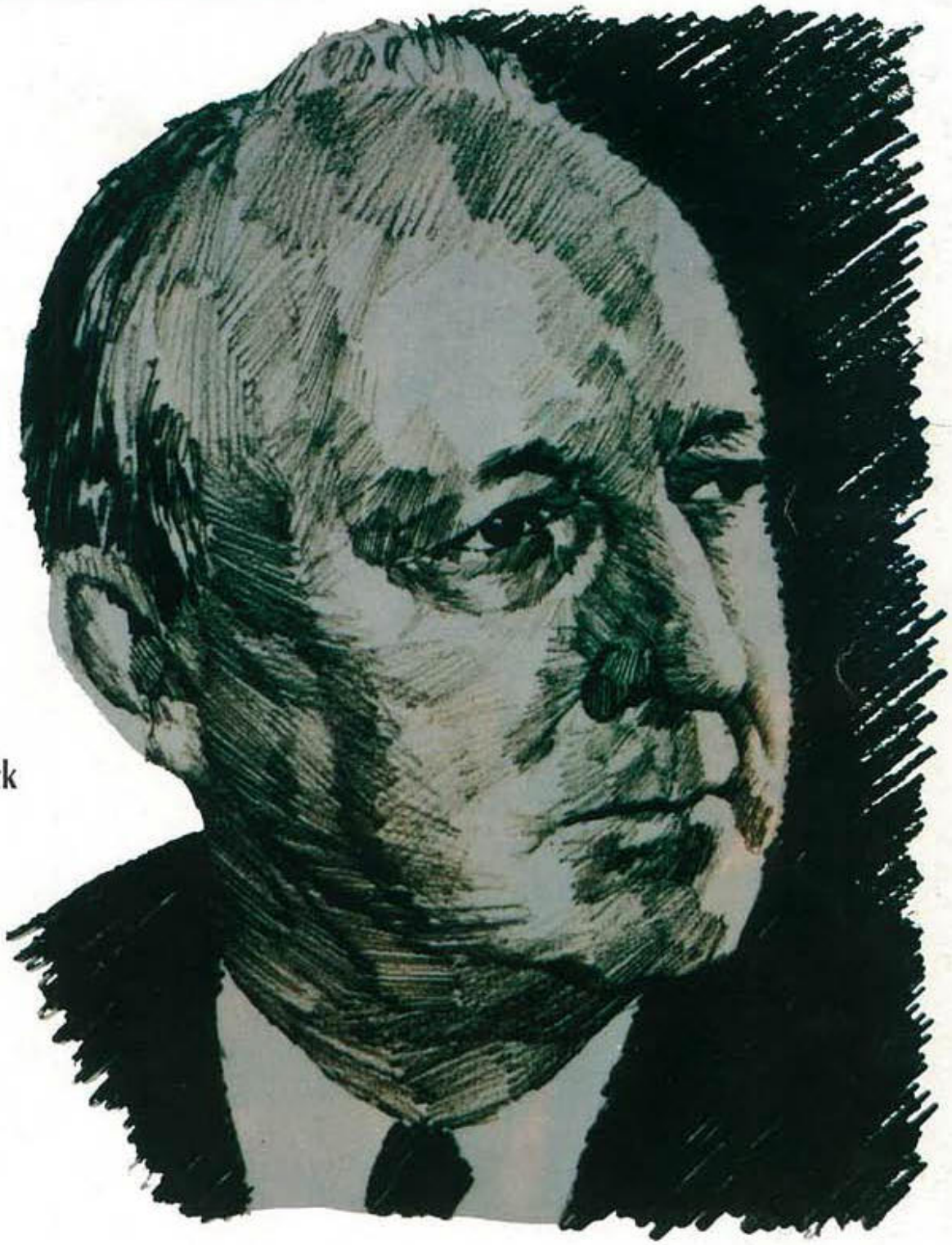
The Alabama Lawyer
Vol.47,No.3 May 1986



Hugo L. Black
1886-1971

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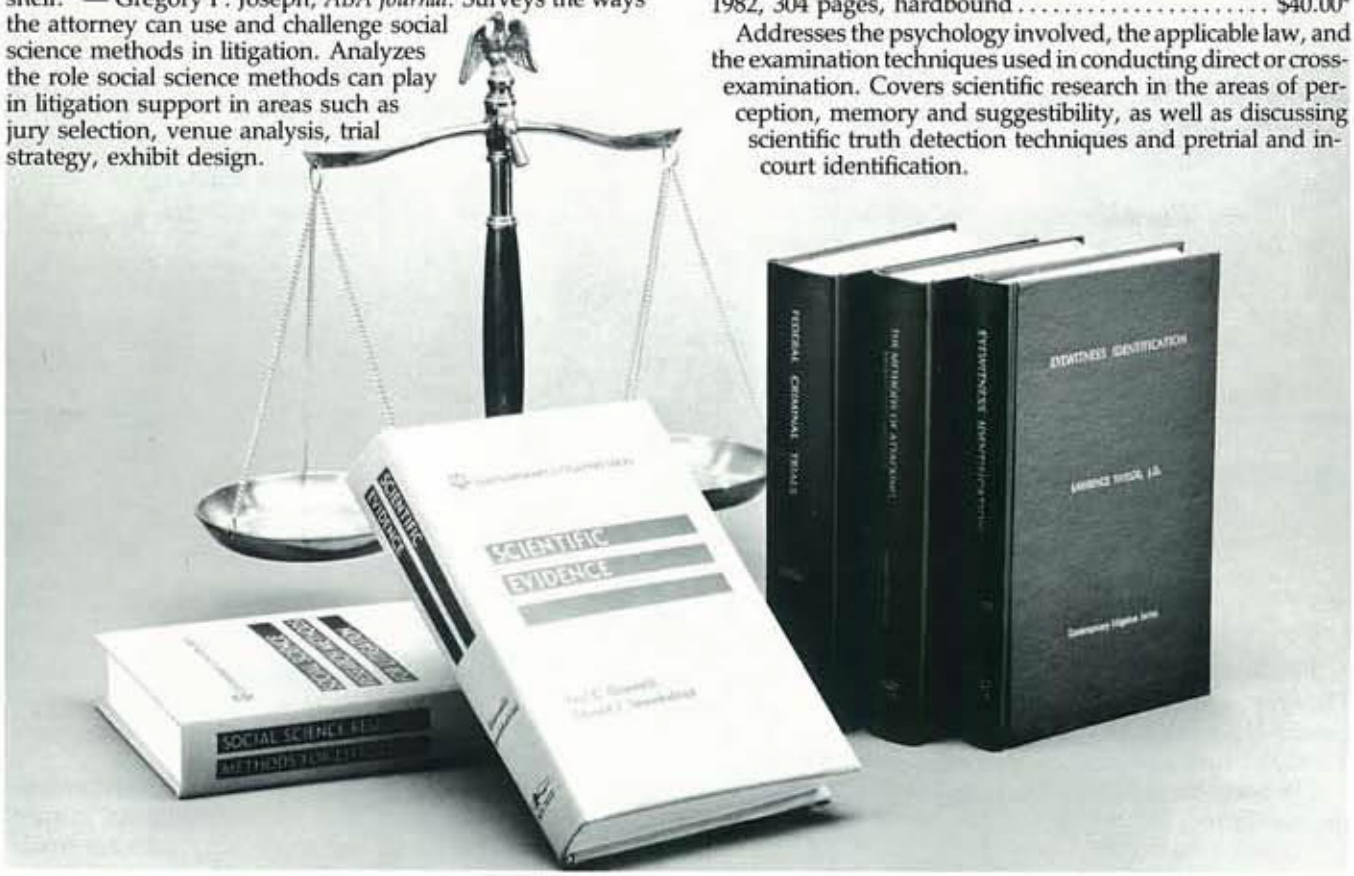

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In Brief

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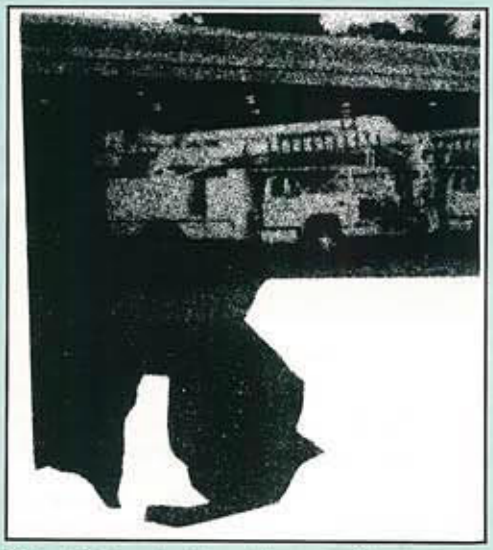
On the cover—

The United States Postal Service honored former U.S. Supreme Court Justice Hugo L. Black by dedicating a five-cent postage stamp in his honor. The stamp was issued February 27,1986, the 100th anniversary of Black's birth. For more information, see page 128 of this issue.

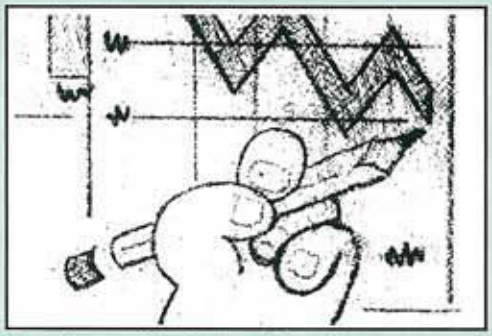
The Work Product Doctrine . . 142

In the final installment of a two-part series, Lee H. Zell outlines the scope of the work product doctrine.



The State Action Immunity Doctrine: a Reassessment . . . 136

Governmental agencies generally have enjoyed immunity from federal antitrust laws. In recent decisions the United States Supreme Court engrafted some exceptions to the traditional immunity rule.



Coping with Vocational Expert Testimony 150

The use of vocational expert testimony has become increasingly common in personal injury lawsuits. How can a vocational expert be used as an effective litigation tool?

INSIDE THIS ISSUE

President's Page

NORTH

Tort reform

One problem writing this message to you is that I must do it well in advance of publication, and by the time you receive your copy of *The Alabama Lawyer* events will have occurred I could not foresee. Like all of you I have given a great deal of thought to the so-called "tort reform" bills considered during the 1986 Regular Session of the Alabama Legislature. As I write this, I have no way of knowing whether that package of bills passed or failed. My guess is they probably will fail during this session, and in my opinion, that package clearly should have failed.

Those proposals represented a radical restructuring of our tort system. One bill would have required a "beyond a reasonable doubt" standard of proof in certain civil cases. This sort of legislation is simply irresponsible. The other bills were not quite as bad, but their passage is not justified by the facts.

It is well documented that insurance rates have not come down in states adopting "tort reform." The crisis, if there be one, is an insurance crisis. It arises from the practice, in past years, of insurance companies competing frantically for premium dollars when interest rates were at historic highs. The insurers today are reaping the results of these improvident practices. Nevertheless, during 1985, property and casualty insurance stocks rose by twice as much as the overall Standard & Poor's stock index. Moreover, it is undisputed the doctors' mutual insurance company in Alabama has been extremely profitable.

The American Bar Association has studied this matter in great detail. Three separate commissions were appointed to investigate the area. The latest, the American Bar Association Special Committee on Medical Professional Liability, concluded, among other things, the following:

1. The regulation of medical professional liability is a matter for state consideration, and federal involvement in that area is inappropriate;
2. there should be rigorous enforcement of professional disciplinary code provisions proscribing lawyers from filing frivolous suits and defenses, and sanctions should be imposed when those provisions are violated;
3. there should be more effective procedures and increased funding to strengthen medical licensing and disciplinary boards at the state level; efforts should be increased to establish effective risk management programs in the delivery of health care services;
4. no justification exists for exempting medical malpractice actions from the rules of punitive damages applied in tort litigation to deter gross misconduct;
5. notices of intent to sue, screening panels and affidavits of non-involvement are unnecessary in medical malpractice actions;
6. no justification exists for a special rule governing malicious prosecution actions brought by health care providers against persons suing them for malpractice;
7. trial courts should carefully scrutinize the qualifications of persons presented as experts to assure that only those persons are permitted to testify who, by knowledge, skill, experience, training or education, qualify as experts;
8. the collateral source rule should be retained; third parties who have furnished monetary benefits to plaintiffs should be permitted to seek reimbursement out of the recovery;
9. contingent fees provide access to the courts, and no justification exists for imposing special restrictions on these fees in medical malpractice actions; and
10. the use of structured settlements should be encouraged.

I do not agree with all these propositions of the American Bar Association and merely include them for your information. Incidentally, your board of commissioners, at its last meeting, endorsed legislation to improve doctor discipline, an ABA proposal.

Nonetheless, notwithstanding the ABA position and what I said above, I believe there is a public perception some change in our tort system is needed. The pressures are simply too great. When the President of the United States weighs in on the side of an extremist task force report, *Time* magazine makes it a cover story, every other major publication writes about the "liability crisis," the air-

waves are filled with programs on the "liability crisis," and so many and such varied constituencies—not just doctors, but homebuilders, small business men and women, municipal and county officials—are calling for modifications in our system, inevitably there is going to be public pressure for change.

Therefore, I believe we will continue to see legislative efforts relating to our liability system. Many friends in the plaintiffs' bar say not. They say, as noted above, the facts do not support change; the fault lies not with our legal system but with the insurance industry, and with appropriate public education, the current clamor simply will go away. Perhaps so. I certainly agree the facts do not support the radical changes recently urged on our legislature or the proposals recommended by the President's task force.

What if I am right, though? What if the public outcry for change continues? Shouldn't it be our responsibility as lawyers to be in the forefront of shaping any change? Can't our present system be improved to eliminate abuses? I believe it can be, and that we have a responsibility to the people of Alabama to participate in fashioning any improvements eliminating existing problems, while protecting the cherished fundamental rights of access to our courts and a trial by jury.

At recent legislative hearings, it became apparent some groups involved have become hysterical and paranoid. Likewise, both sides have drawn a line in the dust, unwilling to make any public concession. In such circumstances, no reasonable compromise can be achieved in a public forum. Certainly, more heat than light was shed in these hearings.

In my testimony on the tort reform package, I recommended to the legislature that either it or the governor should appoint a committee or task force representing all the constituent groups involved to perform an in-depth study of the whole liability area. If this study produces data calling for legislative action, let the study group recommend reasonable solutions. Normally, I do not favor these study groups. However, here, where the stakes are so high—not only for our profession but for the public—such an effort is justified.

Above all, as lawyers, let us not forfeit our duty to lead in this situation. We are especially qualified to do this.

Judge Wright

The Lee County Bar Association honored Circuit Judge George "Spud" Wright in ceremonies April 4, featuring the chief justice as principal speaker. Chief Justice Torbert's remarks about his long-time close friend were both humorous and dignified, perfect for the occasion. There were many lawyers from around the state, along with a number of appellate and circuit judges. Jim Haygood, president of the Lee County Bar, presented Judge Wright with a handsome portrait, to be hung in Judge Wright's courtroom. (editor's note: Judge Wright died April 21, 1986.)

Arthur Goldberg

On March 15, B'nai B'rith presented its Great Americans Award to former Associate Justice of the United States Supreme Court, Ambassador to the United Nations and Secretary of Labor, Arthur J. Goldberg. As your president, I served as state chairman for the dinner. Many lawyers attended, including former Alabama State Bar President Sonny Hornsby and wife Judy.

Hugo Black

March 16th, we attended a reception in honor of Associate Justice William J. Brennan, held in connection with the University of Alabama's Hugo Black Centennial Celebration. The celebration continued March 17th and 18th. The program included Associate Justice Brennan; former Associate Justice Goldberg; Chief Judge John C. Godbold and Judge Frank M. Johnson, Jr., of the 11th Circuit; Judge J. Skelly Wright and Judge Harry T. Edwards of the District of Columbia Circuit; and Chief Judge Truman Hobbs of the Middle District of Alabama.

There also were prominent members of the press, among them Max Lerner of the *New York Post* and syndicated columnist and author Anthony Lewis from the *New York Times*.

The following scholars presented papers: Irving Dillard, *emeritus* professor, Princeton University; Gerald T. Dunne, professor of law, St. Louis University School of Law; Paul R. Baier, professor of law, Louisiana State University Law Center; A.E. Dick Howard, White Burkett Miller Professor of Law and Public Affairs, University of Virginia Law School; Guido Calabresi, dean and Sterling Professor of Law, Yale Law School; and Daniel J. Meador, Monroe Professor of Law, University of Virginia Law School.

Justice Black's law clerks participated in the program, and the highlight of the two-day program was the presence of Mrs. Elizabeth Black and the rest of the Judge's family.

From all reports it was a splendid event. The University of Alabama, President Thomas, Dean Gamble and Professor Tony Freyer are to be commended for their efforts. It was truly appropriate that Alabama honor one of its giants.

Midyear Meeting

The Midyear Meeting of the bar was held in Montgomery March 19 and 20. Jim Sasser of Montgomery was the chairman of the committee planning the meeting, and he did a splendid job. Reggie and the staff performed in their usual outstanding manner.

Commissioners' meeting

At your board of bar commissioners meeting, your commissioners made several important decisions. First, they agreed to petition the Alabama Supreme Court for the establishment of an IOLTA (Interest on Lawyers' Trust Accounts) fund. The fund would be voluntary, the purposes for which moneys used would be precisely defined and it would be administered by your elected representatives. Rowena Crocker of Birmingham and her committee members worked extremely hard on this, and they deserve our thanks.

Ralph Knowles of Tuscaloosa, chairman of the Task Force on Judicial Evaluation, Selection and Qualifications, presented two subcommittee chairmen, Gene Stutts and Donald Sweeney, both of Birmingham. Stutts discussed a plan for the confidential evaluation of state judges. The board approved the plan in principle and requested the committee submit details regarding the cost and administration of it. The committee hopes to have a report for final action by the board before the annual meeting in July.

Following Sweeney's report, the board approved the following minimal standards for judicial office. A judge should be: (1) not less than 30 years old; (2) licensed to practice law in Alabama; and (3) a law school graduate with at least five

Continued on page 127

Executive Director's Report

Reflections on a Drunk Driver

HAMNER

"I tried to keep him off the streets. . ."

This phrase will remain embedded in my memory for years. These words were uttered to me by a woman as I waited at Montgomery's Jackson Hospital, where Alex W. "Al" Jackson, Jr., the seven-year-old son of one of the bar's assistants general counsel, was being maintained by life support equipment in the intensive care unit.

Al was a gifted youngster and wise beyond his years. He possessed a winsome personality and a zest for life causing anyone meeting him for the first time to recognize him as special.

Al's parents were told his critical head injury had resulted in brain death, approximately 15 minutes before this grief-stricken woman spoke to me. She talked about the 24-year-old man whose car struck Al the previous afternoon as he rode his bicycle home for supper. The driver had been drinking and, upon testing, his alcohol level was .16—legally intoxicated.

The problem of the drunk driver on the highways of America, on the roads of Alabama and on the streets of Montgomery has been brought home to me in the most tragic way I can imagine, short of one of my sons' having been the victim.

This driver had been convicted of DUI as a result of an accident in August 1985 with this woman. The same week in which this tragic event occurred, she had gone to circuit court, where the young man appealed the conviction with its fine and jail sentence. The appeal had been continued, and the driver remained free on bond because the city's appellate counsel was involved that day in another case in another court room.

There had been another prior arrest and conviction. As word of the driver's previous alcohol-related offenses became known throughout the city, the question, "How could he still have been permitted to drive?", was asked by lawyer and layman alike.

The hurt and anger felt and expressed caused me to pull my original column about committee work and ABA membership and ask you to reflect with me on our profession's need to examine a system allowing a multiple offender to remain behind a wheel, a threat to all who travel our highways and streets.

Alabama has the finest court system in the nation, but laymen do not fully understand our system of justice or our roles as advocates. I can tell you from the comments I heard following this tragedy, the public is convinced something is wrong in the way DUI cases are handled. A recent juror expressed disgust with the methods used to defend a DUI charge and declared the defense to be "an insult to the jurors' intelligence."

All are aware of the more extreme critics of our courts' handling of DUI cases and the unjust attacks upon judges who must act in accord with statutory law. Likewise, I believe there are cases that appear unduly delayed in reaching the court for judicial determination. I would defend forever the constitutional guarantees of our Bill of Rights as I know you would; however, this tragedy convinced me justice should be not only fair, but swift and certain.

The image of lawyers and our role in the justice system should concern us all. I firmly believe we can take a giant step toward greater public acceptance and understanding if our bench, court administrators and bar will work with legislators in commitment to a critical review and revision of the laws on alcohol-related vehicular accidents.

There has to be a middle ground. I can think of no greater memorial to Al Jackson and other victims of drunk drivers than committing ourselves to finding it. We can make a difference, and we must. ■

—Reginald T. Hamner

President's Page

Continued from page 125

years' legal experience. The committee plans to prepare implementing legislation shortly.

At a luncheon meeting, we were honored to hear from the chief justice regarding proposed legislation providing financing for a new judicial office building. No one can dispute the crying need for new quarters for our appellate courts. The chief's proposal would provide for Alabama courts for the next century. I hope that by the date of this article this legislation will have passed.

We had an excellent forum on medical malpractice. Dr. Julius Michaelson, president of the Medical Association of Alabama and a family practitioner in Foley for over 40 years, spoke first. Michaelson expressed his views ably, and while I disagree with him on some points, there is no doubting his sincerity nor the depth of his convictions.

Philip Gidiere, Jr., of Montgomery and A. Danner Frazer, Jr., of Mobile represented the point of view of defense counsel in medical malpractice cases and M. Clay Alspaugh and Lanny S. Vines of Birmingham spoke for the plaintiff's side.

It was an interesting and provocative discussion of a controversial issue.

We also were honored by greetings from two candidates for governor, Lieutenant Governor Bill Baxley and Attorney General Charles Graddick. Former Governor Fob James and former Lieutenant Governor George McMillan had conflicting schedules. We appreciated the presence of Bill and Charlie and enjoyed their remarks. I hope that we will be able to entertain the next governor at our annual meeting in July.

We also heard from the four contenders for the office of attorney general: District Attorney Jimmy Evans of Montgomery, Secretary of State Don Siegel-

This issue is dedicated to the memory of

–Alex Walter Jackson, Jr.–

March 17, 1979 – March 31, 1986

son of Mr. and Mrs. Alex Walter Jackson, Montgomery, Alabama

man, Houston County District Attorney Tom Sorrells and Governor Wallace's former legal advisor, Ken Wallis. Not surprisingly, they all want to clean up toxic wastes and get criminals off the streets—hardly the stuff of controversy. The discussion really boiled down to who could do the best lawyering job. They are impressive candidates.

Insurance

Legal malpractice insurance continues to be an overriding problem. All I can say is that we are working on this matter as hard as we can. I was told today your insurance committee plans to recommend the funding of a professional study of the feasibility of creating a captive company.

Advertising

The Alabama Supreme Court recently ruled a lawyer must be permitted to advertise the fact he is certified by the National Board of Trial Advocacy. The court gave the bar six months to draft proposed advertising rule changes. There are basically two approaches. One is to set up our own certifying mechanism. The other is to establish criteria which independent certifying boards or organizations must meet in order to satisfy Alabama standards. I asked the Task Force on Specialization, chaired by Carolyn Duncan of Birmingham, to study this problem and come up with recommendations for your board of bar commissioners.

Obituaries

Jefferson County lost two distinguished judges recently, Circuit Judge William Thompson and retired Circuit Judge Wallace Gibson.

As I write to you, I am saddened by the tragic death of seven-year-old Al Jackson, the son of our own Alex and Mary Jackson. Al's needless death at the hands of a drunken driver is profoundly disturbing. Remember Alex and Mary in your prayers. ■

—James L. North

HUGO LA FAYETTE BLACK 1886-1971

The University of Alabama School of Law honored one of its graduates in February with a two-day conference. However, this centennial celebration of Hugo La Fayette Black's birth was not the first.

In April 1984, during Law Week activities, awards were given in honor of the United States Supreme Court Justice. In addition, displays of Justice Black memorabilia were unveiled.

Elizabeth Black

The next year, a one-day conference was held, focusing on Black's years of public service in Alabama prior to his appointment in 1937 to the Supreme Court. Among those making presentations were Virginia Van der Veer Hamilton, professor and university scholar in history, University of Alabama at Birmingham; David Shannon, commonwealth professor of history, University of Virginia; J. Mills Thornton, III, professor of history, University of Michigan; and Sheldon Hackney, president of the University of Pennsylvania.

This year's events included an unveiling of a U.S. postage stamp honoring Justice Black and the final portion of the Centennial, a two-day conference in March.

During the 1986 conference, distinguished jurists, journalists and scholars explored Black's contribution to constitutional law while Associate Justice of the U.S. Supreme Court, 1937-71.

Justice William J. Brennan, Jr., U.S. Supreme Court, delivered the keynote address, and others covered Black's support of freedom of expression in America; his impact on labor law; his decisions pertaining to debtor-creditor rights; his influence upon the tradition of judicial self-restraint; his attitudes toward constitutionalism; and his contribution to American Federalism.

Among those present during these talks were University of Alabama President Joab L. Thomas, University of Alabama School of Law Dean Charles W. Gamble, the Honorable Frank M. Johnson and the Honorable John C. Godbold, chief judge of the 11th Circuit, U.S. Court of Appeals.

Mrs. Elizabeth Black signed copies of *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. and Elizabeth Black.*

The proceedings from the 1985 and 1986 conferences are to be published in a book, edited and forwarded by Tony A. Freyer, a professor at the University's School of Law and director of the centennial honoring Justice Black.

Beginning in the spring of 1983, approximately $50,000 was donated by the Alabama Humanities Foundation, National Endowment for the Humanities, Justice Black's law clerks, Alabama State Bar, American Bar Foundation and Harvard Law School. The University of Alabama Law School Foundation contributed nearly an equal amount. Former law clerks of Black's, particularly Buddy Cooper, Jim North, Truman Hobbs, David Vann and Mel Cleveland, provided the initiative for the commemoration.

Hugo L. Black was born in Harlan (Clay County), Alabama, February 27, 1886. He graduated from the University of Alabama School of Law in 1906, practicing first in Ashland and later in Birmingham.

He was elected to the United States Senate in 1926 and played significant roles in the establishment of the Tennessee Valley Authority and federal wage and hour laws.

Black was selected in 1937 by President Franklin D. Roosevelt to the U.S. Supreme Court. While an associate justice, he advocated separation of church and state, the enforcement of antitrust laws, racial desegregation and protection of First Amendment rights.

U.S. Supreme Court Justice Hugo La Fayette Black

Black is survived by his wife, Elizabeth S. Black; children Hugo L. Black, Jr.; Sterling F. Black; Josephine Black Pesaresi; and Mrs. Black's son, Fred J. DeMeritte; and many grandchildren.

(*The Alabama Lawyer* thanks Gloria Purnell and Tony A. Freyer of the University of Alabama School of Law for their assistance in preparing the information on Justice Black.)

Bar Briefs

Fourth annual Devitt Award announced

The Honorable William J. Campbell, a federal judge for over 45 years, has been named recipient of the Devitt Distinguished Service to Justice Award. The annual award is given to a federal judge nominated by members of the legal profession and deemed by the award committee to have contributed most to advance the cause of justice. Judge Campbell will receive a $10,000 honorarium and a specially engraved crystal obelisk at a presentation ceremony later this year.

The award committee also announced Edward A. Tamm, recently deceased Judge of the United States Court of Appeals in Washington, D.C., will be awarded posthumously a special Devitt Award for his 37 years of leadership in the operation and improvements in the procedures of the U.S. Circuit and District Courts in Washington, D.C.

The Devitt Award, established in 1982, is presented yearly to a federal judge, chosen by a panel of peers, on the basis of his or her outstanding service to the cause of justice. The award was created in recognition of Edward J. Devitt, longtime Chief United States District Judge for the District of Minnesota who, in 38 years of judicial service, made many substantial contributions to the cause of justice.

Previous recipients of the Devitt Award are United States Circuit Judge Albert B. Maris of Philadelphia, United States District Judge Walter E. Hoffman of Virginia and United States Circuit Judge Frank M. Johnson, Jr., of Alabama. Chief Justice Warren Burger was honored by a Special Award in 1983 for strong administrative abilities and inspiring leadership of the federal and state court systems.

24,450 Legal Services cases closed in 1985

Legal Services casehandlers in Alabama and private lawyers representing Legal Services clients closed a total of 24,450 cases last year, caseload figures indicate. Of that, 18,855 cases were handled by Legal Services staff, and the rest were closed by private attorneys. The numbers by program are as follows:

Birmingham Area Legal Services Corporation: 2,462 closed by staff and 548 closed by private attorneys;

Legal Services Corporation of Alabama: 13,690 cases closed by staff and 2,721 cases closed by private attorneys;

Legal Services of North Central Alabama: 2,703 cases closed by staff and 2,326 cases closed by private attorneys. LSNCA's private attorney caseload appears proportionally higher than the other programs because LSNCA reports all cases referred to private lawyers, including fee-generating cases, criminal cases and non-eligible clients, as part of its private bar involvement caseload.

—Legal Services Bulletin, January 1986

Dickens offers new perspective

"If you compare prosecutors' arguments in today's death penalty cases with arguments used in the fictional 19th century English trials of Charles Dickens' novels, you'll find that Dickens was upset by the same things that tend to upset us today," says Norman Stein, assistant professor of law at the University of Alabama.

Stein believes Dickens' works are appropriate reading for "Dickens and the law," a course he is teaching to some 20 third-year law students at the University's School of Law.

After almost three years of intense study of law, a chance to look at law from a broader perspective is especially important, he says.

Dickens studied to be a lawyer, and legal themes and the image of lawyers are central to many of his books; his description of trials let students look at the system of justice from a different angle.

Among Dickens' legal themes are the norms governing social interaction; how society views crime and treats criminals; and how society distributes wealth and privilege among classes.

Texts for the course include Dickens' novels *"A Tale of Two Cities," "Great Expectations"* and *"Bleak House."*

New bar section attempting establishment

Twenty-three Alabama attorneys are attempting the formation of a new bar section dealing with animal cruelty matters as seen through the eyes of the law. In order to establish a new section, at least 100 members are needed.

Objectives include drafting and sponsoring legislation affecting cruelty and abuse to animals, funding the use of the court system to fight this crime and using the law to promote a more humane society through elimination of unnecessary suffering of animals.

For more information, contact Mark L. Rowe, 10th floor, City Federal Building, Birmingham, Alabama 35203-3758 or James R. Foley, 223 East Side Square, Suite C, Huntsville, Alabama 35801.

Position available for full-time United States Magistrate

There will be a vacancy for the position of full-time United States Magistrate in the United States District Court for the Northern District of Alabama. The person appointed will serve an eight-year term commencing in February 1987.

Duties of the office are both demanding and wide-ranging and include: (1) the conduct of all initial proceedings including acceptance of complaints, issuance of arrest warrants or summonses, issuance of search warrants, conduct of initial appearance proceedings for defendants informing them of their rights, imposing conditions of release and admitting defendants to bail, appointment of attorneys for indigent defendants and conduct of preliminary examination proceedings; (2) the trial and disposition of federal misdemeanor cases with or without a jury where the defendant is willing to consent to trial before the magistrate; and (3) acceptance of grand jury returns, conduct of arraignments and hearing of all pretrial matters and motions.

In civil cases, the duties include: (1) the service as a special master in appropriate civil cases; (2) the review of appeals from final determinations by administrative agencies such as those under the Social Security Act and similar statutes and submitting a report and recommendation as to disposition of the case to the United States District Judge; (3) conduct hearings and submit recommendations in *habeas corpus* actions and prisoner petitions challenging the conditions of their confinement; and (4) the conduct of pretrial and discovery proceedings in any civil case on reference from a United States District Judge. The basic jurisdiction of the United States Magistrate is specified in 28 U.S.C. §636.

To be qualified for appointment an applicant must:

(1) be a member in good standing of the highest court of a state for at least five years;

(2) have been engaged in the active practice of law for a period of at least five years;

(3) be competent to perform all the duties of the office; of good moral character; emotionally stable and mature; committed to equal justice under the law; in good health; patient and courteous; and capable of deliberation and decisiveness;

(4) be less than 70 years old; and

(5) not be related to a judge of the district court.

A merit selection panel composed of attorneys and other members of the community will review all applicants and recommend to the judges of the district court, in confidence, the five persons it considers best qualified. The court will make the appointment, following an FBI and IRS investigation of the appointee. An affirmative effort will be made to give due consideration to all qualified candidates, including women and members of minority groups. The salary of the position is $68,400 per annum.

Application forms and further information on the magistrate position may be obtained from:

Clerk, United States District Court
Northern District of Alabama
104 Federal Courthouse
Birmingham, Alabama 35203

Applications must be submitted only by potential nominees personally and must be received no later than July 1, 1986. ■

Riding the Circuits

Calhoun County Bar Association

The Calhoun County Bar elected the following officers to serve in 1986:

President: Andrew W. Bolt, II
Vice president: Charles S. Doster
Secretary: Marcus Reid
Treasurer: Patrick S. Burnham

In addition, the following will serve on the executive committee:

James A. Main
M. Douglas Ghee
Jerry B. Oglesby
George A. Monk
Grant Paris
Joseph Estep

Escambia County Bar Association

Circuit Judge Joseph B. Brogden was installed January 3 as judge for the 21st Judicial Circuit. The ceremony was held in the Escambia County Courthouse in Brewton and was hosted by the Escambia County Bar. Brogden was appointed by Governor Wallace to fill the vacancy created by the retirement of Presiding Circuit Judge Douglas S. Webb.

Brogden served as assistant attorney general of Alabama and as part-time city judge of Atmore before becoming assistant district attorney.

A native of Andalusia, Brogden is a Navy veteran and a graduate of Auburn University. He graduated from the Cumberland School of Law in 1969.

Brogden becomes the second circuit judge appointed by Wallace in the past year. Earlier, Wallace appointed Earnest White to a newly-created judgeship.

Lauderdale County Bar Association

The September meeting included talks from representatives of three north Alabama alcohol and drug rehabilitation units.

In October John Fitzwater, chairman of the Colbert-Lauderdale Economic Association, spoke on economic change.

December 4, the bar held its Christmas party and in late February cardiologist Joel Rainer spoke.

The Humana Shoals Hospital gave a dinner and tour in late March for bar members.

Finally a mock trial on a murder-DUI case was presented February 11 and continued April 16.

G. H. "Spud" Wright, Jr. with his dog, Phineas Finnegan O'Toole

Lee County Bar Association

Shortly before his death April 21, the Lee County Bar Association honored Judge G.H. "Spud" Wright, Jr., for his years of distinguished service to the legal profession and the judiciary. Judge Wright was presented an oil portrait to hang at the Lee County Justice Center.

Hon. James K. Haygood, president of the county bar, presided over the special meeting held in Judge Wright's courtroom, and Chief Justice C.C. "Bo" Torbert, Jr., remarked on his years of law practice and service with Wright. Many circuit judges, personal friends and county dignitaries were present.

In addition, the bar association created a special award, the Judge G.H. "Spud" Wright, Jr., Jurisprudential Award. A plaque will be placed with the portrait of Judge Wright, and the award will be presented on occasions, when such an honor is merited, to a member of the bench or bar who has performed outstanding and meritorious service to the legal profession and judiciary.

Wright was a 1955 graduate of the University of Alabama School of Law. While in the United States Army Reserve, he received a Bronze Star, Purple Heart, Meritorious Service Medal, Army Reserve Achievement Medal and Republic of Korea Presidential Unit Citation.

In 1958, Wright was elected Lee County solicitor; in 1970, Gov. Albert Brewer appointed him district attorney. Three years later, Gov. George C. Wallace named him to his circuit judgeship.

Wright is survived by wife Laura and their three children: Patrick, a first lieutenant in the Army and stationed in Germany; Mark, an employee with Auburn Federal Savings & Loan; and Laura Ann, an Auburn University graduate.

Marshall County Bar Association

The Marshall County Bar elected its 1986 officers as follows:

President: David Lee Jones
Vice president: George M. Barnett
Secretary/treasurer: T.J. Carnes

Mobile County Bar Association

Alabama Supreme Court Chief Justice "Bo" Torbert shared the guest speaker's table with Mobile County Presiding Judge Ferrill McRae at the February monthly meeting of the Mobile Bar Association.

March 21, the bar honored three of its own for having practiced law for 50 years: Albert S. Gaston, Joseph N. Langan and J. Terry Reynolds, Jr. Each was presented with a framed certificate marking the occasion, and Mr. Gaston called it his "certificate of survival." Welcomed as guest speaker was James L. North, president of the Alabama State Bar. In his speech he touched on the topics of malpractice insurance and "tort" legislation.

Torbert and McRae

Gaston, MBA President Lattof, Langan and Reynolds

Pool, John Cameron of Cameron and Cameron, Thompson, Keith Norman of Balch and Bingham and Euel Screws of Copeland, Franco, Screws & Gill—photo by Penny Weaver, LSCA

Montgomery County Bar Association

The Montgomery County Bar Association Pro Bono Project recognized lawyers best exemplifying the spirit of *pro bono* service during 1985 at an awards banquet February 27.

The Pro Bono Project is a joint venture of the Legal Services Corporation of Alabama and the Montgomery County Bar Association. The project refers indigent clients to private practice lawyers who handle the cases, usually domestic relations matters, for no fee. In 1985, 422 cases were closed by lawyers participating in the project. LSCA entirely funds the project as part of its private bar involvement program.

Project director Rob Reynolds presented plaques to lawyers contributing the most to the *pro bono's* success. Honored were the law firms of Cameron and Cameron, Balch and Bingham, and for the second consecutive year, Copeland, Franco, Screws & Gill. The individual attorney award went to Jimmy Pool.

Shelby County Bar Association

The Shelby County Bar held elections for 1986 officers and the following were elected:

President: William R. Justice, Columbiana
Vice president: Conrad M. Fowler, Jr., Columbiana
Secretary: Bruce M. Green, Alabaster
Treasurer: Patricia Fuhrmeister, Columbiana

The bar passed a unanimous resolution to support Judge Kenneth Ingram, 18th Judicial Circuit, who announced plans to seek retiring Judge Charles M. Wright's position on the Alabama Court of Civil Appeals.

Talladega County Bar Association

The following officers were elected by the Talladega County Bar:

President: Bill Thompson
Vice president: William J. Willingham
Secretary/treasurer: Julian M. King ■

Committees

Midyear meeting recap

The bar's 1986 midyear meeting was productive and enjoyable for those participating in it. Nineteen committees, four sections, the board of commissioners, the Disciplinary Commission and the MCLE Commission met.

Gubernatorial candidates Baxley, Graddick and Camp spoke Wednesday. Thursday, Chief Justice Torbert and attorney general candidates Evans, Siegelman, Sorrells and Wallis spoke.

Medical malpractice was the subject of a three-hour seminar featuring Medical Association of Alabama president Dr. Julius Michaelson and attorneys Danner Frazer, Clay Alspaugh, Philip Gidiere and Lanny Vines.

Among the strictly social events were the Shakespeare Festival cocktail supper Wednesday night and the eye-opener breakfast Thursday morning.

Thanks to **Midyear Meeting Committee** chairman James T. Sasser, vice chairman Cliff Heard and members Billy Hill, Joe Borg, Terry Childers, Gunter Guy, Jim Ippolito, Ed Raymon, Carol Jean Smith, Jack Paden, Doyle Fuller, George Pantazis, Sammye Ray, Cindy Cochrane, Laura Calloway, Richard Garrett, Marda Sydnor, Charlotte Clayton, Clark Watson, Laura Crum and Rick Meadows for a job well done. Thanks also to the Montgomery law firms providing meeting rooms for 22 committee and section meetings.

Board takes action on committee reports

During its March 21 midyear meeting, the board of bar commissioners heard reports from 11 committees and task forces and acted on five.

Montgomery attorney David R. Boyd was elected chairman of the board of bar examiners, succeeding Robert L. Potts, whose four-year term expires after the July 1986 exam. Birmingham attorney Kirby Sevier was elected examiner in wills, trusts and estates, also a four-year term. Those elections followed the recommendations of the **Advisory Committee to the Board of Bar Examiners,** Commissioner John B. Scott, Montgomery, chairman.

After two years' study, the **Task Force on IOLTA** recommended and the board approved the adoption of an interest on lawyers' trust accounts program for the Alabama bar. Subject to the approval of the Alabama Supreme Court, the program will be voluntary, and funds will be distributed by the Alabama Law Foundation, for such charitable and educational law-related purposes as legal aid to the poor, law student loans, administration of justice, public education about the law, public law libraries and a client security fund.

If the program is approved by the court, Alabama will become the 40th IOLTA state. Bar members interested in learning more about IOLTA are referred to the informative articles by task force chairman Rowena Crocker and secretary Stanley Weissman, published at 46 *Alabama Lawyer* 264 and 267 (1985).

The **Task Force on Judicial Evaluation, Election and Selection,** chaired by Tuscaloosa attorney Ralph I. Knowles, made two recommendations adopted by the board.

The first is for development of a method of non-public evaluation of judges. With the board's approval of its initial proposal, the task force now will develop its plan in detail, estimate its cost and return it for final approval.

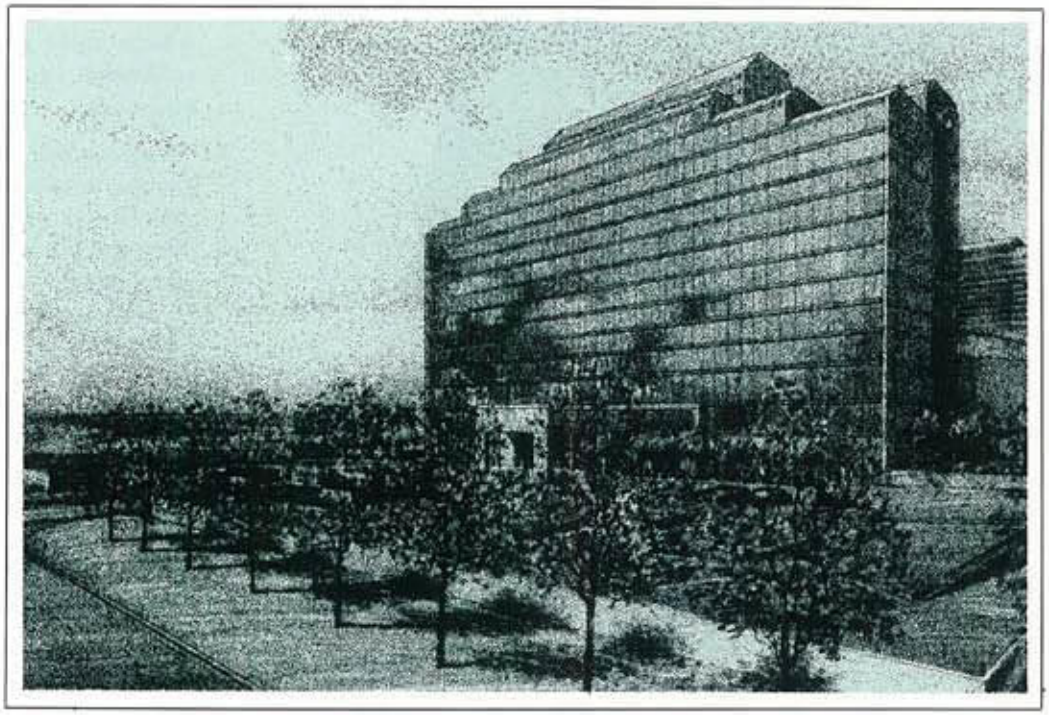
Second, the task force recommended and the board approved the drafting of legislation to specify minimum residency, age and experience requirements for all Alabama judicial candidates and appointees. The recommended minimum qualifications are a 12-month residency in the state, circuit or county of the judicial office, age not less than 30 years and five years' legal experience preceding election or appointment.

A law office management consultant was endorsed by the board, on the recommendation of the **Professional Economics Committee,** David Arendall, Birmingham, chairman. Effective immediately the following services are available: administrative audit, word processing needs analysis and data processing needs analysis. Forms for requesting consulting services may be obtained from Law Office Management Project, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101.

Finally, the board authorized additional funds for processing and evaluating responses to the bar's indigent defense survey, conducted during March. More than twice the number of expected responses were received; the anticipated cost was exceeded by several hundred dollars. The results of the survey will be published in this journal in the near future. **MLP**■

1986 Annual Meeting

July 17-19
Wynfrey Hotel, Riverchase Galleria
Birmingham, Alabama



This year's meeting includes a *new format*. Thursday, July 17, section meetings will be held 10-12 a.m. and 2-3:30/3:30-5 p.m. The bench and bar luncheon, 12:30-2 Thursday, is to be preceded by a complimentary hospitality hour from 12-12:30.

Thursday night's cocktail reception runs from 6-7:30 at the Wynfrey Hotel. This year's reception *will not* be a traditional cocktail supper as in years past. It is hoped the local bar members will utilize Thursday evening for such private parties and entertaining as they choose.

Major emphasis will be placed on attendance at a Friday evening dinner (no head table, no tux) with a nationally prominent speaker or entertainer.

Friday, July 18, the Continuing Legal Education program, so popular since its institution, will be held all day.

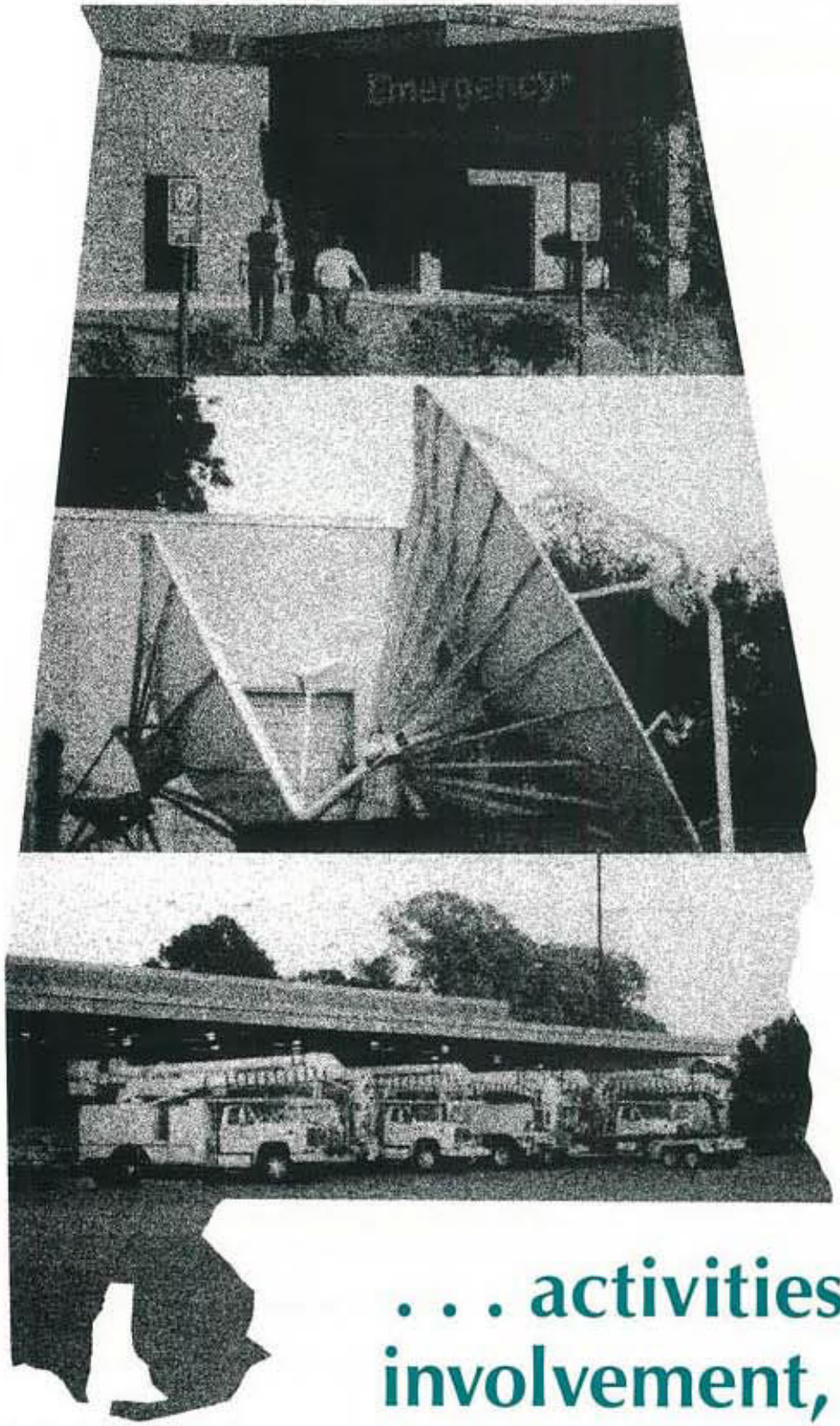
The alumni luncheons and breakfasts still will be Friday, and the spouses' activities being planned by the Birmingham Bar Auxiliary will be at noon this day.

Saturday, July 19, the bar will have its Grande Convocation, featuring an interesting array of speakers discussing issues of importance to Alabama lawyers and their families. The Annual Business Meeting will be held prior to a noon adjournment.

The bar will attempt to arrange a joint appearance of the Democratic and Republican nominees for the U.S. Senate.

The convention adjourns noon Saturday, and all activities will be held at the Wynfrey Hotel in the Riverchase Galleria.

The State Action Immunity



photos by David Shanks

by John F. Mandt

In exercising their police powers, states frequently encourage, regulate and participate in varying degrees in activities which, in the absence of the states' involvement, would violate the federal antitrust laws.

For example, states regulate electric, gas and telephone monopolies and impose noncompetitive pricing schemes in these and other areas of business activity. Although federal antitrust laws do not expressly exclude such activities from the prohibitions of antitrust laws, the United States Supreme Court recognized certain restraints on competition are impliedly outside the proscriptions of antitrust laws because they are imposed by or otherwise attributable to the states' acting in their sovereign capacities. This form of antitrust immunity generally is referred to as "state action immunity."

In addition to its obvious applications to traditional state-regulated monopolies, the state action immunity doctrine has been applied in a variety of other settings. Recent cases considered the availability of state action immunity in antitrust actions involving motor common carriers, liquor dealers, real estate developers, title insurance companies, bar examiners and hospitals. Additionally, a number of cases considered the application of the doctrine to municipal regulation of taxicabs, ambulance service, cable television and wrecker service, and the provision of sewage, garbage and other utility services by counties, municipalities and private firms. The doctrine also has come into play in cases

. . . activities, which in the involvement, would violate

Doctrine: a Reassessment

challenging allegedly anticompetitive covenants agreed to in connection with bond financings.

In recent months, the state's action immunity doctrine has been affected by three significant developments: the supreme court's decisions in *Southern Motor Carriers Rate Conference, Inc. v. United States,* 85 L.Ed.2d 36 (1985) and *Town of Hallie v. City of Eau Claire,* 85 L.Ed.2d 24 (1985), and the passage by Congress in October 1984 of the Local Governments Antitrust Act of 1984. Taken together, these developments will have a dramatic effect on the application of the federal antitrust laws, in general, and the state action doctrine, in particular, to each of the areas mentioned above.

Background

Beginning with its 1943 decision in *Parker v. Brown,* 317 U.S. 341 (1943), the U.S. Supreme Court has consistently relied on principles of federalism and state sovereignty to conclude the Sherman Act was not intended to prohibit anticompetitive actions of a state acting through its legislature. 317 U.S. at 350-51 (purpose of the Sherman Act was not to restrain states or their officers from activities directed by the states' legislatures) Under the reasoning of *Parker,* conduct attributable to a state's acting as sovereign is impliedly immune from antitrust scrutiny. Subsequent to its *Parker* decision, the supreme court made it clear that, at least under appropriate circumstances, state action immunity also may be available for anticompetitive acts which, though attributable to a state, are in fact actions of private parties. *See, e.g., New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1979); *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 790 (1975).

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), the supreme court reviewed its prior decisions under *Parker* and concluded those decisions established a two-part standard for state action immunity: (a) the challenged restraint on competition must be clearly articulated and affirmatively expressed as state policy; and (b) the policy must be actively supervised by the state itself. *Id.* at 105. Although the meaning of each part of the *Midcal* standard and the applications of that standard became the subject of considerable judicial uncertainty, the *Midcal* decision has figured prominently in nearly all subsequent state action immunity cases.

Another significant development in the state action doctrine occurred in 1978 when the supreme court acknowledged municipalities are not beyond the reach of the antitrust laws under the state action doctrine solely by virtue of their status as municipalities. *See City of LaFayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 408, 412 (1978).

Several years later, in *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982), the court elaborated on the holding of *City of LaFayette* and concluded that a state constitutional "home rule" provision granting municipal governments general authority to govern local affairs did not clothe the anticompetitive conduct of municipalities with state action immunity.

absence of the states' the federal antitrust laws.

These two decisions were premised on the notion that, "[C]ities themselves are not sovereign; they do not receive all the federal deference of the States that create them," and that accordingly, municipalities enjoy state action immunity for their anticompetitive acts only to the extent that they act pursuant to a clearly articulated state policy. 455 U.S. at 50-51, 54 The *Boulder* court expressly declined to decide whether municipal conduct also must be actively supervised by the state under the second part of the *Midcal* standard in order to be immune under the state action doctrine. *See id.* at 51-52 n. 14.

State action immunity of private defendants

In its March 27, 1985, decision in *Southern Motor Carriers Rate Conference, Inc. v. United States,* 85 L. Ed. 2d 36 (1985), *rev'g* 702 F.2d 532 (5th Cir. Unit B 1983) (*en banc*), the supreme court reversed the *en banc* decision of Unit B of the Fifth Circuit Court of Appeals and held that private parties need not be compelled to act anticompetitively by a state in order to enjoy antitrust immunity under the state action doctrine. In so doing, the court resolved considerable uncertainty that had arisen concerning the meaning of the *Midcal* decision and the state action immunity standard applicable to private parties.

The defendants in *Southern Motor Carriers* were private associations known as motor carrier rate bureaus which had engaged in collective ratemaking activities in four southeastern states. Each of the four states, like the federal government (see 85 L.Ed.2d at 47 n. 22 [federal Interstate Commerce Act, 49 U.S.C. § 10206, expressly authorizes collective ratemaking]), had expressly authorized motor carriers to agree on rate proposals prior to joint submission of the collective rates to the appropriate regulatory agencies, but none of the states com-

pelled motor carriers to engage in collective ratemaking.

Although the state public service commissions argued that collective ratemaking better enabled them to function as ratemaking bodies, motor carriers in each state remained free to elect not to participate in collective ratemaking and instead to submit individual rate proposals. 85 L.Ed. 2d at 41 The parties also agreed that each state actively supervised the motor carriers' collective ratemaking activities. 702 F.2d at 539 & n. 12

Nonetheless, the United States contended that the motor carriers' collective ratemaking activities constituted price fixing, and the practice of collective ratemaking was not immune under the state action doctrine because the defendants' anticompetitive conduct was not compelled by the various states.

The court of appeals agreed with the government and held that the rate bureaus' conduct was not immune under the state action doctrine because none of the states compelled collective ratemaking. In reaching this conclusion, the court declared that the two-part *Midcal* standard was applicable only in actions against public defendants and not to those against private defendants such as the rate bureaus. *See* 702 F.2d at 539-40.

The court also reasoned, however, that even if the *Midcal* standard were applicable to private defendants, the four states had no clearly articulated state policy in favor of collective ratemaking because motor carriers in each state could have chosen not to participate in collective ratemaking. 702 F.2d at 539 ("[W]e do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to the private party to carry out that policy or not as he sees fit.")

According to the court of appeals, unless private anticompetitive conduct is compelled by a state, the state's policy is merely neutral with respect to the conduct in question and, thus, will not be frustrated by application of the antitrust laws. Under such circumstances, the court reasoned, the state has not clearly articulated its intention to displace competition.

The supreme court squarely rejected the court of appeals' view that the *Midcal* standard is applicable only in cases against public defendants and not in cases against private defendants. 85 L.Ed.2d at 46. The court also disagreed with the lower court's holding that private conduct is only attributable to a state if it is compelled by the state. The court acknowledged that state compulsion may provide strong evidence that a state has adopted a clearly articulated policy to displace competition, but concluded "the absence of compulsion should not prove fatal to a claim of *Parker* immunity." 85 L.Ed.2d at 48

The supreme court's holding in *Southern Motor Carriers* clearly reflects the court's recognition that states often deliberately employ private initiative as an integral part of a regulatory scheme designed to replace competition with regulation. The court stated:

> Thus, through the self-interested actions of private common carriers, the States may achieve the desired balance between collective ratemaking and the competition fostered by individual submissions. Construing the Sherman Act to prohibit collective rate proposals eliminates the free choice necessary to ensure that these policies function in the manner intended by the States. The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties.

85 L.Ed.2d at 47 (emphasis in original) According to the supreme court, the premise of the lower courts' holding —unless a state compels particular anticompetitive conduct the state has no interest in that conduct—ignores the manner in which states often implement their regulatory policies. If a state's intention to replace competition with a regulatory structure is clearly articulated, state action immunity should not be denied simply because the state employed some measure of private initiative in its regulatory scheme.

State action immunity of public defendants

On the day the *Southern Motor Carriers* decision was rendered, the supreme court also decided *Town of Hallie v. City of Eau Claire,* 85 L.Ed.2d 24 (1985), *aff'g* 700 F.2d 376 (7th Cir. 1983). As a result of that decision, it now is clear that municipalities are subject to a less stringent state action immunity standard than are private defendants, because their conduct need not be actively supervised by the state to be immune under *Parker.*

The plaintiffs in *Town of Hallie* were townships located adjacent to the defendant City of Eau Claire. The plaintiffs contended the defendant violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services and illegally tying the provision of those services to the provision of sewage collection and transportation services. The applicable state law authorized cities to construct and operate sewage systems and delineate the area within which sewage service would be provided. The relevant state statutes did not specifically authorize the cities to tie the provision of sewage treatment services to other services or to otherwise use their power to delineate the area to be served in an anticompetitive manner.

The court of appeals held the municipal defendant was immune from antitrust liability under the state action doctrine. Because the applicable state statutes authorized cities to refuse to provide sewage service to unincorporated areas, the court reasoned the state must have contemplated that anticompetitive effects might result from a refusal to serve. Accordingly, the court concluded the city's conduct was engaged in pursuant to state authorization within the meaning of *Parker.* 700 F.2d at 383 The court of appeals also held the active state supervision requirement of *Midcal* was not applicable to municipalities. *Id.* at 384.

The supreme court agreed with the court of appeals' conclusion that the state of Wisconsin must have contemplated a city's refusal to serve unannexed areas could have anticompetitive effects. 85 L.Ed. 2d at 46 The court held the Wisconsin statutes evidenced a clearly articulated, affirmatively expressed state policy to displace competition with regulation in the area of municipal provision of sewage services and plainly showed the Wisconsin "'legislature contemplated the kind of action complained of.'" 85 L.Ed.2d at 32-33 (quoting *City of LaFayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 415 [1978])

The court also answered the question reserved in footnote 14 of the *Boulder* decision by holding that municipal conduct, unlike private conduct, need *not* be

actively supervised by the state in order to be immune under the state action doctrine. 85 L.Ed.2d at 34 The court hinted but declined to decide that active state supervision also would not be required in cases against state agencies. 85 L.Ed.2d at 34 n. 10

The *Town of Hallie* decision by no means provides blanket antitrust immunity to municipalities and other political subdivisions of a state merely because of their status as such. Such entities are immune under the state action doctrine only when they act pursuant to a clearly articulated legislative policy to displace competition in a particular area of business activity. *See, e.g., Fisher v. City of Berkeley,* 54 U.S.L.W. 4222, 4225 (U.S. February 26, 1986) (Powell, J., concurring) (state action immunity depends on whether the state has expressly delegated to municipalities "regulatory power that foreseeably would lead to the anticompetitive effects" being challenged); *Auton v. Dade City,* slip op. at 2291, 2292 (11th Cir. 1986) ("general grant of authority to govern local affairs is insufficient to constitute a clear articulation of state policy because the State's position is neutral with respect to the city's conduct"); *Grason Electric Co. v. Sacramento Municipal Utility District,* 770 F.2d 833 (9th Cir. 1985); *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 (5th Cir. 1985); *Rural Electric Co. v. Cheyenne Light, Fuel & Power Co.,* 762 F.2d 847 (10th Cir. 1985). The availability of state action immunity for municipalities can be determined only after a review of the applicable state statutory provisions and an evaluation of whether the state has contemplated the kind of anticompetitive action complained of by the plaintiff.

As a result of the *Southern Motor Carriers* and *Town of Hallie* decisions, private antitrust defendants are subject to a more stringent state action immunity standard than are public defendants, such as municipalities. In an effort to explain the disparity between the legal standards for public and private defendants, the court observed, "[W]here the actor is a municipality there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals." 85 L.Ed.2d at 34 (emphasis in original)

The court's statement stands in stark contrast to its earlier recognition in *City of LaFayette* that cities acting in the marketplace as providers of services may produce competitive dangers similar to those raised by private actors. *See Fisher v. City of Berkeley,* 54 U.S.L.W. 4222, 4227 (U.S. February 26, 1986) (Brennan, J., dissenting); *City of LaFayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 408 (1978). In any event, the court evidently believed that any dangers of anticompetitive municipal conduct of the kind identified in *City of LaFayette* would be minimized by the requirement that the municipality act pursuant to a clearly articulated and affirmatively expressed state policy. *See* 85 L.Ed.2d at 34; *id.* at 33 n. 9.

Significantly, the LGA does not prohibit actions under the antitrust laws for injunctive relief, criminal enforcement procedures by the Justice Department or ac-

tions by the Federal Trade Commission. Nor is the protection provided by the LGA applicable to cases commenced before October 24, 1984, unless "it would be inequitable not to apply [the LGA] to a pending case." 15 U.S.C. §35(b) The existence of a jury verdict or district court judgment is *prima facie* evidence that the LGA is inapplicable. *See id.*

In general, cases addressing whether the LGA should be applied retroactively have found retroactive application to be appropriate under the circumstances. *See, e.g., Woolen v. Surtran Taxicabs, Inc.*, 615 F. Supp. 344, 350-53 (N.D. Tex. 1985) (LGA applied retroactively to seven-year-old litigation); *Chris' Wrecker Service, Inc. v. Town of Fairfield,* 1985-2 Trade Cas. (CCH) ¶ 66,762 (D. Conn. 1985); *Skepton v. County of Bucks, Pennsylvania,* 613 F.Supp. 1013 (D.C. Pa. 1985) (suit filed 11 days before LGA effective date; LGA applied retroactively).

The local government antitrust act of 1984

Concern over the effect of treble damage antitrust suits on the ability of municipalities and other units of local government to provide essential services and attract qualified persons to public office led to the passage in late 1984 of the Local Government Antitrust Act of 1984, P.L.98-544 (codified at 15 U.S.C. §34-36 [Supp. 1989]) (the"LGA"). In general, the LGA protects local governments and officials thereof acting in an official capacity against suits seeking treble damages, costs or attorney's fees under the federal antitrust laws. 15 U.S.C. §35(a) The LGA also protects other persons who act anticompetitively because they are expressly required to do so by a local government or its officials. 15 U.S.C. § 36(a)

The term "local government" is broadly defined in the LGA to include cities, counties or other general function governmental units created by state law as well as school districts, sanitary districts or other special function governmental units created by state law. 15 U.S.C. § 34 County or city bar associations and medical or dental associations are not included within the LGA's definition of local governments. H.R. Rep. No. 98-965, 98th Cong. 2d Sess. at 20 (1984)

Significantly, the LGA does not prohibit actions under the antitrust laws for injunctive relief, criminal enforcement procedures by the Justice Department or actions by the Federal Trade Commission. Nor is the protection provided by the LGA applicable to cases commenced before October 24, 1984, unless "it would be inequitable not to apply [the LGA] to a pending case." 15 U.S.C. § 35(b) The existence of a jury verdict or district court judgment is *prima facie* evidence that the LGA is inapplicable. *See id.*

In general, cases addressing whether the LGA should be applied retroactively have found retroactive application to be appropriate under the circumstances. *See, e.g., Chris' Wrecker Service, Inc. v. Town of Fairfield,* 1985-2 Trade Cas. (CCH) -a5- 66,762 (D. Conn. 1985); *Skepton v. County of Bucks, Pennsylvania,* 613 F. Supp. 1013 (D.C. Pa. 1985) (suit filed 11 days before LGA effective date; LGA applied retroactively).

Conclusion

By virtue of the supreme court's decision in *Southern Motor Carriers,* it now is clear that to be immune under the state action doctrine, the conduct of private defendants must be engaged in pursuant to a clearly articulated state policy and actively supervised, but not compelled, by the state. Under *Town of Hallie,* municipal conduct is immune under the state action doctrine if the municipality's actions are taken pursuant to a clearly articulated and affirmatively expressed state policy, whether such actions are supervised by the state.

It is important to note, however, neither heavily-regulated private parties nor public bodies such as municipalities are exempt from the federal antitrust laws merely because of their status. They each must be able to demonstrate their anticompetitive conduct was contemplated by and, thus, attributable to a state's acting in its sovereign capacity.

Although municipalities and other units of local government are no longer subject to treble damage actions, their anticompetitive conduct, if not otherwise immune, may be enjoined. Similarly, private parties expressly directed to act anticompetitively by local governments may enjoy some measure of antitrust protection under the LGA.

The state action doctrine applies in a variety of different factual settings. These recent changes in the state action immunity doctrine have obvious significance for pending antitrust litigation involving claims of state action immunity.

Additionally, these developments should be considered by attorneys called upon to advise public and private entities with respect to the legality of contemplated actions which, in the absence of state action immunity, might violate the antitrust laws.

Finally, attorneys called upon to draft state legislation or regulations that might have anticompetitive consequences should carefully consider whether the legislation makes it clear that the state contemplated any possible anticompetitive effects if the state intends to confer antitrust immunity. ■

John F. Mandt received his undergraduate degree from the University of Alabama and law degree from the University's School of Law. He is an associate with Balch & Bingham in Birmingham.

Young Lawyers' Section

J. Bernard Brannan, Jr.
YLS President

In the last few months the Alabama Legislature was in regular session during an election year, and a great deal of rhetoric and controversy existed. Not much has been accomplished toward opening the lines of communication between individual members of the bar and other professions.

The organized bar has made great strides toward solving problems and developing open communication with other professions, as has the Young Lawyers' Section through its annual Conference on the Professions held April 18 and 19 in Gulf Shores, Alabama. There, bar members could be of service to a vast number of other professionals, including the areas of medicine, nursing, engineering, pharmacy, psychology, dentistry and others. The conference further provided open communication among all professions represented.

Topics provided by the YLS were the basics of administrative law, discovery in administrative proceedings, the emergency suspensions of licenses, informal settlement of contested cases and others, giving an overview of the legal system as it particularly applied to controlled professions.

The YLS compliments Randy Reaves for the excellent program and the smooth nature in which the overall conference ran. Lines of communication between the professions are a little more open, thanks to this fine project.

Keith Norman needs to be congratulated for the wonderful job he did as chairman of the Youth Legislative Judicial Program. Individual teams participating throughout the state were better prepared this year than ever before. They received assistance from YLS members as a result of Keith's efforts. Thanks to this committee, hundreds of young people have had a hands-on experience with the legal system, acting as jurors, witnesses, bailiffs, lawyers, judges and supreme court justices.

Within the next year or so these young people will actually be eligible to serve as jurors in litigation, and Keith's committee gave them an opportunity to participate in and understand the system much better than many adults do, actually serving on juries.

Young lawyers throughout the state providing guidance and assistance to the students were Trip Walton, Auburn; Lewis Colley, Montgomery; Cleo Thomas, Anniston; George Day, Gadsden; Robert Childers, Montgomery; Percy Badham, Birmingham; Lynne Riddle-Thrower, Wetumpka; John Hay, Huntsville; Lexa Dowling, Dothan; Randy Haynes, Alexander City; Jake Walker, Opelika; Bess Cox, Florence; Cecilia Collins, Mobile; and Tommy Nettles, Tuscaloosa.

Every member of the YLS and the bar is indebted to them for advising and providing a fine public service project. These efforts make a tremendous contribution toward insuring a positive image in the community for the bar.

James H. Miller, III, again has done a great job as chairman of the CLE committee for the YLS. On April 18 the Annual Bridge the Gap seminar, offering "nuts and bolts" information to new bar admittees, was held in Birmingham. The program was well-attended, and an enthusiastic faculty gave valuable information for the transition from law school to the practice of law. Thanks to Jim for a job well done.

As this bar year comes to a close, efforts must be made to properly plan for our future. Section members will attend American Bar Association affiliate outreach meetings in Charleston, South Carolina, securing new ideas for service to the public and the bar. Claire Black and her Long-range Planning Committee worked tirelessly to prepare a plan for adoption to be presented at the annual July meeting. A course will be set creating additional involvement in the section, enthusiasm and a general good feeling about what the YLS can do.

With the extensive number of projects in which the section is presently involved, and the potential for additional future projects being implemented with the help of the YLS of the American Bar Association, we encourage you to become more active in the YLS. Now you should make plans to let 1986-87 be a year to participate in the activities of the section.

To be an active member in a vibrant professional association, contact Claire Black of Tuscaloosa, president-elect of the YLS, and let her know you want to help. She will be awaiting your call. The hard work by each member of the YLS executive committee makes it a pleasure for me to be involved, and I think you, too, will find it rewarding. ■

The Work Product Doctrine

photo by David Shanks

by Lee H. Zell

(The first half of this article appeared in the March 1986 issue of the *Lawyer.*)

Development of the doctrine

The work product doctrine, first announced by the United States Supreme Court in *Hickman v. Taylor,* 329 U.S. 495 (1947), affords protection in appropriate circumstances for documents and information not otherwise protected by the attorney-client privilege. In *Hickman,* the court extended a qualified immunity from disclosure to written statements of witnesses, together with notes made by an attorney during interviews, under circumstances in which the material was developed in the course of preparation for possible litigation. The court held the materials were protected from disclosure because of the public policy "against invading the privacy of an attorney's course of preparation." 329 U.S. at 512

The court in *Hickman* noted the work product doctrine affords only a qualified immunity from disclosure, rather than a privilege: "Where relevant and nonprivileged facts remain hidden in the attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." 329 U.S. at 511

The work product doctrine now is codified in Rule 26(b)(3) of the Federal and Alabama Rules of Civil Procedure. The rule provides in pertinent part:

> A party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) *only* upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the men-

tal impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Elements of the doctrine

Documents and tangible things otherwise discoverable

The doctrine applies only to documents and tangible things. *Ford v. Philips Electronics Instruments Co.*, 82 F.R.D. 359, 360 (E.D. Pa. 1979) ("[B]y its own terms, [Rule 26(b)(3)] pertains to documents and tangible things," so that an attorney's unrecorded discussions with a witness concerning the attorney's evaluation of a case do not come within the rule.)

Notwithstanding its express limitations, however, the policy considerations underlying the doctrine have led courts to protect an attorney's unrecorded mental impressions and conclusions. *See, e.g., In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (attorney could not be compelled to disclose his recollections of conversations with witnesses). *Ford v. Philips Electronics Instruments Co.*, 82 F.R.D. 359, 360 (E.D. Pa. 1979) (An attorney should be able to prevent the disclosure of his mental impressions although not embodied in a document.)

Even if all elements of the doctrine are satisfied, materials are not discoverable if otherwise shielded from discovery (e.g., by virtue of an applicable privilege). ABA, Section of Litigation, *The Attorney-Client Privilege and the Work-Product Doctrine* 68 (1983)

Prepared in anticipation of litigation or for trial

Generally, to be protected by the work product doctrine, documents or tangible materials must have been prepared or developed with a view toward proceedings which are adversarial in nature. *See, The Special Masters' Guidelines for the Resolution of Privilege Claims, United States v. American Telephone & Telegraph Co.*, Cir. No. 74-1698 (D.D.C. Feb. 28, 1979) (cited in ABA, Section of Litigation, *The Attorney-Client Privilege and the Work-Product Doctrine* 68-69 [1983]). (The court defined litigation for purposes of the rule, as "a proceeding in a court or administrative tribunal in which the parties have the right to cross-examine witnesses or to subject an opposing party's presentation of proof to equivalent disputation.) *Upjohn Co. v. United States*, 449 U.S. 383 [1981] (doctrine applies to materials prepared for IRS tax summons proceedings) *Natta v. Zlitz*, 418 F.2d 633, 636 [7th Cir. 1969] (doctrine affords protection to documents prepared for patent interference proceedings)

Materials may be found to have been "prepared in anticipation of litigation" even though the preparation occurred before an action was filed. The test is whether, in light of the nature of the documents, they "can fairly be said to have been prepared or obtained because of the prospect of litigation." *Hercules, Inc. v Exxon Corp.*, 424 F. Supp. 136, 151 (D. Del. 1977) *See also Sylgah Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 457 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976). ("If the prospect of litigation is identifiable because of specific claims that have already arisen, the fact that, at the time the document is prepared, litigation is still a contingency has not been held to render [doctrine] inapplicable.") *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89 (W.D. Me. 1980) (statements taken by defendant immediately after an accident were obtained "in preparation for litigation," since they were obtained only after it was clear who the plaintiff would be and what claims would be asserted)

Litigation must have been "likely," however, and not merely a "possibility." *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 42, 43 (D. Md. 1942) Accordingly, if the possibility of litigation is remote, protection under the work product doctrine may not be available. *See Coastal States Gas Corp. v. Doe*, 617 F.2d 854, 865 (D.C. Cir. 1980). (Memoranda from regional counsel to auditors working in field offices, issued in response to requests for interpretations of certain regulations, were held to have not been prepared in anticipation of litigation, except when such memoranda were issued after identification of a specific claim by or against a specific firm being audited.) *Garfinkle v. Arcata National Corp.*, 64 F.R.D. 688 (S.D.N.Y. 1974) (In an action by shareholders alleging a defendant corporation's failure to register its shares with the SEC, documents relating to an attorney's opinion letter advising that registration was unnecessary were not protected by the work product doctrine. Documents required to be produced included intra-office memoranda between attorneys representing the corporation, a memorandum outlining legal authority for the opinion and an attorney's notes of telephone conversations with shareholders' attorney.)

Documents routinely prepared in the ordinary course of business generally will not satisfy the "prepared in anticipation of litigation" element of the rule. *See Westhemece Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702 (S.D.N.Y. 1979) (privilege did not apply to documents prepared by insurance company during a routine claim investigation). *Abel Investment Co. v. United States*, 53 F.R.D. 485 (D. Nev. 1971) (IRS documents routinely prepared prior to institution of any action were not prepared in anticipation of litigation. The documents were not prepared at the instruction of an attorney, did not contain legal theories of the case and were nonadversarial, containing matter submitted by the taxpayer as well as by the government.) *But see Heide-*

Lee H. Zell received his undergraduate degree from Columbia University and his law degree from New York University. He is a partner in the Birmingham firm of Berkowitz, Lefkovits, Isom & Kushner.

brink v. Moriwaki, Civ. No. 51017-2 (Wash. S. Ct. September 5, 1985). (A statement made to the insurance carrier subsequent to the accident was protected from disclosure under the work product doctrine where the statement was made by the insured. The court noted that the insured has a contractual obligation to cooperate with the insurer and that to refuse protection for such statements would frustrate the purpose of the doctrine by discouraging full disclosure.)

By or for another party or by or for that party's representative

The doctrine extends to agents of an attorney. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) To be protected from disclosure, however, documents generated by an agent must have been prepared at the request of the attorney. *Sterling Drug, Inc. v. Harris*, 488 F. Supp. 1019, 1026 (S.D.N.Y. 1980)

Discovery of work product materials

In order to obtain materials protected by the work product doctrine, the party seeking discovery must demonstrate: (a) a substantial need for the materials and (b) an inability, without undue hardship, to obtain the materials (or their substantial equivalent) from other sources.

An enhanced showing generally is required in order to obtain "opinion," as opposed to "ordinary" work product. *See Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981). (Production of documents representing counsel's mental impressions, conclusions, opinions or legal theories cannot be compelled merely upon a showing of "substantial need and inability to obtain the equivalent without undue hardship.") Some courts have even suggested that such information can be obtained by an adversary, if at all, only in the most narrowly defined circumstances. *See, e.g., United States v. Exxon Corp.*, 87 F.R.D. 624 (D.D.C. 1980). (If work product consisting of an attorney's mental impressions and legal theories is discoverable at all, it is only when the activities of the attorney himself are directly at issue.) *See also Sprock v. Peil*, 759 F.2d 312 (3rd Cir. 1985). (Preparation for discovery is protected by the work product doctrine; an adverse party was not permitted to inquire about documents used by the deponent to refresh his recollection where disclosure of the selected documents as a group reflected "counsel's legal opinion as to the evidence relevant both to the allegations in the case and the possible legal defenses.")

Courts have not established precise guidelines for determining what constitutes "substantial need." Such determinations generally are made on a case-by-case basis. *See* ABA, Section of Litigation, *The Attorney-Client Privilege and the Work-Product Doctrine* 77 (1983). "Substantial need" may be found, however, where information contained in the documents sought cannot be obtained through any other means or where the only means available is through a hostile witness who refuses to provide the information. *See, e.g., Xerox Corp. v. International Business Machines Corp.*, 64 F.R.D. 367, 389 (S.D.N.Y. 1974). (The party seeking documents demonstrated a substantial need upon a showing that witnesses providing information contained in the requested documents had poor or insufficient recollection of events.) *Copperweld Steel Co. v. Demag-Mannesman-Bohler*, 578 F.2d 953, 963 N.14 (3d Cir. 1978) (substantial need shown where person providing the information contained in the requested documents was dead) The cost or inconvenience of obtaining the substantial equivalent of the requested materials is "not in itself a sufficient showing to meet the 'undue hardship' requirement. " *Arvey v. Hormel & Co.*, 53 F.R.D. 179, 181 (D. Minn. 1971)

As is the case with the "substantial need" requirement, the "undue hardship" element is not met where the in-

formation contained in the materials sought may be obtained through other means. *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029, 1032 (N.D. Ga. 1974) (production not compelled where party failed to show that a substantial equivalent of the documents could not be obtained through depositions) The burden or expense of obtaining a substantial equivalent of the requested documents generally does not suffice to demonstrate "undue hardship." *Arvey v. Hormel & Co.*, 53 F.R.D. 179 (D. Minn. 1971) *But see Jarvis Inc. v. American Telephone & Telegraph, Inc.*, 84 F.R.D. 286, 293 (D. Colo. 1979). ("Undue hardship" was shown where the party seeking documents would have been required to depose over 1,000 witnesses in order to obtain the substantial equivalent of the documents sought.)

Waiver of the doctrine

A waiver of the attorney-client privilege does not necessarily affect the availability of protection from disclosure under the work product doctrine. *See, e.g., Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Cal. 1976).

Courts have not reached consistent results with respect to the circumstances under which the qualified immunity provided by the rule may be waived. A review of the cases, however, suggests general agreement on the following principles:

Since the doctrine is designed to protect against disclosure of information to actual or potential adversaries, disclosure to third parties, particularly those who share common interests, will not be viewed as a waiver. *See, e.g., Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974); *Stix Products, Inc. v. United Merchants & Manufacturers, Inc.*, 47 F.R.D. 334 (S.D.N.Y. 1969).

Disclosure to actual or potential adversaries likely will be deemed to constitute a waiver. *See, e.g., Insurance Co. of North America v. Union Carbide Corp.*, 35 F.R.D. 520 (D. Colo. 1964). *But see Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974).

If the activities of counsel are at issue, production of work product materials likely will be ordered. *See, e.g., Bird v. Penn Central Co.*, 61 F.R.D. 43 (E.D. Pa. 1973).

If portions of otherwise protected material are sought to be used at trial, all potentially relevant portions of the material usually must be made available. *See, e.g., United States v. Nobles*, 422 U.S. 225 (1975).

As is the case with the attorney-client privilege, a waiver will be found in cases of fraud (with the possible exception of material qualifying for protection as "opinion" work product). *See In re Special September 1978 Grand Jury II*, 640 F.2d 49 (7th Cir. 1980). ■

Office Automation Consulting Program

The Professional Economics Committee of the Alabama State Bar has received approval of its recommended consultant to serve the lawyers of Alabama in evaluating their office functions and equipment needs.

The committee first gained board approval in 1985 of a recommendation that the state bar offer the service to lawyers and law firms. David Arendall, chair of the Professional Economics Committee, and Timothy Corley of Birmingham served as the *ad hoc* subcommittee bringing this new service to fruition. Prospective consultants were interviewed with the idea that with proper financial support a consultant might be added to the headquarters staff; however, the alternative of endorsing a consultant who would work through state bar headquarters proved more practical. The person selected is Paul Bornstein of Office Technology Associates, Inc., in Atlanta.

Bornstein holds bachelor's and master's degrees in physics and operations research, as well as the CMC (Certified Management Consultant) appellation from the Institute of Management Consultants. He is one of only two office automation consultants admitted to membership in that organization. Bornstein has 17 years' experience as a management consultant, including three as the administrative director of an international consulting organization and two as MIS director of a major manufacturer. In 1980, he founded his own practice and specializes in office automation, with a major emphasis in the legal field.

The bar's consultant is an independent practitioner, engaged exclusively in the office automation field, and has no financial interests in any vendors or suppliers. He does not accept fees, gratuities or considerations from them.

The three available initial services and a brief description of each follow:

The Administrative Audit

This is an overview of the existing administrative practices in the firm, whether or not they are automated. It encompasses the procedures present, to a greater or lesser degree, in all firms, large or small, general or specialized practice. It includes telephony, copying, dictating, filing, typing (or word processing), accounting, docketing and billing and collections (manual or automated).

Equipment, procedures and the support staff performing them are examined. Recommendations are oriented toward simplification, consistency and efficiency. Particular emphasis is placed on time and disbursements accounting and billing.

Paul Bornstein

An action plan is presented to the firm, both verbally on the occasion of completing the on-site visit and subsequently in writing.

The Word Processing Needs Analysis

This is a look at the problem of getting words on paper, in an efficient manner and in the format required by the firm and the local jurisdictions in which the firm may practice. It either can be an assessment of the suitability of existing word processing equipment or an opinion of the most suitable type of equipment to acquire.

The term "equipment" is taken to be the sum of a micro-processor-based piece of hardware used in conjunction with appropriate word processing software. (Note that the great majority of word processing vendors have absolutely no idea what a floating footnote or table of citations is, much less the software to deal with these requirements.)

An action plan recommending appropriate hardware and software (if applicable), as well as ancillary applications that can be supported in a word processing environment (such as docket control and calendering), will be presented verbally on the occasion of the end of the on-site visit and subsequently in writing.

The Data Processing Needs Analysis

This examines functions that can, and in some cases should, be automated. Conversely, not everything that *can* be automated should, particularly if the function is not well structured, or is performed so infrequently as to be cost ineffective (litigation support, for example). Particular emphasis is placed on time and disbursements accounting and billing and collections, where the return on investment is generally most favorable.

Combining one's data and text processing needs on a single processor is considered. Interface with one of the legal research services (Lexis, Westlaw) will be explored if the firm currently utilizes such a service. The ancillary tasks of conflict of interest resolution, general ledger accounting, docketing and calendering will be examined. An action plan will be presented detailing the suggested configuration (hardware and software) as well as suggested vendors, estimated costs and anticipated benefits.

A schedule of fees and expenses has been agreed upon and is effective through June 30, 1987.

Expenses

The consultant is reimbursed for lodging and meal expenses while engaged with an account, as well as the least expensive transportation between Atlanta and the attorney's office. Transportation generally will be by automobile (at .33 per mile). When the consultant undertakes consecutive engagements within the same week, he will prorate the transportation cost between the firms involved.

The consultant will treat all information and documents of the firm in confidence, and a firm may terminate the engagement at any time without cause, with the understanding all undisputed fees and expenses will be paid to the state bar within five (5) days.

Scheduling will be coordinated by the Alabama State Bar, and all billing and remittance will be handled through the bar.

Lawyers in Alabama have been asking for this assistance, and the board of commissioners is pleased to make it available.

SCHEDULE OF FEES, TERMS AND CONDITIONS

Firm Size*	Duration**	Fee	Avg. cost/ lawyer
1	1 day	$ 500.00	$500.00
2-3	2 days	$1,000.00	$400.00
4-5	3 days	$1,500.00	$333.00
6-7	4 days	$2,000.00	$307.00
8-10	5 days	$2,500.00	$277.00
Over 10			$250.00

*Number of lawyers only (excluding *of counsel*)
**Duration refers to the planned on-premise time and does not include time spent by the consultant in his own office while preparing documentation and recommendations.

■

REQUEST FOR CONSULTING SERVICES
OFFICE AUTOMATION CONSULTING PROGRAM
Sponsored by Alabama State Bar

THE FIRM

Firm name _____
Address _____
City _____ _____ Zip _____ Telephone # _____
Contact person _____ Title _____
Number of lawyers _____ paralegals _____ secretaries _____ others _____
Offices in other cities? _____

ITS PRACTICE

Practice Areas (%)

Litigation	_____	Maritime	_____	Corporate	_____
Real Estate	_____	Collections	_____	Estate Planning	_____
Labor	_____	Tax	_____	Banking	_____
_____	_____	_____	_____	_____	_____

Number of clients handled annually _____
Number of matters handled annually _____
Number of matters presently open _____
How often do you bill? _____

EQUIPMENT

Word processing equipment (if any) _____
Data processing equipment (if any) _____
Dictation equipment (if any) _____
Copy equipment (if any) _____
Telephone equipment _____

PROGRAM

% of emphasis desired

Admin. Audit _____
WP Needs Analysis _____
DP Needs Analysis _____

Preferred time (1) W/E _____ (2) W/E _____

Mail this request for service to the Alabama State Bar for scheduling. Send to the attention of Margaret Boone, Executive Assistant, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

cle opportunities

may

16 friday

HOW TO SERVE CLIENTS THROUGH THE EFFECTIVE USE OF PARALEGALS
Birmingham
Birmingham Bar Association
Cost: $10
(205) 251-8006

17 saturday

MUNICIPAL LAW CONFERENCE
Riverview Plaza, Mobile
Alabama League of Municipalities
Credits: 6.6 Cost: $40
(205) 834-3656

19-25

LABOR LAW AND LABOR ARBITRATION
Hilton Inn, Dallas
Southwestern Legal Foundation
Cost: $625
(214) 690-2377

20 tuesday

ALABAMA POSTJUDGMENT COLLECTION LAW
Montgomery
Professional Education Systems
Credits: 6.3 Cost: $85
1-800-826-7155

21 wednesday

ALABAMA POSTJUDGMENT COLLECTION LAW
Birmingham
Professional Education Systems
Credits: 6.3 Cost: $85
1-800-826-7155

23 friday

DOMESTIC RELATIONS LAW
Birmingham
Birmingham Bar Association
Credits: 3.2 Cost: $20/members; $25/nonmembers
(205) 251-8006

27-28

UTILITY FINANCE AND ACCOUNTING FOR ATTORNEYS
Washington, D. C.
Financial Accounting Institute
Credits: 15.6 Cost: $950
(201) 568-0249

29-30

LAND USE LAW
Westward Hilton, Anchorage
American Institute of Certified Planners
Credits: 12.5 Cost: $235
(312) 955-9100

29-30

ANATOMY OF A RATE CASE
Washington, D. C.
Financial Accounting Institute
Credits: 15.6 Cost: $950
(201) 568-0246

june

5-6

CONSTRUCTION CONTRACTS
San Francisco
Practising Law Institute
(212) 765-5700

11-21

SOUTHERN REGIONAL TRIAL ADVOCACY PROGRAM
SMU School of Law, Dallas
National Institute for Trial Advocacy
Credits: 85.0 Cost: $1,250
(612) 644-0323

13 friday

ALABAMA LEMON LAW LITIGATION
Mobile
National Business Institute
Credits: 6.6 Cost: $96
(715) 835-8525

16-20

ADVANCED LABOR AND EMPLOYMENT LAW
University of Colorado, Boulder
ALI-ABA
(215) 243-1600

18-20

AMERICAN INSTITUTE ON FEDERAL TAXATION
American Institute on Federal Taxation
Wynfrey Hotel, Birmingham
Credits: 20.6 Cost: $300
(205) 251-1000

20 friday

POST-TRIAL MOTIONS IN CRIMINAL PRACTICE
Birmingham
Birmingham Bar Association
Credits: 1.0 Cost: $10
(205) 251-8006

20-21

FINANCE AND ACCOUNTING FOR LAWYERS
Embassy Row Hotel, Washington
Southern Methodist University
Credits: 9.9 Cost: $360
(214) 692-3336

21-22

ANATOMY FOR LAWYERS
Sheraton, Seattle
Medi-Legal Institute
Credits: 13.5 Cost: $400
(818) 995-7189

23-27

ENVIRONMENTAL LITIGATION
University of Colorado, Boulder
ALI-ABA
(215) 243-1600

23-27

FEDERAL SECURITIES LAW
Stanford Law School, Palo Alto
ALI-ABA
(215) 243-1600

27 friday

PROBATE PRACTICE AND PROCEDURE
Birmingham
Birmingham Bar Association
Credits: 3.2
(205) 251-8006

27-29

PRODUCTS LIABILITY
Four Seasons Hotel, Toronto
Professional Education Systems, Inc.
Credits: 14.4 Cost: $345
1-800-826-7155

june-july

29-4

ADVANCED TRIAL ADVOCACY
University of Colorado, Boulder
National Institute for Trial Advocacy
Credits: 43.0 Cost: $1,150
(612) 644-0323

11-12

FINANCE AND ACCOUNTING FOR LAWYERS
Mark Hopkins International, San Francisco
Southern Methodist University
Credits: 9.9 Cost: $360
(214) 692-3336

12-13

HOW TO READ AND INTERPRET MEDICAL REPORTS
Marina Beach Hotel, Los Angeles
Medi-Legal Institute
Credits: 13.5 Cost: $400
(818) 995-7189

17-19

ANNUAL MEETING
Wynfrey Hotel, Birmingham
Alabama State Bar
(205) 269-1515

19-26

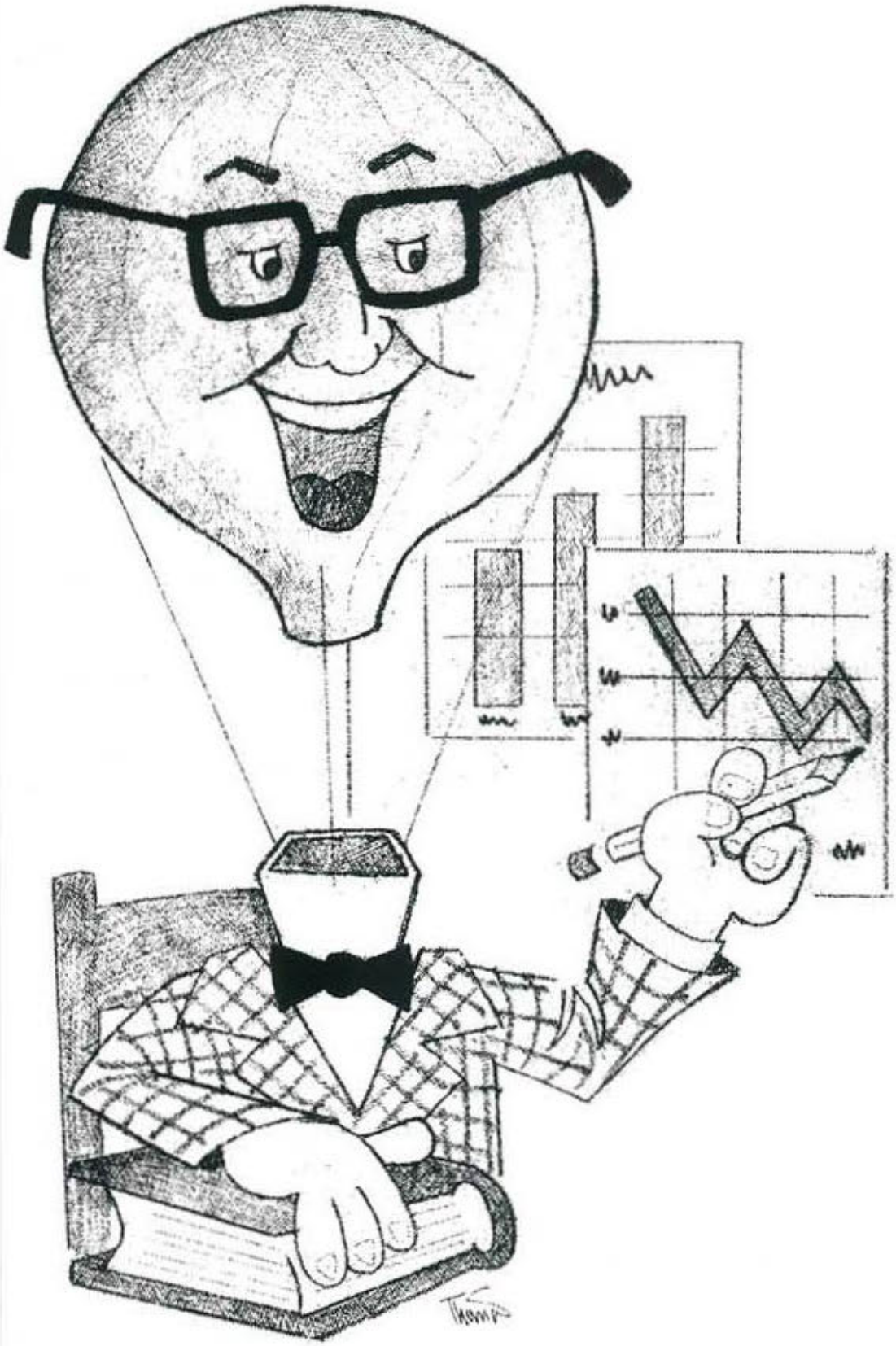
INSURANCE COUNSEL TRIAL ACADEMY
College Inn Conference Center, Boulder
International Association of Insurance Counsel
(312) 368-1494

25 friday

CHECKLIST FOR SHAREHOLDER AGREEMENTS
Birmingham
Birmingham Bar Association
Credits: 1.0 Cost: $10
(205) 251-8006

■

Coping with Vocational Expert



by Paul R. Lees-Haley

Attorneys handling personal injury and workers' compensation cases are confronted with a growing body of slipshod testimony by vocational experts. Professional groups (such as the American Board of Vocational Experts, headquartered in Nashville) are making excellent efforts to improve standards in this field, but until they are successful in doing so, attorneys need instruction to cope with vocational testimony.

Use of a rebuttal witness is not the only solution. One alternative is to have the records examined by a sophisticated expert, to learn of errors and omissions and obtain an outline for the deposition. Another is to become more knowledgable about vocational evaluations and ways attorneys overlook opportunities to assure just decisions. Following is an outline of the correct procedure for performing vocational evaluations involving lost earnings and an identification of common errors made by attorneys for each step in the vocational evaluation procedure.

Who performs vocational impairment ratings, and a comment on their strengths and limits

Most vocational expert opinions are rendered either by psychologists or graduates of vocational rehabilitation and counseling programs. A few are rendered by physicians, especially psychiatrists. As a general rule of thumb, vocational rehabilitation counselors have less education and more job placement experience than physicians and psychologists. Psychologists have more in-depth awareness of relevant testing procedures, and they have more scientific training. Physicians offer the most widely used expertise on physical impairment and no useful knowledge of scientific vocational testing or job market. In some uneducated communities, testimony by a physician still carries a feudal aura of correctness, regardless of its merits.

Testimony

How loss of earning capacity should be calculated, and where attorneys ignore the facts

To answer the fundamental question, "What is the lifetime earnings loss of this individual?" certain data must be collected and correct procedures followed. These steps are:

(a) measuring the physical or mental injury;
(b) defining pre- and post-injury employability;
(c) computing earnings impairment;
(d) calculating lifetime earnings loss.

Each step poses unique problems for attorneys, as outlined below.

Measuring the mental or physical injury—The foundation of the earnings impairment evaluation is the opinion of either a physician or a licensed psychologist (or psychiatrist), depending on whether the injury is physical or psychological. The physician or psychologist should state as clearly as possible what the plaintiff can no longer do, as a result of the injury, that he could do before the injury, and how long the plaintiff will not be able to do these things.

Physicians are by far the most common source of opinions about a person's impairment. Psychological claims are less familiar to most attorneys and a more rapidly growing field of litigation. Examples of such include post-traumatic stress disorder, neuropsychological deficits, psychological injury, psychic trauma, anxiety reactions, phobias and depression.

A psychologist's impairment opinions are usually first encountered in a report discussing psychological testing, interviews and the medical and work histories. A physician's opinion may appear in the form of a letter expressing a general disability opinion or a checklist of opinions about lifting, bending, etc. (a physical capacities evaluation). A vocational rehabilitation counselor's report typically refers to the physician's or psychologist's opinion, relates that opinion to the plaintiff's viability in the labor market and concludes with a statement of the percentage of vocational impairment.

A careful reading of their reports and statements in depositions could reveal many of these experts (especially M.D.s) consistently gather only meager evidence about the plaintiff's prior functioning and prior disabilities. They rarely obtain outside corroboration of the plaintiff's self-report, and when they do, it is from interested parties—usually the immediate family. It is a rare expert who realistically assesses cause-and-effect issues in litigation; the norm is to make a thinly disguised assumption that the litigated event did or did not cause the injuries, and not to further probe.

On deposition, attorneys routinely ask, "Doctor, could that injury have been caused by X?" but they seldom pursue in detail questions such as:

(a) "What percentage of patients of the same age, race and sex already have similar conditions?"

(b) "How many symptoms unrelated to this type injury did you ask about, to see if the plaintiff was just endorsing most of the symptoms you mentioned, without regard to reality?"

(c) "How certain are you that this accident caused this injury?"

(d) "What other causes would be equally valid alternative explanations for the origin of such an injury or illness?"

(e) "Tell us in detail the evidence you used as the basis for concluding that this accident caused this injury."

(f) "What training or continuing education have you had on detecting malingering?"

The blanket statement frequently seen in reports by physicians, vocational experts and psychologists, that the "patient is totally disabled," usually is incorrect and irrelevant. Surprisingly few vocational experts and psychologists, and almost no physicians, have studied the earnings impairment literature in detail—not that this inhibits the expression of such opinions. Their testimony quickly crumbles under a cross-examination prepared with the assistance of an expert who actually knows how these procedures work.

On deposition, if expert opinions are to be used to establish earnings loss, they

Terms to Know

Earnings impairment (also called reduced earnings capacity, impaired earnings capacity, loss of earning capacity): An earnings impairment evaluation determines the loss of earning capacity resulting from an injury or illness. This rating must be calculated in order to obtain a valid lifetime earnings loss, including those offered by economists.

Medical impairment: A medical impairment rating is a percentage produced in accordance with procedures outlines in references such as the Guides to the Evaluation of Permanent Impairment (published by the American Medical Association Committee on Rating of Mental and Physical Impairment), or the Manual for Orthopaedic Surgeons in Evaluating Permanent Physical Impairment, published by the American Academy of Orthopaedic Surgeons. This type of rating is the source of phrases like "15 percent to the body as a whole."

Vocational impairment (employability, residual employability): The number of jobs a person can perform after an injury or illness divided by the number he could perform before, times 100. It is expressed as a percentage.

Disability: This is a general term, in this context most commonly applied to work activities which previously could be performed, but can no longer be handled as a result of an injury or illness. "Disability" is a word with many faces, often confused with the terms above. It ranges from inability to perform a specific profession (in certain insurance cases) to inability to perform any gainful employment at all (statutory use in social security cases).

must be translated or phrased in relevant terms. The extent of medical and psychological impairment associated with an injury does not accurately reflect the extent of loss of earnings capacity. In fact, the extent of psychological and physical impairment and the earnings impairment may be radically different.

For example, in one recent case a physician said the plaintiff had a 25 percent medical impairment, and a vocational expert said he had a 65 percent vocational impairment. On analyzing the data, it was discovered (and demonstrated to the court) that his percent earnings impairment was at most five percent, and very possibly zero percent, depending on how one construed the plaintiff's evidence. In another case, the plaintiff had a serious loss of earning capacity even though he currently was making as much as he had prior to his injury.

Usual and customary practice in the context of litigation is to include an evaluation for malingering. However, a review of vocational expert reports will demonstrate the vast majority of efforts to detect malingering are conducted superficially. Most experts fail to use the available technology, and some do not even address the issue. There is no research evidence whatsoever demonstrating that vocational counselors and psychiatrists can reliably detect malingering.

The only group with demonstrated scientific techniques for detecting malingering is psychologists, and a study of their reports confirms that in general they, too, do a clearly inadequate job, primarily because most do not even bother to try. They appear at depositions with no more to offer than remarks like, "I did not think the plaintiff was malingering," "In my opinion, he was not exaggerating," or "The plaintiff seemed like a sincere person to me." Detailed examination of the procedures behind such statements will quickly reveal most experts do not even know how to evaluate for malingering. Medical, psychological and vocational malingering can be detected and proved.

Defining pre- and post-injury (residual) employability—Using the findings from step one, the evaluator analyzes the relationship between the individual's residual capacities for work and the demands of the jobs available. After considering the work history of the individual, the psychological or medical impairment opinions and the results of testing, one determines the jobs for which the individual continues to be qualified.

There are numerous jobs in the U.S. economy, and most local economies, which can be performed by individuals with serious impairments. Many require little or no training, no skills and average or low average intelligence. It is rarer than most people suppose to meet someone who is genuinely totally and permanently disabled. The majority of disabled people go back to work after settlement. Experts often use the phrase "totally disabled" when they mean the plaintiff cannot work at a specific previous job or do customary heavy work.

Disability is a relative condition, pertaining to the individual's ability to compete in the current labor market in a defined area. Usually a vocational expert will use the state, county or a 50-mile radius of the plaintiff's locale as the relevant labor market. A fact never mentioned is *if the economy changes, the disability changes.*

For example, if the job market tightens, the individual is more disabled. If a local industry arises with numerous sedentary positions, the disability is lessened. If the plaintiff has a history of moving around the country to seek work or for lifestyle reasons, it is reasonable to use the national economy as the labor market—almost invariably meaning more jobs are available and lowering the earnings impairment!

Most vocational experts treat older persons as inflexible and rapidly assign total disability ratings on the grounds that (a) "old dogs do not learn new tricks" and (b) employers do not want them. Historically, this, perhaps, was reasonable.

In the modern economy, conditions have changed drastically. The number of older people is greater than at any time in history. They are influencing who is hired, and they want to continue working beyond traditional retirement ages (ages which, incidentally, were defined by Bismarck a century ago, when hardly anyone lived to retire). Now companies

are sponsoring programs to attract senior citizens to work. Help-wanted ads specifically solicit retired or older employees.

The testimony of a nonpsychological vocational expert almost invariably is based upon a review of medical records and an interview, with minimal, inadequately performed testing. Psychologists, as a result of their scientific training, do a far superior job of testing (in comparison to psychiatrists, who do almost none, and nonpsychologist vocational experts, who do simpler tests with inadequate training in the rationale of the tests they administer). However, a remarkable number of psychological vocational reports contain errors in test administration and interpretation. Testing errors are so frequent one should never accept a report without having it reviewed by an independent expert.

Calculating earnings impairment—This is the moment one computes the answer to the question, "How much was the earning power of this individual reduced?" Looking at the jobs the individual could perform pre- and post-injury, the earnings impairment rating is developed. In essence, it is a ratio of the average wages of the jobs available to the individual after the injury and before.

This procedure is not as simple as it sounds. Using the latest and best methods, surprising outcomes result. Sometimes an individual's earning capacity appears to be greater after an injury than before, because the injury reduces the capacity to perform low-paying jobs without affecting higher-paying performance. Many judgment calls enter into these calculations. On the surface, this procedure sounds like mere arithmetic; in fact, conclusions are colored by semantic issues.

Real earnings loss is never purely the product of the accident; it is also what the plaintiff makes of it. For example, a person's motivation to work can control a surprising percentage of the loss. A man was evaluated who said he could not work at all because he hurt constantly, even at home when trying to rest. Later the same day a woman, who had the same injury but was working, was tested. When discussing her case she said, "I hurt all the time, whether I'm at home or at work, so I might as well work."

Using current medical terminology and procedures, as defined in the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 2nd Edition*, a large percentage of the U.S. working population could sustain a substantial medical impairment rating without affecting their capacity to earn money. This fact is not widely known, but it is easy to demonstrate and directly addresses a key issue in litigation where earnings loss is important.

A common error is being buffaloed by "vocational impairment" percentages as if they were percentages of reduction of earning power, *which they most certainly are not*. Vocational experts are testifying about 70 percent, 80 percent and 90 percent vocational impairment ratings and residual employability figures, without being challenged, despite the fact that these figures are close to meaningless as a measurement of dollar damages.

Calculating lifetime earnings loss—At this point, and not before, an economist's opinion becomes meaningful. The economist can extrapolate the pre- and post-injury earnings capacity and the difference between the two, build in various assumptions and calculate the lifetime earnings loss and the net present value of that loss.

Lazy or uninformed economists will render opinions on flimsy data, such as W-2s. Many legal magazines contain advertisements giving good examples of economists offering budget-rent opinions on lifetime earnings loss, based on earnings history alone, without considering psychological and vocational factors. One example is the Ph.D. economist who used W-2s as the basis for asserting that the boss's *non compos* son had a lifetime earnings loss (net present value!) of four million dollars.

Every economist's report is different. They use different discount rates, including zero. They make different assumptions about future growth in real earnings. They do not all use the same life or worklife expectancy tables. They make different claims about historical interest rates and inflation rates. They use computer programs containing formulas they cannot explain. Not uncommonly, they make programming and computation errors.

The bottom line is that the correct approach to evaluating earnings impairment is a scientific one which can be explained clearly to the court. Instead of meeting this standard, attorneys are permitting serious technical errors. These occur most often in one of two forms: (1) admitting the testimony of self-styled vocational experts using procedures which do not pass the Frye test (Frye v. United States, 1923) of general acceptance in the field, or which are simply erroneous"howlers" from a technical point of view, and (2) failing to solicit the appropriate testimony to confirm or disconfirm the alleged loss. These errors are so easily avoidable they will be considered laughable mistakes, if not malpractice, as soon as they become more generally recognized. The solutions are to become aware of these errors, have vocational expert reports critiqued by an independent expert, obtain suggested deposition guidelines from an experienced witness and, when necessary and reasonable, use a rebuttal witness. ■

REFERENCES

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

Lees-Haley, P. (1985a) Detecting psychological malingerers Trial, 21(1), 68-69

Lees-Haley, P. (1985b) Psychological personal injuries and earnings loss Case and Comment, July-August, 34-37

Paul R. Lees-Haley is a board-certified vocational expert and licensed psychologist with offices in Huntsville, Alabama. He has served as an expert witness and litigation consultant in personal injury and workers' compensation cases and authored numerous articles for psychological and legal journals.

About Members, Among Firms

ABOUT MEMBERS

Jerry Lee Hicks, a Huntsville attorney, recently was named "Boss of the Year" by the Huntsville Legal Secretaries Association at their Fourth Annual Bosses' Night Celebration.

■

Joseph W. Adams announces his withdrawal from the law firm of Steagall & Adams and the removal of his office to 960 East Andrews Avenue, P.O. Box 1487, Ozark, Alabama. Phone 205/774-5533.

■

Mannon G. Bankson, Jr., is pleased to announce the opening of his law office at 404 Snow Street, Suite B, Oxford, Alabama. Phone 205/831-1422.

■

Jerry M. Vanderhoef, Tuscumbia attorney and former district court judge and associate justice of the High Court of American Samoa, has been appointed administrative law judge with the Office of Hearings and Appeals, Social Security Administration, Fresno, California.

■

Robert F. Smith announces the relocation of his office to Suite 1400, 114 West Dr. Hicks Boulevard, P.O. Box 1707, Florence, Alabama 35631. Phone 205/766-3663.

■

Charles E. Sharp was a featured speaker at the Tort and Insurance Practice Section (TIPS) of the American Bar Association's conference on "Transportation Facility Negligence" in San Diego March 20 and 21.

Sharp, a graduate of the University of Alabama School of Law, is a former president of the National Association of Railroad Trial Counsel, Southeastern region.

■

Andrew Gentry of Auburn, Alabama, was elected vice-chairman of the State of Alabama Personnel Board at the board's February meeting. He is a graduate of the University of Alabama, where he also received his law degree. Gentry was appointed to the personnel board by Lieutenant Governor Bill Baxley for the term expiring February 1, 1988.

■

Mary Anne Thompson, a graduate of Auburn University and Cumberland School of Law, is now the assistant general counsel for administration in the executive office of the president in Washington, D.C. Before joining Reagan's staff, she served as a political appointee for Transportation Secretary Elizabeth Dole.

■

Michael E. Jones, formerly of Turner and Jones, P.A., announces the opening of his new office at 300 Glenwood Avenue, Luverne, Alabama 36049. Phone 205/335-6534/6535.

AMONG FIRMS

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves take pleasure in announcing **Mary Kathleen Miller** has become a member of the firm, and **Ray M. Thompson** has become associated with the firm, with offices at 1300 AmSouth Center, P.O. Box 290, Mobile, Alabama 36601.

■

The law firm of **Lyons, Pipes and Cook** takes pleasure in announcing **Deborah L. Alley** has become associated with the firm, with offices at 2 North Royal Street, Mobile, Alabama 36602. Phone 205/432-4481.

■

The law firm of **Odin, Feldman & Pittleman** is pleased to announce **James F. Hurd, Jr.,** has become a principal of the firm, with offices in Fairfax, Manassas and Herndon, Virginia.

■

Judy D. Thomas and **John R. Huthnance** take pleasure in announcing the formation of a partnership under the firm name of **Thomas and Huthnance,** with offices at 1410 Second Avenue East, P.O. Box 1056, Oneonta, Alabama 35121. Phone 205/625-3973.

■

Charles N. McKnight and **Eugene A. Seidel** are pleased to announce they have joined in the formation of a partnership under the firm name of **McKnight & Seidel,** 503 Government Street, P.O. Box 2103, Mobile, Alabama 36652-2103. Phone 205/433-2009.

■

The law firm of **Franson, Dearing and Aldridge, P.A.,** is pleased to announce **J. Keith M. Sands** has become a member of the firm, which will continue the practice of law under the name **Franson, Dearing, Aldridge and Sands, P.A.,** with offices at 1506 Prudential Drive, P.O. Box 10840, Jacksonville, Florida 32247. Phone 904/399-0555.

■

The law firm of **Clark & Scott, P.A.,** #14 Office Park Circle, Birmingham, Alabama, is pleased to announce **Timothy P. Donahue** is now a member of the firm and **G. Steven Henry** an associate.

■

The law firm of **Taylor, Day, Rio & Mercier** takes pleasure in announcing **John McE. Miller** has become associated with the firm, with offices at 121 West Forsyth Street, 10th Floor, Jacksonville, Florida 32202. Phone 904/356-0700.

■

Wertheimer and Feld, P.A., takes pleasure in announcing **Nancy C. Osborne** has become associated with the firm, and it has relocated its offices to 600 Bank for Savings Building, Birmingham, Alabama 35203. Phone 205/328-3355.

■

The law firm of **McDaniel, Hall, Parsons, Conerly & Lusk, P.C.,** takes pleasure in announcing **John M. Fraley, Jack J. Hall, Jr.,** and **David L. McAlister** have become associated with the firm. Offices are located at 1400 Financial Center, Birmingham, Alabama 35203. Phone 205/251-8143.

■

Alabama Gas Corporation is pleased to announce **J. David Woodruff, Jr.,** has joined its legal department. Offices are located at 2101 Sixth Avenue North, Birmingham, Alabama 35203. Phone 205/326-2629.

■

Ralph G. Holberg, Jr., Albert J. Tully, Ralph G. Holberg, III, and **Joel F. Danley** announce the dissolution of the law firm of **Holberg, Tully, Holberg & Danley. Ralph G. Holberg, Jr.,** will continue his law practice, as a sole practitioner, at 701 Commerce Building, P.O. Box 47, Mobile, Alabama 36601. Phone 205/432-8863. **Albert J. Tully** will continue his law practice, as a sole practitioner, at 701 Commerce Building, P.O. Box 47, Mobile, Alabama 36601. Phone 205/432-8863. **Ralph G. Holberg, III,** and **Joel F. Danley** announce the formation of a partnership under the name of **Holberg and Danley,** 701 Commerce Building, P.O. Box 47, Mobile, Alabama 36601. Phone 205/432-8863.

■

The law firm of **Corley, Moncus, Bynum & DeBuys, P.C.,** is pleased to announce **Walter C. Andrews, III,** and **Gene W. Gray, Jr.,** have become members of the firm, and **Robert L. Barnett** has become an associate of the firm.

■

Stephen B. Griffin and **Lindsey J. Allison** are pleased to announce the association of **William Randall May** in the firm of **Griffin, Allison & May,** with offices at Bradford Building, 2025 Second Avenue North, Birmingham, Alabama 35203, 205/326-0591, and Suite Nine, 4509 Valleydale Road, Birmingham, Alabama 35243. Phone 205/991-6367.

■

Thomas E. Bryant, Jr., and **J. Gordon House, Jr.,** are pleased to announce the continuation of their practice of law as **Bryant & House,** and the continued association of **Mark R. Ulmer** and **S. Rosemary de Juan** with the firm. Offices are located at 212 First Southern Federal Building, P.O. Drawer 1465, Mobile, Alabama 36633. Phone 205/432-4671.

■

Jerry W. Schoel, Richard F. Ogle and **Lee R. Benton** announce the formation of a partnership under the firm name of **Schoel, Ogle and Benton,** and **Douglas J. Centeno** has become associated with the firm, with offices at Third Floor Watts Building, 2008 Third Avenue North, Birmingham, Alabama 35203. Phone 205/324-4893.

Legislative Wrap-up

by Robert L. McCurley, Jr.

Lawyers and the legal profession were under heavy attack during the 1986 Regular Session that adjourned April 1986.

A coalition of 54 medical and business groups sought changes in Alabama's civil damage laws by pushing for passage of a package of "tort reform" and "medical malpractice" bills. It is unlikely major revisions will become law this year, but it appears this is only the beginning of "tort reform."

Presently, the House of Representatives has 11 lawyers; if the trend continues there will be even less attorneys in the legislature after the election primary June 3, 1986, and general election November 4, 1986.

Although 800 bills were introduced in the House and 600 in the Senate, relatively few bills of statewide concern will become law. Four bills were prepared by the Alabama Law Institute.

Administrative Procedure Amendments—The Administrative Procedures Act amendments (H. 316, sponsor: Representative Jim Campbell) represent a "clean-up" bill to the 1981 Act effective since October 1, 1983. This bill clarifies existing law and represents 26 changes sought by 11 agencies enabling them to better comply with the Administrative Procedure Act.

Uniform Transfers to Minors—(S. 514, sponsor: Senators Ted Little and Ryan deGraffenried; H. 539, sponsor: Representative Michael Onderdonk) This bill expands the present Uniform Gifts to Minors Act, currently allowing gifts to minors of cash, stock and insurance proceeds, to include gifts of real and personal property. (See January 1986, *The Alabama Lawyer.*)

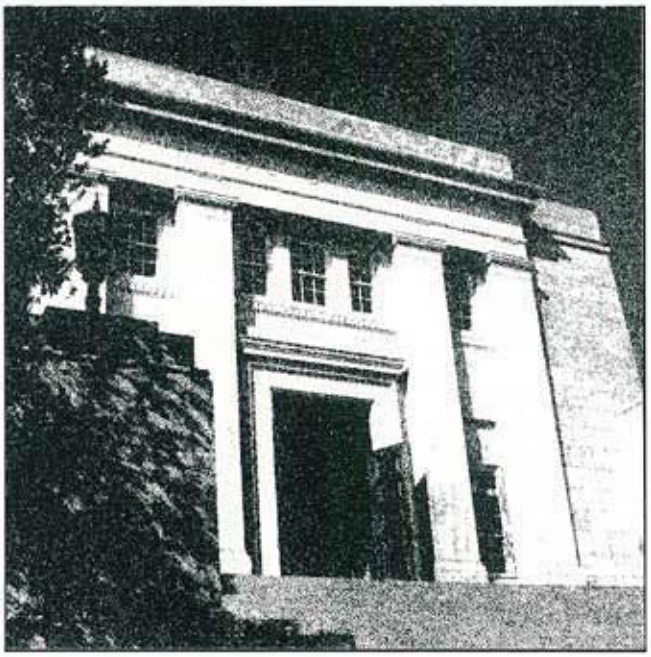
Redemption of Real Property—(S. 438, sponsor: Senator Frank Ellis; H. 493, sponsor: Representative Jim Campbell) The present law can be deciphered only by reading the statutes, *Ala. Code* § 6-5-230 through 6-5-243, and cases interpreting them. This revision clarifies the order and priority of redemption and allowable charges, and provides that commercial ventures may be foreclosed through a judicial foreclosure and thereby not be subject to the one-year redemption period. (See January 1986, *The Alabama Lawyer.*)

Registration of Foreign Judgments—(S. 429, sponsor: Senator Steve Cooley; H. 494, sponsor: Representative Jim Campbell) Thirty states have adopted the "Uniform Enforcement of Foreign Judgments Act," including our neighbors, Tennessee, Mississippi and Florida. This bill permits the filing of a foreign judgment with the circuit court. Thirty days after notice, the judgment is enforceable as any other Alabama judgment.

The board of bar commissioners approved and presented to the legislature a bill increasing the size of the board. This bill gives one additional commissioner for every 300 attorneys in any circuit. It further provides that election of the state bar president will be by mail rather than by popular vote of those in attendance at the Annual Bar Meeting. (H. 742, sponsor: Representative Jim Campbell)

The appellate court system asked the Legislature to approve a bond issue to build a new judicial building. This facility will be on the town side of the Capitol and house the Alabama Supreme Court, Courts of Civil and Criminal Appeals, the law library and the Administrative Office of Courts. ■

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.



Recent Decisions

by John M. Milling, Jr., and Rick E. Harris

Recent Decisions of the Alabama Court of Criminal Appeals

Written expert findings inadmissible and may not be used to impeach live expert testimony

Crosslin v. State, 8 Div. 245—Crosslin was convicted twice of capital murder, despite a defense of insanity. He had been examined at Bryce Hospital shortly after his initial arrest, and a "lunacy commission" subsequently found him capable of standing trial and understanding right from wrong at the time of the offense.

During his second trial, a defense expert testified the defendant was psychotic and suffering from post traumatic stress syndrome related to his service in Vietnam. The lunacy commission report was never introduced, nor did any of the psychiatric experts who found the defendant to be sane testify.

On cross-examination of the defense expert, the district attorney repeatedly attempted to impeach him, using the written findings of the lunacy commission. During summation, the district attorney argued that the defendant was found to be sane when examined at Bryce.

This was improper conduct by the prosecutor requiring a third trial because questions may not assume facts not in evidence. The written findings of the lunacy commission were not in evidence, nor could they have been placed in evidence; they were hearsay. The prosecution was not permitted to prove by way of impeachment what it could not prove directly, that is, the contents of the written expert report.

Since the contents of the report were not in evidence, it also was improper for the prosecution to argue those facts in closing argument.

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . Rule 60(b)(5) "prior judgment" requirement explained

Ex parte: Southern Roof Deck Applicators, Inc. (In re: Sho-Me Motor Lodges, Inc. of Alabama v. Jehle-Slauson Construction Co.), 20 ABR 1253 (February 7, 1986)—Sho-Me, a motel owner, sued Jehle-Slauson, the general contractor, for breach of contract alleging that Southern Roof, the subcontractor, improperly applied sheetrock and damaged its motel. Jehle-Slauson filed a third-party complaint against Southern Roof claiming indemnity if it were determined to have breached its contract with Sho-Me because of work actually performed by Southern Roof. Both Jehle-Slauson and Sho-me filed motions for summary judgment, and both motions were eventually granted by separate orders *on the same day.* Sho-Me appealed and the supreme court reversed the summary judgment in favor of Jehle-Slauson and dismissed the appeal as to Southern Roof for lack of standing to appeal.

Subsequently, Jehle-Slauson filed a Rule 60(b)(5) motion to set aside the summary judgment in favor of Southern Roof, and the trial court granted the motion. Southern Roof filed a petition for *writ of mandamus* and alleged that since both summary judgments were entered on the same day, the judgments were entered contemporaneously and neither judgment can be characterized as "prior" to the other within the purview of Rule 60(b)(5).

Rule 60(b)(5) provides that the court may relieve a party from final judgment where "a prior judgment upon

which it is based has been reversed or otherwise vacated. . . ." In an apparent case of first impression in Alabama, the supreme court disagreed quoting from a Fourth Circuit Court of Appeals case. The supreme court noted that " 'prior' in Rule 60(b)(5) refers not only to prior in time but also to prior as a matter of legal significance."

The summary judgment in favor of Jehle-Slauson rendered summary judgment in favor of Southern Roof appropriate since, at that point, there was no longer an action with respect to which Jehle-Slauson could seek indemnity. Reversal of the grant of summary judgment in favor of Jehle-Slauson is legally significant to the summary judgment in favor of Southern Roof, and the trial court did not abuse its discretion in granting the motion.

Executors and administrators. . . sections 26-2-22 and 26-2-23 are not in conflict

Smith v. Tribble, 20 ABR 1013 (January 24, 1986)—Bama Smith died as a result of an accident and left a will appointing her parents, the Smiths, executors of her estate and also appointed them as guardians of the person and property of her seven-year-old child, Daniel. The Smiths petitioned to have the will admitted to probate after their appointment as testamentary executors. Daniel, by and through his father, Ronald Tribble, opposed the petition and asked the court to appoint the father administrator *ad litem* to pursue the testatrix's wrongful death claim. The testatrix and Ronald Tribble were divorced at the time of her death, and the father had been awarded custody of their child.

The trial court issued letters testamentary appointing the Smiths executors under the will pursuant to §26-2-23, *Ala. Code* 1975, but appointed the father guardian of the estate of the minor son pursuant to §26-2-22, *Ala. Code* 1975. The trial court held that the father was entitled to the preference under §26-2-22 since he had custody of the minor and these two sections were in conflict. The supreme court disagreed.

The supreme court stated that §26-2-23 authorizes a testator-parent to appoint whomever he or she chooses as the guardian of the estate of a minor child. Section 26-2-22 applies in those instances when no guardian is mentioned in the will or when the deceased dies intestate. Therefore, the father is entitled to retain custody of his son but the estate of the child, including any sums received from his mother's estate, is to be maintained and supervised by his grandparents, the Smiths.

Executors and administrators. . . circuit court has jurisdiction to hear will contest until probate court renders final judgment admitting will to probate

Steele v. Sullivan, 20 ABR 1231 (February 7, 1986)—Sullivan filed a petition with the probate court to probate a will. A hearing was subsequently held, and the petitioner called witnesses to prove the will.

While testimony was being reduced to writing and a written order admitting the will to probate was being prepared, the judge received a motion to transfer the contest to circuit court together with a proposed order transferring the contest. The probate judge signed the proposed order transferring the contest before signing an order admitting the will to probate. The petitioner filed a motion in circuit court to dismiss the contest based upon §43-8-190, *Ala. Code* 1975. This section provides: "A will, before the probate thereof, may be contested by any person. . . ." The petitioner argued that since the probate of the will had begun, the circuit court lacked jurisdiction to hear the contest. The circuit court agreed and dismissed the contest. The supreme court disagreed and reversed.

The supreme court reviewed the Alabama case law in an attempt to determine when the probate of a will occurs insofar as §43-8-190 is concerned. The supreme court concluded that the term "probate" includes not only the evidence presented to the court but also the judicial determination by the court on that evidence that the instrument is what it purports to be. The fact the probate judge testified that the will had been proven and he intended to enter an order admitting it to probate is not sufficient to prevent a contest. Therefore, a will contest is timely until there is a final judgment admitting the will to probate.

Insurance. . . a wholly-owned subsidiary of a named insured who is also insured

does not effect a severance of interests to exclude coverage under the completed operations exclusion

American Cast Iron Pipe Co. v. Commerce and Industry Insurance Co., 20 ABR 751 (December 20, 1985)—American Cast Iron Pipe Company (ACIPCo) was insured by Commerce and Industry (C&I) under a general liability policy. American Valve, a totally-owned subsidiary of ACIPCo, also was an insured.

American Valve's employee was injured on American Valve's property as a result of a malfunctioning conveyor system manufactured by ACIPCo. The employee sued ACIPCo and C&I denied coverage based upon the "completed operations hazards" exclusion which excludes coverage for injury which occurs after operations have been completed *and which occurs away from the premises owned by the insured.* C&I relied on the severability clause and maintained that since ACIPCo and American Valve were separate corporations, the injury occurred "away from the premises owned by. . . the named insured." The supreme court disagreed.

The supreme court reasoned the severability clause was intended to broaden or extend coverage rather than limit it. Although American Valve is a separate corporation, ACIPCo owns 100 percent of its stock and has the ultimate voting authority and control. In Alabama, shareholders are the equitable owners of the corporate assets and, accordingly, ACIPCo's purchase of this policy naming its subsidiary as an insured does not effect a severance of the insured's interest. The premises upon which the accident happened were the premises of ACIPCo, and so the exclusion for "completed operations hazard" does not apply.

Torts. . . defamation. . . section 13A-11-161 conditional privilege statute construed

Wilson v. Birmingham Post Company, 20 ABR 967 (January 17, 1986)—Wilson brought a defamation action against the *Birmingham Post* and its reporters because of an article which reported statements concerning him made by two Cuban refugees to the Birmingham police department during police questioning. The trial court determined that the article was conditionally privileged be-

cause of §13A-11-161, *Ala. Code* 1975, and granted summary judgments in favor of the defendants. The supreme court affirmed.

Section 13A-11-161 provides that "the publication of a fair and impartial report. . .of any charge of crime made to any. . .public body or officer. . .shall be [conditionally] privileged. . . ." The supreme court noted that although this statute had not been construed by this court, it was merely a codification of the common law as reflected in *Restatement (Second) of Torts*, §611 (1977).

The supreme court stated the policy behind the privilege is that the public has a strong interest in receiving information in order to "monitor the conduct of its government" and its personnel, such as law enforcement officers.

The supreme court found that since the news report at issue was a fair and accurate report of statements made to the police in the course of an investigation, the report was, therefore, conditionally privileged under §13A-11-161 unless it was proved the report was published with actual malice.

Venue. . .

agent's physical presence not necessary to find that a corporation is doing business

Ex parte: Reliance Insurance Co. (In re: A.J. Morris v. Reliance Insurance Co.), 20 ABR 1072 (January 31, 1986)—Reliance filed a petition for *writ of mandamus* to require the trial court to transfer the case from Lawrence County to Jefferson or Randolph County.

Reliance wrote a payment and performance bond for a contractor who performed work in Randolph County. Reliance and the contractor-principal were sued on the bond in Lawrence County.

Reliance is a foreign corporation qualified to do business in Alabama, and it argued venue was not proper in Lawrence County because Reliance was not doing business by agent in Lawrence County when suit was filed. (Article XII, §232, Ala. Constitution 1901)

Respondent maintained §232 does not require the physical presence of an agent in the county where suit is brought. In other words, a foreign corporation may be doing business in a county even though there was no agent in the county. The supreme court agreed with the respondent.

The supreme court stated a foreign corporation may be doing business in a county within the meaning of a venue statute even though not present by agents and notwithstanding that such business may be entirely interstate in character. Furthermore, the term "agent" is expressly mentioned *only with respect to service of process.* Here, Reliance had written bonds for other principals who performed work in Lawrence County, and this was more than minimally sufficient to enable the trial court to find that Reliance was doing business in Lawrence County.

Recent Decisions of the Supreme Court of Alabama—Criminal

Failure to comply with rule 39(k) always fatal to the further appeal of a "no opinion" affirmance

Ex Parte: Albert Grear, 20 ABR 651 (December 13, 1985) — Rule 39(k) of the Alabama Rules of Appellate Procedure provides that review of a petition for certiorari by the Alabama Supreme Court ordinarily will be confined to the facts stated in the opinion of the intermediate appellate court. If a petitioner is dissatisfied with the statement of facts in that opinion, he *must* file a request for rehearing specifically asking the court to adopt a different statement of facts. If the intermediate appellate court simply affirms the trial court without an opinion, then the supreme court will have no facts upon which to review a certiorari petition, and the petition will be automatically denied. This was Grear's fate.

While the court merely reiterated this long-standing rule in this opinion, recent ABRs are full of summary affirmances in criminal cases in which *Grear* is the only cited authority. Apparently, many attorneys remain unaware of the consequences of ignoring Rule 39(k). This could result in tragic and disastrous events.

The Court of Criminal Appeals is, in a word, overburdened. It cannot possibly issue a written opinion in every case it is required to handle and, therefore, frequently resorts to issuing "Affirmed—No Opinion" decisions. When this happens, it is mandatory for appellate counsel wishing to further appeal to file a request for rehearing accompanied by a Rule 39(k) motion. Failure to do so will be fatal to a later petition for writ of certiorari.

Any conversation with a suspect which might lead to incriminating statements is an interrogation . . .

evidence of affirmative waiver of *Miranda* rights required before incriminating statement may be placed in evidence

Ex Parte: Coy Patrick Crowe, 20 ABR 667 (December 13, 1985)—Crowe was convicted of murdering a deputy sheriff. Evidence was introduced at trial of a conversation occurring between an FBI agent and the defendant while the defendant was being transported from the scene of the arrest to headquarters in Nashville, Tennessee.

During the drive downtown, the defendant asked the agent whether he would be returned to Alabama. The agent indicated that he probably would, and the defendant replied he was afraid to return to the state. The agent said,

"What about that deputy you wasted there?", and the defendant responded, "I can't bring him back or do anything about that now," hung his head in remorse and said he expected to get life in connection with the killing.

Crowe's conviction was reversed on the grounds that introduction of evidence of this conversation violated the defendant's *Miranda* rights. The conversation clearly occurred while the defendant was in custody, raising the issue of whether *Miranda* was strictly observed. The conversation was also an interrogation within the meaning of *Miranda*, because it consisted of "words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." When the agent said, "What about that deputy you wasted?", he engaged in an interrogation just as if he had asked the question, "Did you kill the deputy?"

Since the defendant had been subjected to a custodial interrogation, his statements to the FBI agent were not admissible at his trial unless the state proved he had waived his *Miranda* rights. The fact that the defendant initiated the conversation was not a showing of waiver nor was the fact that the defendant ultimately made an incriminating statement.

Off-duty police officer not a private citizen when he discovers and seizes incriminating evidence . . . Fourth Amendment must be observed

Ex parte: Mary Alice Kennedy, 20 ABR 1382 (February 14, 1986)—An off-duty police officer, working as a part-time pest exterminator, was admitted to Kennedy's apartment by her landlord. There was no evidence that she consented to this admission. While there, the police officer noticed what appeared to be three marijuana plants. He pulled a leaf from one of the plants and took it to the police laboratory for analysis. The leaf was marijuana.

The issue for review was whether the off-duty officer was acting in his capacity as a law enforcement officer or as a private citizen when he removed the leaf from Kennedy's apartment. As a police officer, his actions are circumscribed by the Fourth Amendment. As a private citizen, he is not limited by warrant or probable cause requirements.

The Supreme Court held that seizing the leaf and taking it to police headquarters was the act of a law enforcement officer and not a private citizen. Since there was no warrant, probable cause or consent, evidence of the plants growing in Kennedy's apartment should have been suppressed. (Note: Perhaps the outcome of this case would have been different had the police officer not seized the marijuana leaf but instead gone to police headquarters and made out an affidavit in support of a search warrant.)

More Dison

Ex Parte: State of Alabama (Re: *Cherry v. State)*—In *Cherry v. State*, (reported in this column in January 1986) the Alabama Court of Criminal Appeals held that a uniform traffic ticket must contain: the signature of the officer; the signature of the person administering the oath to the officer; and the title, agency or capacity of the person administering the oath.

In this case, the magistrate administering the oath to the arresting officer failed to affix her title to the traffic ticket, which, according to the court of criminal appeals, rendered Cherry's conviction void. The supreme court reversed, holding a court may take judicial notice of the office or capacity of the signer of a document, even if the title does not appear on the face of the document.

Recent Decisions of the Supreme Court of the United States

What to do when a client wants to commit perjury

Nix v. Whiteside, 54 U.S.L.W. 4194 (February 26, 1986)—The defendant was convicted of second degree murder despite a plea of self-defense. While preparing for trial, the defendant had consistently told his lawyer that he had not actually seen a gun in the victim's hand. A week before trial, he told his lawyer, for the first time, that he had seen something metallic in the victim's hand. When questioned further by the lawyer, the de-

fendant said he needed to testify he had seen a gun in the victim's hand to buttress his self-defense case.

At that point, his lawyer told him: he could not allow the defendant to testify falsely; if the defendant tried to testify falsely it would be the lawyer's duty to inform the judge of that fact; the defense lawyer would probably be allowed to impeach the false testimony if the defendant attempted to give it; and the lawyer would seek to withdraw from the case if the client insisted on the new version of the facts.

At trial, the defendant stuck to his original story—that he had not seen a gun—and was convicted. The conviction was affirmed on appeal, and he filed a federal petition for writ of *habeas corpus* which eventually found its way to the supreme court.

The issue for review was whether the defense lawyer provided ineffective assistance of counsel when he threatened his client with exposure if the client attempted to commit perjury. In a rare unanimous decision (the opinion was not unanimous) the court held that the defense lawyer's conduct did not violate the Sixth Amendment. Defendants do not have a constitutional right to have their lawyers assist them in committing perjury, or even to have their lawyers remain silent in the face of perjury. This leaves unresolved whether it was necessary, legally ethical or morally ethical for the lawyer to tell his client he would probably testify against him if he tried to change his story. It also leaves open the more common and difficult problem facing the lawyer who believes a client intends to commit perjury but whose client does not admit the intended testimony is false.

Co-conspirators need not testify to become witnesses

U.S. v. Inadi, 54 U.S.L.W. 4258 (March 10, 1986)—The introduction in a criminal trial of out-of-court statements by witnesses must pass two hurdles: the hearsay evidentiary rules of the court trying the case and the Sixth Amendment, guaranteeing every accused the right to confront the witnesses against him.

In this federal prosecution, taped statements made by unindicted co-conspirators were played to the jury. There was no showing made that these witnesses were not available for trial. The Supreme Court held that this violated neither the Federal Rules of Evidence nor the Confrontation Clause. This was a significant reversal in direction from the court's holding in *Ohio v. Roberts,* 448 U.S. 56 (1980).

According to *Roberts,* the Confrontation Clause requires a showing that a witness' live testimony is unavailable before the prior sworn testimony of that witness may be introduced in a criminal trial. Now, however, a prosecutor may introduce evidence of incriminating statements made by absent witnesses and need make no efforts to produce those witnesses for cross-examination by the defendant, as long as those witnesses claim to be co-conspirators in the case.

Deceptive police practices . . . lawyer gullibility no defense

Moran v. Burbine, 54 U.S.L.W. 4265 (March 10, 1986) — The defendant was convicted of murder after waiving his *Miranda* rights and making a confession to police. Prior to the confession, his attorney telephoned the police station and was assured the defendant would not be questioned until the following morning. In fact, the defendant was interrogated that very evening, when he made incriminating statements.

The Supreme Court found it did not violate the constitution for the police to deceive the defense lawyer in this fashion. This is a direct message from the supreme court to all criminal defense lawyers. If a client is arrested, go directly to jail and demand to see the client immediately. Make it clear the defendant waives no rights whatsoever and interrogation must cease. Do not rest until the client has been seen and instructed to answer no questions by the police without his or her attorney's presence. Do not believe anything the police report about the progress of the client's interrogation. The client may be penalized for his or her attorney's gullibility. ■

Disciplinary Report

Disbarment

• Dothan lawyer **Harold E. Hayden** was ordered disbarred by the Supreme Court of Alabama, effective March 4, 1986, based upon October 4, 1985, findings of the Disciplinary Board of the Alabama State Bar. Hayden was found guilty of misappropriating funds belonging to a client, issuing a worthless negotiable instrument to the client, forging the signature of a notary public on a power of attorney from the client and, finally, lying to the Grievance Committee of the Houston County Bar Association during its investigation of the matter. (ASB 84-680)

Suspension

• Mobile lawyer **Charles J. Fleming** was suspended from the practice of law for a period of two years, effective August 22, 1984, by order of the Supreme Court of Alabama, dated February 19, 1986. The supreme court's order was entered pursuant to Fleming's guilty plea to disciplinary charges filed against him by the Grievance Committee of the Mobile Bar Association, charging him with eight cases of misappropriation of funds and one case of illegal drug possession. (ASB 84-490 & 84-501)

■

Feedback

Social Security Disability Act
Watford v. Heckler

"Feedback" in the March 1986 issue of *Alabama Lawyer* discusses the November 1985 article entitled "Recent Developments Concerning Eligibility for Social Security Disability." Although Jenny L. Smith provides useful information that was not present in the November article, she makes one very significant error.

Ms. Smith states, "No attorney may be awarded an amount [of attorney's fees] in excess of twenty-five % of the claimant's past-due benefits. 42 U.S.C. §406(b) Therefore, the question becomes whether the claimant pays the attorney's fee from his withheld benefits or whether the government pays the fee pursuant to EAJA." Although the Social Security Administration will *generally* not approve a fee petition for more than 25% of a claimant's withheld benefits, a court has no such constraints. In *Watford v. Heckler,* 765 F.2d 1562 (11th Cir. 1985), the Eleventh Circuit expressly held that there was *no* 25% ceiling fees awarded pursuant to EAJA. This holding in *Watford* is particularly significant in certain cessation cases where the amount of back benefits is small. The court explained that the 25% limit could "thwart the very purpose of the EAJA—to eliminate economic deterrents to challenging unjustified government action and to correct inequities arising from the great disparity in resources between the government and private litigants."

Lawrence F. Gardella

A new feature of the Alabama State Bar Annual Meeting!

LITIGATION SECTION MEETING

Thursday, July 17, 1986 10 a.m.—noon

Wynfrey Hotel, Riverchase Galleria, Birmingham

All bar members are urged to attend.

A CLE program and election of officers are on the agenda for this first meeting of the Alabama State Bar's Litigation Section. Approval of the section by the board is expected this month.

You do not have to be a member to attend the meeting; however, more than 100 Alabama lawyers have joined and more are eagerly sought. Our goals are to:

(1) provide a forum where all trial attorneys may meet and discuss common problems;

(2) undertake an extensive educational program to improve the competency of the trial bar; and

(3) improve the efficiency, uniformity and economy of litigation and work to curb abuses of the judicial process.

Annual dues are $15. All lawyers interested in improving their skills as litigators and advocates are urged to join. Please fill out the application below and send it with your check for $15 payable to the Alabama State Bar Litigation Section, c/o Charles M. Crook, Treasurer, P.O. Box 671, Montgomery, Alabama 36101.

Membership Application
LITIGATION SECTION/ALABAMA STATE BAR

Name: _____

Business Address: _____

_____

_____

Business Telephone: _____

Committee Preference: (choose one)

☐ Membership ☐ Newsletter

☐ CLE ☐ Annual meeting

☐ Law schools liaison ☐ Finance

ALABAMA STATE BAR
LITIGATION
SECTION

Opinions of the General Counsel

by William H. Morrow, Jr.

QUESTION:

"If, after a law firm undertakes employment in contemplated or pending litigation, it becomes obvious one member ought to be called as a witness on behalf of the client, but at the time of the trial this member has withdrawn from the firm and is no longer associated therewith, are the remaining members ethically precluded from conducting the trial?"

ANSWER:

The attorney who has withdrawn from the firm and will testify cannot try the case, but remaining members are not precluded from the trial of the case.

Two formal and several informal requests for opinions posed the foregoing questions.

DISCUSSION:

Ethical Consideration 5-9 provides:

> "Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

Ethical Consideration 5-10 in part provides:

> "Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations."

* * *

Disciplinary Rule 5-102(A) provides:

> "(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

Section (7) under "Definitions" provides:

> "Unless the context otherwise requires, wherever in these rules the conduct of a lawyer is prohibited, all lawyers associated with him are also prohibited."

Canon 19 of the old Canons of Professional Ethics of the American Bar Association provided:

> "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

We arrive at the conclusions expressed in the answer hereinabove for at least two reasons.

First, there is no rule of law or evidence disqualifying an attorney as a witness on behalf of his client because the attorney is conducting the trial of the case. *McElroy's Alabama Evidence,* third edition, contains the following statement, "A counsel in the case being tried is not disqualified, on that account, to be a witness," citing *Quarels v. Waldron,* 20 Ala. 217 (1852), *Morrow v. Parkman,* 14 Ala. 769 (1848) and *McGehee v. Hansell,* 13 Ala. 17 (1948). Any disqualification of an attorney to act in the dual rules of advocate and witness is found only in the *Code of Professional Responsibility of the Alabama State Bar.*

Numerous opinions of courts eluded the fact that an attorney trying a case for a client is not incompetent as a witness on behalf of his client. In the case of *Wolk v. Wolk,* 333 N.Y. Supp. 2d 942 (1972) the court observed:

* * *

> "A trial counsel testifying on behalf of his own client is a competent witness. He is not disqualified as a witness by reason of the fact that he is the trial attorney."

In the case of Bennett v. Commonwealth, 234 Ky. 333, 28 S.W. 2d 24 (1930) the court stated:

> "As to his testifying in the case, it may be said in general that, in the absence of a disqualifying interest, an attorney has always been regarded as a competent witness for his client."

See also *People v. Guerrero,* 47 C.A. 3rd 441, 120 Cal. Rptr. 732 (1975), *Sheldon Electric Co., Inc. v. Blackhawk and Plumbing Co., Inc.,* 423 F. Supp. 486 (1976).

Second, although DR 5-102(A) speaks of the withdrawal of "his firm" when a lawyer must testify on behalf of his client, some courts in considering motions requiring withdrawal have refused to require the withdrawal of an entire firm because one member of the firm ought to testify on behalf of his client. In refusing to disqualify an entire firm because one member ought to testify on behalf of the firm's client, the court in *Greenbaum—Mountain Mortgage Company v. Pioneer National Title Insurance Company,* 421 F. Supp. 1348 (1976) stated:

Opinions of the General Counsel

* * *

"Defendants point to the literal reading of DR 5-102 and ask this court to disqualify Mr. Robins and his entire law firm. Rather than follow this suggestion, we believe it better to explore the rationale of the disciplinary rule and apply the rule in a manner which would serve the interests of justice.

In accepting this approach, we are buttressed by the position of the Committee of Professional Ethics of the American Bar Association. In their informal opinion No. 339 (November 16, 1974) the Committee pointed out that DR 5-101(B) and DR 6-102(A) are not per se rules which require a literal reading, but that their application necessarily depends 'upon the attending facts' in each case. The Connecticut Bar Association has taken a similar view of Canon 5. In its amicus brief in the *International Electronics* case, *supra*, (527 F. 2d 1288), the Bar Association commented:

> It behooves this court, therefore, while mindful of the existing *Code*, to examine afresh the problems sought to be met by that *Code*, to weigh for itself what those problems are, how real in the practical world are in fact, and whether a mechanical and didactic application of the *Code* to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits.

* * *

In fairness to all parties, and to the judicial system, we believe that in this case the trial will not be tainted by allowing Mr. Robins' firm, rather than Mr. Robins himself, to conduct the future course of this litigation. The rationale behind Canon 5, as applied to the facts of this litigation, do not persuade the Court that justice and common sense require disqualification of the entire firm." (parenthetical citation added)

* * *

In view of the language of Section (7) under "Definitions," we adhere to our former opinions holding that if one member of a law firm is prohibited from conducting the trial of a case, all lawyers associated with him are also prohibited. We merely cite the case of *Greenbaum—Mountain Mortgage Company v. Pioneer National Title Insurance Company, supra*, to indicate that some courts refused to give a strictly literal interpretation to a Disciplinary Rule such as DR 5-102(A).

In conclusion, we believe that the fact that a former member or associate of a firm ought to be called as a witness on behalf of the firm's client does not prevent the remaining members or associates of the firm from conducting the trial of the case. We express no opinion as to the wisdom of the remaining members or associates of the firm conducting the trial of the case. This poses a question of trial tactics rather than ethics. ■

ALABAMA BAR INSTITUTE FOR CONTINUING LEGAL EDUCATION

25th ANNUAL TAX INSTITUTE

June 5, 6, 7, 1986

This institute will bring together a nationally-known faculty of attorneys and professors who will address the following topics:

Tax Considerations in Structuring Real Estate Transactions - Robert M. Fink, Troutman, Sanders, Lockerman & Ashmore, Atlanta, Georgia.

Recent Developments in Alabama Taxation - Robert Walthall, Bradley, Arant, Rose & White, Birmingham, Alabama.

Pension Law for the Non-Pension Lawyer: Income Tax Consequences of Pension Distributions - Laurie L. Malman, Professor, New York University School of Law.

Estate Planning - C. Douglas Miller, Professor, University of Florida, School of Law.

Recent Developments and Current Legislation in Taxation - Dr. Joseph E. Lane, Jr., Professor Emeritus University of Alabama School of Accountancy.

Approved for 12.3 Alabama and 10.25 Mississippi MCLE credit hours. CLE credit applied for in Florida and Georgia.

This institute will be held at the Marriott's Grand Hotel, Point Clear, Alabama.

For more information contact the Alabama Bar Institute for Continuing Legal Education, P.O. Box CL, University, AL 35486, (205) 348-6230.

NOTICE

The Alabama Supreme Court has before it for its consideration a proposed Temporary Rule of Criminal Procedure, styled "Rule 20, Post Conviction Remedies." This proposal is a greatly modified version of the rule originally recommended to the court in 1977 as "Rule 32, Post Conviction Remedies," by the court's Advisory Committee on Rules of Criminal Procedure.

This proposed Temporary Rule 20 is being published in the Southern Reporter, Second Series, Advance Sheets, and the court, by order dated February 18, 1986, has given all interested persons until May 30, 1986, to submit to the clerk of the supreme court any comments or suggestions regarding that proposed rule.

The court's February 18 order and the proposed rule were scheduled for publication in the advance sheets dated March 6, March 13 and March 20, 1986.

1986 Midyear Meeting

1 *Alabama State Bar Board of Commissioners meets Wednesday a.m.*

2 *Commissioner Huckaby reports on bar commission reapportionment legislation.*

3 *Gubernatorial forum—Alabama State Bar President North opens luncheon*

4 *Lettie Lane North and Lanie Raymond admire the sculpture at Wednesday p.m.'s Shakespeare Festival cocktail supper.*

5 *Jim Sasser, Midyear Meeting chairman, relaxes with John Robertson.*

6 *Al Vreeland, LSCA board member, and Claire Black, president-elect of the Young Lawyers' Section, were among Tuscaloosa lawyers attending the Midyear Meeting and eye-opener breakfast Thursday a.m.*

7 *Cliff Heard of Montgomery introduces the program at "The Lawyer and the Medical Malpractice Crisis" forum.*

8 *Julius Michaelson, M.D., president of the Medical Association of Alabama, addresses the meeting with respect to physicians' concerns.*

9 *David Boyd of Montgomery, chairman-elect of the board of bar examiners, participates in the CLE question-and-answer session.*

10 *Lawyers' views on the medical malpractice crisis as presented by Lanny Vines . . .*

11 *Philip Gidiere . . .*

12 *Danner Frazer . . .*

13 *and Clay Alspaugh*

Continued

1986 Midyear Meeting

Continued

14 *Alabama Supreme Court Chief Justice Torbert addresses Midyear Meeting Thursday luncheon on status of new judicial building*

15 *President North meets with attorney general candidates, left to right, Evans, Wallis, Siegelman, North and Sorrells*

16 *President North adjourns Montgomery portion of Midyear Meeting following attorney generals' forum*

18 *Charles H.B. Vaucrosson (top center), who arranged the Comparative Law seminar for Alabama lawyers, at the speakers' luncheon*

17 *Brian Smedley, Q.C., discusses the Bermuda court system with those 73 in attendance at the Bermuda extension of the '86 meeting.*

19 *(left to right, background) Alton R. Brown, Luellen Jones and Liz Cassady visit with Teressa Grant and the Wor. Granville Cox, senior magistrate in Bermuda (far right foreground).*

20 *John Cooper (right) visits with Don Reynolds of Montgomery (left) and Bob Dillon of Anniston during a break of Cooper's presentation on legal aid in Bermuda.*

21 *Commissioners Joe Cassady and Gorman Jones, along with Mike Booker, L.B. Feld and Carney Dobbs, on the terrace of the Princess Hotel, overlooking Hamilton Harbor*

22 *Jenelle Marsh, assistant director of the Alabama Bar Institute for CLE, and Mrs. Jerry (Earline) Wood of Montgomery visit the Maritime Museum in Bermuda.*

23 *Archie Reeves and Edgar Stewart, two of the large contingent of Selma attorneys making the Bermuda trip, stroll on the hotel terrace during a conference break.* ■

Memorials

Ames, Mortimer Parker, Jr.—Selma
Admitted: 1956 Died: February 5, 1986

Barnett, George Elbert, Jr.—Florence
Admitted: 1951 Died: December 7, 1985

Bounds, Russell Hampton—Mobile
Admitted: 1984 Died: March 18, 1986

Conway, Timothy Michael, Jr.—Birmingham
Admitted: 1949 Died: February 20, 1986

Embry, Frank B.—Pell City
Admitted: 1913 Died: January 31, 1986

Garrett, Theodore Watrous—Grove Hill
Admitted: 1939 Died: March 11, 1986

Lusk, Marion Fearn—Guntersville
Admitted: 1918 Died: January 2, 1986

Martin, James Floyd—Dothan
Admitted: 1948 Died: January 2, 1986

Prestwood, Roger Austin—Andalusia
Admitted: 1940 Died: January 25, 1986

Raymon, Harry David—Tuskegee
Admitted: 1936 Died: February 11, 1986

Rosser, Claude Pernell, Jr.—St. Louis, Missouri
Admitted: 1978 Died: January 30, 1986

Stambaugh, George Michael—Montgomery
Admitted: 1973 Died: February 13, 1986

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 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.*

MERRILL WILMORE DOSS

Merrill W. Doss, devoted father and husband, lawyer, civic leader and worker, died September 30, 1985. Merrill was a native of Hartselle, Morgan County, Alabama, born August 6, 1914.

He graduated from the University of Alabama in 1940, then served his country in the United States Air Force, from which he retired in the mid-1960s with the rank of lieutenant colonel.

He commenced the practice of law in Hartselle in 1946, and for many years his life was synonymous with the practice of law in that city.

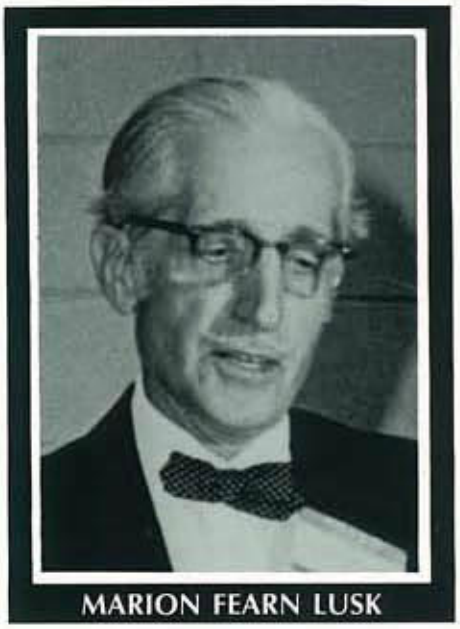
Merrill was instrumental in forming the Hartselle Industrial Board, being a charter member of the same, and served it well as its secretary for many years. He also served the board as attorney until the time of his death. He helped to organize the Hartselle Chamber of Commerce and served it as its president. He served as president of the Morgan County Bar Association. Merrill was a member of the Hartselle Rotary Club from 1946 until the time of his death and was president in the late '50s. In August 1985 he was named a Paul Harris Fellow, the highest honor bestowed upon a member of the Rotary Club. Such has been awarded to only four members of the Hartselle Rotary Club.

Merrill was a devoted member of the First United Methodist Church of Hartselle, serving it in practically every capacity, including being chairman of the board of trustees, on the administrative board and the building committee and constantly on call for any service needed by the church.

He was a devoted father and his children, Robert M. Doss, Diana D. Sparkman and Jean D. Kerr, survive, his wife having died several years ago.

He was a devoted, able and conscientious lawyer. He was constantly concerned with his clients' problems and a loyal servant to the practice of law.

The Morgan County Bar Association extends to his family its deepest sympathy in their great loss.



MARION FEARN LUSK

Marion F. Lusk of Guntersville, Alabama, died January 2, 1986, at the age of 89. He began the practice of law in 1918 with the law firm of Lusk & Lusk. He was a graduate of Marion Institute, Marion, Alabama, and attended the University of Alabama and the University of Virginia. Marion was admitted to the bar in Alabama in 1918 and New York in 1927.

Marion enjoyed the intellectual challenge of the practice of law. He was learned in the law and possessed of high ethical standards, a dynamic personality and a love for his family, his friends and his state and nation.

He loved his profession and its members. Despite the great demand for his law practice, he served his profession well. On many occasions, he was consulted by young lawyers with novel and difficult problems, who came to him for his help. He was never too busy to listen and provide constructive advice.

Marion was past president of the Marshall County Bar Association (1936-1937) and served as a member of the editorial staff of Lawyers Cooperative Publishing Company, Rochester, New York, in 1923-1925. He was mayor of the City of Guntersville, Alabama, from 1920-

1922, being the youngest mayor in the history of the town.

The Alabama State Bar has lost one of its great members, and all who knew him feel deeply our loss at his death. We extend our sympathy to Marion's wife, Anita, and sons, Richard and Louis.

JAMES FLOYD MARTIN

James Floyd Martin, a Dothan attorney, died Thursday, January 2, 1986, at his home in Dothan, following an extended illness. He is survived by his wife, two daughters and five grandchildren.

James was a lifelong resident of Dothan, and was educated in the Dothan City Schools. He graduated from Marion Institute, Marion, Alabama, and attended the University of Alabama, where he earned his undergraduate and law degrees.

During World War II, James served in the Third Army in the European Theatre. He also was a veteran of the Korean Conflict and remained in the Army National Guard and the United States Air Force Reserve until his retirement as a lieutenant colonel.

During his military service, James met and married the former Margaret Jorgensen of Salt Lake City, Utah. He returned to his home in Dothan and practiced law with his father, Harry K. Martin, a former probate judge of Houston County. In later years, after the death of his father, James formed the law firm of Martin and Brackin in which he continued to practice until the time of his death.

His civic activities include distinguished service as president of the Dothan Kiwanis Club and the Houston County Bar Association. He also was a member of Phi Alpha Delta Law Fraternity, Woodmen of the World and the Fraternal Order of Police.

James was a longtime member of the First Baptist Church, where he taught a Sunday school class still bearing his name. In addition to the practice of law, he served as a U.S. Magistrate in the Middle District of Alabama.

PRIME FRANCIS OSBORN, III

Prime Francis Osborn, III, was born in Greensboro, Alabama, July 15, 1915, the son of Prime Francis and Anne Fowlkes Osborn. He was educated in local schools and The University of Alabama, receiving a J.D. degree in 1939. As a student, he served as secretary to the registrar, manager of the Debate Team and president of the Episcopal Student Union; received a commission through the Reserve Officers Training Corps; and was a member of Omicron Delta Kappa Honorary Fraternity, Sigma Alpha Epsilon social fraternity, Jasons, Druids, Interfraternity Council, Honor Committee, Y.M.C.A. Cabinet, Philomathic Literary Society and Blackfriars.

Osborn was admitted to the Alabama State Bar in 1939, served as assistant attorney general of Alabama from 1939 to 1941; served in the United States Armed Forces from 1941 to 1946 from second lieutenant to lieutenant colonel of Artillery and was decorated with the Bronze Star Medal; served as attorney for the Gulf, Mobile and Ohio Railroad from 1946 to 1951; General Solicitor of the Louisville and Nashville Railroad from 1951 to 1957; vice president, general counsel and director of the Atlantic Coast Line Railroad from 1957 to 1967; and vice president, law, and director of the Seaboard Coast Line Railroad from 1967 to 1969. He was admitted to practice law in Alabama, Kentucky, North Carolina and before the Interstate Commerce Commission and the Supreme Court of the United States.

In 1969 he was named president of the Seaboard Coast Line Railroad; in 1970 was added the presidency of SCL Industries, Inc., and in 1972 the presidency of the Louisville and Nashville Railroad Co., becoming chief executive officer of the three corporations. In 1978, Osborn became chairman of each, and in 1980 on the creation of the CSX Corporation, he became its chairman, serving until his retirement in 1982. At the time of his retirement, the CSX Corporation was the nation's largest rail system in revenues ($5.4 billion) and assets ($8.1 billion).

Osborn engaged in many civic, social and religious activities, holding many volunteer positions of national prominence, particularly in the Episcopal Church and the Boy Scouts of America. He received many honors and awards, including being named Man of the Year in Duval County, Florida; recipient of Freedom Foundation's George Washington Medal of Honor; the Boy Scouts of American Silver Buffalo; the Salvation Army's William Booth Award; induction into the Alabama Academy of Honor; and, by this University, an Honorary Doctorate of Law and induction into the Alabama Business Hall of Fame.

He married his college sweetheart, Grace Hambrick, a graduate of the 1939 Class in the School of Home Economics, and they have a son, U.S. Navy Commander Prime Francis Osborn, IV, and a daughter, Mary Anne Osborn, a candidate for Holy Orders at the Episcopal Divinity School in Cambridge.

CLAUDE PERNELL ROSSER, JR.

Claude P. Rosser, Jr., died in St. Louis, Missouri, January 30, 1986, at age 36.

Claude was born January 17, 1950, the son of Mary Lacy Rosser and Claude P. Rosser, Sr. He received his preparatory education in Sanford, North Carolina, later attending the University of North Carolina at Chapel Hill. Claude attended Cumberland School of Law from which he received his J.D. degree in 1978. Claude was an accomplished and dedicated student. He was the research editor of the *Law Review*, an associate justice for the Moot Court Board and a finalist in the Jessup International Moot Court Competition in Washington, D.C. Claude was a member of Phi Delta Phi and Who's Who Among Students in

American Colleges (1977-78) and designated Outstanding Young Man of America in 1980.

After law school Claude clerked for Alabama Supreme Court Justice Reneau Almon, later practicing with the law firm of Prestwood and Rosser in Montgomery, Alabama. At the time of his death he had joined the law firm of Weier, Sherby, Hockensmith & Schoene in St. Louis.

Claude was secretary-treasurer of the Administrative Law Section of the Alabama State Bar (1979-1984), chairman of the Committee on Sections of the Alabama State Bar (1984), co-chairman of the CLE Committee of the Montgomery County Bar (1984) and director of the Cumberland Law Review Foundation (1984). In 1985, he received the pro bono award from the Montgomery County Bar for most service from a small law firm.

In addition to Claude's accomplishments, he was a unique individual, a genuinely wonderful human being possessing unlimited devotion to his wife, children and friends, as well as an unbridled enthusiasm for life. Those who knew him cannot help but remember with fondness his seemingly endless energy, whether channeled toward pulling for his Tar Heels and his Yankees, pleading his client's case or showing the love he had for Randye, Blake and Courtney. Claude truly never met an enemy or left a person untouched by his character, his kindness and his intense willingness to share his time and his talents.

Claude is survived by his wife, Randye Rosser, a member of the Alabama State Bar, and their two children, Blake and Courtney Rosser. A memorial fund has been established at Cumberland School of Law in his memory.

NOBLE JEFFERSON RUSSELL

Noble J. Russell, a member and former president of the Morgan County Bar Association, died September 12, 1985, in Decatur, Alabama.

His practice of law, lasting 50 years, was exemplified by his integrity and his dedication to and gifted advocacy of the causes of his clients. He was greatly admired and respected as a man and lawyer by his fellow lawyers.

Russell served as an assistant attorney general for the State of Alabama from 1939 to 1943, and represented Morgan County in the State Senate from 1946 to 1950, and in the House of Representatives from 1950 to 1954 where he was chairman of the Ways and Means Committee and Administration Floor Leader. His early leadership and influence in the establishment of the Tennessee Valley Technical School which has evolved into John C. Calhoun Community College is recognized by the naming of one of the campus buildings in his honor.

Russell served his country in World War II as a Naval Intelligence Officer, participating in combat landings on islands in the Pacific Ocean.

He was a devoted and loving husband and father, married to the former Ann Tillery of Decatur, and leaving at his death two daughters, Mary Ann Banks and Elizabeth Gilchrist, and a son, Noble J. Russell, Jr. He was a Christian gentleman, faithful and loyal to his God and to his church of which he was an officer and leader for many years.

JOHN JACKSON SPARKMAN

John Jackson Sparkman became a member of the Huntsville-Madison County Bar Association in 1924 after his graduation from the University of Alabama with the degrees of Bachelor of Arts, Bachelor of Laws and Master of Arts. He enjoyed a successful solo practice before joining the partnership of Taylor, Richardson and Sparkman. Sparkman proved himself an able trial advocate and office counselor, while taking a leading role in the civic affairs of this community until 1936, when he was elected to Congress.

Sparkman served five terms in the House of Representatives, making an outstanding contribution through his service on the House Military Affairs Committee and as Majority Whip to the victory of our armed forces in World War II.

In 1946 he achieved the unique distinction of being simultaneously reelected to the House and the Senate, to fill the expired term of Senator John Bankhead. Senator Sparkman served 32 years in the Senate, longer than any other Alabamian, until his retirement in 1979. The senator achieved great prestige in the Senate, serving as chairman of both the Banking, Housing and Urban Affairs and the Foreign Affairs committees and was instrumental in the enactment of legislation broadening home ownership, championing small business and aiding agriculture.

Notwithstanding acclaim that he earned throughout this state, nation and the entire world, including nomination by the Democratic party in 1952 for the Vice Presidency of the United States, and his acknowledged intellectual brilliance and his great political success, Senator Sparkman always remained a man of the people, compassionate and caring, working timelessly in behalf of his district, state and nation.

Upon his retirement from the Senate, Sparkman renewed his membership in the bar and resumed the practice of law, in partnership with his grandson, Tazewell T. Shepard, III, and his former firm, now Bell, Richardson, Herrington, Sparkman & Shepard, P.A.

John Jackson Sparkman died November 16, 1985. ■

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Public interest law

Contrary to reports of public interest law's decline, it is flourishing, according to an unpublished survey by the Alliance for Justice, a Washington, D.C.. public interest law research organization.

Although Reagan administration budget cuts and general economic stagnation have taken their toll, says the poll, public interest legal groups have expanded both in number and attorney employees and in the issues they address and clients they serve. In 1969, only 15 nonprofit public interest law centers addressing civil rights and health and safety concerns existed, employing less than 50 lawyers. By the end of 1975, 92 centers hired nearly 600 attorneys. By the end of 1985, those figures had grown to 159 and 900, respectively.

With the increase in center activities, public financial support has compensated for the decrease in federal funding. In 1983, $105.4 million was contributed to public interest legal organizations—a sum equal to .3 percent of the more than $35.5 billion spent for private legal services that year. Overall income for public interest law from 1975 to 1983 rose 85 percent after inflation. However, since the number of groups also expanded, the average income per group increased only two percent since 1979 and actually dropped 33 percent per group after inflation since 1975.

First Amendment handbook

Speaking & Writing Truth: Community Forums on the First Amendment is an American Bar Association handbook intended for use in public education programs on constitutional guarantees of freedom of expression. The handbook is designed to coincide with the 250th anniversary of colonial printer John Peter Zenger's trial and acquittal on charges of seditious libel.

Published by the ABA's Commission on Public Understanding About the Law, the book contains six fictionalized scripts on First Amendment topics such as libel, obscenity, group libel, the selection and retention of school library books, the relationship between national security and free expression and the confidentiality of news reporters' sources. Each script is followed by a legal memorandum, a mini-course on relevant case law and the history behind each issue.

Copies are available for $4.95, plus $2 handling for multiple copies, from the ABA Order Fulfillment-468, 750 North Lake Shore Drive, Chicago, Illinois 60611.

Victims' rights book

The American Civil Liberties Union released a new volume in its handbook series, titled *The Rights of Crime Victims.* Written by two New York ACLU lawyer volunteers, the 440-page book is called the first comprehensive guide to state and federal laws aiding the victims of crime. Using a question-and-answer format and written in lay language, the book covers all important legal considerations of crime victims, from participating in trials to restitution for damages suffered during the crime.

The book is available from local ACLU chapters.

Client's perjury

What should a criminal defense lawyer do when a client intends to commit perjury? The United States Supreme Court heard argument on this issue on November 5, 1985, in the case of *Nix v. Whiteside.*

In a recent LawPoll survey, a majority of lawyers (71 percent) said a lawyer should withdraw, 17 percent said a lawyer should tell the client that any perjury will be revealed to the court, seven percent thought the lawyer should inform the court only after perjury has been committed and four percent said the lawyer should not do anything.

According to Michael Franck, chairman of the ABA Special Committee on Implementation of the Model Rules and principal author of the ABA's amicus curiae brief in *Whiteside,* the Sixth Amendment does not obligate a lawyer to assist a client in perjuring himself. According to this survey, most lawyers agree. More than three-quarters do not think Whiteside was denied effective assistance of counsel (78 percent).

Complete survey results were published in the February issue of the *ABA Journal.*

Post mortem

Do you always remember everything needing to be done immediately after a client has died? Listen to this audiocassette, and be confident you have taken the necessary initial post mortem estate planning steps.

New York City attorney Edward S. Schlesinger provides step-by-step instructions on how and when to: assist in making funeral arrangements; meet with decedent's relatives to discuss the administration of a decedent's estate; handle and secure a decedent's assets prior to probate; and take pre-probate steps to insure the orderly administration of an estate. Also provided is guidance explaining to family members the duration and costs of the estate's administration and recommending a psychotherapeutic consultation to bereaved individuals.

This 90-minute audiocassette (order number M651) is available for $15, plus $2.40 postage and handling.

To order please call 1-800-CLE-NEWS (outside of Pennsylvania). In Pennsylvania call 215/243-1650 or write to ALI-ABA at 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.

AIDS

Three critical individual rights concerning persons with Acquired Immune Deficiency Syndrome (AIDS) were examined in the February issue of the *Mental and Physical Disability Law Reporter.*

In Part II of "AIDS As a Handicapping Condition," the focus is on federal and state discrimination statutes, publicly funded entitlements and possible limits on decisionmaking that severely disabled AIDS patients may face.

Part I of the article, published in De-

cember, focused on disability related concerns regarding public health questions.

The Reporter will act as a clearinghouse for key legal developments in this emerging field of disability law to help service providers, lawmakers, the courts and the public deal with these controversial issues.

For more information concerning the AIDS controversy, please contact the *Mental and Physical Disability Law Reporter*, 1800 M Street, N.W., Washington, D.C. 20036, (202) 331-2240. ■

Etc.

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Election Results
May 2, 1986

N. Lee Cooper
1,305

Maury D. Smith
694

Ballots Mailed 3,864
Ballots Returned 2,054

MCLE News

by Mary Lyn Pike
Assistant Executive Director

Proposed MCLE rule and regulation changes adopted

March 21, the board of commissioners approved changes in the MCLE rules and regulations. Changes in the regulations went into effect immediately; the rule changes were forwarded to the Supreme Court of Alabama for its consideration. See 47 *Alabama Lawyer* 114 (1986) for details.

March Commission meeting

The MCLE Commission met March 21 in Montgomery and took the following actions:

1. Granted a waiver of the 1985 CLE requirement to a sight-impaired, retired attorney;

2. Discussed and ratified approval of two seminars, after giving the approval by mail ballot and telephone poll;

3. Approved half credit for a seminar on systematizing and automating estate planning being offered by the Mobile Bar Association;

4. Approved, with several conditions, a bankruptcy seminar offered to attorneys and savings and loan personnel by the Alabama League of Savings Institutions;

5. Declined to waive the evaluation requirement for the American Bankers Association;

6. Declined to waive the evaluation requirement for the Federation of Insurance Counsel;

7. Received the report that more than 99 percent of those subject to the 1985 CLE requirement had complied; and

8. Heard it reported that 66 attorneys were certified to the Disciplinary Commission for noncompliance with 1985 requirements. Twelve were individuals with sufficient carryover credits from 1984 who had not submitted the 1985 form. Seven were attorneys certified for noncompliance in one or more preceding years.

■

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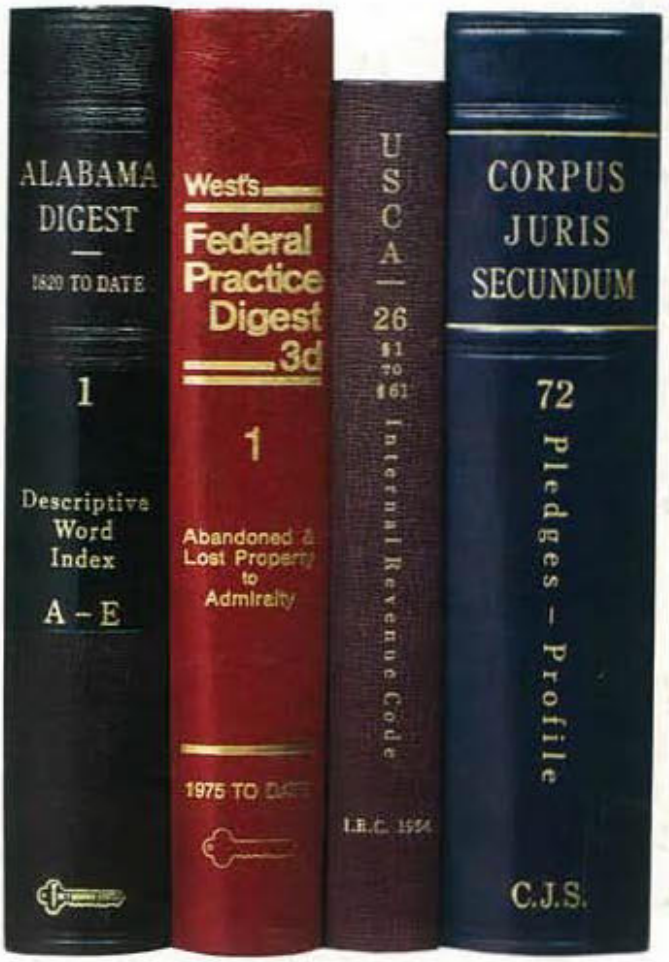

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