with a very colorful background. He had worked in Shanghai and had come here after the war and with Ginsburg had developed the first video patent that really made possible television as it is today. Theretofore all of the television shows were live, and people -- oh, they mentioned people at the time such as Bing Crosby -- were unhappy with demands on their time in making live shows for television.

Ginsburg and Poniatoff had worked on high fidelity sound, and they conceived the idea that the principle applicable to the sound

tapes could be expanded, perhaps, and a picture developed along with the sound. It was apparently a difficult problem, and Ginsburg and Poniatoff persevered against some financial advice, and that was the start of the Ampex Corporation.

One of the amusing stories that Poniatoff told was how after he and Ginsburg had invented the video tape recorder, he applied for various patents in countries all over the world, and he received a response from Japan that it would deny his patent application because it had demonstrated mathematically what he proposed was impossible. In his Russian accent he said, "Ginsburg and I are reading this letter and we are laughing like hell, because over in the corner the television is going." [both laugh] Ampex, by the way, meant "Alexander Mathias Poniatoff, Excellence." So he was a colorful character to deal with and that was an interesting case.

The specific case that we were involved with was Ampex v. Machtronics.* Ampex had developed this video recorder, and as a refinement of that it put in a great deal of time and brought to market a portable video tape recorder that presumably was to have great market appeal, because it could be used in classrooms and in commercial presentations and that sort of thing. I don't think it ever got off the ground to the extent that they expected, but it was a promising product at the time. This was in 1962.

There was a man name Kurt Machein who had come from Germany after the war and was an engineer and was employed by Ampex. He worked in this field of the portable video recorder and while at the time employed by Ampex, he started to develop his own device in competition with it. He went so far as, while still working for Ampex, to meet with brokers to discuss the financing of his new company. He took various people from Ampex when he left and continued the development of his machine.

Hicke: Was he an American citizen?

Dyer: No, he was not. Well, he may have been an American citizen at the time. His background was that he had been a technical man in Germany. In fact, he had been in the Wehrmacht during the war, although that really wasn't pertinent to the case, but that was just part of his background. He was an intelligent and aggressive individual and had great hopes to build up a company that would be a substantial competitor to Ampex.

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* Machtronics Inc. v. Ampex Corp. (1964) U.S. District Court for the Northern District of Calif. No. 40923.

Hicke: Would it make a difference if he were a citizen or not in this case?

Dyer: I don't think it would have made any difference at all, as far as the merits of this case were concerned. In any event, we brought an action against Machein, or Ampex did, to enjoin him from marketing his device, or any device that would incorporate what we thought were trade secrets, and from utilization of various information that was made available to him while employed.

That was a hotly contested case. We had various proceedings in court in Redwood City. Then after the case came along, why Machein, through [Joseph] Alioto, brought an action for an antitrust violation.

Hicke: Alioto was his lawyer?

Dyer: Alioto was his lawyer, and that action was in the U. S. District Court in San Francisco. I continued to handle the trade secret case, but I was not an expert in the antitrust field, and Jim [James] Michael and Bill [William C.] Miller took over the defense of the antitrust action. We then filed a motion to defer or to stay the federal action until resolution of the state court action in superior court in Redwood City.

That case was argued by Noble Gregory in the U. S. Court of Appeals, and we had an adverse decision. The court said that the federal court could not abstain from exercising its jurisdiction and ordered the case to go forward. That resulted in a long antitrust trial in which I did not participate. But the people that I mentioned did, and it resulted in an adverse antitrust verdict, but the trade secret claims of Ampex were upheld. That was a long case and it was hotly contested. A rather interesting case because it involved the development of the video recorder and the field of video televising.

Hicke: Did Ampex come to you for this case or had you been advising them before?

Dyer: I think that the firm had done some work for Ampex before. I got the case through a patent law firm in Chicago that were the patent lawyers for Ampex. A man named Ed Luedeka knew our firm favorably, and I think he was the one that told Ampex that it should come to us to handle the trade secret aspects. I worked with Luedeka after that on that aspect of the case. It was one of the more important early trade secret cases.

Hicke: Let me ask one more question. How did you personally get it after it came to PM&S?

Dyer: Well, I don't know, really. I had just concluded the trial in one of the big drug cases, in the Chloromycetin case. I think I was just one

of the lawyers with some experience that was available, and one of the partners asked me if I would take this matter over, which I did. It was interesting and rather extensive litigation, and is reported in the Federal Reporter.

Stauffer Chemical Company

Dyer: Another case that I had about that time that never did go to trial but was rather interesting involved the Stauffer Chemical Company. I got that case through Art Conley. As I mentioned before, he was a friend and a prominent and skilled trial lawyer and the head of a patent and trade secret firm in Wilmington, Delaware -- Connolly, Bove & Lodge.

Stauffer Chemical had a product with a long chemical name that I cannot recall at the moment but whose short, common name was Tickle-3. It was a catalyst that was useful in various industrial processes. It was manufactured by Stauffer under quite secret conditions and marketed to various industrial concerns in the United States, and a profitable product. Three of the engineers who worked for Stauffer and who were intimately associated with the development and production of this product resigned and came to California and set up a plant at Richmond, California where they undertook the development and production of this same product.

Stauffer contacted us and said that it wanted a complaint filed to stop production of this product by these people. Well, we had recently been through the Ampex case, and I was aware of the antitrust implications of suing a small company to try to stop its production of a product. I asked Stauffer if it had hard evidence or reasonably credible evidence that these three people were actually using the same manufacturing processes and facilities as Stauffer in the development of this chemical. They said, well, they almost had to be but no, they really didn't have that information. "Well," I said, "if we do bring an action against them and it turns out that they have a different process, we could be in trouble antitrust-wise."

Well, we almost got fired at that point, because they wanted us to file a lawsuit right away. In the interim, by the way, the lawyers for these three people had heard that Stauffer was concerned and was thinking of initiating action, and they got in touch with me and claimed that there was dissimilarity in the manufacture of the product. They wanted to settle. They wanted to come to some resolution of the matter, not settle, really, and didn't want to get into long, involved litigation, because even though they claimed they would win, that would be a very deflationary thing as far as starting a business was concerned.

Hicke: But they had switched at that point into a slightly different formula?

Dyer: Well, I suppose they could have. I don't know whether it was possible technically, but in any event, that never came up.

I was apprehensive about this case because of the considerations I've mentioned. I talked to Conley and I suggested, or rather perhaps we just agreed, that we should get some independent person, if possible, to look at what was going on in Richmond and give us an opinion. So Stauffer reluctantly agreed to this and I contacted the lawyers for this company. The case was Stauffer v. Purechem.

They promptly agreed to retention of a person who was an emeritus professor of chemistry at the University of California and who was generally familiar with chemistry, chemicals, and processes of this nature. Under an agreement of confidentiality, he undertook to inspect the facilities and interview these three people and to answer a hundred questions that we made up with the other lawyers and with Stauffer as to whether the process was similar or dissimilar.

After the examination, the response of this professor was that the dissimilarity was total. In other words, in answer to the hundred questions as to similarity or dissimilarity, it was dissimilar in a hundred instances. So at that point we told Stauffer it should silently fold its tent and move away. It did, and nothing ever happened further. I was a little bit chary that it might be sued despite the fact that it went through this comparison. It never was, but it was a lesson that sometimes the best advice to give the client is to do nothing, which happened in this case. Because if we had sued them, I think we could have been dead ducks as far as antitrust liability is concerned.

Hicke: Have you ever had an occasion when you offered advice like that and the client didn't take it?

Dyer: Much later on in another case involving the Zabo Corporation on a totally different matter, I went to trial in a case which I lost. I went to trial on that case very much against my better judgment and against my advice to them. But we can get to that later on.

Hicke: Okay.

MICR-shield v. First National Bank of San Jose

Dyer: Another trade secret action that we had, or rather really it was a patent action, was a case called MICR-shield v. First National Bank of

San Jose.* That action involved a chemical, a solvent compound that was used to obliterate the magnetic numbers on checks.

As you know, checks when written now go through computers which read the magnetic numbers on the checks. They tell me that every once in a while because of a misreading or illegibility of a number on a check, there has to be an erasure of the numbers and new magnetic numbers have to be put on. Apparently, this presented a difficult problem to the banks because it slowed down the process. They needed something that would allow a clean and quick erasure of these numbers and not destroy the checks. There were all sorts of methods -- abrasive erasures and so forth -- that were presented.

There was a company called the MICR-shield Company that had an erasing chemical -- I think it was more or less a common chemical, as we after found out -- but it was able to get a patent on it and was getting royalties from banks throughout the United States. It was a lucrative patent for these people, because it was a common chemical and it was sold on a high marketing basis. There was a lot of advertising and that kind of thing.

The president of the First National Bank of San Jose disputed with the MICR-shield Company over the amount of royalties the bank should pay. He got his back up and finally said he didn't think this was very unique in any event, and he didn't think he would pay. So the MICR-shield Company sued the bank for royalties. That brought into issue the validity of the patent. Well, I wasn't a patent lawyer and the bank didn't particularly want to retain a patent firm; they said the issues weren't that difficult.

Hicke: MICR-shield came to you?

Dyer: No. We represented the First National Bank of San Jose. The bank people were the ones that were saying they weren't going to pay that amount of royalties and, in any event, they didn't think this was unique.

Hicke: They were challenging the patent?

Dyer: In other words, there wasn't anything novel about it and the patent was invalid. So we went to hearing on that, and [chuckles] the other side had its patent lawyer and a couple of chemists. We presented a very simple case. I remember taking out a handkerchief and dipping it into some -- I think it was something similar to carbon tetrachloride. "You know," I said, "if I dip this into this stuff and I rub it over a

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* U.S. District Court, Northern Calif., 45427.

check, it would rub out these magnetic numbers, wouldn't it?" They said, "Yes." I said, "Would you consider that an infringement of your patent?" They said, "Yes."

Well, that was enough for the judge. The patent was ruled invalid and the bank didn't have to pay. I think it was a mistake for the MICR-shield Company to have contested that case, because it became clear to us that one could use almost any kind of cleaning solvent and get the same results as this so-called MICR-shield, which was really carbon tetrachloride, or something similar. I don't remember the precise chemical, but it was something basic with little added. It was a public relations gimmick. They didn't make it stick and they were very foolish to have presented it to a judge.

We also had cases for the 3M [Minnesota Mining & Manufacturing] involving hiring of their employees by other computer companies. That was a big issue among the Silicon Valley firms.

Hicke: They were stealing the employees?

Dyer: They were stealing their employees. One of the cases we had was 3M v. Verbatim. That was before Judge Homer Thompson in San Jose, and we prevailed on that.

International Business Machines

Dyer: Now I want to talk about the IBM cases. There were a series of those that went on for about ten years, commencing in about, oh, 1968, 1969, 1970, and they went on, I would say almost through 1980 -- not continuously, but there was a series of cases that went on and they were all for IBM.

Hicke: Was there some reason they stopped in 1980? The practice didn't cease, did it, of stealing trade secrets?

Dyer: Well, the practice didn't cease. I think probably to some degree it may still be going on. But I think the protective services and the procedures of IBM particularly have improved greatly during that time. They're much more sophisticated now in the way they protect their information, and also they have professionals who can track these practices down and reveal them, and I think they are forestalled before they get to litigation. That's my opinion.

Hicke: Would the evolvement of the law through these cases perhaps have had some effect?

Dyer: Oh, I think so, and with the development of these cases, the judges, particularly in the San Jose area, are now sophisticated in this field, as are the police and the district attorneys. There recently have been some criminal proceedings for stealing trade secrets, and the judges and the lawyers are quite well educated now on this subject and are inclined to believe that a lot of very valuable information is stolen. There have been some heavy penalties that have been imposed in those cases, and this may be another reason for the fact that the volume of the cases doesn't seem to be as high as it was some years ago. Although I'm sure they're still going on.

We were retained in the latter part of the 1960s, about 1970, by IBM.

Hicke: Had the firm done work for them before?

Dyer: I think probably it had. I'm sure it had; to what degree I don't know. But IBM had brought into being a large laboratory and manufacturing facility at San Jose where it employed over 7,000 people, among whom were various scientists and engineers and technicians. They developed computer-related devices, mostly peripheral devices known as disk files.

As a background to these cases, you should understand that there is something called the plug compatible market. There are many competitors of IBM who make disk files, which are devices that have a file of whirling disks on which information is put on and taken off. They are plugged into -- that's the plug compatible part -- the mainframe IBM computer. Now in order for the competitors of IBM to compete with IBM in the manufacture of these disk files, these peripheral devices, their devices have to be plug compatible with the mainframe computer.

Thus, they must have technical information concerning the interfacing electronics and various other things in order to make them compatible and make them workable with the mainframe IBM computers. Thus, it behooves them to determine what the new generation of IBM disk files is to be like in their electronics and in all of their technical circuitry and other attributes. The sooner they know this the sooner they can commence the development of their own competitive devices.

The appeal of the peripheral devices manufactured by competitors was, number one, they were sold somewhat cheaper than IBM, and number two, they not only were compatible with the IBM mainframe but were claimed to be -- although I don't know this at all to be true -- faster and more efficient in various particulars. It also was very much to the advantage of these people if they could get information, legally or illegally, as early as possible and thus save themselves millions of dollars in research and development money.

Well, the reason that we were retained about 1970 was the departure from IBM of many people to the Memorex Corporation. Memorex was a competitor of IBM's in the manufacture of these peripheral devices, with a plant fairly close to the San Jose plant. I believe the Memorex plant was in Cupertino or in that area; I've been there. A vice president of IBM -- I don't know whether I should mention his name because he's still around and an able and savvy guy in the computer field -- had intimate knowledge of what was going on in the IBM laboratory and the identity and skills of particular individuals who were working on the development of these devices.

Well, he became, for various reasons, dissatisfied with IBM, or perhaps it with him, I don't know, but in any event, he left and became a vice president of Memorex. Soon after the drain of IBM technical people from IBM to Memorex started. Eventually they took over 300, and we then filed a lawsuit. Memorex of course denied it.

Their approach, as it developed, in hiring these people was that the ex-IBM vice president would indicate to Memorex the identity of various people with skills in the development of these devices still under development in the IBM laboratory. Then they would be approached, and the approach would be that "You come over and work for us, and we don't want you to take with you any IBM confidential information. We don't want any documents or any plans or charts or anything of that nature." But what they would do, was to start them developing a device that was to perform the same function as the device they knew was under development in the IBM lab at that time. Well, of course, one can't wash clear the slate of his memory. Now, the result would be that they would come out, maybe in six months --

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-- with a device that would be very similar to the IBM device. One of the things they would say to these people was that they would pay them a salary about equivalent to the IBM salary previously earned, but not much, if at all, in excess of it.

Hicke: What was the enticement?

Dyer: The enticement was this; they would say to him, "Now, you go to work for us" -- and I remember one fellow that worked on an actuating device, something that shoved a magnetic head across the whirling disk and would retract it. Theretofore that device had been hydraulically activated, and the IBM man had been working on an electronically activated device that was thereafter put into production and was very much faster and much more efficient.

Well, when they hired this fellow they said, "You start working on this actuator for us." Well, he came up with a device that was

almost identical to ours and the enticement was that they had said to him, "You start working on this device and as part of your employment we will give you" -- whatever it was -- "10,000 shares of Memorex stock. But we're not really going to give it to you; we're selling it to you. You'll pay for it at $1 a share. And you have to pay for it. You have to give us the money. This is not a subterfuge. But we will give you this advantage: that on the day that you develop this device and it's accepted, and on the date of the first sale of this device that has come through the test and has proven efficient and workable, on that day your stock, for which you pay $1, is transferable into fully marketable Memorex stock," which at that time was $60.

Hicke: That's really an enticement --

Dyer: And they made that kind of an offer to various people and they hired a lot of very good ones. For the next two or three years we sued Memorex. Of course, we had an antitrust cross-complaint.* I would say, for the next two or three years, why, we went through all the discovery and it was lots of motions, lots of contesting in court.

Hicke: Who was counsel for Memorex?

Dyer: The Morrison firm -- Bob [Robert D.] Raven. Dick [Richard J.] MacLaury, who is a very experienced antitrust lawyer, of course, represented us too in the Memorex case and represented basically the antitrust aspects of it.

Eventually that case was settled whereby Memorex agreed not to hire any more people and not to use certain information and so forth. I think it was a case where both sides claimed victory, but certainly, at least from the trade secrets standpoint, we were pretty well satisfied that we had stopped them from taking any more of our people.

I think the real main thrust of it was we didn't want this drain to continue whereby we would train these people and qualify them and educate them and spend a lot of money on them and then have them go over to Memorex, which would get the fruits of our endeavors. So that was a long case, a hard and contested case, but worthwhile. I had a lot of education in computers. Before every deposition I had to be educated by these computer people, which is of course routine in any technical case like this. But I found it quite interesting and somewhat challenging.

Hicke: Were there other cases for IBM?

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* Memorex Corp. v. IBM (1972) 555 F.2d 1379.

Dyer: Yes. After the Memorex case -- a year or two after it was settled -- I received a call to be in court in San Jose on a trade secret matter. This was before Judge [Peter] Anello, who was a good, astute judge. There had been a loss of information from the IBM laboratories. IBM then hired a man who had been head of the Drug Enforcement Agency of the United States to investigate the loss of the trade secrets, again involving these peripheral devices. It's interesting how they found that there was this loss of trade secrets. This is quite apart from the Memorex case, now, but it was connected in a way.

In the Memorex case we received information through answers to interrogatories that a supplier of electronic parts in Southern California was selling parts to Memorex, the design of which could only have come from the IBM laboratory. It had not yet appeared on the market. So when that happened, we noticed the depositions of some of the officers of this Southern California supplier and subpoenaed their charts and documents, their plans, their drawings of these parts.

I went there with an IBM engineer and took the depositions of these people, and I remember when they produced their drawings, we compared them right on the spot with the IBM drawings, and it was an almost absolute overlay situation. I remember asking the vice president of that company that here, for instance, is the dimension .00046 and our dimension at the same point, tolerance really, is .00046, which is identical. "Where did you get it?" His counsel said, "I instruct him not to answer on the ground that the answer may tend to incriminate him." Well, of course, this was a civil case and I was shocked at that objection, although it was good, and I said, "You mean it will tend to incriminate him criminally?" He said, "Yes."*

Well, you know, looking at that drawing -- our drawing was marked "confidential drawing not to be used outside of IBM," and they had an absolute Chinese copy of that thing. Well, the information came out that they had bought this drawing.

The scheme was that several of our engineers -- one of them was a fellow named Serrata -- would take drawings of these secret matters under development and go on the Bayshore Highway and into a supermarket parking lot or something similar. He would get out of his car and meet a fellow who was an ex-IBM employee named Steckel and the drawings would change hands for money. Then Steckel would broker these drawings to various competitors of IBM.

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* cf. Forro Precision Inc. v. IBM 673 F.2d 1045.

Well, this man that was hired by IBM, who was head of the Drug Enforcement Agency, got hold of one of Steckel's affiliates. I don't know how he did it. But he persuaded him to act as buyer, and the result was that there was a series of sales that were recorded, because the IBM people would have the next room in the motel where these transactions would take place, and they would record these conversations.

The conversations were really remarkable. For instance, Steckel would say, "You people really need this. This is the real IBM McCoy and it's worth a lot of money." There were meetings at the Chinatown Holiday Inn, there were meetings in the Las Vegas Hilton and other places. IBM ended up with twenty-four recorded tapes of Steckel and various competitors of IBM and compatriots buying this material, knowing that it was stolen goods.

Hicke: That's quite a bit of cloak and dagger.

Dyer: Oh, it was. That ended in indictments of various people. Serrata went to jail and so did Steckel.* They had, as I say, these tapes, and they just really had the wood on these people.

The first time we got into the case was when I had this call to appear. I just got it one night and was told to be in court in San Jose the next day. Of course the criminal proceeding was being handled by the district attorney, and IBM people were cooperating with him. What had happened was that one of the investigators for the public defender's office, which was defending I think Serrata at the time, who was under indictment and in fact just about ready to go to trial in the criminal actions -- one of the investigators had worked for the public defender in investigating on behalf of Serrata in the IBM trade secret case and had, without any knowledge of the IBM lawyers or the executives at San Jose, been hired as a security guard at the IBM plant in San Jose.

Now, this was a security force, but it's a force that had to do with the security of the physical plant, and they didn't know anything about the trade secret matter. This fellow had been trying to get a job there for a long time and had his application in, and it just happened that a slot came up at that time and they called him and asked if he'd be interested, and for various reasons -- I don't know; maybe he just wanted the job -- he never revealed that he had been on this Serrata investigation.

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* People v. Serrata (1976) 62 Cal.App.3d 9.

Well, the defendant's lawyers found out that he had been hired by IBM. They said this was a violation of his constitutional rights, that a criminal defendant is entitled to maintain his confidences between himself and his lawyer without others coming in and intruding into them, particularly the complaining witness. They made a motion to dismiss the criminal indictments on that ground. That was the reason for that hearing.

When I walked into court the next morning [chuckles], it was really something. There were, oh, about six or eight criminal defense lawyers, all pointing the finger at IBM.

That was interesting because Judge Anello said, "Mr. Dyer, I'm going to appoint --" I don't think you'd call him a special prosecutor. He said, "I'm going to appoint special counsel to inquire into this matter. We're going to start hearings on this tomorrow morning. The defendants can tell me who they want produced by IBM, and you'd better have them here." The judge appointed a young Spanish lawyer, or of Spanish extraction -- I thought he was a very fine, good, able fellow -- a young man named Ruiz who conducted what really amounted to a cross-examination of our people for about the next week at least. They went on the stand one after another.

As the tale unfolded, it didn't make us look very smart as far as communication [chuckles] between people at IBM was concerned. But at the end of it Ruiz said, "You know," he said, "I've tried hard here, but I can't make a crack in the story that the people concerned with this trade secret indictment and the stealing of trade secrets didn't know anything about the hiring of this fellow and had no part in it." The judge agreed, despite the loud continued objections of the criminal defense lawyers.

That was the way that we came into that IBM case. In the criminal cases, as I say, some of the people went to jail; a fair amount of them were convicted. But some of them, about six of them, I think, six or eight of them brought civil actions. There was an Arnold case. He was a criminal defendant, and he owned an electronic company in Los Angeles.* There was a man named Jarman, fellows named Bunch** and Kronzer. Kronzer was afterwards represented by the Alioto office. They were dismissed for various technical defects in the search warrants or in the arrest warrants. These are very technical matters in the criminal procedure law. But because of those technical defects, the indictments were dismissed.

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* Wolfgang Arnold v. IBM (1980) 637 F.2d 1350.

** Bunch v. IBM U.S. Dist.Ct. N.D.Ca. No. C-74-2147-RFD.

Then afterwards, Kronzer and Arnold and Bunch and various others, as I say, six or eight of them, brought civil actions in the U.S. District Court. They were all vigorously prosecuted. The claim was that IBM, in effect, had taken over the investigation of the criminal conduct of these people from the D.A. and that without proper warrants, had made unlawful searches of premises and that there was a violation of their civil rights. Basically, they were civil rights cases. Those cases went on for, oh, four or five years.

Hicke: Did you defend IBM?

Dyer: Yes, all of them. As I recall, the Bunch case was before Judge Ingram in U.S. District Court at San Jose. That was dismissed. In the Kronzer case, Kronzer was the head of a machine tool concern in San Jose that previously had made IBM parts. The charge against him had been that he had utilized some of his information unlawfully. He had been indicted and it had been dismissed, and then he sued us. He was represented by John Burnett, who was a prominent San Jose lawyer. Also, later in the case by the Alioto office in San Francisco. That case was vigorously contested. That was the only case in which we paid any money, and as I recall, it was about $100,000.

After about three years of litigation, we were in deposition in New York, taking the testimony of witnesses, when Kronzer asked his counsel to ask me if he could talk to the IBM house counsel, Nick Katzenbach's office, about settling the case. I talked to Dan Evangelista, who is now the general counsel, and he said, "Sure. Send him up here." Kronzer didn't want any of the lawyers around when he talked about it. He walked into the Armonk [New York] offices of IBM and said he was sick of the lawyers, he was deathly sick of the case, and he wanted out. Previously the demand had been in seven figures. As I say, that case eventually was wrapped up. After negotiations between Kronzer personally and the lay people -- he didn't want to talk to lawyers [laughter] -- and businessmen at IBM, that case was settled on a very favorable basis.

Another case that I mentioned in that series that was vigorously prosecuted was Arnold v. IBM. Arnold had an electronics disk file firm in Los Angeles, and he had taken our secrets; we didn't have much doubt about that. He had a vigorous and very aggressive lawyer named Richard DiSantis in Los Angeles. The case was before Judge Francis Whelan in U.S. district court. He was an able but an extremely irascible judge. He lambasted me from time to time. But everybody that went into his court [laughs] got hit one way or another. DiSantis's overly aggressive tactics didn't sit well with Judge Whelan, and there were some heavy exchanges between the two.

Eventually, and after, I think, two or three years of litigation with a very large record, we were able to persuade Judge Whelan to

grant us a motion for summary judgment, and that dismissed the case. Arnold appealed and the U.S. court of appeals affirmed the judgment of dismissal.

Hicke: Can I interrupt just one minute? When a judge does that, what's your best procedure?

Dyer: Does what?

Hicke: Well, you said he gets excited and lambasts you or something like that.

Dyer: Oh, when he lambasts me? Oh well, [laughs] with a judge like Judge Whelan, who is a forceful, experienced judge, I think the best thing to do is to duck and keep a low profile. And of course, when he's lambasting the other side, you just stand aside and [chuckles] observe what is going on. Eventually there came to be quite a vendetta between Di Santis and Judge Whelan. But I think for very substantial legal reasons, because we had a lot of good reasons for it, eventually we had a summary judgment motion granted.

Judge Whelan was like that, as I say. He was quite irascible, but he was still a sound judge and experienced in the law, and he knew the law. We had a substantial summary judgment motion. That is also, I think, supported by two similar cases, one in superior court in Orange County. We brought a similar motion for summary judgment which was argued and granted.

So, as I say, after a long period of time and six or eight cases, we were able to prevail in all of them except in the Kronzer case and there wasn't much of a payment made there. I know the Alioto office wasn't very happy with it. I think that about covers the trade secret cases.

A Case of Advice Refused

Hicke: What about that case where the client didn't take your advice?

Dyer: The case was entitled Elena Dardi, et al. v. Zabo Food Service Company.* It was tried in superior court at San Francisco before a jury about fifteen years ago. Zabo was a large food service company

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* Elena C. Dardi v. Szabo Food Service Co. (1972) Superior Ct. of Calif. County of San Francisco No. 540956.

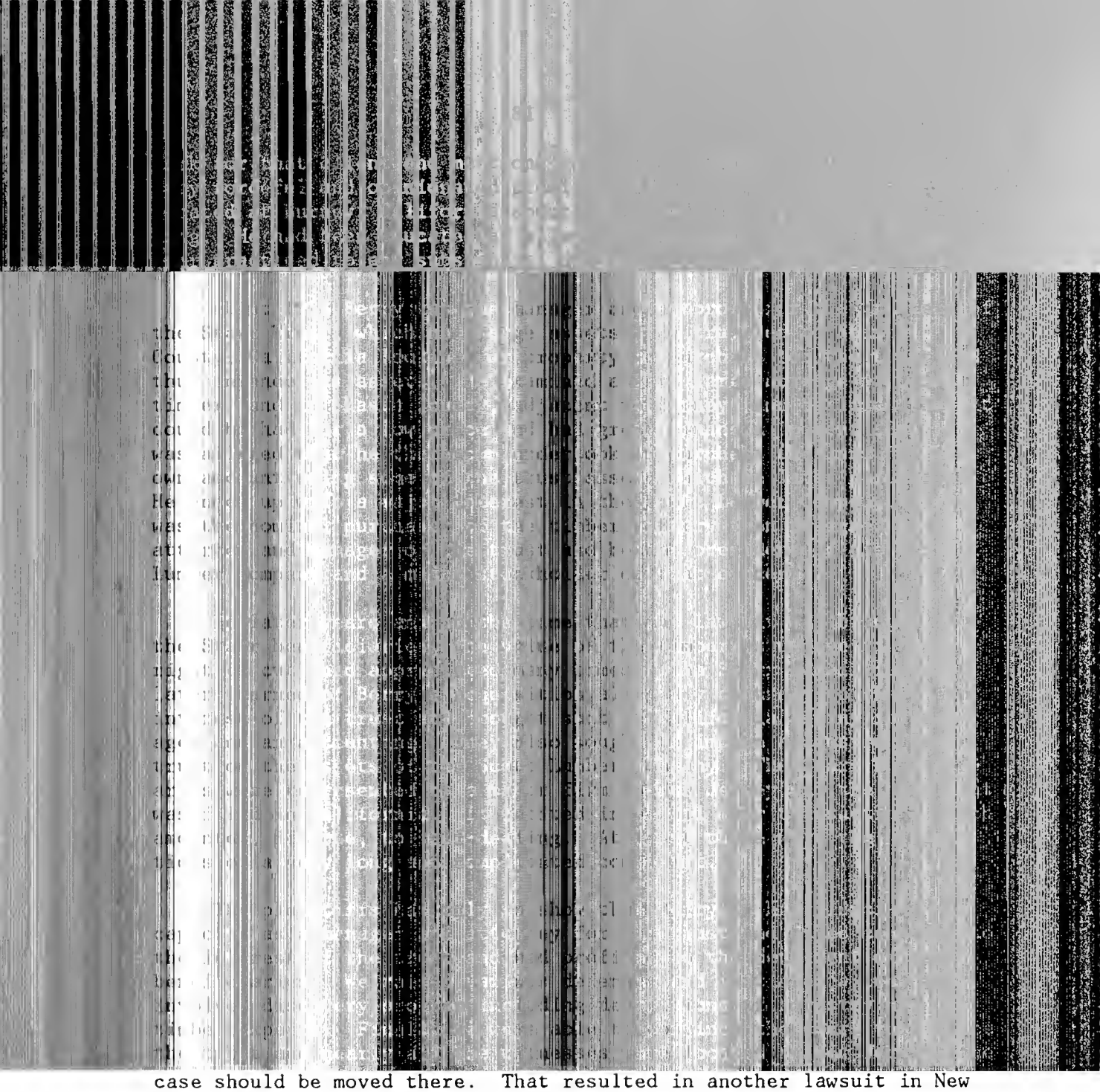
headquartered at Chicago and represented by a large Chicago firm. Virgil Dardi, the plaintiff, was represented by Charles Morgan, an able San Francisco lawyer.

Dardi was somewhat elderly at the time and had a long history of dealings in financial matters. For many years he had been engaged in putting companies together and in making financial arrangements, and I believe at one time he sat on the board of the Bank of America. He claimed to have been a close associate of the Gianinnis. Dardi had done considerable work for the Zabo Company and had a contract whereby he was to be compensated or indemnified two or three hundred thousand dollars for his services and expenses. He and some of the Zabo executives quarreled, with the result that Dardi was never paid and that was the reason for the lawsuit.

A short time after Dardi completed his work for the Zabo Company, he was indicted in another matter for violation of the security laws and was convicted of fraud. He then served some time in the federal penitentiary at Terminal Island. A lawsuit was brought after he came out of prison. The Zabo Company and the Chicago lawyers who worked with us on the case felt strongly that no jury would compensate or indemnify an ex-convict two or three hundred thousand dollars for financially related services, particuarly since his conviction had been for securities fraud. I had a completely different view on the matter and pointed out that the contract was plain that he was to be paid, and that in San Francisco where we have liberal judges the risks were high that the jury would disregard his prison background and would award him the amount called for by the contract. I argued long and hard for that position, but it was rejected out of hand by the Zabo Company and its general counsel, and we then went to trial before Judge Vanderzee and a jury. After about ten days of trial, the jury (10 to 2) decided in Dardi's favor and awarded him the two to three hundred thousand dollars. The prison sentence came out during the trial but was largely disregarded by the jury.

After the verdict and judgment, Judge Vanderzee granted our motion for a new trial and that led to a settling of the case for somewhat less than the verdict. The judge granted the new trial because of extensive impeachment of the plaintiff. However, basically the case should never have been tried before a San Francisco jury and was tried at all only on the insistence of the client and its general counsel. Perhaps it could have been defended in a more conservative county but not in San Francisco.

Another case of some interest that came to the office in my time was that of the Starr Trust v. Scott Lumber Company and Ray Berry. Larry Kuechler, who was an expert in timber matters and timber law, asked me to take the case. He did much work for Berry and the Scott Lumber Company. As I recall, Charlie Prael did considerable labor



case should be moved there. That resulted in another lawsuit in New Jersey and an appeal to the New Jersey appellate court in very protracted proceedings.

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* See Charles F. Prael, "Litigation and the Practice of Labor Law at Pillsbury, Madison & Sutro," an oral history conducted in 1985 by Carole Hicke, Regional Oral History Office, the Bancroft Library, University of California, Berkeley, 1986.

The long and short of it is that we were able finally to settle that case on a quite reasonable basis, and I was very happy to see that occur, because the risks of self-dealing cases such as this were high. Larry Kuechler and I thought we had an excellent result. Berry kept his stock interest in the company and control of its affairs. But he always overspoke and said to us at the time of settlement that he would go along but that "he wished that in handling his affairs we would in the future proceed on the basis of principle and not on the basis of expediency." I suspect that he would have found the judgment rendered in that case, if it had gone to trial, very inexpedient indeed.

Water Rights in California

Dyer: I want to talk now about the water rights cases. There aren't many people engaged in that field of legal endeavor, and I find it rather interesting. One deals with rural people mostly, and with a history of streams and water rights, and I find it rather intriguing. Some of the matters, at least to me, have been more entertaining and interesting than the general run-of-the-mill cases.

Initially I went into that field representing a local rancher in the Hollister area who is a friend of Phil Hudner's named Howard Harris. Harris was a down-to-earth person but extremely knowledgable in many fields and quite an educated man. He knew entomology, he knew geology, he knew hydraulics. He was kind of an all-purpose witness that I found useful in the series of matters I had there involving water rights, matters before the State Water Resources Control Board with various farmers in the area contesting the right to the flow of streams in San Benito County.

Bird Creek was one of the prominent streams over which we contested. There were three or four cases on that. Another matter was for an old-time doctor who had practiced for many years and had a lot of interesting tales about administering medically to the pioneer people in San Benito County. That was Doctor Roland Reeves. He owned a large cattle ranch and a creek on it that initially had only a little water running in it. It was heavily planted along its beds on the sides of the stream with willows and other things -- I think botanists call them phreatophytes. They're water-loving plants, and they soak up incredibly large amounts of water from the stream.

Well, Harris and Reeves were friends. Harris told him that if he spent some money and did a good job of getting rid of those willows and water-loving plants, he could develop a good water source. And he did. He developed a really substantial stream from something that had

been very minor, and it was useful in watering his cattle. He had a lot of cattle down there.

Well, of course, when that stream started to flow well it was enjoyed by the lower riparian owners. They said as lower riparian owners they were entitled to the increased flow of the stream.

Hicke: I take it he had pulled out all of the plants.

Dyer: He had pulled them out. In other words, he had developed the stream. So they filed a complaint with the State Water Resources Control Board saying they had riparian rights. They also had what are called appropriative rights.

There are two kinds of water rights generally in California: riparian and appropriative. Riparian is the old common-law right to reasonable amounts of water flowing in a stream flowing through your land. An appropriative right is a right to water that you take. That emanates from the old practice of the miners in California taking water. The only way you can get an appropriative right is to obtain a permit from the State Water Resources Control Board.

Well, some of these lower owners not only claimed riparian rights but they said they had a permit to a certain amount of water in the stream, et cetera. We went to hearing on that case and produced experts on the effect of the removal of water-loving plants. The State Water Resources Control Board said, "You've developed the water; you're entitled to it. Better that you get it than the trees." That was kind of an unusual case and a rather interesting one. We had various other matters in San Benito and other counties.

Hicke: That probably changed the law in California?

Dyer: Well, it may have changed it some. I don't know, but it certainly was of considerable use to us in that instance.

Another matter, a much more substantial water case, was that of Lake County v. Yolo Flood Control & Water Conservation District.* Ed Chandler is a senior lawyer in San Francisco and for many years was a water expert. He had done some work for Lake County. In this matter, for various reasons, he felt himself disqualified; so he asked me if I would take on the representation of the Board of Supervisors of Lake County. It involved Clear Lake, and this started in 1973.

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* The County of Lake v. Yolo Flood Control and Water Conservation District (Nov. 1973) Superior Court, Solano County No. 58122.

Clear Lake is wholly within Lake County, which is, I guess, a hundred or more miles above San Francisco to the north and is a major recreational resource and source of water. It's the second largest lake in California, Tahoe being the largest. It has a single outlet, which is Cache Creek.

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Dyer: Cache Creek flows to Yolo County, where it is distributed by the Yolo Flood Control and Water Conservation District to the farmers in that area. Most of the crops, I believe, that you see when you are driving to Sacramento past Davis and that general area in Yolo and Solano County are watered by Clear Lake water. Yolo County has had rights to Clear Lake water for over, oh, sixty or seventy years. They are old rights. They've been adjudicated for many years and have been the subject of some litigation, but are well established. There is an extensive acreage devoted to agriculture in Yolo and Solano Counties that depend on that water. So the continued provision of it to the farmers was important.

The holder of that water right was the Yolo Flood Control and Water Conservation District that was the defendant in this action. Well, the reason that we were retained was this: the Yolo Flood Control District would draw down that lake commencing in the late spring, so that by the time June and July rolled around, what otherwise would be recreational and sandy beaches around Clear Lake would be mud, and the algae and the water plants would be exposed and would rot, and there would be offensive odors and unpleasant conditions. There were resorts and homes and vacation places around the lake, and there was more or less of a general outcry against this year after year in Lake County. The supervisors felt compelled to do something about it, and that is why they retained lawyers.

Well, when I first got this case I conferred with Dave Luce, who was the combined district attorney and county attorney, and he told me the background of this dispute. It didn't look good as to contesting the water rights of the Yolo district, since they had been adjudicated and were firm for a long period of time. But there was the environmental factor that had come into play in the last few years, and I knew that that could be one approach to this problem.

Another thing that arose that gave some support to our position was the development and construction of another source of water for the Yolo district which would go into Cache Creek but from a completely different watershed. It was known as the Indian Valley Dam. The Yolo district was building a dam which would back up waters of various streams adjacent to Clear Lake, but these streams did not flow into Clear Lake. They would flow eventually into Cache Creek and then down into Yolo County. But it occurred to me that Yolo would need an environmental impact statement to build that dam.

We filed a lawsuit that raised the environmental issue and the issue of their water rights. It sought to compel Yolo to operate that dam in conjunction with Clear Lake, so that the releases from the dam on Indian Valley would occur before releases from Clear Lake. That would maintain further into the spring and summer the higher levels in Clear Lake and thus alleviate the odious conditions that existed due to early drawdown.

Well, when we filed that lawsuit, we had a really violent and strong reaction from the Yolo district and the farmers. They hired Myron Moskovitz, who was a prominent water lawyer in Sacramento, and vigorously contested this case. They filed a motion for summary judgment that was argued in Solano County Superior Court. It was granted only in one minor particular due to a late filing on our part. That late filing was due to the fact that something was filed by the Yolo District in Lake County to which a response was needed, and I had left specific instructions with the County Clerk of Lake County to let me know as soon as it came in, because the statute didn't require service of a copy on us, and he failed to do it.

He never did have any answer to that. I won't go into it, but in any event we still maintained, after that summary judgment, about 90 percent of our lawsuit and could have gone to trial on that basis. As the case progressed, it was clear that it would be an expensive and a long, drawn-out affair with an eventual expensive appeal because it involved a major water resource in California.

The initial hydraulic engineer that had been retained by Lake County had become very ill and subsequently passed away. I asked Lake County if I could hire Don Kienlen of Murry, Burns & Kienlen, who are highly qualified hydrologists and water experts in Sacramento. I went over this matter involving lake levels with Kienlen.

One of the key factors in this case was a decree that had been issued by the superior court in 1919. You can see at that time it was about sixty years old. It was called the Gopcevic Decree, and it regulated the level of Clear Lake pursuant to a gauge known as the Rumsey Gauge, which had been established way back in the 1870s or so by a retired New England sea captain who had come to Lake County. That was Captain Rumsey.

The decree said that the lake had to be regulated by the Yolo Flood Control District so that it never went below 2 feet or above 7.56 feet on the Rumsey Gauge. This was absolute, and this was the way I knew that the Yolo people had to regulate the Lake. So Kienlen and I discussed it, and I said, "You know, we have the Indian Valley Dam." And I said, "If we develop enough data, do you think we can show these people or show the court if we go to trial how they can conjunctively operate that Indian Valley Dam and Clear Lake so that

they can still be within the Rumsey Gauge mandates, provide enough water to the farmers and keep up the lake levels?" He said, "I don't know. We'll need a lot of information."

We obtained information involving historic inflows and outflows of Clear Lake from the U.C. library, from the library of the U.S. Geological Survey and other sources. Our library and paralegal people did a real job on it. We spent quite a bit of money on computers, and Kienlen pumped all of his data into them. This involved factors of rainfall, inflow, outflow, transpiration, evaporation -- many factors.

He came up with a computer study -- I think the stack was several feet high of computer pages -- and he was able to draw curves from that. Based on all of these factors and on the needs of Yolo, he drew curves showing how it could operate Indian Valley Dam and Clear Lake so that if it drew down at a certain rate from both places there would be some draw down from Clear Lake but not as much -- that they could come pretty much within the Rumsey Gauge requirements and satisfy both the farmers and the Lake County people.

We went into court with this study. The court said it looked good to him and the Yolo people consented to it. It was really an accomplishment on the part of the water engineers. And it was a revelation of what computers can do, because it involved literally millions of calculations. It cost us quite a bit for the computer time. But we did come up with a study and they're now running that lake and the Indian Valley Dam on the basis of these computer runs.

One of the further aspects of that case was that this solution that Kienlen came up with -- his curves as to what the draw downs would be -- departed from the Rumsey Gauge Decree in minor particulars concerning the rate of draw down. Well, that meant that before this matter could be finally settled, we had to get the approval of the court in Mendocino County that initially had issued the Gopcevic Decree in 1919. We asked it to amend a decree that had been in existence for about sixty years and concerned people and land all around that lake.

We of course made various proposals to the court as to what the notifications should be. We had title searches made as to the identities of these people since the decree affected their properties directly.

Hicke: Did you have to drag in that stack of computer runs?

Dyer: No, we didn't have to do that in Mendocino. But we were able to make certain publications and mailings. We had to mail out a lot of notifications. We went into Mendocino court and made this proposal and amendment. We were contested. We got some contest there. But the

court could see that it was in the public interest. And of course we had the support of the public -- the board of supervisors and so forth. And that's the way that case ended. It was an interesting case, although a contested one.

Hicke: Fascinating. Let me just interrupt with a general question. I read a book not too long ago -- a few years ago I guess -- whose thesis was to the effect that whoever owns the water rights has the power world-wide.

Dyer: Well, I don't know about that. Certainly if you have land and you need water on the land it behooves you to have riparian rights. You have riparian rights if your land borders the stream.

Hicke: Well, it sounds like from the size of this lawsuit it was a very crucial factor.

Dyer: Yes, it was an important lawsuit, and it was an interesting one. Of course it involved a lot public interest. That's a small county population-wise. There was a lot of publicity in the local paper every week about it.

When I went there to report to the board of supervisors on the progress of the case, I appeared before the board in public session. There are a lot of retired people there and farmers that I don't think had much else to do at this time. They were all in the place, and it was like a town meeting; people would get up and ask questions or make speeches right from the audience [hearty chuckle]. But it was a new and novel experience -- and I kind of enjoyed it. It was a bit tense at times, but that was all right.

Hicke: It would seem that interest in water rights is a rather strong feeling.

Dyer: Yes. I'll talk about one more group of cases that I'm currently handling that have to do with water rights. For a long time I represented a group of duck clubs in the Butte Sink. Butte Sink is a low-lying marshland east of Live Oak, California. People in these clubs are very interested in wildlife and in the shooting of ducks. And they spend a lot of time and considerable funds in the maintenance of the duck habitats.

Oh, about twenty years ago I was approached by Joe Long, who is the founder and I think chairman of the board of the Long's drug-stores, and he was a member of the Wild Goose Club at the time. This problem has to do with the maintenance of the Butte Sink Wild Fowl Habitat. It is about the greatest flyway for ducks and similar wild fowl, I believe, in the United States. At least that's the pronouncement of the U.S. Department of Agriculture, which is vitally interested in the place.

About 1919, the production of rice was started in fields north of the Butte Sink. Now that, of course, requires great quantities of water. The farmers received their water from a PG&E entity known as the Western Canal Company. And the Western Canal Company got its water from the Feather River, which is outside the watershed. Western Canal sold water to the rice farmers, who would utilize it for their rice, and then they would release it, and the water would drain down over the duck club lands. In those days I don't think really they were duck clubs; they were land companies.

A company called the Moulton Land Company brought a lawsuit and obtained an injunction against the rice farmers. That ended up in various agreements whereby the drainage districts -- these were public districts that drained the rice fields -- obtained a flowage easement -- the right to flow the rice water over the lands of the duck clubs -- from the duck clubs, and the duck clubs in turn got the right to the use of that water and a guarantee of the provision of that water from the Western Canal Company and from the drainage districts.

This water is extremely useful in maintaining water levels at desirable times on the duck club lands which are now very valuable. As I say, it's the greatest duck shooting land, I guess, in the world or probably in the United States. The water must be maintained at certain levels in order to maintain the duck habitat. If the water gets too low the ducks don't come; or if they do come they get disease -- they get botulism and various other things -- so that these duck clubs, and there are a lot of substantial people in those clubs, are very interested in water levels.

Well, I don't think it's going to profit us much to go into all the various controversies we had, but there has been a continuing controversy going on with farmers and agricultural interests and with the federal government about taking the water that we say we own -- the rice drainage water and the water released from the Western Canal Company. For instance, some of the water that we utilize on the duck club lands is carried in a canal called the 833 Canal. And there's a farmer up there that's putting a pipe into that canal to divert water for the growing of wheat and beans. He says he has to use that water and he needs it and all of this kind of thing, and we say, "You can't use it because we use it for the ducks." Well, he said, "You don't use it for the ducks all of the time." It's that kind of thing, and I don't want to go into detail on it but over the years we've had innumerable controversies with these farmers that still go on about who gets to use the water, the ducks or the farmers. Thus far the ducks have been doing pretty well [both laugh]. But it is interesting. They're good people to deal with, although they're strong-minded.

Hicke: Do you have any comments on California agriculture as big business?

Dyer: Well, not really. I'm not that familiar with it, I don't think.

E.I. DuPont Company: Agricultural Chemicals and Paint

Dyer: I can maybe leave the ducks now and the water and talk a little bit about some of the agricultural cases we've had. Those have been mostly for the E.I. DuPont Company, Wilmington, Delaware.

For probably more than twenty years I've been lucky to have represented that client, since it is a fine company, and I find that uniformly it has informed and competent people. By that I mean if one needs help in a case or in a problem they'll provide it, whether it's an agricultural case or a case involving a plastic or a chemical. The witnesses and the experts and the people they send are just absolutely first rate, and, I find, almost always make an impressive and good presentation in court.

DuPont has had a wide variety of problems ranging from those involving explosives to agricultural chemicals -- fungicides and pesticides that are put on crops and allegedly harm them from time to time -- and various other things. Their house counsel are in Wilmington. They are very good people, too. We have tried cases for them in Northern California, at least I have and I'm sure probably other people have too. Although I think I've handled most of them.

Hicke: So they come to PM&S and ask --

Dyer: We're their counsel. At least they come to us in most cases, I believe, in Northern California. Now they're asking us to represent them in Southern California. So as far as outside counsel are concerned, I think we're their designated lawyers in this state. A major portion of their cases have involved product liability throughout Northern California, particularly in the San Joaquin Valley. They make pesticides and insecticides and fungicides which are sprayed onto crops and onto orchards. From time to time there is a claim of damage. That usually means -- unless the case is settled, and a number of them have been -- that we try the case before juries in rural counties. That's always an experience.

Hicke: That's different from juries in urban areas?

Dyer: Well, I think it is a bit different. You must remember that these cases involve farmers as plaintiffs, usually, and you're in an agricultural area with people on the panel who if they're not farmers themselves are engaged some way or other in endeavors related to agriculture. So that alone sometimes presents a problem. Although it hasn't been an unsolvable one.

Hicke: Are you pretty careful in voir dire?

Dyer: Yes, you have to be. The approach that I've taken is I tell them, "Look, I'm a San Francisco lawyer from a large firm in San Francisco and I represent a national company." I say, "We're here in an agricultural county and we're opposed to local farmers. This is a local court with, of course, good local people on the panel. Now you can see my position. If you were in my position here, would you be willing to accept somebody in your frame of mind as a juror?" Well, of course they always say yes [both laugh].

Hicke: You throw yourself on their mercy?

Dyer: Well, you can't hide under the bed about this. I find that it's better to come right out with it, because everybody knows it. You might as well bring it out and tell them, "We're all people, we're all citizens here. Everybody is entitled to a fair shake, that's obvious." You go along with that theme and I find that they try.

I had one experience one time, though, in an agricultural case in Merced. I think it was in the Angelakis case.* That was a matter where Lannate, a pesticide, was put on some crops -- it was sweet potatoes. In any event, we were sued and so were the distributors, because the crop was deficient or damaged. I had gone through this talk about DuPont being a big firm and so forth and it was entitled to equal treatment even though we were in Merced County. There was a defendant that distributed the chemical; we manufactured it.

They tried the case, and after five or six days of trial, why, the jury went out. About 9:30 at night the foreman came back and said he had a question for the judge. This was before the days of comparative negligence, when it was just contributory negligence. The question was if we bring in a verdict against both the defendants, will it be split down the middle? Well, I thought, there goes this one down the drain [hearty laughter by both].

Hicke: That was rather extraordinary.

Dyer: It was like a bucket of cold water. The judge said that that was not a matter for their concern: how the verdict was to be divided between the parties. They could bring in the verdict against one or both plaintiffs or against both defendants or against the plaintiff, and how it was to be split was not their concern.

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* Gus Angelakis, et al. v. E.I. DuPont Co. Superior Court, State of California, County of Merced, No. 33674.

So they went out again and came back in about five minutes with a verdict. I think it was $50,000 against the distributor and it was a defense verdict for DuPont. Well, that just flabbergasted me. I talked to the foreman and asked him why he came in and asked that question. He said, "Well, we thought your experts demonstrated that this product was just as it was stated on the label. And they showed that it had everything in it and had been used in all these other instances both in Merced County and elsewhere. And we didn't think there was any representation made by your people that was false.

"We remembered what you said about giving the big company a fair shake." But he said, "Too, we figured that, after all, you did make the product and we thought you should pay something. But not 50 percent. We thought you should pay 5 percent. That's the reason for the question. And when the judge answered as he did, we knew it would probably be split down the middle, and nobody would go for that."

Hicke: Isn't that interesting.

Dyer: Well, you see, these were honest people; they were trying to make a fair judgment. But they did not want to let a big company out of town without trying to make it pay something. I think it is just part of human nature. This is one of the things you're up against in trying some of these cases in the smaller counties.

Hicke: That's very interesting.

Dyer: But on the whole, I found that they gave us fair treatment. Another case I want to mention which I thought was interesting in its outcome: we had a case called Alvernaz v. DuPont that was tried before a jury.* This also was in Merced County. The lawyer for the plaintiff was prominent and well known throughout the state and a dominant lawyer in Merced County. His name was C. Ray Robinson.

Hicke: Oh yes.

Dyer: He had a large firm there, at least for the size of Merced. He, of course, knew the judge that presided. I will not mention his name because of what I'm going to say. I'm sure from what I heard that Robinson and the judge were on friendly terms. In any event, we went all through this trial, and at the end of it Robinson, I think, got some intimation -- I don't know how he did --

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* In Superior Court, Merced County, No. 32796.

Dyer: -- got some intimation that the case might not go well for him. When the jurors came in and the judge asked them if they had a verdict, they said that they did. Robinson got up and asked the judge if he could look at the verdict slip before it was handed to the judge. Well, of course, this was completely irregular. The code provides, as I recall, that you hand it to the clerk, who looks at it and the judge then looks at it, and the foreman then announces the verdict.

Jim Barstow, who was representing the distributor, was there representing the co-defendant. We, of course, vigorously objected to this request saying it was contrary to proper procedure and that if he wanted to look at it, he could do so after the clerk and the judge had looked at it and after the foreman had announced the verdict.

Well, the judge said he didn't see any reason why Mr. Robinson couldn't look at it at this point. Which, of course, was a very unnerving type of statement from the court. Robinson looked at it and it was a defense verdict. So without giving the verdict to the clerk or anybody else, he made a motion for a mistrial. I'll be darned if the judge didn't grant it -- without ever looking at the verdict. He should have looked at it, of course, and confirmed on the record that it was a defense verdict. But it was just like having the rug pulled out [chuckling] from under you at the crucial point.

It was highly irregular and I don't know what the judge's motives were. He announced some reasons for the mistrial. I don't recollect too clearly but I know we weren't much impressed by them at the time.

Hicke: But clearly, there's nothing you can do.

Dyer: Well, we intended to bring the case further. But Robinson after a few days reflected that his case wasn't as good as he had thought it was. Barstow and I waived costs and Robinson dismissed, and that was the end of it. But that was a rather unusual end to a case and I know one that enraged us at the time [chuckles].

Another DuPont case I had, an agricultural case in the San Joaquin Valley, was the Albaum matter.* That case was tried in 1976. There were, as I recall, about twenty-four farmers that joined as plaintiffs in bringing an action against the DuPont Company and the distributors because of the alleged action of a major DuPont agricultural product, a fungicide.

Hicke: Was that benomyl?

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* Albaum v. E. I. DuPont de Nemours & Co. In Superior Court, Merced County, No. 46101.

Dyer: Benomyl. Yes. Benlate. And as you point out, the active ingredient was benomyl. Benomyl was a relatively new product before this case arose, and DuPont promoted it in various agricultural areas. It invited a group of farmers, including these plaintiffs, to a free lunch, and then showed them movies and gave them a sales talk on Benlate. They all bought Benlate.

It was stated in the sales talk that it was the greatest preventative in existence against the appearance of brown rot in stone fruits. These farmers applied it on apricot orchards. There were hundreds of acres involved, twenty-four farmers from twenty-four farms. These farmers, unfortunately, put it on at the wrong time. They put it on right after a rain, and they got the worst damn case of brown rot in the history of Merced County. They had color aerial photos of these orchards aside other orchards. And, you know, it was just like the orchards had been burned.

So we went to trial before Judge Barrett. One of the things that I was apprehensive about was the possibility of punitive damages, with a company the size of DuPont Company. And punitive damages based, in part, on the wealth and assets of the defendant; you can see what we were up against. We did everything we could to get that issue removed by motions and so forth before trial. This was in the early days of the development of the punitive damages law. But the court wouldn't go along. As it afterwards turned out, the court was right.

But in any event, they claimed punitive damages. We went to trial before a jury, and it lasted about six weeks. Took a lot of time because of the great number of plaintiffs. We had various experts and various farmer witnesses. Well, of course they had quite a sympathetic case. I mean, here they had bought this product on the representation that it was an efficient and effective agent to prevent brown rot and they had a bad case of it with loss -- partial or total loss -- of crop and in some cases damage to the trees themselves.

The plaintiffs' lawyer, who was from Marysville -- Chester Morris, a well-prepared, good lawyer -- I think he made a mistake in reaching too far. Here they had numerous plaintiffs, an attractive liability case, and a deep-pocket defendant. They thought they were going to hit a bonanza and they over-tried it.

Every one of these farmers that got on the stand claimed damages far beyond anything he could sustain. Every one of them would say, for instance, "That year I would have had 600 tons." Well, we had their cannery records from years before by discovery. We knew what their tonnages were. And when we cross-examined these fellows on that subject, it was almost routine.

We would ask, "You say you would have had 600 tons that year. Did you ever get 600 tons in the past?" "Well, no, but this looked like the best year." "How many tons did you get last year?" "I got 150." "How many before that?" "I got 125."

When we went through twenty-four people and elicited similar responses -- I don't know why they didn't amend it after a while; the jury was just fed up with them -- the result was that we had low damages and a defense verdict on the warranty causes of action, which surprised me. In other words, the jury held that we had made no misrepresentations at all. The big fact that underlay that verdict was that we were able to show through rainfall records and through testimony that these people put it on right after rain and the label said do not put on after rainfall.

Hicke: I was going to ask if it was labeled to that effect.

Dyer: Yes. That label was right on the button on that thing, and the jury so found. But the jury was looking to hit us with something because of the losses of these people. Some of them were really hurt. It brought in plaintiffs' verdicts on the negligence issues, saying that we should have told them more on our label and in our literature about what the effects would be if they put it on during rain.

But the damages were very low. The jury didn't give them much more than the cost of the application and the cost of the product. As I recall, the total verdict for twenty-four farmers was less than $150,000. They were looking for several million.

Hicke: And the life of the product was not endangered. Is that correct?

Dyer: That's right. The product was not endangered. So we were lucky in that case, and I think it was due to the fact that they overstated and overplayed their case. I mean, it got to be a case of the greedy farmers and not the rich chemical company. So that was the Albaum case. That's probably the most substantial case involving the agricultural products of DuPont that went to trial.

Hicke: You've been going quite a while here. Maybe we should quit. Are you through with DuPont?

Dyer: No.

Hicke: Oh. Okay. Should we finish DuPont?

Dyer: Well, why don't we finish DuPont? Then next time can go on to something else. Clem [Clement L.] Glynn tried various cases after I slowed down on the DuPont trial cases. He's a partner is the office.

Hicke: Did he go along with you on these cases?

Dyer: No, these were before his time. I tried these by myself. I tried cases in Stockton. There was a case involving the Puregro Company involving Lannate on asparagus. We won that case; we had a jury verdict.

Hicke: Were they all in mid-summer?

Dyer: Pretty much. Hot.

Hicke: That's what I thought.

Dyer: Here's another case involving a DuPont product, which was settled but which was interesting. This involved paint. Among other things, DuPont made paint. It had a paint factory in South San Francisco.

This case was Raymond v. DuPont and Deft Company.* It involved a professor, I believe from U.C. Santa Cruz. I think he was from that school, although it may have been the local state college. In any event, he was an academic. He bought a DuPont can of paint and another can of paint -- I think to put on his cabin as he was painting a kitchen -- made by the Deft Company.

He was painting on a Saturday morning on a ladder, and he sustained convulsions and fell off the ladder, went into further convulsions, spasms, and died. He had incurred brain damage. The claim was that it was due to various toxic emissions from the paint.

Well, it was a complicated toxicological problem. Our people told us that we had some things in there that could be considered toxic. But we had never had an experience like this. A lot of this paint had been sold in the past -- hundreds of thousands of gallons of it.

There were autopsies on this fellow, and slides of his brain tissue, as I recall, were sent to pathologists in a couple of places around the country. We got a report from the pathologist at Harvard, who said it could be due to various classes of chemicals in these fields. We looked into this Deft paint, which was a stain.

It was a co-defendant with DuPont. We were able to show that more probably than not the problem came from that source. The stuff in our paint, I think, was butyl. Although they could not declare us completely innocent, DuPont paint certainly did not present the degree of hazard that the chemical in the Deft did. That case eventually was settled and we paid something. I don't recall how much, but it was

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* In Superior Court, Santa Cruz County, No. 177001.

quite a bit less than the Deft people, simply, I think, due to the toxicological and pathological findings. That was an interesting case medically.

Hicke: Does it often happen that two defendants separate themselves in a trial?

Dyer: Yes. I think basically, and I'm sure that most people would agree, that it's usually a mistake for co-defendants to try the case against one another. Sometimes it can't be helped. But when one defendant starts pointing the finger at the other one, the plaintiff sits back and listens to the cash register ring. So one tries to avoid that. I found, though, that in some cases, even though you have an agreement among defense counsel not to hurt each other more than necessary, that if one fellow thinks he's going down, he may want to drag the other one with him. That's happened to me on a few occasions and I'm sure to a lot of people that have tried cases.

But this case was a situation where we hadn't gone to trial. We were simply trying to find out what caused this death. The toxicologists and pathologists said more probably than not this is the situation, and then it was a negotiating session to decide who pays what. That is what happened.

Hicke: It occurs to me that Deft might have said that, well, "Maybe ours is toxic but maybe it's the mix of the two."

Dyer: Well, that's always a possibility, too. But one pays according to the degree of exposure that one has in a case, and that is what everybody did. We paid something. I don't recall how much it was, but it was fairly substantial because there was the death of a relatively young man with a promising future.

An illustration of the fact that one pays according to the degree of exposure is the Julie Tysland v. Borden Company action that occurred in the 1960s. Clair Herold, who was manager of insurance for the Borden Company, called and advised of a serious accident involving a Borden truck and a young girl in Alameda County.

The facts were that Julie Tysland, a very attractive youngster seventeen years of age and a cheerleader at one of the East Bay high schools, was driving the family car home from school when it was struck by a Borden Company truck. The car turned over and she was pinned beneath it. The resulting injury compressed her spine and led to paraplegia. That, of course, meant that she would be paralyzed and totally disabled for life and would require a great deal of medical and nursing care. Her life expectancy was about sixty years.

The facts indicated that our driver had gone through a red light. More than that, when the ambulance had left, he asked to use the telephone in a nearby house, and called the company and stated: "I've had an all-out wreck and it was my fault." What he did not realize was that the three youngsters sitting in the room where he made the telephone call were schoolmates of Julie's and who would have testified to that conversation. The Borden Company had $300,000 primary insurance with high excess limits carried by Lloyd's of London.

When these facts and the nature and extent of the injury came to my attention, I called Cecil Crouse, who was Borden's general counsel in New York, and told him: "Cecil, you know our $300,000 retention is gone and we should immediately refer this case to Lloyd's of London." He readily agreed. Ingemar Hoberg, who was then a very able plaintiff's personal injury lawyer, represented the plaintiff. We continued to handle the matter, although the decisions as to payment were made by counsel for Lloyd's of London. Eventually, Lloyd's decided to make a payment substantially in excess of Borden's basic coverage. That case, of course, was one of probable liability, and the damage exposure was enormous. I recall attending the settlement conference before Judge Ray O'Connor, who was then on the superior bench, and he commenced that conference by advising us that he had to approve the settlement since Julie was a minor and that we should start at about $300,000 since he would not approve anything less.

Hicke: Well, can you tell me a little bit about the negotiating procedure?

Dyer: Of course you have to talk to your client, and then get the limit of your authority, and then you --

Hicke: So it's just among the attorneys?

Dyer: -- then you talk to the other defense counsel and see if you can make a joint offer. Then you negotiate with the plaintiff's lawyer and see what they'll take on the case.

Hicke: And then did you have to negotiate again with the co-defense counsel?

Dyer: Oh yes. You go to him and find out what he's willing to do. If you can, make a joint offer; that's usually pretty desirable.

Hicke: Is there some art of negotiating that you have found is successful?

Dyer: Well, I suppose it's an art. Usually what you do is try to obtain the best discovery you can through depositions and acquisition of records and that sort of thing. Then you know what you're willing to pay, and you talk to the other lawyer and horse trade with him and come up with the best deal you can. I don't think there's much magic to it. I believe the real touchstone of a satisfactory settlement is prepara-

tion and knowledge of what the true facts are and what the exposure is. And very often that has to do with an estimate of the potential damages and analysis of the medical records, as well as a realistic view of what the chances of success are before a judge and jury.

Hicke: So that it's sort of a case of getting the facts and --

Dyer: Oh, you have to. You have to be well prepared to settle as well as to try a case. If you don't, you're in trouble.

I have quite a few more DuPont cases. Do you want to go on?

Hicke: Well, maybe we should put them off until next time.

Dyer: All right.

[Interview continued: June 22, 1987]##

Hicke: We stopped last time in the middle of the DuPont paint cases, so maybe we can just take up there again.

Dyer: Well, I think I've told you about the Raymond case, the professor -- I believe it was U.C. Santa Cruz -- who died as a result of neurological damage from paint fumes. And we were able to show that that was due to fumes from another company's paint. Happily, the chemical and pathological evidence turned in our favor. There's nothing like having good facts in the case.

Also, we had a series of cases with DuPont involving automobile paint. It had a component called an isocyanate that particularly to allergic individuals would cause respiratory damage. We had one case that was handled basically by Bill Dillingham, who was an associate in the office at the time. Oh, I had similar cases, but this was the case that was tried in Redding and involved a paint spraying operation on trucks.

The claim was that this paint sprayer, who was employed in painting trucks with the DuPont paint, sustained permanent lung damage due to the action of the isocyanate on the lung tissues. It was a typical medical case involving respiratory experts. But we were able to win that case by much lower level technology. We showed that the respirators that were utilized by this man were not approved by Underwriters Laboratories -- by approved organizations -- and that from time to time he didn't wear the protective clothing and the respirator that he should have.

We went through a full-blown trial on that. The jury finally decided not on the medical evidence -- I don't think they had too much problem feeling that he did have lung damage, which indeed he did -- but that he simply didn't follow required safety precautions and, indeed, common sense. That case came out favorably for us.

There was a later case that we didn't handle that was in Oregon. That didn't come out that favorably, and there I believe the evidence was that the safety devices had been utilized, and the result was a rather large verdict.

Hicke: This was the same problem?

Dyer: Same paint. Same type of problem but in a different jurisdiction. We were not involved in that.

Hicke: Would you like to just comment on the difference between those two cases? Here were two cases that seemed very much the same.

Dyer: It is a trite thing to say that there's nothing like good facts to win a case. Here we had the facts that there was a nonuse or misuse of the respirator and other protective devices, including safety clothing. And that is a basic thing that people on juries, particularly working people, can readily understand. So we were able to show this and produce the respirator and show that it was nonstandard equipment. Whereas, as I understand, in the Portland case those facts couldn't be adduced, and thus the fact that the man in Portland did use approved devices and did use the paint and did get respiratory problems I think led the jury to a different result.

Hicke: So they looked at the same things but the men didn't behave the same way.

Dyer: They looked at the same things. There wasn't any particular magic exercised by us in this field. We were just the beneficiaries of good facts, which we did develop, of course, and which were available, and the jury was led to its decision on that basis.

Hicke: But if the paint caused a difficulty in one man you'd think it would cause problems for a lot of people.

Dyer: Well, that's not necessarily true; indeed, I don't think it's true at all. Why do some people get hay fever and others don't? You have these various susceptible conditions. I don't know whether I told you about the case of the lady that was extremely allergic to just about everything and who brought an action against DuPont because there was a spray of weeds along a railroad track about 300 yards from where she lived.

This lady lived on the edge of San Jose, and there was an SP [Southern Pacific Railroad] track several hundred yards from her back yard. And oh, every six months or so, the railroad would run a car along the track and spray the weeds with an industrial herbicide. She claimed that due to the emission of that herbicide and the spray residual in the air, she was permanently damaged.

She had the worst case of allergy -- I think a lot of it was psychological -- but she had to wear special clothing, she had to live in a special room, she could only eat special foods and she couldn't even go into certain doctors' offices because she said the paint on the walls was of a kind that would set off her allergy. Well, she claimed that this was due to the herbicide. But of course, we were able to find that she had had a long history of allergy problems and was an extremely sensitive individual. When you get into this allergy field, it's a very complex one, and you don't get much agreement among the physicians.

Hicke: What you're saying is what's toxic for one person isn't for another; so I don't see how you can define product liability.

Dyer: You have to take the person as he is. Particularly in industrial compensation law, that's an old principle, and it applies also to product liability cases. You may have 99 percent of the population that is immune to, say, a certain food. But if a canner or producer of the food produces it knowing that one percent of the population may become ill because of a particular sensitivity, and he puts that out without an adequate warning, he can be held liable by a jury or court.

Hicke: So it's really a statistical concept.

Dyer: Well, it is to a degree. You may have a situation where the incidence of susceptibility to a product is so infinitesimally small that the manufacturer or producer can't reasonably be expected to anticipate that something harmful is going to happen from the use of his product. And we have had cases like that.

They involved, for instance, cosmetics where people apply a certain type of face cream or whatever and get a rash. We've usually been able to show that this is about the only case that's ever been reported or something like that. But that doesn't mean that that particular person didn't have a strong reaction to the particular substance that was applied. And this is what I'm talking about. There are all kinds of sensitive people in this world, sensitive to all sorts of things. And if one practices in the product liability field, you find that out.

The Borden Company: Wrapping Film

Dyer: Another instance of that was a case that we had for the Borden Company. Borden produced a film, a polyester-type film similar to Saran Wrap or something of that nature. Well, there was a woman that worked in a Safeway meat wrapping department, and her job was to wrap meats for placement in the cabinets where it is sold in Safeway supermarkets. She would draw this big sheet of this film -- this clear, transparent film -- over a hot wire and then as the film touched the hot wire, it would break. And that was the method of separating the desired length of the film from the roll.

Well, in the course of doing this the heat applied to the film would result in a small amount of smoke -- industrial gas I guess -- being emitted to the atmosphere. Of course it would get into her lungs, and she developed a flu-like reaction. So she sued the Borden Company. And it was a typical allergy case, just like the lady next to the railroad right-of-way; here she was reacting to a different substance. And so that sort of thing isn't unknown.

For instance, bakers. We had this case -- a few bakers, one in I don't know, you name it, 100,000 or whatever who deal in a certain type of flour will develop a rash on their hands. This means that these people, if they continue working with that substance or in that environment, will continue to produce symptoms. They have problems. You remove them from it, and they have no problem.

Hicke: Now, in the Safeway case, did she try another kind of film? I mean, I don't see how you can determine that the company is responsible in individual cases like that.

Dyer: Well, again, it's the principle that if you put a product out and you know that it's going to adversely effect some percentage of the population even though it be quite small --

Hicke: Do they know that by testing?

Dyer: They should; they have a duty to test their product to see that it isn't harmful to the general population or to the people that might be expected to use it. If their testing shows that it can in say one percent of the population cause this type of reaction, they have a duty to warn. We have the same problem in these prescription drug cases. You know, many drugs are labeled with warnings. Usually those warnings are prescribed in major part by the Food and Drug Administration.

Hicke: Yes, in that case they're monitored very closely by the FDA.

Dyer: Yes, because they will produce certain side effects. That was one of the big issues in those Chloromycetin cases that I talked about. There the very label was written by the National Research Council, which is a public group of the most eminent scientists in the United States that was designated by the Food and Drug Administration. It wrote the label in that case. But the claim was that it wasn't extensive enough; it didn't give enough information.

This is a fight that you have all the time in the cases where a product is labeled and something happens to somebody that you can show was a rare type of thing. Maybe it's one in 50,000 or one in 100,000. But it has happened and there is a strict liability standard and a negligence standard. Certainly if you don't warn adequately then you have liability.

Hicke: If the FDA is responsible for the labels, do they acquire some of the responsibility?

Dyer: Oh no. Of course, you claim in these cases when you do have a warning on a drug or something of that nature that the label has been approved by an official body and therefore it's sufficient. The answer to that put by the other side usually is that that's the minimum warning that should have been given and under all of the facts of the case known to you, it should have been more extensive or more specific. And this is the thing you run into all the time.

What I'm trying to say is that in the paint cases, herbicide cases, and particularly in the prescription drug cases, you know that there are individuals -- and believe me there are thousands of them out there -- that are sensitive to one thing or another. I think most people are susceptible to something, some more than others. Some have mild reactions and others have major reactions.

Product Liability Law: Some Generalities and Specific Cases

Hicke: Well, before we get back to the case, we've digressed just a little bit, so maybe I could ask one more question. And that is, can you tell me a little bit about how the product liability law has changed?

Dyer: Oh, it's changed tremendously. And of course this is something that is commonplace among lawyers that practice with products. I don't want to give a legal lecture here, because certainly everybody in this firm knows about this. But some years ago, maybe thirty-five years ago, if you sold a product you had a liability under the warranty laws to the person that you sold it to.

Then later on, that was expanded to include people who would use the product even though they weren't the purchaser of the product. It didn't have to have something called privity. Again, I don't want to try to get too pedantic here or too technical. But it was expanded.

And then later on in the Greenman case (Shopsmith case), the Supreme Court of California proclaimed the strict liability doctrine, stating that if a manufacturer put out a product and it caused harm to persons who could reasonably be expected to use it and some person sustained an injury from the use of the product, the manufacturer was responsible, this is apart from negligence. It didn't have to be proven that it was made unsafely or that there were inferior materials in it or anything of that nature. The very fact that the manufacturer made it with a defect leads to strict liability. And that was a tremendous change in the law.

Hicke: When was that?

Dyer: The Greenman case -- I would say that's probably twenty-five years ago now. And then that was expanded later on to include owners of property, and there has been a tremendous expansion in the liability laws particularly in California. But it's been going on all over the country. With the increase in the number of products and their use and the complexity of those products, the courts have just come to the conclusion that if one makes a product, it must be made reasonably safe. If there is a defect and that defect causes harm to somebody, then you're liable. It's strict liability. And that's given rise to a lot of litigation over the years.

Hicke: So they are saying that people are really not able to determine for themselves the safety of a product?

Dyer: Well, I think that's general. Yes. Again we're getting a little bit into judicial philosophy, I guess, here. I don't want to try to take the place of the courts [chuckles]. The courts have said that overall, on a broad social policy basis, the manufacturer of a product that might make millions of these objects is better able to bear the cost of an injury or of a death that is caused by that product, even though it did what it could to make it safely, than is the unknowing and unsophisticated user who sustains an injury. That's the philosophy underlying it and there you are.

I had a case where there was a farmer who used Karmex because he thought that it was a fine product. He had used it before; it was a herbicide. He had used it on a number of his crops and was very happy with it.

And then he decided to use it on another crop, which we said it should not be used on. The label said don't use it on these crops,

these certain categories of crops. Well, he had such good experience with it on other crops and hadn't had too good an experience with other products on this particular crop, so he decided to use it on this one. So he spent several thousand dollars in buying the product and having an airplane fly it on, and he didn't get a crop.

So he sued us and sued the airplane company -- this crop spraying company. I was able to obtain a summary judgment in Willows, California, on the basis that this was not a use reasonably intended by the manufacturer, which is one of the prerequisites to liability. I said, "Here we said don't use it on that crop, and he used it." Well, that doesn't happen very often, but it does from time to time. The judge agreed with us that we weren't insurers of the product. We weren't absolutely liable as distinct from strict liability, and on that basis we were able to walk away from that case.

The crop damage cases represent so many variables having to do with weather and the nature of the product, the nature of the tree or the plant involved, the nature of the soil. Almost anything can happen.

So, that's the strict liability cases, except that I want to mention one or two more. Did I mention the Moreno case, the galvanizing case?*

Hicke: No.

Dyer: Well, that was a case of a very bad injury. Certainly it didn't involve any allergic situation. Our client manufactured something called flux, which is a product that is used in steel making and in the processing and manufacture of various types of metal products. You're probably familiar with the galvanizing process that protects metal from rust. It is coated. What they do is they dip the product, whatever it might be, into long tanks of galvanizing metal substance. The flux is used to more or less control the action of the metal and to give it a certain characteristic that will enhance the efficiency of the galvanizing process.

Moreno was a workman that worked around these galvanizing tanks. Here they were, tanks of molten metal of about 3,000 or more degrees, and there was a little grated walkway over the tank. He went up on the top of the tank, and this stuff is bubbling up, bubbling up. He claims there was a blow-up, kind of a big bubble of the metal that caused him to go into the tank. Not all the way, but up to about his

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* Moreno v. E. I. DuPont de Nemours & Co. In Superior Court, Alameda County, No. 1-149422-3.

middle. They pulled him out quickly, but he sustained some terrible burns.

The claim was that the flux had caused undue turbulence in the molten metal giving rise to this bubble that distracted him, causing him to go into the tank. Well, of course, he had very bad injuries.

Bob [W. Robert] Buxton of our office came into that case later on. This was about four or five years ago. That would have been a really tough case. We were eventually able to settle it, and I was glad to see it settled.

These workman cases are very hard to defend because juries expect that if one is hurt on the job, why, that's it. That combination, the factor of the molten metal and these bad burns that he had, motivated us to settle the case. We didn't pay an astronomical sum of money, because we were able to convince the plaintiff's lawyer that he would have a hard time showing there was anything wrong with that flux, really.

When we got into it I thought we would be able to show that it was a normal type of reaction that one could expect from this product. And it wasn't any different than tons and tons of it that had been used by hundreds of other manufacturers in similar operations. This is the kind of thing you expect to show. But, you know, having once shown that, it still would not wipe from the jury's mind the fact that here this poor, more or less uneducated workman was on top of this grate and it happened to him.

Hicke: Again, the company would be able to sustain the cost more than the individual?

Dyer: Well, yes.

Hicke: What about insurance?

Dyer: Well, of course, we were self-insured, although we had excess insurance. But you see, he was on the job at the time and his only recourse against his employer was under the workmen's comp laws, which have very restrictive levels of recovery. So we were the deep-pocket defendant.

Really, if there was any culprit in that case, and I don't know that there was, it was the employer who had this grating arrangement above that tank. He should have had a safer arrangement, I think, and not have his employees walking around on grates placed on top of molten metal. You can bring that up at the time of trial, but still the only defendant before that jury would have been the maker of the flux. So we were in a somewhat tenuous situation. But we did get out with a reasonable settlement, and Buxton did a good job.

Another case that we had that was a very serious case -- although, I don't think we were liable -- was a case called Pereira v. The DuPont Company.* And that's reported in the Appellate Reports.

Hicke: I think I have that here. Do you want to take a look?

Dyer: Yes [looks through opinion]. This was a case that arose in Alameda County. DuPont Company sold a product called MOCA, and that was a catalyst that was used in plastics that gave it a desirable hardening quality, made plastics very hard and tough. We sold that product to a company, Mid-Coast Plastics, that bought various products and combined them.

In this case it purchased products from several chemical companies, including Dow Chemicals and General Mills Chemicals. It combined those chemicals and processed them to make fireproof doors for airplanes. Periera was the workman that was working with the product produced by the Dow Chemical Company known as DER 599. He had on some protective clothing.

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Dyer: He was transferring the DER 599 from a drum that was elevated into a lower drum that contained a product supplied by another chemical company. Neither of these products was MOCA and neither was supplied by DuPont. During the course of transferring the DER 599, he had to release the spigot of the drum, and the DER 599 was supposed to go into a funnel and then into the lower drum. Somehow or other there was a tilting of the funnel, it was full, and the DER 599 spilled on this fellow's pants and on his skin.

A couple of weeks later he noticed a rash and a swelling of his legs. The long and short of it is that the DER 599 was a toxic chemical that caused kidney damage. The kidney damage was so serious that he needed dialysis three times a week. And it was caused by the DER 599.

We were able to show that MOCA was not involved in that particular process, although it was in the plant at the time. The only problem we had with MOCA was that it could produce certain cyanogenic effects; in other words, it was toxic. And presumably those cyanogenic effects could result in kidney damage or in cancer. But we were able to show that the MOCA was in its container and not involved in this process at the time and not at all involved in this spill.

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* Richard Pereira v. Dow Chemical Company, et al. (1982) 129 Cal.App.3d 865.

The Dow Company had a serious problem with liability and later on settled this case. I don't recall whether we paid anything at all, but we may have paid a few thousand dollars, but it was minimal, on the basis that I have stated that we could demonstrate to a jury that it simply wasn't our product. This is a good defense.

The case went to the appellate court on a motion for summary judgment which I initially did not join in because I thought we had a good case on the facts before a jury or before a court. And I didn't want to subject the client to the legal hazards of a reversal on a motion for summary judgment. But the Dow Chemical went ahead and on a technical statute of limitations point made a motion for summary judgment, which suprisingly was granted. And we thereafter joined in the summary judgment motion by stipulation and went up on appeal.

The court issued an opinion reversing the summary judgment and then the case was settled. The opinion wasn't good for the defendants because it had some language adverse to them. Noble Gregory was around at the time and he forcefully agreed with me that this wasn't a case that we should bring up on motion for summary judgment. We really had no say in it.

But be that as it may, the point is that this was another case of product liability. It wasn't a case of allergy. Here you had a toxic substance that was absorbed through the skin, and the poor man was going to die unless he had a kidney transplant that would be effective. At the time that this case came up for trial and for a settlement conference, he hadn't been able to find a kidney donor. He was on dialysis three times a week.

Again, he was a workman working on the premises. And I think you can see that Dow Chemical had a real problem. It paid several million dollars in settlement. I think it was wise to do so because, again, it was a case of strict liability and a question of inadequate warning. I suspect a jury may have been generous to this plaintiff if it had ever come to a decision on the matter.

Hicke: What about the arrangements in the plant? Was there any question of negligence on their part?

Dyer: Well, yes, there was. It was a question of whether the man had been properly trained and that kind of thing. But it was a simple, mundane type of operation. Here he was transferring the liquid from one barrel to another, and it was a spill. I don't know how much you can make of that. You might make something of it. But the central fact of the case was that Dow Chemical or any chemical company would have known that workmen have to handle these chemicals, and if it gets on their skin, why, you have a difficult situation.

We also have had a number of asbestos cases for DuPont, and those were handled in the main by a relatively new associate, Brian Cella, who's done great work on them and has been able to dispose of them.

We've had many cases involving plastic coverings called Tedlar for greenhouses -- again, product liability -- where it was claimed that the Tedlar inhibited the transmission of light through the plastic to the detriment of the roses, et cetera. There have been any number of greenhouse cases. I want to emphasize, I did not handle those cases. I just, at the beginning, supervised them and brought them along. Clem Glynn, who is a partner in the office, has defended and tried those cases with good results and has become quite an expert in that field. And that's another example of the great reach of the product liability field.

Hicke: How did you decide what you were going to do and what you were going to pass on?

Dyer: Well [chuckles], I had arrived at the point where it was obvious that I had to effect a pass-on, and I had worked with some of the younger partners. I introduced them to the client and let them take over, and that's the way, I think, it's usually done. I must say they've done very well.

Hicke: Did you select the people you wanted to pass this along to?

Dyer: I don't know, I guess I did. I was working with Clem Glynn -- and initially, Paul Truebenbach was here. I thought he might take over, but he went to Chevron and is handling its product liability cases in-house at the trial stage there now. But there isn't any particular secret about this. I think it's commonplace in the firm that when people reach my plateau in life, they pass their cases on to whoever is experienced in the field and who has been handling the matter. You pass it on and introduce the client to them and proceed from there.

Remington Arms Company

Dyer: A couple of things I want to remark on: one is that we've had some weapon cases, gunshot cases, that involved the Remington Arms Company. It is a major manufacturer of shotguns and shotgun shells in the United States. There are, of course, thousands of duck hunters. I might also say that many of our police departments and state police utilize the Remington weapons. They're more or less the standard shotgun in CHP [California Highway Patrol] cars. Remington also manufactures shells which are relatively expensive.

There are thousands of duck hunters. There is something called a self-loading process. If you buy the shell case -- cardboard-and-brass case -- and the powder and the shot, there are machines called self-loading machines. There is kind of a recipe. I think a lot of people find it interesting to manufacture their own shells, and also it's a lot cheaper. So they do it.

The problem is that once in a while somebody gets too enthusiastic and figures out that well, he didn't bring that duck down last week and maybe it was due to the fact that the shell wasn't powerful enough. So he doesn't follow the recipe; instead of putting in so many grams of powder, he puts in twice as much. And then you get the case where there's an exploding shotgun and somebody has half his face blown off. We had several cases of that nature.

One involved a lawyer that I knew. He practiced, I think, in Modesto. He went to shoot ducks, and he had self-loaded and used too much powder and he blew half his face off. He was brought to Modesto General Hospital, and they weren't able to stop the bleeding. They had several surgeons there. It was on a Saturday, and they worked on him for several hours, and they couldn't stop it. So they transfused him and put him in an ambulance and brought him down to San Francisco General. This is attributed, I guess, to the trauma team there. That team flipped him over on his face and went in from the back, they tell me, and it was an artery that was nicked, and were able to find it and to stop it.

He lived, although he had some very extensive injuries that required plastic surgery. That and other cases -- similar cases we've had -- have resulted in litigation. But we didn't pay anything on them, because we were able to show that the products that we sold were perfectly normal and if used properly wouldn't result in injury, and that he, indeed, must have used an overloaded shell. And when one does that he is just asking for trouble.

Another gun case we had that's of more recent vintage was Coca v. The Remington Arms Company.* That was another case that the Boccardo office had in San Jose; it was the worst case of injuries that I have ever seen by far. Coca was a man of Hispanic background. He was riding one evening on a freeway in San Jose when he made, I think, a lane change or wrong turn. It wasn't something that was particularly bad, but he did it in front of a CHP patrol car. So the CHP put on the red light and siren, and when that happened Coca and a young fellow that was with him speeded up and tried to elude the CHP car. There were two people riding in the CHP car: a CHP patrol officer and

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* In Superior Court, Santa Clara Co. No. 504834.

a San Jose City policeman who was there for observance purposes. That's how the CHP operated. It was called a ride-along.

So they gave chase. And the Coca car went off the freeway at a fairly high rate of speed and then went down a side road and into an area where there were trees and a house. By this time it was about 8 o'clock at night and getting dark. The police officers thought they were being led into an ambush. Finally the Coca car stopped and the police got out and one grabbed the Remington shotgun.

The CHP officer pointed his pistol at Coca and his companion and told them to put their hands up. There was a lot of screaming and so forth and confusion, because there were other people there. Coca's relatives were there; it was sort of a little Mexican colony. The city policeman takes the shotgun and goes up with the handcuffs. Coca turned around, and the policeman placed the shotgun on Coca's shoulder with the muzzle next to his cheek.

I don't know what happened, whether there was a jerking -- there were conflicting stories on this -- but in any event, the shotgun went off. And it blew away half of Coca's face. He lost his tongue. He lost one eye. He lost part of the other side of his face. He lost most of his nose. He lost practically all of his teeth. It blew a hole in the side of his neck and he had to be fed for months after that by an opening in his neck in which they'd pour a can of liquid baby food.

He required, oh I don't know -- it was multiple operations, twelve, fifteen, you name it. He was able to speak after a fashion; the plastic surgeons did a terrific job. It took them about two or three years to repair the damage. We finally took his deposition after several years and were able to make some sense out of what he said. But the pictures of the injuries -- you wouldn't believe it could happen to a man and still live.

Well, in any event, there was a lawsuit. Boccardo brought it against the State of California, the CHP, and against the City of San Jose because it was a City of San Jose policeman that fired the shotgun, and against the Remington Arms Company. It made the shotgun. The claim was that the shotgun had a very sensitive -- too sensitive -- sear spring. That's the operative spring that governs the tension on the trigger.

Of course, there were experts on the case, and we ended up with a joint expert examination of that gun at a laboratory in the San Jose area where tests were made on the sensitivity of the sear spring. When it all ended up, although their experts wouldn't admit it, it was plain that the tension on that sear spring was well within normal limits. It could be argued, maybe, that it was a little bit too

sensitive. But I think any reasonable expert -- and their experts almost admitted it -- could find lots and lots of shotguns that were deemed normal that were just the same as this one. And this weapon, too, was the standard weapon that was in use by the CHP. This very weapon had been in use, I think, about eight or ten years and shot on the firing range a number of times. And there were other weapons, dozens of them, in use by the CHP and by police organizations throughout the country.

So we ended up without paying anything in that case, but as for the State of California and the City of San Jose, their insurers paid a very large sum of money because of the actions of the police in inflicting injuries of that magnitude. As I say, that was interesting case. It would have been interesting to try. And it was far and away the case of the most grievious injuries I've ever seen. That's another example of how these product liability cases vary in their scope.

Well, I could go on and on with these product liability things. But I think I've indicated to you the major ones and perhaps the ones of more interest.

Hicke: How are damages determined?

Dyer: Well, damages in these cases are no different than the ordinary, run-of-the-mill injury case of damages that are sustained by the plaintiff, whether they're foreseeable or not. The usual thing there is you have to look at the nature of the injury and what the effect is on the fellow's employment, whether he's going to have any permanent injury and what the degree of that injury will be and what his future medical expenses are going to be. There's the matter of pain and suffering and disfigurement. Really, it's within the discretion of the jury. You suggest to the jury. They consider the special damages, the medical, and the wage loss and all that sort of thing. Then after that it's what they give for pain and suffering and whatever. It's up to the jury, as you well know.

You see in the paper all the time that some juries give very little or nothing and others just give the store away. And that can differ, of course, from county to county. I would have loved to have tried all my defense cases in San Benito County at Hollister, someplace of that nature, or even up in Glenn County, in Willows, where you have conservative jurors. San Francisco, Oakland -- I don't know [chuckles]; they're pretty generous with the money of business defendants, I believe.

Nova v. Daniel Industries

Dyer: One of the cases I think I ought to mention is a case in which we just had a decision about eight months ago. That is the case of Nova v. Grove & Daniel Industries.* That case was decided after 160 days of trial in the Court of Queen's Bench of Alberta on May 8, 1987. The case had its genesis in February 1982. We represented Marvin Grove and the estate of Marvin Grove.

Grove was an elderly man. He died in April, I believe, of 1986. And he was in his eighties at the time. But he had been a talented and a very forceful inventor and businessman, for many years a client of this firm. Harry Horrow was the partner who did his work. Grove was an ex-naval officer in submarines and invented a very efficient gas valve -- a valve to use in gas fields. And it was installed, due to its efficiency, in practically all the major gas fields in the world: in Arabia, in Holland, and in Asia, as well as in the United States and in Canada.

This gas valve, known as the M&J-303, had been manufactured by Mr. Grove and his company, the M&J Valve Company in Houston. It was sold to Nova, which was the owner and operator of a major gas trunk line company in Canada. These were huge gas lines that took gas from the Canadian gas fields and transported it to the United States.

The valve was installed at a compressor station of Nova's which had been known as the Alberta Gas Trunk Line Company at the Princess Station outside of Calgary. A compressor station raises the pressure in the gas line so that gas can flow through the line to its ultimate destination. These gas lines go for miles.

On the morning of February 26, 1980, there was a failure in the 36-inch diameter gas line at the point where the Grove valve was installed, and that failure allowed the escape of natural gas, which was being carried in the line under high pressure. There was a great release of gas, which became ignited on exposure to the atmosphere, and there was a fire that could be seen, they tell me, from fifty to seventy miles. It destroyed the compressor station and caused injuries, burns, to various workers in the compressor station on and near it.

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* Nova, An Alberta Corp., et al. v. Guelph Engineering Co., Estate of Marvin H. Grove, Deceased, et al. Court of Queens Bench of Alberta Judicial District (Calgary) Action No. 8101-14550 (5/8/87)

The upshot of it was that there was a lawsuit filed in Canada asking $65 million because of damage to the line and the compressor station, due to the failure of the valve and the escape of the gas. We also later were sued by the company that owned the gas alleging that over half a million dollars in gas had escaped. Well, we were sued on the basis that Grove was the inventor of the valve. We later had sold our company to a company named Daniel Industries, which was one of the defendants, and also there was a company named Welmet, which was the seller of the valve in Canada.

The claim was that the valve did not meet various requirements of engineering codes that were promulgated by various official and professional organizations in Canada and the United States, and that it didn't meet the specifications of the buyer, the Nova Company, and that because of its failure to meet the professional standards, it was defective in that it could not resist the pressures of frost heave -- this was permafrost in that high latitude -- and that the heaving of the ground due to the frost over a long period time put pressure on the gas line at the point where it joined the valve, and that this led to a rupture, escape of gas from the valve, a failure of the valve, and consequent fire and damage.

Our theory was, as a result of very extensive engineering investigations and so forth, that the valve and the pipeline at the time of constructions were misaligned, resulting in an escape of gas, a slow leak of gas in and around a gasket at the valve site. And that this leak of gas into the surrounding ground with the frost over it, the ice over it, led to a build-up of a pocket of gas that eventually was touched off. There was a dynamic and sudden force applied to the valve by that explosion which it could not be expected to meet, and that was the cause of the failure.

There was tremendous preparation in that case. There were more experts that testified than in any case I've ever been connected with. The case was tried for 160 days, almost all of it expert testimony with the numberless charts and models and exhibits and equations and whatever.

The judge, in his decision, did not go into the testimony of the various experts that testified. He said that those fields of expertise included metallurgy, failure analysis, fracture mechanics, stress analysis, welding stresses, mechanics and strengths of materials, crack arrest, ductile fractures, brittle fractures, critical flaws, fatigue cracks, geothermal analysis, soil mechanics, fluid mechanics, soil dynamics, heat transfer, projectile penetration --

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-- cratering of soil, permeation of gas and soil, combustion, explosive behavior of gasses and burning of gasses, the interaction of flow and flame, shock wave, detonation limits, and he said, "et cetera, et cetera, et cetera," for 160 days.

So the judge made his decision. He took 160 days of expert testimony, and he simply recited the theory of the plaintiff, saying it was that the valve was so designed, manufactured, and supplied that there were inordinately high stresses, and so that the valve was an accident waiting to happen. But it was the position of the defendant that there was a misalignment leading to this slow leak and resulting in a build-up of gas and subjecting the valve to an explosion or sudden impact load.

He said, "I accept the theory of the defendant's experts as the more credible, because I believe that gas leaks of this kind are not uncommon in installations of this nature." So with a record of literally thousands of pages of expert testimony before him, he disposed of the liability aspect of the case in two paragraphs, stating that there was the theory of the plaintiff, which I have stated, and that of the defendant, and he believed that the explanation of the defendants and their experts was the more credible; he accepted that and denied any liability whatever.

About six months before the decision there had been an attempt, particularly by Daniel Industries, which was the successor to Grove, to settle this case. It put $20 million on the table in an attempt to settle. It made that offer of $20 million. It was summarily rejected by the plaintiff on the ground it was reasonably sure it would recover at least $42 million. Now the result of this case is that not only does Nova not get the $42 million, it doesn't have the 20, and it recovers nothing.

In addition to that, we will recover costs of over $300,000. The overall costs of Daniel Industries and other people will be well over $1 million. In addition, the Canadian laws, happily, since we are the winners, are going to allow attorneys' fees, and we feel that there'll be a recovery of fees in this case for all of the attorneys representing all of the defendants of the magnitude of about $5 million.

That was a very long case that went on for months in the discovery stage, and then took over a year to try, overall. I suppose it will be appealed. Since there was a tremendous quantity of evidence in the case and since the judge bottomed his holding simply on his acceptance of the defendants' theories, I think that we are in a good position on appeal. I don't want to overspeak on that, because I think lawyers are inclined to do that in supporting their own theories. But we're in a good position here. That was a happy result in a case of really major magnitude for the client.

Hicke: Indeed.

Dyer: So, I think that's about where I am now. I could think of other things but I think that's about the story, Carole.

Western Union Telegraph Company Computers

Hicke: You mentioned at one point Bowser v. Western Union?

Dyer: Oh, that was a case [chuckles] -- Western Union at one time decided that it would go into the computing business and would provide legal materials through its computers. It would have the mainframe computer in New York, and would sell its service to lawyers. It's similar to the Lexis service that is now common in law offices. But this was more than fifteen years ago when this type of service was in its early stages. Western Union had its computer in New York and sold its service to lawyers in various states, including California.

The problem was that the computer had some glitches in it, and the lawyers wouldn't always get what they were looking for. I remember I took a deposition of one lawyer and asked him what problems he had. He said, "Well, I'll tell you. I asked the computer to give me the cases on a point involving contract law, and what I got back was a speech by Admiral Rickover." [hearty laughter from both]. That basically was the case; we had all these indignant and disappointed lawyers who felt they hadn't had their money's worth. It was one of these cases involving a lot of things that we had to take care of.

Western Union and the Water Main

Dyer: Did I tell you about the Seventh and Folsom water damage case we had for Western Union? I think I did, didn't I?

Hicke: We talked about it on the very first time when we weren't on the tape.

Dyer: Yes. Well, I told you that.

Hicke: But I can't remember if we actually put it on tape.

Dyer: Well, that was a case involving Western Union. Over the years we have had a fair amount of litigation for them. I tried their rate cases, as I've mentioned, and I did much more work in that field than in the liability field for that client. If I haven't told you this I'll try to be brief. But it was sort of an interesting case.

About twenty years ago, perhaps more now, on July the Fourth, about 6 o'clock in the afternoon, water appeared at the intersection of Seventh and Folsom Streets in San Francisco. That's an area where there are various small businesses: distributors and so forth. It's not a residential area; it's a commercial and small business district. That was followed by a wash of water in that area, so that the basements of various concerns within three or four blocks around there were flooded. It was the Fourth of July; it was 6 o'clock. The fire department came. But trying to get the San Francisco Water Department [laughs] to come at that time we found difficult, at least Western Union did.

But the long and short of it is that when they dug down into the street and the fire department and others were finally able to divert the water, there was this tremendous, cast-iron water main uncovered. It was about 1/2 inch thick and came from the resevoir near Twin Peaks and carried water to the downtown area. It had been there since the 1800s. I guess it had been there probably eighty, ninety, a hundred years, maybe. Cast iron lasts almost forever, but it's very brittle.

When they dug down there, and it was deep, they found a cable vault of Western Union's. This is a vault where cables join other communication facilities. Some workmen in years past were building the cable vault, and when they dug down they found the pipe there. And they cemented the foundation of the cable vault right on top of the pipe. And this was just at the site where there was the crack with all the water coming out.

We had damage; we had at least thirty cases. I remember one of the plaintiffs was the distributor of Schwinn bicycles. And he had his basement full of bicycles awaiting distribution to the Christmas trade. I guess they'd start getting those things out around September, maybe, starting to distribute them. We had another fellow who manufactured juke boxes. He had these music boxes and they were all full of water [laughter].

So we had a real mess on our hands and a great number of cases. It was interesting. I had colored pictures taken of that street, and there were seven layers of street on top of that pipe. There was red rock fill. Believe it or not, they even identified adobe, gravel, cobblestones, various layers of asphalt -- it was like a layer cake. You could see it. It must have been twenty feet of street.

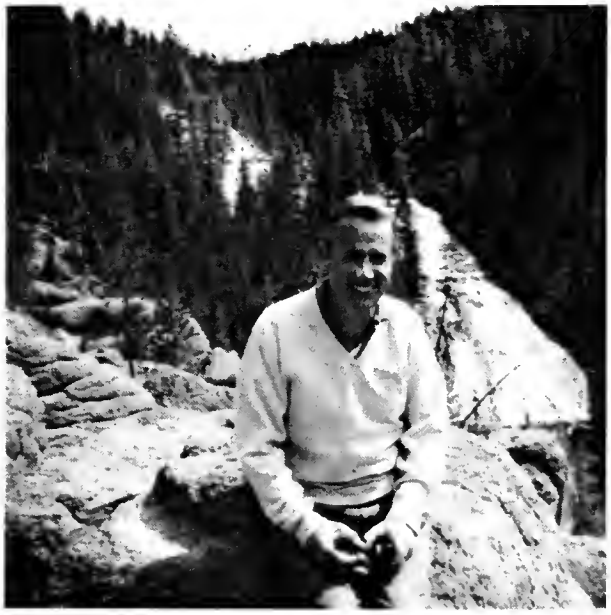
One of the [chuckles] little things that I smile about now was that we theorized in looking around to see what we could say -- we had a pretty hard situation there with that vault being poured right at the point of the break -- we thought perhaps maybe we could show that it was the pipe that eventually sprang this leak due to natural settling of the soil around there. Because, as you probably know, in San

Francisco a great part of our downtown area was soft land where the bay had intruded a hundred or more years ago. The old maps and that kind of thing that we looked at showed that.

So we retained an engineering firm and asked it to run lines and see what the settling had been; we had the old data from the Coast and Geodetic Survey. They told us that there's a bench mark, a Coast and Geodetic Survey bench mark, at the U.S. Post Office and courthouse at Seventh and Mission. And they knew what the elevation was there; that was established. I don't know the details of it, but they ran a line, and I thought these surveyors would come back and tell us that over a hundred years or whatever there'd been a settling of three or four or five feet. And they came in and told me they were amazed. They were a little bit abashed about the whole thing, because it had cost us $4,000 or $5,000 I think for this survey. But they told us that the ground had risen four inches [hearty laughter]. I laugh about that now; I did not think it was funny at the time, because we were looking hard for a defense. But that's one of the little things that's perhaps of some interest. [laughs again]

Hicke: How did that turn out?

Dyer: Oh, we settled those cases. We really had no defense to them. Sure, we joined the City. And the City made some contribution. Everybody sued us. It was mostly a process of finding out what the real damages were. Most of the people were reasonably honest. But there were a few that, I think, were trying to make a few dollars on it. We worked it out fairly well.



Above left:
Yellowstone Park, 1964

Above right:
Noel and Eleanor on Easter Sunday, 1964

Left:
St. Thomas, Virgin Islands, 1974

Below:
Egypt, 1984

V GROWTH AND CHANGE

Changes in Clients, Partners, and Law Practice

Dyer: So I think that's about the story. The firm, of course, over the years has grown tremendously, not only in various areas. We were located only in San Francisco for many years, the clients have grown tremendously and many have changed a lot due to the nature of their businesses. Lord, thirty, forty years ago there wasn't any IBM to speak of. The telephone company and Standard were our main clients, of course. Clients come and clients go. It's due very often to the changing nature of their businesses.

Our people have changed. Years ago we had no women because there were few women lawyers. It was during World War II, I think, that the firm first hired them. They hired the few that were available because many people had left, of course. The ladies did very well. I think then they had a foretaste that they were very capable. Of course, they've come in in fairly large numbers, and they've done fine.

The fields of practice have changed tremendously. I've indicated the change in the basic litigation practice, strict liability and that sort of thing. The discovery is very much greater now. In those days all you could do was take a deposition and that was pretty much it. Now you have interrogatories and demands for the production of documents. Practice in a way is very much easier. Now there are forms and practice hints and that type of thing for almost everything. Then you just had the basic cases and you had to construct your own pleading or your own theory out of whole cloth, so to speak. But on the other hand, in those days the remedies you could use -- discovery and that type of thing -- were pretty limited. You took a deposition and a few things like that and then you went to hearing or you went to trial, whatever the case or the jurisdiction. But now there's just a blizzard or proliferation of paper due to the ease with which one can get the other person's documents.

Hicke: Do you have a sense of why this increase in discovery came about?

Dyer: Well, there's an old case now that was written by Justice Peters called Greyhound v. Superior Court, and it's a basic case that all the lawyers know about. It put down a lot of new rules concerning the various discovery tools that are available. That case, I guess, is twenty-five years old, and it made things a lot easier to get. Now to obtain documents from the defendant, you simply make a demand for production. You couldn't do that before. It was much more limited.

Hicke: It was this case that changed that?

Dyer: It was the basic judicial decision, I believe, that changed it. It's quite lengthy and goes through various areas of discovery practice and outlines what you can do and what you can't do.

In addition to that, over the years the legislature has enacted many discovery statutes that enlarge what one can do. This, as I say, has resulted in more discovery and more expensive discovery. I think the cases certainly involve much more paper. In a way it has made it a lot easier for lawyers. In a way it's made it more difficult. Easier, because now there's a discovery tool readily available to get something or to find out about it, with some limitations, of course. Before it was much harder to find out what was going to happen at trial.

I think the theory is, as stated in Greyhound and other cases, that trial practice shouldn't be a game, shouldn't be a contest between lawyers, that there should be free and open discovery and that all the facts should be produced before trial so one knows what's going to happen.

The object was to cut down on the length of trials and that kind of thing. To a considerable degree the opposite may have happened. And that is that the new discovery rules have allowed any number of depositions; the scope is wider and certainly the paper produced is more prolific. I think that, in turn, has led to a swing of the pendulum in the opposite direction, because now instead of trials the courts are directing arbitration in the lesser cases. I've done some arbitration for the U.S. District Court and superior court, along with many other people, of course. And that's an effort of the courts and a response to this matter of expensive trials occasioned in part by these relatively new discovery rules.

Do you want me to talk a little bit about some of the people?

Hicke: Oh, that would be excellent.

Dyer: Yes. Of course, we have many more people now in many more fields of practice -- things like toxic torts, the environment, the field of pensions and pension trusts, this matter of RICO [Racketeer-Influenced and Corrupt Organizations], and various fields of security practice either unknown entirely when I first came to the firm or present in a very restricted form. It's been not only the growth in the economy and the growth of the clients, but in the various fields of practice that I think have contributed to the growth of the firm.

Then, for instance, Chevron wasn't concerned with all of these tremendous environmental problems if it was going to drill an oil well somewhere. One didn't have this matter of discrimination in employment. Labor law then was a matter of classic labor relations, the strike and lockout and wage disputes and that kind of thing. Now one has all kinds of discrimination problems and termination problems and all the many things that have led to new specialities.

Recollections of Early Partners

Dyer: We had Gene Prince, who was an excellent lawyer. I worked with him a good deal. He was well known at the bar as a good appellate lawyer. I've mentioned that I worked with him on the loyalty oath cases, and indeed, he wrote the first appellate brief in the Chloromycetin cases. He was a very solid partner in this firm.

One of the people I remember that -- I don't know whether others have spoken of him -- was here for a long time and then left and had a good career after that was Gerry [Gerald] Levin. He antedated me, and became a member of the firm at the same time. He later became a municipal judge -- he wanted to be a judge -- and then was elevated to superior judge and then was appointed to the United States District Court. Gerry was a good lawyer. I remember him quite well.

Of course, there was Marshall Madison and I'm sure a lot of people have talked of him. He was really an architect of the firm as it now is. He put into effect the advisory system of partners, if you want to call it that. And I think that was a wise move. Marshall was not a litigator but he was astute in business matters and a great asset to the firm.

Sig [Sigvald] Nielson was a tax lawyer, basically. But later on he worked pretty much in the legislative field. He practiced with Al Shults, who was with us and then became a legislative representative for various petroleum companies in Sacramento. I think Al is still in that field, although I haven't seen him in some years. We don't do that work anymore, but I recall Nielson was quite adept at it, as was

Shults. It was a mysterious kind of practice to me. They would never indicate what was going on or how it was being accomplished [laughs].

Hicke: I was just going to ask you about this. It's mysterious to me, too.

Dyer: Well, I don't know, frankly, and I never was able to find out. There were a number of occasions when I asked Sig and Shults, at the request of clients, to look into some legislative matters concerning either stopping legislation from going through or enacting some legislation. They would always gladly undertake it.

After that there would be silence. And if I asked what was going on, I was, in effect, told that this wasn't an inquiry that was proper. I'm sure they were very efficient at it. I don't mean this in a derogatory way, because I think one needs much skill in that practice. But really, to this day, I don't know how it works.

Hicke: Lobbying, in effect.

Dyer: I guess that's what it is. Yes.

I think that's about it, Carole. I'm all --

Hicke: Did you work with Gene Bennett at all?

Dyer: Oh, I knew Gene Bennett. Yes. I never worked a great deal with him. Gene tried cases. I think he tried some with Charlie Prael.

Hicke: He did. Paramount Pictures.

Dyer: Yes, Paramount Pictures cases. I had one case with him. The facts of it are fuzzy, but it was a matter involving Pan American Airlines. I did work for the Pan Am. The name of the case was Cheng Fang Hsu v. Pan American. It came out of Hong Kong.

Cheng Fang Hsu was a mysterious Chinese that claimed that Pan Am didn't process her immigration documents properly, so that she was denied entrance to the United States. She sued the airline. All the facts happened in Hong Kong. It was very difficult finding out what the facts were. It involved a fellow in the American Consulate named John Wayne Park Williams, who was afterwards involved in some espionage or something that was shadowy. I never did understand it very well.

But she was engaged in some action with him. He took part in the processing of her documents. He was afterwards let go, and it came out all right. We got the airline off. It was in the United States District Court, and it concerned more or less shadowy people in Hong Kong and Williams and all this kind of thing where they would change offices from day-to-day.

As I say, it's vague in my memory now. But it was an esoteric sort of case, and Bennett, I think, liked it for that reason. I did the legwork and the pleadings and the discovery. Eventually, it worked out all right.

Bennett was in the antitrust field. I didn't work in the antitrust area, and so I knew Gene Bennett over the years but did not work with him to any great extent.

In talking about people, I would be remiss if I did not mention two who were invaluable to me -- Isabel Hutchings and Dale Cheeley. In a period of forty years, 1946 to 1986, I was blessed by having only two secretaries -- Isabel Hutchings to 1965 when she retired, and Dale Cheeley from that date to 1986. Each was highly competent, knew my work well and did much to lighten the burdens and stresses of an active practice.

Pro Bono Work: Ethics in Law

Hicke: Well, skipping up to the present now, I know you've been involved in some hearings for the State Bar.

Dyer: Well, I've done some pro bono work. I know some people at the State Bar, and they suggested I might take some of these hearings. I've had a few of the disciplinary hearings where one acts as referee. It's a trial of people that have been subject to a notice to show cause as to why they shouldn't be disciplined.

Hicke: These are attorneys?

Dyer: This attorney appears and one listens to the evidence and then makes findings and conclusions and a recommendation as to what is to be done. I've had some of those.

Hicke: Do you have any comments about the increase of malpractice suits?

Dyer: Well, one of the things that has struck me is that in most of these cases there seems to be an unexplainable lack of communication between the lawyer and his client.

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Dyer: I shouldn't say, because I haven't had that many cases, but in those that I have had, almost every one of them seems to involve chronic inability on the part of the lawyers to communicate with their clients. They accept a retainer in a case or undertake to represent

somebody and then fail to respond to phone calls. They're unreachable; they do not answer letters. This, of course, causes a great deal of concern and eventually indignation on the part of clients leading, in turn, to complaints with the State Bar. It's almost inexplicable. In some cases, why these people don't realize that in order to maintain satisfactory client relationship, one must tell the client what's going on. In instance after instance it is a case where the clients try very hard to find out and are unable to reach their lawyer. These seem to be the kind of people -- at least the ones that have been before me -- that get in trouble.

Hicke: Do you the think that's lack of training? Or is that just the individual?

Dyer: Oh, I don't think it's lack of training. It's almost common sense that when one undertakes to represent somebody, he will want to be advised from time to time as to what the developments are. If they inquire, and there's no response on a repeated basis, why, there will be unhappiness about it.

Hicke: Are these people solo practitioners for the most part?

Dyer: Mostly. Mostly they're people in solo practice, and the usual story is that they're not in their offices and can't be reached and don't return messages and that kind of thing. It's something that I think is very regrettable, because these people have put a lot of time and effort in obtaining a license to practice, and it seems a sad thing that they would follow that course of conduct leading to all the troubles that they do incur. But that's just part of the practice, I suppose; I don't know.

In any event, it isn't the most pleasant work, but I think it's necessary and I don't mind it from time to time. I also do some arbitration work, which is fine. It's no burden. I listen to these contested cases in the district court and superior court. In other fields, too, I do some pro bono work. I don't say it's a matter of occupying time, but at least it keeps me interested and I guess loosens my arteries [laughs].

Hicke: [also laughing]. That's always to the good.

Dyer: That's about it.

Hicke: I have a quote here from Geoffrey Hazard, who is the expert on ethics, and this is from one of his books. He said, "A trial before a capable federal judge presented by competent counsel is a fair trial. But

Noel Dyer being interviewed, 1987

Photograph by Carole Hicke

this doesn't happen very often."*

Dyer: Well, do you want me to comment on that?

Hicke: If you would.

Dyer: I had dinner with a friend of mine who sits on the U.S. district bench a few months ago. And he said to me that the level of advocacy before him for most of the lawyers was not high; some was excellent. I don't know why this is. Even if a lawyer hasn't been in court often, if he works hard enough and prepares well I should think he would be able to make a reasonably good presentation on behalf of his client. Certainly the lack of efficient representation in some cases is due to lack of preparation.

Sometimes lawyers take cases that they're not qualified to take. I don't know. I've heard some awfully fine representations in district court, and I've heard some pretty poor ones, too. But if you prepare well if you've got a medical case, whether it's in district court or in superior court or wherever, you've got to get the medical records, you must know what the words mean, you have to take the depositions of the doctors, you've got to have the advice of your own experts. This holds if you've got an engineer on the stand, too; you need to make the same type of preparation -- or an architect or whatever. If you do that kind of a preparation, you don't have to be a Demosthenes or a Clarence Darrow to make a reasonably good showing.

Hicke: How about capable federal judges or other judges?

Dyer: Well, I think most judges, particularly federal judges, are reasonably capable people. Of course, they differ. Some of them differ markedly in their abilities. But I think if you go through the federal process of selection, there is a reasonable assurance of quality. Judges, of course, differ a great deal in their philosophy. You can see that. I have no familiarity with this, but I'm advised that if one represents criminal defendants, he is much better off appearing before some judges than others at the time of sentencing. And I think that's the way it is.

Judges, I've found, on the whole try to give people fair treatment. I've run into some prejudices, particularly in those Chloromycetin cases before the judge that this judicial counsel assigned. We had a terrible time with him, because he hated our case and he didn't try too hard to conceal it. And we had a really hard time holding him down.

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* Geoffrey C. Hazard, Ethics in the Practice of Law, 1978.

I don't think he was consciously trying to be unfair; I think he felt strongly that he didn't want us to win. He just wished that poor lady to win and win big, and he was going to do everything he could to see to it. Which is a poor way for a judge to proceed, really. In that case he would have been a lot better off for her if he had kept his mouth shut, because the jury resented him. You run into incapable judges at times: those that won't work and fail to rule on matters. But this is implicit in our system, and I have no special knowledge on that.

Rewards and Pitfalls of Law Practice

Hicke: Well, if you've got just a few more minutes, I have a couple of wrap-up questions.

Dyer: Wait a minute. My tie is over the mike.

Hicke: That's okay. You're coming through fine. What are the special rewards of the practicing of law?

Dyer: Well, some of the special rewards, if you want to call it that, are the acquaintances and friendships one makes with other lawyers and with some judges. Over a long period of time one meets a lot of people, a lot of diverse people. I have good friends that are on the other side of the fence that usually represent plaintiffs. I've known many lawyers in various fields and there are fine people among them. It's an old saying, you know; I said this in a speech once that "lawyers are better to work with and to fight with and to drink with than most other varieties of mankind." I have found that more or less to be true.

The variety of the cases themselves present interest. The prescription drug cases were particularly interesting. You can dig into something and find out how antibiotics were discovered and how they were developed and synthesized and brought onto the market. For instance, Chloromycetin was discovered by a botanist who dug up some soil from a mulch field in Venezuela. Then that was taken to the laboratories and looked at by the scientists and they found these bacteria and found out that it had tremendous therapeutic possibilities. Then the chemists took over, and it was interesting to find out what a great feat it was to synthesize that drug and to make it possible chemically so it could be sold in thousands of doses. And this is true of penicillin and various other drugs, erythromycin and most antibiotics.

In those series of cases, the director of public health of the state of California was produced against us. I examined him and I asked him if he hadn't found these antibiotic drugs, including this one, of tremendous benefit to the people of this state. He said, "Mr. Dyer, these drugs have saved more lives than have been lost in all the wars and all the automobile accidents in the history of the United States." You know, here was a doctor volunteering this, a public person. These things that you find out are matters of interest.

I might say that there are some moments in the practice that you don't enjoy particularly, although they are, in a way, interesting. If one is sitting on a hard bench in a dim hallway in a rural county courthouse at ten o'clock at night waiting for a jury and wondering whether it will hit you for $100,000 or $500,000, [chuckles] it can get pretty uncomfortable. But that's just part of the business. If you're going to go into that practice at all and stay in it any time, you can't be afraid to lose, because you will lose some. If you're afraid to lose, you're going to settle all your cases, and you're never going to try any. You must realize you will lose some, and sometimes you will lose big, and, of course when you lose big everybody knows it. But that's all right; that's part of the practice. You just can't expect that you're going in and win all of them. The old saying is if you win more than 50 percent you're doing pretty good.

Hicke: So if you had it to do all over again would you do the same thing?

Dyer: Oh yes. I think it's an interesting profession. Among individual practitioners it must be rather hard now with the tremendous number of lawyers that there are. But they all seem to get along. If you plug along, you'll do reasonably well, and you'll have your anxious moments and your good moments. As you go on over the years you obtain experience in one kind of a case or another before various commissions and boards and courts.

I said when I first started out and I'd have some little case, if I won I thought I was God the Father, and if I lost it was the other way. It's not quite that anymore, hasn't been for a long time. I think experienced practitioners realize this. I mean, you're up against them and you win one against them and so, well, okay, you won it. That's it. Or if you lose, the same way with them. There's no sense of triumph where you think you're triumphing over everybody; it isn't that way.

So it's a rigorous field of practice. It requires a lot of work, but if you don't work, I think -- because of these State Bar proceedings and the insight I've had from them -- I think it could be a lot tougher. That's about it.

The Success of PM&S

Hicke: Okay. Well, one last thought. Can you give me your ideas about what makes PM&S so successful?

Dyer: Well, Gene Prince once said to me that we had the clients we had and we retained them because we did good work. I think that puts it as well as anything. This firm always has done good work. It has always insisted on thorough preparation. We don't represent clients who would accept marginal work at cut rates. It's not a discount law firm by any means. We do do good work and we have good people to do that work, and we thoroughly prepare. And that type of effort is reflected in the results that we obtain and that becomes known among clients and that's the reason for the success of the firm.

Hicke: This has been a very informative interview. Thank you so much for the time.

Dyer: [chuckles] Okay, I probably talked too much.

End of Interview.

Transcribing and revisions by:

Georgia K. Stith
Charlotte S. Warnell
Jerome W. Walker

TAPE GUIDE -- Noel J. Dyer

INDEX

Carole E. Hicke

B.A., University of Iowa; economics.

M.A., San Francisco State University; U.S. history with emphasis on the American West; thesis: "James Rolph, Mayor of San Francisco."

Interviewer/editor/writer, 1978-1986, for business histories, specializing in oral history techniques. Independently employed.

Interviewer-editor, Regional Oral History Office, 1985 to present, specializing in California legal and political history.

Editor (1980-1985) newsletters of two professional historical associations: Western Association of Women Historians and Coordinating Committee for Women in the Historical Profession.

Visiting lecturer, San Francisco State University; U.S. history, history of California, history of Hawaii, oral history.

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