The Alabama Lawyer

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Alabama State Bar
President 1985-86

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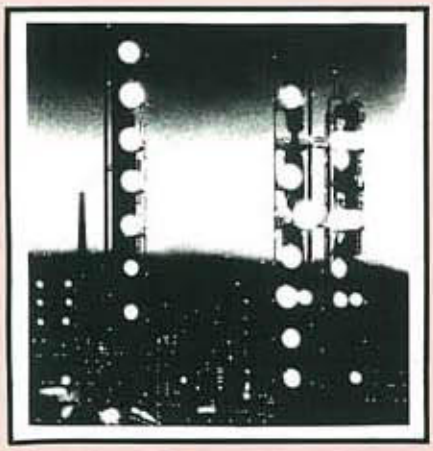
THE SEPTEMBER

On the cover

New bar President North was photographed for the cover of this issue in the board room of the Birmingham Bar Association.



Pitfalls of Preparing Deeds Conveying Oil and Gas Interests

— pg. 236

The continued growth of the oil and gas industry in this state has magnified the need for exercising great care in preparing oil and gas conveyances.

1985 Convention Highlights

— pg. 244

The 1985 Annual Meeting of the Alabama State Bar proved to be both informative and entertaining. Details in pictures inside.

1985 ISSUE IN BRIEF

The Young Judge

— pg. 260

Judge J. Russell McElroy is a jurist well-renowned in legal circles. His mettle was tested at an earlier stage of his judicial career.

IOLTA — "NOW" Provides New Interest

— pg. 264

IOLTA has proven to be a beneficial program in other states. Is it ripe for institution in Alabama?

All You Wanted to Know About IOLTA But Were Afraid to Ask

— pg. 267

Many states have instituted programs to allow accrual of interest on lawyer trust accounts. How would this program operate if initiated in Alabama?

Inside This Issue

President's Page

A Little Extra Special Something

NORTH

"I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with, or play with, or fight with, or drink with than most other varieties of mankind."

Harrison Tweed, accepting the presidency of the bar of the City of New York — May 10, 1945

It is a pleasure to write this first report to you. I love lawyers, and I love our bar. You have honored me greatly, and I pledge to you my best efforts during the coming year.

There are at least two things I want us to focus on this year. First, I want us to try to improve the public image of our profession. Second, I want us to bring to a conclusion as many as possible of the varied and important tasks your committee and task force members already have undertaken.

By improving our public image, I do not mean to attempt to make everyone like us. That is impossible, given the nature of the role we play in society, but we can make an effort to bring into sharper focus what it is we do and what an indispensable function lawyers perform in our free country. In an excellent article in a recent edition of *The National Law Journal,* Milton V. Freeman of the Washington, D.C., Bar suggests "the private lawyer's functions are essential to maintaining our kind of free society." Freeman also quotes our own Justice Black's statement that the right to the assistance of private counsel is "deemed necessary to insure fundamental rights of life and liberty." *Johnson v. Zerbst,* 304 U.S. 458, 462 (1938)

In this regard, I do not share the fear of Derek Bok, president of Harvard University, that too many of our finest minds are going into the legal profession. He suggests this migration of talent creates a drain on the sciences, the humanities and education. But what can be wrong with devoting a significant amount of the nation's wealth of human resources to the greatest system of justice the world has ever known? We lawyers are problem solvers. That is our education, and that is our experience. We creatively address the complex economic, social and political dilemmas of our nation. And we need not apologize for the fact that sometimes we are paid well. For it was the lawyers' entrepreneurial spirit that made industry protective of the environment, brought responsibility and accountability to the securities markets and to the manufacturers of products which are destructive of human life and limb. Likewise, the lawyer serves to defend against irresponsible and extremist claims. So long as we are unfettered in the conduct of our varied practices, the free market of ideas and ideals will insure a stable and prosperous society.

Rather than President Bok's alarm about too many lawyers, I fear a nation of technocrats, specialists of too narrow scope, who would subordinate individual freedom to the bureaucratic process. That will not happen to this country as long as we have a free and independent bar. This is the single most important function we perform. We are there to aid the individual and the helpless in challenging powerful and entrenched interests, particularly our government. In fact, the private lawyer was written into the United States Constitution as the defender of the people against government oppression. I remind you we are the only profession mentioned in that great manifesto of freedom.

One apprehension I do have and would like to share with you is my perception of the lawyer's diminishing role in public life. Pretermitting for the moment our lessened influence in the national government, I see an even greater danger at the local level. At the time I began my law practice, lawyers were the dominant force in both houses of our legislature. Today few lawyers sit in Alabama's House of Representatives, and there are only slightly more practicing lawyers in the Alabama Senate. Lawyers, by their education and training, are uniquely qualified to serve our state and nation in a legislative capacity, and the quality of our legislatures suffers when we are absent from the legislative halls. The only way to correct this problem is for us to encourage each member of our profession, particularly our young lawyers, to become involved in public affairs. To be sure, it can constitute a financial sacrifice, but offsetting that is the opportunity to serve your state and country.

(Continued on page 230)

Executive Director's Report

HAMNER

Red-Letter Day/Convention Critique

October 1, 1985, should be a "red-letter" day for every person admitted to the Alabama State Bar. On this date every lawyer becomes subject to Act No. 85-119, Acts of Alabama, First Special Session, 1985, approved February 5, 1985.

The act amends §40-12-49, *Code of Alabama*(1975) that provides for the purchase of an annual license to practice law. Until it was approved, most lawyers enjoyed a two-year exemption following their admission to practice. The act abolished all exemptions except for the time frame between date of admission and the first day of October thereafter. As a practical matter, those persons admitted in early spring following the February bar exam enjoy this exemption. Successful July examinees admitted in late September are exempt until October 1.

The license fee also was increased from $100 to $150. You should obtain your license from the probate judge or license commissioner in the county wherein you practice law. You can purchase the license in any county; however, since each presiding judge is furnished a list of current licensees after the October 31 deadline, you would be well advised to purchase within your circuit. Your failure to purchase a license can subject you to a charge of "practicing law without a license." Clients are done a disservice if you attempt to represent them without a license.

Those not engaged in active practice or exempt because of a public office currently held are subject to §34-3-17 and/or §34-3-18, *Code of Alabama* (1975), and their special membership fee is paid directly to the state bar within the same October 1-31 time frame. That fee is now $75 under the provisions of Act No. 85-119.

Not all probate judges send reminders of licenses due. Our office however will bill those Special Members currently on our rolls, and we will remind all formerly exempt members of their new obligations. Please consider this a bar-wide reminder statement.

We will send Special Membership cards to those remitting $75 fees and wallet-size duplicates of 1985-86 licenses to those submitting photocopies of active licenses issued locally.

I debated using part of this space to again discuss this licensing issue. However, the new act, plus the fact we had over 400 delinquents after the October 31, 1984, deadline, prompted this "reminder." October 1, 1985, should be *your* red-letter day. Call me if you have any questions regarding your membership status.

"Can we talk?" — Joan Rivers

The Huntsville Convention is history, but it left several puzzling questions. I genuinely would appreciate hearing from those who registered for the meeting as well as those who did not come to Huntsville. We constantly are trying to ensure that our meeting is interesting, fun and affordable. Certain events at this year's meeting are deserving of some thorough "Monday morning quarterbacking." I would like to hear your thoughts. Consider this:

612 lawyers registered; 458 of these preregistered, yet attendance of every event was substantially below previous figures. Only the Bench and Bar Luncheon approached earlier attendance levels.

Last year's dessert party was a sell-out; this year we not only failed to meet our guarantee by 50, but only 200 holders of some 300 tickets purchased showed up. The "Big Band" received rave notices from those who did participate.

The Space Center reception featured a super space dome movie, the best-ever food (according to those present), an interesting facility and free transportation, yet we had the smallest reception crowd since we started having heavy buffet receptions.

The alumni functions, particularly the Cumberland and Alabama luncheons, were off substantially from prior attendance figures.

All social events were subsidized from general conventions revenues. No ticket to a state bar-sponsored event covered the actual cost. Each was a true bargain.

I was surprised at the generally sparse attendance of lawyers from the area in and around Huntsville and north of Birmingham, generally. Huntsville's civic center is an ideal facility in which to have a convention.

The spouses' luncheon was rated time

(Continued on page 280)

President's Page

(From page 228)

We as lawyers have many items on our agenda which transcend narrow economic interests, and a united front on this broader agenda can help all lawyers. I here am talking about the selection and retention of judges, funding for our courts (including a new appellate judicial building), pay for judicial personnel and funding for indigent defense and legal services to the poor — all more encompassing issues affecting all segments of the bar. On these issues, the bar should speak as one. We can be a powerful force if we are together.

As stated above, the second major thrust of my efforts during the next year will be to attempt to complete some of the important tasks already being undertaken by the members of your bar. Anyone who attended our committee breakfast at the annual convention had to be impressed with the breadth and scope of your bar's activities.

Your 1985 Annual Convention was a great success. Thanks are due to Bill Griffin, president of the Huntsville-Madison County Bar Association, the Huntsville Bar Auxiliary and all the Huntsville lawyers and their wives for outstanding hospitality. In addition, Walter Byars and Reggie Hamner provided a superb program, and Bob Meadows and the Young Lawyers' Section put on a fine, well-attended CLE program. Your committees and task forces were well-represented at the Friday morning breakfast and have already organized and are off to a running start.

Friday morning Judge Val McGee, Walter Price and Mike Conaway were responsible for an excellent presentation on Lawyer Alcohol and Drug Abuse. This program was extremely informative about a delicate and emotional subject. Until recently this was a problem generally swept under the rug, but it is real and must be addressed. Under Judge McGee's leadership a non-profit foundation has been formed to provide help to lawyers with chemical dependency problems. That foundation will undoubtedly be calling on us for our financial support, and I hope the bar will respond.

Rowena Crocker of Birmingham has been chairman of a task force studying the implementation of an IOLTA (Interest on Lawyers' Trust Accounts) program in Alabama. Rowena and Reggie Hamner arranged for Pat Emmanuel, president of The Florida Bar (which has one of the country's most successful IOLTA programs), to explain the way IOLTA works. Pat spoke Friday morning in Huntsville, and he made five telling points in favor of IOLTA: Florida has raised over $7 million dollars from its IOLTA program; it does not cost your clients a penny; the money can be used for worthwhile projects; if you do not have such a program, the bankers get the money; and the individual lawyer's participation can be entirely voluntary. I hope during this year your bar commissioners will approve a voluntary IOLTA program for presentation to our supreme court.

During the Saturday morning program David Boyd of Montgomery was presented with the state bar's Award of Merit for the splendid job he did in working with Robert Potts and the board of bar examiners in devising an improved statistical way of scoring the bar examination in order to insure its fairness and uniformity.

Five retiring bar commissioners were presented with certificates of appreciation for dedicated service. They were Harry Gamble of Selma, Bruce Sherrill of Athens, Richard Hartley of Greenville, Warren Lightfoot of Birmingham and Huel Love of Talladega. Your board of bar commissioners is an extremely talented and committed group of lawyers. They give unstintingly of their time and talents, and we all owe them a great debt of gratitude.

We are continuing our efforts to repair the damage caused by Revenue Ruling 84-108. As reported in the May 1985 issue of *The Alabama Lawyer*, this ruling subjects all awards and settlements under the Alabama Wrongful Death Statute to federal income tax —a result contrary to past practice and the clear language of §104 (a) (2) of the Internal Revenue Code.

On July 31, 1985, we attended a meeting in Washington with the Commissioner of the Internal Revenue Service and his staff to discuss the unfairness of the IRS's current position and possible solutions to the problem. Senator Howell Heflin organized the meeting and acted as its moderator. The meeting also was attended by Senator Jeremiah Denton and Congressmen Tom Bevill, Sonny Callahan, Ben Erdreich, Ronnie Flippo and Richard Shelby. All these members of the Alabama congressional delegation have been active in encouraging the IRS to change its position and were most supportive at the meeting.

After a few enlightening remarks regarding the case law on wrongful death suits in Alabama, Senator Heflin allowed me to present the bar's basic position on this matter. Rob Couch and David Wooldridge of the Birmingham Bar ably outlined the technical legal basis of the state bar's position. Alex Newton and John Haley of Birmingham commented on the basic inequity of the IRS's position to Alabama wrongful death plaintiffs (particularly widows and orphans).

The commissioner agreed to keep the lines of dialogue open with the Alabama Congressional Delegation and the Alabama State Bar in an attempt to find some middle ground. Failing an administrative resolution of the problem, the congressional delegation has indicated its willingness to submit legislation addressing the issue. I will keep you informed of any developments in this area.

Let me take this opportunity to thank Walter Byars not only for the great job he did as your president, but also for involving me as president-elect in every aspect of the activities of your bar. For example, I have had the benefit of attending every meeting of your board of bar commissioners, your Committee on Governance, your Committee on Long-Range Planning and a number of other committee meetings. I also have attended meetings of the Southern Conference of Bar Presidents, the National Conference of Bar Presidents, the Midwinter and Annual Meetings of the American Bar Association, the Judicial Conference of Alabama and the

(Continued on page 233)

Bar Briefs

Fred Gray becomes president of the National Bar Association

Fred D. Gray of Tuskegee has been installed as president of the National Bar Association at its annual meeting in Chicago. At the traditional ceremony July 26, 1985, Gray assumed the leadership of this national organization, founded in 1925 by and for the Negro attorneys of America. Gray was recognized for his achievements in his profession and for his outstanding record, particularly in the field of civil rights litigation. He also was recognized for his contributions to the National Bar Association and its constituents, having served on virtually every important committee of the association.

Gray is the senior partner in the firm of Gray, Langford, Sapp, Davis and McGowen which maintains offices in both Tuskegee and Montgomery. He was one of the first two blacks to serve in the Alabama Legislature since the days of Reconstruction, and in 1972 he received the Capital Press Corps award as best orator in the Alabama House of Representatives.

Gray was the first attorney for Dr. Martin Luther King, Jr., during the early days of the civil rights movement. He successfully handled a number of landmark civil rights cases, including the cases involving the Montgomery bus boycott; the integration of the University of Alabama; the integration of Auburn University; the reapportionment of the Alabama Legislature on the basis of one-man, one-vote; the Selma-to-Montgomery civil rights march re-

sulting in federal voting rights laws and other cases of historic significance. He also was instrumental in initiating and trying a class action against the United States which eventually resulted in a settlement totaling more than $10,000,000 for rural black males injured as a result of the Tuskegee Syphilis Study.

Hamner honored recently

Two recent honors helped make the month of July special for Alabama State Bar Executive Director Reginald T. Hamner.

Hamner was elected, by the Executive Committee of the National Association of Bar Executives, to the position of delegate to the House of Delegates of the American Bar Association.

In addition, he was invited by the Board of Directors of the American Bar Foundation to become a Fellow of the Foundation. According to the official invitation,

> "Selection as a Fellow of the American Bar Foundation is recognition of a lawyer as one whose professional, public and private career has demonstrated outstanding dedication to the welfare of the community, the traditions of the profession and the maintenance and advancement of the objectives of the American Bar Association."

The Fellows of the American Bar Foundation was established 30 years ago as an organization of more than 2,000 members of the legal profession encouraging and supporting the research program of the American Bar Foundation.

The American Bar Foundation is an affiliate of the American Bar Association and conducts research upon the operation of the law and legal institutions.

Guin appointed bar examiner

Junius Foy Guin, III, has been appointed to the Alabama State Bar Board of Bar Examiners and began his four-year term in July.

Guin is a graduate of David Lipscomb College and the University of Alabama School of Law.

He currently practices with the Tuscaloosa firm of Tanner and Guin.

About Members, Among Firms

About Members

Vera Moor announces the relocation of her office to Suite One, 2824 Linden Avenue, Birmingham, Alabama 35209. Phone 870-4114.

Henry H. Caddell announces he is now engaged in the general practice of law in association with Thiry, Maples & Brunson. Offices are located at 1911 Government Street, Mobile, Alabama 36606. Phone 478-8880.

Horace V. O'Neal, Jr., announces the relocation of his office to 809 Frank Nelson Building, Birmingham, Alabama 35203. Phone 251-1870.

Patrick P. Hughes is pleased to announce the relocation of his office to Suite 408, SouthTrust Bank Building, P. O. Box 2627, Anniston, Alabama 36202. Phone 237-0428.

Jackie M. McDougal is pleased to announce his relocation to new offices for the practice of law at 1817 Third Avenue, North, Bessemer, Alabama 35020. Phone 426-3000 or 426-3163.

Among Firms

The law firm of **Lyons, Pipes and Cook** takes pleasure in announcing **Joseph J. Minus, Jr.,** has become associated with the firm and **Will G. Caffey, Jr.,** has joined the firm as counsel. Offices are located at Two North Royal Street, Mobile, Alabama 36602. Phone 432-4481.

Stone, Partin, Granade & Crosby takes pleasure in announcing **Daniel G. Blackburn** has become a member of the firm, and the name of the firm has been changed to **Stone, Partin, Granade, Crosby & Blackburn.**

William A. Jackson and **Ann Z. Arnold** are pleased to announce the formation of a partnership in the name of **Jackson & Arnold** for the general practice of law. Offices are located at Suite 508, #1 Independence Plaza, Birmingham, Alabama 35209. Phone 870-3647.

Haskell, Slaughter, Young & Lewis, P.A., takes pleasure in announcing **Sandy W. Murvin** has become associated with the firm in the practice of law. Offices are located at 800 First National — Southern Natural Building, Birmingham, Alabama 35203. Phone 251-1000.

Maynard, Cooper, Frierson & Gale, P.C., takes pleasure in announcing **Kathleen A. Collier** and **James L. Goyer, III,** formerly associates, have become members of the firm, and **James L. Priester** has joined the firm as an associate. Offices are located at Twelfth Floor Watts Building, Birmingham, Alabama 35203. Phone 252-2889.

DeMent & Wise takes pleasure in announcing **Donald E. Fazekas** has become associated with the firm in the general practice of law. Offices are located at 555 South Perry Street, Montgomery, Alabama 36104. Phone 834-8900.

The law firm of **Baxley, Beck, Dillard & Dauphin** is pleased to announce **K. Dee Hutsler** is now associated with the firm. Offices are located at 2100 16th Avenue South,

Suite 304, Birmingham, Alabama 35205.

James G. Clower and **Keith Watkins** of the firm of **Clower & Watkins,** of Troy, and **George C. Douglas, Jr.,** formerly staff attorney with Alabama Electric Cooperative, Inc., Andalusia, are pleased to announce the formation of a firm for the general practice of law under the name of **Clower, Watkins & Douglas,** with offices at 104 South Brundidge Street, P. O. Box 493, Troy, Alabama 36081. Phone 566-0424.

D. Coleman Yarbrough, formerly of Jones, Murray, Stewart & Yarbrough, P.C., and **Edward M. Patterson** are pleased to announce the formation of a partnership for the practice of law effective August 1, 1985, under the firm name **Yarbrough & Patterson,** with offices in Suite 1212, Union Bank Tower, 60 Commerce Street, Montgomery, Alabama 36104. Phone 262-6450.

The law firm of **Figures & Ludgood** is pleased to announce **Thomas H. Figures** has become a member of the firm. The name of the firm has been changed to **Figures, Ludgood & Figures,** with offices located at 2317 St. Stephens Road, Mobile, Alabama 36617. Phone 456-9922.

T. Dudley Perry and **Richard Y. Roberts** are pleased to announce the formation of their firm for the general practice of law under the name of **Perry & Roberts.** Offices are located at 111 Washington Avenue, Montgomery, Alabama 36104. Phone 262-7763.

The law firm of **Radney & Morris, P.A.,** takes pleasure in announcing **Randy S. Haynes** has joined the firm. Offices are located at Court Square, Alexander City, Alabama 35010. Phone 234-2547.

The firm of **Haygood & Benson** is pleased to announce **William A. Cleveland** has become a partner in the firm, and the firm name has been changed to **Haygood, Benson & Cleveland.** Offices remain at 120 South Ross Street, Auburn, Alabama 36830. Phone 821-3892.

President's Page

(From page 230)

11th Circuit Judicial Conference. One year is a short time to learn the ropes, and this experience Walter provided will be invaluable. In this same vein, I believe that we lose too valuable a resource not utilizing in some way the knowledge of our immediate past presidents. To this end, the board of bar commissioners has approved a change in our governance structure to permit continued service by our immediate past president on the executive committee of the board.

In Huntsville, our bar commissioners also took two other important steps regarding governance. One was to recommend an increase in the representation on the board of bar commissioners for the more populous areas of the state. The other was to recommend that your president-elect be elected by mail ballot. As I promised many of you, I favored both changes, primarily as a matter of simple equity. Gary Huckaby of Huntsville chaired this important committee, and he was most ably assisted by John Proctor of Scottsboro and the rest of the committee. Never have I seen a more effective, hardworking group of lawyers from all over the state, big city and small town lawyers alike. They, your board and Walter Byars deserve our thanks for their careful, reflective approach to a potentially sensitive problem.

The lawyers of the state also are to be commended for selecting Bill Scruggs of Fort Payne as your president-elect. Bill brings unequaled experience and ability to this position. He will serve you well, and I am delighted I will have the privilege of working with him.

The board of commissioners elected Harold Albritton of Andalusia as vice president of the bar and the following commissioners to the executive committee of the board: Phil Adams, Opelika; Wade Baxley, Dothan; Gary Huckaby, Huntsville; John David Knight, Cullman; and Archie Reeves, Selma. They will provide fine leadership next year.

Finally, I want to emphasize to you that your bar is just that; it is your bar. Your officers and staff work for you. We owe you dependable, courteous service. We have an outstanding staff. However, some of you have expressed concern to me over occasions of seeming discourtesy or inattention. To the extent that you receive less than acceptable service from your officers or staff, I want to hear about it personally. If you have legitimate complaints, I promise to address them.

In the small town where I was reared, there was a saying about someone who entered the legal profession. It was: "He made a lawyer." This was an honor accorded only one other profession, medicine. Thus, one did not simply become a doctor or lawyer, one "made" an accountant, engineer, banker or whatever. This was not to denigrate those honorable callings. It was simply a tacit recognition of the fact it took a little extra special something to make a doctor or lawyer. That is only one reason why lawyers always have been and always will be something special to me. □

— James L. North

Newest Bar Commissioners Elected

Commissioners reelected to serve on the Alabama State Bar Board of Commissioners include William D. Scruggs, Jr., of Ft. Payne, representing the Ninth Judicial Circuit; Joe C. Cassady of Enterprise, representing the 12th circuit; Ludger D. Martin of Gadsden, representing the 16th circuit; Wade H. Baxley of Dothan, representing the 20th circuit; L. E. Gosa of Vernon, representing the 24th circuit; Charles R. Hare, Jr., of Albertville, representing the 27th circuit; and John F. Proctor of Scottsboro, representing the 38th circuit.

Francis H. Hare, Jr., commissioner for the 10th Judicial Circuit, is a 1959 graduate of the University of Virginia, where he received his law degree. He was admitted to the Alabama State Bar in 1959. Hare is a former president of the Alabama Trial Lawyers Association and former governor of the Association of Trial Lawyers of America. Since 1975, he also has worked as an associate professor at Cumberland School of Law. He is married to the former Suzanne Balliet of Birmingham, and they have three children, Francis H. Hare, III; Catherine Hare Langley; and Margaret Amelia Balliet Hare.

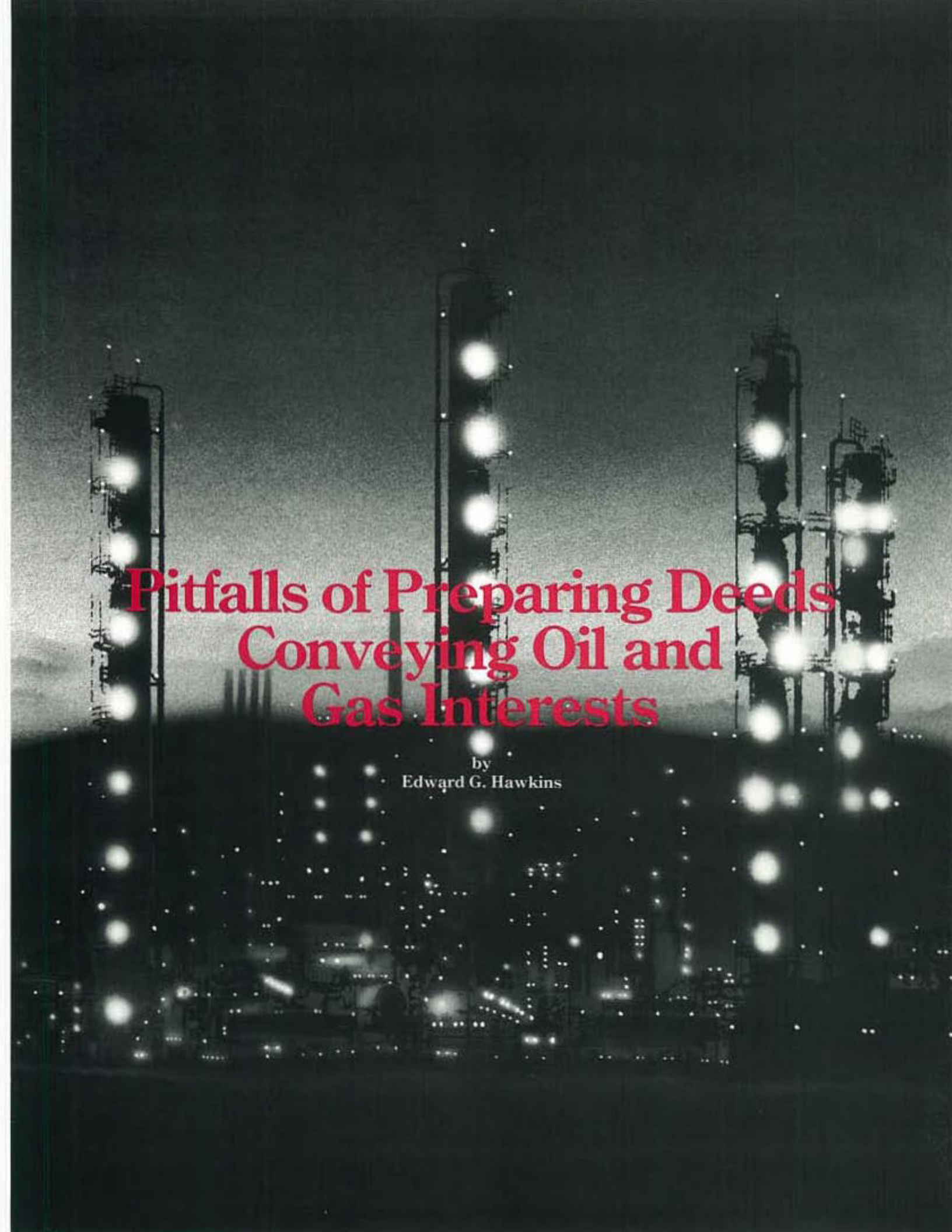
B. Greg Wood, commissioner for the 29th Judicial Circuit, was born August 20, 1952, in Talladega County, where he

still resides. Wood received an undergraduate degree in 1974 in accounting from Auburn University and a degree in law, *cum laude,* from Cumberland University three years later. He was admitted to the Alabama State Bar in 1977. Wood is married to the former Marchella Henley of Pell City, and they have one son, B. Gregory Wood, Jr.

Jimmy E. Alexander, commissioner for the 39th Judicial Circuit, was born in Bear Creek, Alabama, August 8, 1939. He graduated from the University of Alabama in 1961 and the university's school of law in 1963. Alexander is a former president of the Limestone County Bar (1964-66) and a member of the board of directors of the Athens-Limestone Bank. He is married to the former Rose Scheuing of Birmingham, and they have two children, Eric and Tonya.

Archie T. Reeves, Jr., commissioner for the Fourth Judicial Circuit, was born June 6, 1932, in Selma. He attended Davidson College and graduated from the University of Alabama. Reeves also graduated from the University of Alabama School of Law in 1956 and was admitted to the Alabama State Bar that same year. He is a former prosecutor and municipal judge for the city of Selma. Reeves is married to the former Anne M. Smith of Montgomery, and they have three children: Archie, Allen and Edgar.

Jerry L. Thornton, commissioner for the second circuit, was born in Greenville, Mississippi, January 29, 1948. He graduated from Birmingham Southern College in 1971 and the University of Alabama School of Law in 1974. Before entering private practice in January 1977, Thornton served as assistant district attorney for the 10th Judicial Circuit.



Pitfalls of Preparing Deeds Conveying Oil and Gas Interests

by
Edward G. Hawkins

Alabama lawyers are more likely to be asked to prepare or to review a deed affecting oil and gas interests today than at any previous time. This sudden increase of oil and gas transactions results from the expansion of exploration and development activities for oil and gas across much of Alabama. Oil and gas deeds present peculiar problems, partly because of the many facets of an oil and gas transaction and partly because title defects involving the oil and gas mineral estate can be difficult to cure. This article highlights some of the problems and defects commonly occurring in mineral deeds and recommends measures that will aid lawyers in avoiding those drafting problems.

Mineral Deed - Royalty Deed

Before a lawyer can ensure a client has addressed all the aspects of a mineral or royalty conveyance, the lawyer must understand the various rights and privileges associated with the mineral estate.[1] Without that understanding, the lawyer cannot prepare instruments meeting the needs of the client and standing the scrutiny of time. A tempting drafting approach is to classify an interest as a "mineral interest" or a "roylaty interest" and to adopt or modify someone else's form for a "mineral deed" or a "royalty deed." The prudent lawyer (the kind errors and omissions carriers like) uses those terms and possibly other's forms only with a solid understanding of the ramifications of each term. This enables the lawyer to recognize the parties' intentions and to determine what the parties may have overlooked. Merely using a form "mineral deed" or "roylaty deed" without first considering the various rights and privileges associated with a "mineral interest" and a "royalty interest" can produce results that neither party to the deed contemplated or desired.

The most important right of the mineral estate is the right to receive the minerals produced from that estate. This right can be split into concurrent interests, called "mineral interests," "royalty interests" or something else. Unfortunately, deeds often contain ambiguous descriptions of the share of production that is being granted or reserved by the deed. Those ambiguities usually can be avoided by carefully determining what the share of production is to be when: (1) the interest is subject to an oil and gas lease; and (2) the interest is *not* subject to an oil and gas lease. This determination is critical to the description of the interest. Only after making this preliminary determination should the lawyer begin to decide whether to use a "mineral interest" or "royalty interest" label in the deed description.[2]

In oil and gas deeds, a mineral interest and royalty interest in the same fraction can yield different shares of production. In this regard, an interest described as a one-eighth "mineral interest" will yield its owner one-eighth of the oil and gas produced from the subject land *only* when the mineral interest is unleased. If the interest is leased, the owner of a one-eighth mineral interest normally receives one-eighth of the lessor's royalty. If, for example, the one-eighth mineral interest is burdened by a lease with a one-eighth royalty, the mineral interest owner will receive 1/64th of the production (1/8 x 1/8). On the other hand, a royalty interest described as "one-eighth of all oil, gas and other minerals produced" will entitle its owner to one-eighth of all oil and gas produced from the land burdened by that interest *whether* or not that land is leased.

Special attention must be paid to the grantee's share of production in a transfer of an interest that is burdened by an existing oil and gas lease.

Some types of royalty interests can also yield varying shares of production, depending upon the lease burdening the servient mineral estate. For example, a conveyance on one-half "of royalty" would yield one-sixteenth of all oil and gas produced under an oil and gas lease with a one-eighth royalty.[3] If the oil and gas lease provided a one-quarter royalty, the one-half "of royalty" interest would yield one-eighth of all oil and gas produced under the lease. If the servient mineral interest was unleased, the "one-half of royalty" term would be ambiguous, because there would be no royalty to have.

Special attention must be paid to the grantee's share of production in a transfer of an interest that is burdened by an existing oil and gas lease. Many deeds conveying a mineral interest burdened by an existing lease contain a "subject to" clause with language similar to the following:

> "Said land now being under an oil and gas lease originally executed in favor of _____ and now being held by _____, it is understood and agreed that this sale is made subject to said lease, but covers and includes [fraction] of all oil royalty and gas rental or royalty due to be paid under the terms of said lease."[4]

The additional "subject to" clause is designed to assure that the right to receive royalties attributable to the mineral interest passes to the grantee named in the deed and to protect the grantor against a breach of warranty as to the existing oil and gas lease.[5] The clause, however, has caused some serious problems and has spawned a number of cases addressing those problems.[6] For instance, some courts have construed such deeds as having two independent grants, although it is apparent the parties intended only one grant. Other courts have increased the number of mineral acres conveyed by such deeds.

The "subject to" clause is not necessary to protect the grantor's warranties. Protecting the grantor against a breach of warranty could be better accomplished by clearly excepting the existing lease (and all other encumbrances) from the grantor's warranties. Likewise, the "subject to" clause

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is not needed to convey to the grantee royalties attributable to the grantee's mineral interest. Unaccrued royalties under a lease are an incident of the mineral estate and pass with the mineral estate unless otherwise previously conveyed or severed.[7]

Another problem caused by existing leases can arise when a producing well happens to be located on the lands encompassing the servient mineral estate. If there are accrued but unpaid royalties, the unpaid royalties require special attention because oil and gas become personal property once they are taken from the ground.[8] Since accrued but unpaid royalties are personal property, a normal grant of real property will not transfer them.[9] Therefore, to transfer accrued but unpaid royalties a separate grant of the accrued royalties must be included in the deed. The grant should specify a date and time for changing the payee of the accrued royalties. Accordingly, deeds frequently contain language such as:

> Royalties accruing on production runs occurring after [time] a.m. on the [day of month] day of [month], 198__, shall accrue to the credit of grantee.

Both problems that can arise in the transfer of a mineral interest burdened by an oil and gas lease with a producing well are avoided easily with the following approach:

(1) Show the existing lease as an exception from the grantor's warranties as follows:

> Grantor covenants, except as to an oil, gas and mineral lease dated [date], and recorded in [record reference], granted to [name of lessee] by [name of lessor], that Grantor is seized. . .;

and

(2) Show the transfer of accrued royalties with the following clause, used in addition to the basic granting clause:

> Grantor hereby sells, sets over, transfers and assigns unto Grantee all accrued but unpaid royalties on oil and gas produced after [time] a.m. on the [day of month] day of [month], 198__, under the existing lease mentioned above that are attributable to the mineral interest conveyed herein to grantee and such accrued royalties shall be paid directly to grantee.

Another factor affecting the share of production is the costs that the interest is to bear. Royalty interests typically are not charged with production or development costs.[10] On the other hand, mineral interests customarily bear their proportionate share of production and development costs.[11] Of course, once a mineral interest is burdened by an oil and gas lease, the terms of the lease govern the allocation of costs between the mineral interest owner and the lessee.

The second most important right of the mineral estate is the right to grant oil and gas leases. This is called the "executive right."[12] Usually, the owner of the mineral interest has the executive right and a royalty owner does not.[13]

Mineral owners sever the executive right for many reasons. For instance, they might sell a royalty interest in the mineral estate underlying their lands and thereby retain the executive right to control mineral operations on their remaining surface estate. Such landowners frequently have ongoing timber operations, residential subdivisions or other types of surface operations that would be interrupted by unrestricted drilling and producing operations. By retaining the executive right, the landowners can restrict and control the development activities on the surface lands. Other reasons to sever the executive right include consolidating control over leasing activities and ensuring that the royalty negotiated under an oil and gas lease is sufficiently large.

If the right to share in production is severed in any fashion from the executive right, the lawyer drafting the deed must consider a number of factors. First, who is to have the executive right? If the executive right is being severed through the grant of only a royalty interest, the owner of the mineral estate customarily would have the executive right.[14] If, however, the executive right is being severed from a mineral interest the lawyer must determine:

(1) Who will hold the executive right?

(2) Will that person represent and protect the interests of the owner of the non-executive interest?

(3) How will the executive right be exercised in the event of the death, incompetency or bankruptcy of the person holding the executive right?

(4) Are there safeguards against the unreasonable refusal of the executive to grant a lease?

(5) How long will the executive right be vested in a third party?

(6) If the executive right is to be vested in a third party for only a limited duration, what is the event that is to trigger the termination of the severed executive right and cause it to merge with the servient mineral interest?

(7) If the executive right is to be vested in a third party for an unlimited duration, who is to succeed to the executive right upon the death of the person appointed in the deed to exercise that right? Will the arrangement violate the rule against perpetuities?

The owner of the non-executive interest should be entitled to fair treatment by the holder of the executive right. Sometimes economic realities leave the holder of a non-executive interest, such as a royalty interest, unprotected. Consider the holder of an undivided one-fourth royalty interest, which would not have executive or development rights. Most oil companies buying leases rarely agree to a lease for a royalty in excess of one-fourth. Therefore, any lease granted by the holder of the executive right probably would not yield any production royalties under the normal lease to the servient mineral estate burdened by the severed one-fourth royalty interest. Unless the holder of the executive right in such a case was offered an extremely high lease bonus, there would be no economic incentive for the executive to grant a lease. High bonuses normally prevail only in locations reasonably close to production or drilling activi-

ties. If the servient mineral estate was situated far from production or drilling activities, the bonus probably would be low. This could discourage the executive from leasing the land since the executive would have little economic incentive to lease. As this example illustrates, the lawyer must recognize the ramifications of the severed executive right and discuss them with a client seeking to create a non-executive interest.

The third most important right of the mineral estate is the right to receive lease bonus and rental payments. Normally the owner of the mineral estate receives these payments.[15] If payments are to be made to anyone other than the owner of the mineral estate, provisions must be made in the deed to that effect.

Another important right of the mineral estate is the right to explore the lands subservient to that estate and to develop those lands for oil and gas.[16] If the client wants to create a non-executive mineral interest, the lawyer must ensure that the executive right, the exploratory right and the development right vest in the same owner. Otherwise, the deed will create a contradiction: the person nominally having the power to lease would not have the powers to explore and to develop, both of which are essential to the lessee. Such a situation invites judicial tampering with the deed.

Some landowners, who carve undivided mineral interests from their surface estates, have legitimate concerns about the disruption of their surface use by oil and gas operations. Landowners with subdivisions, timber operations, industrial operations or any valuable surface activity can protect those activities by restricting the exploration and development easements incident to the mineral interests they are conveying. Such restrictions require careful drafting to protect the landowner and at the same time give the grantee an interest attractive to an oil company. Occasionally landowners incorporate surface damage covenants in mineral deeds. Again, care must be taken to prevent the covenant from destroying the commercial marketability of the grantee's interest.

Only after the parameters of the conveyance have been developed by considering the various factors mentioned above can the lawyer properly label the interests and draft the deed. Although the lawyer can prepare the deed without the aid of reference forms, most lawyers do not try to re-invent the wheel and instead modify an existing form to fit the particular transaction that is involved. One reliable course of forms for this purpose is 6 W. SUMMERS, THE LAW OF OIL AND GAS §§1271, 1273—1290 (1967).

Mineral Acre - Fractional Grant Conflicts

Mineral deeds frequently contain two different descriptions of the mineral interest that the grantee hopes to acquire. Different descriptions result when the granting clause describes the mineral interests as a fractional interest and another clause in the deed describes the interest as a certain number of mineral acres. Usually, the mineral acre description appears in an "intention clause,"[17] but occasionally it appears in a second granting clause in the same deed. Many purchasers insert the alternate "mineral acre" expression when the purchase price is based on the net mineral acres conveyed.[18] Describing the mineral interest by both fractions and mineral acres can render a deed ambiguous and give rise to serious consequences when:

(1) The deed conveys less than the entire mineral estate in a tract of land containing more or less area than the parties contemplated; or

(2) The deed conveys a mineral interest in multiple tracts of land and the grantor's title fails as to some of the tracts.

Recognizing the effects of the fractional formula and the mineral acre formula is important because the results of the two formulas can be significantly different. Consider a conveyance of an undivided one-eighth mineral interest in a quarter section surveyed according to the Rectangular Survey System.[19] If the quarter-section is regular and contains exactly 160 acres, the undivided one-eighth mineral interest would be equivalent to 20 mineral acres. If the quarter-section is enlarged and contains 162 acres, the undivided one-eighth mineral interest would be equivalent to 20.25 mineral acres. Correspondingly, if the quarter-section is diminished and contains only 158 mineral acres, the undivided one-eighth mineral interest would be equivalent to 19.75 mineral acres. Only when the quarter section is regular will the fractional description and the mineral acre description agree.

As the examples show, the fractional formula yields a higher net interest for enlarged tracts and a lower net interest for diminished tracts. On the other hand, the acreage formula yields the same interest regardless of the tract size, so long as there is sufficient title to fund the grant.

Conflicts between a fractional formula and an acreage formula can occur when:

(1) Accretion enlarges a riparian tract;[20]

(2) An accurate survey reveals a size discrepancy in the tract;[21] or

(3) The grantor suffers a partial title failure.[22]

Courts generally resolve conflicts be-

tween a fractional formula and a mineral acre formula in one of three ways: (1) find the deed unambiguous and uphold the mineral acre formula; (2) find the deed unambiguous and uphold the fractional formula; or (3) find the deed ambiguous and admit extrinsic evidence to determine the parties' intent.[23] The approach adopted can significantly increase or reduce the interest. For instance in *Wade v. Roberts,* the Oklahoma Supreme Court considered facts where accretion added 15.26 acres to a 32-acre riparian tract.[24] The accretion led to a dispute over a reservation alternatively described as an undivided 5/32nd of the tract and as five undivided mineral acres. Under the fractional formula, the grantor would have reserved 7.385 mineral acres, and under the mineral acre formula the grantor would have reserved only five mineral acres. The 2.385 mineral acre difference would be extremely significant if a prolific well was on the tract.

Another example of the conflicting results of the two formulas occurs when: (1) a grantor conveys mineral acres by warranty deed in one of several contiguous tracts owned by the grantor; and (2) the grantor suffers a partial title failure in that tract. In such instances, the mineral acre formula can lead to a replacement of title. For example, in *Crayton v. Phillips,* a Texas court held:

> The law is well settled that where one conveys by general warranty deed a specific number of undivided acres out of a larger or several tracts of land, from which grantor has already conveyed a part, the deed conveys a grantee good title to his complement of acres out of the remainder of the land.[25]

Under a fractional formula, no replacement of title would occur, and the grantee's remedy under the breached warranty would be limited to money damages.[26] In order to avoid the problems occurring when both a fractional formula and a mineral acre formula appear in the same deed for the same interest, the lawyer should choose one or the other and should *not* use both formulas to describe the same interest.

Reservations and Prior Grants

Prior mineral reservations and grants can cause two types of common problems in mineral deeds. The first type of problem occurs when the grantor does not have sufficient title to convey the interest purportedly granted by the deed. The second problem arises when the deed mentions a prior reservation or conveyance that never happened. These problems normally are created when the grantor has forgotten or never knew what transactions have occurred in his prior chain of title. The lawyer drafting the deed usually does not have an accurate summary of prior mineral transactions and therefore must rely on the client to supply the facts necessary to draw the deed. Both types of problems can produce results that at least one party, and sometimes both parties, to the deed never anticipated.

The first type of problem is commonly called a *"Duhig"* problem in reference to the case of *Duhig v. Peavy-Moore Lumber Co.,* 135 Tex. 503, 144 S.W.2d 878 (1940). A *Duhig* problem occurs when a grantor, who owns less than the entire mineral estate, attempts to reserve an undivided mineral interest in a deed that otherwise purports to convey the entire fee simple interest in a tract of land. *Morgan v. Roberts,* 434 So.2d 738 (Ala. 1983) is an example of such a problem.[27] In *Morgan,* the landowner previously had conveyed an undivided one-half mineral interest in the land to a third party. The landowner then reserved an undivided one-fourth mineral interest in a warranty deed purportedly conveying the entire fee simple interest to the grantee. The Alabama Supreme Court held that the attempted reservation of the one-fourth interest was contrary to the warranties in the deed, which on its face conveyed the surface estate and an undivided three-fourths mineral interest. The court held that the grantor kept nothing under the reservation and that the grantee received the entire undivided one-half mineral interest held by the grantor at the time of the execution and delivery of the deed.

The second type of problem occurs when a deed refers to a prior reservation or grant that, in fact, does not exist. For example, assume a grantor owns the entire mineral estate in, on and under his land. Also assume that, even though neither the grantor nor any of his predecessors had previously severed any portion of the mineral estate by conveyance or reservation, the grantor executes and delivers a warranty deed containing one of the following false recitals:

(1) "There are hereby excepted. . . . An undivided one-half (1/2) interest in and to the oil, gas and minerals lying in, under or upon . . . same having been reserved to G. C. Coggin Company, Inc., in the certain deed. . . .";[28] or

(2) "Subject to one-half interest in mineral and oil rights as conveyed to Wm. Henderson";[29] or

(3) "SAVE AND EXCEPT an undivided three-fourths of the oil, gas and other minerals in, on and under [said land]. . . , which minerals do not belong to grantors herein";[30] or

(4) "Except all minerals and mineral rights, heretofore sold and conveyed."[31]

The first example is *Union Oil Co. of Cal. v. Colglazier,* 360 So.2d 965 (Ala. 1978). The others simply are instances where deeds have contained false recitations about prior mineral reservations or conveyances.

In *Colglazier,* the Alabama Supreme Court held the exception language clearly excepted the one-half mineral interest. The fact that the recitation about the prior mineral reservation was false did not void the exception. The Alabama Supreme Court declined to decide in *Colglazier* whether the language quoted above was present in the deed solely to protect the grantor's warranties. Other courts had employed the warranty protection approach to permit the grantee to acquire the mineral interest mentioned in the exception language if that language was intended only to protect the grantor against a breach of warranty.[32] Since the Alabama Supreme Court left the door open to the warranty protection approach, the possibility of confusion still remains with respect to erroneous recitations about prior mineral conveyances and reservations.

The lawyer drafting a mineral deed for the grantor can avoid both the *Duhig* and the false exception recitation problems by:

(1) Excepting any interest that the grantor wishes to retain in clear and unequivocal language of exception such as:

> Grantor hereby excepts from this conveyance an undivided [fraction] interest in all oil, gas and other minerals in, on and under [property] together with all and singular the rights and appurtenances. . . .

(2) Excepting the prior reservations or conveyances from the grantor's warranties as follows:

> Grantor covenants, except as to [all prior mineral reservations and conveyances] , that Grantor is seized. . . .

This approach shifts the risk of prior mineral severances to the grantee. Where the grantee has paid consideration for a specified mineral interest, this approach is unsatisfactory and the warranty language should not contain a blanket exception of all prior mineral reservations and conveyances. If, however, the grantor is merely conveying all that the grantor owns to the grantee, the blanket exception is not objectionable.

Rule Against Perpetuities

Occasionally, an oil and gas transaction will involve the transfer of a future interest. Usually the future interest will be something that is to take effect after: (1) the termination of an existing oil and gas lease, which can remain in effect so long as oil and gas are produced from the leased premises; (2) the lapse of a specified term of years and the cessation of all paying oil and gas production; or (3) a well on the property has produced enough oil and gas to allow the operator to recoup its costs of drilling and completing the well. In each of these situations, the time that the future interest vests is uncertain. Further, the interest may not vest in the grantee for many years. Due to this uncertainty, the transfer easily can run afoul of the rule against perpetuities.

In *Earle v. International Paper Co.*, 429 So.2d 989 (Ala. 1983), the Alabama Supreme Court considered the application of the rule against perpetuities to a deed that left the grantor with an undivided one-half mineral interest for a period of 15 years and so long thereafter as oil, gas or minerals were being produced in paying quantities. The question in the case was whether the grantor or the grantee got the undivided one-half interest when the 15-year term elapsed and there was no mineral production. The grantor argued the rule against perpetuities voided the grantee's right to the one-half mineral interest, despite the parties' manifest intentions in the deed. The court sided with the grantee by finding that the grantor conveyed the entire fee simple estate to the grantee and *reserved* an undivided, defeasible one-half mineral interest. Since a reservation is technically a grant back to the grantor, the grantee held a possibility of reverter in the disputed one-half mineral interest. Although a possibility of reverter is a future interest,[33] it is not subject to the rule against perpetuities.[34]

Earle provides excellent guidance on how to avoid the disastrous effects of the rule against perpetuities. Simply grant everything to the grantee, and *reserve* the defeasible interest the grant-

or desires to retain. The reservation clause should contain words of inheritance and should contain no words of exception.[35]

Roadways

A problem that can appear in deeds conveying rural land involves roads constructed along the governmental subdivision lines. In such cases, the grantor usually holds fee title to the entire governmental subdivision involved in the conveyances. Sometimes, however, the deed description is based on a survey describing the tract boundary with reference to the edge of the road right-of-way rather than the true boundary, which may be the center of the public road. This practice leaves the grantor with title to the strip of land located between the true boundary and the edge of the road.[36] As an illustration of the amount of land that can be involved in such strips, consider a quarter section of land with a 100-foot right-of-way centered on one side of the quarter-section. In such a case, 3.03 acres would underlie the 50-foot portion of the right-of-way situated on the quarter-section.[37] This vacancy normally is not significant when only the surface use is concerned, because the public road occupies the strip anyway. Nevertheless, the value of the minerals can cause the strip to become more valuable.

Miscellaneous

Grantors frequently have their spouses join with them in mineral deeds. When the grantor is reserving an interest in the deed, the reservation should be only in favor of the grantor and the grantor's heirs and assigns. Confusion can occur if the deed defines both the grantor and the spouse as "Grantors" when the reservation is in favor of the "Grantors, their heirs and assigns." In such a case, some question might arise as to whether the reservation vested an interest in the spouse. The Alabama Supreme Court of Civil Appeals held that the common law rule prohibiting reservations in favor of strangers to title prevented a spouse from acquiring an interest by reservation in *James v. Bell*, 419 So.2d 251 (Ala. Civ. App. 1982). The Alabama Supreme Court, however, has not ruled on the question. In order to avoid the issue, deeds should not contain reservations in favor of a spouse who has no interest in the property prior to the reservation. If the grantor wants the spouse to receive an interest in the property, he or she should make a specific and separate grant of that interest to the spouse.

Some mineral conveyances involving homestead property do not contain homestead acknowledgments on the deeds. The lawyer should not overlook the requirement of Section 6-10-3 of the *Code of Alabama* (1975) that the spouse must join in all conveyances of homesteads and the deed must bear a valid acknowledgement of the spouse's signature.

A practical problem can arise when a grantor conveys a certain number of mineral acres situated in multiple tracts where the grantor retains other mineral interests. In such cases, a survey and a title search of all the multiple tracts are necessary to allocate the grantor's and the grantee's mineral interests across those tracts. If all those tracts are not included in the same drilling and production unit, the survey and the title search are impractical. Consequently, such grantors and grantees may be forced to stipulate their interests in order to receive payments of royalties or production attributable to their interests. A grantee may want the grant of mineral acres spread across several tracts in order to benefit from the Texas replacement of title rule.[38] The grantee, however, should weigh the inconveniences such a grant can bring.

Another problem can occur when the parties to a royalty trade express the interest as "royalty acres." In a footnote in *Dudley v. Fridge*, 443 So.2d 1207, 1209 (Ala. 1983), the Alabama Supreme Court defined a royalty acre "as a 1/8 royalty in one mineral acre." Although that footnote now exists in Alabama case law, the term "royalty acre" still can be misleading. For example, a 29.5 acre tract of land covered by an oil and gas lease with a one-fifth royalty constitutes 29.5 mineral acres. Using the definition of "royalty acre" adopted by the Alabama Supreme Court, however, there would be 47.2 royalty acres.[39] The 29.5 acre tract and the lease with a one-fifth royalty were present in the facts of *Thibodeaux v. American Land & Exploration, Inc.*, 450 So.2d 990 (La. Ct. App. 1984), *cert. denied*, 458 So.2d 118 (La. 1984). The court in that case upheld the grant of royalty acres using the definition mentioned in the *Dudley* footnote against a landowner fraud attack. *Thibodeaux* illustrates the confusion that can result from using the term "royalty acres." It is too easy to assume that a lessor would have the same number of royalty acres as he has mineral acres under lease. For that reason, the lawyer must be extremely careful when facing a deed granting "royalty acres." □

FOOTNOTES

[1]The term "mineral estate" in the context of this article indicates the highest possible interest in oil and gas as opposed to lesser interests that may be created in those minerals and as opposed to interests in other minerals.

[2]This article primarily discusses mineral and royalty interests. For discussions of other types of interests see H. WILLIAMS & C. MEYERS, OIL AND GAS LAW (1984) and W. SUMMERS, THE LAW OF OIL AND GAS (1967).

[3]See *Texas Gulf Producing Co. v. Griffith*, 218 Miss. 109, 65 So.2d 834 (1953); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §303.1 (1984).

[4]2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §340 at 224.6 (1984).

[5]2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §340 (1984).

[6]See 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §340.1-340.5 (1984).

[7]3A W. SUMMERS, THE LAW OF OIL AND GAS §572 (1958).

[8]1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §303.1 (1984).

[9]3A SUMMERS, *supra*.

[10]See *Mounger v. Pittman*, 235 Miss. 85, 108 So.2d 565 (1959).

[11]*Id.*

[12]H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 293 (6th ed. 1984).

[13] *Westbrook v. Ball*, 222 Miss. 788, 77 So.2d 274 (1955).

[14]*Id.*

[15]*Mounger v. Pittman.*

[16]See *Westbrook*; 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §303.4 (1984).

[17]An example of an "intention clause" is: "The parties hereto intend for 20 net mineral acres to be hereby conveyed."

[18]See *Dudley v. Fridge*, 443 So.2d 1207 (Ala. 1983); *Thibodeaux v. American Land & Exploration, Inc.*, 450 So.2d 990 (La. Ct. App. 1984), *cert. denied*, 458 So.2d 118 (La. 1984).

[19]See 2 Stat. 324 (1805) (applied the Rectangular Survey System to United States lands south of Tennessee, which included what is now Alabama); C. WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM (1982).

[20] *Wade v. Roberts*, 346 P.2d 727 (Okla. 1959).

[21] Governmental sections are rarely staked to contain exactly 640 acres. For example, of the 36 sections contained in Township 7 North, Range 5 East of St. Stephens Meridian in Alabama, only four sections contain exactly 640 acres. White, *supra*, note 3, at 84.

[22] *Williams v. Phillips Petroleum Co.*, 453 F. Supp. 967 (S.D. Ala. 1978), *aff'd*, 614 F.2d 293 (5th Cir. 1980).

[23] 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §320.2 (1984); *Wade v. Roberts; Williams v. Phillips Petroleum Co.*

[24] 346 P.2d 727 (Okla. 1959).

[25] 297 S.W. 888 (Tex. Civ. App. — Austin), *aff'd*, 4 S.W.2d 961 (Tex. Comm'n App. 1928, holding approved).

[26] *Williams v. Phillips Petroleum Co.*

[27] The Alabama Supreme Court adopted the Duhig principle in *Morgan v. Roberts*, 434 So.2d 738 (Ala. 1983), which adopted the holding in *Brannon v. Varnado*, 234 Miss. 466, 106 So.2d 386 (1958). Brannon is based on a line of Mississippi cases adopting Duhig.

[28] *Union Oil Co. of Cal. v. Colglazier*, 360 So.2d 965, 967 (Ala. 1978).

[29] *Wilson v. Gerard*, 213 Miss. 177, 182, 56 So.2d (1952). See also *Whitman v. Harrison*, 327 P.2d 680 (Okla. 1958); *United States v. McKenzie County*, 187 F.Supp. 470 (D.N.D. 1960), *aff'd sub nom., Murray v. United States*, 291 F.2d 161 (8th Cir. 1961).

[30] *Pich v. Lankford*, 157 Tex. 335, 337, 302 S.W.2d 645, 646 (1957).

[31] *Oldham v. Fortner*, 221 Miss. 732, 736, 74 So.2d 824, 825 (1954).

[32] See *Whitman*; McKenzie County.

[33] L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS (1966).

[34] Earle.

[35] Earle turned on the distinction between a reservation and an exception. If the disputed interest had been excepted from the grant, the grantee would have acquired a springing executory interest, which would have been subject to the rule against perpetuities. The court construed the presence of words of inheritance in the reservation as an indication that the grantor intended to reserve and not to except the disputed interest.

[36] *Standard Oil Co. v. Milner*, 275 Ala. 104, 152 So.2d 431 (1962).

[37] (50 feet) x (2640) ÷ (43,560 sq. feet per acre) = 3.03 acres.

[38] *Crayton v. Phillips.*

[39] (0.20 lease royalty) ÷ (1/8 royalty) x (29.5 mineral acres) = 47.20 royalty acres.

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CLE News

by
Mary Lyn Pike
Assistant Executive Director

Commission meeting

At its June 7 meeting, the Mandatory Continuing Legal Education Commission:

1. Heard the report that 53 seminars were accredited and 11 were denied accreditation during April and May;

2. Received a digest of the commission's decisions, January 1, 1982, through January 1, 1985, prepared by the commission's staff;

3. Noted that Chairman Richard Hartley and Commissioner Warren Lightfoot would be completing their terms as bar commissioners June 30, creating two vacancies on the MCLE Commission;

4. Reviewed a program designed for lawyers and nonlawyers by an approved sponsor and ruled that such programs are not presumptively approved and must be submitted for consideration in advance of occurrence;

5. Declined to approve a course on health care cost management on the grounds that it was not focused on legal issues, and none of the faculty members were attorneys;

6. Granted retroactive approval of a 1984 course;

7. Tabled consideration of an in-house program;

8. Approved a landman's course on recent developments in oil and gas law;

9. Approved a comparative law course conducted at Cambridge University, July 1985;

10. Declined to approve a seminar on law firm marketing, management and profitability; and

11. Approved portions of a seminar on corporate restructuring of hospitals.

1985 compliance reports

Forms for reporting 1985 CLE compliance will be mailed to most members of the Alabama State Bar this month. Attorneys over the age of 65 are not required to submit reports and, thus, will not receive forms.

Attorneys subject to the 12-hour requirement must report complete information on courses attended during 1985: the sponsor of each seminar, title, date, location and credits earned. Full credit is to be claimed for attendance of whole programs; only partial credit may be claimed for less-than-full attendance.

Credits brought forward from 1984 are being posted on the forms by bar staff and may be used to satisfy the 1985 requirement. They may not be carried forward to 1986, however, extra credits earned but not needed in 1985 may be so carried.

Individuals exempt from the CLE requirement are required to claim their exemptions by filing the form each year. Full-time judges, 1985 admittees, legislators, most special members and attorneys 65 years or older are exempt. Others prohibited from private practice may be exempt by virtue of an MCLE Commission ruling; one's status may be ascertained by calling the commission's office, (205) 269-1515. □

The 1985 Alabama State Bar

Annual Meeting Highlights

in Pictures

1. Beginning Thursday morning, Huntsville Convention and Visitors Bureau volunteers and Alabama State Bar staff registered more than 600 bar members plus spouses and guests.

2. President Byars called the meeting to order for "Update '85: Recent Developments in the Law," sponsored by the Young Lawyers' Section, James R. Miller, III, Birmingham, chairman (left).

3. Prior to the Bench and Bar Luncheon, members gathered at the Huntsville Hilton for a Bloody Mary party hosted by the state bar.

4. Among those enjoying the hospitality were Young Lawyers' Section President Robert T. Meadows, III, Auburn (left), and Richard E. Flowers, Columbus, Georgia.

5. During the luncheon, Senator Jim Smith of Huntsville (left) and others received legislative appreciation awards from the Alabama Law Institute, Robert L. McCurley (right), director.

6. Texas lawyer Leonard Passmore entertained President Byars . . .

7. . . . and members of the bench and bar with answers to such questions as "What *does* the IRS do with that little box on the form 1040 labeled 'Do not mark in this space'?"

8. After lunch, the seminar reconvened. Vanzetta Penn Durant, Montgomery, spoke on recent developments in domestic relations law as Claire Black, Tuscaloosa, YLS secretary (right), presided.

9. Later that evening, members gathered at Huntsville's Space and Rocket Center Museum for a cocktail supper.

10. Among the participants were Mississippi State Bar President Walter W. Eppes and his wife, Katherine, of Meridian, Mississippi.

11. Inspired by the setting, Montgomery attorneys Oakley Melton, Jr., and Richard M. Jordan considered volunteering for space flight.

13. Past presidents who gathered for their annual breakfast were: Ernest W. Hornsby, Oakley Melton, Jr., E. T. Brown, James E. Clark, William B. Hairston and L. Drew Redden.

15. Nashville attorney Stafford McNamee told of his dependency and recovery.

12. Friday morning, President-elect North challenged committee members to pursue their assigned tasks with vigor.

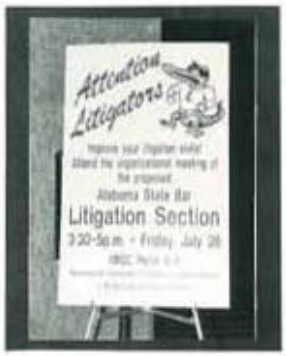
14. Friday's general assembly showcased the work of the Committee on Lawyer Alcohol and Drug Abuse.

16. The Task Force on IOLTA presented as speakers Patrick G. Emmanuel, president, The Florida Bar (right) and chairman Rowena M. Crocker.

17. Spouses participated in a luncheon and tour entitled "Taste of History and Elegance of Huntsville," hosted by the Huntsville Bar Auxiliary.

18. Friday afternoon members chose two out of 12 section meetings to attend. Shown are scenes from the Administrative Law Section meeting, William S. Halsey, Jr., Anniston, chairman (left) . . .

19. . . . and the Family Law Section meeting, Samuel A. Rumore, Jr., chairman (left).



20. Sixty potential charter members gathered to organize the proposed litigation section. A charter membership application appears on page 279 of this journal.

21. Insurance Specialists, Inc. President Spann W. Milner, Atlanta (left), hosted Friday evening's cocktail reception. Among his guests were (left to right) Warren B. Lightfoot; Mrs. William B. Hairston, Jr.; Mrs. Warren B. Lightfoot; and immediate past President William B. Hairston, Jr., all of Birmingham.

22. Later that evening, Huntsville's Von Braun Civic Center was the setting for a Dessert and Nightcap Party.

23. Louisiana State Bar President Eldon E. Fallon sampled ingredients at the sundae bar as . . .

24. . . . Bo Thorpe and His Orchestra, Rocky Mount, North Carolina, entertained.

25. A number of hearty souls gathered for the annual Fun Run which was cancelled due to damp and darkness. Among those who did not run was race chairman L. Tennent Lee, Huntsville, shown making a false statement (third row, far right).

26. Following Saturday's champagne breakfast, members gathered at the Von Braun Civic Center where President Walter R. Byars convened the annual business meeting. Among those receiving awards were P. Richard Hartley, Greenville, outgoing bar commissioner . . .

27. . . . David R. Boyd, Montgomery, recipient of the Alabama State Bar's Award of Merit . . .

28. . . . and outgoing bar examiner Milton C. Davis, Tuskegee.

29. More than 30 attorneys reached the 50-year state bar membership mark. Shown receiving a certificate is Jack L. Capell.

30. Camille Wright Cook received the Judge Walter P. Gewin Continuing Legal Education Award, presented by the ABICLE, Steven C. Emens, director (left).

31. CNN newsman Jerry W. Levin told of his experience as a hostage in Lebanon, kidnapped by terrorists in March 1984, escaping in February 1985.

32. Kenneth D. Wallis represented Governor Wallace and presented a deed to President Walter R. Byars for property adjacent to bar headquarters.

33. Past President Hairston (left) presented Mr. Byars and his wife, Mickey, with a memento of their year of service, a silver plaque.

34. Huntsville attorney Gary C. Huckaby rose to nominate Fort Payne attorney William D. Scruggs, Jr., for the office of president-elect. Mr. Scruggs was elected by acclamation.

35. President Byars then passed the gavel and the presidency to James L. North of Birmingham.

36. Immediate past President Byars with President North and President-elect Scruggs

37. Immediately after the business meeting, the board of commissioners convened to elect officers and fill vacancies on the various disciplinary panels.

38. This year's post-convention event was a bus trip to Lynchburg, Tennessee, where members and guests toured the Jack Daniel Distillery.

39. Shown here is a scene from one of seven barrelhouses.

40. Listening intently to tour guide Mack McCurry's explanation of the distilling process were (left to right) Wayne Love of Anniston and wife Ann and (far right) William H. Kennedy, Tuscaloosa.

41. After a tour of Lynchburg and supper at the White Rabbit Cafe, participants convened at Cumberland Springs where members of the Jack Daniel Distillery Bluegrass Band entertained.

42. Buck dancing, square dancing and the Tennessee waltz were the order of the evening and a perfect ending for a fun-filled annual meeting.

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ALL YOU WANTED TO KNOW ABOUT IOLTA BUT WERE AFRAID TO ASK

(From page 270)

Q. What are the benefits of participating in an IOLTA program?

A. If the program in Alabama were to be designed in the same fashion as the Florida program then all attorneys within firms participating in the IOLTA program automatically would become members of the bar foundation and would have a voice in the disposition of the foundation's funds. No matter how the Alabama IOLTA program is designed there is no doubt it would provide an excellent opportunity for the legal community of the state to aid law-related public interest programs.

Q. What is the source of information given in this article?

A. These questions and answers were to a large extent adopted from a pamphlet prepared by the Supreme Court of Florida, The Florida Bar, the Florida Bar Foundation and the Special Commission to Implement the Interest on Lawyers' Trust Accounts Program. In addition, information has been obtained from the National IOLTA Clearinghouse and from the Legal Services Corporation of Alabama, Inc.; the Birmingham Area Legal Services Corporation, Inc.; Legal Services of North Central Alabama, Inc.; and the Texas Legal Services Center *Alert* (March 1985). □

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(continued on page 256)

cle opportunities

september

13 friday

USE OF MICROCOMPUTERS IN LAW FIRMS IN 1980s
Birmingham-Jefferson Civic Center
Sponsored by: Alabama Bar Institute for Continuing Legal Education
Credits: 3.0 Cost: $75
For Information: (205) 348-6230

19 thursday

REAL ESTATE
Von Braun Civic Center, Huntsville
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Credits: 6.0 Cost: $75
For Information: (205) 348-6230

PRACTICAL ASPECTS OF REAL ESTATE FORECLOSURE
Montgomery County Courthouse
Sponsored by: Montgomery County Bar Association
Credits: 2.0 Cost: free/members; $15 nonmembers

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20 friday

REAL ESTATE
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26 thursday

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26-27

GOVERNMENT LIABILITY
The Knickerbocker, Chicago
Sponsored by: Defense Research Institute, Inc.
Credits: 15.2 Cost: $370/members; $395/nonmembers;
For Information: (312) 944-0575

ESTATE PLANNING WORKSHOP
Hilton, Huntsville
Sponsored by: Alabama Society of Certified Public Accountants
Credits: 16.0 Cost: $180
For Information: (205) 834-7650

REAL ESTATE
Quality Inn, Airport Blvd., Mobile
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october

3 thursday

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3-4

SECURED TRANSACTIONS, ARTICLE 9 AS REVISED
Hyatt Regency, Nashville
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Credits: 15.4 Cost: $225
For Information: (615) 244-7545

4 friday

INSURANCE
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10 thursday

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11 friday

INSURANCE
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17 thursday

ESTATE PLANNING FOR THE VERY WEALTHY
Cumberland School of Law, Birmingham
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For Information: (205) 870-2865

TAX FOR THE GENERAL PRACTITIONER
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17-18

LABOR LAW INSTITUTE
The Westin, Dallas
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For Information: (214) 690-2377

18 friday

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24 thursday

MARITAL LAW
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25 friday

MARITAL LAW
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29-nov. 1

EQUAL EMPLOYMENT LAW
The Biltmore, Phoenix
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For Information: (312) 944-0575

31 thursday

MARITAL LAW
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november

1 friday

MARITAL LAW
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7 thursday

CRIMINAL LAW
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8 friday

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14 thursday

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15 friday

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21 thursday

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21-22

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22 friday

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december

3 tuesday

PSYCHOLOGY OF A TRIAL
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4 wednesday

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6 friday

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12 thursday

TRIAL TACTICS
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12-13

BAD FAITH
Marriott, New York City
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13 friday

TRIAL TACTICS
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13-14

CAPITAL LITIGATION
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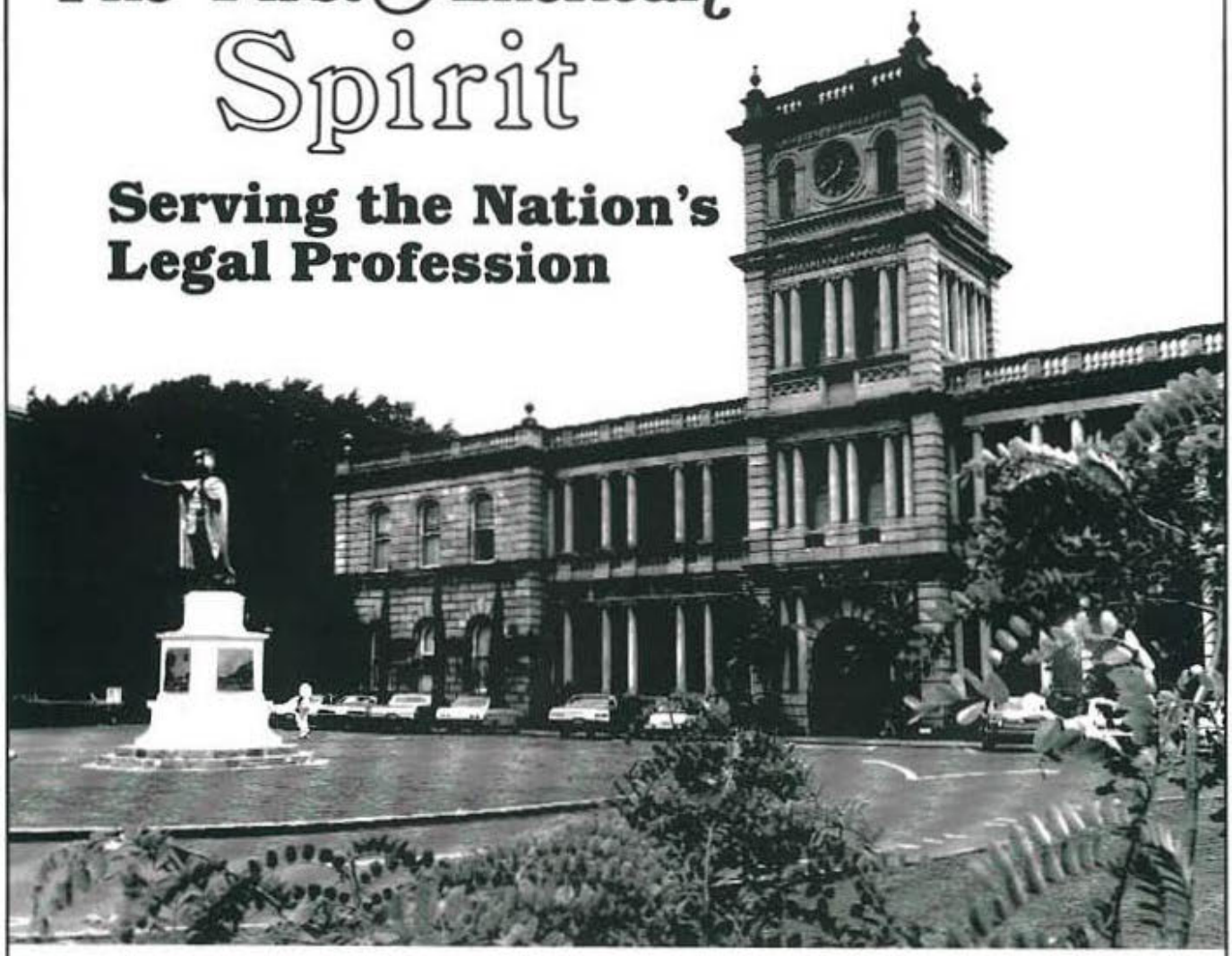

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Escambia County Bar Association

The Escambia County Bar hosted the formal investiture June 14 of Circuit Judge Earnest Ray White and District Judge Gordon R. Batson at the Escambia County Courthouse in Brewton. A crowd of over 300, including friends, relatives, judges and local attorneys, attended the investiture. White was appointed by Governor Wallace to fill the newly-created second circuit judgeship for the 21st Judicial Circuit. Upon Judge White's elevation to the circuit court bench, Batson was appointed district judge for the 21st Judicial Circuit.

White (left), Batson

Broox G. Garrett, Sr., past president of the Alabama State Bar and the oldest practicing attorney in Escambia County, offered remarks on his many years as a practicing attorney in the 21st Judicial Circuit and the many changes that had occurred during that time.

Following the close of the investiture, a reception was hosted by the Escambia County Bar, and the womens' auxiliary of the bar served refreshments.

Lauderdale County Bar Association

The Lauderdale Bar Association completed a successful year with election of new officers in their May meeting. Justice Richard Jones conducted a seminar in December 1984, and a seminar was sponsored by the Alabama Bar Institute for Continuing Legal Education held in Florence, Alabama, during Law Week 1985. The gratitude of the Lauderdale Bar is extended to Justice Jones, the Alabama Bar Institute and those lawyers who gave of their time preparing for and lecturing at the seminars.

Ralph Young will serve as president of the Lauderdale Bar for 1985-86 with the assistance of Bill Musgrove serving as vice president and Robert Burdine, Jr., as secretary-treasurer.

McCall (left), Helmsing

Mobile Bar Association

Over 100 members of the Mobile Bar Association attended a luncheon June 21, honoring Judge Dan T. McCall

(Continued on page 282)

The Young Judge

by
Grover S. McLeod

The young judge somberly looked at Andrew Thomas standing in the doorway, impatiently waiting for him to reply. He was a tall, heavy-set lawyer, who was dressed in a gray suit. His face was expressionless; yet, his eyes registered intensity, while his tall, stern-faced manner was so official and demanding. The judge raised his eyebrows and moved his jaws as if he were chewing his cigar, though it was in his hand; then in a voice of resignation, he said to him, "If I must, I must. But Andrew, I don't want to!"

"Judge, you must — it's been a long hearing — we're waiting — all the other character witnesses have testified," the lawyer impatiently said, making it very clear that he intended for the young judge to rise and follow him — and he would lead him to the handsome law library on the ninth floor where he and four other bar commissioners were holding a hearing for W.A. Denson, a prominent damage suit lawyer who had been practicing law for 35 years. He had spent most of his legal career suing large corporations, and in doing it, he had been a fearless, bodacious trial lawyer, with a record of considerable success. He had attacked the corporation defendants as though they needed to be eradicated. His tactics had been condemned by the defense bar, but without success. Denson had been too strong, too clever, as he not only knew the basic law, but was well versed in trial tactics. He had been so successful that some swore that he had caused the Workmen's Compensation Act to be passed. He may have — his hatred for Alabama Fuel and Iron is legendary. It is said that once he opened a trial in Pell City with a most uncommon prayer, and the prayer was heard by the jury which was to try his case against the company: "Dear God, save us from the pain and suffering caused by the cheating of Alabama Fuel and Iron against its employees. Forgive the lawyers defending them — they do not know the suffering and misery that their client has caused the people of this State." The lawyer representing Alabama Fuel and Iron was so taken aback that he did not object to the statement, lost his case, appealed and was told by the high court that because he did not object, there was no error for it to explore.

The young judge had been subpoenaed to testify on Denson's behalf. He had ignored the subpoena, even the calls from the bar commissioners to appear and give evidence as to the character of the defendant. Other judges and prominent lawyers already had testified that Denson's general reputation was good. It had been an imposition, but most had done it because it was the expected thing to do; then, what did it matter? A lawyer was supposed to have good character or else he would not be practicing; then why should not judges and lawyers step forth to help a lawyer on trial?

The lawyer on trial was charged with solicitation of damage suits and the attempt to bribe a witness. His great success as a damage suit lawyer had gone to his head; he had become so arrogant and self-centered that his enemies, including his competitors, had convinced the leaders of the bar that Denson had to go. Denson learned about the bar's decision, but foolishly continued to handle himself in his old way, as if he were above and beyond the discipline of the organized bar. He always had had a sharp tongue, but as he became more successful, he had begun to show in court a disdain for his opposition as if he were the only lawyer present with brains. He was not only clever, but he also had solid legal connections. His father-in-law was a chief justice of the supreme court. His brother was a circuit judge. Yet, he lacked the tact of these two men. He had a reputation of brawling in court, demanding and getting his way with judges whom he intimidated by the score. He carried a pistol, sometimes in his pocket or else strapped to his leg. And he often threatened to use it. He also rendered an awesome appearance. His face was as red as his hair. His bushy eyebrows shaded crafty eyes that sometimes were as red as hot coals. He was

ONE MAN WITH COURAGE MAKES A MAJORITY

tall, heavy-set with an overpowering demeanor that demanded he have his way. His appearance in court was often enough to win cases from any but the fearless. Young lawyers often cringed when they met him in court, and he talked down to them about their lack of knowledge and skills. Most lawyers and judges did not want a confrontation with him, as he seemed intent on fighting, one way or another. He often spoke of fighting the other lawyer with his fists or with his weapons. Thus, whether by courtesy or fear, every lawyer and judge that Denson had called in his own defense had testified that his reputation was good.

"Good — good!" had been their replies to his question about his general reputation. All had testified except McElroy; thus, the hearing was in short recess while Thomas went for young Judge McElroy. Denson stood by the counsel table with his hands on his hips, his face stern and his tinted red hair combed high on his head, being closely eyed by a hundred or more spectators. The bar

commissioners having the duty of hearing the matter were sitting back in their chairs. Denson saw the young judge striding toward him; he intently watched him pass the stacks which held the out-of-state reports. He smiled and, in a most solicitous manner, walked toward the door to meet him.

"Judge, I'm glad that you've come; I'll take you next — you won't be here very long — I'll just ask you a couple of questions —"

"I don't recommend that you call me, Denson," replied the judge, his eyelids flickering as he chewed on his cigar.

"Why?" asked the lawyer, his face flushing, becoming much redder. His lower lip drooped, then quivered, while his eyes steeled.

"I can't help you!"

"You mean something is wrong with my character?" Denson asked with an adamance which meant that irrespective of the judge's revealing to him that he would not give him a favorable report, he would use him as a witness, which would thereafter perplex lawyers for years, as much as why he had defended himself rather than employ a lawyer, for it has long been a legal adage: "A lawyer who represents himself has a fool for a client!"

"I would advise you not to call me as a witness," the judge warned for the second time, "as I would be under oath — would have to tell the truth!"

"I dare you to attack my character —"

Spectators saw the confrontation. They eyed them and noisily whispered. What was between the two men?

"Attack!"

"Yes —"

"Don't call me!"

"I want to hear what you've got to say about me!" he said, spitting out his words — he said it as though he intended to use his gun on the young judge. Reason had left him. The whole procedure already had become personal. During the course of more than a week of testimony Denson had divided the courthouse into those for him and those for the corporate world. Denson clearly stood against the corporate world — and he had supporters — but that was expected. Times were hard. The country was in the midst of a depression. It was March 1936. Denson's lot was with the have-nots, though he had plenty. He was a damage suit lawyer who had sided with the injured and maimed and made a lot of money because of it; even so, he considered himself to be a warrior on behalf of his clients, pitting himself against the railroads, corporations and insurance companies. It was not Denson, a person, but Denson the lawyer, the warrior who fought them. His face reddened. He swelled from the affront — he was used to fighting the corporate lawyer — the judges who sided with him — guts, it seemed to many that he had aplenty. He sincerely felt that he was a part of a class struggle, maybe even a part of a religious movement, though he was a rich man and lived in a big house. Men were being killed on picket lines — children were hungry because their fathers did not have work — class hatred was in the winds — Denson's mind was so clouded by his personal involvement in this class struggle that he was not able to use the skills that he professed he had, as he often called himself "the state's greatest damage suit lawyer." His temper would be his undoing!

"Order in this room!" loudly declared Files Crenshaw, the chairman of the five-man commission, and he rapped on the table for order. The large, beautifully decorated room, having an extraordinary mural of Alabama history on its wall, was packed with reporters, lawyers, courthouse personnel and hangers-on. It was a cause celibre. The famous Denson was on trial for his professional life. And he was defending himself. Some said that he was making a circus of the proceeding. He degraded witnesses, the prosecutor and competing damage suit lawyers and negated the ability of the bar commissioners. The newspapers carried daily accounts of his attacks on lawyers, the railroads, large corporations and insurance companies Denson claimed were out to disbar "the best damage suit lawyer in this state." It was a rough and tumble procedure. Threats and counter threats had been made daily between Denson and the handsome, silver-tongued Roderick Beddow, who would soon come to be the state's most prominent criminal lawyer. His courage soon would become legend. He would try hundreds of celebrated cases which would make his name as well-known as that of the governor.

"Who will you have, Mr. Denson?"

"Judge J. Russell McElroy."

"Swear in the judge."

Denson stood in the center of the room like a lion tamer; quiet came over the room. All eyes focused on him, sensing the drama; it was as though everyone present recognized that the trial was about to reach a climax. Heretofore there had been lengthy testimony about Denson chasing cases — but that was not uncommon then or even now — lawyers have to eat. It was common knowledge back then that most of the successful lawyers got their cases by runners to whom they obviously paid commissions; yet, this had been offset by testimony from a dozen lawyers and judges who swore that Denson's character was good. The testimony about his attempt to bribe a witness to change his testimony was not so strong that reasonable men could skirt it. He asked the young judge the usual identification questions, received the proper answers; but this was not the usual witness. Denson's eyes were as shiny as a fox's with bright light on them as he directed the following questions.

"Are you acquainted with W.A. Denson?"

"Yes."

"Are you acquainted with his reputation in the community?" His questions were always short, terse and very professional. Even his critics would have agreed that he had the skills of a good trial lawyer.

"As of the present time?"

"And before the present time?"

"Yes, sir."

"Ever since you have been here?"

"Yes, sir. I would judge so."

"Is it good or bad?"

"I would rather not answer that, Mr. Denson," he replied and nervously blinked his eyes and made chewing motions. The atmosphere reeked with drama as Denson, with his hands on his hips and his eyes steeled, faced the young judge, standing only a few feet from him.

"Well, I insist on an answer," he caustically asked, as if daring him to say the worst.

"All right, sir. It is unfavorable!"

Denson's face reddened. Wrinkles came to his neck. He glared at the judge. He angrily faced him. It was evident to the keen observers that the apex of the trial had been reached.

"Do you know his reputation as to truth and veracity?"

"I think so."

"All right, sir. Is it good or bad?"

"Not favorable!" he replied. There was a loud murmur in the hearing room. All wondered why Denson had called as a witness a judge who obviously had previously told him that his testimony would be unfavorable. He had to have known something about the kind of man McElroy was. He was not an ordinary judge; previously he had distinguished himself by doing the unheard of and campaigning against an incumbent fellow judge, declaring throughout the county that the judge was incompetent. And he was! The incumbent judge was handily defeated.

"And do you know his reputation as a lawyer?"

"I do."

"Is it good or bad?"

"Unfavorable."

And thus, the testimony of the young judge ended, but the effects lingered on like bad perfume or dust after a noisy explosion. It also made an impact on the defendant trying his own case, as later on during the proceedings he attempted to inject into the record that the young judge had a reputation for tampering with juries. He even made the statement to the commission that the judge shuffled the cards of the jurors in the jury box so that he was able to pick those that he wanted to serve. But he was unable to introduce any evidence as to this charge, and thus, his case worsened and finally collapsed. Denson was disbarred, which was affirmed by the highest court. He never practiced law again. He became a familiar, forlorn figure at the courthouse; he was most always dressed in corduroy riding pants, jacket and sundown hat. He made a daily trip to the law library, as if searching it for loose pieces of his case. He read the library's books, made notes, talked of the old days to those who would listen and snoozed on the leather couch.

The young judge, on the other hand, continued to try cases, some of which were the most celebrated cases ever tried in Alabama, one of which was *State v. Fuller*. Fuller was charged with the assassination of an attorney general nominate. McElroy became presiding judge of the 10th Judicial Circuit and professor of law at the University of Alabama and Cumberland Law Schools. He authored the first treatise ever written on Alabama evidence. And in doing so, he probably read every Alabama case reported. He retired in 1977 after having served for more than 50 years as a circuit judge. By then, the name of J. Russell McElroy had become a symbol amongst the bar for truth and veracity. □

Grover S. McLeod, a Birmingham native, attended Birmingham Southern College and received his law degree from the University of Alabama School of Law. He also attended the University of Western Australia. His published works include Civil Actions at Law in Alabama, Equitable Remedies and Extraordinary Writs in Alabama *and* Trial Practice and Procedure in Alabama.

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IOLTA — "NOW" Provides New Interest

by
Rowena M. Crocker

The Alabama State Bar, through its Task Force on IOLTA, is considering adopting a program allowing the pooling of otherwise unproductive client funds held in lawyers' trust accounts into interest-bearing accounts for funding law-related charitable and public interest activities.

Adopted in 37 states, the concept is discussed here by task force chairman Rowena M. Crocker and member Stanley Weissman.

IOLTA is an acronym for "Interest on Lawyers' Trust Accounts." IOLTA is a program allowing lawyers and law firms to establish interest-bearing trust accounts for client funds which are so nominal in amount or which are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits.

HISTORY

IOLTA programs originally were established in Australia and Canada in the 1960s and are active in 22 English-speaking countries. When banking procedures were changed to permit interest to accrue on trust accounts, Florida undertook to implement the first IOLTA program in the United States.

To date IOLTA programs have been adopted in 37 states, although programs are operational in only 21. From these 21 over $32,000,000 have been collected in interest income.

THEORY

IOLTA is simple in concept and operation. The fundamental premise of the program is a recognition of the traditional role of attorneys who receive funds in trust from their clients to be held for future transactions. Although the *Code of Professional Responsibility* does not impose an affirmative duty on lawyers to invest client funds, where such deposits are significant in size or are to be held for a significant period of time, the attorney customarily deposits them in an interest-bearing account for the benefit of the client. However, many lawyers' trust accounts are so small in amount or are held for such a short period of time that the cost of administering individual accounts for each client or of having interest computed and allocated to individual clients exceeds the potential earnings. These client trust funds traditionally have been deposited in aggregated non-interest bearing trust or checking accounts. This certainly benefited the financial institutions, but left substantial amounts of money idle in banks, earning no interest.

The underlying theory of IOLTA is to put these otherwise idle funds to work for charitable purposes by transferring them in the aggregate to negotiable order of withdrawal ("NOW") checking accounts which bear a fixed rate of interest. The interest earned on these funds would be paid directly from the financial institution to a not-for-profit corporation for use in specified law-related public interest activities. The result is to provide for public benefit without cost to the taxpayer, the lawyer or the client. The proposal to establish an IOLTA program in Alabama reflects the Alabama State Bar's continuing commitment to the development and support of activities to improve the legal system.

IOLTA IN ALABAMA

Alabama is proposing a voluntary — opt-out IOLTA program to be established by the Alabama State Bar Board of Commissioners. The approval of the Alabama Supreme Court will be required pursuant to §34-3-43, *Code of Alabama*, 1975.

Certain questions arise concerning IOLTA. What are the tax consequences of interest generated by IOLTA accounts? What is the availability of NOW accounts for use in an IOLTA program? Are IOLTA programs violative of the "Taking" provision of the Fifth Amendment? What are ethical considerations of the attorneys dealing with funds in escrow or trust funds?

TAX CONSEQUENCES

In a proposed IOLTA program the monies would be paid to the Alabama Law Foundation, Inc., a non-profit corporation. The foundation has nine trustees selected by the board of bar commissioners, and up to six additional trustees may be selected by the board of trustees at its discretion. The IOLTA program would be implemented and administered by this foundation. All interest is paid to the foundation, and from this interest monetary grants will be made to fund permissible activity.

The purposes for which IOLTA funds are used must meet the criteria for tax exemption under Sec. 501(c)(3) of the Internal Revenue Code. Purposes which have received favorable IRS rulings are the Client Security Fund, IOLTA program administration, continuing legal education, indigent fee programs, legal ser-

Rowena M. Crocker received her undergraduate degree from Birmingham Southern College and her law degree from the Cumberland School of Law. She presently serves as an assistant city attorney for the City of Birmingham and is the chairman of the Alabama State Bar Task Force on IOLTA.

vices to the poor, county and state law libraries and student loans and scholarships. Application would be made to the foundation on a yearly basis requesting grants. The grant proposals would be reviewed by the foundation and grants appropriated from the available accumulated funds.

The IRS has ruled that interest earned on these client trust accounts and paid to the foundation for the IOLTA program is not income nor taxable to either the lawyer or client, and the entire beneficiary of the IOLTA income is the foundation. The interest will be reported to the IRS by the financial institution using the foundation's tax identification number.

PERMISSIBILITY OF NOW ACCOUNTS

The general counsel of the Federal Reserve System has opined that NOW accounts may be utilized in the IOLTA program by any participating law firm, sole practitioner, partnership or professional association and for all deposits held in trust for individuals, partnerships and others.

DUE PROCESS

IOLTA so far has withstood the court challenge. Two separate lawsuits have been filed testing the legality of IOLTA programs in California and Florida. The Florida case, filed in the U.S. Middle District of Florida, alleges that the payment of interest earned on a client's principal held in trust to a bar foundation constitutes a taking of the client's property in contravention of the Due Process Clause of the Fifth and 14th Amendments to the U.S. Constitution. A preliminary injunction has been denied. *Glaeser, et al v. The Florida Bar, et al,* C.A. No. 84-1345, CIV-T-13. In *Carroll v. State Bar of California,* Court No. N22139 (San Diego Superior Court), the California Court of Appeals ruled in December 1984 the state's IOLTA program did not violate the due process clause. The court held the client suffered no *real* economic loss since net income after offsetting transactional costs against the accrued interest would be nil, at best. Such an "abstract" economic interest is not subject to monetary compensation nor is it subject to the protections of the Fifth Amendment. The California court concluded:

> "So long as the principal is secure, not diminished, and is not economically capable of generating net income through deposits on investments legally available for lawyer's trust funds, the client retains no meaningful right of control except to recover the principal upon a request made before it is properly expended."

The favorable ruling by the courts to date on this issue certainly speaks to a positive and encouraging attitude that the courts hold toward IOLTA programs.

ETHICAL CONSIDERATIONS

The lawyer's traditional fiduciary obligations to safeguard funds for the benefit of the client would remain unchanged. No new decisional burden would be imposed on the lawyer. Lawyers would continue to soundly exercise their discretion in determining whether a given client's trust deposit was of a sufficient size or duration to justify placement in a separate interest-bearing account, and no charge of ethical impropriety or professional misconduct shall attend an exercise of judgment in that regard. An IOLTA program is fully consistent with the lawyer's ethical obligations under Canons 2 and 8 of the *Code of Professional Responsibility* to make legal services more fully available and under Canon 9 to provide for the administration of justice. (ABA Formal Ethics Opinion No. 348, dated July 23, 1982)

CONCLUSION

An IOLTA program will provide the Alabama State Bar with funds to expand its own programs designed to enhance the profession and also to aid many other programs having impact upon the delivery of and access to legal services at a critical time when traditional funding sources are becoming scarce. □

All You Wanted to Know About IOLTA But Were Afraid to Ask

by
Stanley Weissman

Q. What is IOLTA (Interest on Lawyers' Trust Accounts)?

A. IOLTA or Interest on Lawyers' Trust Accounts is quite simple. Attorneys often receive funds to be placed in trust for future use. If the amount of the funds is large or if the funds are to be held a long time, the attorney would be expected to deposit these funds in an interest-bearing account so his or her client would obtain the interest. However, if the amount of the funds is small or if the funds are to be held a short time it is impracticable for the attorney to put the money in an interest-bearing account because the amount of interest earned would be less than the cost of setting-up and administering the account.

Until a few years ago, American lawyers could put such small amounts or short-term funds in commingled noninterest-bearing checking accounts. However now in many states, such as Florida, North Carolina and Maryland, IOLTA programs have been instituted and attorneys now place these small or short-term funds, which would otherwise be idle, in interest-bearing accounts, and the resulting interest is forwarded to a charitable organization which ultimately distributes the money for use in law-related public interest programs. It is to be emphasized that to the extent that interest on any client's deposit could be used for the benefit of the client, the IOLTA programs do not alter the long-standing fiduciary obligations of the legal profession.

Q. What do the IOLTA programs do?

A. The interest earned from the deposit of small funds and short-term funds is sent to the state bar foundation or other organizations which have been designated to receive and distribute IOLTA funds.

Foremost among the uses of the IOLTA money is the provision of legal aid to the poor. At present, 10 programs have distributed IOLTA income: Florida, New Hampshire, Colorado, Minnesota, Maryland, Delaware, Oregon, Virginia, California and Illinois. In all of these programs at least 80% of the money has been given to provide legal services to the needy — almost $13 million. Another approximately $1.1 million has gone to assist law students and law-related education programs and to fund administration of justice projects. Generally speaking, the uses for which the IOLTA money have been approved are legal aid to the poor, law-related education (including student loans), the administration of justice and other programs for the public interest as approved by the state supreme courts. In a few separated cases other proposed uses are: to provide aid to law reform projects (Hawaii); the development of lawyer referral programs, development of a client security fund and improvement of grievance and disciplinary procedures in the bar (North Carolina); to help prevent crime (South Dakota); and to cover administrative expenses of IOLTA programs (California and Rhode Island).

Among the actual uses of IOLTA Funds in the above mentioned 10 programs are providing supplementary support for federally funded legal services programs, bar associations' *pro bono* programs and other legal projects sponsored by private, law school and church-related organizations. Among these projects are a disabilities advocacy center and a domestic violence project. Some grantees are using IOLTA funds for additional staff or general support; however, other grantees are initiating or supplementing senior advocacy projects, juvenile programs, family law clinics, guardianship programs or representation of the institutionalized and handicapped.

Q. Is the idea of an IOLTA program new?

A. No. Sometime ago, in the search for new funding sources for the operation of the organized bar and for legal services delivery programs, several English-speaking jurisdictions developed programs which placed clients' funds in interest-bearing accounts. The interest generated then was used for legal aid and other projects to improve the administration of justice. The development of these programs in common-law jurisdictions was facilitated by two factors: one, the bar was regulated, and, two, the banking system provided interest-bearing demand deposits. In the 1960s the bars in a number of British and Canadian jurisdictions established IOLTA programs which used the money generated to support legal aid, law libraries, scholarships for law students, clients' security funds and projects for the improvement of the administration of justice. Since then the idea of IOLTA has spread widely.

Q. How widespread are IOLTA programs?

A. Since 1972 there have been in existence IOLTA programs in 22 English-speaking jurisdictions, including Canada, Australia and South Africa. Such programs are currently in operation in the Republic of South Africa, Southwest Africa, Zimbabwe, the Australian States of Victoria, New South Wales, South Australia, Queensland and the Australian Territory, and also in the Canadian Providences of Ontario, Alberta, Manitoba, New Brunswick, Prince Edward Island, Nova Sco-

tia, Saskatchewan, Quebec, Yukon, the Northwest Territories and British Columbia. In the United States there are 18 operational IOLTA programs: Florida, California, Idaho, Maryland, Colorado, New Hampshire, Minnesota, Oregon, Virginia, Illinois, Oklahoma, Delaware, North Carolina, New York, Utah, Vermont, Arizona and Kansas. In addition, 17 other states' IOLTA programs have been approved by the state supreme court or enacted by the state legislature. These programs are: Nevada, Hawaii, Georgia, South Dakota, Texas, Nebraska, Mississippi, Connecticut, Washington, New Mexico, Arkansas, Missouri, Tennessee, Rhode Island, Iowa, Ohio and Louisiana.

Q. Why is an IOLTA program needed in Alabama?

A. Approximately 85% of the legal needs of poor people in Alabama are presently unmet. According to the data of the United States Census Bureau, the poverty population of the state of Alabama in 1980 was approximately 720,000: also according to a study by the Legal Action Support Project of the Bureau of Social Science Research, using data collected by the American Bar Association and the American Bar Foundation it was estimated approximately 23% of the poverty population would have one or more legal problems in a year. It was stated these figures do not take into account individuals with multiple legal problems and, thus, the estimation seriously may understate the actual legal requirements of the poor. In 1984 the three field programs supported by the Legal Services Corporation closed approximately 23,150 cases. When this number is compared to the need as estimated from the 1980 figure for the poverty population and the estimation of the legal requirements of indigent people, it is seen that only about 14% of the legal needs are being taken care of. It is to be understood that these numbers are only approximations and estimates. The unmet legal needs of the poor are probably greater because unemployment in the state of Alabama has increased significantly since 1980, and the standard for eligibility for help from the field programs is 125% of the poverty level. Also, the field programs presently are getting approximately 80% of the funds which were provided to them in 1981.

Also, an IOLTA program is needed because in recent years the funds available for student loans and the administration of justice projects have been reduced substantially and, in addition, law libraries should be maintained and expanded. Participation in an IOLTA program presents an excellent opportunity for additional public service by the legal and financial communities of the state of Alabama.

Q. How would an IOLTA program affect my current trust fund practice?

A. If an IOLTA program is adopted in Alabama which is similar to the programs that have already been instituted in so many states such as Florida, the program would impose no new decisional burden upon Alabama attorneys. Lawyers always have had to exercise their sound judgment in determining whether a particular trust deposit was of sufficient size or long enough duration to justify placing it in a separate interest-bearing account with the interest payable to the client. Under an IOLTA program attorneys still retain this discretion and will continue to make fiduciary decisions based upon considerations of associated costs, tax ramifications, practicability and other factors.

Q. Is there some guideline an attorney can use to decide which trust deposits are to be used in an IOLTA program?

A. Yes. The program developed in Maryland uses a "$50 Benchmark." The significance of this $50 standard is based on a study done in Maryland to determine the cost and office overhead for a law firm or an attorney to open up a passbook account for the benefit of an individual client. This study takes into account the expense in securing the client's Social Security Number, opening a passbook account, accounting for the interest on the law firm's books, furnishing form 1099 at the end of the year and accounting for the funds and issuing a check when the account is closed. The Maryland study concluded all these items would require an overhead of at least $50, and therefore it would be economically impractical to open an individual account unless it were reasonable to expect the minimum amount of the interest generated would be $50. Following is a table developed in Maryland showing the amount of principal and the length of time needed to generate $50 of interest at 5 1/4% compounded daily.

Principal Deposit	Number of Days to Generate $50
$ 500	654
$ 1,000	335
$ 2,000	169
$ 5,000	69
$10,000	34
$20,000	17
$30,000	12

The above table, or one similar to it, can be used by an attorney to make a good faith judgment as to which funds should be used in an IOLTA program.

Q. Does participation in an IOLTA program deprive the clients of their interest money?

A. No IOLTA program ever uses interest money from clients' trust deposits which are large enough or held for a long enough time interval to generate interest in an amount greater than the costs of establishing an interest-bearing account. Only those client trust deposits which are nominal in amount or held for short periods of time such that it would be impractical and uneconomical to set up as a separate account are used. Thus, no client is deprived of any practicable income opportunity. Only those deposits for which the sum of the administrative costs to the law firm or attorney, the service charges of the financial institution and the tax liability of clients is less than the interest yielded would be used in an IOLTA program. That is to say, if the amount of money or the duration the money held is such that the client can obtain interest in a practical fashion, the client's money is not used in the IOLTA program.

Q. Can an attorney continue to invest trust fund monies on behalf of clients if the attorney participates in an IOLTA program?

A. Yes. When a client requests, interest earnings should be

made available to the client whenever possible on deposited funds which are neither nominal in amount nor held for short periods of time. As is the customary practice, such large, short-term client deposits or modest deposits which are held for a long time are invested by attorneys in interest-bearing accounts for the benefit of the client.

Q. What are an attorney's ethical obligations under an IOLTA program?

A. As in any other circumstance, attorneys and law firms are precluded from earning interest on funds which they hold in trust for clients. When a client requests, the earnings on deposited funds which are neither nominal in amount nor held for short periods of time should be made available to the client whenever administratively practical. Such large, short-term client deposits and modest deposits held for significant time intervals usually are invested by attorneys in interest-bearing accounts for the client's benefit with full disclosure.

Formal Opinion 348 of the American Bar Association Standing Committee on Ethics and Professional Responsibility was published in the November 1982 issue of the *American Bar Association Journal*. In this opinion the committee found nothing in the Model Code of Professional Responsibility that would prohibit any attorney from participating in a state-authorized IOLTA program, similar to that established in Florida. That is to say, if the program used interest earned on bank accounts in which clients' funds, nominal in amount or to be held for a short time, were deposited and the interest was paid to a tax-exempt organization to be used to fund law-related public interest projects, then there is no conflict with the model code. The opinion stated in part:

> "For several reasons, participation in these programs differs significantly from the lawyer's use of interest earned on clients' funds to defray the lawyer's own operating expenses, a practice which, as noted above, is prohibited by the model code unless the client consents after full disclosure.
>
> First, retention by a lawyer of interest earned on clients' funds inevitably places the lawyer's own financial interests in conflict with those of the client. The lawyer who retains the interest has an incentive to delay disbursement of the funds. That is why client consent after full disclosure is a prerequisite to such lawyer activity. In contrast, a state-authorized program, by requiring payment of the interest to tax-exempt organizations not selected by the lawyer, poses no conflict between the financial interest of the client and that of the lawyer.
>
> Second, the state-authorized programs are subject to public scrutiny and accountability. Precise standards for use of interest earned on lawyer trust accounts are set by state legislatures and state supreme courts. As circumstances may warrant, the programs may be altered by law. Any direct use by a lawyer of interest on clients' funds, on the other hand, would be virtually unsupervised and, in most states, subject to public review only on complaint of a client.
>
> Third, lawyer participation in these programs involves no commingling of funds belonging to the client and the lawyer. Since all the interest is payable to the charitable organization, interest earned on the account is not even arguably the lawyer's property. In contrast, the lawyer's personal retention of interest on client trust funds would lead inevitably to some commingling, could lead to disputes between the lawyer and client, and might subject the account to claims made by the lawyer's creditors.
>
> The model code also imposes no duty to obtain prior consent or to notify clients of the application of their funds in the programs described above. Although keeping the client informed about the program is laudatory, here, as a practical matter, the client's funds cannot be placed at interest for the benefit of the individual client. Therefore, the lawyer has no ethical responsibility to advise the client that the interest earned will be used toward funding law-related public service projects. *In re Interest on Trust Accounts*, . . . 402 So.2d at 396. Furthermore, it is ethically proper without the client's consent to allow the application of a portion of the earnings on these funds to reasonable bank charges, as distinguished from the law firm's own expenses, for performing the additional computerization, transfer and reporting called for in the programs.
>
> The committee recognizes that the bar long has been sensitive to its role in the careful stewardship of clients' monies entrusted to lawyers. The committee finds no conflict with the principle of careful stewardship when a lawyer participates in the state-authorized programs described [essentially the Florida IOLTA program]. Canon 8 of the model code says "[a] lawyer should assist in improving the legal system." This standard of conduct is advanced when a lawyer participates in a program which puts idle funds to law-related public uses. Moreover, by focusing attention on the earnings potential of lawyer trust accounts, these programs have the added benefit of encouraging lawyers to earn interest for clients on trust funds where the expected interest is more than the cost of administering the account."

Q. Are there any additional administrative duties for an attorney participating in an IOLTA program?

A. IOLTA programs generally impose no new administrative burdens on participating attorneys. Whether or not an attorney has a duty to offer separate, interest-bearing accounts to clients whose trust deposits are neither nominal nor short-term is not modified by an IOLTA program. A participating attorney would continue to place small or short-term deposits into a single unsegregated account. The only change caused by participation in an IOLTA program is that these unsegregated accounts would now bear interest, but this should not change how an attorney or law firm currently handles client trust deposits because any interest automatically would be forwarded to the organization administrating the IOLTA program.

Q. What would be the tax consequences of participating in an IOLTA program?

A. There would be none to the client or the attorney. If the program was designed in the same fashion as those in other jurisdictions, the organization which receives interest from the participating trust accounts would be exempt from federal income tax. The Internal Revenue Service issued Revenue Ruling 81-209 (26 CFR 1.61-7) stating that the interest earned on client's nominal and short-term advances which are deposited in an attorney's trust account and paid over to a bar foundation, pursuant to a program established by the state supreme court, is not includible in the gross income of the client. In this ruling it is noted no client may individually elect whether to participate in the program, and if an attorney elects to participate the attorney must do so with respect to nominal and short-term advances of all clients. The ruling also

noted the program would bar clients from receiving the benefit of any interest earned on the commingled deposits, and, because of their fiduciary responsibilities it is illegal for attorneys to receive any benefit from the interest earned on the commingled funds. The ruling concluded that under the facts described above the interest earned on nominal and short-term advances and paid to the bar foundation pursuant to a program established by the state supreme court is not to be included in the gross income of the client.

Q. How does an IOLTA program affect financial institutions?

A. In Florida and other jurisdictions the participating financial institutions — not attorneys — are responsible for sending the interest income and furnishing quarterly reports to the state bar foundations which distribute the IOLTA funds. The program is designed so that the organization administering the IOLTA program and distributing the funds will absorb any financial institutions's special charges for its involvement in the program, so the interest payments are net of such charges. The interest remitted to the IOLTA organization should state the lawyer or law firm in whose name the money was sent and the rate of interest applicable to the payment. With each remittance the participating lawyer or law firm is provided with information such as the amount paid to the IOLTA organization, the applicable interest and the average account balance during the time period for which the report is made. The financial institution also provides the participating attorney with a duplicate of the IRS form 1099 that is sent to the IOLTA organization.

Q. Would all types of law firms and trust deposits be eligible for participation in an IOLTA program?

A. When the IOLTA program was established in Florida, a ruling of the general counsel of the Federal Reserve System was obtained authorizing the use of Negotiable Order of Withdrawal (NOW) accounts in connection with the IOLTA program. Thus, NOW accounts may be utilized by any participating law firm, sole practitioner, partnership or professional association and all deposits held in trust for individuals, partnerships, not-for-profit corporations, for-profit corporations and others may be so utilized. This ruling was predicated on a Florida Attorney General opinion letter which concluded the Florida Bar Foundation, which distributes the IOLTA funds to law-related public interest programs, holds the "beneficial interest" in the interest monies derived from trust accounts of lawyers and law firms participating in the program.

Q. What is the status of the judicial challenges to IOLTA programs in other jurisdictions?

A. Lawsuits have been filed against the Florida and California programs alleging that clients have been deprived of property (interest) by state action through the implementation of the IOLTA programs. Initially, in the California case of *Carrol v. State Bar of California*, the San Diego Superior Court held the state legislature had established a voluntary rather than a mandatory program. This decision was reversed by the California Court of Appeals, Fourth Appellate Division, December 19, 1984, which held that the legislature had actually created a mandatory program. The appellate court also considered challenges to the constitutionality of the statute which created the California program. These challenges alleged the California program constituted a taking of property which is prohibited by the Fifth Amendment. The court stated in part:

> Here, respondents apparently contend they are entitled to the monetary value of the interest generated by their funds deposited with their attorney. However, to do this would, under ordinary trust principles, entitle the trustee-lawyer to be reimbursed for transactional costs incurred in generating that interest and accounting for it to the client. Where, by definition, those transactional costs exceed or equal the total interest income generated, the clients suffer no loss for which they are entitled for compensation. The abstract right to control where interest earned on a person's money may be funneled, is not an economic loss subject to monetary compensation.

On May 2, the California Supreme court issued a 6-1 ruling which denied without comment a petition to review the lower court's ruling upholding the California program. One of the parties in this case has stated there will be an appeal to the United States Supreme Court. If the *Carrol* case is appealed, it will be the second case presenting the issue of IOLTA to the U.S. Supreme Court. In Iowa, on March 14, five attorneys appealed to the U.S. Supreme Court, *Ronwin v. Supreme Court of Iowa*, alleging the Iowa program violates the Fifth Amendment's "taking" clause. The attorney general of Iowa opposes the granting of certiorari in this case.

The Florida case was filed in federal district court and alleged that an elderly client was denied interest of an amount under $5 by an attorney participating in the Florida IOLTA program. The U.S. District Court, in *Glaeser et al v. Florida Bar et al*, denied injunctive relief to enjoin the distribution of funds by the Florida IOLTA Program. Presently, this case continues under appeal to the 11th Circuit Court of Appeals; however, the court of appeals and U.S. Supreme Court Justice Powell have denied emergency stays of the district court's decision which upheld the IOLTA program.

(Continued on page 249)

Stanley Weissman, assistant director and task force coordinator with the Alabama Consortium of Legal Services Programs, is a graduate of Roosevelt University, Illinois Institute of Technology and Capital University. He is a member of the Alabama and Ohio bars.

It's A Boy!

Congratulations to Mr. and Mrs. Stephen Dubberley on the birth of a son, Sellers Lacey, August 26, 1985. The baby weighed six pounds, 12½ ounces and was 19½ inches long.

The mother is the managing editor of *The Alabama Lawyer.*

Young Lawyers' Section

by
J. Bernard Brannan, Jr.
YLS President

By the time you read this article, the Young Lawyers' Section will have elected a new slate of officers and a new executive committee will have been appointed. During the next year, we look forward to a continuation of the excellent programs Bob Meadows has so effectively administered as president. The entire section has greatly benefited from Bob's leadership.

The purpose of the Young Lawyers' Section is to serve the bar as a whole by being of service to the members of the profession at the first stages of their development as lawyers and to serve the public with time and energy that they may not have as older practitioners. During the next year, I foresee an opportunity for the young lawyers to aid in the development of a bar that is dedicated to public service and the highest ideals of the profession by not only offering programs for the young and entry-level members of our profession, but by making information available to those young people interested in pursuing a career in the law.

To further this goal, the section has developed a viable program in conjunction with the YMCA Youth Legislature. The program, called the Youth Legislative Judicial Program, offers young persons in high school who are interested in legal careers the opportunity to actually participate in mock trials. The teams of youth lawyers, coached by members of the Young Lawyers' Section, have trials at various points throughout the state. The winning teams in each area will come to Montgomery in April during the session of the Alabama Youth Legislature. In Montgomery, young people involved with the youth legislature are selected as jurors, and those who have been active in the program for some time are elected as judges. Subpoenas are issued, and young people serve as witnesses. At the conclusion of the mock trials, the cases are appealed to a Youth Supreme Court, elected by members of the Youth Legislative Program and trained by young lawyers to consider the appellate cases.

This program has now been in effect long enough that we are beginning to see the fruits of our efforts. It is an excellent way to educate the public at an early age and to give a hands-on view of our justice system. We have found that for some of the young people, there is a burning desire to follow their interests and, with the proper perspective of the career, pursue a legal education. With other young people, we find the learning experience, although quite valuable, gives them the insight to see, in time to concentrate on their other interests, that the career is not what they expected.

In the same vein, within the next year the section will have available a pamphlet for college students and the public at large that gives an overview of the requirements, both educational and legal, for engaging in the practice of law. Entry requirements for law school and estimated expenses will be discussed in the publication and, generally, persons interested in legal careers will be given some idea of the commitment required to become a lawyer and aided in beginning the process.

In an effort to provide a service to the members of the bar, our section intends to continue to emphasize the development of interesting and valuable continuing legal education programs. Those programs which tend to "bridge the gap" between law school and the actual practice of law will be provided and highly promoted by the section, but we also intend to emphasize CLE programs to aid the association as a whole. A goal of the section during the upcoming year in this area will be to stress the importance of a bar highly knowledgeable in the area of its own

ethical standards.

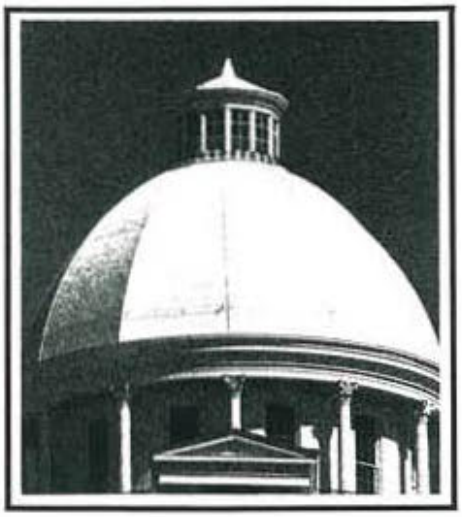
Our section hopes to fulfill its duty to the public and create a positive image of our profession through projects aiding those segments of our population who can least help themselves — children and the elderly. We envision two major projects to help these two groups. We are beginning to establish a program that will provide a videotape presented by a young lawyer to school children making them aware of the need to avoid strangers and the importance of notifying someone when they are being abused or mistreated. Companion to this program, we will offer a child advocacy program through which the protection of childrens' rights will be studied and, ultimately, aid will be provided for such protection. Another program we intend to establish will be one to provide information and legal services to the elderly. We will produce a pamphlet to be made available to the elderly, and it will provide information particularly attuned to their needs.

Along with the projects and programs previously mentioned, the Young Lawyers' Section will continue to stress the involvement of its members in the programs of the entire state bar. Jim North, newly-elected president of the bar, has given us, as young lawyers, an excellent opportunity to become involved. At this time, he has provided a position for a young lawyer to serve on each standing committee of the state bar, and appointments have been made to fill those slots. I am certain this opportunity to serve will be greatly appreciated by each young lawyer appointed to a standing committee, and I am confident each will contribute greatly to the ultimate success of our bar year.

Finally, committee appointments for the Young Lawyers' Section will be made during the next few weeks. Any member of the state bar who is under 36 years of age is eligible to serve. If you meet that requirement and are interested in becoming involved in the Young Lawyers' Section as a committee person, please contact me so we might be able to get you actively involved in what should be a dynamic year for both the Young Lawyers' Section and the state bar. □

STATE BAR MEETINGS SEPTEMBER 1985

Date	Committee or Task Force, Meeting Location and Time
6	**TASK FORCE ON ALTERNATIVE METHODS OF DISPUTE RESOLUTION** 1400 Park Place Tower, Birmingham 2 p.m.
6	**INDIGENT DEFENSE COMMITTEE** 400 South Hull Street, Montgomery 3 p.m.
13	**BOARD OF BAR COMMISSIONERS** Bar headquarters, Montgomery 10 a.m.
13	**TASK FORCE ON CITIZENSHIP EDUCATION** 2015 Highland Avenue South, Birmingham 1:30 p.m.
20	**LEGISLATIVE LIAISON COMMITTEE** Bar headquarters, Montgomery 9:30 a.m.
20	**PERMANENT CODE COMMISSION** Bar headquarters, Montgomery 10 a.m.
20	**TASK FORCE ON JUDICIAL EVALUATION, ELECTION AND SELECTION** Bar headquarters, Montgomery 1 p.m.
27	**TASK FORCE TO EVALUATE PROPOSED CHANGES IN THE CONSTITUTION OF 1901** Cumberland School of Law, Birmingham 10 a.m.
27	**COMMITTEE ON LAWYER ALCOHOL AND DRUG ABUSE** Bar headquarters, Montgomery 10:30 a.m.



LEGISLATIVE WRAP-UP

by
Robert L. McCurley, Jr.

Legislators Recognized at State Bar Meeting

Senator Frank Ellis and Representative Jim Campbell were recognized for their sponsorship of the "Eminent Domain Code" at the Bench and Bar Luncheon during the state bar meeting in Huntsville. Also honored with plaques were Senator Jim Smith and Representatives Mike Box and Beth Marietta for their sponsorship of the "Pro Tanto Settlements Act." These new laws drafted by the Alabama Law Institute were passed by the 1985 legislature. This is the seventh consecutive year that the Alabama Legislature has passed all the major revisions presented it by the institute.

Institute's Annual Meeting

The Alabama Law Institute held its annual meeting Thursday, July 25, 1985, in Huntsville. The meeting, presided over by President Oakley Melton, elected the following officers for 1985-86:

President:	Oakley Melton
Vice President:	James M. Campbell
Secretary:	Robert L. McCurley, Jr.
Executive Committee:	Hugh D. Merrill, chairman
	George F. Maynard
	Rick Manley
	Yetta Samford
	Ryan deGraffenried, Jr.
	Bill Baxley
	Tom Drake
	C.C. Torbert, Jr.

Elected to fill vacancies on the council were Hugh Nash, Oneonta, and Gordon Rosen, Tuscaloosa.

Major Revisions to be Presented to 1986 Legislature

The institute expects to complete and present to the 1986 legislature three new major revisions, as follows:

Condominium Law After three years of work, the Condominium Committee has completed its revision of the Alabama Condominium Law. The present law enacted in 1971 was found deficient and out of date in today's market. The committee followed the 1980 draft of the Uniform Condominium Law and still has under consideration whether this should include other common interest ownership property in addition to condominiums. Mr. E.B. Peebles of Mobile is chairman of this committee, while Professor Jerry Gibbons and Ms. Clara Fryer serve as reporters.

Guardianship Law Revision The Probate Committee, after completion in 1982 of the "intestate succession and wills" portion of the probate code, began a review of Alabama's guardianship law. Following the "Uniform Guardianship and Protective Proceedings Act" the committee has redefined our present "guardianship" laws to clearly delineate a "guardian" of the person from a "conservator" of the estate. Mr. E.T. Brown is committee chairman, and Professor Tom Jones is the reporter.

Redemption of Real Property A committee of the institute reviewed Alabama's real estate statutes and found the most pressing need for revision being in the area of redemption. The law appears cloudy as to who can redeem, the priority of redemption, cost of redemption and "lawful charges." Professor Harry Cohen has redrafted Article 14 of Chapter 5 of Title 6 of the *Code of Alabama*. The committee has been chaired by Mr. Hugh Lloyd.

Anyone wishing a copy of either of these three proposed revisions may obtain a copy by writing the institute. Prior to the introduction of these bills in January 1986, a series of hearing and council meetings will be held. □

Robert L. McCurley, Jr., director of the Alabama Law Institute, received his B.S. and LL.B. degrees from the University of Alabama. In this regular column, Mr. McCurley will keep us updated on legislation of interest and importance to Alabama attorneys.

Tape Recording Opinion Reconsidered

by
William H. Morrow, Jr.

QUESTION:

"Is it ethical for an attorney or an investigator or other persons acting on behalf of an attorney to make recordings of conversations with clients, other attorneys, witnesses or others without prior knowledge and consent of all parties to the conversation?"

Note: The foregoing question was answered in an opinion heretofore published in the May 1984 *Alabama Lawyer* as follows:

It is unethical for an attorney or an investigator or other persons acting on behalf of an attorney to make recordings of conversations with any persons, be they clients, other attorneys, witnesses or others without prior knowledge and consent of all parties to the conversation.)

MODIFICATION OF ANSWER ON RECONSIDERATION:

Absent any element of dishonesty, fraud, deceit or misrepresentation, it is not unethical, per se, for an attorney who is a party to a conversation with any persons, be they clients, other attorneys, witnesses or others, to make a recording of the conversations without prior knowledge and consent of all the parties thereto.

DISCUSSION:

In issuing the opinion heretofore published in the May 1984 *Alabama Lawyer* as a precedent we relied primarily upon Formal Opinion 337 (1974) of the American Bar Association Committee on Ethics and Professional Responsibility. Upon reconsideration we conclude there is no provision of the *Code of Professional Responsibility* of the Alabama State Bar which directly precludes an attorney who is one of the conversants from recording conversations as described herein. One member of the Disciplinary Commission respectfully dissents and is of the opinion that an attorney's recording of such conversations, without the knowledge and consent of all parties, thereto in and of itself constitutes "deceit" (DR 1-102 [A] [4]). In issuing this modification, the Disciplinary Commission expresses its intent that this opinion is to be strictly construed.

Recent Decisions

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

Recent Decisions of the Supreme Court of Alabama — Civil

Alabama Medical Liability Act (AMLA) . . . podiatry not included

Sellers v. Picou, 19 ABR 2682 (July 3, 1985) In a case of first impression, the supreme court held the "practice of podiatry" is not subject to the AMLA. The AMLA defines a "medical practitioner" as one "licensed to practice medicine or osteopathy." The supreme court noted that although the practice of podiatry appears to be a more specialized practice of osteopathy, as defined in §34-24-50(1), *Ala. Code* 1975, a podiatrist actually is *not* licensed to practice medicine or osteopathy in Alabama. Indeed, candidates for the practice of podiatry are examined and certified for license to practice under §34-24-250, *et seq.,* and are exempt from examinations administered by the board of medical examiners.

Condemnation . . . condemnation orders must be filed under Section 35-4-90

State v. Abbot, 19 ABR 2391 (June 21, 1985) In dispute was a 17-foot highway right-of-way which the state condemned in 1939. The state, however, did not record this order of condemnation, and Abbot subsequently purchased property adjoining the highway without notice of the condemnation order and constructed a store on part of the right-of-way. The trial court and the supreme court held that the right-of-way claimed by virtue of condemnation was void as to Abbot, a bona fide purchaser, because the state failed to file the order. Section 35-4-90, *Ala. Code* 1975, provides "all conveyances of real property" are void as to purchasers for value unless they are recorded. The supreme court reasoned the legislature intended "all conveyances of real property" should include *final orders of condemnation.*

Contracts, indemnification . . . notice of claim required

Cochrane Roofing & Metal Co., Inc. v. Callahan, 19 ABR 2218 (June 7, 1985) In an apparent case of first impression in Alabama, the supreme court held that a contractual undertaking to indemnify requires the indemnitee to notify the indemnitor of a claim and notice of suit within a reasonable time of same even where the contract is silent concerning notice.

The contractor-indemnitor built a warehouse and subcontracted the roof work to the indemnitee. The contract contained a more or less standard indemnification agreement which was silent on when and how notice of a claim and notice of suit was to be given the indemnitee. In July 1980, the warehouse owner sued the contractor and alleged the roof was improperly constructed. The contractor retained his own counsel and did not notify the subcontractor-indemnitee until over two years later. At that time, the contractor demanded that the subcontractor assume defense of the litigation and provide indemnity. The subcontractor refused the demand on the grounds that notice of suit was not given in a timely manner. The supreme court agreed that notice was not timely given and stated that although the indemnity agreement did not contain a specific notice provision, it goes without saying that notice is a prerequisite to performance and that the law implies an obligation on each party to a contract to allow the other party all reasonable opportunity to perform his undertaking. The supreme court reasoned the indemnitor must receive reasonable notice of a claim he must defend, for only in this way can he investigate the claim and prepare his defense. He must also be promptly forwarded a copy of the complaint once it is served upon the indemnitee.

Insurance . . . uninsured motorist. . . prejudice material to reasonableness for delay of notice

State Farm Mutual Automobile Ins.

John M. Milling, Jr., a member of the Montgomery law firm of Hill, Hill, Carter, Franco, Cole & Black, received his B.S. degree from Spring Hill College and J.D. from the University of Alabama. As a co-author of significant recent decisions, he covers the civil portion.

David B. Byrne, Jr., a member of the Montgomery law firm of Robison & Belser, received his B.S. and LL.B. degrees from the University of Alabama. He covers the criminal law portion of significant recent decisions.

Co. v. Burgess, 19 ABR 2585 (June 28, 1985) Burgess, a State Farm insured, was involved in an accident in August 1979. In June 1980, he sued the owner and driver of the other vehicle. While litigation was pending, Burgess learned the other parties were uninsured and in August 1981, Burgess notified State Farm of the accident and the potential uninsured motorists' claim. The State Farm policy required Burgess to give notice of the accident "as soon as practicable" and to send a copy of the summons and complaint "immediately." Burgess failed to notify State Farm of the accident until over two years after it occurred and never forwarded the complaint he filed. State Farm declined to pay uninsured motorist benefits based on the failure to comply with the notice provisions.

The supreme court held that in "uninsured motorist" cases prejudice to the insurer is a factor to be considered, along with the reasons for delay and the length of delay, in determining the overall reasonableness of the delay in giving notice of an accident or forwarding suit papers. In the typical case, the insured puts on evidence showing the reason for not complying with the notice requirement, and then the insurer may show that it was prejudiced by the delay. If the insurer fails to show prejudice, then the insured's failure to give notice will not bar his uninsured motorist recovery. The supreme court stated, however, uninsured motorist coverage differs from liability coverage in regard to a showing of prejudice and reaffirmed prejudice is not allowed to bear on reasonableness of delay when *liability* coverage is at issue.

Malicious prosecution. . . rule 41(a)(1)(ii) dismissal is not a termination favorable to the plaintiff

Evans v. Alabama Professional Health Consultants, Inc., 19 ABR 2570 (June 28, 1985) Alabama Professional Health Consultants (APHC) filed suit against Evans alleging sabotage of contract and property rights. The suit was terminated when all parties filed a stipulation for dismissal with prejudice. Subsequently, Evans filed this malicious prosecution suit. APHC filed a motion to dismiss and argued that a malicious prosecution action cannot be sustained because a voluntary dismissal pursuant to Rule 41(a)(1)(ii) is not a "termination of such proceedings in plaintiff's favor." The trial court and the supreme court agreed. The supreme court reasoned a stipulation of dismissal is more in the nature of a settlement agreement compromising the interests of *both* parties but "in favor" of neither party.

Torts. . . intentional blasting is an action on the case

Stocks v. CFW Construction Co., Inc., 19 ABR 2259 (June 7, 1985) In a certified question from the federal district court, the supreme court was asked to determine whether intentional blasting which caused damage solely from *concussion and/or vibration* is an action in trespass (six-year statute of limitations) or an action on the case (one-year statute of limitations). Recognizing that the precise legal question is one of first impression, the supreme court reviewed its earlier blasting cases and concluded since blasting in itself is a lawful and proper use of one's own land, liability is dependent upon negligence. By retaining the fault philosophy in intentional blasting cases, the court has retained the negligence classification of actions, which falls within the scope of the one-year statute of limitations, §6-2-39, *Ala. Code* 1975.

Torts. . . pre-race releases valid

Young v. City of Gadsden, 19 ABR 2592 (June 29, 1985) This action arose out of injuries sustained by Young when his "go-cart" struck a telephone pole while he was on a practice lap just prior to the start of the race. The race course was laid out on the streets of Gadsden. Prior to the race, Young paid a $30 entry fee and signed a general release for all injuries and damages he might sustain as a result of his participation in the race.

In a case of first impression in the state courts of Alabama, the supreme court was asked to consider whether the pre-race release violated public policy. A review of decisions from sister states and one Alabama Federal District Court case revealed pre-race releases are upheld and found not to violate public policy. The courts have reasoned that even though automobile racing is dangerous, it is not cruel or

shocking to the average man and is, therefore, not obviously contrary to public policy. The supreme court noted that Young was an experienced driver, and he freely and voluntarily executed the release with full knowledge of the dangerous nature of the road race.

Recent Decisions of the Supreme Court of Alabama — Criminal

Absolute right to confront and cross-examine the state toxicologist

Baker v. State, 19 ABR 2291 (June 7, 1985) The supreme court granted the defendant's writ of certiorari because it appeared the defendant was denied his right to confront and cross-examine a witness against him, specifically, the pathologist who prepared the autopsy report on the individual whose death was the basis of the defendant's conviction for murder.

The supreme court, in a *per curiam* opinion, distinguishes this case from *Seay v. State*, 390 So.2d 11 (Ala. 1980), in which the court held that §22-50-22, *Code of Alabama*, 1975, which provides for depositions of physicians at state mental health facilities, "furnishes a constitutional alternative to compulsory attendance at trial." Unlike *Seay*, the supreme court held no such procedure exists to substitute for the cross-examination of a state toxicologist or his assistants. Accordingly, the supreme court refused to approve the language utilized by the court of criminal appeals holding that the admission of the pathologist's report was not error.

Revocation of probation does not constitute double jeopardy

Wray v. State, 19 ABR 2286 (June 14, 1985) Following a presentence investigation, the trial court conducted a sentencing hearing April 5, 1984. After listening to the testimony offered by the defendant Wray, and considering the presentence report, the court sentenced Wray to five years' imprisonment. The court then suspended the sentence and placed Wray on three years' probation.

A few days later, Wray confessed to committing two other burglaries April 4, 1984, the night before the sentencing hearing. Based upon this newly discovered evidence, the state filed a motion with the trial court seeking reconsideration of the court's grant of probation. The court conducted a hearing and after reviewing the testimony vacated its original order granting probation and required Wray to begin serving the five-year sentence.

On appeal, the court of criminal appeals referred to the trial court's action as "resentencing" and subsequently held it violated the double jeopardy clause of the United States Constitution. The supreme court granted the writ of certiorari. The supreme court reversed the court of criminal appeals and reinstated the trial court's judgment. The supreme court observed the power of the trial court to grant probation is a matter of grace and lies entirely within the sound discretion of the trial judge. Following that observation, the supreme court turned to the question of whether the trial court's action amounted to a "resentencing" of the defendant. The court held:

> "We have recently held that a grant of probation does not reduce a sentence, but rather that the original sentence which was suspended remains the same. *State v. Green*, 436 So.2d 803 (Ala. 1983) Since a grant of probation does not reduce a sentence, it necessarily follows that the revocation of probation does not increase a sentence."

A defendant's right to cross-examine the prosecutrix's inconsistent conduct

Jenkins v. State, 19 ABR 2319 (June 14, 1985) Jenkins was convicted of rape and was sentenced to life in prison. At trial, the prosecutrix testified that Jenkins forcibly raped her. Jenkins defended the charge by claiming consent. Their testimony significantly differed as to what happened leading up and subsequent to the sexual intercourse. The jury was, therefore, faced with the difficult task of judging the credibility and demeanor of each of the parties.

Six of the eight witnesses called by the state testified the prosecutrix was upset and crying on the night of the

alleged rape. The trial court refused to allow Jenkins to cross-examine the prosecutrix as to her demeanor during and immediately after the preliminary hearing. Jenkins sought to show the prosecutrix cried continuously during the hearing and then laughed with friends immediately after. The defendant's attorney stated witnesses would testify that immediately following the preliminary hearing the prosecutrix and several of her friends were laughing and making jokes about Jenkins' being locked up.

The supreme court held that the trial court *abused its discretion* in limiting cross-examination of the prosecutrix and in disallowing the proffered evidence of her inconsistent conduct. Justice Almon, writing for a unanimous court, observed:

> "Testimony of the prosecutrix's inconsistent conduct was offered as bearing on her veracity and credibility. Due to the conflicting account of the facts offered by the prosecutrix and Jenkins, her veracity and credibility were major issues in this case.
>
> One of the chief functions of cross-examination is to test the credibility of a witness. (Citing cases) Demeanor being an aspect of credibility, a party may place before the trier of fact an opposing party's inconsistent conduct through direct or cross-examination. Cross-examination of prosecution witnesses in matters pertinent to their credibility ought to be given the widest possible scope. See *McConnell v. United States*, 393 F.2d 404 (5th Cir. 1968)."

The mandate of Anders

Sturdivant v. State, 460 So.2d 1210 (1984); cert. denied, 105 S.Ct. 1391 (March 4, 1985) Sturdivant asserted he was denied the effective assistance of counsel because his trial defense counsel failed to comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967). In *Anders*, the supreme court addressed "the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction after that attorney has conscientiously determined that there is no merit to the indigent's appeal."

In *Anders*, the United States Supreme Court found that a "no merit letter" and the procedure it triggers did not pass constitutional muster.

> "Counsel should, and can with honor and without conflict, be of more assistance to his client and to the Court. His role as an advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. *That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.* A copy of the counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements of due process are concerned."

The Alabama Supreme Court found the requirements of *Anders* were not followed in Sturdivant's case. A unanimous supreme court applied *Anders* to Alabama practice and held that once counsel had complied with the *Anders'* requirements, the court of criminal appeals may then grant counsel's request to withdraw, but must appoint substitute counsel to argue the appeal for the indigent.

It is this writer's opinion the application of *Anders* by the Alabama Supreme Court arguably leads one to question if a notice of appeal should be filed in all criminal cases. The reason for this logic rises from the fact that an *Anders* motion can be filed only after an appeal has been perfected and after counsel has had the opportunity to review the transcript and write a brief. The days of the "no merit letter" are gone in Alabama.

Recent Decisions of the Supreme Court of the United States

Prosecutor's argument in a capital murder case . . . the buck stops where?

Caldwell v. Mississippi, 53 U.S.L.W. 4743 (June 11, 1985) The supreme court held a prosecutor's argument to a capital sentencing jury, to the effect that the responsibility for determining the appropriateness of the sentence of death rested not with the jury but with the appellate court later reviewing the case,

rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's need for "reliability" in determining that death is the appropriate punishment.

In a bifurcated proceeding conducted pursuant to Mississippi's capital punishment statute, the defendant was convicted of murder and sentenced to death. The defendant's lawyers, in their closing arguments at the sentencing stage, referred to the accused's youth, family background and poverty as well as to general character evidence. They asked the jury to show mercy, emphasizing the jury should confront the gravity and responsibility of calling for another's death. In response, the prosecutor urged the jury not to view itself as finally determining whether the petitioner would die, because a death sentence would be reviewed for correctness by the Mississippi Supreme Court.

Justice Marshall, speaking for a majority of the court, vacated Caldwell's death sentence. Specifically, Marshall held it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe, as the jury was in this case, the responsibility for determining the appropriateness of the defendant's death rests elsewhere. The law is clear that sentence discretion must be consistent with the Eighth Amendment's "need for reliability in the determination death is the appropriate sentence in a specific case." See *Woodson v. North Carolina*, 428 U.S. 280, 305 (plurality opinion)

Giglio refined?

United States v. Bagley, 53 U.S.L.W. 5084 (July 2, 1985) A prosecutor's failure to disclose exculpatory evidence in response to a defense request amounts to a constitutional error requiring reversal *only if* there is a *reasonable probability* such evidence would have affected the outcome of the defendant's trial. In route to this decision, the supreme court lays to rest any doubt that impeachment material is exculpatory evidence within the rule of *Brady v. Maryland*, 373 U.S. 83 (1963).

Bagley was indicted on charges of violating federal narcotics and firearms statutes. Before trial, he filed a discov-

Charter Members of Litigation Section Sought

Sixty bar members attended the organizational meeting of the proposed Alabama State Bar Litigation Section July 26, 1985. Proposed section goals are:

(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.

Charter membership dues of $15 a year were set. All lawyers interested in improving their skills as litigators and advocates are urged to join. Please send a photocopy of the following application with your check for $15 payable to Alabama State Bar Litigation Section, c/o Charles M. Crook, Treasurer, P.O. Box 671, Montgomery, Alabama 36101.

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Over 300 Alabama lawyers attended the Young Lawyers' "Update '85" seminar during the bar's annual meeting, July 25, 1985.

If you missed this opportunity, you may obtain a set of the program materials by forwarding a check for $10 made payable to the Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

Subjects and speakers were: recent developments in criminal law — search and seizure, Judge Leslie C. Johnson; attorney-client privilege and the work product doctrine in Alabama — scope, maintenance and attack, Lewis W. Page, Jr.; commercial and contract law update, Professor Nathaniel Hansford; estate planning for the general practitioner, Professor Carolyn Burgess Featheringill; new co-employee legislation, Ralph M. Young; domestic relations — recent developments, Vanzetta Penn Durant.

Current supplies are limited, but additional sets can be made available if the response warrants. Please order today.

ery motion requesting, *inter alia*, "any deals, promises or inducements made to government witnesses in exchange for their testimony." The government's response did not disclose that "any deals, promises or inducements" had been made to its two principal witnesses who had assisted the ATF in conducting an undercover investigation of the defendant.

At trial, the two principal government witnesses testified about both the firearms and narcotics charges. The trial court found the defendant guilty on the firearms charge. Subsequently, in response to requests made pursuant to the Freedom of Information Act and the Privacy Act, the defendant received copies of ATF contracts signed by the principal government witness during the undercover investigation and stating the government would pay money to the witness commensurate with the information furnished.

The defendant then moved to vacate his sentence, alleging the government's failure to respond to the discovery motion to disclose these contracts, which he could have used to impeach the witnesses, violated his right to due process under *Brady v. Maryland, supra.* The district court denied the motion, but the court of appeals reversed.

The supreme court reversed and remanded the appellate court decision. Justice Blackmon concluded the court of appeals erred in holding that the prosecutor's failure to disclose evidence that could have been used effectively to impeach important government witnesses required automatic reversal. The court went on to hold that such nondisclosure constitutes constitutional error and requires reversal of the conviction "only if the evidence is material in the sense that its suppression might have affected the outcome of trial."

Justice Blackmon, joined by Justice O'Connor, set forth a new standard in part III of the opinion. Justices Blackmon and O'Connor conclude the nondisclosed evidence at issue is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. This standard of materiality is sufficiently flexible to cover cases of prosecutorial failure to disclose evidence favorable to the defense regardless of whether the defense makes no request, a general request or a specific request.

The court suggests the standard established in *Bagley* extends to, but is not different from, that of the court's holding in *Giglio v. United States,* 405 U.S. 150 (1972).

In *Giglio,* the supreme court said:

> "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the general rule of *Brady.* We do not, however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . . A finding of materiality of the evidence is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ."

This writer suggests, however, the definition of "reasonable probability", i.e. a probability sufficient to undermine confidence in the outcome, is different from a test which would require the evidence produce a "reasonable likelihood that it could have affected the judgment of the jury." It appears the standard in *Bagley* is more narrow. □

Executive Director's Report

(From page 229)

and again as *the best ever,* yet it had the lowest attendance in 15 years.

The staff and I appreciate the nice letters we received from those who enjoyed this year's convention; however, we perceive problems somewhere. We need your constructive criticism of the annual meeting. Tell us why you came or did not come, what you enjoyed, what you did not and what changes you would like to see made.

— Reginald T. Hamner

P.S. The 1986 Midyear Meeting will be held on Wednesday and Thursday, March 19-20 in Montgomery. A post-convention seminar will depart on Friday, March 21 for Bermuda with a return on Monday, March 24. Details to follow.

Disciplinary Report

The following reprimands took place June 7, 1985.

Reprimands

• A Birmingham attorney was privately reprimanded for violation of Disciplinary Rule 1-102(A)(5) of the *Code of Professional Responsibility*. The Disciplinary Commission determined the attorney made a court appearance on behalf of a client some three weeks after the attorney was suspended from the practice of law for failure to comply with mandatory continuing legal education requirements. [ASB No. 84-714]

• An Alabama attorney received a private reprimand for violation of Disciplinary Rules 5-101(C) and 5-105(A). The Disciplinary Commission determined the attorney was engaged in representing a party in one lawsuit while acting as attorney for the plaintiff in a substantially related lawsuit in which the client from the first case was a party defendant. The commission determined the attorney should receive a private reprimand for this conflict of interests. [ASB No. 84-710]

• An Alabama attorney received a private reprimand for violation of Disciplinary Rule 7-110(C). It was determined by the general counsel this attorney engaged in an *exparte* communication with a trial court judge during the attorney's representation of a client and wherein the opposing party was also represented by counsel. [ASB No. 83-418]

Public Censures

• Mobile lawyer **Stephen K. Orso** was publicly censured for having willfully neglected legal matters entrusted to him, in violation of DR 6-101(A), *Code of Professional Responsibility*, by having, as appellate counsel of record in eight separate criminal appeals, failed to file with the court of appeals a timely appellate brief, a timely motion for extension of time within which to file a brief, a timely motion to withdraw, a timely no merit brief or any other timely pleading. [ASB Nos. 83-446, 83-470, 84-50, 84-107, 84-385, 84-387, 84-402 & 84-409]

• Anniston lawyer **Thomas M. Semmes** was censured for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A), *Code of Professional Responsibility*, by having undertaken to represent the estates of Lewis Dewitt Marlowe and Annie Elese Marlowe, both of whom died without leaving wills. He accepted $89.50 in mid-April 1982 from the administrator of the estates, to be paid to the Calhoun County Probate Court as court costs in the estates, but then failed to pay until December 2, 1983, the court costs to the probate court after the administrator of the estates had filed a complaint against him with the Alabama State Bar. [ASB Nos. 83-507 & 83-529]

Suspensions

• June 25 attorney **Cecil M. Matthews** was suspended from the practice of law for 45 days, commencing June 24, 1985, and ending August 15. Mr. Matthews had been hired to represent a party in a divorce and was found to have neglected the case by failing to seek the lawful objectives of his client, failing to carry out the contract of employment entered into with the client and prejudicing or damaging his client during the course of the professional relationship, in violation of Disciplinary Rules 6-101(A), 7-101(A)(1), 7-101(A)(2) and 7-101(A)(3) of the *Code of Professional Responsibility*. [ASB No. 84-152]

• Gulf Shores lawyer **Michael H. Sullivan** was suspended, effective June 19, for failure to comply with the mandatory continuing legal education requirement of the Alabama State Bar.

The following suspensions were effective June 10, 1985.

• Water Valley, Mississippi, lawyer **Richard Lamar Carlisle** was suspended for failure to comply with the mandatory continuing legal education requirement of the Alabama State Bar.

• Dothan lawyer **Deanna S. Higginbotham** was suspended for failure to comply with the mandatory continuing legal education requirement of the Alabama State Bar.

• Fairfield lawyer **Robert Lee Aldridge** was suspended for failure to comply with the mandatory continuing legal education requirement of the Alabama State Bar.

• Birmingham lawyer **Robert E. Mathews** was suspended for failure to comply with the mandatory continuing legal education requirement of the Alabama State Bar.

• Ashville lawyer **Kenneth W. Gilchrist** was suspended for failure to comply with the mandatory continuing legal education requirement of the Alabama State Bar.

• Selma lawyer **Rodney Butts Lee** was suspended for failure to comply with the mandatory continuing legal education requirement of the Alabama State Bar.

Disbarments

• Selma attorney **Rodney Butts Lee** was disbarred from the practice of law, effective 12:01 a.m., August 5, 1985, by an order of the supreme court dated June 25, 1985. Mr. Lee was disbarred pursuant to the provisions of Rule 14 of the Alabama Rules of Disciplinary Enforcement relating to his conviction on three criminal charges. [ASB No. 85-143]

• **Michael Inge Kent,** of Opelika, was disbarred, effective July 24, based upon his guilty plea to charges of having violated the *Code of Professional Responsibility* by having mishandled certain guardianship trust funds, in the amount of approximately $3,600, and by having issued a worthless negotiable instrument in the amount of $800. Mr. Kent previously was suspended from the practice of law for a period of two years, effective September 1, 1981, for other, unrelated violations of the *Code of Professional Responsibility.* [ASB Nos. 82-284, 83-97 & 83-390]

Riding the Circuits

(From page 259)

for his 50 years as a member of the American Bar Association. Fred Helmsing, local ABA representative, made the presentation. Former U.S. magistrate David A. Bagwell, now in private practice, entertained his audience with "Reflections on Descending to Earth from the Clouds of Olympus (d/b/a the Judge's Bench)."

The Young Lawyers' Section of the MBA has, via fundraisers and private donations, furnished a room in the Mobile County Courthouse to be used as an attorney-client conference room.

Russell County Bar Association

The Russell County Bar Association recently elected new officers. These include Kenny Davis, president; Carolyn Curtis, vice president; and Charlotte Adams, secretary-treasurer. □

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In Memoriam

John Benton Tally, Sr.

Former Circuit Judge John B. Tally, Sr., died March 27. He practiced law in Scottsboro from 1937 until 1942 and served from 1947 to 1955 as circuit solicitor for the Ninth Judicial Circuit of Alabama. Tally was also circuit judge of the ninth circuit, and later the 38th judicial circuit, from 1968 until his retirement in 1983.

Judge Tally was in the United States Navy during World War II and was a member of the Jackson County Hospital Board of Directors, an elder of the Cumberland Presbyterian Church and a trustee of the Cumberland Presbyterian Theological Seminary.

The Alabama Association of Circuit Judges commends his accomplishments to the bar; the bench; his community and country; his wife, Blanche McCutchen Tally; and their three children, Nancy Loper, John B. Tally, Jr., and William W. Tally.

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.*

Allison, Claude Ferrell
Montgomery — Admitted: 1977
Died: June 30, 1985

Gilmer, Eugene Edwards
Birmingham — Admitted: 1942
Died: June 4, 1985

Hood, David, Jr.
Bessemer — Admitted: 1948
Died: May 13, 1985

Ingram, Frank Raymond
Birmingham — Admitted: 1933
Died: August 5, 1985

James, Walter Ervin
Houston, Texas — Admitted: 1941
Died: August 7, 1985

Lee, James Gardner, II
Tuscaloosa — Admitted: 1966
Died: June 12, 1985

McCord, Roy Davis
Gadsden — Admitted: 1920
Died: June 14, 1985

Reames, Samuel Lewis
Birmingham — Admitted: 1949
Died: May 17, 1985

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miscellaneous

ATTORNEY JOBS: National and Federal Legal Employment Report: a monthly detailed listing of hundreds of attorney and law-related jobs with the U.S. Government and other public/private employers in Washington, D.C., throughout the U.S. and abroad. $30 — 3 months; $50 — 6 months; $90 — 12 months. Send check to Federal Reports, P.O. Box 3709, Georgetown Station, Washington, D.C. 20007, Attn: Al. (202) 393-3311. Visa/MC

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