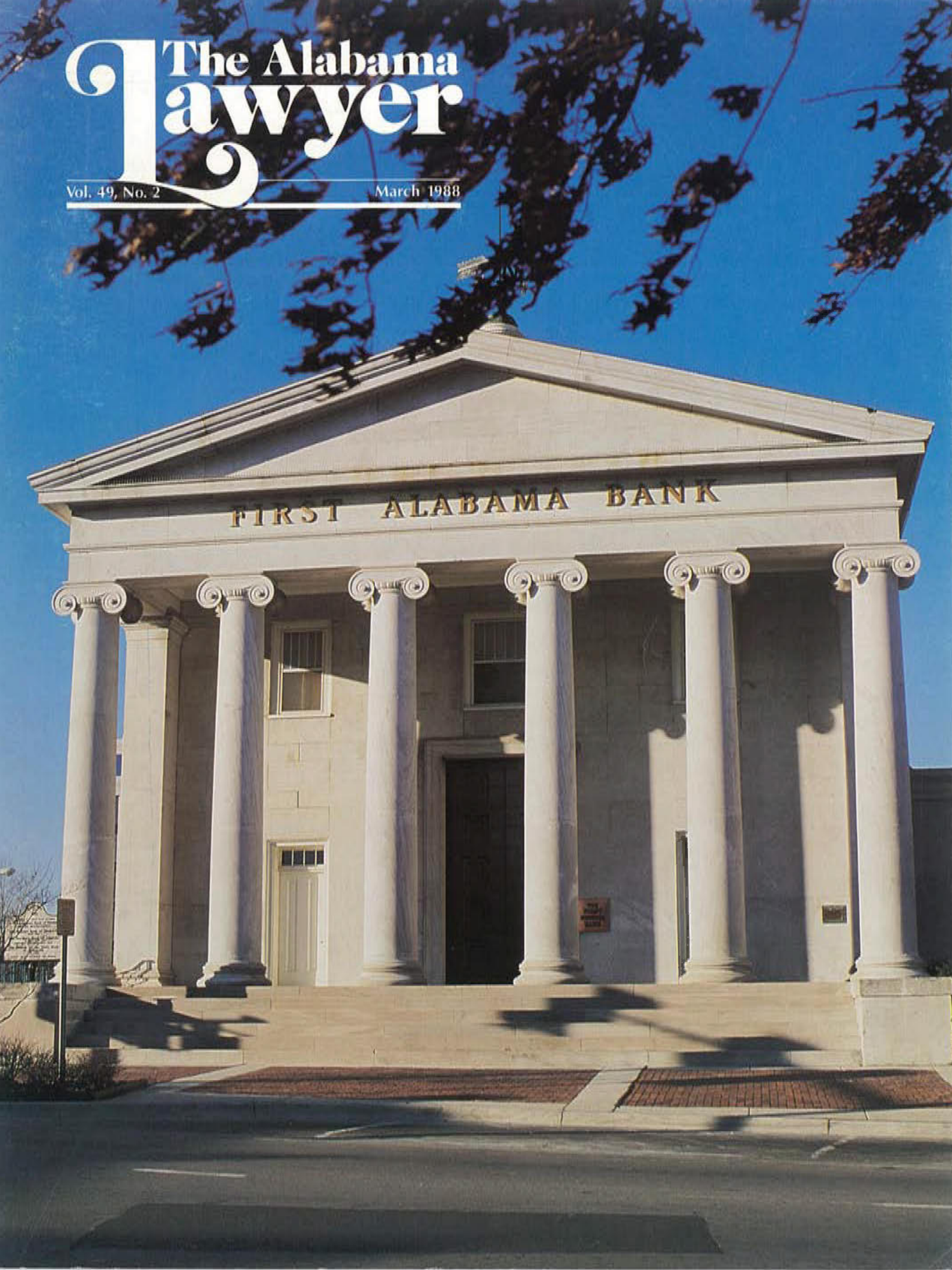
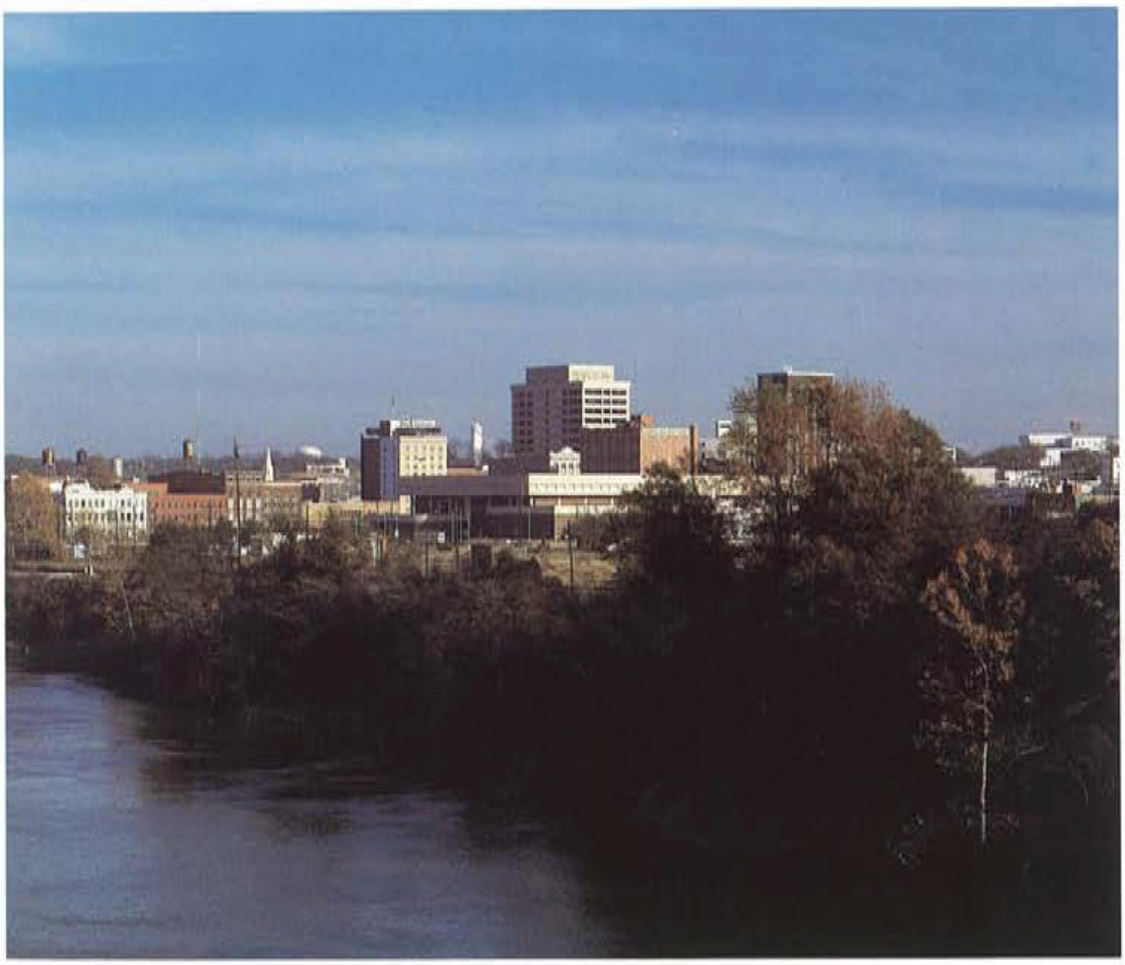
The Alabama Lawyer

Vol. 49, No. 2 March 1988





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Schroeder, Hoffman and Thigpen on

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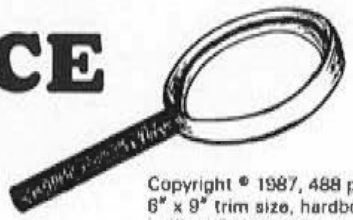

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INTRODUCTORY PRICE $69.95 Regularly $74.95

by William A. Schroeder, Jerome A. Hoffman and Richard Thigpen

In this comprehensive examination of the rules of Alabama Evidence, the authors present an in-depth discussion of all areas of evidentiary procedures from the relatively simple ways to object to evidence through competence, privileges, relevance, impeachment, the best evidence rule and parol evidence. Many sections contain a discussion of Federal law and how it compares to its Alabama counterpart. Case law is thoroughly cited throughout the book. An excellent reference tool for both the inexperienced and veteran lawyer!

Table of Contents

Obtaining, Offering and Objecting to Evidence • Competence • Examination of Witnesses • Relevance and Limitations on the Admission of Relevant Evidence • Privileges • Impeachment • Expert Testimony • Hearsay • Authentication and Identification — Rules 901, 902, 903 • Special Rules Relating to Writings: The Best Evidence Rule and the Parol Evidence Rule • Real and Demonstrative Evidence • Judicial Notice • Presumptions • Burdens of Proof and Persuasion

About the Authors

William A. Schroeder received his B.A. and J.D. from the University of Illinois and his LL.M. from Harvard Law School. He is a member of the American Bar Association. He taught Evidence, Criminal Procedure and Trial Advocacy at the University of Alabama from 1980 to 1984. Since then he has been a Professor of Law at Southern Illinois University School of Law where he teaches Evidence and Criminal Procedure.

Jerome A. Hoffman received both his B.A. and J.D. from the University of Nebraska. He is a member of the Alabama State Bar Association and the State Bar Association of California. He has been a member of the Alabama Supreme Court's Advisory Committee on Civil Practice and Procedure since its creation in 1971. He is currently a Professor of Law at the University of Alabama School of Law where he teaches Evidence and Civil Procedure.

Richard Thigpen received his B.A. and M.A. from the University of Alabama and his J.D. from the University of Alabama School of Law. He has an LL.M. from Yale University and also an LL.D. (Honorary) from the University of Alabama. He is a member of the Alabama State Bar Association. He is currently a Professor of Law at the University of Alabama School of Law.

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The Alabama Lawyer

VOL. 49, NO. 2 MARCH 1988

In Brief

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Robert A. Huffaker—Editor
Carol Ann Smith—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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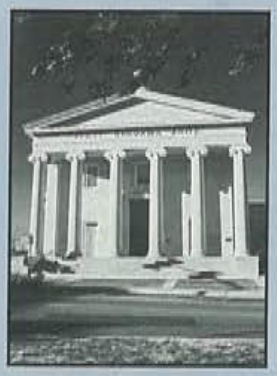
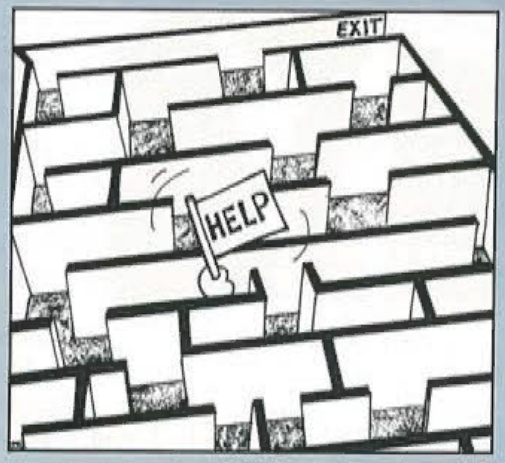
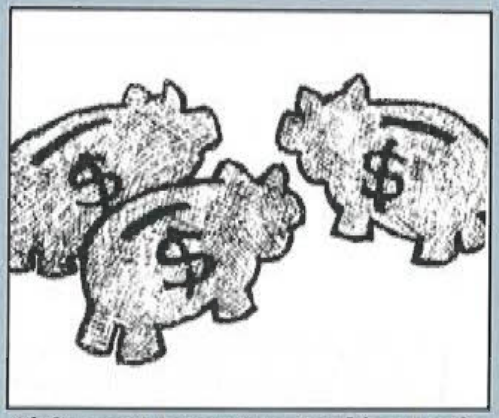
On the cover—



First Alabama Bank in Huntsville, built in 1835, is the oldest chartered bank in Alabama. It changed its name from the First National Bank of Huntsville in 1975; the "Marble Palace," as it used to be called, has been continuously occupied as a bank for 153 years. (cover photography by Dennis Keim of Huntsville) The editors thank Ramona Whisenant with FAB-Huntsville and Gary Huckaby, president-elect of the ASB, for their help.





INSIDE THIS ISSUE

President's Page

HARRIS

In preparing this report, as I begin the second half of my term in office, I am more appreciative than ever of the support of the members of the Alabama State Bar. As the months go by, I meet more and more of you and experience the rich diversity we have in our membership. Observing your willingness to support our bar has been the best part of serving as president. The members of this bar are more than ready, when called upon, to contribute efforts toward the improvement of the profession.

The IOLTA program is beginning to gain momentum. As soon as your bank is ready, please take the easy step of converting your trust account to an interest-bearing one. You do not have to wait until the September 1988 opt-out date. Informational mailings have been sent to all Alabama banks and attorneys. If you have any questions about IOLTA, call Tracy Daniel at bar headquarters (269-1515).

Local bars with the best percentage of participation will be recognized at the annual meeting. Tom King, Tom Heflin, Taylor Flowers and others on the Local Bar Activities Committee will be contacting local bar leaders, urging you to have a program on IOLTA. The state bar office will be happy to assist you or actually put on a program for you. IOLTA is good public policy.

The Local Bar Activities Committee also is planning a conference for local bar leaders in the spring. I urge the local presidents, presidents-elect or vice presidents to participate. We all can learn from each other.

The bar commission now has adopted comments to the proposed Alabama Rules of Professional Conduct and recommended adoption by the supreme court. Saying "thank you" to the Permanent Code Commission, its chairman, Wilbur Silberman, and vice chairman, Lewis Page, is totally inadequate. They put in untold hours of hard work in structuring the model rules and comments to best fit practice in our state. They are to be commended for a job well done.

The Post-conviction Capital Appeals Action Group, headed by Governor Albert Brewer, is moving forward to tackle a difficult problem critical to the orderly administration of justice in our state. The situation related to representation of death row inmates must be addressed, and I urge your support of Governor Brewer and his action group.

By the time this issue of *The Alabama Lawyer* goes to press, we will know the results of your response to the inquiry regarding your interest in forming a captive insurance company to provide malpractice insurance. Your state bar is interested in assisting in any way with the formation of a captive, but its development must be in response to your wishes and needs. I know each of you will seriously consider the proposal.

The re-establishment of our Client Security Fund is underway. Its redevelopment reflects our bar's position that although we have no legal obligation to help persons injured by a rare dishonest lawyer, we nevertheless do take upon ourselves a portion of that burden. I know of very few professions that take on that type of moral burden. The fund covers a gap in client protection. Malpractice policies generally exclude willful thefts of clients' money, and the Client Security Fund would offer some protection to the public. Payments from this fund would be a matter of grace and not a matter of right.

Please mark your calendars for the annual meeting in Birmingham at the Wynfrey Hotel, July 21-23. We anticipate having outstanding programs and events and the best convention yet. ■

Executive Director's Report

Arden House III

A national conference on the continuing education of the bar met at the Arden House, Harriman, New York, in November 1987. Arden House is the estate of the family of former Governor and Ambassador Averell Harriman which was given to Columbia University for an executive education conference center. Along with President Ben Harris and Professor Camille Cook, I was an invitee to this meeting. Dean Marjorie F. Knowles of the Georgia State University School of Law and a member of the Alabama State Bar attended.

Arden House I convened in 1958 and considered the need to improve professional competence and to achieve a greater sense of professional responsibility, as well as the organizational structure to promote such objectives. Arden House II, held in 1963, focused principally on issues of CLE quality, implementation of programs of education for professional responsibility and the continuing development of the organization and financing of CLE providers.

These conferences, plus national conferences in 1967 and 1968 and the 1981 Houston Conference which addressed enhancement of lawyer competence, were instrumental in stimulating the organized bar to take the initiative in expanding the scope of continuing education (CLE) throughout the United States.

The environment in which law is practiced today is significantly changed from that at the time of the last national forum in 1963. Today the estimated bar population is 750,000 lawyers as opposed to 265,000 24 years ago. Minorities and women have been admitted to the bar in increasing numbers and added new sources of strength and diversity to the profession. Mega-firms with 200 members, inter-state practice and new technologies have altered major aspects of practice. Costs have escalated for providers and consumers of legal services with a resulting greater cost consciousness on the part of both. A new concern is that in the current environment lawyers are deriving inadequate professional fulfillment and less satisfaction from law practice.

CLE has gained wide acceptance as an integral part of the continuum of legal training to be undertaken by all members of the profession. The Alabama State Bar started offering continuing legal education in 1948 and continued to do so until Alabama became one of over half the states (tenth) to adopt mandatory CLE. The bar was prohibited at that time from being a major provider; however, programs at Cumberland and Alabama and many at the local bar level, plus for-profit providers as well as in-house (firm) training, have flourished.

Arden House III conferees reexamined many of the issues from prior conferences in this changed environment and sought to identify and respond to new educational and professional needs as the 21st century approaches.

HAMNER

General conclusions reached at this conference included:

1. There is a need to reach out to underserved lawyers to help them better serve their clients.
2. CLE plays a vital role in creating an awareness of the full dimension of professional responsibility. Goals of prior conferences in this area have not been fully achieved. Ethical issues should be identified and addressed in substantive programming.
3. The identification of competence problems and the encouragement of all efforts to enhance competence should continue to be a central objective of CLE. Concerns remain over the inability of CLE, despite diligent efforts, to adequately address the problems of transition education and skills training. Consideration should be given to successful completion of a "bridge-the-gap" program as a condition for admission to the bar.

4. CLE quality, while significantly improved since 1963, should still be subjected to more improvement efforts. These include using a variety of delivery systems and encouraging greater cooperation among providers in offering a comprehensive structured curriculum to meet professional needs even though some programs may not be profitable.

5. In order to insure neutral decision-making with respect to quality programming, finances and operations, the CLE government bodies of state and local bars should be given a significant degree of functional independence.

6. The senior lawyer should be encouraged to be a mentor and role model. These senior lawyers should support and participate in all phases of CLE. Their advice and service as models to be emulated by younger lawyers are perhaps their most important roles.

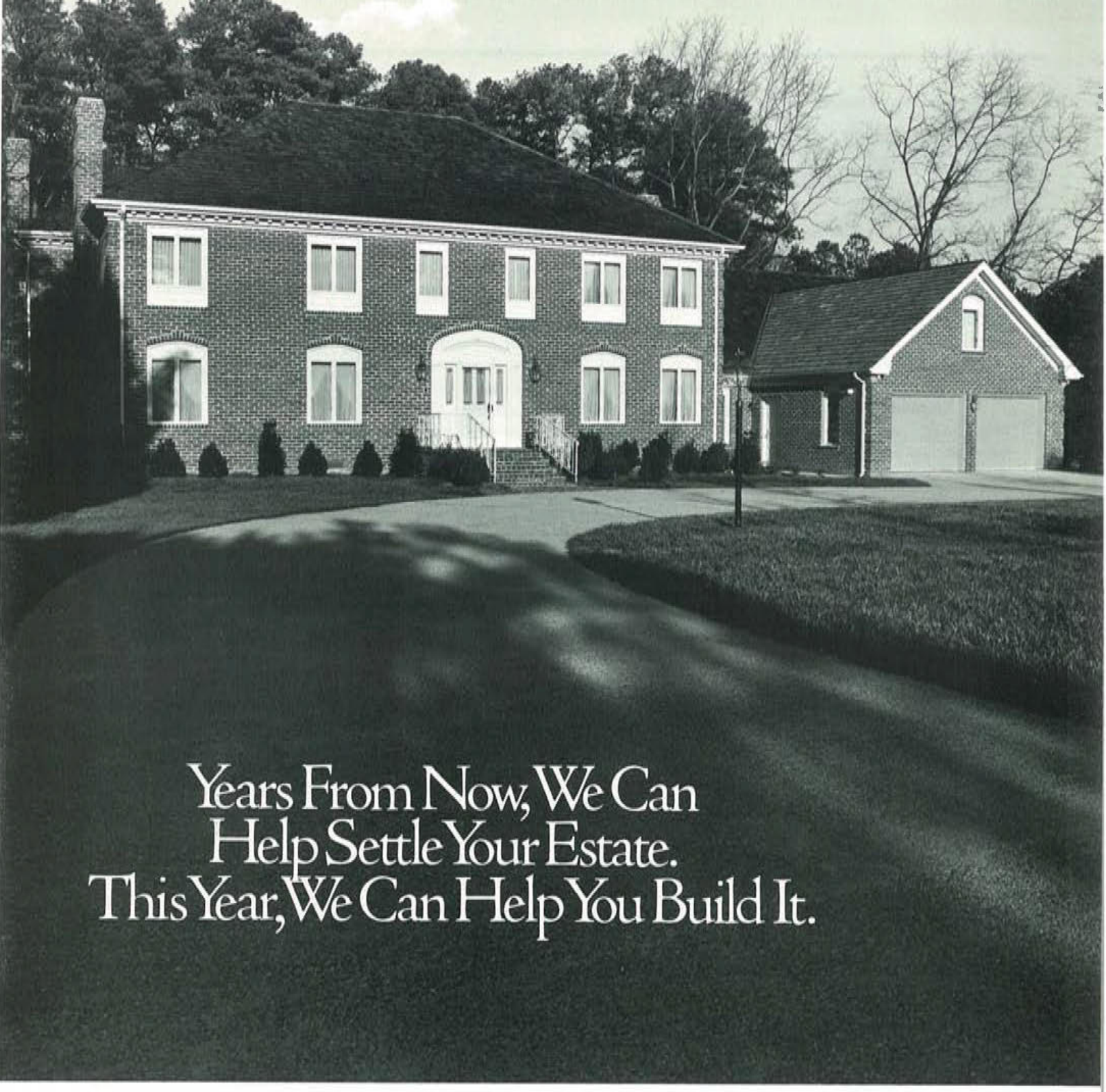
I am grateful for the opportunity to participate in a conference such as Arden House III. As my service concludes in August 1988 as a member of the American Bar Association's Standing Committee for Continuing Education for the Bar, I can reflect on a unique opportunity which had never been afforded a bar executive. I hope these six years have in some small way permitted me to make a contribution to the post-admission legal education of our profession as a whole and more particularly the Alabama lawyer. ■

CIRCLE

July 21-23

1988 Alabama State Bar Annual Meeting

Wynfrey Hotel
Riverchase Galleria
Birmingham, Alabama



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About Members, Among Firms

ABOUT MEMBERS

Richard E. Browning, formerly associated with Cunningham, Bounds, Yance, Crowder & Brown, announces the opening of his office February 1, 1988, at 158 South Jackson Street, P.O. Box 1267, Mobile, Alabama 36633. Phone (205) 433-0200.

■

W. Stephen Graves, formerly a Montgomery practitioner, announces the opening of his offices in San Antonio, Texas, after a tour as an Air Force Judge Advocate. His offices are located at 6838 San Pedro Avenue, San Antonio, Texas 78216. Phone (512) 826-0409.

■

Jeffery C. Duffey announces the relocation of his office to 600 South McDonough Street, Montgomery, Alabama 36104. Phone (205) 834-4100. **Susan G. James** announces the relocation of her law offices to 600 South McDonough Street, Montgomery, Alabama 36104. Phone (205) 269-3330.

■

Micki Stiller announces the relocation of her offices to The Wyman-Dismukes House, 225 South Decatur Street, Montgomery, Alabama 36104. Phone (205) 834-5544.

■

Effective January 1, 1988, the office of **Melton L. Alexander** will be located at Suite III, 2 Metroplex Drive, Birmingham, Alabama 35209. Phone (205) 871-7525.

■

C. Wayne Morris announces the relocation of his office to 2206 Clinton Avenue, West, Huntsville, Alabama 35805. Phone (205) 539-7793 or 536-9375.

■

Randolph P. Reaves announces he has withdrawn from the firm of Wood & Parnell, P.A., and has relocated his office at Suite 112, Corporate Square, 555 South Perry Street, Montgomery, Alabama 36104. Phone (205) 834-2415.

AMONG FIRMS

The firm of **Johnston, Barton, Proctor, Swedlaw & Naff** announces that **Daniel E. Drennen, II,** formerly with the firm of Lyons, Pipes & Cook in Mobile, has become a partner with the firm. **Hollinger F. Barnard,** previously an associate, has become a partner with the firm. Offices are located at 1100 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-0616.

■

Sirote, Permutt, McDermott, Slepian, Friend, Friedman, Held & Apolinsky, P.C., announces that **C. Michael Gilliland** and **Rodney E. Nolen** have joined the firm in the Birmingham office; **Tobin K. Clark** has joined the firm in the Huntsville office; **Christine Sampson Hinson, John H. Nathan** and **Michael A. Youngpeter** have joined the firm in the Mobile office; and **Roderic G. Steakley** has become counsel to the firm in the Huntsville office. The firm also announces that **Timothy A. Bush, T. Julian Motes, Steven L. Nicholas, Joseph T. Ritchey** and **Kim E. Rosenfield** have become members of the firm. The Birmingham office is located at 2222 Arlington Avenue, South, P.O. Box 55727, Birmingham, Alabama 35255. Phone (205) 933-7111.

■

Smith & Taylor announces that **Thomas S. Spires** has become a member of the firm, and **James C. Gray, III, William F. Smith, II,** and **Maria D. Willingham** have become associated with the firm. Offices are located at 1212 Brown-Marx Tower, Birmingham, Alabama 35203. Phone (205) 251-2555.

■

Foster, Bolton & Dyson, P.A. announces that **Robert A. Wills** has become a member of the firm in the Bay Minette office, and the name of the firm has been changed to **Foster, Wills, Bolton & Dyson, P.A.** Offices are located at 1715 N. McKenzie Street, Foley, Alabama 36635-1798, phone (205) 943-4500, and Courthouse Square, P.O. Box 547, Bay Minette, Alabama 36507, phone (205) 937-2411.

■

The firm of **Stone, Patton, Kierce & Kincaid** announces that **V. Edward Freeman, II,** has become a partner. **Thomas E. Kincaid** has withdrawn, and the firm's new name is **Stone, Patton, Kierce & Freeman.** Offices are located at 118 North 18th Street, Bessemer, Alabama. Phone (205) 424-1150.

■

Rosen, Harwood, Cook & Sledge announces that **Karen C. Welborn** has become associated with the firm, effective January 4, 1988. Offices are located at 1020 Lurleen Wallace Boulevard, North, P.O. Box 2727, Tuscaloosa, Alabama 35403. Phone (205) 345-5440.

■

Pope, Kellogg, McGlamry, Kilpatrick & Morrison announces that **Earl F. Lasseter** has become associated with the firm. He recently retired from the Judge Advocate General's Corps, U.S. Army, with the rank of colonel. The firm's offices are located in Atlanta and Columbus, Georgia.

■

Capell, Howard, Knabe & Cobbs, P.A. announces that **James N. Walter, Jr.,** became a member of the firm April 1, 1987, **James H. McLemore** became a member of the firm January 1, 1988, and **Will Hill Tankersley, Jr.,** became associated with the firm October 15, 1987. Offices are located at 57 Adams Avenue, Montgomery, Alabama 36104.

■

Norman Roby and **Robert F. Tweedy** announce the combination of their practices under the firm name of **Roby & Tweedy.** Offices are located at Walgreen Professional Building, 207 Johnston Street, S.E., Suite 203, P.O. Box 2925, Decatur, Alabama 35602. Phone (205) 353-5212.

■

The firm of **Gathings & Tucker** announces that **Timothy C. Davis** has become a partner in the firm. The firm name has been changed to **Gathings, Tucker & Davis.** Offices are located at 600 Farley Building, 3rd Avenue North & 20th Street, Birmingham, Alabama 35203. Phone (205) 326-3553.

■

James M. Tingle, Robert R. Sexton, Christopher R. Murvin, W. Clark Watson and **Roger L. Bates** announce the formation of a firm in the name of **Tingle, Sexton, Murvin, Watson & Bates, P.C.** Offices are located at Suite 900, Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203. Phone (205) 324-4400.

■

Edward B. Parker, II, and **Paul A. Brantley** announce the formation of **Parker & Brantley,** with offices at 407 South McDonough Street, Montgomery, Alabama 36104. Phone (205) 265-1500.

■

Inge, McMillan, Adams & Ledyard announce that **David R. Coley, III,** has joined the firm, and the firm name has been changed to **Inge, McMillan, Adams, Coley & Ledyard.** Offices are located at 12th Floor, Southtrust Bank Building, P.O. Box 2345, Mobile, Alabama 36652. Phone (205) 433-6506.

■

The firm of **King & King** announces that **David R. King** and **Stephen L. Sexton** have become members of the firm. Offices are located at The King Professional Building, 713 South 27th Street, P.O. Box 10224, Birmingham, Alabama 35202-0224. Phone (205) 324-2701.

■

The firm of **Emond & Vines** announces that **R. Bradford Wash** and **Timothy P. Donahue** have become associates of the firm, effective December 1987. Offices are located at 1900 Daniel Building, Birmingham, Alabama 35233. Phone (205) 324-4000.

■

The firm of **Johnstone, Adams, Bailey, Gordon & Harris** announces that **Celia J. Collins, R. Gregory Watts** and **John A. Carey** have become members of the firm, and **Walter F. McArdle** and **John M. Lawhorn** have become associated with the firm. Offices are located at Royal St. Francis Building, 104 St. Francis Street, Mobile, Alabama 36602.

■

The firm of **Rushton, Stakely, Johnston & Garrett, P.A.** announces that **Frank J. Stakely** and **William S. Haynes** have become associates of the firm. Offices are located at 184 Commerce Street, P.O. Box 270, Montgomery, Alabama 36195. Phone (205) 834-8480.

■

David W. Crosland, formerly general counsel and acting commissioner of the U.S. Immigration and Naturalization Service, has opened offices in Washington, D.C. and San Francisco under the name of **Crosland, Haynes, Strand & Freeman.** The Washington address is 818 Connecticut Avenue, N.W., Suite 1000, Washington, D.C. 20036. Phone (202) 331-8274.

■

Ramsey, Baxley & McDougle announce that **Lori Stutts Collier** has become an associate of the firm with offices at 207 West Troy Street, Dothan, Alabama 36303. Phone (205) 793-6550.

■

The firm of **Tanner, Guin, Ely & Lary, P.C.** announces that **Howard W. Neiswender** has become a partner, and **Herbert M. Newell, III,** has become an associate of the firm, effective January 4, 1988. The firm name has been changed to **Tanner, Guin, Ely, Lary & Neiswender, P.C.** Offices are located at 2711 University Boulevard, Suite 700, Capitol Park Center, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

■

Rives & Peterson announce that **Edgar M. Elliott, IV, Jerry D. Roberson** and **James B. Carlson** have become partners in the firm, effective January 1, 1988. Offices are located at 1700 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203-2607. Phone (205) 328-8141.

■

The firm of **Levine & Levine** announces that **W. Dennis Schilling** has joined the firm, and the firm name has changed to **Levine & Schilling.** Offices are located at 433 Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 328-0460.

■

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor, First National Bank Building, Mobile, Alabama, announce that **Douglas L. McCoy** and **Helen Johnson Alford** have become members of the firm. Phone (205) 432-5511.

■

Bishop, Barry, Howell, Haney & Ryder announce that **Thomas M. Ray,** formerly with Gordon, Silberman, Wiggins & Childs in Birmingham, has joined the firm. Offices are located at 465 California Street, 11th Floor, San Francisco, California 94104. Phone (415) 421-8550.

■

The firm of **Manley & Traeger** announces that **Taylor T. Perry, Jr.,** formerly an associate with Simmons, Ford & Brunson in Gadsden, Alabama, has become associated with the firm, effective December 1, 1987.

Offices are located at 111 South Walnut Avenue, P.O. Drawer U, Demopolis, Alabama 36732. Phone (205) 289-1384.

■

The firm of **Wallace, Brooke & Byers** announces that **Richard T. Davis** has joined the firm, effective October 1, 1987. Offices are located at Suite 525, SouthBridge Building, 2000 SouthBridge Parkway, Birmingham, Alabama 35209. Phone (205) 870-0555.

■

Lange, Simpson, Robinson & Somerville announce the return of **John E. Grenier,** who served as chief of staff to Governor Guy Hunt. The firm also announces that **Lynn B. Ault** and **Augusta S. Dowd** have become partners in the firm, and **Floyd Wisner, Bruce T. Russell, Michael Contorno, Morris Wade Richardson, Joe A. Joseph** and **Sue Ann Willis** have joined the firm as associates. Offices are located at 417 North 20th Street, Birmingham, Alabama 35203. Phone (205) 250-5000.

■

The firm of **Pittman, Hooks, Marsh & Dutton, P.C.** announces that **L. Andrew Hollis, Jr.,** formerly a partner in Hardin & Hollis, has become a member of the firm. The name of the firm has been changed to **Pittman, Hooks, Marsh, Dutton & Hollis, P.C.,** and is located at 801 Park Place Tower, 2001 Park Place, North, Birmingham, Alabama 35203. Phone (205) 322-8880.

■

Tony S. Hebson and **Paul A. Miller** announce they have formed a firm in the name of **Hebson & Miller, P.C.,** with offices at Suite 529, Brown-Marx Tower, Birmingham, Alabama 35203. Phone (205) 326-0442.

■

Hill & Weathington, P.C. and **Richard K. Mauk,** formerly law clerk to Stephen B. Coleman, bankruptcy judge, announce that they have combined their practices under the name of **Hill, Weathington & Mauk, P.C.** Offices are located at 819 Parkway Drive, S.E., Leeds, Alabama 35094. Phone (205) 699-6164.

■

Eyster, Key, Tubb, Weaver & Roth announce that **William L. Middleton, III,** has become a partner in the firm. Offices are located at 402 East Moulton Street, Decatur, Alabama 35601. Phone (205) 353-6761.

■

NOTICE

In the last few years the eastern states office of the Bureau of Land Management has noticed an increase in the number of title problems involving federal lands located within its jurisdiction.

The bureau is charged with administering and managing public domain lands, that is, lands which never left federal ownership. Traditionally, these holdings in the east have been smaller, isolated tracts. Consequently, most people are unaware of the federal interest. This federal interest may be a result of uncompleted claims under the various Homestead or Credit Acts or clerical errors resulting from the vagaries of 19th century transportation or communication systems.

Attorneys certifying title to property in Alabama need to be aware that a federal title issue may exist. Ordinarily, in the absence of legislation providing otherwise, title to public lands cannot be acquired by adverse possession as against the United States. *United States v. California,* 332 U.S. 19 (1947); *Marine R. & Coal Co. v. United States,* 168 U.S. 208 (1921); 239 (1889) Therefore, Alabama's adverse possession statute may not be sufficient to warrant title in some cases. Attorneys should be cognizant of the fact that they may need to establish severance of the federal title.

If you have any questions regarding this issue, please call (703) 274-0093.

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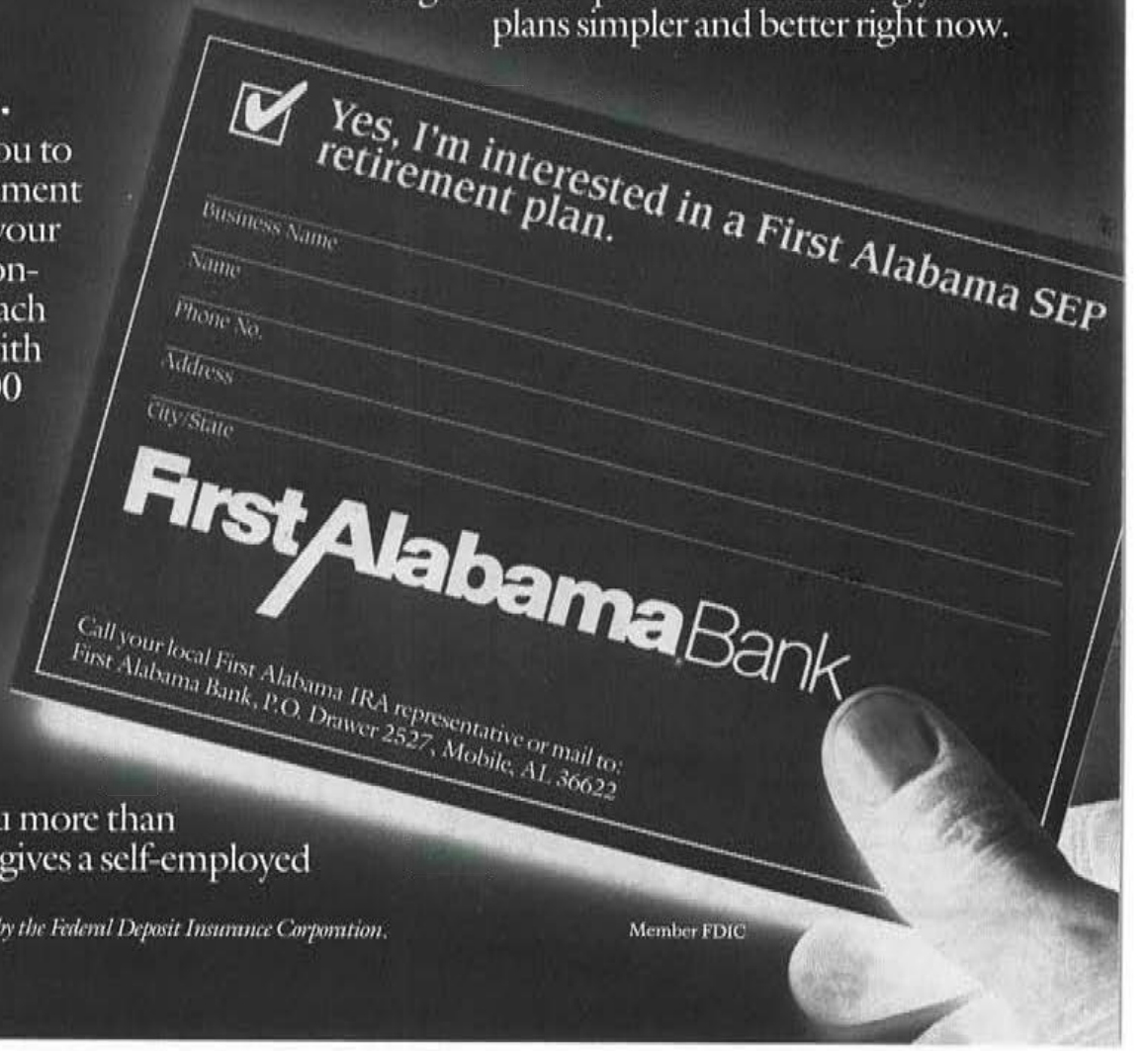

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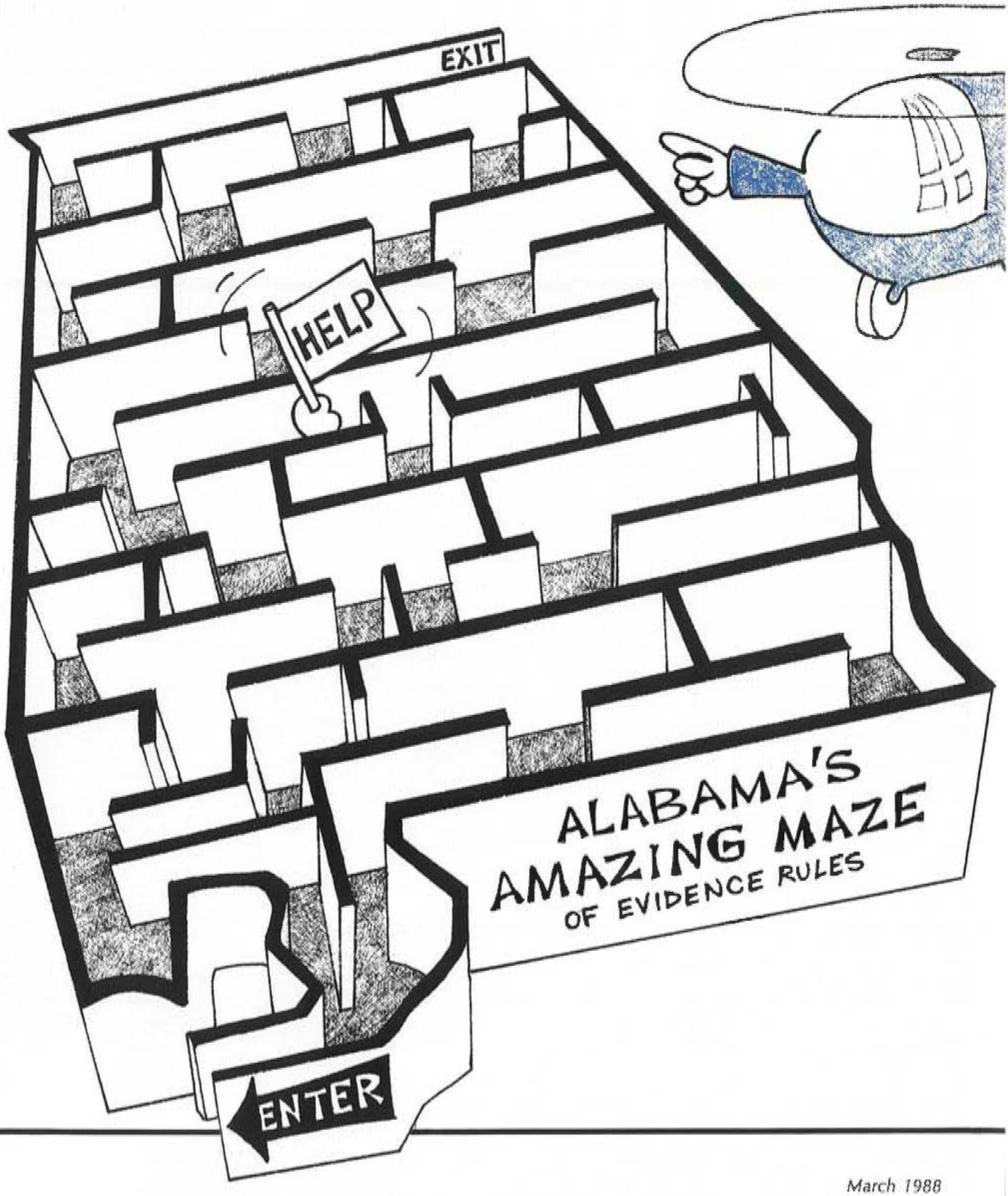
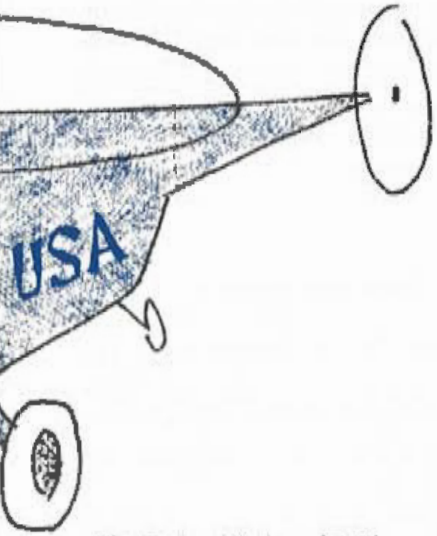


Federal Rules of Evidence?



by Joseph A. Colquitt

Be not the first by whom the new are tried, Nor yet the last to lay the old aside.[1]

The Federal Rules of Evidence took effect in the federal courts on July 1, 1975. The rules consist of 63 rules in 11 articles. To date, 30 states have adopted rules of evidence based on or similar to the Federal Rules of Evidence. Three additional states patterned their rules of evidence after the original Uniform Rules of Evidence. The Uniform Rules were redrafted in 1974 to conform to the Federal Rules. This article briefly compares the Alabama rules of evidence, i.e., the statutes, court rules and case law relating to evidence, with the Federal Rules of Evidence. It demonstrates that although in many respects the Federal Rules of Evidence are similar, perhaps even identical, to corresponding Alabama rules, the Federal Rules are better organized, clearer and more readily usable by the bench and bar. Where the Federal Rules differ substantially from existing Alabama rules the article briefly discusses those differences. The article concludes that:

1. Alabama should have a comprehensive, coherent, usable set of evidence rules;
2. The Federal Rules of Evidence should serve as the model for the drafting of a set of evidence rules;
3. A broad-based committee appointed by the Supreme Court of Alabama should draft the Alabama rules; and
4. The Supreme Court of Alabama should adopt the new rules.

The adoption of Alabama Rules of Evidence would be the logical extension of Alabama's on-going procedural reform. Alabama already has modern rules on court procedure and judicial administration, but still lacks rational, understandable and easily-accessible evidence rules.

Current Alabama evidence law

Alabama's present evidence rules are a morass of technical and complex common-law, statutory and court-adopted rules. Several of the present rules resulted from attempts to refine previously existing law to meet an immediate need without sufficient consideration of the effect of the change on other areas of the law. Consequently, many of the rules contradict or clash with others.

Presently, the rules are scattered and not easily accessible. The statutory rules appear throughout the 21 volumes of the *Alabama Code*. The *Alabama Digest* indexes the case law, but the rules of evidence are spread among a number of digest subjects, including appeal and error, criminal law, evidence, trials and witnesses. Fortunately, the rules are collected in treatises that are used by many practitioners and judges and serve as indexes to the rules.

The rules on authentication and admissibility of business and official records provide examples of the deplorable condition of Alabama's evidence law. Alabama law contains three business records rules. Civil Procedure Rule 44 governs the admissibility of business and official records in civil cases only, although criminal appellate decisions occasionally refer to the Civil Rule.[2] Sections 12-21-42 and 12-21-43 of the *Alabama Code* state the rules for the admissibility of business records in criminal proceedings.[3] Addi-

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tionally, Alabama law retains a "multitude of statutes in proof of official records and other documents"[4] and both rule and statutory methods for proving foreign law.[5] Such multiplicity of evidence rules can be demonstrated throughout the existing Alabama rules of evidence.

Need for a comprehensive code

Present Alabama evidence law is in need of revision and codification. In 1925, Professor Sunderland observed:

> "[W]e have so little confidence in the ability of the jury to use good judgment and common sense in passing upon evidence, that we have devised an elaborate system of rules for excluding evidence from the jury, to keep it from going astray. These rules are so intricate and difficult that a lifetime of study is scarcely sufficient to master them."[6]

Whether Sunderland assigned the proper reason for the evolution of the present state of evidence law, his conclusion that the rules are too "intricate and difficult" is correct.

Virtually all recognized authorities on evidence law have supported the adoption of workable evidence rules. National authorities, such as Ladd, McCormick, Morgan, Thayer and Wigmore, have called for improvements.[7] Alabama writers, such as Dean Gamble, Judge McElroy and Professors Schroeder, Hoffman and Thigpen, have endorsed the adoption of new Alabama rules of evidence.[8] The Alabama Commission for Judicial Reform reported "that a thorough overhaul of the rules of evidence is sorely needed in Alabama."[9] Present Alabama evidence law is too complex and scattered to allow trial judges to rule quickly and correctly during trials. In discussing rules of evidence in 1942, Professor McCormick observed:

> "In any practical system of trial procedure, the rules of proof should be simple enough to be applied with fair accuracy on the spur of the moment by judges and lawyers of reasonable skill and learning, but this is not true with us today. With the multiplication of rules, exceptions and distinctions through thousands of decisions upon evidence points each year, the system has become so elaborate that no lawyer, however studious, can carry in his head a detailed familiarity with this body of learning."[10]

Despite the valid criticisms of Alabama law, most of the evidentiary rules are worthy of retention in a more usable format. We should retain, clarify and simplify sound rules and discard unsound rules. The Federal Rules provide the model for presenting sensible rules in a central and accessible form.

Federal Rules of Evidence

Alabama practitioners already should be familiar with the Federal Rules. The federal courts in Alabama use them, evidence treatises and law review articles discuss and cite them as authority, Alabama appellate decisions refer to them and speakers at seminars on evidence discuss them. A brief review of the main features of the Federal Rules, however, may help one to understand the efficacious nature of the rules.

The Federal Rules contain 63 rules in 11 articles. This article discusses only major features of the Federal Rules.

Article I The six general rules comprising Article I, Rules 101 through 106, reflect familiar concepts found in present Alabama law. The most important of these rules is Rule 102. It states the primary objectives of the Federal Rules of Evidence, which are fairness, justice, simplicity, reasonable costs, flexibility and the future development of the law of evidence. Rule 102 establishes the basic guide for the interpretation of the Federal Rules. The current Alabama rules are in accord with the objectives of the Federal Rules.[11]

The remainder of Article I of the Federal Rules of Evidence covers diverse evidentiary rules such as objections, plain and harmless error and the completeness doctrine. These rules generally comport with existing Alabama law.

Article II The second article of the Federal Rules contain only one rule. Rule 201 addresses judicial notice of adjudicative facts. The rule permits judicial notice of facts that are not subject to reasonable dispute. Those facts either can be generally known or capable of accurate and ready determination from re-

liable sources. The rule is similar to existing Alabama law.[12] It provides specific guidelines, however, for taking judicial notice, giving notice to the parties and providing them with an opportunity to be heard and instructing the jury on facts that are judicially noticed. Although the Federal Rules do not contain a rule on judicial notice of law, several states have adopted rules governing judicial notice of law as a part of their evidence rules.[13]

Article III The two rules contained in Article III, Rules 301 and 302, address the use of presumptions. The rules are procedural in nature and, therefore, do not establish particular presumptions. Because presumptions generally are substantive in nature, they require legislative action in order to amend them. The procedures governing the use of presumptions, however, should appear in the rules of evidence. Due, in part,[14] to the differences between federal and state court procedures, a number of states that have adopted the Federal Rules have deviated from Article III of the Federal Rules in their state rules. Consequently, a number of possible rules on presumptions are available for consideration.

Article IV The 12 rules comprising Article IV, Rules 401 through 412, contain significant provisions on the admissibility of evidence. The first three rules are particularly important to an understanding of the concept and use of the Federal Rules.

One theme of the Federal Rules is that courts should admit into evidence logically probative evidence unless a sufficient legal basis exists to exclude it.[14] Rule 402 therefore provides, in part, that "[a]ll relevant evidence is admissible . . . ." Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, evidence that has any tendency to prove a germane fact is admissible unless it is excluded by another rule. The Federal Rules, therefore, contain a definite bias toward the admissibility of evidence, even though not all relevant evidence is admisssible. Rule 403 permits the exclusion of even relevant evidence if the probative value of the evidence is substantially outweighed by its potential for prejudice, confusion or delay. Moreover, the theme of fairness established by Rule 102, noted above, can weigh on any decision on admissibility. Rules 401-403 are key provisions in the Federal Rules. They mirror familiar Alabama evidence principles on relevant evidence.

The remaining nine rules in Article IV cover the admissibility of such specific facts as character and habit evidence to prove conforming conduct, subsequent remedial measures, offers to compromise and liability insurance coverage. These rules are similar to present Alabama evidence law. Rule 405 on its face, however, represents a significant difference between the Federal Rules and existing Alabama law.

Rule 405 permits character witnesses either to testify to the reputation of or offer their *opinion* of the character of the person in question. Alabama law presently permits only reputation evidence.[16] It does not permit witnesses to render an opinion on the character of another. Actual practice, however, differs significantly from the existing Alabama rule. Anyone who is familiar with actual practice should agree that character witnesses often give their opinion of the character of the subject despite the carefully-worded questions of the interrogator seeking to follow the strict Alabama rule. The Federal Rule simply legitimates an existing practice.

Article V Rule 501, the only rule contained in Article V, simply provides that principles of common law or state privilege laws govern the subject of privileged communications. Privileges arguably are substantive matters that are not properly subject to being changed by procedural rules. Although the Federal Rule does not establish any privileges, the Uniform Rules of Evidence do contain privilege rules. Some states have chosen to include specific privilege rules in their rules. I believe that the proposed revision should include the current Alabama rules on privileges.

Article VI Article VI contains 15 rules, 601 through 615. This paper discusses four: Rules 601, 607, 608 and 611(b). The remaining nine rules essentially agree with existing Alabama evidence law.

Rule 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." Adoption in Alabama of this provision would repeal that "disrespected relic of antiquity,"[17] the "Dead Man's" statute. *See Ala. Code* § 12-21-163 (1986 repl. vol.). A number of states have taken the opportunity to repeal their "Dead Man's" statutes by adopting Rule 601. Others have chosen to retain such provisions as an exception to the general rule of competency. Rule 601 makes an objection to the competency of a witness a matter for the fact-finder in weighing the credibility of the witness, rather than a matter for the judge in permitting or excluding the testimony of the witness.

Rule 607 permits "[t]he credibility of a witness to be attacked by any party, including the party calling" the witness. Alabama presently retains the "voucher rule," which means that the party calling the witness vouches for the witness's credibility. Thus, current Alabama law does not permit the direct attack of one's own witness. The offeror, however, can call other witnesses whose testimonies contradict the testimony of the offered

witness. Moreover, evidence doctrines such as surprise and refreshing the recollection of the witness decimate the voucher rule. Additionally, hostile and adverse witness rules limit the applicability of the voucher rule. The trend in Alabama is toward greater flexibility in impeaching one's own witness.[18]

Federal Rule 608 permits the use of character evidence to attack or support the credibility of a witness. The character witness can testify either to the reputation of the subject or to the witness's opinion of the subject's character. The rule limits the evidence to veracity, although Alabama law also permits general reputation evidence. As mentioned in discussing Rule 405, permitting opinion evidence may conflict with present Alabama evidence law, but not with present Alabama practice. Despite the careful wording of questions by attorneys seeking to comply with the strict Alabama rule, character witnesses usually give their opinion of the subject's character. Moreover, present Alabama evidence law does permit the witness to state an opinion concerning whether the character witness would believe the subject under oath.

Rule 611(b) limits cross-examination to the subject matter of the direct examination and the credibility of the witness. Alabama law permits cross-examination to address any relevant point. Several states have adopted a version of Rule 611(b) that retains broad scope cross-examination.

Article VII The six rules of Article VII, Rules 701 through 706, govern opinion and expert testimony. The Federal Rules significantly liberalize former evidence law on the subject. The Federal Rules and present Alabama law permit the reception of both lay and expert opinion testimony. Both Rule 701 and the similar Alabama Rule[19] limit lay witness opinion evidence. Lay opinion testimony must be rationally based on the knowledge of the witness. Moreover, the lay opinion evidence must be helpful to developing a clear understanding of the testimony or determining a disputed fact.

Rule 702 permits an expert witness to testify "in the form of an opinion or otherwise" if it "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Alabama law is comparable. Rule 703, however, permits an expert to base an opinion on facts or data "perceived by or made known" to the witness either at or before the trial. The facts or data need not be admissible in evidence if the information is "of a type reasonably relied upon by experts" in the field. Thus, Rule 703 would change existing Alabama law. The present Alabama rule permits expert opinions based either on personal knowledge or facts assumed in a hypothetical question, but requires that the facts known or hypothesized be in evidence. In many instances, Rule 703 also eliminates the need for hypothetical questions. Rule 705 permits the expert to give an opinion without prior disclosure of the underlying facts or data unless the trial court otherwise orders. Additionally, Rule 704 permits reception of a witness's opinion on an ultimate fact. Alabama case law normally disallows such testimony.[20]

Article VIII Federal Rules 801 through 806 conform to the idea that although hearsay generally is inadmissible, a number of exceptions exist to the general exclusionary rule. The six rules of Article VIII contain both the rule of exclusion and its many exceptions.

Rule 801 defines hearsay. Rule 802 provides that hearsay is normally inadmissible. Rules 803 and 804 set forth the exceptions to the exclusionary rule. The Federal Rules reflect an attempt to codify improved versions of orthodox rules on hearsay. Most of the provisions are familiar concepts that are comparable to existing Alabama evidence law. An adoption of the rules, however, might clarify uncertainties in existing law. Adoption also might sanction the introduction of more hearsay evidence.

Rule 803 sets forth 24 exceptions to the hearsay rule, "even though the declarant is available as a witness." Rule 804 establishes five exceptions to the hearsay rule "if the declarant is unavailable as a witness" and states five situations in which the declarant is deemed to be unavailable.

Any definitive discussion of Article VIII easily would exceed the space available for this discussion of the Federal Rules. However, several points must be made. The Federal Rules do not codify a *res gestae* exception to the hearsay rule. Instead, the Federal Rules permit the introduction of present sense impressions, excited utterances and statements of then-existing mental, emotional or physical conditions. Alabama's *res gestae* exception to the hearsay rule is confusing and difficult. The Federal Rules eliminate this troublesome exception.

Rule 804(b)(2) permits the introduction of dying declarations in both civil actions and prosecutions for homicide. Traditionally, dying declarations have been admissible only in homicide prosecutions. Rules 803(24) and 804(b)(5) are residual exceptions. They permit the introduction into evidence of hearsay evidence that is not otherwise admissible if 1) "equivalent circumstantial guarantees of trustworthiness" are present; 2) the statement is material and more probative than other procurable evidence; and 3) the admission of the statement is in keeping with the general purposes of the rules and interests of justice. The residual exceptions in the Federal Rules are controversial. Opponents contend that the rules give trial judges too much discretion. In contrast, supporters argue that the provisions permit growth and development of the law while providing appropriate safeguards against abuse. I endorse the idea of residual exceptions in a revised Alabama rules of evidence.

Article IX The three rules of Article IX, 901 through 903, adopt a liberal approach to the authentication and identification of evidence. According to the Rule 901(a), an exhibit is appropriately authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901 then illustrates the rule of authentication by listing ten examples, such as identification by a witness or by distinctive characteristics. Rule 902 establishes rules on the self-authentication of certain documents and records. Presently, Alabama has a number of statutes and rules governing the authentication and identification of exhibits, which are in accord with the Federal Rules.

Article X The eight rules of Article X, Rules 1001 through 1008, relate to writings, recordings and photographs. Rule 1002 is the "best evidence" rule. Rule 1004 permits other evidence of the contents of the original if the original is collateral to a controlling issue, or is in the possession of the opponent, lost, destroyed or not obtainable. Moreover, the rules permit the admission of evidence other than originals in additional cir-

cumstances. Rule 1003 permits the use of duplicates unless either a genuine question of authenticity of the original exists or the admission would be unfair under the circumstances. Rule 1005 allows the admission of copies of public records, and Rule 1006 authorizes the use of summaries of voluminous writings, recordings or photographs. The major provisions of Article X are similar to Alabama evidence law, although the Federal Rules do clarify some points. For example, Rule 1008 clarifies whether the judge or the jury determines the questions of fact preliminary to the consideration of other evidence of the contents of the original.

Article XI This article contains three miscellaneous rules, 1101 through 1103. Any state adoption process would require the redrafting of these rules.

Adoption—a judicial function

Clearly, the Supreme Court of Alabama has the power to enact procedural rules of evidence. Section 6.11, Amendment 328 of the Alabama Constitution provides that "[t]he supreme court shall make and promulgate rules governing . . . practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party . . . ."[21]

The terms "practice" and "procedure" include rules of evidence. The Supreme Court of Alabama has adopted evidence rules in the past. The court-adopted Alabama Rules of Civil Procedure contain a number of rules addressing evidentiary issues. Civil rules 43 ("Evidence") and 44 ("Proof of documents") are clear examples of court-promulgated rules of evidence.[22] Unquestionably, nearly all rules of evidence are procedural in nature. Alabama law, however, does not permit the court to enact rules affecting the substantive rights of litigants. Thus, the court may not be able to adopt rules of evidence that change existing rules on privileges or presumptions. Although the court can enact usable rules that merely restate existing substantive rules, the legislature must make any changes of rules affecting substantive rights of parties.

Court adoption of the rules of evidence is preferable to a legislative enactment of the rules. Because the courts are responsible for the proper and efficient resolution of litigation, they will use the rules. The content of the rules, therefore, mostly will affect litigants, attorneys and judges. Moreover, the court-adoption process could use the knowledge of attorneys, judges and law professors by their court appointment to a study and drafting committee. A proposed draft of the rules could be circulated, studied and discussed by interested parties before the adoption of any rules. After adoption, the Supreme Court of Alabama can easily amend the rules.

Asking the legislature to enact the rules may prove futile. The legislature must address many compelling issues in short sessions. Legislators have to review many proposed enactments, and, typically, budgets and tax issues compel higher

priority and more attention than court rules. The enactment of a proposed set of rules would depend upon many extraneous factors. Unfavorable committee referral or poor sequencing could prevent passage of the rules. Moreover, both houses of the legislature must concur in order to pass the proposed legislation. Many unopposed, worthwhile pieces of legislation are not enacted due to the complex legislative process. Additionally, statutory rules are not subject to easy revision by the legislature, and the courts may be reluctant to amend recently-enacted statutory rules, even if those rules prove to be faulty.

Advisory committees have been effective in the past. Committees on judicial administration, and civil, criminal, appellate and juvenile rules of procedure have been formed. These committees, which contained representatives of all of the interested parties, met over a period of time to study and draft workable rules. They widely circulated drafts of the proposed rules and solicited comments on the drafts. Moreover, open hearings on the drafts were held. Attorneys and judges provided valuable ideas and information to the committees. After the Supreme Court of Alabama adopted the rules suggested by those committees, knowledgeable people presented seminars on the educational television network or at various locations in the state to educate interested parties on the rules.

The committee-study, court-adoption process provides the best method for the study and adoption of rules of evidence. Knowledgeable people would serve on the study and drafting committee. Interested parties would have ample opportunity to comment on the proposed rules.

Summary

Clearly, present Alabama evidence law is too technical, unwieldy and difficult to locate. The Federal Rules of Evidence offer sensible rules in a manageable and accessible format. The Federal Rules, on balance, are neither too brief and general nor too lengthy and complex. They address the vast majority of recurring evidentiary issues. For the sake of brevity, however, the rules do not deal with some topics such as the parole evidence rule, constitutional law-based criminal evidence rules and burdens of proof. The Federal Rules are not radical revisions of existing law. Rather, they restate principles of evidence law familiar to Alabama practitioners.

Adoption of the Federal Rules will promote uniformity in practice among the state and federal courts. Moreover, the adoption process will provide an opportunity for the thoughtful reexamination and possible revision of the more problematic Alabama evidence rules.

The Supreme Court of Alabama should appoint a broad-based committee to study and draft proposed rules of evidence. The committee should use the Federal Rules of Evidence as a model for the proposed rules. Members of the legal profession in Alabama should actively support the effort. Throughout the process all interested parties should have the opportunity to comment on the proposed rules. Upon submission of the final draft of the proposed rules, the Supreme Court of Alabama should adopt clear, comprehensive and usable rules of evidence for use in Alabama's state courts. In those few instances where a proposed rule necessarily changes a substantive rule, the Alabama legislature should enact the proposal by statute.

Chief Justice Torbert correctly has noted, "[T]he success of our judicial system must be measured by our increased ability to provide for a speedy, just determination of issues."[23] A modern set of evidence rules will increase our ability to offer just and speedy answers to litigants' problems. ■

FOOTNOTES

[1] A. Pope, *Essay on Criticism*, Part II, Line 133 (1711).

[2] *Compare Carroll v. State*, 370 So.2d 749, 758 (Ala.Crim.App. 1979)(citing Ala.R.Civ.P. 44(h)), *and Hammett v. State*, 482 So.2d 1330, 1333-34 (Ala.Crim.App. 1985)(citing Ala.R.Civ.P. 44(h)), *cert. denied*, No. 85-291 (Ala. 1986), *with Neal v. State*, 372 So.2d 1331, 1342 (Ala.Crim.App.) (citing *Ala. Code* § 12-21-43 (1975)), *cert. denied*, 372 So.2d 1348 (Ala. 1979).

[3] The *Code* commissioner's note to each of the *Code* sections states that the section has been superceded by Ala.R.Civ.P. 44 as to civil proceedings, but is retained for "possible" applicability in criminal or probate cases. *See Ala. Code* §§12-21-42, 12-21-43 (1986 repl. vol.). The *Alabama Code* also provides that these *Code* sections do not apply if the Ala.R.Civ.P. or any other court rule applies. *See Ala. Code* §12-21-145 (1986 repl. vol.). Rule 1(a) of the Ala.R.Civ.P. provides that "[t]hese rules govern procedure . . . in all suits of a civil nature . . . ."

[4] *See* Ala.R.Civ.P. 44 committee comments. As the comments note, Rule 44 consolidates a number of these rules into one, but the rule only applies to civil proceedings. The "multitude of statutes" still apply to criminal proceedings. Examples include *Ala. Code* § 12-21-72 (authentication of papers or documents by department heads), 12-21-73 (additional mode of proof of official documents) & 12-21-95 (*prima facie* evidence of municipal ordinances, bylaws and resolutions) (1986 repl. vol.).

[5] *See* Al.R.Civ.P. 44.1 (governing civil cases); *Ala. Code* §§ 12-21-70 (authentication of foreign legislative acts), 12-21-71 (authentication of foreign public records of books), 12-21-93 (presumptive evidence of statutes of other states) & 12-21-94 (*prima facie* evidence of congressional acts and foreign statutes) (1986 repl. vol.).

[6] Sunderland, *Cooperation Between the Bar and the Public in Improving the Administration of Justice*, 1 Ala. L.J. 5, 8 (1925) (emphasis added).

[7] *See* C. McCormick, *Law of Evidence* xi-xii (1954); E. Morgan, *Foreword, Model Code of Evidence* 69-70 (1942); J. Thayer, *A Preliminary Treatise of Evidence at the Common Law* 529-32 (1898); 1 J. Wigmore, *Evidence* §§8-8(c) (3d ed. 1940); Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 Va. L. Rev. 692, 715-16 (1963).

[8] *See* W. Schroeder, J. Hoffman & R. Thigpen, *Preface*, Alabama Evidence (1987) ("[I]t is hoped that an awareness of the increasing similarities between Alabama and federal practice will ultimately lead to the adoption of the Federal Rules of Evidence in Alabama."); Gamble, Howard & McElroy, *The Turncoat or Chameleonic Witness: Use of His Prior Inconsistent Statement*, 34 Ala. L. Rev. I, 22 (1983) ("[T]he appropriate Alabama bodies should enter a deliberative and consultative process to consider the express and unequivocal adoption of the Federal Rules of Evidence."); Howard v. McElroy, *"Vouching for the Credibility" of One's Own Witness Whose Testimony has been Contradicted by Another Witness*, 40 Ala. Law. 489, 493 (1979) ("The Federal Rules of Evidence do not apply in state courts; but they are worthy of adoption in every state").

[9] *Commission For Judicial Reform Report*, Alabama Rules of Civil Procedure 118 n.1 (Final Draft 1959).

[10] McCormick, *The New Code of Evidence of the American Law Institute*, 20 Tex. L. Rev. 661, 662-63 (1942).

[11] *See, e.g.*, Ala.R.Civ.P. 1(c) ("These rules shall be construed to secure the just, speedy and inexpensive determination of every action."); Ala.R.App.P. 1.

[12] *See, e.g., Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232, 237 (1883) (trial courts may take judicial notice of undisputed matters generally known in the jurisdiction of the court and may refer to authoritative sources to determine facts).

[13] *See* Ala.R.Civ.P. 44.1 (determination of foreign law).

[14] The debate over whether to impose a burden of going forward or a burden of persuasion on the party opposing the presumption is beyond the scope of this article. *Compare* Fed. R. Evid. 301 (burden of going forward) with Unif. R. Evid. 301 (burden of persuasion).

[15] *See* J. Thayer, *supra* note 7, at 530.

[16] *See, e.g., Charley v. State*, 204 Ala. 687, 87 So. 177 (1920); *Chunn v. State*, 402 So.2d 1139 (Ala.Crim.App. 1981).

[17] Ladd, H.R. 5463: *A Need for Reevaluation Consistent with the Judicial Conference's Draft of the Proposed Federal Rules of Evidence*, 32 Fed. B.J. 233, 238 (1973).

[18] *See* Gamble, Howard & McElroy, *supra* note 8, at 2.

[19] *See, e.g., Johnson Publishing Co., Inc. v. Davis*, 271 Ala. 474, 124 So.2d 441 (1960) (trial court has discretion to permit lay witness to give his or her opinion on facts that are difficult to describe and are within personal knowledge of witness to better enable fact-finder to determine disputed facts).

[20] Ultimate fact opinions *generally* are inadmissible in Alabama. Compare *Huffman v. State*, 470 So.2d 1368 (Ala.Crim.App. 1985) (admission of state fire marshall's testimony that fire was intentionally caused violated ultimate fact rule), with *Allen v. State*, 472 So.2d 1122 (Ala.Crim.App.) (admission of state human services specialists testimony that child in question had been sexually abused did not violate ultimate fact rule), *cert. denied*, No. 84-802 (Ala. 1985).

[21] (emphasis added).

[22] *See also, e.g.*, Ala.R.Civ.P. 32 (use of depositions in court proceedings), 35(b)(2) (waiver of privilege), 44.1 (determination of foreign law) & 46 (exceptions unnecessary).

[23] Torbert, *Alabama's Judicial System*, 43 *Ala. Law.* 576, 577 (1983).

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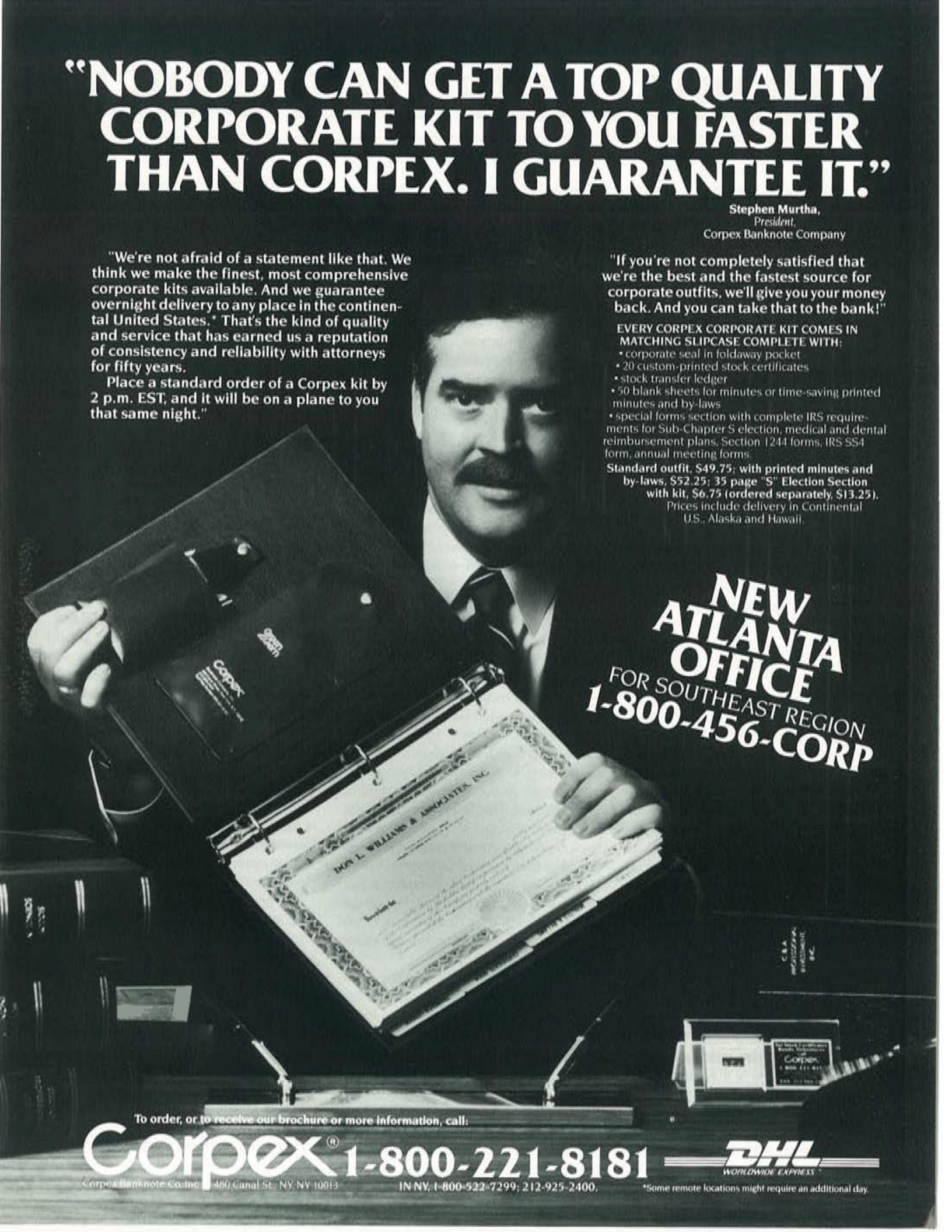

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Alabama's Interstate Banking

by John A. Nathan

I. Introduction

On July 1, 1987, the Alabama Regional Reciprocal Banking Act of 1986 became effective, and Alabama banking entities became prospective players in the regional banking game. The passage of this legislation, however, has not produced the anticipated whirlwind of merger activity that was expected by many prior to the adoption of the act. Instead, there has been merely a breath of activity to date as only a handful of the larger Alabama bank holding companies have utilized the new regional framework in acquiring entities across the border. The megamergers and huge regional acquisitions that occurred upon the passage of similar statutes in other southeastern states have not developed in Alabama. In fact, the Alabama State Banking Department has not received a single application for acquisition from an out-of-state entity.

The Alabama Regional Reciprocal Banking Act permits banks or bank holding companies domiciled within a defined southeastern region to acquire banks in this state, provided Alabama banks and bank holding companies are extended similar privileges in the home states of the acquiring entities. The basic intent of the regional approach, which has been adopted by a majority of the states, is to soften the blow to each state's financial network which inevitably should occur when nationwide interstate banking becomes a reality, either through slow evolution or Congressional action.

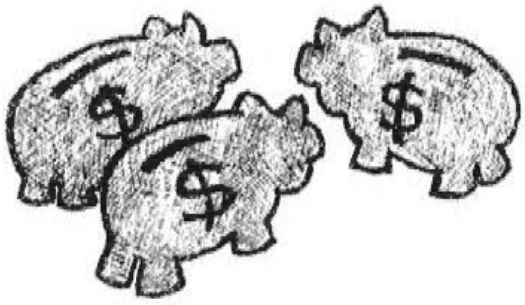
This article will analyze the regional approach and, more specifically, the Alabama legislation, and familiarize the potential out-of-state acquiror with unique state laws that must be considered upon entry into the Alabama market. First, a brief historical background will be given, outlining events predating regional interstate banking. Following this background an analysis of the Alabama legislation will be provided. Included in this analysis will be a comparison to regional legislation passed in surrounding southeastern states, a summary of provisions that are unique to the act and a discussion of potential ramifications the regional approach will have on state, regional and national financial markets. Though the act is similar in many respects to interstate legislation passed in other states, there are distinct differences that must be examined. This article will discern these differences by explaining and summarizing the provisions of the act.

II. Brief historical background

Congress first dealt with the topic of interstate banking with the passage of the McFadden Act in 1927 which basically prohibited the interstate expansion of commercial banks. This effectively limited both national and state chartered banks to markets defined by the boundaries of the state in which they were located.

Bank entrepreneurs attempted to circumvent this legislation by forming bank holding companies to satisfy their expansionist desires. The bank holding company, instead of branching, could establish one or more banks or acquire existing institutions in various other states. Congressional concern with the detrimental effect such expansion might have on banking in the United States led to the passage of the 1956 Bank Holding Company Act. This legislation, *inter alia*, prohibits the acquisition of a bank by a bank holding company without prior approval of the Board of Governors for the Federal Reserve System. Interstate acquisitions that occurred prior to the passage of the Bank Holding Company Act were allowed to remain, but further expansion was disallowed.

A portion of the Bank Holding Company Act known as the Douglas Amendment has important implications to the regional approach to interstate banking recently enacted by several states. The Douglas Amendment forbids bank holding companies from acquiring out-of-state banks, but it reserves states' authority to lift this prohibition against acquiring out-of-state banks.



States had no reason to lift this prohibition until competitive pressures, from nonbanks marketing similar financial services as banks, entered the picture in the late 1970s. Interest deregulation arrived in 1980, and it became apparent that the geographical constraints on the banking industry had to be lifted for banks to survive and compete in the increasingly changing financial services market.

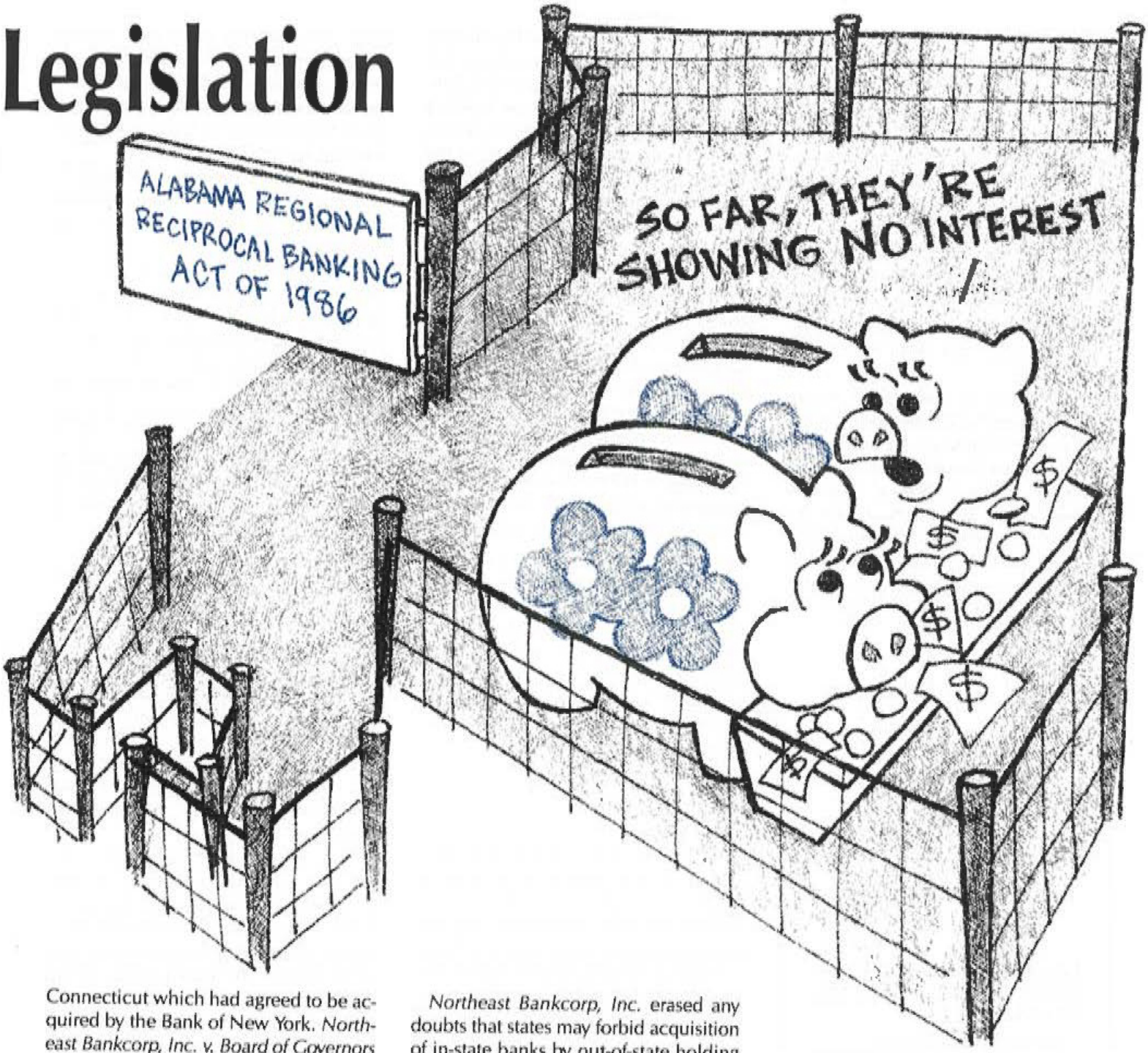
While the money center banks advocated a total elimination of all geographical barriers, executives of smaller banks viewed such a scenario as a nightmare—the huge out-of-state invaders would enter their local markets, offering services at an intensity and level that could not be matched by smaller banks. Medium-sized banks were in a dilemma—they desired to expand, but realized that full interstate banking would create a market in which most would not be able to survive.

Since the money center banks are located primarily in only three or four states, the regional approach was chosen as the optimal alternative by most states that have addressed interstate banking. This approach effectively excludes the big money center banks from the acquisition game.

The first states to adopt regional reciprocal interstate legislation were Massachusetts in 1982 and Connecticut in 1983. These states' legislation created a New England region, but reciprocity was not granted to New York, where several of the nation's largest banks are headquartered.

The constitutionality of the regional system was challenged by Citicorp of New York and Northeast Bankcorp of

Legislation



Connecticut which had agreed to be acquired by the Bank of New York. *Northeast Bankcorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985) Justice Rehnquist, in his opinion for the Court, said that regional banking systems do not violate the equal protection clause, nor do they amount to a compact between the states at the expense of other states. The Court found that the Douglas Amendment patently permitted states to open in-state banking to out-of-state entities, and the amendment allowed states a high degree of flexibility. The Court emphasized that the intent of Congress was to allow states to maintain local, community-based control over banking.

Northeast Bankcorp, Inc. erased any doubts that states may forbid acquisition of in-state banks by out-of-state holding

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John H. Nathan is a summa cum laude graduate of the University of Alabama College of Commerce and Business Administration with a degree in corporate finance and investment management. He worked as the financial institution analyst for the National Bank of Georgia (now the First American Bank of Georgia) in Atlanta. He is a 1987 graduate of the University of Alabama School of Law. Nathan practices with the Mobile firm of Sirote, Permutt, McDermott, Slepian, Friend, Friedman, Held & Apolinsky, P.C.

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companies, grant access only under certain conditions or allow only those holding companies located within a designated region to acquire an in-state bank. The Alabama legislature, like those in most states that have addressed the issue, has opted for regionalization rather than national interstate banking. Many believe that regionalization is the final barrier to national interstate banking and that it is a step that will enable regional banks to become large enough eventually to enhance competition between comparatively local banks and out-of-state money center banks.

It will be up to Congress to decide whether regional interstate banking is the final step or if another step exists—national interstate banking. In either event, it appears that the traditional close link between financial institutions and the communities they serve is being compromised in return for a more efficient, centralized system in which economic decisions may be entrusted to a more removed authority.

III. Analysis of Alabama legislation

The act is a regional reciprocal bill designed in response to a growing realization that full-scale interstate banking is inevitable in the United States within the next five years. The sponsors of the bill, the Modern Banking Association which was composed of the four largest bank holding companies in Alabama, believed that without a regional plan to buffer the eventual nationwide liberalization of the banking industry, even the strongest state institutions in the region would be no match to acquisition overtures of the money center banks. When full interstate banking becomes a reality allowing money center banks legal access to banking markets in any state, the regional plan will enable banks within the region to put themselves in a better competitive posture when nationwide interstate banking is implemented.

The Alabama act is similar in many respects to those implemented in other states that have opted for the regional plan, but there are a few distinct differences that must be examined. Each provision of the act, which is located in *Alabama Code* sections 5-13A-1 through 5-13A-10 (Supp. 1986), will be summarized and analyzed in the following paragraphs.

A. Definitions

A thorough understanding of the definitional section of the act is essential for grasping the regional concept since it provides the basic parameters that participating entities must meet to engage in regional banking, and it defines the specific transactions that will fall within the legislative framework. The act provides numerous definitions, and most will be explained in this article. Some additional terms used within the act are defined by reference to federal statutes.

First, of course, is the definition of the "region" from which participating entities must be domiciled. The Alabama act includes the states of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia and the District of Columbia. The drafters and sponsors of the act basically followed leads established in other regional states that had already drafted legislation. The basic intention of those who defined the region was to choose the area of the country where common social and economic goals exist so that development within that region could be enhanced by the new regional banking system.

It is important to note that the 14-member "region" as defined in the Alabama act differs in varying degrees from the definitions in other states that have legislation. North Carolina, South Carolina and Virginia have identical regional definitions, while Maryland includes two additional states, Delaware and Pennsylvania. The Florida statute is identical in its definition of the southern region except that Kentucky is excluded. The definition in the District of Columbia statute also excludes Kentucky as well as Arkansas. The Tennessee interstate banking bill, adopted in 1985, is nearly identical in its regional definition, except it excludes Maryland and the District of Columbia, and it includes Indiana and Missouri. The Mississippi regional definition mirrors the Tennessee definition except that Texas is included instead of Missouri. The least expansive regional definition is reflected in the Georgia statute which differs from the Alabama legislation in that it excludes Arkansas, Maryland, West Virginia and the District of Columbia. There has been speculation, however, the additional states will be added by amendment.

As adopted in 1984 the Kentucky statute only allowed acquisitions in states with reciprocal legislation contiguous to it, but it provided for nationwide reciprocity two years after the effective date of the statute. The West Virginia statute allows acquisitions with any state with reciprocal legislation which is substantially no more restrictive than the West Virginia statute.

The states of Arkansas and Louisiana have not yet adopted any interstate banking legislation.

The term "acquire" as used in the act defines the type of transactions that will trigger the operative terms and restrictions of the act. Transactions that create a "control" situation will fall under the purview of the act. These include the following:

1. mergers between two bank holding companies;
2. acquisitions by banks for bank holding companies of 5 percent or more

of the voting shares of another bank or bank holding company;
3. acquisitions of "all or substantially all" of the assets of a bank or bank holding company; and
4. any other transactions that would create control of one banking entity by another.

Thus, minor common stock trades or transfers of non-voting preferred stock would not be affected by the legislation since no control is transferred.

Only "banks" and "bank holding companies" are affected by the legislation. FDIC-insured banks or those eligible to be FDIC-insured that take demand deposits and make commercial loans are the only institutions affected. Savings and loan associations, trust banks, consumer finance companies and other non-bank institutions are not included within this definition.

"Alabama banks," "Alabama bank holding companies," "regional banks" and "regional bank holding companies" are eligible for acquisition under the terms of the act. "Alabama banks" are those banks which are organized under the laws of Alabama or the United States and have banking offices located within Alabama. Similarly, a "regional bank" is a bank organized under the laws of one of the states in the defined region or under the laws of the United States which has banking offices located only in states within the region. A "banking office" is a bank or branch which accepts deposits, but does not include unmanned automatic teller machines, offices outside the United States or other production offices where deposits are not taken.

The act authorizes "Alabama bank holding companies" and "regional bank holding companies" to acquire other institutions within the region. An "Alabama bank holding company" is one which has its principal place of business in Alabama, which has more than 80 percent of its total deposits held by its banking subsidiaries within the region and which is not controlled by any bank holding company other than an Alabama bank holding company. The principal-place-of-business test, determined on the basis of where the bulk of the banking subsidiaries' deposits are located, assures that most of the company's banking activities will occur in Alabama. The 80 percent test warrants that virtually all of the holding company's banking activities will transpire within the region defined in the act.

The definition of "regional bank holding company" follows the same pattern as the above definition of Alabama bank holding company. First, the company's principal place of business must be located in the region. Second, more than 80 percent of the total deposits of its banking subsidiaries must be located in the region. Third, it must not be controlled by a bank holding company other than a regional bank holding company. Finally, it cannot be controlled by a "foreign bank" as defined in the International Banking Act of 1978.

The purpose of these requirements is to insure that all banking activities within the region will be confined to those states which also have enacted reciprocal regional legislation.

B. Permissible acquisitions

Various criteria is established by the act that must be followed by institutions which wish to acquire an Alabama bank or bank holding company. The potential acquiror must submit an application to the Superintendent of Banks in Alabama, who shall approve the application when it is determined that this criteria has been met.

First, the reciprocity test must be met. That is, the state where the acquiring entity has its principal place of business must have operative legislation permitting Alabama banks and bank holding companies to make similar acquisitions in that state. This requirement means that

the laws of the state in which the regional bank holding company has its principal place of business must permit Alabama bank holding companies to acquire banks and bank holding companies in that state. Specifically, the laws in the acquiring entity's state must be such that if the roles of acquiror and acquiree were reversed, the Alabama acquiree also would be able to acquire the acquiror.

Second, the Alabama bank sought to be acquired or all of the subsidiaries of the Alabama bank holding company sought to be acquired must have been in existence and continuously operating for at least five years. However, the acquiring entity may satisfy this requirement by organizing a "phantom" bank in Alabama, if the purpose of the phantom bank is to facilitate the acquisition of a bank that has been in existence and continuously operating for more than five years.

Furthermore, if the bank or bank subsidiaries of the Alabama bank holding company to be acquired resulted from the merger of two or more banks and at least one of these banks satisfies the five-year requirement, the superintendent is authorized to approve the acquisition.

The five-year requirement would also be satisfied if the subsidiary was in existence as a banking subsidiary of the Alabama bank holding company prior to the trigger date of the act.

The third requirement that is necessary for the superintendent to approve an acquisition involves notice to those individuals in the state who might be affected by the transaction. The acquiror must publish a notice of intent to acquire the Alabama bank or bank holding company at least once a week for two consecutive weeks prior to the merger. This notice must appear in a newspaper of general circulation in the county or counties where the acquiree is located during the period 30 to 180 days prior to the effective date of the merger. In the alternative to newspaper publication, the acquiror may send to each stockholder in the target institution, via certified mail, a notice of intent to acquire.

In addition to the foregoing requirements, the superintendent is authorized to impose certain restrictions on an acquisition application. If restrictions, conditions or requirements exist in the state where the acquiring entity has its principal place of business that would be imposed on an Alabama acquiror if the roles of acquiror and acquiree were reversed, the superintendent should impose those same limitations in this state upon the acquiring institution. These requirements would be such that they would not be imposed on an instate institution making an acquisition, but only would apply to an out-of-state acquiror, such as an Alabama entity, that could attempt a similar acquisition.

C. Prohibited transactions and divestiture

The act provides that acquisitions of Alabama banks and bank holding companies may be obtained only by bank holding companies from within the region. The purpose of this requirement is to exclude the money center banks from the acquisition game in the region, thus insuring that many crucial decisions on regional economic development remain in southern institutions.

Divestiture of banking subsidiaries also is required in certain instances. If an Alabama or regional bank holding company ceased to be an Alabama or regional bank holding company, within one year it must divest itself of all Alabama banks and bank holding companies. The superintendent may extend this period within his discretion for one additional year.

The act does provide certain exceptions to the divestiture requirements. A regional or Alabama bank holding company will not be required to divest itself of Alabama banks or bank holding companies in four instances.

First, acquisitions of failing banks or savings and loan institutions made pursuant to the Garn-St. Germain Depository Institutions Act of 1982 are allowed. However, such acquisitions cannot be used as a base for expansion in the area outside the region. Such uses would disqualify the entity from any interstate expansion within the region.

Second, acquisitions that are consummated in the regular course of securing or collecting a debt previously contracted in good faith are allowed as provided in the Bank Holding Company Act. Under these circumstances though, the acquiring entity is required to divest itself of these assets or securities within two years of their acquisition.

A third exception to the divestiture requirement involves Edge Act subsidiaries and other international banking operations. These acquisitions or subsidiaries are permitted to continue provided they are business activities that are permissible under the Federal Reserve Act.

Finally, the act allows increases in deposits in bank subsidiaries not within the region, provided that these increases are not the result of the acquisition of a bank holding company.

D. Enforcement and supervision

The superintendent of banking is vested with the power to enforce the provisions of the act. The superintendent is authorized to impose fines, issue cease and desist orders or seek judicial action to effectuate the provisions of the act. Also, he is allowed to charge an application fee to potential acquirors in an amount that must be approved by the state banking board.

The superintendent also is permitted to enter into cooperative agreements with other regulatory agencies to facili-

tate compliance with Alabama laws. Moreover, the superintendent may accept examination reports from other regulatory agencies in lieu of performing a separate examination, and may provide such reports to other agencies.

Finally, the act authorizes the superintendent to take joint action with another regulatory agency which has concurrent jurisdiction over a violating entity, or he may take actions independently, if necessary.

E. Severability

The act contains a severability provision providing that if any part of the act is declared invalid, such invalidity shall not affect other provisions of the act. The valid provisions would be given effect without the invalid part. In effect, this provision would allow for a degree of distortion in the overall framework of the legislation if a part of the act is declared unlawful or unconstitutional.

F. Construction with other laws and moratorium on changes in branch banking laws

The act declares that any laws, (whether general, local or general with local application) conflicting with the provisions in the act will be amended so that full effectiveness of the act can be given.

The section does have one noted exception that was included as a bargain with the independent bankers, some of whom felt that the new act would threaten their existence.

This exception is a moratorium that the branch banking laws of the state will not be changed for the next seven years. Currently the only way a holding company can locate a bank in an area is to purchase an existing bank, and the smaller banks in the state would prefer that this law not be changed. In exchange for the independent bankers' agreement not to fight the passage of the regional legislation, the Alabama Bankers' Association and the Modern Banking Association promised not to lobby for branch banking law changes for seven years.

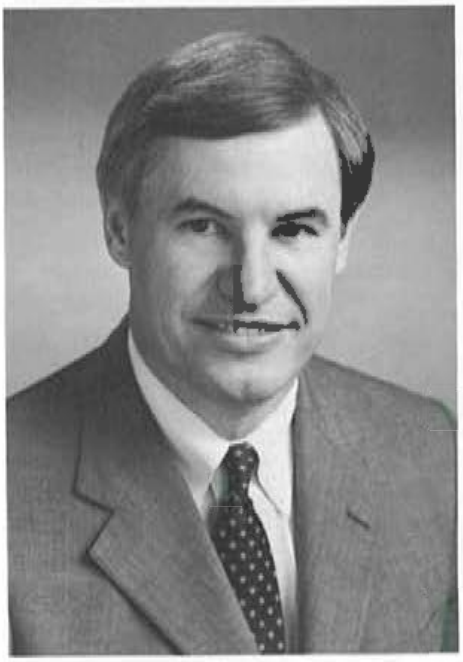
G. Conclusion

Alabama's regional reciprocal interstate banking law marks a major change in Alabama and southeastern banking. The impact of the similar legislation already has been felt in our neighboring states of Florida, Georgia, South Carolina and North Carolina. Although many of the provisions of the act have been borrowed from previously enacted regional laws, the act is unique in many respects. Many potential practical problems still exist, such as the degree of reciprocity that will be required of the states of potential acquirors.

Though merger and acquisition activity has been practically nonexistent in Alabama since the passage of the act, this scenario is expected to change. Market analysts and bank executives continue to have cautious expectations that foreign banks soon will be entering the Alabama market. For those potential acquiring entities, an analysis of the act is only the first step in that direction. Many issues, such as qualification requirements for doing business in the state, user and consumer protection laws and corporate and state tax laws are beyond the scope of this article, but they must be addressed by the potential out-of-state acquiror. In the acquisition game those who understand and abide by the rules of the game not only will survive, but prosper. ■

Bar Briefs

Ellwanger



Huckaby

Ellwanger new president of The Southwestern Legal Foundation

J. David Ellwanger, a member of the Alabama State Bar, recently accepted the position of president of The Southwestern Legal Foundation. He began his duties January 27, 1988. Most recently the chief executive officer of the State Bar of California, Ellwanger was previously executive director of the District of Columbia Bar and the Los Angeles County Bar Association. Prior to this, he served the American Bar Association as director of the Public Services Activities Division and the Commission on National Institute of Justice.

Born in St. Louis, Ellwanger grew up in Selma, and received his undergraduate and law degrees from the University of Alabama. In 1977, he received the Alabama State Bar Award of Merit. Ellwanger's past professional activities include being a member of the House of Delegates of the American Bar Association and chairman of the ABA Section on Individual Rights and Responsibilities. Currently, he serves on the ABA Commission on Public Understanding About the Law and is a member of the state bars of Alabama and the District of Columbia. He has also been active in the Lutheran Church, serving on the Lutheran Wheat Ridge Foundation Board of Directors.

The Southwestern Legal Foundation, located on the University of Texas at Dallas campus in Richardson, is an international continuing education organization.

Huckaby elected to American Judicature Society board

Gary C. Huckaby, of Bradley, Arant, Rose & White in Huntsville, has been elected to the board of directors of the American Judicature Society, a national organization dedicated to the improvement of the judicial system.

Founded in 1913, the American Judicature Society is supported by more than 20,000 concerned citizens. Through research, educational programs and publications, the society addresses issues related to the selection and retention of judges, court management and the public's understanding of the judicial system.

Huckaby, who received both his bachelor's and law degrees from the University of Alabama, currently serves as president-elect of the state bar and is a member of the Alabama Law School Foundation's Board of Directors and the Alabama Law Institute. He is also the state bar representative to the ABA House of Delegates and past chairman of the Mandatory CLE Commission. In the past, Huckaby has served as a member of the Executive Committee of the state bar; president of the Huntsville-Madison County Bar Association; member of the Judicial Selection Panel for U.S. Magistrates; and chairman for the ABA Lawyer Referral and Information Services and Delivery of Legal Services committees. He received the Alabama State Bar Award of Merit in 1986.

Kitchens

Kitchens wins in national ALR/Lexis (R) contest

Lynne B. Kitchens, a research attorney who performs computer-assisted legal research for the trial and appellate judges of Alabama, won $1,000 for an article about one of those searches, as one of five national winners in the LEXIS (R) BRIEF ALR Success Story Contest.

The contest drew numerous entries describing unusually creative or productive uses of American Law Reports (ALR) on LEXIS, Mead Data Central, Inc.'s online information service.

Kitchens' winning article described her use of ALR on the LEXIS service to find an opinion containing specific details that were only partially remembered by the person making the request. In this instance, she was asked to find an opinion involving newspapers as "ancient documents" in the context of a courthouse fire in Selma. Through ALR, she found the precise federal case the person had in mind.

The winning entry was published in the September issue of Mead Data Central's *LEXIS BRIEF*, the LEXIS newsletter.

Kitchens received her undergraduate degree from Emory University, graduate degree from Vanderbilt University and law degree from Jones Law Institute.

(left to right) York, Paulovich, Royal, Holliman

IOLTA underway

By now attorneys have received information on the Interest on Lawyers' Trust Accounts (IOLTA) program and have considered converting their attorney trust accounts. The first two IOLTA accounts have been open since October of last year. James A. Holliman converted the first account at the National Bank of Commerce in Bessemer. Pictured above with Mr. Holliman are Joe Paulovich, Bette Royal and Debbie York. Pictured below with IOLTA Director Tracy Daniel is Stanley Garner of Ozark, from whom the first interest check was received.

Daniel and Garner

New admittees, fall 1987 (admitted December 10, 1987)

BOWMAN, Gene Mitchell
R.R. 1
Pittsfield, IL 62366

BROOKS, Rebecca Gail
1113 15th Court
Tuscaloosa, AL 35401

CHURCH, Clyde Eugene
301 Belden Avenue
Selma, AL 36701

DAVIE, Gabe Yongue
1804 12th Avenue S.
Birmingham, AL 35256

GEORGETON, Maria Konstantinou Sarris
411 W. Clifton Avenue
North Augusta, SC 29841

GLOVER, Thomas Clinton
P. O. Box 37
Hopkinsville, KY 42240

HARRIS, Gregory LeBarron
305 S. Warren Street
Mobile, AL 36603

LESTER, Frank Martin, Jr.
306 Levert Street
Mobile, AL 36607

LIPTON, Beverly Ann
P. O. Box 17591
Montgomery, AL 36117-0591

MACON, Robert Russell
6200 Fairview Drive
Pensacola, FL 32506

OVERBY, Charles Frederick
1925 Oak Avenue
Columbus, GA 31906

Ben H. Harris, Jr., president of the Alabama State Bar, recently presented a memorial resolution to Rosa Lee of Dothan. The resolution, adopted at the 1987 ASB annual meeting in Mobile, honors her late husband, Alto V. Lee, who served as president of the state bar from 1974-75. In May, Mrs. Lee also was presented her husband's 50-year certificate recognizing his long membership in the bar. Mr. Lee died May 8, 1987.

ATLA names Henderson executive director

Thomas H. Henderson, Jr., who until recently was bar counsel of the District of Columbia, has been named executive director of the Association of Trial Lawyers of America.

Henderson served as bar counsel for four years, where he was responsible for administering the disciplinary process for the D.C. bar. Prior to this, he held several positions with the U.S. Department of Justice, including four years as chief of the Public Integrity Section.

As an attorney with the criminal division, Henderson prosecuted several labor racketeering cases, most notably obtaining the conviction of United Mine Workers President W.A. Boyle for political corruption and embezzlement. He also received a special appointment by the United States Attorney General to investigate alleged misconduct in the Drug Enforcement Agency.

In 1973, Henderson was deputy chief counsel for the Senate Judiciary Subcommittee on Administrative Practice and Procedure, chaired by Senator Edward M. Kennedy.

Henderson received his undergraduate degree in business administration from Auburn University. He earned his law degree from the University of Alabama and an L.L.M. from the National Law Center at George Washington University. Henderson replaced Marianna Smith, who left ATLA in October to run the Manville Personal Injury Trust. ■

CORRECTION—this "Lawyers in the Family" photograph appeared in the January issue of the Lawyer *and should have read: Randall Harry Bolen (1987); Ralph J. Bolen (1977) and H. Ralph Bolen (1952) (admittee, brother & father)*

Consultant's Corner

BORNSTEIN

The following is a review of and commentary on an office automation issue with current importance to the legal community, prepared by the office automation consultant to the state bar, Paul Bornstein, whose views are not necessarily those of the state bar.

This is the seventh article in our "Consultant's Corner" series. We would like to hear from you, both in critique of the article written and suggestions of topics for future articles.

Telephone procedures

Not very heady stuff, is it? After all, this column is supposed to be about high tech, and how to manage it. A telephone is one of the more remarkable high tech devices we have, and also is one of the more deadly. Approximately every 20 seconds, your most valuable client calls your office. Do you know how the phone is answered? How long clients are left ringing or holding? Standards should be set, and you should set them.

Busy, busy, busy

Many firms make the mistake of reserving too many trunk lines for incoming calls. If you have more than three, the chances are your receptionist will become swamped. Think for a minute. Do you want to be perceived as busy or asleep at the switch (or out to lunch)? Most callers want/need to speak to you; otherwise why are they calling? If they get a busy signal, a subliminal message also is received: busy lawyers.

The only caller who may not call again is the price shopper. He or she is too busy (looking for the cheapest lawyer) to bother with redialing. If a busy signal drives him away, have you really lost anything of value? Think about ten unanswered rings (versus a busy signal) from the caller's perspective. What impression are you trying to create?

Thank you

A good receptionist is a gem, someone to be prized, and compensated accordingly. That said, he or she should expedite the transfer of incoming calls to the appropriate lawyer's secretary. She should (almost) never have anything else to say; get the call to the lawyer's secretary as quickly as possible. A secretary may have special instructions for handling the call, "He wants to set a meeting for Tuesday," "He'll be back Friday and call you then," "No problem with the closing." Not only is the secretary likely to be better informed, she has more time to talk with a client and more time to take a message.

Three rings and you're out

No call, passed by a receptionist, should ring more than three times without being answered, by someone. If the referenced lawyer's secretary is away from her desk, she always should arrange to have one of the other secretaries answer for her or she should forward her line to another secretary, and tell her so. Nothing is more frustrating to a caller than to be on hold for an interminable time only to be told, "He's not in the office," or to be "programmed" back to the switchboard after 15 unanswered rings.

Watch your mouth

Everyone knows that only persons licensed to practice law may give legal advice. That said, it is critical for secretaries to avoid even the inference of such activity. Notice, however, the distinction between giving advice and repeating what an attorney previously has told a client, or following attorneys' instructions in the event a client calls. In the latter cases, it is mandatory that the secretary make a memorandum of the call and promptly bring it to the attorney's attention. That memorandum, annotated as appropriate by the attorney, should then be filed in the client's file.

Answer up

I regularly get asked, "What is the best way to handle phone calls?" I answer (regularly), "I don't know." I doubt there is a "best" way. In any event, they should be returned, either on a first come/first returned basis, during a set interval of time, or some other such rationale. If the prospect of returning calls is the most dismal activity you can envision, consider transferring your practice to New Jersey, where the supreme court requires that all calls be returned.

Cheer up

For better or worse, legal practice is increasingly a telephone-based one. Compare the number of calls received to the number of chairs in your client conference room(s). Try and get a little zip in your voice when returning calls. Have the relevant client file at hand when you call.

With some forethought, you can delegate some return calls to your secretary. Using speed dialing can expedite the process. Finally, remember that you often are (or should be) charging callers for advice. They are entitled to the same courtesy and enthusiasm as they would expect sitting across from your desk. ■

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National College of District Attorneys
Cost: $430
(713) 749-1571

24-25

TITLE INSURANCE
Sheraton Grand, Tampa
Practising Law Institute
Credits: 11.0 Cost: $350
(212) 765-5700

24-26

FROM AIDS TO TORTS: WORKPLACE REMEDIES
Le Meridien, New Orleans
American Bar Association
Credits: 13.6 Cost: $400
(312) 988-5000

25 friday

REAL ESTATE LAW
Harbert Center, Birmingham
Birmingham Bar Association
Credits: 3.0 Cost: $30
(205) 251-8006

25-26

MEDICAL NEGLIGENCE
Atlanta
Association of Trial Lawyers of America
(800) 424-2725

31 thursday

DRAFTING DOCUMENTS FOR CLOSELY-HELD CORPORATIONS (satellite)
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 3.7 Cost: $135
(800) 253-6397

april

1 friday

BANKING LAW
Wynfrey Hotel, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

7 thursday

PENSION LAW & PRACTICE I (satellite)
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.0
(800) 253-6397

8 friday

SOUTHEASTERN TRIAL INSTITUTE
Harbert Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.3
(205) 348-6230

8-9

FAMILY LAW
Sandestin Resort, Destin
Alabama State Bar Family Law Section
Credits: 7.5 Cost: $125

INSURANCE LITIGATION
Los Angeles
Association of Trial Lawyers of America
(800) 424-2725

14 thursday

INSURANCE/TORTS/PRODUCTS LIABILITY (satellite)
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.0
(800) 253-6397

15 friday

ARBITRATION
Harbert Center, Birmingham
Birmingham Bar Association
Credits: 1.0 Cost: $10
(205) 251-8006

15-16

REPRESENTING CITY & COUNTY GOVERNMENTS
Perdido Hilton, Orange Beach
Alabama Bar Institute for CLE
Credits: 8.0
(205) 348-6230

17-20

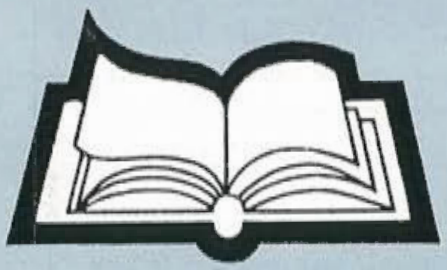
REPRESENTING STATE & LOCAL GOVERNMENT
Bahia Resort, San Diego
National College of District Attorneys
(713) 749-1571

21 thursday

MUNICIPAL LIABILITY (satellite)
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.0
(800) 253-6397

21-22

CRASH CASES: VEHICLE COLLISION LITIGATION
Omni Parker House, Boston
American Bar Association
Credits: 11.5
(312) 988-5000



21-23

UNIFORM COMMERCIAL CODE
Drake Hotel, Chicago
Uniform Commercial Code Institute
Credits: 15.6 Cost: $585
(717) 249-6831

22 friday

SOCIAL SECURITY
Harbert Center, Birmingham
Birmingham Bar Association
Credits: 3.0 Cost: $30
(205) 251-8006

25-29

PLANNING TECHNIQUES FOR LARGE ESTATES
Waldorf-Astoria, New York
American Law Institute-American Bar Association
Credits: 32.4 Cost: $700
(215) 243-1600

28 thursday

REAL ESTATE PURCHASES AND SALES (satellite)
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.0
(205) 348-6230

28-30

CORPORATE LAW
Marriott's Grand Hotel, Point Clear
Alabama Bar Institute for CLE
Credits: 12.0
(205) 348-6230

DIRECT & CROSS EXAMINATION
Holiday Inn-Union Square, San Francisco
Practising Law Institute
Credits: 15.3 Cost: $550
(212) 765-5700

may

5-6

WILLS AND PROBATE
Westin Hotel, Dallas
Southwestern Legal Foundation
(214) 690-2377

5-15

TRIAL ADVOCACY
University of North Carolina, Chapel Hill
National Institute for Trial Advocacy
(800) 225-6482

6 friday

ADVANCED REAL ESTATE LAW
Harbert Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.5
(205) 348-6230

6-7

BANKRUPTCY PRACTICE
Perdido Hilton, Orange Beach
Alabama State Bar Bankruptcy and Commercial Law Section
Credits: 3.5 Cost: $40/members; $55/non-members
(205) 343-0800

10-20

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

12 thursday

INCOME TAX ISSUES AFFECTING ESTATE TRUSTS (satellite)
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.0
(800) 253-6397

12-13

SECURITIES LAW FOR NONSECURITIES LAWYERS
Hyatt on Union Square, San Francisco
American Law Institute-American Bar Association
Credits: 10.7 Cost: $325
(215) 243-1600

12-14

FUNDAMENTALS OF BANKRUPTCY LAW
Ritz-Carlton, Boston
American Law Institute-American Bar Association
Credits: 15.8 Cost: $375
(215) 243-1600

13-14

OIL, GAS & MINERAL LAW
Perdido Hilton, Orange Beach
Alabama Bar Institute for CLE
(205) 348-6230

15-20

ADVANCED TRIAL ADVOCACY
University of Houston, Houston
National Institute for Trial Advocacy
Credits: 40.0 Cost: $1,450
(800) 225-6482

16-20

LABOR LAW AND LABOR ARBITRATION
Hilton Inn, Dallas
Southwestern Legal Foundation
(214) 690-2377

19 thursday

LITIGATION (satellite)
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.0
(800) 253-6397

20 friday

THE ART OF NEGOTIATION
Harbert Center, Birmingham
Birmingham Bar Association
Credits: 1.0 Cost: $10
(205) 251-8006

20-21

YOUNG LAWYERS' SEMINAR ON THE GULF
Sandestin Resort, Destin
Alabama Bar Institute for CLE
(205) 348-6230

27 friday

HOW TO TAKE A DEPOSITION
Harbert Center, Birmingham
Birmingham Bar Association
Credits: 3.0 Cost: $30
(205) 251-8006 ■

Alabama Bar Directory

The 1987-88 directory contains current addresses and telephone numbers of bar members, and state and federal courts; state bar committees, policies and procedures; the **Code of Professional Responsibility**; and sections of the judicial, executive and legislative branches of government.

Name (person, not organization)_____

Address_____

_____

Telephone #( )_____

Number of directories wanted ($15 each, includes postage)_____

Total enclosed (**must** accompany order) $_____

Please make check payable to: **The Alabama Bar Directory** and mail to:
Alabama State Bar
P.O. Box 4156
Montgomery, AL 36101

Alabama State Bar Board of Bar Commissioners' Actions

December 18, 1987, Montgomery, Alabama

Present: President Harris; Commissioners Thornton, L. Jackson, Reeves, Crownover, Owens, Love, A. Coleman, Scruggs, F. Hare, Lloyd, T. Coleman, Dillard, Davis, James, Higginbotham, Hill, Cassady, Holmes, Engel, Laird, Crook, Seale, Martin, Manley, Head, Bowles, Baxley, Garrett, Albritton, Royer, Rowe, Gosa, Brassell, C. Hare, Chason, Wood, Hereford, Knight, Matthews, Melton, White, Adams, Proctor and Alexander; Insurance Committee Chairman Henzel; Permanent Code Commission Chairman and Vice-chairman Silberman and Page; board secretary Hamner; bar staff members Jackson, Lacey and Pike.

Absent: Commissioners Turner, Hamner, Edwards, Blan, Lott, Gill, Vinson, Jones and Bouldin.

After invocation, roll call and correction and approval of the minutes of its September 25 meeting, the board conducted the following business:

- administered eight private reprimands;
- authorized solicitation of organizational funds ($125 per member) for a captive professional liability insurance company;
- ratified the executive committee's earlier endorsement of an individual disability insurance policy for members;
- voted to request that the bar's professional liability insurance administrator, Kirke-Van Orsdel Insurance Services, pay over to the bar $14,233 accumulated, based upon a percentage formula of premium dollars paid by members, for use in the bar's risk management program.
- approved for submission to the Supreme Court of Alabama comments on the Model Rules of Professional Conduct, developed by the Permanent Code Commission;
- authorized the president to lend such support as he deems appropriate to the Kentucky Bar in its U.S. Supreme Court litigation on Model Rule 7.3, targeted direct mail solicitation of clients;
- approved for submission to the Supreme Court of Alabama proposed Rule 3(g), Rules of Disciplinary Enforcement, outlining procedures and sanctions for failure to pay the annual Client Security Fund assessment;
- authorized renewal of the bar's contract with Wendell W. Mitchell, legislative counsel;
- authorized a 90-day extension of the bar's contract with special assistant general counsel Holly L. Wiseman;
- elected Linda A. Friedman bar examiner in pleading and practice;
- approved the bar's proposed budget for fiscal year 1989-90;
- approved longevity payments for bar staff, as authorized by the legislature for state employees meeting certain criteria;
- reaffirmed its position that all matters with respect to lawyer discipline and the records of the Alabama State Bar are confidential within the purview of Rule 22, Rules of Disciplinary Enforcement;
- ratified the action of the executive committee re-electing William B. Hairston, Jr., to the Judicial Inquiry Commission;
- authorized the bar's Committee on Access to Legal Services to cooperate in a survey on that subject with the Southern Poverty Law Center;
- rescinded a 1981 board resolution relating to disclosure of information on possible criminal activity, discovered during the course of disciplinary proceedings;
- voted to host the the Southern Conference of Bar Presidents' annual meeting in 1993;
- authorized reimbursement of unexpected expenses incurred on behalf of the board of bar examiners, incident to a regional meeting of the National Conference of Bar Examiners;
- voted to recommend to the Supreme Court of Alabama amendment of Rule II-C, Rules Governing Admission to the Alabama State Bar, establishing November 1 and March 1 as bar examination application deadlines for all potential examinees;
- approved staff compensation recommendations for 1988.

—MLP

The Revenue Act of 1987—Selected Provisions

by Lloyd V. Crawford

Introduction

The massive changes to the Internal Revenue Code occasioned by the Tax Reform Act of 1986 were enacted in pursuit of tax simplification. Soon after its passage, the need for substantive and technical corrections became apparent. The stock market crash of October 1987 and the budget deficit compelled Congress to consider legislation having as its principal purpose an increase in revenue. On December 22, 1987, President Reagan signed the Revenue Act of 1987 which contains amendments to the Internal Revenue Code. This article will outline the more significant provisions of the 1987 act as they may affect general practitioners.

Qualified residence interest

TRA-86 eliminated the deductibility of personal interest incurred by an individual. However, interest on debts secured by a security interest perfected under local law on a taxpayer's principal residence or second residence ("qualified residence interest") remained deductible in full. Interest on such debt was generally deductible to the extent that the debt did not exceed the amount of the taxpayer's basis for the residence (including the cost of home improvements). In addition, a taxpayer was permitted to deduct the interest on certain loans incurred for educational or medical expenses up to the fair market value of the residence. A grandfather rule permitted the deductibility of all interest on debt incurred on or before August 16, 1986, and secured by the taxpayer's principal or second residence on that date, provided the amount of the debt did not exceed the fair market value of the residence.

The marketing of "home equity loans" by lending institutions caused the House Ways and Means Committee to become concerned that a taxpayer could deduct interest on a loan secured by his residence that had no relation to the acquisition or substantial improvement of the residence. In addition, the rule permitting the deductibility of interest on a loan in excess of the taxpayer's cost basis in a residence, but only if the loan was for educational and medical purposes, was considered needlessly complex. As a result, the 1987 act has changed the rules with respect to the deductibility of interest on a loan that is secured by a taxpayer's residence.

The definition of "qualified residence interest" which is treated as deductible has been amended by the 1987 act. Such term includes only interest on loans which qualify as "acquisition indebtedness" or "home equity indebtedness." The aggregate amount treated as acquisition indebtedness for any period shall not exceed $1,000,000 ($500,000 in the case of married individuals filing separately); the aggregate amount treated as home equity indebtedness shall not exceed $100,000 ($50,000 in the case of married individuals filing separately).

Acquisition indebtedness means debt that is incurred in acquiring, constructing or substantially improving the principal

or a second residence of the taxpayer. Acquisition indebtedness is reduced as payments of principal are made. Thus, for example, if the taxpayer incurs $50,000 of acquisition indebtedness to acquire his principal residence and pays the debt down to $40,000, his acquisition indebtedness with respect to the residence cannot thereafter be increased above $40,000 (except by indebtedness incurred to substantially improve the residence). Refinanced acquisition debt continues to be treated as acquisition debt to the extent that the principal amount of the refinancing does not exceed the principal amount of the acquisition debt immediately before the refinancing.

Home equity indebtedness means debt secured by the taxpayer's principal or second residence, to the extent the aggregate amount of such debt does not exceed the difference between the total acquisition indebtedness with respect to the residence, and the total fair market value of the residence. Interest on qualifying home equity indebtedness is deductible, even though the proceeds of the indebtedness are used for personal expenditures. Thus, the 1987 act provides no special rules for amounts borrowed for educational or medical expenditures; interest on debt incurred for such expenditures is deductible in the same manner as interest on any other home equity indebtedness.

The $1,000,000 limitation for acquisition indebtedness and $100,000 limitation for home equity indebtedness results in an overall limitation of $1,100,000 for deductible qualified residence indebtedness ($550,000 in the case of married individuals filing a separate return). However, any indebtedness which was incurred on or before October 13, 1987, which was secured by a qualified residence on that date, and at all times thereafter, is grandfathered. It is treated as acquisition indebtedness, and the $1,000,000 limitation does not apply to such debt. Interest on such debt continues to be deductible. The amount of such debt, however, reduces the amount of the $1,000,000 limitation on new acquisition debt (but not below zero).

The grandfather rule for indebtedness incurred on or before October 13, 1987, applies to *all* indebtedness secured by a

qualified residence on that date. It is likely that many taxpayers have incurred interest on secured debt in excess of the cost basis of their residences, the proceeds of which were not used for qualified educational or medical expenses. Such interest is non-deductible under TRA-86. The 1987 act converts the interest to a deductible expense.

Example—Taxpayer A purchased her primary residence in 1980 for $50,000. The fair market value of the residence increased to $150,000 in 1986. On January 1, 1987, Taxpayer A borrowed $100,000 secured by her residence. The proceeds of this loan were not used for educational or medical purposes. Under TRA-86, the interest on $50,000 of the loan proceeds ($100,000 loan minus $50,000 cost basis in residence) is non-deductible consumer interest. However, the interest incurred during 1988 on the entire amount of the loan proceeds is deductible as acquisition interest.

The 1987 act also provides that, for purposes of the deduction for qualified residence interest, mobile homes used on a transient basis and boats are not treated as a second residence of the taxpayer. This provision reflects the belief of the committee that home ownership is not encouraged by the allowance of interest deductions on loans secured by vehicles.

Installment sales

A taxpayer who sells property must recognize gain or loss at the time of the sale. However, a taxpayer who is eligible to use the installment method may defer the payment of tax and recognize gain from the sale of property when payments are actually received. Under the installment method, a taxpayer recognizes income resulting from a disposition of property equal to an amount that bears the same ratio to the payments received in that year that the gross profit under the contract bears to the total contract price (the "gross profit ratio"). In general, the installment method may be used to report gain from a disposition of property where at least one payment is to be made after the end of the taxable year of the sale.

TRA-86 limited the use of the installment method for dealer sales of real and personal property, and sales of real property used in the taxpayer's trade or business or held for the production of rental income where the selling price of such real property is greater than $150,000. It was reasoned that taxpayers who pledged such installment obligations in order to borrow money should be limited in their use of the installment method, because their cash flow position is better than that of the taxpayer who does not pledge his installment obligation. Under the so-called "proportionate disallowance rule," a *pro rata* portion of the taxpayer's indebtedness was allocated to, and treated as a payment on, the installment obligations of the taxpayer. This rule was flawed because it assumed that all of the taxpayer's indebtedness was secured by installment obligations. Excepted from the rule were taxpayers who sell timeshares and unimproved residential lots, who could elect to compute their tax liability under the installment method and pay interest on the amount of deferred tax attributable to the use of the installment method.

The 1987 act repeals the installment method in its entirety for taxpayers ("dealers") who regularly sell or otherwise dispose of personal property on the installment plan or hold real property for sale to customers in the ordinary course of the taxpayer's trade or business. Dealers are now required to recognize income from the sale of property in the year of sale, regardless of when payments are received. Use of the installment method is still available for dealer sales of certain farm property, timeshares and unimproved residential lots. Dealers in timeshares or unimproved residential lots who use the installment method of reporting are required to pay interest on the amount of deferred tax attributable to the use of the installment method. The interest rate is 100 percent of the applicable federal rate applicable at the time of the sale, compounded semi-annually.

The proportionate disallowance rule proved to be short-lived, as it was repealed by the 1987 act. However, the purpose of the rule has survived with respect to installment sales of real property used in the taxpayer's trade or business or held for the production of rental income. For any such installment obligation in excess of $150,000 which is pledged to secure indebtedness, proceeds of the indebtedness received by the taxpayer are treated as a payment received on the installment obligation.

Example—On February 1, 1988, Taxpayer B sold a parcel of rental real estate with a cost basis of $50,000 for a total contract price of $200,000. The purchase price was to be paid in twenty (20) installments of $10,000 each. Under the installment method, the portion of each annual payment which is recognized as income by Taxpayer B is $7,500 (gross profit ratio of 75 percent).

On January 1, 1989, Taxpayer B borrowed the sum of $100,000, securing the loan with a pledge of the installment obligation. The loan proceeds of $100,000 are deemed a payment on the installment obligation in 1989. Accordingly, 75 percent of the proceeds, or $75,000, is included in Taxpayer B's gross income for 1989.

Non-dealers who sell real property on the installment method also must pay interest on the deferred tax liability, if the face amount of all such obligations which arose during, and are outstanding as of the close of, such taxable year exceeds $5,000,000. The secretary of the treasury is directed to prescribe such regulation as may be necessary to carry out the intent of the interest provision,

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including application of the rule in the case of contingent payments, short taxable years and pass-through entities.

Practitioners should be alert to the possibility of triggering income recognition upon the pledge of an installment obligation arising from a non-dealer sale of real property. In negotiating payment terms with respect to such property, taxpayers should consider whether interest payments on a deferred tax liability will be required.

Tax years for partnerships, S corporations and personal service corporations

TRA-86 required all partnerships, S corporations and personal corporations to conform their tax years to that of the owners. A partnership must have the same tax year as that of its majority interest partners, unless it establishes, to the satisfaction of the secretary of the treasury, a good business reason for having a different tax year. S corporations and personal service corporations must adopt a calendar year, unless a business purpose is established for a non-calendar year. The intent of this provision was to require such entities to adopt the calendar year as their taxable year, thereby precluding the deferral of income by partners or stockholders.

Example—Smith & Jones, P.C. is an Alabama professional corporation with a taxable year ending January 31. For the fiscal year beginning February 1, 1986, the P.C. earned income of $200,000, and distributed $50,000 in salary to both Smith and Jones during 1986. On January 31, 1987, both Smith and Jones received a bonus of $50,000. The $50,000 received by Smith and Jones in 1987 is taxed to them at lower 1987 rates.

TRA-86 required the P.C. to adopt a calendar taxable year for the year which began on February 1, 1987. Conversion to a calendar year prevents Smith and Jones from deferring bonuses to 1988, when tax rates will be even lower.

The calendar year conformity requirement generated significant concern among tax practitioners. Differing fiscal years of partnerships, S corporations and personal service corporations permitted return preparation and tax planning to be conducted ratably over a 12-month period. Calendar-year conformity would intensify the rush period from January to April of each year and impose insurmountable burdens upon practitioners. In response to the outcry from practitioners, the committee believes that a partnership, S corporation or personal service corporation should be allowed to retain its fiscal year if the benefit of income deferral to partners or stockholders could be eliminated by other statutory means.

The 1987 act provides that an existing partnership or S corporation, which is otherwise required to conform its tax year to the tax year of its owners, can elect to retain its fiscal tax year. This optional election would be made at the entity level, not by the individual partners or owners, and is binding on all partners and owners. Partners and S corporation shareholders of electing entities are required to make enhanced estimated tax payments determined with reference to the amount of tax deferral. In general, partners and shareholders must pay approximately the same amount in enhanced estimated tax payments as they would have paid in actual tax payments had the entity changed to the calendar tax.

The 1987 act also provides that an existing personal service corporation, which is otherwise required to change to a calendar year, can elect to retain its fiscal tax year. If payments to owner-employees are not made ratably before and after December 31, the electing personal service corporation will have to postpone some or all of its deduction for such payments until the following fiscal year. In order not to postpone any of the deduction, the payments to owner-employees prior to December 31 must exceed a minimum distribution amount. This minimum distribution amount is the lesser of:

(1) an employee-owner's gross income from the personal service corporation paid in the prior fiscal year, divided by 12 and multiplied by the number of months in the personal service corporation's fiscal year before December 31, or

(2) a historical payout percentage (not in excess of 95 percent times the taxable income of the corporation for the period from the first day of the entity's fiscal year through the end of the calendar year).

A newly-formed partnership, S corporation or personal service corporation may elect a taxable year other than a required year only if such taxable year results in a deferral period not longer than three months. The deferral period is the number of months between the close of the taxable period elected and the close of the taxable year otherwise required (the required taxable year). For example, if a taxable year ending September 30 is elected and the taxable year ending December 31 is otherwise required, the deferral period of the taxable year ending September 30 is three months.

In the case of a partnership, S corporation or personal service corporation's changing taxable years, an election is available only if the deferral period of the taxable year elected is not longer than the shorter of three months or the deferral period of the taxable year being changed.

Example—A partnership with a required taxable year ending December 31 had a taxable year ending October 31 for its last taxable year beginning in 1986. The partnership may elect to retain the year ending October 31 if it makes such an election for its taxable year beginning November 1, 1987. The partnership also may elect to change to a taxable year ending November 30. The partnership may not elect to change to a taxable year ending September 30, since such a taxable year would have a deferral period of three months which exceeds the deferral period (two months) of the taxable year that is being changed. If the partnership did not make an election for the taxable year beginning November 1, 1987, and instead adopted the taxable year it was otherwise required to use of December 31, an election to change taxable years would not be available in the future, as any other taxable year it might elect would have a deferral period in excess of the deferral period of the taxable year being changed (zero months).

The 1987 act did not specify when the election of a personal service corporation, partnership or S corporation to re-

tain a fiscal year must be filed other than to state that the deadline cannot be set before the 90th day after the date of the enactment of the 1987 act, December 22, 1987. As of this writing, Internal Revenue Service officials have said that such entities will have either until April 30, or 60 days after the publication of temporary regulations, whichever occurs later. In the event an election to retain a fiscal year is not made, practitioners should be alert to the filing due dates for the short taxable year ending December 31, 1987 (March 15 for personal service corporations and S corporations; April 15 for partnerships).

Accrual method of accounting for farm corporations

Taxpayers engaged in farming traditionally have been able to report their income and expenses from farming operations on the "cash receipts and disbursements" method of accounting. Simply stated, income under this method is calculated by adding amounts actually or constructively received in the tax year, and subtracting allowable deductions. Treasury regulations allow a farmer to report all income on the cash method of accounting, thus creating an exception to the requirement that businesses producing merchandise must maintain inventories. A "farm" for this purpose is a farm in the ordinarily accepted sense, including stock, dairy, poultry, fruit and truck farms, as well as plantations, ranches and all land used for farming operations.

A corporation engaged in the trade or business of farming was permitted to compute its income on the cash method of accounting if it was an S corporation, a corporation of which at least 50 percent of the total combined voting power was owned by members of the same family or a corporation having gross receipts of $1,000,000 or less. Therefore, family farm corporations were not required to keep inventories and were allowed all the immediate deductions permitted cash method taxpayers.

The committee determined that any corporation or partnership with a C corporation as a partner engaged in the trade or business of farming that has average annual gross receipts in excess of $25,000,000 should be required to use the accrual method of accounting. It was determined that the accrual method of accounting would more accurately reflect the economic results of such an entity. Whether such entitles are closely held, it was believed such are sufficiently sophisticated to keep their books and records using the accrual method.

The 1987 act provides that a family corporation is required to use the accrual method of accounting unless such corporation (and any predecessor corporation) did not have gross receipts exceeding $25,000,000. If any family corporation is required by this provision to change its method of accounting, such corporation will not be required to take into income adjustments which are normally required when a taxpayer changes its method of accounting. Rather, the normal income adjustment is credited to a suspense account and taken into gross income ratably over a period of time.

Most family farm corporations which are required to adopt the accrual method of accounting must utilize inventory accounting. This means inventories must be taken at the beginning and end of each taxable year. The manner by which some family farm corporations do business will be drastically changed as a result of this provision of the 1987 act.

Publicly-traded partnerships

Under present law, a partnership is not subject to tax at the partnership level, but, rather, income and loss of the partnership is subject to tax at the partner level. Partnership deductions, losses and credits are included in each partner's distributive share, which is determined in accordance with the partner's interest in the partnership. A partner's distributive share generally is determined without regard to whether he receives any corresponding cash distributions. A corporation, by contrast, generally is subject to tax at the entity level, and distributions with respect to corporate stock generally are subject to tax at the shareholder level.

The committee had become concerned that the proliferation of publicly-traded partnerships may erode the tax base. The concern was increased by the changes made by TRA-86 which resulted in the maximum regular corporate tax rate being higher than the maximum individual tax rate. The committee believed that publicly-traded partnerships resembled corporations because of the way their business functions and the way their interests are marketed. Limited partners as a practical matter resemble corporate shareholders, have limited liability, may freely transfer their interests, generally do not participate in management and expect continuity of life of the entity for the duration of the conduct of its business enterprise.

The 1987 act requires that certain publicly-traded partnerships be taxed as corporations, rather than as pass-through entities. The term "publicly-traded partnership" is broadly defined as any partnership if (1) interests in such partnership are traded on an established securities market, (2) interests in such partnership are offered with the expectation that there will be a secondary market for such interest or (3) interests in such partnership are readily tradeable on a secondary market (or the substantial equivalent thereof). Excluded from this definition are partnerships which derive 90 percent of their gross income from interest, dividends, real property rents or other passive type sources.

Committee reports indicate that interests in partnerships are offered with the expectation that there will be a secondary market for such interests where the interests are marketed with representations that there is likely to be a ready market for resale or other disposition of

the interests or rights to income or other attributes thereof. This determination is made at the time partnership interests are initially offered for sale. An interest is treated as readily tradeable on a secondary market if the interest is regularly quoted by brokers or dealers making a market in the interest. A partner's ability to trade the interest, without more, will not cause the interest to be treated as readily tradeable, nor will occasional sales of interests in the partnership, the terms of which are not widely publicized, indicate the existence of a secondary market.

Characterization of a partnership as "publicly-traded" also affects the application of the passive loss rule. Under TRA-86, deductions from passive trade or business activities, to the extent they exceed income from such passive activities, may not be offset against other income. Income from passive activities does not include income such as compensation for services or portfolio income. A passive activity generally is an activity involving the conduct of a trade or business in which the taxpayer does not materially participate. The passive loss rule prevents a taxpayer from offsetting salary, wage, interest or dividend income by passive losses or credits.

The committee was concerned that taxpayers may take the position that income from publicly-traded partnerships is treated as passive income under the passive loss rule. Income from such partnerships then could be offset by passive losses from unrelated activities. As it was determined that publicly-traded partnerships resemble corporations in significant aspects, the return on investment in a publicly-traded partnership was determined to be comparable to the return on an investment in corporate stock.

The 1987 act provides that net income from an interest in any publicly-traded partnership is not treated as passive income for purposes of the passive loss rule. Net income from publicly-traded partnerships is treated as portfolio income, and such income cannot be offset by passive losses. In addition, losses from a publicly-traded partnership can only offset subsequent gains from the same partnership.

The taxation of publicly-traded partnerships as corporations apply to taxable years beginning after December 31, 1987. However, in the case of a publicly-traded partnership in existence on December 17, 1987, the provisions do not apply until the first taxable year beginning after December 31, 1987. The provisions of the 1987 act relating to publicly-traded partnerships may make investments therein less attractive. Accordingly, practitioners should be alert to these provisions when advising clients about investments in partnerships which may be characterized as publicly-traded.

Conclusion

In summary, the 1987 act changes to the mortgage interest deduction may significantly affect the deductibility of interest incurred by homeowners. Changes in the installment method of reporting may curtail the use of installment obligations by non-dealers of real estate as collateral for loans. As maintenance of a fiscal year by a partnership, S corporation or personal service corporation can no longer result in a deferral of income to the partners and stockholders, such entities may succumb to the calendar-year requirement. Certain family farm corporations will drastically change their manner of doing business as a result of the change to the accrual method of accounting. The popularity of publicly-traded partnerships may decline as a result of their taxation as corporations. It remains to be seen how the 1987 act changes to the Internal Revenue Code will affect the collection of revenue and the economy of the United States. ■

Legislative Wrap-up

by Robert L. McCurley, Jr.

Legislature convenes

The 1988 regular session of the Alabama Legislature began February 2, and most likely will remain in session until May 16, 1988.

The 1987 session was dominated by tort reform bills. A few tort bills are still around which would limit liability to various professions and exempt certain employees from liability. The session appears to be dominated by education reform; however, 729 bills were introduced the first week. This is up from 573 introduced one year ago.

Law Institute bills

Although committees and individuals have reviewed major revisions for years before they are passed by the legislature, it has been the institute's experience that almost every major code revision requires a few amendments. This year clarifying amendments are being addressed to the Guardianship and Protective Proceedings act, Eminent Domain law and Probate Code.

Guardianship and Protective Proceedings amendment

This comprehensive revision was passed last year. The amendments are to the following sections:

§26-2A-6— Requires that notice of payments made to a minor without a conservator be filed with the probate judge.

§26-2A-7— Enumerates that this section cannot be used to get around the juvenile proceedings and the Interstate Compact on the Placement of Children.

§26-2A-73— Enumerates that a probate court may not appoint a guardian for a minor whose parents have had their parental rights terminated where the juvenile court already has appointed a custodian of the child.

§26-2A-138— Allows prior practice of a sheriff to be appointed conservator when there is no one else to serve.

§26-2A-142— Provides that costs of a guardianship proceeding or a conservatorship proceeding can be paid from the estate of the ward/protective person.

§26-2A-8— Provides that existing guardianships continue in effect as they existed prior to this act until a petition is filed to have the powers under the new act.

Eminent domain

This amendment to the Eminent Domain Code passed in 1985 makes clarifications in the following ways:

§18-1A-30— Computations of interest clarified with §18-1A-211.

§18-1A-70— Alabama Rules of Civil Procedure apply in circuit court of condemnation.

§18-1A-110— Landowner may receive money at any time after the probate award.

§18-1A-194— Section applies to temporary easements, as well as partial takings.

§18-1A-211— Clarifies how interest is determined.

§18-1A-276— Clarifies language concerning the landowner's right to file an answer and be heard on a complaint.

§18-1A-282— Clarifies along with §18-1A-211 how interest is determined.

Probate Code

In February the institute began a comprehensive review of probate procedure. This study is expected to require several years of study. The drafting committee has recommended that the word "estate" be defined in §43-8-40 and §43-8-70 to be the net estate after payment of expenses for funeral, administration costs, homestead and family allowances, exemptions and claims.

Real estate

The legislature also has been presented bills clarifying the law of redemption of real estate, *see Alabama Lawyer,* January 1986, and powers contained in mortgages, *see Alabama Lawyer,* January 1987. ■

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.

Riding the Circuits

Bessemer Bar Association

The new officers of the Bessemer Bar Association are:

President: Arthur Green, Bessemer
Vice-president: Jim Kierce, Bessemer
Secretary: Sam Russell, Bessemer
Treasurer: Dan Reynolds, Bessemer

—George M. Higginbotham

Etowah County Bar Association

At the December 10, 1987, meeting of the Etowah County Bar Association, the following officers were elected:

President: George P. Ford, Gadsden
Vice-president: F. Michael Haney, Gadsden
Secretary/ treasurer: M. Lynn McCain, Gadsden

—George Ford

Huntsville-Madison County Bar Association

Douglas C. Martinson, president of the Huntsville-Madison County Bar Association, recently appointed a special committee to review the rules and regulations regarding election of qualified members of the Alabama State Bar to the Madison County Judicial Commission. The committee consisted of chairman Paul Pate, Robert Ford, Mal Griffin, Joe Payne, Herman Watson and Bud Watson.

The executive committee of the Huntsville-Madison County Bar Association approved the committee report on December 30, 1987. The new rules provide that the nominating committee for new judicial commission members shall consist of the current president and four most recent past presidents of the bar association, no two of whom are affiliated with the same firm. Provision also is made for additional nominations by not less than 20 members of the state bar residing in Madison County.

Nathaniel Hansford, acting dean of the University of Alabama School of Law, spoke at the December meeting of the association. He reviewed accomplishments during Dean Charles Gamble's tenure at the law school, and stated the law school now has 480 students from 16 states. He also said the law school has an endowment of $10,000,000 and three endowed academic chairs. He explained that "the goals of a law school are to give the students a sound grounding. To be complete lawyers, they must understand the mechanical process of applying the rules. The practice of law is a profession. Every lawyer must strive to grow."

Ben Harris, state bar president, spoke at the January 6 meeting of the bar association and urged the members to take time to serve their profession. All Alabama attorneys will receive brochures on the 12 most-asked questions about IOLTA (Interest on Lawyers' Trust Accounts). The money will go to the Alabama Law Foundation. He urged attorneys to participate in IOLTA as soon as possible and support the recently organized Huntsville-Madison County Law Foundation.

The association celebrated the 50th law practice anniversary of M. H. "Pete" Lanier at the February meeting. Lanier graduated from the University of Alabama in 1936 and received his LL.B. from the University of Alabama School of Law in 1938. He was admitted to the Alabama State Bar in 1938 and has practiced in Huntsville continuously since then.

Bruce Larson, an Atlanta attorney, will speak at the March bar association meeting on immigration law. Dean Parham Williams of the Cumberland Law School will speak at the April meeting.

—Robert Sellers Smith

Macon County Bar Association

New officers of the Macon County Bar Association are:

President: Milton C. Davis, Tuskegee
Vice-president: Walter McGowan, Tuskegee
Secretary: Linda Henderson, Tuskegee
Treasurer: Jock M. Smith, Tuskegee

The association undertook a year of monthly meetings with presentations by members of the legal community. The county sheriff discussed better communication and procedures for serving documents. A panel discussion was given by officials of the circuit, district and city court clerk offices. The circuit judge and district judge for Macon County presented discussions on new legal topics affecting the court system.

The topic of a new or renovated court facility was foremost on the minds of the members, and the association has had effective input into discussions and planning by local government officials.

During the December holiday season the association sponsored a holiday luncheon for the membership and their office staff. At that time a monetary contribution was presented to the Macon County Office of Human Resources to assist in their ongoing program providing for the needy during the holidays. The membership numbers 14, and all officers were unanimously re-elected for the 1988 term.

—Milton C. Davis

Marengo, Sumter, Greene Counties Bar Association

The 17th Judicial Circuit Bar Association held its December meeting at the Cotton Patch in Greene County, Alabama, on December 1, 1987. Parham Williams, dean of the Cumberland School of Law, was the featured speaker and presented an update on significant recent decisions of the Alabama Supreme Court. Afterwards, Honorable Claud D. Neilson, circuit judge for the 17th Judicial Circuit, led the membership in a discussion of the new child support rules and chart.

The Honorable Thomas F. Seale, retired district judge from Livingston, Sumter County, was honored by the bar association for 50 years of membership in the state and local bar associations.

—Nathan G. Watkins, Jr.

Mobile Bar Association

The Mobile Bar Association had a very busy 1987. In March it honored three of its own for giving a total of 150 years in the practice of law: Robert F. Adams, Thomas O. Howell, Jr., and Nicholas S. McGowin.

Also in March the Mobile Bar entertained a group of appellate judges from across the nation who chose the city (thanks to Justice Richard L. Jones) for their conference.

Assistant Attorney General of the United States Arnold I. Burns was the keynote speaker for the Law Day celebration.

Stockman

At the December monthly meeting, J. Edward Thornton was honored for the thousands of hours he has contributed as the originator and editor of the Mobile Bar Association *Monthly Bulletin*.

New officers and committee members are:

President:	Samuel L. Stockman, Mobile
President-elect:	William H. McDermott, Mobile
Vice-president:	Richard W. Vollmer, Jr., Mobile
Secretary:	Cecil B. Monroe, Mobile
Treasurer:	Sandra J. Grisham, Mobile

Officers for the Mobile Young Lawyers' Section are:

President:	Donald C. Partridge, Mobile
Vice-president:	Sidney W. Jackson, III, Mobile
Secretary/ treasurer:	Frank Woodson, Jr., Mobile

—Barbara Rhodes
Executive Director, MBA

Russell County Bar Association

The following officers were elected for 1987-88:

President:	Robert P. Lane, Phenix City
Vice-president:	Julius H. Hunter, Jr., Phenix City
Secretary/ treasurer:	LeAnne E. Bonner, Phenix City

—LeAnne E. Bonner

Shelby County Bar Association

The Shelby County Bar Association elected new officers for 1988 at its December meeting. New officers are:

President:	Bruce M. Green, Alabaster
Vice-president:	Patricia Fuhrmeister, Columbiana
Secretary:	John A. McBrayer, Iverness
Treasurer:	Steven R. Sears, Montevallo

The bar association's annual Christmas dinner was held at Meadowlark Farms Restaurant in Alabaster. Among special guests attending at the invitation of the association were Justice and Mrs. Richard L. Jones and Judge and Mrs. Kenneth Ingram. The association is organizing committees and making plans for the coming year.

—Bruce M. Green

St. Clair County Bar Association

At the fall meeting of the St. Clair County Bar Association the following were elected:

President:	Luther S. Gartrell, III, Ashville
Vice-president:	A. Dwight Blair, Pell City
Secretary/ treasurer:	Tommie Wilson, Pell City

A golf tournament and dinner were held at the Pine Harbor Country Club in Pell City, Alabama, before the meeting.

—Luther S. Gartrell, III

Riding the Circuits

Tuscaloosa County Bar Association

The newly-elected Tuscaloosa County Bar Association officers are:

President: Cam Parsons, Tuscaloosa
Vice-president: Jay F. Guin, Tuscaloosa
Secretary/treasurer: Ronald L. Davis, Tuscaloosa

—Ronald L. Davis

(left to right) Vice-president, Jay Guin; President, Cam Parsons; and Secretary/treasurer, Ron Davis, (officers of the Tuscaloosa bar)

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Notice of Election

Notice is given herewith pursuant to *the Alabama State Bar Rules Governing Election of President-elect and Commissioner for 1988.*

President-elect

The Alabama State Bar will elect a president-elect in 1988 to assume the presidency of the bar in July 1989. Any candidate must be a member in good standing on March 1, 1988. 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, 1988. 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, 1988.

Commissoners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 2nd; 4th; 6th-Place #2; 9th; 10th-Places #1, 2, 5 and 8; 12th; 13th-Place #2; 15th-Place #2; 16th; 20th; 23rd-Place #2; 24th; 27th; 29th; 38th; and 39th. 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, 1988, and vacancies certified by the secretary on March 15, 1988.

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 29, 1988).

Ballots will be prepared and mailed to members between May 15 and June 1, 1988. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 14, 1988) to state bar headquarters.

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Young Lawyers' Section

Charles R. Mixon, Jr.
YLS President

ABA-YLD mid-year meeting

By the time this article appears, the 1987-88 year of the Alabama Young Lawyers' Section will be more than three-quarters complete. We have accomplished much this year, but still have a lot to do before the year is concluded. I am taking this opportunity to bring you up to date on certain activities.

In February 1988, several members of the YLS attended the mid-year meeting of the ABA/YLD in Philadelphia. Those in attendance were Terry McElheny, Percy Badham and Steve Shaw from Birmingham, Warren Laird from Jasper and James Anderson from Montgomery. James Priester of Birmingham also attended and served as a voting delegate at the general assembly of the YLD. I attended the meeting as YLS president and district representative for Alabama and Georgia.

The focus of this year's mid-year meeting was a presentation of the Membership Support Network of the YLD. This program is designed to provide information and programs for the benefit of young lawyers. In addition, the YLD general assembly considered several matters of importance to the profession as a whole, and young lawyers in particular. Of course, the social activities gave us an opportunity to meet young lawyers from throughout the country.

YLS Executive Committee

The YLS Executive Committee met Saturday, February 19, 1988, at the Grand Hotel near Point Clear. Duane Wilson of Mobile was instrumental in arranging our weekend at this outstanding resort. Each committee chairperson reported on progress in their respective areas; of particular importance were reports on upcoming seminars and a proposal to amend the bylaws of the YLS to involve more people in the state in this organization. In the future, you will be hearing more about that.

Continuing legal education

One of the most important services of the YLS is the presentation to our bar of continuing legal education programs. This year is no exception, and March 4-5, the annual Bridge-the-Gap seminar was presented at the Birmingham-Jefferson Civic Center. Under the direction of CLE Chairman Steve Rowe, this year's event included presentations on bankruptcy, real estate, litigation, corporations, domestic relations and collections. Numerous Alabama lawyers and judges gave their time and knowledge for the benefit of our newest young lawyers.

On May 20-21, 1988, the YLS again travels to Sandestin for the Seminar-on-the-Gulf. This annual event combines the best social activities and continuing legal education programs. Sid Jackson and Preston Bolt of Mobile once again are co-chairmen of this event, and this year promises to be just as successful as prior years. We are expecting another outstanding turnout, so mark your calendars.

Youth Judicial Program

I especially draw attention to the outstanding job again being done by Keith Norman of Montgomery in coordinating the Youth Judicial Program. In this, high school students participate as attorneys, judges, witnesses and jurors in a spectrum of courtroom experiences. Young lawyers throughout the state serve as advisors to the teams participating. This year, a videotape was produced publicizing the program to schools across the state and also served as training material for the program participants. The teams prepared for the program in February and local competition is taking place this month. The program will culminate with the state competition in Montgomery April 8-10. ■

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.
Miglionico & Rumore
1007 Colonial Bank Building
Birmingham, Alabama 35203-4054

Limestone County Courthouse

Limestone County

The area now comprising Limestone County once was called Elk County of the Mississippi Territory. This county was created May 9, 1817, out of lands obtained from the Cherokee and Chickasaw Indians in 1816. In those early days the courts of justice met at Fort Hampton.

On February 6, 1818, after the organization of the Alabama Territory, Limestone County as we know it today was created. The name of the county was derived from the large creek flowing through it which had a stream bed of hard lime rock.

On November 17, 1818, the Alabama Territorial Legislature passed an act calling for an election in March 1819 for the selection of five commissioners to choose the permanent site for a seat of justice and purchase four acres of land for public buildings and a courthouse. The preference for a county seat site by the candidates was the key issue in the commissioner elections.

Three communities vied for the honor of county seat: Athens, Cambridge and English's Spring. However, Robert Beaty and John D. Carriel, co-founders of Athens, offered to give all the land necessary for the needed public buildings, plus $8,000 toward the erection of a courthouse, if Athens were selected as county seat. Athens also was the most centrally located of the three possible choices. The elected commissioners chose Athens, and the Alabama legislature confirmed this selection December 3, 1819.

Courts were held in private residences until 1820 when the first courthouse was built on the public square. This first courthouse probably was built of logs cut from the site where it was built. It was replaced in 1825 by the first brick building in Athens. This building served as the courthouse until 1831. In addition to the courthouse and jail, the county maintained public stocks and pillory on the court square. These were kept for minor punishments until the 1840s.

When the walls of the first brick courthouse began to buckle in 1831, the building was dismantled and removed from the square. A new courthouse was built but was burned around 1864 by federal troops during the Civil War.

The rebuilding of this courthouse was a tremendous task for the people of Limestone County who were left nearly destitute after the war. Work on the structure, which was rebuilt upon the walls of the prior courthouse, progressed slowly. Work was suspended several times for lack of funds.

Then, on February 28, 1867, the judge and county commissioners of Limestone County pledged themselves as responsible parties for payment so work could proceed. By mid-summer 1867 work was progressing, but not anywhere near completion. In March 1868 a fence was completed around the building, but the courthouse remained unfinished. A year later, in April 1869, court still was being held in a store near the square.

Finally, in May 1869, the courthouse was finished. The building itself was two stories high topped by a two-story clock tower. It served as the courthouse until early 1917.

Approximately 100 years after Athens was selected as the county seat of Limestone County, the present edifice on the square was completed. It was constructed in the neo-classic style with a portico and Corinthian columns fronting each of the four entrances. The triangular pediment over the columns encloses a clock face. This two-story structure with a basement level dominates the public square in Athens; the building is crowned with a central dome. ■

Samuel A. Rumore, Jr., is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairman of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore.

Opinions of the General Counsel

by Holly L. Wiseman, acting assistant general counsel

QUESTION:

The Department of Human Resources (DHR) routinely contracts with private attorneys and district attorneys to prosecute child support cases and paternity actions pursuant to Title IV-D of the Social Security Act. DHR is empowered to provide such services to Aid to Dependent Children (ADC) recipients and those who do not receive ADC payments. However, ADC recipients must assign their child support rights to the State. The attorneys are compensated by DHR. Who is their client, the individual or DHR?

ANSWER:

When an attorney prosecutes a child support case pursuant to an assignment of child support rights to DHR, the attorney's client is DHR rather than the individual spouse, whether or not the spouse is the recipient of ADC. Where the individual has not assigned support rights to the State, the attorney's client is the individual, even though DHR pays the attorney's fee.

DISCUSSION:

In RO-83-46 the Disciplinary Commission answered an identical inquiry, holding that where DHR hires an attorney to prosecute non-support cases, the attorney's client is the individual spouse rather than DHR (previously the Department of Pensions and Security). For the reasons stated herein, that opinion is hereby withdrawn.

As stated in the request for opinion, the Child Support Act of 1979, *Code of Alabama* (1975), Section 38-10-1 et. seq., provides that every recipient of ADC must assign to the state his or her child support rights. As the agency empowered to enforce the Child Support Act, DHR then contracts with non-agency attorneys to prosecute paternity actions and enforce child support orders obtained thereby. DHR contracts with both private attorneys and district attorneys for this purpose. Although DHR pays attorneys to handle these matters, this fact alone does not establish that DHR is the attorney's client. DR 5-107(A) recognizes that an attorney may accept compensation for his legal services from one other than his client if the client consents after full disclosure. For this reason, our previous opinion RO-83-46 held that an attorney hired by DHR to prosecute a child support action on behalf of an individual actually represented the individual rather than the department.

This holding does not recognize that in many instances the individual's right to child support has actually been assigned to DHR. When DHR seeks to enforce child support rights acting through attorneys with whom it has contracted, it actually is seeking to enforce its own rights rather than those of individual recipients of ADC. Forty-two U.S.C. Section 602 A-26 specifically holds that assignment of support rights to the State constitutes "an obligation *owed to such state* by the person responsible for providing such support." (emphasis provided)

Accordingly, in *Gibson v. Johnson*, 582 P.2d 452, 35 Ore. App. 493 (1978), the Court of Appeals of Oregon held that where an ADC recipient assigns child support rights to the State and the State proceeds to enforce those rights, there is no attorney/client relationship between attorneys enforcing the assigned rights and the ADC recipient. Accord, *Butchko v. Butchko*, 602 P.2d 672, 43 Ore. App. 199 (1979)

WISEMAN

At least two state bars have issued ethics opinions agreeing with this holding. Both Missouri and Tennessee held that the attorney in a Title IV-D Child Support Case represents the state and not the ADC recipient. Missouri Informal Opinion 15 (6-2879) and Tennessee Opinion 83-F-55 (8-2483)

Accordingly, we hold that where an attorney contracts with DHR to enforce child support rights pursuant to an assignment under Title IV-D, the attorney represents DHR rather than the individual. In these circumstances the individual is in the same position as a witness in a criminal prosecution.

Although the witness's rights and interests may be involved, it is the State's interests which override. This is so whether or not the individual is actually receiving ADC benefits, as where ADC benefits have terminated but the State continues to provide support services. It is not the applicant's receipt of ADC benefits which controls, but rather the assignment of rights to DHR.

Where, however, legal support services are provided under Title IV-D to non-ADC applicants who do not assign their support rights to the State, the individual is the client rather than the State. In this situation it is the individual's legal rights which are being enforced, regardless of who is paying the lawyer's bill. Although the State has an interest in seeing that those rights are enforced, in doing so it acts on behalf of the individual rather than in the individual's place. In this situation, the lawyer must be scrupulous to comply with DR 5-107(B), "A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

We further caution that when the attorney seeks to enforce child support rights pursuant to an assignment to the State, he must explain to the individual that he represents the State rather than the individual. The individual also should be informed that if the investigation reveals a possibility of fraud in obtaining benefits, that information will be conveyed to prosecuting authorities. ■

Charter Members Of Professional Economics Section Sought

The Professional Economics Committee of the Alabama State Bar has been charged by the President with determining the interest among members of the Alabama State Bar in a Professional Economics Section. Proposed section goals are:

(1) To assist attorneys in providing legal services to their clients at the least cost through efficient management of their practice.

(2) To educate attorneys on all matters related to the economics of their practice.

(3) To provide practical guidance in all aspects of the management of a law office.

Charter membership dues of $10 per year have been set by the Professional Economics Committee. All lawyers interested in increasing the economic efficiency of their practice are urged to join. Please send a copy of the following application with your check for $10.00 payable to Alabama State Bar Professional Economics Section c/o Mary Lyn Pike, Post Office Box 671, Montgomery, Alabama 36101.

Charter Membership Application Professional Economics Section Alabama State Bar

Name: _____

Business Address: _____

_____

_____

Business Telephone: _____

Et Cetera

Education

UAB and Samford offer joint JD and MPH degrees

The University of Alabama at Birmingham School of Public Health and Cumberland School of Law have begun offering a joint Juris Doctor and Master of Public Health degree.

The program, only the second of its kind in the nation, is designed to give graduates all the tools necessary to deal with improving public health services in Alabama and the Deep South.

According to William F. Bridgers, M.D., dean of the School of Public Health, it will take students about three-and-a-half years to complete the coordinated JD/MPH dual degree program.

For more information, call UAB at (205) 934-6041 or Cumberland at (205) 870-2901.

Law student essay contest

A first prize of $750 and second prize of $250 will be awarded to the winners of a law student essay contest sponsored by the American Bar Association's Standing Committee on Law and the Electoral Process.

The topic of the essay contest is "Can and Should a Code of Fair Campaign Practices be Imposed on Candidates for Public Office?" Students should address the subject of whether political campaign practices can and should be regulated.

Papers prepared for law school credit and those written specifically for the competition are eligible, provided that the work is original and the citation and editing have been done solely by the author. Articles prepared for law reviews or other publications also are eligible, but must not be published elsewhere prior to April 15, 1988. Joint papers will not be accepted.

Entries may not exceed 3,000 words, footnotes not included in the total. Textual footnotes are not encouraged. The title page of the essay must include the author's name, his or her year in school, law school attended, date submitted for academic credit (if applicable) and both the author's permanent and temporary addresses and telephone numbers. Three copies of the essay, typed and double-spaced, must be postmarked no later than April 15, 1988, and sent to Martha Rinker, ABA Standing Committee on Law and the Electoral Process, 1800 M Street, N.W., S-200, Washington, D.C. 20036.

For further information, call (202) 331-2278.

"This Honorable Court" broadcast in May

"This Honorable Court," a major two-part series on the Supreme Court produced by WETA/Washington, D.C., will be broadcast over the Public Broadcasting System in May 1988, not March 1988, as previously announced. PBS dates are May 2 and 9; consult local listings for local broadcast time.

Services

Attorney general opinions now offered on WESTLAW

Alabama Attorney General opinions now are available on WESTLAW, West Publishing Company's computer-assisted legal research service. Coverage begins with 1977, and includes new opinions as they are released by the attorney general's office.

Attorney general opinions from Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia and Wyoming also are available on WESTLAW.

For further information call 1-800-328-0109.

The Evidence Store

The Evidence Store, a walk-in retail store supplying visual aids for trial lawyers, has introduced the Mini-Map for anyone engaged in auto accident reporting and reconstruction.

The Mini-Map is an 8 1/2" x 14" board over which ten pre-printed roadway intersections can be laid. By using any combination of the over four dozen magnetic cars, trucks, traffic signs, people, trees, etc., that come with the map, a graphic, accurate diagram can be constructed of the accident scene. The map also comes with a drawing template and markers to facilitate custom-drawn intersections.

The map comes with its own zippered case, and fits into most briefcases; it is available for $100, plus shipping, from the Evidence Store, 1551 Stuyvesant Avenue, Union, New Jersey 07083.

Understanding obstetric malpractice

Professional Education Systems, Inc. announces the release of the "Understanding Obstetric Malpractice" videotape series. This three-part video series gives basic medical information on three common areas of obstetric malpractice:

—anatomy and physiology of pregnancy (35 minutes);
—abortion, miscarriage and ectopic pregnancy (45 minutes);
—prenatal care and delivery procedures (45 minutes)

The video presenters for the set are Michael J. Hughey, M.D. and Daniel G. Samo, M.D.

For more information contact Professional Education Systems, Inc. at 1-800-826-7155, ext. 31, or write PESI, P.O. Box 1208, Eau Claire, Wisconsin 54702.

Etc.

Etc.

Surveys

Lawyers increase use of advertising

When a 1977 Supreme Court decision upheld the right of lawyers to advertise, few lawyers saw advertising as a polite method of attracting clients, but an ABA *Journal* poll shows that the old attitudes may be changing.

Thirty-two percent of lawyers now say they have advertised at some point, according to "LawPoll," a survey published in the November issue of the *Journal*. A quarter of the lawyers surveyed are currently advertising, and 26 percent intend to advertise.

The profession's acceptance of advertising appears to be growing. According to a similar *Journal* survey two years ago, only 25 percent of lawyers had advertised their services, and 17 percent were advertising at that time.

Average attorney makes $75,040

Attorneys working in business/industry/non-profit organizations have a mean income of $75,040 and a median income of $62,480, with 10 percent making under $37,000 and 10 percent over $121,922. Dr. Steven Langer, using data from his recent survey of 226 organizations, compiled these figures. Copies of the complete, 700+ page survey report are available for $325 from Abbott, Langer & Associates, 548 First Street, Crete, Illinois 60417.

Legal administrators have a median income of $40,177, with an interdecile range of $23,928 to $66,013.

Paralegal assistants have a median total compensation of $26,935; 10 percent of this group earn under $20,000 and 10 percent over $39,080.

Publications

Book maps disclosure issues for counsel in municipal bond offerings

In the volatile world of investments, municipal bonds remain relatively unregulated but present complex issues involving disclosure and other responsibilities of lawyers representing all principals.

A new book, *Disclosure Roles of Counsel in State and Local Government Securities Offerings*, explores the issues and reports responses and experiences of lawyers who already have coped with the problems. It presents a diversity of practices to help readers develop responses most suited to their own needs, but is not intended as a prelude to standards or guidelines.

The book is a joint project of the ABA Government Law Section, the ABA Section of Corporation, Banking and Business Law and the National Association of Bond Lawyers.

Copies are available to members of the ABA sections for $29.95, and to others for $39.95. Order from the American Bar Association, Order Fulfillment Department, 750 N. Lake Shore Drive, Chicago, Illinois 60611. Add $2.50 for handling to all orders.

Guide to title insurance

"Attorneys' Guide to Title Insurance," a 500-page manual covering practice throughout the country, is distributed by the American Bar Association's General Practice Section.

Originally published by the Illinois Institute of Continuing Legal Education (IICLE) in 1980 and revised in 1984, the comprehensive guide has been reprinted by the ABA's General Practice Section.

The guide was compiled by Michael J. Rooney, who chairs the Real Property Committee of the ABA's General Practice Section. It is available for $67.85, plus $2.50 for handling, from Order Fulfillment, American Bar Association, 750 N. Lake Shore Dr., Chicago, Illinois 60611, or in Illinois from IICLE.

Sample jury instructions for civil antitrust cases

After two years of work by a task force of antitrust specialists who represented the viewpoints of plaintiffs, defendants, the Department of Justice and the federal judiciary, the American Bar Association's Section of Antitrust Law published "Sample Jury Instructions in Civil Antitrust Cases."

This new volume provides over 180 sample jury instructions covering all the antitrust issues likely to be considered by a jury in a civil antitrust case.

In addition, the appendix provides illustrative special verdict interrogatories.

The 500-page looseleaf volume, with binder, is available for $75 ($59 to members of the Antitrust Law Section), plus $2.50 per order for handling, from the American Bar Association, Order Fulfillment 503, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Advanced Chapter 11 bankruptcy practice

Advanced Chapter 11 Bankruptcy Practice, in looseleaf, published by Professional Education Systems, Inc. is available as a two-volume looseleaf with an update service and four appendices.

Volumes I & II of the Chapter 11 series is written in outline format and combines the work of 22 lawyers from various major firms throughout the United States. The volumes include citations to more than 2,000 cases, many of which interpret the Bankruptcy Amendments and Federal Judgeship Act of 1984.

Volumes I & II of the Chapter 11 series are priced at $145. The update service is guaranteed a price of less than $75 each for the next three annual updates. Volumes III-VI retail for $45 each.

PESI provides continuing education materials for professionals in law, banking, construction, real estate, nursing, business and credit and collections.

For more information on the Advanced Chapter 11 Bankruptcy Practice set, call PESI at 1-800-826-7155, ext. 31.

Et Cetera

Et Cetera

Reasonable efforts to prevent foster placement

Federal foster care law requires that in each case where a child is placed out of the home, a judge must determine whether reasonable efforts have been made by the agency to prevent the unnecessary removal of the child from his own family. Without a court order finding that such efforts have been made, the state is not eligible for federal foster care matching funds for that child's placement.

Three publications from the American Bar Association's National Legal Resource Center for Child Advocacy and Protection examine the federal "reasonable efforts" requirement.

The three publications are the result of the ABA Foster Care Project's 18-month study on state implementation of reasonable efforts. They may be ordered as a set for $30. Individually, Reasonable Efforts (Second Edition) (#549-0063) is available for $20, and Reasonable Efforts: Manual for Judges (#539-0062) and Reasonable Efforts: Report on Agencies (#549-0061) cost $10 each. Discounts of 20 percent are available on orders of ten or more of the same title.

Orders should be sent to American Bar Association, Order Fulfillment 549, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

Bail law periodical published by ABA criminal justice section

A new periodical was launched recently by the American Bar Association's Section of Criminal Justice to provide regular updates on developing case law under the federal Bail Reform Act of 1984.

The *Bail Reform Act Reporter* summarizes cases interpreting the act and contains references to selected law review articles and notes. It includes all reported cases and a number of unreported cases.

An annual subscription to the Bail Reform Act Reporter includes six issues published from October 15, 1987, through August 15, 1988—a compendium issue, plus five bimonthly updates. Cost is $40, or $25 to members of the ABA Criminal Justice Section.

For more information, contact Bonita Davis, Subscription Director, ABA Criminal Justice Section, 1800 M Street, N.W., 2-South, Washington, D.C. 20036, (202) 331-2260.

Etc.

Miscellaneous

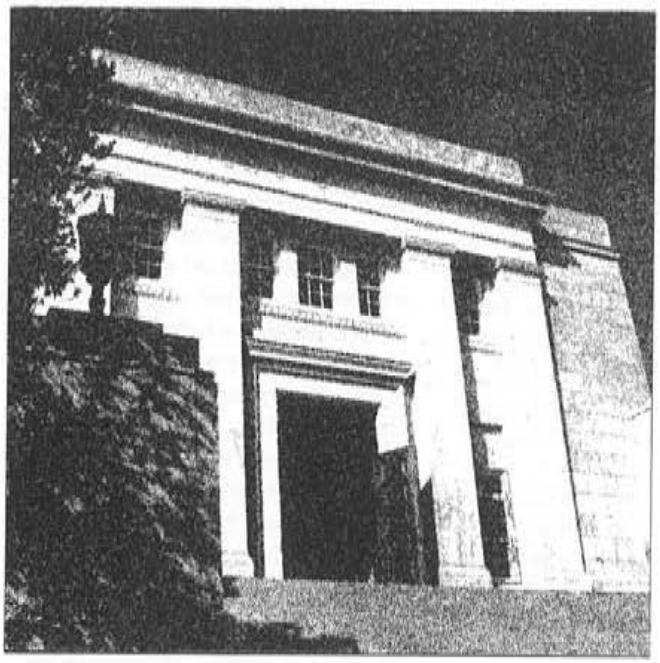
Commission on women in the profession

The American Bar Association's Commission on Women in the Profession held its first meeting in October 1987 to discuss issues and set its agenda for the coming year. The 11-member Commission was appointed in August by ABA President Robert MacCrate. It is chaired by Hillary Rodnam Clinton of Little Rock, Arkansas.

Clinton said that the commission will examine previously gathered materials on relevant issues, conduct surveys of an appropriate sample of the profession to answer current questions about the progress of women in the profession and convene forums to exchange ideas, experiences and strategies relating to women in the legal profession.

Anyone wishing to give or receive information should contact Carolyn F. Taylor, ABA Commission on Women in the Profession, 750 N. Lake Shore Drive, Chicago, Illinois 60611. ■

Et Cetera



Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

Actual arrest for DUI must occur in order to authorize custodial detention for chemical testing

Hays v. City of Jacksonville, 7 Div. 876 (December 8, 1987)—Hays was convicted for driving under the influence of alcohol. On appeal, the Alabama Court of Criminal Appeals focused upon the issue of whether a motorist must be arrested for DUI before being taken into custody and before being required to submit to a chemical test for intoxication. Presiding Judge Bowen, in an excellent opinion, surveyed the Alabama law of "implied consent."

Jacksonville police officers stopped Hays after they observed the vehicle she was driving was weaving. The officers requested the defendant's driver's license and noticed a strong odor of alcoholic beverage coming from within her car. The defendant failed two field sobriety tests. Officer Starr placed the defendant under arrest for "improper lane usage" and transported her to the police station where she was given a breath test. The defendant's blood alcohol level was .16 percent. Only then was the defendant arrested for DUI. Under Alabama's Chemical Test for Intoxication Act (implied consent law), §32-5-191, *Code of Alabama* (1975), a motorist must have been "lawfully arrested" before any chemical test to determine intoxication is conducted in order to authorize the admission into evidence of the test results. *See Ex parte Love*, [Ms. 86-128, June 5, 1987] 513 So.2d 24 (Ala. 1987). The threshold issue in this case was whether Hayes was properly arrested. Section 32-1-4(a), *Code of Alabama* (1975) provides:

> (a) Whenever any person is arrested for a violation of any provisions of this title punishable as a misdemeanor, the arresting officer shall. . . take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice . . .*Such officer* shall thereupon and upon the giving by such person of a sufficient written bond, approved by the arresting officer, to appear at such time and place, *forthwith release him from custody.* (emphasis added)

The clear import of this section is that the police have no authority to take a motorist into custody and then require him to go to the local stationhouse when that motorist has committed a misdemeanor traffic violation, but is willing to sign the summons to court. *Morton v. State*, 452

John M. Milling, Jr., is a member of the firm of Hill, Hill, Carter, Franco, Cole & Black in Montgomery. He is a graduate of Spring Hill College and the University of Alabama School of Law. Milling covers the civil portion of the decisions.

David B. Byrne, Jr., is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Belser and covers the criminal portion of the decisions.

So.2d 1361, 1364 (Ala.Cr.App. 1984) In the present case, neither the fact that the defendant's improper lane usage may have arisen because she was driving under the influence, nor the fact that the arresting officer had probable cause to believe she was driving under the influence, authorized her being required to submit to a chemical test for intoxication because she was unlawfully taken into custody and arrested. Improper lane usage, a violation of §32-5A-88, *Code of Alabama* (1975), is a violation of the Rules of the Road and is a misdemeanor. Subject to the exceptions of §32-1-4(b), custodial arrest is not authorized for improper lane usage.

Presiding Judge Bowen held that:

"The clear language in §32-1-4(b) requires that, in order to fall within the custodial arrest exception to §32-1-4(a), a motorist must be charged with DUI. Thus, unless one of the other exceptions (an accident resulting in personal injury or death or probable cause to believe the motorist has committed a felony) applied, probable cause to arrest for DUI, accompanied by an arrest for another misdemeanor traffic offense, is not sufficient to authorize custodial detention for chemical testing. Probable cause to arrest for DUI must be followed by an *actual* arrest, *Ex parte Love, supra*, and that arrest must be 'lawful' within the meaning of §32-1-4."

In short, if the officer has probable cause to believe that the motorist was driving under the influence, as the officers did in Hays, he should arrest for DUI. If he does not have probable cause to believe the motorist was driving under the influence then an arrest for another traffic offense (misdemeanor) may not be followed by a chemical test to confirm his suspicion of DUI. "The reason for requiring a prior arrest is that the blood test itself should not be a factor upon which the determination to arrest is made, and correspondingly, that probable cause should be established prior to the taking, in order to prevent general investigatory searches into the suspect's person to determine whether he had been drinking." *See Arrest Requirements for Administering Blood Tests*, 1971 Duke L.J. 601, 613-14 (1971).

Use of prior convictions as substantive evidence

King v. State, 1 Div. 456 (December 8, 1987)—Separate indictments against John Wesley King and Joey Thomas King were consolidated for trial. Both defendants were convicted of robbery in the first degree and sentenced to life imprisonment without parole as habitual offenders.

At trial, Joey King testified in his own behalf and admitted that he had six prior burglary convictions. In his oral instructions to the jury, the trial judge stated:

"If you are reasonably satisfied from the evidence that the witness, Joey King, has been convicted of a crime involving moral turpitude, such evidence goes to the credibility of this witness and you may consider it along with all the other evidence in determining what weight you would give his testimony."

The trial defense counsel made a timely objection to that portion of the court's charge on the ground that the trial judge "failed to instruct that prior convictions may not be considered in determining whether or not the defendant is guilty or not guilty of the particular offense, but only as far as the credibility of the witness on the stand." The trial judge noted the exception, but did not give the additional requested charge.

The court of criminal appeals reversed, holding that the request for additional instructions should have been granted by the trial judge.

The law in Alabama is clear that "a prior conviction of a crime involving moral turpitude can be used to discredit a witness . . . proof of such convictions is for the purpose of impeachment and not to 'support guilt or enhance punishment.' " *Ciervo v. State*, 342 So.2d 394, 399 (Ala.Cr.App. 1976), *cert. denied, Ex parte Ciervo*, 342 So.2d 403 (Ala. 1977).

The defendants in this case were entitled to have the jury instructed that the prior convictions of Joey King could not be considered as evidence of guilt of the crime charged. "Where particular evidence is offered for a *particular and limited purpose*, collateral to the main issue, as in the case of all impeaching or discrediting evidence, parties have a right to have its proper function and its limited operation presented to the jury by an appropriate instruction."

Evidence of intoxication requires trial court to instruct on lesser included offense of manslaughter

Peterson v. State, 4 Div. 895 (November 24, 1987)—Peterson was convicted of murder in violation of §13A-6-2, *Code of Alabama* (1975), and sentenced to life imprisonment pursuant to the habitual felony offender act. On appeal to the court of criminal appeals, the defendant argued that the trial court erred in refusing to charge on the lesser included offense of manslaughter since there was evidence of voluntary intoxication. The trial judge gave the jury the standard instruction on voluntary intoxication, but refused to give an instruction on the lesser included offense of manslaughter. The defense counsel objected at the conclusion of the trial court's oral charge stating, "I believe the law is if there is evidence of intoxication the jury has to be charged that they may find manslaughter, the lesser charge of manslaughter." (sic)

The evidence at trial clearly reflected that the defendant was intoxicated when he shot the victim. Six different witnesses testified that the defendant appeared to be "highly intoxicated" or "very drunk."

The law is clear in Alabama that:

"A lesser-included offense instruction should be given if there is any reasonable theory from the evidence which would support the position.' *See Crosslin v. State*, 446 So.2d 675, 682 (Ala.Cr.App. 1983)."

Judge McMillan reversed the case on the trial court's failure to give the lesser-included offense of manslaughter. Judge McMillan noted:

"When the crime charged involved a specific intent, such as murder, and there is evidence of intoxication, the trial judge should instruct the jury on the lesser-included offense of manslaughter."

In his opinion, Judge McMillan further reaffirmed the intermediate appellate court's holding in *Silvey v. State*, 485 So.2d 790, 792-3 (Ala.Cr.App. 1986), for the proposition that "the best practice is for trial courts to charge on all the degrees of homicide included in the indictment 'when a party is on trial for murder, unless it is perfectly clear to the judicial mind that there is no evidence tending to bring the offense within some particular degree.' "

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . affidavit totally inconsistent with

prior deposition does not create disputed fact

Robinson v. Hank Roberts, Inc., 21 ABR 5030 (September 25, 1987)—Robinson, an officer and stockholder of a corporation, filed suit in August 1984 against a bank and several other defendants, alleging that the defendants wrongfully converted the assets of the corporation to their own uses. Defendants filed motions for summary judgment, alleging the statute of limitations had run because Robinson had testified in deposition that he was aware of the alleged wrongful conduct for more than one year prior to filing suit. Robinson subsequently filed an affidavit in opposition to the motions for summary judgment which totally contradicted his previous deposition testimony wherein he stated he did not learn of the alleged misconduct until March 1984, some five months before filing suit. The trial court granted defendants' motions, and the supreme court affirmed.

In a case of first impression, the supreme court stated that a party cannot create a genuine issue of material fact to defeat summary judgment by filing an affidavit which is totally inconsistent with that party's previous deposition testimony. The supreme court quoted from *Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc.*, an Alabama Northern District Court case as follows:

"When a party has given clear answers to unambiguous questions which negate the existence of a genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."

The supreme court stated that the record showed that Robinson was aware of facts on which his claims were based more than one year prior to filing, and therefore, this action is barred by §6-2-39, *Ala. Code* 1975.

Estates . . .

Section 12-11-41, removal statute discussed

Ex parte Clayton (In Re: The Estate of Robert J. Eckert, Jr., deceased), 21 ABR 5013 (September 25, 1987)—Clayton, petitioner, filed a claim against the estate in the probate court for breach of warranty arising out of a contract with the decedent. The warranty claim was tried during part of a day and recessed. By the following morning, the administratrix of the estate had obtained an order granting her petition for removal of the administration of the estate to the circuit court pursuant to §12-11-41, *Ala. Code* 1975. Clayton filed a petition for mandamus asking the supreme court to compel the circuit court judge to vacate his order removing the administration of the estate to circuit court. The supreme court denied the writ.

The petitioner argued, *inter alia*, that it was unjust and a waste of time to allow removal of the estate in the middle of petitioner's trial in probate court. The supreme court stated that petitioner's arguments were reasonable, however, the court noted that §12-11-41, *supra*, allows removal "at any time before a final settlement." A final settlement begins with the filing of accounts and the vouchers with statements of heirs, etc., §43-2-501, *et seq.*, *Ala. Code* 1975. Moreover, §43-2-501, *supra*, provides that final settlement may be made "if the debts . . . [of the estates] are all paid . . . ." If petitioner's claim for breach of warranty is a debt owed by the estate, then final settlement cannot occur until that claim has been decided. Therefore, Section 12-11-41, *supra*, permits removal even in the midst of trial.

Insurance . . .

loss payee in "standard mortgage clause" may recover even if named insured not covered

International Surplus Lines Ins. Co. v. Associates Commercial Corp., 21 ABR 5305 (October 2, 1987)—The insured owned several trucks that were financed by Associates. The insured and one of his drivers, Sexton, had bad driving records. The insured purchased a policy written by ISLIC which provided that the insurance did not apply when the vehicle was driven by Sexton. The policy also contained a "loss payable clause" in favor of Associates which provided that the interest of the mortgagee was not invalidated by any act of the mortgagor/owner of the vehicle.

Sexton had an accident while driving one of the insured's vehicles, and ISLIC was notified of the loss. ISLIC asserted the "driver exclusion endorsement" and denied coverage and filed the declaratory judgment action. The trial court denied coverage as to the insured, but held that ISLIC was obligated to afford coverage to Associates. The supreme court affirmed.

In an apparent case of first impression in Alabama, the supreme court stated that where the loss was at least arguably within the coverage afforded by the insurance and the breach of the policy provision (i.e., the driver exclusion endorsement) came about as a result of the wrongful act of the insured or his agent or employee, the mortgagee's interest under a standard mortgagee clause will not be defeated. The supreme court reasoned that the standard mortgagee clause is an independent or separate contract between the mortgagee and the insurer which is measured by the terms of the clause itself. The mortgagee clause must prevail in the case of an irreconcilable conflict between it and the other provisions of the policy.

Medical malpractice . . .

neither psychologist nor pharmacist may testify as experts concerning standard of care required of physicians

Bell v. Hart, 21 ABR 5071 (September 25, 1987)—The plaintiff, Bell, went to Dr. Hart complaining of insomnia, agitation and depression. Dr. Hart prescribed Elavil, a tricyclic anti-depressant. Bell took the prescribed dosage and subsequently became incoherent and confused. Dr. Hart discontinued use of the drug and plaintiff filed suit, alleging that Dr. Hart negligently prescribed Elavil.

Dr. Hart filed a motion for summary judgment and attached an affidavit stating he did not breach the standard of care. Bell produced a pharmacist and psychologist to testify that Dr. Hart was negligent, i.e., that he did breach the standard of care for the prescription, dosage and administration of Elavil. Prior to trial, Dr. Hart filed motions, *in limine*, seeking to exclude the expert's testimony on the grounds that they were not competent to testify as experts because they were not physicians. The trial court granted Dr. Hart's motion *in limine* and also granted the motion for summary judgment. The supreme court affirmed.

In a case of initial impression in Alabama, the supreme court held that unless the conduct complained of is readily ascertainable by lay persons, the standard of care must be established by medical testimony. "Medical testimony" means testimony by physicians or properly introduced medical treatises that are recognized as authoritative and standard works in the medical profession. The supreme court noted that even though Bell's experts may possess greater knowledge of the drug and its effects on the human body than a medical doctor authorized by law to prescribe the drug, they could not permit a non-physician, who cannot legally prescribe a drug, to testify concerning the standard of care that should be exercised in the prescription of the drug.

Property . . .
parole easement by contract enforceable

Cleek v. Povia, 21 ABR 5125 (October 2, 1987)—Plaintiff and defendant live on contiguous lots with a single private road providing ingress and egress for both homes. Plaintiff's late husband and defendant's predecessor in title orally agreed to build the road. The road was placed almost entirely on plaintiff's property. The cost of building the road was split equally. The parties and/or their predecessors in title used the road for over 19 years before plaintiff brought this suit for trespass. The trial court found for the defendant and entered an order granting cross-easements to both parties. The supreme court affirmed.

The court noted that this easement was by contract and recognized the paucity of law in Alabama regarding such easements. The court also noted that the easement was created by the defendant's predecessor in title and that it was parole. After examining authorities in other states, it was noted that easements, by their very nature, are tied to the land, and, as such, have been found to be alienable. The open and obvious nature of this easement satisfied any notice requirement and is sufficient to put the successors-in-interest on notice.

The court also recognized a problem concerning the statutes of frauds, but stated that in Alabama an oral agreement involving real property will be enforced under the "partial performance" exception to the statute. In this case, the court found sufficient compliance with this exception to make this agreement enforceable.

Recent Decisions of the Supreme Court of Alabama—Criminal

Alabama entrapment defense—evidence of separate and subsequent misconduct

Davis v. State, 21 ABR 4995 (September 25, 1987)—Davis was found guilty at trial of selling cocaine, and the conviction was affirmed on appeal to the Alabama Court of Criminal Appeals.

The supreme court, speaking through Justice Adams, reversed and remanded Davis' case on two issues. The court granted cert to determine (1) whether the trial court erred in allowing evidence of a separate, subsequent offense, and (2) whether the trial court erred in charging the jury on the defense of entrapment after the defendant had denied committing the act charged in the indictment.

Davis was convicted of selling cocaine to Gulley, a known drug user. The incident occurred December 3, 1983. Davis testified at trial and disputed making the sale.

Over objection, Ivey, another undercover agent, testified that on January 5, 1984, in a restaurant parking lot, Gulley sought to buy cocaine from Davis again, but Davis had none. The state alleged that on that occasion, Davis gave Gulley a marijuana cigarette. Davis denied giving Gulley any marijuana on January 5, 1984, and claimed that the testimony by the police agents concerning that incident was inadmissible hearsay.

The supreme court held that the separate and subsequent misconduct, occurring on January 5, 1984, was inadmissible hearsay. However, the trial judge allowed the police agents to testify about the January 5, 1984, incident even though they had no direct knowledge of what occurred, on the ground that "with the defense of entrapment, almost anything this defendant has done in the

way of narcotics is admissible." At trial, the defendant did not raise the defense of entrapment and took the stand testifying that the alleged crime did not occur.

The supreme court reaffirmed its holding in *Owens v. State*, 291 Ala. 107, 278 So.2d 692 (1973), regarding entrapment as follows:

> "... the decided weight of authority is to the effect that the defense of entrapment is not available, and requested charges on the law of entrapment are properly refused, where the defendant takes the witness stand and denies the commission of the offense charged."

Accordingly, the court reversed because the testimony of the police officers regarding the January 5, 1984, incident was not admissible on a theory of "predisposition to commit the offense" because the defense of entrapment was not raised under Alabama law. Moreover, the court held that the trial court erred to reversal in allowing the testimony of the separate and subsequent misconduct.

Justice Adams stated:

> "We have held that when a person is on trial for the commission of a particular crime, evidence of another criminal act 'is not admissible if the only probative function of such evidence is to show his bad character, inclination of propensity to commit the type of crime for which he is being tried. This rule is *generally applicable whether the other crime was committed before or after the one for which the defendant is presently being tried.*' (emphasis ours) *See also Ex parte Tucker*, 474 So.2d 134 (Ala. 1985)."

The Supreme Court of the United States is presently considering whether a trial court may refuse to instruct a jury on the defense of entrapment because the accused would not admit to all of the elements of the offense charged, including the *mens rea*. *United States v. Matthews*, 803 F.2d 358 (7th Cir. 1986); *cert. granted*, 107 S.Ct. 1601 (1987) There is a split in the federal circuits which permits a defendant to admit all of the acts alleged in the indictment, but deny the *mens rea*. The decision of the Supreme Court, if favorable to the accused, will cause a reassessment of Alabama's current law regarding the entrapment defense. ■

Disciplinary Report

Surrender of License

● Jefferson County lawyer **Jeb Lewis Hughes** has surrendered his license to practice law in the State of Alabama, and, pursuant to the surrender, the Supreme Court of Alabama cancelled his license and struck him from the roll of attorneys in Alabama, effective January 12, 1988.

Suspension

● Huntsville lawyer **Warren E. Mason, Jr.,** was ordered suspended from the practice of law, effective December 1, 1987, based upon his guilty plea to seven separate charges of unethical conduct that had been filed against him by the Grievance Committee of the Huntsville-Madison County Bar Association. Mason pleaded guilty to six cases of having willfully neglected a legal matter entrusted to him, and one case of having engaged in conduct adversely reflecting upon his fitness to practice law. [ASB Nos. 84-624, 84-639, 85-19, 85-413, 85-620, 85-654 & 86-308]

Private Reprimands

● On December 18, 1987, a lawyer was privately reprimanded for having engaged in conduct adversely reflecting upon his fitness to practice law.

The lawyer ignored repeated requests from the bar to provide written responses to two separate complaints that had been filed against him by aggrieved clients. The lawyer ultimately pleaded guilty to formal disciplinary charges and refunded fees that had been paid by the two clients. [ASB Nos. 83-285 and 86-368]

● On December 18, 1987, a lawyer was privately reprimanded for "willful misconduct," in violation of DR 1-102(A)(4), and for communicating with an adverse party, on the subject of the representation, without the prior consent of the adverse party's counsel, in violation of DR 7-104(A)(1). This violation occurred when the respondent attorney, representing the plaintiff in a civil suit, roughly grabbed the arm of a party defendant, in the courthouse hallway, and bragged to him about how much money the plaintiff was going to recover in the matter. [ASB No. 87-128]

● On December 18, 1987, a lawyer was privately reprimanded for willful neglect, in violation of DR 6-101(A), and for intentional failure to seek the lawful objectives of a client through reasonably available means, in violation of DR 7-101(A)(1). The lawyer was appointed to represent an indigent on the appeal of a criminal conviction, and briefed the case before the Alabama Court of Criminal Appeals, which affirmed the conviction and denied rehearing. The lawyer then failed to file a timely petition for a *writ of certiorari* in the Supreme Court of Alabama. [ASB No. 86-746]

● On December 18, 1987, a lawyer was privately reprimanded for willfully neglecting a legal matter entrusted to him in violation of DR 6-101(A). The lawyer was retained to seek damages done to his client's mailbox, fence and residence by a certain person's automobile, but after writing a demand letter to the person responsible, the lawyer took no further action on behalf of his client. [ASB No. 87-159]

● On December 18, 1987, a lawyer was privately reprimanded for having violated DR 7-110(C). The lawyer obtained a judge's signature on a restraining order in a domestic relations case, without prior notice to opposing counsel, even though he knew the opposing party was represented by counsel, and had spoken with opposing counsel about other aspects of the matter that day. [ASB No. 87-282]

● On December 18, 1987, a lawyer was privately reprimanded for violating DR 9-102(B)(4), by having failed for a number of months to refund to a client some $1,500 that had been advanced by the client for expenses in an adoption matter, but that had not been needed in the course of resolving the matter. [ASB No. 86-499]

● On Friday, December 18, 1987, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 6-101(A). The Disciplinary Commission found that the attorney delayed filing a consent divorce for over two months after having had all necessary documents executed in his office and all fees paid to him. The Commission determined that this conduct constituted willful neglect of a legal matter entrusted to the attorney. [ASB No. 86-471]

● On December 18, 1987, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 7-104(A)(1). The Disciplinary Commission found that the attorney entered into a communication with an adverse party, who was represented by counsel, without prior permission of the opposing attorney or of the court. The Disciplinary Commission further found that the attorney secured the client's signature on documents materially related to a lawsuit then pending and that these documents were subsequently filed in that cause. The Commission determined that the lawyer communicated on the subject matter of a representation with the party she knew to be represented by a lawyer in that matter without the prior consent of the lawyer representing that party and without authorization by law to do so. [ASB No. 87-283] ■

MCLE News

by Mary Lyn Pike
Assistant Executive Director

At its December 4, 1987, meeting the Mandatory CLE Commission transacted the following business.

(1) It was reported members' reactions to the new CLE transcript were positive so far.

(2) Concluding several months' consideration, the commission voted unanimously to recommend to the board of bar commissioners and the Supreme Court of Alabama an increase to 13.0 the minimum CLE credits required each year, to include one hour of ethics education.

(3) Several individual requests were granted, including a waiver of the 1987 requirement and several amendments of 1986 reports.

(4) Two attorneys were denied teaching credit for activities designed for nonlawyers.

(5) Course approval was denied in the following cases:

(a) a presentation on continuation of benefits for law office employees leaving their firms;

(b) a basic course on petroleum exploration, drilling and production;

(c) a trial seminar without handouts or other written material;

(d) a Westlaw legal research seminar; and

(e) a program to help prosecutors develop victim-witness assistance programs for their offices.

(6) Partial approval was given a medical-legal seminar and a legal history seminar.

(7) The Nashville Bar Association, Atlanta Bar Association and Institutes on Bankruptcy were granted approved sponsor status.

(8) CRR Publishing Company was denied approved sponsor status.

(9) Approved sponsor status was renewed for 1988 for the following organizations, contingent on more timely submission of evaluations and registration lists:

Alabama Lawyers Association
ALI-ABA
American Bar Association and bar sections
Association of Trial Lawyers of America
Continuing Legal Education Satellite Network
Huntsville-Madison County Bar Association
National College of District Attorneys
National College of Juvenile Justice
Practising Law Institute
Tuscaloosa County Bar Association

(10) The following organizations' approved sponsor status for 1988 was renewed without special conditions:

Accredited law schools
Alabama Judicial College
Alabama Bar Institute for CLE
Alabama Consortium of Legal Services Programs
Alabama Criminal Defense Lawyers Association
Alabama Defense Lawyers Association
Alabama District Attorneys' Association
Alabama State Bar and bar sections
Alabama Trial Lawyers Association
American College of Trial Lawyers
Bar Associations of the sister states, the District of Columbia, Puerto Rico and the trust territories
Birmingham Bar Association
Commercial Law League Fund for Public Education
Congressional Research Service
Cumberland Institute for CLE
Federal Bar Association, Montgomery Chapter
Federal Bar Association, North Alabama Chapter
Federal Energy Bar Association
International Association of Defense Counsel
Legal sections, agency programs-U.S. and state governments
Mobile Bar Association
Montgomery County Bar Association
Montgomery County Trial Lawyers Association
Morgan County Bar Young Lawyers Section
National Association of Attorneys General
National Association of Bond Lawyers
National Association of Railroad Trial Counsel
National Bar Association
National Health Lawyers Association
National Institute of Municipal Law Officers
National Institute for Trial Advocacy
National Judicial College
National Legal Aid and Defender Association
National Organization of Social Security Claimants' Representatives
National Rural Electric Cooperative Association, Legal Division
Patent Resources Group, Inc.
Southwestern Legal Foundation, Inc.
Transportation Lawyers Association
Tuscaloosa Trial Lawyers Association ■

Memorials

John Powell Hynds—Birmingham
Admitted: 1984
Died: December 29, 1987

Ralph Lee Jones—Ocala, Florida
Admitted: 1919
Died: October 11, 1987

George Edward McNally—Atlanta, Georgia
Admitted: 1953
Died: December 16, 1987

Joseph Johnson Mullins—Clanton
Admitted: 1929
Died: January 5, 1988

Joe Thomas Pilcher, Jr.—Selma
Admitted: 1953
Died: December 30, 1987

John Doyal Prince, Jr.—Birmingham
Admitted: 1942
Died: January 6, 1988

George Malcolm Taylor, Jr.—Prattville
Admitted: 1932
Died: January 22, 1988

Alton Lee Turner—Luverne
Admitted: 1950
Died: November 21, 1987

JOSEPH JOHNSON MULLINS

The bench and bar of the 19th Judicial Circuit mourn the loss of a distinguished senior member. Judge Mullins was born September 17, 1902, and passed away January 5, 1988. He was the son of Tipton Mullins, a practicing attorney, and Roberta Ann Johnson Mullins of Clanton, Alabama.

He graduated from the University of Alabama in 1926 and thereafter attended Columbia University Law School, later transferring to the University of Alabama Law School where he received the LL.B. degree in 1929.

After practicing law in Birmingham from 1929 to 1936, he practiced in Clanton from 1936 until his election in 1960 as circuit judge of the 19th Judicial Circuit.

Prior to his election he served as Clanton municipal judge, attorney for the Chilton County Commission and special assistant attorney general.

After his retirement in 1976 as circuit judge he was appointed by the chief justice as a special judge assigned to the Alabama Court of Criminal Appeals, and in that capacity he was principal author of 132 opinions from 1976 to 1985.

He and Sara Nabors of Mansfield, Louisiana, were married in 1928. Mrs. Mullins died in 1980. Judge Mullins is survived by his son and daughter-in-law, Mr. and Mrs. Joseph Johnson Mullins, Jr., and three granddaughters, Melinda, Cerianne and Margarethe, all of Albuquerque, New Mexico, and one sister, Mrs. Lawson Boone Nelson of Sun City, Arizona. Joseph Johnson Mullins, Jr., is a practicing attorney in Albuquerque, New Mexico.

He was a member, Sunday School teacher, lay speaker and member of the board of trustees of First United Methodist Church of Clanton, Alabama. ■

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.*

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