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John B. Bates

LITIGATION AND LAW FIRM MANAGEMENT AT  
PILLSBURY, MADISON & SUTRO: 1947-1987

With Introductions by  
Allan N. Littman  
Anthony P. Brown  
Harlan M. Richter

An Interview Conducted By  
Carole Hicke  
1986

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JOHN B. BATES

1987



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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 BY ALLAN N. LITTMAN

I first began to work with Jack Bates in 1953. Jack and Don McNeil were involved in preparing Milton v. Hudson Sales Corporation for trial in the Alameda County Superior Court. Milton was a Hudson dealer who claimed that Hudson failed to supply his full requirements of Hudsons. It may strike readers in the 1980s as strange that an automobile dealer who actually wanted to sell Hudson automobiles would find any resistance from Hudson. The Hudson was a fine car, preferred by some enthusiasts to Studebakers, Fords, Chryslers, Buicks, Oldsmobiles, or Cadillacs, if not to Packards. Alas, it is now only an antique.

Jack had inherited the case from Murray Gartner, who had successfully demurred to four or five complaints until he finally educated Milton's lawyers in how to plead that Hudson had violated both its implied covenant of good faith and the antitrust laws. Gartner then left the firm and Jack had to try the case. As I had some antitrust experience in the office and had taken a seminar on the subject at law school, I was assigned to assist Jack.

The case was not what you would call a natural winner. The chief Hudson Motor car executive from Detroit, Roy Chapin, was a very nice fellow and a good witness. He later became president of American Motors, the corporation into which the Hudson and Nash Motor companies merged. Nash had a small car, the Metropolitan, and another model in which the seats folded down. Hudson had a good big car. Together they did not do very well. American Motors eventually acquired the Jeep line from Willis Overland. Years later the French government company, Renault, acquired a controlling interest in American Motors, and then sold out. More recently a revived Chrysler has acquired American Motors.

That automotive history puts me ahead of my story. In 1954, when I helped Jack and Don try the Hudson case, Jack had the duty of convincing the jury that the demand for Hudsons was insatiable, that Milton was trying to get more than his fair share of them, and that Hudson had not and could not restrain trade. The thought of Hudson restraining trade strikes me today as hilarious, but in those days, a person who bought a Japanese car would have been thought to be idiotic -- it was accepted wisdom that the Japanese only made inferior copies of American products. Times and custom certainly change.

The local Hudson representative was not helpful. He wore a white Stetson hat and, during recesses, he used to whisper conspiratorially where the jury could see him. Even Jack had difficulty in smoothing him over to the satisfaction of the jury, and the jury came in against us. After we lost the



verdict, I remember Jack saying, "Finish in style." We did. In the trial court, Jack congratulated Stan Sparrow, our opponent, and thanked the judge. We went on to win the antitrust part of the case on appeal. It was a pretty mixed bag. The jury probably concluded that as Milton was probably the only fellow in the country who really wanted to buy more Hudson automobiles than Hudson would sell to him, Hudson should have given him what he wanted. Before the verdict, I had written a somewhat critical doggerel poem about Milton. I found it recently and concluded that it lacked both objectivity and poetic quality. I should have left the poetry to Don McNeil.

The best thing about the Milton case from my point of view was that I began working with Jack Bates and Don McNeil.\* Jack always impressed me as one of the finest trial lawyers. Years later he became first a member and then a Regent of the American College of Trial Lawyers. I tried a number of cases with him, and became one of his great admirers. Jack carried with him a basic sense of fairness and decency which permeated every aspect of his conduct: towards the court, its staff, the jury, witnesses, the lawyers and secretaries who worked with him. Having known him for a long time, I know that he is basically incapable of mean or petty actions; they are incompatible with his character. To be sure, I don't mean that he has never done what he wishes he hadn't done, but if that happened, it was seldom and there was never any malice to it. Jack's always seemed an open and generous spirit. He carried that with him in his conduct of litigation. Judges and juries admired him greatly. A few years ago, a BBC Television show attempted to place Robert Kennedy at the deathbed of Marilyn Monroe. Unfortunately for the story, Mr. Kennedy had been a guest at Jack's ranch at the time. The show included Jack pointing out in a good-humored way how difficult it was for Robert Kennedy to have been at two places 300 miles apart at the same time. Mr. Kennedy could never have had a better alibi witness than Jack Bates.

Jack was a very thorough investigator into the facts and law of any case on which he worked. He also showed a rare talent for being able to delegate effectively and for helping young lawyers find their style. Tony Brown, Mike Richter, Bill Edlund, James Kirkham, and I were all at one time in Jack Bates's trial group.

Jack was very thoughtful about the welfare and advancement of young lawyers. From early in our acquaintance I watched him encourage me and other associates who worked with him to take on new responsibilities with clients. Jack and his wife, Nancy, were gracious hosts to us in their home in Piedmont and later at their ranch, from which, by the way, they grow grapes which are

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\* In addition to being a fine lawyer, Don has never forgotten any funny story he has ever heard. Later, Don and I tried three major cases together. We won two, lost one, and then settled that one favorably. Don, in addition to being a scholar and wit, is a fine tennis player and a wonderful colleague, but that is another story.

made into a velvety\* cabernet sauvignon. Jack and Nancy are hospitable people.

Jack was always a team player. That is one of the reasons why he became chairman of the Management Committee and senior partner of the firm from 1979 to 1983. He knew how to listen to the views of various people, and, where reasonable, to give way graciously when the consensus was different than he would have liked. In a firm such as ours, that ability to agree to disagree is an essential part of our collegiality. Jack had and has that quality in abundance. I do not think he has an ounce of jealousy in him. For example, practically all of us who knew Noble Gregory revered him, among other things, for his great scholarship. It was no disgrace, indeed, it was no effort at all for most of us to concede that Noble knew more about almost any aspect of the law than we did. Jack, who had known Noble since the two were at the University of California Law School at Boalt Hall just before and after World War II, was unstinting in his praise of Noble's scholarship. He told me that he did not think the law school had graduated anyone better than Noble.

Noble and Jack were a wonderful contrast in style and complemented each other perfectly. Jack would win motions in the trial court he never should have won (or made in the first place, according to Noble), and Noble with much grumbling would miraculously sustain them on appeal. Jim Kirkham tells of encountering Jack loitering irresolutely outside the door of Noble's office with the woebegone look on his face of a student who had just been sent to the principal. Jim asked what was wrong, and Jack said, "I just won a motion for summary judgment, and I can't face Noble."

I can tell many stories about Jack Bates both in the courtroom and out of it. One of the best occurred during the trial of Leach v. Ford Motor Company in the United States District Court for the Northern District of California before Judge William Sweigert. It was one of the first cases under the Automobile Dealer Day In Court Act. We were picking the jury. Clif Hildebrand and Julian Caplan represented Leach. Jack, I, and Charlie Richardson represented Ford Motor Company. One of the jurors disclosed that he had gone to high school with Clif Hildebrand. Hildebrand was a well-known personal injury lawyer. He had had difficulties with the State Bar, but he was a tough and wiley opponent, as was Julian Caplan. During a recess Hildebrand walked up to Jack and said he would be willing to stipulate to excuse the juror. Jack said, "Well, I'll think about it." I looked at Jack in astonishment and said, out of the judge's hearing, in effect: "Jack, why don't you take that

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\* Originally, I said "very passable." I had meant that it would be passed from hand to eager hand, clutched at by connoisseurs eager for another drop. Jack thought the phrase might be misconstrued. Wine adjectives are often ambiguous, e.g., mellow, fruity, earthy, noble, puckerish, silken, satiny. In deference to Jack, however, I retasted -- he sent me a case -- and as result of this "rehearing," have modified my opinion.



stipulation? We may have to exercise a peremptory challenge to get rid of that juror." Jack looked at me and said: "I'll bet you Clif dumps him." A little while later Hildebrand exercised a peremptory challenge to get rid of the juror. At the next recess I asked Jack how he knew that would happen. His answer was a classic. "If anyone went to school with Hildebrand, the chances are he didn't like him then and doesn't like him now." I am sure Clif Hildebrand had his share of friends, but Jack certainly judged that juror perfectly.

I have another story from the same case. Jack at the time was in his early forties. He stood some 6'4" with dark brown hair, a fine carriage, and a pleasant smile. He was a very handsome and dashing figure. He is a little grayer now, but is still in good shape. One of the jurors in the front row was a very attractive woman in her early 30's. She rarely took her eyes off Jack. As we obtained a directed verdict, we never knew how the full jury would have voted. I talked to some of them. They were pretty sympathetic to our case. It wasn't like the Hudson case. People wanted to buy Fords! The young juror was most willing to discuss the case with me. Her first remark was: "What a wonderful thing it must be for a young fellow to work with such a marvelous man as Jack Bates." I replied that one certainly learned a lot, and tried to ask her a few questions about Leach, Ford, and the Automobile Dealer Day In Court Act. Although we had been in trial about three weeks, she knew absolutely nothing about any of those subjects. She did say repeatedly and with emphasis, however, that Jack Bates was a wonderful fellow! I had no doubt about her vote.

I remember Jim Kirkham telling me a story from the Lucky Mc Uranium case. A lawyer with a taste for cowboy hats and boots showed up at a meeting. Jack, looking at him disarmingly, as one cowboy to another, asked how many cows he ran and mentioned he had a few back home. The other fellow was "big hat, no cows." I don't think he had any further trouble with that lawyer.

I remember being in antitrust motion picture cases with Jack and his letting Bill Edlund and I go up against Joe Alioto in a jury trial involving a refusal to execute a settlement. Joe was a superb trial lawyer. Our clients had some doubts about two young fellows taking on the old master, but Jack gave us a boost, and we were lucky. The trial involved whether a settlement had been made. Jack Sutro and Jack Bates were both called as witnesses by Joe Alioto. As Bill and I rode back from court with them, Sutro was a little critical of Bates, for no good reason that I could see. I later felt that it was to reassure me that I should not worry about losing the case: Sutro would blame it on Bates! There was nothing to worry about; they were both good witnesses. We won.

Jack and I also tried Marnell v. United Parcel before retired U.S. Supreme Court Justice Tom Clark, without a jury. Mr. Justice Clark was a very gentlemanly judge, and it was a privilege to try a case before him. Mike Khourie, a very fine antitrust lawyer, represented the plaintiff. Justice Clark ruled for Marnell, but the damages were very low. Winning is sometimes a matter of definition. On the whole, I think it was a tie.

I could go on and on about Jack. Telling one story stirs memories of others. This is a consistent theme. Having known the man for over thirty years, I would say that I have known few people as warm-hearted, decent, friendly, and collegial as Jack. He and Nancy make a great pair. Not long ago I had the privilege of a professional association with one of their sons, John Bates, Jr., who is a partner in the Cooley, Godward, Castro, Huddleson & Tatum firm. John takes after both of them. It is a pity that under our present firm rules we were not permitted to have him join our firm. As we once said about a famous English statesman, "He is not just a chip off the old block; he is the old block itself."

Jack is now an advisory partner. He and Nancy continue to do what Jack told me long ago in the Hudson trial, and what every lawyer might do in every case and at every time: "Finish in style."

Allan N. Littman  
Pillsbury, Madison & Sutro

November, 1987

INTRODUCTION BY ANTHONY P. BROWN

Jack needs no introduction, but I was introduced to him on my first day of employment, December 1, 1952. Jack Sutro assigned me to work for Jack Bates at the outset, and I continued in that assignment for more than nine years until I had the pleasure of becoming his partner. Jack himself had become a partner a month after my arrival and for many years, he and Jim Michael were the firm's leading litigators.

I am pleased and proud to assert that Jack never had an unsatisfactory result in any trial that I helped him with. I was mostly on the medium-sized general litigation, often involving technical or medical questions, while others worked on the antitrust cases. Our unbroken string of successes was really remarkable.

To my observation, Jack's greatest strength may have been in settlement discussion. It was uncanny to see him pick up the telephone and improve on what I had been able to do. The opposition knew they were getting a one-two punch and grumbled about it, but Jack just rode it out and got excellent results. My real education started when I went to work, and I had a good teacher.

Anthony P. Brown  
Pillsbury, Madison & Sutro

November, 1987

## INTRODUCTION BY HARLAN M. RICHTER

I have been asked to write an introduction to the Bates oral history. While I am pleased and flattered to have been asked to do so, the request should have gone to Jack's longtime secretary, Margaret Kidson. To compile a history of Jack's outstanding career as an attorney, administrator, and leader of the firm without tempering it with Margaret's pungent insights loses a whole dimension of the man.

One of the many great stories about Kidson and Bates occurred when tear gas canisters were placed in elevators in the Chevron building by activist groups. (This led incidentally to installation of the infamous security system in the Chevron building.) The elevators stopped at each floor and gas escaped into the hallways. When Margaret Kidson was hit by the gas, she went coughing and weeping into Bates's office and together they went onto the balcony outside of his office window to escape the effect of the gas. As the gas seeped into Bates's office and started to come out the window, he pushed the window closed to avoid the gas, thereby locking it. Margaret is caustic about Jack's failure to prevent this happening. Someone on the 21st floor opened a window to ventilate the room, and the gas being heavier than air descended onto Margaret and Jack. So they stood there in the cold, shivering and coughing until Bud Dapello came into Bates's office and found the waifs pressed against the window. Dapello's comments about Margaret at the time led to the famous mock slander suit by Kidson against Dapello, in which Dapello was ably defended by Allan Littman, but that is another story.

The other story people like to tell about Jack bears on some of the attributes which have made him such a persuasive and effective advocate. Jack has the ability to evaluate a case and to arrive at an explanation of his client's position which is simple, down-to-earth, and persuasive to court and jury. The interesting aspect of it which leads to the story is that it has the same impact on opposing counsel. It is related that in a given case in which the law was clearly against our client's position, a savory, seasoned trial lawyer came to talk to Bates about settlement of the litigation, confident in his client's position and the law. After a long session with Jack in which Jack refused to acknowledge that the law said what was on the printed page, the veteran trial lawyer left Jack's office, shaking his head in uncertainty and doubt and muttering, "Can I be wrong?" While the story is apocryphal, it illustrates Jack's extraordinary persuasive powers as a litigator.

His persuasive powers stood Jack in good stead when he took over the position of managing partner of the firm. During those years Jack was very effective in getting things done because of his strong negotiating skills. He

was a good listener and open to persuasion when others disagreed with him. These skills enabled this ex-navy man to steer this ship successfully through many a crisis in the firm's life.

Harlan M. Richter  
Pillsbury, Madison & Sutro

February, 1988



## INTERVIEW HISTORY

John B. Bates was interviewed as part of the series of oral histories being done with twelve advisory partners at Pillsbury, Madison & Sutro. Mr. Bates was primarily responsible for building Pillsbury, Madison & Sutro's litigation practice during the post-World War II decades. Before that, the firm did such litigation as was needed by its clients, but it was Mr. Bates and his practice group that established the firm's outstanding reputation in the field.

An astonishing number and variety of cases comprised Mr. Bates's practice, ranging from defense against personal injury suits to the problems of well-known financier Victor Posner. The success he obtained shows Mr. Bates to be a dedicated and brilliant trial lawyer, and in the oral history, he reflects on some of the aspects of litigation such as jury selection and the final argument.

Armed with an outline of topics for discussion and research material furnished by the interviewer, Mr. Bates went through his own voluminous files picking out, from the wide range of diverse cases, the ones of most significance and interest.

At various times in his career, Mr. Bates found himself studying -- for purposes of argument -- hardwood forests in Iran; the semiconductor industry; mining and construction; and purchasing practices for cemetery monuments. A trip to England with Chief Justice Warren Burger in 1973 showed him that there was much to be learned about the English legal system. For one thing, he notes, there are no briefs, even in the appellate courts, and clerks get books off the shelves of the courtroom during the trial when a lawyer wants to read from a reported case.

Mr. Bates was also chairman of the firm from 1980-1983, and he comments thoughtfully on the evolution of the firm's management practices. In discussing traditions of the firm handed down from founders and early partners, Mr. Bates concludes, "We've always tried to have everything that comes out of Pillsbury, Madison & Sutro, everything done by our lawyers, to be top grade, top quality, and of the highest ethical standards."

Eleven interview sessions took place in Mr. Bates's ninth floor office in the Adam Grant Building, located in the financial district of San Francisco. Overlooking San Francisco's busy Sansome and Bush Streets, the office contains portraits of John A. Sutro, Sr., Francis Kirkham, Del Fuller, Sr., Marshall Madison, and members of Mr. Bates's family. Historical pictures of early

California decorate the walls, along with scenes of ducks. A long, heavy, Italian refectory table stands against one wall, piled high with records and working papers -- many of them collected for this oral history.

The interviews were done on April 7 and 22, May 13, June 23 and 26, July 7, 8, 9, 21, 22, and 29, 1987.

After the tapes were transcribed, Mr. Bates carefully corrected the edited transcript and added more information that he considered pertinent. He selected clippings, articles, and photographs from his collection to illustrate the transcript.

Carole Hicke  
Interviewer-Editor

June 1987  
Regional Oral History Office  
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University of California, Berkeley



BIOGRAPHICAL INFORMATION

Your full name

John Burnham Bates

Date of birth

March 2, 1918

Birthplace

Oakland, Calif.

Father's full name

Charles David Bates

Birthplace

Oakland, Calif.

Occupation

General Contractor

Mother's full name

Isabella Margaret Barker

Birthplace

Oakland, Cal

Occupation

Housewife

Family

Spouse

Harry Witter Bates

Children

John B. Bates Jr., Catherine Maurer Bates,

Law Catherine B. Kreitzer, Charles Witter Bates

Where did you grow up?

Piedmont, Calif.

Education

Piedmont High School, Stanford University,

Boalt Hall at the University of California, Berkeley.

Areas of expertise

Litigation

Special interests or activities

Government, politics,  
education, Republican Party, and candidates,  
Sports - golf, tennis, duck hunting, skiing  
(winter years)

## I BACKGROUND

[Date of Interview: April 7, 1987]###\*

### Family History

Hicke: I wonder if we could just start this afternoon by you telling me a little bit about your background, your grandparents and parents.

Bates: My father's parents arrived in the San Francisco area at about the time of the Gold Rush. My father's father was a general contractor in Oakland. He died at a rather early age. My father had to go in and take over the business and was unable to take the time to go to the University of California, where he very much wanted to go to college. But he had four sisters, and he had to get to work to support his mother, his four sisters, and himself.

I don't know how he did it, but he did it very well, and he was quite successful.

My mother's parents had their backgrounds in Burlington, Iowa. My grandfather, John Russell Burnham, was a very interesting character. When he was a teenager, he left his family home in Iowa and went into the lumber business down in the southern states. He accumulated some money and he came back and bought his father out; his father was also in the lumber business. He bought his father out under an assumed name and retired him. He stepped in and ran the business.

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\* The following symbol ### indicates the beginning or end of a tape. See tape guide at the end of this volume.

Then he sold out and came West, and he got into the linseed oil business in Oregon. He sold that business when he was in his late thirties, and then he invested quite well. He lived in Oakland, alongside Lake Merritt, in a great, big, white colonial house, and he had all sorts of boats: rowboats, and whatnot. As a young boy, I always looked forward to going to Grandpa Burnham's house.

He was just a marvelous man. He was only five feet, two inches tall and he had a crooked arm. I asked him what was the matter with his arm. He said he'd broken it when he was very actively engaged in the lumber business, and he just didn't have time to get it fixed, so he went through life with this crooked arm, but it didn't seem to handicap him very much. He was a great sportsman. He loved fishing.

One of the most amusing tales of his history had to do with his marriage. He proposed to my Grandmother Burnham on the morning of her wedding day to another man.

Hicke: He must have been persuasive.

Bates: He was. An amazing man.

Hicke: Is his house still standing?

Bates: No. The land lay vacant for many years but just this year (1986) I see that an apartment house is being built.

### Growing Up in Oakland

Bates: Getting back to my father. My father was a contractor, and he was in the paving business in Oakland, but he was also heavily involved in major road construction and earth moving. In those days, in the late teens and twenties, earth was moved by big mule teams pulling earth-moving blades and scrapers; they didn't have any tractors or big self-propelled earth-moving equipment in those days.

Hicke: Did he know Henry Kaiser?

Bates: Yes, he was a very good friend of Henry Kaiser's, and he was a good friend of the Bechtels.

Hicke: What was his name, did you tell me?

Bates: Charles David Bates, Jr.

Hicke: And he had his own business?

Bates: Yes, it was called Bates and Borland; he had a partner named Borland.

Hicke: Did he ever joint venture with Bechtel or Kaiser?

Bates: As far as I know, he may have on a limited scale, but not heavily. In any event, he decided to take the whole family around the world in 1928 and '29. He was a very good friend of Stanley Dollar's. Stanley Dollar then controlled the Dollar Line, which eventually became the American President Lines.

My father arranged with Mr. Dollar to take his marvelous, big Marmon touring car. The whole roof rolled back, and there were luggage racks along the sides and a big luggage rack in the back. And it had three or four spare tires. It was a tremendous, marvelous thing.

The Marmon touring car was taken up in slings and cranes and put on the front deck of the ship and then lashed down. The Dollar Line had a lot of President Line ships in those days, and we'd go, say, to Hawaii, then we'd get the next ship that came through and go on to the Philippines. Then we went to Japan and Hong Kong and Shanghai. The car wasn't always taken off. But we went all the way around the world. We were gone for about a year and a half. We went through India. We got off in Ceylon, and we got a train that took us from southern India up to Calcutta, where we got the car. And then we made our way across India and ended up over in Bombay.

Our family included my two older sisters, my mother, dad, and myself. Dad would always hire a driver who knew the roads and knew how to speak the language, of course, a native. And then he'd sit up in the front seat with the driver, and I would sit on one jump seat, and my sisters would either sit in the other one or in the back seat with my mother, and off we went.

Hicke: That must have been a wonderful experience.

Bates: It was a marvelous experience. Then we went all through Europe, and we came back, went through the Panama Canal, and back to San Francisco. We got back right when the stock market crash hit, so that we never would have made this trip if we had planned to leave in 1930, '31. We just wouldn't have done it.

Dad got hurt by the stock crash because he had quite a bit invested in the market. Fortunately, he wasn't wiped out, by any means, but it had hit him severely enough so that he just didn't want to commit the rest of his capital to getting back in the construction business. At about that time, the big, automated, earth-moving machinery was becoming more and more available, and the big contractors were using that. The mule teams were fast becoming a thing of the past, so it would have entailed a big capital commitment.



Hicke: In order to get this large machinery, draglines and so forth?

Bates: In order to get the contracting equipment and compete for the kind of work that dad had done in the '20s. So he got into various relatively small housing projects with Beckett and Federicke, who were contractors in the housing business. He was in a venture with Walter Leimert in a housing project in Los Angeles: Leimert Park. But none of these things were anything like the housing developments that came on later; these were relatively modest.

The biggest housing boom in California really didn't come on until after World War II. As I told you earlier, dad was a very good friend of both the Kaisers and the Bechtels, and Kaiser was just a general contractor. He wasn't any graduate engineer or the like. As a matter of fact, he was a photographer when he started out.

Hicke: I'm not even sure that he graduated from high school. I think maybe he just left school, and he became a photographer.

Bates: That's probably true.

When he started building those ships in Richmond, I was in law school, and after my first year of law school, he asked me and my father to come out and visit the shipyards. He was anxious to hire young men, young college graduates, to work for him. And because he'd known me all my life, he was interested in giving me a job. This was before Pearl Harbor. He had a shipyard in Richmond, and he had another one up north in Seattle, and he'd have competitions between the two yards as to which could get the job done the quickest; those were the liberty ships. Just a fascinating man.

And I remember him telling my father, "There's nothing to building these ships if you just find an easy way to build them, and this is it."

I decided I'd like to finish law school before going to work. And, of course, none of us had any idea at that time that we'd be so quickly involved in the war.

I'm trying to think if I've left anything out about my grandfather and grandmother.

There was always a lot of family activity. We invariably all got together for Sunday lunch, which was a big family occasion.

Hicke: When you say all, who would that include?

Bates: That would be all our family: my sisters, and then once in a while some aunts and uncles and the like, and we'd often go to my grandfather's home on the lake. He had only one child, my mother.

Although my father never had time to go to the University of California, he always supported the University of California. Dad was a good athlete, good sportsman. He was an amateur boxer, and he sparred with "Gentleman Jim" Jeffries. He was an amateur bicycle rider and an amateur jockey. They used to have gentlemen horse racing in those days. He was one of the top-ranked tennis players in the state of California. So he was a very busy young man.

They moved earth either by mule teams or by water: hydraulic. I remember dad took on the job of digging out the hill and making the bowl for the stadium for the University of California. I don't think he ever got paid for the job, but he did get lifetime seats to all the sporting events that took place there. He and Robert Sproul, Sr., turned out to be very close friends.

Hicke: Would he have been using Caterpillars?

Bates: In those days? No, that was before Caterpillars. They just used water -- hydraulic methods; they'd use water to wash the soil down.

Hicke: Just with big hoses then?

Bates: They used to have mules to haul the dirt and whatnot out. They'd have to build all sorts of drainage pipes to take the effluent away.

Hicke: I guess Kaiser actually helped Caterpillar get started, too.

Bates: I don't know about that story. I know that Harry Fair had a lot to do with starting Caterpillar. He lived in Piedmont, which was our home, and which was the Stanley Dollar's home. Henry Kaiser lived near Lake Merritt; I think he always lived in that apartment house just off Lake Merritt. Benjamin Holt was the one who conceived of and developed the Caterpillar tractor in Stockton in 1905. It started with a vehicle that could crawl across peat land in the delta without being submerged. Interestingly, my sister is married to Parker Holt, who is one of the senior partners of the present Holt Brothers, a Caterpillar dealership in Stockton.

I never knew Steve Bechtel's father, but I know dad was friends with both the present Steve Bechtel, Sr.'s father, and Steve Bechtel, Sr. I've known the Bechtels all my life. They live in an apartment on Lake Merritt, the same apartment building my mother-in-law lives in, Mrs. Jean C. (Catharine) Witter, a widow.\*

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\* Mrs. Witter died on April 20, 1987.

I came along late in the family. As I said, I have two sisters; they're still very active. One of them is seven years older than I am, and the other one is ten years older than I am. I think my family had given up on having or wanting any more children; then I was the unexpected result of a weekend outing in Glen Ellen.

But, as I say, the family gathered a lot more than families do these days.

Hicke: You were born in 1918, is that correct, in Oakland?

Bates: Yes. The old Fabiola Hospital.

Hicke: These weekend outings you were talking about were with your mother and sisters?

Bates: Yes, and my grandfather would almost always come for Sunday lunch at our house after his wife died, but before that we'd trade off and go to his home, and then he'd come to ours.

My grandmother Bates lived to be in her nineties, but we were seldom entertained at her home. She would usually come to our home or go to my grandfather Burnham's home.

Hicke: What kind of family values were passed along to you?

Bates: Our family was always very close. We were always very loyal and very respectful of our parents and others. I think it's quite a bit different today, although we still, in our family, are quite close; there are just not as many family gatherings as there used to be. Maybe it's because we've all gotten more mobile. I think everyone has got their own thing to do, and their own interests, and everyone seems to be rather free to do them. Not to say that we certainly didn't have our freedoms; we were all quite active and moving around.

Skiing, for example, used to be more of an effort to get to in our youth than it is today, when you can go to the mountains in a day and ski and get back, if you have the energy. There weren't as many weekend trips up to the mountains when I was a young man as there are today.

Hicke: Was it a sort of major expedition to get up there?

Bates: Yes. There was just a little two-lane road to Tahoe, so that you didn't have the mobility of the freeways.

Hicke: Was there some particular member of the family who influenced you the most?



Bates: I don't think I can say that. I was always interested in being a lawyer. I was always very interested in doing what I could to be as good as I could be in public speaking and debating. I also took Latin, thinking that that was what young aspiring lawyers were supposed to do.

Hicke: How did you get started in this interest?

Bates: I don't know. I was just interested. I think our trip around the world had something to do with it. I remember being fascinated with going to the Forum in Rome. I was only ten and eleven when we took that trip around the world, and I remember learning a lot about Rome, the early history of the senators and the senate. And then the Greeks and the Greek histories fascinated me, particularly the senates and the public forums and discussions and all that. That, I think, was something that motivated my interest. I just can't put my finger on any incident, but it was just an accumulation of things.

Hicke: But this went on throughout high school?

Bates: Yes, and I'd go down and audit trials. I remember sitting in on a jury trial in which Chief Justice [Earl] Warren was the prosecutor; he was then the district attorney in Alameda County. I recall sitting in on several trials. My father encouraged me, because he said he'd always been hiring lawyers and he thought it would be nice to have one in the family.

I was always amused by my grandfather's remark when I was in law school. I took my first year at Stanford, and I came home for the weekend. We had some horses out at Orinda, and my father and I would go there and ride horseback, and then come home and have a family noontime dinner with whatever other members of the family were around, including my grandfather. I had come back, and I was lying on the floor reading the Sunday paper in the library. My grandfather was playing cards with my dad -- my grandpa loved to play cribbage -- and he turned to me, and he asked me what I was doing now. I said, "I'm going to law school, G.P." -- we called him "G.P." And he said, "Well, didn't you just finish college?" and I said, "Yes." He said, "You know, the worst mistake I ever made in my life was when I finished the fifth grade I decided to go on through and finish the sixth. I wasted a whole year of my life." G.P. was really a self-made man if there ever was one.

Hicke: That's a wonderful story.

Bates: Yes.

Education

Hicke: Let's back up a little bit. Is there anything that you particularly remember about your high school days?

Bates: I went to the Piedmont High School, and we had a great school; it's still a good school, but it was really, I thought, truly great in those days. We had a marvelous highlander bagpipe band. Brick Johnson, the football coach, was the one who really started the whole thing.

Hicke: You played the bagpipes?

Bates: I didn't, no, but we had this marvelous bagpipe band. They still have a few bagpipers around in Piedmont, but nothing like the band that Brick Johnson put together. He had eight or ten bagpipers, a big drum, and then the smaller drums, and it was quite something when they came into the auditorium; the student body just went wild. We had winning team after winning team there in football and basketball, and it was just a marvelous atmosphere. I thoroughly enjoyed my high school experience.

My father thought it might be a good idea for me to go to private school, and he sent me off on a pack trip with Professor McBride, who was a mathematics teacher at Thatchers. I liked the experience very much, and thought that Thatchers had a lot to offer, but I told my father I would prefer to go to a public school. I didn't want to just go to a boys' school. I thought it was kind of fun to be with girls, and I would have a more active and interesting opportunity in a public school.

I was actively involved in the school. I was president of the Rigmas, which was a boys' club organization: there were two of them, the Rigmas and the Kimmers. I played some basketball, tennis, and golf. I finally got my letter in tennis. I was also president of my senior class. In those days, all the girls wore uniforms; they wore black skirts, white middies, and ties.

Hicke: To school?

Bates: To school, everyday; that was the uniform of the day. Even though it was a public school, they all adhered to that. The young men who had received athletic awards, the block "P," would act as the monitors in the school, and they would make sure that the student body was orderly, particularly in the meetings in the auditorium and the like. There would be a block "P" student sitting at the end of every other row or so, and his responsibility was to maintain order, and it really worked.

We had some good, well-respected, honor societies -- Alpha Clan, and Beta Scots at the junior level -- and it was a lot of fun; it was well ordered. Piedmont still has fine schools, among the best in the country, but I don't think there's near the discipline and respect that there was when we all attended school. They don't seem to take a serious civic responsibility in taking care of the grounds and stopping littering, things of that kind. I hope that the cycle has ended and that things will get better.

It was a great school and, comparatively speaking, it still is. We just had our fiftieth reunion this last year. It was a lot of fun, a great evening. There was a lot of talent there.

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Bates: When I graduated from high school, it was in January of 1936, and I wasn't due at Stanford until the fall. I got a job on the Dollar Line and worked my way around the world as a cadet, which was a very interesting experience.

Hicke: What did a cadet do?

Bates: He got a dollar a day, and he was supposed to be an apprentice to become an officer in the merchant marine. What a cadet did was relieve all the watches. He got a regular assigned watch, and I had the dog watch: that's from 12 midnight to 4 o'clock. So you never really get a decent night's rest, but being young and vigorous, it didn't seem to make much difference. I'd go around and relieve the man on the wheel up in the wheelhouse. And then I'd go out and relieve the man on the watch in the bow of the ship. Then I'd have to sound the bilges to see if the ship was intact or leaking water anywhere. It was a very good experience, and I learned quite a little bit about navigation and whatnot from the other officers. It was the President Adams, a good ship, and a good crew, and a very worthwhile experience.

Hicke: It was your second trip around the world?

Bates: That's correct.

Hicke: How did you decide to go to Stanford?

Bates: My two sisters went to the University of California, and I'd always been very loyal to Cal. My father used to take me out there to watch the football practice. But there were a number of my friends who were interested in going to Stanford, and I really wanted to go to Stanford. I guess I just wanted to have the change, and go there instead of going where my sisters had gone.

I hadn't played football in high school. I was a tall, skinny guy, and wasn't nearly as adept at sports as my father was. But I did participate in a lot of sports, being very keen on athletics. In any event, I thought it would be a good idea to go to Stanford early, a month before school started at Stanford, and go out for football. I thought it would be a good way to get exposed to the campus and get to meet the other students; so I did.

I went with some other Piedmont graduates, very close friends of mine: Howard Hickingbotham, Lew Stahley, Jack Forsman, and in particular, Derrol Huddleson. Derrol is with Thompkins and Company, insurance brokers. Derrol was All-Alameda County Athletic League center; he was a very good football player. Howard Hickingbotham was a good football player, a fullback.

As I say, I'd never played before, but Harry Shipke, the coach, thought that I was some star tackle from the Midwest. I didn't know about his problem, but I wanted to go out for end. He put me at tackle, and I ended up on the second string, much to my surprise. Derrol Huddleson was really upset because he ended up on the fourth string. Harry Shipke was not a very smart man, and he and Larry Ruble were the coaches. Shipke called me Graham all the time, so I finally just accepted that my name was Graham, because I felt I was doing pretty well to be on the second team.

Hicke: Did Graham ever show up?

Bates: No, there wasn't any Graham. I don't know how he got all confused, but finally what happened was Judge Dewey Weinman, who was a lawyer in Oakland -- Weinman, Rhode, Burnhill & Moffett -- a Stanford graduate, and a very strong supporter of Stanford and Stanford athletics, visited the campus. He had a lot to do with a lot of the good athletes going to Stanford.

He was particularly interested in Piedmont graduates. Anyway, he came to Stanford one day and had a visit with Harry Shipke and Larry Ruble to find out how the Piedmont graduates were doing. He went down the line with all of them, and finally he got to me. He had me down last because he didn't think I'd still be on the football team, I guess. He asked Shipke, "Well, how's Bates coming along?" He said, "Oh, he's doing fine." I don't know how Shipke realized who Bates was. But somehow or other, he did, and the Graham thing I guess cleared in his mind somehow, and he said, "Oh, he's doing pretty well. He's on the second string." Weinman said, "You know, that's incredible. He's never played football before." The next day I ended up on the fourth string; my football career came to a very abrupt end, and I went out for basketball after that. Finally got my numerals in tennis.



booming voice. He would sit at his desk in front of us all. We were all on raised platforms, so that we all sat above each other; and he sat at eye level with us so that he could see exactly what was going on throughout the entire classroom: who was paying attention and who was with it and who wasn't. He was very quick to call on the person that he thought was unprepared or not paying close attention. We all really respected him and loved the challenge that he forced on us. I get a little emotional when I think about it, because he was such a great teacher.

We had this young Oriental in the class who was very reticent and shy, and he used to make him come up and stand in front of the class and recite the holding in these cases. And these cases were terrible, early common-law contract cases and tort cases; they were just almost completely incomprehensible, so you never could really come to firm grips with what the case was about. And yet, he would abuse you as if it was so obvious that you ought to know, when in reality he knew darn well you couldn't know. But he challenged you so vigorously that it really made you think.

And Professor Hurlbutt was an excellent professor in Contracts. We had very good professors.

Hicke: Before we get further into law school, let's back up a little bit. After you went right on from graduation and took one year of law school, then you went into the service? Are we there yet?

Bates: That's right. Actually, when I started my second year, I decided that I'd be better off going to Boalt Hall, at the University of California, so I transferred to Boalt in the fall of -- I graduated in 1940 -- I guess that would have been --

Hicke: '41.

Bates: Yes. I just felt it would be better for me to get away from my undergraduate distractions, of which I had quite a few at Stanford, and Boalt had quite a good reputation, and I just thought it would be better all the way around for me to transfer, so I did.

Then I was exposed to Professor James P. McBaine, who was Turner's father,\* and I finally became acquainted with the importance of Latin in the educational program of a law student.

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\* Turner McBaine is a partner at PM&S.

But being early at Stanford did expose me to the school, and I had a very pleasant four years at Stanford. Among other things, I was on the debating team, and I was president of my fraternity, Zeta Psi. Then I took my first year of law school.

Hicke: What did you major in?

Bates: Economics. I always felt it would be very important to get a broad undergraduate education, and I particularly wanted to emphasize business and economics, just thinking that would be a good background for practicing law, because I got plenty of western history and politics as I went along. I was more interested in trying to get a decent education in economics as a base.

Hicke: Is that fairly unusual for a law school background?

Bates: I don't think so.

Hicke: It seems like history or political science is more common.

Bates: I did take a lot of history, but I majored in economics. Taking pre-legal in those days really wasn't that important, because you didn't want to take pre-legal and maybe get off on the wrong track when you're going to get your legal education in law school.

Hicke: There was a pre-legal course of some type?

Bates: There were business law programs and the like, which I did take. But there were also other programs that emphasized more of the law side of society than economics or history, which I didn't take.

Hicke: Were there any particular professors or courses that you remember especially?

Bates: No, not as an undergraduate, no professors that really stood out in my mind. It's really hard for me to even recall any of the undergraduate professors. I didn't really start feeling close to the professors until I got to law school. I was fortunate enough to get involved in a lot of seminars where we'd be using teaching assistants rather than professors. I was on the Stanford Debating Team and I do have a vivid memory of our debating coach and teacher, Chapin.

But then in law school, I had some very good teachers. I think Professor George Osborne, who taught Remedies to first-year law students, was the best professor I ever had. He was a very dynamic, forceful teacher. He had polio as a young man, so he was somewhat crippled but not immobile. He could get up and walk around the room. It was difficult for him, but he could move, and move rather well. He was not a big man, but he was a very powerful teacher, and he had a



Professor McBaine said, "When the opposition starts talking Latin, you know you've got him licked." So I really don't know what good all my Latin was; I guess it was a good discipline, but I don't know that Latin's of any value.

Hicke: I think it's a good help just for English, because I learned more grammar in Latin than I ever did in English classes; and also for other languages, it's a good background. And also for recognizing when you've got your opponent beat: you have to know that he's speaking Latin. [laughs]

### World War II Service

Hicke: Before we get onto the subject of Boalt Hall, can you tell me a little bit about your service during the war?

Bates: When the war broke out December of '41, I immediately dropped out of law school and volunteered for the the navy.

Hicke: So you dropped out right in the middle of the year?

Bates: Yes. I was anxious to get in the service just as soon as I could after Pearl Harbor. I wanted to get in the navy. Finally, I was interviewed by a Commander Aroff here in the Twelfth Naval District. I can't remember exactly what building he was in, but it was here in San Francisco. But I'll never forget waiting to be interviewed by him. He had some brand-new tires leaning up against his desk. And I learned later that the way to get into the navy was to give Commander Aroff some tires, or whatever else was in short supply. It had a lot to do with expediting your application. That was terrible. I think he was finally caught, and something was done about him.

Hicke: It's a little hard to hide tires leaning up against your desk.  
[laughs]

Bates: I didn't have any tires or anything else to give Commander Aroff. I was slightly near-sighted, and my eyes weren't good enough to be a line officer, so I ended up in the supply corps. I really didn't know exactly what I was involved with, it was a whole new world to me; I'd never been exposed to the navy.

Hicke: You got into the navy perhaps expecting to be doing something on a ship because of your previous experiences?

Bates: That's right. I didn't know exactly what I was going to get, and I remember how disillusioned I was when I got this announcement from the

government saying, "We're pleased to inform you that you have been made an assistant to the paymaster general with the rank of ensign." Being a paymaster was really kind of a comedown; nobody wants to be a paymaster. Anyway, that's what I was. And it turned out to be a very healthy experience, a marvelous thing.

I started out with the port director's office here in San Francisco under Commander Tricou, and what we'd do was try to help the ships when they came into port, get special things that they might need that they might not otherwise be able to obtain: just servicing the ships as they came. It wasn't a very important position, by any means. I was waiting to go back to Harvard to be trained in the intricacies of supply and payments, prepare myself for taking responsibility as a supply officer. In just a month or two, I received word that I was transferred to Harvard.

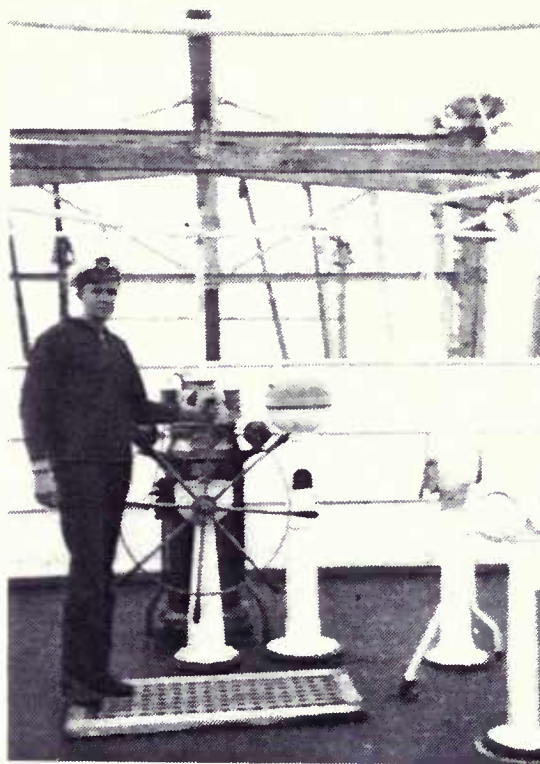
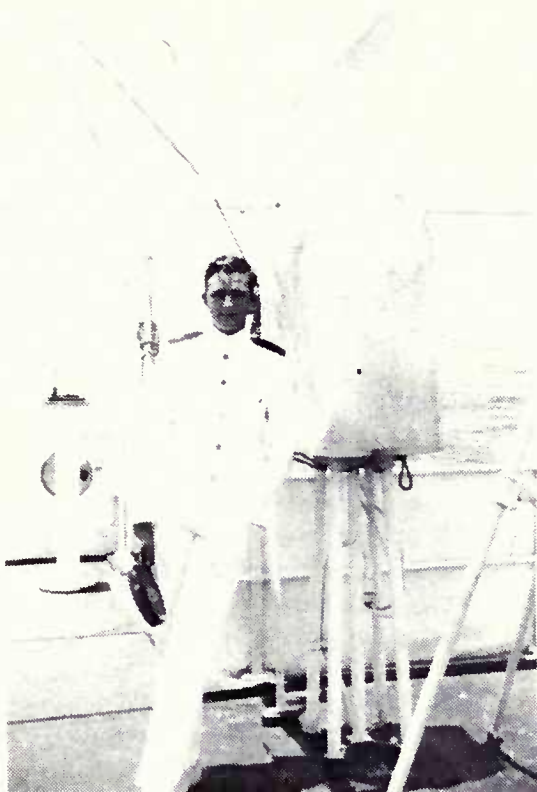
I went to the Business School and I and about twenty others were put in a special class for construction battalions, and I thought that would be fascinating. They were going to take each one of us and assign us to a construction battalion in the Pacific. But then when we graduated after about two months, they didn't have enough construction battalions in commission to absorb all of us, so they took every fourth man, alphabetically, and assigned him to a destroyer. I was assigned to the [U.S.S.] Farragut, which turned out to be a great destroyer.\*

We were all through the Aleutian campaign. We were patrolling Attu and Kiska to prevent the Japanese from reinforcing those islands. We had our whole squadron up there, all eight destroyers. Our mission was to keep any Japanese ships from getting into either Attu or Kiska to bring in any sort of supplies, because we were getting ready to invade. We didn't realize it then, but the Japanese had decided to evacuate both islands, and all the time we were up there to stop them from coming in, they were going out. Our captain reported seeing some strange lights on what was called Saboka Rock, and we reported that to COMNORPAC [Commander North Pacific], but they never followed through with any investigation. If they had, we might have found out then what they were up to.

We did sink one submarine, but we didn't know then that they were actually evacuating the islands. The submarine we sunk was probably full of Japanese trying to evacuate. Then we had all these troops up there that had been waiting there almost a year for this invasion. They were a pretty sad lot. It was a very dismal area, very desolate. They had a hard time of it; even got around to playing Russian

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\* See following page.



Cadet John Bates, 1936



John Bates aboard USS *Farragut* in the Aleutian Islands, 1942





Roulette.

A fleet came up and joined us. We had some small carriers and the battleships New Mexico and Mississippi, a couple of cruisers, and other ships to create a task force to support the invasion of Attu and Kiska. We were all out patrolling together, getting ready for the invasion and doing some shore-shelling and the like.

One night we thought that we were being hit; there was just a terrible, resounding concussion that vibrated the whole ship. The GQ buzzer sounded. I, being a supply officer, was assigned the decoding machine, but I was free to go anywhere I wanted on the ship. The doctor and I went up on the bridge and learned that the battleship New Mexico with her 16-inch guns had opened fire. They were right next to us, and the concussion was so great from their big guns that we felt like we were being hit.

They had an enemy contact and had started to open fire on an invading task force. This firing went on and on, and then the cruisers joined in the fire -- of course, it was too far for our guns. You could see the shells, these big molten shells. I'd never seen such a bombardment in my life, just kind of floating over the horizon, solid steel. This went on for twenty or thirty minutes. The New Mexico burned its guns out they fired so many rounds.

Then the firing stopped, and the New Mexico ordered us in for a torpedo attack. It was the only torpedo attack ordered for a squadron of destroyers in World War II. They had torpedo attacks with those PT boats and the like, but they never ordered a torpedo attack with a squadron of destroyers other than this one.

It was a beautiful, moonlight night. Being on the Farragut, in the Farragut squadron, we were the first in line, and these other seven destroyers were behind us; it was really an exciting sight.

The torpedo men were intense; they were going to be able to fire their torpedoes, and they were up there making sure everything was in order. There was a state of high excitement on the ship.

We were gone for quite some time, an hour or so. The skipper called back over the intercom system, back to the New Mexico -- our code name was White Poppy -- and the captain said, "This is White Poppy." The New Mexico recognized us, and the captain reported that he had no enemy contact. We were well over the horizon from the battleships and the cruisers -- more than thirty miles south of our task force.

We were told, "Very well, return to screen." So we started back. After about forty-five minutes or so, all of a sudden we were illuminated with star shells, which is a prelude to being hit by enemy fire.



One of the cruisers, our own cruiser, reporting to the New Mexico said, "I have enemy contact, bearing so and so. Request permission to open fire." The commander of the New Mexico, the senior officer, said, "Don't fire. That might be White Poppy." And with that, our skipper picked up the speaker and cried, "Don't fire. This is White Poppy." That incident has been written up in the naval history books of the war.

Hicke: There's a book about that?

Bates: It's quite an extensive chapter in a book about the war up in the Aleutians.\*

After the Aleutians, we got involved with the invasion of the Gilberts; we supported that invasion. And then we went into the Marshall invasion. After the Marshall invasion, we were ordered to stay in Eniwetok Atoll, and it was there that the new task force came down with Admiral Spruance in charge. Now we had the new carriers, the Bunker Hill, and the Essex, and all these ships that had been built since Pearl Harbor. It was a thrilling sight to be there and be standing at attention on our destroyers, paying recognition to these brand new ships that came steaming into the atoll; it was really a marvelous sight, and such an inspiring thing to see what America could do under pressure in creating these wonderful ships in such a short time.

Admiral Spruance was really a gung-ho admiral; he was tops. Very professional. He got restless waiting down there. We were waiting to support General Douglas MacArthur in New Guinea and that area, but it wasn't time and we were just to sit there. Spruance just couldn't stand that. He got word that there was a big portion of a Japanese task force at Truk, so he got permission to go up there and try to catch that task force. We were ordered to start towards Truk.

These new, big carriers could go faster than we destroyers. Anyway, we all started out together, and we were the screening destroyers, the old Farragut squadron. A Japanese spotted us and was shot down, but the navy communication officers were fairly well convinced that the pilot had gotten word to the Japanese task force that we were on our way. So Admiral Spruance wanted to speed up and try to get there before the Japanese could pull anchor and get away. So he went full speed and just ran away from us, the screening destroyers; we couldn't keep up with him. We got there the next day.

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\* Brian Garfield, The Thousand-Mile War (Toronto: Bantam Books, 1969).

The bulk of the Japanese fleet got away. But he did get some good licks in and bombed the daylights out of all the airport facilities and everything else up there. We got there for the end of it. That's when they filmed "Fighting Lady." I remember coming back and taking my family to see it -- my family, my parents -- to let them see what sort of things went on.

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Hicke: You were just saying there wasn't one picture of a destroyer --

Bates: In the whole movie, that I can recall anyway. We were quite active in many engagements. I remember one time we ended up with three crews of TBF [Torpedo Bomber Fighter] pilots on board--that was the torpedo plane pilots--because they'd get shot down and we'd go pick them up and bring them aboard. That was very exciting for the doctor, because he'd get all sorts of broken legs and arms, and he loved to get to work and get some bones set.

Hicke: Finally had something to do.

Bates: He had something to do. I was relieved after I'd been on board for eighteen months, which was the tour of duty at that time.

Hicke: What years were you there? Was it '42 and '43?

Bates: Yes, it would have been '42, and half of '43. Then I came back. They had quite a number of billets open, and they gave me my choice of several billets that were open. I chose being on the staff of VR-4, which was the maintenance squadron for the Naval Air Transport Service, headquartered at the Oakland Airport.

Admiral "Blackjack" Reeves was in charge of Naval Air Transport Service. I ended up being sent down to Moffett Field, where I was the supply officer who was in charge of all backup material for the maintenance of the R-5D airplane, which was the biggest Douglas transport that they made at that time. The idea was to take them through an assembly line operation in those big hangars at Moffett Field, and service them, replace parts, and all that sort of thing.

But it wasn't long after that that we dropped the bomb and the war was over.\*

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\* Bates received five battle stars in the Pacific operations.

Law School

Bates: I was anxious to get on with my life and my career. Now, I'd cooled somewhat on being a lawyer, because I wanted to get out in the business world and start making some money and find myself a place in the world. But I thought that I ought to give serious thought to completing my legal education. We were still in uniform, as I recall, but we were just waiting discharge. We hadn't been discharged. I was still stationed at Moffett Field, because it took so long to get discharged. So I went out to Boalt.

Evan Haynes was the acting dean. He had been a partner at Brobeck, Phleger & Harrison, and I guess the [former] dean got himself involved in the war effort, and for one reason or another, Haynes was not eligible and ended up acting as dean at Boalt. He was quite a nice man. The secretary, and I can't think of her name, was a wonderful woman, and she was very sensitive to all of the students at Boalt who had left to enter the service. She was delighted to see me back. It was the middle of the term, so I knew there wasn't any way I could start law school in the middle of the term. Much to my surprise, I ended up with a big load of books and a great, big assignment sheet, and told to get to work. I had to work my tail off.

Hick: You started right in?

Bates: Started right in, right in the middle of the term; I started going to school the next day. Luckily, they didn't give me any time to think about it. I think I was still in uniform, which was good for me because I might have fumbled around and found something else to do. So I got right back into it, and it was great.

Hicke: Do you know if that happened to other people coming back from the war?

Bates: Noble Gregory and I ended up in the same class. It may well have happened to him, too. Our classes got so mixed up during the war because the others that had been deferred and hadn't gone into service were there. I would have normally graduated in the class of 1943, but my class was 1947, January of '47.

Hicke: You left in the middle, and you came back in the middle of a term, right?

Bates: Yes. Noble Gregory was there at the same time. Noble was a partner here, and died just before his 65th birthday, or during that year; it was just a year before he was to retire to become an advisory partner. He was a great man, an outstanding lawyer, and a brilliant law student.



Ensign John Bates

U.S. Navy

1942





I remember there was a new book that came out on torts written by [William L.] Prosser, who ended up becoming dean at Boalt. I remember asking Noble what he thought of it. Here was Prosser on torts, which was a major work. Noble said, "Oh, I went through that last night. I don't really think that much of it." It would have taken me a month to get through a book like that.

Noble and I enjoyed a very happy relationship all through our professional lives here at Pillsbury, Madison & Sutro. He was our top appellate lawyer.

One of the most colorful professors I had after the war was Professor [Alexander M.] Kidd; they called him "Captain Kidd." He wore a visor, and he taught Sales. He was just an impossible character, and I don't know whether I learned anything in his course or not. He'd get very excitable and very irritated with his students. He always impressed me as being completely disorganized.

He was so upset with some of the answers that the students had given in the final examination -- he was on a train trip across the country, and he took along all the final examinations and threw them all out the window. He didn't know how to grade them, so he finally gave everybody a C.

Barbara Armstrong was teaching. She was a character. She taught Labor Relations and Family Law. And I think I told you this before about Marshall Madison.

Hicke: I want to get it on tape.

Bates: My brother-in-law, Everett Brown, was a lawyer in Oakland: Brown, Rosson & Berry. It was his father, Judge Brown's firm. He and his partner, John Rosson, were quite interested in having me come with their firm after I finished law school. I was thinking about that. I may have been now in my last year of law school, but I was just halfway into it, more or less.

Marshall Madison wrote me a note and said he'd like me to come by and have a visit to explore the possibilities of my going with Pillsbury, Madison & Sutro. That sounded very exciting.

I visited with Mr. Madison and he offered me a job. I thought that that would be great, but "It's an awfully big firm, about forty-five lawyers." But I thought, "Well, it would be fine to start out with a big firm and really get all that exposure, and this is where the action is, and the big cases, big problems." So I thought, "That's where I want to start." Of course, I never indicated to him or anybody else at Pillsbury, Madison & Sutro that at that time I was very tentative about it; I was just full of enthusiasm, as far as they

were concerned. But I was quite concerned about getting involved with that many lawyers.

### Marriage.

Bates: I was taking out Nancy Witter, Jean Witter's daughter. I'll have to back up a bit to the war period in order to tell you how I met her.

Our destroyer would come back intermittently to San Francisco, because our home base was Mare Island, and we'd come back to be overhauled every once in a while at Mare Island. I think we were back twice. We'd go to Mare Island, then we'd go down to San Diego and go through some runs with the task force. Then we'd go out to wherever we were destined to go, either the Aleutians or the Gilberts or wherever.

Or course, San Francisco was a great port for the navy; they were very supportive of the navy, and the navy was very supportive of San Francisco.

Hicke: What kinds of things would happen when a ship came in?

Bates: The sailors would all have a lot of money coming to them, because they didn't have any way to spend it until they got here in port, unless we'd stopped at Pearl Harbor. But if we were coming back to San Francisco, we wouldn't stop at Pearl Harbor very long. It didn't give them any time for shore leave. We'd just stop for a day or so, and then head back to San Francisco. We usually really didn't have any major payday until just before arriving in San Francisco. They'd have all this money, and they just wanted to have a good time.

Hicke: Did the city do something officially?

Bates: No, not really, because the fleet was always in and out. There wasn't any Fleet Day or anything like that because every day was Fleet Day.

Hicke: They had a band marching?

Bates: No, none of that, just very hospitable and always very kind to the navy.

As we approached San Francisco, it was my first payday, and I'd never handled over twenty or thirty dollars in my life before; now I had about half a million dollars in cash to pay out. It was more money than I'd ever seen in my life, and I guess I handled more money through those days and months than I ever had, ever will, in cash.

So we had our first payday in the mess hall on the Farragut, and these men had a lot of money coming because they'd all been down in the South Pacific. I was the first supply officer they'd had. Right in the middle of payday, the GQ buzzer was sounded. Jesus, the money was all over the place, the ship was rolling and rocking around. They had an enemy contact, a submarine. All the men were going to battle stations, and I was groveling around with my storekeepers and clerks, trying to get all this money together. Also, I was assigned to be the assistant to the gunnery officer at that point. I'd gone to gunnery school in Pearl Harbor, because they were short of line officers, so they wanted to use me on deck. So my battle station at that time was assistant to the gunnery officer. I was trying to get my money together and get up to my battle station; it was a terrible mess. It turned out to be a whale.

We finally got our act together, and found our money, and went on with payday.

When we arrived at Mare Island, the captain said, "Now, Pay," they always called us supply officers "Pay." "I realize this is your home port, and I want you to get off and get home and have a nice visit with your family. But I'd very much appreciate it if you would stand watch along with the line officers." Staff officers -- the doctor and I were staff officers -- weren't supposed to have anything to do with standing watches. But he said, "I'd really appreciate it if you'd stand a deck watch here, because it would give the officers more time away from the ship and more opportunity for leave if you would help out." He never thought to ask the doctor to do it, too; doc wouldn't think of doing it. But I said, "Sure, I'll be happy to."

I got home and had a big family reunion that night. Everybody was around that dad and mother could find. Then I took my Oldsmobile, and I came back to Mare Island, and I parked my Oldsmobile right next to the gangplank that went up to the ship. Then I went to work, doing my supply work, and getting orders, and all that sort of thing. I was due to stand watch that afternoon.

We all had lunch in the wardroom, all the officers that were on board, with the captain and executive officer, and the captain said, "Pay, I want to see you up in my quarters after lunch." "Yes sir." So after lunch I went up to see the captain, and he said, "Pay, I've been thinking about your having to stand watch. It really isn't necessary. I very much appreciate your willingness to help out, but you don't really have to do that. You're going to be working every day here anyway on ship's business. There's no reason for you to stay up here at night."

I said, "Well, captain, it's fine with me. I'd like to help out, and do what I can." He said, "No, that's not necessary." So I

started to leave, and he said, "Oh, by the way, what time will you be leaving this afternoon?" It became my duty to drive the captain to San Francisco. Then I'd pick him up in the morning, and we'd go by the old Hall of Justice in San Francisco, and go in, and pick up the sailors from the Farragut who had been put in jail by the shore patrol the night before.

The shore patrol, in cooperation with local police authorities, would pick up sailors and bring them in and hold them all night because they were just drunk. Then the captain and the ship's officers would come around and pick them up the next morning. So we'd have two or three enlisted men and the captain and I in my Oldsmobile going back.

Hicke: In your merry Oldsmobile?

Bates: Yes, my merry Oldsmobile.

On one of my visits to San Francisco I was walking down Post Street and this gorgeous-looking blonde was walking up the street with another woman. She said, "Hello, Jack." I didn't know who in hell she was, and she said, "Gee, it's good to see you." I said, "Oh, it's good to see you." They'd just come out of Shreve's and I fumbled around and did the best I could. Then I rushed into Shreve's, and my friend, Howard Hickingbotham, was managing Shreve's at the time. Howard was right there, fortunately, and I said, "Hey, Howard. Who was that blonde that just left here who had another lady with her?" And Howard said, "Oh, you mean Nancy Witter?" I said, "God, that was Nancy Witter? That fat, dumpy, little girl we knew in high school?" That was Nancy Witter and her mother. I really got all sparked up, and I got hold of Nancy and started taking her out.

I wasn't at all close to her in high school. She is six years younger than I am. She was just a funny-looking little girl when I was in high school, but now she'd turned into quite a beautiful young lady. She and I had a lot of fun together, but I was pretty busy taking out other girls around San Francisco. Nancy was almost too much like family. It was almost like a brother-sister relationship. I had a lot of fun with her, and I really thought she was most attractive, and there was certainly a romantic feeling there, but it wasn't all that much. We'd go horseback riding together, and anytime I didn't have anything else to do, I'd ask her to go to a movie or something like that. She was always great, always wonderful company, and I always figured that sooner or later I'd probably marry Nancy, but I wasn't quite ready to be that serious about getting married, because I had a lot of other girls that I was having good times with.

Everything was going along all right. I started back to law school, and there was a big Junior League party. This was the big



party of the year. I used to participate in the shows for the Junior League. I played MacArthur in one show; it was a lot of fun. And I'd gone with Nancy to these Junior League parties on occasion, but she didn't ask me to this one. I knew it was coming up. I got a call from Izabel Tinning; Izzy Tinning was the daughter of Archibald Tinning, who was a lawyer in Martinez. The family lived in Piedmont. Izzy asked me if I wanted to go to the Junior League party with her. Sure, I accepted right away, wondering what happened to my old buddy Nancy.

We were invited to cocktails at Roy Bronson's house in Piedmont, that's Bronson, Bronson & McKinnon. Marge Bronson was an old girlfriend of mine; she by now had gotten herself married to Steve Townsend. So we all gathered at Roy Bronson's for cocktails. I was there with Izzy, and all these others were there.

Nancy wasn't there, hadn't arrived yet. All of a sudden, Nancy appeared with this handsome, blond submariner. He was a lieutenant commander and full of gold dolphins and ribbons. My God, if you ever wanted to cast a hero, this was the guy. I was really almost in a state of shock to see this thing going on. I thought right away, "You'd better get off your duff, Bates, something's going on here." His name was Brooks Hall, from Oklahoma, and he was quite a handsome guy.

After cocktails, we went to the Claremont Hotel for the dinner dance. I excused myself; I said, "Izzy, I'll be back in a few minutes. I have an important thing I have to do." I got Nancy and danced with her, and I took her out on the porch and proposed to her. She said, "It's too late, Jack. I'm engaged to Brooks." I said, "What the hell's going on here? When did all of that happen?" And she said, "Oh, it's gone on for quite some time. I've been corresponding with him over the last two or three years. We're engaged; we're going to get married." I was just flabbergasted; this kind of put one over on me. "That's the story. It's too late. I didn't really think that you were all that interested, and now it's too late. I've got the ring, and we're going to announce it very shortly." She didn't have the ring on then. "But we're going to announce it. My grandfather's coming out here for an announcement party."

I got busy. I was back in law school. Before I went to law school in the morning, I'd come up and bring in the morning paper. By this time, Bill Witter was back. He'd been in the air corps. He was up in the Aleutians in the Army Air Corps. Bill was there with his wife, Carolyn. Tommy Witter was there. So all of the Witter family were there. Except, of course, Jean Witter Jr., who was a naval line officer who was killed on the bridge of the San Francisco at Guadalcanal. When I walked in, I could hear all the doors closing upstairs; they didn't want to get involved.



But I was there every morning. I was sending up roses and doing all sorts of things. Then I guess it was one afternoon I got Nancy in the car and drove her out to Diablo. I took her up to the lake where we always used to go swimming when we were kids. I gave her all my old Zete [Zeta Psi fraternity] charms and pins and everything else I'd never given to any girl before.

All the male Witters were Zetes at Cal, so Zete was a very important thing in the Witter family. I knew this was going to impress Nancy to get all this Zete stuff that I had, because that really showed how serious I was, to give her all these things.

I said, "Come on, Nancy; he's a great guy, but you don't want to marry him and end up in Oklahoma. You're going to miss all this. You're going to miss all your friends here in the Bay Area." She said, "Well, Jack, I like you very much; as a matter of fact, I love you, but it's just too late." I said, "Now, Nancy. My grandfather Burnham" --

Hicke: Like grandfather, like grandson.

Bates: He had proposed to my grandmother on the morning of her wedding day to another man.

Hicke: She thought that over?

Bates: In the meantime, Grandpa [Eugene D.] Maurer, Catharine Witter's father, had come out for the big engagement announcement. Fortunately, they hadn't put it in the papers yet, and they hadn't had the engagement party, but Grandpa Maurer had come all the way out from Wisconsin. He was staying at the house, getting ready for the big engagement party and the announcement.

The next day Nancy called off her engagement to Brooks. Sent him packing. Poor Grandpa Maurer had to go back to Wisconsin.

Hicke: And your grandfather did you a good turn, too.

Bates: Yes, that's what did it. Anyway, she's quite a girl; there she is over there. [points to picture]

Hicke: Beautiful, lovely.

Bates: And she hasn't changed. That was taken sixteen years ago at the wedding of our son John to Denny Coonan. We were married in June of '46.

Hicke: Didn't grandpa want to stay for the announcement?



*left:*

15 June 1946

**JACK BATES AND HIS BRIDE**, the former Nancy Witter, exchanged toasts at the reception following their marriage on Saturday. The couple's wedding took place in the beautiful gardens at the Piedmont home of the bride's parents, Mr. and Mrs. Jean C. Witter. They will honeymoon in the southland, then return to the East Bay.

*Photo by Wayne Peters*

*below:*

grandfather's house on Lake Merritt, ca. 1924







Bates: We didn't announce it right away. We didn't announce it until a month or so later, and then we were married June 15, 1946. So this is our fortieth anniversary year.

Hicke: That's a wonderful story.

Bates: Yes, it was fun. Then I was busy finishing law school, and I mentioned this place we had in Orinda where the family used to go horse-back riding. We had three or four horses out there. My father died in 1945. I was going to convert the barn we had at Orinda into a home for ourselves, and I was going to finish law school. I was just in over my head. I said, "Nancy, I'm trying to do too much here." I was working with Jack Warnecke on trying to fix up this barn, making it into a home, and making plans, and all that sort of thing. I said, "We've either got to call off the wedding, or I've got to drop out of law school, or I've got to stop working on this house we're planning to build." She said, "I guess you'd better stop working on the house." So we dropped the house.

##

Bates: We rented a little house in Montclair: 7056 Broadway Terrace. My mother bought the house, and we rented it from her; I didn't have any money. She was kind enough to buy the house, and then rent it to us.

I should have said that before Nancy and I were married, I was quite active in law school and having a good time, having gotten out of the service. A lot of my old buddies now were coming out of the service, including Jack Kennedy and Red Fay. Jack Kennedy and I were on the host committee here for the formation of the United Nations. Red Fay had a lot to do with me getting to know the Kennedys in the first place. He and Jack were in PT boats together and Red and I were very close friends, fraternity brothers. So Red had a lot to do with me getting to know Jack Kennedy, whom I came to know quite well.

As a matter of fact, both Jack Kennedy and I were taking out Anita Marcus, who subsequently married Red Fay.

Hicke: At some point, can you give me your impressions of him?

Bates: Sure. Yes, I'm jumping around, but I could do it right now.

Hicke: We can put it off and put it in where it's appropriate. I didn't know whether you were going to come to it later.

Bates: It becomes important later on.

Hicke: Okay, we'll just wait then.

Bates: I went ahead and finished law school.

Hicke: You had also started to talk about the U.N.

Bates: I just mentioned that because we were involved with that, just on the social side of it. It was during my law school time but before getting married to Nancy that I was involved with all that United Nations business and Jack Kennedy and getting to know him.

Then Nancy and I got married and went off on our honeymoon down at San Ysidro Ranch near Santa Barbara.

After the war, you couldn't move around very much. I'd taken that summer off because I'd been working hard to catch up with the class and everything else; and I wanted to get organized in my new life with Nancy.

I went on to finish law school. I had taken Labor Relations from Barbara Armstrong, and I think I got a B or an A-. Then my last term at law school, I had finished all my necessary courses, so I didn't want to get too loaded up now being married, so I thought I'd take the courses I was most interested in, and I also took a couple of easy courses, supposedly. One was Family Law from Barbara Armstrong; there's not much to Family Law, so I thought I'd breeze through it. But she gave me a D in Family Law, and I was very upset about it. Other than that, my grades were fairly good. So I thought I had a duty to tell Marshall Madison I'd gotten this D in Family Law. I was really embarrassed about it. I wrote him a note, sent him my grades, and he wrote right back and said grades didn't really make all that much difference. If they did, he never would have made it at Pillsbury, Madison & Sutro. [laughs] He was a marvelous man. I graduated in January.

Hicke: You graduated in 1947; I have the date here.

Bates: Yes, I did, that's right. I went right to work for Pillsbury, Madison & Sutro.



## II PILLSBURY, MADISON & SUTRO: THE EARLY YEARS

[Interview continued: April 22, 1986]###

### Joining the Firm

Hicke: I thought we might start this morning by your telling me a little bit about the reputation of Pillsbury, Madison & Sutro, which you were interested in joining.

Bates: Pillsbury, Madison & Sutro was the biggest firm in the West. There was a lot of apprehension among young lawyers about going with such a big firm. On the other hand, Pillsbury, Madison & Sutro represented the Standard Oil Company of California, the telephone company, the Bank of California, and many other very substantial clients.

Another concern was that the then present heads of the firm, at least quite a few of them, were sons of founding and other partners. So, as a young lawyer, you had to be concerned about your future in going to a firm of that size where there was evidence of nepotism.

I just finally concluded that I really ought to accept. I thought it was a great opportunity to go with the firm, even though I foresaw these problems. It just seemed to me that if you're going to be a lawyer in the commercial field, the best place to start would be where the big cases were, and there was no question in my mind that the big problems, the big cases, were centered in San Francisco, and that Pillsbury, Madison & Sutro was the biggest and most influential firm in San Francisco, so that having an opportunity to start there, I thought I should accept it, and I did. I never regretted it. But I did always have in the back of my mind, "Well, this is a good place to start, but I don't know whether I'll do this the rest of my life." They got me so busy I really never had a chance to look back.

Did I mention the roadman?

Hicke: No. I wanted to ask you about that; that was your first job with the firm?

Bates: Yes. The policy of the firm in those days was to make each young lawyer that came into the firm the roadman. Of course, they didn't have near the numbers of new hires that the firm has now; perhaps they'd hire one or two lawyers a year, but the firm kept on growing tremendously after I came. Just looking back, when I came to the firm, there were less than fifty lawyers in the whole firm, and of course now there are more than four hundred lawyers.

The first job of the new lawyer was to be the roadman, but first of all, he'd have to get himself admitted. Once admitted to the bar, then he was able to take on the responsibility of being a roadman. The reason the roadman had to be admitted is that he had to appear in court on occasion, particularly in the federal court where, in order to get a stipulation extending time, you'd have to get court approval in many instances, and you couldn't appear before the court unless you'd been admitted to practice.

Hicke: Were some attorneys hired without being admitted to the bar?

Bates: Yes, a lot of them were just waiting for the results of the bar examination, but as soon as they were admitted, they were eligible to go on the road. The roadman would sit at a desk in the business office, right next to the calendar clerk's desk. Now we have different offices where all these functions fall. In those days, everything was centered in one big office.

John Stamp was the calendar clerk, and the roadman would keep a book similar to the calendar clerk's. It would be sort of a check on the calendar clerk. He'd enter all the new cases, enter all the new estates being probated, and do that first thing in the morning. Then he'd collect all the papers that had to be filed or presented at courts and the like, and put them in a briefcase and start the rounds. He, the roadman, would take care of all the filings in the municipal court, the superior court, the federal courts, the state Supreme Court and the district courts of appeal, so he got to know all the clerks in all the courts. And as time went on, he got to know many of the judges. So it was a very good exposure to the mechanics of the legal system in San Francisco.

I felt particularly fortunate because I stayed as roadman for several months, and some of the lawyers got enough confidence in me so they'd let me go out and argue a demurrer or the like. In one case, I even got to try a case, and that was the case about the automobile that had been left at the Standard station at Fisherman's Wharf. The owner picked it up, and the car suddenly caught fire. The fire was eventually put under control, but the owner was naturally quite

incensed, and he sued Standard Stations. There wasn't an awful lot of money involved; it wasn't a very big case. But Standard decided that nothing had gone wrong at the Standard station, that there hadn't been any problems servicing the automobile, and they decided they ought to defend it.

I remember that Al Brown, now an advisory partner here in the firm, was in charge of that business and a lot of the commercial litigation business of the Standard Oil Company. So Al asked me if I'd take on the case. I think he thought it would be good training for me, and then when the case finally came up for trial, he came out and sat with me at the counsel table.

I had a lot of witnesses that I'd gathered from the Fisherman's Wharf area, and I can't right now recall just why I thought they were important. I guess they were men who were operating the station and the like. I had them all in the courtroom, and I remember Leo Cunningham was the judge. I made an opening statement, and I introduced my witnesses to the court, just pointing them out. The theory of the plaintiff's case was that he'd taken his car to this Standard station, had it serviced, picked it up and drove it a few blocks, and it caught on fire. So that Standard station must be liable, because he didn't do anything to the car after it left the station.

My defense was that, as I pointed out in my opening statement, I had witnesses there who would testify that they did everything that they were supposed to do in servicing the automobile -- it wasn't a major overhaul that we were called upon to perform, it was just an ordinary oil change and service job -- and that the job had been accomplished quite professionally, in a reasonable period of time, and that there wasn't anything that was done by the Standard station people that could have caused the car to be set on fire.

The plaintiff presented his witness, who was the owner of the automobile and who was the only witness he had, and then he rested. I was very new at the game, and quite nervous, in fact, but I was prepared to present my case. Al Brown whispered to me, "Move for a non-suit." I thought, "Well, all right." I moved for a non-suit, and the judge said, "Well, I'm inclined to agree with you." I think that's about all I said. I don't think there was any extensive argument.

Hicke: And that was it?

Bates: Then, naturally, the plaintiff's lawyer was all upset about the judge's attitude, so he started arguing with the judge that he shouldn't grant a non-suit, that the doctrine of res ipsa loquitur applied. Judge Cunningham said, "Well now, I could go on and take the time of this court, with all these other cases waiting to be heard, and listen to all these witnesses, but I'm not going to do that. I've

got a lot of other cases coming up today, and I'm going to grant the motion. Motion's granted." So that was the end of it.

Hicke: And you and all of your witnesses had nothing to say?

Bates: Yes. I remember delaying for a moment. Al said, "Come on, pack your bag, get out of here. You've won, don't delay and give the judge a chance to change his mind." I never forgot that. There's nothing like success, so that was that. I was always amused by that, my first trial, and that result.

Hicke: I have 1947 for that. Does that sound about right?

Bates: Yes, that's right. I started on my birthday, March 2, 1947.

#### Working with Jack Sutro, Sam Wright, and Gene Prince

Bates: After finishing my tour of duty on the road, I was to go to work for Norbert Korte, who was one of the senior trial partners. But unfortunately, Mr. Korte was suffering from a cancer of the heel, as I recall, and it was fatal. So I was then asked to assist Sam Wright, who was not a partner, but who was a very competent trial lawyer. Shortly after that, Southall Pfund was asked to devote more time to litigation to try to make up for the loss of Norbert Korte.

I tried quite a few cases with Sam Wright. Sam was a trial lawyer of the old school. He was a heavy drinker, but he was really a very good trial lawyer. This description may seem incongruous, but Sam was tall, dark, and gangly. He reminded me of what a forty-five-year-old Abe Lincoln might have looked like.

One of our early cases was King v. Pacific Telephone & Telegraph Company. The only really significant thing about that case is that I became involved with Jack Sutro, who was the attorney for the telephone company. Jack had an office in the offices of the telephone company as well as at Pillsbury, Madison & Sutro. Jack was very actively involved in the telephone company account and in the management of the firm. And Jack was the one who was in charge of interviewing and recruiting all the young lawyers at that time. I was one of the few, I guess, that the firm hired without having to be interviewed by Jack Sutro.

It was in connection with the King case that I first got to know and work with Jack -- and it was very frustrating, because even though I was really working with Sam Wright, Sam delegated practically all of the paperwork to me and Jack Sutro insisted on reviewing it all. So



I'd have to go in and fight with Jack about almost every word. He had to find something that had to be changed in every paper.

As I recall, we did not prevail in the King case; I don't think it was a very substantial case. The only real significance of that case was that I did come to know Jack and like and respect him. I think we developed a satisfactory relationship at that point that went on through the many years of my practice, and even today. Jack, his wife, Betty, my wife, Nancy, and I are very close friends. We, over the years, have not only worked together, but we've played together. I've played a lot of dominoes with Jack, Francis Kirkham, Jim Michael, George Eckhardt, and Frank Roberts. It was Jack Sutro that got me started duck hunting up in Marysville, which was a fascinating experience, and I guess we'll cover that as we go along.

Hicke: In the case of the litigation, who would decide how the work was to be done? Would Mr. Sutro decide to pass that along to you or Sam Wright? How would he decide what to handle himself and what to pass along?

Bates: Jack never, to my knowledge, tried any cases, other than maybe a substantial commercial case. I know that he got involved in some litigation involving a labor dispute, but he wasn't trying these personal injury cases. He would give them to either Sam Wright or me, and then as time went on he gave practically all of them to me. But in the early days, Sam and I were trying these cases together.

I remember one case we tried in Martinez. The plaintiff's name was Rubino; it's not really significant except for the personalities involved. She had suffered an accident, and it had to do with the telephone company. In any event, she contended that she had very serious injuries, but after taking her deposition and after the investigations, we determined that she was not being truthful in telling us about her injuries. So we had a surveillance put on her, and we had movies of her doing some things that she said she couldn't do.

The case started out as a very substantial case. The plaintiff's lawyers were Carlson & Collins. Bob Collins was a competent trial lawyer, but of the old school, and he too was a heavy drinker. He had his own locker in the superior court in Martinez, down in the basement where he had his liquor locked up. And yet, as much as he would drink, he was a good trial lawyer. The drinking never showed -- at least, not in the courtroom.

We, of course, did bring out the surveillance and the movies, and Sam handled the matter very discreetly. The jury didn't get upset with us having done all this and came in with a very modest verdict which we and the telephone company considered a win.



Sam had been in the navy. He started out as an aide to the commandant at Mare Island. He was very independent, and he and the commandant didn't get along very well, so the commandant had him transferred to an ammunition ship. Sam was very upset at having to go to sea. He wasn't concerned about his personal safety; he was concerned about the fact that he wouldn't be able to drink. After he was out at sea for a couple of days, he discovered that the captain enjoyed his whiskey and that he had his own supply of liquor, so they got along very well. Sam's drinking, to my knowledge, never ever interfered with his competence. It was just one of the things that some of the really old-time trial lawyers did.

I remember in the middle of this trial up in Martinez, we had recessed for the weekend, and I asked Sam to get his wife and join my wife and me for dinner at our home in Piedmont, and he did. We were having a fine old time talking about our navy days and litigation we'd been involved with. Sam was telling some war stories. He said, "You know, Jackson, I'll never forget when we came in to this atoll out in the Pacific. All of a sudden the ship hit a coral reef and started to sink. The ship was so low in the water you couldn't wipe your ass with a piece of paper." Of course, my wife is quite a lady, and this was a shock to her, to have her dinner guest come out with a story like that. But we made it through the evening, and I think she even sort of got a kick out of the story. That was typical of Sam.

I remember the Yuba Consolidated litigation, involving the floods, very serious floods, in Marysville and Yuba City. I couldn't find a sheet on that case in my book; did you by any chance run across that?

Hicke: Those files were destroyed. I looked in the file room.

Bates: It was in 1950. Our client, Yuba Consolidated, had done a lot of work in dredging for gold in the Yuba River, and that changed the water-course substantially. There was an extensive investigation by the state and also by the company, and with the assistance of Eugene Prince, one of the then senior partners of the firm, we concluded that there was a good probability that Yuba Consolidated would be held liable for a lot of the flood damage, because it had changed the flow of the river to such an extent that it caused a substantial part of the damage. Yuba Consolidated and Eugene Prince were quite concerned that if they had to deal with each one of these claimants individually, the damages could be so substantial that it could wreck the company. He concluded that the only way to deal with this in a sensible way was to file a common-law Bill of Peace in the federal court and bring all the parties into one case. This was a unique procedure. There was very little case law on the subject; he was relying on the common-law.

Hicke: In bringing several clients together? It was before the class action suits?

Bates: That's right. It was before the class action had become a legislative part of our system, way before Rule 23 in the federal courts.

In any event, this is what he was planning to do. The first step was to try to figure out who we were going to bring into this class. So we had to find a way to relate the damaged properties to the property that was flooded as a result of the change of the watercourse. Gene Prince asked Sam Wright and me to go to the area and to start to work on finding who all these potential claimants might be.

Sam and I went to Marysville, and we got a room in the old Marysville Hotel. Of course, Sam had his bottle of whiskey, but he was careful about not drinking too much in the daytime. He was getting settled, and I said, "Well, Sam, I'm going to the Hall of Records and start trying to find out how we can put this story together."

It just seemed like an impossible task to me. In conversations with the clerks down at the Hall of Records, I concluded that the thing to do was to visit the local title company and see if they could help us. I did, and it turned out that the title company had some very good records, and they had some quite competent people, and so I made arrangements with them to do all this work for us. They could locate the properties, they could locate the areas we were concerned about, and they could locate the property owners. The task could be done in a matter of weeks, and it would have taken us months.

I came back to the hotel and told Sam this, and Sam was just ecstatic, because I think Sam thought that he was going to be stuck up in Marysville for months. We came back to San Francisco and made the recommendation to Gene Prince and talked to the client, and that was the way the matter was handled. The Bill of Peace was filed and the people were all brought in. Unfortunately, Judge Lemmon of the federal district court ruled that our action in equity for a Bill of Peace was not appropriate because the claims were different, even though they arose out of the same tragedy; that some damages to some of the parties were not within the jurisdiction of the federal court; that the damaged parties would not be deprived of their right to a jury trial by a proceeding in equity, but that the burden of having to defend numerous claims could be avoided by consolidation. The court granted consolidation of the claims within the jurisdiction of the court and reasonable, though substantial, settlements ensued. Only a few cases were consolidated for trial and the company survived.\*

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\* Yuba Consolidated Gold Fields v. Kilkeary, et al., U.S. District Court, N.D. (1952) 103 F.S 990

Cross-Examination: A Lesson

[Interview continued: May 13, 1986]##

Hicke: You indicated that you had another case with Sam Wright that you wanted to talk about.

Bates: Yes. This was a case that we filed on behalf of a Mrs. Hazelton and her husband. They were involved with the military back in the early 1950s when they were being transported in a navy bus from Mare Island to San Francisco. The bus was in an accident, and somehow or other, we got the case. We didn't take very many plaintiff cases, and I can't recall just how the case came into the office, but it was another one of Sam Wright's cases, and the thing that sticks in my memory is what I learned on how to cross-examine.

In that case, our investigation, interviews, indicated that the Hazeltons always took care to sit next to one of the emergency doors on the bus when it was being driven by this certain navy driver. In our interviews, we discovered that the reason for that was that they didn't have any confidence in the driver and they were quite concerned that sooner or later he was going to get into an accident. So they wanted to be very close to the emergency door. There was no way that we could bring this out in direct examination, but we were both hoping that it might come out in some way or other, as things can happen in the course of litigation. This was a case under the Federal Torts Claims Act, so we were in the federal court. I can't recall the judge that was presiding, but that's beside the point.

In any event, we'd presented our case, but we had some more questions of Mrs. Hazelton. Then when we finished, Mrs. Hazelton was turned over for cross-examination. It so happened at that time, the United States attorney who was defending the government in that case was Robert Peckham, who is now chief judge of the federal district court. Mr. Peckham started the cross-examination, and it was brought out where the Hazeltons sat in the bus, and where Mrs. Hazelton was sitting at the time of the accident, the time she sustained the injuries.

Mr. Peckham asked the question, "Why was it that you sat where you did in the bus?" and there it was. So Mrs. Hazelton brought out that the reason that she and her husband always elected to sit next to the emergency door was because they didn't have any confidence in the driver. He'd been in several accidents, and they were quite concerned that he was going to be in another one.

That taught me a great lesson, and that is: in cross-examination, never ask a question of a witness unless you're sure that



you have that witness nailed down, either by an earlier statement, by a deposition, or something of the kind; never gamble on an answer that you're going to get from a witness. Make very certain that you're not going to get an answer that you can't immediately impeach, if it's going to be a dangerous answer, and that was a great lesson. I was happy to learn it back in the early stages of my career as a trial lawyer. But I don't hold this against Bob Peckham. I've made plenty of little slips in my career, but it was a great lesson to me. Beside all that, Mr. Peckham was a fine trial lawyer, and he is an excellent federal judge and a fine presiding federal judge, but it's just one of the learning experiences that I never forgot.

#### A Saudi Rescued

Bates: There's another little interesting episode that happened back in the early days. And that involved Fuad Muhtasib, who was the son of the Postmaster General of Saudi Arabia. Fuad was sent over here to attend Stanford University. While he was there, he had a little too much to drink one night, and he, in going back to Stanford after visiting a few places in San Francisco and drinking a little too much, got to speeding down the Bayshore Highway, went off, and rolled his car over. Fortunately, he didn't do any serious damage to anyone else other than himself and the automobile, and even then he didn't suffer any serious injuries. But he did wind up in jail with some very serious drunk driving charges against him.

I was called out by Marshall Madison to get down to the Hall of Justice, get into the jail, visit with Fuad, get him out on bail as quickly as I could, and try to keep the whole thing hushed up.

The reason for all this concern was that it's strongly against the religion of the Saudis to drink. Our relations with Saudi Arabia were very firm and very good, and we wanted to strengthen those ties. We didn't want to have anything happen in our student exchange program that would in any way interfere with the opportunity of having the Saudi Arabian people, young people particularly, come over here and be educated in the United States, so that we could improve our relations with Saudi Arabia. Furthermore, Marshall Madison was involved because he was then general counsel for Standard Oil Company of California, and we were very heavily involved with the Arabian-American Oil Company in our relations with Saudi Arabia. So it was only natural that when this happened, Marshall Madison would be called. And then he called me and asked me to do the best I could with the situation.

I can't recall exactly what time it was, but I know it was late at night; it might have been even after midnight. I arrived at the

Hall of Justice, and I was put into a holding cell, behind bars, for my interview with Fuad. A reporter from the Chronicle was there; somehow or other, he'd gotten the word that there was something interesting going on at the Hall of Justice and they had a Saudi in custody. So he was there, and he got a photograph of me behind bars with young Fuad.

Despite all the publicity, I was able to persuade the judge in chambers of the delicate nature of what we had before us. So the judge was quite careful in talking to the young man in chambers, and warning him about the severity about what he'd done, and how fortunate it was that he hadn't injured anybody. I'm sure he put the fear of God in this young man -- I should say the fear of Allah into this young man -- so that he'd never do it again.

Then we appeared in court, where, of course, the press was in attendance, and the judge handled the matter very well. He put the young man on a suspended sentence and probation, which wasn't all that newsworthy, fortunately, and did not hurt our relations with the Saudis. I have before me a very nice letter, dated October 9, 1957, that I received from Abdul Kader Muhtasib. I, with my early experience, enjoyed his comments, particularly when he said, "I realize that the result is better than expected, thanks to both your good self and to the very competent lawyer, Mr. Bates." This is directed to Mr. Terry Duce, who was then in charge of our Saudi Arabian involvement. I don't know whether I want to leave that in or not, but that's part of history.

There was another interesting piece of correspondence that I ran across, dated January 6, 1952, from Elliott McAllister, the then-president of the Bank of California, in which he was writing to me about the possibility of leaving Pillsbury, Madison & Sutro and going with the bank to become the chairman of their trust department. I was flattered by the invitation, but I declined. Needless to say, I did mention the opportunity to Marshall Madison, and I think he agreed with me, and appreciated that maybe I had a fairly good potential with Pillsbury, Madison & Sutro.

#### Two Great Trial Lawyers: Southall Pfund and Arthur Dunne

Bates: One of the first cases that I tried with Southall Pfund was Burleson v. Pacific Telephone & Telegraph Company,\* and that was in

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\* Burleson v. Pacific Telephone & Telegraph Company (Sup.Ct. San Francisco City & Co. 1950) No. 380505



the early '50s. It was a substantial case. As a matter of fact, it was so substantial that Arthur Dunne, the senior partner of Dunne, Dunne, Boyd & Phelps, thought that he should take responsibility for the plaintiff's case himself, rather than leaving it to Mitch Boyd, who was a competent trial lawyer and a partner of Arthur Dunne's.

This woman had suffered a substantial injury when she got tangled up with a telephone line that she contended had not been properly installed in the offices of Mrs. Burleson's employer.

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Bates: Southall Pfund was defending, and he was every bit a match for Arthur Dunne. He presented the case very well and we had a very satisfactory result. It was a verdict for the defendants [the telephone company]. It was on the basis that the hazard had been created by Mrs. Burleson's employer and that there hadn't been any adequate notice to the telephone company to take care of the hazard that resulted in Mrs. Burleson's injury. But it's very difficult to prevail in a case of that kind where there's any evidence of negligence, and particularly where the plaintiff has a very serious permanent disability without any adequate means of being compensated under workers' comp. So it was to the credit of Southall Pfund that the telephone company was able to prevail in that case.

South and I, after that, tried a number of cases together.

Hicke: Before we move on, could you tell me a little bit about what made Arthur Dunne and also Southall Pfund great lawyers? You saw these two in action.

Bates: I think what makes them great lawyers is that they'd had a lot of experience. They'd tried a lot of cases in their time, and they knew how to present a jury case. You learn a lot when you go through the experience of working with other good trial lawyers. You learn that you've got to handle juries with great care and deference. In other words, you've got to be nice to them, and you've got to talk to them and not down to them. You've got to be always mindful of your conduct before the judge and the jury, realizing that your case is being tried all the time that you're exposed to either the judge or the jury, whether it's in the courtroom or in the corridors. You must constantly be alert to any impressions or nuances that enter the proceedings. The right use of humor is always very helpful. It's just that these men were very competent in that regard.

Hicke: Did they add a touch of humor?

Bates: Oh, sure, invariably. I can't recall the precise touches, but they both had great abilities and great charm. But South did not like the

pressures of going back into trial at his age and he left the firm to become vice president and general counsel of U.S. Smelting.

I'll talk a bit about Arthur Dunne when we get into the Safeway Beef Antitrust litigation, because Arthur Dunne never should have tried that case. It was some fifteen years later, and he just had lost his timing and his reaction time and his response time. There's no script when you're trying cases before a jury. Anything can happen in the courtroom, and you have to react quickly and carefully or you can lose the case.

I don't know whether to jump to the Safeway litigation now or not.

Hicke: No, let's put that off. I think it's probably better if we leave that. It was in the '70s, I take it.

Bates: Yes.

#### A Discussion of the American and English Legal Systems

Hicke: I have one more question, and I don't know whether it's a good question to put now or whether you would like to talk about this later, too. I'm interested in knowing something about how the assessment is made for personal damages in a suit. How do you decide how much to sue for, or does the person suing decide?

Bates: The trouble with our system is that a plaintiff's lawyer can sue for anything that comes into his mind. He wants to get into superior court, so he's going to have to sue in the thousands, but after he's there, he can sue for a hundred million or a hundred billion. It doesn't make any difference, the filing fee is the same. And neither the court nor the jury pays much attention to the amount of his damage claim. The only thing is that sometimes, and particularly in those early days, it would get into the newspapers and cause some attention, but anybody who's at all knowledgeable would know that it didn't make any difference, which is unfortunate.

I went to England with Chief Justice [Warren] Burger on the Anglo-American Legal Exchange in 1973. That was a most interesting experience. There were only eleven of us, so I felt very privileged to be able to join the group, and being with Chief Justice Burger, we were entertained royally all the way along the line. We visited the

civil courts in and around London. It was a fascinating experience.\*

Some years earlier, I had visited London with my family, and on that occasion Sir Malcolm Hilberry, Judge of the Queens Court, invited me to visit the courts. I visited four courts during the morning. I heard several commercial cases for a time and in one court I witnessed the trial and disposition of a substantial personal injury case. The facts, injury and liability had been presented by stipulation. In his final argument plaintiff's counsel said, "This is a most substantial case and I urge your honor to keep this in mind in awarding damages" -- no charts or actuarial studies.

One thing all the courts had in common was that the jury boxes were vacant. Later, at luncheon with Sir Malcolm at Lincoln Inn, he asked me about my morning in the courts. I told him that the thing that amazed me most was that I saw no juries, that all the jury boxes were empty. He said, "We don't think that juries help us very much in these civil matters."

Many of us on the American team of the Anglo-American Legal Exchange concluded that there was a lot that we could learn and use that was being used in the English system. All the way along the line, the prevailing party recovers costs and attorney fees. What I mean by all the way along the line is this: if the defendant moves for summary judgment or makes a preliminary motion of some kind to dispose of the case, if he prevails, he gets costs and attorney fees. If he doesn't prevail, then he has to pay costs and attorney fees to the other party. And these are substantial. Their fees at that time were not much out of line with our billing rates in the United States.

You can see how that would deter a plaintiff or a plaintiff's lawyer. He'd think very hard before he went ahead and filed a case, because if his case wasn't any good and he lost it, he was going to have to pay the other side's costs and attorney fees. And many times, they'll work this out so it has to be done right in the middle of a case, so that you're assured of recovering your costs and attorney fees at that point before the plaintiff is allowed to proceed any further.

Another thing that really amazed us about the English system was that there are no briefs, even in the appellate courts. The most that the appellate lawyer will present to the court is a list of his cases, and as his argument progresses and he wants to read from a case, or he wants to bring the court's attention to the case, there'll be clerks running around the courtroom getting the books right off the shelves

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\* See following page.

in the courtroom and bringing them to the judges, so that the judges, if they want to, can follow the case that the trial lawyer is referring to.

Another thing about the English system is that very rarely do they have any pretrial discovery: depositions and the like. One lawyer calls the other, and that's the way it goes. So they learned from us that perhaps they ought to consider some form of written briefs, and they ought to consider some pretrial discovery.

We learned from them the importance of costs and attorney fees as a deterrent to frivolous litigation. In our country, I think that there has been more emphasis put on imposing sanctions, attorneys' fees and costs, on plaintiffs and plaintiff lawyers who bring frivolous suits. There's a Rule 11 in the federal courts now which is used by many judges to do that. And even our state courts are finding ways in which they too can take care of the frivolous lawsuit. I think that we should give more attention to that in our system. All of this is in response to your question about figuring out what to sue for.

Hicke: That's great. Briefs and discovery: are these things that have evolved in the history of American law through needs that we had?

Bates: I think that probably in the early days, when the means of communication and transportation weren't what they are today, the deposition was a very valuable tool in presenting a case, because you could have witnesses that would not be able to present themselves in court. But now it's quite different. And, of course, in the English system where the courts, and particularly the lower courts, were quite close to the people, the transportation problems weren't the same. Bear in mind that England, geographically, is about the size of California.

So we have a much different problem here in the United States, with fifty states and vast territories. I should have added that in England, contingency fee cases are rare, while in this country the rationale of justifying contingency fee cases is quite different, because if we didn't have contingency fee cases, there are a lot of plaintiffs who just wouldn't be able to bring their case. In England, they have a much broader use of legal aid than we do in this country, which more or less takes the place of the contingency fee case. But it certainly keeps attorney fees in more reasonable bounds than they are in this country.

On the other hand, as much as we read about the large contingency fee cases, there are a lot of plaintiffs' lawyers who take on contingency fee cases and lose. You never read about those, but there are a lot of them. As a matter of fact, in my memory here at Pillsbury, Madison & Sutro, it's been rare that we have ever made any money out of a contingency fee case, and we've taken on quite a few of them along the way.





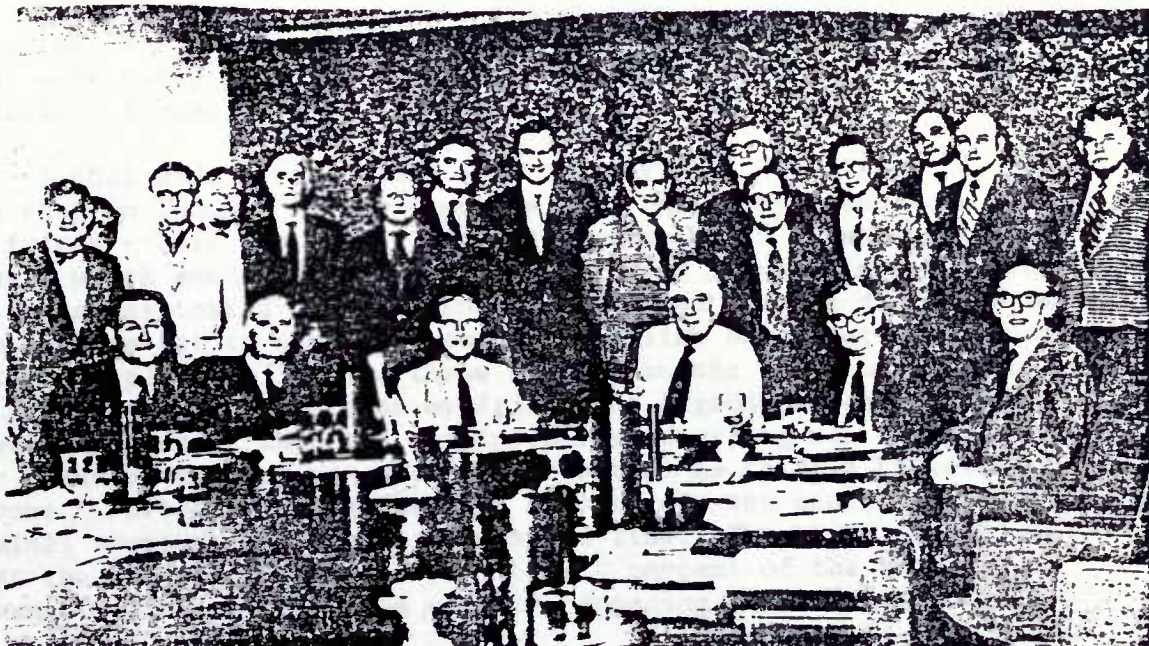
*left:*

John Bates and  
Andrew Leggatt

Old Woking, England

*below:*

1973 Anglo-American  
Exchange



**INTERCHANGE PARTICIPANTS:** Seated, left to right: Judge Robert A. Wenke (California), Justice Paul C. Reardon (Massachusetts), Lord Diplock (England), Chief Justice Warren E. Burger, Sir John May (England), and Judge John Llewellyn (England). Standing, left to right: Judge Walter R. Mansfield (U.S.C.A. Second Circuit) Professor Delmar Karlen, Registrar Michael Birks (England), Thomas E. Deacy Jr. (Missouri), Sir Denis Dobson (England), Max Williams (England), John B. Bates, Esquire (California), Andrew Leggatt, Esquire (England) Robert L. Clare Jr., Esquire, (New York), Richard E. Kyle, Esquire (Minnesota), Master Jack Jacob (England), Richard Green, Esquire (Federal Judicial Center), Mark W. Cannon, Esquire, (Administrative Assistant to the Chief Justice), and Rowland F. Kirks (Director, Administrative Office of U.S. Courts).





Some years after my visit to the English courts in the Anglo-American Legal Exchange, on an early Monday morning, I received a call from a good friend that he had been arrested at the airport for carrying cocaine. He was allowed to make some telephone calls to advise his family and to obtain counsel. Possession of cocaine is a very serious offense in England.

I told my friend that I was well acquainted with the top echelon of solicitors and barristers in London and that I would get right to work and have a lawyer visit him. I then placed a call to the chambers of Andrew Leggatt, who was a Queen's Counsel. His clerk answered the telephone; I identified myself and told him that I was a good friend of Mr. Leggatt's and that I was taking the liberty of calling him directly instead of going through a solicitor. The clerk said that he knew of me, but that Mr. Leggatt had been involved in a very serious automobile accident, that he was in the hospital and they were quite concerned about his recovery. This came as a great shock. After collecting myself and expressing my concern and sympathy, I told the clerk that I had Mr. Max Williams' telephone number, a well-known solicitor, but I did not have it handy and asked him to give it to me so that I could call him and arrange for counsel to represent my friend who had been incarcerated for possession of cocaine. The clerk said, "Oh, Mr. Bates, Mr. Williams was in the same accident with Mr. Leggatt." However, he said that Mr. Williams had not been seriously injured, but that he had fractured ribs and that he was in the hospital. He gave me the number of his room in the hospital. I then called Max Williams, who was in some pain. However, he informed me that the latest report was that Andrew Leggatt suffered very serious injuries, but that he was over the most critical stage of surviving. They were both riding in a taxicab which was crashed into by another vehicle. Anyway, Max referred me to a good criminal trial lawyer.

I then made arrangements with our partner, Gary Christensen, who was then in London, to get together with this lawyer and take care of my friend. This was done. The lawyer sent me an advance billing charge which amounted to about \$1,000, which I sent him. Even though my friend protested his innocence and claimed that he did not know how the cocaine got in his briefcase, the English barrister advised my friend to plead guilty and throw himself on the mercy of the court. He persuaded the court that my friend was a good, honest, substantial American citizen, that the cocaine he was carrying was a small amount for personal use and was not so substantial as to be a threat to anyone. Fortunately, he was able to persuade the court to impose a nominal suspended sentence and a small fine. The happy ending was that the barrister refunded about forty percent of the original advance. I cannot conceive of this happening in the United States.

I should say that several years later Andrew Leggatt was appointed to the Queen's Courts and subsequently knighted for his contributions

to the laws of England. Max Williams was also knighted for his contributions to the Bar.

... Tuesday, June 20, 1972

ARKANSAS DEMOCRAT — 7A

Plan for \$792 Million  
San Francisco Area  
Transit Issue Upheld  
By d WALL STREET JOURNAL Staff Reporter

**Worthen takes  
credit hassle  
into courtroom**

In the Courts

**Charges Traded  
In Bank Card Suit**

**'Sweeping Victory  
For Rapid Transit'**

**Transit Contract  
Defended at Trial**

**Mrs. Hecht  
Back in Court**

**Posner: Deal Is Foremost**

**Empire Builder Reaches for Food-Drug Giant**





### III GROWTH OF PM&S'S LITIGATION PRACTICE: SOME CASES

#### Zanardi v. Pacific Telephone & Telegraph Company

Hicke: Do you have your list of cases there? Is that how you want to proceed?

Bates: I have some cases that I thought were significant [looking at list]. I'm surprised there are so many cases, but I went through them, and I've selected a few that I thought were interesting and significant. I have another pile here, but I'd like to do a little more investigating.

I don't know whether I mentioned the Milton v. Hudson Sales case.

Hicke: No, we haven't talked about that.

Bates: All right. Jack Sutro had me involved in all sorts of personal injury litigation, and then Gene Prince got me involved. Jack represented the telephone company, and Gene Prince represented Railway Express, and they both had quite a few vehicles running around in Northern California, and they had a lot of personal injury cases: intersection collisions and the like.

As I've said, through the kindness of Jack Sutro, I think I got familiar with every major intersection in Northern California.  
[laughs]

I did have some very interesting cases which came to me from Jack Sutro. I have a note here on one of them, Zanardi v. Pacific Telephone & Telegraph Company.\*

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\* Zanardi v. The Pacific Telephone & Telegraph Company, (Superior Court, County of Calaveras: 1955) 134 Cal.App.2d 3.

Hicke: Excuse me just a minute, did we finish Milton?

Bates: No, I didn't finish Milton; I was going to come to it later.

Hicke: Okay, that's fine. We'll start with Zanardi.

Bates: Yes.

That was a case filed by C. Ray Robinson, who was probably the best trial lawyer in the central valley of California. It was C. Ray Robinson who started the Miller & Lux litigation; we'll come to that in a moment.

One of his partners was Wally Evert, and Wally Evert filed this case against the telephone company in Calaveras County, San Andreas. It was really quite interesting to go to San Andreas in the early '50s, stay in the old hotel up there, and try this lawsuit in the same courthouse from which Black Bart had been hung. He was a notorious stagecoach robber in the early days, a very notorious criminal, and the story, as I got it, was that he was hung from that courthouse porch.

In any event, Zanardi was the local fire chief, and he was also in the heating business, an electrician. He was called by the telephone company because the heater in the telephone company offices was malfunctioning. Mr. Zanardi came to the telephone company office, started to repair the heater, and proceeded to blow himself up, and he had very substantial injuries. Somehow or other, he was able to prevail upon C. Ray Robinson and Wally Evert to file this personal injury claim. We put a lot of time and effort into that case. I never could understand why they ever brought the suit in the first place, and neither could the jury, and neither could the judge. But we spent ten days or so trying this case up there in Calaveras County.

The other interesting thing was that when the jury deliberated, they deliberated in the courtroom, and the lawyers and the judge all went into the judge's chambers. You could hear the jurors arguing about the case; it was very distracting. In any event, the jury brought in a verdict for the defendants, I think quite rightfully so.

#### Fraser v. Armour and Company

Bates: I guess the next case of some significance was for Armour and Company,

the Fraser case.\* In that case, wherein the plaintiff was represented by James Mack of Palo Alto, the case was filed in superior court in San Mateo County, and the case was tried before Judge Aylett Cotton. Judge Cotton was a very appropriate judge for this case because -- I have a great deal of respect for him; I don't want to say this with any disrespect, but if you're doing a caricature of Judge Cotton on the bench, he would look like a big pig.

The case involved the contention that Armour and Company had not properly cared for its ham; that the ham contained trichinosis spiralis and that Mrs. Fraser had cooked and eaten the ham and had come down with trichinosis. She was suing for substantial damages. I think the case was particularly significant to me because I was still an associate, and it was a big case. Armour and Company was quite concerned about it, and the case had somehow or other generated a lot of attention.

I'd done a lot of research on trichinosis, and I'd retained a number of experts on the subject, but there was still the problem of trying to convince a jury that Mrs. Fraser should not recover damages. She was a very attractive lady, and she was suffering permanent disabilities from trichinosis, and there wasn't much question but that it had come from the Armour ham. Mrs. Fraser was a German emigre, and in Europe, the pigs do not eat garbage and refuse, they eat fresh vegetables and fresh foods, while in this country our pigs, unfortunately, are fed almost anything, and this is how they contract trichinella spiralysis. It gets in their system, and that doesn't seem to debilitate the pig at all. But if the trichinella isn't properly processed, it stays alive, and when it gets into the human system, it results in trichinosis. But adequate cooking will take care of the problem, and my defense was that she had not adequately cooked the ham, and if she had, she would not have contracted trichinosis.\*\*

I remember in my research I found that an Italian family had eaten infected meat, and the only ones who did not come down with trichinosis were the ones who drank wine with their meal.

Hicke: That's interesting.

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\* Fraser v. Armour and Company, (Superior Court, County of San Mateo).

\*\* In Europe, you can eat uncooked pork without fear of trichinosis, but in this country you must cook pork thoroughly. Since Mrs. Fraser was a recent emigre, the problem was to convince the jury that she was bound by U.S. habits and customs, which mandated thorough cooking even though there were no warnings on the label.



Bates: I thought that was very interesting, and should help the wine business.

Hicke: More cabernet sauvignon.\*

Bates: Right.

The wine assists in the digestive process. I learned more than I ever wanted to know about trichinosis, and I'm afraid that most of what I learned has been forgotten. But, somehow or other, I was able to persuade the jury that Mrs. Fraser should have known better, even though she was a European, and had she cooked the meat properly, she wouldn't have gotten trichinosis. Our defense and the verdict were very pleasing to Armour and I guess helped enhance my reputation in the firm.

Milton v. Hudson Sales\*\*\*

Bates: Shortly after that, Del Fuller asked me to take on the defense of Hudson Sales Corporation in a very important alleged violation of the state antitrust laws, the Cartwright Act. When Del Fuller asked you to take on a case, you took it on, and that was it, and it was your case. He, I guess, had developed enough confidence in me at the time to give me this, which I thought was a very heavy responsibility. I saw that it would give me an opportunity to hopefully demonstrate to Jack Sutro that I could rise above the intersection. [chuckles]

John Milton had a dealership in East Oakland, and he sued Hudson Sales Corporation on the theory that Hudson Sales had combined and conspired with other dealers to give them preference in the allocation of cars over John Milton, so that John Milton was not getting his fair share of Hudson automobiles, and he wasn't getting the types and makes of automobile that he desired, while his competitor was.

Hicke: This was shortly after the war, and Hudson hadn't a lot of cars to sell, whereas there were a lot of people looking for cars to buy.\*\*\*

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\* Bates owns Janaca Vineyards, which produces and bottles a cabernet sauvignon.

\*\* Milton v. Hudson Sales (1956) 375 Cal.App.2d, 418.

\*\*\* The years were 1946-1949.

Bates: That's right. There was a shortage of cars, and they were just starting to manufacture, and the automobiles were on allocation.

Our defense was that this was not a violation of the antitrust laws, even if true, and that Hudson Sales had a right to choose its own allocation system among its dealers, and that there shouldn't be any recovery. But the jury disagreed. On the other hand, we did prevail on the antitrust count eventually before the court of appeals, in an opinion written by Justice [P. J.] Peters. The jury did come in with a verdict on the ground that he should have gotten some cars that he didn't get. Damages were less than \$50,000, according to my notes. We settled it for a very reasonable sum. Even though it wasn't by any means a clear win, at least it established my reputation in the antitrust field, and then from there on, I was apparently considered qualified to take on more substantial commercial litigation, which I always wanted to do.

Hicke: The antitrust count had to do with restraint of trade?

Bates: The contention was that Hudson had combined and conspired with another dealer to prefer that dealer over Milton. We contended that this wasn't a combination within the interpretation of the antitrust laws.

I think what the court concluded was that there may have been an unfair allocation of cars to Milton, for which he was entitled to damages, but insofar as any violation of the antitrust law was concerned, Hudson had a right to sell its automobiles to whichever dealer it selected, and the mere fact that it preferred other dealers over Milton, and even to the extent of terminating Milton, did not constitute such a combination or conspiracy among competitors and the like that would give rise to a violation of the antitrust laws, whether they're talking about the state Cartwright Act or the federal antitrust laws.

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Hicke: Why would they choose to talk about the state law rather than the federal law, the Sherman Act?

Bates: At that point, there were not a lot of cases under the Cartwright Act, so it was quite proper to look to the federal authorities for an interpretation of the Cartwright Act, because the sum and substance of the Cartwright Act was to create an antitrust law for the state. The reason that a plaintiff's lawyer might choose going to a state court rather than federal court is that in the federal court, the juries have to be unanimous, while in the state courts it does not require a unanimous verdict.

Hicke: Okay, that explains it.

Bates: Do you want me to just go ahead with some more significant cases?

Hicke: Yes, but I'd like to ask one more general question first. Had the firm been doing a lot of litigation before this?

Bates: No, I don't think it had. I think that they had settled an awful lot of the cases; I don't think there had been all that much litigation. You have to bear in mind that this was right after World War II, and I don't think there was a lot of litigation during World War II. Of course, I'm not knowledgeable in that regard, but it just seemed to me that litigation was sort of a bastard child in the firm; it just didn't draw all that much attention. As a matter of fact, the firm had to go out and take on Eugene Bennett laterally and make him a partner, just because they didn't have strength in litigation. I don't think it was until after the war, in the late '40s and '50s, that litigation started to take on more and more importance in the firm. And it required more and more attention as years went on, to the point where now the whole emphasis has shifted, so that litigation has become probably the most important practice in the firm.

Hicke: So that you were actually really in on the beginning of building up the litigation.

Bates: That's correct. My contemporary, Jim Michael, was working one side of the street, and I was working the other side of the street. [both laugh] My side of the street was a little messier than Jim's.

Hicke: We'll have to get his side of the street eventually, too. One more question: this might be a little difficult to answer, but did the litigation practice build up due to your successes? That's obviously a big part of it. Did it follow along a trend of general increase in litigation in the United States or in California, for instance, and you were there to respond to it?

Bates: Yes, I think that's true. I think that it grows as you're successful, and we were being successful in that period of time. I certainly wasn't the only litigator of the firm; as I say, Jim Michael, my contemporary, was very heavily involved in litigation with Gene Bennett, not the same volume, and not all the personal injury litigation, more working with Gene Bennett, and then on his own in some major commercial cases. But I think through our efforts, we were making litigation a much more important practice in the firm, and I think as you establish your reputation and get some recognition, you draw other clients. For a time there, after I got into the automotive end of litigation, and after I'd defended some cases for General Motors, I started in defending major antitrust cases for General Motors, Ford [Motor Company], Hudson, and then American Motors. I was very, very busy in those days.

Hicke: Those were the major automobile makers.

Bates: That's correct, yes.

Hicke: Okay, then if we could just continue on with the cases.

Bates: All right.

### Henry Clausen

Hicke: I believe you wanted to say a little bit about a couple of cases:  
Lawson v. Key System Transit Lines, Inc.\*

Bates: Well, I just thought it was kind of amusing because Henry Clausen represented the plaintiffs in both of these cases. They were tried sort of back-to-back in approximately 1953. I had never had any litigation with Henry Clausen. Henry was very much involved with the Shriners. As a matter of fact, he, shortly after this, became the High Potentate of the Shrine. He also was quite a war hero. He was very much involved in important security matters in World War II. He was a very interesting person, and really has a fine reputation. I still see him out at the San Francisco Golf Club where he plays golf with some of the old-timers of the community, including Sam Stewart, who used to be general counsel of Bank of America and is now retired. I guess Henry has got to be in his 80s. There is really nothing of any great legal significance in these two cases.

The first case was Lawson v. Key System, a personal injury case. Lawson was a passenger on a Key System bus. He brought suit for his personal injuries. I really can't recall all the details and all the facts involved in the case, although I know it was of some significance at the time. I was involved in so many personal injury cases during that period of time, I can't recall exactly how much was involved or why we won it. But we did win it. As I say, the only thing of any real significance is the fact that it was just shortly after that that I went to trial defending Standard Oil Company against Henry Clausen, in the Superior Court in Fresno County, where his client was Judge Crothers, who gave Crothers Hall to Stanford University.\*\* In that case Judge Crothers contended that he was entitled to some oil royalties from Standard. This was to be a jury trial in Fresno County.

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\* (In the Superior Court, City and Co. of San Francisco 1952)  
No. 412392.

\*\* Crothers v. Standard Oil Company (Sup.Ct.Fresno Co. 1953).



Crothers contended that he had a contract with Standard for the development of some oil interests, properties in which he had an interest, and that he had not received his fair share of the royalties, and he demanded an accounting and damages.

In the course of presenting his case, Clausen brought out just before we recessed for luncheon one day that Judge Crothers was having his 80th birthday. Later on, when I was presenting my case, I brought out that one of my witnesses was having his 35th birthday. Those are the little touches [chuckles] that add a little humor to a case. [both laugh] We didn't have to go to the jury in that case. The judge granted my motion for a non-suit, and we prevailed at that level. But it is interesting, because Henry Clausen was and is quite a colorful character.

Another significant memory I have of that case is that Tony Brown had just come to the firm and he had been assigned to me. We were working on the jury instructions. I had asked Tony to bring the instructions down with him. I think it was about the only thing I asked him to do in that case, because he had just arrived in the office. I recall that he overlooked bringing the instructions, which wasn't a very good way for us to get started. But there was no harm done. We got the instructions sent down there by quick transportation so that they were all there when we were ready to submit them the first day of the trial. It is just one of those things that can happen to any of us. But it is something that you do remember. But I only remember it as an amusing incident.

Hicke: Since you mentioned that old story, maybe this might be a good point to ask you if you could tell me just a little bit about how you go about training new associates and new members of the litigation group. Is there any particular process?

Bates: Well, in the old days, as I told you, the new lawyer would go on the road, so to speak, particularly if he was going to be involved in litigation, so he could familiarize himself with all the courts, the bureaus and whatnot that were involved in the process.

Now, as we have become bigger and bigger, it's becoming more and more difficult to spend the time in developing young trial lawyers that we used to be able to do. Furthermore, clients are more and more aware of everything that professionals do in litigation, so that you don't have the luxury of being able to take along a young lawyer with you and take him to every trial and every deposition to let him observe how everything functions. Because the clients just won't bear the expense of that. It's much more difficult.

What we have done is after we are fairly comfortable with the fact that the young lawyer really does want to get into litigation, we

have litigation training programs that we involve him with. Then we do use him as much as we can in preparing for and attending depositions and eventually taking depositions. But it is just that it is a little different process than we used to have. Each individual lawyer, after he learns the techniques of litigation and of taking depositions, and finding the facts and whatnot, he develops his own style. Each one of us, I think, is just a little bit different in how we approach a problem and how we approach litigation. There are certain basic things you have to know and do. Once you have mastered them, then I think each of us develops his own style.

Hicke: Could you characterize your style?

Bates: No, I don't think I can. It is just like trying to get somebody to characterize their personality. I think that's something that somebody else has to judge. I don't see how the individual could judge his own personality.

#### The Interment Association of California

Bates: I thought of another interesting case, and then after that I think we'll talk for a minute about Robinson and the Miller & Lux litigation. I was asked to take on the defense of the Interment Association of California, an antitrust case, which was brought by the Northern California Monument Dealers Association against the Interment Association. I represented the Interment Association, but its members were composed of the Catholic Archbishop, the Olivet Memorial Cemetery, Cypress Lawn, and various monument manufacturers: Clarence I. McGillard, E. J. Mahaney, and [Frances] Donohoe. The plaintiffs, the Northern California Monument Dealers, were represented by some good Italian Catholics: Ferrari & Ferrari.

The Interment Association was having a convention here in San Francisco, and it was at the Sir Francis Drake Hotel. I'll never forget walking into this big room where they were having their association meeting. I was surprised that there were so many members of the Interment Association. It was something like approaching the threshold to the Pearly Gates: there were flowers all over the place and organ music, as if the members of the association had something to do with the souls of the dear departed, and that they were here to do God's bidding, which I thought amusing.

Also, we had a very interesting array of trial lawyers in that case. As I said, Ferrari & Ferrari represented the plaintiff; Andrew Burke, another good Catholic, represented the Catholic Archbishop; Henry Rolph, of Graham & Morris, represented Olivet; Moses Lasky, of

Brobeck, Phleger & Harrison, represented Cypress Lawn. We went through some discovery, and finally we moved to dismiss the case. The federal judge who was presiding over our case was Judge Theodore Roche, another very good Catholic.

The plaintiffs' theory was that the Catholic Archbishop and these other cemeteries in which Episcopal and others were involved used their influence to have the bereaved buy their monuments from the cemetery at a much more substantial price than they would have to pay if the customers were just referred directly to the monument dealers. And that the Archbishop and the other defendants were conferring and conspiring in violation of the antitrust laws to force customers to buy monuments from the cemeteries at unreasonably high prices. I just wonder how the case might have turned out in a different environment, but it's pretty hard for good Catholic lawyers to persuade a Catholic judge that the Archbishop is exercising undue influence to pressure his customers to buy their monuments from the Catholic church in violation of the law.

We moved to dismiss, and I'll never forget that day in the courtroom, because Andrew Burke got the Archbishop there, along with his retinue of assistants, priests, and others; they were all sitting there in the courtroom. It didn't take Judge Roche very long to resolve that the defendants' motions ought to be granted.

### Miller & Lux

Bates: I do at this stage want to mention the Miller & Lux litigation.\* As I said, that was started by C. Ray Robinson of Merced. His principal client was George Bowles, who was then an officer of Miller & Lux, and George Nickel, who really should take key responsibility for starting the litigation. Both of these men, incidentally, are very good friends of mine, but at that time, when that case was filed, it created a lot of concerns and animosities and high emotional feelings throughout the San Francisco financial community and indeed throughout California.

The saga of Henry Miller is well laid out in a book that was written by his water lawyer, Edward Treadewell, called The Cattle King.\*\*

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\* Miller & Lux v. Anderson, (1963) 375 U.S. 986.

\*\* Edward F. Treadewell, The Cattle King (Fresno, California: Valley Publishers, 1931).

It's interesting that Henry Miller was born in Germany and he didn't come to the United States until he was 19; his name was actually Henry Kreiser and he had a good friend in New York named Henry Miller. Henry Kreiser was most anxious to come to California in the late 1840s, and the most reasonable way for a single man to come to California was by going to Panama and crossing the Isthmus and then finding a ship that would take him to California.

He tried to book passage on a ship to Panama but was always put down at the bottom of the waiting list. His friend Henry Miller was also interested in coming to California. Henry Miller did find himself at the top of the waiting list and eventually obtained a ticket that would take him to Panama, but he became ill and he couldn't make the trip; so he called his friend Henry Kreiser to see if they could work something out. Henry changed his name to Henry Miller and took his ticket and made his way to California.

He arrived in San Francisco in 1850 with six dollars in his pocket and a butcher knife. He got a job in a butcher store, and he was such a good butcher that all of the customers would come to his counter. So he started his own butcher shop, and his business was so good that he went out into the country and started buying cattle, and then he started buying land.

By the time Henry Miller had been in the West for ten or fifteen years, he had amassed substantial land holdings throughout California. His financial involvements were such that he needed a partner, so he got Lux, who was a good financial man. At his maturity, you could ride a horse from the Mexican border to the Washington border and always spend the night at a Miller & Lux ranch. And the holdings kept increasing.

Then Miller & Lux got in trouble during the Depression. And by now, there were a substantial number of heirs. Henry Miller was gone. Leroy Nickel and others were running the company. They ran up some substantial debts, so they formed a bondholders/noteholders protective committee, which was composed of Allen Chickering, Charles Blyth, Harry Fair, and Jim Hunter, the president of Bank of California. These men resolved that the only way to save the company was to put all of its real estate holdings on the books for sale. So they got all the real estate appraised, and anybody who came in and offered the appraised price could buy the property.

It turned out that they discovered oil on these properties. There was an immediate reappraisal of the properties, but there was a lot of inside information being bandied around: among the oil companies, among the oil brokers, and among the insiders at Miller & Lux, and Leroy Nickel in particular.

Hicke: Are we in the 1930s now or '20s?



Bates: Yes, it would have been in the '30s, right. The discovery of all this came out in the '50s, but the incidents themselves happened in the '30s. Coincidentally, Dean Witter became a very wealthy man out of all of this, because Dean Witter was involved in trying to bail out Miller & Lux, and had taken a position in various properties and property interests and also in some equity holdings in Miller & Lux. Dean Witter had invested so much that he wanted to share it with his partners -- this was way before the discovery of oil. And the partners took some, but they just couldn't come up with very much, so Dean Witter got stuck with it. Of course, when they struck oil, he became a multimillionaire.

In any event, there was a lot of hanky-panky going on, and there were kickbacks and payments; Leroy Nickel was very much involved in all of this. But it wasn't until the '50s that George Nickel came across some evidence that made him believe that this had been going on during the liquidation period, and that there had been illegal deals being made. It was George Nickel who brought all this to the attention of C. Ray Robinson, having reviewed it with other members of his family, and then this is when the case was started. The oil companies were sued: Standard Oil Company of California was sued, along with Charles Blyth, Harry Fair, Allen Chickering, and Jim Hunter.

Hicke: Now the Miller & Lux estate was suing the oil companies?

Bates: This was what you would call a derivative case. It was a suit by one of the stockholders of Miller & Lux against all these other people that had been involved in taking the assets of Miller & Lux.

We represented so many of the defendants that we couldn't represent anybody. And so Marshall Madison asked me to coordinate the defenses, and find lawyers to represent the individuals, and under his general guidance, to take care of the litigation. So, with Marshall's concurrence, we set about finding lawyers to defend the case.

During the years that the case was in the courts, Marshall Madison became an advisory partner and Francis Kirkham replaced him as general counsel to Standard. I think the case is best summarized in the memorandum that I prepared on February 24, 1964, for Francis to send to Hillyer Brown:

In Miller & Lux v. Anderson, et al., the plaintiff corporation charged that Standard and others had acquired substantial properties, formerly owned by Miller & Lux, through fraudulent conspiracies with agents of Miller & Lux. Values were alleged to be in excess of \$100 million. The agents were alleged to have sold the land, or assigned leases, to the defendant oil companies who acquired the property with knowledge that these agents were making an unlawful profit

from Miller & Lux. The action sought to set aside the conveyances and oil leases, and to have the land and the value of the production therefrom returned to Miller & Lux. The plaintiff's claim was founded on the principle that where an agent makes a profit in dealing with the property of his principal, the transaction is absolutely void.

The defense was complicated by plaintiff's exploitation of the fact that the Estate of Houchin, a deceased defendant land agent, capitulated and secured a dismissal by paying cash and reconveying land to Miller & Lux, which was valued in excess of \$9 million.

Since it was alleged that various officers of the plaintiff corporation and trustees of the Henry Miller Trust, which owned all the stock of the plaintiff corporation, had participated in the alleged frauds, we continually urged that the statute of limitations had long since run on any claim by the corporation, and that the real dispute, if any, was between the beneficiaries and the trustees of the Henry Miller Trust. The Federal District Court was finally persuaded to grant our motions to dismiss. The decision was affirmed by the Court of Appeals for the Ninth Circuit, and a petition for certiorari to the Supreme Court of the United States was denied; so the case is at an end.

If the motions had not been granted, and if Standard had been required to defend the case on its merits, there would have been further extended discovery proceedings, and the trial itself could have taken well over a year, since it involved the history of Miller & Lux over a period of some twenty years, many people and many transactions. In view of the conspiracy nature of the charges, it would have been continually necessary for Standard to have independent counsel. Standard was exposed to a loss in the millions of dollars, and the trial would have been a heavy burden and expense to Standard.

Aside from winning the case and disposing of the litigation, considerable has been saved by the successful outcome of the motions and the pre-emptory closing of this case.

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Bates: Leroy Nickel was so distraught over being found out as an insider, illegal profiteer that he committed suicide.

Wilson v. Granite Rock Company

Bates: The next case of any real significance that I have in my notes here is Wilson v. Granite Rock Company.\* I can't recall whether I mentioned this case before or not.

Hicke: No, you haven't.

Bates: Okay. In this case, [A. A.] Wilson, a stockholder of the Granite Rock Company, was suing the company and primarily Anna K. Wilson for the salary paid to Mrs. Wilson which was ultra vires and improper and should be returned to the corporation. The substance of this case was that Mrs. Wilson's husband had been president of the Granite Rock Company, and when he died, Mrs. Wilson, because of the stock ownership she inherited, assumed the position of president and chief executive officer of the Granite Rock Company, but that she knew nothing about running a quarry and that her salary was no more than an improper dividend and that all of it should be returned to the company.

Granite Rock Company was a client of ours, and eventually Southall Pfund and I were asked to take on the defense of the case and the representation of Mrs. Wilson. In our interviews with Mrs. Wilson, it turned out that she really didn't know very much about the Granite Rock Company or its operations, so I had photographs taken of all of the operations of the Granite Rock Company, had them blown up into 8" x 10" pictures, and then I went through each step of the operations with Mrs. Wilson, and assisted her with these photographs. We were doing our best to put her in a position to be able to defend herself and justify the salary that she was receiving.

The case finally came up for trial. South tried very much to settle the case, realizing that we had a volatile situation. A lawyer named George Naus represented Mr. Wilson and the other stockholders who were complaining about this. He was bargaining rather hard. We could not work out a satisfactory settlement; so our only recourse was to proceed to trial. The case was set for trial in the Superior Court in Watsonville before Judge Atteridge. The case was of considerable interest to the local community and to the local press.

In any event, we proceeded to trial. Mr. Pfund asked me to take on the direct examination of Mrs. Wilson to bring out her knowledge of the situation, and in order to, hopefully, build a case for the court that she was entitled to keep the salary she had received.

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\* Wilson v. Granite Rock Company (1956, Sup.Ct., Santa Cruz Co.)  
No. 24412

I did this, and after several hours, Judge Atteridge interrupted and said he would like to ask a question of the witness. Of course, there's very little you can do if the judge wants to ask a question of the witness. Mrs. Wilson was sitting there in the witness chair with these dark glasses on. She was a rather mature, stout woman, and she was obviously apprehensive about her situation, and the dark glasses probably had something to do with trying to help her camouflage her true feelings. On the other hand, she was an able woman. She was intelligent but quite stubborn, or we wouldn't be where we were in the course of this trial. The judge asked her, "Mrs. Wilson, what is the angle of repose?" Mrs. Wilson had no idea what was the angle of repose. This is kind of like asking a young mathematics student what is two and two; it's fundamental to the rock-quarry business that you know what is the angle of repose.

Hicke: It's the point where a rock stops rolling downhill, isn't it?

Bates: That's correct.

So [laughs], maybe it was something we overlooked in our preparing of Mrs. Wilson. [both laugh] In any event, the question stopped the trial, and we went into recess until the next day. Fortunately it was late in the day, so stopping the proceedings didn't look like we had completely defaulted at that moment, although I think South and I had.

We were all staying at the same hotel; not Mrs. Wilson, she was staying at her home there in Watsonville.

Hicke: This is the case you told me made headlines every day while this was going on?

Bates: Yes. Needless to say, that question hit the headlines; it was in bold headlines, "What is the angle of repose?" That night, Southall and I got to work with George Naus, and we were able to work out a settlement whereby, in effect, the Wilson heirs purchased the stock of Mr. Wilson and the other critics. It was a closely held corporation, and Mrs. Wilson's family paid a premium for this stock, and in that way we were able to close out the case.

I guess I tell this story because it was a very interesting case in the history of Santa Cruz County, and Judge Atteridge was an outstanding jurist, and the Wilson family were very important. Fortunately for all concerned, the company went on, and there were other relatives involved in the company that took over, so that the litigation, although somewhat embarrassing for a time, was probably a good catharsis for the organization. Since then, they've done quite well.



Mahoney v. Hercules Powder Company

Bates: Then the case of Mahoney v. Hercules Powder Company\* is of some interest.

Hicke: Do you have some dates there? Do you know what period this is?

Bates: Yes, this is in the middle of the '50s.

Hicke: Middle '50s, okay.

Bates: And this was written up. This case went up on appeal, so it would be reported, yes.

This case is interesting because it was a rather major death case. Mr. Mahoney had been involved in the construction of a tunnel in which they were using Hercules dynamite and blasting caps. Mr. Mahoney left behind a very attractive widow and family, and generated a lot of sympathy.

Hicke: He was killed in an accident on the site?

Bates: Yes, he was killed. The face of the tunnel where the dynamite had been installed, blasting caps and whatnot, exploded, and he was killed. The suit was against Hercules on alleged failure of the equipment to function properly. The case was interesting in that Leslie Gillen, who was one of the leading plaintiff trial lawyers at the time, had the case for the Mahoneys.

It was a substantial case. It was one where the company was quite concerned, because there was no evidence of any imperfections or defects in any of the blasting caps or the powder. We were able to establish this, and we contended that the doctrine of res ipsa loquitur should not apply in this situation.

We took the position that it would not be appropriate to instruct the jury on the doctrine of res ipsa loquitur because the evidence was such that the cause of the cave-in in the mine that resulted in the injuries to Mr. Mahoney -- which caused his death -- could be attributed to the failure to properly support the overhead of the mine with appropriate trusses and boards, rather than any failure in the blasting caps that were manufactured by Hercules; and that the soil was such that if the installation of the blasting caps and the powder

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\* Mahoney v. Hercules Powder Company (Sup.Ct. San Francisco City and Co. 1956) No. 459070.

were not done in a proper manner, one charge could set off other charges and create an explosion that was of such a magnitude that it could cause a cave-in which had nothing to do with any defect in the caps. It was a very difficult case because Mr. Mahoney had a big family and his wife and children, and they, at least as many of them as could, appeared regularly throughout the course of the trial. They did stimulate a lot of sympathy, but the jury brought in a defense verdict.

The case was appealed by the plaintiffs. The principal argument on appeal had to do with whether the trial court was in error in not having instructed on *res ipsa loquitur*. When the case came back after the district court of appeal found that the trial court was in error, there had been a change of attorneys. Marvin Lewis had been substituted in for Gillen, who tried the original case. I should say that Les Gillen was one of the most outstanding plaintiff's personal injury lawyers at that time.

We believed that we were going to have to go through another trial and that we would have to cope with a *res ipsa loquitur* instruction, that this could confuse the jury enough so that we should give serious attention to a settlement. Mr. Lewis was, of course, new to the case and he was somewhat apprehensive about whether he was going to be successful. So, on balance, we advised Hercules to settle the case and the case was settled. At the time the Mahoney case did attract quite a bit of attention, I guess primarily because of the involvement of Les Gillen and then Marvin Lewis.

In any event, Noble Gregory handled the case on appeal, and it was the only case in which I'd been the trial lawyer where Noble got reversed.

I always chided Noble Gregory about the result in that litigation. My secretary, Miss [Margaret] Kidson, has told me that after that, whenever she would be on the elevator with Mr. Gregory or come in contact with him, he would always say with a wry smile, "Is that Jack Bates still upset with me?" [both laugh] Noble was a brilliant lawyer. When I get into the BART litigation I'll bring his name up again. Noble was outstanding in every respect. You can't win them all.

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Bates: The defense that was used in the Mahoney case has been modified. We don't have the doctrine of contributory negligence, as such; what we have now in California is comparative fault, so that the jury is given an opportunity to give the plaintiff no recovery or to reduce the recovery based on the plaintiff's participation in the events which led to the accident.

Hicke: Is it more like being on a continuum now instead of being either/or?

Bates: That's correct, which is very difficult for the jury to do. The legislature changed the rules because, under the old doctrine of contributory negligence, the slightest contributory negligence on the part of the plaintiff would bar his recovery, even if the defendant were negligent beyond the negligence of the plaintiff, although it's very hard to evaluate.

### The Problem of Damage Settlements

Bates: This kind of leads me into another case, Todd v. The Pacific Telephone & Telegraph Company\*, which may be a little out of context; it was in 1966.

Hicke: Why don't we go ahead and do that? I think sometimes it's easier to follow a topical situation than to just do it chronologically.

Bates: Okay. It really has a bearing on the impact of the doctrine of contributory negligence. Todd had sustained a very serious injury and ended up being a paraplegic, because he had dived into one of these portable above-ground swimming pools that had a telephone wire that went across from the house, over the pool to a telephone pole. The young man wasn't conscious of where the wire was until after he had sprung into this dive. He hit the wire, and that threw him off balance in such a way that he came down and severely injured himself against the side of the pool and ended up to be a paraplegic.

He was, at the time, a student, and he lived outside of Seattle, but the accident happened down here in the Bay Area. So this was where Bruce Walkup brought his suit, because our juries in the City and County of San Francisco have been much more generous than juries elsewhere. I took the young man's deposition. Of course, being a paraplegic, he had to have around-the-clock attendants, because even though he had some functioning in his arms, his condition was such that he had to be rolled over in his bed at night, and whatnot, so that he required almost constant attention, but he was able to get around in a wheelchair. He was a very attractive young man.

I think I should say a little bit about Bruce Walkup, who was the plaintiff's lawyer. He's a professorial type. He's very quiet, very methodical, a thorough gentleman, a complete contrast to Mel Belli.

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\* (Sup.Ct., San Francisco City and Co. 1966) No. 566273.

He doesn't care about a lot of publicity. All he wants to do is get substantial verdicts for his clients, and he does it in a very scientific way. He hires a lot of good, solid professionals, including actuaries and economists, as well as some very competent medical people to support his case. He's very methodical about it. He has been most successful.

I have another interesting aside about Bruce Walkup which I'd like to mention after I finish the story of the Todd case.

In taking the deposition of young Todd, I brought out that he admitted, in effect, that he should have known better, that he shouldn't have been diving in that kind of a pool in any event, and that he should have looked at what he was doing, that the wire was quite obvious, and he should have noticed it. So I felt quite comfortable that I had established a very good case for contributory negligence.

On the other hand, the wire was not properly installed by the telephone company, and it didn't have the right clearance from the structures, as the telephone company tariffs, rules, and regulations required, so there was negligence on the part of the telephone company. But because we had the doctrine of contributory negligence, I felt that we had a very good opportunity of prevailing in the case.

On the other hand, this young man was going to be an invalid all his life. He was going to require a lot of medical attention, a lot of personal care. And there was no way that this young man could be taken care of, other than through either state assistance or through recovering in this litigation. He was not at the age of majority; I think he was in his late teens, because he was in college, so I would guess he was around eighteen, and quite an intelligent young man.

I talked to the telephone company, and we agreed that I should make a serious effort to settle the case, so I started negotiating with Bruce Walkup. Bruce was very hard-nosed about it, and he wanted a lot of money. I discussed the case at length with Bruce. He was well aware of the dangers of not recovering because of the contributory negligence doctrine.

I said, "Now Bruce, you've got to recognize this doctrine. And you've got to realize that these jurors can be persuaded that they've got a duty under the law, having taken their oath as jurors that they will obey the law, to obey the instructions given to them by the judge. This could very well result in the miscarriage of justice, if this plaintiff recovers in this case." Bruce said, "Well, Jack, you may be entirely right, but regardless of the doctrine of contributory negligence, there was negligence on the part of the telephone company, and the jury is not going to let that young man get out of that courtroom without giving him a substantial amount of money."



It was hard for me to disagree with Bruce, although, of course, I would never concede that in my bargaining discussions with him. But the telephone company finally decided that there was a very serious risk in the case and that we should settle it for what was then a rather substantial sum. I don't recall the exact figures, but it was in the hundreds of thousands of dollars. So the case was settled, and the funds were put into a trust account. The beneficiaries of that trust account were, of course, young Todd, and if anything happened to him, then his parents.

In the course of our discussions, Bruce and I got into talking about the very substantial awards that were starting to come out at that time. This was in the late '60s. Of course, nowadays the awards are many-fold more than they were at that time. But to us, at that period of time, they were very substantial. I told Bruce that I thought awards, substantial awards, particularly to a minor or in almost any situation, should be done as we award damages in workers' compensation cases; that it should be done on an installment basis, and that the funds should be put into a trust account and disbursed by a trustee under the general supervision of the court, so that the funds are kept and preserved as much as possible and only distributed in an orderly manner. And if there was a premature death or the like, then the funds either ought to be returned to whoever made the settlement or should be otherwise used other than for the benefit of someone who was not intended to receive any award from the settlement or from a judgment.

It was like throwing water on a duck's back. Bruce was in the business of getting as much money as he could for his clients. He wasn't interested in philosophizing about how our damage system worked.

The interesting thing is several years later Bruce called me on the telephone and asked me if I remembered the Todd case. And I said, "Oh, certainly, I remember it very well." He said, "You know, young Todd was murdered." And I said, "Well, gee, I'm very sorry to hear that." "Yes," he said, "Something happened, and they think it might have been murder." I said, "I'm sorry to hear that, Bruce. Although I didn't really know the young man, I'm always sorry to hear something like that. But," I said, "Bruce, that just proves my point. What's going to happen to all that money, and who were the people who had the motive to try and get the money?" I don't know what sort of an impact I had on Bruce, if any, but to me, that was food for thought, and hopefully our state legislature will get hold of that problem and try to do something to resolve it.

I've noticed more and more that substantial settlements are impounded, but I haven't been that familiar lately with the conditions imposed on those settlements. Right now, here, in May of 1986, we are

having various considerations given by the United States Congress to limitations on recovery in damage suits, and I think it's very important. I also think it's very important that we give attention to impounding these substantial sums, and making sure that the funds are properly used.

The thing we lose sight of, and the thing that our juries lose sight of, is the fact that we all pay for these substantial awards, all of us. If it is the telephone company, we pay for it in higher rates for our phone bills. The money has to be recovered from someplace. And for companies that carry insurance, the insurance companies have to set up different actuarial standards to be able to get the funds to sustain the losses that are being imposed by these substantial awards, and that's why our insurance rates are going up so high.

People lose sight of the fact that when they sit in that jury box and vote for these substantial awards, they're going to be paying part of it themselves, and it's something we just have to get control of. It's gone beyond all reason, and that's, of course, why the plaintiff personal injury lawyers seek to sue in San Francisco, or at least in the United States, as in the Bhopal tragedy in India where the plaintiffs' lawyers are working very hard to keep the case in the United States. The latest decision by the court has been that the cases should be transferred to India and tried there. I don't know what the outcome's going to be, but it's a very serious problem that we have to deal with.

I have one other interesting comment about Bruce Walkup. We're both members of the American College of Trial Lawyers. The College doesn't take in very many plaintiffs' personal injury lawyers. My friend, Mel Belli, and others haven't been invited, those who are a little too flamboyant for the American College, which is limited to a very small percentage of the trial lawyers in each state. Anyone under consideration has to go through a very thorough reviewing process by the board of regents of the College before he's invited to become a member. In any event, Bruce did become a member of the College.

In the spring, we have a formal dinner dance here in San Francisco for the members of the College in Northern California. It's attended by about a hundred couples or so; it's a very attractive event. Several years ago, we had it at the Pacific Union Club. I told Bruce how nice it was to be able to bring our ladies to the club for evening parties so that we could enjoy the club with them. Bruce said that he was not a member of the club. He said that his name was put up, but he was turned down because he was a plaintiff's personal injury trial lawyer.

Bruce had been quite successful in investing in the oil business, and he invested with a group that was very successful in a wildcatting oil investment in the North Slope of Alaska and he was making a very substantial amount of money. I didn't know exactly how much he was making in that investment, but suddenly I found out. Bruce said to me, "You know, now that I'm making a million dollars a month in the oil business, maybe they'd reconsider my application for membership."

Hicke: That's a good tidbit of San Francisco history.

### A Fictitious Case

Bates: You take these things in chronological order, and you run into all sorts of strange contrasting events that somehow or other befall a trial lawyer at Pillsbury, Madison & Sutro.

The next incident of some significance in my memory is Standard Oil v. Black & White. I found an old file on this case dated July 7, 1958. Enough time has gone by now so that I don't think there would be any embarrassments involved. I know there are no privileges being violated as I talk to you about this incident.

It involved some senior officers of the Standard Oil Company of California: Howard Cuyler, who was a senior vice president of Standard Oil Company, Howard Gunnels, Augie Johnsen, and they too were senior officers of the Standard Oil Company of California, and Horace Steele, who was the principal of the Texas Independent Oil Company. Mr. Steele was based in Phoenix, Arizona.

Cuyler, Gunnels, and Johnsen had worked out an arrangement with Horace Steele whereby they received a certain percentage of the amount of business that Horace Steele did with the Standard Oil Company. Howard Cuyler and the others had prevailed on Francis J. Ryley, who was Standard's lawyer in Phoenix, to draw up a partnership agreement for them. But they didn't disclose to Mr. Ryley that the partnership was in the business of receiving what amounted to kickbacks from Horace Steele.

It came to the attention of management of Standard that there was some sort of a relationship there as among those people that might be seriously questioned. Marshall Madison was called, and he asked me to take on the problem. We couldn't get any definitive evidence on what was going on. However, we had enough leads through the work of the investigators at Standard.



The first intimation that the company received that there may have been something improper going on was at the time of Howard Gunnels's retirement in January of 1958. His secretary was a Mrs. [Bonnie] Quisenberry, and when Mr. Gunnels was collecting his papers to take with him when he left the company, she observed that he had many file boxes filled with papers having to do with a partnership called HAHH, which it turned out stood for Howard Cuyler, Augie Johnsen, Howard Gunnels, and Horace Steele.

Apparently in cleaning out these files and observing Mr. Gunnels, Mrs. Quisenberry became concerned that the company should know about this, that Mr. Gunnels overlooked some things, which she reported to the company. Mr. [John] Chreighton, the company's investigator, went to Phoenix and discovered some papers that indicated there might have been some improper payments being made from the Texas Independent Oil Company to this partnership. Among those papers some information was obtained as to the banks which had been receiving deposits to the partnership account.

Further investigations indicated that a substantial amount of money might be involved and that the company should take immediate steps to get the matter under control. However, and particularly since senior officers of the company were involved, the company did not want to bring a lot of public attention or notoriety to what was going on. To me, the interesting story in the case is that these people, although senior officers and quite knowledgeable, didn't think they were doing anything wrong. That seemed incredible to me, and seemed incredible to Hillyer Brown, Howard Vesper, and the top management of Standard. And so I was asked to gather the facts and try to handle the matter as discreetly as could be done, without disclosing all of this to the public, to the embarrassment of Standard and to the detriment of the individuals involved.

What I wanted to do was get the bank records of this organization, because we wanted to get things nailed down before we confronted these people; we wanted to get our evidence under control. And in talking with the banks, I found I couldn't get access to any of the records unless I had a subpoena from a court. They just couldn't voluntarily turn them over to me because of their confidential nature and because of their obligations to the depositors. Realizing we were in a diversity situation with citizens in Arizona and in California, I filed the action of Standard Oil Company v. Black & White Corporation and some fictitious John Doe defendants in the federal court, seeking an accounting and the return of funds. The whole idea was to get into the federal court so that I could get some subpoenas issued to the banks calling for the production of the accounts of the individuals involved.



The courts did not look with favor at suing fictitious defendants; in other words, we should identify the target of the litigation by name and not by fictitious name. So with this concern in mind, I had a visit with Chief Judge Louis Goodman of the federal district court here in San Francisco. I told him our problem, told him that I had to get a legal action on file in order to get a subpoena in order to obtain these records, and that the information would all be kept confidential.

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Bates: Judge Goodman was most realistic. He recognized the problems involved and gave me approval to proceed, which I did. I obtained subpoenas requiring the banks to appear at an office in Phoenix with all of the records pertaining to the accounts of the individuals and the partnership. Naturally, I served the potential defendants with appropriate papers so that they could arrange for counsel to appear.

From these records, we learned that more than a half million dollars was involved, which in 1958 was a rather substantial sum. Unfortunately, the filing of the lawsuit did arouse some suspicion in the press, and several newspaper articles appeared at the time. However, none of the individuals involved were identified.

I see an article here in the San Francisco Examiner dated Thursday, June 26, 1958. It says, "Attorney John Bates of the law firm of Pillsbury, Madison & Sutro confirmed that he had been assigned to investigate the matter for the company. He declined to discuss details, however, until the investigation and the discussions are completed."

In any event, we were able to get the funds under the control of the court, and eventually made a satisfactory settlement between the company and the individuals involved.

Hicke: A financial settlement?

Bates: Yes, Standard got all the money back.

Hicke: And that's all?

Bates: I've forgotten what the government did about it, if anything. I don't think the government did anything. I think they figured they'd been punished enough.

Hicke: That's what I was wondering.

Bates: I don't think the government actually saw fit to prosecute. The three men were most upset when they came to realize that they were involved

in a criminal activity, and the matter was settled without any serious consequences to these individuals, nor to Standard. But Standard did, I think, recover most of the funds that were involved, and the men were properly dealt with.

Years later, it came to my attention that Don Bower, who ended up being vice chairman of Standard, was very much involved in Phoenix. He had nothing whatever to do with this scheme of these officers, but he always felt that he should have known about it and he should have taken care of it before it got as far as it did. Much later, Don jokingly said to me, "If it hadn't been for that, I would have been chairman of Standard," but I doubt that very much. Don Bower is a very competent person and a wonderful man. It was just a fascinating incident in the history of our involvement in litigation.

### Pacific Lumber Company

Bates: The next case I have that was of some significance, although there were a lot of smaller cases going on all the time, was the condemnation of what became Prairie Creek State Park.\* The Prairie Creek properties in Northern California, west of Eureka and along the coastline of the Pacific Ocean, had substantial stands of redwood timber. The property was owned by the Pacific Lumber Company. It included Fern Canyon, which is a very beautiful canyon, full of marvelous ferns, in the middle of a substantial redwood grove.

I had been working with the Pacific Lumber Company and had been handling various cases for the company, so Marshall Madison asked me to take on the representation of the lumber company in the state's effort to obtain the property as a state park.

We tried very hard to work out a satisfactory settlement with the State of California, but we were unable to do so, and the case was set down for trial in the superior court of Humboldt County in Eureka. And because the lumber business is such a big business in Humboldt County and involved so many of its people, directly or indirectly, we all realized that it was going to be difficult to obtain an impartial jury. The Superior Court of Humboldt County was particularly conscious of this. There wasn't a judge in Humboldt County that could really sit on the case, because one way or another, all the judges in Humboldt County had an interest in the lumber business, either through

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\* State of California v. The Pacific Lumber Company (Sup.Ct. Humboldt Co. 1964) No. 37225.

relatives or through stock ownerships, or otherwise. So Judge Barr of Siskiyou County was asked to come over and preside at the trial.

Notices were sent out to prospective jurors, including Stanwood Murphy, who was the president and chief executive officer of the Pacific Lumber Company. Stan was sensitive enough to the situation to call me and ask me what he ought to do with this summons for jury duty. Knowing Stan as I did, I thought it would be best for him to go ahead and appear as a prospective juror. I felt that it would demonstrate that he indeed was one of the citizens of Humboldt County and didn't put himself above the jury process.

The case came up for trial, and they planned to have the trial in a big auditorium, not in the regular courthouse, because they wouldn't have room for all of the prospective jurors. So they had a big auditorium, and I can't recall exactly whether it was affiliated with some college or high school, but it was in Eureka. They set up a place for the judge to sit on a raised platform, and a place for the jurors on one side, and counsel tables in the center, and the auditorium filled with the prospective jurors.

The judge took the bench and asked the clerk to start calling the roll of prospective jurors. He said, "Now if any of you are in any way connected with any lumber company or with the State of California, when your name is called, I want you to stand up and indicate what your involvement is." So the clerk started reading off the names in alphabetical order. He went down the names, and he'd get to Adams, and Adams would stand up, and say, "I'm a sawyer for the Simpson Logging Company," and on down the list. "My name is Brown. I work with the state of California." "You're excused." And this went on and on, "You're excused." I think we only got two or three prospective jurors out of the list through the middle of the alphabet.

Finally, we got down to Mr. A. Stanwood Murphy. Murphy had been brought up in the redwoods; he'd been working out in the forest and then in the lumber mill. His father had brought him up to be a lumberman, and he proved himself quite well; now he was head of the company. Stan was a big, rugged Irish blond, and he flushed easily. So there he stood. And he attracted the humorous attention of everybody in the audience, because they all knew who Mr. Murphy was. Mr. Murphy said, "I am the president of the Pacific Lumber Company," [chuckles] which was of great interest and amusement to all of the people concerned. And I know it caused a kind of humanistic reaction in all the people in that auditorium. And the clerk said, "You're excused." [both laugh]

We finally did get a list of prima facie impartial jurors, and they took the box. That day we got our jury, and we started our opening statements. And I thought the whole presentation had gone

very well for us. You could sense that there was a natural sympathy towards the Pacific Lumber Company. Pacific Lumber Company had a very good reputation, and in particular in Humboldt County, and even with the environmentalists, including the Save The Redwoods League.

Hicke: Why was that?

Bates: Stan's father had preserved the Avenue of the Giants, which is probably the most gorgeous stand of redwoods in the world. He was asked by the Save the Redwoods League to try to preserve those properties, even though he had every right to cut them, until the Save the Redwoods League could put enough money together to acquire them. So in deference to the League and to the conservationists, he didn't touch any of the redwoods along the Avenue of the Giants, nor any of the redwoods in the perimeter of the Avenue of the Giants. He just forewent the opportunity of cutting all that lumber to his economic disadvantage, because he was very sensitive to public reactions and concerns.

Also, the Pacific Lumber Company had a clearly defined policy of having its mill and its forests on a perpetual yield basis. It was a very valuable way to run the company and also to resolve any concerns that the environmentalists had, because the redwood forest was continually replenishing itself. As the old redwood was cut, the new redwood would replace it; so it was designed to go on in perpetuity. It was like having oil wells that never ran out of oil, that kept replenishing themselves.

That leads me to another terrible comment, because I can't help but mention at this time that the Pacific Lumber Company was recently acquired by Charles Hurwitz and Maxxam Group Inc., which is another story, and which brings us right up to date. I won't get into it now, but I can't, while I'm on this subject, help but mention it. Just to briefly finish that thought, none of us on the board -- and of course, I was not on the board at the time of representing Pacific Lumber Company in this condemnation litigation; it was only some years later that I was invited by Mr. Murphy to go on the board -- none of us was at all interested in seeing the company acquired by Maxxam or Mr. Hurwitz.

The question resolved itself into the simple fact that Maxxam had made us an offer that we couldn't refuse. They offered \$40 a share for the company, and all the friends that we thought would be most anxious to acquire the company for substantially more than \$40 took a very careful look at the company and couldn't come up with that kind of a price, either by merger or by acquisition. Maxxam was offering all cash, and if Maxxam didn't get it, the arbitrageurs were loaded with Pacific Lumber Company stock, and if we didn't go ahead and approve this acquisition by Maxxam, and turned our backs on him, the



arbitrageurs would unload their stock, and he would pick up a very substantial block of stock, and the stock would go back to trading in the twenties and low thirties where it had been trading.

The stockholders would be very upset, because they had been deprived of their opportunity to receive \$40 a share for their stock. It was almost an impossible situation. Fortunately -- not fortunately for us, because it's after the fact -- the federal reserve changed its rules, unfortunately after this, and now requires a larger cash commitment before a party, such as Maxxam, can acquire a company through the use of what we call junk bonds, and that's what Maxxam did; they used so-called junk bonds to get the cash to buy the company just the end of last year. The stock was just finally tendered in March of this year.

As I said, I thought things had gone quite well for us, and that it became clear to the lawyers for the State of California that the Pacific Lumber Company had a lot going for it and that we were going to get a very fair price for our valuable properties. So that evening, I got busy negotiating a settlement with the State of California lawyers and I came up with a figure that was satisfactory to Stan Murphy and the other senior officers of the Pacific Lumber Company, and we agreed to a settlement. After that had all been disposed of, it was getting late in the evening, and Stan Murphy and I had a few drinks together; marvelous man, and a great friend of mine.

I get a little upset and emotional about this, because Stan died about eight years later. He had a severe heart attack when he was getting off his plane in Eureka and shortly thereafter died.

In the course of having these drinks, Stan said, "Jack, I think you've handled this whole case very well, and the settlement and the whole proceedings," he said. "But you really blew it when you dismissed that Indian girl from the jury." "Well," I said, "Stan, it was perfectly obvious to me. I looked at this pretty little Indian girl, and I thought of Hiawatha, the babbling streams, the redwoods, and nature -- how this Indian would be so upset about the Pacific Lumber Company logging all those trees and desecrating Fern Canyon that I just knew how her sympathies would be in preserving that property and preserving that land. So I excused her." He said, "Bates, you are not very smart after all." [both chuckle] He said, "Don't you realize the Indians hate the government?" [laughs]

Stan Murphy and I had just become members of the Cypress Point Club. It so happened that the upcoming weekend was the Men's Fall Tournament at Cypress Point. So Stan and I decided that now, since the case had been settled and we weren't otherwise committed, we might as well go down and enter the tournament, sign up together as a team. And so we did.

We entered this tournament. It was a two-day affair, and it was best ball twosome against par. On Sunday, the last day of the tournament, it became rather clear that Stan and I, for some strange reason, were leading the tournament. So on the eighteenth hole, I have a sidehill putt for a par, a net birdie. The fellows involved in the tournament all came out to watch us finish, and it was rather evident to everybody that if I sunk that putt, we'd win the tournament. I, through some miracle, sunk the putt. [laughs] And they all cheered and clapped. It was kind of a happy win because we were least expected to win. Roger Lapham was bankrolling the tournament in the sense that he booked it. We had a Calcutta, and the odds against us winning the tournament were quite substantial. So this meant that our friend Roger Lapham would have to come up with quite a bit of money for us if we won.

There was another foursome behind us that included Richard Cooley and Tom Dwyer. Nobody thought that they'd do anything at all because Dick Cooley only had one arm. He played with just his left arm. He lost his right arm as a marine fighter pilot in World War II.

It turned out that Dick Cooley got a 3 net 2 on the eighteenth. He sliced his drive over to the right side of the fairway on eighteen, and to get onto the green, he had to make a miraculous long iron shot through the trees and have it then land on the green, which is just impossible.

Hicke: Through the trees? He couldn't hit over them?

Bates: He had to go through the first trees nearest his ball, and then go over the trees farthest from his ball, and drop the ball on the green. He did it. [both laugh] And he sunk his putt for a 3 net 2, and the tournament was tied as between Cooley-Dwyer and Murphy and Bates.

Murphy and I had a little conference of war, and we figured that if we could hold Dwyer on the first two holes of the playoff, we would win the tournament, because we all got strokes on the first two holes, but then after that, Dwyer didn't get any strokes, and we figured we'd then have a good chance of beating him, and we figured between the two of us we could hold them. And we just discounted Cooley, because that was just a miracle; he was out of it, as far as we were concerned. You know, a guy with only one arm can only do so much, and his miracle had happened.

Everyone was busy eating lunch, or finishing lunch, but Roger Lapham came out to witness this playoff, because he had a lot at stake. It was also interesting that Tom Dwyer and Dick Cooley thought so little of their chances that they didn't bet any money on themselves. Of course, Murphy and I had bet quite a little bit on ourselves; even though we really didn't have any chance of winning the tournament, we at least wanted to have the fun of wagering something.

Cooley's drive went off to the left, so naturally he was out of it. He was the farthest away, so he had to approach the green first. Much to our horror, he took a wood out of the rough and hit the ball up on the green. His team then won the tournament.

Hicke: He used a wood in the rough?

Bates: It was about a 200-yard shot. We couldn't believe it. Murphy and I really got very upset about that.

Cooley was a vice president of Wells Fargo Bank at that time. Word of this heroic deed on the part of Dick Cooley went all through the financial community. [both laugh] And it wasn't too long after that, that Dick Cooley was made president and chief executive officer of Wells Fargo. I recall having him to dinner, and getting up and toasting him, but reminding him that he never would have been president if it hadn't been [chuckles] for winning the tournament against Murphy and Bates. [both laugh]

### Jury Selection

Hicke: I have one question that goes back to what you were saying before about jury selection. I wondered if this might be an appropriate time for you to tell me just a little bit about how you go about accepting or refusing a jury person.

Bates: Okay. Your question comes at a very appropriate time, because one of the next cases I have to talk about is Raleigh Leach v. The Ford Motor Company.\* This was a case filed by Clif Hildebrand, who was a very famous trial lawyer at the time, assisted by Julian Caplan, who had established a solid reputation for himself as a plaintiff's antitrust trial lawyer. The case was filed in the federal court, assigned to Judge [William T.] Sweigert. Leach was a Ford dealer in Alameda County in Oakland, and he contended that the Ford Motor Company had violated the antitrust laws and treated him unfairly in discriminating against him in favor of other automobile dealers.

This was a landmark case, because it was the first case that was filed under a new federal act called the Dealers Day in Court Act. It was a federal law that was passed specifically for the benefit of automobile dealers.

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\* (1960) 189 F.Supp. 349. See following page.



# Automobile Manufacturer's 'Standard Of Performance' Requirement Upheld In Ruling Of U. S. Judge Sweigert

In a ruling of utmost interest to the automobile industry—manufacturers and dealers—United States District Court Judge William T. Sweigert yesterday held that the Automobile Dealer Franchise Act, (15 U.S.C. 1221), does not prevent a manufacturer from terminating a dealer who was not providing adequate representation.

"It is not bad faith, coercion or intimidation for the manufacturer to ask the dealer to sell up to his expected standard of performance," Judge Sweigert said, adding that to classify the manufacturer's attempt to rehabilitate the dealer as coercion "would be to make the Act a snare for the dealer rather than a protection," because the manufacturer would be inclined to terminate immediately rather than suffer the risk of attempting to help the dealer.

The court, granting a defense motion for dismissal and ordering judgment for de-

fendants, ruled in the case of Raleigh R. Leach versus Ford Motor Co.

The attorneys for the defendant were Pillsbury, Madison & Sutro, John B. Bates, Allan N. Littman, and Charles M. Richardson, Jr.; for the plaintiff were Hildebrand, Bills & McLeod, Clifton Hildebrand, and Julian Caplan.

The importance and general interest in Judge Sweigert's findings warrants publication in full in The Recorder. Therefore, the first installment follows:

## Court Told Auto Dealers Sales Drop

An attorney for the Ford Motor Co. introduced evidence through cross examination today in Federal District Court designed to support the firm's contention that Oakland Ford Dealer, Raleigh R. Leach, was "not doing the job" that the company set out for him.

Leach is seeking \$4,843,500 damages from the company which canceled his franchise Dec. 9, 1958. Leach has accused the company of setting unreasonable sales quotes which could not be met.

Under cross examination by Ford attorney John Bates, Leach's son, partner and sales manager, Eugene R. Leach of 4350 Dorset Court, Concord, admitted that Raleigh R. Leach Co. sold only 219 new Fords in 1958 or 3.22

per cent of the total Ford sales in the East Bay sales division.

In 1953, the Elmhurst district Ford agency sold 334 Fords, or 4.68 per cent of the total sales volume.

Bates maintained that the standards which the Ford Motor Company set for Leach in 1958 were reasonable, and not oppressive.

On direct examination yesterday, Leach testified that in 1956-57-58 he and his father had approximately a dozen conferences with Ford officials.

During one of the later sessions, he claimed, company officials threatened to revoke his franchise unless he would meet a sales quota of 50 cars a month.

Ford Co. officials claim they set no such goal.

(above incomplete)

The Recorder

11/9/60





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Bates: It was very unusual for the Congress of the United States to be persuaded to give the automobile dealers a particular advantage, and give them an opportunity to go into federal courts just on the theory that they've been treated unfairly. But somehow or other, Congress was lobbied and persuaded to do this, and this legislation was now being utilized by Mr. Leach's lawyers to file his action in the federal court.

The company felt very strongly about the issues involved in this case. They did not want to settle unless it could be settled for what would amount to nuisance value. They were anxious to contest the constitutionality of this new legislation, and they wanted to put up a vigorous defense.

By this time, I had been involved in several antitrust cases for the auto industry, including Ford and General Motors, and I'd been able to dispose of them in preliminary motions to dismiss or for summary judgment. This was the first major case which was going to go to a jury.

In any event, we finished all of our pretrial procedures and motions and whatnot, and the case got down for a jury trial in the federal court before Judge Sweigert. We started to pick the jury. You alternate challenges between counsel. In the federal court, the judge takes much more control of the so-called voir dire of the jury -- that's the examination of the jurors -- than the judges do in the state courts. The federal courts give very limited opportunities to the lawyers to examine the jurors, because the problem is that many trial lawyers will use examination of the jurors to pretry their case, to precondition the jurors. And I have another story about Jim McGinnis on this subject which involved another case in the superior court, which we'll come to.

But the federal courts took control of that situation to try to prevent it as much as possible, which I think is a good idea; because the lawyers can go overboard and spend an undue amount of time in really arguing the pros and cons of their cases in the selection of the jury, to try to precondition them, and I think the federal system is much more efficient in the selection of jurors.

Hicke: It's more efficient, but what's lost in that system? Anything of value?

Bates: I don't think anything is lost. I think the lawyers tend to overspeak their situations. If you give a lawyer an opportunity, he's always got something to say. And we don't want to impose too much on these poor jurors, who have to sit through all of this. Getting on with the

determination of the case is the most important thing. Of course, you want to do justice, but nothing's lost. The judge brings out the issues, and then he asks if there are any jurors that are in any way connected with either side, to figure out if there are some jurors who ought to be just excused for cause at the outset. And many times, many judges in the federal court will ask for written questions from both lawyers, and the judge himself will ask the questions, or he will allow the lawyers to examine the jurors, but he'll keep very tight control of the extent of the examination.

Anyway, it came out that one of the prospective jurors was a neighbor and a fairly good friend of Clif Hildebrand. And it got around to whether or not that juror should sit. There was nothing there to disqualify him for cause. The judge brought out the fact that he knew Mr. Hildebrand, that he was a next-door neighbor. The judge asked him if he saw in that any reason why he could not be fair in determining the issues in the case, and the prospective juror said no, he didn't.

It came to be my turn to excuse a juror. And I passed the jury. I said, "The defendant is satisfied with the jury, accepts it as it stands." Clif was so thrown off by this that he excused his neighbor. He thought that I knew something that he didn't know, [both laugh] I guess. We got another juror to take that juror's place.

Hicke: He thought maybe you knew that his neighbor didn't like him.

Bates: I didn't know anything about his neighbor, not a darn thing; I didn't know his neighbor from Adam or Eve. I just thought it would be amusing. I thought that Clif might excuse him, and I thought it would kind of throw him off a little bit, and the other jurors might think, "What has he done that for?" I find that, on balance, unless a juror has a rather clear bias, that one juror is going to be just as good or bad as the next one.

The more intelligent prospective juror, in my view, is the best juror for me and for the defense of a case. In defending a corporate client, I think the more intelligent juror can resist the passions and prejudices that sometimes are resolved to the benefit of the plaintiff in a case against a large corporation; that's why I think the more intelligent jurors usually are the best. That's not always so, but that's what I prefer: someone who has not been exposed to the business community, who is on the lower end of the economic scale, has no conception of money really; they've probably never had more than several hundred dollars under their control. Ten thousand dollars is a lot of money, and a hundred thousand dollars is a lot of money, and a million dollars is an awful lot of money, but the relative difference in their mind is not as significant as it is to a more intelligent person who has had the responsibilities of business and money. He or she knows how hard it is to accumulate wealth.

Hicke: Do you have ways of finding out how the jurors have thought in a case?

Bates: Yes, sure. There are jury services that will give you the voting records on all prospective jurors and give you their political affiliations. They'll give you quite a bit of information about prospective jurors.

Hicke: And then after a case is over, you can find out how the jury voted on your case?

Bates: Sometimes the judge will instruct the lawyers not to talk to the jurors after the verdict, but rather rarely and only in sensitive cases. Most of the time you can go around and talk to the jurors, if they'll talk to you.

Hicke: And do you do that?

Bates: Yes, we want to know what impressed the jury, why they reacted the way they did, and why they voted that way. We'll do that, win or lose, to try to get a better feel for how to present our case and how to handle a jury.

At the recess, after I'd excused Mr. Hildebrand's neighbor, I was out in the corridor, and Clif came running up to me, and he said, "Jack, why didn't you excuse my neighbor from the jury? I just don't understand it. Why didn't you do it?" I said, "Clif, I thought your next door neighbor probably knew you well enough to know that you were up to some sort of mischief in this case, and that he'd probably be in favor of my position in the lawsuit." [both laugh]

You've got to have a sense of humor to deal with these situations. I'm happy to say that we were able to persuade Judge Sweigert, after the presentation of the plaintiff's case, that we were entitled to judgment as a matter of law.

The evidence I brought out in the plaintiff's case was that the plaintiff admittedly had not sold the number of cars that the Ford Motor Company had set for him as his target quota; that he ought to sell at least that many cars to stay in business; and there was no evidence whatsoever that that quota was in any way unfair or discriminatory insofar as he was concerned. So there was no evidence of unfair treatment. This was a very satisfactory result for me and for the Ford Motor Company.

Unfortunately, it didn't give them a chance to test the constitutionality of the act. Eventually it was tested, and it was found constitutional. But it has been interpreted by the courts in such a way that the obligation of fair dealing is not much different than the common law obligation that is read into every contract of good faith



and fair dealing, so that this breakthrough in this new law favoring automobile dealers finally just turned out to be really an accepted standard which maybe got a little more emphasis through this Dealers Day in Court bill. Maybe it attracted the trial lawyers to think of other ways that they could use that same theory in other contract situations, and the law was there all the time, just as in Gene Prince's brilliance in conceiving the idea of the use of the Bill of Peace in that Yuba County flood case. I think I mentioned that earlier.

Hicke: Yes.

Richard Rheem

Bates: The next case I think is of some significance, certainly in my own life and my own affairs. The litigation itself wasn't all that important, but it involved Richard Rheem. Richard Rheem had been the president and chief executive officer of the Rheem Manufacturing Company. It started out as a business in Contra Costa County manufacturing oil barrels, which were sold primarily to Standard Oil Company. But then it expanded to the manufacture of all sorts of metal products, including, finally, refrigerators and home appliances.

The company had been successful, and Richard Rheem had made a lot of money, owned a lot of stock in the company. He was a great sportsman, a fine gentleman. He owned the Morning Star, which was one of the fastest and best sailing ships of the time and won many deep sea yachting competitions, including the race to Hawaii. He had a fabulous estate in Sleepy Hollow in Orinda, which was near a little place that my family had out there. We had seven acres there off Minor Road, where we had a few horses. I used to ride horseback from our little place in Orinda on dirt roads all the way over to the outskirts of Martinez and back in one day, without ever crossing a paved road. That was back in the '30s. No way in the world that could be done today. It's all been developed.

But Richard Rheem bought this property and built himself a marvelous plantation-type, Colonial-style house, beautiful thing. He was doing very well, but he got into the oil business, and he started putting more and more money into oil ventures. He became distracted from his responsibilities with Rheem Manufacturing, and he came at odds with his board of directors and others, and he was forced to resign as president and chief executive officer of Rheem Manufacturing.

He had now been borrowing from the bank to continue his investments in the oil business, and the bank insisted on foreclosing on the

stock that he'd pledged as collateral for his loan. This triggered a liability under the federal laws, because the bank had forced a sale within six months of his having acquired some stock, and that is a violation of section 16b of the Securities Exchange Act. Richard Rheem was an old friend of Marshall Madison's, and he asked me to take on his representation in this federal court case.\*

Much to the surprise of Al Brown and the securities exchange people, the judge ruled in my favor, in the favor of Richard Rheem.

Hicke: No faith, huh? [both laugh]

Bates: I guess at the time there was some importance attached to the legal significance of having prevailed in that 16b case. But it's not for that reason that I mention Mr. Rheem and that situation. It's just that he was really a fine man, very well respected with innumerable friends, and he got involved investing in the oil business, and it got beyond him. He died a pauper not many years later, and this really had an impact on me. What do I do with whatever I can accumulate in the way of an estate? And, of course, this was at a time when if you made any sort of an income, you jumped into the 70 to 90 percent tax bracket; so it was pretty hard to set aside any estate unless you got into tax shelters of some kind. A lot of my partners, including Jim Michael, had become heavily involved in tax shelters and had been quite successful. But my experience with Mr. Rheem made me very shy of getting into the oil business or any so-called tax shelters.

Hicke: The idea is to shelter your income, not demolish it!

Bates: That's right.

Richard Rheem had gotten himself in too deep. He was a marvelous man, fine wife and family. And it was just devastating. It had a great impact on me. If I hadn't had that experience, I might have ended up with a very substantial [chuckles] estate, but I never had the courage [both laugh] to put what capital I had in any sort of venture of that kind.

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\* Rheem Manufacturing Company v. R. S. Rheem (1961) 295 F.2d 473.

Bay Area Rapid Transit District

Hicke: What's next?

Bates: The BART litigation, having to do with the validity of the bond election in the three Bay Area counties which voted to obligate themselves in support of the bonds that were subsequently issued to construct the Bay Area Rapid Transit system. Wally Kaapcke was general counsel for BART. He had worked very hard and diligently with Malcolm Barrett, who was the in-house counsel for BART, to do everything they could to make sure that the bond election was properly presented to the electorate. But it was probably one of the most substantial financial obligations that had ever been imposed for the construction of a transit system up to that time.

Hicke: I think it was \$792 million.

Bates: Well, the end contract, as I recall, obligated the counties in excess of a billion dollars, which was a lot of money back in that time, in the early 1960s. I guess a billion dollars isn't very much money any more. [chuckles]

Hicke: Sounds like a fair amount to me.

Bates: But insofar as public financing is concerned, I guess it's not. At that time, Noble Gregory and I had offices right across the hall from each other, and most of the time we worked with our doors open, so there was always free access into my office or into Noble's office. I conferred with Noble a lot about trial strategy and about appropriate legal maneuvers in the trial of a case. I always appreciated Noble's opinion.

It's almost inevitable when you have something of this magnitude that some people are going to get together and challenge the validity of the election in a taxpayer suit, and this happened after the successful vote on the bond issue. The case was Robert L. Osborne, et al. v. San Francisco Bay Area Rapid Transit District\* and the engineers, Parsons Brinkerhoff-Tudor-Bechtel and the others. Wally got me involved in the defense of the litigation and I ended up with the principal responsibility, although I worked very closely with Ed Ruff of the Thelen, Marrin firm,\*\* who represented Bechtel and some of the

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\* Contra Costa Superior Court No. 87332 (1963).

\*\* Thelen, Marrin, Johnson & Bridges.

other contractors. [Casper] Cap Weinberger of Heller, Ehrman\* appeared for one of the contractors and Dana Murdoch appeared for several members of the board of directors of BART.

We, at the outset, prepared and presented a motion for summary judgment, which in itself required a considerable amount of time and effort on the part of Wally Kaapcke and Malcolm Barrett and our staff and myself in preparing the proper affidavits and the memorandum of law. Our effort was to try to dispose of the litigation as quickly as possible, because it was brought to my attention that every day that there was a delay in proceeding with the construction of this system, there was a substantial expense. At that time, we were in the throes of an inflationary period and delays would add to the expense. Furthermore, financial commitments had to be made, and all those things would add to the expense. So each hour was an expense in the thousands of dollars, and I was constantly reminded of that, which I can assure you led to some rather troublesome and sleepless nights. [chuckles].

Hicke: I can believe it. Did PBTB\*\* go ahead with some of the work while this was going on or did they completely stop?

Bates: Well, we did prevail on many of the points that we made in our motion for summary judgment. I should say that the case had been specially assigned to Judge Martin Rothenberg of the Superior Court in Contra Costa County. He granted summary judgment with respect to several of the causes of action, but there still remained, in his opinion, the factual question as to whether the matter had been fully and properly presented to the voters. So we were compelled to go to trial on that issue. In the meantime, he ordered a preliminary injunction so that we couldn't move forward. We appealed from this, but we also asked for an early trial date and set forth how expensive each delay was and how important it was to have an early trial of this issue, realizing that even if we went up on appeal and were successful in relieving the preliminary injunction, the contractors would be at risk in proceeding if eventually the trial judge said that there was something wrong with the election.

There was a very interesting group of people involved, including Adrian Falk, who was head of the district, Carl Wente, John Kiely, the many engineers, demographers, and other experts. Bill Stokes, who was the managing director, was a very able man. Bill had been in public relations work, but he had really done an excellent job in pulling

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\* Heller, Ehrman, White & McAuliff.

\*\* Parsons Brinkerhoff-Tudor-Bechtel, the engineers.



together all of the pieces that focused on helping the district to be a cohesive, effective unit. Bill Stokes just kind of put himself on top of everything and was an excellent manager, although he was sometimes criticized by the engineers and others as not having enough expertise, but that wasn't his forte. His forte was to be a good coordinator and at this he did, I think, an excellent job.

We were all under a lot of pressure to get this trial completed, but to do it as thoroughly as could be done. David Birenbaum, who was the lead lawyer for the plaintiffs, was effective and resourceful. This, of course, was a case that was tried to the court on the validity of the election. So it was purely an equity case, in which the court had the responsibility of either declaring the election void or finding in favor of the defendants and disposing of the case. But the case generated a considerable amount of interest and publicity. Instead of a jury in the jury box, we had a group of newspaper reporters. There were from eight to a dozen reporters in the jury box every day, prior to the opening session of court.

I remember one day when the judge came in and took the bench and the clerk went over and whispered in the judge's ear. The judge said, "Oh well, that's all right. We'll go ahead with the case." We learned later that the clerk had told the judge that one of the reporters was missing. [laughter by both] He was coming to treat the reporters just like a jury, and apparently felt that if there was a reporter missing, we shouldn't proceed with the case.

Because of the attention that was given the case throughout the Bay Area, we would try to close the morning with something that would appear favorable. I remember on one occasion I was cross-examining one of the plaintiffs' so-called experts on mass transportation. He was saying that there were other alternatives that should have been considered by BART, such as monorail. I realized at the time that we were going to go into recess and all the reporters would be running off to their newspapers to get some sort of a story for the afternoon editions, so I asked the witness, "Well, were some of the alternatives you considered pogo sticks and water wings?" [laughter by both] The witness merely smiled, as did Rothenberg, and then we adjourned for the noon recess. I was happily surprised to see one of the headlines in the afternoon papers that said, "POGO STICKS AND WATER WINGS."

Hicke: Do you suppose that was a Richmond paper? I would really like to try to find that.

Bates: I can't remember.

Hicke: It was about a week into the trial, maybe the last part of March?

Bates: Yes, it would have been about that time. It was front page stuff. If it's not on the front page, forget about it. It was of great interest in all of the three Bay Area counties: in Alameda County, Contra Costa County and San Francisco. It could have appeared in any one of those papers.\*

Getting back to Noble Gregory, he knew the pressures we were under to expedite the trial. We tried our best to get an early, satisfactory result. One evening when we were busy working in my office, Noble suddenly appeared. He said, "I've been thinking about your problem Jack. I think what you ought to do is hurry up and lose this case so I can win it on appeal." [both chuckle]. He certainly gave the impression of being very serious at the time. But I can't help but think there was a little wry humor in what he was advocating.

Anyway, even though he gave us fits at times, we were able to obtain a very favorable ruling from Judge Rothenberg.

Hicke: How did he give you fits?

Bates: Well, he liked to be smarter than anybody. So he would always be thinking of things that he thought that we hadn't thought of, calling for things that we didn't think were particularly important, being somewhat critical. Judge Rothenberg is a good judge and a very intelligent judge, but I think he takes pleasure in trying to demonstrate to the lawyers that he's smarter than they are.

Hicke: Sounds like a bit of one-upmanship.

Bates: Well, that's probably true. I don't criticize him for that. He was always challenging us and probably rightfully so, but he never gave us any idea how he was going to end up on the case, which was quite troubling because we'd expected after we'd been in the trial for some time that we'd have some indication of how he was leaning, but he was careful to avoid that. He was somewhat quixotic in a lot of the things he did, throwing us off.

The plaintiffs were constantly coming up with new ideas. On one occasion, they were offering these contracts that we had negotiated with the engineers. The purpose behind offering the contracts was to try to demonstrate that these called for cost-plus payments and that BART was in league with the engineers to give them profits that were unjustified. As a matter of fact, our interpretation of the contracts was that they were very carefully monitored and that they were not

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\* A search of local newspapers failed to locate that headline, but see following page for story.

cost-plus contracts. We'd just as soon have them in evidence because we thought the contracts helped our case, even though we didn't think they were relevant to the validity of the bond election. We wanted to do everything we could to demonstrate that the district was beyond reproach, that everybody had done his homework, and that Wally Kaapcke and our lawyers had done a very careful job in making sure that the whole matter was properly presented. We didn't want to keep anything out; we wanted this in. We didn't want to create the impression that we were trying to hide something or withhold something.

As I mentioned earlier, Cap Weinberger represented one of the joint venture engineers that was involved in the litigation. Cap didn't attend very many of the days of trial. At that time, he was busy being the news commentator for KQED as well as carrying on a rather active practice. I really don't think that Cap had ever devoted himself to an extended trial. But he would show up on occasion. Most of the time he left the appearances to one of the younger lawyers in his firm.

On this particular day, he did show up, and that was when these contracts were being offered. Cap stood up and said, "Your honor, I object to the introduction of this contract." I was quite surprised at this because we'd just as soon have them in evidence. Ed Ruff and I had worked very hard in strategy and planning -- early in the morning, at noon, and all this -- and now suddenly one of our co-counsel was injecting himself into the case and objecting to this. "Well," Judge Rothenberg said, "On what grounds counsel?" Cap said, "There's been no proper foundation laid."

With this, I pulled Cap's coat [chuckling] and got his attention and I said, "Cap, withdraw your objection; we want these in evidence." And with that, Cap said, "Oh, Your Honor, don't be concerned about my objection, I'll withdraw the objection. We'll go ahead with the trial. Let the matter go in." [laughter from both] I don't want to criticize Cap; what he was doing was the right thing to do legally, but it didn't serve our purposes. Cap is really a brilliant lawyer, and he just had too many things to do at the time.

Hicke: That is an interesting point though. What are the ramifications of delegating work, especially trial work, to other partners?

Bates: Well, I think it all depends on the firm's responsibilities and the litigation. I mean, when something unusual happens, they expect to rely on the lead counsel to take the responsibility of the case because everybody has a mutuality of interest. It's a lot less expensive for the client to have a young lawyer there who's following the proceedings and able to report back to whoever is in charge of the matter in the firm, and then evaluating their situation and reporting to the client. He's only there in case something of some significance



# Contract Fees For Rapid Transit Defended in Suit

Two attorneys for the three-county Rapid Transit District Tuesday denied allegations that the engineering contract for the \$792 million system provides for excessive fees.

First to defend the contract in the Martinez courtroom of Superior Judge Marin E. Rottenberg was the man who drew it up, Wallace L. Kaapcke, counsel for the district.

**EXAMINED** by Atty. David Bierenbaum, representing a group of taxpayers trying to block the transit plan, Kaapcke insisted the arrangement with the engineering firms of Parsons, Brinkerhoff, Tudor and Bechtel was a "fair contract complying entirely with federal and state laws."

In support of this contention, Kaapcke cited what he called several "safeguard provisions" in the contract like the one which leaves it up to the district to approve engineering budgets at six-month intervals.

The contract also entitles the rapid transit people rather than the engineers to allocate manpower and set work schedules, he stressed.

**THIS FLEXIBLE** arrangement, Kaapcke explained, was decided upon because there are so many phases in the transit program that no single best estimate could be made in advance.



By  
H. W.  
KUSSEROW

It's estimated that total engineering cost will add up to \$47 million.

Kaapcke's views were supported by Atty. Allan E. Charles of San Francisco, chairman of the district's engineering committee.

Pointing out that the contract was drawn up after consulting with many "reputable engineering firms" not involved in rapid transit, Charles said:

"It appears there's nothing unique or unusual about the (compensation) percentages we're dealing with."

**THE TESTIMONY** by the two rapid transit representatives followed a heated morning session during which Bierenbaum asked about a study of copters as a possible alternative to rail traffic.

At that point BART Atty. John B. Bates exploded:

"This is ridiculous," he stormed, adding "next we'll be going into pogo sticks and water wings."

As the hearing continued today, Supervisor Harold Dobbins and Boardman John F. Shelley said the newly formed Rapid Transit District was seeking to speed up the construction of the system.

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Fisher v. Pacific Telephone & Telegraph Company.\*

Bates: The next case I have of some significance is Fisher v. Pacific Telephone & Telegraph Company.

The Fisher case against the telephone company was a particularly interesting case. The case involved a duplex in the Sierras, south of Lake Tahoe. The telephone company had installed a telephone wire that went across the roof of this duplex over to a telephone pole, and one end of it was attached to a tall pine tree.

The duplex had a gas furnace, and there was an outlet, a vent, above the duplex to exhaust fumes. There was a big storm in the middle of winter, and the pine tree blew back and forth. The wire came down and hooked into the top of the chimney that vented the furnace and pulled it out, detached it from the furnace, so that the fumes, the carbon monoxide, accumulated in the duplex. The family living in there were the Fishers: the husband, wife, and two children. The husband died as a result of the carbon monoxide. The wife did not suffer any discernible serious consequences. One of the children was mentally damaged because of the exposure. Fortunately, the other child was in a fairly well-ventilated room and didn't suffer any discernible injuries.

The people went to Paul Laxalt, who was then governor of the state of Nevada, and who had been a practicing lawyer in Carson City. These people knew or were referred by friends to Governor Laxalt. He was really not in the plaintiff's personal injury business, but he knew he had a substantial case, and he wanted to get someone whom he thought was the best plaintiff's lawyer for the case, so he called upon James Boccardo.

Jim Boccardo took on the representation of the Fishers, and he filed an action against the telephone company here in the superior court in the City and County of San Francisco. Jim Boccardo thought this was the biggest case he'd ever been involved with, and he was going to really ring the bell in this case and get a big recovery from the telephone company.

There was no way that we could work out a settlement with Boccardo, because he wanted to go all out in this case and get a big verdict.

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\* (Sup.Ct. San Francisco, City and Co. 1964) No. 498362.

The big advantage was that with BART there were no on-grade crossings, that all the crossings were either above or below grades, so there were never any intersections to be concerned about -- just like a subway system. There was no question but that it was a marvelous feat of engineering, to construct it with the elevated rails that had to be constructed so the train would run very quietly so it didn't interfere with any of the neighborhoods, and all the tunneling, and then the tube under the San Francisco Bay and the subways in San Francisco. It really is a marvelous feat of engineering, and those elevated rails are very, very quiet. You can hardly hear them even when you're right next to them. It was indeed a very successful achievement.

Hicke: I certainly wish it went down the Peninsula.

Bates: Well, the other frustrating thing, though, is that all this was supposed to relieve the traffic, and all it has done is create other metropolitan areas and stimulate more traffic. I mean, Concord and Walnut Creek and Martinez were just kind of sleepy, little, residential towns and now they've become major metropolitan areas. Who would have thought that Pillsbury, Madison & Sutro would ever think it feasible to have an office in Walnut Creek? And now we've got one. [chuckles] So I think in some ways that BART, it could be argued, created more problems, population congestion, than it solved. [chuckles] But I think it is a very good system, despite the fact there are always mechanical failures in any system.

I think that about does BART.

Hicke: I just have one more question. The suit was brought by four citizens?

Bates: Yes.

Hicke: Just on their own, or were they supported by some groups?

Bates: Well, we never knew. We don't know. I'm sure they got funds from others and they were just fronting for the others. I remember one of the plaintiffs was [Dwayne E.] Bobblett, who ran a donut shop in Contra Costa County. [chuckles] But you see, they didn't have to really concern themselves because the challenge was up to BART to demonstrate that there wasn't any misrepresentation, despite the fact that under the law, the plaintiff has the burden of proof.

Bates: Oh, well, there was another interesting development in the BART litigation: it was continually emphasized that this was the biggest contract of its kind that had ever been awarded. When I was preparing the Bechtel witnesses to testify in the case -- we were working with Ed Ruff -- we came across an in-house annual report that Bechtel put out to all of its employees and disseminated generally to the public and to others with whom Bechtel was doing business. They went through all the major contracts that they had throughout the world -- the Middle East, Europe, United States, Australia, everywhere -- and it was amusing to me that they didn't even bother to mention the billion dollar contract involved in the [chuckling] construction of BART. I think we somewhat amused Judge Rothenberg when that was brought to his attention. [both chuckle]

Hicke: Too close to home or something?

Bates: Obviously, whoever was responsible for the publication was not fully informed.

Well, after Judge Rothenberg gave his favorable ruling, we were all concerned about the plaintiffs taking an appeal. Fortunately, the trial costs had become rather substantial, with all the depositions and discovery that had gone on -- it was in the several thousands of dollars. So I was authorized to do anything I could to accomplish a disposition of the case and get the final judgment entered.

I recall taking David Birenbaum to lunch at Villa Taverna, of all places, and going over the trial with him, going over the costs and persuading him it would be a waste of time and expense for him to take the case any further. Naturally he was resisting me, but then I went over the cost bill with him and wondered how he was going to take care of that. He finally concluded that it would probably be the sensible thing to dispose of the case if I would waive costs. I told him I'd try to get that authority and get rid of the case. Fortunately I already had that authority, but I wanted to let him know that it might be hard to come by. It was later on that day that I called him, and then the next day we entered into appropriate stipulations and final judgment was entered, and BART was on its way.

You know, it was kind of interesting that with all these demographic studies and the trends in population and all this so graphically laid before us, that to my knowledge, none of us took advantage of that and tried to get options on any land in the area or get any investments that would benefit from this. There were always asides about the amount of traffic that we all had to suffer to get in and out of Martinez in the morning and afternoon and across the Bay Bridge, and how important it was to develop this alternate means of transportation.



comes up that might involve the client, so that he'll know that he ought to talk to his superior about it; of course, in this instance that would be Cap Weinberger. Then he could evaluate the situation and decide whether or not he ought to become more actively involved in the case.

It happens quite frequently. We do that on many occasions where we're involved with a client who has an incidental role in the case but he has to have separate representation; we'll defer to the lead counsel.

I've always strongly believed that the very best strategy in the trial of a case is to have as few lawyers in the courtroom as possible. I always think, particularly in an antitrust case, that the more lawyers you have in the courtroom representing the defendants, the more the jury and the court have the impression that there's an awful lot of power there represented by all these law firms, and it's very expensive to have all those lawyers there, so that these defendants could afford to pay a very substantial judgment if they were called upon to do so. Also it focuses more attention on the defense side of the case, because if the plaintiff is just alone or with one or two other lawyers assisting him, he's the poor little guy against the amassed wealth of the defendants. So you create an atmosphere that puts you at a disadvantage right at the outset.

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Bates: So the fewer lawyers you have, the better off you are. Oftentimes in an antitrust case you just can't do that, because if you have one lawyer representing a group of alleged co-conspirators, that creates the impression that the defendants are working so closely together that they can all afford to use the same lawyer, that the conspiracy is that well organized that they don't need separate representation. So that's a problem. If you can explain the situation satisfactorily to the judge and the jury as to why one lawyer can represent one or two or three alleged co-conspirators, then you can proceed in that fashion. But it is difficult.

The important thing is to have as few lawyers as you can get by with, and not have them all trying to participate in the trial of the case, because then they start bumping into each other and creating problems amongst themselves, which always inures to the benefit of the plaintiff. So the fewer lawyers you have presenting the case and examining the witnesses, the better off you are in the defense of a case. And I think the same thing goes when you're on the plaintiff's side. You don't want to load the courtroom with a lot of lawyers.

Hicke: Well, I interrupted you in the middle of the BART story.

The telephone company wanted do its very best to keep this case contained within reasonable bounds. Our investigation disclosed that the chimney had not been properly installed, that the flanges that held the flue, the stack, to the heater had not been properly clamped together, and if they had been properly clamped together, the wire couldn't have pulled the chimney away from the heater, and the carbon monoxide poisoning wouldn't have happened. So that was my defense.

But, unfortunately, there was negligence in the installation of the telephone wire. Although it was common practice in the industry to do it this way, it was not in accordance with the regulations of the telephone company to use a pine tree in place of a pole. So we had negligence. The only way we could defend the case would be to establish that the accident wouldn't have happened but for the improper installation of the smoke stack. And the jury could believe us or not, of course, so it was going to be a question of fact to go to the jury no matter what we did. Our investigation also disclosed that there were faults in the orifice of the heater, and that it wasn't the proper dimension; if it had been, it wouldn't have thrown off the amount of carbon monoxide that was thrown off, but that was not a substantial defense.

Boccardo had been careful to bring in every conceivable defendant. In the course of discovery, I took the deposition of Mrs. Fisher. Our investigators had found out that she was a graduate of one of the best finishing schools in the country, one of the eastern finishing schools, and she came from a fine family and all that, but she ended up in Las Vegas and became a waitress and show girl, probably rebelling from her family and her early life. She was leading quite a fast life, and she got involved with Mr. Fisher, who was not a very reliable man. He'd been cavorting with a lot of show girls, and had been married several times and living with other young ladies of the night. Because of the serious nature of the case, the telephone company did a very complete investigation on these people.

I intended to use all this information in taking the deposition of Mrs. Fisher, and then bring out in her deposition all these sordid relationships. He was dealing with jewel thieves and all sorts of terrible people, and I brought all of that out in the course of taking her deposition. I remember that David Lull, one of Jim Boccardo's partners, was representing her at the deposition. I was cross-examining her about all of these events, about her rather fast life, and her various bank accounts, and how she accumulated and spent money in various ways.

I remember one instance where she started to break down, and turned to David Lull, and said, "Mr. Lull, do I have to answer that question?"

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Bates: Yes, of course she had to answer the question.

I had all these admissions from her in her deposition, which was most relevant, particularly in a wrongful death action where the damages are limited to the pecuniary loss of the survivors. The nature of their marriage relationship, and his contributions to the marriage, his infidelity, his character and conduct were very important as to how much he could be expected to have contributed in the future to the community of the marriage. It seemed to me that through the evidence we could establish that in all probability this was a very flimsy, tenuous relationship.

I had every intention of bringing this out in the course of defending the action. The case finally was called on for trial, and of course everybody was there, including Laxalt, and of course Mrs. Fisher and her two children. She had herself all dressed up and, indeed, looked like she had just recently graduated from Vassar as an MBA, very proper and sedate. Boccardo had worked hard to make sure that she would present a very conservative picture to the jury as a devoted wife and mother.

Hicke: Solid citizen.

Bates: Solid citizen, that's right.

So we go about the trial of the case, and I've had the Scott Plumbing people make a mockup of the whole heater and the chimney, the wooden frame, the installation, so that I could demonstrate how it wouldn't have pulled apart if it had been properly installed. It was only that these flanges had to be secured to the base of the heater, and the chimney couldn't have been pulled out by that wire. It took up a good part of the courtroom.

We proceeded into the trial, and there was a lot of evidence put on, pros and cons, about the chimney and the wire and the orifice, and all sorts of experts were called. Then Boccardo finally got to the time where he called Mrs. Fisher to the witness stand. He had Mrs. Fisher tell a very emotional story about how she loved her husband and her children, and how her children had been impaired, and how distraught she was over the loss of her husband, and all that. At the end of the day, the courtroom was a little moist. A few of the jurors had become quite emotional about it, and even the judge, you could tell, had been affected by all this. It was a Friday, I remember, and it was about four o'clock in the afternoon. Everyone was trying to get their emotions together after Jim Boccardo had finished his direct examination, and he turned to me and he said, "Mr. Bates, your witness." [laughs]



Mrs. Fisher was up there, having just finished this emotional discourse, wiping her eyes, and I said, "Your Honor, it's rather late in the day. I suggest we recess until Monday morning." The judge was quite happy with that. It may have only been 3:30, I can't recall the precise time, but I know I could not have had time to commence my cross-examination, and I didn't want to with that atmosphere in the courtroom. And the judge was just as happy to recess. My wife and whatever children were available were down at our ranch, so I joined them down there, but I spent most of the weekend working on the case and thinking about it, how I was going to get in all this evidence that I had, that I'd developed in the deposition.

I thought, "Oh, my gosh, to do this by cross-examining Mrs. Fisher on the witness stand would be very difficult, because every question would have objections, and she'd have time to get her act together, and it would look like I was just beating the information out of her, and the jury would develop a sympathy for her that might really turn them against me. They might get so upset with me that they'd make the damages even higher than normally." So I struggled with how to handle it.

Finally I realized that under the California Rules of Procedure, I could read in the testimony of an adverse party at any time that I determined it was appropriate to do so. So I called Pat Burdick, the lawyer who represented one of the co-defendants. I said, "Look, Pat, I think the best way to handle this thing is to read in her deposition. I think I prefer to have it read by a man, rather than a woman. If you don't mind, I'd appreciate it if you'd do it, if you played Mrs. Fisher." I guess I was a little bit devious in this, because Burdick represented one of the co-defendants that I was anxious to have share legal liability. [both laugh] Burdick got after me later on for having put himself in that position, and in the final arguments, he went after me. But he agreed to do it.

Monday morning when we came to resume trial, I asked to see the judge in chambers before we called in the jury and everybody else. We went into Judge [Alvin E.] Weinberger's chambers, and I told the judge what I was going to do. Of course, Jim Boccardo immediately objected, and I pointed out the rule, and finally the judge agreed with me that I had the right to do that. And I said, "Also, Your Honor, I don't want to embarrass Mrs. Fisher in front of her children, and I'd like to ask that the children be excused from the courtroom. There's no reason in the world why they should be here." Fortunately, Boccardo couldn't think of any plausible arguments as to why they ought to be there; it would have really sounded very improper for him, indecent for him, to insist that they be there, because I told the judge exactly what this was going to bring out.



The judge admonished me in chambers. He said, "You know, Mr. Bates, you're taking a very serious risk here. This jury could turn against you for bringing all this out." I said, "I realize that; however, I'll face that risk. But," I said, "this is all very relevant to what she recovers, if anything, in a wrongful death claim. I have to bring out this relationship and how questionable it was and how sordid it was. It's something the jury has to consider. I feel very strongly about this, and I feel compelled to do it." Because here this woman had been made to appear like the perfect mother.

We went back in, and I read in all that testimony, through Burdick. So then we got down to the final arguments, and I said to Tony Brown -- Tony might have his own ideas about this case, and I think it would be amusing if you could spend a little bit of time with some of these lawyers who are now senior partners in the firm and who all worked with me.

Hicke: I think we'd like to very much, because we want to get the history of the practice groups.

Bates: I ended up with the biggest practice group in the firm, and all these partners that were working with me now each have their own practice groups; that's Mike Richter, Tony Brown, and Allan Littman, primarily, those three.

We finally got down to the time of final arguments, and I told Tony, who was always a very great assistant, and a brilliant trial lawyer now, I said, "Tony, keep an eye on that exhibit." We both knew that somehow or other, Jim Boccardo was going to fool with that exhibit, either directly or through one of his henchmen. So Jim made his argument, and it was my turn to start my response. We were having a recess, and Tony came up to me and he said, "He's done it." Tony didn't have to say any more to me.

So we went back, and I looked at the exhibit, and sure enough, the flanges had been loosened so that he could brush against it in his closing argument, and the whole thing would fall apart; it would demonstrate how flimsy [laughs] the whole thing was. There we were: the jury was coming in, sitting down, and the judge was on the bench, and I said, "Your Honor, before I commence my argument, I have to direct your attention to something that's happened to this exhibit," and I pointed out how the exhibit had been tampered with. I installed it properly, and then I commenced my argument. I don't think that little demonstration was lost on the jury, and Boccardo couldn't say anything. I never talked to them afterwards about this, but I think one or two of them may have realized that Mr. Boccardo or one of his friends may have had something to do with that.

Hicke: That brings out your point of wanting an intelligent juror, an alert juror, who would pick up that.

Bates: Yes. When you try a case, you're trying the case all the time, even when you're out in the corridors, particularly in our superior court where the jurors and lawyers are mingling around all the time. And Boccardo is one of the real pros at trying his case all the time. He tries it all over the courthouse. "This is the biggest case I've ever had; this woman is entitled to millions of dollars," and all that; he's always trying his case.

Hicke: He's saying all of this all the time?

Bates: Oh, sure; not in front of the jurors, because that would be really improper, but to everybody else; the word is constantly buzzing around the courtroom. In a major case, such as this was, the courtroom is always filled with spectators, so Jim is always motivated.

Hicke: Gathering momentum.

Bates: Without being caught at it, yes. In my final arguments, I argued, of course, that the accident wouldn't have happened if the chimney had been properly installed. But then I suggested that if they did find a liability here, the most the damages ought to be was \$70,000.

Jim Boccardo was up into the millions, which would have been one of the most substantial verdicts ever brought in, if it ever approached Boccardo's figure. I said that if I were doing it, I'd put it at a maximum of \$100,000 for the death award and I said, "I personally would cut that in half."

The case finally went to the jury, and then we all had to sweat it out while the jury deliberated. They were at it for a long time. Finally, the next day the jury came in with a verdict of \$70,000 for the wrongful death, \$70,000 for the child, and \$10,000 for Mrs. Fisher. Of course, this threw Jim into shock; he just couldn't understand it. He immediately moved for a new trial, which is customary anyway.

So we ended up arguing before Judge Weinberger the matter of a motion for a new trial, to be set some weeks after the trial. He called us into chambers, and he said that we ought to get together and settle the case; that he felt that the verdict was so low that he was going to order a new trial on the issue of damages unless we could come up with a satisfactory settlement. He recommended, I don't know, a hundred thousand dollars to the little girl that had some brain damage, and ten or twenty thousand dollars to Mrs. Fisher, because he recognized that the jury had bought my argument, and I shouldn't be penalized, having taken the risk of making it. It was a nominal

amount for Mrs. Fisher, but it was substantially more than I had in mind, and I was quite upset about this, because I thought the verdict was quite in accord with the evidence of the case; so I was really upset with Judge Weinberger, and I told him so. But he told us to do the best we could to try to settle it. And so we did, and we settled it. Actually, we ended up paying more than the judge had recommended, because the lawyers at the telephone company realized they had a very satisfactory result, and they wanted to be sure to finally dispose of the case.

That's the saga of Fisher v. Pacific Telephone & Telegraph Company, which was interesting because of the cast of characters involved. It was satisfying to me to take on the "barracuda," head-to-head, and keep him in line.

Hicke: That seems like an unusual case for the governor to get involved in.

Bates: I think he thought there was going to be a lot of money in it, and he was still practicing law, and the governor of Nevada doesn't have the same demands on him as the governor of California.

Hicke: But he apparently didn't know very much about her.

Bates: No. He was just a conduit.

Hicke: That was indeed an interesting case.

#### Iranian Hardwood Forests

Hicke: Let's go to the next case, Whiteman v. Fairhurst.\*

Bates: Okay. Let's see. This case arose in June of 1964 and it all started when I received a call from Philip von Ammon, a lawyer in Phoenix, Arizona. Phil told me that he had a client named Jack Whiteman, who was the president of Empire Machinery Company, which was the local Caterpillar Tractor dealership for Phoenix, and for that matter, for most of Arizona. Mr. Whiteman was very well-to-do and quite an important citizen in Arizona. He had invested with others in a venture that was designed to promote and develop the hardwood forests of Iran. Well, that was amazing to me. I just couldn't believe that there were any hardwood forests in Iran. I think Phil, too, was a little

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\* (In U.S. District Court for Northern District of California, Southern Division, 1964) No. 42495.

perplexed about the whole thing. But he indicated that his client was most reliable.

The reason he was calling me was that the respective defendants that were involved in the affair were California residents, that he believed that the best forum and perhaps the only place in which he could pursue the defendants was in California. He wondered if I would take it on. I indicated I could see no reason why I shouldn't take it on, particularly if his client was of that substance, and it sounded like a very interesting case.

Shortly after that Mr. Whiteman came to San Francisco. I met with our prospective clients, the principal client, of course, being Mr. Whiteman. Then the others were Reesman Fryer -- Rees Fryer was formerly with the United States government in World War II. Then after World War II, he was with A.I.D.,\* the foreign relief agency, and he was primarily involved in the Middle East. It was there that he learned of the hardwood forests of Iran. It was through Mr. Fryer, whose nickname was Sy Fryer, that Jack Whiteman and Carson Matthews became interested. Carson Matthews was in the real estate business in Pendleton, Oregon. These people were good friends.

Hicke: Of each other?

Bates: Yes, of each other. Fryer persuaded Whiteman and Matthews that it would be a good thing to try to develop the hardwood forests of Iran, but that they would need somebody who knew the lumber business, who could build a mill there and who could operate it and work out a program of harvesting the trees. They hit upon Jack Fairhurst, who had been heavily involved in the lumber business, who, I believe, at that time had decided to liquidate his interests and was looking for something to do. They talked with Jack Fairhurst and Fryer convinced him that there was a good potential. So he decided to join the group and see what they could do.

Fryer's contacts had been such that he had the confidence of the administration of the government of Iran under the Shah. Ardeshir Zahedi was related to the Shah. I believe he was his son-in-law. In any event, Zahedi was a very important person in the administration of the Iran government at the time. He was an ambassador, and at that time, he had a residence in London and also in the United States. I can't recall if it was in Washington, D.C. or whether it was in New York. He was quite active and very visible and very personable. In any event, Fryer had worked with these people.

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\* Agency for International Development.



After Fryer put this team together with Whiteman, who had the financing, and Fairhurst, who had the expertise in the lumber business, he was able to persuade the Iranian government, through his contacts with Zahedi and with the Shah, that they ought to allow this to be done with this group. But protocol demanded that the group go to Iran and negotiate with the various bureaucrats involved in the matter. This could take many days, even though the deal had already been set. Protocol demanded that they go through this negotiating process.

Hicke: You have to drink innumerable cups of coffee and tea and so forth.

Bates: Apparently that's what you have to do. Fairhurst decided that he ought to have a lawyer. So he hired Edmund FitzSimmons of FitzSimmons & Petris in Oakland. Well, the story was that they all got together and they went to Iran, including Mr. Ed FitzSimmons. The negotiating process with the various bureaucrats commenced. This went on for days.

Jack Whiteman and Carson Matthews were becoming increasingly restless because they had to attend to their businesses here in the United States. Ed FitzSimmons suggested that Whiteman, Matthews, and Fryer need no longer stay there and that he would complete the negotiations in Iran with Jack Fairhurst, who after all was going to be responsible for the construction of the mill and the actual harvesting and development of the forests. After he had worked out his arrangements with the Iranians, they could move on. There wasn't any sense in all of them wasting their time over there. It looked like everything was all set and they might as well go home. Jack Fairhurst and his lawyer, FitzSimmons, would finish the protocol and finalize the matter. That would be the end of it. So the others came home.

Well, days went by. Finally they learned that there had been a contract worked out with the Iranian government and that they were going to start in developing a mill and start in cutting and logging the forest. But Whiteman, Matthews and Fryer were no longer in the deal. [laughter] That's what Philip von Ammon's call was all about.

Hicke: And this Ed FitzSimmons arranged this for Fairhurst?

Bates: Yes. I got my friend Tony Brown, who had now graduated from handling the delivery [laughter] of jury instructions and who had turned out to be a very valuable lawyer. Tony and I went to work on the case. We decided to frame an action to seek to impose a trust and demand an accounting. We would sue Fairhurst and FitzSimmons to impose a trust on any of the proceeds they received from the development of the hardwood forest and also to make an accounting to the plaintiffs, our clients, Fryer, Matthews, and Whiteman.

Hicke: There had been no written legal agreement among them?

Bates: No. They all trusted each other.

Hicke: Mistakenly, as it turned out.

Bates: Mistakenly, yes. We decided we would probably get a broader scope of discovery if we filed the action in the federal district court, which we did. Then the immediate problem was to get service on FitzSimmons and Fairhurst, who were busily engaged, and traveling out of the country. Tony Brown was very much actively involved in this. I don't recall the specifics of it, but through him and through the people he hired, we were able to obtain rather quick service on these individuals. So the action proceeded forthwith.

Hicke: Does that then require them to return or to just file the necessary depositions or what?

Bates: No, we took depositions and discovery. The whole effort in the case was to seek to impose a trust on the proceeds from this project.

Hicke: So you didn't require their physical presence?

Bates: Oh, yes. We had to get jurisdiction of them. Oh, sure. When we got service on them, then we had them under the supervision of the court. So then we could control their movements by court orders and require them to give testimony and all that, which we did. We took their depositions and we developed a case. I should say that my advice to our clients right at the outset was that they shouldn't do anything to interfere with the contract that FitzSimmons and Fairhurst had made with the Iranian government, because if they did, the Iranians might get very upset and actually kick both of them out of the country. Then they wouldn't have anything.

Hicke: This way they might participate in whatever happened.

Bates: That's correct. That's right. This way if they were successful they would participate, and hopefully FitzSimmons and Fairhurst would see the light and bring them back into the fold, and they would all work together on the development of this project.

As it turned out, after about six months the Iranians, I guess, were just about as upset with FitzSimmons and Fairhurst as my clients were. They were terminated and ordered to leave Iran. So now we didn't have much of a lawsuit. All we had was a lawsuit against these individuals for damages. Fairhurst had not received very much for the sale of his interest in his lumber company. FitzSimmons wasn't worth all that much, but we proceeded to get ready to go to trial in the case.

August Castro [attorney for Fairhurst] was a partner of Cooley, Godward, Castro, Huddleson & Tatum. Coincidentally, my son, John, Jr. is now a partner of that firm. Anyway, we got ourselves all set to go to trial. We went out there all ready for battle, but we were able to work out a settlement of the case at the commencement of trial just for money damages. We didn't get a lot; they couldn't afford to pay very much, but we satisfied our clients to some extent, although unfortunately they never got the opportunity to develop the hardwood forests of Iran. For all I know, they are still there and still undeveloped. That's just a really unfortunate ending to the story.

I just have to lay it on the machinations of Ed FitzSimmons. Ed FitzSimmons is a bad man. He has been involved in many other questionable situations. He was actually found guilty of embezzling a client's funds and served time in the penitentiary. An interesting thing is that this involvement with Whiteman was more than twenty years ago. I saw Ed Fitzsimmons in the Russ Building garage just a few days ago. He looked just as bouncy and vigorous as ever. I said, "Ed, I am glad to see you're out of jail." [laughter] And he said, "Oh yeah, that's all behind me. I am moving on, you know, and I have a lot of things to do." Then we exchanged greetings, and "How are you?" and that sort of thing. He just bounced right along.

Hicke: Do you think he is still practicing law?

Bates: I don't know how; but he shouldn't be allowed to do so.

### Investment Banking

Hicke: Well, there is one other case that I have here that you said you could talk about. That's Harris, Upham.

Bates: Yes. I think the saga of Bertha Hecht v. Harris, Upham & Co.\* is worth mentioning. This is a suit that was brought by Morris Lowenthal, Lowenthal & Lowenthal, and Reed Bement on behalf of Bertha Hecht in the federal district court against Harris, Upham for fraud and violation of the federal securities laws in the way in which Harris, Upham traded the account of Bertha Hecht. I had been involved in a number of securities cases for Dean Witter and other clients. I guess it was because of that that I was asked by Harris, Upham to take on their defense in this case.

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\* (1968) 283 F.Supp. 417.



What had happened was that Bertha Hecht had lost quite a bit of money in her account. Her contention was that her account had been churned. In other words, there had been an unreasonable amount of trades in her account that had cost her a lot in commissions. Furthermore, the investments had not been good for her. As a result of all this, she had lost a substantial amount of money.

The account executive who handled her account had been an investment adviser for the Hecht family for many years; he was Asa Wilder. Our defense was that Asa Wilder had cleared every transaction with Bertha Hecht. As a matter of fact, he contended that many of the transactions had been directed by Bertha Hecht. Well, as time went on, and as we developed the testimony of the various people involved, including particularly Bertha Hecht and Asa Wilder, it became more and more clear to me that Asa Wilder had not received the confirmations from Bertha Hecht that he said he did; and in those instances where he did, Bertha Hecht was really not well enough informed to make an intelligent decision. As a matter of fact, it became rather apparent in the course of her own testimony that she was well along in years and did not have the mental ability to properly manage an investment account. So I became quite concerned about the case.

By this time, I had gotten very well acquainted with the Harris, Upham people, who were really marvelous people, particularly Henry Harris and Arthur Mejia, who was resident partner for Harris, Upham. They were very honorable, straightforward men. I was convinced that if they went to trial, there was probably going to be a verdict against them.

The sensible thing to do from all aspects was to try to enter into a reasonable settlement. It would be hard to settle this case for a small amount. I thought it would take more than \$100,000 to accomplish a settlement, but I was also concerned about the prospects of a punitive damage award. I felt that under all the circumstances, realizing the publicity that could come out of the trial, plus the fact that the verdict could go substantially in excess of any potential reasonable settlement within the hundreds-of-thousands-of-dollars, the thing to do was to settle it. I so wrote the principals of Harris, Upham. I had been assured by the NASD [National Association of Security Dealers] that if we could accomplish a settlement of the case, this would terminate proceedings against the defendants by them.

Henry Harris came out here from New York. He said that they would like to retain another lawyer by the name of Emanuel Becker to come out and review the case and review all the investigations and discovery. By this time, we had doctors involved in evaluating Mrs. Hecht's mental competence and we advised Harris as to the importance of trying to settle the case. Becker came out here from New York and we made everything available to him.



He advised Harris, Upham that they could prevail in the action and that unless the case could be settled for a relatively small nuisance amount, that they shouldn't consider settling; they ought to go ahead and defend the case. So Henry Harris again came to San Francisco. He wanted me to try the case with Becker. I told him I wouldn't do that. I said that we didn't agree on the facts and that every trial lawyer presented a case in his own way, that his and my evaluations of the case and the evidence were entirely different and that I just couldn't honestly participate with him in the trial of the case, that either they had to accept my analysis of the case or accept Becker's.

I said I thought the case might possibly be won, but that the odds were it was going to be lost. Any good trial lawyer would have to work very hard to keep the case within reasonable limits. I told them that the prospects were that there was going to be a recovery by the plaintiff and it was probably going to be substantial. Mr. Harris regretted that I wouldn't participate. We left on the friendliest of terms and our billings were all paid.\*

The only unfortunate conclusion of this whole story is that they did go to trial. Mrs. Hecht came in with a very substantial judgment against Harris, Upham, which cost them a lot of money\*\* and also which impacted on their reputation, but which developed my own reputation in the financial community [laughter] and the world of investment banking. I had a lot of friends in the business of investment banking and they were all following the case very closely and were well aware of all the machinations that had taken place in the litigation. So that's the story of Bertha Hecht v. Harris, Upham.

Fairchild Semiconductor Corp. v. Rheem Semiconductor Corp.

[Interview continued: June 24, 1986]##

Hicke: The next case I think you wanted to talk about was Fairchild Semiconductor v. Rheem Semiconductor (N.D.Cal. 1960).

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\* See Appendix III.

\*\* The judgment was for \$439,520 plus interest. The court did not award punitive damages stating that the defendants were subject to disciplinary proceedings before the NASD. (283 F.Supp. pp. 444-445)

Bates: Yes. Dr. Robert Noyce was the CEO of Fairchild Semiconductor Corporation. He came in to see me about a situation in which three of his top electronics engineers had left him and formed Rheem Semiconductor Company, which he found was developing and going to be in direct competition with Fairchild Semiconductor.

He was particularly concerned about the fact that several of his highly secret trade manuals were missing and that they had been the ones that had been allocated to several of the individuals involved who had gone with Rheem Semiconductor. He was fairly well convinced in his own mind that these men had taken these trade secret manuals and that they were using them in the development of the products to be manufactured by Rheem.

We saw no conflict and decided that we would take on the case.

Hicke: What do you mean you saw no conflict? Did you have other clients that might have had an interest?

Bates: Well, we were concerned, for off and on we had done some work for Rheem through our relationship with Richard Rheem and the Rheem family.

Hicke: So it's the same Rheem.

Bates: But we hadn't done any work in connection with any of the Rheem interests for a number of years, and we just didn't see any conflict, even though Rheem Semiconductor was a wholly owned subsidiary of Rheem Manufacturing.

Hicke: Oh, I see.

Bates: Here again I prevailed upon Tony Brown to work with me in this case. Tony was particularly suited for this because he had been in electronics when he was with the navy in World War II, so he was quite knowledgeable and most helpful and had really developed into a very good trial lawyer.

So we took on the case and we filed an action. In our complaint we alleged that the defendants had left Fairchild with some of their trade secrets and that they were using these trade secrets to develop a product similar to that manufactured by Fairchild. We sought a temporary restraining order and an injunction to prevent these former employees from using Fairchild's trade secrets.

We learned that Brobeck, Phleger & Harrison would be representing Rheem and that Moses Lasky, a partner at Brobeck, would be in charge of the defense. Accordingly, we made service on Rheem and advised Lasky of our request for a temporary restraining order. Shortly

thereafter Lasky called for an appointment and he came to visit me in my office.

After his arrival, he proceeded to lecture me about how bad it was for me and Pillsbury, Madison & Sutro to be involved in what he described as a spite suit against Rheem and several of its employees, because Fairchild was upset that some of its key employees were unhappy and had left the company and that a firm of our stature shouldn't get itself involved in a case with so little substance. I said, "Well, Mose, if you'll return our trade secret manuals to us, and if you'll persuade Rheem Semiconductor not to use any of our trade secrets in the development of its products, and if you'll pay us some money for the trouble we've been put to in having to pursue all this, it may well be that we can dispose of the matter."

Well, Mose stood up, twirled around, and left in a huff, very upset with the whole meeting. But several days later he telephoned me and said, "Jack, I'm embarrassed to say that I find that these new employees of Rheem that came from Fairchild do have Fairchild Semiconductor's trade secret manuals. I'm ready to have another visit with you and see if we can dispose of this matter." [very hearty chuckle]

Hicke: He really leaped in before he had investigated very thoroughly?

Bates: Well, he may have -- yes, I think he did. I think he was trying to talk us out of the case and trying to prevent us from seeking a temporary restraining order.

Hicke: Is that a rather unusual thing to do, or is that something that you might try if you think you can persuade the opposing counsel to back off?

Bates: Well, I thought it was unusual for Mose to express opposition without having made a more complete investigation. In any event, we did get together, and he returned the trade secret manuals to us. We entered into a stipulation for an injunction, whereby they wouldn't use any of our trade secret materials in developing their products, and they paid us some money in order to take care of the time and trouble that we'd been put through in having to file the case.

There isn't any law that prevents an employee from leaving an employer; this is a free country and an employee can choose to leave or not, which is his personal prerogative. But the law prevents him from taking the property of his employer, and when the employer has developed a trade secret through the efforts of himself and his employees, then that is the property of the employer, and there the law gives a remedy to prevent employees from appropriating these trade secrets for their own benefit.

Hicke: Would this be like a manufacturing process?

Bates: Yes. Yes, that's correct.

So that matter was resolved satisfactorily. It's interesting that after that Dr. Noyce had other problems: he had some family problems, which unfortunately led to a divorce, and Tony Brown was advising him in that regard. Then several years later, Dr. Noyce decided that he had thought of something completely unique in the electronics industry, having to do with semiconductors, but not related to the kind of work that he was doing for Fairchild Semiconductor Corporation.

After reviewing the matter with Fairchild Semiconductor, he obtained that company's approval to leave the company and to embark on a project of developing what he thought would be a breakthrough in the electronics semiconductor field.

Hicke: It was the microchip?

Bates: It was the microchip. He came to us to form his new company. He was now dealing with our corporate securities people and they had discussed the project with Turner McBaine, who was then chairman of our Management Committee, because Dr. Noyce having just gone through a divorce did not have all the funds that he needed to start up his new business, pay his attorney's fees, and find a home for himself. What he wanted to do was sell enough of an interest in his new company to be able to make a down payment on a new home.

Well, some of our partners thought they'd want to help him out in this regard, and I, having gone through the Fairchild Semiconductor/Rheem Semiconductor experience and having been aware of his marital problems, just felt that he was under great pressure in dealing in such a sophisticated field. I couldn't understand how he could leave Fairchild and go into competition without relying on some of the trade secret information that he had gained from being with Fairchild Semiconductor. I was pretty busy anyway and pretty well committed financially, so I just didn't think of making any sort of investment with him.

But I must say that those partners who were less knowledgeable [both laugh] did invest with Bob and their investments turned out to be quite profitable, because that company turned out to be Intel, which is one of the very successful, early microchip companies.

Hicke: Although the investors would have had to get out before the last year or so, I think, to save their gains.



- Bates: Well, the last year or so Intel hasn't done too well. And I don't know how long my partners held their stock or whatever, but it certainly took off when it went public, and for quite a few years after that.
- Hicke: That was a case of knowing so much about a new company that you missed that one. [both laugh]
- Bates: Missed in the oil [chuckles] business and missed in the semiconductor business.

Regents of the University of California

- Bates: Another case of some interest, at least to me, involved the Regents of the University of California. The university was anxious to condemn some land near the University of California Medical Center here in San Francisco, and it brought an action against the landowner because it had been unable to negotiate a satisfactory acquisition of the property.
- Hicke: Do you know the name of the case?
- Bates: The name of the case is: The Regents of the University of California v. City Title Insurance Company, and it was filed, I believe, in 1960.\*
- Hicke: Thank you.
- Bates: I can't recall exactly how it was that the case came to me, but in any event, it ended up that I was working with Judge Thomas Cunningham, who was general counsel for the university, and John Sparrow, who was his assistant and who later became a superior court judge in Alameda County.

The property owner was represented by James Martin McGinnis, who had developed a substantial reputation as a trial lawyer. He was a very interesting character, a good lawyer, but a little too flamboyant for my consumption. [quiet chuckle]

On the other hand, I liked Jim, but I knew him well enough so that I felt obligated to watch him like a hawk. When we got ourselves involved in settlement discussions, he showed me some various drawings

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\* (In Superior Court, San Francisco) No. 521367.

by architects and renderings of a substantial medical office building that his property owner thought could be built on the property. It was with these tools that, I think, he wanted to persuade me and the university that he ought to receive a substantial amount of money for the property owner. I resisted. There was only a very small office building on the property at the time and there weren't any engineering studies, or soil tests, or for that matter approvals by the planning people of San Francisco, or anything else to support the theory that this property could be suitable for the substantial kind of an office building that he'd projected.

So we just couldn't get anywhere in settlement, and finally after a certain amount of discovery, the case was set down for jury trial in the superior court and assigned to Judge [John W.] Bussey. Preliminarily, along with the preparation of jury instructions, I, in working with Gerry Doppelt and others in the firm, had developed a pretrial memorandum and, among other things, it set out authorities for the proposition that it would be an error for a property owner in a condemnation case to offer evidence of the projected plans for his property without first laying a foundation through admissible testimony that the property could qualify for the project. He just couldn't come in with a lot of colorful renderings and drawings of what the property could be used for without first laying a proper foundation.

I anticipated a problem in trying to find an unbiased jury, because Jim McGinnis was of the school of ultimate advocacy whereby he would want to get that rendering --

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-- of this substantial office building, with marvelous views of the north San Francisco Bay from the offices, before the jury to get them thinking in very substantial figures. This is something that some trial lawyers try to do in obtaining juries. The ultimate advocates, such as Jim McGinnis, would use every tool that was available to promote his case.

I don't criticize him for that, because it was my job as a good trial lawyer for the defense to counteract it. But it was a problem that we were constantly faced with. Judges more and more were taking control of what we call the voir dire, the preliminary examination of jurors to determine their qualifications, to prevent trial lawyers spending immense amounts of time arguing their case in selecting the jury. And this rule, by that time, had started to become adopted in the federal courts. Now practically all of the voir dire of juries in federal courts is done by the judge, and the trial courts, our superior court, are more and more limiting the scope of voir dire just to cut down on all of this.

But at this time, and before Judge Bussey, there was still a rather wide latitude. I wanted to keep this in check, realizing who I was dealing with on the other side of the case. So when we were assigned to Judge Bussey's court and the courtroom was filled with prospective jurors and counsel, I told the clerk that I would like to have a visit with the judge in chambers with attorneys for both sides to go over a problem that I anticipated in obtaining the jury.

Judge Bussey acceded to my request, and we ended up in his chambers. I presented him with this pretrial memorandum and I pointed out to him that we had authorities in that memorandum to the effect that if Mr. McGinnis were to use any sort of illustration to the jury, demonstrating or purporting to demonstrate that a substantial office building could be constructed on this property which would enhance the value of the property quite substantially, that would be prejudicial error.

As I recall McGinnis didn't make any argument or indicate in any way that he had any such intention, but he didn't say much of anything in that session, to my recollection. That was the end of the session and we went back and we started in to get the jury. As time went on, all of a sudden Jim McGinnis reached under his table and pulled out this roll, and proceeded to hold it up before the jury. I immediately went around to where I could see what he was doing, and sure enough, there was this rendering of this substantial office building. I said, "Your Honor, I'm compelled at this moment to move for a mistrial, and I'm asking that the court stop all these proceedings and discharge the prospective jury that is sitting in the box at the present time, and all the prospective jurors sitting in this courtroom. This error is so prejudicial that I can't proceed any further in this litigation."

Judge Bussey said, "Very well, Mr. Bates, I'll take your motion under advisement, but I ask that you please proceed to impanel the jury and I will advise Mr. McGinnis not to make any further use of this illustration." I said, "Judge, the damage has been done. The whole courtroom is now aware of this illustration. The prejudice has been committed and I have no recourse to protect the interests of my client but to ask that there be a mistrial and that a whole new jury panel be assigned to this case." The judge said, "Well, I'll take your matter under advisement and you proceed to examine the jurors." I said, "Your honor, I'm not going to further participate in the examination of this jury. I will just await Your Honor's ruling and then we will see what steps we will take."

Well, the judge allowed Jim McGinnis to go ahead and ask a few more questions, and then he told the jurors that were in the box to return and all the prospective jurors to return to the court the next day and that he would make his ruling. All the jurors did return and those jurors that were still in the box returned to their seats in the

box and Judge Bussey came out, took the bench, and declared a mistrial. [laughs] So with that, he announced that all the jurors should return to the courtroom of the presiding judge for reassignment. I guess there must have been about thirty people involved in this. He also instructed us to return to the presiding judge for further instructions.

We went back to the presiding judge and the presiding judge -- I think it was Carl Allen -- was upset with me because here he had all these jurors, and a lot of cases going on, and he'd already dropped some cases because he didn't have sufficient jurors, and now he'd got a whole new panel of jurors [hearty laugh] for our case and he didn't have any place to put these thirty jurors that had just been released by Judge Bussey.

Hicke: He might have been upset with McGinnis for being the real cause of the problem. [both laugh]

Bates: I wish he had been, but it was my motion for a mistrial that was the main focus of frustration at the time.

Anyway, we finally got a jury and I think we went to trial in the next day or two. This time McGinnis behaved himself and, through careful handling through the rest of the trial, we finally submitted our case to the jury. They came in with a verdict which was in the range of settlement that we had been discussing. So it was a satisfactory outcome for the Regents of the University of California.

But I don't want to take anything away from Jim McGinnis. I think Jim was in an automobile accident and without any of his doing; somebody else here in San Francisco had just run an intersection and crashed into him and he was killed, and it was a very great loss because he was a good trial lawyer.

Hicke: What kind of risks were you taking when you asked for the mistrial?

Bates: The risk I was taking was that if the judge denies my motion for a mistrial it hurts my standing before the jury, because I've already got a couple of strikes against me: I've interrupted the court, I've been overruled by the court, I've insulted the plaintiff's lawyer, and if the case proceeds with him being able to put that illustration in without any foundation, without any supportive evidence, it sort of binds the judge to make every effort to let illustrations go in. It never did get into evidence because he never could lay a sufficient foundation to get it into evidence.

But if I'd lost on that round, the case would have gone to trial, there probably would have been a very substantial award to the plaintiff, and then we would have had to appeal it, and then it would have



cost the university a lot more money. They would have probably had to settle for a lot more than the ultimate jury verdict.

I think I should mention McGinnis's representation of Morse Erskine. Erskine was a very good friend of mine, still is a very good friend although I don't see him as often as I might. Morse had been charged with violating a federal statute by having misrepresented his assets to a national bank. He had gotten himself into a financial bind, he was emotionally disturbed and upset, and he had been affected by alcohol. His situation was such that he felt compelled to misrepresent the value of his assets in seeking to increase his borrowings from a national bank, which is a federal offense.

He was indicted and he was tried in the federal court before Judge [Robert] Peckham. He was represented by McGinnis, and McGinnis, realizing my close friendship with Morse, kept me informed of developments in the case. Jim McGinnis offered an instruction to Judge Peckham to put to the jury having to do with diminished capacity. If you recall, that's the same defense that was used to minimize the sentence that was imposed on that man who killed Mayor [George] Moscone; Dan White. Anyway, Jim McGinnis offered this instruction -- and this was offered before it was used as a tactic in the case involving Moscone -- and Peckham refused to give the instruction on diminished capacity. The jury found Morse guilty, and this is a felony which required Morse to go to a federal penitentiary. Jim McGinnis advised Morse to go ahead and take his sentence. This was a first offense of a man who was very emotionally disturbed, who had an excellent reputation, a brilliant background, marvelous family -- his father was Judge Herbert Erskine -- so the judge was very sympathetic in sentencing Morse, but realized that since he had been found guilty of a felony, he had to serve some time in the federal penitentiary. So he did order that he be incarcerated, I forget how long but it was several months; after that he'd then be put on probation for several years.

As I say, McGinnis advised him to go ahead and serve his sentence rather than seek a stay, pending appeal.

McGinnis thought it would be a good thing for his emotional stability to do this, because he was also suffering from rather heavy drinking, which was brought on because of his emotional problems. Furthermore, Jim advised him that he was going to go ahead and take an appeal and it might very well be reversed because of Peckham's refusal to give the diminished capacity instruction and that if Morse went ahead and completed his sentence and the case was reversed, the government couldn't go back and try him again; that would be the end of the case and he would never be disbarred because he'd served his time in prison and he'd prevailed on the appeal.

And that's exactly what happened. McGinnis did get the case reversed. Morse had finished his sentence, cured his emotional and alcohol problems, and is now back a rehabilitated citizen.

Hicke: Oh, that's a good story. A nice, happy ending to that.

Bates: I just wanted to tell you that Jim McGinnis has done some pretty good things in his career.

Melvin Belli

Bates: Let's see, in the 1960s I had been doing some libel defense work, and I took on the representation of the Curtis Publishing Company, the publisher of the Saturday Evening Post, in a case in 1964 brought by Melvin Belli.\* In his case he alleged that the Saturday Evening Post had libeled him in two articles appearing in two separate editions of the Post. The first article was written by Richard Warren Lewis and it was under the title, "Jack Ruby's Flamboyant Lawyer." The second article was under the title "The Trial of Jack Ruby" and was by Edward Linn. He contended that the first article was libelous in the way in which it described him and his dress, habits, office, and the colorful life he is said to have lived. He said that the second article was libelous in its criticism of his defense of Jack Ruby.

When I got the case, I first arranged with Allen's Press Clipping Bureau here in San Francisco to obtain all the press clippings that they had on Belli.

I should say that Jim Kirkham was assisting me, and we made arrangements to obtain information concerning all the cases in which Belli had appeared as a party, plaintiff or defendant throughout the San Francisco Bay Area. I was quite surprised to learn from all this that Belli had been sued in a number of malpractice cases which had been settled one way or another, and there were quite a few malpractice cases still pending throughout the San Francisco Bay Area.

I didn't know just how we were going to use all this mass of information that we'd managed to collect on Belli, but I knew that it would come in handy when we were taking his deposition.

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\* Belli v. Curtis Publishing Company (1972) 102 Cal.Rptr. 122.

I then worked with Jim Kirkham in preparing some interrogatories to put to Belli to set out in more detail in what respect he contended he'd been libeled in any of the writings in the issues of the Saturday Evening Post.

Then, in due course, it came time to take Mr. Belli's deposition. Belli was represented by Marvin Lewis, who was one of the leading trial lawyers of the time, and I believe that Marvin is still active here in San Francisco. I read something in the paper the other day about him being given some special recognition for his involvement with the early beginnings of BART. I think that Lewis was on the board of supervisors and was one of the very first to give substantial support -- political support -- to the idea of having the Bay Area Rapid Transit system.

In any event, it came time to take Belli's deposition. After a day or two, going through in detail with Belli all the things he contended were libelous in these articles, we were having an afternoon recess, and Belli came up to me and said, "Jack, I have to go on a television program late this afternoon and I'd like to recess early so that I can prepare myself for this television program." Then he said, "But I'll be quite ready to proceed the next day at 10 o'clock and hopefully you'll be able to complete your examination." And I said that I thought that I could, and that I'd be happy to accommodate him, but we might as well go for a few more questions before we recessed for the afternoon. He said that would be fine.

Jim Kirkham came to me and said that he thought Belli was wearing the same kind of clothes he wore when he arrived in Dallas for the first day to commence the defense of Jack Ruby. I agreed.

We went back into session to proceed with the taking of his deposition and there was just Belli, Marvin Lewis, the reporter, Jim Kirkham, and me. We commenced and I said, "Mr. Belli, I noticed that the blue coat that you're wearing has a red velvet lining. Is that the same kind of coat that you wore when you arrived in Dallas to prepare yourself for the defense of Mr. Ruby?" He took a minute, and he looked at his coat, looked at the lining, and he said, "Yes." I said, "And, Mr. Belli, those pants that you're wearing: they have sort of a cowboy cut to them with pockets that are parallel to the waist. Aren't those the same kind of pants that you were wearing when you arrived in Dallas?" He looked at his pants and he said, "Well, yes. Yes, I guess they were." I said, "Now Mr. Belli, those cowboy boots you have on, are those the same kind of boots that you wore when you arrived in Dallas and which the local newspapers said were 'fruit boots'?"

With that [very hearty chuckle], Marvin Lewis jumped to his feet and started in on a long tirade, objecting to my examination, that I

was invading Mr. Belli's rights of privacy and his constitutional prerogatives and all sorts of things that you could possibly dream of which had no bearing on anything that was going on. He finally ran out of wind. He was all flushed, and the reporter was going as fast as he could to get all this down, and he finally stopped. Belli was sitting there taking this all in and he said, "Mr. Lewis, if you are going to continue to represent me in this litigation, and if you are going to make these emotional outbursts, the least you can do is zip up your fly." [both laugh] Poor Marvin was standing up there with his fly wide open, completely embarrassed, and needless to say, at that point, the deposition was recessed to the next day.

Hicke: It sounds as if he has a sense of humor anyway.

Bates: Oh, he has a delightful sense of humor. As irritated as some people get with Belli, I've always enjoyed him. I think I'll just conclude the saga of Belli v. Curtis Publishing, and then, if I may, I would like to comment on a few of my recollections of Belli that I think are most amusing.

Hicke: That would be wonderful.

Bates: After we'd completed discovery, we put together a motion for summary judgment on the basis of the Sullivan case against New York Times\* in which, in substance, the federal courts had held and the Supreme Court had affirmed the proposition that when a publisher published something about a matter of public interest or about a public figure, someone who had put himself in the public limelight whereby he had attracted a lot of publicity, before a plaintiff could establish a liability for an alleged libelous statement, he had the burden of establishing, in opposition to a motion for summary judgment, that the statement was false and that the statement was published with knowledge of falsity or with reckless disregard for the truth, either of which would amount to actual malice.

Hicke: So in the case of a public figure the burden of proof is on that person.

Bates: That's right. The burden of proof shifts to the public figure.

We made our motion for summary judgment on two grounds: that Belli was a public figure and, on the second ground, that this was a matter of great public interest and so there couldn't be any liability because there was no proof of malice.

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\* New York Times v. Sullivan (1964) 376 U.S. 254.



As I recall, we got Judge [Robert H.] Schnacke, and it was the first libel case that he'd ever had. It was most difficult to convince him about this shifting of the burden of proof; it was very hard for him to grasp that concept. I must say it was very hard for me to grasp it originally, because it changed the whole ball game in the context of litigation as we were used to it. Summary judgment is a very harsh burden put on a moving party to establish that there is no question of fact to proceed to trial. Now here the whole burden shifts, but Schnacke granted summary judgment and the case was taken up on appeal and it was affirmed. I believe you have that citation.

Hicke: Yes, I do.\*

Bates: I was amused too, in this regard, that when the case finally was brought up for summary judgment, Mr. Belli was represented by one of his partners. Mr. Lewis was out of the case.

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Bates: During the time Judge Schnacke had the case under submission, I ran into Marvin Lewis on the street and I said, "Marvin, I notice you're no longer involved with Mel Belli's libel cases. What happened?"

He said, "Oh, Jack, Mel just doesn't understand the laws of libel."\*\* [both laughing]

Schnacke granted our motion and we were affirmed on appeal.

There are several other stories about Mel Belli that I've always found very amusing. One has to do with a suit that he brought against the San Francisco Giants and Candlestick Park. It was a suit in which he contended that he was defrauded into buying his box at Candlestick Park because it was represented that he was going to be completely comfortable, that the box was going to be heated with radiation heat, and that he need not have any concern about going to the ball games.

His complaint was he was never comfortable when he went to an evening baseball game at Candlestick Park, and he sought substantial damages for fraud and return of the money that he'd paid for his tickets. The case went to trial before a jury in the Superior Court in San Francisco, and my good friend, Mory Doyle, who is a very serious, dour but able trial lawyer, was defending the case. Mel, when he was to take the witness stand, came to the courtroom with a large

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\* Belli v. Curtis Publishing (1972) 25 Cal.App.3d 384.

\*\* See following page.

# Belli, Cepeda and the Law of Libel

Melvin Belli's libel suit against the Saturday Evening Post began here yesterday with a discussion of the relative fame of Belli and Orlando Cepeda, a renowned member of the San Francisco Giants baseball team.

In a preliminary hearing of the \$2 million suit, Superior Court Judge Joseph Karesch and Belli's attorney, Marvin E. Lewis, disagreed on fame.

Lewis and attorneys for the Curtis Publishing Company, which publishes the Post, were debating the magazine's right to comment on Belli's handling of the Jack Ruby murder trial in Dallas,

Texas, last year.

Lewis said the legal concepts of qualified privilege, under which interested parties may freely exchange unmalicious views and free comment do not protect the Post's comments on Belli. "is more of a national figure than Orlando Cepeda."

When he cited the case of Cepeda, in which a Federal judge ruled another magazine could not claim fair comment just because Cepeda was a well-known baseball player, Judge Karesch suggested mildly, "Melvin Belli is more of a national figure than Orlando Cepeda."

"What!" said Lewis, unbelievingly. "I wouldn't say

that, your honor. Orlando Cepeda is as much a national figure as Rock Hudson."

Lewis, who is also Cepeda's attorney in his still-unsettled libel suit against Look Magazine, conceded that his client Belli is "certainly a well-known, famous, able lawyer."

However, he said, "it is amazing how many hundreds of thousands of persons have never heard of Mr. Belli."

"I concede that," said Judge Karesch.

Lewis and attorney John Bates, representing the Post, then got into a discussion of

# First California Co. Settles With Birr

By DONALD K. WHITE  
*Examiner Financial Editor*

**AFTER SEVERAL MONTHS** of hammering out details, H. Theodore Birr Jr., has settled his \$500,000 suit against First California Company, it was learned yesterday.

Birr, a prominent figure on Montgomery Street for the last 32 years, was deposed as board chairman and president of the investment banking and brokerage firm last year and promptly sued both First California and the company that owns it, Pepsi-Cola United Bottlers, Inc.

Pepsi-Cola United is an outgrowth of the old Blair Holdings Corporation and has thousands of shareholders in the Bay area.

Birr left First California in September of last year after a fight with the board of directors over policy matters. In December he joined the brokerage firm of Walston and Company here as vice president.

His suit against Pepsi-Cola United and First California was based on breach of contract.

While the suit came close to being put "on calendar" in Superior Court here several times, it never was, and the final settlement was made without resorting to an open court hearing.

Terms of the settlement were approved by directors of both First California and Pepsi-Cola United within the last few weeks.

Birr's contract with First California was due to expire in 1961 and called for a salary of \$60,000 a year, participation in a profit sharing retirement plan and an option to buy 40,000 shares of what was then Blair Holdings, at \$3.68 a share.

While no details of the out of court settlement were released, it is understood Birr received a substantial lump sum on the retirement plan and the stock option. He also will receive a good sized monthly check over the next several years.

Birr was out of the city yesterday and not available for comment on the settlement, but his attorney, John B. Bates of Pillsbury, Madison and Sutro, put the final touch on the case.

"Mr. Birr's in as good a position as if he hadn't been

San Francisco  
Chronicle  
11 November 1958



raccoon coat, a portable heater, and [begins chuckling] several thermos bottles to demonstrate how he had to dress to go to a baseball game at Candlestick Park. [both laughing]

Well, it didn't take long for the jury to decide in his favor. They didn't impose any punitive damages for fraud on the city, but they did award him the verdict and he got his money back for his tickets, and some additional nominal damages. After the jury returned the verdict and the judgment was entered, he went right down to the sheriff's office and he got a levy of execution on Willie Mays, because Willie Mays was a property of the San Francisco Giants.

Right after he did that, he got a sheriff and a couple of newspaper reporters and went out and he served this levy on Willie Mays, [hearty chuckling] and so the sheriff had to pick him up and take him down and hold him as security. [both laugh] Needless to say, it made all the headlines, and I thought it was really delightful. Well, of course, shortly after that they got a stay of execution and Willie Mays was released, but it certainly was, I thought, a very amusing incident; nobody really got hurt by any of it and I think that the citizens of San Francisco thoroughly enjoyed it.

The other incident that I think is particularly amusing is this: Mel Belli just can't stand the established Bar; he just doesn't want anything to do with the American Bar Association, the San Francisco Bar, or any organized bar other than his own, which is the American Trial Lawyers Association, which is a group of plaintiffs' lawyers.

But he did attend a meeting of the American Bar, and I can't recall exactly where it was, which is really beside the point. He sent out invitations to all the attendees at the Bar meeting announcing that he was going to have a tax seminar, which he thought would be of very great interest, and he asked all the members if they wanted to attend. He hired a large convention hall, and many of the lawyers that were attending the meeting were fascinated that Belli was even there, and even more interested in what sort of a tax seminar he would be putting on; so he filled the hall. Quite a number of members of the ABA came -- I don't know whether it was 500 or 1,000, but a substantial number.

They all came in and sat down, and then he came in onto this stage above the assemblage. There was a podium there, and he said that he was pleased that he'd had such a large turnout and that he'd now like to introduce the lecturer on tax avoidance. So this short little man came out from the wings and ambled across the stage, went up to the podium, and he said, "My name is Mickey Cohen." He said, "I just got out of the federal penitentiary for tax evasion. My advice to youse guys is to pay dem taxes." [both laugh]

Hicke: End of seminar?



Bates: End of seminar. [both continue laughing]

Hicke: Oh no!

Bates: Melvin Belli said, "Ladies and gentlemen, thank you very much. That is the end of the seminar."

Hicke: That's marvelous.

The Lucky Mc Mine and Utah Construction Company

Bates: The next case of significance that I think deserves discussion involved Utah Construction & Mining Company; it subsequently became Utah International and was then later acquired by and merged into General Electric.

The case that involved me was the defense of Utah in an action brought by Walter G. Knauff and his wife on behalf of themselves and other minority shareholders of Lucky Mc Uranium.\* In this suit they contended that they did not get fair consideration for their interest in Lucky Mc when Lucky Mc was merged into Utah on the basis of one share of Utah stock for every ten shares of Lucky Mc. They also contended that there were misrepresentations by Utah in the proxy solicitation material, which induced other stockholders to tender their shares, and that they too were entitled to damages for the misrepresentations and for the fact that they received an unfair value for their shares.

The case was filed in the federal district court in Cheyenne, Wyoming, in the summer of 1962, and it was not concluded until the denial of certiorari by the United States Supreme Court in October of 1969.

During this long period, it involved a considerable amount of my time and attention. It was a most interesting case involving the history of the discovery of uranium near Riverton, Wyoming, by Neil McNeice in September of 1953. Because of McNeice's name, the company took on the name of Lucky Mc. McNeice was joined by Lowell A. Morfeld, R. Lauren Moran, a Wyoming lawyer and geologist, W. H. H. Cranmer, and his son Robert Cranmer. They needed capital to develop the uranium mine, and because of their familiarity with some of the key personnel in Utah International, they induced Utah to come in and

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\* Knauff v. Utah Construction & Mining Co. (1967) 277 F.Supp. 564.

give them some financing for an interest in the company.

It involved people throughout Wyoming and Utah where Utah Construction had a substantial involvement, as well as the men involved with Lucky Mc. Utah Construction was of the very strong belief that it had acted fairly throughout the history of its involvement with Lucky Mc and that, if anything, it had leaned over backwards to be fair to the Lucky Mc stockholders.

I became very well acquainted with all of the key personnel of Utah, as well as most of those involved with Lucky Mc. It was an interesting case from beginning to end. There were so many interests involved that practically every lawyer in Wyoming and Utah had been signed up to represent various parties in the litigation. It was a requirement of the federal district court in Wyoming that all parties before the court be represented by local counsel.

It so happened that there was a lawyer in Casper, Wyoming, who had done some work for Utah and had not yet involved himself in the litigation, so I was authorized to call Mr. [William] Wehrli and retain him as our local counsel, which I did. When I asked Mr. Wehrli whether he would represent Utah in connection with this case and be its local counsel, he said that he would do so on only one condition. I asked him what that was, and he said, "I will do it on the condition that I don't have to do any work." [chuckles]

Well, it turned out that Mr. Wehrli was a very good, practical lawyer, and despite the fact that he wouldn't involve himself with any of the details of investigations and discovery, he had to attend all sessions of the court. He was well acquainted with all the personnel of the court and he was really very valuable to me in assisting me with the actual trial of the case.

I'll never forget: we stayed at the Hitching Post Motel. There really aren't very many places that you can stay comfortably in Cheyenne, so we chose the Hitching Post. The Hitching Post had a hot room, and after each session in the court, at the end of each day, I would spend a half an hour or so with Bill Wehrli in the hot room at the Hitching Post [both laugh] and we would review the events of the day and discuss our strategy for the next day.

We had our first preliminary sessions, where we were presenting our motions having to do with discovery, motions for summary judgment and the limit of the issues and all that, in the same courthouse and in the same courtroom where the Tea Pot Dome scandal was litigated. We concluded the case some years later in the new federal courthouse that was built during the administration of John F. Kennedy.

The proceedings of the trial court from beginning to end, including the trial of the case, were handled by Judge Ewing T. Kerr, who was a very sound, very intelligent, practical judge. Of course, being that sound, practical, and intelligent, he had to rule in our favor. [chuckles]

Hicke: Well, I hope so. [both laugh]

Bates: Otherwise I might have had a different opinion of him. But there were many anxious moments during the trial.

Hicke: Why did it drag on so long? And was it for a huge amount of damages?

Bates: Oh, yes. Millions of dollars. And if the plaintiffs had been successful, as time went on, it would have been worth an awful lot more money to them.

It took a long time because the discovery involved a complete evaluation of Utah Construction Company. I was having a hard time trying to develop from the officers of Utah just how valuable Utah was.

Hicke: That company was founded in 1900. [quiet chuckle] You must have had a lot of work to do.

Bates: Well, that's right. It's publicly held. The financial officer was Orville Dykstra, and he was a very able, very intelligent individual, but he was quite unsure as to whether his knowledge of the values was actually valid, and he was very reluctant to give his opinion or the opinion of the company on any values that might in any way be deemed inflated values. But after a considerable amount of time and effort, I was finally able to persuade Dykstra to produce the evidence that he had on these rather substantial values, which really demonstrated that the shareholders of Lucky Mc, who received the one share of Utah for each ten shares of their stock, were treated most fairly in the exchange.

It turned out that the value of Utah stock was considerably more than the value of Lucky Mc, and as time went on and supplies of uranium got more plentiful and the demand fell off, having the shares of stock in Utah turned out to be extremely more valuable than if the shareholders had just been left with their Lucky Mc shares.

Hicke: Utah was eventually acquired by Broken Hill Properties in Australia, I believe.

Bates: Yes. But that was after the acquisition by General Electric. That was some way down the line.

Hicke: Will these uranium mine stockholders still have some of their stock?

Bates: Well, if they held on, if they didn't sell, then they would have enjoyed another substantial profit when Utah was acquired by General Electric, and then the sale by General Electric to Broken Hill was another benefit to all stockholders of General Electric.

I could spend an awful lot of time going through all the developments in that litigation and talking about all the people that were involved. It was the first time that Ed Littlefield had ever testified. Ed was, I believe, even at that time taking on the role of chief executive officer of the company. As it ended up, he gave a very good deposition and he also gave very good testimony before Judge Kerr.

Ed was nervous before his deposition. I tried to ease his concerns. I said, "Ed, be sure you understand the question; and if you don't, ask him to rephrase it; and remember, there's no time running in making your response." Later, he told me that he always remembered my advice and that it helped him a lot.

Allen Christensen was very heavily involved in the whole matter, but his commitments were such that he could not personally appear in the trial. His testimony given at his deposition was read in at the trial and, I think, was received very well by Judge Kerr.

There were many other key witnesses, including, of course, Orville Dykstra and Moran, the Cranmers, and others. I was going to say that the array of lawyers was also very interesting. Edgar Schoen from Chicago was really the lead lawyer for the plaintiffs, and he was a very tenacious and sometimes objectionable advocate, but he was certainly most persistent. We spent an awful lot of time in discovery. Our discovery took us all over the Midwest; we even had sessions in Colorado Springs where the Will Rogers shrine is. We stayed in that famous, big, beautiful hotel, the Broadmoor, and we spent probably a week there taking depositions of local personnel. We spent a lot of time in Salt Lake City taking testimony, and even in Phoenix, Arizona. Schoen was just determined that he had one of the biggest cases that had ever been presented.\*

Actually the hired gun in the litigation -- the lawyer that actually presented their case during the trial and took the lead -- was Glenn Hanni of Strong & Hanni in Salt Lake City. He was a real bulldog, a good lawyer. I'd say they were all good lawyers, they were

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\* He wrote a book: The Dowdy Reign of Power Politics by Edgar J. Schoen, Exposition Press, New York 1972. "To us who madly with each other fuss; yet never hold a quarrel long, because we know we both are wrong."



just misdirected in this litigation [quiet chuckle]; they just never seemed to get the picture. I kept telling them they really didn't have anything in the case; I told them that from the very inception of the case. I even asked them to meet with Ed Littlefield and me and other principals of Utah, including Lauren Moran, and we just let our hair down with them and went over all the facts and revealed everything we knew about our case to try to persuade them they really didn't have anything worthy of litigation, but we couldn't talk them out of it. They were just dedicated to going the whole route, and they did. They went to the court of appeal and then petitioned the Supreme Court of the United States.

Hicke: Now why did it get all the way to the Supreme Court?

Bates: Well, it didn't. It got to the court of appeals, but it didn't go further than that. They petitioned for certiorari but that was denied. So the Supreme Court never granted them a hearing.

And Judge Kerr ruled right down the line for us that there was substantial value, that the minority shares of Lucky Mc received more than fair value and there were no misrepresentations.

Hicke: Do you happen to know how that case came to PM&S?

Bates: Oh, we had been lawyers for Utah for quite some time. For many years prior to this litigation, we had been very much involved with Utah, a very good and loyal client, and I had handled other cases for Utah prior to that time. They had always been a very good client with which to work.

I spent a lot of time in Salt Lake City and I have to tell you about one little interesting vignette -- I guess you might call it that. We were heavily involved in discovery in Salt Lake. I was staying in a motel there. On occasion I had stayed in that marvelous old hotel on the square.

Hicke: That's the Hotel Utah, right on the square there?

Bates: That's right. The one that looks right out at the angel Moroni; she's the big, golden angel there on top of the Mormon Tabernacle; a wonderful old hotel.

You couldn't order a drink in Salt Lake City; you had to go to a liquor store and buy your liquor. They carry their liquor around in violin cases [both laugh] that were designed to carry two bottles of liquor; so you could carry a bottle of scotch and a bottle of gin and put them in these violin cases and off you'd go.

Hicke: Just on my way to choir practice. [quiet chuckle]

Bates: That's right.

In any event, we usually had our violin cases when we went out for dinner. We were very busy, but it happened to be duck season -- it had just begun -- and I was working very closely with Seaton Prince, who represented one of the parties defendant in the litigation. He lived in Salt Lake, a very nice gentleman, good lawyer, principal partner of Mulliner, Prince & Magnum at that time. He asked me if I'd like to go duck hunting. I said, "Gee, Seaton, I don't have a gun, I don't have a license, I don't have any clothes." He said, "Don't worry about that, I'll get some clothes for you. You don't have to do any wading or anything, we'll just go out in a boat. It won't be any problem. I'll fix you up. I'll pick you up here at the motel at 5 o'clock in the morning." And I said, "Well, gee, don't you want to get out there before daybreak?" He said, "That's no problem; we'll be out there in plenty of time."

So I got up early, got a little breakfast, and I was out there waiting for him, and sure enough, there he was, right on time.

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Bates: I got in his car and off we went to his club, and much to my surprise, we were there within twenty minutes or so. Then we got in a boat and off we went down these canals, and we ended up out in what was fresh water, the headwaters of the Great Salt Lake. Fresh water with tules all around. We went out in this boat and threw out our decoys, and then we hid the boat, and we shot right from a blind adjacent to the boat. The duck hunting was just fabulous. Within an hour or two we both had our limits. We filled up the boat and jumped in and off we went back to the clubhouse. He was going at top speed for his out-board motor and the boat, and all of a sudden we hit one of these wooden boxes that regulated the height of the water. If he'd hit it the right way and turned promptly, nothing would have happened, but he was going too fast, and all of a sudden we ended up on the ditch. The boat had turned over. We had decoys and ducks and guns and everything all over the place. But there were no injuries. We were both laughing about our misfortune, and Seaton Prince confessed that he didn't usually drive the boat; he usually had somebody else drive it for him. [both laugh]

Hicke: And of course you weren't prepared for any such drenching.

Bates: No. Nothing like that. But I'll tell you, we got all our things collected and no damage had been done, no injuries had been sustained, and it was just a great experience. I'll just never forget it.

There was another interesting thing that happened during the course of this litigation. We arrived in Cheyenne for the commence-

ment of the trial. It was on May 1st, May Day, and there was a blizzard in Wyoming -- just a freezing, cold blizzard -- snow, hail, sleet; it was just awful. We struggled our way into the Hitching Post. I'd been there enough before to have my heaviest clothes and gloves, but we were all still freezing to death. We got into the Hitching Post. The storm had subsided, there was snow all over the place, and Bill Wehrli drove in to meet us for breakfast before we went to court for the first day of trial. While having breakfast, I said, "Gee, Bill, here it is the first of May, my gosh, what goes on around here in Wyoming? When is spring?" He said, "Oh, we had that a long time ago." [both laugh]

Hicke: This was summer.

Bates: So I tell you, all sorts of interesting things went on in that case.

I tried to get home on weekends as often as I could, and Allan Littman was anxious to get me back here because he wanted me to testify in a case that he had going in the federal district court. Allan had moved for a special separate trial in a case in which Joe Alioto represented the plaintiff; it was a motion picture theater antitrust case against one of our clients who was one of the major motion picture producers and distributors.

Jack Sutro and I had been involved in the settlement of that case. The issue that Allan was trying was whether or not the case had in fact been settled. Apparently Joe Alioto's client was unhappy with the settlement and was contending that there had been no settlement and that the case was not settled and it should proceed to trial.

I guess what was going on was that Joe Alioto's client was trying to get some more money out of us to dispose of the case and Allan Littman had made a motion to have a separate trial on the validity of this settlement. Both Jack Sutro and I had been quite involved with the settlement negotiations and our testimony was important on the fact that the settlement was consummated, that releases had been signed and delivered.

So I came back from my heavy involvement in this Utah litigation and it was the very next day that Allan was going to put me on the stand. I talked with Allan as soon as I got back and said, "Look Allan, I've got to get prepared. This is going to be very difficult for me." Allan said, "I really don't care what you have to say. I've got this case under control and your testimony is not going to be that significant."

Well, Jack Sutro and I went out to court and we sat there in the courtroom. Joe Alioto was going to put us on the stand as adverse witnesses. The first witness he called was Jack, and Sutro got up

there, and he'd been spending days getting himself ready to testify in the case. He sat up there and he had all these answers very well set out and gave his answers and was on the stand for maybe a half an hour or so. Then I was called and I did the very best I could in Joe's vigorous cross-examination.

I thought everything had come off all right, particularly [chuckle] considering the pressures I was under at the time. And I'll never forget, we got in the cab to come back to the office and were sitting there in the cab together and I said, "Jack, I thought you did very well in your testimony," expecting that he'd reciprocate with the same compliment to me. And he said to me, "Well, thank you. I think Alioto got out of you what he wanted." [deep chuckle]

Hicke: Ouch!

Bates: Ouch, yes. Anyway, happily, Allan Littman won the case and got a judgment on the fact of the settlement of the case. At least my testimony did not lose the case. [both laugh] But I'll never forget that little episode.

Anyway, that concludes the saga of Utah.

United Parcel Service, Ford Motor Company, and Justice Tom Clark

Bates: Another case of considerable importance that I was involved with was United Parcel Service of America: Edward J. Marnell, et al. v. United Parcel Service of America.\* It was filed in the United States District Court in September of 1964. This was an antitrust case filed by Michael Khourie and his law firm in which he alleged that United Parcel Service, through unlawful acquisitions and combinations, had achieved a monopoly of the parcel delivery business in the greater San Francisco Bay Area, and this had deprived Edward Marnell of the opportunity of competing successfully for retail parcel deliveries.

Marnell was operating under the name of Finesse Delivery Service. The case involved the entire history of United Parcel Service. It was filed in 1964 and the court rendered its final opinion in December of 1971.

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\* (U.S. District Court, Northern District of California 1971)  
No. 42778.



Hicke: This was another lengthy case going on at the same time that the Utah case was going on and a number of other things?

Bates: Yes. That's right, a number of other things. There were always a lot of cases going on that required my involvement, which were my principal responsibility. I never really realized that at the time, until I looked back [quiet chuckle] and saw what was going on. Fortunately I had some very capable lawyers working with me who could take the responsibility while I was involved with other cases. Allan Littman was my right-hand man in the United Parcel Service litigation and took on a considerable amount of the responsibilities for the preparation of the case.

But it was a fascinating case in that it did involve the entire history of the development of United Parcel Service, and [James E.] Jim Casey was in his 80s at the time of the trial. He was one of our principal witnesses, and he started United Parcel Service by delivering parcels with his bicycle in Seattle. When you look at United Parcel Service today, which is probably the second biggest deliverer of parcels in the United States of America and really close to the volume of the United States Post Office, it's an incredible achievement in the lifetime of one man.

There was a considerable amount of discovery in this case. Michael Khourie is a very dedicated and determined trial lawyer, and I must say that he really gave this case every effort he could. We were determined to do the very best we could for United Parcel Service in defending this case.

Unfortunately the history of UPS in the San Francisco Bay Area was quite a bit different than the history of the involvement of UPS in other major metropolitan areas, because Jim Casey's business had grown considerably in Seattle, to the point where he was making deliveries of practically all the retail parcels in Seattle. He gained access into the San Francisco market by the acquisition of a delivery company and subsequently acquired some other companies, and it was these acquisitions that created a problem for us in the defense of the charge that he had combined with others to achieve this monopoly of the retail package delivery business in the San Francisco Bay Area.

The alternative would have been for United Parcel Service to come in and open its own business and go into competition with these other companies, which would undoubtedly have achieved the same result. It was probably through the benevolence of Jim Casey that he achieved his dominance in a friendly way, rather than in an antagonistic and ruthlessly competitive way, but his acquisitions created a problem for us in defending the charges of violating the antitrust laws.

Finesse Delivery, under the guidance of Mr. Marnell, had considerable problems of its own. One of my contentions was that the entire issue should actually have been resolved before the Public Utilities Commission rather than through an antitrust case in the federal district court, and this would have been one of our arguments on appeal if the case had not been disposed of by way of settlement after the judge's opinion.

[Interview continued: July 7, 1986]##

Hicke: I know that you have been looking over your files rather extensively, and you have more to say about the United Parcel Service case and another case that you want to discuss with it.

Bates: Yes. To continue with the case of Marnell (Finesse Delivery Service) v. United Parcel Service, as I said, in this case the plaintiff contended that United Parcel Service monopolized the relevant market for retail package deliveries in this Greater San Francisco Bay Area. Allan Littman and several other associates in our firm and I were working very closely with Bernard Segal and Irving Segal of Philadelphia. Bernard Segal had for some time been the general counsel of United Parcel Service and was on its board of directors. His brother Irving had been more actively involved with the day-to-day legal problems of United Parcel Service and had participated in many proceedings before various public utility commissions throughout the United States.

As I said, this antitrust case was of great significance to United Parcel Service because it was the first time that they had been faced with the challenge that they had exercised antitrust violations in obtaining their dominance in the retail package delivery business. So what happened to this case here in San Francisco would have a very important impact on how United Parcel Service conducted itself in other metropolitan areas and whether it had such problems that it could suffer adversely from any decision that went against it here in the federal district court in San Francisco.

Hicke: Would it also affect the growth of other competitive firms?

Bates: Oh yes, oh yes. Most definitely. I was reminded on many occasions that this was considered the most important case that United Parcel Service had ever been called upon to defend, which of course put additional pressures on me and the other lawyers here in San Francisco who were working on the case with me. It was not easy dealing with Bernie Segal and his brother Irving. They followed every maneuver we made very carefully, and although we got along very well and worked well together, it was quite difficult at times to have another trial lawyer second-guessing almost every procedure we went through in the litigation.

We were in discovery in the case for quite some time, taking depositions both here in San Francisco and outside the state. As a matter of fact, Jim Casey was hospitalized for a time under observation in Seattle, and his deposition was taken in Seattle by Michael Khourie and went on for a number of days. Although Jim Casey, was in his 80s, he was still quite alert and quite vigorous despite the fact that he was hospitalized. He was, as I said, hospitalized for tests and observation. He was subsequently released and came down and appeared as one of the key witnesses at the trial of the case and actively participated with us in the early days of the trial of the case when he was preparing himself to testify. Then he went back about his business. He was still a very active chairman of United Parcel Service.

After we had finished all the pretrial discovery and submitted pretrial statements and the like, we learned that Justice Tom Clark, who had formerly been a justice of the United States Supreme Court, was going to be assigned to be presiding judge at the trial of our case. Justice Clark resigned from the Supreme Court when his son Ramsey was appointed to be attorney general. Justice Clark believed that it would not be appropriate for him to sit on the Supreme Court with his son in that capacity. Furthermore, Justice Clark was approaching 80. I think he thought it was time for him to step down. Otherwise it may well have been that his son Ramsey would not have taken the appointment and become attorney general. But I never heard him say this and I think that many of us just surmised that this was probably the case.

We all had a very high regard for Justice Clark. He was a close friend of Jack Sutro's and Jack Sutro spoke very well of Tom Clark. So we felt quite comfortable and most interested in the fact that we would be presenting the case to Justice Clark.

Also, I learned that Justice Clark had been assigned another case in which I was very deeply involved and that was Cope v. Ford Motor Company.\* That case was filed prior to the United Parcel Service case and was set to go to trial before the United Parcel Service case. The Cope case was an action brought by Julian Caplan on behalf of Mr. and Mrs. Cope, having to do with a Ford dealership in Willows, California. In that case, the plaintiffs contended that the Ford Motor Company had acted in bad faith in its dealings with the Cope dealership, that it had coerced the Copes into trying to stay in business and take more automobiles in an area that Ford should have known could not profitably sustain a Ford dealership. The plaintiffs contended that Ford

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\* (In U.S. District Court for the Northern District of California, 1970) No. C-47414-TCC



had induced them to take on the dealership on the representation that if they really got in trouble, Ford would cooperate with them in arranging a sale of the dealership and they wouldn't lose any money.

Hicke: None of that was on paper?

Bates: No, that was not on paper. They contended this was part of a fraudulent scheme to induce them to take on a dealership point in Willows which had not been profitable in the past and which they contended Ford should have known was going to be very difficult to be made profitable and that Ford misled them and, in effect, defrauded them into taking on the dealership. And then the plaintiffs contended that Ford had breached its inducements to take on the dealership and didn't assist them in finding another buyer. They did lose money in trying to dispose of the dealership.

As I said, Julian Caplan represented the plaintiffs in this case, and he was the same lawyer who worked with Clif Hildebrand in the Raleigh Leach case.\* In any event, by 1970 we had completed our discovery and were ready to go to trial in that case and I knew that right on the heels of the disposition of the Cope case would come the United Parcel Service case.

Hicke: These were both going to be held before Justice Clark?

Bates: That's right.

Hicke: You told me earlier that you thought the most interesting cases were being sort of picked out for him to judge.

Bates: Well, that's what we were led to believe. I felt that it was quite challenging to have the opportunity of trying two cases before Justice Clark. And also I was interested in the fact that the presiding and other judges of our federal district court had chosen two cases in which I was involved to assign to Justice Clark. Anyway, we had finished our pretrials and were ready to go to trial, and did go to trial before Judge Clark.

I think I should say by way of background that my general approach to any case that came into the office was to try to evaluate the case as thoroughly and as responsibly as we could to determine whether the case was really a dangerous case insofar as the client was concerned. In other words, as a practical matter, we wanted to explore whatever legal deficiencies there might be in the plaintiff's case early on. By the same token, we wanted to find out whether we

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\* Leach v. Ford Motor Company (supra) (1960) 189 F.Supp. 349.



had any weaknesses in our potential defense of the case as soon as possible, so that we could sit down with a client and go over the prospects for the litigation, as we saw them at that time, as to whether this was a case that could be won, as to whether it was a dangerous case in establishing some bad law for the client that would make it difficult for it to do business in the future, and whether there was a probability of a recovery by the plaintiff.

Then we wanted to try our best to evaluate the economic risks involved and weigh them against the expense of defending the case. If we felt that the case was defensible, then we would want to explore with the client just how hard they wanted to litigate the case, so that they could evaluate whether they wanted to try for a nominal settlement rather than go ahead and spend a lot of money litigating the case, even though we felt that the case could be won.

Hicke: Could I just interrupt a minute to ask: did you have some cases which you felt were dangerous cases, which you advised the client not to pursue?

Bates: Oh, yes. Sometimes our early evaluation of the case would change as the discovery developed. I mentioned this, I think, in the Hecht litigation, where as we got into discovery, and particularly after taking the testimony of the salesman, the picture changed.

In that case, we learned from the testimony that the case had suddenly taken on a dangerous aspect, because their principal witness, we believed, was not telling the truth. Now that's something you can't evaluate at the outset, because at the outset you believe that all your principal witnesses have told your client the truth. But sometimes it comes out in discovery that the witness has really not been telling the truth.

Hicke: What if it goes the other way and you start out thinking this is going to be a dangerous case, the client doesn't have a good case, but the client wishes to pursue it anyway. Has it ever happened that you found eventually that it was a good case?

Bates: [pauses] I can't really bring to mind any case in which that has happened. Most of the cases where we've found a weakness, we've worked with the client and disposed of the case as sensibly as we could. I don't know of any case where that kind of information has come to light, because usually right at the outset of the case, you look at all the facts and you talk to all the witnesses and then you take the substance of what you've got and evaluate the case. It is rare that you would find a situation where your factual situation has improved.

The Cope case, on reflection, had some aspects of that. We thought in the Cope case that the case was defensible because of our

early interviews with the witnesses and the people involved. We believed that the Copes knew that going into this area of Willows was very questionable. The former dealer had not done well, and we believed the Copes were well aware of that and that they were able to get this dealership in Willows for a relatively nominal price because the dealership had not done well.

We believed, in talking to our witnesses, that there hadn't been any inducements made to the Copes. Always, as we would go through development of a case for trial, in dealing with the opposing counsel, whenever it seemed appropriate, we would explore the possibility of settlement, so that the client would know the economics of the case as we went along.

Hicke: That is, how much he could possibly settle for?

Bates: That's correct. Then we would determine how this was going to impact on company policy and relations with other dealers in the future, because clients like Ford always know that whatever happens to them in any case, particularly if it's adverse to them, the other dealerships are going to know about it. It is going to impact on the way they do business with all their dealers throughout the country.

Hicke: Who in Ford were you dealing with?

Bates: Well, I dealt primarily with the general counsel at Ford. At that time the lawyer who was in charge of major litigation was Bob Scott. It was Bob Scott who I first worked with in the Raleigh Leach litigation, which I mentioned earlier.

Anyway, we went to trial in the Cope case. The case appeared to us to be going rather well for Ford, but we did have some trouble with several of our witnesses and particularly Mr. [A. W.] Avery, who did not come across very well before the jury. But something happened in the testimony of Mrs. Cope that turned out to be very helpful to our defense. She took care of the books for the Cope dealership. She testified from statements she had made at the time, particularly of the year-end performance of the dealership, which indicated that the dealership had been profitable. I believe she was trying to show a profit to help sell the dealership. We had reason to believe that the dealership had not been profitable from studies that our accountant had made of the books of the dealership.

So after Mrs. Cope had finished her testimony, I called her accountant, who happened to be in Sacramento, and went over her testimony with him. He said that he did not believe that could be so. When we put him on the stand, he was able to bring out that Mrs. Cope had in fact manufactured the year-end summary to show a profitability which in fact did not exist. This was quite important to us, because

it demonstrated that the Copes should have known early on that they were trying to deal in a very difficult area, in a difficult market, that they could have taken more immediate steps to work out some arrangement where they might have been able to dispose of the dealership for a better price, rather than trying to hang in there and bargain for a better price when the history of the dealership just didn't warrant it. I was able subsequently to get Mrs. Cope's admission from the stand that she had not been truthful. Needless to say, that helped us quite a bit before the jury.

You have to be very careful when you are trying to discredit a principal in litigation, particularly if it is a woman who is obviously working very hard to make a success of a business with her husband. There is also the problem, if you are not careful with something like that, that it might boomerang. The same kind of problem that I had in the Fisher litigation.

Hicke: The jury might become sympathetic toward her?

Bates: That's right. She was doing her very best trying to create an accounting that would assist her husband. You have to be quite careful how you handle those things. Fortunately, the jury agreed with us and came in with a defense verdict.

Hicke: That was certainly an interesting case.

Bates: That was interesting. I recall that before the jury was instructed and when we were going over the proposed instructions among the attorneys for both sides and Justice Clark, both Caplan and I were concerned that Justice Clark was not allowing us to voice our objections to the other's proposed instructions. Justice Clark wanted to instruct on the good faith aspects of the case in one way in which neither I nor Caplan agreed. So we made arrangements for the court reporter to present our objections for the record. We did this outside the presence of Justice Clark. We wanted to preserve the record but we didn't want to burden him with our concerns. Furthermore, we were concerned that he might not ever let us get our objections properly into the record.

In any event, we did this and subsequently Justice Clark called us into his chambers and reprimanded us for doing this. Fortunately we were both being equally reprimanded, so it didn't make much difference to us. I guess it gave Clark some satisfaction. But at least we preserved our positions on the record. I guess Justice Clark had some comfort in the fact that he reprimanded us, but frankly, he was wrong in what he'd done. We had every right to preserve our objections.

Hicke: Have you ever done that before or is that a usual procedure?

Bates: No, I had never had the occasion to do that before. I guess it was just because this whole experience of sitting as the presiding judge in the trial of a case was relatively new to Justice Clark, or else he'd forgotten what procedures he should follow. But he was very attentive and very conscientious. Anyway, that case having been successfully concluded and Justice Clark having been complimentary of the jury and the attorneys, I felt quite comfortable in anticipating that he would be the presiding judge at our very important United Parcel Service case, which was to come up very shortly.

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Bates: A trial is always a very burdensome ordeal on the part of the trial lawyer, and particularly on the trial lawyer that has the principal responsibility for presenting his client's case. You live the case day and night. You think about it, even in your sleep. When you get up in the morning you think about the case and you're constantly reviewing your anticipated examination of witnesses or how the case is going. You're always thinking about how to present the final argument. In my own mind, I am preparing the final argument almost from the first day of the trial. I'm always thinking about it. I am always making notes to myself as to significant points that I should recall and put into the final argument.

Hicke: That's your goal: the final argument?

Bates: That's right. That's where you want to get. It completely takes over your whole life. You are really at it all the time, even though you are not in the office, you're not in the courtroom. You never get away from the case. It kind of lives with you. Even after its over, you think about it. Then after a while, it all completely goes and you're into some other case.

Hicke: Do you get an inspiration in the middle of the night sometimes?

Bates: Oh, sure.

Hicke: Or at odd moments when you are driving down the highway or that kind of thing?

Bates: Oh yes. That's right. So when you finish a case, particularly if you've been successful, it is a celebration. You want to rest for a while and take a breath, you know, relax before you get involved in the very next case. It so happened that the Cope case was finishing up about the time that duck season was about to commence. [laughter]

Hicke: Timely.



Bates: But we were also busily engaged in preparing for the defense of United Parcel Service in this very important antitrust case. It was coming up right on the heels of the Cope case. On one occasion I participated in some pretrial meeting with Justice Tom Clark while I was in the course of having to try the Cope case. Justice Clark was pushing the United Parcel Service case to trial on a date that would conflict completely with the opening of the duck season, [laughter] which I didn't learn about until after we finished the Cope trial.

Hicke: You didn't have time to think about ducks.

Bates: No. But it was such a marvelous thing to finish the Cope trial and then be able to look forward to the opening of duck season. Unless you are crazy enough to be a duck hunter, you can't appreciate what comes over a duck hunter with the anticipation of the opening of duck season. You have to be born as a duck hunter, I guess. My father hunted ducks and fished. We never hunted deer or other four-legged animals. Our hunting was just upland game and ducks. Love to trout fish, but that's another story. I can't appreciate duck hunting unless I've got a dog, a retriever. My wife, Nancy, and I usually have two Labradors: one young one and one old one.

Hicke: You train them yourself?

Bates. Yes. Well, we do now. We didn't originally. We had trainers, particularly when we only had one Labrador. I think at this stage we only had one. We now have two. We sort of train them ourselves and the young one learns from the older Lab. But when you are sitting out there in the duck blind, if you are thinking about whether you really should be doing this, you can look at those Labradors and see how intense they are and how excited and how vitally interested they are in watching those ducks. They are marvelous hunters too. Then when you finally bag one and the duck falls and you see that Labrador charge out there as fast as he can go to get that duck before it gets away, and he brings it back to you and hands it to you in your blind, you realize that the Lord wouldn't have endowed this dog with all these marvelous abilities if there hadn't been something proper about it. Furthermore, duck is pretty good eating.

Hicke: Yes, I do enjoy the eating. [laughter]

Bates: Practically all the duck hunters I know are good sportsmen, and if it weren't for them, we probably wouldn't have any ducks. Because they are the ones that give a lot of time, effort, and money to support ducks and try to sustain the duck population through Ducks Unlimited and through various other organizations which all good sportsmen support.

Anyway, I was amused in looking through the correspondence file in the Cope case. I guess I had shared my concern about the setting of the trial of the United Parcel Service case with Douglas Cutler, who had been sent out by Bob Scott to assist me in the defense of the Cope case. I wrote him on September 17, 1970. Among other things, I said, "Just this morning I had a telephone conversation with Mr. Justice Clark. He said that he had been thinking about the opening of duck season on Saturday, October 17, the weekend before our next trial commences. He said that in view of this, he would like to put the commencement of the trial over to Monday, the 26th. He hoped that this would be agreeable with me and the others. Needless to say I am delighted with this continuance. Maybe it is an indication that the Justice does have some compassion for the tribulations of the trial lawyer." Needless to say, I didn't send a copy of that to United Parcel Service. I didn't want them to think that I put duck hunting above the defense of United Parcel Service. [laughter]

Hicke: Was Justice Clark a duck hunter also, or did he just know that you were?

Bates: He was a good friend of Jack Sutro's, and I imagine that Jack Sutro had something to do with it, because even though Jack wasn't involved in the United Parcel Service case, he would, on occasion, have Justice and Mrs. Clark at his house for dinner. I imagine he shared my concern about not being able to be at the opening of duck season.

Hicke: And you did make the opening?

Bates: I did make the opening.

Hicke: Happy ending to that story.

Bates: And then we prepared ourselves to proceed with the defense of the United Parcel Service litigation. As I said earlier, this was a very important case to United Parcel Service. It was a case that we thought was defensible, but which we recognized would be difficult. We were always looking for a possibility of settlement that would be within an economic range that would not establish an adverse precedent for United Parcel Service.

But Michael Khourie is a very determined, dedicated advocate, and I believe that this was one of those cases where he believed that it would be better to proceed to a trial of the case rather than to consider any sort of nominal settlement. I think he sensed that it was an important case and that whether he prevailed or not, he would establish himself as a recognized plaintiff's antitrust lawyer, which, in his mind, would bring him up to the category of Joseph Alioto and some of the other plaintiff's antitrust lawyers.

We had spent several years in pretrial discovery and, as I say, now the issues had been set forth, the pretrial statements had been made, and the pretrial order had been entered. The case was ready to go to trial.

Hicke: You spent several years in discovery because there were so many people involved or because they were all hard to get hold of?

Bates: The complaint was filed in September of 1964 and the case went to trial in 1970. So there were actually six years of pretrial proceedings, depositions, and discovery. Along the way we had made several motions, including a motion for summary judgment based on the ground that the Public Utilities Commission of the State of California really had primary jurisdiction of the controversy involved in litigation, and that if United Parcel Service was exercising monopoly power in San Francisco, this was something that could be taken care of by the Public Utilities Commission. We were not able to persuade federal Judge Sweigert of our point of view. We, however, did reserve the point and could quite properly bring it up before the trial judge at the time of trial. I don't know whether I talked about the history of the United Parcel Service, did I?

Hicke: Yes. You got up to just where they had acquired a delivery company in the Bay Area.

Bates: I refreshed my recollection from Justice Clark's memorandum opinion, which he filed in October of 1971. I saw from that, that Jim Casey commenced the delivery of parcels in Seattle in 1907. He moved to Oakland in 1919, to Los Angeles in 1922, Pasadena 1924, and then to San Francisco in 1925. By the time of trial, United Parcel Service had taken on parcel delivery service in San Diego, Portland, New York City, Cincinnati, Philadelphia, Milwaukee, and through other metropolitan areas throughout the United States, ending up with Denver in 1969.

As we now know, United Parcel Service has expanded manyfold since 1970 and is now delivering nationwide and even, I believe, internationally and is probably the second largest carrier after the United States mails. It's really a fascinating story, realizing that Jim Casey started delivering retail packages in Seattle on a bicycle and within his lifetime had developed the company into a national wholesale and retail parcel delivery system. It is just unmatched in its efficiency and economics. It's an amazing story of what an individual can accomplish in the United States.

It all has been brought to mind by these very elaborate ceremonies rededicating the Statue of Liberty, which I thought was very well done and which I think brought home to all of us what can be accomplished by a free individual here in the United States. I think it is

also interesting to note that everything good about America seemed to have been presented to us on this Fourth of July, and immediately prior to and over the weekend, the Dow Jones average reached its highest point in history. I heard on the radio today that Dow Jones had dropped some sixty points today, Monday, July 7, [1986] which I think is the biggest drop in history. So it will be interesting to see where we go from here.\*

It's the great American way that brought about the case of Marnell v. United Parcel Service and the defense of this antitrust case, because Jim Casey had been so successful. In this case Marnell contended that United Parcel Service had, by illegal means, obtained a monopoly of the retail parcel delivery service business in the San Francisco Bay Area. Our defense was that he had not acquired this dominance in the retail package delivery business by any violations of the antitrust laws and that it was just a consequence of the efficiencies and abilities of United Parcel Service that put them in the dominant position that they were in.

Furthermore, we contended that there were many ways by which parcels were delivered by retail stores, including the customer himself, and there were many stores which still made their own deliveries; that there was really no control over the market; and furthermore, if there were any complaints in this area, that those complaints should properly be presented to the Public Utilities Commission.

Hicke: Did you have to show that other businesses were free to enter the industry if they wanted to?

Bates: Well, that's what the case was all about. The plaintiff's theory was that a competitor just could not get into this market because United Parcel Service controlled it so tightly and so broadly. I don't want to go through all of the findings in Justice Clark's memorandum opinion, but he was quite concerned about the dominance of United Parcel Service in all phases of parcel delivery, and particularly in the wholesale business, which was national in scope and becoming international. He found the profits from that business could be used to bolster up any economic problems that United Parcel Service was having in its retail parcel delivery business; so that it could, in reality, have competitive problems in achieving dominance of retail parcel deliveries in a particular market which it could suffer and sustain because of the profits that it was making on the whole business.

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\* On October 19, 1987 the Dow suffered its biggest drop in history -- down over 500 points.



It would be very tough for a competitor to come in and try to undercut United Parcel Service. With volume came efficiency of scale, and that would make it very difficult for a competitor to come into the market. These are things that I am saying now which, of course, I only thought at the time and never mentioned except in the confidence of my client. The issue has long since passed now.

Justice Clark's memorandum opinion is forty-four pages long. He gave a very careful review of all the evidence. He finally, on page 43, after determining that United Parcel Service had not acquired its dominance of the market just by historical means, said, "The court has considered the damages and finds that the plaintiff has failed to meet the required burden of proof in that its damage study is founded on certain assumptions that the court cannot use as established fact upon which to base any reasonable estimate of damage, other than loss of capital investment, loans, debts and the like in the sum of \$125,000, and it is so found."

After going over the entire situation with the Segals, it was concluded that we should make a serious attempt to settle the case rather than take it up on appeal. So Irving Segal was delegated by United Parcel Service to negotiate with Michael Khourie, which he did, and a settlement was achieved. The case was dismissed with prejudice. The judgment was not entered and the memorandum of opinion of Justice Clark did not create any substantial problems for United Parcel Service in any other metropolitan areas or other areas in which United Parcel Service was doing business.

Both Allan Littman and I, particularly, were upset, because at the last moment and after I had spent a lot of time and effort in preparing for oral argument, Irving Segal announced that he was going to make the final argument before Justice Clark. I don't know whether the result would have been any different if I had made the final argument. But Allan believed rather strongly, as did our partner, Noble Gregory, that Justice Clark was presiding at the trial to hear from local San Francisco attorneys, and we believed that it was not good trial tactics for a Philadelphia lawyer to take over the courtroom and present the final argument. It was uncomfortable to me that Irving Segal did this, but I cannot say that the result would have been any different.

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Bates: However, the result was not so disastrous that it worked any substantial harm to United Parcel Service. Of course, it did help to establish Michael Khourie as a recognized plaintiff's antitrust lawyer. He has done quite well as such since then and has become a fellow member of the American College of Trial Lawyers. Mike had not tried very many cases up to that point. Tom Clark seemed to lean over backwards

in helping Mike on those occasions where the judge felt that he had not properly presented a matter.

I was always of the impression that if the trial judge was trying to help the other side, this demonstrated a partiality to my side of the case, because he was doing everything he could to preserve in the record that there hadn't been any error in presenting the evidence that would have led to a grounds for appeal. I always felt that way, and when a judge instructed a jury, if the judge was inclined to use the other side's instructions and use very few of the instructions I submitted, I felt that he was probably doing that because he wanted to preserve the record on appeal insofar as my client was concerned. Of course, it didn't always work out that way, but most of the time it did.

Shortly after the judge wrote his opinion and the case had been settled, I was at a meeting of the American College of Trial Lawyers in Florida at Miami Beach. I went out for a swim. I saw this head bobbing up and down in the ocean. I got closer to that head and it turned out to be Justice Tom Clark. Now off the bench and back to informalities of friendship, I, of course, said hello to Tom and he recognized me right away. I said, "Gee, you know, Tom, you made it very difficult for us in that case. Your verdict was kind of a compromise for us and our client chose not to take an appeal and we settled the matter." Clark chuckled and said, "I had that in mind when I wrote that opinion." [laughter]

I recall some very amusing incidents in the course of the trial of that case which are worth mentioning. This case was just tried to the court without a jury. Both Michael Khourie and I stipulated that that could be the situation. I felt quite comfortable with that stipulation, having just finished this Cope trial before Justice Clark. I think that Mike was quite comfortable with it, because he looked on Tom Clark as a Democrat and a former antitrust prosecutor. I think he thought that he would benefit from having the case just tried to Justice Tom Clark.

Even though I felt very comfortable with Clark, I know that the Segal firm had reservations about waiving a jury. I just don't know what a jury would have done with this case. I think on balance it was probably best that we did waive a jury and try the case to Justice Clark. If we'd been before a jury, Justice Clark could not have helped Mike Khourie in the presentation of his case. We may have done better before a jury.

Anyway, trying the case to Justice Clark, he made it very difficult for all of us, because he would come out here and he'd be in session for a week or two and then he would go off and he would sit on some other court in some other metropolitan area in the United States.

Or he would go off and sit on a court of appeal and then he would come back. Then we would all have to pick up the case where we left off and resume. So it made it difficult for us.

I remember on one occasion when Jim Casey was on the witness stand, we reached a point in the testimony where it seemed appropriate that we have a recess, and furthermore, it was about 7 o'clock in the evening. I suggested to Justice Clark that this might be a good time to take a recess. Clark looked at Jim Casey and said, "Well, Mr. Casey, are you tired? Do you want to take a recess?" Here is this octogenarian asking another octogenarian about being tired. Jim Casey said, "No, I'm not tired, Judge, are you?" And the judge said, "No, I feel fine." I said, "But Your Honor, I'm exhausted. I've been on my feet all day long and I would appreciate it if we could take a recess." [laughter] Anyway, he was most charitable, and he decided to recess the case until the next morning at 9 o'clock.

When he was here he really worked us hard and long hours. I recall that he even had us going to trial on Memorial Day holiday, and we were the only ones in the federal courthouse on this Memorial Day holiday. We were in that transition period when some businesses would recognize the holiday and some would not. Of course, all the federal courts were closed, the post office and all federal functions were closed in San Francisco, but there was still a lot of commercial activity.

As usual, I had this big, old Cadillac sedan and I'd pick up Allan Littman and whatever files we were going to use that day and took them out to the courthouse, and I'd usually park in the garage right across from the federal court building, but that day it was closed. There wasn't much traffic. I parked on the street, which was normally a tow-away after a certain hour, which I think was 5 o'clock or thereabouts. But figuring it was a holiday, I didn't give it any thought.

We went to trial, and as usual we didn't get through until 6 or 7 o'clock at night. Allan and I packed up all our stuff to go out and get my car, and it was gone. Well, it turned out that my car had been towed away. Of course, I was really upset about this whole thing. I was upset and mad at Justice Tom Clark, who worked us so hard. And it took hours to get my car. It was a terrible ordeal. They had it down in the basement of some garage. It was just awful. I got home about midnight. Then I had to get ready to go to trial the first thing the next day. I was ready to throttle Tom Clark for that.

Well, I think that finishes the saga of United Parcel Service. Time to take a recess.

Hicke: Okay, before our cars get towed away. [laughter]

U. S. Tank Car Corporation

[Interview continued: June 23, 1986]##

Hicke: I know that you have been reviewing the files for the U.S. Tank Car case.\* I think that was 1975. Maybe we could start with that today.

Bates: Actually, I think it was 1974.

Hicke: Oh. It probably began the year before the date I found?

Bates: No, it was in the end of July in 1974. What happened was that I received a call from Paul Dubow, who was the lawyer with Dean Witter Reynolds who was in charge of litigation. He told me that one of their account executives had been responsible for monitoring the sale of tank cars by United States Tank Car Corporation to customers of Dean Witter. This was a program that was initiated by a young man named [Bernard] Dohrmann, out of Seattle. Gibson, Dunn & Crutcher had been in charge of the prospectus and of getting the matter registered through various blue sky filings in states throughout the United States. The program was to sell these tank cars so that each investor would become an owner of a tank car; then he, as owner of the tank car, could lease the tank car to railroad companies.

Hicke: Each investor would just own one complete tank car?

Bates: Yes. He might buy it with his family, with his wife and relatives, but he would own the tank car. It was a fairly substantial investment. But then he could depreciate it, lease it, and get certain tax benefits. Tank cars were in short supply at the time, so Dean Witter thought this would be a good opportunity for its customers.

Hicke: It was something like \$29,000 for the tank cars?

Bates: Yes. That's correct. As I say, the program was being run by this fellow Dohrmann out of Seattle. Arnie Hoffman, who was in charge of monitoring this program for Dean Witter Reynolds, was concerned about whether or not these tank cars were being satisfactorily manufactured and delivered.

Arnie Hoffman had a relative, his ex-father-in-law, a man named Rick Lloyd -- I am refreshing my memory from the file here -- who also managed a tank car investment program. He said something to Hoffman

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\* Securities and Exchange Commission v. U.S. Tank Car Corporation, (U.S. District Court, Northern California, No. C-74-1914-LJHB 1974).



that led him to believe that the tank cars may not have been on line and actually sold to investors, even though investors had received delivery papers and a model of the tank car inscribed with their names. He decided that he had better go to Seattle and visit the offices there and find out what was going on

He and Jim Connelly of Dean Witter went to Seattle on July 26, 1974, and had a visit with Dohrmann.

Mr. Dohrmann was a young man, in his early 30s; he was sitting there in front of this map of the United States. He had pinpoints on the map indicating where various tank cars were located. He also had indications as to whether cars were being manufactured. He had charts showing the number of cars that had been ordered, the number of cars manufactured and to be manufactured. It was quite an elaborate display. But there was just something that bothered our friend Arnie Hoffman about this whole presentation. He was concerned about it.

He started asking about what manufacturers were actually involved and when cars were to be delivered. Dohrmann indicated that he was becoming upset with Hoffman's questions, so he pressed his speaker phone and asked his secretary to get a certain individual at a manufacturing facility, and gave the number to call. A few minutes later the secretary announced that this gentleman was on the line. Dohrmann asked him how the cars were coming along and when to expect deliveries. The person said that the cars were coming along fine. They had already delivered a certain number of cars and others were in the process of being delivered. That was the end of the conversation. He thanked him very much and then he nodded to Arnie Hoffman as if that was quite adequate, wasn't it? But there was still something that bothered Hoffman.

Hicke: Did Hoffman talk to the person or did he just hear the conversation?

Bates: No, he was just sitting there listening to the conversation that was coming through the speaker phone. He was still troubled by it. He finished the meeting and left. He made a note of the person that Dohrmann had spoken to and of the number and the manufacturing company that this man was working for. When he left he walked away from the office, and several blocks later he went into a place that had a pay telephone. He looked up the phone number and the address of the manufacturing facility. He found that it was different than the phone number that Dohrmann had called.

In any event, he called this manufacturing facility and asked for this man. They said that they were sorry, that the gentleman that he named had left some weeks before and was no longer with the company. That really bothered Hoffman. He thought he had better get busy and do something about this.

He talked to Tom Pitcher of Gibson, Dunn & Crutcher, who had done the work on the prospectus and done the work on the blue sky filings in the various states. He was concerned in his conversation with Pitcher, because Pitcher indicated that he had talked to Dohrmann and that the manufacturers had not fulfilled their obligations to Dohrmann and that there may not yet have been any cars delivered. Well, this was very upsetting to Hoffman, because he knew that there had been customers of Dean Witter that actually paid U.S. Tank Car for these tank cars and actually received certificates of ownership along with models of the freight cars. He was quite agitated and reported all this to the management of Dean Witter Reynolds, and then I was called.

I talked with Bill Mailliard, one of our partners, and we immediately arranged for Bill to get on a plane and get back East and report all this to the Securities and Exchange Commission. We wanted to make sure that the Securities and Exchange Commission realized what importance we put on this matter. We quickly retained Manny Cohen, who had been head of the Securities and Exchange Commission for a while. In any event, he was now in private practice. We retained him to go in with Bill, so we would get the attention of the proper people at the Commission. Bill did that. They agreed to get themselves immediately involved, and they did. We worked very closely with the SEC in putting the whole story together.

It turned out that it was a fact that these cars had not been delivered. But fortunately, most of the money was still in various banks in escrow, awaiting certificates of delivery from the manufacturing facilities. We were fortunate in being able to keep all the funds in these escrow accounts. A receiver was appointed. The SEC got very much involved and filed an action here in the federal district court. We were able to keep the funds in these escrow accounts with the banks, and eventually the funds were returned to the investors. There was something over \$3 million involved in investments at that time. Dean Witter thought very seriously of authorizing us to bring an action against Gibson, Dunn & Crutcher, because they should have known that the program wasn't going well. They should have found out more about it. They should have been more alert to the failings of this fellow Dohrmann. But fortunately all but about \$300,000 or so was obtained from various depositories and returned to the investors.

Hicke: What did he actually have in mind? It's funny that he didn't take the money and run, but he sat in this office with this front.

Bates: Well, he couldn't get the money because the money had to go into escrow accounts, pending delivery of the tank cars to the investors.

Hicke: Was he actually then going to deliver them at some later date?

Bates: That was his program. He just didn't follow through. He just didn't get the job done. He hadn't worked out a satisfactory arrangement with the manufacturers.

Hicke: He didn't really intend to abscond or anything like that?

Bates: No, he didn't really. He had just fallen down on all his commitments. He just hadn't followed through. He just didn't have his program together and he had lied to the investors.

Hicke: Were the investors up in arms?

Bates: Oh yes! The file is full of letters from investors threatening lawsuits, and there were some lawsuits that were actually filed. But fortunately, we got practically all the money back and were able to satisfy the investors.

There was a final recapitulation of this in another file, which I don't have in front of me, which had to do with Gibson, Dunn & Crutcher, because I went to Los Angeles and interviewed the partners of Gibson, Dunn & Crutcher. After considerable correspondence and pulling and hauling, I was able to get their files and their accountings on the matter. It turned out that Dean Witter was out of pocket about \$300,000, including our attorneys' fees, which amounted to approximately \$100,000. They decided that it really wasn't worth it to bring an action against Gibson, Dunn & Crutcher. So they didn't. Gibson, Dunn & Crutcher was very self-righteous about the whole thing and denied that they failed to do anything they should have done in apprehending this. That's the way that little saga ended.

Hicke: That actually went to trial?

Bates: No. We got hold of all the funds and there wasn't anything to try, because Dohrmann had just fallen down on his job, and U.S. Tank Cars just hadn't made it. Subsequently, Dohrmann was tried and found guilty of various frauds. The prosecution was initiated by the Securities and Exchange Commission.

Hicke: That's what I thought.

Bates: He was found guilty and I think he served some time, and then he completed his sentence on probation, whatever that was. I heard just the other day from Arnold Hoffman, who is now in the securities business on his own. He is no longer with Dean Witter Reynolds. But I still stay in contact with him. He is, I think, a very intelligent individual. In any event, he told me that he had learned recently that Dohrmann was back in business. He was now in the business of selling jewelry or something else of the kind. I don't know just what it was. [laughter].

Hicke: You didn't rush out to invest? [laughter]

Bates: No. I didn't rush out to invest. I hope he's learned his lesson and that he's got his act under control this time.

Hicke: This is really amazing, that he could get that far with that.

Bates: Well it is, but I think it's a credit to Arnie Hoffman that he was alert enough to think that there might be something wrong here and follow it up and initiate this direct confrontation with Dohrmann. Then for some reason or other, have his suspicions still there and then follow through and make the investigation that he did. It finally and quickly resulted in us being able to get control of those funds.

Hicke: You could certainly speculate a little bit about coincidence, couldn't you, because his father-in-law, who was in this business, gave him some kind of clue. And the chances of that happening certainly don't seem to be great.

Bates: Yes. I think it's a demonstration of how fast the law can move, too, when there is a problem of that kind. We always look on the legal system as being very cumbersome and slow, but here, we had these funds under control within a matter of just a few days. I think a lot of credit goes to Bill Mailliard, who really got right on this and went back East and got to work with the Securities and Exchange Commission, and to all the rest of them that were involved. Eugene Garfinkle represented the receiver, and he was very cooperative and very efficient in everything he did. And the staff and the people involved in the Securities and Exchange Commission all reacted very promptly. So it shows that we can really put our system to work rather quickly and satisfactorily if we all work together.

Hicke: And have a good result too.\*

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\* On July 20, 1987 the San Francisco Chronicle printed an article about Dohrmann in its Business Extra Section. The headline read "New Venture for Two-Time Loser" and the article began, "Marin County businessman Bernhard (Bernie) Dohrmann spent five months in prison for securities fraud, and later served as a top executive of a diamond company that went bankrupt in 1982. Can he finally find happiness and respectability as the head of a financial-planning network? Maybe not."



Cerrito v. Time, Inc.\*

[Interview continued: July 9, 1986]##

Hicke: You indicated that the next case you'd like to talk about is Cerrito v. Time, Inc.

Bates: Yes, that was a libel action filed in our federal district court by Joseph Cerrito. Cerrito was a Ford dealer in Los Gatos. In the suit he claimed that he had been libeled by an article appearing in Life published by Time-Life, Inc., in which he had been identified as a leader of the Mafia family in Northern California. He alleged that he was a reputable automobile dealer, that he had a fine family and a good reputation -- one of his sons had fought in World War II, another one had fought in Korea -- and that this accusation was doing very serious damage to him, to his reputation, to his family and to his ability to work effectively as a Ford dealer.

The article was written by Sandy Smith, who was an independent reporter who had specialized in trying to expose organized crime for some period of years. The article had a map of the United States and identified all the leaders of the Mafia throughout the United States, and specifically Joseph Cerrito as the leader of the Mafia in Northern California. I had been doing some libel work at the time, and had become quite closely involved with Harold Medina, who was a senior partner of Cravath, Swaine & Moore in New York City, and who was responsible for the defense of all the libel litigation that was brought against Time or Life.

He and I worked closely together. In the way of background, Harold came out here and filled me in on the work that had been done to develop this story. The Time-Life organization had a substantial team of knowledgeable people who had thoroughly reviewed the article and verified the substance of the information that had been mentioned by Sandy Smith.

Hicke: This was before it was published?

Bates: Before it was published. Sandy Smith would not reveal the sources of much of his critical information because once a source was revealed, if it were revealed publicly, then that person could be killed by the Mafia. There are many, many examples of that. Some of these, I note, have been referred to in the opinion of federal Judge [George B.]

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\* 449 F.2d 306 (1971); also 302 F.Supp. 1071 (1969). Trial Court opinion by Judge Harris.

Harris, who was the presiding judge in charge of this case here in the federal district court in San Francisco. I assume you have a citation to the case [supra].

It was pretty gruesome stuff. All this was developed in the course of our discovery; because we wanted to be in a position to be able to persuade the court that Sandy Smith should not be called upon to reveal his sources; that if he were, and if he had to give his sources, he would refuse to do so, and if necessary, he'd go to jail in contempt of court before he'd give up those sources. So it boiled down to an argument of protecting a right of free speech, because if the law did not protect a person from having to give up his sources in a situation of this kind, it would completely suppress the opportunity to expose the Mafia. You'd be in fear of ever writing about them if you had to reveal the sources, because the sources wouldn't allow themselves to be revealed. They know that it could mean death.

Hicke: Was this the first case that had been tried where a reporter tried to protect his sources?

Bates: No. There'd been other cases, but that wasn't the main focus of our concern in this case. It never became important, and I'll get to that in a minute.

The law of libel at that time had developed from the case of Sullivan v. New York Times.<sup>\*</sup> The rule simply stated was that if the subject involved a figure or a matter of public concern, then in order for a plaintiff to recover against a publisher in a libel action, he had the burden of establishing, with convincing clarity, that the statements were false and that they were made with actual malice: namely, the statements were made either with knowledge of falsity or with reckless disregard for the truth, which is a heavy burden for a plaintiff to have to meet. The Sullivan case involved a public figure and it was questionable as to what was meant by "a matter of public concern."

Now, he has to meet that burden of proof if the defendant moves for summary judgment and sets forth facts sufficient to demonstrate that the plaintiff is a public figure or the subject matter involves an issue of "public or general concern." In some instances you could prove both. In this instance, Cerrito argued that he was not a public figure, that Time and Life were the ones that brought him into the public interest domain.

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<sup>\*</sup> New York Times Co. v. Sullivan (1964) 376 U.S. 254.

However, there was very little question -- it was just an accepted fact -- that organized crime, in particular the Mafia, was a matter of great public interest and concern. But the courts had not yet clarified the nature and extent of the "public concern" defense; so we didn't want to proceed to present our motion for summary judgment until we had obtained as much discovery as possible by taking the depositions of the individuals who had been identified as leaders of the Mafia and any others who were importantly involved with the Mafia.

Before we made our motion for summary judgment, we wanted to build as strong and broad a record as we could. We realized that we were on the edge of developing law; so we wanted to get all we could before we made our motion for summary judgment.

We organized a team throughout the country, including, of course, Harold Medina, me and the lawyers at our firm, and lawyers in New York, New Jersey, Illinois, Arizona, Mississippi, Texas and Florida to assist and participate in the taking of these depositions. Bill Hundley, who had been special counsel to the congressional committee on organized crime, was retained by Harold Medina to assist us in the taking of these depositions. He was most helpful and most knowledgeable with respect to the organized crime problem.

Early on, I met with my namesake -- but no relative -- Charles Bates, who was head of the FBI in San Francisco. He was most anxious to cooperate in our efforts because he saw an opportunity to make use of some government evidence that the government would never be able to use in a criminal prosecution. The FBI had tapes of meetings at the California Cheese Company in San Jose where Joseph Cerrito presided, and Angelo Marino, one of the principals of the California Cheese Company, was also among the top echelon of the Mafia here in Northern California. It was all centered in the San Jose/Santa Clara County area.

Hicke: And the cheese company was involved, or their headquarters?

Bates: No, they had these meetings in the basement of the cheese company and the FBI was able to get a wiretap in there. They had wiretaps of these meetings, which were fascinating.

Hicke: Did you hear some of those?

Bates: Oh yes, and a lot of them were transcribed. But if they were seeking a criminal case against Joseph Cerrito and Marino for whatever criminal activities they were involved in, they couldn't use those tapes because they had been obtained illegally. At the time they got them, they were not illegal, but the law had changed and now there was serious question as to whether they could ever use the tapes. But we could use that information in order to impeach the witnesses in a civil trial. So it was very helpful.

I remember one very amusing situation, although this whole subject matter is so gruesome it's hard to classify anything as amusing, but to me this one was. Peter Misuraca was the principal hit man for Cerrito's organization. According to highly reliable confidential sources, Misuraca was working at Harold's Club in Reno, Nevada, using the name "Peter Mayo." One night Harold Smith, Sr., who had been drinking heavily, asked Misuraca in the presence of Smith's wife, Lois, if Misuraca would be willing to take care of someone for him. Misuraca told Smith to think about it and see him in the morning when he was sober. The next day Smith, again in the presence of his wife, offered Misuraca \$100,000 to kill his stepmother so that he could be sure of getting control of Harold's Club. Misuraca accepted the contract, but later on Smith contacted him and told him the deal was off and that the family matter had been straightened out.

According to the code of the Cosa Nostra, once a contract has been made it must be paid even though the contracting party has called off the job. In March of 1956, Misuraca and another member of Cerrito's group went to Reno in an attempt to collect the money from Smith, but without success.

Misuraca had killed two men for Harold Smith prior to 1954 and Smith was with Misuraca when he disposed of one of the bodies near Carson City. Even though these killings were held over Smith's head, Misuraca was unsuccessful in collecting the \$100,000. Cerrito instructed another member of his "family," Frank Sorce, to accompany Misuraca to Reno and make a deal with Smith. The fact that Smith was welching on the deal was becoming known to the other members throughout the Mafia community and it was causing embarrassment to Cerrito that he was unable to force Smith to pay off.

Misuraca and Sorce went to Reno and met with Guy Lent and Ray Smith, a brother of Harold Smith. Ray Smith offered Misuraca a check in the amount of \$82,000, but Misuraca refused to take anything but cash and the negotiations ended. There were meetings in 1961 and 1962 to either recover the money or kill Harold Smith, but nothing happened.

I took Misuraca's deposition in Martinez, accompanied by Harold Medina and Jack Sutro, Jr. I was standing out on the sidewalk waiting for Misuraca to arrive and I saw this man walking down the street. He kind of looked like a misplaced Frankenstein monster. He was about six foot five and wore a dark suit and he looked just like a member of the Mafia ought to look, and particularly someone by the name of Misuraca. I didn't know whether to wait [hearty chuckle] there or run into the office. But I waited; he was moving rather slowly. He finally got there and I introduced myself. He acknowledged that he was Peter Misuraca, and I said, "Well, follow me," we went in, and I took his deposition.



What these people would do was either lie or take the Fifth Amendment. There was very little they could tell the truth about without exposing themselves to criminal charges. Misuraca decided to lie, so among other things, I got into the story of Harold Smith. But I didn't do it right off. I asked Misuraca if he'd ever been to Harold's Club in Reno. He said, "Oh yes, I was up there." The questioning took longer than this but this was the substance of it, and yes, he'd been there. I asked, "What did you do up there?" He said, "Well, I played slot machines -- nickel, incidentally." He flatly denied any conversations with Harold Smith, Ray Smith, Frank Sorce about money or anything else. It was just a series of lies.

But he said enough that he involved himself with all these other key people such as Angelo Marino and Joseph Cerrito and others. I mean, he admitted at least he knew them. But that's about as far as it went.

Funny thing is, after we finished his deposition, he got up, and young Jack Sutro was busily taking notes throughout the deposition and assisting me with the taking of the testimony, and he went by him. As he walked by Jack he whispered in his ear, then he went out the door. I said goodbye and thanked him for having appeared and one thing and another. Then I asked Jack Sutro, "What was that all about?" Jack said, "I don't know. He leaned over and he said, 'You sonofabitch' [heartly laughter] and walked out of the room." I don't know why he picked on young Jack Sutro. [more laughter]

Hicke: If I were him, I think I'd look around behind me from time to time for a few weeks after that. [both chuckle]

Bates: Well, the FBI and Harold Medina and all the others told us that we didn't have to be concerned for our own personal safety, that they didn't know of any instance where the Mafia had killed any prosecuting lawyers or defense lawyers or any other lawyers involved in litigation; they just killed potential adverse witnesses.

Hicke: They didn't think you'd start the precedent?

Bates: That's right, they thought we were free of risk. [both chuckle]

Hicke: Easy enough for them to say.

Bates: Well, anyway, among others, I took the deposition, of course, of Joe Cerrito, and he just chose to deny anything, any involvement. Angelo Marino pleaded the Fifth Amendment. You couldn't get anything out of him except his name and address and that he was connected with the California Cheese Company, and that was it. Since that deposition was taken, the Marinos have been involved in all sorts of nefarious activities not having anything to do with the issues involved in our case.

That was after the Cerrito case, well after it. There was a lot in the newspapers about the Marinos trying to kill somebody and putting them in the trunk of an automobile, leaving them for dead. Somehow or other he attracted some attention and got out, and then there was a big criminal prosecution.

If you're ever driving down Highway 101 just after it intersects with 17, about three or four-five miles down from that intersection, you look over to the right, you'll see the California Cheese Company.  
[both laugh]

Hicke: And it's still there and going strong?

Bates: It's still there. [continued laughter] I don't know how they do it.

Well anyway, we finally concluded we'd got enough discovery.

Hicke: Are you going to tell any more stories about getting discovery?

Bates: No. There were similar stories but --

Hicke: Because I think that must have been pretty interesting.

Bates: Oh, it was, it was. These depositions were going on all over the country, but I didn't personally participate, for example, in the testimony of Joseph Columbo, Carlo Gambino, or Gerardo Catina and many other known members of Cosa Nostra throughout the nation. But I did take the testimony of Alex Camarata, Stefano Zoccoli, James Lanza, Angelo Marino, Emmanuel Figlia, Dominic Anzelone, Philip Morici, and others. They were all fascinating, terrible characters.

Hicke: Were they all identified by Sandy Smith, or how did you get their names?

Bates: Many of them had been identified by Sandy Smith but others became known to us through FBI investigations. We were getting their testimony just to have it, to get their whole story as best we could.

Hicke: And did you get anything out of any of the rest of them?

Bates: No, no admissions of any kind. I mean, either they lied or they took the Fifth Amendment.

Typical of how they testified is as follows: [written example]

Angelo Marino, the owner of the California Cheese Company:

Q. State your name for the record.

A. Angelo Marino.

Q. Your address.

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Your employment.

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Do you know Joseph Cerrito?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Do you have any connection with the California Cheese Company?

A. I refuse to answer on the grounds it may tend to incriminate me.

Alex Camarata:

Q. Where were you born?

A. I refuse to answer as this may tend to incriminate me.

Q. Are you related to Peter Misuraca?

A. I refuse to answer as this may tend to incriminate me.

We had ourselves in pretty good shape now to be able to establish without much difficulty that these people were all involved with the Mafia. We had them all set up now with their lying so that we could impeach them at the time of trial and be able to use the information that the FBI had obtained in cross-examining these witnesses, which I know the FBI was most anxious to do.

In other words, they would have preferred that we not move for summary judgment and that we go through a trial. But that would have been a pretty courageous thing for Time-Life to do, although they spent an awful lot of money in discovery, taking all these depositions and getting ready. We couldn't really take great comfort in our ability to persuade the judge that he ought to grant summary judgment, because we'd have a hard time convincing him that Cerrito was a public figure. He was just an automobile dealer in Los Gatos. The judge might have felt that we're the ones -- that Time-Life were the ones -- that made a public figure out of him. And the public interest protection, I will say, had really not been that thoroughly crystalized; it

hadn't been dealt with by the Supreme Court of the United States. The law was developing as we were in the process of discovery. Then, fortunately, when we made our motion for summary judgment there were a couple of cases that had been decided which were quite helpful.

One was Rosenbloom v. Metromedia, Inc.,\* having to do with a man who ran a newspaper and magazine distributorship outlet in New York. He was also selling pornographic literature and the like. It was in that connection that he was mentioned in an article about selling pornographic literature. Even though he wasn't a public official or a public figure, the court concluded that the subject matter had enough importance to the people of the country, as the court put it, so that the subject matter gave the publisher the protection of a summary judgment challenge, having the plaintiff have to meet this burden of proof that the statements were false or made with reckless disregard or falsity. So it was just a developing area of the law.

Hicke: So this was a precedent-setting case?

Bates: Our case, I would say, was on the heels of the beginning of the precedent-setting cases. United Medical was one of the first.\*\* Then ours became another precedent, in due time, with the opinion of the Ninth Circuit Court of Appeals. We made the motion for summary judgment. I have the highest regard for Judge Harris, who was chief judge for our federal district court. He had a very difficult time sympathizing with our argument. We're all used to the general rule that on summary judgment, the moving party has the burden of convincing the court that there isn't any question of fact for a jury to try. And that's a pretty heavy burden on a party moving for summary judgment.

Now, suddenly, for the first time in Judge Harris's experience, we're trying to persuade him that "Here the ball game is different, Your Honor. Here the burden shifts to the party opposing the motion for summary judgment," and it was not easy. He took the matter under submission for quite some time, which was unlike Judge Harris. Some of our judges on the federal district court will take cases under submission, or did at that time, for undue lengths of time, but Harris was fairly prompt. But this one really bothered him.

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\* (1971) 403 U.S. 29.

\*\* United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc. (1969) 404 F.2d 706.



Bates: He finally ruled in our favor. The case was appealed to the Court of Appeals for the Ninth Circuit and the court of appeals affirmed, so Cerrito became a landmark case.

Hicke: Well, I just have a couple of questions.

Bates: Sure.

Hicke: What did Cerrito hope to gain by all this?

Bates: Oh, well, he wanted to clear his name.

Hicke: But did he really think he could?

Bates: Well, I don't know what went through his mind but I think he had no alternative. I mean, it was a fact that he was a very reputable automobile dealer in Los Gatos, and nobody ever identified him as a head of the Cosa Nostra until the Time-Life article came out. None of his friends knew he had any connection with the Mafia -- I mean his public friends, his social friends, the other automobile dealers, his salesmen, his staff. They had no idea he was connected with the Mafia. They are very secretive about their involvement with the Mafia. It's a religion to them, it's a code, it's a very tight-knit, very secret, clandestine family that only operates under cover, and they're very good at it -- they're real professionals.

He did have two sons, and, as I recall, one was a doctor, and they both had fought in wars -- one in World War II and the other one in Korea. It was a very good, solid family, for all appearances; everyone in the area believed they were a good, solid Italian family. So he really had no recourse but to file a libel action to try to save his reputation.

I don't know what happened to him after that. You know, these cases come and go and you don't follow up unless circumstances just bring you back or the publicity is such that you catch something. I really don't know what became of Cerrito or his family. He was a very nice guy, it's just that he was a head of the Mafia. [hearty chuckle] Amazing group and they go on, as we know.

Hicke: Well, the other thing I wanted to ask was this: you pointed out that the discovery involved rather large expenditures of both time and money, and I was wondering, who made the decision to go ahead with this? Would this be Time's?

Bates: It would be Time-Life, sure. They made the decision. Well, you see, I don't think they could see any other recourse but to prepare thoroughly to be ready to go to trial and be able to establish the truth of what was said in these articles. That's what we were preparing to

do. If we hadn't received summary judgment, we would have expedited the case to trial. It would have been a very interesting trial. The FBI, I think, is very sorry [chuckles] we weren't able to carry the case to trial. But if we'd gone to trial, it would have lasted a long time.

Hicke: Did you contact the FBI or did they hear about the case and contact you, or how did that work?

Bates: As I recall, I think we did. We went and talked with the FBI and they were quite happy to talk to us.

I don't want to intimate that Joe Alioto was any way involved as a member of the Mafia, but according to the FBI, his name appeared all the time in connection with these people. I guess he, being a good Italian, had a lot of Italian friends and it's no sin for a lawyer to represent an alleged member of the Mafia. But he had a lot of contacts with them.

Hicke: Had PM&S done other work for Time-Life?

Bates: No libel cases until after the Cerrito case. I did a lot more work for Time-Life, handled a lot of cases.

Hicke: Mostly libel?

Bates: Yes, all libel cases. Jack Sutro, Jr. was working with me. Then Jack, who was in cases that I had been involved with originally, had taken more and more responsibility. Harold Medina then subsequently reached retirement and a younger partner, Schwarz -- what's the toy store?

Hicke: F.A.O. Schwarz.

Bates: Yes. Well, he was the son and a good lawyer and was quite knowledgeable in a lot of defense work. He and Jack Sutro worked together in defending Time-Life in the case involving articles exposing Synanon. I was involved in that litigation at the outset, but the subject matter of Synanon had involved Time-Life quite extensively, and Schwarz was quite knowledgeable, so it became apparent that he would probably be taking the lead and they wouldn't need me, in the litigation as well as Jack Sutro, Jr.

Those Synanon people were quite difficult and dangerous. They didn't have any rules about not harrassing lawyers. That was a very difficult case, difficult for Jack, difficult for his family, but we finally prevailed. As I recall, we received some costs and attorneys' fees on the ground that the suit was groundless. I believe we ended up recovering a fairly good sum from Synanon for having put us to the

trouble. That was the case where the article had to do with the rattlesnake that was found in the man's post box down in Southern California. There were a lot of gruesome things that went on with Synanon people. Jack Sutro, Jr., is more knowledgeable of that than I am.

After the Cerrito case, I was involved in a lot of libel cases for Time, and none of them went to trial. Time-Life is very proud of the fact that they'd never lost a libel case and they'd never paid anything other than perhaps a small amount as a nuisance settlement. They fought very hard to protect their integrity with honest reporting.

Hicke: You fought hard also.

Bates: I fought hard also, sure. We had many other articles and cases that involved me. I could get out a list of them, but I don't know whether it's all that significant.

Hicke: Were you the first one that they came to at PM&S, do you think? I'm trying to --

Bates: Trying to figure out how I got into it? I think so. I don't think that anybody had had much experience in libel defense work, and I think they came to the firm. I can't recall whether they first called me or called one of the other partners. I think that they called Harold Medina of the Cravath firm -- we had a good working relationship with the Cravath firm -- and I think Harold felt whoever he called in the first instance, he'd have to educate as to the laws of libel and the procedural ramifications and all that.

So, I'm fairly sure it was Harold Medina who called and I probably ended up with the case because of my defense of the Saturday Evening Post in the Belli libel case.

Hicke: Can you elaborate a little bit about the relationship with Cravath?

Bates: Well, I think it probably emanated from working with the oil companies. I think Francis Kirkham is more intimately involved with the history of that relationship than perhaps anybody in the firm. I know that Marshall Madison was quite involved, but Francis Kirkham would be the only living partner who, I think, could recall how we got so closely involved.

Hicke: Okay, that would be a good question to ask him about. I'll do that.

National BankAmericard

Bates: I think the next case of some significance that I was involved in had to do with National BankAmericard.\* We were representing National BankAmericard and the Bank of America, although National BankAmericard, Inc., was independent from the Bank of America. Of course, it was the company that conceived of and issued the bank card.

Hicke: The first credit card or one of the first?

Bates: Yes, I believe this was the first one; Mastercard came along later. Francis Kirkham had a lot to do with laying the legal groundwork to proceed with the bank card. He worked very closely with Dee W. Hock, who was president of National BankAmericard. Dee Hock was a very intelligent, sensitive, responsive young man but very difficult to deal with. I was working with Francis Kirkham and his son Jim, and since I had the principal responsibility for the litigation, I would go over to have a meeting with Dee Hock in the Bank of America building. He always made it a point for us to cool our heels for twenty minutes or a half an hour or so. He was very unusual, intelligent, but almost a psychotic type. He is, I think, now retired from the company, but he deserves a lot of credit for what was done. He was difficult to deal with, I must say.

In any event, the case started with Worthen Bank & Trust Company in Little Rock, Arkansas -- a substantial bank in Arkansas -- filing an action against BankAmericard for alleged violation of the antitrust laws because BankAmericard, in its by-laws and by its actions, would not sign up a bank in the BankAmericard system if it took on a competing card. The Worthen Bank wanted to take on Mastercard as well as the BankAmericard and contended that BankAmericard's by-law was in violation of the antitrust laws because it prevented taking on a competing card.

Hicke: We're in the early 1970s now, so the Mastercard had been developed?

Bates: Well, Mastercard had been developed then, yes, that's what caused the litigation. But BankAmericard was the first one that hit the marketplace.

This was an important case. The reason BankAmericard had the by-law it did was because it was afraid if a bank took on both systems, it would in effect merge the systems; that there were a lot of

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\* (In U.S. District Court, Eastern District of Arkansas, Western Division, 1971) No. LR 71-C-248.



techniques and electronic devices and procedures that were jealously guarded by BankAmericard as trade secrets: the way in which they handled the charge-backs and the credit and communication and all that sort of thing.

They were quite concerned that if both systems were handled by the same bank, they'd lose control of their trade secrets and procedures, and the competition would be lost, and eventually the systems would be merged and there'd only be one card system. They wanted to preserve their independence, and they felt very strongly that in the end that would foster competition because it would keep the card systems independent.

After some discovery in the case, Worthen Bank moved for summary judgment, and I went back to Little Rock to oppose it. Their theory was that on the face of it, our by-law excluded the potential competition of Mastercard. I made our argument that the whole procedure was designed to protect the competition between the two cards so the systems wouldn't end up being merged.

The bank lawyers stipulated, for the purposes of their motion for summary judgment, that they would concede that it could end up with a merger of the two systems. So it was quite surprising to me that after the arguments and after the judge had taken the motion under submission, he ruled in favor of the Worthen Bank. We appealed the case and Francis Kirkham was able to persuade the court of appeals that the motion had been improperly granted.\* Then the case came back to be tried.

But after that a settlement was worked out, because the systems were in a stage of development and the rules were being changed as practicalities of the marketplace entered into it. The problem was eventually resolved.

It was, however, an important case at the time. I often was amused by the fact that I was sort of a Kirkham sandwich, young [James] Kirkham below me in the pleadings and his father, Francis Kirkham, on top of me in the pleadings. [hearty chuckling by both] But it all worked out, and I give all the credit to Francis Kirkham for finally getting the problem unraveled.

Hicke: How was it worked out?

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\* Worthen Bank & Trust Co. v. National BankAmericard Inc. (1973) 485 F.2d 119.

Bates: Well, I think it just worked out in time, frankly. The case never went to trial and due to the practicalities of the situation, the marketplace just finally worked it out. I think they did make some changes in the by-laws. Eventually, a bank was enabled to take on more than one system, so I think they found a way to protect their trade secrets and their competitive interests, even though a bank might take on more than one system. But it was a very interesting case and a very interesting cast of characters and lawyers. Steve Sussman at that time was with Fulbright, Crooker & Jaworski in Houston. He's since branched out on his own and has created a national reputation for himself as an antitrust lawyer.\*

Dee Hock was a very unusual individual. I recall one day he came to my office to get prepared for the taking of his deposition, and he handed me a book that he'd been studying, something to do with philosophy. He didn't get along with some of his associates. In any event, this was a rather small book and had a great big screw screwed through the binder and the pages of the book. He told me that it appeared on his desk that morning when he was coming over to my office to get ready for the taking of his deposition. It had such a psychological impact on him that we had to postpone the taking of the deposition.

Anyway, as I say, he was good at what he was doing, but he had some emotional problems that added to his fascination [hearty chuckle] -- let's put it that way.

It is just an example of the kind of people you have to deal with.

Hicke: Yes, and I think we should have on the record that part of your job is having to deal with difficult personalities and having to satisfy them, as well as the Mafia and other types of people. The wide range of personalities that you have had to deal with on all sides is part of the interest of your work.

#### Paul Erdman and the United California Bank

Bates: Another case of some significance involved the United California Bank. This was a case that had to do with the acquisition by the United California Bank of a bank in Basel, Switzerland. The bank was being run by Paul Erdman. Paul Erdman was an American citizen, a

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\* Sussman represented the Worthen Bank.

Californian. He'd had a very thorough education and had business degrees and master's degrees. He'd been involved with Stanford Research Institute and other prestigious organizations. Then he got involved in banking.

Through the support of -- I think it was Salik [Bank] in Southern California, and others, he became the chief executive officer of this bank in Switzerland. Frank King, who was then the president of United California Bank, was quite interested in the bank becoming involved more internationally and he thought that acquiring a Swiss bank would be a great asset to the international operations of United California Bank.

Well, one thing led to another and he became exposed to Paul Erdman's bank. He was quite impressed with Paul Erdman -- he was a very knowledgeable, very interesting person -- and he thought that Erdman was running a fine operation and had some very smart people working with him and it would be a great thing if UCB could acquire this bank. So it did.

The banking laws in Switzerland are quite different from the banking laws here in the United States. We have very strict restrictions on what banks can do in the United States, both state and particularly national banks. But in Switzerland, they are very free-wheeling. The Swiss banks can deal in commodities and all sorts of speculative transactions that a bank in the United States just couldn't do.

It turned out that Paul Erdman thought that he could make a lot of money for his bank and for the United California Bank if he could corner the cocoa market. So he and his fellow officers at the bank proceeded in an effort to corner the market. Well, they were in a very sophisticated field where there were a lot of smart, tough players. Nestle\* and other companies were following the commodities and the futures market very, very closely, and I don't know all the intricacies and the ins and outs of it, but it ended up that Nestle and these others traded very hard and let Erdman run his course.

The market collapsed and Erdman's bank lost over fifty million dollars in a matter of a very few days. Erdman and the officers were terribly concerned about United California Bank's becoming aware of all this. So they did their very best to hide the transaction so that they wouldn't have to enter the losses on their books for some period of time. They worked it out with traders in Europe and England. They were using a bank in Panama and another bank in Liechtenstein to work

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\* Nestle S.A.

out a process of delaying having to enter the losses on the books of their bank and coming to the attention of United California Bank. They were hoping to recoup their losses in other trades.

There was a very alert young accountant at the offices of United California Bank in Los Angeles who sensed that there was something wrong going on.

Hicke: Erdman was trying to protect United California Bank?

Bates: What he was trying to do was to get time to recoup so that he could cover the substantial losses that the bank had suffered in the cocoa market. Well, it never would have worked, because he would have had to speculate in some other area to try to recoup the losses in cocoa, and he probably would have lost even more money if this young accountant hadn't caught it and brought it to the attention of the management of United California Bank.

So they blew the whistle on Mr. Erdman, and United California Bank had to pick up these losses, which were in the millions and millions of dollars. This gave rise to derivative actions. The principal case was filed in the federal district court in Los Angeles and was assigned to Judge William Gray, who was then chief judge of the Central District of the Federal Court in Los Angeles. There were also cases filed in several of the state courts.

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Bates: And there was one filed in the superior court in San Francisco. These lawyers were trying to cover all the bases with these derivative actions and trying to set themselves up to cut up whatever awards might be made in the cases. I was asked to undertake the representation of the outside directors.

The case, of course -- putting it quite simply -- had to do with whether or not there was some failure of fiduciary duty or some acts of negligence which would impose a liability on the officers and directors of the bank in allowing this to happen, going into the history of acquiring the Swiss bank in the first place and then of allowing the systems to be such that this sort of trading could take place; then also whether or not there was negligence on the part of the officers and directors in not preventing it and in not having caught the activity sooner and correcting the situation so these substantial losses would not have been incurred.

I had the most interesting individual array of clients that I think I've ever had in my life, including Asa Call, Ed Carter of Carter, Hawley, Hale; Victor Carter; Jim Crafts, who was the head of Firemans' Fund [Insurance Company]; John Gustafson, who was chairman



of the board of Homestake [Mining Company]; Stanton Hale, the president of Pacific Mutual [Life Insurance Company]; Dan Haughton, chairman of Lockheed [Aircraft Corporation]; Dr. Lester Hogan, president of Fairchild [Camera & Instrument Corporation]; Jack Horton, who was chairman of Southern California Edison; Gordon Hough, who was president of PT&T [Pacific Telephone & Telegraph Company]; Harry Kendall, who was vice president of operations of Potlatch [Forests, Inc.]; Herrick Lowe, vice chairman of the UCB board; John McCone, the chairman of the board of Hendy International; Henry Mudd, chairman of Cypress Mines; Everett Olson, president of Carnation; Downey Orrick, partner in the firm of Orrick, Herrington, Rowley & Sutcliffe here in San Francisco; Wes Poulson of Coldwell, Banker; Charles Thornton, chairman of Litton Industries; Norman Travis, chairman of Borax [U. S. Borax & Chemical Corporation].

It was quite a challenge to take on the representation of all these men who were tops in their fields, and all very alert, very sensitive to what was going on, and quite anxious to be kept informed. They decided among themselves that John McCone would be the one to deal with me as their lawyer insofar as scheduling, billings and the management of my relationship with these individuals was concerned.

One of my most difficult problems was to keep the directors from writing me. Jim Crafts was particularly troublesome, because he was quite imaginative and very intelligent and he would write me long letters about the mistakes that he thought the officers had made in the course of their business relations with the Swiss bank. Fortunately, these letters were privileged and confidential as between a lawyer and his client, but they really were almost beyond the role of imagination of most lawyers. [chuckles]

I finally persuaded him not to write the letters anymore, that we'd be happy to discuss these things but I didn't want to get all these theories and things ingrained in his mind to the point where they might take on some aura of truth, where he might make some slip in conversations with other directors so that he'd stimulate their concern; because their depositions were going to be taken. So it was quite challenging to be able to deal with all these characters, and I really did relish the opportunity of getting to know all these fine men.

Hicke: You took their depositions?

Bates: I didn't, but the plaintiffs' lawyers did. I had a deal with Bill Vaughn, who represented the bank, and Sherman Welpton, who was a partner with Gibson, Dunn & Crutcher, and he represented the officers. Actually, when I got into the litigation, the officers were all seeking their own separate lawyers, and I spent a lot of time and effort persuading them to choose one lawyer and not to have separate

lawyers, because there were five or six officers directly involved in all this. The way I looked at the case, they were all going to end up having the same defense, and there was no need for separate representation. All it would do would be to help the plaintiff.

As I've said earlier, the fewer lawyers you can have in the defense of a case, the better off you are. Here I saw no reason why one law firm shouldn't represent all of the officers while I represented all of the outside directors. I persuaded them to choose Sherm Welpton, whom I had a high regard for and who I knew had a good, strong firm in Gibson, Dunn & Crutcher to back him up. Bill Vaughn of O'Melveny & Myers represented the bank. But the bank really took an impartial stand as it was bound to do in a derivative action. I advocated and the others finally agreed that we allow the depositions to be taken, allow discovery to be taken, and hopefully, then, be in a position to move for summary judgment.

The California law at the time was such that unless there was evidence of fraud or intentional wrongdoing, a board of directors had it within its discretion, in exercising an honest business judgment, to determine, all things considered, that a derivative action was not in the best interests of the corporation. Unless there was a showing of some dishonesty, breach of fiduciary duty or fraud, the law in California was such that the court should not interfere with the exercise of an honest business judgment by the directors.

What I urged, and I had some difficulty with Sherm Welpton in this regard and with Bill Vaughn and Warren Christopher, who was the senior partner at O'Melveny & Myers, who was overseeing the case for the bank, was to not rush in with affidavits and try to present an early motion supported by a decision of the board of directors that the action was not in the best interests of the bank. I thought it was best to let the discovery run, because otherwise you'd have to go back and take the depositions anyway. I don't think the judge would have granted the motion without allowing discovery. They finally decided that they would go along with that recommendation -- have discovery and then make our motion. So we did.

We completed all the depositions and all the discovery. Even though there may have been some question about the actions or failures to act on the part of certain of the officers and their employees, there was no sufficient cause to allow the case to proceed. There was no showing of any dishonesty or fraud or any breach of fiduciary duty. The directors had a special meeting, and after all this was presented to them and after going through all the discovery in the case, they determined that prosecuting the action was not in the best interests of the corporation. Well then, having done that, we used that as a basis for making a motion for summary judgment. Happily, after extensive briefing and argument and all that, Judge Gray agreed with us and summary judgment was granted.

The plaintiffs filed a notice of an appeal, and the insurance company that carried the directors' and officers' liability insurance decided that they wanted to settle the case, because they were concerned that enough questions of fact had been raised about the conduct of the officers that an appellate court might send the case back for a trial on certain issues, and that trial could be very expensive. No one can ever anticipate how a case is going to come out, and under all the circumstances, they decided that discretion was the better part of valor, and it would be better to enter into a settlement. So a nominal settlement was accomplished.

It was a fascinating case, and we learned a lot in the process about what goes on in Switzerland and how the banks are handled in Switzerland. One of the interesting points that I recall is that the accounting firms in Switzerland that audit the banks are owned and controlled by the banks, which I thought was quite interesting. [chuckles] Of course, accounting firms must be completely independent under our law and procedures, but that was apparently not of any real concern to the Swiss. And the case did involve a lot of coverups and illegal activities on the part of brokers and other institutions throughout the world in trying to cooperate with Erdman in trying to conceal, and at least defer, having to show these losses.

Hicke: Did they get into any trouble for those?

Bates: Oh yes, oh yes. Paul Erdman was immediately incarcerated in Switzerland. He was in jail, right off the bat.

Hicke: He started writing his books in jail.

Bates: It was amusing, because he was finally able to persuade the Swiss to let him out on bail. He vowed that he would not leave the country and he would be there to stand trial, to defend his reputation in Switzerland. But he slipped out of the country. He jumped bail. What happened to him is best summarized in the following article that appeared in the Wall Street Journal (December 15, 1973):

Paul Erdman, the American banker turned best-selling novelist, was convicted of fraud and other charges stemming from the 1970 collapse of United California Bank's Basel branch with a loss equivalent to \$66 million.

Erdman, author of "The Billion Dollar Sure Thing," had jumped bail of \$132,000 before the trial started in October and wasn't in court to hear himself sentenced to a nine-year penitentiary term and a \$6,200 fine. Four other principal defendants received lesser sentences.



Presiding Judge Rudolf Koenig said that falsification of the bank's records occurred on a massive scale to conceal commodity speculation by bank officials.

Mr. Koenig said that neither Erdman nor the other defendants began with the intent to defraud the bank but were drawn deeper and deeper into speculation to erase commodity losses. Erdman was blamed for operating "a bank ripe for bankruptcy" and continuing to speculate contrary to instructions from the parent bank.

The judge also observed that Erdman, the bank's former president, realized more than \$190,000 from the sale of his wife's capital stock in the bank to the parent company and a salary of about \$5,500 a month over the 27-month period during which the fraud and speculation took place.

The defendants were also found guilty of fraudently selling worthless shares in the original Salik Bank before its 1969 sale to United California Bank and of doctoring the bank's books to conceal huge losses. Other defendants, who received penitentiary sentences of two to six years, were also fined \$6,000 each.

He was very clever, you know. He wrote several best sellers after that: The Silver Bears, The Billion Dollar Sure Thing, The Crash of '79, The Last Days of America, The Panic of '89. I read them all with great interest; they were very interesting, very exciting books. He said that this whole experience was the greatest thing that ever happened to him because, he said, while he was in jail, he discovered that he could write and he came to realize that he was a lousy banker. [both laugh]

We had a complaint in another independent action against Paul Erdman. We didn't do it by way of cross-complaint; we filed another action against Paul Erdman. Finally, because they couldn't see how he'd ever have any money, he'd been thrown in jail and his reputation having been ruined, the cases were just eventually dropped. Then, of course, later on these best sellers were published and he made a lot of money. [laughter] It's just ironic that he saved himself all the way around, except I doubt very much he could safely go back to Switzerland.

Hicke: He certainly landed on his feet, otherwise.

Bates: Yes, he certainly did.



Discovery: Some History and Comparisons

Hicke: I just have a question. You've talked a lot about discovery, and that's been crucial in the cases that you've talked about today. I wonder if you could tell me a little bit about the development of that as a process, and how it's changed.

Bates: Yes, well, I think that discovery is very important and disposes of a lot of litigation, because it gives the lawyers and their clients an opportunity to see how the case is developing and how it's going to be presented at the time of trial, and see whether their witnesses stand up, whether the facts that they believe to be true actually can stand the heat of cross-examination by way of discovery.

Many times you find out that your witness just isn't reliable and hasn't been telling the truth, as I found out in that Bertha Hecht case. When I participated in discovery, I could see that Asa Wilder, who was the principal involved in handling that account, wasn't being truthful. Sometimes truth is hard to discern, and sometimes people are very clever at hiding the truth. But a good cross-examiner can usually expose the falsity of the testimony, and that helps the parties understand their case and hopefully resolve it early on by way of settlement, rather than going through a long, expensive trial.

Now, of course, on the other side of the coin, in some of these major antitrust cases, discovery is used as a club just to smother the opposition with a lot of work, so that, say a plaintiff who really may well have a good case finds that he just can't afford -- his lawyer can't afford, as most of them are taken on a contingency basis -- to keep up with all the discovery that's being demanded by the defendant.

Of course, you could also turn it around and have a plaintiff doing the same thing to a defendant to make him capitulate, which has happened. Some trial lawyers take great pride in that sort of tactic, which I think is abhorrent -- it's terrible. But the courts are becoming more acute to the problem of discovery abuse, particularly in the federal courts.

Discovery can be very well monitored by a good trial judge. More and more trial judges are very sensitive to this and to abuses that can take place in discovery. They'll control discovery so that abuses won't happen. If there's any showing of any attempted abuse, the judges are very alert to that problem and most of them will come to the assistance of a party who is being abused or is threatened abuse in discovery proceedings. So on balance, I think discovery is very helpful, and properly controlled it's very important to the resolution of cases.

That brings me to a comparison between our system and the English system. In the English system, there's no pretrial discovery; there are no depositions: at least there weren't any depositions when we visited England with the chief justice in the Anglo-American Legal Exchange.

I don't know whether I touched on that or not; I think I may have. But I've got a few publications and some pictures that might be of interest.

There were two things that struck me about the English system where I thought that they were deficient. One was the lack of pre-trial discovery -- the lack of the opportunity to take depositions of the other party. You see, in England, the solicitor, in effect, does all the trial preparation and the barrister doesn't get into the case until it's just about ready to go to trial. He doesn't even talk to his clients until they're about ready to go to trial. I just don't know how you can really function in a system of that kind.

The other place where I thought they were deficient is that there are really no trial briefs, and there are no appellate briefs. In a big case in England, you go to one of the high courts -- appellate courts -- and the lawyer will hand up a list of cases to the judges and then a clerk will run around the courtroom collecting the cases. The appellate courts are like big libraries, and they run around and get the books and put them in front of the judges, but there's no extensive briefing. You just plod along from case to case, and the barrister gets up and refers to the page and reads the part of the case he wants to. [chuckles] The other judges can follow along.

I don't know whether they're now allowing for more discovery in England, or not. I haven't checked their latest procedures, but I'd be surprised if they were. It takes them years to make any changes.\* I remember going through the Queen's Courts and the Master Clerk, Sir Jack Jacobs, was pointing out the building where we were going, "Now this is the new wing." I think it was built in 1780. [laughs] That's marvelous. Boy, when you get to court and you see those English in operation -- they really know the language; of course, they invented it, and they certainly know how to use it. They're really craftsmen in their trade. But, no, I think discovery is an important tool.

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\* By letter dated March 9, 1987, Sir Max Williams, the senior partner of Clifford-Turner in London, confirmed to me that there is still no right to take depositions. -- John Bates

Hicke: Going back in the history of American law, was the process of discovery then developed in the United States?

Bates: Yes, I think it was. I don't know of any other country that has developed it, particularly to the extent we have. They have written interrogatories which you can submit to a foreign country, and England does that too. They have a form of interrogatory they can submit to witnesses that are out of the jurisdiction. But written interrogatories, responses to written interrogatories, are never as valuable as being able to cross-examine a witness.

The most significant change that I've seen in the development of the discovery procedures is the fact that the judges will now step in and take more control of discovery: either by way of expediting it, expanding it, or restricting it, which I think is a significant development. So we need good judges.

Demonstrative Evidence: Fairchild v. Data General

Bates: I think probably one of the most significant developments in litigation has been in the use of demonstrative evidence, of charts and exhibits and pictures and diagrams and all that, to help the judge and the jury understand the complexities of the case. I mean, now when we get into these complex cases of antitrust violations in the fields of technology and trade secrets and inventions, it's very difficult for us, the lawyers, to really grasp the technicalities of what we're arguing about. So we have to be educated and we have to be able to get the jury to understand what the issues are, so that the use of demonstrative evidence has become extremely important in the trial of complex cases. That's been a big development in the law since I've been involved.

Right now there's a big effort to cut down on trials and to encourage more arbitrations and settle disputes without having to resort to the courts. But we have not had a very happy experience with arbitration. The difficulty is that in most cases the arbitrators want to split the apple. You don't get a clear decision one way or the other. I don't think we've ever been very happy about the results of arbitration. If it's a complicated case, it sometimes takes just as much time and effort to present it to arbitrators as it does to present it to the court. The difficulty is when you're in arbitration you don't have the normal rules of procedure and evidence, so that the arbitration can go on and on for some time without any real control over the evidence or the procedures.

Alternative dispute resolution is getting a lot of attention these days. A lot of our lawyers are becoming involved with it, to see if there's some sensible means of helping the clients cut down on the expense of litigation and resolving their problems without having to go to court.

Hicke: Just to go back to demonstrative evidence for another couple of seconds, can you think of any good illustration, of a case where you used it to great advantage?

Bates: Well, I first found it quite helpful in the defense of Ford Motor Company in these dealer cases. I could get the facts put on a chart as to the dealer's performance and contrast his performance with other dealers, and I could present that on a chart to the jury. That was quite helpful in my being able to demonstrate that Raleigh Leach just wasn't measuring up to other dealers and just was not doing a satisfactory job.

In personal injury cases, of course, the plaintiffs all learned from Mel Belli, who I guess deserves some credit for being one of the pioneers in the use of demonstrative evidence. They love to bring the skeletons in and blowups of the injury, showing the nature and extent of it and all that. You have to be careful about abuse in that regard, so that demonstrative evidence isn't used as a vehicle to improperly stir the emotions of the jury. It can be abused. Of course, I mentioned that Fisher case involving --

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Bates: -- the telephone company, where we had a complete mock-up of the duplex and the furnace and the heater running out of the roof of the duplex. We had that done by Scott Plumbing so that we could have that right in the courtroom and demonstrate the entire installation.

Talking about demonstrative evidence, I think that the epitome of the use of demonstrative evidence came about in the recent trial of Fairchild v. Data General in the federal district court.\* This was before Judge [William] Orrick; it was a jury trial. In this case, we represented Fairchild, and we brought a plaintiff's antitrust suit -- which is most unusual for our firm -- against Data General.

The fundamental theory of the case was that Data General required its customers to buy its so-called hardware, buy its computer and related equipment, if the customer wanted to use Data General's

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\* In re Data General Corporation Antitrust Litigation (1980) MDL Docket No. 369 (WHO).



software programs. Data General had developed a very good software program, and Fairchild and others wanted to use this program. Fairchild went to considerable time and effort to design a computer that could use this software program. At the time, Data General was allowing people to buy or lease the program without imposing any condition of having to buy their computers, their so-called hardware. Well, after Fairchild had finished manufacturing this computer that could use the program, they came around to get the program and Data General wouldn't sell it to them unless they bought Data General's computer. So that's what prompted the suit.

I always thought that we could set the stage for obtaining a summary judgment. It was pretty clear to me that it was a violation of the antitrust laws, an illegal tie-in, requiring the customer to take a product he didn't want in order to get a product he wanted, and that there were two different products: the marketplace recognized them as such. So I didn't think we'd have any difficulty in getting summary judgment.

Well, as it turned out, the judge wouldn't grant summary judgment and the case was set down for jury trial and did proceed to jury trial. The principal trial lawyer for Fairchild was Jack Brown of Brown & Bain out of Phoenix, Arizona. Jack Brown had been with Cravath, Swaine & Moore. He left and formed his own firm in Arizona and got a national reputation as a fine antitrust trial lawyer particularly in the field of computer technology. Jack was very knowledgeable in electronics matters and he was very close to Fairchild, so it was most appropriate that he take on the principal responsibility for the litigation. In that regard, he was assisted by my partner, Russ Johnson.

Because the case had to be presented either by Jack Brown or by me, and Jack Brown certainly was very able and there was no need for both of us to be actively involved in the trial of the case, I was actively involved in only the preliminary stages, but I followed the progress of the case with great interest. I counseled with Jack Brown and assisted him with trial preparation and briefs.

The reason I mention the case in connection with demonstrative evidence is that we rented two full floors of a rather substantial building on Market Street which was about halfway between our office and the federal district court -- it was an easy walk to the court. These floors were full of computer equipment and printers. We actually had a demonstrative evidence room where the evidence was created. We worked with other commercial illustrators who had special trucks for conveying large presentations. The work would be done and reviewed there in our office, then put in trucks and taken out to the court and placed in the courtroom so that the judge and the jury could follow the testimony and relate it to the demonstrations that had been prepared for them.

We even had models of how software relates to hardware and how the computer relates to the software; it was a great learning experience. The burden on the lawyers was really tremendous to help the judge and the jury understand what sort of business we were dealing with and how the computer related to the software and what impact the defendant's conduct had on the market.

Hicke: Regarding whether there was an illegal tie?

Bates: Yes, that's correct, yes. Judge Orrick put a tremendous burden on the trial lawyers in that case. He required a summary of the anticipated testimony that each side expected getting out of the witness in the next day or two. These summaries came to be called "Beowulfs." Apparently there is an old English poem Beowulf that went on forever. I remember the designation of the books over there in our offices was the "Beowulf" summaries. [both chuckle] I mean, this case just took on a life of its own.

The paralegal staff was tremendous; we really had a lot of very able support from our firm, from our top paralegals. But the expense was horrendous; the billings were most substantial. All this was aimed at educating the judge and the jury.

Here we had a very simple case that I always thought should have been resolved by summary judgment. Well, the case went to the jury on the judge's roadmap. Judge Orrick framed the instructions to the jury and even though we disagreed with him all the way, the case went to the jury and we prevailed. We got a plaintiffs' verdict of liability. It was determined that we first try the liability question and then, if successful, damages. Then, much to our surprise and horror, Judge Orrick set the verdict aside and granted judgment for the defendants. So we appealed and the court of appeals reversed.\* The case came back for trial on the issue of damages.

The jury verdict was reinstated. That had been a very, very expensive, very hard case for everybody. I don't know what happened to Judge Orrick, but that's the way it goes.

I am pleased to say that thanks to the United States Court of Appeals for the Ninth Circuit, to Jack Brown and Russ Johnson, we ended up with what I consider to be a belated but complete win. The case was settled with a payment to Fairchild of \$52,500,000 and a very satisfactory injunction against Data General Corporation.

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\* Digidyne Corp. v. Data General Corp. (1984) 734 F.2d 1336.

- Hicke: How did it happen that you took the plaintiffs' case, or maybe I should ask the other question: Why is it that you normally only take defense cases?
- Bates: The difficulty is that there is so much advocacy in the antitrust field that if you are classically a defense lawyer, you're continually advocating a restriction, a curtailment of the broadening of the antitrust laws. You're trying to keep damages within reasonable bounds, realizing all these damages are trebled anyway. You're trying to keep attorneys' fees and damages and everything within very conservative bounds. Also, you're trying your best to limit the application of the antitrust laws. While if you're a plaintiff's trial lawyer, you're trying all you can to broaden the scope of the antitrust laws; you're trying to make every question a jury question. Here, in effect, the situation was really reversed in theory in many respects. In our case, we had what we thought was a very classic violation of the antitrust laws and all we wanted to do was get summary judgment and be able to buy the software of Data General. We looked on it as a very simple case that didn't require a lot of advocacy in broadening the antitrust laws. So that's why we felt comfortable in taking the case on.

Furthermore, we had done work for Fairchild in the past. As I told you, I originally represented Fairchild Semiconductor when Bob Noyce was running the company and we went after those engineers who had stolen our trade secrets. So we had a long history of involvement with Fairchild, and we were quite comfortable. We have taken plaintiffs' antitrust cases, but we're very careful about not getting ourselves into a position where we are having to argue a case that is going to work against us in the defense of another major antitrust case.

Hicke: I see. Thank you, that explains that very well. Okay, shall we stop for today?

Bates: Fine.

Grafton Worthington and the Shaklee Corporation

[Interview continued: July 21, 1986]###

Hicke: I guess we are up to 1973, the Shaklee case.

Bates: Yes. That involved the Shaklee Corporation and our client was Grafton Worthington, who was the principal owner and operator of a company called Eopa. Eopa manufactured the vitamin pills that were sold by



Shaklee Corporation. The way that I got into the case was through Al Shults, a former member of our firm, who left our firm some eight or so years before this and set up his own law firm. He had become active in lobbying in Sacramento and he became quite familiar with most of the Sacramento governmental agencies and politicians. John Knox, who was a legislator in Sacramento, had a good friend in Grafton Worthington, who was involved in a dispute with the Shaklee Corporation and needed a lawyer. Al Shults had talked with Wally Kaapcke and my name was recommended. We saw no reason not to take on the case.

I had some preliminary sessions with Worthington's commercial lawyer, Assemblyman Knox, in his office in Richmond and subsequently had meetings with John and Grafton Worthington. Worthington was a very robust, active entrepreneur. He didn't have any particular scientific knowhow, but he was a good organizer and a good businessman. He had developed quite a business in supplying Shaklee with the "vitamin pills" that were the substance of Shaklee's business. When I got into the matter, Shaklee Corporation had brought an action in the Superior Court in Alameda County against Eopa, against Grafton Worthington, contending that the defendants had breached the requirements contract to produce these vitamin pills for Shaklee.

Getting into it with Worthington and investigating the matter, it became apparent that Grafton's problems emanated from the fact that Shaklee was trying to circumvent Eopa and deal directly with some of the suppliers that had been working with Eopa in producing a lot of the raw materials that went into the final production of the vitamin pills. Shaklee was on the road to putting together its own operation to manufacture its own pills and thereby cut out Eopa and Worthington. There was quite a bit of money involved. Eopa's contract with Shaklee still had a number of years to go and had been quite profitable for Eopa and Worthington.

In any event, after we'd been at it for some time and after we had a handle on the facts, I suggested that we try to settle the matter with the Shaklees. There was a meeting set up in the East Bay in their principal offices, which were then in Emeryville, in that new complex there on the west side of the freeway. I think its called the Watergate complex. We talked in generalities about the claims involved. It appeared that the parties were far apart. There was a strong difference of opinion. But by that time it had become fairly apparent to me that Shaklee could be charged with violating the anti-trust laws in that they were embarked on a scheme to get control of the production of these vitamin pills by, in effect, forcing Worthington out of business. By getting his supplier to cut him off. And in that way, Shaklee would get control of the market and would have entered into a conspiracy and arrangement to eliminate Eopa as a supplier and as a competitor in the business.

Hicke: That's the old vertical integration, isn't it?



Bates: Yes, that's right. Also there were some very serious fraud claims that could be leveled at these people and also interference with advantageous business relationships and the like.

Before the meeting, I had lined up John Martel of Landels, Ripley & Martel here in San Francisco to take on the representation of Grafton Worthington and Eopa if it came down to having to litigate the case. The reason I thought it was necessary to line up John Martel was that I had learned that our old and good client, Dean Witter, had been involved in an issue of Shaklee stock in which certain representations were made about the contract that Shaklee had with Grafton Worthington that could be troublesome and could lead to an involvement with Dean Witter. I just didn't think it would be appropriate for us to represent a party where we might be running into a direct conflict with representations that had been made in a prospectus which Dean Witter would have been involved with. Furthermore, the antitrust charges that would have to be made in this kind of a case would demand the kind of advocacy that could be awkward for us in our defense of other cases where we may be taking a position that was contrary to the position that we were advocating in this case.

Hicke: In effect, you become almost a plaintiff's advocate.

Bates: Well, oh yes, you would be. I could tell from the way the parties were approaching each other in this attempted settlement that there was going to be a tough fight, if it ever got to that.

Hicke: If I could interrupt just one more time: you brought up the antitrust charges rather than just deal with what was a breach of contract originally?

Bates: At this first session, the exploratory settlement discussion, I didn't bring up the plan that I had laid out. That was a day or two later when we had our next settlement discussion. But after that first discussion, I reviewed the whole situation with Grafton Worthington and with John Martel and the others, and we decided that I should use all this now and confront them with the prospect of this kind of a fight, but we were after a substantial sum in the millions of dollars.

If that were the case, Worthington would be quite happy. He himself was not anxious to continue the relationship with the Shaklees. It had become very difficult and almost intolerable. So as far as he was concerned, it was more important to him to sever the relationship and get adequate damages and then go about his business doing something else.

In our next session, I laid all this on the line with the Shaklees. I told them quite frankly what I had done and that I'd arranged for Grafton Worthington and Eopa to be represented by John Martel, and

I told about his abilities and his experience and the results that we had come to in our deliberations about the position of Worthington in relationship to Shaklee and how we thought that Worthington and Eopa had some very substantial claims against the Shaklees.

I know we had an impact in presenting all of this. I explained to them why I could not prosecute the action against them because of Dean Witter's involvement in the public offering and the representations that were made in that offer. They and their lawyers got the message and shortly thereafter there was a satisfactory settlement.

Mr. Worthington was quite pleased with the settlement. He was one of the most interesting individual clients I think I ever had. He was very pleased and quite complimentary of all of us who had been working on the case here in our office, including Frank Sieglitz and Dennis Bromley. He was also most appreciative of John Martel's participation.

There's an amusing conclusion to all this. It was a few days before Christmas, and I was getting dressed up in our bathroom at home. The doorbell rang, and I could hear this ruckus outside and my wife, Nancy, was at the door. I looked out the window and there was this delivery truck with all these potted poinsettias. And there must have been two or three delivery men walking up the stairs with all these poinsettia plants. There must have been a dozen of them. Nancy was saying, "What's going on here? What's going on here?" I said, "Well, Nancy, who are they from?" There I was half dressed peering out the window. She opened the envelope and said, "They are from somebody named Worthington." I said, "Oh, that's Grafton Worthington. They are for us. I am sure they are for us, so you had better take them." Well, we had poinsettia plants all over the front and all over the house. That went on for four or five years.

Hicke: Every Christmas?

Bates: Yes. He did the same thing with John Martel. He is just a very thoughtful man, a very nice man. It's those kinds of cases and those kinds of incidents that add cheer to a trial lawyer's life and stimulate us to keep on doing what we are doing.

Hicke: You talked about the Shaklees. Who were you actually talking to?

Bates: Well, at that time, I was talking to Forrest Shaklee, Sr., Forrest Shaklee, Jr., and Raleigh Shaklee. Robert Wooten was then the president. They were represented by the Wyman, Bautzer firm\* out of Los

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\* Wyman, Bautzer, Christensen, Kuchel & Silbert

Angeles and also Paul Greenberg of Nelson Liker, et al., in Los Angeles.

Hicke: The Shaklees were there in person at the conference and you were talking to them?

Bates: Yes.

Hicke: They sort of dug up the hornets nest for themselves, didn't they?

Bates: Well, I think that they started this whole thing by filing this lawsuit against Worthington, and maybe they didn't anticipate that Worthington would come back with as strong a counterattack as we were able to put together. Of course they got rid of Worthington, but on the other hand, Grafton really got what he was entitled to. He achieved a satisfactory settlement.

Of course Shaklee, after that, was free to go ahead and deal directly with these suppliers and manufacture their own products. Shaklee did extremely well. I guess they are having a few problems now, but from everything that I understand, they are doing quite well. Management has changed completely. I think the Shaklees now are just stockholders.

#### The Diversity of Litigation at PM&S: Pexoil Corporation

Bates: This case is not of any great importance. It is just that I think it demonstrates the diverse types of litigation that we have here in the firm. You see, I was involved with this rather large litigation group that handled all sorts of litigation. At the same time, there were other litigation groups like Dick MacLaury's group that handled primarily Standard Oil litigation. They were very busy with that, and it was really difficult for them to get into other cases. But we were taking on all sorts of cases.

Hicke: There were other groups besides the one you headed?

Bates: Oh, yes.

Hicke: Who were the heads of the others?

Bates: I'd have to go back and look at the framework of the firm at that time. Many of them had worked with me in their early days, and then the litigation group I was with grew to a such size that it was really more practical to split it off so that the other groups could develop. In addition to Dick MacLaury's group, there were groups headed by Jim

Michael, Bill Mussman, Allan Littman, and Noble Gregory, who headed the appellate lawyers. Now there are more headed by Tony Brown, Mike Richter, Allan Littman, Bill Edlund, and Dick Odgers.

Anyway, the next case of some interest involved a contract with Pexoil Corporation, which was really a government corporation of Indonesia and had to do with the development of the Indonesian oil fields within the territorial waters of Indonesia.\* Our clients were Carver-Dodge International Partnership and the various partners within that partnership, including my client, Reuben Hills. Reuben Hills was the head of Hills Bros. Coffee. He had been a client of mine for some years and I had been on the board of Hills Bros. Coffee. One of the other principal partners was Douglas Carver.

Reuben invested with Doug Carver and Carver-Dodge Partnership, and they had been extremely successful in the development of oil interests both here in the United States and in Indonesia. The Indonesian venture involved negotiations, to some extent, with a fellow named [Ananda] Krishnan. Krishnan contended that he, through his relationships with Pexoil, was entitled to a percentage of the interest in the development of the finds by Carver-Dodge International.

We took some depositions, and it became apparent to us that Mr. Krishnan wasn't being honest and that we would undoubtedly be able to prevail in opposing his contentions. But the important thing was to try to terminate the litigation at an early stage, as soon as we practically could, so that our clients wouldn't be running up substantial litigation bills. I felt that in the depositions, we had demonstrated lack of credibility on the part of Krishnan, that his lawyer, Craig McAtee of the McCutchen, Doyle, Brown & Enersen firm here in San Francisco, might sense that he was going to have a very difficult contest and a tough time with his client.

We put together a motion for summary judgment on the ground that there was a party that was quite involved in the case who should have been joined as a plaintiff. I remember we had some in-house discussions here among ourselves and Kirke Hasson and others that perhaps we might not prevail on the motion. I said, "Well, that may not be all that important, if we can put together an honest motion for summary judgment." I felt that it might well be that this could dispose of the litigation, because I sensed that Craig McAtee might already be having some difficulties with his client.

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\* Pexoil, Ltd. v. Carver-Dodge International (In the U.S. Dist. Court, Northern Dist. California, 1977) No. C-76-2832 CBR



We put together the motion for summary judgment, and that ended the litigation. McAtee apparently persuaded his client that it would not be worth his time and effort to attempt a response. I just thought it would be of interest to mention this Carver-Dodge case because of the personalities involved and to demonstrate the diverse kinds of cases that we have handled over the years.

Hicke: You've actually talked about several cases that have successfully ended on a motion for summary judgment. Is that typical of the way a lot of your work has gone?

Bates: It just depends a lot on the case as to whether or not that's the direction you can go. I have always been of the view that it is best to not attack the pleadings in the early pleading stages unless you are very strong on the law and you anticipate the plaintiff really can't honestly state a cause of action and get himself into court. I think it's best not to file motions to dismiss just on the pleadings or a demurrer in the state courts just on the insufficiency of the complaint, because invariably the judge who is hearing the matter will give every benefit to the plaintiff in trying to present his case properly, because he is concerned that if he grants a demurrer without leave to amend or he grants a motion to dismiss just on the pleadings, the record will be incomplete and he should have given the plaintiff an opportunity to amend his complaint.

What we have found is that it's better not to go at the plaintiff at that stage. Just let him go ahead. Let him have discovery, because if you attack the pleading in the early stages, he might improve his case. The judge might lead him into another theory of the law which may be even better than the theories that he's commenced with. So we feel that it's better to let the plaintiff's lawyer go ahead and develop his case and let us have some discovery and see how the case is developing before we move for summary judgment.

If you don't think you've got a good chance of summary judgment, it's better just to let the case go ahead and either be tried or settled. But if you think you've got a fairly strong factual showing and you're anxious to demonstrate your position to the court, even though you might not prevail in the motion for summary judgment, it gives you a chance, particularly in federal court, where you get the same judge all through the case. Cases in the federal court are assigned. So you want to try to educate the judge to your point of view.

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Bates: Now we tried this quite vigorously in the Marnell litigation against United Parcel Service. We did not prevail on our motion for summary judgment. We tried our best to educate Judge Orrick to our point of view in the Fairchild case. We just never could do it. He was just

determined to try that case under his own theories, and that's the way the case was tried and went to the jury. It wasn't until we got to the court of appeals that we were able to find some judges that agreed with us.

Each case is different and you develop your own strategy for that case. Summary judgment is a very useful tool. And of course, it is particularly important in these libel cases where on a summary judgment, if you are representing a publisher, you throw the burden to the party that is claiming that the publisher has libeled him in the article. That's almost ordained. So if you're defending a publisher in a libel case, you're going to be moving for summary judgment at a very early stage.

Hicke: You said the people were one of the interesting things about this Indonesian case. Was there a personal motive for Mr. Krishnan's bringing the case? Or was the Indonesian government involved?

Bates: No, I think that he felt that he had had enough contact with the people involved, enough conversation and the like, that he thought he might be able to pull it off. His theory was that he'd brought everybody together and he was entitled to a fee. It wasn't really clear just what kind of fee he was entitled to: was it a finder's fee? He never did really have a straight story.

He purported to represent the government of Indonesia. He really didn't. He didn't have the authority that he purported to have, and if he did, he shouldn't be receiving any sort of kickback, such as special fees, anyway. But I guess he came on as a very credible young man when he was talking to the McCutchen firm and they were persuaded to take his case. I think as they got into it, and particularly after they heard my cross-examination of Krishnan, I think they seriously doubted whether he was really entitled to anything.

When we moved for a summary judgment they probably -- I am speculating on this -- had a little heart-to-heart talk with Mr. Krishnan. Wanted him to put up some money to further prosecute the case. So they were probably relieved when they saw a motion for summary judgment. This might be a way to not have to spend their time on a case that may not have any real merit.

Directorships: Hills Bros. Coffee

Hicke: Tell me about your tenure as director of Hills Bros. Coffee.

Bates: Reuben Hills is a very interesting person. He's very intelligent, very sensitive. This was some time ago. Actually, it was when I was in that Utah International-Lucky Mc litigation in Wyoming that Reuben got hold of me and asked me if I would be interested in becoming a member of the board of Hills Bros. Coffee. I was very pleased to receive the call. I had known Reuben, but not intimately. I had done some work, some estate planning work and the like, and been of assistance in that regard, and in some probate proceedings where I was assisting Harold Boucher. But I had always been, all through my life, well acquainted with various members of the Hills family.

I was pleased to receive Reuben's call. I told Reuben that I saw no reason why I couldn't go on the board, but that I would have to check with my partners and then I would get back to him. I did check with Marshall Madison and Jack Sutro and others. They saw no reason why I shouldn't go on the board. Hills Bros. Coffee had been a client of the firm for quite a few years, a good client of Marshall Madison's. So I accepted.

I enjoyed the opportunity of being a director of Hills Bros. I should say I was a director without any compensation. But we did represent Hills Bros. and I think it helped in our relationship. I was on that board for ten or fifteen years.

I finally felt compelled to offer my resignation from the board, because the family was split almost 50-50 between the heirs on the Herbert Gray Hills side of the family and the heirs on the Edward Hills/Leslie Hills side of the family. Reuben and Austin were on the Edward Hills side. They were both on the board of directors. Herbert Hills was on the other side of the family -- the Herbert Gray Hills side. They got along fairly well through these representations, but the coffee business had not been doing well for some years. What had happened was that a lot of the big companies, like General Foods and others, had gotten into their own brands, and that was hurting Hills Bros. Coffee. They really weren't making enough money to support the kind of distributions that they were making to the family.

The family members were quite extensive. Over the years, they had all become quite well to do because of their interest in Hills Bros. Coffee. They relied on dividends from their stock in Hills Bros. Coffee to maintain their lifestyles. The profits weren't covering these dividends, so they, in effect, were distributions of capital, which I was getting concerned about. I was, at that point, the only nonfamily member, nonemployee, who was sitting on the board of directors. I told Reuben, "Reuben, all the present members of the board and their families can take the risk here, but I am just concerned that somewhere along the line one of the children of the families may get upset about your distributing what amounts to capital distributions here to help maintain the lifestyle of some of these



people. I just feel I can't expose myself to that risk. I am uncomfortable staying on the board of directors under these circumstances." Well, fortunately, Reuben understood my predicament and was very nice about it. So I did proceed with my resignation.

I have continued to represent Reuben Hills and the firm has continued to represent him in his estate-planning work. I continue to be a director of the Edward E. Hills fund, which received a substantial block of Hill Bros. stock from Edward Hills.

Hicke: Does the firm have a policy about directorships?

Bates: Yes. We discourage members of the firm and associates from serving on boards of directors, but there are quite a number of our lawyers that do serve on boards. I was on the board of The Pacific Lumber Company. Jack Sutro was on the boards of the Bank of California and Kaiser Steel. I know that Toni Rembe is on a number of boards. Others have been involved as directors. We just try to be very careful about it. We don't want to expose the firm to having to defend cases against directors and the like. There is always a little concern about a partner of the firm serving on a board where the law firm is the attorney for the corporation. On the other hand, in many instances, it does help the relationship.

There is always a question raised by some of the directors with whom the lawyer is serving that he may not always be able to act independently, that there is a problem for the partner from the law firm which represents the corporation serving on the board of directors because he tends to favor that law firm and support the decision of that law firm. Some directors feel that shouldn't be the case, that the lawyer serving on the board shouldn't be of the same firm as the one advising the board, because he has more or less got to be loyal to his law firm. He is not in an independent situation where he can say, "You ought to go to this other law firm or try this other law firm" rather than his own law firm.

Hicke: If you're serving without pay, that has some mitigating effect, doesn't it?

Bates: Not really, because if you are not getting paid anything as a director, a director's fee or anything else, then the only way you'll get any sort of financial benefit out of your representation is if your law firm gets some of the business.

Hicke: Oh, I see. Yes.

Bates: So it is a problem. And we are very careful about it.

Hicke: So each individual case is decided on its own?



Bates: Yes. I haven't checked the manual lately, but I think our procedure is that you have to get a clearance by the chairman of the management committee, who will confer with the members of the management committee.

Hicke: I see.

New York Times: The Right to Protect Confidential Sources

Bates: In the early 1970s there was another case which stimulated a considerable amount of local and national interest. This case had to do with the right of a newspaper reporter not to reveal his sources. The case was brought to us by The New York Times, specifically by James Goodale, who was general counsel of the Times.<sup>\*</sup> How it all came about was that Earl Caldwell was a black reporter for The New York Times. He was, at the time, acting independently. Through his efforts, he obtained the confidence of various members of the Black Panther Party, which was headquartered in Oakland. He obtained all sorts of interesting information about the Black Panthers, which information was published in a series of articles in The New York Times, which exposed the activities of the Black Panthers. This eventually led the United States government to subpoena Earl Caldwell to appear before a grand jury that was investigating the activities of the Black Panther Party to determine whether or not there were any federal crimes being committed.

Earl Caldwell was quite concerned about maintaining the confidentiality of his sources, as was The New York Times. It was to represent The New York Times and Earl Caldwell that James Goodale came to us, recognizing, however, that it would be necessary for Earl Caldwell to have separate representation. Anthony Amsterdam, who was a professor of law at Stanford University Law School, was called upon to represent Earl Caldwell individually. We represented The New York Times.

We took the position that Earl Caldwell should not be required to reveal his confidential sources. We filed a motion to quash the grand jury subpoena that had been served on Caldwell. Of course, Caldwell and Amsterdam joined, and were in fact the real parties in interest. However, the court recognized that the relationship to The New York Times was such that it too was an important party in interest in the litigation.

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<sup>\*</sup> Earl Caldwell v. United State of America (1970) 434 F.2d 1081.

The case was assigned to Judge [Alfonso] Zirpoli and it, as I said earlier, stimulated a lot of national interest. Many other newspapers and magazines and other publications joined as amicus curiae in support of our motion. It was in fact a case of first impression.

After considerable amount of briefing and arguing, Judge Zirpoli held that Caldwell did have a limited right to maintain the confidentiality of his sources of information. The rationale for all this was that if Caldwell were to reveal his sources, then his sources would dry up. In fact, if he were even called before the grand jury, there was considerable concern that Caldwell's personal well being and even his life could be in jeopardy.

We urged this upon Judge Zirpoli, but Zirpoli was not prepared to go that far. Even though the court order recognized that Caldwell could maintain the confidentiality of his sources, he was still required to appear before the grand jury and give testimony. Then if any problem arose as to the propriety of Earl Caldwell's contending that his sources were confidential, and to reveal them would impair his right to publish the information that he obtained and therefore hamper free speech in this country about being able to expose the activities of such people, then that issue could be brought before Judge Zirpoli and he would resolve it.

Hicke: So, was free speech the important point?

Bates: Yes. That was the important point. If Caldwell and other reporters were required to reveal their confidential sources, they wouldn't be able to obtain that kind of information, because the confidential source would know that he really didn't have any legal protection. We were trying to put the reporter and his confidential source in the same category of privilege as an attorney and his client.

However, The New York Times and Caldwell were so concerned about this and the scope of the ruling that it was decided that an appeal should be taken to the Ninth Court of Appeals. Even though on the face of it, it looked like we prevailed and established our point, there was still a considerable amount of concern that just having to appear before a grand jury could dry up sources of information, because no one knows what goes on in the grand jury proceedings. A person giving information in confidence to a reporter would never be comfortable because he wouldn't know whether or not the reporter revealed this information when he appeared before the grand jury. So the mere fact of his appearance, or that he would be obligated to appear before a grand jury, could have a very damaging effect on his obtaining information from these confidential sources.

So an appeal was taken to the United States Court of Appeals for the Ninth Circuit. There we prevailed. The court concluded that

Mr. Caldwell could, in the first instance, if he had reason so to do, assert the fact that his sources were confidential and to reveal those sources would impair his right to obtain information which would be very important for the public to know. If he had to reveal those sources, that would damage his opportunity to tell the public about what was going on. Therefore it would have a very damaging impact on freedom of the press, freedom of speech in this country.

If he took that position, then in the first instance there would be a proceeding in camera, in confidence before the judge, before the witness would have to appear before the grand jury. Then the judge, in camera, in confidence, would make a determination as to whether the need for giving this information was so compelling that the government had to have it in order to present its case. The court said, page 12 of its opinion: "If any competing public interest is ever to arise in a case such as this, where First Amendment liberties are threatened by mere appearance at a grand jury investigation, it will be on an occasion which the witness, armed with his privilege, can still serve a useful purpose before the grand jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the government to show that such an occasion is presented here."

The court goes on, "In light of these considerations, we hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret grand jury interrogation, the government must respond by demonstrating a compelling need for the witness's presence before a judicial process properly can issue to require attendance."

Hicke: Okay. There were no precedents for this decision?

Bates: No. This was a case of first impression. The court, in its opinion right after what I just read, goes on to say, "We go no further than to announce this general rule as we noted at the outset: this is a case of first impression. The courts can learn much about the problems in this area as they gain more experience in dealing with them."

Hicke: Part of the problem obviously was the enormous publicity that surrounded all this, because if he appeared before a grand jury, it would be well known throughout the United States, right?

Bates: That's right.

Hicke: What was it like dealing with all of this publicity, the media, the television cameras? Was it televised? Reported?

Bates: Oh, to a limited degree. But I didn't appear on any television shows and I can't recall whether Professor Amsterdam did or not. We try to

avoid that sort of thing. We don't want to try our cases in the media: in the press or on television. But there was an awful lot of media attention given to this case, I can assure you.

Hicke: Did he go to jail or say he would go to jail?

Bates: No, he was held in contempt. But then there was a stay of execution pending the appeal, so that he didn't have to go to jail.

There were similar cases from New York and Kentucky, and on petitions for certiorari the Supreme Court reversed the Ninth Circuit in the Caldwell case in a lengthy five to four opinion.\* The court held that neither Caldwell nor any other reporters had any "First Amendment privilege" to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation" and that there was no privilege to refuse to appear before a grand jury until the government demonstrates some "compelling need" for a newsman's testimony. The court did say that news gathering is not without its First Amendment protections and that if an investigation was shown to have been instituted or conducted other than in good faith, the court was not without power to take control and quash the subpoena or otherwise protect the witness.

#### International Paper Company

Bates: In the mid-'70s, when my partner Bill Mussman was asked to join the Standard Oil Company of California and become its chief legal officer, one of the cases --

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-- I inherited from him was United States v. H. S. Crocker\*\* and other paper companies, including our client the International Paper Company. Bill Mussman had worked very closely with Byron Kabot, who was general counsel of International Paper, and John Dillon, who was Byron Kabot's assistant.

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\* Branzburg v. Hayes (1972) 408 U.S. 665, pp. 708-709.

\*\* (United States District Court, Northern District of California, 1974) Civil No. C-74-0560 CBR.



In going over the activities of the defendants and the officers of the defendants, certain determinations had been made before I got into the case. Among others, it was determined that the case and civil actions involving similar incidents would be vigorously defended, and that the case would undoubtedly go to trial. As time went on, some of the civil cases were disposed of by way of settlement or otherwise.

As we got into the case and talked with the people involved, it became apparent to us that we did have a problem. Tim Carr, who had been working with Bill Mussman on the case, was still on it and working with me. Reviewing the matter with Byron Kabot, John Dillon, and some of the executives of International Paper, we saw that there were problems involved in exchanging price information and in pricing activities, and that some of the other paper companies had similar problems. After spending a lot of time with the lawyers in the antitrust division of the United States Attorney's office, we decided that we should enter into a consent decree.

It so happened that the case had been assigned to Charles Renfrew, who had been a partner of our firm and was and had been a federal judge for five or six years. By then, enough time had gone by so that Renfrew felt he could be a judge in a case in which we were representing one of the litigants. We had meetings in Renfrew's chambers with lawyers from the antitrust division and with lawyers from the other defendants. It was finally agreed that the individual defendants would plead nolo contendere. Renfrew would hear their testimony and then determine what punishments and what sort of final decree would be entered.

Fines were imposed and a final decree was entered. One of the conditions that Renfrew imposed on the officers was that they embark on a campaign of public speaking to their employees and others to tell about what constitutes a violation of the antitrust laws, and, in effect, to confess their improper activities in public. Renfrew felt that this would be a therapeutic experience, particularly for the officers involved and for the companies, employees, and others. The individuals involved embarked on their campaign of giving these speeches.

As part of the order, the judge obligated each one of the defendants to file an annual report of antitrust compliance for a period of ten years after the entry of the decree. This has been done religiously ever since. I see just last year we reached the tenth anniversary of those reports.

When Renfrew left the bench, the court assigned the cases to Judge Schnacke. Schnacke did not require oral testimony from the principal officers each year as had Renfrew. It was the first time

that any federal judge had taken the approach that Renfrew pioneered. I think it was a good thing to do. Actually, it also prompted International Paper to finance the preparation of a film, The Price, about the activities involved in the case and about the serious consequences of violating the antitrust laws, which had very popular acceptance throughout the country.

Fortunately, potential civil liabilities were rather limited at the time of entering the consent decree. The consent decree and final judgment did not create any additional liabilities on the part of the defendants, which is sometimes a very serious matter to consider whenever a party is contemplating entering into a consent decree in a case of this kind, because the consent decree and the final judgment can create a civil liability in a civil antitrust case.

Hicke: Is this a trend that you see in recent ways of arriving at decisions?

Bates: I'm not aware of this kind of procedure having taken place since. I don't know of any other judge that has done that. I don't know if the circumstances are such that it would be appropriate. I think it was particularly appropriate in this case. Of course, it is a lot better than having to serve time in prison.

Hicke: Right. It seems to make so much more sense.

Bates: Yes, it does. It's a very troublesome thing for an officer with an established fine reputation to have to go around and confess he violated the antitrust laws and admonish others not to do the same, help them avoid the consequences of violating the antitrust laws. Many of them were obligated to pay fines for their participation in this scheme.

Hicke: But a fine is a fairly, perfunctory thing, although it may hurt in the books.

Bates: Well, yes, and I don't know whether the law has been changed in this regard, but at the time, as far as I know, the corporations assumed the financial obligations. I don't know that. But I suspect that is what happened in quite a number of cases. Of course, these probably wouldn't be deductible expenses, but the company helped the individuals.

#### Safeway Stores: Beef Antitrust Litigation

Bates: It was in the mid-'70s, about 1976, that there was a very substantial

verdict in the case of Bray v. A&P\* [Great Atlantic & Pacific Tea Co., Inc.], for what amounted to over \$32 million, after trebling, plus an additional \$3.2 million in attorneys' fees. This was an anti-trust case filed by Bray and other cattlemen originally against Safeway, A&P, and Kroger here in our federal district court. Our client was Safeway. As I say, the other clients were A&P and Kroger.

After investigating the matters involved, Safeway and Kroger decided very firmly that there weren't any antitrust violations. The theory of the case was that the retail chains had combined and conspired with each other to suppress the price that they paid for beef; that they got together through a newsletter and through this, they were able to suppress the price they paid for beef from the packers and the packers, in turn, suppressed the price that they paid to the cattlemen. So the cattlemen suffered substantially from these anti-trust violations.

Safeway denied there was any sort of combination or conspiracy to violate the antitrust laws. They denied that there were any efforts to suppress the price of beef paid to packers or anybody else. Their view was that there was nothing to support such a charge. But they had gone to considerable time and expense in working on the defense of the case. They felt that if they could dispose of it with a nominal settlement, they would do so. Safeway settled for \$30,000, and Kroger settled for slightly more. So they were out of the case when the case went to trial.

The case, as I said, was in the federal district court here in San Francisco. Young Joe Alioto, Joe Alioto, Jr., represented the plaintiff cattlemen. He joined together several other cattlemen, but Bray was the lead plaintiff and went to trial against A&P. A&P was determined not to pay anything in settlement of the case. Arthur Dunne represented A&P.

Anyway, as I say, the jury came in with a substantial verdict in excess of \$10 million, which, when trebled, was over \$30 million, not counting attorneys' fees and whatnot that were put on top of that. When this verdict came in, it received national publicity. Immediately, other cases were filed throughout the country. Safeway again was named as a defendant along with other retailers. Here we were now, faced with having to defend a lot of new cases filed all around the country. We had meetings of co-counsel.

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\* Bray v. A&P, (N.D.Cal. 1968) No. C 48536-OJC.

My partner Dick Odgers had been working on these cases and was quite familiar with the facts and had been involved in the earlier settlement by Safeway. So Dick really took on the major responsibility for these cases. Eventually, and later on, he assumed full responsibility for the cases.

Anyway, I was actively involved in the early stages of the litigation. Early on, I had a meeting with Joe Alioto. Young Joe came into my office and reviewed with me what happened in the Bray case. The way he told me the story, it went like this, just briefly, hitting the highlights:

It was really his father's case, but his father had been elected mayor and was out of the case. He would have settled with A&P for \$35,000, but A&P refused. The time was such that the case was becoming ripe for dismissal because of failure to prosecute so he had no recourse but to go to trial. He confessed that he really didn't know whether or not he was going to be able to establish a case. He didn't have much to go on. He had some pictures which were taken at a convention of retailers and others in the retail business. One of the meetings may have involved discussions of pricing. He had the fact that Safeway and Kroger had settled, but the settlements were inadmissible to establish any liability on the part of A&P. He also had the fact that there was a trade journal, the so-called "yellow sheet," that came out regularly and showed prices paid for beef, but little else, other than that there was a large mark-up for the price of beef from the cattle ranchers to the retail customer.

Hicke: You mentioned that there was a newsletter involved.

Bates: Yes. That was the newsletter that published news about beef prices. The plaintiffs contended that this was a vehicle by which the retailers disseminated information to each other on pricing and were able to suppress the price to the packers. We didn't think it made any sense, and there wasn't any factual basis for showing that there was any sort of a conspiracy to suppress the price paid to packers involved in this activity.

Anyway, as the case went along, Joe Alioto created the impression in the minds of the court and the jury that the other defendants who had been in the case at first, namely Safeway and Kroger, had paid a substantial sum in order to get out of the case. He did this indirectly by seeming inadvertence and referring to Kroger and to Safeway, who were no longer in the case. It was improper to bring out the fact that there had been settlements with these other defendants. These Aliotos are very clever. You just have to watch them like a hawk.

Arthur Dunne was getting along in years. He was a very honorable, successful trial lawyer, but you have to be very quick and very



alert when you're in that courtroom and before a judge and a jury. You have to react quickly to a situation where the other side is trying to create an impression that could very well mislead the jury and be adverse to you. Arthur Dunne was getting concerned that the jury might think that there were very substantial settlements paid by Safeway and Kroger. He finally thought it would be a good idea just to go ahead and introduce the amounts of the settlements and let the court and jury see what the settlements were all about; they were relatively nominal; and there were a lot of self-serving statements in the settlement agreements about no evidence of any price fixing conspiracy or any other violation of the antitrust laws.

It just so happened that shortly after these settlements were made, the price of beef went up about ten cents a pound, which was rather a substantial percentage increase at that time, about a 25 percent increase in the price of beef.

Hicke: This was the retail price?

Bates: No, that was the price paid to the cattlemen. He also got in a photograph showing that there was a member of the A&P sales force at a meeting where prices were supposed to have been discussed. Well, the salesperson had earlier testified he couldn't recall that he was at this meeting. He had also testified there wasn't anything of any significance, but he couldn't recall he was at the meeting. When Alioto introduced this big blow-up of this salesperson being at this meeting, it created an impression that the salesperson may not have been telling the truth about his participation in that meeting and what went on.

Hicke: It was thought that he was really covering up, maybe?

Bates: That's the impression that was created. When the case finally went to the jury, young Joe got up and argued that there was obviously collusion among the defendants, there was obviously a price-fixing arrangement, because right after the settlements were made by Kroger and Safeway, the conspiracy ended. The price of beef went up by ten cents a pound. "There is no question but what there was involvement here and participation and an illegal scheme. You've got this photograph of the salesperson at this meeting." He said, "It's very simple to assess damages in this case: all you have to do is just tack on ten cents to the poundage of beef that was involved in this period of time and you've got \$10 million." That's exactly what the jury did. It's incredible. The judge trebled it automatically. Of course A&P appealed.

I think that the case was finally settled for about \$10 million. But it stimulated a lot of activity all through the United States.

There is an interesting memorandum that was prepared by Steven Douse\* He was with the Department of Justice. In this memorandum, the author explodes the plaintiff's theories and the facts offered in support of these theories in a very critical analysis of Alioto's trial tactics, and the article is very critical of the way Judge Oliver Carter handled the trial of the case. It is, I think, of very great historical value. It's a memorandum dated April 19, 1976. If it isn't in our library, it ought to be. But it just points out how the court and the jury were misled by the trial tactics involved in that case and how there really wasn't any actual factual support for the verdict.

Hicke: Could I just take a look at that?

Bates: Yes. You can keep it if you want. Give it back later.

The following is quoted from Mr. Douse's memorandum (pp. 60-63):

This large verdict -- prima facie proof of a massive price-fixing conspiracy among the nation's leading food retailers -- is, in my view, a shell with nothing of substance behind it.

The jury's verdict is not difficult to understand. They could not have accurately assimilated and critically analyzed the mass of evidence presented. They were forced to rely primarily on the incomplete and sometimes inaccurate representations of counsel. The judge's conduct of the trial and jury instructions were in some respects questionable, but his disposition of the defense motion for directed verdict, judgment notwithstanding the verdict, or a new trial was indefensible. Judge Carter, like defense counsel, failed to go to the record to check the accuracy of Alioto's assertions. As a result he made repeated factual errors and inferences unsupported by the evidence, and he demonstrated an unseemly eagerness to accept almost anything, no matter how speculative or irrelevant, as support for the verdict.

The vast majority of evidence introduced in Bray was either immaterial or irrelevant, not only for the issues of that case, but for antitrust purposes generally. The plaintiffs' theory of the case was in many respects legally and economically unsound. There were no really significant leads to offenses not alleged in Bray, and much of the background information and the questions raised here might be of

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\* United States Government "Memorandum" from Steven C. Douse to Steven Brodsky dated April 19, 1976, File 60-50-101.

use in other areas, but none justify an independent inquiry. The cattlemen's charges appear to be without foundation and, at least based on the record in Bray, do not warrant further investigation by the Antitrust Division.

Anyway, these beef cases that we got involved in were finally consolidated in Dallas. There were preliminary motions made and motions for summary judgment. I believe most of the cases have been disposed of now, either by way of very modest settlements or by way of summary judgment. I was talking to Dick Odgers about them the other day, and there are still a few cases pending against the meat packers, but not the retailers.

Hicke: Did he handle most of those?

Bates: Yes. That's the story of the beef antitrust litigation.

Hicke: That's an amazing tale.

Bates: Yes. It really is. It just, I think, demonstrates how alert you have to be and how responsive you have to be in litigation to make sure that neither the judge nor the jury gets the wrong impression.

Hicke: Did this memorandum have any effect on the settlement of the case?

Bates: No. It was written because the antitrust division was quite concerned about whether there was any illegal activity involved in all this and concluded that there was not. So the memorandum itself wouldn't be admissible. It was probably used by others to persuade other potential claimants that they shouldn't get involved in this sort of litigation.

Hicke: To settle or not even to bring suit?

Bates: Yes. A most interesting epilogue to all this is the fact that in 1980 a San Francisco jury found Mayor Alioto, "Little Joe" Alioto, and their firm guilty of such gross malpractice in the handling of their clients in the beef antitrust litigation that they brought in a verdict against them in the unprecedented amount of \$3.55 million for negligence, intentional misrepresentation, and breach of fiduciary duty. The award was the highest in legal malpractice history. Subsequently, Judge Ira Brown reduced the award to \$880,000.

Among other things, it was found that the Aliotos were negligent in not preserving the claims of the many cattlemen who were clients of the Aliotos but had not been brought into the Bray case. In addition, young Joe Alioto arbitrarily entered into a settlement of the case with A&P for \$9 million -- \$3.2 million for himself and \$5.8 million for the plaintiffs, of which he would also take one-third, or \$1.9

million, giving a mere \$670,000 to the 200 cattlemen. (See "Bonanza!" published in the New West Magazine dated September 8, 1980.)\*

Dean Witter Reynolds Intercapital, Inc.

Bates: In the latter part of 1977, an agreement had been worked out as between Dean Witter and Reynolds Securities whereby Dean Witter and Reynolds were going to enter into a merger. Proxy solicitations were sent out urging the shareholders to approve the merger. A subsidiary of Dean Witter, Dean Witter Intercapital, Inc., was a mutual fund in which funds could be invested and carried and would return the investor some income from a surplus he had in his securities account, and it granted him a return which was fairly good in comparison to interest returns in banks and the like. In any event, Dean Witter Intercapital was also, of course, to be merged into Reynolds and become Dean Witter Reynolds Intercapital, Inc. David Gold filed an action during the last week of December seeking to enjoin a meeting at which Dean Witter Intercapital was to --

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-- exercise the proxies to vote to proceed with the merger along with Dean Witter and Reynolds. In his complaint, filed on behalf of plaintiff Zell, he purported to allege a class action.\*\* Plaintiff Zell was a representative of the class. The class consisted of all of the investors in the Dean Witter Intercapital fund, of which he was one of some 330,000 stockholders.

He alleged in his complaint that the proxy solicitation was misleading in that it did not mention the cases that were pending against Dean Witter, that the cases could have a substantial impact on the value of an investment in Dean Witter Intercapital, and that these cases should have been described and the actual materiality of the cases should have been set forth.

This last-minute complaint caused a considerable amount of concern among the people of Dean Witter Reynolds, and I ended up working very hard with these people to file a response to the plaintiff's application for a temporary restraining order to restrain the

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\* Attached as Appendix I. Also see 188a.

\*\* Paul W. Zell v. Intercapital Income Securities, Inc., 459 F.Supp. 819 (1978).



defendants from voting the proxies and consummating the merger. David Gold, representing the plaintiff, filed his action on December 29, 1977. My response was filed on January 1, 1978. The case was assigned to Judge Orrick.

We all went to court on the Friday before the hearing to give a brief review of the situation and set aside a time for the hearing. On that Friday we had just received additional papers from the plaintiff and we did not have time to prepare a response. Judge Orrick recognized the importance of disposing of the matter before the January 3 meeting. Therefore, the hearing was set for the morning of January 1.

Hicke: Which is New Year's day.

Bates: New Year's day, right. So we were working hard that weekend to get ready for these hearings. I recall going out there on the morning of the hearing with some of the senior officers of our client and David Gold and his client, Mr. Zell.

Hicke: Going out where?

Bates: To court, before Judge Orrick. Needless to say, we were the only thing going in the federal district court in San Francisco. Earlier in the morning, I had delivered my memorandum in opposition. When Judge Orrick got into the matter, he indicated that he was going to dismiss the action. I said, "Your Honor, we are not seeking dismissal at this time. All we want Your Honor to do is not to enter the temporary restraining order."

I said, "Your Honor, we are in the process of preparing affidavits in support of a motion for summary judgment. After Your Honor has those affidavits and has the information before you, we think the case will then be ripe for summary judgment, but we do not think the record adequate at this time to support a motion to dismiss that would stand up on appeal." Orrick, having reviewed the papers and reviewed our memorandum, was most upset with David Gold having filed this action at this very late date, which could have thrown a very serious cloud on the whole merger of Dean Witter and Reynolds, and many stockholders were involved, both on the Dean Witter and Reynolds side. It could have created a lot of confusion in the marketplace.

So Judge Orrick denied David Gold's application for a temporary restraining order. The vote on the merger went ahead and Dean Witter and Reynolds were merged. We still had this case pending, which was now, in effect, a damage case.

Shortly after that we got a notice that Judge Orrick had recused himself from the case. The case was being assigned to Judge

MONDAY, JUNE 22, 1987 *The Recorder*

# State bar files discipline charges against Aliotos

By MONICA BAY  
Recorder Staff Writer

Seven years after a San Francisco Superior Court jury found them guilty of legal malpractice, the State Bar of California has filed formal disciplinary charges against former San Francisco mayor Joseph L. Alioto, 71, and his son, Joseph M. Alioto, 44.

In the charges, filed Friday, the bar claimed that the Aliotos breached their fiduciary duties in handling the settlement of an antitrust battle between Wyoming cattle ranchers and three supermarkets.

In a related action, state bar lawyers filed a stipulated public reproof against the Aliotos' co-counsel in the antitrust case, San Jose trial lawyer James F. Boccardo, 76, for failing to properly monitor the settlement. The Boccardo reproof is subject to State Bar Court approval.

Neither the Aliotos nor Boccardo could be reached for comment Friday.

The Aliotos' discipline charges stem from their conduct during 1974 and 1976 settlements of a highly-publicized beef price-fixing case. Former client Courtenay Davis sued the Aliotos for legal malpractice after he was dropped from a \$10-million settlement.

The San Francisco Superior Court 1980 trial ended with a \$3.55-million verdict against the Aliotos. The jury's award was slightly reduced by an appeals court to \$3.2 million, and that figure was affirmed by the state Supreme Court in 1984.

The state bar initiated its investigation of the Aliotos after newspaper reports of the Davis litigation, said bar spokeswoman Anne Charles.

The bar charged that the elder Alioto failed to adequately supervise his son, who had been practicing law for a year when assigned to the case.

Both Aliotos are charged with breach of fiduciary duties, abandoning their client, entering into a business transaction adverse to their client, accepting employment adverse to their client, representing conflicting interests without appropriate consent agreements and collecting an unconscionable fee, said Charles.

Boccardo was sanctioned for failing to adequately supervise Joseph M. Alioto's distribution of settlement funds in the case. He was out of the office and did not return telephone calls Friday. According to the bar, the cattle ranchers initially approached Boccardo to represent them, and he contacted the elder Alioto as an authority on antitrust litigation. Both Boccardo and Alioto were hired on a contingency fee basis, reported Charles.

The price-fixing suit was eventually dismissed as part of the out-of-court settlement arranged by Joseph M. Alioto and ratified by his father, but without Boccardo's knowledge, said Charles.

She referred further inquiries to the bar's new chief trial counsel, James Bascue, who was unavailable for comment.



[William W.] Schwarzer. I saw Judge Orrick after this. I went up to him and asked him, "Bill, why did you recuse yourself from hearing this Intercapital case that was filed by David Gold? I was surprised to receive a notice the other day that you'd recused yourself and the case was going to be assigned to Judge Schwarzer." He said, "Jack, I litigated against David Gold when I was in private practice with my firm, with the Orrick firm. When I sat up there on the bench, after reviewing the papers and considering the matter and listening to David Gold, I decided that I disliked that man so much that I just could not sit there and be an unbiased judge in the case, and that the only reasonable thing for me to do was to get the case assigned to another judge." I thought that was most amusing.

Anyway, we eventually made a motion for summary judgment to Judge Schwarzer, arguing that the nature of any litigation pending against Dean Witter at the time these proxies were sent out in support of the merger could not be material to the financial strength of Intercapital Income Securities, that there was no need for Intercapital Income Securities to go into the details of the litigation pending against Dean Witter, and that in fact the companies were now much stronger financially together than they ever were separately. Judge Schwarzer granted our motion for summary judgment.

Gold appealed the case to the Court of Appeals in the Ninth Circuit and that court reversed, but sent the case back for further proceedings, advising the trial judge to allow discovery as to the materiality of the litigation that was pending against Dean Witter.

Well, when the case came back, we now had to proceed with discovery. The appellate court said that after discovery, the trial court would be quite free to again consider a motion for summary judgment if there was no showing of any substantial material impact on the financial strength of Dean Witter Intercapital. But now we were faced with the ordeal of having to go through discovery as to the materiality of all these cases, which, of course, would be pretty hard to evaluate, because some of them had just been filed at the time the proxies were sent out and still hadn't developed to a stage where you could give a reasonable evaluation of the case. It would take an awful lot of time, effort, and expense. But by the same token, David Gold would be faced with the time and expense of having to participate in all this discovery. So after considering the matter, and as difficult as it is to get along with Gold, we finally arrived at a very modest settlement. We decided to settle just to get rid of the litigation.

Since there was only one plaintiff, the case had never been classified as or determined to be a class action. With court approval, we could eliminate any problems as far as any potential class was concerned. We recommended the settlement to our client, which was



approved. We sent out some settlement papers, release and dismissal, to be signed by Zell and by Gold.

David Gold called me and said he couldn't get Mr. Zell to come into his office to sign the settlement papers. He said he would like to come over and have a visit with me. So he came to my office. We decided that we'd go ahead with the hearing before Judge Schwarzer. Even if Zell did not appear at the hearing or even if Zell objected, we would be willing to proceed with the settlement without Zell signing a dismissal or a receipt and release. He said that he had a very difficult time with his client.

We noticed the matter for approval of the settlement and I had papers served on Zell and filed with the court. On the day of the hearing, we went out there and the clerk advised us to go into Judge Schwarzer's chambers, which we did. We talked about the disposition of the case. The judge was quite agreeable to going along with it and approving the settlement. Then the clerk appeared in the judge's chambers and said that Mr. Zell was in the courtroom. We were the only matter on the calendar at this particular time. So the judge put his robes on and we went back into the courtroom.

The matter of our case was called. Mr. Gold and I presented our reasons for the settlement. Then the judge asked us if there were any comments to be made and Mr. Zell stood up and walked up to the podium and announced himself. He said that he was a lawyer, admitted in Massachusetts, that he had spent an awful lot of time on the case, that he had flown around the country and gathered some material. When the judge pressed him on it, he said he'd gone back to Massachusetts and gotten a copy of some complaint in a similar case and then come back home to San Francisco.

It was quite apparent that the man was elderly and confused, but quite stubborn. Judge Schwarzer tried to handle him as carefully and diplomatically as he could. He tried to explain to him that it would be a hard burden for him to take on and that he didn't think that the time and expense was there to pursue the litigation. So the judge went ahead and approved the settlement.

I felt that the whole affair ended up with an amusing conclusion. It was interesting to have David Gold come to my office and beg me to help him try to dispose of the case. It was the most diplomatic thing I had ever seen David Gold do. Gold has quite a reputation as a plaintiff's strike lawyer and he's been very successful at it. He takes a case like this with one shareholder and he is just a technical rascal that gets into these things and creates all sorts of problems. But he's part of the system. Maybe sometimes he does some good. I don't know. I think he's been quite successful financially; but he can be a most irritating pest.

- Hicke: I just wondered if you wanted to speculate on how these stockholder cases originate. What motivates them? This man Zell was a retired lawyer, is that correct?
- Bates: Yes. Oh sure. He was well on in years. I think he had studied the proxy statement and felt that there might have been something wrong here. I guess he knew of David Gold's reputation. So he got David and his people to take a look at it. I guess David thought it might be worth the effort. Maybe he felt that the risk of throwing a cloud over the merger of Dean Witter and Reynolds would be enough to stimulate a substantial settlement right at the outset to get rid of him.
- Hicke: And if he had been able to obtain the temporary restraining order, it would have been a different story than it was?
- Bates: But our people were sophisticated and determined and they weren't about to be thrown off by a fellow like David Gold. If we hadn't gotten the right judge and filing right on the eve of this meeting, another judge might have granted a temporary restraining order, which could have led to a substantial settlement, just to get rid of Mr. Gold.

Gold is a real student of the securities laws and regulations and a knit-picker, and he'll take one of these things just on the gamble that he might be able to get a lot of money out of it. As I say, he has been successful. He's been involved in quite a number of anti-trust cases, too.

### Victor Posner

[Interview continued: July 22, 1986]##

- Bates: I think the case of Foremost-McKesson v. Victor Posner, Steve Posner, Krackower and Sharon Steel and others is quite significant. It was the first time to my knowledge that the firm had been involved in representing a so-called raider. I recall that when this case came to us, we were quite apprehensive about taking on such a representation. I reviewed the prospects with George Eckhardt, who was then our managing partner, and other partners in the firm. Victor Posner and his son, Steve Posner, were anxious for us to represent them in the attempt to take over the McKesson Corporation, then Foremost-McKesson, Inc., by Sharon Steel Corporation, which was controlled by the Posner interests.
- Hicke: How did the case come to Pillsbury, Madison & Sutro?

Bates: I have a hard time remembering exactly how it came to us. I don't know who referred Posner to us. I think it may have been Shearman & Sterling. Shearman & Sterling are a big New York firm. Bob Claire was a good friend of mine and knew our firm well. I subsequently talked with partners who had worked on Posner matters at Shearman & Sterling. They confessed that he was difficult but that he was always honest and above-board with them, that he always paid his bills, and if there were not any conflict, they saw no reason why we shouldn't take on the case. They would; they did quite a bit of work for him.

I called my friends in the investment banking business and called friends at Dean Witter. From their investigations, they didn't see any reason why we shouldn't represent him. I was quite apprehensive about doing so, because I had a lot of good friends that were at Foremost-McKesson, including both the Ditz brothers, who were fraternity brothers of mine at Stanford, and we were very close friends. But that was all there was to it. I didn't represent the Ditzes and we didn't do any work for Foremost-McKesson; so there really wasn't any reason not to take on the case. Even though we were not comfortable in the role of representing a raider, I thought it might be a good experience for us to see how that side of a lawsuit operated. So we decided to get into it. We were very active for several months.

There was a lot of publicity about the case. The litigation involved most of the people that have to do with matters of this kind, including Joe Flom, who is one of the leading lawyers in this field. It was through Joe Flom's efforts that a full-page ad appeared in the Wall Street Journal. The headline: "Would You Do Business With This Man?" It was a vicious attack on Victor Posner. We countersued in the litigation to seek libel damages for the statements made in the article. There were suits started off by Foremost-McKesson seeking to restrain Victor Posner and Sharon Steel from taking over the company; then we filed countersuits. The cases all ended up before Cecil Poole.

I'll never forget my first visit to the offices of Victor Posner. I was asked by Bernie Crackower, his general counsel, to come to New York and to go over the whole situation with Victor Posner and the board of directors of Sharon Steel. At that time, Posner's office was the entire top floor of the Plaza Hotel in New York City.

I arrived at the top floor of the Plaza Hotel and entered a reception area. A voice came on and asked me to introduce myself, and I did. I could look up and see television cameras trained on me. Then the voice said, "You can enter the door to your right," and a door clicked open, and I entered a long hallway. I heard the door click behind me, and so I proceeded to walk down the hallway. I saw television monitoring cameras following me as I walked along.



I finally got to the end of the hallway and I walked into a very large room. I'll never forget that room. On one side of the room there was a tremendous wall, red, a very gaudy thing with a mirror background all up the wall and filled with glasses -- a big bar. Then there was a rather substantial dining area. There were windows overlooking the park, and there was a big desk. Behind it was Victor Posner.

I was introduced. Victor was really busy. He was busy thinking about taking over other companies. It was hard to get him to focus on the problems in the McKesson takeover -- he was so busy working on other matters. But we finally got his attention and went over the situation.

Hicke: Can you give me a little bit more of his background?

Bates: Well, it's amazing. He came with his family to New York City in the middle of the Depression, in the late '20s -- early '30s. He was a young man in his late twenties and he went to work and accumulated a little money. He started buying up depressed real estate values in and around New York City, in the slum areas and whatnot. Then as we came out of the Depression, he was selling off these properties and he made a lot of money. Then he got into other ventures, and by the time he was in his early thirties, he was a multi-millionaire.

He decided he was going to retire and he went down to Florida. He was trying to relax there with all his millions, but he was a very restless young man. There was a friend there who had a cigar business and he was in some trouble and asked Posner if he could help out. Well, one thing led to another and Victor got in and before you knew it, he owned and controlled the cigar company. Then out of the cigar business he started to buy other companies and gradually expanded to the point where he owned a lot of companies, including Sharon Steel -- he was in the steel business. He's a genius, an incredible person.

Hicke: He's pretty highly leveraged, I assume.

Bates: Oh, sure. Oh, yes.

Hicke: And he didn't ever run into trouble?

Bates: Well, he certainly did. The funny thing is, he just never seemed to know when to quit; he just kept going and going. I have an article from the San Francisco Chronicle of July 19, 1986. "Tycoon Guilty of Evading \$1.2 Million in Taxes." I see that Edward Bennett Williams represented him in this criminal proceeding in Florida in which he was found guilty of violating federal laws and evading income taxes. This had to do with a charitable gift that he had made which he overvalued to the extent that the government was able to persuade the jury that



it was a fraud. It's just incredible that for this amount of money he would jeopardize himself and his tremendous fortune. Even though \$1.2 million is a lot of money to most people, and to me, as far as his holdings are concerned, it's relatively minor. But of course he is pretty highly leveraged, and these people can get in trouble very quickly.

We went at it hot and heavy in the McKesson case. Jim Brosnahan represented McKesson. He was and still is with the Morrison firm.\* Jim is very high-strung and one day he threatened to punch me in the nose. But that's the way it goes. It wasn't in the courtroom. It was after court, in the corridor. I got Jim Walsh, a partner here in our firm, involved in the case. I was thinking early on that this was something that Jim could handle, but I felt that there was so much publicity about it and so much going on that it was something that I just had to handle myself.

Well, there were a lot of interesting witnesses involved here. The gut issue as it shook down was whether or not Posner and Sharon Steel had misrepresented their assets in any way. Cecil Poole finally concluded that in evaluating some of the reserves and the like, there should have been more said about the assets. He didn't go any further than holding that Sharon Steel would be restrained from going ahead with the offering unless it revealed more about the financial situation with respect to certain of the reserves. It had to do with the way in which they they reported the value of their inventory.

I guess by that time Posner had lost some interest and didn't want to go back and change things; he had other targets in mind. Of course, he eventually made a lot of money out of buying all this McKesson stock and driving the price way up, and that was finally worked out. He sold his stock, sold most of it back to McKesson, but he made quite a bit of money on the whole show.\*\*

He was a fascinating character. Even though he was a real pirate, he was always very candid with me and he always paid his bills, although I took a lot of razzing from my good friends about representing him. It was very interesting and certainly gave us an insight into how these people operate. So that's the saga of Victor Posner.

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\* Morrison & Foerster of San Francisco.

\*\* See following page.

# How rich IS Victor Posner?

By Peter D. Whitney

Victor Posner, the Florida entrepreneur who is trying to take over Foremost-McKesson Corp., has so carefully protected any disclosure of his personal wealth that a federal court magistrate was persuaded to seal it in deepest secrecy in the U.S. District Court clerk's office here.

Nobody consequently is allowed to tell the press—and through it the investing public—whether the takeover specialist really is worth the hundreds of millions that legend says he is. Or whether, by reason of that, he is capable of swinging the Foremost-McKesson acquisition.

The battle to keep the net worth statement under wraps was

led by John Bates of Pillsbury, Madison and Sutro here, and by Walter McGough of the Pittsburgh firm that represents Sharon Steel, the company that is making the bid for F-M.

But they didn't succeed before Posner, testifying in a deposition hearing here June 25, had identified the net worth statement as apparently authentic.

James Brosnahan, for Foremost, had sought to discover whether Posner had the "vast resources" that his son Steven told the Wall Street Journal in February made it possible for them to "do what we want."

His father said that at the time he told Steven, who is 33, that "if I would have been you, I wouldn't have said it." But he testified that

"I'm very proud of what he does, and I have no complaints."

Specifically, he said, Steven's quoted statement was factual.

The revelation from the mass of depositions and affidavits in the case came as Federal Judge Cecil Poole took under submission the Foremost attorneys' case for a preliminary injunction that would force Sharon Steel to revise radically last year's financial statement and terms of its F-M offer.

Bates in final argument denied the claims of Foremost that the statements of earnings had been inflated by accounting tricks, and said the injunction would in effect kill off the Posner takeover offer, which is simultaneously being examined by the Securities and Exchange Commission.

San Francisco Examiner, 4 November 1976

## Accountants battle at hearing here

By Peter D. Whitney

"It looks like the O.K. Corral out there," drily quipped U.S. District Judge Cecil Poole, looking over his glasses at the federal courtroom where the battle of Foremost-McKesson vs. Victor Posner et al. was raging for the fifth court day.

But the shootout wasn't with guns and bullets. Computers — human and electronic — were firing away, and six figure sums were being ricocheted about the courtroom.

It was, in short, a battle of accountants, and the judge's wisecrack was triggered by the charge by John Bates, attorney for the Posner interests, that plaintiff's expert witness, accountant Clarence Houghton, was "a hired gun."

Bates was trying to get Houghton to acknowledge that he was put on the case by his firm, Haskins and Sells, because he had a liking for a fight. Judge Poole halted the line of inquiry, on the basis that "there are plenty of them (hired guns) out there."

The big dairy, drug and liquor conglomerate that is based in The City is resisting a takeover bid by Posner and his Sharon Steel Corp.

Houghton was critical of the way Sharon Steel's accountants, Peat Marwick and Mitchell, had permitted the company to value its piles of ore. He also questioned

the handling of other items in the Sharon books.

By incorrectly applying an inflation index to some of the ore, he said, the Sharon financial report made it appear to be worth \$38 a ton, when the true market value was \$27.

And he said that although some of the Sharon practices were permitted in tax law, they were not right by "generally accepted accounting practices" and the Peat Marwick firm ought to have refused to lend them its sanction.

Bates put a Peat Marwick partner, John L. Miller of Cleveland, on the stand to testify that the valuing methods were required because they were consistent with Sharon's past practices.

Foremost-McKesson attorney James Brosnahan asked Miller if he wasn't worrying about what the Securities and Exchange Commission might do to Peat Marwick over the Sharon report.

Miller replied that he had a clear conscience and hadn't given the matter any thought.

It is Foremost's contention that Sharon was making its earnings look artificially big with "paper profits" so that owners of F-M shares would be lulled into accepting the takeover. Sharon is a much smaller company than Foremost-McKesson — but Posner took over Sharon, in its day, with the instrument of a very much smaller company than Sharon.

San Francisco Examiner, 29 October 1976



Hicke: What was it like sitting down at the table to discuss things with him? You said that it was a little hard perhaps to get his interest, to get his mind to focus on this case.

Bates: Oh, once he got focused on the case, he was full-bore, he was good. He was very responsive; he was a good witness. He was quick and very intelligent. It was just kind of absurd that he would get himself tangled up with trying to save a little money, a relatively small amount of money, in trying to get a bigger tax deduction with this gift that he made that got him in trouble with the government.

Hicke: Sounds like another form of risk-taking which he didn't really need. But maybe that goes along with that kind of life.

Bates: Oh yes, he had a flashy life-style: a big yacht and all sorts of accoutrements. When he came here to San Francisco, he'd always get a tremendous suite for himself and his mistress. I once remember he arrived and he was staying at the Fairmont. He was unhappy about the service, so he took over the biggest suite he could find at the Mark Hopkins and everybody moved over there. He always lived in very high style. Very interesting character.

### The Jacqua Case

Bates: All right, where do we go from here?

Hicke: You were going to talk about the Jaqua divorce case.\*

Bates: That's right. We don't handle very many divorce cases here in the firm, only very rarely. We don't purport to be experts by any means and we usually refer any contested divorce case to other firms that tend to specialize in divorce and domestic relations problems. I had represented Reuben Hills in his first divorce. James Martin McGinnis represented Mrs. Hills, and we had a little contest over some of the property, but that was about the only time I'd ever actually appeared in a contested divorce proceeding.

In any event, this one afternoon in -- I believe it was in the fall of 1982 -- it was late in the day and I had some phone messages that I hadn't been able to deal with, including a call from a

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\* In the matter of the marriage of Rosamond Robinson Jaqua and John Evans Jaqua (In circuit court of the state of Oregon for Grant County 1983) No. 8681.



Mrs. Jaqua. Well, I didn't know who Mrs. Jaqua was so I just set it aside with some other calls and went on home. That evening, Miss Kidson called me and said that there was a Mrs. Jaqua that had been trying to get in touch with me all day and that Mrs. Jaqua had finally gotten hold of Miss Kidson. She was most anxious to visit with me, that she had had to postpone a trip to Switzerland because she hadn't been able to get an appointment with me. I said, "Well gee, Miss Kidson, if it's that important I'd better see her." I had no idea what it was all about and neither did Miss Kidson.

She arranged for Mrs. Jaqua to come in and see me the next morning at 9:30. So I was in my office and Mrs. Jaqua was introduced and came in. She was quite an attractive woman in her early fifties. She sat down and said that she wanted to get a divorce from her husband John Jaqua, that they were residents of Oregon, that John Jaqua practiced law in Eugene, Oregon, that he had been president of the State Bar of Oregon and he was revered and immensely liked by practically all the members of the Oregon Bar. She wanted to get a divorce from him and she couldn't find any lawyers that she knew in Oregon that would represent her. She said that she had been referred to me by Mr. Wheary, who was an accountant with Arthur Young & Company. She was hoping that I could represent her.

I said, "Mrs. Jaqua, I'm not any sort of specialist in divorce matters and we just don't take on contested divorces. I don't even know whether Oregon is a community property state or not, and I don't know of any other law firm here in town where I could send you that would take on your case. They wouldn't want to get themselves involved in Oregon law."

Well, we went on to discuss her problem and background, and it turned out that she was a sister of Chuck Robinson, who had been head of Marcona, a subsidiary of Utah, and been a good friend of many of my partners and a good client of the firm. Chuck Robinson, I believe, at that point had left Marcona and was involved in other activities in Phoenix, Arizona. In any event, I told her I couldn't send her to any other lawyer in our firm, and I said, "If you weren't as attractive as you are and if you weren't the sister of Chuck Robinson, I'd really just ask you to leave the office. But under all the circumstances, I don't see any alternative but to try to do what I can for you."

"I'm going to have to hire some Oregon lawyers to help out in this situation." I said that I had a good friend in Eugene -- Windsor Caulkins -- and that I might get him to help out. She said that she knew Windsor Caulkins, that she was thinking of asking him to represent her but she had already learned that he wouldn't get himself involved in it. I said I might be able to get him to work on it through me. Anyway, I proceeded to take it on.

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Bates: It turned out that her husband, John Jaqua, had been the attorney for the founder of the Nike, Inc. shoe company, and as a result of that representation, he had received a substantial amount of stock in Nike shoe. He had \$10 or \$12 million worth of stock in that company. It also turned out that Oregon was not a community property state, but the law on divorce was such that the results of property division after the long marriage were quite similar, as if the property had been earned as community property.

Anyway, I talked with Windsor Caulkins and he said that even though he liked John Jaqua very much and didn't want to get in a head-to-head fight with him or his law firm, he would be happy to assist me in trying to do the paperwork, if we could work out a satisfactory settlement. I dealt with Bill Wheatley, who was a partner of John Jaqua's, and I also called my good friend, Bill Morrison, who had a substantial firm in Portland, Oregon. I had him arrange for me to confer with and if needs be have available one of their good trial lawyers who were familiar with the divorce laws of Oregon, in order to have someone who could take on a contest if it became necessary to do that. But I made it clear to Bill Wheatley that I did have this lawyer prepared to go ahead if we couldn't work out a satisfactory settlement.

The Jaquas owned a substantial ranch near Eugene on the river, which I understand was very attractive and quite a historic piece of property and quite valuable. Well, one thing led to another, and we finally were able to work out a satisfactory settlement calling for a split of the Nike stock and other assets. Then we had to redo her will, and I got my partner, Gary Botto, to take on that responsibility. Finally after we worked it all out and had gotten her half the Nike stock and a total of what amounted to \$8-\$10 million or more of assets and redone her will and the whole business, the matter was concluded. There were just some papers to be delivered and whatnot.

I got a call that Mrs. Jaqua was coming to San Francisco and wanted to come in and see me. So she arrived in my office with a very large box that she had on a dollie that you can drag along behind you. She had come down on a Greyhound bus from Oregon with all this material. You know, here's a lady who is now a multi-millionaire [laughs] dragging this dollie with this big box of things down Market Street and into 225 Bush Street, up to my office. [continued laughter by both] Miss Kidson was there to hold the door open so she could trundle it into my office.

Well, she opened this up and it turned out to be running suits and a whole bunch of Nike running shoes and tennis shoes and hiking boots. She had outfits for me -- two outfits apiece for me -- for Miss Kidson, for Gary Botto and for the notary. The will had to be notarized; Oregon requires a notarial acknowledgment of the execution

of a will, and the notary, Fred MaKinney, who works with George Guisti. She had all the sizes right. Gary Botto is very small but she had sizes for him.

Hicke: Even the shoe sizes?

Bates: Oh, sure. Running suits and everything. I thought that was delightful.

I think one of the most pleasant aspects of this whole thing was that shortly after this, I learned -- I think I learned this from Windsor Caulkins -- that she and John Jaqua had gotten back together again and that he'd gone to Switzerland with her where she was embarked on a course of teaching. So it was a happy conclusion.

Hicke: Indeed.

Bates: I guess the bargaining powers between Mr. and Mrs. Jaqua became stabilized when she ended up with half the property. He couldn't threaten her any more. He didn't have anything to hold over her when she was on an equal footing with him economically. He had had a drinking problem and apparently this whole thing had a therapeutic effect on him, and as far as I know, they're happily back together again.

Hicke: That's a wonderful story.

Bates: I tell that story about my rather limited experience in divorce. I just think it's a lovely story.

Hicke: It is, it is. It's a wonderful story and certainly indicates that it was well worthwhile.

Bates: Oh yes, and it was very pleasant all the way around the way it worked out.

There were many, many other cases, but I think I have touched on all the significant cases that I've been involved with over my career here in the firm.

Then after I became chairman of the management committee, I had less time to involve myself with active litigation, although I did continue to appear in various cases and continued to take on responsibilities in litigation. But by that time, fortunately, most of the lawyers that worked with me over the years had become relatively senior partners and the bulk of the workload could be taken over by them.

I think that pretty much touches on all the significant cases I had. I guess the next subject matter would involve the growth of the

firm and my involvement with the management of the firm and with the policies of the firm.



## IV LAW FIRM MANAGEMENT: CHAIRMAN, 1980-1983

[Interview continued: July 29, 1986]##

Management in Early Days

Hicke: I thought we'd start this morning by talking about law firm management.

Bates: The history of my involvement with the firm and getting to know the individuals has a lot to do with the eventual management of the firm, because we're dealing with individuals and with their contributions to the firm in the way of professional contributions as fine lawyers, dealing with clients, dealing with the business aspects of the firm, and a multitude of those things, so that personalities become extremely significant in the whole story.

When I first came to the firm as a young lawyer after World War II in 1947, Felix Smith was the senior partner. We didn't have a management committee. There really wasn't any real organization of the firm, at least that I could discern. It was run by the top partners, and the senior partner was invariably a very strong individual, recognized both for his legal talents and his capacity to deal with clients and deal with the business problems of the firm.

There were quite a few stories about Felix Smith because he was such a powerful person, and it was unfortunate that he died shortly after I came with the firm. There were stories about him getting memoranda from the chief executive officer of Standard Oil and just scrawling, "You're wrong" on it, or words to that effect, and sending it back. It's just a far cry from the way we deal with our clients today, where we're so sensitive and careful and diplomatic about each situation.

Back in those early days, I think that the lawyers were a lot more I guess you'd say respected, and by the same token, the lawyer himself became more intimidating. Yet that was not by any means prevalent in the firm.

Hicke: He had a lot of authority even with the clients?

Bates: That's correct. Yes, at least that was my impression of it.

But as I say, he passed away shortly after I came with the firm. Felix Smith had been the general counsel of the Standard Oil Company of California, and after Felix passed away, Marshall Madison took on that role. Marshall was a great person and a great force. I don't believe it was recognized that he had the legal powers that Felix Smith had; he didn't have the intimidating intellect that Felix Smith had. I knew Marshall Madison even before I came with the firm and then got to know him very well during his tenure as the senior partner. Although at times he could be quite autocratic and blunt, he had the ability to work with the partners and get them together. And yet he had a lot of legal ability and he was well respected in the business community; he was on the boards of many of our major corporations, including the Bank of California, Del Monte, and others.

Hicke: What were the responsibilities of the senior partner at that point?

Bates: Well, I think that he would guide the firm in any principal policy way: the making of new partners, or anything to do with participation, which is always a most important factor in giving recognition to the proper lawyers so as to encourage them and also to be careful not to bring someone along too fast that might, in the long run, not measure up.

Hicke: Would he make those decisions himself?

Bates: The decisions were made by Marshall and confirmed with Gene Prince and Jack Sutro, and Gene Prince was very close to Gene Bennett; they had adjoining offices, and they had a door between their offices as well as into the corridor into the hall, so they could walk back and forth and exchange their views. I think that Gene Prince was the one who sort of took the lead in the relationship with Gene Bennett, and then Gene Prince, and Marshall Madison, and Jack Sutro would make the major decisions on the policies of the firm, and distribution of partnership shares, and the like.

Hicke: Hiring?

Bates: Well, Jack Sutro was the employment committee. He did it all by himself. There are a lot of fascinating stories about Jack that I became aware of. I didn't actually witness this, but there was one occasion

where a young lawyer left some doubt as to what his intentions were, and Jack told this young lawyer, "If you haven't got the intelligence to make up your mind to go with Pillsbury, Madison & Sutro, we don't want you." [both laugh]

Hicke: Wonderful.

Bates: Jack is just an individual in every respect, and his devotion to this firm, I think, is really unmatched by any individual. He spent an awful lot of time and effort in trying to take on the best young lawyers he could find.

Hicke: He apparently did a good job. [quiet chuckle]

Bates: I think he did. I don't have to include myself in that category, because I was hired by Marshall Madison; fortunately Jack Sutro went along with it, I guess. [both laugh] But I spent a lot of time with Jack Sutro, for one reason or another; he gave me quite a few cases and let me take the principal responsibility, but he invariably wanted to review every paper that was filed in a case and every letter that was written to a client of any importance, and he would invariably correct it.

I defended a lot of personal injury cases against Jack Sutro's clients in my early years in litigation. Also Del Fuller would come up with some commercial cases quite frequently, and I was pleased he would call me and ask me if I could take them on. Del just gave me a completely free hand, and yet I would keep him informed and report to him and always get his cooperation and his intelligence, his input on cases, and then I'd deal with him and his client.

Del Fuller also was in charge of our estate planning and probate group, which was run by Harold Boucher, but Del Fuller managed the estate planning and probate business. Whenever litigation developed in that area, I'd be asked by Del to take it on.

Del was a very strong partner, but he didn't take the lead insofar as the management and the policy of the firm were concerned. He was more or less Marshall Madison's executive assistant. As a matter of fact, he was really the executive committee of the firm and took care of all the problems of the administration of the firm: the business office, and the management of the calendar desk; Del Fuller just took charge in that area. He was a great asset to the policy makers of the firm, who were I think at that time the real leaders of the firm: Marshall Madison, Jack Sutro, and Gene Prince.

Francis Kirkham was always looked upon as being the most powerful legal intellect in the firm. I mean he was the bright star; he was the real genius. He took on all the complicated antitrust cases.

Kirkham, as you know, had been law clerk to Chief Justice [Charles Evans] Hughes, and so he had really a powerful reputation in the legal community, and he deserved every bit of it. And yet he was and is a very humble, likeable, politic person. Marshall Madison was a good, strong leader, and also a good friend, but he was more aloof than the others, more aloof than Jack Sutro and Francis Kirkham, Gene Prince, and the others. They all became good personal friends, which makes for a very pleasant environment.

Jack Sutro in particular has been a good friend. Jack started asking me to go duck hunting with him at Marysville, which was a very pleasant outing. He was a member of a club outside of Marysville called the Heave-ho on some property that was owned by Jack Sullivan and Allan Michaels. The members of this Heave-ho Duck Club, in District 10 north of Marysville, were a very interesting group. Quite a few of them came from Reno: George Wingfield, whose family owned the Riverside Hotel; Norman Biltz, who was one of the big developers up there, Bill Cashel, who was a lawyer in Reno, and then there were several members from the San Francisco Bay Area: Dr. Steve Jensen, Richie Smith, Jack Sutro, some others.

That is really the prime duck hunting area in the United States. The farmers grow rice in this area of District 10. After the rice is harvested, the fields are flooded. It is right in the middle of the Pacific flyway, and the ducks just pour in there because it is a natural habitat for them and also they have the leftover rice to feed on. So it is marvelous hunting.

Jack and I would go out in a double blind, and of course Jack would completely manage the entire hunt; he'd be telling me exactly what to do. He had this dog named Devil, he'd usually have his cigar going, and he'd have his whistle to get the dog's attention when he wanted him to come back, and then he had a big duck call. All of this was going all the time, and he was constantly talking; it was amazing that a duck ever came near our blind. [both laugh] On many occasions he'd tell me to get down -- "For God's sake Bates, get down, get down." So I'd get down, and all of a sudden there'd be all this blasting going on [continues to laugh], and I'd have to quickly jump up and try to get a bird. But it was a lot of fun and I thoroughly enjoyed my outings with Jack.

The Heave-ho properties were sold. Actually Michaels and Sullivan came to Jack and offered to sell the property to him, and Jack talked to me and George Wingfield about it, but he felt the price was too high. I don't know what it was, but it was in the hundreds of dollars per acre, and now the property is in the thousands of dollars. I think it was about \$300 or \$400 an acre, and now, even with the present depression in rice farming and farm products generally, the property is still quite valuable and the selling prices are around



\$3,000 an acre. But Jack thought the price was too high, so we didn't do anything about it, and then we started shooting in several other clubs, and eventually Jack, his wife Betty, and Nancy and I leased a shooting area for ourselves.

So we were very close, and yet even though I never hesitated to talk to him about the firm and he would share his thoughts about the firm with me, there was still that senior difference there in the management of the firm. There was still sort of an area into which I couldn't enter really, which was left to major policy decisions of Jack Sutro and Marshall Madison, or when Marshall Madison passed away, to Jack and Gene Prince and the others.

It was during Marshall Madison's tenure that the management committee was formed. This was the first time that the firm had established a committee group, a recognized group, to confer in the establishment of policy and the distribution of partnership shares. The idea originally was to bring the younger partners into the decision-making process so that a young partner would have a voice on the management committee, and in effect represent the younger partners.

The committee at this stage in its early development was still relatively small -- I believe seven or eight at the most -- and it really wasn't a representative group. Invariably the young partner on there was thinking more of himself and his own future rather than trying to represent a consensus of younger partners, because these lawyers are all very independent and all have their own professional pride, and they all want to do their very best in relationship to their peers; so at that level there's a constant competition to do better and to get more recognition.

Hicke: Who was on that early management committee? Do you recall?

Bates: Well, I remember that Jim Michael was on it, and then several years later, I took Jim's place. Turner McBaine was on, Marshall Madison, Jack Sutro, Gene Prince, Harry Horrow, and Al Brown. As I recall, Del Fuller was not on the management committee, and there again he was more or less cast in the role of an administrator.

I think the senior partners felt that Francis Kirkham was so valuable to the total profession, really a genius in the practice of law, that they didn't want to impose on him to bother with the management of the affairs of the firm. They were quite happy to give him top recognition and distributions and all that sort of thing, but they didn't want to burden him with the day-to-day management of the affairs of the firm. And I don't know whether that was because they didn't want to put that burden on him or because they didn't feel that he really had that much interest and that he'd make that much of a contribution to the management of the business affairs of the firm.

Advisory Partnership Program

Bates: It was during this early period, within a year or two of Marshall Madison's retiring that we started the advisory partnership program.

Hicke: Oh, so he was not responsible for that?

Bates: Oh, yes. Yes, he was. It happened just several years before he became an advisory partner under the program. This program was pushed by Turner McBaine and me and other middle and younger partners because we could see, and then Marshall Madison came to see, that the future strength of the firm depended upon the senior partners relinquishing their participation, which was substantially more than the younger partners, and gradually having it available to distribute to the younger partners to be able to encourage them and attract other top lawyers to our firm.

We were one of the first firms in the country to do this. At other major firms, the senior partners were very reluctant to give up their authority and give up their participation, and it wasn't until some years later that law firms like Brobeck, Phleger & Harrison, and then Morrison, Hohfield, and Chickering & Gregory, and the Orrick firm -- it was some years later before they came around to this policy. I think the fact that Marshall Madison didn't have any sons that were in the firm had some influence in his going along with this decision, although historically he was, of course, the son of one of the founding partners of the firm, as was Jack Sutro the son of the founding Sutro of the firm. So there was a demonstration that sons of former partners add a lot of strength and continuity to the firm.

It wasn't until some years later that we decided that we should have an anti-nepotism policy, because we concluded that the fact that we did have sons of partners in the firm turned off other potential, brilliant, young lawyers from coming with our firm, because they got the impression that the son of a partner would have a preference over the others. I talk about sons because it was some years later before we talked about women with any degree of importance. Of course, now they are becoming increasingly important to the firm and within the partnership.

Hicke: Could you elaborate just a little bit more on the advisory partner program, how the plan was developed and how it works?

Bates: Well, I think that the plan works about the same now as when it was conceived. The idea was to develop a program of transferring responsibility and of transferring participation of the profits of the firm. And as originally designed, the program did exactly that. When Marshall Madison reached that age, a year after he was 65, he resigned

as general counsel of Standard Oil, and that responsibility was taken over by Francis Kirkham.

Jack Sutro was general counsel of the telephone company, but when he became an advisory partner, the situation had changed so completely that there wasn't a partner from our firm that became the general counsel; the telephone company decided to go in-house, and that became a firm policy even before Jack Sutro became an advisory partner. I think that the Pacific Telephone & Telegraph Company was the last subsidiary in the Bell system to change that policy of having an outside lawyer as a general counsel of the local Bell company.

So that changed, but in other situations where a partner had been the leading lawyer for a client, there was an almost immediate transition when the partner became an advisory partner, so that responsibility could be transferred to another younger partner. I think it has worked very well.

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Hicke: As I understand it, the partner can choose to keep some clients or a certain amount of work when he becomes advisory. He has a choice. How does that work?

Bates: Well, he has the freedom to decide what he's going to do. I mean, it's hoped that he will continue to take on some responsibility in relationship with a client, and it's also anticipated that he'll involve himself in some pro bono work that will inure indirectly to the benefit of the firm.

But as far as maintaining any sort of heavy responsibility for the business affairs of a client, that responsibility changes. When that happens, the advisory partner loses the control over the lawyers that had been working with him, and if he's been in a major practice area, such as in litigation, the younger lawyers aren't going to want to work for an advisory partner because they know he's out of the system; he's no longer a member of the management committee, and he's not going to have the same impact on the important decisions of how partnership shares are going to be distributed and matters of that kind. The young lawyer doesn't want to find himself working for an advisory partner. So the whole program is designed to shift the responsibility to the next generation -- the other partners that are coming along.

Hicke: Would the head of a practice group designate the person who was to follow him as head of a practice group?

Bates: It's an orderly transition, because everybody knows when the partner is going to reach advisory status, so he works it out well ahead of

time to gradually shift that responsibility to the more junior partners. But he doesn't relinquish control of the practice group until he becomes an advisory partner.

Some of the partners, I think, when they become advisory partners continue to practice, particularly those that have a specialty, such as Albert Brown. He continued to be quite active in securities matters. Noel Dyer continued to be quite active in product liability litigation and in particular areas where he had developed an expertise.

I think a lot of it has to do with the individual. Some individuals are just dedicated to continuing to practice law and others are more interested in getting involved in other matters, which may well be related to the practice but having to do with pro bono activities, such as Jack Sutro, who did very little actual practice after he became an advisory partner. He still conferred with clients, particularly individual clients in estate planning and matters of that kind, but shifted almost all of his responsibilities into pro bono work, particularly the American Bar Association and the judicial committee of the ABA. So each individual handled these things as they wished when they became an advisory partner.

#### Evolution of Management

Hicke: Tell me about some of the older partners, and also about the younger ones you worked with.

Bates: I'm sure you've heard about these older partners such as Gene Bennett and Sig Nielson. Gene Bennett was a master trial lawyer and he had great ability and great powers of persuasion, and he was a thorough gentleman at all times. If you ever tried to get in an elevator with Gene Bennett, it was impossible to enter the elevator after Gene Bennett. I mean if you tried that, you'd be hung up there forever getting on an elevator. [chuckles] He was a complete gentleman.

Sig Nielson was the tax specialist in the firm at that time. Of course, now there are many of them. Sig was also sort of the master politician in the firm -- he conceived of himself as that anyway -- and a very interesting individual, but he was a hard man to get to know unless you were very close to Sig and working with him. I didn't work that closely with Sig so I really can't comment much further on him.

You asked about some of the younger partners. I worked very closely with Tony Brown, Mike Richter, Allan Littman, Jim Kirkham, and



Jack Sutro, Jr. I guess I worked more closely with Tony Brown, Allan Littman, and Mike Richter than the others. We tried many important cases together, and they were great assistants. Now they are among the leaders of the firm. I also worked with Bill Edlund, Dick Odgers, and most of the other litigation partners in the firm at one time or another.

It's interesting that Jack Sutro, Jr. is really quite different from his father. Jack is a very able lawyer but he's most reluctant to push himself or take advantage of the fact that he's Jack Sutro, Jr., and it puts him under a handicap in a firm the size of ours if he is unwilling to become, in effect, a politician within the firm. I mean, you just have to make an effort to work with the other partners in the firm and get to know them and have them get to know you and your contributions to the firm's welfare. But it's no easy task. If you push too hard the other partners will resent it; so you've just got to do your best by making an effort to get along with everyone in the firm.

#### Secretaries

Bates: We're dealing with people, their abilities, personalities and character. All of us need to be motivated with satisfying incentives. One thing I learned early on was to get and keep a good secretary. A person who could not only do good professional work but also be able to act as an assistant. In this, I was most fortunate in first being able to find and work with Dorothy Towne and then with Margaret Kidson. They were not only fine secretaries but good assistants with good personalities and character and, very important, good senses of humor.

Although we had been working together for several years, I knew nothing about Margaret Kidson's religious beliefs. In preparing for our first day of trial in the Leach case, there was a large contingent of executives from Ford -- lawyers and witnesses -- assembled in my office. Kidson was busy finalizing papers and running in and out. Finally, we were ready to go to court. Kidson got the elevator and we all proceeded to pile in. As the elevator door was starting to close, I asked her to pray for me. As the door was closing, I heard her say, "I can't, I'm an atheist." Needless to say, that kept creeping into my thoughts throughout that first day of trial.

Some months later I was talking with my good friend the Reverend Bob Morse in my office. Kidson was involved and when she left, I said, "Bob, she's an atheist." He said, "I'll bet she's a very honest, reliable person." He was right. Perhaps it's because an atheist can only answer to himself. He cannot ask God's forgiveness.

Long before I became chairman of the firm, Kidson argued that I needed two secretaries. I disagreed and told her that during billings, or whenever we needed help, we could always make special arrangements. But she was adamant about this; and once when we had extra help, she kept the lady on. Whenever I gave the extra a letter, almost invariably, Kidson was back in my office with some editorial comment. I said, "Miss Kidson, it seems that with this extra help, I'm ending up having to do everything twice."

After this, she told me she was going to leave. I said, "Don't leave -- you're too good." She said, "No. I won't do that, because you might prove that you were right." So she left and I was in trouble. I just couldn't find a person who could replace her. To make things worse, she had gone to work with Morrison & Foerster, which seemed to be on a vendetta against us. I took her to lunch in the Palace Court. But try as I could, I couldn't get her back.

Finally, when I became chairman and I had Mrs. Pirie, who came with the job, Sandy Palazzi, who was then in charge of the secretarial force, was considerate enough to call Miss Kidson. Kidson had been working for Mr. [George F.] Clinton, who was head of probate for Morrison. Clinton had been murdered by his maniacal son -- a terrible tragedy. But Kidson was ready to come back, and thank goodness she did.

She retired in 1986 and I now have the pleasure of again working with Dorothy Towne -- my very first secretary -- who called me about six years ago and asked if the firm would be interested in employing her. She was divorced with grown children. She had been running a restaurant in San Diego, but she had sold it and she wanted to come back to San Francisco. I urged her to come in and we took her back.

My only problem is that I share her with Jack Sutro, Sr. But there is little pressure now on an advisory partner. The main problem is that Sutro keeps her all morning, so I must have a brown bag lunch and get my work to Dorothy so that she can get it done in the afternoon. Dorothy is terrific and she's got the ability and the sense of humor to put up with both of us.

I tell this story because a law firm is people and good secretaries are just as much a part of a strong firm as lawyers, administrators, paralegals, clerks and all the rest. Simple fact: if you don't like working with people, don't try to be a lawyer in a big firm.

In any event, as the firm grew the need for a more democratic process grew, because you had to make an effort to let the younger partners know that they had an opportunity to have their voice heard in the affairs of the firm. I always pushed very hard to make sure

that the lawyers in the firm felt comfortable in their ability to communicate their concerns about the firm, the direction of the firm, and about their own participation. So I was always working on Jack Sutro, and then Turner McBaine, who became the next chairman of the management committee, to have adequate representation on the management committee from the various practice areas within the firm, and to develop enough practice areas so that the various areas of expertise were covered and so that those practice groups had representation on the management committee.

Hicke: So there was something of a new force here, where the firm had previously been run by its most senior partners.

Bates: Yes.

Hicke: And now, coming along, we have some of the less senior partners having quite a say in the management of the firm.

Bates: That's correct. I always felt very comfortable in conferring with Jack Sutro and then with Turner McBaine and others in the management of the firm about the affairs of the firm, the policy of the firm, and I think my views were always welcome and there was a good and comfortable feeling of communication of ideas at that time. There was an effort by some of us to disperse the centralization of the power in the firm so that other partners felt that they were sharing in the deliberations and in the policy. When we built a new conference room on the sixth floor, I urged that we have a round conference table so that all the members of the management committee, whether it be fifteen or twenty or whatever, could sit at a round table, so that you didn't have the long table with the central authority sitting at the head of the table. It was just to give an opportunity to the partners to face each other and be able to communicate more directly to the chairman of the management committee and to the other partners.

Hicke: And that was done?

Bates: That was done. Yes. Then I think the management committee became sort of the, as I looked at it, house of representatives of the firm. It was a rather difficult transition from the so-called senior partner to the chairman of the management committee. Turner McBaine was really the last senior partner that we had, and there was a strong feeling that developed during the period that Turner McBaine was the senior partner that this system ought to be changed, that there shouldn't be a senior partner as such, that power should be shared.

Hicke: How had the senior partner been chosen?

Bates: Well, it was more by appointment and strength than by any sort of democratic resolution. I think when Jack Sutro was reaching the age

where he was going to become an advisory partner, he conferred with other senior partners and made a determination that Turner McBaine, who was then acting as general counsel of Standard, should be selected as the senior partner. And that was it; you got a memorandum, and that was about it.

As I said, when Turner was reaching the status of an advisory partner, it was felt very strongly that the senior partner concept should be eliminated. So there was what was called a senior committee established to take the place of the senior partner, and this was a committee of the six senior partners of the firm.

The only person in our firm who'd ever had any parking privilege in this Standard Oil building was the lawyer who was designated general counsel of Standard Oil Company of California. Well, I thought it was kind of unfair not to give us more parking stalls in the Standard Oil building garage. You know, after all, we were renting seven floors of the Standard Oil building; we were renting more than a third of the space in the building, and we had only one space in the garage. [chuckles]

Hicke: That's really not too --

Bates: Well, it was kind of amusing. As I recall, it was during the regular Christmas luncheon at the Pacific Union Club, and Bill Haynes, who was then chief executive officer of Standard, was there having lunch with Frank Roberts. Frank was now the general counsel of Standard. I told them that I thought we ought to have six parking stalls in the Standard Oil building garage for our senior committee. Shortly after that, Bill Haynes let me know that he thought that was what should happen. So we got six parking stalls for the six members of the senior committee. [both laugh]

Hicke: Well, that wasn't the total purpose for forming the senior committee? [quiet chuckle]

Bates: No. No, but gee, I'll tell, you it made life a lot easier for us to be able to use those stalls in the garage and particularly for me, because I still had quite an active trial practice and had to go to court quite often, and it was convenient just to get in my car with all my files and witnesses and clients and go out to the federal court, or wherever, right from the garage; it made life a lot more pleasant. I think one of the most troublesome things to have to give up when I became an advisory partner was to give up my stall in the garage.

I thought it was very important that along with everything else, along with the transfer of power and clients and practice groups, that when a senior partner became an advisory partner, he give up his stall



in the garage. After I became chairman of the management committee, one of the most difficult chores I had was establishing that policy and having partners who reached that status give up their space in the garage. I don't want to get into personalities, but I had some very difficult clashes [both laughing] during that time, and now it seems to be working quite smoothly, although most reluctantly.

Hicke: Well, once you established the precedent, then it's harder to get away from it.

Bates: That's right. Anyway, this senior committee, composed of the six seniors --

Hicke: That would be Roberts, Brown, Kaapcke, MacLaury, Michael, and Bates. I think that's six, isn't it?

Bates: Yes. Let's see, that lasted three or four years, from 1977 to 1980. Yes. Since the senior committee and the management committee had to have somebody to call the meeting to order, that became a problem among the senior partners. It was finally decided that Wally Kaapcke would do it for a time, and then I would do it. Then after the time that Wally became an advisory partner, it was decided that the senior committee really wasn't working. I mean, some of the partners complained that they didn't have anybody to blame for decisions.

I remember specifically Bill Edlund complaining about that. He said, "You know, when the senior committee makes a decision, and we do something, distribute points or something of that kind, we don't know who to blame." [hearty chuckle]

Then when Wally Kaapcke became advisory -- well, that might have happened even a year before he became an advisory partner -- it was decided that we'd forget about the senior committee and I would be chairman of the firm and chairman of the management committee. But the six senior partners still had their stalls in the garage. [both laugh]

Hicke: That was saved.

Bates: That was very important.

Hicke: Was it hard to make decisions when six people were all working at it?

Bates: Well, it was difficult because you had to have a meeting, and you had to develop a consensus, and then somebody couldn't make the meeting and he'd be upset that he wasn't consulted before the final decision was made; it was difficult.

Anyway, we didn't have a senior partner as such, but the chairman of the management committee became the chairman of the firm, and he was, in effect, the senior partner. But now the management committee was well established and the firm was becoming more and more democratic, and partners became used to the decisions of the management committee, so that what you worked for was getting a consensus of the members of the management committee. If you didn't have a good, strong consensus, you wouldn't do it.

We are always confronted with some fairly major decisions as to whether we should rent or buy space or what we should do, but the most difficult problem was always in the distribution of the points each year; to figure out which partners ought to be given more recognition and which partners should be held back. That has always been the most difficult decision.

### Culmination of the Democratic Transition

Bates: As the year approached when I was to become an advisory partner, I began caucusing the members of the management committee regarding the selection of the next chairman. Some thought we should have an election by all the partners. We finally decided by consensus that the members of the management committee would elect the next chairman after caucusing the members by their groups. This was done, and among several well qualified candidates, George Sears was elected chairman for a fixed term. This is quite a change from my early years with the firm where a selection was made by the two or three senior partners of the firm, but I think it is all to the good, and the firm is much more comfortable realizing that all of the partners were given an opportunity to participate in the choice of a chairman.

### Space Arrangements

Hicke: What were the problems regarding space?

Bates: We had various opportunities presented to us about buying space. We were very close to acquiring a property interest in the building that was being built by Corwin Booth at the corner of Bush and Montgomery. Jim Michael undertook the responsibility of trying to negotiate a satisfactory deal with Booth, but every time he went to him with a proposition, the proposition would not be acceptable and the price would go up.

Many of the partners were quite reluctant for us to make a commitment, which would be a substantial undertaking, to buy space, either by way of owning another building or owning floors in a building. We didn't feel we wanted to get into the real estate business, and we saw considerable problems in younger partners buying into the building and then us having to buy them out, transferring the ownership when they became advisory partners.

Hicke: That's what I was going to ask about. In a corporation it's a little different thing, because the corporation owns property, but in a partnership, anytime you make capital investments, it has to come out of that year's distribution. Is that right?

Bates: Well, yes, it would probably be done by some sort of financing arrangement. I know O'Melveny & Meyers did this down in Los Angeles. They have a substantial interest in one of the big downtown buildings in Los Angeles, and what they did was to have their pension plan buy it so that they don't have the constant problem of changing ownership shares. It sounds like a very sensible way to do something of this kind, if you want to commit your pension funds to that kind of an investment. It would be a tremendous commitment, and it's a good device because then the partnership rents from the pension fund and the rentals go into building up the pension fund. So I guess it works out very well.

You know, there's a problem there of treating the pension fund fairly and treating the partners fairly in the establishment of rentals and things of that kind. I guess it's fairly easy if you have a continually rising real estate market, but now, when you've got a lot of vacant office space and values falling and a lot of open space in Los Angeles, I just don't know how that's all going to shake out.

In any event, we just didn't want to commit ourselves that expensively in such a substantial real estate investment, so we didn't do it.

Hicke: But you did have to keep expanding all the time?

Bates: Oh, yes. We thought, "Boy isn't this great? We're almost finished renovating the sixth floor." Or, "Now we're finished building a new library on the fourth floor." But as soon as you finish that, all of a sudden you've got to redo the sixth floor, and the fifth floor, or something else: constantly expanding. It never seems to stop, and I don't know what happens if it ever does stop, but I see us still expanding, even at this stage. Now, in addition to the seven floors we have in the Standard Oil building, we've also got this marvelous library. We invested millions of dollars in taking over the old cafeteria in the Standard Oil building. It's a beautiful library. We've taken on six floors in the Russ building, and we've got five floors or so here at 114 Sansome, so we just go on.

The amusing thing is that we are on a month-to-month tenancy in the Standard Oil building. With all that investment, those millions of dollars, we're only on a month-to-month tenancy. I don't know what would happen if we got thirty days' notice to vacate the premises. It's kind of mind-boggling. I can't imagine our lawyers ever allowing one of our clients to get themselves in that sort of position. [hearty chuckle] Well, I hope our confidence in our relationship with Standard is as comfortably placed as we think it is.

Hicke: I'm sure it is.

Bates: I think it is. I hope it is, and I'm sure they would treat us fairly if the occasion ever arose.

#### Committee System##

Bates: [looking through papers] The development of the committee system in the firm was just a gradual thing. Responsibilities became more diverse and more complicated, such as insurance; the rising premiums for malpractice insurance commanded that we pay more attention to our insurance, so a special committee was established for that purpose.

We had always had a salary committee, which was a very representative committee, and the responsibility of the salary committee was to review all the associates in the firm with the heads of the various practice groups and make a decision as to what sort of recognition should be given to an associate. The associate got the benefit of the doubt for the first two or three years, and then after that, we tried very hard to give more recognition to those associates that were demonstrating more value to the firm than other associates, but it was always very difficult. It became very politic, and no matter how hard you tried, the practice groups always tend to be supportive of the associates within their groups, and they think they are better than associates in other groups. So it's always very, very difficult to reconcile the differing views among the practice groups and try to give recognition to the lawyer who is making the best contribution.

No matter how many objective guides you try to establish to determine what lawyers are making the best contribution, it all gets down to a subjective decision as to who's better than the other person. We can look at billable hours, but that's just one indication of a lawyer's contribution to the firm. Some lawyers have the ability to put in tremendous amounts of billable hours, but we recognize that many times they are not the lawyers that are really able to manage the affairs of clients and to develop clients, bring in new clients. It's not necessarily those lawyers that are billing the most time that are the best lawyers.



After many years, by 1983 -- and I'm looking at a memorandum that we sent out to the partners dated September 29, 1983 -- we developed various criteria for recognizing a partner's contribution to the firm. One is "The quality and quantity of legal work performed by the partner." Another is "The partner's ability to attract, satisfy, and retain clients." Another is, "The partner's degree of effectiveness in developing associates and working with the staff." Next, "The partner's contribution to the firm's standing in the local and national communities." Next, "The partner's leadership qualities, present and potential. The partner's cooperativeness with other partners." Whether the partner is "a good housekeeper in such things as time entries, management, files, and billing."

Many of our partners are fine lawyers and have good client relationships, but they're not good housekeepers, and they don't get their time charges in, they don't get their billings out, and they don't get the bills paid. This is a big business; we have a tremendous overhead with substantial partnership distributions, which means you've got to get the work done, the bills out, and the bills paid in order to function. So it's very important. But when you look down all these standards, almost all of them have more of a subjective quality about them than an objective or quantitative quality about them. So it becomes very difficult.

### Managing Partner

Bates: We didn't touch on the transition of the role of the managing partner. As I said, in the early days of my involvement with the firm, Del Fuller was the chairman of the executive committee, and he, as a practical matter, was the managing partner of the firm. Then when Del became an advisory partner, Frank Roberts took over that responsibility. George Eckhardt had been working with Francis Marshall primarily in appellate work for the telephone company account, but he became quite ill and had to undergo major surgery. He had been out of the firm for an extended period of time; so that when he returned, his practice responsibilities had been absorbed by other partners. So Frank persuaded Jack Sutro that he'd like to be relieved of his responsibilities as the chairman of the executive committee, in effect the managing partner of the firm, and that he'd like to transfer that responsibility to George Eckhardt, who had a good business head and was a good, solid lawyer.

So George Eckhardt took on that responsibility. By now the size of the firm was such that you just had to devote more and more time to the job of running the firm, and this made George quite vulnerable. He took on this responsibility when he was in his late forties, early

fifties. George is a very good friend of mine and I had a lot of respect for him, but I knew there were other partners in the firm who were unhappy about the situation, because the firm wasn't used to having a partner devote that much time to managing the firm. George was getting a substantial distribution, and other partners believed that was unfair to them because he was producing relatively little income to the firm.\*

I used to talk to George about this and share with him my concern, because I was hearing this from other partners. George's situation became more and more difficult. He had devoted so much time to the management of the firm that it would be very difficult for him to return to the heavy practice of law. But at the same time, the then senior committee of the firm felt very strongly that we needed an administrator in the firm with more of a business background, that we needed someone who had a Masters Degree in business administration and who'd actually been involved with computers and with systems analysis and the management of a major business, which we now were and had been for some time.

So it was a very difficult transition, but George came to realize that that was the way the direction of the firm was going to take and that therefore his value to the management structure of the firm would be diminished or eliminated by that change. So he finally decided that what he would do was take early advisory status, which he did; he was a real gentleman about it, and the firm really owes him a lot for everything he did and for the sacrifices he made. It's just one of those things that happen. It was a transition into becoming a major business, a big business.

We on the senior committee interviewed many candidates for the job, and we finally hired a lawyer, Herb Schwab, who had been the administrator for Gibson, Dunn & Crutcher. Herb Schwab had been a senior officer in the navy and worked in the judge advocate's general office for a time -- the judge advocate general of the navy. It's interesting that Ira Nunn, who had been commodore of our destroyer squadron, the Farragut squadron in World War II, became the judge advocate general of the navy after the war and Herb Schwab was his assistant. So it really kind of brought old memories back when Schwab came with the firm.

Hicke: He was a consultant, is that correct?

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\* George Eckhardt died in 1987, after this interview took place.

Bates: Yes. Well, he took on more responsibility than that. But then he saw that he just wasn't the right person, so we went to work interviewing some more. Herb didn't particularly want to stay on very long doing this job for us; he didn't want to become a full-time administrator. So with his assistance, we started looking for someone to take on that responsibility.

I was so pleased when Gene Richter appeared, because I thought he had all the qualities to be a good administrator of a law firm. He was an MBA, he had been a marine colonel, and he'd been in the front lines in Viet Nam. Then after that tour of duty, he headed up a major civil department within the marine corps where he had all sorts of different types of employees, all sorts of racial mixes. He was a specialist in computer technology and computer systems, and he was a three or four handicap golfer. [laughter] Well, I thought if he could take on all those responsibilities and still be a low handicap golfer, he must have a lot of stability and strength about him and a lot of the kind of expertise that we were looking for. So I felt very fortunate that Gene Richter appeared and that we were able to have him take on that responsibility.

The business office is very, very important to the firm, and I hope all is going well. From everything I see, it seems to be.

Hicke: It no longer requires a lawyer's time?

Bates: No. The chairman of the management committee works very closely with the administrator. I think that it is important that we do have a competent, forceful business administrator and that we give him a good solid staff for his support. Computerization, of course, is also becoming very important to the whole operation here. It has helped us tremendously in keeping track of time charges, in assisting us in our billings, and getting out enough information in short order so that we can satisfy our clients.

The business has become increasingly competitive, and clients demand more and more information about who does what and why. It's not like the old days where you could just send a bill for \$10, \$20, \$30, or \$100,000 and you'd never get a call back from the client. Now anytime you have any substantial billing, the client wants to know all about what was done, who did it, and why it was done, and they're constantly wanting projections on future expense.

Hicke: Do you know what brought about that change?

Bates: Well, I think it was just a combination of factors. First of all litigation, particularly, is getting more and more expensive, and I was, of course, most familiar with the litigation end of our law firm, but the clients were wanting to know more and more about why it was

necessary to spend \$50,000 or \$100,000 or more a month, which is quite understandable.

Then during my time we first started in using paralegals, and now being a paralegal is almost a special profession in the law. Using competent paralegals cuts down considerably on the amount of lawyer time that has to be expended in litigation and helps keep expenses within some reasonable bounds. But even then, litigation can be quite expensive, and the client wants to know what's going on, why it's going on, and what we can advise them about the future and the expense that might be involved in the future, always considering whether or not they ought to try to work out a satisfactory settlement.

### Other Changes

Bates: Also, during the period of my history with the firm, there was a great change in the racial and in the sexual mix of the firm. When I first started here there just weren't any women lawyers. I understand they hired some during the war, but then after the war, I can't recall any women lawyers being around here, and that went on for quite some time. Then the first woman became a partner of the firm -- Toni Rembe -- and that was quite an historic event. She was one of the first women to become a partner in any major firm here in the San Francisco Bay Area, so it was a real breakthrough for the ladies, and I think we have taken the lead in that. I believe that we have a larger number of women partners and women associates percentage-wise in our firm than any firm in the area.

Hicke: Do you think that was a conscious policy?

Bates: I think there were two things going on: I think there were more women going into the profession in law school, and therefore there were a lot more competent women among top graduates coming out of law schools. Furthermore we made a conscious effort to make sure that we did take on qualified women, which I'm sure would have been quite surprising to the former senior partners of the firm.

Hicke: That must have been, at least partly, Jack Sutro's doing.

Bates: Well, this is really at or about Jack's time that the ladies were becoming available. But by that time the firm had gotten so big that we did have an employment committee, even under Jack Sutro. The work got so burdensome and the numbers had gotten so great that Jack just couldn't handle it as a personal matter anymore. But he did handle it as a personal matter up into the middle '50s, and then after that, it got so big we had to develop an employment committee, because we found



that the competition was such for the top graduates that we had to send representatives touring around the country and visiting the law schools to interview students and consider them for employment with the firm; it was more than any one man could do. The numbers just demanded that we do that.

It's interesting that even though there's been a great increase in the number of law school students and law school graduates, there is still a very limited number of top qualified graduates for law firms. But there are a lot more law firms and a lot larger law firms, so that competition for top graduates has increased rather than diminished, even though there are a lot more lawyers coming out of law schools.

Hicke: What characterizes the top graduates other than grades?

Bates: That's about it. You never really know whether a top graduate is going to be a good lawyer until he gets out and gets to work and starts practicing. I don't think there are any statistics on it. I don't know how you measure it. I don't know whether 70 percent or 80 percent or 60 percent of the top graduates become top lawyers. Many times a top law school graduate is not a top lawyer. A lesser student can become so dedicated and such a good practicing lawyer that he emerges as a better lawyer than the top graduate.

The difficulty is that the only guideline that you have is grades. You can look at grades, and then you also look at what the student has been involved in -- extracurricular activities -- and what his background is and what he was doing in undergraduate school, but the initial requirement that you look at are top grades. So he has to be a very unusual person if he's going to be considered for employment with the firm if he doesn't have top grades.

Hicke: Does the summer clerkship program then help bridge this gap?

Bates: Yes. Oh yes, it helps quite a bit; because then we do get more familiar with the individual, and he becomes more familiar with the firm.

I have mentioned that the racial mix of the firm changed quite substantially over the years. We've tried very hard to find competent minorities, and particularly black lawyers. We haven't had a very happy experience in this regard. Many just didn't seem to take hold at our law firm.

But there was a young, black lawyer named Lloyd Took that I shall never forget. He seemed to have excellent promise. He worked with Tony Brown and me in litigation, and we spent a lot of time with him, and he seemed to be coming along very well. We got him to the

point where he was going out and defending some of our clients, including the telephone company, before juries, and doing very well. He had been a good law student and he expressed himself well and he was at ease in the courtroom, so we had great hopes for him. We thought, "Here we've got a man who's going to be one of our top trial lawyers, and he's going to become a partner in our firm," and we were quite excited about that prospect.

One day he came to my office and he said, "Mr. Bates, I've decided to leave the firm." And I said, "Oh, what's the matter, Lloyd? Is something wrong?" Tony Brown and I had leaned over backwards to make sure that he was treated very well. He said, "Oh no, the firm has treated me very well; it's not that at all. It's just that I have an opportunity to join with some other lawyers in forming a law firm in Beverly Hills down in southern California. They've got a business lawyer, and an estate planning and probate lawyer, a tax lawyer, and I'm going to be the litigation partner. I'm going to be able to head up my own litigation group and take care of the litigation of the firm." I said, "Well, gee, that really does sound very exciting, Lloyd. Are there going to be any white lawyers in that firm?" He said, "No, sir, and if there ever is one, he's going to have to be awfully damn good."

One of the things that happened as we developed here -- developed our practice and took on all these lawyers -- was the increasing problem of divorce affecting our partners. The problems there had to do with the claimed interest of the spouse in the profits of the firm. This would require exposing the firm's books and the anticipated profits, which we were most reluctant to do. We tried to limit this as much as possible, but we were obligated by the courts to produce this evidence, and we would do so under a confidentiality order; the courts, by and large, seemed most sympathetic with us doing it that way.

So we suffered through the problem, but in quite a number of instances, particularly in a contested divorce, one of us would have to appear and testify in court as to the prospects of the partner in the firm and what the reasonable probabilities were, because it was, in most cases -- practically all cases that I can recall -- where the wife was the problem in the allocation of properties, it was the husband who happened to be the one who was the partner in the firm. It was really awkward at times to have to appear and testify that the lawyer might well not be making the same kind of increases as he had been making in the past, and the prospects were that he would not receive any substantial distributions in the future. Now that came very hard to the lawyer who was getting the divorce. On the other hand, it would --

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-- save the lawyer some money in the settlement but it was a very awkward experience; I had to do that on one occasion, and I'm sure my partners had to do it on other occasions. The time and effort that we'd have to put in to responding for requests for materials and having to appear as a witness and things of that kind was a troublesome problem for us. Well, that's the way it is. I guess it's still going on.

I also mentioned that during my period, my experience with the firm, we started out with all our relationships being confidential, and there was no effort by anyone to solicit any business; it was considered highly unethical. But then as time went on, the competition and the atmosphere became such that the famous lawsuit having to do with another Bates in Arizona -- no relation to me -- worked its way through the courts, and ended up with the court concluding that lawyers under the exercise of their First Amendment rights should have the opportunity to advertise.

So the ethics were changed, and it was not unethical to advertise. Now there are certain limitations on this, but by and large, lawyers can advertise, and there're advertisements on television and in the newspapers by lawyers indicating that they can do better than others in personal injury fields and the like. This has created a whole new atmosphere in the competition among law firms for client business.

It wasn't very long after this that even the major firms started to advertise. They took a more dignified approach, but in any event, they were advertising. They were preparing brochures. They weren't advertising in magazines, on television, and in newspapers, but they were preparing brochures and sending them around to the clients and prospective clients. We finally developed our own techniques for doing this. We now have seminars in labor relations and environmental fields and other fields for which we prepare brochures, so that our existing clients and prospective clients know about these seminars. We tell them about our specialties here in the firm in hopes of cementing our existing client relationships, and we are also letting others know that we do have these services.

Another development that has become increasingly troublesome is that there are more publications having to do with lawyers. The American Lawyer and the National Law Review are two of the leading publications having to do with lawyers. The American Lawyer is particularly aggressive in finding out all it can about the major law firms throughout the country.

Just the other day I was looking at the most recent publication, which purports to set forth the total revenues of all the major firms throughout the United States and talks about the average profits per



partner and compares all these firms. That is a problem for us, because many times the statistics and the financial information that they reveal is not presented in such a way that the reader can really get a full understanding of the comparative financial situations. A lot of the numbers don't take into account certain factors; I don't know how they treat our advisory partners in the number and how that affects the average income per partners, and we certainly don't furnish The American Lawyer with this information.

Hicke: I was just going to ask, how do they get that?

Bates: Well, they get it, I guess, from other lawyers in the firm who might talk to others. There are so many people involved in the firm, it's very difficult to keep all this confidential, and The American Lawyer will work on secretaries and whatever source they can dream up to keep pursuing this information. If you give them a little bit, then they'll play that information on another partner, somebody else in the law firm, and they'll gradually try to piece it together. That's become a real problem.

Anytime there's any significant development in the law firm, whether it be how we handle summer associates or a partner leaving the firm or merging with another firm, The American Lawyer is on us very quickly. Other reporters who are specializing in talking about the activities of lawyers try to find out the reason and what's going on and all that sort of thing.

I remember there was one partner who left the firm to go with a securities house. I got a call from one of the trade journals about it, and they questioned me on why the partner was leaving. I said, "Well, I guess one of the reasons he's leaving is to make more money." That appeared in the publication, and that was very upsetting to the partner who was leaving the firm. I didn't think there was anything wrong with it, and I thought it was absolutely true. [chuckles] It's strange how these things impact on people.

So what we've tried to do here in the firm is to prevent people from talking to the press, other than the chairman of the management committee or his designee when he's not available. Usually I would designate two or three other partners that inquiries could be referred to if I was unavailable. That doesn't mean that I or any of the other designees are going to do any better than any other lawyer in the firm.

These are all new developments in the law. I think it's now not as interesting as it used to be, but there was a time there, between five and ten years ago, when law firms were the paramount interest; there were a lot of books coming out about lawyers and law firms, particularly the Washington law firms, and then they got into other law



firms. There was somehow or other a broad national interest in lawyers and law firms, the money they made, and everything else. Now that interest has waned. You don't see any books right now about lawyers; there's not an awful lot coming out about them.

I recall one book, The Partners,\* that mentioned practically all the chairmen of the leading firms in the country, including me.

Hicke: I was just going to say, you must have been in it.

Bates: Oh, yes. Yes. But I don't see any of that anymore. I mean, now the whole interest of the country, insofar as the professions and business are concerned, is aimed at securities, and these buyouts --

Hicke: Inside traders.

Bates: Yes, inside trading and traders and raiders. So that's the focus of national interest right now. And the lawyers, I think now, are not as interesting as they were at one time. I guess that's the way the system works; we have our ups and downs. Of course, genetics, biotech and all that, and the securities fields have much more attention now insofar as the business and professional community is concerned.

Hicke: What about lateral hiring?

Bates: Lateral hiring is always difficult, because even though you have a very competent lawyer who really has some proven ability and a client following, and is a moneymaker, to bring him into the firm is upsetting to the contemporaries that he's coming in with at the same level. Because they feel now they've got another competitor, that there's somebody else going to be sharing their position in the law firm. So we're very reluctant to make a lateral hire where it's going to have that kind of impact on other lawyers that are his contemporaries. We discourage and do not take on lateral hires when that's going to happen.

However, when we find we have a need, such as Neal McNamara had in the pensions and benefits group, we will supplement our lawyer professional work force by taking on someone and having him or her become of counsel. This doesn't have the same competitive impact on the other lawyers that are partners in the firm, and it fills the need. We have some lawyers now who are of counsel who are making very good contributions to the firm.

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\* James B. Stewart, The Partners (New York: Simon and Schuster, 1983) p. 117.

Hicke: They're not partners; they're working on a compensation basis?

Bates: That's right. They're given a salary. But they're given the recognition of being of counsel, so that gives them a certain dignity that puts them above an associate and makes them feel more comfortable in their situation as far as the law firm and the public and their clients are concerned. Then if it all works out, they may well become partners in the firm.

But if we're trying to fill an area of expertise that we haven't been in before, we can do that without creating a lot of problems within the firm. We did that in bankruptcy where we needed specialists in the bankruptcy field. We took in Dennis Montali, and after we tried him out for a while, we then made him a partner, and I think he has worked out very well. He has brought others with him who are now partners. That business has expanded, and it's been, I think, a very good thing for the firm.

Another area was where we hired a communications specialist. That is a specialty of its own: the intricacies of licensing for television and the Federal Communications Commission and all the state and federal laws having to do with communications. That was Dennis Kahane. That was quite palatable with the partners because they recognized we had a need in that field, and I think that's worked out very well. And in the Washington office where we've taken in specialists in international trade and the like, I think that's working out well.

I mentioned the summer associate program. I think that's been very good. Probably all of us -- all major firms -- cater too much to these summer associates. And here's another phase of our practice where The American Lawyer does a lot of talking, comparing the benefits of one associate program with another. It creates some awkward situations but it's something that on the whole, I think, has been quite beneficial in exposing us to the prospective associate and also exposing the lawyer to the law firm.

I think one of the things that is most troublesome to us in hiring new lawyers is that they'll stay with us for a year or two and then leave. I'm really increasingly surprised at the number of lawyers who leave the firm. It is very troublesome because we spend a lot of time, effort, and money in recruiting new lawyers, visiting their schools, studying their prospects, reviewing their records, taking trips, summer sessions, and everything else. After we finance it all, and all the time and effort we put into it, it's very troublesome that they'll be with us for two or three years and then leave. A lot of lost time and effort in that, but I don't know what we can do about it. It's just too bad that it happens, but with the size of the firm, it's one of those things you just can't avoid.

Hicke: Also do you think that it's partly due to the changing times? I mean, it used to be in the early 20th century that a person would start in with a company and work there all his life.

Bates: That's correct. Oh, sure.

Hicke: Now people jump from one company or one job to another without any thought.

Bates: Right. And I think, too, when you have both the husband and wife working, particularly in professions, you know, one or the other may have opportunities elsewhere and want to pursue them, so that for the lawyer with the firm who has a husband or wife who's called upon to go the Mid-west or New York or somewhere else, it might be to their mutual benefit to make that move. That's all come about in the last twenty years or so, which adds to the problem.

## TV CH. 9 AIDS BAR IN PUBLIC RELATIONS

WITHIN the last two months our San Francisco Bar Association has been able to present two panel discussions over television. These programs were made possible because we in San Francisco are



JOHN BATES

fortunate in having Channel 9 as an educational television channel. The first panel discussion presented in March was entitled "Human Relations and the Law." Judge Orla St.

Clair, Martin J. Dinkelspiel, Harold W. Tobin and Brent M. Abel appeared on the panel. The second show given on April 20th, entitled "Case in Point," was introduced by our President, Burnham Enersen. Judge Albert C. Wollenberg moderated the panel which was composed of Edward D. Bronson, Wallace L. Kaapeke, Eugene H. O'Donnell and Francis W. Mayer.

As a result of the interest stimulated by these panel discussions your Public Relations Committee is planning for additional panels, and it is quite possible that they, too, will be presented to the public over Channel 9.

### Top Programs

Channel 9 is now on the air four evenings a week with regularly established programs. These programs have included Dr. Baxter's series on Shakespeare; "With These Weapons," a series on public health produced by the San Francisco Health Council and the San Francisco Medical Association; Dr. Mortimer Adler on "Great Ideas"; "Your Growing Child"; "The Great Plains" trilogy; "The Ballet de France"; "Salzburg Marionettes"; and "Europe, 1955" with Drs. Thomas Lantos and Alfred Sumner. Special programs have been shown, such as our own Bar Association panels; rebroadcasts of Murrow programs; a panel on the Salk vaccine, which included Dr. Sox and other eminent doctors; Charles Laughton and others. "The Little Symphony" composed of leading musicians in the Bay Area began a series of concerts which appear regularly on Friday night of each week; "Industry on Parade" will also be shown. There are plans for many others, including the coming sessions of the United Nations in San Francisco.

Channel 9 is operated by the Bay Area Educational Television Association, which is a nonprofit corporation composed of representative Bay Area educators, businessmen and professionals. It had its beginning in 1953 when the Federal Communications Commission made television channels available throughout the country for educational purposes. At that time, there was considerable debate whether the channels should be financed and operated by Federal or local government, or whether the station should

be supported by voluntary efforts from the communities in which the channels were made available. It was finally decided in California, that the television channels would be given a wider and freer scope of expression if they were eventually supported by private contributions from the public in the area served.

### Sponsors

Without public funds it wasn't easy to get started. The first major assistance came from the Fund for Adult Education which was established by the Ford Foundation. This Fund has contributed or committed \$150,000 for capital equipment. Westinghouse sold its KPIX transmitter and antenna atop the Mark Hopkins Hotel to KQED for substantially less than cost. The Rosenberg Foundation made a grant of \$60,000. With this background and with this financial support in capital equipment, Channel 9 went on the air in June of last year. In this short time, and without a major drive, KQED has gained more than 3,000 members from the community at large.

Realizing that there are over one million television sets within the listening area of Channel 9, there exists a great potential for community enlightenment, both in the educational sense and in the broader field of public information. Although programs are carefully screened by an impartial citizens' committee, time on Channel 9 is free.

Our Bar Association has already received a direct benefit from this channel by being able to present its panels which help to educate the lay public on the role of the lawyer in everyday life. It seems to me that this worthy venture deserves our support.

**Memberships may be obtained by sending a check for \$10.00 to Bay Area Educational Television Association, 165 Post Street, San Francisco 8 (contributions are deductible).**

The Brief Case, May 1955



By Robert G. Sproul, Jr.

## BAR MEMBERS OF NOTE

These thumbnail sketches are selected at random with the aim of making you better acquainted with your fellow practicing attorney.



**John B. Bates**—Among the younger members of the Association, the name of John B. Bates is also one certainly deserving of note. Like Peter Teige, Jack Bates was selected for a position of considerable distinction and responsibility in the legal profession prior to his 35th birthday. On January 1, 1953, at the age of 34, he became a partner in the leading San Francisco firm of Pillsbury, Madison & Sutro.

Jack Bates got his start in life in Oakland, California, on March 2, 1918. He attended Oakland and Piedmont public schools and, later, Stanford University. After graduating from college, he attended Stanford Law School for a year and then transferred his allegiance to Boalt Hall. Jack's legal education was interrupted by the War and, in April of 1942, he was commissioned as a naval supply officer. He served on the Destroyer *U.S.S. Farragut* and participated in the Aleutian and Gilbert and Marshall Island campaigns. With the end of the War, he returned to Boalt and obtained his LL.B. in 1947. That same year Jack Bates joined Pillsbury, Madison & Sutro and went right to work in the firm's trial department.

Jack and his wife, Nancy, live in Piedmont and last year the voters elected Jack to membership on the Piedmont City Council. He is also a member of the Board of Directors of the Bay Area Educational Television Association, which operates Channel 9 (KQED). He has served as Secretary and Vice-President of the Barristers' Club and in 1952 headed the Lawyers Committee for United Crusade. The Bates have three children—Johnny, age 7; Cathy, age 5; and Charlie Bates, 1 year.

### THE BRIEF CASE

September 1954

### PLAINTIFF RESTS IN DAMAGE SUIT AGAINST PHONE CO.

San Andreas — The \$75,000 suit of Tony Zanardi vs. The Pacific Telephone and Telegraph Company, Thelma Deboy, Charles Hale and Conrad Simondet entered its second day on Wednesday before Superior Judge Smith in the Superior Courtroom in San Andreas with Mr. Everett Wallace, attorney for the plaintiff resting his case at approximately 4:20 p. m. Immediately following this action, Mr. John B. Bates, attorney for the defendants, made motion for judgement of non-suit on the grounds that no evidence had been submitted which would show negligence on the part of the telephone company or on the part of Mrs. Deboy, that there existed equal knowledge on the part of both parties as to any danger which might exist and that there was no more breach of care on the part of the telephone company than there was on the part of Tony Zanardi.

(article incomplete)

Calaveras Californian  
9 September 1952



### Crusade Leader

John B. Bates, a partner in the law firm of Pillsbury, Madison and Sutro, has been named to head the San Francisco legal division of the United Bay Area Crusade. He will be assisted by Attorneys Joseph Martin Jr., Owen Jameson and Hart Spiegel.

1955

## MacLeod, Milligan, Bates & Wyatt Elected to Council



John B. Bates of 20 Bellevue Ave. (left) and Lowry Wyatt of 122 Dracena Ave. are the new members of the Piedmont City Council. They succeed Osgood Murdock and Arthur Paulson who did not run for re-election.

Piedmont voters stayed away from the polls in droves last Tuesday in one of the quietest elections in years. Only 2,011 of the city's 6,868 registered voters cast their ballots. This was a turnout of less than 30 per cent. In 1952, a total of 3,510 voters out of a 6,137 registration went to the polls for a 57 per cent showing.

Elected to four-year terms were Mayor Clair MacLeod, John B. Bates and Lowry Wyatt. Roy S. Milligan won the two-year term without opposition and Mrs. Margaret McIvor and Robert Wells were also unopposed for the Board of Education. Morris Arthur Braaten was the fifth candidate for the Council. William Wood is the holdover member of the Council.

Milligan, an insurance company executive, topped the list in votes with 1,853, followed by Mrs. McIvor, 1,845 and Wells, 1,825. Mayor MacLeod who did not wage

an election campaign, polled 1,663, and John B. Bates, a San Francisco attorney, and Lowry Wyatt, a food company executive, who ran as a team, received almost identical votes of 1,792 and 1,770, respectively. Braaten's vote was 366.

The Piedmonter  
26 February 1954



Lieutenant Edward Moody, Omar A. Khadra and Attorney John B. Bates as they waited to bail out the Arab youth.

Saudi Official's Son

## Arab Student Held In Hit-Run Case





Roy A. Bronson  
Chairman



John B. Bates  
Vice Chairman

## Report Of The Special Committee On Federal Judicial Dists. Of The Bar Association Of San Francisco

(First Installment)

We are opposed to the establishment of Federal District Courts in San Jose and Oakland, and in this respect we are opposed to H. R. 4534, introduced in the House of Representatives by Congressman Edwards of San Jose, for the following reasons:

### I.

Facilities are already available in San Francisco for the administration of Federal justice in the San Francisco Bay Area, including San Jose and Oakland.

A new Federal office and United States court house building was recently completed in San Francisco at a cost of \$34,000,000. This court house comfortably houses the seven judges of the Southern Division now sitting in San Francisco, and there are courtrooms, chambers and facilities ready and available for five additional Federal judges. The court house was designed and built to accommodate the anticipated needs for Federal judges in the San Francisco Bay Area for many years to come.

The establishment and maintenance of separate facilities for Federal judges in San Jose and Oakland, with the creation and establishment of additional United States Attorneys, Clerks, Marshals, Bailiffs, Probation Officers, Court reporters, detention facilities, and the like, would be against the best administration of Federal justice in the San Francisco Bay Area, and would be contrary to the recent policy that was established when the present Federal court house was constructed in San Francisco.

### II.

**A centralized multiple judge court is best for the efficient administration of Federal justice, particularly for the San Francisco Bay Area.**

The best utilization of judicial manpower comes from consolidation, by the pooling of judges in the most conveniently located center of business and population.

San Francisco is the most sensibly located hub of the greater San Francisco Bay Area.

This is a natural geographic choice which has already been recognized by the Congress in building the newly constructed court house here in San Francisco.

To now divide the court into separate divisions with judges sitting in San Jose and Oakland would fractionate the court, dissipate the best utilization of judicial manpower, substantially increase the cost, and lessen the efficient administration of Federal justice in the San Francisco Bay Area.

There is no geographic need for the establishment of separate Federal courts in San Jose or Oakland.

It takes less than 20 minutes to travel from downtown Oakland to the Federal District Court in San Francisco, and the Bay Area Rapid Transit System, currently under construction, will offer a commute of less than 15 minutes from downtown Oakland to downtown San Francisco.

There are regular commute trains from San Jose to San Francisco, and the trip takes less than 80 minutes. For example, there are four commute trains in the morning that allow arrival in San Francisco prior to 9:20 a.m. The trip by automobile takes less than one hour.

(To Be Continued)

## V OVERVIEW

### PM&S's Major Contributions

Hicke: What do you think are Pillsbury's major contributions to the law, to society, to San Francisco, and to California in general?

Bates: I think that our lawyers have done an awful lot in pro bono work. We started a program of supplying lawyers to supplement the staff of the public defender's office, and that's been a great public service and very much appreciated by the public defender. Also it's been a benefit to the firm, because it gives our young lawyers an opportunity to get familiar with the courtroom and become comfortable with examining witnesses and standing up before judges and juries. So it's given them a very good, practical experience in how to handle themselves in a courtroom.

Hicke: Do you know when that started?

Bates: Yes. It started about twenty years ago.

Hicke: So it's been going on a long time?

Bates: Oh, yes. Yes, it has. It may have been a little longer than that.

We've always involved ourselves in a lot of community work. Many of us have been actively involved in Bar Association activities and serving on the boards of various charitable and educational organizations throughout the area. I personally was on the board of the Barristers Club, and then the San Francisco Bar Association, and then I was chosen to be a fellow of the American College of Trial Lawyers, and I served as a member of the Board of Regents of the American College, which was a very fascinating opportunity.



Because of my involvement with the American College and the exposures I had there, I was asked to join Chief Justice Burger and a group of eleven lawyers and judges from the United States to go to London; we spent two weeks there, as I have mentioned. Our mission had to do with observing, evaluating, and reporting on civil trials and procedures. There was an American team and an English team. Being with the chief justice, we were royally entertained for luncheons and dinners. I don't think there's any country in the world that can do it quite like the English when they want to really put on a show: it was really a magnificent experience:

I was a founding trustee of KQED, and president and still a director, of the Commonwealth Club of California.\*

I've been involved on the boards of various schools, a member of the Piedmont City Council, director of the Pacific Lumber Company, director of Hills Brothers Coffee Company. I'm on the Edward Hills Foundation, and I recently became a trustee of the Pacific Legal Foundation. I think many of our partners have involved themselves in many pro bono charitable educational and hospital activities, which I think inure to the benefit of the state and the country.

What else?

#### Factors in PM&S's Success

Hicke: This is a hard question, but do you want to talk a little about what factors have made PM&S successful? I know that's what you've been talking about all this time basically.

Bates: Well, I don't know what successful means. I was looking at The American Lawyer survey, the most recent survey, and I noticed that some of these New York firms, and even Gibson, Dunn & Crutcher, make a lot more money than we do here at Pillsbury, Madison & Sutro. I guess the most profitable firm, if The American Lawyer is correct, is the Wachtell, Lipton\*\* firm in New York, and they're the ones that specialize in all this takeover and anti-takeover law in the securities field.

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\* See Appendix II.

\*\* Wachtell, Lipton, Rosen & Katz.

Hicke: Mergers and acquisitions?

Bates: Mergers and acquisitions, that's right. And Skadden Arps\* is right behind them; that's Joe Flom and all of his machinations. Take Cravath, Swaine & Moore: they've increased their overhead tremendously by paying their new associates a lot of money, which motivated us to increase our starting salaries, which is really completely unrealistic; the beginning lawyers aren't really worth very much at all for the first year or two. [quiet chuckle] There's no way you can make any amount of sense out of it. But I noticed that Cravath, Swaine & Moore, I think, is number three in the country, and we're down in around the forties out of some seventy law firms. So I don't know. When you're talking about success, I think Pillsbury, Madison & Sutro has been very successful and I think that our partners have done very well financially. I think that our clients are very fortunate to have Pillsbury, Madison & Sutro lawyers representing them and doing their legal work.

I think that San Francisco is very competitive. We have a lot of lawyers in San Francisco, a lot of good lawyers, and a lot of good law firms. So if you're talking about economic success, I think that the New York lawyers probably do a lot better financially than we do, and even the lawyers in Los Angeles probably do somewhat better than we do. But as far as a good working environment and a good place to live with many opportunities for a lot of different activities, this law firm, I think, has been tremendously successful.

Hicke: PM&S's success can also be measured by it's high reputation for outstanding legal work.

Bates: Well, I think that we have that, and we have our traditions handed down from Felix Smith, Marshall Madison, Gene Prince, Jack Sutro, Francis Kirkham, Gene Bennett in being very careful and always producing top-quality work that has been thoroughly reviewed and checked. That has always been our aim. We've always tried to have everything that comes out of Pillsbury, Madison & Sutro, everything done by our lawyers, to be top grade, top quality, and of the highest ethical standards. Sure everybody's going to make a mistake now and then, but I think that by and large we've achieved a lot of success in that regard.

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\* Skadden, Arps, Slate, Meagher & Flom.

Branch Offices

Hicke: Well, that's really good enough to stop on. But I did want to ask you a little bit about branch offices; could you comment on those?

Bates: Oh, yes. Some years ago some of our partners were most anxious for us to have an office in Washington, D.C. As I recall, Bruce Mann was one of the strongest proponents of that. This was when there was a lot of attention being given to the Silicon Valley. Of course there still is, but this was some fifteen or more years ago when there was just one new company after the other coming along in the Silicon Valley, and a lot of the activity was in Washington, D.C. Bruce and some of the other partners in the corporate and securities field felt that we were missing out by not having a Washington office because of the necessary involvement that you get into with the Securities and Exchange Commission and the people in Washington, D.C. He and other partners felt that it was most important.

Some of us had a vivid recollection of the time when we had a Washington office and our partner had some problems -- mental and physical -- and he overlooked filing income tax returns, got into considerable difficulty, and caused us some problems and embarrassment. So we were very chary about branch offices, but we wanted to explore.

The idea was just to have a limited presence in Washington, D.C., and we were looking around for a law firm that we could perhaps merge with. We found a very competent law firm that we were most interested in merging with, but then it turned out that there was some conflict in having to represent interests that might be adverse to the interests of Standard Oil Company of California; so we felt we couldn't go in that direction.

But we finally found an interest here that some of our partners had in going back to Washington and trying to build a firm in Washington, D.C.. We've moved very carefully and very slowly in gradually building our presence in Washington, D.C.

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Bates: We had some problems here within our own firm in deciding how extensive our presence ought to be there. Some of our partners even wanted to merge with one of the more substantial firms in Washington, but I was opposed to that. I didn't think that we wanted to become a Washington law firm. I thought we ought to keep our central focus here in San Francisco and develop our Washington office to service our established clients and not try to compete with the other firms in Washington, D.C., for new Washington, D.C., business.

I should have mentioned that Mike Halloran was the first one to go back there and head up the Washington office, and Mike did have a lot of expertise in securities and corporate work. He did develop some new business with new companies -- particularly in the high-technology field -- in the Washington, D.C., area. But our main emphasis in developing the Washington office was to give full and better service to our California clients.

I don't know what the future is going to bring there, and I don't really know how profitable it is. We haven't treated the Washington office as a profit center really, although we're always interested in how much of a financial burden it is on us to maintain the Washington office. I haven't seen any recent financial data; it may be that it's beginning to carry itself. But the important thing is that the contribution of the Washington office enhances our services here to our clients so that we can recover out of our overall activities for a client.

Bruce Mann and his group were also most interested in us opening an office in the Silicon Valley area. We explored various opportunities down there, and considered mergers and how we could go about expanding in that area. Finally -- and I think this was primarily because of Bruce Mann -- we became familiar with Jay Margulies, who's a partner in the Ruffo firm; Jay and Bruce Mann were in the same kind of work helping start up Silicon Valley businesses and having to do with going public and whatnot.

Then I got involved with the situation and got to know Al Ruffo and the other partners there, and this finally culminated in a merger. I think that it's working very well, and we now have quite a substantial presence in San Jose. We considered Palo Alto, and the opportunities for merging there were -- we just couldn't seem to work it out with the right kind of relationship. There were some very successful firms in the Palo Alto area, some of which our partners had joined; partners who have left us have joined the Wilson, Sonsini firm,\* and the Ware, Friedenrich firm.\*\*

These law firms are quite successful. As a matter of fact, Leo Ware made so much money in taking a percentage interest in the start-up companies who couldn't afford to pay all of their attorneys fees that when they went public, he had quite a bit of stock in the company -- he and some of his other partners, the same as is going on in the Wilson, Sonsini firm -- but Leo Ware made so much money in his

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\* Wilson, Sonsoni, Goodrich & Rosati

\*\* Ware, Fletcher & Friedenrich.



early fifties that he decided to reduce his responsibilities and became of counsel to his firm. He has a ranch near ours between here and Monterey, between Morgan Hill and Watsonville, and he spends a lot of his time down there raising exotic chickens, pigeons, and pigs and all sorts of interesting barnyard animals. He also has a vineyard and grows some excellent varietal grapes.

But we, I think, were fortunate to work out this relationship with the Ruffo firm, and now we're in a position to service a much broader range of clients, including a lot of the start-up companies that are in that area. I think we can offer them a broader range of legal services than the other established firms in the area. So it should work out.

I didn't have anything to do with our recent decision to open an office in Walnut Creek. I understand that we are doing it on a very careful basis to make sure it's the thing to do.

We have a group of representatives from the major law firms here in San Francisco that meet, oh, every other month or so for a luncheon to share mutual problems. When we were going through the experience of whether or not we ought to open a branch office in San Jose or wherever, I was sharing our concerns about branching out with some of the other major firms and going through the experiences that some of them have had in this area. For example, the McCutchen firm opened a branch in Los Angeles, and within a few years the Los Angeles branch became so profitable as a profit center that they split off from the head office in San Francisco. That's the risk you take when you get into this branch office business: if the branch becomes quite profitable, they're going to be persuaded that they ought to be completely independent rather than having to share their profitability with the head office.

The Pettit & Martin law firm has seemed to be very successful in establishing branch offices throughout the country. Walter Pettit built up a specialty in government contracts. He founded another law firm in Washington, D.C., to specialize in government contracts, and that was sort of their base. But I just don't think it's good for our firm to put too much emphasis on this branching. I think the most important thing for us to do is to give good service to our existing clients here in San Francisco and expand only where we can do so with good, strong clients based in this area. I just think that any time you open another branch office you increase your management problems and your backup personnel problems and office problems, so that I think you tend to dilute the profitability of the firm with these branches.

Hicke: Were you involved in the London branch?

Bates: Oh, yes. But that didn't last very long, and that was almost entirely to service Standard Oil of California. Frank Roberts was very much involved in that. We were hoping that it would generate some other business for us here in San Francisco with Europeans and English interests wanting to invest in California, but that never really developed into anything of any significance.

Hicke: And do you want to comment on Los Angeles?

Bates: Well, the Los Angeles branch really wasn't much more than a mail drop. Ruth Modisette had come from the O'Melveny & Myers firm, and she had done a lot of work in municipal bonds and government financings, particularly in municipal bonds. We -- I say we; I think it was primarily the securities lawyers, and particularly Al Brown, who believed that the market, the potential clients, were looking for another law firm that they could use in public financing. And because Ruth Modisette had been in the Los Angeles area and had a lot of contacts down there, we thought that we should have an office for her there, and if the work in Los Angeles expanded, then we could supplement that office. If it didn't, we weren't going to be financially burdened to any great extent because we did that by obtaining an office in the offices of Lawler, Felix & Hall. And really, that's all there was to it. Ruth Modisette was spending most of her time in San Francisco and a limited amount of time in Los Angeles. That was the extent of it.

Hicke: Oh, I see. And the work continued on here then, for the most part?

Bates: Yes.\*

#### Recollections of the Kennedys

Hicke: Okay. I think that's just about everything, except at one point, very early on, you said you would tell me a little bit about the Kennedys.

Bates: Jack Kennedy and I were approximately the same age. We got to know each other before the war. He had made several visits to Stanford University where some of the Kennedys were in school, and we had a very good, mutual friend in Paul "Red" Fay; Red and I were very close friends and fraternity brothers, and Red served in PT boats with Jack Kennedy. Jack Kennedy and I developed a good friendship because of

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\* Later in 1986 the Los Angeles branch was expanded considerably by taking in a group of lawyers who were anxious to leave Lawler, Felix & Hall and join PM&S.

our mutual friendship with Red.

After the war it so happened that both Jack and I were getting out of the United States naval service about the same time, and we were both here in San Francisco during the days of the formation of the United Nations. We were sort of brought in to help host the arrangements here for the United Nations. We were all excited about the war being over, and we were in our late twenties and single and very busy making sure that we properly entertained the guests, and particularly the ladies. [chuckles] So we spent quite a bit of time together.

Then as time went on and Jack Kennedy got himself into politics, Red Fay spent a lot of time with him. Red went back East and actually campaigned for him when he first ran for Congress, and then when he ran for the United States Senate. I would see him off and on, quite often in the company of Red. But Jack and I got to know each other quite well.

Then he decided that he thought he ought to run for president of the United States. He hadn't announced his intentions but it was understood that he was most interested. It so happened he came out here to participate in a seminar for the World Affairs Council that took place in Asilomar, down on the Monterey peninsula. Nancy and I were going to be down at our ranch for the weekend, and I knew that Jack was going to be involved in this debate with Arthur Dean, who had been very heavily involved with the Atomic Energy Commission.

They had this debate on Southeast Asia and the growing "red menace" in the area. Jack Kennedy really did an excellent job both in his arguments and in his personality and manner and all that, and Dean was much older, and he just didn't have the appeal that Jack Kennedy did, so Kennedy was very well received.

But anyway, after the discussion had concluded, they took some questions from the floor, and I recall that one of the questions asked of Jack was, "Senator, are you going to run for president of the United States?" And he said, "Well, I'm not prepared to say anything about that at this time, but I've already selected my favorite candidate." [both laugh]

Anyway, after the discussion they had a social gathering so that Jack could get around and meet the other representatives of the World Affairs Council. Jack was working his way around the room, and he finally got to where Nancy and I were. I told him how happy I was to see him and what a fine job he'd done in the discussions and whatnot, and then I said, "Jack, the only trouble with you is you're not a Republican." And he said, "Well, you know, Jack, there have to be some of us in the Democratic party." [quiet chuckle] Jack had one of the quickest and nicest wits I think I've ever been exposed to.



When Jack was running in the primaries, I sent him a contribution. I always have supported Republicans and Republican candidates, but I thought he was the best Democrat running, and I sent him a contribution; he was most appreciative of that.

He was running against [Richard M.] Nixon and he won the election. He invited Red Fay to come back to Washington. The only place they could find where Red Fay might be appropriate was to be undersecretary of the navy. I think that in discussions as among Red Fay, who had gotten very close to the Kennedys, and President Kennedy and Bob Kennedy, they were anxious to have me come back there and serve as assistant to the attorney general under Bob Kennedy. Bob called me and told me of this, and I was very flattered that they'd want me in their administration, and I was really quite interested in going.

I talked to Frank Coakley, who was then district attorney of Alameda County, because I'd resolved that the only office I could take in the administration where I wouldn't have any conflict and which would be a matter of interest to me would be to head up the criminal division. Not knowing anything about the criminal law other than the fact that I was terribly upset about the increasing criminal activity in the United States and particularly the rackets and Mafia, I talked to Frank Coakley and asked him if he'd be willing to go back to Washington with me to help me out in this field, and he said he would.

In the meantime, I talked to my father-in-law Jean Witter, who thought I'd be absolutely out of my mind to go back to Washington, as did my partner, Jack Sutro. He thought it'd be crazy for me to go. I'd just reached a position where I'd been a partner for a number of years, and I felt that I was getting a little bit of attention from the other more senior partners in the firm. Our children were becoming more of a burden in going to private schools and whatnot, although I think I could have worked it out financially. Francis Kirkham thought it would probably be a good idea, but we hadn't had anybody who had left the firm and gone into government.

Anyway, I finally concluded not to go. It was a very difficult decision. However, I told the president that if he got reelected and he still wanted me I would be prepared to join him.

Shortly after I'd made that decision, we were going to have the American Bar [Association] convention here in San Francisco. I phoned Bob and found that he was coming out here and that he in fact was going to make the principal address at the convention on the Monday following the first weekend of the convention. I asked him if he and his family would like to come out and spend a few days at the ranch before the convention. I said, "It would be a good place for you to rest, and you can work on your speech, and we'd be delighted to have you."



When I went home that night and told my wife, Nancy, about it, she was horrified. She didn't want to get all that exposure, with all these Kennedys and the FBI and everything else running all around our ranch. [both laugh] I said, "Well, Nancy, don't worry, they're not going to come. He's not going to come and spend any time at our ranch. Don't worry about it. I just wanted to do it because I thought it would be a nice gesture." Well, much to my surprise, a few days later he called back and said they'd be delighted to come to our ranch.

So they arrived on the Friday before the opening of the convention on Monday.

Hicke: "They" meaning his family?

Bates: Yes. He and his wife and four of their children. Nancy and I both took cars to the airport to pick them up. I was amused by the fact that I had a big bumper sticker that said, "Tom Coakley for Attorney General." I was Tom Coakley's campaign chairman in Northern California, and he was the Republican candidate for the attorney general running against Stanley Mosk. Unfortunately Stanley Mosk beat him, but that's another story.

Anyway, they all arrived and we could just barely get them into our cars, so it was decided that the FBI would come down later with the luggage. I left some maps and instructions as to how to get to the ranch for the FBI. The FBI took care of the attorney general. The Secret Service takes care of almost everybody else, but the FBI takes care of the attorney general. And so off we went.

Well, the FBI got lost. [chuckles] They couldn't find the ranch, and they didn't get there until, oh, later on at night.

But, I tell you, it was a very active weekend.\* [both chuckle] A very active weekend. We were up bright and early Saturday morning and took the whole gang of them horseback riding up Mt. Madonna to where Henry Miller's ruins were -- Mt. Madonna is just directly west of our ranch. That was about a two-hour horseback ride up and back, maybe a little more. Then we got back and Bobby had a chance to swim and play a little touch football before lunch.

We had lunch and then I remember in the afternoon we all hiked up and played touch football at the top of the ranch. Finally when it was time for dinner, the four children and our children all got cleaned up and dressed for dinner, came in, and Bobby proceeded to

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\* See following page.



Inaugural Ceremony of Governor Ronald Reagan  
January 5, 1967

*Left to right:* John Bates, Bruce Mitchell, Wayne  
Thompson, Gov. Ronald Reagan



The Robert Kennedys at the Bates Ranch  
August 5, 1962



throw them all in the swimming pool. So then they had to go back, dry off, change their clothes, come back -- well anyway, they finally had dinner about seven o'clock or so. Nancy wanted to get all the children fed before we had dinner. We had dinner about eight or nine o'clock, and then, of course, everybody was exhausted. The Kennedys had just flown out from Washington the day before.

Hicke: No jet lag stopped them.

Bates: No. No. But they were tired. So that Saturday night everybody went to bed early, not early but after dinner; it was probably ten or eleven o'clock when we finally got to bed.

And then bright and early in the morning, everybody was up and at it again. But, the first thing they did was, Nancy and our son Charlie took them all to church, Catholic mass, leaving the ranch early a little after eight. I think they went to nine o'clock mass and then came back, and then the activities began.

Then after lunch and that afternoon, we all left the ranch. I drove them to San Francisco. We met the Ed Callans here in San Francisco. Senator Joe Tydings was out here with his wife, Ginny, and we all went to dinner at Ernie's here in San Francisco. And somewhere during the course of the day, I can't remember just when, we learned that Marilyn Monroe had committed suicide and died.

It's interesting that this fellow Anthony Summers wrote a book called Goddess, and he placed Bobby Kennedy with Marilyn Monroe the Saturday night that he was at our ranch. Well, that was absolutely absurd. He called me and wanted to interview me about that, and he came to my office, and I told him the whole story. He did mention in the book that he talked to me and I said something to the effect that Bobby would have to be Peter Pan to be down there that night, and went through the activities of the weekend which, of course, Summers didn't do in his book.

Then sometime after that, British Broadcasting [Corporation] -- Tony Summers's book was published in England; Tony Summers was an Englishman -- called and wanted to interview me about that weekend, and I felt compelled to get the truth out and try to set the record straight. So I said, fine, they could come and I'd let myself be interviewed. They came here to the office with a television crew and the whole bit, and they must have interviewed me for an hour, hour and a quarter, and then they finally went on the air with this program. I think it was called "The Last Days of Marilyn Monroe,"\* something like

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\* "The Last Days of Marilyn Monroe" was characterized by the San Francisco Examiner's television critic as "the trashy 1985 BBC inves-



that.

##

Bates: In that program I only appear for about five minutes, and none of the details of all the activities of the Kennedys are in the program; they didn't use that part of my story. They had all these so-called eye witnesses that placed Kennedy down in Los Angeles on that Saturday, which is absolutely impossible. I just don't know how they could find people that could say things like that when it's just not true. Of course, so much time had gone by they could have confused the time and everything else, but it just was impossible that it could have been that Saturday night; there's no way he could have gotten away from the ranch, gotten down to Santa Monica, and gotten back to Sunday mass. There's just no physical way he could have done it.

One gal said he did it in a helicopter. Well, that's ridiculous.

Hicke: You might have noticed a helicopter flying around your house. [both chuckle]

Bates: Oh, yes. Flapping around. And it's just ridiculous that they [BBC] didn't bother to talk to my foreman or anybody else. They never talked to my wife, just to me. They sort of treated me as some goof-ball who was trying to protect Bobby Kennedy, which is, of course, absolutely ridiculous.

Hicke: Well, you were spoiling a good story, though.

Bates: Yes, that's the trouble.

It's unfortunate that both Jack and Bob were killed. Regardless of what anybody says about them, they really were great public servants and made a great contribution. It was a great loss, a great loss to the country really.

Anyway, this reminds me that I didn't mention the fact that I was quite actively involved in politics and in supporting Republican candidates. Spencer Grant and I followed Chris De Guigne and Joe Hickingbotham as chairmen of the United San Francisco Republican Finance Committee. We acted as such for some ten years, and this was at a time when northern California really exercised the most influence in the Republican party in California. Since that time, the power

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tigation into the alleged John and Robert Kennedy connection in [Marilyn Monroe's] death." It aired again on August 5, 1987, the 25th anniversary of her death.

base has shifted to Los Angeles. At that time, the San Francisco Republican Finance Committee was very important and very strong in developing and raising money for Republican candidates. We had a very good executive director in Milton Esberg.

Unfortunately since that time Republican support has diminished, and a lot of Republican money no longer goes to the San Francisco Republican Finance Committee: just enough to support the local Republican committee, but really not much more than that because the substantial donors like to give to the candidates themselves, rather than to any committee. But during the time Chris, Joe, Spencer Grant, and I were involved, it was a very important arm of the Republican party in northern California, and we were quite active in supporting Republican candidates.

I must say I was most embarrassed about President Nixon and the exposure of Watergate. I just recently read [Leon] Jaworsky's book on The Right and the Power, and it's a very interesting book. It is really appalling how badly Nixon conducted himself, in the fact that he was engaged in a criminal conspiracy to withhold evidence and obstruct justice. A very difficult period in American political life. So I have some regrets at having worked so hard to help Nixon become the president of the United States. But as president of the Commonwealth Club of California, I became very well acquainted with a lot of the leading citizens and leading politicians of our time, which was a very exciting and interesting opportunity.

Hicke: How did you feel about becoming an advisory partner?

Bates: When I was fifty-five, I never thought about what it would be like to be sixty-five. When I then thought about the firm and its future, I thought about giving full support to the active general partners and associates and getting the advisory partners out of their way. I was highly in favor of the advisory partner program and I resisted the elimination of increases in relationship to inflation, but I agreed with the final compromise that related percentage increases to increases to the senior partners. Now having passed the traumatic age of sixty-five and having become an advisory partner, I have a much more meaningful perception of the program.

First, it is worrisome to reach that stage in your career when there appears to be no prospect of financial gain and you have lost the ability to keep up with inflation by increased personal income. You begin to review all the cards you have left. You are concerned that your dignity will go down with your income; so you appreciate the fact that you have an office and secretarial assistance as your adjustment goes on.

You are encouraged to continue to give your support to the activities of the firm, but an advisory partner cannot be expected to carry on as before and particularly in some areas of our practice. Litigation is a young man's game. Unless he has very unusual genes, he cannot put the energy, attention, and reaction time into the trial of a case that the representation demands. Furthermore, a younger lawyer does not want to work for an advisory partner. It is best to pass the baton to the next in line and encourage the continuing vitality of the firm. But it is not an easy adjustment. You must make sure that your safety belts are fastened.\*

Hicke: You've given us an enormous amount of information, and it's very helpful, and I just do thank you so much for the time that you've spent. I appreciate it very much.

Bates: I appreciate it very much. Thank you.

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Transcribers: Georgia K. Stith  
Kenneth W. Albertson  
Charlotte S. Warnell

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\* It's been more than one and a half years since my interviews were completed. Unfortunately, transcribing and checking took more time than anticipated. Now I want to say that I'm beginning to enjoy my new status as an advisory partner, but my golf game needs more attention. John B. Bates (March 1988)





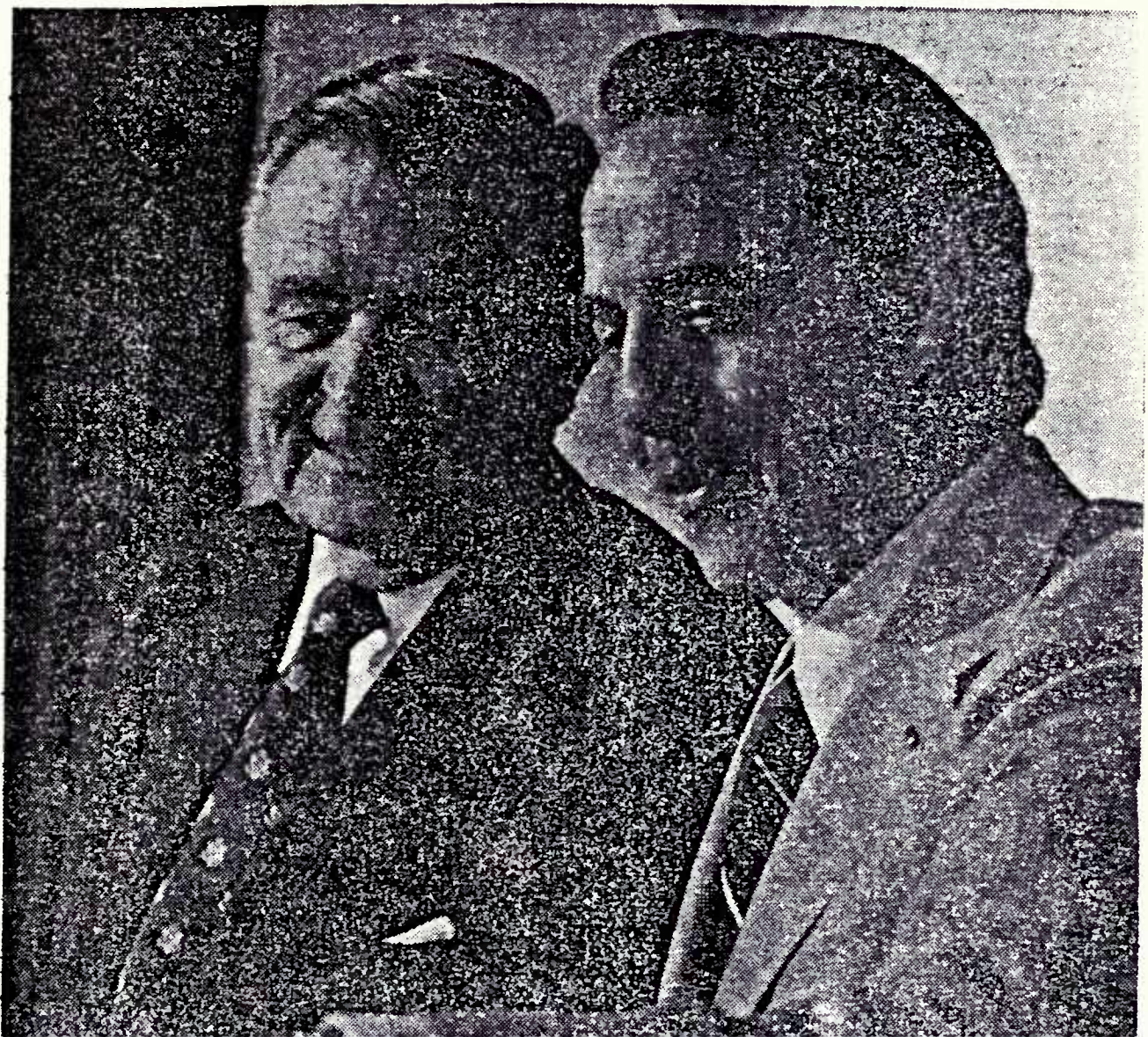
*left:*

San Francisco Chronicle  
5 May 1976

*below:*

San Francisco Chronicle  
15 September 1976

*By Susan Ehmer*  
**Vice President Nelson Rockefeller (right) chatted with John B. Bates  
at San Francisco's Commonwealth Club yesterday**







## APPENDIX I. "Bonanza"

Special Centerfold Poster—The Road to Selfhood  
Head Lice: Does the Cure Cause Cancer? (Page 63)

# NEW WEST BONANZA

STARRING  
"Mayor"  
Joe Alioto and  
"Little"  
Joe Alioto



A gripping true tale  
of cattle, malpractice and  
the Alioto Dynasty



Merry Lamb



# BONANZA!

OR, HOW A PERSISTENT WYOMING CATTLE RANCHER

 **WON** 

THE LARGEST LEGAL MALPRACTICE VICTORY ON RECORD,  
AGAINST ALL ODDS AND AGAINST THE SHARPEST ANTITRUST

# LAWYERS

IN THE BUSINESS:

## MAYOR JOE & LITTLE JOE ALIOTO

## BY EHUD YONAY

**M**AYOR JOE Alioto of San Francisco has been accused of many things during his long, turbulent public career, from conflict of interest and Mafia ties to fee splitting. But nobody ever accused him of being a bad lawyer. This is especially true in his area of expertise, antitrust law. Even his toughest competitors reluctantly concede that when it comes to taking on the big combines *mano a mano* in the courtroom, Mayor Joe is one of the best.

Yet on June 5, 1980, a jury of their peers found Mayor Joe, his brash lawyer son Joseph M. Alioto, 37, and their family firm guilty of such gross legal malpractice in an antitrust case that they ordered them to pay an unprecedented \$3.55 million to a client for negligence,

intentional misrepresentation and breach of fiduciary duty. The judge in the case subsequently reduced the award to \$880,-



000. The Aliotos indicated that they intended to appeal the case.

The unexpected jury verdict (the case had been kept under wraps by Judge Ira Brown for over three years) sent shock waves through law offices and the sedate cafés where lawyers meet in San Francisco's Financial District. It was a dominant conversation topic on the PSA commuter runs to L.A. Lawyers were either elated or incensed, depending on how they felt about the Aliotos, but they all found the ruling remarkable in several important ways: First, the \$3.55 million award was the highest in legal malpractice history. Second, malpractice suits are so rare in the antitrust field that antitrust lawyers enjoy the lowest legal malpractice insurance rates. Third, the Aliotos carry no malpractice insurance.

But the case is even more remarkable



# LITTLE JOE ALTO WAS STILL IN LAW SCHOOL WHEN BRAY V. SAFEWAY WAS FILED. IN JANUARY 1970, MAYOR JOE FORMALLY ASSIGNED THE TWO-YEAR-OLD CASE TO LITTLE JOE, WHO LATER DENIED BEING ASSIGNED IT. "I TOOK IT," HE CLAIMED, BUT LITTLE JOE ALSO TOOK HIS TIME.

because of its substance. As pieced together from volumes of court records and related documents, it has acquired almost Shakespearean dimensions—a classic tale of justice triumphing over power and greed, arrogance, selfishness and deceit.

"We contended that lawyers deliberately tried to defraud their client, and the jury, acting as the conscience of the community, ruled that the lawyers should not be allowed to keep the money they made on the case," the plaintiff's attorney, James Penrod, remarked later. He was understating the case, a compelling western saga that began more than two decades ago when an aging rancher, Courtenay C. Davis of the Y Cross Ranch in Horse Creek, Wyoming, first came upon the trail of the modern-day cattle rustlers now known as the "Yellow Sheet"

and "Tuesday Buying." C.C. Davis decided to track them down.

**C**.C. DAVIS was born on April 5, 1901, in Park Ridge, Illinois. He graduated from Princeton University in 1924, was married in 1925 and entered law school. He had barely gotten started in Chicago real estate when the Great Depression hit. Davis survived the hard times in real estate by helping people protect their properties from foreclosures. His law degree came in handy, even though he never really practiced law, never handled any litigation, never even joined a bar association.

The tension and fast pace of city living finally got to him, however, and in 1941 he bought a small ranch in Wyoming and began to raise cattle. Located in a remote spot between Cheyenne and Laramie in southeastern Wyoming, the Y Cross Ranch was just what he needed to regain his peace of mind. The nearest town, Horse Creek, was a mere "wide spot in the road" around which maybe 50 residents lived in ranches and backcountry homes. The move proved successful financially, too, for shortly after Davis bought the ranch, the Japanese bombed Pearl Harbor, America's war efforts doubled, and beef prices shot up and remained high through the 1950 Korean conflict. Davis was able to increase his holdings to 75,000 acres and built a reputation for high-quality Hereford yearlings, which he sold to feedlots through the Omaha stockyards.

Shortly after the Korean War ended in 1953, beef prices dropped as supply temporarily outstripped demand. But then something strange happened. Throughout that decade the demand for beef by a soaring U.S. population steadily rose, but C.C. Davis noticed that although the price of beef to the consumer shot up, beef prices to the cattlemen did not rise with the new demand. It made no sense, given the rules of free-market economics. It was as if somebody were tampering with the system, and C.C. Davis decided to find out who.

Davis discovered that a quiet revolution was sweeping the nation's beef industry. Ever since the railroads ended the

great western cattle drives, the beef business centered around the major railheads, in the huge stockyards of Chicago, Denver, Kansas City, Sioux City, Omaha. Beef on the hoof from the western ranges and corn belt feedlots would arrive by train for slaughter and then be shipped out to fill separate orders from a multitude of beef markets and small stores throughout the nation. At the turn of the century, the five major packing houses created a cartel and eliminated competition from the beef packing and wholesale business. But then Congress passed the 1921 Packers and Stockyards Act, which broke the cartel and restored competition to the industry. The number of packing houses rapidly rose to over 2,000.

After World War II, however, something else happened. "Small stores [were] being forced out by the major chain stores," Davis recalled later. "You had a few men buying the product from the packing industry as opposed to hundreds of people who used to buy when they had the small stores. Competition was being eliminated." He suspected that the chains were using several devices to monopolize the beef market and manipulate prices so they could underpay cattlemen and overcharge consumers. One such device was the Yellow Sheet, the trade name for a one-page daily report of beef transactions and prices compiled by the *National Provisioner* publication and distributed by mail, telephone or wire to subscribers that included most beef retailers, wholesalers and packers. Many beef buyers would rely on Yellow Sheet prices rather than bargain for their beef. He also discovered that the major chains eliminated store-by-store competition by buying beef for all their stores on one day in one market (for example, A&P on Tuesday, Safeway on Wednesday). Their purchases were so huge that they could literally set the price. Davis's suspicion that the chains were not passing their savings to the consumers was bolstered when, poring over government and market reports, he learned that both the retail price and the "spread" (the difference between what the consumers were paying for beef and what the cattlemen were getting) had been rising steadily, even when prices to the cattlemen were declining. He discovered that the supermarkets made more money on a head of beef in less than a week than he did in two years of raising it.

As he compiled his data, Davis began talking about his findings. Before long he became a one-man crusade against the chains' growing domination of the beef scene. In 1960, the First National Bank of Omaha invited him to present his findings to the annual gathering of their rural branch heads. The following year, he delivered a similar address to the Iowa Bankers Association convention and to a meeting of the Colorado Cattlemen's Association. His speech was picked up by



several papers and trade publications and was eventually reprinted in the Congressional Record. "I don't know why, but for some reason or other I was one of the first ever to kind of correlate this all and bring it together," he recalled later.

As more articles and speeches spread his message through cattle country, the chain markets began to take notice of the diminutive rancher with the legal mind. In 1962, Davis was suddenly invited by Swift & Company, one of the nation's largest meat packers, to go on a two-week, all-expenses-paid tour of their facilities. When he reached Chicago, Swift's president took Davis to lunch and asked him to lay off the chains. "I think there had been some pressure put on them from the chain store people to put me on this tour," Davis concluded mildly. (Five years later, the U. S. Department of Agriculture ordered Swift to stop placing its employees as meat-counter managers at client stores and to stop interviewing and evaluating prospective meat-counter employees for various supermarkets.)

In 1964, Davis went to Washington to address a congressional hearing on livestock prices. He tried to interest Federal Trade Commission chairman Paul Rand Dixon in looking into supermarket buying practices. "I explained our problem to him, and—I will never forget—he says, 'Well, Mr. Davis, this is just too hot to handle. I won't be here.' And he wasn't." But Davis had better luck with a young presidential assistant whose own family was taking a beating in the beef business. The assistant placed a memo outlining Davis's charges on then-president Lyndon B. Johnson's night table, the president read it, and things began to happen.

On July 8, 1964, the Denver-based *Rocky Mountain Journal* reported on its front page that Davis "won a significant victory in Washington, D.C., last week when President Johnson signed into law a bill creating the National Commission on Food Marketing ... to investigate the buying practices of chain stores." The story concluded euphorically that "up in lonely Horse Creek, Wyoming, a sun-and-wind-tanned cowman named Davis can pause and reflect on the fact that in America one person *can* do something about a problem." The journal's celebration was premature. The commission used \$2.5 million appropriated by Congress to hold a series of hearings and publish a series of reports. But if the commission discovered any evidence of wrongdoing, it didn't do much about it: No legislation or litigation resulted.

Davis was not surprised. He had warned from the start that the only way to prove a conspiracy was to force chain executives to testify under oath and to subpoena their financial records. But the commission refused to go that far. Davis decided that the only thing to do was file a lawsuit against the chains.

## NOBODY TOLD THE CATTLEMEN AT THE TIME HE BECAME THEIR ATTORNEY OF RECORD THAT JOE ALIOTO WAS ALREADY RUNNING FOR MAYOR OF SAN FRANCISCO. BEFORE THE FIRST COMPLAINT HAD BEEN TYPED UP, HE ACTUALLY PULLED OUT OF THE CASE AND ASSIGNED IT TO OTHER STAFF ATTORNEYS.

**T**HE FAILURE of the National Commission on Food Marketing led others to similar conclusions. On March 22, 1967, Davis was invited to meet an attorney-rancher from San Jose who was coming to Denver to discuss a lawsuit against the chains. Davis and a few other cattlemen met James F. Boccardo at the Denver Hilton. Boccardo told them that the chains were vulnerable to an antitrust suit and that "we can sue [them] and get relief and some damages." He offered to handle the suit if the cattlemen could raise \$25,000 to pay for the initial expenses. Davis remembers Boccardo saying that anyone who paid \$1,000 or more would be a "client," entitled to a share of whatever money they could get out of the chains. Those contributing less would be mere "supporters."

On September 1, 1967, Davis sent Boccardo a check for \$1,000, on which he wrote "legal fee." Boccardo endorsed the check, and it cleared the First National Bank & Trust Company of Wyoming on September 14. By the time Boccardo came to Denver again, on October 25, the money was being raised, and 30 eager cattlemen from seven western states gathered at the Diplomat Motor Hotel to hear what their attorney was proposing to do. According to the minutes of the meeting, Boccardo was described to the group as an "eminent antitrust attorney," and he proceeded to outline a two-step legal plan. First, a few cattlemen would file a "pilot suit" and then the rest would follow up with a class action suit.

Boccardo told the cattlemen that "under civil law, the plaintiff is allowed redress of losses times three," and that he "and an associating law firm will take the case on a contingency fee basis."

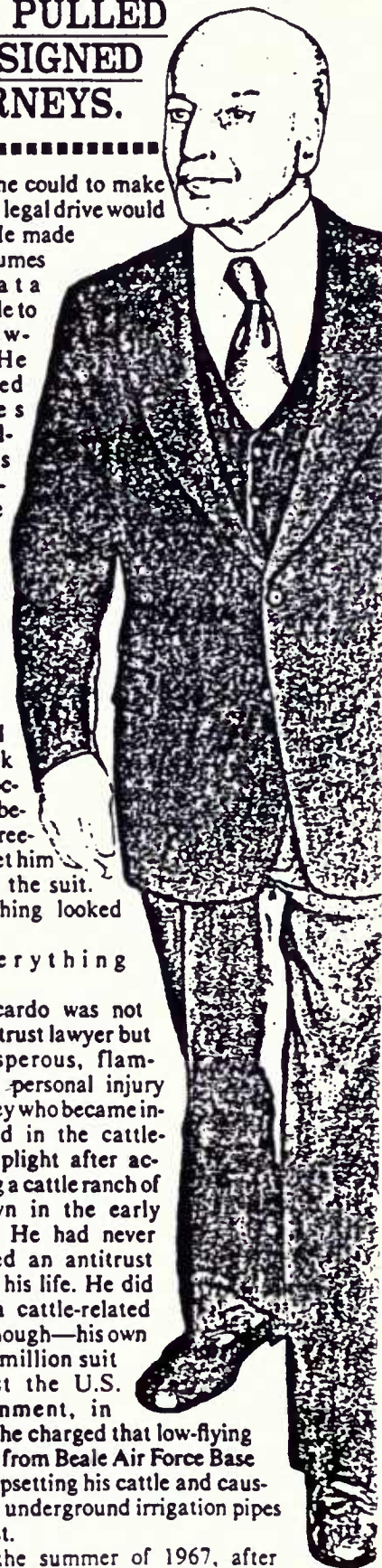
Davis was ebullient. After more than a decade of activism, he was finally going to see something done about the chains. The case was much more important than the low prices his beef was bringing in, he thought. Beef was a leading farm commodity and the number one item on the American shopper's market list. Breaking the chains' monopoly and ability to fix wholesale and retail prices would benefit both farmers and consumers and restore stability to the U.S. food system. Davis

did all he could to make sure the legal drive would work. He made his volumes of data available to the lawyers. He compiled names and addresses of valuable witnesses. He even asked an attorney friend to check out Boccardo before agreeing to let him handle the suit. Everything looked great.

Everything wasn't.

Boccardo was not an antitrust lawyer but a prosperous, flamboyant personal injury attorney who became interested in the cattlemen's plight after acquiring a cattle ranch of his own in the early 1960s. He had never handled an antitrust suit in his life. He did have a cattle-related case, though—his own \$1.25 million suit against the U.S. government, in which he charged that low-flying planes from Beale Air Force Base were upsetting his cattle and causing his underground irrigation pipes to burst.

In the summer of 1967, after





[illegible]

That was only the beginning. As court documents reveal, *nobody* in the San Francisco Alioto law offices wanted to do *anything* about the case. Why? "Because nobody could see any money," Lawrence Alioto, Joe Alioto's other lawyer son, explained later. The cattlemen's case was not "important," he added, because it was merely "a case to establish a point, to make some principles," while the real money is in class action suits, where a victory means enormous settlements and attorney's shares. This spring, when he was making these incredibly frank admissions, Lawrence Alioto was in court defending his father and brother against Davis's malpractice charges, and he went on to claim that the cattlemen didn't really have a legitimate case and that they only wanted to pressure the chains to pay them more for their beef: "The attorneys in the Alioto office analyzed [the case] as essentially a public device for getting beef prices up, as opposed to a justiciable damage action."

On January 17, 1968, after "an untold number of telephone calls from me to get them off the dime," according to an exasperated Boccardo, the Alioto attorneys finally got around to filing "a complaint for damages and injunctive relief under Sherman and Clayton antitrust acts" against Safeway, Kroger and the Great Atlantic and Pacific Tea Company (A&P), the largest supermarket chains in the country at the time. The suit charged the chains with conspiring to fix beef prices, and it demanded that the cattlemen be compensated for their losses due to the alleged conspiracy and that the chains be made to stop such activities in the future. The pilot suit was filed on behalf of six representative cattlemen who could prove damages and lived close enough to the San Francisco court to attend the lengthy deposition and court sessions that were anticipated (four of the six were from California). First on the plaintiffs' list was Irvin Bray of King City, California, so the case became known as *Bray v. Safeway*. Davis was not among the plaintiffs. He agreed with the attorneys that his legal background and record of political activism against the chains might prejudice the jury against him. But, as the lawyers explained it, this was only a pilot suit, the first step in the litigation, and Davis would be able to file his own suit later, based on the legal principle of collateral estoppel (which means that if Bray and the others won, Davis could sue and rely on their verdict without having to argue the case all over again).

But filing the suit was apparently all the Alioto attorneys did. Boccardo charged that they took their time before they even began discovery motions (requesting information from the defendants to document the alleged conspiracy). Instead of gathering steam, the file was still gathering dust. "Finally," as Boccardo reminded Joe Alioto in a letter dated August 11, 1975, "in desperation I advised you that it would be necessary for me to remove the litigation from your office since nothing was being accomplished . . . [but] I acceded to your pleas that you would get the matter taken care of by assigning the case to your son Joe, who had just become a lawyer."

July 22, 1975 Santa Barbara, Calif.

In settlement of all def cases against

A+P:

① A+P agrees to pay \$1,000,000.  
the payments to be made at \$250,000  
down, \$250,000 when case filed  
against other chairmen, and \$250,000  
for each other thereafter for two years  
payable upon anniversary date  
of suit.

② The 600 other gentlemen represented  
by Law Offices of Joseph R. White and on  
Joseph R. White will execute consent  
not to sue running to A+P only, &  
will any other gentleman that they  
represent.

July 22, 1975 Santa Barbara, Calif.

In settlement of the Bray case:

1. A & P agrees to pay \$9,000,000 to the plaintiffs. The payments will be \$1,000,000 down and \$1,000,000 for 5 years thereafter - the date to be subsequently agreed upon for 5 annual payments to the plaintiffs with interest at 10% per annum.
2. The plaintiffs will discontinue all litigation.

This settlement is contingent upon the vacation of the present judgment in the Bray case by the Court of Appeals (as they it could have collateral estoppel effect) and removal for damages to the District of Columbia to effect this result.

The above is subject to approval of A & P's Board of Directors, which a formal agreement will be made.

No publication of the above under contract by plaintiffs before A & P has done so first.

Dear Mr. [Name],

Joseph H. White  
Attorney for Plaintiff



Enter Joseph M. Alioto. Since his father had been elected mayor of San Francisco in November 1967, we'll call the elder Alioto Mayor Joe; Joseph M. will be referred to as Little Joe.

Little Joe was still in the University of San Francisco Law School when *Bray v. Safeway* was filed. He graduated in June 1968, took the California bar examination in August and joined his father's law firm the following January ("nepotism runs rampant in the Alioto office," Lawrence Alioto deadpanned to the jury a decade later). In January 1970, Mayor Joe formally assigned the two-year-old case to Little Joe. Little Joe later denied being assigned the case, simply claiming that "I took it," but Little Joe also took his time. On April 13, 1971, more than three years after the case had been filed, Boccardo impatiently wrote to Little Joe that "the little bird on my windowsill tells me that you haven't done a damn thing about [*Bray v. Safeway*] and that we are going to get our respective fannies in a sling unless we can show some action."

It was only after the chains asked the court to dismiss the case against them that Little Joe finally got going. He was, after all, an Alioto. He had grown up in the hottest antitrust law office in the country. On November 30, 1971, Little Joe delivered to the court such a devastating outline of the chains' alleged collusion and price fixing schemes that the judge denied the chains' motion for summary judgment. Little Joe explained that the chains divided up the country so that Safeway dominated the West, A&P the East and Kroger the Midwest and South. He charged that the chains used different meat grading systems so that cattlemen producing beef to A&P's specifications could not sell to Safeway and vice versa. He told all about the Yellow Sheet and other means the chains allegedly used to dictate beef prices and market conditions. It was a brilliant performance for the cocky young lawyer. He had done his homework, marshaled his facts and put the chains' high-powered attorneys in their place in a way that must have made his father proud.

But in the flush of victory he also committed a monumental blunder. In antitrust suits, the statute of limitations runs for four years, starting at the time the plaintiff first learns of or begins to suspect the existence of a conspiracy. In the present case, the statute of limitations clock began ticking when *Bray v. Safeway* was filed in January 1968. All collateral estoppel suits against Safeway, A&P and Kroger should have been filed before January 1972, then placed on a back burner to await the outcome of *Bray*. Whether Little Joe forgot or didn't know about it, the fact is that he didn't tell Davis and the other cattlemen to file their collateral estoppel suits, thus causing them to lose their legal drive and their chances to recover any damages from the chains.

## **JURTENAY C. DAVIS, A PRINCETON-EDUCATED WYOMING CATTLE RANCHER, WAS THE FIRST TO CONTEND THAT SUPERMARKETS WERE FIXING BEEF PRICES. THEY MADE MORE MONEY ON A HEAD OF BEEF IN FIVE DAYS THAN RANCHERS MADE IN TWO YEARS OF RAISING IT.**

While missed deadlines are a major cause of legal malpractice suits, they are extremely rare in antitrust litigation, where several attorneys usually work on each case and keep track of such things. But Little Joe made it abundantly clear during his trial that he didn't like to consult anybody and that "I just take [a case] and run with it." It is possible that had Little Joe consulted with Boccardo, an experienced trial attorney, he would not have missed the deadline, but, as the court record shows, Little Joe considered Boccardo to be an intruder in his case and didn't even brief him fully on the case Boccardo was supposedly conducting with him.

In late 1972, after losing their motion for summary judgment, attorneys for Safeway and Kroger came to Little Joe to discuss an out-of-court settlement. They offered to pay \$85,000 if the plaintiffs would drop their suit against them and promise not to sue again. Little Joe persuaded his clients to accept the offer by promising to get a court injunction prohibiting Safeway and Kroger from engaging in the alleged price manipulation practices in the future. The cattlemen agreed. Davis gave his consent to the settlement at a meeting in the Denver airport Holiday Inn on November 25, 1972. The cattlemen also agreed that Little Joe should use the entire \$85,000 for fees and costs. (Little Joe subsequently split his share with Boccardo). The way the cattlemen saw it, they had won their case against Safeway and Kroger and were now free to sock it to A&P.

But Little Joe saw it differently. Almost three years since he took over *Bray v. Safeway*, he was finally about to see some money, and he was not going to do anything to louse it up. "The Alioto office had worked on this case for five years and had not received anything, not received one penny in fees—nothing," his brother Lawrence said at the trial. So he didn't tell the cattlemen until much later that, in his opinion, their case against A&P was even weaker than against Safeway and Kroger or that he never got the injunction he promised them. He kept telling people that he did, though, including his father, so that in December 1974, when Mayor Joe came to testify before a Senate committee looking into food

prices, he told Senator William Proxmire that his office had indeed obtained an injunction prohibiting Safeway and Kroger from violating antitrust laws. He was left with egg on his face when the *Safeway attorneys* simply read the agreement aloud. In the "stipulation and order of dismissal" that Little Joe and Safeway signed on February 5, 1973, Safeway denied that it had ever engaged in such activity and stipulated that Safeway was not planning to change its practices.

There was something else that Little Joe never told anyone.

On January 16, 1973, at least two weeks before he formally settled with Safeway and Kroger, he took the deposi-





# IT WAS AN ANTITRUST LAWYER'S DREAM: ONE WOULD HAVE EXPECTED LITTLE JOE TO BURN THE TELEPHONE LINES TO HIS CLIENTS WITH THE NEWS, TO DASH DOWN TO SAN JOSE AND HUG BOCCARDO, TO TELL SAFEWAY AND KROGER THAT THE DEAL WAS OFF. INCREDIBLE AS IT MAY SOUND, LITTLE JOE KEPT IT TO HIMSELF.

tion of Kent Christensen, executive director of the National Association of Food Chains (NAFC). Under questioning, Christensen admitted that chain representatives were meeting periodically to discuss prices and market conditions.

This was pure dynamite, the stuff Emma Lathen murder mysteries are made of. NAFC meetings were shrouded in secrecy. Meeting topics, agendas and minutes were kept confidential. Participants were identified not by name but by color-coded badges. The CIA couldn't have done better to assure secrecy and anonymity.

It was an antitrust lawyer's dream. Little Joe and the cattlemen had suspected all along that chain representatives were meeting to compare notes, but they could never prove it. Suddenly everything they needed fell into their laps. One would have expected Little Joe to burn the telephone lines to his clients with the news, to dash down to San Jose and hug and kiss Boccardo, to throw a big previctory celebration at his cousin's lobster joint on Fisherman's Wharf, to tell Safeway and Kroger that the deal was off, to go for blood.

But Little Joe did none of that. Incredible as it may sound, he kept the information to himself, settling the case against Safeway on February 5, 1973, and the case against Kroger on February 12. It would take Davis three years to find out about the Christensen deposition.

Shortly after the Safeway and Kroger settlement, still keeping the Christensen testimony under his hat, Little Joe approached A&P and offered to settle for \$50,000 if A&P would also agree to close its central meat buying office in Chicago. Against the advice of counsel, A&P wouldn't hear of it. Little Joe came down to \$45,000, then to \$40,000. It was only after A&P turned down his final offer, \$35,000, that Little Joe began to make preparations for a trial.

**T**HE TRIAL BEGAN on June 5, 1974, and lasted six weeks. Little Joe was brilliant, relentlessly charging and overwhelming A&P's legal barricades. He argued the entire trial by himself, five days a week, until at one point he had lost his voice.

(Two years later, a U.S. Justice Department lawyer specializing in antitrust work analyzed Little Joe's case and found it so full of holes that the only way Little Joe could have made anything stick was by whipping judge and jury to a fevered emotional pitch.)

Little Joe didn't miss a trick. When A&P's chief meat buyer, Robert Carpenter, denied meeting with the competition, Little Joe pulled out a photograph of the man sitting at an NAFC meeting with some of his competitors. "And why do they give themselves color designations and number designations—grown men?" Little Joe inquired. "What for? Not for fun. They are not playing games, these people. This is a big game. It involves meat; they know it involves every American's life, whether he's a rancher or consumer or whatever he is. It is big money, and it's big stakes, and they are going in there under color cover or a number cover, and they are not doing it for fun." He discovered that the executives of Lucky Stores and Safeway had met at an East Oakland motel, and he ridiculed their claim that they were discussing the sale of a store—especially since Safeway's real estate man knew nothing about the meeting. And he dismissed the chains' contention that belonging to a trade association like NAFC was not an antitrust violation. "Any time you sit around a table with enemies [competitors], you are not sitting there to make war. You are sitting there to make peace," he argued. He even quoted from a participant at one NAFC meeting who said, "I think that it is about time we stopped passing along the savings in distribution costs to the customer. I think we ought to keep some of it for ourselves."

The jury deliberated only two days, returned, and the clerk of the court began to read the verdict: "The jury finds in favor of the plaintiffs in the amount of ten thousand, nine hundred..."

The A&P people sighed their relief. A \$10,000 verdict they could live with. But their joy was premature. The clerk was wrong, and he had to start reading once more before he got it right: "Ten million, nine hundred four thousand and twenty-seven dollars." The courtroom was hushed. Jury awards in antitrust cases

are trebled for punitive purposes. A&P was ordered to pay \$32,712,081, and its motion for retrial was denied. The judge complimented Little Joe for his handling of the trial and awarded him \$3.2 million in attorney's fees. On August 9, 1974, Davis wrote to Little Joe to tell him: "Those of us back here are delighted with the outcome, and I am sure that you realize how much we appreciate all the effort you ... put into this litigation." Boccardo was relieved. "I hate to envision the aftermath had a defense verdict ensued," he wrote. "Can you imagine what the clients would have said, since they had initially hired me and I had convinced them to permit you to try the case ... and let another lawyer act as trial counsel? All I can say is thank God that all is well that ends well."

A&P was devastated. According to Lawrence Alioto, "At this time they were wishing they had paid the \$35,000 and closed the Chicago office. The top management at A&P was fired, the lawyers were fired. Anybody who had anything to do with Bray against Safeway was fired." As if the \$32 million award wasn't bad enough, cattlemen throughout the West were hitting A&P with lawsuits based on the case Little Joe had won. The prospects for an A&P financial collapse were so frightening that, after formally appealing the case on March 27, 1975, A&P sent its attorneys to look up Little Joe and start talking settlement.

On June 3 of that year, Little Joe wrote a letter to A&P and stated his initial offer: First, he wanted the full \$3.2 million fee the court awarded him. Then, he wanted \$11 million for the six named plaintiffs (instead of the \$32 million they won in court). Total demands: \$14.2 million. While protecting his take to the penny, he magnanimously gave away \$21 million of his clients' money. He called the six named plaintiffs, got them to agree to the deal by warning that if they lost on appeal they wouldn't get anything, then sent the letter by messenger to A&P's San Francisco attorneys. He did not discuss the proposed settlement with any of the other cattlemen.

Little Joe had good reason to keep the matter quiet. Remember, the cattlemen's litigation against the chain stores was going to be a two-step process. First, one group would file a pilot suit, then the others would follow with collateral estoppel suits (for which the statute of limitations, unbeknown to the cattlemen, had lapsed more than three years before). As Little Joe himself told A&P, the 200-odd cattlemen who financed the suit back in 1967 were already part of it, and he was representing their legal interests.

A&P wanted to settle less because of the \$32 million judgment than because those hundreds of suits could bring about its financial ruination. So in exchange for paying out any money, A&P wanted Lit-



the Joe to vacate (nullify) the lower court judgment so that no one could rely on it in a collateral estoppel suit. In other words, to get his settlement cut, Little Joe had to betray the nearly 200 cattlemen who waited for him to begin the second phase of their legal drive against the chains by filing collateral estoppel cases on their behalf. He could only get his money by making sure that they could not get theirs. Little Joe didn't want Davis and the other supporters to know that, in order to settle the case, he might have to accede to A&P's request to vacate the judgment against that chain, thus removing the grounds for any future suits.

On July 22, 1975, Little Joe and his family were vacationing at a dude ranch near Santa Barbara when a team of A&P lawyers flew in to finalize the deal. Little Joe met them in Santa Barbara. First he settled the six plaintiffs' case for \$9 million—\$3.2 million for himself and \$5.8 million for the plaintiffs (of which he would take one-third, or \$1.9 million). He then began to work out his plan.

"We have 199 fellows who supported this suit by ... coming up with the money," he said. "Something has got to be done for these people. These people are our supporters. Without these people we couldn't have brought the suit." The A&P lawyers offered to pay an additional \$250,000 for the supporters. Little Joe said it was not enough, but how about a million? The lawyers went back to their hotel room, called the New York office, then came back and told Little Joe he had himself a deal for a total of \$10 million—as soon as the judgment was vacated. All he had to do was get those supporting cattlemen to promise not to sue A&P.

Before he could face the supporters with the news, however, an unexpected problem popped up. Little Joe had not told Boccardo of his deal with A&P, so when Boccardo learned of the June 3 letter he wrote to A&P and threatened to sue them unless they included him in the settlement. A&P contacted Little Joe, who immediately sent them a "hold harmless" agreement, promising to defend them against any suit by Boccardo. On July 28, Boccardo was stunned to learn from one of the named plaintiffs that Little Joe had already reached an agreement with A&P. In a series of letters, telephone calls and meetings, he blasted Little Joe for not consulting him "before \$22 million is cavalierly wiped out," and for not squeezing A&P for more money. He then demanded his 50 percent cut of the attorney's fees. Apparently, Little Joe blasted right back that Boccardo did nothing in the case and had no money coming to him. He claimed he had never heard of Boccardo's deal with his father. Little Joe was so abusive that Mayor Joe apologized to Boccardo for his son's behavior. But Mayor Joe was no

re forthcoming on the settlement split. It was his son. On August 11, Boccardo wrote and reminded him of their 50/50 agreement and of the fact that he, Boccardo, had handled the mayor's libel suit against *Look* magazine, "working until the early morning hours for week after week for a friend without any thought of compensation. I even paid my own living expenses in San Francisco."

Boccardo then came to the point. According to their agreement, he was entitled to \$2.6 million. He was willing to compromise for one-third of the total, or \$1.7 million, but unless Alioto agreed to pay, Boccardo was going to sue. "I abhor the thought of having to ... publicize the fact that the lawyers are receiving more than the clients," he warned the mayor, since "when we take the \$3.2 million plus one-third of the clients' remaining share, we are receiving more than they. Under the circumstances I think you should be happy with almost \$3.5 million as a fee and not worry about me receiving \$1.7 million for making it all possible." Not a word in this lengthy correspondence mentioned the fact that 200 supporters would have to split a mere \$670,000 (\$1 million less the attorney's one-third fee) for giving up their collateral estoppel rights on the advice of their own attorneys. When it came right down to it, the greatest beef antitrust case of the century boiled down to bickering over money among attorneys.

Mayor Joe got the message and ordered his son to pay Boccardo a \$1.7 million "referral fee." Assured of his cut, Boccardo dropped all of his criticism of Little Joe's deal with A&P and received his first check on September 3, 1975. (Little Joe couldn't resist a final stab, however; Boccardo complained that, while he received one-third of the attorney's fees, he was billed for half the costs of handling the case.)

With Boccardo out of his way, Little Joe could get back to "taking care" of his clients. On August 5, the appeals court vacated the A&P verdict, but it was a whole week later, on August 13, that Little Joe first notified the supporters that A&P wanted to settle. He wrote that A&P agreed to pay them \$1 million over three to four years. He applauded them for having "achieved an historic event by which the American cattleman, before the chief judge and a jury of the oldest federal court in the West, has established his willingness to take on all odds in order to preserve and maintain a free, open and competitive market."

All that was missing was the sound of trumpets. "From the efforts of your predecessors in 1890 who would not tolerate the collusion of beef buyers, it is fitting, just and proper that you have reestablished, through the law which you engendered, the same spirit which has characterized the American cattleman in



the past. . . . I am honored and privileged to be part of what you have, "e" his letter went on.

Little Joe didn't mention that he had already vacated the "historic event" and that the biggest thing the cattlemen's lengthy legal campaign had achieved was to make him richer by several million dollars. The settlement left the supporting cattlemen worse off than they were before the suit was filed. They had lost the basis for their suit, missed the statute of limitations deadline and were several years older, which in the case of 76-year-old C.C. Davis precluded undertaking a new campaign.

Some of the cattlemen may have bought Little Joe's rousing salute to the American cattleman; Davis didn't. On August 15, Little Joe flew to Colorado to meet with the supporters to discuss the disposition of the \$1 million. He still didn't tell them that he had vacated the judgment. But he announced that he was taking one-third of their \$1 million in fees as well. Davis didn't say a word, but after the meeting he took Little Joe to his room and, with nobody around, told him that taking one-third of the fee was an act of unconscionable greed and totally unacceptable. Little Joe blew his top and warned Davis to stay out of "his business." Davis held his ground. Little Joe later backed down and agreed to take only \$50,000—Davis had a feeling that something else was wrong. He still didn't know that the judgment had been vacated (he found out three months later), but Davis sensed that Little Joe, his attorney, didn't behave as an attorney should. Davis couldn't get any answers out of him to such questions as how much money was involved in the settlement offer, how the money was to be distributed or what conditions A&P insisted on.

As Davis charged later, both Little Joe and Boccardo were suddenly behaving as if they "became attorneys for A&P. They relentlessly pressed the cattlemen to sign, sign, sign [the A&P release] or cause the settlement to fail. They beat the bushes for the cattlemen to please A&P. They wanted nothing to happen that could upset their apple cart and cause A&P to back out of the settlement." They even got various cattlemen's organizations to help them get signatures. The Montana Cattlemen's Association International, for example, exhorted its members to sign A&P's releases and "benefit to some dollar amount by signing . . . we estimate between \$100 and \$400 each."

Little Joe had probably talked himself into a corner. The judgment against A&P was already vacated. So now A&P was constantly upping the ante, demanding 300, then 600, and then over 700 signatures, and Little Joe had to come up with those signatures or risk losing the entire settlement. He was seeking out cattlemen he had never met and offering them money in return for their pledge not to

sue, when they had never intended to sue anyway. Above all, he had to get the original 200 supporters to sign their releases. But Davis refused to sign, and as long as he refused, it didn't matter how many others did; Little Joe could not deliver his part of the settlement deal.

Little Joe then turned against his own client. He suggested to Davis that unless he signed, the entire A&P deal would be off. Davis was placed in a frightening position. If he didn't sign and the settlement failed, the other cattlemen could sue him for the millions they lost. Davis had invested twenty years and a lot of money in trying to break the chains' monopoly. That monopoly had cost him over \$600,000 between 1964 and 1967 alone, and he could document it. Had he sued and won, the trebled damages could amount to \$1.8 million. Under the deal Little Joe was forcing him to sign, he stood to get a paltry \$17,000, while Little Joe and Boccardo would be collecting millions.

Davis refused to give up. On the advice of his Wyoming attorney, he retained a San Francisco law firm specializing in professional liability (malpractice) cases and then did two things. First, he signed the A&P settlement agreement, received his share of the money but didn't cash the checks. Then, on July 15, 1976, he sued Little Joe, Mayor Joe, Boccardo, their law firms and the six named plaintiffs for selling him out. He charged that although their cashing of his \$1,000 check for "legal fees" back in 1967 made Boccardo and the Aliotos his attorneys, they then conspired to withhold important information from him during both the Safeway-Kroger and the A&P settlement negotiations, to cut him out of the bulk of the A&P settlement money, to vacate the A&P verdict without his knowledge and against his best interest, and to deprive him of the opportunity to sue A&P for damages caused by its price fixing practices. He later dismissed the named plaintiffs from the suit and agreed to settle with Boccardo for \$150,000 before the case went to trial. By the time the jury began to hear the case last April, Davis faced only the Aliotos, who were represented by Little Joe's brother, Lawrence. Davis's attorney, 38-year-old James Penrod, hardly seemed a match for the Alioto steamroller. He is soft-spoken, shy and has been practicing law for only thirteen years. "I must confess a degree of intimidation about taking them on," he said after the case was over. "They are famous people. You knew you were going to have nothing but anxiety and hassle for four years. You knew you were going to have a royal battle." He did.

The Aliotos denied that Davis was ever their client. Further, they accused him of being not a simple cattleman but a prosperous Chicago lawyer who refused to become a plaintiff in *Bray v. Safeway* because he didn't want to open his finan-

cial records for inspection. They said he was greedy. "Mr. Davis didn't want to get anywhere near this case until the money came in . . . then Davis was all over everybody like a blanket," Lawrence Alioto, defending his father and brother, told the jury in his opening statement.

But Davis had all the evidence. He produced letters from the Alioto firm addressing him as "plaintiff" and communications that Little Joe assured him were written "under attorney-client privilege." When Davis was invited to Montana to report on the progress of the case but couldn't go, Little Joe went in his place. Witnesses testified that Davis had attended practically every meeting the attorneys ever held with the cattlemen. There was a letter from Little Joe reporting on the failure of a motion to make *Bray* a class action suit, in which Little Joe explained that "this is a test suit," and that "after it is won, the farmers will be able to use the suit to claim damages." Davis also pointed out that, at the time of the Safeway-Kroger settlement, he was asked to vote on the settlement proposal, thus acknowledging his role in the case.

More facts came out during depositions, facts that combined to show a pattern of callous disregard of Davis's interest by his attorneys. Under questioning, Little Joe admitted that he had never taken any notes during his meetings with the cattlemen and therefore didn't know exactly what they wanted the suit to accomplish.

Q: Did you take notes . . . concerning any of the complaints that the cattlemen you met with had about the meat business?

A: No, I don't—I'm not really a notetaker . . . and many times some cattlemen would say something, heck, we had everything—we had the lambs in there, we had the hogs in there, we had the wool in there, we had all kinds of things. . . . They expressed damn near everything—excuse me—that doesn't have to be on the record. Does that have to be on the record?

An even more revealing exchange took place later:

Q. Do you agree that the standard of care for an attorney requires him to diligently protect the interests of his client?

A. Subject to the court and the law. I don't think that I should . . .

Q. Do you believe that the standard of care for an attorney requires that he disclose all that is necessary to the client's making a free decision and intelligent decision regarding the subject matter for which the attorney has been retained?

A. So far as, so far as that's possible.

Q. Do you agree?

A. You have . . . (goes off the record).

Q. Do you agree that the standard of

initiate the decisionmaking process if the client doesn't do so?

A. What does that mean?

Still another exchange:

Q. Did anyone at your office ever advise the clients that it was such a massive case that no one ever wanted to take it?

A. I have no idea.

Q. Did anyone ever advise the clients that the prospects were very dim?

A. I have no idea.

Q. Did you personally advise any of the clients that you took the case because no one at your office wanted to touch it?

A. No.

The Alioto brothers also contradicted each other regarding the role of their father in the case. According to Lawrence Alioto, Mayor Joe had nothing to do with the case until he stepped between Boccardo and Little Joe in the fee dispute. "Joseph Alioto in September of 1967 had run for mayor of San Francisco and was elected in November of 1967. He was not really practicing law," Lawrence said. Mayor Joe himself, during his testimony before Senator Proxmire's committee in Washington in 1974, announced proudly that the beef litigation had been handled by Little Joe alone. But under questioning, Little Joe admitted that "I talked to my father about all cases," and according to a story in the *Western Livestock Journal* dated March 10, 1975, there was speculation that Mayor Joe was meeting with A&P officials to discuss settlement more than two months before Little Joe made them the offer in the letter of June 3, 1975.

The trial lasted eleven stormy weeks, but the jury deliberated only two days before returning a unanimous verdict against the Aliotos. Finding them guilty of negligence, intentional misrepresentation and breach of fiduciary duty, the jury ordered Mayor Joe and his son to pay Davis \$700,000 and \$1.5 million, respectively, in punitive damages and levied an additional \$1.3 million in compensatory damages against the Alioto family law firm. The end of the long suit was an emotional event. One of the jurors walked over to Penrod and thanked him because "you kept your cool, and you didn't talk down to us." The 79-year-old Davis, normally composed and reserved, had tears in his eyes. The money was not nearly as important as his vindication. "It was a matter of principle," he told reporters—his only statement to the media throughout the lengthy litigation. Several weeks later, his attorney was asked what the *Bray v. Safeway* case was all about. "It was an example of what can happen when an attorney begins to think of a case as his rather than his client's," he explained. ■



APPENDIX II. Inaugural Speech, Commonwealth Club President

## Inaugural Remarks of 1976 President John B. Bates

"Alexander Hamilton, Thomas Jefferson, Benjamin Franklin, John Adams, Patrick Henry: It is great to have you here and assembled with us at the Commonwealth Club in San Francisco. I know the members of our Club would be interested in your observations as to how this country looks to you 200 years after the Declaration of Independence. The Commonwealth Club of California and its membership is a most appropriate place to set forth your observations, because it is the mission of this Club to get the facts and report on the current issues of the day.

### Clear Danger Signals

Ben, I am sure our membership is in substantial agreement with your concern about our economy and the substantial deficit budgets that our government has allowed to mount year after year. You say that we were founded on basic principles of protecting the individual and our citizens, and preserving his right to keep the fruits of his labor. A penny saved was a penny earned. But these deficit budgets have stimulated such inflation that our citizens find that they are fast losing the fruits of their labor. They get a double clout from taxation and inflation. The country, the administration and even the Congress seem to be waking up to the serious economic problems that confront us. England and New York City have given us clear danger signals as to what may come. Our membership will give serious thought to your concerns, our Economics Section is directing its attention to the problem.

### Noble Cry

I understand, Patrick Henry, that you are quite troubled by the country's attitudes arising from your noble cry "Give Me Liberty or Give Me Death" and the Constitutional right to bear arms. You are rightfully concerned about the Symbionese Liberation Army, the Manson family, the terrorists and the so-called "sane" women that run around with revolvers trying to kill the President, and all of this in their own self proclamations of liberty or power to the people. Our section on the Administration of Justice is being asked to consider appropriate gun

control laws, including Federal licensing and registration. But there are no simplistic answers, the cowardly, senseless bombing at the La Guardia Airport last night cannot be explained. No matter who claims credit, it cannot be justified, it was an atrocious act that repels the moral conscience of every American. We cannot afford to suffer the tortures of the Eldridge Cleavers who vigorously rebel against our system in their early years only to find later on, that it is the best in the world and then come back.

### Free Speech?

John Adams, I realize your embarrassment as to what has happened to free speech. We have topless, bottomless and public pornography and all this, because of the first amendment. The courts don't seem to understand the difference between obscenity and free speech. Your fight for free speech and a free press was so that every individual could speak out in disagreement with the government without being concerned about prosecution. I realize that you did not intend to encourage the citizens to turn the country into a breeding ground for obscenity and immorality under the protection of your noble words. Hopefully, we can work together in resolving this present state of confusion.

Tom Jefferson, it is interesting that you would be concerned that your courageous fight for equal opportunity and equal rights would result in women's lib but don't be troubled because I do not think even the ladies want to become 'persons' and 'its.' As Lafayette would say—Vive La Difference.

### 200 Years Ago

Yes, gentlemen we are pleased and honored to have you with us. We appreciate your concerns and we look forward to the consideration of them in this coming Bicentennial Year.

When you were in power 200 years ago you looked to the West as a strange wilderness. Now you are here. The continent is one and this once awesome territory has become so populated and commercialized that we are now concerned about waste, pollution and conservation. When

## "We Can Help Our Country Get the Facts" — Bates

BATES (Continued from preceding page) you were last on this continent, we had untapped, overwhelming natural resources. Now we are concerned about the preservation and development of our energy. We are anxiously looking to new sources to take the place of those that our country is fast depleting. Our section on Environment and Energy is struggling with these important problems.

### Club is Unique

We draw sounds and images from the sky; we have landed on the moon, we go to the heights of the heavens and the bottom of the sea and we have computers that can answer complex questions in seconds, but we cannot resolve our own conflicts of man against man, nation against nation, race against race, and we are still confronted with religious wars.

I want our Bicentennial guests and our vast radio audience to know that the Commonwealth Club of California is unique. With but one or two exceptions, every President since Theodore Roosevelt has appeared before our membership. The Club has never paid an honorarium other than a free lunch. Just within the last year our speakers included Senators Baker, Church, Kennedy and McGovern—William Simon, the Secretary of the Treasury, the English, Indian, French, Israeli Ambassadors and Dr. Maksud from the League of Arab States—Sargent Shriver, Elliott Richardson, Cap Weinberger—and the Chief Executive Officers of the Standard Oil Company of California and Unlon Carbide—and Audrey Rowe Colom, Chairperson of the National Women's Political Caucus.

### Over 13,000 Members

There are more than 13,000 members of the Club scattered around the nation and the world. Our Speakers' speeches are broadcast over more than 100 radio stations and the Voice of America. Our dues are less than \$30 a year. Each member receives a weekly bulletin called "The Commonwealth" which publishes the remarks of our speakers and the activities of our Sections. Members of the Club may become members of the Sections and participate at meetings, in deliberations and

in the preparation of reports. Members receive Section reports on the current issues of the day. Our report on Land Use, Open Space, and the Government Process, and the Water Section's recent report on the Peripheral Canal received national attention. One of the most valuable services that the Club performs is the analysis and publication of the pros and cons of State ballot propositions. The Club deserves your interest, participation and support.

### Issues of the Day

I urge you to become involved, join the Club, if you are not already a member, and encourage members of your family, business associates and friends to join us and participate, consider and try to resolve the issues of the day.

It is particularly appropriate in this Bicentennial Year that the Commonwealth Club of California devote its efforts to the important concerns of our founding fathers and work together to review and evaluate where we are and where we are going. We can use this great forum to bring before us the current issues of the day by the leaders of the world. Surely we can help this great country get the facts and prepare ourselves to keep our freedom, our property and our incentives, so that Americans can continue to grow, prosper and lead this world to an everlasting peace."



John B. Bates

**1976 Club President's  
Inaugural Address**

## APPENDIX III. Letter, Bates to George U. Harris

JOHN B. BATES  
(Kidson) 1&2

January 31, 1967.

Hecht v. Harris, Upham  
& Co., et al.

AIR MAIL

CONFIDENTIAL AND PRIVILEGED

Mr. George U. Harris,  
Harris, Upham & Co.,  
120 Broadway,  
New York, N. Y.

Dear Mr. Harris:

As I told you, I was surprised to receive your telephone call on Wednesday, January 25th, and have you inform me that you had decided that Mr. Becker should take over the defense of the above case.

In my conversation with Mr. Becker when he was here in San Francisco, it was my understanding that we were going to work together on an appropriate pretrial statement, and that after the pretrial a decision would then be made as to who should try the case. Although we had developed the evidence and made the point many times, both before the court and before the NASD, that Mrs. Hecht had been a trader and in the market for many years before she came to Harris Upham, we were pleased with Mr. Becker's presentation of this history and we were working it into our proposed pretrial statement.



More than two weeks ago, we commenced working with Mr. Becker in connection with the pretrial statement. As we were in the process of putting the statement in final form and merging Mr. Becker's proposals with our own, I received a telegram from Mr. Becker saying "Material furnished to you is not to be changed. Your criticism is welcome but I will make all changes." This was most troublesome to us, particularly because we disagreed with Mr. Becker's interpretation of some of the holdings in the cases. Furthermore, our approach to the legal points involved was different from his. However, and in your best interests, I did not want to present the statement as Mr. Becker's pretrial statement alone and create the impression that we were disavowing it; this could run the risk of prejudicing Mr. Becker before the court. An extended telephone discussion with Mr. Becker failed to produce any changes of substance; nonetheless, with your interests in mind, I did sign and submit the statement with the representation that Mr. Becker and we had counseled together concerning its preparation, and that prior to the pretrial we would move his admission to the court.

It is my understanding that Mr. Becker will appear and present the arguments on behalf of Harris Upham at the pretrial conference, which is being held on Thursday, February 2nd, and that he will be responsible for the future conduct of the litigation. In this regard, I enclose and ask that you please sign the original substitution of attorneys and return it to me.

In view of the inter-relationship of the litigation in the Federal Court and the proceedings before the NASD, Mr. Becker should also represent Harris Upham before the NASD. The hearing before the NASD is now set for March 1st. I believe the NASD can be persuaded to defer any further hearings in the matter until after the trial. In this respect, it is interesting to note from the plaintiff's pretrial statement, a copy of which is enclosed, that among the witnesses plaintiff's counsel intend to call are members of the NASD and the staff who have, or will conduct, hearings in this matter (see p. 38(x)). This should be enough to persuade the NASD to not get further involved and expose themselves to the possibility of having to be witnesses in the action in the Federal District Court.

I realize that your change in attitude about our representation of Harris Upham must have arisen because of my insistence that you give serious consideration to a settlement of the case. I considered the Hecht case a serious case from the outset, and I made a point to appear and involve myself in all proceedings in the litigation, including the taking of depositions, so that I could get a full understanding of the case, the witnesses, and the documentary evidence. In civil litigation such as this, I feel a continuing obligation to try to evaluate the case and advise the client accordingly. After having taken Bertha Hecht's deposition, and the depositions of her doctors; after having talked to various people who knew Mrs. Hecht;

having reviewed the matter thoroughly with our investigators and reviewed how she kept her checks and conducted her personal affairs, I reached the conclusion that she pretended more than she knew; that she was confused, and that Mr. Wilder must have known of this and prevailed upon her confusion. After reviewing the accounts independently with Mr. Les Rosenthal of Chicago, and Mr. Al Henke of Haskins & Sells, I concluded that Mr. Wilder appears to have made a practice of taking profits but deferring losses in an attempt to avoid having to show substantial losses on the statements that were sent to Mrs. Hecht. The imposition of liability for a violation of the Securities Exchange Act in a situation of this kind was recently expressed in Newkirk v. Hayden, Stone & Co. (Sep.30, 1965) CCH Fed.Sec.L.Rep., par. 91,621, in the Southern District of California. In that case the court said:

"The leading case on discretionary accounts is Norris & Hirshberg Inc., 21 S.E.C. 865 (1946). Among the factors listed by the Commission to determine if the account was discretionary were whether the customers were naive and if they followed the defendant's advice. In our case the plaintiff was naive and even though the defendants' attempt to rebut the discretionary character of the account by showing that plaintiff was informed of the transactions, merely telling him of the transactions is not enough. Informing plaintiff of what happened and then asking permission is a futile gesture where the plaintiff does not understand the nature of the transactions. In Norris, supra, the Commission stated that if consent is to be a defense it must be fully informed consent. In the present case the plaintiff received monthly statements from defendants on several different accounts, including a short account and a margin account. However, they did not contain sufficient information for him to determine his cash position or

determine the total amount of loss occurring in his account. It appears that as a practical matter McNutt was in complete control of the account and all transactions were at his discretion. Thus the account should be classed as discretionary" (emphasis added).

I do not want to burden this letter with a rehash of the many matters that I have written your attorneys and your associates about in the past months. But I should comment on what I said about being misled by the reports of Haskins & Sells. I have the highest regard for Haskins & Sells; they are accountants for our firm, and also act as my personal accountants. Although there is nothing wrong from an accounting standpoint in their "Summary Prepared by Haskins & Sells on December 28, 1966," which I am sure you must have been considering at the time we had our telephone conference about settlement, it is misleading. It concludes that in the account of Mrs. Hecht from May 1957 to June 1964 she had a net gain from her securities and commodities transactions in the amount of \$53,045.23. This does not take into account the substantial diminution in value, the unrealized loss of approximately \$100,000, nor the debit in her margin account of over \$200,000. Regardless of what our accountants say, we could never convince anyone that the account was well traded and that her account did not depreciate substantially in value from 1957 to 1964.

As I told you, if we were able to make a settlement of this case, it should also dispose of the proceedings before the NASD. I talked to Mr. Radding, secretary of the local committee of the NASD, and he told me that it was his opinion that



the NASD would not proceed without a prosecuting witness, and that the proceedings would be discontinued if we settled with Mrs. Hecht. In my settlement talks with the plaintiff's attorneys, I always made it clear that any settlement would have to be conditioned on the discontinuance of any proceedings before the NASD, CEA, or any other governmental agency.

As I mentioned, I think the case can be successfully defended, but the odds are that the jury is going to give the plaintiff something, and it could be in excess of \$100,000, but I cannot foresee the sum being in excess of \$200,000. Naturally, we were preparing to do everything reasonably possible to successfully defend the case.

Since this is a jury case it must be handled by one trial lawyer with such assistance as he deems advisable. I know that Mr. Becker and I would have different ideas as to how the case should be tried, and regardless of which one of us tried the case it would not be helpful to have the other one involved; the lawyer in charge of the trial should be left free to try it in his own way.

Please sign and return to me, at your earliest opportunity, the original substitution of attorneys document.

My very best wishes to you, your partners and associates.

Sincerely,

John B. Bates

Encs.

cc: Donald C. Hays, Esq.

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