

## **Chapter 15: Me and the Law (Part One)**

Six hours in sleep, in law's grave study six,  
Four spend in prayer, the rest on nature fix.

Sir Edward Coke<sup>1</sup>

Law never *is*, but is always about to be.

Benjamin Cardozo, *The Nature of the  
Judicial Process* (1921)

Dr. Johnson did not like to speak ill of a man  
behind his back. but he believed the gentleman  
was an attorney ...

Hester Lynch Piozzi, *Anecdotes of  
the Late Samuel Johnson* (1786)

Back in 1967, just before starting my senior year in college, when I had pretty much an open choice of what to do with my life, I chose to become a lawyer. I went to a famous law school and did very well there (see Chapter 14). And yet I never practiced law in any kind of serious way. Even though I worked in the field for many years, I was not a partner or even an associate or solo practitioner, preferring to make a living as a part-time researcher and writer, a very marginal character at a good law firm (Farella Braun + Martel LLP in San Francisco). I made an adequate living but never accomplished anything significant in a professional sense, and never built a real career or made any serious money as a lawyer. I was well thought-of at my firm, but never even tried to make a reputation outside it. I almost never appeared in the courts, and almost never represented anyone. And I really preferred it that way (except maybe for the money part). How did this happen?

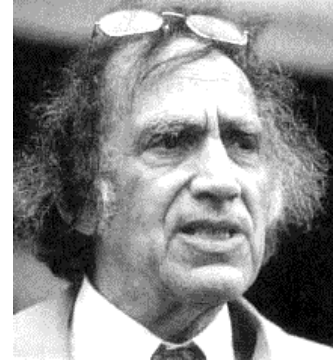
### **A. Kennedy & Rhine**

As I told in Chapters 12 and 13, I went to law school intending to be a left-wing political lawyer, working in the movement for social change some of us thought existed in the late 1960s. The idea was that activists would work in the streets and elsewhere, and I would work in the courts protecting the movement from the government. My role-models were

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<sup>1</sup> This couplet is the customary translation of an “ancient verse” quoted in Latin by Sir Edward Coke (1552-1634), Lord Chief Justice of England and one of the greatest of the English common lawyers, in his *Institutes of the Laws of England* (1628-44).

lawyers like William Kunstler (1919-1995) (right), Arthur Kinoy and Leonard Weinglass. Readers who remember Vietnam, segregation, and the 60s will recognize this attitude – to others it may seem quite foreign. But by 1967, and especially after the Columbia Strike of 1968, I was soaked in it.



In the course of my draft counseling work I learned to master a statute and a complex set of regulations and help people get through their encounters with a coercive bureaucracy. I liked it. I took a military law course at Columbia Law School and got a taste of formal law study, and liked that too. It seemed that being a lawyer would be interesting and socially useful work, well suited to my talents and inclinations. Unusually, I asked my father what he thought, and he said the law seemed like a good career for me because I liked to argue. I think I was also drawn to lefty lawyering (which I thought of then mostly as criminal defense work) as a way of continuing my childhood fight against oppressive authority (see Chapter 7), and as a way of helping prevent the kind of injustice I had suffered in my own life (see Chapter 8).

So as described in Chapter 14, I went to the University of Pennsylvania Law School, enjoyed it thoroughly, and learned quite a lot. During the Christmas vacation of my second year (1969-70) I went to San Francisco to look for a summer job for 1970, and ended up getting an offer from Michael Kennedy, a famous lefty lawyer I had come to know when he represented my draft center colleague Rev. Bill Price after Price turned in his draft card (see Chapter 12.B). As discussed here and in Chapter 19.A, I spent the summer working for Kennedy on Timothy Leary's appeal from what was called the Laguna Beach marijuana bust. It was very exciting indeed.



The Leary case was a good example of how I worked on amphetamines (see Chapter 17.D). It involved the 1968 search of a car in which Tim and Rosemary Leary (shown here in 1969) and Tim's son Jack had a lot of dope in all sorts of places. But the search was constitutionally defective. I was living in Berkeley that summer and spent many hours every day in the library at Boalt Hall (the law school of the University of California) reading just about every dope case in California, of which there were an awful lot.

In 1970, before there was any such thing as Westlaw or Lexis or personal computers, *reading a case* meant finding a reference to it in a set of books called (for state cases) the California Digest, with its quaint pocket part

supplements tucked into their back covers, and then going to another set of books called the Pacific Reporter and reading through the actual printed opinion, taking notes with a pen on legal pad, checking to see if was still good law by consulting a series of books called Shepard's Citations (which were nothing but columns of numbers, see tailpiece at page 354) for references to later cases which cited that case, and looking those up too. I repeated this for every case I found, and then went home, read through my notes, typed up a draft memorandum on a typewriter complete with carbon paper (positioning all footnotes by hand), stopping every now and then to change the ribbon and make changes with xxx's and ink and erasers and Correct-Type and whiteout and scissors and Scotch tape, and then retyped the whole thing to revise it. Just describing this on my sleek word processor gives me a case of anti-nostalgia – it was a hugely cumbersome system made bearable only by the fact that no one knew there could be another way. It probably took an experienced lawyer at least six times as long to do research as it would today, and I was not an experienced lawyer.

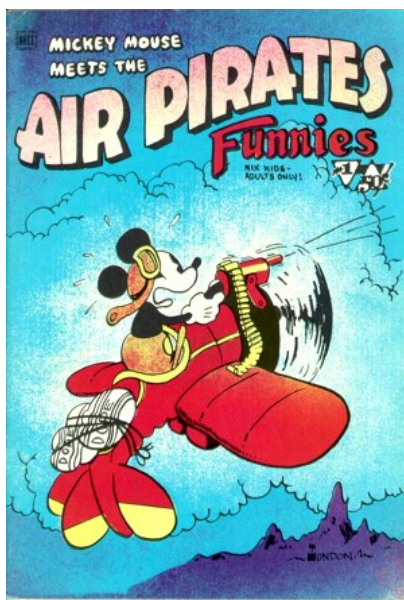
But I had been trained to spot issues, and I spotted far more than anyone imagined were there. I gradually constructed a strategy to divide all that dope (including the hashish in Rosemary's hat) into different classes, and apply a different legal theory (cobbled together from the case law) to each class, until when I was done I had in theory avoided Tim's legal responsibility for all of it. My draft brief ran well over 100 pages, which was of course *wildly* excessive. Michael Kennedy thought it was terrific and offered me a permanent job when I graduated. Now, having been admitted to practice for 39 years and having Westlaw available to me, I would do it much better and much faster and in many *many* fewer pages. But then it was an impressive although undisciplined maiden effort. Of course what I didn't know was that plans were even then afoot to spring Tim from prison in an unconventional fashion, and that the appeal I was working so hard on would never be heard. It was duly filed, but the appeal was regarded as waived when Tim escaped in September 1970.

As soon as I graduated in May 1971 I headed out to California to work for Kennedy. It was an ideal situation for someone with the goals I had then. Kennedy was a superb trial lawyer, the Kennedy & Rhine office (in a fire-engine red Victorian house at 2424 Pine Street near Steiner) had only two partners, and I was at first the only associate. They had a left-wing political practice paid for by defending pornographers – what could be better than that? Michael (now again practicing in New York) and his partner Joseph Rhine (who later married a porn star, moved to Los Angeles, and died) were ready to teach me whatever I needed to know to become a criminal defense lawyer. With so few lawyers in the office, I could count on early responsibility and court exposure that an



associate at a major firm could not even dream of. I respected them, and although I was pretty green they saw my potential and treated me with respect and courtesy. It was perfect. It was good that it was perfect, because when I felt I had to quit almost as soon as I joined the firm (before the bar exam results were even in), I knew it wasn't that something was wrong with the job. I have searched on the Internet for a picture of Michael as he looked in 1970, but all I could find was the much more recent picture shown above.

I moved to California in May 1971 and spent the summer studying for the August bar examination. For more about this period see Chapter 16. After that, but before the bar results were announced, I began working for Kennedy & Rhine as a law clerk pending admission to the bar (results were not announced until November, and candidates were not sworn in until January 1972, five months after the exam). That fall I worked on a number of cases for Michael and Joe, mostly of course doing research and writing legal memos, as I couldn't actually function as a lawyer until I was sworn in.



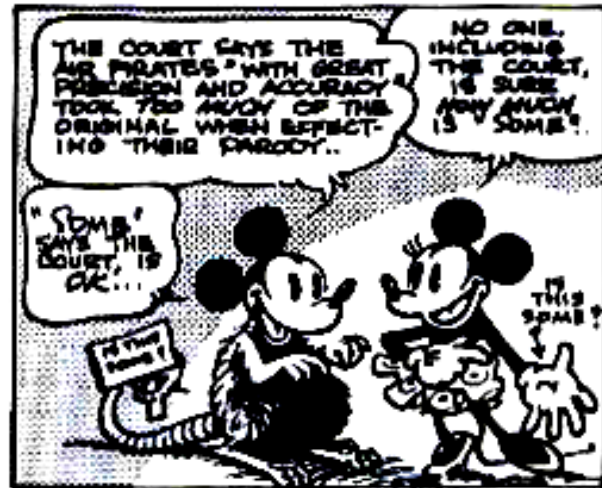
One case I worked on was that of the underground cartoonist Dan O'Neill and his three colleagues, who called themselves the Air Pirates after the gang of villains in Walt Disney's Mickey Mouse comics. O'Neill and his fellow cartoonists had written a very funny underground comic book in the Mickey Mouse tradition, using the well-known Disney characters and imagery (although in a slightly more modern underground style), but as parody, to attack the conventional values and conservative politics they felt Disney represented. Disney sued them for copyright infringement, and the case turned on the First Amendment, the copyright privilege for parody, and the principles of what is called *fair use*. Having no money, they had to be represented *pro bono publico*. I persuaded Michael and Joe to take on the case, which I had the responsibility of thinking through and preparing.

I urged them to take the case because I saw it as an important one for freedom of the press and defense of dissidence – this was just the sort of thing I had become a lawyer in order to do. I spent some time with the Air Pirates at their North Beach studio-lair on Osgood Street just off Broadway, and a lot more time in the library learning copyright law, and wrote another hugely long but highly regarded brief. After I was sworn in, I even nominally represented one of the cartoonists (Bobby London) because ethically

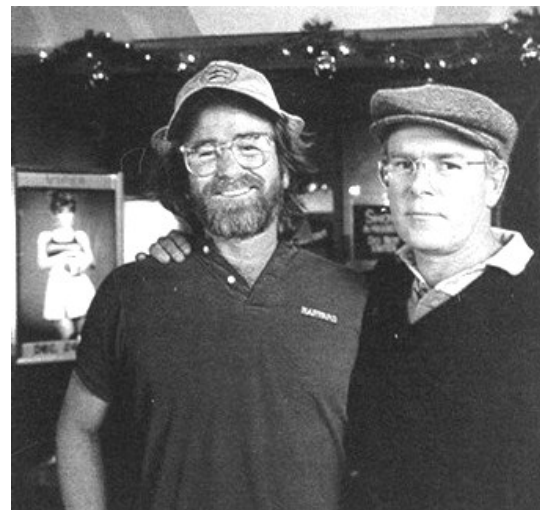
Michael couldn't represent them all.<sup>2</sup> I argued the case at the hearing in U.S. District Court before the noted reactionary judge Albert C. Wollenberg. He disregarded all my arguments and issued an opinion finding against the Air Pirates on every count.<sup>3</sup>

The infuriating thing was that the judge didn't meet my arguments, but just disregarded them, and gave every indication of having written his opinion *before the hearing*. It was not a fair result, which shocked me, although as a supposed radical I should have known better than to be shocked.<sup>4</sup>

- Anyone wishing to know more about the Air Pirates case should read Bob Levin's definitive 2003 book on the subject, called *The Pirates and the Mouse: Disney's War Against the Counterculture*, for which he interviewed me extensively and in which I have more than a cameo role. See also [http://en.wikipedia.org/wiki/Air\\_Pirates](http://en.wikipedia.org/wiki/Air_Pirates). I will send the brief up to Yale as a Supplement.



I also did a lot of work on pornography cases during this period – we represented the Mitchell Brothers (right), whose production company and O'Farrell Theatre (on Polk and O'Farrell Streets in San Francisco) were leaders in the field. In the picture Jim is on the left, Artie on the right. Back in those days, before the Internet and even before home videotape, pornographic films were real films, not videos, seen in movie theatres, and the police kept harassing the theatres and busting the staff. The Mitchell Brothers used our firm to defend them, and I wrote the



<sup>2</sup> Representing co-defendants raises ethical problems because one might blame the other, leading to a conflict of interest. Co-defendants sometimes waive the potential conflict.

<sup>3</sup> See *Walt Disney Productions v. Air Pirates*, 345 F.Supp. 108 (N.D.Cal. 1972).

<sup>4</sup> Judge Wollenberg's order was later modified on appeal. See *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

briefs. My theory, often ignored but never refuted, was that since the definition of obscenity (in this connection meaning sexual content unprotected by the First Amendment) required the challenged expression to exceed community standards, the very fact that the O'Farrell Theatre sold huge numbers of tickets proved that their films were acceptable under the standards of *our* community, anyway. But typically I had a lot of other arguments too.

The Mitchell Brothers won all their cases except one, lost for reasons I now forget (I wasn't in the office yet when that case was lost – perhaps we weren't trial counsel there). The case they lost involved a film called *Glowy Flesh*.<sup>5</sup> Since our side had lost, that became an appellate case, and I wrote the brief. I always insisted on seeing the film I was writing about, to check it out for *redeeming social importance* (a term of art – if a work had that, as a matter of law it wasn't obscene). So I had the films delivered to the office and screened there – I even gave a small party at the office for the screening of *Glowy Flesh*. Of course even I could never find any redeeming social importance in these films.

I was admitted to the bar in January 1972, but as related in chapters 17.F and 18.C, I took my transformative acid trip in October 1971, and quit my job soon after that. However, I couldn't just leave without giving Kennedy & Rhine the chance to replace me, so I stayed on until February 1972. Here's how I described my work in a letter to a law school colleague in November 1971 (attached as Document 15-1).<sup>6</sup>

I am running around practicing law, writing letters and arguing with people like inheritance tax appraisers and making telephone calls and handling cases of various sorts, suing people, interviewing clients, and who knows what-all. Someone will call for an appointment and a note will appear in my mailbox: "David – see what this fellow wants." And I take it from there.<sup>7</sup>

Michael and I had a long talk in which he tried to get me to reconsider and continue at the firm, but I told him I couldn't, that it would be very destructive to keep on in practice, and I had to leave. Michael and Joe understood that I needed to leave, if not exactly why,

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<sup>5</sup> Was *Glowy Flesh* the one with the famous Mazola Oil scene, or was that *Mona*?

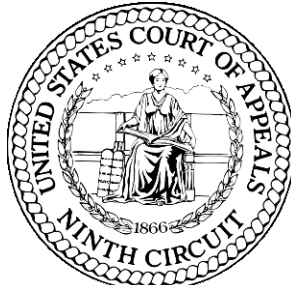
<sup>6</sup> I was just going to quote from it and send it up to Yale as a Supplement, because it is so long (eight pages). But it tells the whole story of my thinking during this pivotal time in my life so completely and vividly that I am attaching all of it. Skip it if you're not that interested in how I felt about my job in 1971.

<sup>7</sup> Of course even though the principals were often out of the office, I was not actually suing people without a license, or acting without supervision. By *suing people*, for example, I'm sure what I meant was that I prepared the complaint papers Michael or Joe asked me to prepare. I now understand that what I did pending my licensing, apart from research, was roughly what a busy paralegal would have been doing.

but were both sorry to see me go. I was sorry to leave, too – as sorry as I could be consistently with feeling enormous relief. From the same letter:

I even handled a hearing before a committee of the Office of Economic Opportunity. I marched in with five witnesses, a vest, an eyeshade, and a court reporter and took the place over.<sup>8</sup> My opponent was a wimpy sort of lawyer who didn't know what to do when I didn't give him time to figure out what to do but did it myself instead. We won going away. A triumph. And it didn't do a thing for me. All I got out of it was a feeling that I didn't want to sue anyone, and that I had been wasting my time.

My admission ceremony on January 5, 1972, was quite an experience. There were actually three ceremonies – a California Supreme Court ceremony in the Masonic Auditorium on Nob Hill, for admission to all the California courts, then one for the Northern District of California federal court in the U. S. Courthouse (at Golden Gate



Avenue and Polk Street near City Hall), and finally one in the ceremonial courtroom at the magnificent 1905 Beaux-Arts U. S. Court of Appeals for

the Ninth Circuit, at Seventh and Mission Streets. I wore my law school graduation robe to all three, and was high as a kite on LSD during all of them. I remember arriving at the Court of Appeals in a taxi – the guard took one look at me in my robe and said “you’re here for the ceremony, aren’t you?” My California license is attached as Document 15-2. I colored it in with colored pencils (a sign of the times), which have since faded (a sign of later times). My license for the U.S. Court of Appeals is Document 15-3; my district court license looks very similar. I noticed the district court license gave my titles as *attorney, counselor, solicitor, proctor and advocate*. I loved having titles like that, and used them often. Sometimes I signed (non-professional) letters “Proctor in Admiralty.”

But I had to leave – LSD had made it clear to me that I couldn’t go on as I was. The defining moment for my law practice came during that epochal trip when I looked at my briefcase, bulging with legal papers, and realized that if I had to take speed to do work like that, I should stop doing it. I was highly stressed out from the dangerous combination of inexperience, perfectionism, and amphetamines, which made me work long anxious hours under intense self-applied pressure. I didn’t think I knew what I was

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<sup>8</sup> All right, maybe I shouldn’t have been doing *that* without a license. So sue me. Maybe it was after I had been sworn in.

doing (and in large part I didn't), but felt I had a responsibility to the client to do it to a high professional standard anyway. I was right not to compromise on my standards, which I never have done as a lawyer, but I was perhaps not so right to take all the responsibility on myself and not ask for guidance.

Anyway I had to stop, and I had to detox from the speed, and I had to pay immediate attention to the new perspective and new vistas I had discovered on LSD. As I put it in that same letter I keep quoting, I needed to *work on my own case*. Also I found it impossible after LSD to take the subject of my work seriously anymore. As in Tim Leary's famous slogan, I had turned on, I had tuned in, and now I had to drop out. If I had been wiser and able to work with less intensity, both of which I am now, I might have seen that I could work to a high professional standard, as a craftsman, *without* taking it so extremely seriously I exhausted myself with anxiety and overwork. But I didn't know how to do that then, and so I had to go. I went, finally, in February 1972, and didn't practice law again for more than 16 years. I have never regained my ability to take any of it seriously.

## **B. First Retirement**

After I left my job at Kennedy & Rhine in February 1972, I did not go back to practicing law until November 1988. I thought for a while that I might move to the sticks (in Oroville, Butte County, for example, near where I had taken my acid). I could get an office for almost nothing on the decaying old main street (ironically named Montgomery Street) and practice there, taking the occasional conflicts assignment from the Public Defender and assigned appeals and whatever else came along.<sup>9</sup> “[The hippies in the hills](#),” I wrote in the same letter I have been quoting,

[can supply me with dope, and I can get divorces for their old ladies. The local mechanics can keep my car running smoothly, in return for springing them from the tank when they get drunk.](#)

It was an idealized version of what might even have worked if I had truly been up for it. But I wasn't – I was exhausted and really had to stop – and so this never happened.

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<sup>9</sup> *Ironically* because Montgomery Street is also the name of the main street in San Francisco's Financial District, where I would work for the last 19 years of my career as a lawyer.

A conflicts assignment happens when the Public Defender can't represent someone who is entitled to free representation, for example because he is representing a co-defendant and the interests of the two defendants conflict, and so has to farm the case out to someone else. It is a traditional source of entry-level cases for new practitioners.

Other than the time I unwisely agreed to stand up in court for Trena Beagle (my LSD hostess in Feather Falls) in her uncontested divorce in the Butte County courthouse in Oroville in 1972 (it was a good thing it was uncontested because I had no idea what I was doing), and one more aberrant exception years later, that was it for me with the law until about 1987.

Why did I not go back to it during that time? In 1972 I was burned out and unable to continue, but I got over that after a while. But after LSD I no longer had much interest in the main rewards of law practice. These I saw as including:

- Victory. This is the reward of the competitive instinct. A litigator likes to win – that’s why he litigates. A trial lawyer, which is what I planned to be, *especially* likes to win. After LSD, I wasn’t interested even in *playing* that particular terrestrial game, much less in winning.
- Manipulation of intricate systems. A trial, with its procedural and evidentiary rules and multi-layered strategies, is an extremely intricate system, as is whatever substantive area of law it concerns. The same is true of transactional law, where the goal, for example, is to structure a business transaction for maximum tax benefit. A lot of lawyers get satisfaction in mastering these complex systems, and so did I in law school. After LSD this didn’t seem like so much fun any more, because now I had access to a wider viewpoint which saw the whole endeavor as extremely trivial, a game without much point.
  - Later, during my second legal career with Farella Braun + Martel, I became able to take some satisfaction in my competence in certain complex systems such as the Federal Sentencing Guidelines, a monstrous structure which makes the Talmud seem like the directions for dry cleaning a raincoat. But not enough to make it my life’s work. If I hadn’t needed the money, I wouldn’t have paid any attention to the Federal Sentencing Guidelines or any of the rest of the law. When I retired I found I didn’t miss it one single tiny bit.
- Validation of worth and status. This too drives a lot of lawyers – they want the reputation for success, the regard of their peers, the belief in themselves which comes with victory and professional achievement. This meant something to me before LSD, which is one reason I worked so hard in political campaigns and as a draft counselor, but not afterwards.

I did some work later for lawyers at Farella who took these peer-regard games very seriously. I made a good living helping them write articles to publish as their own, and preparing materials to help them secure awards, and so on. They sometimes offered me co-author credit or the chance to publish under my own name, and never quite understood why I was not interested and usually insisted on

keeping my name even off legal briefs I had written the arguments for. For most subordinate lawyers it is a prized honor to have your name on the brief. I preferred not to do this – it made it easier to accept revisions.

- I *don't like* hard work, as I did in my youth for Ryan and Flatow and my draft counseling centers, and even for Michael Kennedy. Back then I was proving something (capacity? importance? value?) by how hard I could work. After LSD I didn't have anything to prove, and to this day I still don't.
- Money. I was never much interested in this either – see Chapter 10. Now of course I regret slightly not having been interested enough to make any serious money. But although people think lawyers are ordinarily rolling in the stuff, and it is true that a good lawyer with my education and contacts could have expected to make a lot of money, rich lawyers work for what they get. A successful trial lawyer works 70-hour weeks, is in trial under unbelievable pressure sometimes for months at a time, is totally committed to and responsible for the vital interests of lots of people and corporations, and when not working is trolling for clients, serving on professional committees, or going to social events for “practice development.” This money is not free. If I could somehow have changed some of my past choices and magically become a partner at a downtown firm, I wouldn't have lasted a month with the associated pressure and demands.
- Responsibility. I ultimately became confident enough in my professional abilities that when a partner at Farella Braun + Martel asked me what the law was on a certain topic, after researching it in my own way, to my own standards, I was quite willing to take the responsibility for telling him what the law was and having him represent the client accordingly. But I was always uncomfortable representing anyone *myself*, although I did do it a few times. Even when I did the work and developed the legal theories on my own, I didn't want to be the one with the ultimate responsibility.

In part this was a survival from the early days when I had no professional self-confidence. There is so much to remember! There is so much I don't know! And in part this lack of self-confidence was justified, because I never really learned the nuts and bolts. How *do* you notice a deposition, exactly? What *is* a motion to shorten time? At Farella I was so senior an attorney that it was too late to learn this from a mentor as young lawyers traditionally do, and as I was set to do at Kennedy & Rhine before the Meatball hit. In part it was not justified, but the pattern for my practice was set, and if I had gone to the partners and said I'd like to start representing people and appearing in court, they wouldn't have let me do it, because they saved those opportunities for associates they were training for partnerships. That was just as well, really – I didn't want to make the investment of time and energy and commitment it would have taken to represent anyone.

Every so often I was tempted to try, and saved myself just in time by anticipating the agony I would have had to go through before actually appearing, and the embarrassing climbdown which would have been my only alternative.

- Michael Gladwell, in his book *Outliers* (2008), says that mastery of any skill or craft takes about 10,000 hours of dedicated, concentrated effort. I usually billed about 1200 hours a year as a lawyer at Farella, which works out to a bit more than eight years to mastery. And sure enough, by about that time (1997) I had mastered my craft as a lawyer, and could do the kind of lawyering I was actually doing with confidence and without anxiety.
- Toward the end of my time at Farella I did appear in court a few times, on my own, and it went fine. I had negotiated everything beforehand by phone with my opponent, so the court proceedings were a formality. It felt great, and I'm glad I got to do it. But it wouldn't have done for me as a career.
- Politics. Also, and again this is due to LSD, I lost interest in politics and even justice as the focus of my life (I am still in favor of justice, and interested in politics as a spectator, but not as a participant). When I started out to be a lawyer in the 1960s, politics was the reason for it. But after LSD I saw that was largely yet another terrestrial game – my purpose in life was quite different.
  - What is that purpose? To gain knowledge and understanding as a path to wisdom, and wisdom as a path to liberation. “Wisdom is the principal thing; therefore get wisdom: and with all thy getting get understanding.” Proverbs 4:7. That's mainly what I'm interested in – liberation and understanding things. Nothing else counts much. “How much better is it to get wisdom than gold! and to get understanding rather to be chosen than silver!” Proverbs 16:16.
- Other people's legal problems. What the practice of law comes down to is concentrating hard on other people's legal problems. The truth is I am not interested in other people's legal problems, even their criminal problems. I would rather think about other things, like Buddhism and heraldry.

As a result of all this I was really not suited to a serious career in the law. The things I could do with ease and facility are just what I ended up doing – legal research, and writing signed by someone else. It is ironic that in law school I did not compete for a position on the law review, and when I was offered a position anyway I declined it, because if I joined the law review I would have to spend a lot of time writing long, ambitious and heavily footnoted technical articles on recondite legal subjects. Later, at the apex of my career (such as it turned out to be), I became my firm's go-to guy for exactly that.

I did take one case, though, around 1980 or so. This is the “aberrant exception” mentioned above. My law school classmate and later San Francisco pot buddy Ron Green had a plant store on 24th Street – see Chapter 23. He had a long-standing feud with his landlord, and when he sold his store the landlord refused to transfer the lease, which torpedoed the deal. Ron spoke with me about this problem and I helped him figure out an ingenious legal strategy to recover the lost profit from the landlord. Ron asked me to represent him for a contingent fee, and I agreed with the understanding that we would work together on the project.<sup>10</sup> I did actually represent him, and even conducted and defended a deposition (held in a conference room at the law firm where I was librarian). I recently reviewed the transcript of this deposition and think I would have done a better job today..

By the time the case went to trial I had done all the preparation and written all the papers, but had moved to Truro and so was not in a position to conduct the trial myself even if I had felt competent to do so. Our mutual friend Leo Paoli, an experienced trial lawyer, took over for me and conducted the trial, and won. Leo and I split the fee, and I got a few thousand dollars out of it, my only legal fee to that time, and practically my only one ever.

I took the bar in Massachusetts in 1986 and passed it – I spent a few days in the Copley Plaza Hotel in Boston preparing for the test. I thought then that I would stay in Truro indefinitely and take a few cases or do some appeals to make ends meet. But that never happened.

- My elegant Massachusetts law license is attached as Document 15-4. My District of Massachusetts and First Circuit Court of Appeals licenses look very much like my Ninth Circuit license (Document 15-3).
- My Massachusetts license and First Circuit Court of Appeals admission certificate came by mail, but the federal district court insisted I come to Boston and be sworn in in person, which was not easy to arrange as they wouldn’t do it one-off and required that I attend a group public ceremony. I finally got it done – I couldn’t pass up another license! I am now listed with the Massachusetts state bar as “retired” so I don’t have to pay even inactive dues. My Massachusetts federal licenses are (2010) still active.

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<sup>10</sup> A contingent fee gives the lawyer a percentage of the recovery if the client wins, but nothing if he loses.

### C. Re-Entry



In 1987 the decision had been made to sell the property where I was living in Truro. I was originally against this but was outvoted by my siblings – see Chapter 25.C. But a problem arose that affected our ability to transfer title. I went down to the Barnstable County law library in Hyannis and pulled out the books – it was the first legal research I had done (except for Ron’s case and a couple of short briefs) in more than 15 years. I looked up the law and figured out a legal strategy which would permit us to convey title in an orderly fashion; I implemented it and it worked.

I tell this story because doing the research in Hyannis led to me realize that I could practice law if I had to, and I would have to have *some* kind of job when I returned to San Francisco after selling the Truro house, because I would have to pay either rent or a mortgage. Being a librarian was pleasant, for a job, but it paid very little. I thought I could work about half time as a lawyer and get by. Ted Winchester, who while awaiting his bar results had been my assistant librarian at Farella Braun + Martel, was now practicing as a solo divorce lawyer and invited me to work with him. I agreed to do it and began on November 1, 1988.

- In preparing to work for Ted I switched from typewriter to word processor. It has now been almost 22 years since that change – it was one of the smartest things I ever did.



I worked for Ted (right) at his office in a Victorian house at 1734 Fillmore Street, between Geary and Post. He paid me by the hour. I sort of liked it – I got to go to court, which I enjoyed, and participate in chambers conferences and work out solutions to disputes. The issues were very fact-dependent, and the court ordinarily had either wide latitude or no discretion at all – either way this meant the issues did not require deep legal research or complicated writing, just on-the-spot reasoning and advocacy, and the ability to see a way through that took account of everyone’s interests. Also Ted was the attorney of record, and as I was paid by the hour, I had no risk. There were parts I didn’t like – figuring out how to divide pensions, dealing with sordid family disputes – but it was not all bad.

Looking through my diaries of the period I see that I did quite a lot of lawyering – appearing in court, advising people, devising settlements, winning motions – I kept remarking to myself that I was practicing law! It was exhilarating, starting from scratch, and the number of projects I wrote about in my diary and the number of appearances I made are pretty impressive to me now, looking back on it. If I’d stayed with it I could have become a pretty good family lawyer and even made some money, although nothing close to the kind of money I could have made practicing at Farella Braun + Martel on Montgomery Street.

However, the economics of this arrangement did not work for Ted, who was paying me up front and as a result was having trouble paying himself. After about six months he said he couldn't go on that way – I could stay in his office and learn from him, but I would have to take my own cases. This triggered the same anxiety the thought of representing anyone on my own always did, and I was unwilling to do it. This was ironic in a way, because here I was being offered a second chance – a similar deal to the one I had declined at Kennedy & Rhine. An expert practitioner would show me the ropes and teach me how to do it until I could manage on my own. But I never even considered it. We parted amicably and remained friends.

So now I was out of a job. George Buffington, a tax lawyer who had been on my library committee at Farella and was now practicing in a small firm of his own, invited me to work for him at an hourly rate. I said George, you're a pension specialist, I don't know a thing about pensions. George said don't worry about that, I'll teach you the pension part.

In my notebook of the time (Book 64) I put down the pros and cons. Pros: Instant job. Chance to learn new subject, previously a closed book to me, with a competent teacher. Potentially profitable. Complex and potentially intriguing system if I could ever learn it. Working in Financial District, which I liked. Potential tie-in with my projected private probate practice.<sup>11</sup> On the con side: no clients, court, or attorney interplay (all of which I had grown to enjoy while working with Ted), except for what I might do by way of moonlighting. Also the subject was boring, required a grounding in taxation, and I had no understanding of it. I should have listened to the cons – working for George was a mistake as I not only had no grasp of the subject, I had no aptitude for it either. I had never even taken taxation in law school (this work was mostly about avoiding taxes), and whatever training I had was almost all in the litigation field. I started on May 17, 1989, and after about a month we too parted amicably.

I then decided to go into business for myself as an appellate specialist, writing appeals for trial practitioners who had no time or inclination to do it themselves, and requesting assignments from court panels to handle appeals for indigent criminal appellants. I printed up a sort of brochure, and business cards in the form of a Rolodex card with a tab saying APPEALS (very clever), and drew up a long list of contacts from Farella days and elsewhere.<sup>12</sup> One contact, given to me by the Boccardo firm where I moonlighted as a

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<sup>11</sup> I did a little probate work with Ted and liked it because there was no time pressure, payment was certain, the procedure went mostly according to easily understandable forms, and the client was dead.

<sup>12</sup> Future researchers: Rolodex is a system for keeping addresses and phone numbers handy and accessible. There is a rack (either a wheel or, for smaller systems like mine, an arc) with two parallel rails, and blank cards cut out to fit over the rails. You put the cards, measuring 5.5 x 10 mm, on the rails in alphabetical order, with special alphabetic tabs

(footnote continues →)

librarian filing their looseleaf services (see Chapter 24.B) panned out, and a busy lawyer engaged me to do his appeals. But my anxiety level, already high at the prospect of representing people, was multiplied by the prospect of running my own practice rather than having a paycheck. So I needed to find something else. What I found was the job at Farella, which I stayed with for the rest of my career, and which I discuss in Chapter 27B.

CITATIONS TO LAW, AS PUBLISHED IN COURT DECISIONS							
CITED COURT DECISIONS							
<b>Vol. 386</b>							
- 171 - 352FS1411 So C 194S2403	- 714 - 351FS588 h351FS1955 57FRD199	- 780 - Ore 504P2d1408	- 167 - 471F2d190 352FS708	- 541 - 471F2d11091 127CaA515 52112d480 Ga 194S2319 NY 340S2d812	- 175 - 31NY951	272So2d624 Calif 105CaR677 105CaR719 106CaR107 106CaR110 106CaR112 505P2d531 505P2d534 505P2d536 Cole 471F2d425	18MdA529 292Min402 96PRR389 96PRR392 96PRR393 96PRR394 96PRR711 108RI531 1TnCr123 1TnCr185 1TnCr350 1TnCr417 1TnCr630
- 213 - 352FS1741 174Col271 174Col587 711A104 16MdA 72Msc2 95-2R8	- 724 - 352FS1661	<b>Vol. 387</b>	- 213 - 470F2d1695	- 244 - 73FTC	- 218 - 470F2d1153 470F2d1162 470F2d1380 470F2d1380 470F2d1718 d470F2d1949 d471F2d1119 471F2d425		
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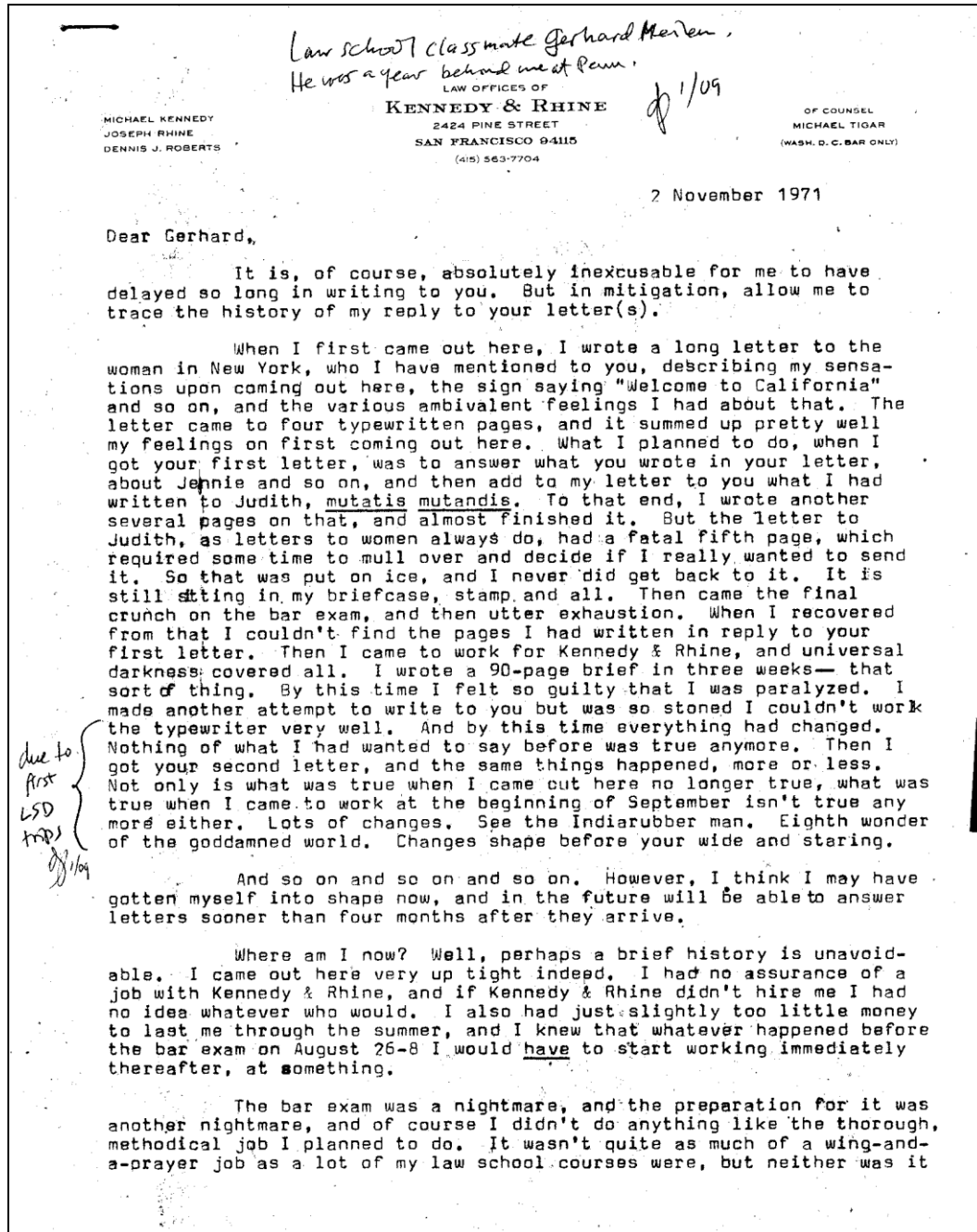
Tailpiece: Shepard's Citations

(footnote continues ...)

setting off each new letter, and you can flip them back and forth easily to find the one you want. Cards can be added, revised or removed at will. Access is instant – you don't even have to turn it on. No electricity? Rolodex still works, on Phoenician technology (hand-written marks on a fiber medium) – primitive, perhaps, but there is no battery to fail or hard drive to crash, and no way to delete anything accidentally. *Litera scripta manet*.

**DOCUMENT 15-1: Long letter from 1971 on why I left Kennedy & Rhine**

While preparing this letter to my law school colleague Gerhard Meilen for the Supplement file in 2009, I made some marginal notes explaining references. These are initialed and dated to distinguish them from the original 1971 text. This page only is reduced to provide space for this note.



## KENNEDY &amp; RHINE

the sort of preparation which gives one confidence. Nevertheless, I pulled through, and I do believe I even passed it. Which means, unless I have changed into one of those lucky souls who never get caught because the examiners always ask the one thing they know, that I must have learned something at Penn.

The bar exam was over on Thursday, and on Monday I began work for Kennedy & Rhine on a full-time basis. With characteristic irresponsibility, K&R didn't give me the final word until that day, although I had been given some broad hints before. And I felt absolutely on top of the world. "How is it possible," I wondered, "for me to have pulled this off? I have finished law school, moved to San Francisco, and been given a full-time job working in exactly the firm I wanted, doing exactly what I wanted to do? Will wonders never cease?"

Apparently wonders never do cease. Now that I have it, I don't bloody want it. Which surprised the hell out of me. But it seems that that's the way it is.

What I have been doing here is not really what I had expected practice to be like, but I can hardly fault it for that. If you look at the list of lawyers on the first page, you will see three names. Michael Kennedy is in Europe, ostensibly for the asylum thing for Tim Leary, which is to be argued before the Swiss Parliament when everyone involved gets around to it. Actually he is fucking off, believing (and it is now apparently office policy) that lawyers who do nothing but be lawyers dry up like muffins left too long in the oven, and/or turn into law machines like Gorman or neurotics like Bender or Amsterdam or even single-minded hard-and-gemlike cats like Charley Garry. Which Michael doesn't want to be. So the policy now is that everyone takes six months or so off every two or three years to do something entirely different. His wife got a job offer in Italy and France and so on, traveling around, and he split to do that. When he stops, nobody knows.

Joe Rhine has been in Los Angeles doing a trial for four and a half weeks. Dennis Roberts, ~~seeing~~ like as how I don't have a license to practice law (the bar results come out at Christmas, four months after the exam... thoughtful motherfuckers...), is zipping around doing all the trial work and court appearances and hobnobbing with major clients. Which leaves guess who into most of the day-to-day office practice, plus appeals, at which I was thoughtless enough to have acquired something of a reputation. So I am running around practicing law, writing letters and arguing with people like inheritance tax appraisers and making telephone calls and handling cases of various sorts, suing people, interviewing clients, and who knows what-all. Someone will call for an appointment and a note will appear in my mailbox: "David— see what this fellow wants." And I take it from there.

I even handled a hearing before a committee of the OEO— a lady who was fired for dishonesty, except she wasn't dishonest. What she was was a Salvadoruena— is that what you call someone from El Salvador?— and the Central Americans were fighting with the Mexicans as to who would beat out the Chinese for the parts of the Poverty Program money still left that the blacks hadn't gobbled up. That sort of thing. And I marched in with five witnesses, a vest, an eyeshade, and a court

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reporter and took the place over. My opponent was a wimpy sort of lawyer who didn't know what to do when I didn't give him time to figure out what to do but did it myself instead. We won going away. A triumph. And it didn't do a thing for me. All I got out of it was a feeling that I didn't want to see anyone, and that I had been wasting my time.

I have been feeling more and more recently that I am wasting my time. Running around in my lawyer's costume, playing this role, is not the sort of game we played in law school or college or high school. That was amateur game-playing. This is the pros. You can't see the seams on these games. People play their own games within this giant shuck of professions and careers and politics, and they rush around and never have the time to stop and figure out anything about themselves. "I'm a lawyer" is no bloody answer to the question "Who are you?" It isn't even a decent answer to the question "What do you do?" Think for a moment about the real answer to the question "what do you do?" "I dress up in three-part suits and run around on other people's business, talking to other people who are doing the same thing. I talk in a language so perverse and abstract that I can make my living from the fact that no one without a special university degree has the faintest idea what I'm talking about. And if I am one of the elite, I get to spend two months at a time in a draining criminal trial, rigid with tension every fucking minute, afraid of dropping my guard in this perpetual combat, this artificial ritual combat, up at 6:30 writing closing argument, to bed at 2:00 after prepping my next day's witnesses, living in a hotel room in Los Angeles. It is true that the lawyer always goes home, as the old cynical saw has it, but on the other hand the lawyer is also sweating out a criminal trial all the time, when he hasn't murdered anybody.

I don't want it.

I don't have time to stop and figure anything out. I am putting all my energies into my job. Except it isn't my job. It is someone else's job I am being paid to do.

Remarkable how things progress. In 1967 I couldn't even consider leaving New York. In 1970 Philadelphia was torture— I had to have San Francisco. In 1971 San Francisco is insane to me. I am thinking about Quincy, California, in the middle of the Plumas National Forest. Before long I will be practicing law in Death Valley. My coif will be useful to keep the sun away.

Order of the  
Coif = National  
Law Honor Society  
dp/lon

When I came to law school I had just finished a time of introspection, of taking stock, of sorting out. That was the turmoil which led to the C.O. business and the draft counseling and college suspension and so on. I was finished with that; I was ready to apply myself to something. I came to Philadelphia intending to do that. I even got engaged to a J.-A. P. And I did apply myself to something. I studied law. I wasn't a grind, but I applied myself to it. I did that for a year and a half, until the middle of my second year. From that time on I coasted, feeding myself lies I didn't recognize at the time were lies. (More of that, as we lawyers put it in our simple way, infra.) Now, goddamn it, I am ready to stop again, take stock some more, get into some internal trips, think, read, maybe do some serious

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drugs. Try something else for a while. But I can't.

Q: Why can't I?

A: Because I have a job.

Q: That's what I just said. I have quite a job ahead of me, getting my head in order, trying new things, exploring myself, figuring out why I am thinking so much about some of the things I'm thinking about, learning... that is a full-time job.

A: That isn't the job I mean.

Q: What job do you mean?

A: Well, there's the appeal to be taken in "Reckless Claudia", one of the Mitchell Brothers' fuck films, and there is Tim Leary's house to sell, and don't forget to terminate the joint tenancies on Angelina Craus' properties so she can pay the death duties...

Q: What are you talking about?

A: ...and after that, there is the problem with the contest of Eleanor Ingram's will, and before you forget, what are we going to do about Ramon Taraya, who wants to attach the treasury of the Agooenians Benevolent Association before the other side gets to it. And the suppression issue in "Hollywood Blue". That's a tricky one, but...

Q: When do I get time to solve my own questions?

A: ...I'm sure you can handle it. By the way, congratulations on winning Alma Lee's case before the OEO! Now, let's see... What?

Q: I said, when do I get to work on my own case?

A: Oh. Your own case. Hmm. Well, this weekend is out, because Joe will be back and he needs some things done for the trial which he can't handle in Los Angeles... But you really should take some time off. Next weekend. Get away for the day. Out in the country.

Q: For the DAY?

A: Yes. For the whole day.

Q: This isn't a simple case.

A: Yes, I know, but there are other priorities. What have you done about People v. Natali? And Marlo v. Federighi?

That, Gerhard, is the bunkeroo. I am not complaining about being overworked. Except for some occasional office crises, which everyone who works in an office has to expect, I am not really overworked. If I find I have more than I can manage I can assign stuff to law students (get that.) But I am beginning to think that having a job is being overworked.

I have a good friend out here who hasn't worked in over a year. Unemployment. He will take an occasional gig when he needs it, but he has other things to do. Such as the things I mentioned. He reads, he thinks, he works things through, he pays attention to what is going on inside him. WHY CAN'T I DO THAT?

Well, I can. It just requires seeing through the shuck of the career. I do not accept that I will have to "practice my profession" for the rest of my life. I have a profession now. In Butte County, which is in the sticks, the Public Defender pays \$25/hr for office work and \$150 a day for trial for assigned counsel in conflict-of-interest cases. I could handle one of those every six weeks, for a week's trial,

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KENNEDY & RHINE

and have all the money I needed. The hippies in the hills can supply me with dope, and I can get divorces for their old ladies. The local mechanics can keep my car running smoothly, in return for springing them from the tank when they get drunk. If they pay that much in Butte County, what do they pay in San Francisco?

The point is, I could use law the way people who are not trapped into the professional ethic use their trades— get a gig when you need one, and then go about your private business until the money from the last gig runs out, and then do it again. Only a professional gig pays four times as well, or more. If I can get \$25 an hour, why do I need to work every day?

I don't. And I won't, much longer.

That, I am beginning to understand, is what the Tonga trip was about. Only Tonga is ridiculous, and therefore a safe fantasy to have. Oroville, California, or even San Francisco-unemployed, is not ridiculous, and it is a dangerous fantasy to have. Because just as San Francisco itself was a fantasy, which I nevertheless ended up doing— going 3000 miles away to this city where I knew almost no one, without a job— because it was possible and I got myself to the point where I called my own bluff and had to go, so this is dangerous, because there is nothing stopping me from doing it.

Well, not entirely. There are a few things stopping me. First, there is the professional ethic. Remember how Ziff used to call himself a "hired gun"? In fact, you used the same phrase a few times, I think. Why that self-derogation? Because making a mockery of the truth permits people to believe the truth isn't true. If you call yourself a hired gun, you can't really be one, because if you were one you couldn't stand it. So you call yourself one as a joke. That establishes that calling you a hired gun is a joke, and so you must be something else. Which frees you to be a hired gun, secure in the knowledge that you are really a consultant.

That is one type of lie. May I quote you some others?

1. "I don't understand how people can be office lawyers. I can't wait to get into the courtroom where the action is. I love fighting in the arena."
2. "It is possible to use the law against society. I see myself as a fifth columnist."
3. "Law per se\* isnonsense, and everyone knows it. The thing about a criminal trial is theatre,"
4. "Practice will be different; there we will be dealing with real cases and real problems and what we do will make a difference to real people."

And so on. These are techniques to justify devoting ourselves to something which is foreign to us, which distracts us from our real business, which is internal, and doing that for the rest of our productive lives.

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"per se": Christ, it sneaks up on us, doesn't it?

## KENNEDY &amp; RHINE

I am coming to believe that "trying something new for a while" is not only what I need right now, it is, or should be, my profession. People grow by fits and starts. Life is episodic. It should remain episodic. Consider the Phillips sermon on marriage. How can you possibly know now who you will want to be living with in 2015? You can't possibly. And in my myopically enlightened, parlour-pink version of Consciousness II $\frac{1}{2}$ , I decided that I wouldn't tie myself down to a woman, meanwhile making plans, in all seriousness, to tying myself down to a whole way of living in which my time was never my own except on weekends. No.

We get sucked into the career thing. Why must I have a career? I got a first-rate education at Penn— why do I have to use it in the technical specialty I was trained in? Where is it writ in letters of fire that I have to "succeed" at anything external to myself? It is not respectable at all to be a down-at-the-heels lawyer who gets a court assignment once in a while and lives as best he can off that. But the question should be: what is that lawyer doing the rest of the time when his colleagues in the Coiffettes are handling so many cases it takes three secretaries to handle the money? (Or, if you are a new, long-haired, counterculture lawyer, handling the press clippings?) Bernie Segal left Needleman, Needleman, Needleman, Needleman, Famine, Pestilence & Death because he was so busy he never had any time to think. And what did he do? He founded a new, hip firm, and now he still never has time to think. But he enjoys what he's doing, or so he says. Maybe he does. Maybe I would, too, if I had nothing else to do. But I have a great many other things to do, most of which I haven't found out about yet, and I don't have the fucking time to be a lawyer.

The thing is not to practice law for a career, and cultivate your garden on weekends. The thing is to cultivate your garden full-time, and practice law on weekends. And if the courts are closed on weekends, then practice law every six weeks, for a week, and then get back to the garden.

I went up to a town called Oroville, California, for a weekend about two weeks ago. I stayed with some hippies who have a house in the woods, use kerosene lanterns, get vitamin C from rosehips they plant themselves, and smoke dope all the time. That was a nice change. I don't see myself being a hippie in the woods, at least not yet, but I would like to try out the town of Oroville. You can get ~~xxxxxx~~ stores in the older section of town, the genuine non-plastic 1935 section of town, which everyone else has deserted for the plastic shopping center, for enough to pay the taxes, and turn them into law offices. A desk and a wood stove and a genuine shingle. Why not? Never ~~break~~ break into the community— all the big cases will go to someone else; never make a name as anything but a hang-around-the-court-house lawyer. BUT: if you don't care about that, and are merely looking for a gig every now and then? Why not? Try something new for a while.

The principal problem is Kennedy & Rhine. This is so good a position that if I ever want to get back into San Francisco full-time law practice it will be hard to match, and it is a pity to give it up. Suppose I only want a vacation. But I don't think that's what I want. This has been coming on for two years now, or more. I have been through it before, with the C.O., and I know a real honest-injun

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irresistable life-change when I see one, percolating for years and then surfacing like a pimple which will give you no rest until you pop the fucker and have done with it.

So I don't know, Gerhard. I badly miss being able to talk to you about things like this. I haven't really said what I wanted to say properly; this is the first time I have ever tried to put this on paper. I have repeated a lot, only touched the surface of things. I have thought through more deeply, left out a lot. If I could talk instead of writing I would do better. But I suppose I will see you before 1979...

I am afraid my commentary on your letter will have to wait. I am about written out at the moment. But rest assured that now that I have caught up, and I don't see writing a letter as ~~requiring~~ requiring a vaster and vaster history (as events pile on top of my tardiness), that I will be a more punctual correspondent.

There ~~was~~ is so much I haven't said about this. For example (and here again you see the outcome of things which seemed only quirks or affectations last year): Remember my thing about water-glasses? I would always insist on a glass made out of glass. My abhorrence for the plastic and the disposable, and ~~my~~ attraction to things which are just as they were in 1940, has become less of a quirk, and more of an obsession. Which is not to say it is an obsession, or anything like it. But it is more of an obsession than a quirk. Well, now, what about that. Mississippi and the old advertising signs which were enamel instead of plastic. Old DeSotos and LaSalles. Etc. I have been reading Faulkner, and that had a part of it too.

Well, Oroville is just like that. It is like a dream. It is still 1940 in the old section of Oroville. It ~~is~~ is Mississippi, except it isn't Mississippi, but Californai. Well, now, what about that?

This may be trivial. But it is a more important part of my life than it was a year ago. Who knows what this interest will lead to if I take the time to explore it? Suppose I follow this up; find out why that sort of thing is important to me. Suppose I move to Oroville and see? Not to get away from plastic, but (1) to see what it would be like to live without plastic (2) to see what it would be like to do all the time what is now only an occasional reverie (my Mississippi thing). What does too much of a good thing feel like? Wouldn't that be useful to learn? Would it be like practicing law? It would help to know how that too-much-of-a-good-thing thing works. And why this thing? Why do I prefer 1940s advertising signs to 1970s graphics, when I know that by every standard my education has taught me the graphics are better? Who knows what I might find out about myself if I really took the time to run that down and find out?

This is a sample of the kinds of things I am thinking about. And the answer that I can't because I don't have the time wbn't wash anymore, because it is I who determines what I do with my time. And I have time for anything I want to do, if I will learn to take it slow, and follow the gleam, and to hell with my career. Time's winged chariot

also  
ball-point  
pens  
[note  
in  
original  
of 1/69]

(8)

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is drawing near, Gerhard. It is miles away now, but it is coming. There is just so much time. And somewhere along the way, they tell me, I promised to spend most of it being a lawyer, and that comes first. I don't remember signing anything binding me to that, though. I have no doubt that I will spend a lot of my life being a lawyer. But only when it is where I want to be, and feel I should be there at the time.

Think about your statements, in light of this. Your thing about building huge enterprises and becoming a millionaire and sailing boats. (a) How do you know you want to do that? (b) do you have the time to spend practicing law in the meantime? (c) How do you know you will still want to do it when you get around to it? Are the boats and so on as much of a delusion as my theatre-in-the-courtroom stuff was? It has the same hard-polished gloss ~~as~~ as the things I told myself so often I could recite them by heart, and even came to believe them.

I AM NOT TELLING YOU YOU ARE MAKING A MISTAKE!! I am only telling you to be damned careful you aren't, and if you decide you are that you can quit.

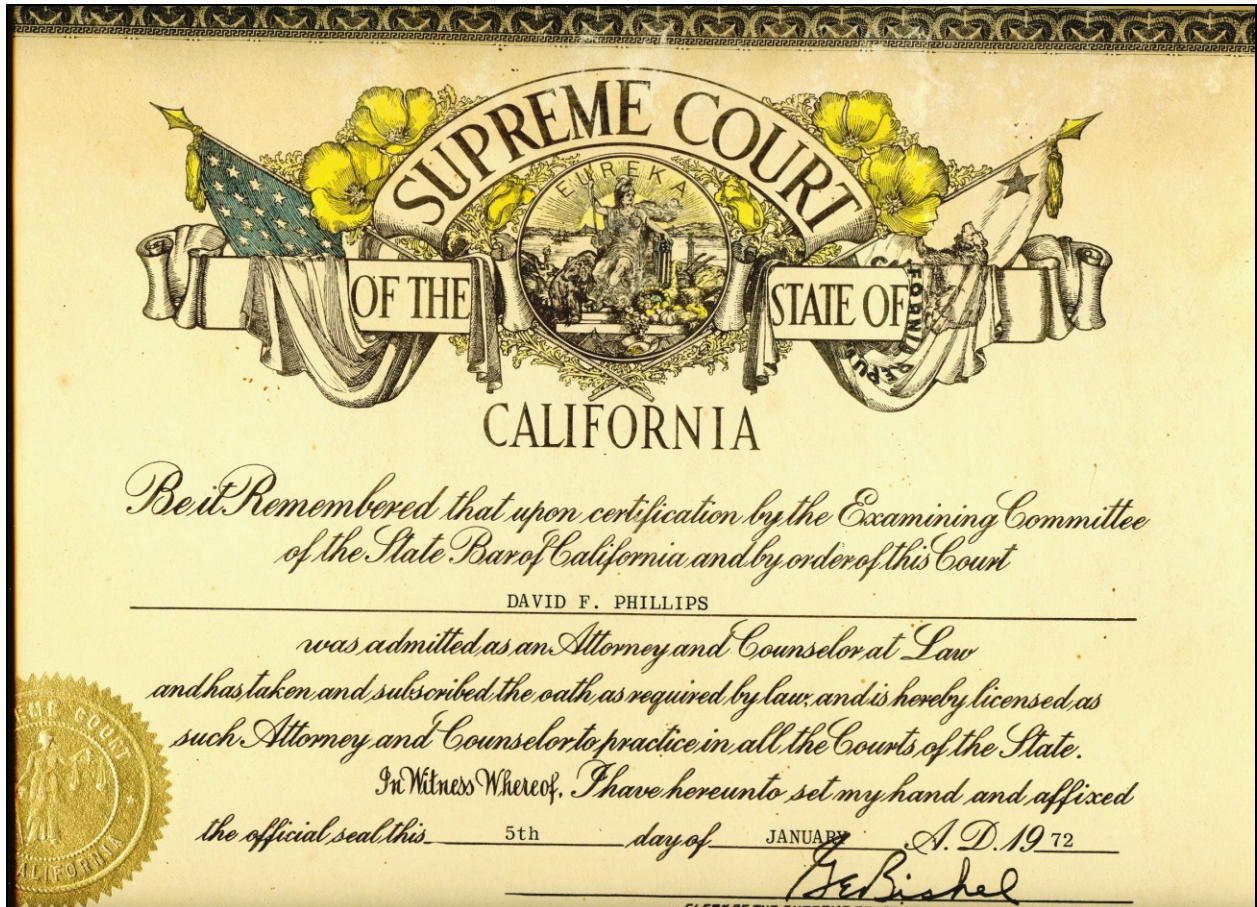
R.S.V.P.

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**DOCUMENT 15-2: California Law License**

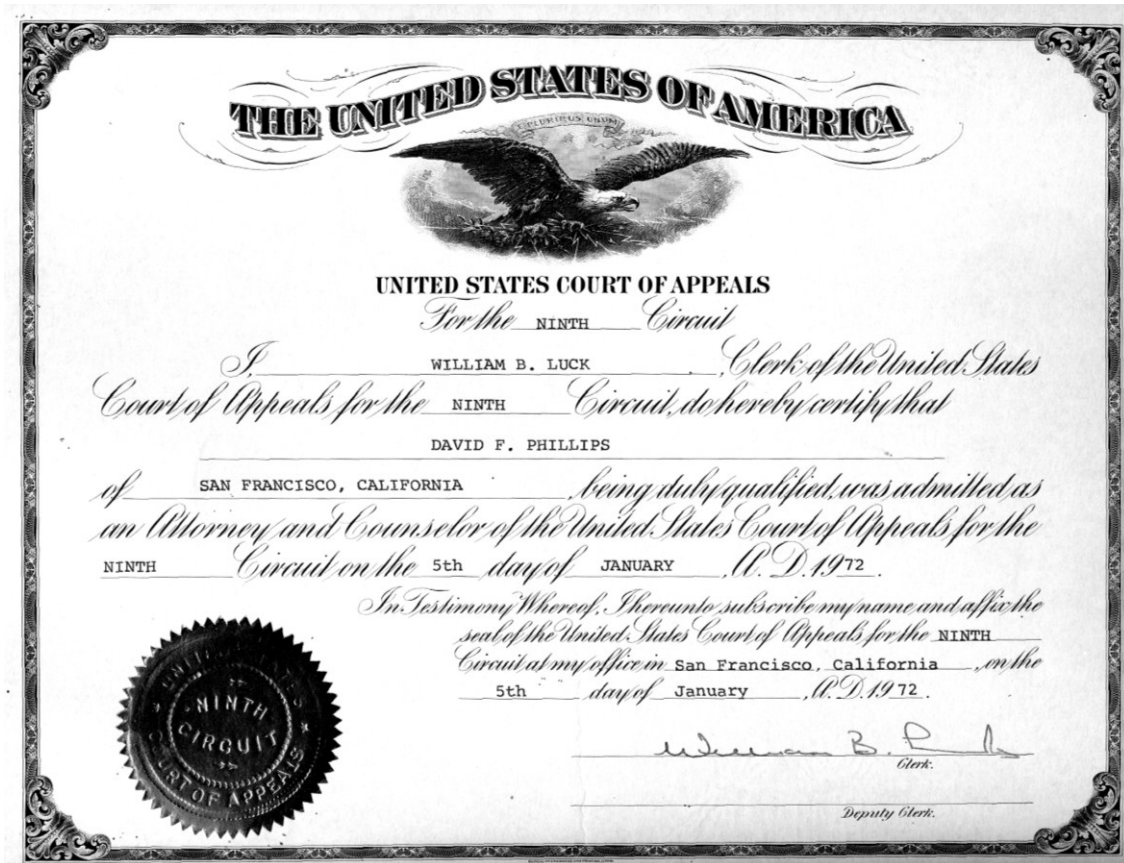
The license was too big for the scanner, so the borders cannot be shown.

I colored the image with colored pencils, but it has since faded, especially the red.



**DOCUMENT 15-3: U. S. Court of Appeals admission certificate**

This certificate is for the United States Court of Appeals for the Ninth Circuit. On the same day I also got one for the United States District Court for the Northern District of California. Later, in 1986, I got two more – for the First Circuit, and for the District of Massachusetts. They all look pretty much alike.



**DOCUMENT 15-4: Massachusetts law license**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

BE IT REMEMBERED, that at the Supreme Judicial Court holden at Boston within and for said County of Suffolk, on the twenty-second day of September A. D. 19 86 , said Court being the highest Court of Record in said Commonwealth:

DAVID F. PHILLIPS

being found duly qualified in that behalf, and having taken and subscribed the oaths required by law, was admitted to practise as an Attorney, and, by virtue thereof, as a Counsellor at Law, in any of the Courts of the said Commonwealth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-second day of September in the year of our Lord nineteen hundred and eighty-six.



*John E. Powers*  
CLERK.