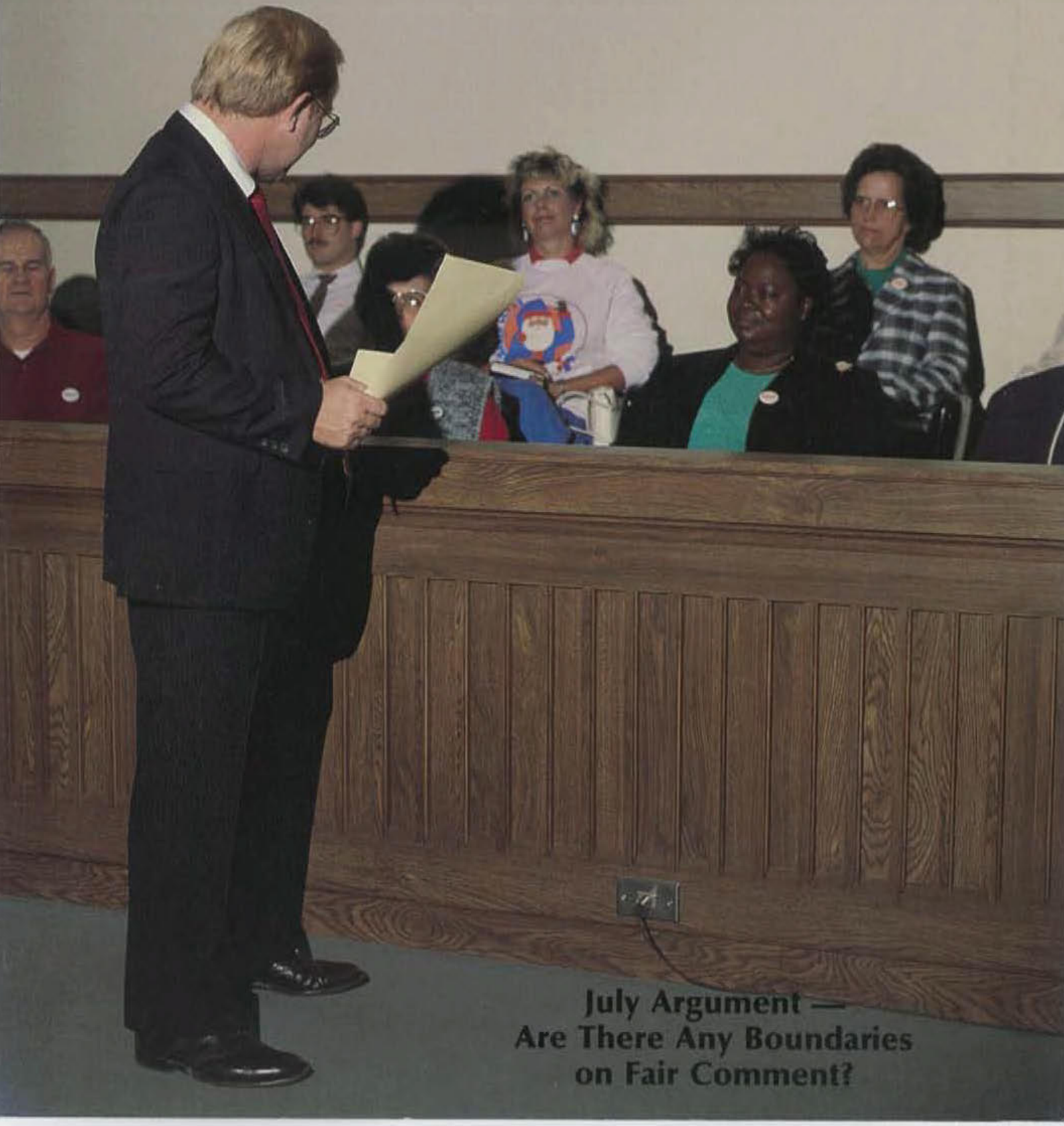
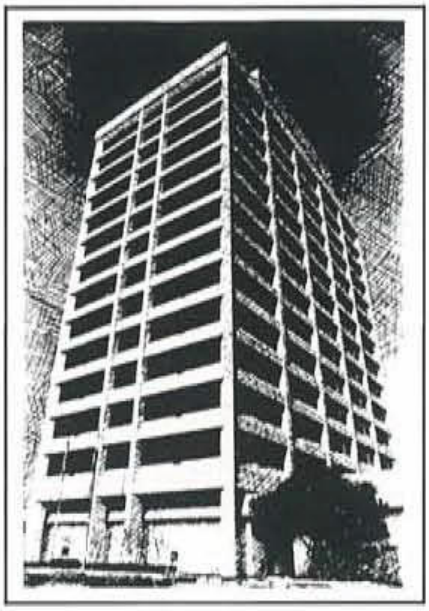
The Alabama Lawyer

Vol. 50, No. 1 January 1989



July Argument — Are There Any Boundaries on Fair Comment?



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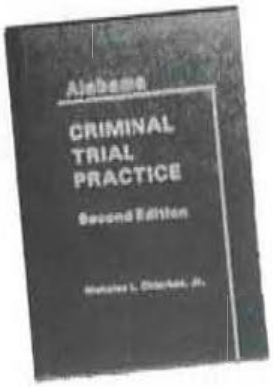

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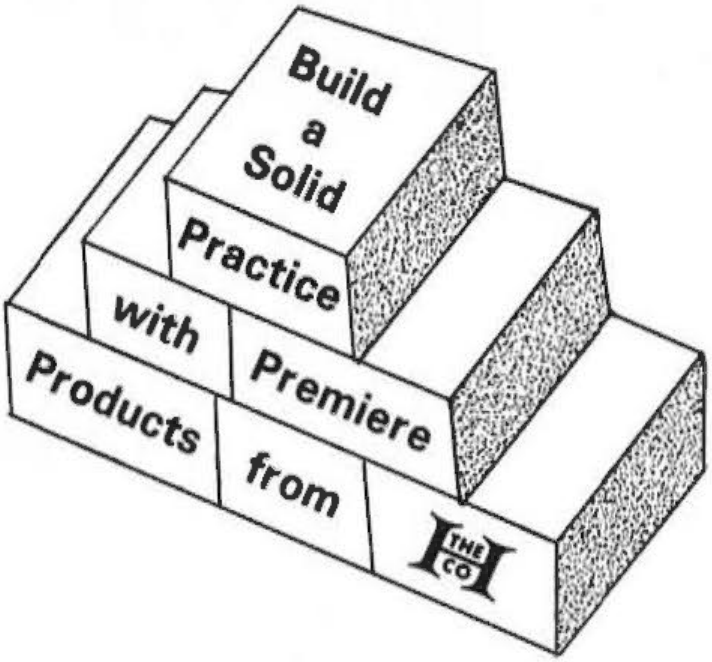

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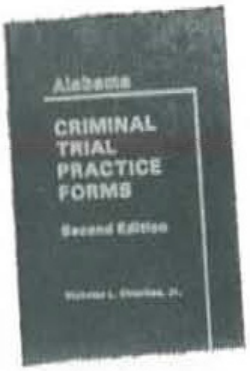

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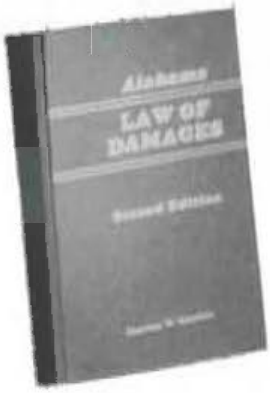

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The new Second Edition retains the character of the first edition in its emphasis, and, due to the advent of tort forms, treats the constitutionality of statutes limiting damages.

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In Brief

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Susan Shirock DePaola—Associate Editor
Margaret Lacey—Managing Editor

GENERAL INFORMATION **The Alabama Lawyer, (ISSN 0002-4287)**, the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, July, August (bar directory edition), September and November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive **The Alabama Lawyer** as part of their annual dues payment; $15 of this goes toward subscriptions for **The Alabama Lawyer**. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed, but publication herein does not necessarily imply endorsement of any product or service offered.

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On the cover—
Jury argument—are there any boundaries on fair comment? See "A Survey of Alabama Law Pertaining to Closing Arguments" by Benjamen T. Rowe and William H. Pryor, Jr., page 9.

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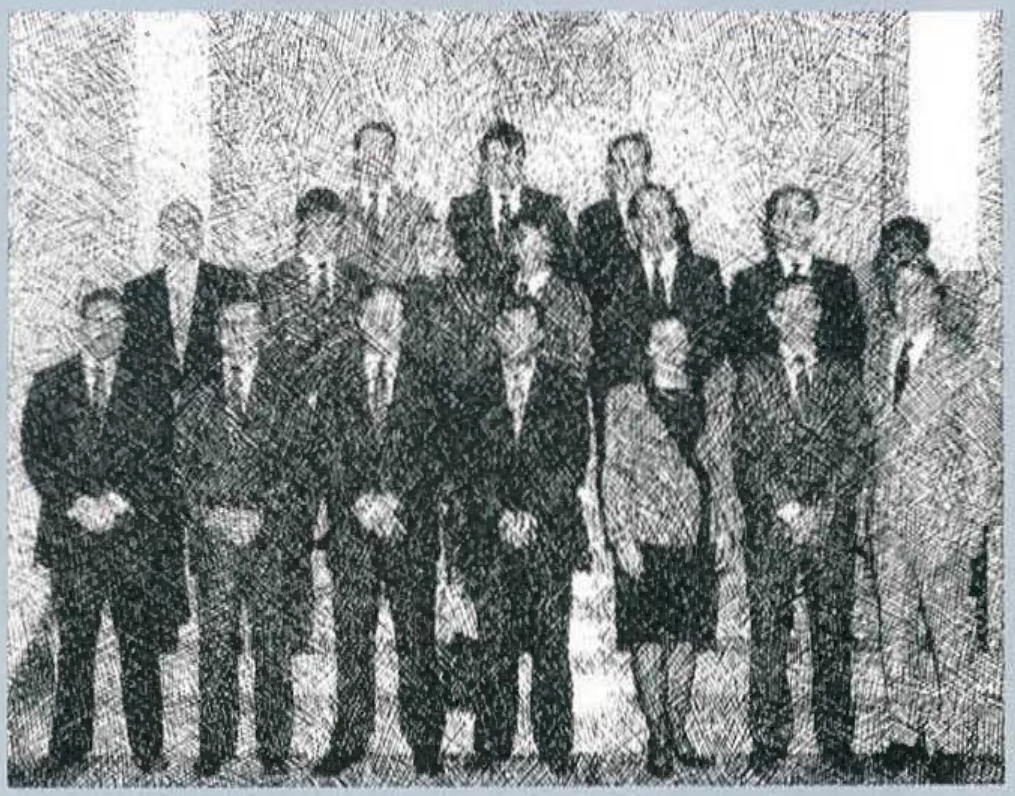
Time is short! January 31, 1989, is the last day to purchase a subscription in the Attorneys' Insurance Mutual of Alabama, Inc. before the price increases.



Attorneys Admitted/Fall 1988 25

It's "all in the family." The 261 new admittees (since July) include many whose relatives are present bar members.

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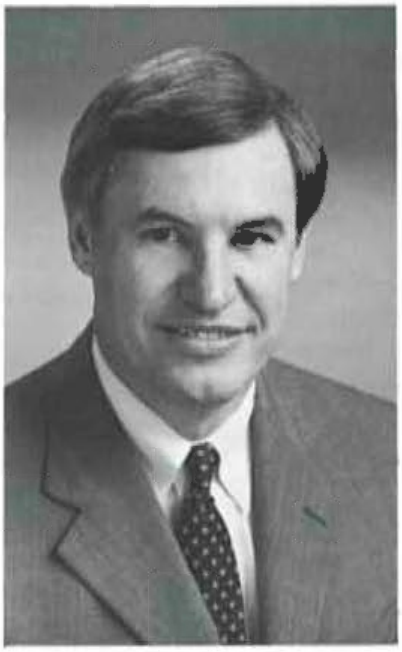

HUCKABY

Consider the following from a report of proceedings of the Alabama State Bar.

The decline of professionalism

"We have said that the chief cause of the lowering of our standards was economics, due to the commercialism which pervades society. We will now add that the next most effective cause is the excessive number of lawyers. Like almost every other institution in America adopted from older lands, the American Bar, freed from the restraining of an historic society, has grown as it would, unguided, unlimited, and until recent times without even the restraining influence of an admission examination."

The excessive number of lawyers

". . . It is necessary to have fewer lawyers today in Alabama . . ." "Every established family has its would-be lawyer, and every high school debater, proud of his incipient forensic ability, longs to submit his arguments to a real tribunal in support of a real issue. Nor is the ease with which a license to practice was formerly obtained alone responsible. The best law schools are still largely to blame. Struggling as they do to display their importance by the number of their students, they advertise their courses, and present every argument to draw more would-be lawyers to their halls. Last year in the University of Alabama there were registered more than one hundred and fifty law students alone. Can anyone of us honestly advise those 150 students to practice law in Alabama?"

A uniform procedure and court system

"One of the great needs of the State was a uniform system of trial courts, and a uniform system of procedure.

Confidence in the courts

"Are the courts the bulwarks of the people? Do they still retain this entrenched position in the minds and eyes of our great body politic, flanked by centuries of wholesome and sound precedent, and guarded all around by fundamental right and justice? Has the history of the recent past taught us that our people at large stand firmly facing the sunlight of reason and common sense in the comprehension of the value and position of our judicial tribunals in their relations to litigants and the country in general? Or, have we reached that state of unrest which comes with the growing knowledge and consequent conclusion that the fabric of our judicial bodies is being warped because our courts have been inclined to depart from the path of fundamental ideas and have grasped upon other reasons as a basis for judicial decisions?"

The selection of judges

"It is the proud boast of some people when a judge has pronounced judgment against them, even in civil matters, that they can vote against such presiding judge at the next election. These boasts are nearly always made in places and under circumstances which warrant the belief that they will be conveyed to the judge's ears. Even presiding judges are human and desire the indorsement that makes and unmakes them. Your Committee therefore believes it would be to the benefit of administrative justice to change the manner of making up both our trial courts and courts of last resort. Considering the honorable course shown by both the English Courts and these of the United States there could hardly be a doubt of the wisdom of appointing judges for life, or during good behavior. Even their election by the people for life, or during good behavior would greatly improve present conditions found in nearly all the states of frequent elections and comparatively short terms of office."

President's Page

Continued from page 3

Law reform

"Perhaps never before has there been such a general demand for reforms in the law and in its administration. The demand is not now confined alone to the layman, but is participated in, too, to a large extent, by the lawyer and the judge."

Comparative negligence

"The theory of comparative negligence in its purity is a relic of the common law, handed down from the earliest times, and grew out of the attempts of the courts to fix and distribute damages and liability for injuries in strict accordance with the degree of culpability of the respective parties." " . . . We believe that in addition to correcting the harsh rule of not allowing the plaintiff to recover anything when his injury was due mainly to another simply because he was not wholly free from negligence, it was served to reduce accidents in that it will induce both employer and employee to use more care and diligence, and thus insure general satisfaction. It is certainly the fair thing, the proper and just thing, and with this in mind no harm can be done in an effort to adopt such a rule."

Strikingly, these issues could make up the agenda of the annual meeting of the Alabama State Bar in 1989. These quotes, however, are taken from a tattered copy of the verbatim Proceedings of the Thirty-Eighth Annual Meeting of the Alabama State Bar Association held July 9 and 10, 1915, in the hall of the House of Representatives. The president of the bar at that meeting was Ray Rushton, and the treasurer reported total receipts during the year of $2,928.40, with total disbursements of $1,505.25.

There are several conclusions that we can reach from reviewing our history. We can conclude that problems do not go away and the striving for solutions is futile. On the other hand, we can view history as markers of a time when our system was less perfect and use it as a guide for our present endeavors to insure that our profession and justice system moves toward ultimate perfection. I believe we can take hold to the latter.

When the Alabama State Bar met in 1915, women could not vote or serve on juries, and blacks were virtually disenfranchised, all in a nation founded on the principle of equality.

But who can truly say that lawyers during the almost 75 years since the 38th annual meeting—serving as judges, advocates and legislators—have not given each of us in our time the greatest individual measure of justice that any citizen has ever known? While we have not reached perfection, the progress made over the last 75 years gives little cause for heeding the carping critics of the legal profession. ■

—NOTICE—

The Judicial Award of Merit

On July 15, 1987, the Board of Bar Commissioners of the Alabama State Bar established a judicial award of merit with the thought that the award would be analogous to the "Award of Merit" given yearly recognizing outstanding service by lawyers to the bar.

Ben H. Harris, Jr., then-president of the state bar, appointed attorneys Oliver Head of Columbiana; Fournier J. Gale, III, of Birmingham; and David A. Bagwell of Mobile to study the possibilities concerning such an award, and make recommendations for the operation of an award program, if adopted.

The committee considered analogous awards given by the American Judicature Society (which has recognized Allen Tapley, former Chief Justice Heflin, Joseph F. Johnston and Rod Nachman), and also corresponded with the West Publishing Company, which established the Devitt Award for the member of the federal judiciary who has contributed the most in various ways to the service of the law.

The committee recommended:

1. That a name be selected by the board of bar commissioners, after suggestions are received from the bar following publication in *The Alabama Lawyer,* with an appropriate deadline;

2. That the award is not necessarily intended to be an annual award, but shall be made as determined by the board of bar commissioners;

3. That the award be given to that judge, whether state or federal, either trial or appellate, who has contributed most to the administration of justice in Alabama;

4. That a committee of three persons select the nominees and make recommendations to the board of bar commissioners, said committee to be composed *ex officio* of the three lawyers who are designated by the president of the Alabama State Bar to be members of the Judicial Conference for the State of Alabama, under *Alabama Code* § 12-8-1; and

5. That a suitable commemorative device be produced and given to each person selected for the award.

Please send recommendations for the award to:

Judicial Award of Merit, Oliver P. Head, chairperson, P.O. Box 587, Columbiana, Alabama 35051

Executive Director's Report

HAMNER

Two Down—Sixteen to Go

I honestly had expected that after September I would never feel compelled to devote another message to the bar's captive insurance effort. Unfortunately, I must.

This is being written at the close of phase II (October 1, 1988, through November 30, 1988,) of our subscription effort. We need 802 more subscribers before we can break escrow and begin YOUR company. We must not let this effort die; the benefit to you, the lawyers of Alabama, is too significant.

Already our start-up effort has caused a drop in the commercial rates. This has happened everywhere a captive has begun. The commercial carriers do not want us to succeed, and we expect to see further reductions. We will be able to compete—and favorably—for our insureds.

Between now and January 31, 1989, the bar commissioners, the AIM Board of Directors and some of those who already have committed themselves to this undertaking will urge your support. These people are just as busy as you and should not have to beg you to help yourself.

We know initially there are some firms, because of excess limits, we cannot expect to serve fully, but we want to appeal to your sense of professionalism to buy into this effort that can benefit all Alabama lawyers in the long term. Be assured that the commercial market will tighten again. Not only will we see escalating premium costs where coverage is available, but we will see some of those carriers withdrawing altogether again from the market.

I have been greatly encouraged to notice that 20 percent of those who purchased units never indicated support by survey or by making a $125 contribution to the start-up funds. Discouraging, however, are the over-640 persons who indicated they would support this undertaking but who, to date, have not. Candidly, we relied on your words of support when we stepped forward in forming Attorneys Insurance Mutual of Alabama, Inc.

Please take the time to carefully consider this issue. We spent over $50,000 on mailings, and our last four presidents have written almost monthly to advise you of progress and encourage your support. In spite of these efforts to communicate the goals and advantages of our own liability insurance company, a shocking number of lawyers have told those calling on them, "I have never heard of this undertaking." Fortunately, many of those persons have responded most favorably when they have taken the time to listen and learn.

I appreciate the reluctance of some of our members to buy into a company which has no policy form to show or a rating table for coverage, but believe me, those of us working in this effort would not be doing so if the results in our sister jurisdictions which have such companies had not been so very successful.

To those of you who legitimately feel you can wait until present coverage conditions decline, you still can support this effort at minimal front-end cost. We still have over $775,000 available in our credit facility against which each lawyer can borrow $1,250 of the current $1,400 unit cost. You can borrow the majority of your unit cost, and 18 or 24 months from now you may find our company offering the only affordable source of coverage. Please consider helping AIM now so it will be available to help you in the future.

AIM needs you and your support NOW. I am not asking you to do something I have not done myself. It is two payments down and 16 to go. ■

About Members, Among Firms

ABOUT MEMBERS

George E. Jones, III, formerly staff attorney to the Honorable Henry B. Steagall, II, associate justice of the Supreme Court of Alabama, announces that he has become an assistant attorney general for the **State of Alabama.** His new address is Office of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama 36130. Phone (205) 261-7300.

■

Lauren L. Becker announces the opening of her practice under the name of **Law Offices of Lauren L. Becker,** at Suite 205, LaVista Center, 1535 LaVista Road, N.E., Atlanta, Georgia 30329. Phone (404) 634-3835.

■

James M. Scroggins announces the opening of his practice of law at 98 Office Park-Suite C, Daphne, Alabama. The mailing address is P.O. Box 2250, Daphne, Alabama 36526. Phone (205) 626-7725.

■

Donna E. Baggett announces the relocation of her office to Seventh Floor, Watts Building, 2008 Third Avenue, North, Birmingham, Alabama 35203. Phone (205) 328-6869.

■

Thomas E. Baddley announces the opening of his office at 229 Roebuck Plaza Drive, Suite 205, Birmingham, Alabama 35206. Phone (205) 833-4566.

■

Boyd F. Campbell announces the opening of his office at 606 South Perry Street, Montgomery, Alabama 36104. Phone (205) 265-8671.

■

Roger M. Monroe announces the relocation of his office to 315 Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 324-4444.

■

David Elliott Hodges announces the opening of his new office located at 2200 City Federal Building, Birmingham, Alabama 35203. Phone (205) 328-9000.

AMONG FIRMS

David A. Garfinkel was admitted to the Florida Bar September 21, 1988. He is associated with the firm of **Datz, Jacobson & Lembcke** with offices located at 2902 Independent Square, Jacksonville, Florida 32202. Phone (904) 355-5467.

■

Richard M. Jordan and **Randy Myers** announce the formation of a professional corporation for the practice of law in the name of **Richard Jordan & Randy Myers, P.C.,** with offices at 302 Alabama Street, Montgomery, Alabama 36104. Phone (205) 265-4561.

■

Beasley, Wilson, Allen & Mendelsohn, P.C. of Montgomery announces that **Mays R. Jemison** has become a member of the firm, and the firm's name has been changed to **Beasley, Wilson, Allen, Mendelsohn & Jemison, P.C.** and that **Thomas J. Methvin** has become associated with the firm.

■

The firm of **Lyons, Pipes & Cook** announces that **Stephen D. Springer, William E. Shreve, Jr., James Rebarchak** and **R. Mark Kirkpatrick** have become associated with the firm, with offices at 2 North Royal Street, Mobile, Alabama 36602. Phone (205) 432-4481.

■

Harvey B. Morris, Charles R. Smith, Jr., Thomas H. Siniard, Joseph M. Cloud and **Douglas J. Fees** announce the formation of **Morris, Smith, Siniard, Cloud & Fees, P.C.** effective August 1, 1988. Offices are located at 300 Clinton Street, West, Alabama Federal Bank Building, Huntsville, Alabama. Phone (205) 534-0065.

■

Ralph W. Hornsby, David H. Meginniss and **S.A. Watson, Jr.,** announce the formation of the firm of **Hornsby, Watson & Meginnis,** at Suite 133, Park Plaza, 303 Williams Avenue, Huntsville, Alabama 35801. Phone (205) 539-9300.

■

The firm of **Hampe, Dillard & Ferguson** announces that **Leslie Ramsey Barineau** has been made a partner of the firm, with offices at Suite 331, Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 251-2823.

■

Warren S. Reese, Jr., of **Reese & Reese, Eugene W. Reese** and **William F. Addison** of **Reese & Addison** and **Elna Reese** and **Tom Wright** of **Reese & Wright** announce the relocation of their offices to 339 Dexter Avenue, Montgomery, Alabama 36104.

■

Stone, Granade, Crosby & Blackburn, P.C. announce that **George R. Irvine, III,** has become associated with the firm, with the office mailing address at P.O. Drawer 1509, Bay Minette, Alabama 36507.

■

Charles R. Stephens and **G. Warren Laird, Jr.,** announce the formation of a partnership under the name of **Stephens & Laird,** with offices at 107 East 18th Street, P.O. Box 1493, Jasper, Alabama 35502. Phone (205) 221-4383.

Robert Wyeth Lee, Jr., and **G. Thomas Sullivan** announce the formation of a partnership and the opening of their office at 310 North 21st Street, 3rd Floor, Birmingham, Alabama 35203. Phone (205) 323-1061.

■

Fairfield, Farrow, Hunt, Reecer & Strotz announce that **R.R. Flowers, Jr.,** formerly an attorney with the office of the Judge Advocate General of the United States Air Force, has become associated with the firm. Offices are located at Union Square, 111 Gold Avenue, Southeast, Albuquerque, New Mexico.

■

Coale, Helmsing, Lyons & Sims announces that the name has been changed to **Coale, Helmsing, Lyons, Sims & Leach,** and that **John M. Green, John J. Crowley, Jr., Joseph D. Steadman** and **Joseph P. H. Babington** have become associates. The office mailing address is P.O. Box 2767, Mobile, Alabama 36652. Phone (205) 432-5521.

■

Haynsworth, Baldwin, Miles, Johnson, Greaves & Edwards, P.A. and **Haynsworth, Baldwin, Miles, Johnson & Harper** announce that **W. Melvin Haas, III,** has joined the firm as resident partner in the new Macon, Georgia, office, located at 484 Mulberry Street, Suite 560, Macon, Georgia 31202-1975. Phone (912) 746-0262.

■

Michael Bryant Wingo announces that he now is a member of the firm of **Simmermon & Morgan,** located at 444 Seabreeze Boulevard, Suite 445, Daytona Beach, Florida 32018. Phone (904) 253-0040.

■

Hare, Wynn, Newell & Newton announces that **Patrick M. Lavette** has become an associate, with offices located at 7th Floor, City Federal Building, Birmingham, Alabama 35203-3709. Phone (205) 328-5330.

■

Morris & Vann announces that **Cindee Dale Holmes** has become associated with the firm located at 1707 City Federal Building, Birmingham, Alabama 35203. Phone (205) 254-3885.

■

Ford, Caldwell, Ford & Payne and **Lanier & Shaver, P.C.** announce the consolidation of the firms under the name **Lanier, Ford, Shaver & Payne, P.C.**

■

The firm of **Watson, Gammons & Fees, P.C.** announces that **Richard Dwayne Mink** has become associated with the firm. Offices are located at 107 North Side Square, Huntsville, Alabama 35801. Phone (205) 536-7423.

■

The firm of **Bryant & de Juan** announces that **Rosemary de Juan** has married and changed her name to **Rosemary de Juan Chambers;** therefore, the firm now will be known as **Bryant & Chambers,** with offices at Suite 1107, Riverview Plaza, 63 South Royal Street, Mobile, Alabama. Phone (205) 432-4671.

■

The offices of **G. Daniel Evans** announce the association of **K. Edward Sexton, II,** with offices located at 1736 Oxmoor Road, Birmingham, Alabama. Phone (205) 870-1970.

■

The firm of **Pittman, Hooks, Marsh, Dutton & Hollis, P.C.** announces that **J. Glenn McElroy** and **Archie C. Lamb, Jr.,** have become associated with the firm. Offices are located at Suite 800, Park Place Tower, 2001 Park Place North, Birmingham, Alabama 35203. Phone (205) 322-8880.

■

The firm of **Shelby & Cartee** announces that **Jonathan W. Cartee** has become an associate of the firm. Offices are located at 2958 Rhodes Circle, Birmingham, Alabama 35205, phone (205) 933-8383, and Suite 322, Alabama Federal Building, Tuscaloosa, Alabama 35401. Phone (205) 759-1554.

■

The firm of **Tanner, Guin, Ely, Lary & Neiswender, P.C.** announces that **Bert M. Guy** has become an associate of the firm, with offices located at 2711 University Boulevard, Suite 700, Capitol Park Center, Tuscaloosa, Alabama 35401.

■

Peters & Lockett, P.C. announces that **A. Joan Connolly** has become associated with the firm. Offices are located at 160 South Cedar Street, P.O. Drawer 1129, Mobile, Alabama 36633. Phone (205) 432-3700.

■

Frank Leon announces the relocation of his practice of law to the firm of **Drinkard, Sherling & York,** 1070 Government Street, Mobile, Alabama 36604. Phone (205) 432-3531.

■

The firm of **Merrill & Harrison** announces that **Gary A. Hudgins** has become a partner, which will continue under the name of **Merrill, Harrison & Hudgins.** Offices are located at 119 South Oates Street, Dothan, Alabama 36301. Phone (205) 792-0061.

■

The firm of **Conrad, Hammond & Barlar** announces that **Ann B. Curtright** has become an associate. The mailing address is P.O. Box 3045, Mobile, Alabama 36652. Phone (205) 433-3968.

■

Kaufman, Rothfeder & Blitz, P.C. announces that **Simeon F. Penton** has joined the firm, with offices at One Court Square, Montgomery, Alabama 36104. Phone (205) 834-1111.

■

Wilson & King announces that **D. Michael Sawyer,** formerly law clerk to the Honorable Arthur J. Hanes, Jr., has become associated with the firm. Offices are located at 1816 Bankhead-Byars Building, Jasper, Alabama 35501, phone (205) 221-4640, and 1905 14th Avenue, South, Birmingham, Alabama 35205, phone (205) 930-9830.

■

Reams, Vollmer, Philips, Killion, Brooks & Schell, P.C. announces that **A. Lewis Philips, III,** has become associated with the firm. Offices are lo-

cated at the Pillans-Roberts Building, 3662 Dauphin Street, Mobile, Alabama. Phone (205) 344-4721.

■

Julian B. Brackin, Jr., and **Thomas O. Bear** announce the formation of the firm of **Brackin & Bear.** The mailing address is P.O. Box 899, Foley, Alabama 36536, and the office address is 201 North Alston Street, Foley, Alabama 36535. Phone (205) 943-4040.

■

The firm of **Patterson & Jester** announces that **Robert Willson Jenkins** has become associated with the firm. Offices are located at 117 Mobile Plaza, Florence, Alabama 35630. Phone (205) 764-3941.

■

Najjar, Denaburg, Meyerson, Zarzaur, Max, Wright & Schwartz, P.C., 2125 Morris Avenue, Birmingham, Alabama, announces that **Robert H. Adams, Jr.,** has become a member of the firm, and **W. James Ellison, Michael G. Graffeo** and **Allan L. Armstrong** have become associated with the firm. Offices are located at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 250-8400.

■

R. Michael Leonard has become a partner in the firm of **Womble, Carlyle, Sandridge & Rice** at its Winston-Salem, North Carolina, office. Offices are located at 1600 One Triad Park, 200 West Second Street, Winston-Salem, North Carolina 27102. Phone (919) 721-3600. ■

—NOTICE—

Alabama Hospital Law Manual

The Alabama Hospital Association is contemplating updating the 1982 *Alabama Hospital Law Manual,* a comprehensive manual relating to various laws and regulations governing a wide range of health-related areas. This manual includes chapters on licensure, taxation, certificate of need, organization of hospital authorities and boards, and programs for indigents, physicians, pharmacists and other occupations.

Since 1982, there have been a number of new health-related statutes passed by the Alabama Legislature, as well as a number of amendments. For example, the Health Care Authorities Act has been amended, the vital statistics laws have been amended and comprehensive malpractice legislation was passed last year. With this in mind, the Alabama Hospital Association may undertake to publish the manual in a new edition, if enough purchase commitments are made.

For more information regarding orders and costs,
contact Frank Williford at (205) 272-8781 or 1-800-392-5831.

A Survey of Alabama Law Pertaining to Closing Arguments

by Benjamen T. Rowe
and William H. Pryor, Jr.

Introduction

There is a widely accepted belief that closing arguments in Alabama are subject to no restrictions, other perhaps than those pertaining to Rassle Royals and Texas Death Matches, and arguments routinely proceed accordingly. Too many lawyers, being ignorant of the law or expecting their efforts to be fruitless, do not object to the most flagrantly inappropriate comments, and when objections are made too often they are dismissed with the all-purpose response, "It's argument, I'll allow it." In fact, there is a vast volume of Alabama law dealing with closing argument. It could be improved. It is sometimes contradictory and confusing, but it exists and provides a reasonably clear—and strict—set of rules for conducting argument.

This article addresses 13 common types of improper arguments and contains a guide to dealing with them in court. The authors' primary purpose is to provide examples of these arguments and show how Alabama courts have dealt with them. We do not attempt to reconcile these cases, many of which are simply irreconcilable, and detailed criticism of caselaw is not our purpose. Instead, this survey is offered as a practical tool for practitioners.[1]

Trials should be conducted to resolve disputes on a basis approximating justice as nearly as possible, and to impress participants and observers with a sense of the dignity and majesty of the law and the legal process. For these reasons, among others, we employ strict evidentiary rules for the conduct of trials. There is little point in employing these rules during trial, however, if the courtroom is to be transformed into a free-fire zone for closing argument, where justice and respect for the law can hardly be more ill-served. Judge Gewin's advice on this issue is worth repeating:

> "Trials are rarely, if ever, perfect, but gross imperfections should not go unnoticed. In every case involving improper argument of counsel we are confronted with relativity and the degree to which such conduct may have affected the substantial rights of [a party]. It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'"

Dunn v. United States, 307 F2d 883, 886 (5th Cir. 1962).

> Over 100 years ago, Justice Stone of the Alabama Supreme Court said: "It is one of the highest judicial functions, to see the law impartially administered, and to prevent, as far as possible, all improper, extraneous influences from finding their way into the jury-box."

Wolffe v. Minnis, 74 Ala. 386, 389 (1883). This statement is an appropriate introduction to a survey of the law of closing arguments in Alabama.

I. A baker's dozen improper arguments

We have divided examples of frequently repeated improper arguments into 13 traditional, but necessarily subjective, categories. Not surprisingly, most have to do with money. These include references to the wealth or poverty of litigants, the financial interests of jurors, the availability of insurance, the nature of corporations and irrelevant factors regarding damages. Others seek to capitalize on jury sympathies and prejudices. Some are plain attempts to subvert judicial rules. In each instance, Alabama caselaw provides numerous and often colorful examples.

A. Comments on wealth and poverty

References to a party's financial status are improper. "[L]iability for damages . . . must validly be determined by the rules of legal liability applicable, and not [by] the economic condition of either party." *Allison v. Acton-Etheridge Coal Co., Inc.*, 289 Ala. 443, 447, 268 So.2d 725, 729 (1972). Examples are nearly endless in the Alabama cases. An obviously improper reference to a party's financial status follows:

> "I represent county people and poor people before the jury, and Mr. Dominick, the defendant's lawyer, represents corporations; and, in the five years of my practice at the Columbiana Bar I have always been representing poor people. * * * I represent widows and orphans before this Court, and the gentleman on the other side represents great companies."

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Alabama Fuel & Iron Co. v. Bennante, 11 Ala.App. 644, 648, 66 So. 942, 943 (1914). Another clearly improper argument is found in *Horton v. Continental Volkswagen*, 382 So.2d 551, 552 (1980):

> "Now we expect the evidence to show, ladies and gentlemen of the jury, that [the defendant] Continental Volkswagen, a small private domestic corporation, owned by Mr. William R. Alford—
>
> "I expect the evidence to show that he is the sole owner of that business."

See also *Holt v. State Farm Mut. Auto. Ins. Co.*, 507 So.2d 388, 391 (Ala. 1986), where the supreme court reversed on the basis of defense counsel's argument that verdicts based on sympathy rather than "the facts" would drive insurance companies out of business.

In *Landers v. Long*, 53 Ala.App. 340, 300 So.2d 112, 114 (1974), the trial court committed reversible error in overruling an objection to this question by the plaintiff's counsel to his client, "[Y]ou are a poor man?" The court in *Pryor v. Limestone County*, 225 Ala. 540, 540, 144 So. 18, 18 (1932), held, notwithstanding that the trial court had sustained an objection to the offending language and instructed the jury not to consider it, that argument that "these rich little children have no complaint against Limestone County" was "of that character which is so poisonous and improper as to be almost immune from eradication."

In *Liberty National Life Insurance Co. v. Kendrick*, 282 Ala. 227, 230, 210 So.2d 701 (1968), the court reversed where counsel remarked that, "Liberty National is a very wealthy company; a man stole a million dollars up there a week ago." In *Metropolitan Life Ins. Co. v. Carter*, 212 Ala. 212, 213, 102 So. 130, 131 (1924), the court reversed where counsel argued that if the jury gave the plaintiff "every nickel claimed . . . it would not hurt this defendant," notwithstanding the trial court's sustaining of an objection to that argument. And in *American Ry. Express Co. v. Reid*, 216 Ala. 479, 484, 113 So. 507, 510 (1927), where counsel argued that the amount awarded "doesn't make any difference to the American Express Company . . . they will still be running Georgiana," the court reversed, notwithstanding the "withdrawal of the argument." In *Hartford Fire Ins. Co. v. Armstrong*, 219 Ala. 208, 121 So. 914 (1929), the court reversed on the basis of a reference to the defendant's lending and collecting money. In *Taylor v. Brownell-O'Hear Pontiac Co.*, 265 Ala. 468, 469, 91 So. 828 828 (1957), the court affirmed the trial court's granting of a new trial where counsel had argued, "We are after somebody that can pay." See also *Ashbee v. Brock*, 510 So.2d 214, 216 (Ala. 1987) (where the "trial court properly exercised its discretion in prohibiting plaintiff's counsel from arguing that the jury was not to consider how the defendant would satisfy any judgment"). In *Jackson Lumber Co. v. Trammell*, 199 Ala. 536, 74 So. 469 (1917), the court reversed where the trial court had declined to grant a new trial notwithstanding references to the defendant as a large and powerful corporation and to the plaintiff as a poor man.

References to financial status can be improper even when they are based on facts contained in the record. In *Allison v. Acton-Etheridge Coal Co.*, 289 Ala. 443, 446, 268 So.2d 725, 727 (1972), the court held the following remark by defense counsel to be improper and reversed: "It's a great thing, folks, to be a very wealthy man and to be able to go out and hire two law firms with four lawyers." It did not matter that the plaintiff was in fact a wealthy man and that his earnings had been put into evidence to prove his loss of income. In *Otis Elevator Co. v. Stallworth*, 474 So.2d 82 (Ala. 1985), the remark that the defendant could afford to hire an expert in 100 cases warranted reversal even though the

record showed that one of its experts had in fact been hired by the defendant in 100 cases. Compare these cases with *Windham v. Newton*, 200 Ala. 258, 259, 76 So. 24, 25 (1917), in which the court said, "[P]arties have a right to try their causes on illegal evidence if they so desire, and if they try it on such evidence, counsel have a right to argue it . . . ."

The Alabama courts very often have held this type argument to be ineradicable. *See, e.g., Watts v. Epsy*, 211 Ala. 502, 503, 101 So. 106, 107 (1924) (statement that "defendant was a popular, wealthy man who did not go to see whether the plaintiff was dead or alive and left her lying there like a dog" not eradicated by retraction, sustaining of objection and rebuke of court); *Pryor v. Limestone County*, 225 Ala. 540, 144 So. 18 (1932) (see above); *Birmingham Water Works Co. v. Williams*, 228 Ala. 288, 289, 153 So. 268, 268 (1933) (references to the poverty of the plaintiff, the power of the defendant and the irrelevant fact of the defendant's cutting off of water to its customers was "of that class of argument that cannot be eradicated"). *But see, e.g., Daniel Construction Co. v. Pierce*, 270 Ala. 522, 530, 120 So.2d 381, 387 (1959) (where the court deemed eradicable the argument that the defendant company was saying that a poor man's son should not recover and that "if the jury brings out a verdict less that [sic] $50,000 it wouldn't be any more than a mosquito bite to this defendant"); *Geer Brothers, Inc. v. Mary J. Walker*, 416 So.2d 1045, 1048-49 (Ala.Civ.App. 1982) (references to the plaintiff as a "widow lady" who lived in a mobile home with a retarded son held not to be beyond the "curative powers" of the trial court); *Blount Brothers Construction Co. v. Rose*, 274 Ala. 429, 439, 149 So.2d 821, 832 (1962) (statement that a $25,000 verdict "would not be a slap on the leg" held eradicated). "[T]he interjection of wealth into a trial . . . is not per se ineradicable . . . Each case must be decided in light of the peculiar facts and circumstances involved . . . ." *General Finance Corp. v. Smith*, 505 So.2d 1045, 1049 (Ala. 1987).

B. Insurance

"It is a general rule of long-standing that it is error to introduce the fact of liability insurance to show that a party will not have to pay the judgment." *Eathorne v. State Farm Mut. Auto. Ins. Co.*, 404 So.2d 682, 683 (Ala 1981). It is error to allow "testimony to show, or tending to show, that defendant was indemnified in the premises, in any degree or fashion, by an insurance company." *Colquett v. Williams*, 264 Ala. 214, 222, 86 So.2d 381, 387 (1956) *quoting Standridge v. Martin*, 203 Ala. 486, 486, 84 So. 266, 267 (1919). Moreover, evidence that a "plaintiff has [already] received insurance benefits for his injuries is prejudicial to his case and should not be admitted." *Mathews v. Tuscaloosa County*, 421 So.2d 98, 100 (Ala. 1982), *quoting Jones v. Crawford*, 361 So.2d 518, 521 (Ala. 1978). In short, any argument of counsel regarding the availability of insurance is entirely improper, but see *Ala. Code* §12-21-45 (Supp. 1988), which provides that evidence that medical bills have been or will be paid is competent.

The policy of this rule is clear. As stated in *Standridge v. Martin*, 203 Ala. 486, 486-87, 84 So. 266, 267 (1919):

> "There can scarcely be made to a jury a more seductive and insidious suggestion than that a verdict for damages . . . will be visited, not upon [the] defendant, but upon some invisible corporation whose business it is to stand for and pay such damages."

A statement that "[h]e said if I would turn it over to the insurance, they would pay for it" is objectionable, *Lloyd Noland Foundation, Inc. v. Harris*, 295 Ala. 63, 67, 322 So 2d 709, 712 (Ala. 1975), as are the statements by counsel in closing that, "We have also dismissed as to Mr. Ritchie. We don't want to penalize Mr. Ritchie. We are after somebody that can pay." *Taylor v. Brownell-O'Hear Pontiac Co.*, 265 Ala. 468, 469, 91 So.2d 828, 828 (1956). And, "[W]ouldn't you feel that the people you paid to protect you should take care of this child in some way." *Colquett v. Williams*, 264 Ala. 214, 221, 86 So.2d 381, 387 (1956). And, "I don't ask you to hurt anybody and you won't. You return fair compensation to her and that is $200,000.00. You won't hurt anyone." *Prescott v. Martin*, 331 So.2d 240, 246 (Ala. 1976).

When the defendant's counsel argued, however, that the defendant might have to pay the plaintiff damages, the following statement was not held improper: "If he wants to go into where the money comes from, we will meet him on it." *Alabama Power Company v. Smith*, 273 Ala. 509, 524, 142 So.2d 228, 243 (1962). In *Mathews v. Tuscaloosa County*, 421 So.2d 98 (Ala. 1982), however, a similar rebuttal argument apparently was disallowed. *See also Colquett v. Williams*, 264 Ala. 214, 86 So.2d 381 (1956); *Lloyd Noland Foundation, Inc. v. Harris*, 295 Ala. 63, 67, 322 So.2d 709, 712 (Ala. 1975) ("what's good for the goose is good for the gander").

The court in *Parker v. Williams*, 267 Ala. 12, 15, 99 So.2d 210, 212-213 (1957), offered the following guidance:

> "There is a principle in this connection that if counsel voluntarily and without legal right injects into the case the fact of insurance carried by his opponent it may be the cause for granting a new trial although no motion or objection was made as to it at the time of its occurrence. To insist upon and argue such a matter at that time would tend to magnify the fact in the estimation of the jury. It would therefore seem appropriate to wait and make a motion for a new trial if the verdict is adverse

and have that as one of the grounds. That would justify a consideration of the question on its merits as to whether it was injected into the trial without any necessity therefor and voluntarily by counsel in order to prejudice the case against the defendant. In determining that question the whole situation must be considered in order to find whether counsel has voluntarily injected into the case matter which is prejudicial and ineradicable . . . ."

In *Thomas v. Ware*, 44 Ala.App. 157, 204 So.2d 501, 504 (1967), however, where the plaintiff "in a volunteered unresponsive remark" testified that he was "under the impression that Mr. Thomas' insurance was going to pay for it," the court of appeals held that the trial court had not erred in refusing to grant a mistrial although "[a] motion to exclude or strike would have been well-put." The court explained that "not all such references are beyond remedy on a proper instruction." See also *Prescott v. Martin*, 331 So.2d 240, 246 (Ala. 1976); *Cooper v. Bishop Freeman Co.*, 495 So.2d 559 (Ala. 1986).

Although it is unclear whether a single reference to insurance is ineradicable, certainly repeated references are highly improper and almost certain to lead to reversal. *See Colquett v. Williams*, 264 Ala. 214, 222, 86 So.2d 381, 388 (1956) ("neither retraction nor rebuke would have destroyed the strongly prejudicial suggestions that it was an insurance company . . . who should and would have to pay"); *Somach v. Norris*, 361 So.2d 1005, 1008 (Ala. 1978) ("this case has to be reversed so that it can be tried in an atmosphere free of the prejudicial influence of insurance").

Improper arguments in this area do not have to be in reference to an "insurance" agreement per se. References to an indemnity agreement or any other suggestion that the opposing party will not have to pay a judgment is improper. *Robins Engineering, Inc. v. Cockrell*, 354 So.2d 1 (Ala. 1977).

There are, of course, exceptions to the rule against references to an insurance agreement. For example, "a defendant's mentioning his liability insurance is not inadmissible if it is associated with or interwoven with another part of his statement admitting fault, so as to be inseparable." *Crump v. Geer Brothers, Inc.*, 336 So.2d 1091, 1096 (Ala. 1976) (the alleged statement: "I am personally covered with insurance to cover my errors"). And, "One may make reference to an insurance carrier for the purpose of showing the fact that the witness has been retained by the carrier for the purpose of preparing evidence to be used in the case." *Calloway v. Lemley*, 382 So.2d 40, 543 (Ala. 1980).

C. Corporations

Corporations are tempting targets and improper arguments concerning them come in a variety of forms. References to corporations as "soulless" entities are an old tactic. In *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 573, 1 So. 202, 204 (1887), the Alabama Supreme Court reversed where the trial court had overruled an objection to the following argument:

> ". . . the court . . . permitted plaintiffs' counsel in his concluding argument to say to the jury, 'that the ancestry (naming them) of plaintiffs were well-known to counsel, and to every one else who lived in the community with them; that their honor, integrity, honesty, and

truthfulness, and that of their descendants, had never been called in question *until this soulless corporation*, defendant in this case, had charged one of their descendants, Ben. Lee Allen, with falsehood, fraud and misrepresentation in procuring the policy of insurance in this case." (emphasis added)

More recently, in *Southern Life & Health Ins. v. Smith*, 518 So.2d 77, 80 (Ala. 1987), the court stated that it was improper and highly prejudicial for an attorney to make the following argument: "A corporation, like I said, is a legal entity . . . but it's not a human being. It has no conscience." However, because the trial court had sustained an objection to these remarks and offered to give curative instructions, the court held that reversal was not mandated.

Perhaps the most blatant–and famous–example of this type argument occurred in *Chrysler Corporation v. Hassell*, 291 Ala. 167, 272, 280 So.2d 102, 106 (1973):

> "This is what this lawsuit is all about. Let me tell you something about this corporation, lady and gentlemen. They keep talking about Mr. Preuitt, Mr. Preuitt, Mr. Preuitt. Jim Preuitt, as an individual, is not being sued. We have got two corporations here in this case. Jim Preuitt Chrysler Corporation and the Chrysler Corporation in Detroit. Think just a minute about what a corporation is, if you will.
>
> "You are people, I am people, Mr. Hassell is people. You have got blood running through your veins and you have got a heart beating. If you stick your finger, you bleed. One of these days, it may be tomorrow or it may be years from now, but you *are* every one going to die. I'm going to die and Mr. Hassell is going to die.
>
> * * *
>
> "And lady and gentlemen, when you die and I die, we are going to face the same Maker. We are going to answer for what we did on this earth. I'm going to answer for what I did. Let me tell you something, lady and gentlemen. A corporation has no heart, it has got no soul. It has got no fear of Hell and Damnation in the hereafter."

The supreme court reversed on other grounds, but "for guidance in the event of another trial" said, "[T]his argument was improper, highly prejudicial and not relevant to any issues in the case. A corporation is entitled to fair and equal treatment if it is a party to litigation." *Id.*, 291 Ala. at 273, 280 So.2d at 106. *See also Alabama Electric Co-Operative, Inc. v. Partridge*, 284 Ala. 442, 447, 225 So.2d 848, 852 (1969) ('Employers Mutual of Wausau is not a person, they don't have blood in their veins, and you can't cut them and hurt them'); *Gordon v. Nall*, 379 So.2d 585, 586 (Ala. 1980) ("It doesn't have a soul, it has a board of directors").

Other cases concern improper statements about the conduct or methods of corporations. These arguments frequently involve assertions or implications that witnesses who are corporate employees will lose their jobs if they testify adversely to the company. For example, "'if defendant's employees were guilty of negligence and came into court and admitted it, they would lose their jobs" was deemed to have "passed the bounds of legitimate argument" in *Louisville & N.R. Co. v. Cunningham Hardware Co.*, 213 Ala. 252, 255, 104 So. 433, 435 (1925). *See also Louisville & Nashville Railroad Co. v. Wade*, 280 Ala. 453, 195 So.2d 101 (1967) (concerning a statement that the presence of bosses in the courtroom was intended to intimidate employee witnesses); *American Rubber Corp. v. Jolley*, 260 Ala. 600, 605, 72 So.2d 102, 106 (1954) ("if you told it, you would lose your job"); *Birmingham Electric Co. v. Cleveland*, 216 Ala. 455, 462, 113 So. 403, 408 (1927) (conductor and motorman who allegedly injured boy on car "are not going to let it be known" since "they are not going to lose their jobs").

In *Louisville & N.R. Co. v. Mason*, 10 Ala.App. 263, 271, 64 So. 154, 157 (1914), the following argument was deemed "highly improper":

> "If you reach a verdict by making it in that way [by quotient], as soon as the jury room is cleared, where you have been, there will be somebody there picking up scraps of paper to see if there is a quotient verdict, and, if they find anything there that looks like that, they will bring it in, and have it set aside, so, when you go and get a verdict for this plaintiff, or any other plaintiff in this state, against a corporation, you have to guard against everything."

The court refused to reverse, however, because "it does not appear that the ruling of the trial court with respect thereto were promptly invoked." *Id.*, 64 So. at 157.

In *Moore v. Crow*, 267 Ala. 325, 328, 101 So.2d 321, 323 (1958), the trial court overruled objections to the following:

> "Are we going to let the loan companies in Jefferson County like the Acme Loan Company take even one of us and throw us in jail for a civil debt and make us undergo the rigors and tortures of the damned?"

The supreme court reversed, saying that "we think substantial prejudice . . . resulted" and that "overruling the defendant's objections tended to put the court's stamp of approval upon such argument." *Id.*

D. Appeals to the financial interests of jurors

It is improper for counsel to appeal to the jurors' financial interests. In *Williams v. City of Anniston*, 257 Ala. 191, 192, 58 So.2d 115, 116 (1952), the trial court failed to sustain an objection to the following improper argument:

> "If the plaintiff is given a verdict, where will the money come from? It will come out of the city treasury. The city has no money of its own. The only money which it has is money which it gets from taxes. All the improvements, including this courthouse we're in, have to be paid for out of taxes. Taxes are used to build the streets and the schools. All city improvements call for taxes. Our money must go for those things. And if the plaintiff is given a verdict the money will have to come out of taxes."

The supreme court reversed since, "[i]n effect counsel for the defendant told the members of the jury that if they gave the plaintiff a verdict, they were taking the money out of their own pockets." *Id. See also Badger v. Hollon*, 27 Ala.App. 534, 175 So. 700 (1937).

In *Lawrence v. Alabama Power Co.*, 385 So.2d 986, 987 (1980), defense counsel made the following appeal to the juror's financial interests as utility customers:

> "In other words, the plaintiff must prove that [negligence] and if he has not, then you can not return a verdict in his favor. And that's sometimes not an easy thing, and I know that it's not an easy thing in this case. The easy thing would be [to] say, 'Okay, we feel sorry for these people and therefore we're going to return a verdict against the Power Company. They can afford to pay it.' And that's true, and *the* rates will be passed on, because it's a public utility, and the rates are based on the expenses, and it'll be passed on, but you are the law in this case, and so you have to answer the question today."

On appeal by the plaintiffs, the supreme court declined to reverse because no objection had been made and the court was "simply unable to conclude that the remarks cited when considered along with the entire trial [described as low-key and straightforward] were 'so grossly improper' and 'highly prejudicial' that [their] evil influence and effect [were] ineradicable . . . by proper admonition." *Id.*, 385 So.2d at 988. *See also Holt v. State Farm Mut. Auto. Ins. Co.*, 507 So.2d 388, 391 (Ala. 1986), in which the supreme court reversed where the trial court had overruled an objection to the following argument:

> "I submit to you that if you base—or juries base—their verdicts in a case like this purely out of sympathy for the defendants, not on the basis of the facts, that insurance companies will soon go out of business."

The court classified this argument as a reference to the wealth or poverty of a litigant, but the remark clearly could have been construed as an appeal to the jurors' interests as insureds.

E. Appeals to passion and sympathy

An appeal to the sympathy or passion of a jury is improper. An improper, though eradicated, appeal to a jury's sympathy was made in *Mobile Light & R.R. Co. v. Gallasch*, 210 Ala. 219, 220, 97 So. 733, 734 (1923), where "[T]he attorney for the plaintiff in his closing argument to the jury stated to the jury . . . that the plaintiff was a mother and a wife and remarked that the jury knew what a mother meant to a home and urged the jury to increase her damages on account thereof." *See also Life & Casualty Ins. Co. v. Bell*, 235 Ala. 548, 552, 180 So. 573, 576 (1938) (reference to plaintiff as "that depressing figure" improper but eradicated); *Alabama Power Co. v. Bowers*, 252 Ala. 49, 53, 39 So.2d 402, 405 (1949) (reference to father kneeling by son "dying in his own blood" improper though eradicated).

An improper appeal to the passion of a jury was made in *Birmingham Electric Co. v. McQueen*, 253 Ala. 395, 401, 44 So.2d 598, 603 (1950), where plaintiff's counsel stated:

> "I was surprised when I found out that he wasn't killed. I will tell you, gentlemen, you go out there and do your duty and render a verdict for the amount which we are asking for in that complaint and you will serve your country here and you will stop the headlines of the papers in Birmingham and other papers of people killed and run over by street cars in Birmingham."

The harmful effect of this argument again was held to have been eradicated by the trial court's prompt and very emphatic instructions.

The line between proper and improper arguments in this area is a fine one. In *Birmingham Electric Co. v. Cleveland*, 216 Ala. 455, 462, 113 So. 403, 408 (1927), the court said:

> "The court cannot too narrowly circumscribe the scope and latitude of argument. Counsel must be allowed, within limits, to draw their own conclusions and to express their arguments in their own way, provided, of course, they do not travel out of the record or make use of unfair means to create prejudice in the minds of the jury."

When "counsel stated to the jury that defendant had scoured the records of

every doctor's office in the county to get something on plaintiff, and also plaintiff was as sweet as a ten-cent bottle of Hoyt's cologne as long as he was paying in, but as soon as he got sick he was as offensive as a polecat to the company," the court thought, "While the statements of counsel in argument might be termed rather extravagant, they are not wholly unsupported by the evidence." *National Life Insurance Co. of America v. Hedgecoth*, 16 Ala.App. 272, 273, 77 So. 422, 422-23 (1917). In *White v. White*, 33 Ala.App. 403, 34 So.2d 182, 183 (1948), counsel's reference to his client (who was suing to collect a debt) as an "afflicted [handicapped] sister" did not require reversal since "the jury was privileged to observe her condition" and "counsel could make comment in argument on this evidential fact." Nor did the supreme court reverse where counsel made the following remark in a medical malpractice suit:

> "Gentlemen of the jury, you should not show to the defendant any more consideration on this trial than he showed to [the Plaintiff] when he took that big steel instrument and rammed it into [the plaintiff's] penis and gouged a hole in it."

Piper v. Halford, 247 Ala. 530, 531, 25 So.2d 264, 265 (1946) ('The argument of counsel . . . merely was an emphatic way of stating plaintiff's contention . . . "). See also *Wayland Distributing Co. v. Gay*, 287 Ala. 447, 454, 252 So.2d 414, 421 (1971), where the court held that an invitation to the jury to consider that "a man has been wiped off the earth and his family cut in half" was not so inflammatory as to require reversal where the trial court had overruled objections but charged the jury against deciding the case on the basis of sympathy. And see *Windham v. Newton*, 200 Ala. 258, 259, 76 So. 24, 25 (1917), where the remark, "Why, these men considered it a trifling thing for the boy to have his leg crushed" was "justified" by "the evidence, the issues, or the testimony."

The following remarks by counsel were allowed, over objections, in a wrongful death case:

> "I was thinking of the beginning of Longfellow's poem, 'The Reaper.' I was thinking that in connection, gentlemen, 'There is a Reaper whose name is Death, and with his cycle keen, he cuts the bearded grain in a breath and flowers that grow between.' And here was a 19-year-old flower, and as human beings, we have the losses in life, but you go through a bureau drawer, and you will have in it a few Kodak pictures and a book, and a watch he used to wear, little scraps of maybe a particular shirt he was proud of. That is his bureau drawer. He is gone, he is living in a mount under a mountain on a hillside, but you can go and open that drawer and look at the letters he used to write, and the pictures of his friends he used to take, and you can think of how he used to come in and kiss his mother and add joy and delight and brightness to the home."

Southern Railway Co. v. Jarvis, 266 Ala. 440, 445, 97 So.2d 549, 553 (1957). Incredibly, the court on appeal declined to reverse since the remarks were made as an "illustration" and not as an assertion of fact.

Still, such appeals to passion or sympathy are fraught with peril. The following remarks of counsel in his opening statement were held improper: "Now this accident happened back in January 1968 * * * when Susan Swan was killed * * * [H]er daddy, Col. Swan, was flying combat in Southeast Asia." *Magnusson v. Swan*, 291 Ala. 151, 153-54, 279 So.2d 433, 423 (1973) (eradicated by prompt instruction to jury). And a plaintiff's counsel's reference to his client as a "poor, crippled Veteran" was held improper, though eradicated by a very strong response from the trial court, in *American Rubber Corp. v. Jolley*, 260 Ala. 600, 605, 72 So.2d 102, 107 (1954). In *Britling Cafeteria Co. v. Shotts*, 230 Ala. 597, 597, 162 So. 378, 378 (1935), where the trial court overruled an objection "to that portion of the argument of plaintiff's counsel wherein he stated that the plaintiff was a poor country boy come to town from Franklin County," the supreme court reversed, saying:

> "The natural tendency is to create prejudice and the argument must be accorded 'just that purpose which its author intended it should serve—nothing less.' * * * [I]f it be said that reversal of the judgment in such cases may work a hardship upon appellee, it results from the conduct of him who stands as his sponsor in the trial. We know of no more effective way of repressing the wrong and maintaining the integrity of the profession in the administration of the law."

Alabama "decisions are to the effect that though a fact may be in the proof, yet this would not justify an undue use thereof in order to arouse sympathy or prejudice." *New Employees' Benevolent Soc. v. Agricola*, 240 Ala. 668, 676, 200 So. 748, 755 (1941), citing *Birmingham Electric Co. v. Mann*, 226 Ala. 379, 147 So. 165 (1933).

F. Invitations to jurors to stand in the shoes of litigants

"Generally, an appeal to the jury's sympathy during closing argument by inviting the jurors, individually, to stand in the shoes of the litigant is considered improper. *Allison v. Acton-Etheridge Coal Co.*, 289 Ala. 443, 268 So.2d 725 (1972). Case law demonstrates, however, that the courts have not been overly restrictive in their application of this rule." *Fountain v. Phillips*, 439 So.2d 59, 63 (Ala. 1983). In *Fountain* the court held that there was no basis for reversal where counsel argued, "We are dealing with serious business . . . the same thing could happen to you or to your family or your estate."

In *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249, 1254 (Ala. 1986), the trial court sustained an objection and instructed the jury to disregard the following argument: "I will approach this task as I have tried to seriously just as you would want it if you were on the front row in this courtroom." On appeal, the Alabama Supreme Court again stated that inviting "the jury to stand in the shoes of the litigant is considered improper," but the court found, in the light of the trial court's actions, that reversal was not warranted. *Id.*, 514 So.2d at 1254.

In *Hayles v. Jeter*, 279 Ala. 283, 284, 184 So.2d 363, 364 (1966), the plaintiff's counsel invited "you, gentlemen, to put yourself in the plaintiff's place." An objection to this argument was overruled. In affirming, the Alabama Supreme Court said:

> "We do not say such argument would be proper. We do not, however, have before us enough of the argument to say that the *bare invitation* constituted such a forbidden appeal to the sympathy of the jurors as to prejudice defendant to the extent that this judgment must be reversed."

Id., 279 Ala. at 285-86, 184 So.2d at 366 (emphasis added).

In *Allen v. Mobile Interstate Piledrivers*, 475 So.2d 530, 537 (Ala. 1985), the trial court's overruling of an objection to the plaintiff's counsel's invitation to "picture

a line of people, about a dozen people," put in the plaintiff's place and asked to fill in a blank check was held not reversible error because the argument referred to "some unspecified imaginary individuals."

In *British General Insurance Co. v. Simpson Sales Co.*, 265 Ala. 683, 689, 93 So.2d 763, 768 (1957), the plaintiff alleged that his insurance agent had told him that his property would be covered by his policy when he moved to Tennessee, and his counsel argued to the jury:

> "Gentlemen when you walk into your insurance agent's . . . you had better not go in and say I want to insure my automobile and fail to say, but I am going to take a trip to Florida, now, who will I call on in Florida to take care of it, while I have it in Florida? *Are you going to do that?*
>
> * * *
>
> *"Now the British General Insurance Company says, oh, no, we can't insure that property. * * * How would you like to have that happen to you?"* (emphasis added).

On appeal, the court said that the remarks were not so improper and prejudicial as to require reversal and that "[m]uch must be left in such matters to the enlightened judgment of the trial court . . . ." *See also Crump v. Geer Brothers, Inc.*, 336 So.2d 1091, 1097 (Ala. 1976) ("if there was error, it was error without injury").

In *Estis Trucking Co., Inc. v. Hammond*, 387 So.2d 768, 773 (Ala. 1980), however, the overruling of an objection to "[t]he last statement made in closing argument by plaintiff's attorney to the effect that 'if somebody told you that you were going to go through that wreck'" was deemed reversible error. The supreme court held, "In the instant case, there was not merely a bare invitation for the jurors to put themselves in the place of the plaintiff. There was more. The argument here presented was an appeal to the jurors' feelings and passion, tantamount to requesting the jurors to hold in favor of the plaintiff based upon the jurors' sympathy for" the plaintiff. *Id.* 387 So.2d at 774.

Compare *Estis*, however, with *Osborne Truck Lines, Inc. v. Langston*, 454 So.2d 1317, 1322-23 (Ala. 1984), where the plaintiffs' counsel's suggestion that the jurors consider whether "a family" would accept $5,000,000 in exchange for allowing the children in the family to be injured was dismissed by the supreme court as merely "an allegorical discussion of an imaginary family." Counsel's argument contained, in addition to the mythical family, the "particular remark, 'Would you take five million dollars?'" *Id.* The court did not discuss the allegorical nature of this language, but did note that it "has the appearance . . . of verging on appeal to the sympathy of the jury." *Id.* The defendants, however, had not objected on this ground, and the court did not consider whether the argument in fact passed beyond the verge.

G. Appeals to local or racial prejudice

Appeals to local or racial prejudice are improper. In *Florence Cotton & Iron Co. v. Field*, 104 Ala. 471, 480, 16 So. 538,

540 (1894), the supreme court reversed where the trial judge failed to eradicate the following argument: "[t]hey came down here, a party of rich Northern capitalists, wanting to speculate on our property, and are now trying to rob an elegant, chivalrous Southern gentleman of his justly and hard-earned salary." The court said:

> ". . . the remark was calculated to seriously prejudice and injure the defendant with the jury. The action of the court in excluding it was very mild and not a sufficient antidote to the poison that had been injected into the minds of the jury . . . . Verdicts ought not be won by such methods, and when an attorney, in the heat of debate, goes to such extraordinary lengths, generally, the court should promptly set aside any verdict that may be rendered for his client. The repressive powers of a court, to prevent such departures from legitimate argument . . . should be vigorously applied. No mere statement, that it is out of order or improper, can meet the exigencies of the case. Nothing short of such action . . . and a clear satisfaction, that the prejudice . . . had been removed from the minds of the jury, ought ever to rescue a case from a new trial. . . ."

Id., 104 Ala. at 480-81, 16 So. at 540-41.

The supreme court affirmed the granting of a new trial in *Haywood v. Alabama Fuel & Iron Co.*, 203 Ala. 550, 551, 84 So. 259, 260 (1919), on the basis of remarks that included a reference to shareholders of the defendant gathering "around the table in Washington to divide the dividends." In *Brotherhood of Painters, etc., of America v. Trimm*, 207 Ala. 587, 588, 93 So. 533, 533 (1922), the court reversed where the trial court overruled an objection to the following remark:

> "You know that any member of this local union here would gladly pay this man, if they had charge of the disbursement of the money. Gentlemen, you are not rendering a verdict against the local union here, but these people up in Indiana."

In *General Finance Corp. v. Smith*, 505 So.2d 1045, 1048 (Ala. 1987), however, the Alabama Supreme Court held that the trial court adequately eradicated the following argument:

> "Your verdict has got to be a big enough verdict so that it will be heard in Illinois at the corporate headquarters, so that these folks like the Mike Houses of the world won't be laughing at you. They're laughing at you. They're laughing at me, a little ol' lawyer from Phenix City."

The court called it an "indirect interjection of wealth" that was eradicated by an objection and curative instruction. *Id.*, 505 So.2d at 1049.

In *McLemore v. International Union*, 264 Ala. 538, 542, 88 So.2d 170, 172 (1956), an action against a labor union for preventing the plaintiff from working at his job, the following remarks were held ineradicable:

> "There are men in Morgan County who will not sit in a Union Hall with a negro. There are men in Morgan County who will not walk a picket line with a negro. I don't blame them. They have as much right to their opinion about that as the Union has to a contrary opinion."

In affirming the granting of a new trial, the court noted with approval the trial court's confession of its "dereliction in not acting *sua sponte* in stopping the argument." *Id.*, 264 Ala at 544, 88 So.2d at 174.

In *Donald v. Matheny*, 276 Ala. 52, 56, 158 So.2d 909, 912 (1963), a racial "argument was improper, but not incurable." Counsel had stated, "Due to the breed of the race, we were afraid she would change her testimony, which she did." The trial court sustained an objection, but "[n]o further action was invoked by the defendant." *Id.*, 276 Ala. at 57, 158 So.2d at 913.

H. Comments on the failure to call an equally available witness

> "There is a rule, and a just one, that if a party has a witness possessing peculiar knowledge of the transaction, and supposed to be favorable to him, and fails to produce such witness when he has the means of doing so, this, in the absence of all explanation, is ground of suspicion against him. . . ."

Carter v. Chambers, 79 Ala. 223 (1885). "A party cannot comment in argument upon the failure of his opponent to call a particular witness if the witness is equally accessible to both parties." *Donaldson v. Buck*, 333 So.2d 786, 787 (Ala. 1976); *see also Wang v. Bolivia Lumber Co.*, 516 So.2d 521 (Ala. 1987); *City of Birmingham v. Levens*, 241 Ala. 47, 200 So. 888 (1941).

Determining whether a witness is "equally available" is sometimes difficult, however. Amenability to service of process is relevant to a witness's availability, but "it is not the sole criterion." *Donaldson v. Buck*, 333 So.2d 786, 787 (Ala. 1982). A "reasonable conclusion" that the witness would be friendly to one party and unfriendly to the other can determine whether the witness is equally available. In *Donaldson* a potential witness was not equally available because he had filed suit against the defendant and had employed the plaintiff's counsel. Where the witness "and the plaintiff were obviously friends," the witness was not "equally available." *Harrison v. Woodley Square Apartments*, 421 So.2d 101, 103 (Ala. 1982). Close relatives also are not equally available. *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249 (Ala. 1986) (potential witness was son of corporate defendant's owner); *Waller v. State*, 242 Ala. 1, 4 So.2d 911 (1941). Parties, of course, are not equally available, and "the failure or refusal of a party in a civil action to testify when present is ordinarily subject to comment . . . ." *Stegall v. Wylie*, 291 Ala. 1, 7, 277 So.2d 85, 90 (1973).

The argument, "I can't close, I feel, in justice to my client without repeating, isn't it strange to you that the doctor they select, Dr. Clyde Brown, has not been called before you to tell what he saw just a few seconds after the accident," was improper, because the doctor was available to both parties. *Cooper v. Gubbs*, 262 Ala. 519, 521, 80 So.2d 284, 285 (1955). *See also City of Birmingham v. Levens*, 241 Ala. 47, 200 So. 888 (1941). Where a potential witness's medical record entries, however, "clearly indicated that testimony from him would be favorable to the defendants," the court approved the trial judge's determination that the witness was not "equally available." *Drs. Lane, Bryant, Eubanks & Dulaney v. Otts*, 412 So.2d 254, 260 (Ala. 1982).

I. Comments on the conduct or character of opposing counsel

Comments concerning opposing counsel come in various forms and are frequently improper.

> "As was said by Justice Gardner in *Arant v. State* [citation omitted] 'We must not lose sight of the fact that a trial is a legal battle, a combat in a sense, and not a parlor social affair.' To put it a little differently, it is expected that counsel will

> strike hard blows in behalf of his client but, *of course, the blows must not be foul blows.*"

Alabama Great So. Railroad Co. v. Gambrell, 262 Ala. 290, 293, 78 So.2d 619, 621 (1955) (emphasis added).

"Remarks of counsel reflecting upon the opposing counsel for interposing objections to proposed evidence should not be indulged." *Brown v. Brown,* 242 Ala. 630, 632, 7 So.2d 557, 558 (1942). The following argument was held ineradicable in *Birmingham Electric Co. v. Ryder,* 225 Ala. 369, 370, 144 So. 18, 19 (1932).

> "[L]et me tell you one thing, about the Birmingham Electric Company. They have got attorneys up here, and any old way to break into, when I get below the belt, and hit a lick that hurts and tell the truth, they break into my line of thought, and into my argument—just anything to save the company, men, when they are hooked."

An argument that "when the shoe begins to pinch a little bit, he objects," however, did not require a mistrial where the trial court had sustained an objection. *Pacific Mut. Life Ins. Co. of California v. Green,* 232 Ala. 50, 52, 166 So. 696, 698 (1936). At the very least, it would seem, such arguments should not be "indulged in, viewing them from the standpoint of professional etiquette." *Louisville & N.R. Co. v. Watson,* 208 Ala. 319, 323, 94 So. 551, 554 (1922) (the court refused to reverse, however, where plaintiff's counsel had simply complained of defendant's attorney's "voluminous objections" in the hearing of the jury).

Comments reflecting upon other tactics of opposing counsel also have been deemed improper. In *Sinclair v. Taylor,* 233 Ala. 304, 304, 171 So. 728, 728 (1937), the following argument was held ineradicable:

> "A lawyer should not tamper with a jury, an umpire or a judge in the trial of a lawsuit * * * He (naming attorney for defendant) made a statement to the jury * * * well, that is tampering with them. * * * He was making side remarks and smiling at the jury, and was there looking at the jury when the witness was on the stand, and we had thought that he was asking the jury a question."

In *Birmingham Electric Co. v. Perkins,* 249 Ala. 426, 430, 31 So.2d 640, 642 (1947), the following improper statement did not require granting motions for a mistrial or new trial because it had been excluded by the trial court: "He [defense counsel] has got what is called a Sears-Roebuck brand of interrogatories, about 75 of those things, and asking a man to make answer to each of them--he don't [sic] have to answer them that way." Nor did the following inappropriate remark in *Western Ry. of Alabama v. Mays,* 197 Ala. 367, 374, 72 So. 641, 644 (1916), require a new trial when it was withdrawn with apology and counsel failed to ask the court to exclude it: "He [a witness] could not remember what had been told him; he could not remember what had been drilled into him." (emphasis added). In *Harvey Ragland Co. v. Newton,* 268 Ala. 192, 198, 105 So.2d 110, 114 (1958), a remark before the jury that a statement by opposing counsel was not made in "good faith" was "not of such grossness as to require the granting of a motion for new trial," but it was deemed improper. Apparently the first complaint concern-

—NOTICE—

State Constitutional Clearinghouse Project

In 1987, under a grant awarded by the State Justice Institute, the National Association of Attorneys General organized a State Constitutional Law Clearinghouse Project. The association again this year will produce both a monthly publication and an annual law review, and organize a seminar on state constitutional law (in Washington, D.C., March 9-10, 1989).

Further information follows about each of the project's activities.

State Constitutional Law Bulletin

Ten monthly issues, starting this month, comprise Volume 2. A three-ring binder and subject and case indices are included with a subscription. Each issue summarizes recent significant state constitutional law decisions in two areas, governmental powers and functions and individual liberties.

Seminar: March 9-10, 1989, Washington, D.C.

A 1 1/2 day seminar on state constitutional law issues has been scheduled. In the first year, a one-day seminar included faculty and participants from the full spectrum of those interested in the subject. Topics included the theory and history of state constitutions, effective presentation of state constitutional law cases, consideration of independent state grounds to resolve criminal procedure questions, separation of powers and state officials' powers-and-duties questions, methodologies of interpretation and a moot court argument on the constitutional bar to use of state credit for private purposes. One of the successes of the seminar was the range of participation—from the judiciary, the public and private bars, academia and the media. The same breadth of representation is expected next time. The Association makes every effort to comply with continuing legal education requirements, and has been accredited as a presumptively recognized CLE provider in 29 states. Pre-registration forms will be available with the January issue of *Bulletin.* The registration fee is $95.

Annual Law Review

The association will publish a second collection of articles on state constitutional law developments in the volume of *Emerging Issues in State Constitutional Law* to be released next fall.

ing this remark was made in a motion for a new trial.

The following statements are additional examples of improper comments concerning opposing counsel:

> "I will tell you this: Whenever you see a lawyer walk in the courtroom and commence trying a case, it don't mean just like it means when you see these shock troops like my friend McFarland come in and try a case. It don't always just mean cold-hearted business."

F. W. Woolworth Co. v. Erickson, 221 Ala. 5, 6, 127 So. 534, 535 (1930) (argument held eradicated by trial court, but key element in reduction of verdict by appellate court.).

> '[W]hen a man goes and gets George Barnet and Henry Jones both (defendant's attorneys), he's got a bad case . . . .'

Ritter v. Gibson, 217 Ala. 304, 306, 116 So. 158, 160 (1928) (objection held insufficient).

In *Birmingham Ry., Light & Power Co. v. Brennen*, 175 Ala. 338, 349, 57 So. 876, 880 (1911), the plaintiff's counsel stated to the jury: "I know Hugh Morrow [the defendant's attorney] and I know what I am going to tell you about him is true. I know that if he was on the jury trying this case he would render a verdict in favor of the plaintiff in a large amount." In response, the Alabama Supreme Court said, "It would be difficult to conceive of argument more objectionable, unfair, and prejudicial than was this, coming, as it did, in the closing argument, to which the defendant's counsel has no opportunity to reply. Courts should not allow verdicts obtained by such argument to stand." *Id.*, 175 Ala. at 349-50, 57 So. at 880. The court held the argument uneradicated. The trial court had sustained an objection, "but the court did not ex *mero motu* exclude such argument or reprimand counsel so using it." *Id.*, 175 Ala. at 350, 57 So. at 880.

The similar statement, "I would be willing to have defendant's lawyers on the jury," though "highly improper" did not require a new trial where the court sustained an objection, excluded the statement and admonished counsel to confine himself to the evidence. *Alabama Power Co. v. Goodwin*, 214 Ala. 15, 17, 106 So. 239, 240 (1925).

J. Comments regarding the conduct or character of parties and witnesses

In *Johnston Bros. Co. v. Bentley*, 2 Ala.App. 281, 287, 56 So. 742, 744 (1911), the court reversed and held it improper for counsel "in his closing argument to the jury, to read the pleas filed by [the] defendant, setting up its different defenses, and calling attention to the different dates of their filing, and to state in the argument, in connection with reading the pleas, that he (counsel) could see the president of the defendant in the law office of his counsel, telling what his defense was, and the stenographer of counsel for defendant taking down the statement, and at a subsequent time, as shown by the allegations in a plea subsequently filed, defendant's president had stated a different defense to his counsel." The court said:

> ". . . the trial court should, upon request, restrain counsel within the limits of legitimate argument and . . . when the statement is of a fact pertinent to the issue, unsupported by the evidence, and having a natural tendency to influence the finding of the jury, a failure to do so authorizes a reversal of the case."

Id., 2 Ala.App. at 289, 56 So. at 745.

The overruling of an objection to a reference in closing argument to a doctor as "the slickhaired $50.00 witness," however, was permitted because the "evidence supported the reference '$50.00 witness'" and the appellate court had "no way of knowing how the doctor's hair was dressed," while the "trial court and jury were afforded this opportunity." *Tennessee Valley Sand & Gravel Co. v. Pilling*, 35 Ala.App. 237, 47 So.2d 236, 243 (1950). The failure to strike a defense counsel reference to an expert witness as a "hired gun" in *Calloway v. Lemley*, 382 So.2d 540, 542 (Ala. 1980), did not constitute reversible error because the expert witness's qualifications were "hotly contested." The court, though, said, "By finding that the reference to a 'hired gun' is not prejudicial, we should not be understood as approving its usage in a case where experts testify and are compensated for their services." *Id.*, 382 So.2d at 542. The court also suggested that counsel's objection to the latter argument was not properly stated.

In *Ford Motor Credit Co. v. Jackson*, 347 So.2d 992, 996 (Ala.Civ.App. 1977), the debtor's counsel made an improper reference in closing argument to another apparently similar lawsuit pending against the defendant, but the appellate court declined to reverse "giving due regard to the emphatic instructions given the jury to disregard . . . ."

In *Birmingham Electric Co. v. Carter*, 234 Ala. 672, 672, 176 So. 464, 464 (1937), however, the plaintiff's counsel made the following ineradicable argument:

> "[H]e [defendant's counsel] brings up the fact that I mentioned that I didn't ever subpoena witnesses where the Birmingham Electric Company is defendant because their investigators go out and talk to them. If you have had any experience with investigators and people who write statements, you know what they can do to a negro's statement. You know, if you have ever given a statement, that that man writes down everything you say favorable to him and he leaves out everything unfavorable, and he writes it up in his own language and puts it in such favorable terms that if you ever go to read that statement again he has got it all turned around and twisted around and you don't know what you said."

But a reference to a defendant as a "parasite" was "justified by the evidence and inferences to be drawn therefrom" where "the charge for the loan was $4 per two weeks on $20." *Southern Finance Co. v. Foster*, 19 Ala.App. 109, 111, 95 So. 338 (1923). Similarly, in *Robert M. Green & Sons v. Lineville Drug Co.*, 167 Ala. 372, 379, 52 So. 433, 436 (1910), the defendant's counsel "after calling attention to discrepancies in plaintiff's testimony, remarked, 'what monumental liars these plaintiffs are,'" and the supreme court declined to reverse, saying, "While we do not approve of such language, yet it was a comment on the evidence . . . ." "In argument to the jury counsel may not argue as a fact that which is not in evidence, but he may state or comment on all proper inferences from the evidence and may draw conclusions from the evidence based on his own reasoning." *Adams v. State*, 291 Ala. 224, 228, 279 So.2d 488, 492 (1973).

K. Damages

Appeals to the jury to consider irrelevant matters in awarding damages are improper. These comments are separable into two principal categories: (1) appeals

for punitive damages when only compensatory damages are at issue, and (2) appeals for compensatory damages in wrongful death cases where only punitive damages are recoverable.

In *Hundley v. Chadick*, 109 Ala. 575, 19 So. 845 (1896), an action was filed to recover damages for a wrongful attachment. The complaint made no claim for punitive damages, but:

> "[C]ounsel for the plaintiff, in his argument to the jury stated, that 'the action of defendants in this case showed vexatious, willful and malicious persecution of the plaintiff; that his character had been assailed; and that the jury ought to award extraordinary damages, for the damage to his character.'"

Id., 109 Ala. at 581-82, 19 So. at 848. The supreme court, reversing, held that this "argument was well-calculated to impress the jury, that they could inflict punishment, and the refusal of the court to interfere doubtless tended to emphasize this impression. The court erred in allowing the argument," which "was foreign to the issue." 109 Ala. at 582, 19 So. at 848. In *Alabama Electric Co-Operative, Inc. v. Partridge*, 284 Ala. 442, 225 So.2d 848 (1969), the trial judge was affirmed where he had properly sustained an objection to and instructed the jury to disregard an argument for punitive damages because only compensatory damages were at issue.

Arguments for compensatory damages in wrongful death cases are a frequent source of appellate litigation. In *Hardin v. Sellers*, 270 Ala. 156, 157, 117 So.2d 383, 384 (1960), where plaintiff's counsel asked the jury to "compensate her [the widow] for the death of her husband" and the trial court overruled the defense lawyer's objection, the supreme court reversed. And in *Young v. Bryan*, 445 So.2d 234, 237 (Ala. 1983), where plaintiff's counsel asked the jury, "What about the living victims that he left?" the trial court's failure to instruct the jury as to the impropriety of the latter argument resulted in reversal, notwithstanding a subsequent oral charge correctly defining the damages available in a death action.

In *Estes Health Care Centers, Inc. v. Bannerman*, 411 So.2d 109, 112 (Ala. 1982), however, the court held that "compensation was not the measure of damages sought by Plaintiff's counsel" when he made the following argument in closing:

> "How valuable and how precious is human life? Ladies and gentlemen, how valuable and how precious are the hostages over in Iran? How much would this country pay to have those individuals back?
>
> * * *
>
> "Would any amount of money suffice for those lives? How much are the lives of all the Cuban refugees that our tax dollars are going to support, how much are they worth? They are human beings also.
>
> * * *
>
> "[A]nd I submit to you that the life Ronnie Joe Cowan had during his lifetime was worth as much to him as mine is to me and any other individual in the world is to them."

The court also noted that the trial court correctly charged the jury concerning the proper measure of damages and that there was "no evidence that the jury retired with the attitude of awarding compensatory rather than punitive damages." 411 So.2d at 113.

The trial courts sufficiently eradicated improper appeals in *Magnusson v. Swan*, 291 Ala. 151, 154, 279 So.2d 422, 424 (1973), where plaintiff's counsel argued that the $100,000 he had asked for "won't pay for this young lady's life," and *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Humphrey*, 54 Ala.App. 343, 308 So.2d 255, 258-59 (1975), where counsel for plaintiff referred to the "value" or "worth" of human life as being the measure of damages.

L. Reading or arguing law

> "The jury are to receive the law from the court, and not from either the counsel, or from textbooks or adjudged cases. This is a part of the police-power, so to speak, of the court, often necessary to prevent confusion and insure the orderly administration of justice in the trial court."

McCullough v. L & N R. Co., 396 So.2d 683, 685 (Ala. 1981), quoting *Harrison v. State*, 78 Ala. 5, 12 (1884). "Not infrequently counsel are permitted to argue legal propositions, even to read legal propositions to the jury," but this permission is within the trial court's discretion. *McCullough*, 396 So.2d at 685 (Ala. 1981). And a trial judge's "refusal to permit such reading is not reversible error.

The reason for this is obvious. The duty of the jury is to try the facts and apply such facts to the law as given them in charge by the court." *McCullough*, 396 So.2d at 685-86 quoting *City of Anniston v. Oliver*, 28 Ala.App. 390, 393, 185 So. 187, 189-90 (1938).

The overruling of an objection to the argument that "'you put all our evidence on this side and their evidence on this side and all we've got to do is tip the scale just a little bit and we win . . .!'" did not constitute error in *Osborne Truck Lines, Inc. v. Langston*, 454 So.2d 1317, 1323 (Ala. 1984). Nor was it considered error to allow "counsel [to] read to the jury a decision from the Supreme Court of Alabama, and [endeavor] to explain to the jury the means by which it might arrive at the proper amount of damages . . ." in *Cahaba Southern Mining Co. v. Pratt*, 146 Ala. 245, 254, 40 So. 943, 947 (1906), since "counsel have a right to argue to the jury the manner in which they are to ascertain the amount of the verdict . . . ."

M. References to other cases

References to the facts and results of other cases or trials are generally improper. In *Ford Motor Credit Co. v. Jackson*, 347 So.2d 992, 995-96 (Ala 1977), counsel improperly commented on a similar cause of action pending against the opposing party, but the prejudicial effect of the remarks was deemed eradicated by "emphatic instructions" given by the court. In *Birmingham Electric Co. v. Bryan*, 25 Ala.App. 556, 558, 150 So. 560, 562 (1933), counsel's repeated references to facts and results of other cases that he had successfully litigated were deemed not to have been effectively eradicated in some instances and to have been erroneously allowed in others, and the court of appeals reversed. In *Birmingham Electric Co. v. Ryder*, 225 Ala. 369, 372, 144 So. 18, 20 (1932), counsel's reference to "other cases, their facts, and verdicts" required eradication by the trial court. In *Rose v. Magro*, 220 Ala. 120, 124 So. 296 (1929), the trial court in a wrongful death case properly excluded a reference by defense counsel to a previous criminal trial and the acquittal of the defendant, but the court was reversed for allowing the indictment to be put in evidence. It was deemed improper for an attorney to state "that a verdict should be for 'plaintiff for a substantial amount, and two previous juries which have tried this case agreed with me,'" in *Tennessee River Nav. Co. v. Walls*, 209 Ala. 320, 323, 96 So. 266, 269 (1923), but "intervention of the court was sufficient to remove any adverse influence." Reading facts and results from other reported cases is improper also. *City of Tuscaloosa v. Hill*, 14 Ala.App. 541, 69 So. 486, *cert. denied* 194 Ala. 559, 69 So. 598 (1915).

II. Opposing improper arguments

Although it may be clear that an opposing counsel has made an improper argument, effectively countering the remark is another matter. Prompt action—objecting, requesting a curative charge, requesting a mistrial—is, of course, the obvious and almost always the desirable method of opposition. In many instances, however, counsel may not wish to draw additional attention to a highly prejudicial remark and requests to approach the bench to make side-bar objections risk offending the jury. Letting such an argument pass is, nevertheless, perilous business, because a failure to object is likely to constitute a waiver. An attorney can respond to an improper argument with another improper argument—a reply in kind—but this, too, has its dangers. Alabama cases provide the following guidelines.

A. The method of objection and standard of review regarding improper argument

"As a general rule, improper arguments by an attorney are not sufficient ground for a new trial absent a timely objection . . . and a ruling thereon, or a refusal by the trial court to make a ruling." *Lawrence v. Alabama Power Co.*, 385 So.2d 986, 987 (Ala. 1980). Objection should be made "promptly upon the utterance of the supposedly improper remarks." *Birmingham Ry., Light & Power Co. v. Gonzalez*, 183 Ala. 173, 285, 61 So. 80, 84 (1912); *see also Hill v. Sherwood*, 488 So.2d 1357 (Ala. 1986) (objection waived). In addition, "[i]t is the duty of counsel to point out to the trial court the portion of the argument deemed objectionable." *Pacific Mut. Life Ins. Co. v. Yeldell*, 36 Ala.App. 652, 62 So.2d 805, 815 (1953). *See also* Ala.R.Civ.P. 46.

Once an objection has been made, the following tests are said to apply on appeal to determine the impropriety and impact of the argument:

> "In a case of improper argument where the trial judge overrules objection and fails to instruct the jury as to the impropriety with direction to disregard, the test upon appeal is not that the argument did unlawfully influence the jury, but whether it might have done so."

Estis Trucking Co., Inc. v. Hammond, 387 So.2d 768, 771 (Ala. 1980) (emphasis added), citing *Williams v. City of Anniston*, 257 Ala. 191, 58 So.2d 115 (1952).

> "In a case where objection to improper argument is made and sustained, with *immediate and strong action by the trial court instructing the jury that such argument was not correct* and admonishing them not to consider it, the test on motion for new trial and on appeal is whether the argument was so harmful and prejudicial that its influence was not or could not be eradicated by the action of the court."

Estis Trucking Co., Inc. v. Hammond, 387 So.2d 768, 771 (Ala. 1980), citing *McLemore v. International Union, Etc.*, 264 Ala. 538, 88 So.2d 170 (1956).

But the trial court does not seem to have an affirmative duty to instruct the jury upon objection, as the latter quotes might suggest. "As a general rule, where a party's objection to improper agrument is sustained, it is necessary for the party to request a corrective instruction from the trial court as a predicate for an appeal based on the prejudicial statement." *Calvert & Marsh Coal Co., Inc. v. Pass*, 393 So. 2d 955, 958 (Ala. 1980), citing *Employers Insurance Co. of Alabama v. Cross*, 284 Ala. 505, 226 So. 2d 161 (1969), and *Alabama Great Southern Railway Co. v. McFarlin*, 174 Ala. 637, 56 So. 989 (1911). When the objection is overruled, however, "a further motion . . . is a useless formality." *American Ry. Express Co. v. Reid*, 216 Ala. 479, 485, 113 So. 507, 512 (1927).

Failure to make a proper objection will not affect an appeal if an argument is deemed to be ineradicable. In *Anderson v. State*, 209 Ala. 36, 44, 95 So. 171, 179 (1922), the court said:

> "An exception to the general rule requiring appropriate objection or motion invoking correcting instruction or action by the trial court is where the remark or argument of counsel is so that neither retraction nor rebuke by the

trial court would have destroyed its sinister influence."

Nor does it matter that an objection was sustained and the jury instructed to disregard the statement when the argument was ineradicable. Such an argument is too "poisonous and improper" to be eradicated. *Pryor v. Limestone County*, 225 Ala. 540, 144 So. 18 (1932).

With regard to the necessity of stating the grounds for an objection with specificity, the Alabama Supreme Court has said:

> "This Court has frequently refused to consider an objection where it was not accompanied by specific grounds . . . ."
>
> "However, we have also recognized that a specific ground is not required and a general objection will suffice if the ground "'is so manifest that the court and counsel cannot fail to understand it.'"

Holt v. State Farm Mut. Auto.Ins. Co., 507 So.2d 388, 391 (Ala. 1986) (citations omitted). *See also Otis Elevator Co. v. Stallworth*, 474 So.2d 82 (Ala. 1985). The best practice, however, is to object specifically and to clearly state each ground of the objection. *See Osborne Truck Lines, Inc. v. Langston*, 454 So.2d 1317, 1323 (Ala. 1984) ("when an objection is made on specific grounds, other grounds may not be raised on appeal").

B. Reply in kind

It is frequently asserted that an otherwise objectional argument constitutes a permissible "reply in kind." "Where counsel for a party litigant pursues an improper line of argument he thereby invites a reply in kind, and statements which would otherwise be objectionable are often proper." *Smith v. Blankenship*, 440 So.2d 1063, 1066 (Ala. 1983). Founded upon the doctrine of "curative admissibility," see C. Gamble, *McElroy's Alabama Evidence* §14.01 (3d ed. 1977) ("if a party introduces illegal evidence, his opponent has the unconditional right to rebut . . . with other illegal evidence"), a reply in kind is allowed to cure the effect of an illegal argument so long as, according to one formulation of the rule, "the rebuttal statement sought to be offered [is] to some extent related to the [improper] statement of [opposing] counsel . . . ." *Cook v. Latimer*, 274 Ala. 283, 288, 147 So.2d 831, 835 (1962). Of course, a reply in kind must be in retaliation to an *improper* argument; an illegal rebuttal to "permissible argument" is not a reply in kind. *Allison v. Acton-Etheridge Coal Co., Inc.*, 289 Ala. 443, 448, 268 So.2d 725, 730 (1972) (defense counsel responded to plaintiff's counsel's argument concerning lost income by saying that plaintiff "was a very wealthy man").

Though generally "[s]tatements or arguments of counsel which are provoked or produced by statements or arguments of opposing counsel can furnish no ground for complaint or corrective action," *St. Clair County Bukacek*, 272 Ala. 323, 331, 131 So.2d 683, 691 (1961), the rebuttal may not extend to overkill. *Cook v. Latimer*, 274 Ala. 283, 147 So.2d 831 (1962).

Examples of replies in kind are numerous. In *St. Clair County v. Bukacek*, 272 Ala. 323, 331, 131 So.2d 683, 691 (1961), an appeal to the self-interest of jurors as taxpayers invited the following argument: "'There are two and a half million people in the State of Alabama. It will cost you one/tenth of one cent to pay him $25,000.'" A statement by defendant's counsel as to how sorry ("as a man can be") his client was that the plaintiff was injured "provoked, produced, invited, and justified [this] retaliatory argument": "'I dare say that if he is as sorry as all that, he might like for Mrs. Jones to get every dollar she is asking for.'" *McQueen v. Jones*, 226 Ala. 4, 8, 145 So 440, 442 (1932). An improper reference to the wealth of a party invited opposing counsel "to remark to the jury

that the 'old gentlemen's life and his property [are at stake].'" *Smith v. Blankenship*, 440 So 2d 1063, 1066 (Ala. 1983).

References to insurance, however, generally have been held not to be proper replies in kind, *Williamson v. Raymond*, 495 So.2d 609 (Ala. 1986); *Mathews v. Tuscaloosa County*, 421 So.2d 98 (Ala. 1982) (defense counsel referred to worker's compensation lien in response to statement that all the proceeds of a judgment would go to the minor children of a deceased workman); *Colquett v. Williams*, 264 Ala. 214, 86 So.2d 381 (1956) (statement in personal injury case that jury should not take the defendant's money and give it to the plaintiff did not warrant response by the plaintiff's counsel to the effect that the money would come from an insurance company), except in highly unusual circumstances, *Atlanta Life Insurance Co. v. Stanley*, 276 Ala. 642, 165 So.2d 731 (1964) (where counsel for the *defendant* told the jury of his client's coverage and defendant testified with regard to his limits in an apparent attempt to hold down the verdict). *But see Clark-Pratt Cotton Mills Co. v. Bailey*, 201 Ala. 333, 77 So. 995 (1918) (where the court stated in apparent *dicta* that a reference to an "insurance man" who had inspected the plant where the plaintiff was hurt could not be complained of "with good grace" by defense counsel who had argued that the defendant was a little corporation owned by citizens of Prattville).

Conclusion

The classification of improper arguments is, as has been said, necessarily subjective. The various categories obviously overlap and serve common policies. The analysis at trial by court and counsel of a questionable comment, however, ought not to be limited to a formalistic search through the traditional categories of improper arguments; it should involve consideration of the fundamental question whether the comment aids the jury in reaching a considered and objective result. When the answer is in the negative, case law and justice dictate an appropriate curative action. "We know of no more effective way of repressing the wrong and maintaining the integrity of the profession in the administration of the law." *Britling Cafeteria Co. v. Shotts*, 230 Ala. 597, 162 So. 378 (1935). ■

FOOTNOTES

Another article on this subject was written by William J. Gamble of the Selma bar. See Comment, *Improper Arguments of Counsel*, 19 Ala.L.Rev. 75 (1966).

—NOTICE—

Marital and Family Law Certification

The Marital and Family Law Certification Committee has now been appointed by the Board of Commissioners of the Alabama State Bar to begin the process to certify family law practitioners.

The results of the recent bar poll show that a vast majority of those lawyers responding are in favor of a combination of examination and peer review for certification as a specialist. In the next few months, the application and testing process will be clearly defined and reported.

It is now planned that by February 1, 1989, applications will be available to be completed and submitted by March 31, and the test is tentatively scheduled in Birmingham for the morning of May 5, 1989.

The purpose of certification is for attorneys to voluntarily obtain certification by a statewide review committee because of their concentration, experience and continuing education in the family law area and that the qualifying attorneys be allowed to appropriately announce such certification.

Presently, approximately 12 states have specialization plans in place, 11 states have submitted specialization plans for court approval and 13 states are presently studying specialization plans.

Riding the Circuits

Dale County Bar Association

The Dale County Bar Association elected new officers November 10 at the monthly bar association meeting. The new officers are:

President: Ray Kennington, Ariton
Vice-president: Anthony R. Livingston, Newton
Treasurer: William H. Filmore, Ozark
Secretary: Donald C. McCabe, Daleville

■

Young Lawyers' Section

N. Gunter Guy, Jr.
YLS President

As president of this section, I am fortunate to be able to attend the meetings of the Alabama Board of Bar Commissioners. For those young lawyers who recently have been admitted to the bar and for those others who might not yet understand the bar's makeup, the board of commissioners governs the Alabama State Bar. Subject only to the approval of the Alabama Supreme Court, the board promulgates and enforces rules relating to admissions, rules of ethics and discipline of its membership. Today there are 39 judicial circuits and 53 bar commissioners, representing all lawyers in Alabama.

At the recent commission meeting in Birmingham, one order of business was the Attorney's Insurance Mutual of Alabama, Inc. This, of course, is the captive insurance company that has been formed to write malpractice coverage for Alabama lawyers. The formation of this insurance company will play a very important role for members of the Young Lawyers' Section. Malpractice insurance rates create a great financial burden for us all and particularly the young lawyer. It is incumbent that all lawyers of this state come together to support the formation of this insurance company.

There is a necessary startup figure of $2.5 million required to break escrow in the formation of this company. To date, the bar has received approximately $1,400,000, and 1,198 lawyers have subscribed to support the information of this company. However, the bar needs another $1,100,000 to break the minimum escrow needed. As your presidant, I urge all members of the YLS to make the necessary sacrifice to support the formation of this company.

It is my opinion and the opinion of the board of bar commissioners that in the long run you will more than reap the benefits of this investment. As an example, I point to the following: in North Carolina, the members of their bar association formed a similar corporation in 1977. The average rate of a malpractice insurance premium for an Alabama lawyer today is around $2,300 per year. Today in North Carolina, the average premium for malpractice insurance for their own captive insurance company is under $1,000 per year. With a volatile insurance market that is sure to increase your premiums and dictate the circumstances under which you pay insurance, it is imperative that we all take an active role in this company. For those who cannot afford the initial investment, be aware that AmSouth Bank is offering to lend you the money for this investment at a very reasonable rate and with reasonable terms. I urge you to contact the Alabama State Bar and join today for the benefit of us all.

By the time this article appears in print, I am hopeful that we have had another successful Youth Judicial Program. Charlie Anderson of Montgomery has been outstanding in taking over this responsibility from Keith Norman this year. We are fortunate to have had participants from Prattville, Auburn, Birmingham, Clanton, Montgomery, Wetumpka, Opelika, Dothan, Florence and Selma. This is the first year that we have held this program separate from the Alabama YMCA Youth Legislature Program. Because of this fact, we are hopeful that the program will be able to grow in the years ahead and that many of the state's high school students will be able to participate in and learn from this experience. The statewide competition will be held the weekend of February 18, 19 and 20 in Montgomery. This is an excellent opportunity for the legal profession to enhance its image in the community and to develop our leaders of tomorrow. This program would not be successful, of course, without the help of many lawyers from across the state, and on behalf of Charlie Anderson and me, we thank you.

Also, as this article reaches you, plans are being finalized for our upcoming seminar at SanDestin. I urge everyone to attend this year's program. Sid Jackson has promised to make this year bigger and better than ever. Here is a great way to get your CLE credit and enjoy the social functions that we have planned with your fellow lawyers. Hope to see you on the beach!■

Attorneys Admitted to Bar, Fall 1988

Pamela Karen Agee ..... *Birmingham, Alabama*
Andrew Clay Allen ..... *Birmingham, Alabama*
Mary Amelia Anderson ..... *Camden, Alabama*
Wade Stephen Anderson ..... *Birmingham, Alabama*
Chisorom Uba. Anyanwu ..... *Montgomery, Alabama*
Allan Lamar Armstrong ..... *Birmingham, Alabama*
Joseph P. H. Babington ..... *Mobile, Alabama*
Jeffrey Tipton Baker ..... *Birmingham, Alabama*
Jeffrey Reed Bankston ..... *Ozark, Alabama*
Michael Lester Bell ..... *Birmingham, Alabama*
Thomas Hart Benton, Jr. ..... *Mobile, Alabama*
Johnny Vinson Berry ..... *Cullman, Alabama*
Anthony James Bishop ..... *Boaz, Alabama*
Sonja Faye Bivens ..... *Mobile, Alabama*
Johanna Klip Black ..... *Boston, Massachusetts*
Jeffrey Michael Blankenship ..... *Madison, Alabama*
Robin Denise Blevins ..... *Birmingham, Alabama*
Michael Lyle Bloomston ..... *Birmingham, Alabama*
Paul Peter Bolus ..... *Birmingham, Alabama*
Laura Ann Bowness ..... *Andalusia, Alabama*
Deloris Mitchell Boykin ..... *Birmingham, Alabama*
Randall Keith Bozeman ..... *Montgomery, Alabama*
Lisa Ann Bradford ..... *Gulf Shores, Alabama*
John Robert Bradwell ..... *Montgomery, Alabama*
Edith Annette Brashier ..... *Tuscaloosa, Alabama*
Bradley Sorrell Braswell ..... *Union Springs, Alabama*
Scott Gardner Brown ..... *Daphne, Alabama*
Mary Smith Burns ..... *Birmingham, Alabama*
John Hudson Burton, Jr. ..... *Birmingham, Alabama*
Clifford Louis Callis, Jr. ..... *Montgomery, Alabama*
Orion Gray Callison, III ..... *Birmingham, Alabama*
Charles Edward Calloway ..... *Montgomery, Alabama*
Andrea Denise Campbell ..... *Birmingham, Alabama*
Boyd Frederick Campbell ..... *Montgomery, Alabama*
Thomas Franklin Campbell ..... *Birmingham, Alabama*
Jonathan Wayne Cartee ..... *Birmingham, Alabama*
David Baldwin Champlin ..... *Birmingham, Alabama*
James Sturgeon Christie, Jr. ..... *Birmingham, Alabama*
Andrew Christopher Clausen ... *New Orleans, Louisiana*
Linda Fay Clausen ..... *Kenner, Louisiana*
Renee Mynette Collier ..... *Birmingham, Alabama*
Jonathan Hollis Cooner ..... *Montgomery, Alabama*
Lawrence Cooper ..... *Birmingham, Alabama*
Charles David Cottingham ..... *Tuscaloosa, Alabama*
Kenneth Wood Cox, Jr. ..... *Troy, Alabama*
Brent Maurice Craig ..... *Decatur, Alabama*
James Clayton Crenshaw ..... *Montgomery, Alabama*
Timothy Perry Culpepper ..... *Montgomery, Alabama*
Ann Lee Curtright ..... *Mobile, Alabama*
Daniel Sargent Cushing ..... *Mobile, Alabama*
Judith Carmela D'Alessandro ..... *Bessemer, Alabama*
Marye Ann Zicarelli D'Alessandro ... *Bessemer, Alabama*
Joseph Carrel Daniel ..... *Huntsville, Alabama*
Gregory Louis Davis ..... *Montgomery, Alabama*
John Calvin Davis, Jr. ..... *Tuscaloosa, Alabama*
Charles Welch Debardeleben .... *Birmingham, Alabama*
Richard Alan Deer ..... *Birmingham, Alabama*
Deborah Lynn Dille ..... *Birmingham, Alabama*
Merry Virginia Dixon ..... *Huntsville, Alabama*
Mark Livingston Drew ..... *Birmingham, Alabama*
Thomas Samuel Duck ..... *Birmingham, Alabama*
Gilbert Forbes Dukes, III ..... *Mobile, Alabama*
Linda Lee Dukes ..... *Birmingham, Alabama*
David Alan Elliott ..... *Birmingham, Alabama*
Hugh Raymond Evans, III ..... *Montgomery, Alabama*
Rose Paulnetta Evans ..... *Dothan, Alabama*
Gary Wayne Farris ..... *Birmingham, Alabama*
Elizabeth Anne Forester ..... *Washington, D.C.*
Denson Nauls Franklin, III ..... *Birmingham, Alabama*
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Michael David Freeman ..... *Birmingham, Alabama*
Sherri Tucker Freeman ..... *Birmingham, Alabama*
James Guy Fullan ..... *Birmingham, Alabama*
Erskine Ramsay Funderburg, Jr. ..... *Pell City, Alabama*
Roger King Fuston ..... *Birmingham, Alabama*
Frank Coffey Galloway, III ..... *Birmingham, Alabama*
John Richard Galvin ..... *Leeds, Alabama*
Gayle Haywood Gear ..... *Helena, Alabama*
Anthony Gerard George ..... *Birmingham, Alabama*
Gwendolyn Thomas George ..... *Montgomery, Alabama*
John Edward Goodman ..... *Birmingham, Alabama*
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Elissa Hutson Green ..... *Huntsville, Alabama*
Stephen Keller Greene ..... *Birmingham, Alabama*
Lisa Claire Gullage ..... *Montgomery, Alabama*
Bert Morgan Guy ..... *Tuscaloosa, Alabama*
Mary Kathryn Hallman ..... *Eufaula, Alabama*
Patricia Anne Hamilton ..... *Montgomery, Alabama*
James Hughes Hancock, Jr. ..... *Birmingham, Alabama*
John Richard Hansen ..... *Birmingham, Alabama*
Bart Gregory Harmon ..... *Montgomery, Alabama*
Sharon Eleanor Harvey ..... *Camden, Alabama*
Robert William Hensley, Jr. ..... *Bluefield, West Virginia*
William Schley Hereford ..... *Birmingham, Alabama*
Lucy Cathcart Hicks ..... *Birmingham, Alabama*
Robert Benjamin Hill ..... *Atlanta, Georgia*
Joseph Henry Hilley ..... *Birmingham, Alabama*
Elizabeth Barnes Hilyer ..... *Clanton, Alabama*
Celia Sullivan Hinson ..... *Douglasville, Georgia*
Daisy Mae Holder ..... *Birmingham, Alabama*
Cindee Dale Holmes ..... *Birmingham, Alabama*
Cynthia Gail Hooks ..... *Birmingham, Alabama*

Ernest Clayton Hornsby, Jr. ..... *Birmingham, Alabama*
Steven Mitchell Howie ..... *Calveston, Texas*
Donald Gene Jackson ..... *Birmingham, Alabama*
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Robert Willson Jenkins, Jr. ..... *Florence, Alabama*
Elizabeth Johnson ..... *Montgomery, Alabama*
L. Scott Johnson, Jr. ..... *Montgomery, Alabama*
James Emory Johnston ..... *Troy, Alabama*
Andrew McEvilley Jones ..... *Mobile, Alabama*
Rhonda Gayle Jones ..... *Homewood, Alabama*
Julia Evans Jordan ..... *Montgomery, Alabama*
Parkey Diane Jordan ..... *Birmingham, Alabama*
Sandra Lynn Jordan ..... *Fairfield, Alabama*
Stephen Gary Jordan ..... *Birmingham, Alabama*
Cecily Linne Kaffer ..... *Mobile, Alabama*
Charles Joseph Kelley ..... *Tuscaloosa, Alabama*
Constance Renee Kidd ..... *Tuscaloosa, Alabama*
Cavender Crosby Kimble ..... *Phoenix, Arizona*
Brent Alden King ..... *Huntsville, Alabama*
Steven David King ..... *Birmingham, Alabama*
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Thomas Owen Kolb, Jr. ..... *Birmingham, Alabama*
Cynthia Lamar ..... *Birmingham, Alabama*
Kelley Lynn Laughlin ..... *Birmingham, Alabama*
Robin Garrett Laurie ..... *Montgomery, Alabama*
Vincent Ray Ledlow ..... *Birmingham, Alabama*
Wesley Tony Leonard ..... *LaGrange, Georgia*
Cecil Lamar Loper ..... *Montgomery, Alabama*
Dana Leigh Love ..... *Talladega, Alabama*
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Glenn Harris Lubel ..... *Homewood, Alabama*
Jeffrey Lynn Luther ..... *Mobile, Alabama*
Kendall Walton Maddox ..... *Birmingham, Alabama*
Stephen Joseph Maggio ..... *Birmingham, Alabama*
Tamela Sheree Martin ..... *Leighton, Alabama*
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John Forrest McDaniel ..... *Birmingham, Alabama*
James Glenn McElroy ..... *Birmingham, Alabama*
William Stova McFadden ..... *Mobile, Alabama*
Ami Helen McRae ..... *Mobile, Alabama*
John Steven Meador ..... *Huntsville, Alabama*
James Alan Mendelsohn ..... *Birmingham, Alabama*
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Myron Calvin Milford, Jr. ..... *Five Points, Alabama*
Thomas Brown Miller ..... *Birmingham, Alabama*
Richard Dwayde Mink ..... *Hueytown, Alabama*
Stuart Lynn Moore ..... *Cullman, Alabama*
Randall Hodge Morrow ..... *Birmingham, Alabama*
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Mark Smith Nelson ..... *Talladega, Alabama*
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Mary Beth O'Neill ..... *Birmingham, Alabama*
Charles Clapp Osbun ..... *Birmingham, Alabama*
James Franklin Ozment ..... *Birmingham, Alabama*
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Jayna Jacobson Partain ..... *Birmingham, Alabama*
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Mary Jane Perry ..... *Birmingham, Alabama*
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Abram Lewis Philips, III ..... *Mobile, Alabama*
Elizabeth Neal Pitman ..... *Birmingham, Alabama*
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Dennis Wayne Price ..... *Tuscaloosa, Alabama*
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Kathryn Ottensmeyer Pugh ..... *Birmingham, Alabama*
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Gregory Scotch Ritchey ..... *Birmingham, Alabama*
Timothy Scott Ritchie ..... *Birmingham, Alabama*
John Steven Robertson ..... *Anniston, Alabama*
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Lindsay Lankford Sinor ..... *Birmingham, Alabama*
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Wesley Gene Smith ..... *Bessemer, Alabama*
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Kyra Sparks-Weinberg ..... *Montgomery, Alabama*
Polly Spencer ..... *Andrews AFB, Maryland*
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Kevin Scott Stapp ..... *Tuscaloosa, Alabama*
Joseph David Steadman ..... *Mobile, Alabama*
Linda Bridgers Steadman ..... *Mobile, Alabama*

Felice Ann Stern ..... *Birmingham, Alabama*
Michael Garnet Stewart ..... *Birmingham, Alabama*
Susan Carol Stewart ..... *Andrews AFB, Maryland*
Christopher Mark Strength ..... *Birmingham, Alabama*
James Warren Tarlton, IV ..... *Mobile, Alabama*
Jo Alison Taylor ..... *Birmingham, Alabama*
Peyton Clark Thetford ..... *Mobile, Alabama*
William Cooper Thompson ..... *Birmingham, Alabama*
Lisa Carol Tinsley ..... *Mobile, Alabama*
Naomi Hosea Truman ..... *Birmingham, Alabama*
Barry Webb Tucker ..... *Birmingham, Alabama*
Joseph McNamee Tucker ..... *Tuscaloosa, Alabama*
John Thomas Tully ..... *Birmingham, Alabama*
Edward Tatum Turner ..... *Chatom, Alabama*
Karen Pailette Turner ..... *Montgomery, Alabama*
Richard Dillard Turner ..... *Tuscaloosa, Alabama*
Robert Barry Tuten ..... *Montgomery, Alabama*
Thomas Glenn Tutten, Jr. ..... *Birmingham, Alabama*
Joyce White Vance ..... *Birmingham, Alabama*
Jesse Stringer Vogtle, Jr. ..... *Birmingham, Alabama*
William Randall Wade ..... *Russell Spring, Kentucky*
Lonnie Dolphus Wainwright, Jr. ..... *Birmingham, Alabama*
Susan James Walker ..... *Birmingham, Alabama*
Jack Booker Weaver ..... *Brewton, Alabama*
Robert Moore Weaver ..... *Birmingham, Alabama*
David Falconer Webber ..... *Mobile, Alabama*
Helen Crump Wells ..... *Montgomery, Alabama*
Christopher Michael West ..... *Mobile, Alabama*
Anita Barnes Westberry ..... *Birmingham, Alabama*
Larry Russell White ..... *Birmingham, Alabama*
Stephanie Rose White ..... *Birmingham, Alabama*
Calvin Mercer Whitesell, Jr. ..... *Montgomery, Alabama*
Carleton Richard Wilkins ..... *Mobile, Alabama*
Lori Joyce Williams ..... *Lexington, Alabama*
Richard Scott Williams ..... *Arlington, Virginia*
Thomas Patrick Williams ..... *Bay Minette, Alabama*
Wendy Lee Williams ..... *Birmingham, Alabama*
Phyliss Craig Wimberly ..... *Chapel Hill, North Carolina*
Jill Verdeyen Wood ..... *Birmingham, Alabama*
Kenneth Tim Wyatt ..... *Birmingham, Alabama*
Steven Joseph Youngpeter ..... *Tuscaloosa, Alabama*
Omar Raul Zamora ..... *Birmingham, Alabama*

Fall 1988 Bar Exam Statistics of Interest

Number sitting for exam 395
Number certified to Supreme Court 245
Certification rate 62%
Certification percentages:
- University of Alabama 70%
- Cumberland 68%
- Alabama nonaccredited law schools 33%

—NOTICE—

Public TV Provides "Tax Break"

Specialized tax advice for specific segments of the American population will be broadcast on Alabama Public Television in January in a 15-part series entitled TAX TIPS ON TAPE.

Developed by the IRS and public television, each 13 and ½ minute program is targeted at one of 15 distinct taxpayer groups, including military personnel, educators, older Americans, daycare providers and medical personnel.

APT will broadcast TAX TIPS ON TAPE from 11 to 11:30 p.m. Monday through Wednesday, January 9-11, and on Thursday, January 12 from 11 to 11:14 p.m. While the hour is late, APT and the IRS encourage taping of the series for later use at taxpayer convenience. The dates of broadcast for specific taxpayer groups are as follows:

January 9	Clergy Tip Income Recipients	**January 11**	Medical Personnel Daycare Providers
January 10	People with Second Jobs Older Americans	**January 12**	Children with Income

cle opportunities

january

19-20

ADVANCED STRATEGIES IN EMPLOYMENT LAW
Hyatt Regency, San Francisco
Practising Law Institute
Credits: 12.0 Cost: $425
(212) 765-5700

CHAPTER 11 BUSINESS REORGANIZATIONS
Helmsley Hotel, New York
Practising Law Institute
Credits: 11.0 Cost: $425
(212) 765-5700

20 friday

WORKERS' COMPENSATION
Atlanta
Atlanta Bar Association
Credits: 6.0
(404) 521-0781

25-27

ANTITRUST IN THE HEALTH CARE FIELD
Capital Hilton, Washington, DC
National Health Lawyers Association
Credits: 13.8 Cost: $450
(202) 833-1100

26 thursday

PRACTICAL LEGAL PROBLEMS
Harbert Center, Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $95
(205) 870-2865

26-27

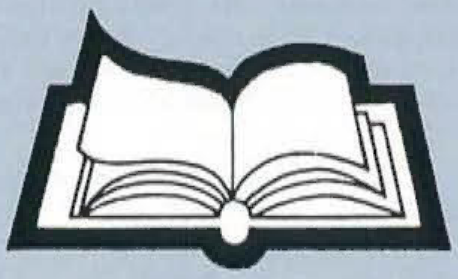
PREPARATION OF ANNUAL DISCLOSURE DOCUMENTS
Waldorf-Astoria Hotel, New York
Practising Law Institute
Credits: 11.0 Cost: $450
(212) 765-5700

26-28

MIDWINTER CONFERENCE
Wynfrey Hotel, Birmingham
Alabama Trial Lawyers Association
Credits: 9.0
(205) 262-4974

27 friday

REAL ESTATE
Atlanta
Atlanta Bar Association
Credits: 6.0
(404) 521-0781



february

3 friday

COMMERCIAL LAW
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230

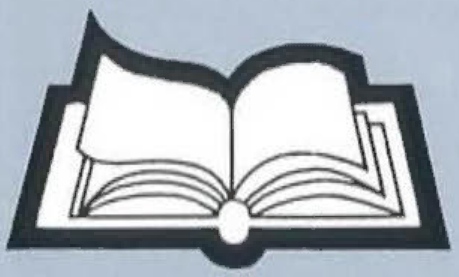
6-7

ADVANCED ANTITRUST
Fairmont Hotel, Chicago
Practising Law Institute
Credits: 10.3 Cost: $475
(212) 765-5700

10 friday

SOCIAL SECURITY VETERANS' & WORKERS' COMPENSATION CLAIMS
Admiral Semmes, Mobile
Cumberland Institute for CLE
Credits: 6.0 Cost: $90
(205) 870-2865

ALABAMA APPELLATE PRACTICE
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230



12-16

TRIAL ADVOCACY
Monteleone Hotel, New Orleans
National College of District Attorneys
(713) 749-1571

17 friday

PRODUCTS LIABILITY
Hyatt Regency, New Orleans
Tulane Law School
(504) 865-5900

WORKERS' COMPENSATION
Ramada Civic Center, Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $95
(205) 870-2865

17-18

BRIDGE-THE-GAP
Birmingham
Alabama Bar Institute for CLE
Credits: 12.0
(205) 348-6230

22-24

OIL & GAS LAW & TAXATION
Westin Hotel, Dallas
Southwestern Legal Foundation
Credits: 16.5
(214) 690-2377

march

2-3

IMPACT OF ENVIRONMENTAL REGULATIONS
Mark Hopkins Hotel, San Francisco
Practising Law Institute
Credits: 11.0 Cost: $425
(212) 765-5700

5-8

MEDICAL/LEGAL UPDATE - SKI SEMINAR
Lake Tahoe
Association of Trial Lawyers of America
(800) 424-2725

10 friday

ADVANCED FAMILY LAW
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

12-18

SKI SEMINAR
Park City, Utah
Alabama Trial Lawyers Association
Cost: $175
(205) 262-4974

13-15

EMPLOYMENT DISCRIMINATION
Doubletree Inn, Dallas
Southwestern Legal Foundation
(214) 690-2377

16-17

STRUCTURING AND CAPITALIZING BUSINESS ENTERPRISES
Hyatt Regency Hotel, New Orleans
Tulane Law School
(504) 865-5900

31 friday

BANKING LAW
Birmingham
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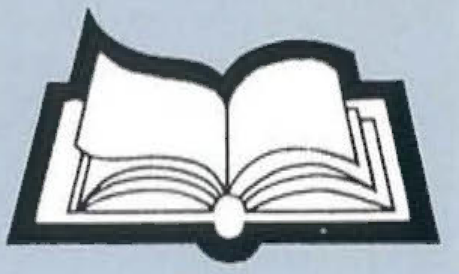

FALL 1988 ADMITTEES

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Lawyers in the Family

Calvin M. Whitesell, Jr. (1988); Christine W. Lewis (1981); Calvin M. Whitesell (1951); Timothy Lewis (1988); and Bill Prendergast (1980) (admittee, sister, father, brothers-in-law)

Charles Alex Short (1988); Amy Williamson Jones (1987); John Fletcher Jones (1953); John Fletcher Jones, Jr. (1987) (admittee, sister-in-law, father-in-law, brother-in-law)

Jonathan W. Cartee (1988); Senator Richard Shelby (1961); Michael J. Cartee (1979); David D. Shelby (1978) (admittee, uncle, brother, cousin)

William S. McFadden (1988); Stova F. McFadden (1955); Beth McFadden Rouse (1978); Robert H. Rouse (1980) (admittee, father, sister, brother-in-law)

Michael C. Stewart (1988); Amy W. Stewart (1983) (admittee, wife)

front row—Gregory S. Ritchey (1988); Albert E. Ritchey (1959); Ferris S. Ritchey, Jr. (1951); Ferris S. Ritchey, III (1984)
back row—Robert M. Ritchey (1985); George M. Ritchey (1978); Ferris W. Stephens (1981); Joseph T. Ritchey (1981) (admittee, father, uncle, cousins)

Steven J. Youngpeter (1988); Michael A. Youngpeter (1987); Laura L. Youngpeter (1987) (admittee, brother, sister-in-law)

Mary Beth O'Neill (1988); Robert W. O'Neill (1974) (admittee, father)

David B. Champlin (1988); Elizabeth A. Champlin (1984) (admittee, sister)

Jack Merrell Nolen, Jr. (1988); Jack M. Nolen, Sr. (1952); Theron Wayne Nolen (1982) (admittee, father, brother)

E.C. Hornsby, Jr. (1988); E.C. Hornsby, Sr. (1960) (admittee, father)

James W. Tarlton, IV (1988); James W. Tarlton, III (1961) (admittee, father)

Andrea D. Campbell (1988); John A. Lentine (1987) (admittee, fiancé)

Christopher Stanley Rodgers (1988); W. Stanley Rodgers (1964) (admittee, father)

Frank Coffee Galloway, III (1988); Frank Coffee Galloway, Jr. (1962) (admittee, father)

A. Lewis Philips, III (1988); Abram L. Philips, Jr. (1959) (admittee, father)

James H. Hancock, Jr. (1988); Judge James H. Hancock (1957) (admittee, father)

Joseph McNamee Tucker (1988); Billie Anne Crouch Tucker (1959) (admittee, mother)

D. Leigh Love (1988); Betty Love (1965); Huel Love (1949) (admittee, mother, father)

Randall Keith Bozeman (1988); Judge A. Ted Bozeman (1967) (admittee, father)

Elizabeth Barnes Hilyer (1988); Charles H. Barnes (1963) (admittee, father)

Carleton Richard Wilkins (1988); Robert B. Wilkins (1948); Robert B. Wilkins, Jr. (1980) (admittee, father, brother)

Alison MacDonald Peeler (1988); David Rowles Peeler (1983) (admittee, husband)

J. Guy Fullan (1988); James M. Fullan, Jr. (1950); Margaret Sparks Fullan (1953) (admittee, father, mother)

Pamela Karen Agee (1988); William M. Acker, III (1986); Judge William M. Acker, Jr. (1952) (admittee, husband, father-in-law)

James MacDonald Russell, Jr. (1988); P. Richard Hartley (1971) (admittee, uncle)

Glenn H. Lubel (1988); Edward B. Raymon (1973) (admittee, brother-in-law)

E. Tatum Turner (1988); Edward P. Turner, Jr. (1955); Halron W. Turner (1984) (admittee, father, brother)

Kendall Walton Maddox (1988); Justice Hugh Maddox (1957) (admittee, cousin)

Judith C. D'Alessandro (1988); Marye Ann Zicarelli D'Alessandro (1988) (admittees/sisters-in-law)

Laura S. Shores (1988); Justice Janie L. Shores (1959); James L. Shores (1956) (admittee, mother, father)

Kathryn Ottensmeyer Pugh (1988); John David Pugh (1988) (admittees/spouses)

Rhonda Jones (1988); R.B. Jones (1953) (admittee, uncle)

Donald G. Jackson (1988); Billy W. Jackson (1975) (admittee, brother)

Lisa Gullage (1988); Judge Jim Gullage (1960) (admittee, father)

Richard D. Turner (1988); Louise I. Turner (1953); James A. Turner (1952); James D. Turner (1974) (admittee, mother, father, brother)

Andrew Christopher Clauson (1988); Linor Fay Clauson (1988) (admittees/spouses)

David A. Elliott (1988); Edgar M. Elliott, III (1953); E.M. Elliott, IV (1982) (admittee, father, brother)

For extra copies of these family photographs or group photographs contact:
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Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. *The Alabama Lawyer* plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to:

Samuel A. Rumore, Jr.
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1230 Brown Marx Tower
Birmingham, Alabama 35203

Morgan County

Morgan County was originally named Cotaco County. The Alabama Territorial Legislature created Cotaco County in February 1818 from lands ceded by the Cherokee Indians in 1816. Different sources attribute the name "Cotaco" to an Indian chief in the area, his tribe or a large creek that flows through the northeastern part of the county.

The first court session convened June 8, 1818. The building used was a former stagecoach exchange or inn. Its location was near the Eva community, and the structure today is known as the "White House." This building was moved from its original location and now is used as a residence. It is considered one of the oldest structures in the county.

The next session of the court convened in the town of Somerville on September 14, 1818. The town was named for Lieutenant Robert M. Summerville of Tennessee, who died at the Battle of Horseshoe Bend March 27, 1814. The spelling of the town's name was later changed. It is speculated that the home of William Vaughan in Somerville was the site of the court sessions.

On June 14, 1821, the name Cotaco County was changed to Morgan County in honor of General Daniel Morgan of Pennsylvania who was a famous Revolutionary War leader. He had defeated the British at the Battle of Cowpens, South Carolina, on January 17, 1781.

Courts were held in Somerville in a frame building that burned. The wooden structure was replaced by a brick building constructed around 1837. This Somerville courthouse remains standing today, and is believed to be the oldest existing building constructed as a courthouse in the State of Alabama.

The old Somerville courthouse is listed on the National Register of Historic Places. It is a two-story rectangular brick building constructed in the Federal style. It has a hipped roof surmounted by an octagonal cupola on a square wooden base and topped with a weather vane. The roof consists of the original rolled copper plate. Since it ceased to serve as a courthouse, this building also has been used as a military college, high school, junior high school, elementary school and senior citizen's nutrition center.

The town of Somerville served as county seat for Morgan County for over 70 years; however, Somerville was in a land-locked location, and other areas of the county were rapidly growing. On February 10, 1891, the legislature approved an election to determine the site for the seat of justice. The choices were to keep the courthouse at Somerville, move it to the more central location of Hartselle or transfer it to the fastest growing area at Decatur.

Settlers had lived in the Decatur area known as Rhodes Ferry Landing as early as 1818. On March 22, 1820, the famous American naval officer Stephen Decatur, hero of the Tripoli War and the War of 1812, was killed in a duel. Soon after this tragedy, a group of Morgan County developers took the name Decatur Land Company. They sold their first lot July 9, 1820, and their town on the Tennessee River steadily grew. By 1891 more than half of Morgan County's population resided in Decatur and its twin city of New Decatur. The result of the courthouse election was a foregone conclusion.

The residents of Hartselle still objected to the move of the courthouse to Decatur, so county officials transferred their records and offices from Somerville to the new county seat under cover of darkness by wagon to avoid any conflicts. The first courts in Decatur were held on the third floor of the John Bank

Somerville

Decatur

drugstore building located at the corner of Oak and Cain streets. This building still stands and is known as the McEntire Building. Fire damage caused the removal of the top story. The building was used for apartments until 1988, and it currently is under renovation.

A new courthouse was occupied by the county in 1893. It was a four-story brick structure located on Ferry Street and cost approximately $45,000. The building was topped by a clock tower. Inside the building, under the rotunda, stood a bronze statue of Justice holding scales in her left hand and a sword in her right. This courthouse was remodeled in 1918.

In 1927 a fire gutted the interior of the building and the clock tower crashed into the structure. The citizens of Hartselle immediately sought to have the courthouse removed to their town as their fathers had tried to do in 1891, and the rival towns conducted voter registration drives. However, the majority again chose Decatur as in 1891. The courthouse was rebuilt in 1928 on the ruins of its predecessor. The statue of Justice was moved to the lawn facing Ferry Street, but she had lost her scales and sword in the fire.

The most significant proceedings conducted in this Morgan County Courthouse were the "Scottsboro Boys" trials. The initial trial had been held in Jackson County. The re-trials were all heard in Decatur. The second trial commenced on March 28, 1922, and was presided over by Judge James E. Horton. A third trial commenced on November 17, 1934. A fourth trial began in 1936, and resumed on July 13, 1937. During this time the eyes of the nation were fixed on Decatur and the Morgan County Courthouse, and press coverage was extensive. After a conviction was reported in one of the trials, Walter Winchell, possibly knowing the story of the statue, told his radio listeners, "Justice in Morgan County has no scales."

This courthouse, which had been hastily erected in 1928, served Morgan County for almost 50 years. It was a two-story structure built of orange-colored brick. The main entrance was flanked by a pair of Ionic columns which supported a Classical pediment. By 1972 the building was no longer adequate for the needs of the county, and a bond issue was approved for its replacement. Several groups proposed that the old courthouse building be used for a county museum, but the structure was demolished and the site is now Cotaco Square Park located behind the present-day courthouse.

The new Morgan County Courthouse was designed by architect Walter Hall of the firm Hall & Colvard. The contractor was Gresham, Williams & Johnson Co. of Decatur. The building is of contemporary design consisting of four stories and a basement. It was occupied by the county in April 1976, and the formal dedication took place Sunday, September 12, 1976. This modern edifice is a fitting monument to the county where three prior structures, which have served as the county courthouse, still survive. ■

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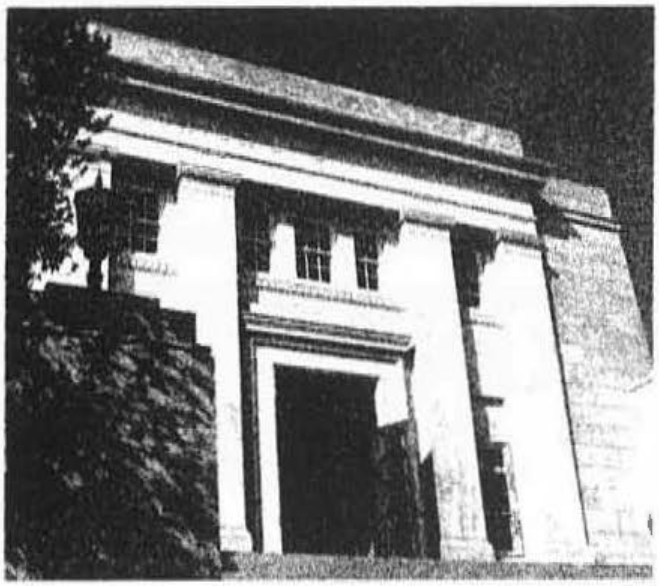

Recent Decisions

by John M. Milling, Jr., and David B. Byrne, Jr.

Recent Decisions of the Supreme Court of Alabama—Criminal

Is there a time limit on making a *Batson* objection?

Bell v. State, 22 ABR 3595 (September 9, 1988)—The Supreme Court of Alabama granted the state's petition for writ of certiorari to consider whether Bell's *Batson* objection was timely. In *Bell*, the defense counsel did not make the *Batson* objection until after the jury was selected and sworn. After the jury was excused for lunch, defense counsel moved to quash the jury on the basis "that race played a part in the strikes exhibited and used by the District Attorney's office . . . ."

The Supreme Court of Alabama, in a *per curiam* opinion, reversed and remanded; in doing so, the court has given us a "brightline test" regarding the timeliness of a *Batson* objection.

Following the rationale of the Alabama Court of Criminal Appeals in *Williams v. State*, [Ms. 3 Div. 305, March 8, 1988] ____So.2d____ (Ala.Crim.App. 1988), the supreme court held that "in order to preserve the issue for appellate review, a *Batson* objection, in a case in which the death penalty has not been imposed, must be made prior to the jury's being sworn." The supreme court reversed and remanded because the defendant's *Batson* objection came too late.

Competency to stand trial—motion for psychiatric examination; the rationale of *Davis v. State* extended

Gordon v. State, 22 ABR 3312 (August 26, 1988)—Gordon appealed from a denial of her motion for psychiatric examination. She maintained that she was incapable of "aiding or assisting" her attorney in the preparation of her defense. Gordon pled guilty to a theft charge following the trial court's denial of her motion for psychiatric examination.

The Supreme Court of Alabama granted certiorari to review whether the trial court erred in denying Gordon's request for psychiatric examination. The court, in a *per curiam* opinion, reversed and remanded.

At the outset, the court noted that the matter of court-sanctioned psychiatric examination is addressed in §15-16-21, *Code of Alabama* (1975). Our supreme court has held that requests for psychiatric examination are within the trial court's discretion which will remain undisturbed on appellate review absent a clear abuse of that discretion. *Pace v. State* 284 Ala. 585, 226 So.2d 645 (1969).

The State maintained that the evidence supporting Gordon's request for

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psychiatric evaluation lacked the necessary elements under *Davis v. State*, 354 So.2d 334 (Ala.Crim.App. 1978). In *Davis*, the Alabama Court of Criminal Appeals held that three factors were to be considered by the trial court in evaluating an accused's competency to stand trial:

1. the existence of a history of irrational behavior;
2. prior medical opinion; and,
3. the accused's demeanor at trial.

The State contended that Gordon failed to satisfy the *Davis* requirements because no evidence of irrational behavior or prior medical opinion was adduced.

In *Gordon*, three attorneys who had personal encounters with Gordon testified that she was incapable of aiding an attorney in her defense. After carefully reviewing the testimony of the three lawyers, the Alabama Supreme Court suggested that the *Davis* factors were not all-inclusive and extended the rationale of *Davis* as follows:

> ". . . To suggest that an accused's competency can be assessed based solely on such a restricted analysis defies common reasoning. The three *Davis* elements, namely, 1) an accused's history of irrational behavior, 2) prior medical opinion about the accused, and 3) an accused's demeanor at trial, are all relevant in determining whether further inquiry is required . . . . [However,] [t]here are . . . no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts."

Drope v. Missouri, 420 U.S. 162, 175 (1975).

The court concluded that the evidence presented to the trial court clearly warranted further inquiry into Gordon's mental competence. The judgment of the court of criminal appeals therefore was reversed and the cause remanded.

Alabama firearms enhancement statute triggered only by element of intentional criminal conduct

McCree v. State, 22 ABR 3617 (September 16, 1988)—Defendant was convicted for manslaughter and sentenced to 10 years in prison under Alabama's Firearm Enhancement Statute, §13A-5-6(a)(5), *Code of Alabama* (1975). At trial, defendant's attorneys filed a written motion to bar the use of the enhancement provisions in determining his sentence. The trial court denied the motion.

Defendant advanced two arguments in support of his contention that the trial court erred in applying the enhancement provisions of the statute. First, the language of section 13A-5-6(a)(5) allows enhancement of the sentence only when a defendant is convicted of a felony that involves the use of, or the attempt to use, a weapon *"in the commission of [that] felony."* Defendant next argued that the element of intent is a necessary element of any felony to which the enhancement statute is sought to be applied in order for the statute to have a deterrent effect on the use of weapons, especially firearms.

The State, relying on *Holloway v. State*, 477 So.2d 487 (Ala.Crim.App. 1985), maintained that the application of the enhancement statute is mandatory with the only requirement for its application being that the jury find that the defendant *used* a firearm in the commission of a class B or class C felony.

The Supreme Court of Alabama disagreed and reversed. Justice Jones focused the issue as follows:

> ". . . The resolution of this issue requires a two-step process. First, implicit in the language of §13A-5-6(a)(5)—'a firearm or deadly weapon was used or attempted to be used in the commission of the felony'—is the requirement that the underlying felony for which the defendant is convicted have, as one of its necessary elements, the element of *intentional* criminal conduct. Therefore, McCree's reckless or negligent conduct, which *resulted* in manslaughter, while sufficient to supply the criminal scienter to support a conviction for a Class C felony, does not require a finding that he intentionally used the firearm *to commit* the felony, and thus cannot support the application of §13A-5-6(a)(5)."

In other words, the court construed subsection (a)(5) to mean that convictions for those underlying felonies that are committed without the intentional use of a deadly weapon do not fall within the category of convictions that invoke the enhancement provision of this statute.

Second, "enhancement," as that word is used to describe the effect of §13A-5-6(a)(5), necessarily means that *in addition to* the culpability of the offense for which the defendant has been convicted, the defendant's conduct is necessarily the result of a higher degree of culpability because of the jury's finding that a "firearm or deadly weapon was used or attempted to be used in the commission of the felony." Indeed, the use of

a deadly weapon *to commit* the underlying felony is the classic situation intended by the legislature to invoke the enhanced penalty.

Here, the jury returned a verdict of manslaughter against the defendant. By virtue of that finding, the jury eliminated the element of defendant's intentional use of a firearm as a means to take human life. The culpability of defendant for *recklessness* was established by the jury's verdict. Therefore, the trial court was without authority to sentence defendant under an enhancement statute that, by its very terms, is invoked by a culpability higher than that for which defendant had been found guilty.

Ineffective assistance of counsel

Foster v. State, 22 ABR 2788 (July 15, 1988)—Defendant was convicted of rape, robbery, kidnapping and sodomy. On appeal, the Supreme Court of Alabama granted certiorari as to the issue of whether defendant should have been granted a hearing on his *pro se* motion for a new trial on the basis of ineffective assistance of counsel. Defendant's motion alleged that his counsel did not bring out at trial: (1) that the victim had a history of mental illness; and, (2) that the Montgomery warrant clerk's office had posted a sign warning officers not to accept complaints from this prosecutrix because she had a history of making false complaints.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established the standard for the review of an ineffective assistance of counsel claim:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

In reversing, the Alabama Supreme Court held that the trial judge incorrectly held, in his order denying the motion for new trial, that the notice posted in the warrant clerk's office would not have been admissible in the case.

Justice Maddox reasoned that, "The evidence Foster says he can present regarding the notice in the warrant clerk's office would be admissible, as it relates to the prosecutrix's reputation for truth and veracity. A witness, by taking the stand, puts in issue his character or reputation for truthfulness." *Allen v. State*, 382 So.2d 11, 23, (Ala.Crim.App. 1979). "Second, Foster alleged that the prosecutrix's psychiatrist would state that she was not competent to testify. Of course, such evidence would be relevant and could have changed the outcome of the trial."

Search predicated upon misdemeanor arrest requires that the officer have actual possession of misdemeanor writ of arrest

Brownlee v. State, 22 ABR 3688 (September 16, 1988)—Defendant was arrested on a writ of arrest issued for his failure to pay a fine on an earlier misdemeanor charge of driving while his license was revoked. At the police department, a small quantity of marijuana was found in defendant's possession, and he was subsequently charged with unlawful possession of marijuana. Defendant moved to suppress the evidence of the marijuana on grounds that the arrest writ on the misdemeanor was not in possession of the police officer at the time of his arrest as required by §15-10-3, *Code of Alabama* (1975).

On appeal, the issue for review was whether the State bears the burden of proving the existence of a valid writ of arrest at the time and place of defendant's arrest, and, if so, whether the trial court erred in denying the motion to suppress the evidence of marijuana.

For an arrest to be valid on a misdemeanor offense *not witnessed* by the arresting officer, the officer must have the arrest warrant in his possession at the time of arrest. *Ex parte Talley*, 479 So.2d 1305 (Ala. 1985); *see also Ex parte Edwards*, 454 So.2d 503 (Ala. 1983). Thus, when a police officer arrests without a warrant and the defendant objects to the introduction of the evidence seized as an incident to the arrest, "the burden is on the State to show that the arrest was lawful." *Duncan v. State*, 278 Ala. 1435, 161, 176 So.2d 840, 855 (1965).

The Alabama Supreme Court, in a *per curiam* opinion, found that where a defendant properly objects to testimony pertaining to a search and the admission into evidence of the "fruits" of that search on the ground that there was no search warrant, the objection places upon the

State the burden of showing either a warrant or one of the exceptions to the requirement of a warrant. *Ex parte Paschal*, 365 So.2d 681 (Ala. 1978).

By properly raising this objection as to the admissibility of the marijuana as evidence, the supreme court reasoned that defendant shifted to the State the burden to show that the seizure of the marijuana was lawful; in other words, the State had the burden of showing that the seizure was the product of an arrest by an officer with actual possession of the misdemeanor writ.

In light of the testimony from the arresting officer that he could not remember defendant's arrest, the defendant himself or whether he possessed the writ at the time of the arrest, and the further testimony from the booking officer after defendant was taken into custody, the State failed to meet its burden of proving the existence of a valid writ at the time and place of Brownlee's arrest. The supreme court, therefore, concluded that the trial court erred in denying the motion to suppress.

What price a conviction? a treatise on *Agurs* and *Strickland*

Ex Parte Womack, 22 ABR 3440 (September 2, 1988)—The supreme court cataloged a 14th Amendment violation by the district attorney's office from Montgomery County, Alabama, in failing to provide exculpatory information within its control and, second, found that defendant was denied his Sixth Amendment right to counsel. In the opinion of this writer, this case represents a truly significant decision in the area of criminal procedure. Every Alabama lawyer should carefully read this entire opinion if they practice criminal law in this state.

On February 2, 1981, the City Curb Market, located in Montgomery County, Alabama, was robbed by someone who killed the owner. Although there were no eye witnesses to the crime, the State called as witnesses several customers who were in the store just before and just after the crime.

Defendant's most serious allegation of the State's failure to produce exculpatory information involved suppression of a plea bargain with both Neal Martin and Rex Jones before their grand jury testimony. At the *coram nobis* hearing, the attorney who defended Martin testified that some time after Martin gave his grand jury testimony, Martin sent him a letter indicating that defendant was innocent and that the grand jury testimony was false. The attorney's testimony was corroborated by the letter that Martin sent to him while Martin was in prison. The letter, which was authenticated by Martin at the *coram nobis* hearing, was not only exculpatory of the defendant,

Notice of Election

Notice is given herewith pursuant to the *Alabama State Bar Rules Governing Election of President-elect and Commissioner for 1989.*

President-elect

The Alabama State Bar will elect a president-elect in 1989 to assume the presidency of the bar in July 1990. Any candidate must be a member in good standing on March 1, 1989. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1989. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 19, 1989.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices on the following circuits: 1st; 3rd; 5th; 6th-Place #1; 7th; 10th-Places #3 and 6; 13th-Place #3; 14th; 15th-Places #1 and 3; 25th; 26th; 28th; 32nd; and 37th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1989, and vacancies certified by the secretary on March 15, 1989.

The terms of any incumbent commissioners are retained.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 28, 1989).

Ballots will be prepared and mailed to members between May 15 and June 1, 1989. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 13, 1989) to state bar headquarters. ■

but strongly implicated both Martin and Jones.

The Supreme Court of Alabama found constitutional error and the requirement for a new trial based upon *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264, 271 (1959). The supreme court critically noted:

> "There was voluminous evidence presented at the *coram nobis* hearing to the effect that the district attorney's office had negotiated a plea bargain with both Neal Martin and Rex Jones before their grand jury testimony, but failed to disclose those plea bargains to Womack's attorney."

Just as in *Giglio*, the prosecutor in *Womack* aggravated the prejudicial effect of the suppression of the plea bargain by affirmatively representing to the jury that Jones had no deal with the State.

In summary, the Supreme Court of Alabama found a denial of due process for three essential reasons:

> "1. First, due process precludes the use of perjured testimony by the prosecution in acquiring a conviction. We have concluded, in this regard, that the State's misrepresentation that it had no plea bargain or other arrangements with Jones and Martin at the time of trial was a denial of the constitutional rights of the accused.
>
> "2. Similarly, 'constitutional error' occurred when the prosecutor knowingly suppressed evidence that Martin was guilty of the crime and solicited reiteration at trial of Martin's dubious grand jury testimony. Moreover, due process requires the production of exculpatory evidence that is the subject of a specific pretrial request. We have concluded, therefore, that it was reversible error for the trial court to reject Womack's constitutional argument with regard to the State's suppression of police reports that showed inconsistencies with Jones's and Martin's later statements before the grand jury and the trial court . . .
>
> "3. Due process requires the disclosure of exculpatory matter, even in the absence of a request, if it creates a reasonable doubt about the defendant's innocence that did not otherwise exist. We have concluded that it was reversible error for the trial court to reject Womack's due process argument with regard to the prosecutor's suppression of evidence of Martin's attempt to recant his grand jury testimony. Similarly, it was 'constitutional error' for the State to suppress the Robert Glenn memorandum, which also indicated that Jones and Martin had committed the crime."

The supreme court also found that the Sixth Amendment right to effective assistance of counsel required reversal under the mandate of *Strickland v. Washington*, 466 U.S. 668 (1984). The court concluded that, "It was constitutional error under the Sixth Amendment for defense counsel to voluntarily take the stand and testify against his client. Second, reversible error occurred when defense counsel failed to present the testimony by James Williams that would have impeached the testimony of Jones and Martin and implicated them in the murder. Third, it was constitutional error for the defense counsel to ignore the exculpatory evidence that Robert Beno possessed but which was protected by the attorney-client privilege."

It is significant to note that the Supreme Court of Alabama did not create any new strictures to apply in criminal trials. Rather, the court applied the protections that the United States Supreme Court has required for nearly 20 years under the Sixth and Fourteenth amendments to the Constitution.

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . interrogee may introduce its interrogatory answers which tend to explain answers introduced by other party

Cody v. Louisville & Nashville Railroad Co., 21 ABR 3222 (August 26, 1988). Cody was injured while working, when a boxcar door fell on him. He sued L&N, owner of the boxcar. During the trial, Cody's attorney read to the jury 42 of 55 interrogatories and answers that Cody had propounded to L&N. Thereafter, L&N offered two of the questions and answers that Cody had omitted. The two questions regarded previous instances of the boxcar doors falling. Cody objected to L&N's offer on the grounds that the answers were self-serving declarations. The trial court admitted the answers into evidence over Cody's objection. The supreme court held that the trial court did not err.

In a case of initial impression in Alabama since adoption of the *Alabama Rules of Civil Procedure*, the supreme court adopted a New Mexico court's holding that when a party submitting written interrogatories offers into evidence part of the answers thereto, the

interrogee has a right to introduce or to have introduced all of the interrogatories which are relevant to, or which tend to explain or correct, the answers submitted. Prior Alabama practice held that the examining party had the option of introducing answers to interrogatories, but that if he did so, he had to offer the whole and could not select the answers or parts of answers suited to his purpose.

Civil procedure . . .
pre-trial motions may serve as answer

Ex parte United States Gypsum Company (In Re: City of Enterprise v. United States Gypsum Co., et al.), 22 ABR 3537 (September 9, 1987). U.S. Gypsum was sued as a manufacturer of asbestos products. U.S. Gypsum filed numerous pre-trial motions including a motion to dismiss, a motion for judgment on the pleadings and a motion for summary judgment. The motions raised the statute of limitations and improper use of fictitious party rules. The trial court denied all motions except for the motion for summary judgment and the motion for judgment on the pleadings.

Thirteen days prior to trial, U.S. Gypsum filed an "answer" which raised the same issues raised in the pre-trial motions. The City filed a motion to strike the answer, which alleged that the answer was untimely and afforded the City insufficient notice of the defenses to prepare for trial. The trial court granted the motion. U.S. Gypsum filed a petition for writ of mandamus to decide the dispute. The supreme court granted the writ and held that the pre-trial motions served as an answer and were sufficient notice to the City that U.S. Gypsum intended to raise the defenses at trial.

In dicta, the supreme court also noted that Rule 12(a), Ala.R.Civ.P., alters the 30-day period for filing an answer under certain circumstances when a "motion permitted under this rule" is filed. The motion for judgment on the pleadings filed by U.S. Gypsum is clearly a "motion permitted under" Rule 12. The supreme court also noted that there is persuasive authority that would treat a pre-answer Rule 56 motion for summary judgment similarly to a "Rule 12" motion.

Civil procedure . . .
rule 12(a) and §6-5-440 applied

Ex parte Canal Ins. Co. (In Re: Sparks v. Canal Ins. Co.), 22 ABR 3532 (September 9, 1988). Canal insured Sparks and his truck. Sparks had an accident and filed a sworn proof of loss. Canal disputed the claim and filed a declaratory judgment action in federal court seeking a declaration of its obligations under the policy. *Subsequently*, Sparks filed a suit in state court alleging breach of contract, bad faith, etc. Canal moved to dismiss the state court action, asserting that the prior federal court action barred the state court action and the matters alleged in the state court action were properly matters of a compulsory counterclaim in the federal action pursuant to *Fed.R.Civ.P.* 13(a). Eventually, Sparks filed a counterclaim in federal court and alleged breach of contract, bad faith, etc. Canal petitioned the supreme court for a writ of mandamus directing the state court judge to dismiss the state court suit. The supreme court granted the writ.

The supreme court stated that under both the Alabama rules and the federal rules, Sparks' suit was a compulsory counterclaim to Canal's declaratory judgment action. The supreme court also stated that because the matter asserted in the counterclaim is subject to the mandate in rule 13(a), *Fed.R.Civ.P.*, §6-5-440, *Ala. Code* (1975), requires the dismissal of the subsequently filed state court action. The federal court acquired jurisdiction of the controversy before the state court action was filed and §6-5-440, *supra*, forbids the prosecution of two actions in the courts of this state at the same time for the same cause against the same party. "Courts of this state" as used in this section includes a United States District Court within this state.

Civil procedure . . .
party must move to strike affidavit that violates rule 56(e), or he waives objection

Perry v. Mobile County, 22 ABR 3777 (September 23, 1988). Perry was injured in an accident that occurred at an intersection in Mobile County. He sued M.L. Risher, an engineer employed by the State of Alabama Highway Department, and alleged *inter alia* that Risher had negligently or wantonly failed to alter, modify or change the intersection prior to the accident. Risher filed a motion for summary judgment, and plaintiff filed a motion in opposition and an affidavit that contained speculative and conclusory statements. The affidavit was not based on personal knowledge, and it was accompanied by documents which were not certified or otherwise authenticated. The trial court granted Risher's motion for summary judgment, and the issue of the admissibility of the evidence in opposition to the motion for summary judgment was raised for the *first time on appeal*.

In a matter of initial impression in Alabama, the supreme court adopted the language contained in C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure: Civil Second*, Section 2738 (1983), which states that 'a party must move to strike an affidavit that violates Rule 56(e); if he fails to do so, he will waive his objection and, in the absence of a 'gross miscarriage of justice,' the court may consider the defective affidavit.' The supreme court noted that the foregoing is applicable equally to those affidavits in support of a motion for summary judgment and to those in opposition to such a motion.

Labor . . .

state courts lack jurisdiction of disputes involving federal government employment

Mims v. American Federation of Government Employees, 21 ABR 3302 (August 26, 1988). Mims, an employee of a Veterans Administration hospital, was fired. He requested that his union challenge his termination pursuant to union grievance procedures. The union filed a grievance which was rejected by management, and the union refused Mims' request that the matter proceed to arbitration. Mims filed this action in state court and contended that the union breached its duty of fair representation, a duty recognized under federal labor law. The trial court dismissed Mims' claim against the union on the basis that Alabama state courts lacked subject-matter jurisdiction over such a lawsuit. The supreme court affirmed.

The supreme court noted that although it had held that state courts have subject-matter jurisdiction over such claims where they concern the *private sector employees*, the court held that the statutory scheme enacted by Congress governing such claims in the context of *federal government employment* preempts state court jurisdiction. The supreme court relied on authorities in the Eleventh and Ninth circuit courts of appeals but acknowledged that the issue is disputed and is presently before the United States Supreme Court.

Torts . . .

AEMLD discussed

Sanders v. Ingram Equipment, Inc., 22 ABR 3341 (September 2, 1988). Sanders, a sanitation worker, was injured when he slipped off a garbage truck's running board and was run over by the truck. The truck was manufactured by General Motors. The truck carried a garbage packer manufactured by The Heil Company. The Heil Company mounted the garbage packer on the GM truck and sold the unit to third parties who sold it to Sanders' employer. Sanders sued Heil and others under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) and contended that the garbage packer when mounted on the GM truck constituted a "completed vehicle" and that the "completed vehicle," taken as a whole, was defective. The trial court disagreed and granted Heil's motion for summary judgment. The supreme court affirmed.

The supreme court stated that the issue was whether someone who manufactures a non-defective component, and then participates in assembling the component onto a defective product, can be held liable under the AEMLD for injuries occurring as a result of the defect in the component not manufactured by that party. The supreme court said no and held that a distributor or manufacturer of a non-defective component is not liable for defects in a product that it did not manufacture, sell or otherwise place in the stream of commerce. There was no evidence that Heil manufactured or sold a defective component, and there was no proof of a causal relationship between Sanders' injury and Heil's actions. ■

Opinions of the General Counsel

by Robert W. Norris, General Counsel

QUESTION:

A solo practitioner with an active trust account died. Attorney A was appointed executor and undertook to wind up the practice and distribute the funds from the trust account. The solo practitioner maintained an accounts ledger of the trust account, but the balances did not reconcile with the bank account. After several years A was able to determine the clients who owned the various accounts, and appropriate disbursements were made. He was unable, however, to determine the owners of some of the funds or the whereabouts of certain clients. What distribution should A make in order to close the account?

ANSWER:

There are two categories of funds in the account. The first category involved those funds that cannot be attributed to a particular client. After a reasonable and good faith effort is made to determine the ownership of the funds, and after holding the funds as long as necessary to assure that no unidentified client could make a successful claim against the account, A may distribute the funds to the solo practitioner's estate. The second category of funds in the account are those that can be attributed to a client but the location of that client is unknown. After making a good faith and reasonable effort to locate the client, A must hold the funds until they are presumed abandoned under state law, at which time he should turn them over to the state.

DISCUSSION:

Attorney A first should make every reasonable effort to ascertain the identity and location of the clients entitled to the funds. This would include publication of a notice in a newspaper of general circulation, not only in the area where the decedent practiced but also in the last known area where the client or clients reside or do business.

Regarding the funds that cannot be attributed to a client or clients, several state ethics committees have held that after reasonable and good faith attempts to ascertain the ownership and after holding the funds long enough to insure that no unidentified client could make a claim against the funds within any applicable statute of limitations, they may be distributed to the attorney's personal account or his estate.

Unidentified funds in a trust account could properly be funds deposited to pay service charges [DR 9-102(A)(1)] or to avoid any possibility of a shortage in the account or fees earned but not withdrawn [DR 9-102(A)(2)].

The Alabama Disciplinary Commission addressed a similar question in RO-82-649. In that case there were several thousand dollars in a deceased attorney's trust account that could not be "traced to its rightful owner." The commission held that:

• • •

"Some type of legal proceeding should be instituted whereby notice by publication could be given to potential claimants. Although other proceedings may be available we suggest that the property could be disposed of under the Alabama Uniform Disposition of Unclaimed Property Act, Section 35-12-20, *Code of Alabama*, 1975."

In this case the commission assumed that the funds were client funds and were "not earned attorney's fees which [the attorney] deposited in a trust account pursuant to the provisions of DR 9-102(A) and failed to withdraw therefrom." The opinion then cites an earlier opinion where the client was known but could not be located.

In the case at hand, we make no such assumptions and hold that where it cannot be determined that the funds are client funds by reasonable, diligent and good faith efforts, including public notice in a newspaper of general circulation and after holding the funds long enough to assure that no successful claim will be filed by an unknown client, the funds may be distributed to the deceased attorney's estate.

The second category of funds in the trust account are those that can be attributed to a client but the whereabouts of the client are unknown. In this situation Attorney A does not have the option of distributing the funds to the deceased attorney's estate because the money clearly does not belong to the deceased attorney. In situations such as this, numerous opinions of state bar ethics committees, including the Disciplinary Commission of the Alabama State Bar, have held that the funds must be retained until presumed abandoned under state law at which time the funds must be turned over to the state.

The Office of General Counsel and the Disciplinary Commission have, in a number of opinions, held that where funds in a trust account may be attributed to a client but the location of the client is not known, some type of legal proceedings should be instituted whereby notice by publication could be given to the owner of the deposited funds. The opinions also hold that although other proceedings may be available, the property could be disposed of under the Alabama Uniform Disposition of Unclaimed Property Act, §35-12-20, *Code of Alabama*, 1975, (RO-82-649, RO-83-14, RO-84-26, RO-84-48, RO-83-146 and RO-84-106).

In situations where the client is known but cannot be found the money clearly *does not belong* to the attorney. Consequently, the lawyer has no alternative but to retain the funds on the client's behalf at least until such time as the funds may be considered legally abandoned.

Consequently, in the case at hand, we hold that attorney A must take every reasonable effort to locate the client, including public notices in a newspaper of general circulation in the area where the deceased lawyer practiced, as well as in the area where the client maintained his last known address or business. If these efforts are unsuccessful, then Attorney A must hold the funds until such time as they may be considered abandoned under the Alabama Uniform Disposition of Unclaimed Property Act, Chapter 12, Article II of Title 35, *Code of Alabama*, 1975. ■

Increase Income with the Alabama Lawyer Referral Service

by William D. Owings

So you want to increase your income, but you find legal advertising to be offensive, and you can only talk so many times to the Rotary Club? Join the Lawyer Referral Service of the Alabama State Bar.

First, this is what it is *not*. The Lawyer Referral Service is not legal aid, and it is not a bureaucracy with many regulations about how to practice law. What it is is a toll-free telephone number for people to call who want a lawyer and do not know one. The LRS gives them the name and address of the next lawyer on the list who practices in the caller's locale in the field of law needed.

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So what are you waiting for? Even if you only accepted one case all year, the service would pay for itself and net you a tidy profit, and that case would have gone to another attorney on the referral service list if you were not there.

To sign up, fill in the form on the following page and mail to **Alabama Lawyer Referral Service, P.O. Box 671, Montgomery, AL 36101.** (If you practice in Birmingham, Mobile or Huntsville contact your local lawyer referral service.)

—NOTICE—

Attorneys Practicing in the Middle District of Alabama

Effective **January 1, 1989,** the attorney admissions fee increased to $40. In compliance with order of this court, dated November 21, 1988, a $20 special attorney admission fee will be assessed in addition to the $20 general admissions fee presently required by the Judicial Conference of the United States Courts, pursuant to 28 U.S.C. §1914. In addition, there will be a $10 fee for every *pro hac vice* admittance.

A copy of the *Plan for the Creation and Administration of a Special Attorney Admissions Fund* is available for inspection by counsel in the Office of the Clerk, United States District Court for the Middle District of Alabama, Montgomery, Alabama. Phone (205) 832-7308.

—Thomas C. Caver, clerk

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Year admitted to bar: _____ Year admitted to federal courts: _____

Courts in which you practice: _____

Other states in which you are admitted to practice: _____

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3. ____ Bankruptcy
4. ____ Civil rights
5. ____ Collections & repossessions
6. ____ Consumer affairs
7. ____ Contracts
8. ____ Corporation
9. ____ Criminal
10. ____ Estates, trusts & wills
11. ____ Family law
    a. ____ Divorce
    b. ____ Adoption
    c. ____ Guardianships
    d. ____ Paternity
12. ____ Immigration & naturalization
13. ____ Insurance
14. ____ Labor relations
    a. ____ Management
    b. ____ Unions
    c. ____ Wage & hour
    d. ____ Employment discrimination
15. ____ Landlord-tenant
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    a. ____ Legal b. ____ Medical
17. ____ Military law
18. ____ Negligence
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22. ____ Social Security
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24. ____ Torts
    a. ____ Personal injury
    b. ____ Workers' compensation
25. ____ Traffic
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AGREEMENT

(1) I hereby apply for membership in the Lawyer Referral Service of the Alabama State Bar. I am licensed to practice in Alabama and engaged in private practice within the state. I am covered by a professional liability insurance policy with limits of not less than $100,000/$300,000 (attach copy of certificate). (2) I understand this application is made only on my behalf and not on behalf of my firm or any of my associates. Accordingly, I agree that the initial consultation in connection with any referred matter will be with me personally, although other counsel may be associated to perform all or a portion of subsequent professional services agreed upon, if the referred client agrees to such association. (3) In my opinion, I am qualified to handle cases I have designated in the areas of "practice preference." (4) I agree to abide by the rules of the Lawyer Referral Service and to act within the spirit of its purposes. I agree to be bound by the following rules concerning fees. (a) A fee of $20, which may be waived, will be charged for the initial one-half hour. (b) Should any dispute concerning fees arise between a client and me referred to me by the Lawyer Referral Service, such dispute will be submitted to the Alabama Lawyer Referral Board and I agree to be bound by its determination.

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(Date) (Signature of Applicant)

Please enclose registration fee of $37.50 payable to the Alabama State Bar and a copy of your current coverage binder for professional liability and mail to: **Lawyer Referral Service, P.O. Box 671, Montgomery, AL 36101.**

Legislative Wrap-up

by Robert L. McCurley, Jr.

Alabama Rules of Evidence

The Alabama Supreme Court, within their rulemaking authority, has appointed an advisory committee to draft Alabama Rules of Evidence; the Alabama Law Institute serves as an agency designated to carry out the order of the supreme court regarding this study. Pat Graves of the firm of Bradley, Arant, Rose & White was named chairperson of the committee. Other committee members are:

Judge Joseph Colquitt—Tuscaloosa
Gregg Cusimano—Gadsden
Senator Michael Figures—Mobile
Charles Gamble—University of Alabama School of Law
Judge Sally Greenhaw—Montgomery
Judge Arthur Hanes—Birmingham
Brooks Holmes—Mobile
A. Richard Igou—Fort Payne
Ralph Knowles, Jr.—Tuscaloosa
L. Tennett Lee, III—Huntsville
Howard Allyn Mandell—Montgomery
William H. Mills—Birmingham
Bruce J. McKee—Cumberland School of Law
Frank B. McRight—Mobile
Richard Ogle—Birmingham
Abner R. Powell, III—Andalusia
Ernestine Sapp—Tuskegee
Clarence M. Small, Jr.—Birmingham
Judge C. Lynwood Smith, Jr.—Huntsville
Bill Clark—Birmingham

Professor Charles Gamble, former dean of the University of Alabama School of Law, was named reporter. Professor Gamble is the editor of *McElroy's Alabama Evidence, 3rd Edition,* and author of numerous other articles on evidence. Professor Gamble teaches at the University, and is a frequent lecturer on the subject at continuing legal education programs.

The first item on the committee's agenda was to determine which model to use for the project. The alternatives were the Uniform Rules of Evidence and the Federal Rules of Evidence. The consensus of the committee was the model should be the Federal Rules of Evidence which became effective July 1, 1975, and have been amended through November 1, 1988.

It was agreed that the committee would use the structure of the federal rules, and that the wording of such rules would be adopted unless there existed a substantial state policy or preferable Alabama Rule of Practice or Rule of Evidence which justified deviation. Considerable thought and discussion have gone into the question of what impact the adoption of the Alabama Rules of Evidence would have upon pre-existing statutes which contained rules of evidence. It was agreed that no specific position would be taken at the outset, but that such statutes would be charted throughout the drafting process.

Thirty-one states have adopted the Federal Rules of Evidence, including neighboring states of Florida and Mississippi.

Anyone with suggestions or comments concerning these rules should contact a member of the committee or write the Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35487.

The Alabama Legislature convenes for their regular session February 7, 1989. The Law Institute is expected to introduce a revised adoption law, revised condominium law and a fraudulent transfers act. ■

Robert L. McCurley, Jr., is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

Memorials

Theron Eugene Burts, Jr.—Cincinnati, Ohio
Admitted: 1949
Died: October 2, 1988

Donald Wilburn Strickland—Birmingham
Admitted: 1925
Died: October 14, 1988

Lucien D. Gardner, Jr.—Birmingham
Admitted: 1924
Died: October 29, 1988

A. Lamar Reid—Birmingham
Admitted: 1949
Died: November 25, 1988

These notices are published immediately after reports of death are received. Biographical information not appearing in this issue will be published at a later date if information is accessible. We ask you to promptly report the death of an Alabama attorney to the Alabama State Bar, and we would appreciate your assistance in providing biographical information for *The Alabama Lawyer.*

LUCIEN D. GARDNER, JR.

After 64 years as a member of the Alabama State Bar, Lucien D. Gardner, Jr., of Birmingham, passed away October 29, 1988.

He was the fourth generation in a family of Alabama lawyers and was the son of the late Chief Justice Lucien D. Gardner, who served on the Alabama Supreme Court for 37 years.

He was a graduate of the University of Alabama and the Harvard Law School and was admitted to the state bar on July 20, 1924, at the age of 21. In 1929, he joined the firm now know as Cabaniss, Johnston, Gardner, Dumas & O'Neal, at which he engaged in the active practice of law until two weeks before his death.

His contributions to the legal profession included serving as president of the Birmingham Bar Association and establishing the Chief Justice Lucien D. Gardner Scholarship Fund at the University of Alabama Law School. He was the recipient of the Birmingham Bar Association's award for Outstanding Meritorious Service.

When the United States entered World War II, he volunteered for service in the Army, in which he attained the rank of lieutenant colonel.

During the majority of his career, he was an active trial lawyer and was recognized for his courtroom abilities by being elected a Fellow of the American College of Trial Lawyers.

He was a faithful member of the Cathedral Church of the Advent and served as senior warden of the vestry of the church.

He believed in and exemplified the best attributes of our profession of diligence and dedication in the representation of clients, adherence to integrity, insistence on a thorough mastery of the facts and the law of every case and courtesy in all relationships with his fellow members of the bar.

He is survived by his wife, Ann Gallion Gardner (whose brother is MacDonald Gallion of the Montgomery County Bar), his son, William F. Gardner of the Birmingham Bar, two grandchildren and his partners and members of the Alabama State Bar who will miss him.

—William F. Gardner
Birmingham
■

The deadline for getting in copy for the March 1989 issue of the *The Alabama Lawyer* is January 27, 1989.

Disciplinary Report

Disbarment

● Effective November 15, 1988, Birmingham lawyer **Dan W. McCoy** was disbarred by consent, pursuant to the provisions of Rule 15, Rules of Disciplinary Enforcement, by order of the Supreme Court of Alabama. [ASB Nos. 87-198 & 87-254]

Suspension

● Mobile lawyer **Major E. Madison, Jr.,** is suspended from the practice of law in the State of Alabama for a period of four months, effective December 28, 1988, by order of the Supreme Court of Alabama. The suspension is based upon Madison's conviction before the Disciplinary Board of the Alabama State Bar of various ethics violations. [ASB Nos. 86-303, 86-597, 86-709 & 86-718]

Private Reprimands

● On October 7, 1988, an Alabama attorney received a private reprimand for violation of Disciplinary Rule 5-101(C) and Disciplinary Rule 9-101(B) of the Code. It was determined that the attorney in question had, while serving as district attorney in a judicial circuit of Alabama, prosecuted an individual on criminal charges and it was further determined that this attorney, upon leaving his public office, entered into the defense of this same individual in a civil action arising from the same set of facts. The Commission deemed this to be a conflict of interest in violation of DR 5-101(C) and acceptance of employment in a matter in which the attorney had substantial responsibility while a public employee in violation of DR 9-101(B). [ASB No. 88-84]

● On October 7, 1988, a lawyer was privately reprimanded for engaging in conduct involving dishonesty, fraud, deceit, misrepresentation, willful misconduct and other conduct which adversely reflects on his fitness to practice law. The lawyer delivered the individual tax records of a political candidate to several media outlets. He was subsequently indicted for the felony of attempting to influence the outcome of an election by attempting to make public the tax records of a political candidate, and for aiding and abetting another in perpetrating this same offense. Subsequently, in exchange for the felony charges being dismissed, the lawyer pled guilty to the misdemeanor violation of making tax returns of a taxpayer public. [ASB No. 86-664]

● On October 7, 1988, a lawyer was privately reprimanded for engaging in conduct that adversely reflected on his fitness to practice law. In 1985, the lawyer wrote 800-1,000 associates in law firms throughout the United States soliciting $250 from each recipient of the letter. In exchange for the $250 the lawyer offered to negotiate for and on behalf of the associates with their employer law firms and demand that the partnership decision-making process be changed in a way which would result in more associates becoming partners than would otherwise be the case under the then-existing firm policies. Even though the letter stated that the $250 was being solicited from each associate, the letter was in fact sent to only a random number of associates in each firm. The lawyer admitted that in the event he did not receive $250 from half the associates, he intended to keep the $250 fee received from each associate, even though under those circumstances the lawyer would not perform any negotiations for and on behalf of the associates. [ASB No. 85-238]

Reinstatement

● It is ordered that **Thomas E. Baddley, Jr.,** be reinstated on the roll of the Alabama Supreme Court as an attorney authorized to practice law in the courts of Alabama, effective October 19, 1988.

Classified Notices

RATES: Members—no charge, except for "positions wanted" or "positions offered" listings, which are at the nonmember rate (two free listings per bar member per calendar year); Nonmembers—$35 per insertion of 50 words or less. $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule:

January '89 Issue—Deadline November 30
March '89 Issue—Deadline January 29
May '89 Issue—Deadline March 31

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THE CONFEDERATE STATES OF AMERICA replica passport as sold by the Museum of the Confederacy as "proof" of Confederate nationality can be a perfect gift from your firm. **For sample and bulk rates, please send $4 to CSA Printing House, Inc., Suite C-50, 105 S. Alfred Street, Alexandria, Virginia 22314.**

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FOR SALE: Law library, partial listing as follows: 1988 Martindale-Hubble; Ala. Reports, Vol. 33, Ala. Reporter Vols. 334-519; C.J.S., updated through 1987; Fletcher Cyclopedia Corps. Vols. 1-20 and Forms Annotated. Others too numerous to list. **For details call Richard Watters (205) 432-2677.**

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CORPORATE COUNSEL: Cotton States Insurance Company is accepting applications for a corporate staff attorney. The company does business on a multi-state basis with its home office in Atlanta. The company is seeking an applicant with two years' general experience in insurance, contract, regulatory and corporate matters. For immediate confidential consideration, please send résumé and salary requirements to: **Cindy M. Swinson, General Counsel, Cotton States Insurance Company, P.O. Box 105303, Atlanta, Georgia 30348.**

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Classified Notices

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

1A. Title of Publication: The Alabama Lawyer	1B. Publication No.: 2 6 5 0 9 0	2. Date of Filing: 9/30/88
3. Frequency of Issue: Bimonthly beginning in January with special edition of bar directory in August	3A. No. of Issues Published Annually: 7	3B. Annual Subscription Price: $15 in U.S.A.; $20 elsewhere

4. Complete Mailing Address of Known Office of Publication (Not printer): Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104

5. Complete Mailing Address of the Headquarters or General Business Offices of the Publisher (Not printer): Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104

6. Full Names and Complete Mailing Address of Publisher, Editor, and Managing Editor (This item MUST NOT be blank)

Publisher (Name and Complete Mailing Address): Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104

Editor (Name and Complete Mailing Address): Robert A. Huffaker, 184 Commerce Street, Montgomery, Alabama 36193

Managing Editor (Name and Complete Mailing Address): Margaret Lacey, Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104

7. Owner (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given. If the publication is published by a nonprofit organization, its name and address must be stated.) (Item must be completed.)

Full Name	Complete Mailing Address
Alabama State Bar	415 Dexter Avenue, Montgomery, AL 36104

8. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages or Other Securities (If there are none, so state)

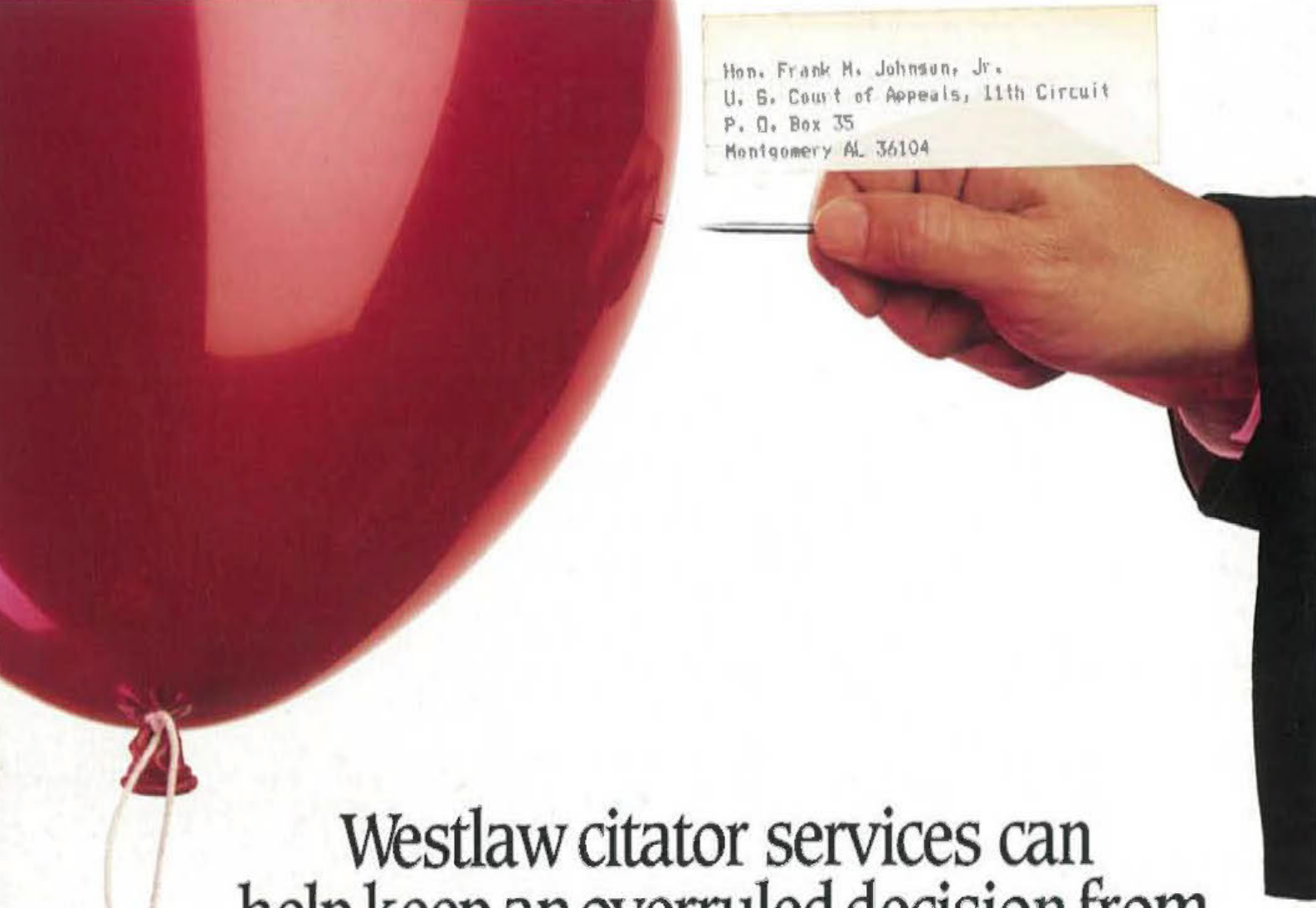
Full Name	Complete Mailing Address
None	

9. For Completion by Nonprofit Organizations Authorized To Mail at Special Rates (DMM Section 424.12 only)
The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes (Check one)

(1) ☐ Has Not Changed During Preceding 12 Months (2) ☐ Has Changed During Preceding 12 Months (If changed, publisher must submit explanation of change with this statement.)

10. Extent and Nature of Circulation (See instructions on reverse side)	Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
A. Total No. Copies (Net Press Run)	9,086	9,000
B. Paid and/or Requested Circulation 1. Sales through dealers and carriers, street vendors and counter sales	227	-0-
2. Mail Subscription (Paid and/or requested)	8,496	8,706
C. Total Paid and/or Requested Circulation (Sum of 10B1 and 10B2)	8,723	8,706
D. Free Distribution by Mail, Carrier or Other Means Samples, Complimentary, and Other Free Copies	123	135
E. Total Distribution (Sum of C and D)	8,846	8,841
F. Copies Not Distributed 1. Office use, left over, unaccounted, spoiled after printing	240	159
2. Return from News Agents	-0-	-0-
G. TOTAL (Sum of E, F1 and 2—should equal net press run shown in A)	9,086	9,000

11. I certify that the statements made by me above are correct and complete. Signature and Title of Editor, Publisher, Business Manager, or Owner: Margaret Lacey, Managing Editor



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