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Vol. 47, No. 5

September 1986



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by Nathaniel Hansford

*The author received his B.S. and LL.B. from the University of Georgia, his LL.M. from the University of Michigan. He is a member of the American, Georgia, Alabama, and Tuscaloosa Bar Associations. Mr. Hansford is the author of numerous law review articles and he serves as a lecturer for CLE. He has also served as a faculty member for the Alabama Judicial College. He is currently Professor of Law for the University of Alabama.*

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VOL. 47, NO. 5

SEPTEMBER 1986

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

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The Alabama Lawyer is published seven times a year for  
\$15 per year in the United States and \$20 outside the  
United States by the Alabama State Bar, 415 Dexter Ave-  
nue, Montgomery, AL 36104. Single issues are \$3, plus  
postage. Second-class postage paid at Montgomery, AL.

**Postmaster:** Send address changes  
to The Alabama Lawyer, P.O. Box  
4156, Montgomery, AL 36101.

## On the cover—

William Doyle  
Scruggs, Jr., of Ft.  
Payne, became  
the 110th presi-  
dent of the Ala-  
bama State Bar.  
An interview  
with him will ap-  
pear in the  
November issue  
of the Lawyer.



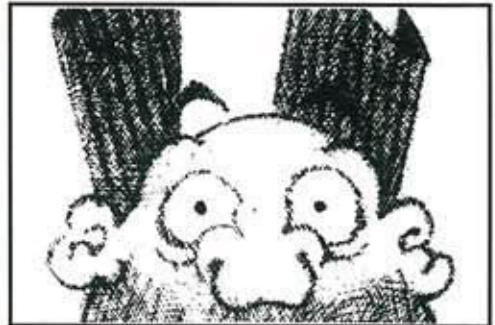
## What a Civil Practitioner Needs to Know about the Defense of White-collar Crime . . . . . 250

"Civil practitioners faced with a criminal investigation should be aware that decisions made early in the investigation may be critical to the success or failure of a subsequent criminal defense."

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fluenced and Corrupt Organizations act,  
enacted to attack the infiltration of  
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Unfortunately Assistant General Counsel  
Alex W. Jackson periodically has to give  
this presentation at the bar's Annual  
Meetings. Fortunately, here it is again in the  
hopes malpractice lawsuits and client com-  
plaints can be decreased.

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# President's Page

Two of my heroes and former presidents of this bar, Bill Hairston and Norborne Stone, separately have warned me that this page presents a wonderful opportunity for the president of the Alabama State Bar to display his ignorance to every lawyer in the state.

Taking that advice generally and knowing it was meant for someone else, I recall that the French lawyer and philosopher, Michel de Montaigne, in his *Essays* noted in 1580 that the most accurate observations and comments most often were made by those ignorant of their subject because clever and experienced people interpret and alter rather than report. Therefore, being at least partially qualified and recalling my ancestor Hilliard B. Black's warning to say little and write less, I now report.

It is worthwhile at the beginning of a new bar year to identify the immediate areas of concern and put in place a crisis management system for what we believe will be the major areas of movement affecting the profession. There are four immediate problems/opportunities the bar must continue to deal with in the short run.

The first, the issue of "tort reform," is national in scope, and legislation is at the threshold in Congress, the Alabama Legislature and the legislatures of most states. The views of this bar are as diverse as the issues. This is not a trade association and, based on the decisions involving other bars, *Falk v. State Bar of Michigan*, 305 N.W. 2d 201 (Mich. 1981); *Arrow v. Dow*, 636 F. 2d 287 (10th Cir. 1980); *Arrow v. Dow*, 544 F. Supp. 458 (D.C.N.M. 1982); *Romany v. Colegio De Abogados De Puerto Rico*, 742 F. 2d 32 (1st Cir. 1984); *Petition of Champman*, 509 Atl. 2d 753 (N.H. 1986); and *Keller v. State Bar of California*, 226 Cal. Rp. 448 (1986), we are prohibited from most activities having a direct influence in the content or outcome of such legislation. That does not mean, however, that the Alabama State Bar cannot be a vehicle for the dissemination of facts about the complex issues and certainly does not prohibit



SCRUGGS

this bar from promoting, in a general fashion, the administration of justice in Alabama. As officers of the court, we not only have the right, but are charged with the duty, of improving the delivery of ultimate justice.

I personally have been very pleased with the intelligent, open-minded and well-reasoned comments I have received from Alabama lawyers on all sides of this issue. The public has been subjected to a barrage of misleading and sometimes ludicrous statements from interest groups on both ends of the spectrum, and it is up to us to help the parties charged with final responsibility in this area to define the truth so ultimate policy decisions may be made on fact, not fright.

The second issue is "specialization." By virtue of an opinion of the Alabama Supreme Court in *Allen W. Howell vs. Alabama State Bar*, the bar must present to the court a meaningful response relative to permitting lawyers to advertise their expertise in certain specialties. Note here that lawyers may specialize in any fashion they wish, and there has never been any rule against any form of specialization; the focus of the case is the advertising of a specialty or of some accomplishment suggesting expertise or specialization.

The immediate problem is that there is not a national or regional certifying board having the respect and standing to certify specialists, with the possible and traditional exceptions of the admiralty, patent and trade mark practices. Unlike our comrades, the physicians, who have various examinations and boards such as the American College of Surgeons, there are no true counterparts in the legal profession and may never be such. Surgery is surgery in Louisiana or Vermont. Standard examinations in such fields as engineering and medicine obviously have uniform application in the United States, but both substantive law and procedures vary dramatically from state to state.

The ultimate choice may be whether to abandon any



rule against advertising a specialty or adopting a series of state board examinations a lawyer must pass successfully in order to advertise a specialty in this state.

The third issue, lawyer advertising in general, is reaching a crossroads. The United States Supreme Court, in cases directly involving lawyer advertising, *Bates et al. v. State Bar of Arizona*, 433 U.S. 350 (1977); *In Re R.M.J.*, 455 U.S. 191 (1982); and *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. \_\_\_, 85 L. Ed. 2d 652, also in cases involving generic advertising, is edging closer to an essentially unlimited right of commercially free speech. Rules involving pre-publication review also are under fire and having a chilling effect on free speech.

In the future we may be unable, constitutionally, to review lawyer advertising material prior to publication, or to have any supervision of the content of advertising by lawyers except after the fact, and then only to punish lawyers whose advertisements are deceptive, misleading or factually incorrect. This is a poor result from the standpoint of the bar, the general public and the lawyer who advertises, because it offers no guidelines and no control, except subsequent punishment.

Perhaps the United States Supreme Court will chisel a definitive mark on lawyer advertising, I hope, short of total commercially free speech. In the meantime, your bar must come to grips with this problem.

On a much more mundane and practical level, the fourth issue, malpractice insurance coverage for lawyers, is in a state of disarray. Companies enter and withdraw from the market regularly, policy provisions are changed, renewals are declined, coverage shrinks and premiums increase. The sole practitioners and small firms have premium levels that are shocking while large firms and some specialists cannot obtain complete coverage at any price. It is a two-fold problem of cost and stability in the market.

We have been and are continually studying three possible solutions. The first is to find a domestic company to write the policies directly, keeping premiums, coverages and the underwriting standards constant for several years. The second is to find reinsurance on the London market with a domestic company handling underwriting and claims, giving essentially the same stability and fixed cost. The third possibility, offering the best solution albeit at the highest cost

in time and effort, is the creation of a captive insurance company owned by the lawyers in Alabama.

This obviously would require substantial capitalization in addition to higher initial premiums, but the experience in other states has been constant policy provisions, fairly uniform underwriting standards and relatively reasonable premiums. Even with the captive company, however, very large firms and firms engaged in securities and bond work still might be at the mercy of aberrant market trends.

On balance then, it readily can be seen we have four dragons at the door, all of which have raised their heads within the last 12 months. A substantial amount of work already has been done under the leadership of Jim North on all four of these areas, and certainly some or all of these problems may remain for my successor, Ben Harris. The speed and momentum at which these problems are developing require our immediate attention and best efforts, but the other fine committee work and progress of the bar must not be neglected.

—William D. Scruggs, Jr.



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# Executive Director's Report

## *This and That*

### **Almost loaded!**

**W**e're almost loaded! It has been a long and personnel-intensive operation; however, the bar's IBM 36 computer becomes more useful every day. We anticipate being fully operational within the next month.

A final request for personal data has been sent to approximately 1,000 of our 8,000-plus members who have not submitted their information forms. The 1986-87 *Alabama Bar Directory* will be printed from computer-generated copy, and while we want to have a complete listing of members, the failure to submit personal data could result in your not being included.

Lawyer referral records, admission applications, law student registrations, disciplinary function records, mandatory CLE records and bar census data are now retrievable.

I am particularly proud of the staff acceptance and training efforts to become computer literate. Mary Lyn Pike supervised the installation, programming and loading of the system, and Margaret Boone was designated the systems operator and coordinated staff training. Vivian Freeman oversees system operations at the Center for Professional Responsibility. We all should be grateful to them for the 100 percent-plus efforts they gave.

### **Get captured**

The professional liability insurance cri-

sis has not been solved, unfortunately. No single issue has consumed more bar leadership time over the last six months than this. I feel as though I have spoken to most of you personally in seeking to solve your problems. Invariably, the suggestion has been made to form our own "captive" or mutual. . . like the doctors.

Your board of commissioners authorized a study of this action, and a consulting firm with such experience will be engaged. The survey of the membership, seeking detailed data, is an essential part of the start-up effort. We must have your cooperation in supplying the information so proper actuarial and underwriting decisions can be made.

This is going to require a financial commitment of each member. Capitalization in the amount of two and one-half to three million dollars will be required before the first policy can be written. This effort requires a minimum of six months, under the best of circumstances.

I hope when you read this, a new endorsed E&O program will be in place. A 100 percent re-insurance slip and fronting company has been acquired, and contractual details are being worked out as I write.

In spite of our present difficulties, I am aware of only two firms who have been unable to get coverage. In each case prior or pending claims had an adverse impact on these applications. The availability of coverage has been a primary concern; however, the premium quotes



**HAMNER**

have not been those desired in most cases. Unlike a year ago, I believe things will get better before getting worse.

### **Office checkup**

Two firms already have used the services of our office consultant, Paul Bornstein of Office Technology Associates, Inc., and they were pleased. Neither was a large firm; they were the smaller firms the Economics of Law Committee hoped to see benefited by the services. A request form for the consulting services is on page 259 of this issue. You may wish to review the in-depth article on this service in the May *Alabama Lawyer*, pages 146-147.

### **Are you a member?**

Alabama lawyers have held one of the highest percentages of state membership in the American Bar Association. We consistently ranked in the top ten states. We ranked 13th at the end of May 1986,



up from 17th a year ago.

Over one-half of the lawyers in the United States belong to the ABA, and it rightfully claims to be the voice of the legal profession in America.

Benefits of membership are numerous. Insurance program savings alone allow you to recoup your annual membership dues, and the publications are more "bread and butter"-oriented than in the past.

Fred Helmsing of Mobile is our Alabama membership chairman and James Anderson of Montgomery is the Young Lawyers' membership chairman. If you are not an active ABA member, (3,654 Alabama lawyers are), consider joining.

I do not agree with all positions taken by the ABA; however, I doubt many of us

agree with every decision of the groups to which we belong.

I have applications available upon request at the state bar headquarters.

### Best ever? (Certainly the biggest)

The many compliments I received on the 1986 Annual Meeting are gratifying. The section leaderships should be justifiably proud of their "all-day" effort; the overflow crowds told the story of their excellent programming. "Update '86" will be a tough act to follow, and "Popsie" Miller's '86 encore was superior.

The Wynfrey and the Galleria were super! Pre-registrants numbered 605 lawyers (a record) while 200 more registered during the convention—another record.

Mobile will be the location of the 1987 annual meeting—July 15-18, 1987. We will return to the Wynfrey and Birmingham in July 1988; those dates will be July 20-23. Huntsville will host the 1989 convention.

### Finally

I have been receiving more requests for prospective employees than I have candidates. Do not forget our placement services. If you would consider a career change, please send a current résumé with salary ranges, geographic considerations and area practice preferences. All placements are handled in the strictest confidence. ■

—Reginald T. Hamner

## MCLE News

by Mary Lyn Pike  
Assistant Executive Director

### MCLE Commission

Gary C. Huckaby of Huntsville is the newly-elected chairman of the MCLE Commission. New members are Lynn Robertson Jackson of Clayton and Richard H. Gill of Montgomery. Returning members are Phillip E. Adams of Opelika; Wade H. Baxley of Dothan; Francis H. Hare, Jr., of Birmingham; Ben H. Harris, Jr., of Mobile; John David Knight of Cullman; and H. Wayne Love of Anniston.

### Important CLE rule and regulation changes

During the last year the MCLE Commission, board of bar commissioners and Supreme Court of Alabama have considered and approved several changes in the rules and regulations governing MCLE in Alabama. See 47 *Alabama Lawyer* 114 (1986).

The most important changes ease the burden of CLE recordkeeping and reporting for attorneys and their secretaries. Although the deadline for attending courses remains December 31, the deadline for filing reports of attendance has been extended to January 31 to avoid the year-end rush and panic regarding the re-

ports. Any attorney filing after January 31 will be required to pay a late filing fee of \$50.

To accommodate those attorneys who do not earn 12 CLE credits in a calendar year, the court has adopted a deficiency plan procedure. Individual and specific plans for attending approved courses between January 1 and March 1 may be accepted if filed with the commission by January 31 and accompanied by a \$50 late compliance fee.

Attorneys not filing reports of compliance or deficiency plans by January 31 will be certified to the disciplinary commission, and no extensions of the deadlines can be given.

Beginning January 1, 1987, sponsors of approved CLE courses will be required to report the attendance of Alabama attorneys. Not intended as a "policing" procedure, the requirement will give the MCLE Commission the ability to generate individual transcripts of courses attended at the end of 1987. Attorneys merely sign them if they are correct or amend them if not.

This recordkeeping burden has been shifted to the state bar as a service to its members. There will be no auditing or double-checking, and the commission will continue to operate on the honor system.

### July Commission meeting

The commission met July 16 in Birmingham and took the following actions:

1. Granted a waiver of CLE require-

ments to an attorney retired from the practice of law due to physical disability;

2. Awarded half-credit under Regulation 4.1.12 for a seminar entitled "Effective Use of Paralegals;" and

3. Declined to accredit a seminar focused on getting and keeping good clients. ■

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# Legislative Wrap-up

by Robert L. McCurley, Jr.

## Federally Mandated State Legislation\*

At each legislative session, state legislatures are told "you must pass this bill, it is required by federal law." Moreover, they are told that failure to enact these "mandated" laws may result in the loss of federal funds. With "Gramm-Rudman" cuts already occurring, states can ill afford to lose additional funding. Consequently, as the legislatures plan for the budgeting periods they must anticipate any funding cuts and make informed decisions as to receiving federal funds.

In order for states to comply with federal mandates they must be aware the federal law exists. Presently, there is no single source identifying or compiling these mandated laws for the federal government or the states. In fact, most agencies do not even have a list of the major federal statutes within their own jurisdiction requiring state action. In many cases a state first learns of a federal mandate when a federal agency notifies a state that the state is out of compliance with the federal law and the state legislature must pass a statute or lose federal funding.

Federally mandated state legislation usually appears in one of four forms:

- (1) Compulsory legislation clauses in federal statutes, directing states to comply under the threat of civil or criminal penalties (i.e., the Equal Employment Opportunity Act of 1972);
- (2) Legislation requirements which apply generally to recipients of federal grants furthering national, social or economic policies (i.e., environmental protection and non-discrimination laws);
- (3) Legislation not requiring compliance, but imposing financial sanctions, such as reduction or elimination of funds for certain programs if the state does not comply (i.e., Emergency Highway Energy Conservation Act of 1974);
- (4) Partial pre-emption laws establishing basic policies, but permitting administrative responsibility to be delegated to states if they meet nationally determined conditions or standards (i.e., Water Quality Act of 1965, Clean Air Act Amendments of 1970).

This is not a problem for the states when an issue is highly publicized (e.g., the 55 mph speed limit); however, it

is a problem with more obscure federal laws (e.g., the Wholesome Poultry Products Act of 1968).

The National Conference of State Legislatures looked into the possibility of identifying legislation requiring state legislatures to take some action.

Our first thought was to require the superintendent of documents to send a copy of all public laws to the secretary of state of all 50 states. This option, however, was abandoned because:

- (1) Most secretary of state offices do not have the sophistication required to analyze federal legislation;
- (2) It would be impossible for any state office to dissect a three-inch tax act or a supplemental appropriation act with a legislative "rider"; and
- (3) It is inefficient to have each state do what could be done at the federal level.

Next looked into was the possibility of providing for the identification of federally mandated state legislation in the legislative process. However, before a bill becomes a law, it does not receive the type of substantive analysis necessary to identify it as requiring state action. Bills receive only a cursory examination by the Congressional Research Service pursuant to the "State and Local Cost Estimate Act of 1981," P.L. 97-108, requiring the Congressional Budget



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



Office to prepare fiscal notes for bills which have an impact on states or localities of more than \$200 million. Moreover, it would be more efficient to identify the legislation at the public law stage, as opposed to the bill stage, since approximately 5 percent of the bills become law. For example, the 98th Congress introduced 12,201 bills and passed only 623 public laws.

We found there to be no corresponding depository for acts in the federal system similar to a state's "secretary of state" office.

Once a bill passes both houses of Congress it goes to the appropriate Senate or House Enrolling clerk; however, no substantive analysis is performed by the legal counsels at this stage.

After the president signs the bill into law, the original goes to the national archives. A copy goes to the superintendent of documents, who supplies slip laws to the various agencies and depository libraries. Another copy goes to the law revision council of the U.S. House of Representatives for incorporation into the U.S. Code. Again, at this stage no substantive analysis is performed by any of these organizations.

By process of elimination, the best group to identify federal mandated legislation is the agencies: the only place where substantive analysis is done. Every federal law goes to a federal agency for implementation and enforcement, with the Department of Justice as the catch-all. The agencies seemed to be the easiest place to track laws requiring state action.

Using as a starting point a 1984 report entitled "Regulatory Federalism: Policy, Process, Impact and Reform," published by the Advisory Commission on Intergovernmental Relations, the National Conference of State Legislatures with the assistance of the White House Office on Intergovernmental Affairs contacted each federal department and agency. The departments responded with 12 of them listing 145 acts requiring action on behalf of the states. The vast majority of these mandates have been required since 1972.

Each agency identified the state compliance requirements of the laws under their jurisdiction, and the results were compiled in the following manner. The laws requiring some state action are arranged according to the agency respon-

sible for the law's enforcement. Each entry contains the following information:

- (1) act name—public law number
- (2) United States Code citation
- (3) appropriate section requiring state action
- (4) one-line description of subject matter of required legislation

This compilation is published by the National Conference of State Legislatures and is available to all 50 states through the NCSL's "Legisnet" computer system.

The institute's study was conducted for the Alabama Legislature and National Conference of State Legislatures. Assisting in this project were Deborah Steelman, director of the White House Office of Intergovernmental Affairs; Gordon Martin, assistant to Senator Howell Heflin; and Bob Goss, director, state-federal services, National Conference of State Legislatures. ■

*\*This article is the introduction to a compilation prepared by Bob McCurley, director, Alabama Law Institute, which is being published as a State-Federal Issue Brief of the National Conference of State Legislatures, Washington, D.C.*

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# About Members, Among Firms

## ABOUT MEMBERS

**John W. Parker**, formerly a member of the firm of McFadden, Riley and Parker, is pleased to announce the opening of his office for the practice of law. His address is 4332 Boulevard Park South, Suite D, Mobile, Alabama 36609. Phone (205) 341-1020.

**Tommy Nail**, formerly assistant district attorney for Jefferson County, is pleased to announce the opening of his office in association with **Arthur Parker** and **Bill Dawson**, at Suite 210, Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 324-9517.

**Albert E. Byrne** takes pleasure in announcing his retirement, effective June 30, 1986, as vice president and trust officer of First Alabama Bank after 25 years of service and his entry into the private practice of law as a sole practitioner at his residence, #12 Camelot Apartments, Dothan, Alabama 36303. Phone (205) 793-8267.

**Henry D. Binford** is pleased to announce the opening of his law office at 119 South St. Andrews Street, Dothan, Alabama 36301. Phone (205) 793-7771.

**Michael S. McNair**, formerly of Noojin & McNair, PC, announces the opening of his new office at 4300-B Midmost Drive, Mobile, Alabama 36609. Phone (205) 343-2814.

**Ira A. Burnim**, of the Southern Poverty Law Center in Montgomery, is leaving his position to become the legal director of the **Children's Defense Fund** in Washington, D.C. Ira's wife, **Elizabeth Samuels**, currently teaching at Auburn University at Montgomery and doing freelance editorial work, also is a member of the

Alabama State Bar.

**Daniel A. Pike** announces the relocation of **Daniel A. Pike, PC**, to 962 Dauphin Street, Mobile, Alabama 36604. Phone (205) 432-2620.

**Janie Baker Johnston** is pleased to announce the opening of her law office at 516 South Perry Street, Montgomery, Alabama. Phone (205) 264-2325.

**Sharon L. Byrd** announces the opening of her law office at 108-A South Side Square, Huntsville, Alabama 35801. Phone (205) 534-8485.

**Joseph M. Powers** announces the opening of his new office at 1053 Dauphin Street, Mobile, Alabama 36604. Phone (205) 432-6966.

**Douglas C. Freeman** is pleased to announce the relocation of his office to 305 South Lawrence Street, Montgomery, Alabama. Phone (205) 265-7335.

**William K. Abell** is pleased to announce the relocation of his office to 305 South Lawrence Street, Montgomery, Alabama. Phone (205) 265-7335.

**David G. Flack** is pleased to announce the relocation of his office to 305 South Lawrence Street, Montgomery, Alabama. Phone (205) 265-7335.

## AMONG FIRMS

**Kellogg, Williams & Lyons**, of Washington, D.C., and Vienna, Virginia, is pleased to announce **Cleveland Thornton**, formerly trial attorney for the National Highway Traffic Safety Administration and senior trial attor-

ney for the Office of General Counsel, United States Department of Transportation, has become of counsel to the firm. Offices are located at 1275 K Street, Northwest, Washington, D.C. 20005, and 246 Maple Avenue, East, Vienna, Virginia 22180. Phone (202) 898-0722 in Washington and (703) 938-4875 in Vienna.

The law firm of **Lamar & McDorman** takes pleasure in announcing **Roy W. Scholl, III**, has become a member of the firm, with offices at 100 Vestavia Office Park, Suite 200, Birmingham, Alabama 35216. Phone (205) 823-5968.

**Frank McRight; T.K. Jackson, III; Paul D. Myrick; and William M. Moore** are pleased to announce the formation of a firm under the name of **McRight, Jackson, Myrick & Moore**, with offices at 1100 First Alabama Bank Building, P.O. Box 2846, Mobile, Alabama 36652. Phone (205) 432-3444.

**Ford, Caldwell, Ford & Payne** takes pleasure in announcing **D. Edward Starnes, III; Joe W. Campbell; and Donna S. Pate** have become partners in the firm, with offices at 218 Randolph Avenue, Huntsville, Alabama 35801.

**David L. Hirsch** and **Susan J. Watterson** announce the formation of **Hirsch, Watterson and Associates, PC**, with offices at 3045 Independence Drive, Birmingham, Alabama, serving the Birmingham, Montgomery and Huntsville areas.

The office of **David L. Hirsch, Attorney-at-Law, PC**, is still maintaining its practice at 1212 Cedar Avenue, Columbus, Georgia, and serving the Columbus, Georgia, and Phenix City and Opelika, Alabama, areas.



**Christopher E. Peters and John R. Lockett** take pleasure in announcing the formation of their partnership, **Peters & Lockett, PC**, with offices at 160 South Cedar Street, P.O. Drawer 1129, Mobile, Alabama 36633. Phone (205) 432-3700.

**Dennis N. Balske and Joan Van Almen** are pleased to announce the formation of a partnership under the firm name of **Balske and Van Almen**, with offices at 410 South Perry Street, Suite 200, Montgomery, Alabama 36104. Phone (205) 263-4700.

**McFadden, Riley & Parker** announces a change of the partnership name to **McFadden, Riley & Lyon**, with offices at 718 Downtowner Boulevard, Mobile, Alabama 36609. Phone (205) 342-9172.

**David B. Carnes, Michael R. Wamsley, Walter J. Waid and Carolyn C. Hyman** announce the formation of **Carnes, Wamsley, Waid & Hyman, PC**, with offices located at 140 South 9th Street, Gadsden, Alabama. The mailing address of the firm is P.O. Box 1218, Gadsden, Alabama 35902.

The Office of General Counsel, State Department of Postsecondary Education, is pleased to announce **Edward M. George**, formerly assistant director of the Alabama Real Estate Commission, has joined as associate counsel to the State Board of Education.

**Balch & Bingham** takes pleasure in announcing **M. Roland Nachman, Jr.**, has joined the firm as a partner, and **Steven G. McKinney** and **Steven F. Casey** have become partners in the firm. Offices are located at 600 North 18th Street and Financial Center, 505 North 20th Street, P.O. Box 306, Birmingham, Alabama 35201; and The Winter Building, 2 Dexter Avenue, Court Square, P.O. Box 78, Montgomery, Alabama 36101. Phone (205) 251-8100 in Birmingham and 834-6500 in Montgomery.

The law firm of **Norman, Fitzpatrick, Wood, Wright & Williams** is pleased to announce the relocation of its offices to 1800 City Federal Building, Birmingham, Alabama 35203. Phone (205) 328-6643.

The firm of **Hanes and Cotton** is pleased to announce **Daniel D. Sparks** has become associated with the firm. Offices are located at 933 Frank Nelson Building, Birmingham, Alabama 35203-3676. Phone (205) 324-9536.

**Najjar, Denaburg, Meyerson, Zarzaur, Max & Boyd, PC**, and **David Schwartz, PC**, are pleased to announce their merger for the practice of law under the firm name of **Najjar, Denaburg, Meyerson, Zarzaur, Max, Boyd & Schwartz, PC**.

The law firm of **King and King** is pleased to announce **Allan M. Trippe** and **David A. Garfinkel** have become members of the firm. Offices are located at The King Professional Building, 713 South 27th Street, P.O. Box

10224, Birmingham, Alabama 35202-0224. Phone (205) 324-2701.

**Judith S. Crittenden, Glenda G. Cochran and Belle H. Stoddard** take pleasure in announcing their formation of a partnership for the practice of law under the name of **Crittenden, Cochran & Stoddard**. Offices are located at 1044 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 324-9494.

**Webb, Crumpton & McGregor** takes pleasure in announcing **Michael M. Eley** has become associated with the firm in the general practice of law. Offices are located at 166 Commerce Street, P.O. Box 238, Montgomery, Alabama 36101. Phone (205) 834-3176.

The law firm of **Marr & Friedlander, PC**, is pleased to announce **Clifford C. Sharpe** has become associated with the firm. Offices are located at 955 Downtowner Boulevard, Suite 111, Mobile, Alabama 36609. Phone (205) 344-1663.

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**J. Allen Reynolds, III**, is pleased to announce the formation of a partnership July 1, 1986, with **James Clarence Evans, Richard A. Jones** and **Winston S. Evans**, for the general practice of law under the firm name of **Evans, Jones & Reynolds**. Offices are located in the Metropolitan Federal Building, Sixth Floor, 230 Fourth Avenue North, Nashville, Tennessee 37219. Phone (615) 259-4685.

The law firm of **Wood & Parnell, PA**, is pleased to announce the association of **Dan E. Schmaeling**, formerly of Webb, Crumpton, McGregor, Schmaeling and Wilson, and **Charles L. Anderson**, former law clerk to Hon. H. Randall Thomas, 15th Judicial Circuit of Alabama. Offices are located at 641 South Lawrence Street, Montgomery, Alabama 36104. Phone (205) 832-4202.

The law firm of **Higgs & Conchin** is pleased to announce **Bennett L. Pugh** has become associated with the firm. Offices are located at 405 Franklin Street, Huntsville, Alabama 35801. Phone (205) 533-3251.

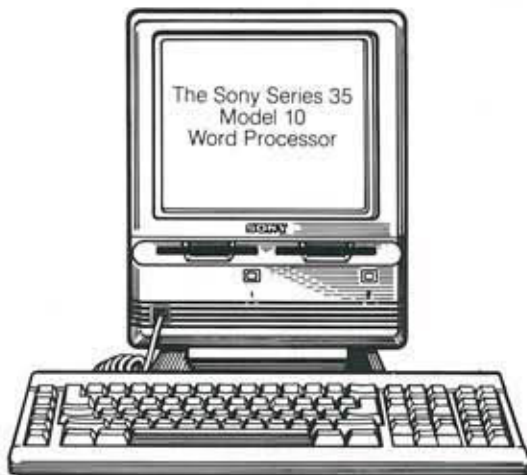
The firm of **Tanner & Guin, PC**, Tuscaloosa, Alabama, is pleased to announce the association of **T. Alan Friday** and the firm's offices will be relocated to 2711 University Boulevard, Tuscaloosa, effective September 30, 1986.

**Capouano, Wampold & Sansone, PA**, is pleased to announce **Alvin T. Prestwood** has become associated with the firm, and the firm name is **Capouano, Wampold, Prestwood & Sansone, PA**. Offices are located at 350 Adams Avenue, Montgomery, Alabama 36104. Phone (205) 264-6401.

**Gordon & Lathum** announce the change of the firm name to **Gordon, Harrison & Lathum**, and take pleasure in announcing **Jack H. Harrison** has become a partner of the firm. Offices are located at 2301 City Federal Building, Birmingham, Alabama 35203. Phone (205) 251-7807.

**W. Banks Herndon** and **Joseph L. Dean, Jr.**, formerly partners in Walker, Hill, Adams, Umbach, Herndon & Dean, announce the formation of a partnership for the practice of law under the firm name of **Herndon & Dean**. Offices are located at 457 South 10th Street, P.O. Box 231, Opelika, Alabama 36803-0231. Phone (205) 749-2222.

The law firm of **Heaps and Ramsey** is pleased to announce the relocation of their offices to Suite 100, 2019 Third Avenue North, Birmingham, Alabama 35203. Phone (205) 328-5496.



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# Bar Briefs

## McGee chosen liaison to ABA committee

Alabama State Bar President William D. Scruggs, Jr., chose the Honorable Val L. McGee to represent the state bar on the American Bar Association's Advisory Committee on Youth Alcohol and Drug Abuse.



McGee

McGee currently is a member of the governor's Task Force on Alcohol and Drug Abuse, and he served as the initial chairman of the bar's similar committee and continues as chairman emeritus.

## Privett receives special citation

Caryl P. Privett, an assistant United States attorney for the

northern district of Alabama, has been chosen by Food and Drug Administration Commissioner Frank E. Young to receive the Commissioner's Special Citation.

The citation is a personal award granted to individuals or groups the commissioner wishes to honor. Only ten awards have been given to individuals not employed by the Department of Health and Human Services, of which the FDA is a part.

## New bar commissioners elected

Five new bar commissioners were elected recently and eight re-elected to serve.

The new commissioners are John Earle Chason of Bay Minette (28th circuit), Lewis H. Hamner of Roanoke (fifth circuit), Phil Laird of Jasper (14th circuit), Richard H. Gill of Montgomery (15th circuit) and William Watson of Ft. Payne (ninth circuit).

Chason is a native of Baldwin County and a graduate of the University of Alabama and its school of law. He has been with the firm of Chason and Chason since 1961 and a municipal judge for 18 years.

Chason is married to Carol Anne Chason, and they have three children.

Hamner was born in Camp Hill and graduated from the University of Alabama School of Law. He served as assistant staff judge advocate for the 1st Cavalry Division, United States Army, in Korea.

Hamner has been in private practice since 1952, and from 1977-80, he served as a bar commissioner for the fifth circuit.

He is married to the former Marion Pinnell and they have three children.

Laird received an undergraduate degree from the University of Alabama and a law degree from Cumberland School of Law.

He has served as president of the Alabama Association of School Board Attorneys, president of the Walker County Bar Association and member of the Alabama State Bar Board of Bar Examiners. He is a partner in the firm of Laird & Wiley.

He is married to Nancy Goodwyn Laird, and they have three children.

Gill is a native Montgomerian and a graduate of Vanderbilt University and the University of Virginia School of Law.

He was a captain with the U.S. Army from 1965-67 and received an Army Commendation Medal.

Gill joined the firm of Godbold,



Chason



Hamner



Laird



Gill



Watson



Hobbs and Copeland (now Copeland, Franco, Screws and Gill) in 1965. He was a senior associate special counsel to the U.S. House of Representatives' Committee on the Judiciary for Impeachment of President Richard Nixon and has served on other committees and task forces. Gill is the author of several articles appearing in law reviews and journals.

He represented the 15th circuit in 1983.

He is married to the former Minnie Lee Richardson, and they have one child.

**Watson** was born in Tuscaloosa and graduated from high school in Ft. Payne. He is a graduate, with honors, of Auburn University and the University of Alabama School of Law.

Since 1974, Watson has been in private practice in Ft. Payne with the firm of Watson & Watson.

He is married to Letha Jo Watson.

Re-elected commissioners are **Edward P. Turner, Sr.**, of Chatom (first circuit); **Lynn Robertson Jackson** of Clayton (third circuit); **Walter P. Crownover** of Tuscaloosa (sixth circuit); **H. Wayne Love** of Anniston (seventh circuit); **Nelson Vinson** of Hamilton (25th circuit);

**Bowen H. Brassell** of Phenix City (26th circuit); **John David Knight** of Cullman (32nd circuit); and **Phillip E. Adams, Jr.**, of Opelika (37th circuit).

### **Board meeting and seminar for Alabama Association of Legal Secretaries**

The Alabama Association of Legal Secretaries announces a seminar and board meeting in Destin, Florida, at the Sandestin Beach Hilton. This is the first time the association has ventured outside the state to conduct its convention.

The Annual Legal Seminar will encompass one day and will be held October 31, 1986. Three speakers will cover such topics as grammar, time management and legal research; the board meeting of the association will be held the following day.

Any paralegal, clerk, student, legal assistant or legal secretary is invited to attend this seminar. To insure accommodations, room reservations should be received by the Sandestin hotel no later than September 30, 1986. A special rate of \$50 per night has been arranged for suites with gulf-view balconies, wet bars and refrigerators. There will be no charge for children staying with parents.

These prices will remain in effect three days prior to and three days after the seminar.

Registration for the seminar, including lunch, is \$20 for members and \$25 for non-members.

For further information contact Joyce Ary at 338-1926, Pell City, Alabama, or Ann Haskew-Garner at 326-4160, Birmingham, Alabama.

### **Torbert nominated by Reagan**

Alabama Supreme Court Chief Justice C.C. Torbert, Jr., was nominated by President Reagan to serve on the first board of directors of the State Justice Institute, a private, non-profit corporation established by Congress to improve the administration of justice in state courts.

Torbert, nominated for a two-year term, was one of nine the President sent to the United States Senate for confirmation to the Institute's 11-member board.

Congress established the institute as a non-profit corporation to further improvement in the administration and operation of state courts and assure ready access to a fair and effective system of justice. The non-profit structure was chosen to assure the Institute's independence in keeping with the separation of powers doctrine. ■

## Riding the Circuits

### **Blount County Bar Association**

At the annual bar meeting of the Blount County Bar Association, the following officers were elected for 1986-87:

President: Hugh A. Nash

Vice president: Michael A. Criswell

Secretary/treasurer: John Huthnance

### **Walker County Bar Association**

The Walker County Bar Association's newly-elected officers are:

President: Margaret H. Dabbs

Vice president: Kerri J. Wilson

Secretary: Richard E. Dick

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Civil practitioners increasingly are faced with business clients, individual and corporate, who have become the objects of criminal investigations. Often such investigations may be initiated by some non-law enforcement agency, but are the precursors to a criminal investigation.

With an ear tuned to what might happen "down the road," civil practitioners faced with such an investigation should be aware that decisions made early in the investigation may be critical to the success or failure of a subsequent criminal defense. Thoughts included here are to remind the civil practitioner that repre-

sentation in a criminal investigation or prosecution, at whatever stage, requires somewhat of a different mind set than that expected in a typical civil case.

Before examining specific suggestions and guidelines, it is important to understand the broad scope of what has come to be known as "white-collar crime."

# What a Civil Practitioner Needs to Know About the Defense of White-Collar Crime

by William N. Clark

## What is white-collar crime?

Sociologist Edwin H. Sutherland coined the phrase "white-collar crime" in 1939 in an address to the American Sociological Society. In his classic treatise on the subject, he defined white-collar crime as being a crime committed by a "person of respectability and high social status in the course of his profession." Sutherland, E., *WHITE-COLLAR CRIME, THE UNCUT VERSION*, 7 (1983) (originally published in 1949)

The Chamber of Commerce in its effort to define white-collar crime focused less on the status of the perpetrator of the crime and more on the nature of the offense: "White-collar crimes are illegal acts characterized by guile, deceit, and concealment—and are not dependent upon the application of physical force or violence or threats thereof." Solomon, *The Economist's Perspective on Economic Crime*, 14 AM. CRIM. L. REV. 641, 643 (1977)

In hearings before a congressional subcommittee, a white-collar crime was defined as "an illegal act which is commit-

ted in the context of an occupation, involves a breach of trust, does not rely on physical force, and has money, property or power as a primary goal." *White-Collar Crime, The Problem and the Federal Response: Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 95th Cong. 2d Sess. VI (1978)

Sutherland's sociological interest in white-collar crime as upper class criminality versus the more general definition is important here only for background purposes. It is perhaps more helpful to recognize that white-collar crimes may be either occupational (physicians, bankers, contractors, lawyers) or organizational (labor unions, corporations, etc.).

The characterization of crime as "organizational" has increased steadily in the last ten years. Nearly two-thirds of the Fortune 500 corporations were convicted of some violation between 1975 and 1976. Between 1970 and 1980, 115 of the Fortune 500 were convicted of at least one major crime or paid civil penalties for serious illegal activities. Clinard, Marshal B., *CORPORATE ETHICS AND*

*CRIME*, 15 (1983) Another report states that from 1976 to 1979, 574 corporations were convicted of criminal offenses. 1 *CORPORATE CRIMINAL LIABILITY*, § 1:02 at 4 (1984) In 1983 alone, there were 657 criminal convictions of military contractors. 1 *CORPORATE CRIMINAL LIABILITY*, iii (1985 cum. supp.) Department of Justice and Congressional studies have placed the annual cost to taxpayers for white-collar crime at 10 to 20 billion dollars and 174 to 231 billion dollars, respectively. Kramer, Ronald C., "Corporate Criminal Liability", *CORPORATIONS AS CRIMINALS*, 17, 19 (E. Hochstedler ed. 1984)

The crimes for which these corporations have been convicted cover a broad spectrum. A list of some federal and state statutes which may be categorized as white-collar offenses appears at Appendix 1. The federal list includes antitrust, embezzlement, securities fraud, bankruptcy fraud, false advertising, RICO, obstruction of justice, tax evasion and many others. The federal government does not have a monopoly on statutes involving white-collar crime.



Alabama has its own repertoire, although not so frequently used. Offenses coming within the scope of the term white-collar crime include extortion, copying and sale of recorded devices, forgery, deceptive business practices, fal-

sifying business records, defrauding secured creditors, issuing false financial statements and interfering with judicial proceedings.

As the number of available offenses has increased, so have the available sanctions. On the federal level, criminal sanctions for violators have increased significantly in the last decade. The Antitrust Procedure and Penalties Act of 1974, 15 U.S.C. § 3, created a separate one million dollar penalty for corporate violators. It also changed the violation from a misdemeanor to a felony and authorized penalties for individuals of three years' imprisonment or \$100,000 fine, or both. The Foreign Corrupt Practices Act, 15 U.S.C. § 78 ff(c)(1), also provides for the punishment of institutional violators by a fine of up to one million dollars.

Another new statute of interest to corporate executives and civil practitioners is the Criminal Fine and Enforcement Act of 1984, applying to offenses committed after December 31, 1984. This statute permits the trial judge to impose increased

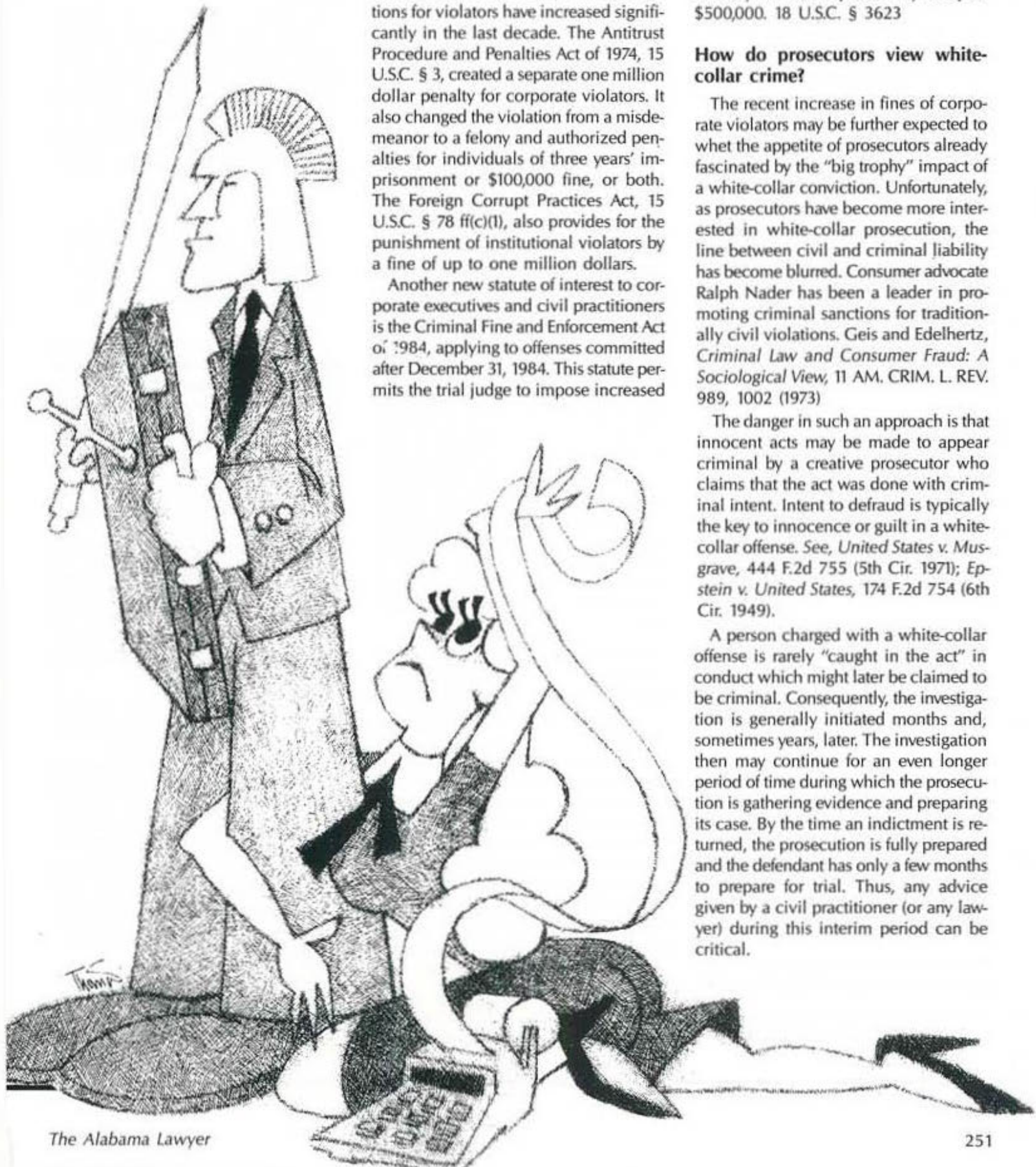
fines on both individuals and corporations depending on the existence of certain factors. 18 U.S.C. § 3622 (e.g., pecuniary loss, defendant's income and earning capacity, and size of the organization) In the case of a corporation convicted of a felony the fine imposed may be up to \$500,000. 18 U.S.C. § 3623

### How do prosecutors view white-collar crime?

The recent increase in fines of corporate violators may be further expected to whet the appetite of prosecutors already fascinated by the "big trophy" impact of a white-collar conviction. Unfortunately, as prosecutors have become more interested in white-collar prosecution, the line between civil and criminal liability has become blurred. Consumer advocate Ralph Nader has been a leader in promoting criminal sanctions for traditionally civil violations. Geis and Edelhertz, *Criminal Law and Consumer Fraud: A Sociological View*, 11 AM. CRIM. L. REV. 989, 1002 (1973)

The danger in such an approach is that innocent acts may be made to appear criminal by a creative prosecutor who claims that the act was done with criminal intent. Intent to defraud is typically the key to innocence or guilt in a white-collar offense. See, *United States v. Musgrave*, 444 F.2d 755 (5th Cir. 1971); *Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949).

A person charged with a white-collar offense is rarely "caught in the act" in conduct which might later be claimed to be criminal. Consequently, the investigation is generally initiated months and, sometimes years, later. The investigation then may continue for an even longer period of time during which the prosecution is gathering evidence and preparing its case. By the time an indictment is returned, the prosecution is fully prepared and the defendant has only a few months to prepare for trial. Thus, any advice given by a civil practitioner (or any lawyer) during this interim period can be critical.





The prosecution of bank-related offenses serves as an example of the extended process.

Bank officials have been frequent targets of prosecution for offenses relating to loans, benefits to officers and directors and omissions in bank records. See, e.g., *United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983) (influencing loan applications); *United States v. Larson*, 581 F.2d 664 (7th Cir. 1978) (compensating balance); *United States v. Krepps*, 605 F.2d 101 (3rd Cir. 1979) (loan and reloan to officer). Even lawyers advising banks have been convicted of bank offenses. E.g., *United States v. Payne*, 750 F.2d 844 (11th Cir. 1985) (bank's counsel convicted for misapplication). The alleged offense is often discovered during a bank audit, and the bank's counsel is contacted. Decisions such as whether the bank officer, who is the apparent target of the investigation, should make a statement could have a significant, if not decisive, effect on a subsequent defense.

The bank in such a situation cannot act totally without fear of prosecution because in pursuing white-collar defendants, conspiracy, 18 U.S.C. § 371, has been a favorite vehicle for prosecutors. It has long been settled that a corporation may be indicted for conspiracy. See, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 140, (1940). More recently, the Racketeering Influenced and Corrupt Organizations Act (RICO) has gained wide use. 18 U.S.C. § 1020 et. seq. The 11th Circuit is one of several circuits recognizing RICO conspiracy liability. *United States v. Carter*, 721 F.2d 1514 (11th Cir. 1984).

Congress and prosecutors obviously view white-collar crime as extremely serious business. Given the serious consequences which may result from a preliminary white-collar crime investigation, the role of a civil practitioner advising a potential target may be critical to the success of any subsequent defense.

### **What do I do when a client is contacted by a state or federal agent?**

Recognizing the attitude of those who frame the statutes and those who enforce

them, perhaps the first step the civil practitioner should take when a client is contacted by a state or federal agent (and there is even a scintilla that a criminal investigation may be involved) is to stop thinking like a civil practitioner. The FBI, police, IRS agents, etc. are not your friends; they are single-minded (perhaps rightly so). With few exceptions, their goal is not to eliminate your client as a suspect, but to gather evidence to prove a case.

The substantive offense under investigation is not the only problem with which the lawyer must be concerned. Obstruction of justice, 18 U.S.C. §§ 1503, 1512, may replace the substantive offense as the focus of the investigation if one is not careful. Section 1503 of Title 18 prohibits corruptly influencing, obstructing or impeding the "due administration of justice" as it relates to grand jury or petit jury proceedings. The omnibus provision of the statute makes it particularly dangerous. Section 1512 of Title 18 prohibits, among other things, engaging in "misleading conduct toward another person" with the intent to influence the testimony of any person in an official proceeding, or causing or inducing them to withhold testimony or documents or concealing or destroying documents. The success or failure of the effort is immaterial. *Knight v. United States*, 310 F.2d 305 (5th Cir. 1962)

There may be circumstances in which a violation can occur where there has been no subpoena. *United States v. Faudman*, 640 F.2d 20 (6th Cir. 1981) (witness altered and defaced records with knowledge of grand jury investigation). A non-lawyer who is himself a target and advises a witness to take the Fifth Amendment may be guilty of obstruction of justice. See, *United States v. Cioffi*, 493 F.2d 1111 (2d Cir. 1974) (veiled threats connected with suggestion that a witness "take the Fifth"). The key is whether the advice is motivated by some corrupt design, such as to protect the person giving the advice from criminal prosecution.

Consequently, at the first sign of a criminal investigation of a civil client a lawyer should ask the following questions:

**A.** Who do I represent—corporation or employee?

**B.** What is the goal of my representation—to protect the corporation or an employee?

**C.** Should I involve another attorney?

The purpose of asking these questions is to determine whether there is a conflict of interest. Both the corporation as an entity and its officers and employees may be targets of an investigation. EC 5-18 of the *Code of Professional Responsibility* of the Alabama State Bar provides in part:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.

Even without the codified ethical consideration, it is obvious defenses in some cases might be antagonistic. Most likely there is an inherent conflict. It may be in the best interest of the corporation for its employee to tell all, while such openness would amount to a confession for the individual, or the situation may be reversed. Separate representation is generally the better course.

When the investigating agent calls he may want to talk informally under the pretext that he is simply attempting to gather information. Before making the decision to allow a client to participate in such an interrogation, the following steps should be considered.

**A.** Get all of the facts from the client and determine whether some criminal statute may have been violated.

**B.** If the interview is proposed by a federal agent or a state law enforcement officer, contact the prosecutor, establish the limits of the interview and determine whether immunity may be granted.

**C.** Do not recommend that the client participate in an informal interview without first being granted formal immunity if there is a remote possibility of a criminal charge.

Before agreeing to the interview and accepting a grant of immunity, certain procedures must be followed. A brief explanation is set forth hereafter. An alter-



native to the interview is for the lawyer to proffer to the prosecutor the defense lawyer's understanding of the facts.

If the informal interview is bypassed, the government may proceed to a grand jury. Whether to appear before the grand jury is another issue. At this point it is important to note that a suspect does not have a right to appear before a grand jury. See, *United States v. Pabian*, 704 F.2d 1533, 1539 (11th Cir. 1983). However, the United States Attorney's manual does encourage that suspects who want to testify be permitted.

### What do I do if my client receives a grand jury subpoena?

A corporate or business client who gets a subpoena to a grand jury must be treated initially as if he or his corporation is guilty. The presumption of innocence is for trial—not for evaluating whether criminal liability may exist. The following questions should be answered before deciding how to respond to the subpoena:

- A. Who do I represent?
- B. What is the goal of my representation?
- C. Do I need to involve another attorney?

Those three questions should sound familiar. The next is new.

D. Should I move to quash the subpoena?

Before answering this, several others must be answered.

1. Is the subpoena for records, the person or both? Only natural persons, not entities, make invoke the Fifth Amendment privilege against self-incrimination. *Bellis v. United States*, 417 U.S. 85 (1974)

2. Is the subpoena overbroad and burdensome? Rule 17(c), Federal Rules of Criminal Procedure (F.R.Cr.P.) *Ealy v. Littlejohn*, 569 F.2d 219 (5th Cir. 1978) (First Amendment); *United States v. Calandra*, 414 U.S. 338 (1974) (Fourth Amendment protection not available); but see, *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385 (1920) (subpoena *duces tecum*—after indictment—for use at trial) (Fourth Amendment—government conducted illegal search of corporate office—copied documents—returned them and then subpoenaed them)

3. Is there evidence of prosecutorial harassment or misuse of the system? *In re: Grand Jury Investigation*, 565 F.2d 318, 320-21 (5th Cir. 1977) The investigation must be in good faith—the investigation must be exclusively criminal in its inception. *United States v. Proctor & Gamble*, 356 U.S. 677, 683 (1958) Attorneys in the civil division of the Justice Department are prohibited from having routine access to grand jury material for civil purposes. *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) See, Rule 6(e) F.R.Cr.P.

4. Is the subpoena the result of an illegal interception of wire or oral communications? Eighteen U.S.C. § 2515 prohibits such illegally obtained information.

The answers to these questions will provide the answer, or at least guidance, as to whether a motion to quash should be filed. However, not only the law

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## What do I do?

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should be considered, but also tactical and strategic considerations.

One consideration is whether the client is going to testify. For most serious, experienced criminal practitioners the answer to that is easy. However, consider the following guidelines.

A. Inevitably there is little to gain and much to lose. The government may decide to prosecute not only for the substantive offense under investigation but also for perjury if the defendant testifies, 18 U.S.C. §§1621, 1623 Unless a clear advantage can be determined by allowing the client to testify, and the prosecutor states in writing that the client is not a target, the client should not testify!

B. The prosecutor should be asked why the client is being subpoenaed, i.e., as a recordkeeper only, as a corporate representative, as a witness for the pros-

ecution, as a suspect or as a target. If it is represented that the witness is a suspect or a target, the client should be advised not to testify. If the client is a corporation, a decision must be made about separate representation before an officer or employee should be advised to testify. Generally, if the prosecutor is advised that the witness will assert the Fifth Amendment privilege, the witness will be excused from appearing.

C. Consider exploring with the prosecutor the possibility of a grant of immunity. Remember, however, that a grant of immunity does not protect a witness from a perjury prosecution. *United States v. Mandujano*, 425 U.S. 564 (1976)

1. Federal courts—use immunity. 18 U.S.C. §§6001-6005 Before a United States attorney may obtain statutory immunity, he must submit a written application to the district court and have the approval of the Department of Justice. Do not accept an informal grant of immunity.

2. State courts—the prosecutor may agree to transactional immunity. Any agreement for immunity should be in writing.

### What do I do if the prosecutor will not release the client from grand jury subpoena, or it is decided that the client will testify?

Assuming that after extensive soul-searching it is decided the client will testify before a grand jury, he should be educated about the overall process and purpose of the grand jury. That education should include as a minimum the following:

A. Describe to the client the methods employed by prosecutors in asking questions, e.g., leading questions, questions based on tape recordings or statements of others and questions designed to place the witness on the defensive and in fear of criminal prosecution.

B. Review with the client the importance of not only what his answer might be but also the manner in which he responds. (Do not tell the client what to say.)

1. Advise the client to tell the truth.

2. Explain the prosecutor is not the client's friend, despite how friendly he or she might appear.



3. Advise the client as to the consequences of being adamant in response to questions, i.e., an adamant response to a nonconsequential question which turns out to be a mistake may be considered by the prosecutor as a lie. On the other hand, where a client may not recall where he was or what he was doing on a specific day he can be adamant that on whatever day it was he did not embezzle anything (assuming of course that he did not).

C. Advise the client that if he truly cannot remember, to say that he cannot and not allow himself to be coerced into some other answer.

D. Advise the client about the various legal privileges available. No effort is made here to discuss in detail the available privileges; the law in this area is rapidly developing. When faced with a grand jury privilege question—research. A brief discussion of the key privileges follows.

1. Fifth Amendment privilege against compulsory self-incrimination—Corporations, unions, etc., are not protected from the production of corporate documents, although a sole proprietor is when the act of production is testimonial and self-incriminatory. *United States v. Doe*, 79 L.Ed.2d 552 (1984); see, *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969) See generally, *Third Annual Survey of White Collar Crime*, 22 AM. CRIM. L. REV. 559 (1985). A corporate officer may invoke his privilege as to personal papers. See, *Wilson v. United States*, 221 U.S. 361, 384-85 (1911).

2. Attorney-client privilege—Review and understand the scope of the privilege as it relates to corporations. See, *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

3. Psychiatrist-patient privilege

4. Marital privilege

5. First and 14th Amendments—These amendments generally provide little help, but should be considered where there is no basis for the investigation or question. See *Ealy v. Littlejohn*, 569 F.2d 219 (5th Cir. 1978).

6. Sixth Amendment—While a witness does not have a right to have his counsel present in the grand jury room, he does have a qualified right to leave the grand jury room to confer with counsel. See, *United States v. Mandujano*, 425 U.S. 564 (1976); but see, *Matter of Lowry*, 713 F.2d 616, 617-18 (11th Cir. 1983). If the prosecutor refuses the witness that right, the witness should refuse to answer. If the prosecutor

chooses to pursue the matter further, a judge will decide.

7. For the creative attorney other constitutional objections may be asserted under the Ninth Amendment. To assist the client in asserting the appropriate privileges, he should be given separate cards stating the assertion. The client must fully understand his qualified right to leave the grand jury room to confer with counsel and be reminded to freely exercise it.

E. Do not allow the client to testify before the grand jury without having received a subpoena. If the appearance is not compelled, there is likely no Fifth Amendment protection.

F. The lawyer should accompany the client to the grand jury in every instance if the client is to testify. Where only documents are to be delivered and there is to be no actual appearance before the grand jury, there may be some advantage to having the client or a representative deliver the documents without an attorney.

G. Be aware that the rules of evidence do not apply in grand jury proceedings. See *United States v. McKenzie*, 678 F.2d 629 (5th Cir. 1982); F.R.Evid. 1101(d)(2).

#### H. Other decisions

1. Immunized testimony of a witness cannot be used as evidence for gaining an indictment against the witness in a grand jury proceeding. *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985)

2. In order to avoid contempt for refusal to answer a question before a grand jury on the ground of an illegal wire tap, the witness must say that the unlawful surveillance has taken place, not just that it "may" have taken place. See *In re: Baker*, 680 F.2d 721 (11th Cir. 1982).

3. A witness may properly invoke the Fifth Amendment when he reasonably apprehends a risk of self-incrimination even though no criminal prosecution is pending and the threat of prosecution is remote. *In re: Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086 (5th Cir. 1980)

4. Communications between a corporate general counsel and corporate employees may be protected by the attorney-client privilege and, thus, not subject to disclosure before a grand jury. *United States v. Upjohn Co.*, 449 U.S. 383 (1981) However, where the advice is given as a business advisor rather than attorney the privilege will

not be available. See, *In re: Grand Jury Investigation*, 769 F.2d 1485 (11th Cir. 1985).

On occasion, either before or after a grand jury session the prosecutor may request the client to take a lie detector test for the purpose of resolving conflicts between witnesses. Such a request raises still other questions.

### What do I do if the prosecutor wants my client to take a polygraph (lie detector) test?

It is important to recognize that polygraph tests are by no means infallible. While the polygraph industry claims 85 to 98 percent accuracy, a review by the U.S. Congress Office of Technology, as well as other studies, reveal that the rate probably is much lower. Some studies would place the rate at closer to 50 percent. Kleinnuntz, *Trial by Polygraph*, TRIAL 31 (September 1985) Before making the decision to allow the test the following steps should be taken:

A. Interview the client thoroughly as to all facts.

B. Question the investigator and prosecutor concerning the investigation, the client's alleged role and the purpose of the polygraph test. Determine what concessions, if any can be made, i.e., if the client passes, will the state or government forego any prosecution?

C. Assess the effect of cooperation versus non-cooperation.

D. Assess your client's personality versus polygraph limitations.

E. Consider a preliminary test.

F. Consider participating in preparing the questions. You probably should not; lawyers tend to frame too technical questions inviting equivocation.

G. Let the client make the final decision after a thorough discussion.

H. Insure that the prosecutor agrees the results are not admissible, except by agreement.

Sometimes despite the best preliminary maneuvering of even the most knowledgeable civil practitioner (or criminal practitioner) the prosecutor advises that there must be an indictment. What comes next?



## What do I do if the government or state prosecutor advises that my client is going to be indicted?

Assuming all prior steps concerning scope of representation and investigation have been taken, consider the following:

**A.** Request to talk with *the* district attorney or *the* United States Attorney if the case is complex. If it is somewhat routine, an assistant is adequate. If a federal prosecution, request a conference with the appropriate justice department division.

**B.** Discuss with the prosecutor the specific nature of the charge and the client's alleged involvement.

**C.** Fully evaluate the case, and determine the likely outcome. Consider seeking another opinion from someone experienced in the defense of white-collar offenses.

**D.** Consider the possibility of a plea to a lesser charge by information rather than allowing the matter to proceed to an indictment.

**E.** Consider other alternatives to prosecution, e.g., pretrial diversion, surrender of professional license and cooperation as a government witness.

All of this discussion may lead nowhere. However, it may serve to let the client know that the prosecution is serious and that even a white-collar executive can be indicted (and sometimes convicted). It may also provide additional insight into the prosecution's theory, and consequently, an aid to defense preparation.

## What do I do if my client is indicted?

When all else fails and an indictment is returned, white-collar clients often become the focus of the news media. Although some lawyers counsel otherwise, trials are not won in the press or on television. Thorough trial preparation and skillful trial advocacy are the key. The latter subjects, however, are too broad for coverage here. Several reminders may be helpful in the initial stages after indictment:

**A.** Determine who you are going to represent if a corporation and employees

are involved. Decide whether to associate someone else.

**B.** If an indictment has been returned, necessary motions must be filed and trial preparation must begin immediately. The criminal process now moves *rapidly* in federal and state courts.

**C.** Remember that the individual client's liberty and reputation, and perhaps profession, are at stake—not just an economic loss.

An interesting legal problem sometimes preceding indictment or arising after indictment is the relationship between parallel civil and criminal proceedings.

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# What do I do?

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## What do I do if in the midst of a civil case my client appears to be the target of a criminal investigation or is indicted?

This question may arise most often in cases involving securities, anti-trust and tax regulation. The civil practitioner must recognize immediately the problems inherent in such a situation.

The Federal Rules of Civil Procedure provide for broad discovery which could be devastating in a criminal case and contrary to constitutional protections. Administrative summons may be used in civil proceedings. See *United States v. Powell*, 379 U.S. 48 (1964). However, they may not be used once a case has been referred for criminal prosecution. *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). As soon as counsel becomes aware of a possible criminal investigation, he must prepare accordingly. Some

general thoughts follow. (Caution: This area, like others discussed here, easily could be the subject of a separate article, and an in-depth review of the law should be made if the problem arises.)

**A.** The Fifth Amendment may be invoked in a civil proceeding. See, *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Slochower v. Board of Higher Education of the City of New York*, 350 U.S. 551 (1956); *United States v. Kordel*, 397 U.S. 1 (1970).

**B.** Consider seeking an order staying the criminal prosecution or enjoining discovery. Rule 2, Federal Rules of Criminal Procedure (rules intended for just determination of criminal proceeding); *McNabb v. United States*, 318 U.S. 332 (1943) (inherent supervisory power over administration of criminal justice); Rule 26(b) (power to limit burdensome discovery); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979) (court held stay appropriate of civil action while criminal case pending)

**C.** An alternative to a stay may be a motion that depositions be taken under seal to be opened only after completion of the criminal trial. See, *D'ippolito v. American Oil Co.*, 272 F.Supp. 310 (S.D.N.Y. 1967) (civil anti-trust proceeding).

**D.** Be conscious that answering interrogatories or allowing a witness to be deposed will constitute a waiver of the Fifth Amendment privilege as to the same questions in a subsequent criminal prosecution. *United States v. Kordel*, 397 U.S. 1 (1970)

Parallel civil and criminal proceedings may be seen more often as the criminal law is made applicable to more areas once exclusively the subject of civil enforcement. Also, as this trend develops, civil practitioners may become players in the investigation rather than just coaches.

## What do I do if I am subpoenaed to a grand jury to produce a client's file or my fee records?

Attorneys increasingly are being subpoenaed to appear before federal grand



juries to testify about transactions with their clients. A recent National Association of Criminal Defense Lawyer study revealed that while prior to 1980 such subpoenas were rarely used (Gerego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, 1 *Criminal Justice*, 2 [Spring 1986], since then they have become commonplace. This subject has produced heated arguments from defense attorneys. For two excellent discussions of the current law see, Rudolf, *The Attorney Subpoena: You Are Hereby Commanded to Betray Your Client*, 1 *CRIMINAL JUSTICE*, 15 (Spring 1986); Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal For Reform*, 23 *AM. CRIM. L. REV.* 95 (Summer 1985). See also, *The Attorney-Client Privilege As A Protection of Client Identity*, 21 *AM. CRIM. L. REV.* 81 (1983). General guidance applicable to any attorney subpoena is set forth below.

A. Advise the client of the fact of the subpoena. DR 4-101(B),(c)(1) Suggest that

he should have separate counsel to advise whether the attorney-client privilege should be invoked. Consider getting separate legal advice yourself.

B. Consult with the prosecutor as to the purpose of the subpoena.

C. Do not produce anything without a waiver or order. DR 4-101(A),(C) However, recognize that the privilege will not protect documents transferred to the lawyer if they would not have been privileged in the hands of the client. *Fisher v. United States*, 425 U.S. 391, 400-05 (1976)

D. Seek an opportunity to be heard by the court on your assertion of the attorney-client privilege. The 11th Circuit has held that the government is not required to make a preliminary showing of relevance and necessity of the information sought in order to compel a target's attorney to comply with a subpoena. *In re Grand Jury Investigation*, 769 F.2d 1485 (11th Cir. 1985); *Re: Grand Jury Proceedings in Matter of Freeman*, 708 F.2d 1571

(11th Cir. 1983) However, the Fourth Circuit has. *In Re: Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir.) *withdrawn on other grounds*, 697 F.2d 112 (4th Cir. 1982) (en banc)

Apparently recognizing the gravity of attorney subpoenas, the justice department recently issued guidelines to its United States attorneys regarding subpoenas issued to attorneys for the purpose of obtaining fee information and requires the following:

A. Any grand jury or trial subpoena to an attorney for information relating to the representation of a client must be authorized by the assistant attorney general, criminal division.

B. The subpoena must seek non-privileged and relevant information.

C. Reasonable attempts to obtain the information from alternative sources must be exhausted.

D. The government must have reasonable grounds to believe the information sought is reasonably needed.

## 1985-86 50-Year Certificate Recipients

Lee Bains	Herman Walter Maddox
Judge Joe G. Burns	Judge Telfair J. Mashburn
Harry B. Cohen	Sam Frierson McDonough
Jerome A. Cooper	William P. McGough
Albert S. Gaston	F. Marshall Neilson
Alfred K. Hagedorn	Olen Hill Pate
Judge E. David Haigler	J. Howard Perdue, Jr.
James O. Haley	Herbert W. Peterson
David M. Hall, Jr.	John Terry Reynolds, Jr.
Nicholas S. Hare	Paul William Scherf
Edwin Irby Hatch	Irene F. Scott
Jule R. Herbert	Elton Bryson Stephens
William Charles Hughes	Ralph Bryant Tate
Palmer Keith	Lee Joseph Tyner
Paul Joseph Kelly	Elizabeth Wilbanks
Sara Mae Hammond Knight	Sim Wilbanks
Joseph Nicholas Langan	Frank A. Wilkinson, Jr.
Manuel Levine	

## License/Special Membership Notice

### 1986-87 Occupational License or Special Membership Dues

**Due October 1, 1986**

This is a reminder that all Alabama attorney occupational licenses and special memberships expire September 30, 1986. Sections 40-12-49, 34-3-17 and 34-3-18, *Code of Alabama*, 1975, set forth the statutory requirements for licensing and membership in the Alabama State Bar. Licenses or special membership dues are payable between October 1 and October 31, without penalty. These dues include a \$15 annual subscription to *The Alabama Lawyer*.

If you have any questions regarding your proper membership status or dues payment, please contact Margaret Boone at (205) 269-1515 or 1-800-392-5660 (in-state WATS).



E. The need for the information must outweigh the potential adverse effects on the attorney-client relationship. Justice Department Guidelines, 38 CRIM. L. REP. 2001 (Vol. 38, No. 1, Oct. 2, 1985)

### What can I do to avoid being prosecuted?

Just as the number of subpoenas has increased, so has the prosecution of attorneys. There is no mantle of immunity protecting lawyers. A civil practitioner who becomes involved in a criminal investigation must be wary of clients, prosecutors and law enforcement officers. Innocent actions may be the subject of scrutiny, particularly where some governmental agency has been adversely affected. Before beginning representation of a client in a criminal investigation, the civil practitioner should carefully consider the applicable rules of ethics relating to fees, relationships with clients, etc. The following suggestions for consideration may be helpful.

A. Read and understand the rules of ethics.

B. Recognize your limitations, if any.

C. Advise the client to tell the truth if he is to be interviewed or to testify, and, in either case, always tell the whole truth.

D. Do not accept fees from someone other than the client or his family without a clear, satisfactory explanation. EC5-1 and EC5-21, 5-22

E. Be aware that seemingly legitimate civil advice to a target in an investigation or to an indicted defendant may be considered by an overzealous prosecutor as obstruction of justice, 18 U.S.C. § 1503, or an attempt to avoid the forfeiture provisions of RICO, 18 U.S.C. § 1963(c).

F. Do not engage in business with clients. EC5-1, DR 4-104

G. Do not socialize with clients, particularly those who are subjects of investigation or under indictment.

H. As a rule, do not represent more than one defendant, and never do so without fully disclosing all potential conflicts to the clients. EC5-14 through -19, DR 5-105

The absolute nature of the preceding guidelines is subject, of course, to the

lawyer's discretion. It is not meant to cast dispersions generally or discourage the good rapport so often developed between lawyers and clients, but simply to cause the civil practitioner who begins representation of a client in a criminal

investigation to be aware of some of the potential pitfalls. It certainly is not meant to discourage vigorous representation.

A final thought: Represent your client zealously but only within the framework of the law. EC7-1 and EC7-39

### APPENDIX 1 Federal Statutes

1. Restraint of Trade, Sherman Act, 15 U.S.C. § 1
2. Bank embezzlement or misapplication, 18 U.S.C. § 656
3. Bankruptcy fraud, 18 U.S.C. § 152
4. Bribery, 18 U.S.C. § 201(b)
5. Copyright, 17 U.S.C. § 506(a)
6. Conflicts of interest, 18 U.S.C. §201-224
7. Extortion, 18 U.S.C. § 1951
8. Environmental offenses, 33 U.S.C. §§ 401-407, 15 U.S.C. §§ 2601-2629
9. False advertising, 15 U.S.C. § 45
10. False claims, 18 U.S.C. § 287
11. Fraud or false statements to government agencies, 18 U.S.C. § 1001
12. Misrepresentation on loan applications, 18 U.S.C. § 1014
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14. Wire fraud, 18 U.S.C. § 1343
15. RICO, 18 U.S.C. § 1961-1968
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17. Labor bribery or pay-off, 29 U.S.C. § 186(d)
18. Currency reporting, 26 U.S.C. §6050(l)
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23. Failure to file, 26 U.S.C. § 7203
24. Conspiracy, 18 U.S.C. § 371

### Alabama Statutes

1. Theft of property, *Ala. Code*, § 13A-8-3 through -5
2. Extortion, § 13A-8-13 through -15
3. Copying and sale of recorded devices, § 13A-8-80 through -84
4. Forgery, § 13A-9-2 through -4
5. Deceptive business practices, §13A-9-41
6. False advertising, § 13A-9-42
7. Bait advertising, § 13A-9-43
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9. Defrauding secured creditors, § 13A-9-46
10. Defrauding judgment creditors, §13A-9-47
11. Issuing false financial statement, §13A-9-49
12. Receiving deposits in failing financial institutions, § 13A-9-50
13. Misapplication of property, § 13A-9-51
14. Bribery of public servants, § 13A-10-61
15. Interfering with judicial proceedings, § 13A-10-130
16. Securities, § 8-6-17

*William N. Clark is a graduate of the United States Military Academy and the University of Alabama School of Law. He served as an officer in the U.S. Army from 1963-68 and currently is a colonel in the Army Reserve. Clark is a partner in the Birmingham firm of Redden, Mills & Clark.*







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# Civil RICO—

by John E. Grenier  
and Sally S. Reilly

In response to growing concern over the expanding influence and economic power of organized crime, Congress passed the Organized Crime Control Act of 1970. Title IX of this act is the Racketeering Influenced and Corrupt Organizations Act, or RICO, 18 U.S.C. §§ 1961-68.

Originally enacted to attack the infiltration of legitimate businesses by organized crime, ordinary businessmen have discovered they, too, can be targets of its civil provisions. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275 (1985), the United States Supreme Court quickly arrested the attempts by some federal courts to limit RICO's scope with respect to two RICO issues—the racketeering injury and prior criminal conviction requirements. However, the *Sedima* court opened the door to RICO's "pattern of

racketeering" requirement which may limit just how far RICO can be carried, even after *Sedima*.

Section 1962 of RICO prohibits a person from engaging in four types of conduct:

(1) § 1962(a): Using or investing any money received from a pattern of racketeering activity to acquire an interest in, establish or operate an enterprise;

(2) § 1962(b): Acquiring or maintaining an interest in or control of an enterprise through a pattern of racketeering activity;

(3) § 1962(c): If employed or associated with an enterprise, conducting or participating in the conduct of the enterprise's affairs through a pattern of racketeering activity;

(4) § 1962(d): Conspiracy to violate any of the above.

Racketeering activity can be based upon a number of predicate acts, or violations of certain state and federal laws. These laws include criminal statutes prohibiting such crimes as kidnapping, extortion, drug smuggling, etc. However, it is the inclusion of wire, mail and securities fraud in the predicate arts giving RICO its broad reach and providing federal jurisdiction for many claims which traditionally had been adjudicated in state courts under the common law of tort or contract.

Section 1964(c) of RICO provides the right to pursue a private civil action to any person who suffers injury to his "business or property by reason of a vio-





# The Scope of Coverage after *Sedima*

lation of Section 1962." Not only does this section provide a cause of action for damages, it also allows recovery of treble damages and attorneys' fees. It is this aspect of RICO giving additional incentive to plaintiffs to categorize ordinary commercial disputes as RICO claims.

Although infrequently invoked until the late 1970s, in the last six or seven years civil RICO has been used in a wide variety of cases against defendants not remotely connected with organized crime. Many federal courts reacted swiftly and strongly to curb the "garden variety" disputes involving RICO claims. Some courts went so far as to require plaintiff to prove a link between defendant and organized crime. See e.g., *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F.Supp 256 (E.D. La. 1981).

In 1984, the United States Court of Appeals for the Second Circuit, alarmed at the "extraordinary, if not outrageous uses to which RICO has been put," attempted to restrict RICO's broad civil sweep. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), the court stated "RICO . . . presents a classic case of a statute whose ambiguous language

needs to be construed in light of Congress's purpose in enacting it."

The court then imposed two barriers for plaintiff to overcome. First, the Second Circuit determined it was insufficient for plaintiff to only prove he was injured by the commission of the predicate acts themselves—he must prove a "racketeering injury," or an injury caused by the type of activity which RICO was designed to deter. Second, plaintiff must prove defendant had a prior criminal conviction for the underlying predicate offenses.

In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275 (1985), the United States Supreme Court, in reversing the Second Circuit's decision, decisively put an end to the racketeering injury and criminal conviction requirements. The court stated nothing in RICO's history or language supported the prerequisite of a prior criminal conviction or mandated the amorphous standing requirement of a racketeering injury. However, the court did not issue an open invitation to plaintiffs who can prove no more than they were damaged by two or more acts of racketeering. Instead, the court offered a new approach under which RICO's civil provisions can be limited.

Although rejecting the Second Circuit's opinion, the *Sedima* court recognized that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." The court noted "private civil actions under the statute are being brought almost solely against [respected businesses], rather than against the archetypal, intimidating mobster." The court then stated as follows:

The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.'

In a now-famous footnote, the *Sedima* court implied two criminal acts committed in connection with an enterprise may not be sufficient to satisfy the pattern element, even though the terms of the statute itself require only two such acts:

As many commentators have pointed out, the definition of a 'pattern of racketeering activity' differs from the other provisions in § 1961 in that it states that a pattern 'requires' at least two acts of racketeering activity, . . . not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'

The legislative history, noted the court, shows that "two isolated acts of racketeering activity do not constitute a pattern," but rather that:

[T]he infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

The court also cited the following statement made by the sponsor of the senate bill:

[T]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . .

The court drew attention to the definition of pattern adopted in a separate portion of the United States Criminal Code enacted at the same time as RICO:

[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristic and are not isolated events.

Thus, the Supreme Court sent out a clear signal that the RICO pattern element should not be ignored or treated in





a perfunctory manner and, indeed, remanded *Sedima* in part to determine if the requisite pattern was present.

In a dissenting opinion, Justice Powell argued that although RICO "should be read broadly and construed liberally to effectuate its remedial purposes" in criminal prosecutions, the same principles do not necessarily apply to the Act's private civil provisions. The Justice emphasized RICO should be construed in a manner consistent with its original purpose—to eradicate organized crime—not in a manner so as to authorize private civil actions brought against respected businesses to redress ordinary fraud and breach of contract cases.

Justice Powell then pointed out the RICO requirement of proof of a pattern of racketeering may be interpreted narrowly to effect its original legislative purpose:

Section 1961(5) defining "pattern of racketeering activity" states that such a pattern "requires at least two acts of racketeering activity." This contrasts with the definition of "racketeering activity" in § 1961(1), stating that such activity "means" any of a number of acts. The definition of "pattern" may thus logically be interpreted as meaning that the presence of the predicate acts is only the beginning; something more is required for a "pattern" to be proved.

By construing pattern to focus on the manner in which the crime was perpetrated, stated Justice Powell, courts could more successfully limit RICO's scope to its intended target—organized crime.

Thus, *Sedima* has cast doubt on earlier decisions which held that predicate acts need not be related to each other through a common scheme, plan or motive as long as all the acts are done in the conduct of the affairs of the enterprise. See e.g., *United States v. Weissman*, 624 F.2d 1118, 1121-22 (2d Cir.), cert. denied, 449 U.S. 871 (1980); *United States v. Elliot*, 571 F.2d 880, 899 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1979). These cases found that the enterprise itself supplied the necessary unifying link between the predicate acts that may constitute a pattern of racketeering activity. *Weissman*, 624 F.2d at 1122; *Elliot*, 571 F.2d at 899

Court decisions since *Sedima* have been moved by the *Sedima* court's statements to emphasize an aspect of the pattern requirement which had often been overlooked in the past—that of continuity. The "continuity plus relationship" requirement means not only that the predicate acts be related, but also that the acts be part of some continuous, as opposed to isolated, criminal activity.

At one extreme are those courts suggesting multiple fraudulent acts committed in a single criminal scheme or episode do not satisfy the continuity requirement of pattern, and thus, can never constitute a pattern of racketeering activity. These courts require proof of multiple criminal schemes in order to satisfy the pattern requirement. See e.g., *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828 (N.D. Ill. 1985) ("Surely the continuity inherent in the term presumes repeated criminal activity, not merely repeated acts, to carry out the same criminal activity. It places a real strain on the language to speak of a sin-

gle fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity'"); *Allington v. Carpenter*, 619 F.Supp. 474, 477-78 (C.D. Cal. 1985) (separate acts of wire fraud committed in connection with the same criminal transaction do not constitute a pattern of racketeering activity; continuity of racketeering activity requires that the predicate acts occur in different criminal episodes).

At the other extreme are those courts rejecting out of hand the notion that multiple schemes are necessary to prove a pattern. See e.g., *Conan Properties, Inc. v. Mattel, Inc.*, 619 F.Supp. 1167 (S.D. N.Y. 1170) (two acts arising out of the same scheme may constitute pattern of racketeering activity); *Trak Microcomputer Corp. v. Wearne Bros.*, 628 F.Supp. 1089 (N.D. Ill. 1985) (pattern of racketeering activity can be established with respect to a single fraudulent scheme); *Fleet Management Systems v. Archer-Daniels-Midland Co.*, 627 F.Supp. 550 (C.D. Ill. 1986) (although more than a mere counting of racketeering acts is necessary, this does not mean that a pattern cannot be established with respect to a single fraudulent scheme).

Somewhere between these two positions lie those courts which, while accepting the proposition that a pattern may exist within a single criminal episode, require some differentiation time lapse among the predicate acts in order to satisfy the continuity prong of the pattern requirement. Some courts require the scheme present a threat of future racketeering activity.

For example, in *Superior Oil Company v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), the Eighth Circuit was presented with a RICO claim in connection with a single scheme to defraud. Although recognizing that a pattern may be proved in a single criminal scheme, the court nevertheless required proof of a threat of continuing racketeering activities in the future in combination with ongoing acts of racketeering. In *Graham v. Slaughter*, 624 F.Supp. 222 (N.D. Ill., 1985), the court found the allegations of the complaint stated a cause of action under RICO due to the ongoing nature of an open-ended scheme to embezzle which included a number of independently motivated crimes.

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Other courts have determined a pattern can exist if the individual predicate offenses are separated in time and form. In *Paul S. Mullin & Associates, Inc. v. Bassett*, 632 F.Supp. 532, 541 (D.Del. 1986), the court noted, because the alleged predicate acts occurred over a short period of time, were made to the same people and took substantially the same form, the acts were not sufficiently distinct in *time* or *substance* to comprise a pattern. And, as stated by the court in *Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903 (D.N.J. Jan. 9, 1986):

Where a single criminal act is repeated against a second victim, or repeated in a time and place removed from its first commission, the two acts arguably suggest a design or configuration, and may satisfy the pattern requirement. But the repetition of an act taken against a single victim or set of victims following closely on the heels of the original wrong, in some circumscribed circumstances, . . . suggests no expansion, no ongoing design, no continuity, such as was the target of Congress in RICO.

The 11th Circuit joins those courts rejecting the proposition that a pattern of racketeering activity can be established only upon proof of a pattern of racketeering schemes. In *Bank of America v. Touche Ross & Company*, 782 F.2d 966 (11th Cir. 1986), the court held allegations of predicate acts which constitute distinct statutory violations, even if part of the same scheme or transaction, are sufficient to withstand a motion to dismiss. The *Touche Ross* court did not, however, ignore the continuity prong of the pattern requirement. The court cited *Sedima* that to establish a pattern, "there must be a showing of more than one racketeering activity and the threat of continuing activity." In addition, the court noted the following passage should be used as an aid to interpret RICO's pattern requirement:

[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Thus, the *Touche Ross* court focused on the manner in which the alleged

criminal activity had been perpetrated through an analysis of the relationship among the parties, the time frame of the predicate acts, the number of predicate acts and the purpose of the fraudulent activity. The court held the complaint satisfied the pattern requirement by alleging defendants committed nine separate acts of mail and wire fraud, involving the same parties over a period of three years, for the purpose of inducing plaintiff banks to extend credit to defendants.

A decision recently handed down by the northern district of Georgia underscores the continuity requirement laid down by the 11th Circuit. In *Sheftelman v. Jones*, No. 84-472A (N.D. Ga. May 28, 1986), a purchaser of bonds sold to finance the development of a retirement project filed suit against participants in the bond issue and development, alleging, *inter alia*, claims for securities fraud and violations of RICO. Although the court conceded plaintiff met his initial burden of pleading two predicate acts, the court dismissed plaintiff's RICO

claims on the grounds plaintiff did not demonstrate a threat of continuity:

The predicate acts in this case did not occur over the protracted period present in *Touche Ross*. Moreover, the defendants did not target a small group of investors and subject them to frequent fraudulent solicitations. Rather, as part of a single bond offering one allegedly misleading official statement was delivered to thousands of investors. Plaintiff has not demonstrated similar conduct on the part of defendants in the past. On the facts as a whole the court does not find the continuity and ongoing design required to demonstrate a pattern.

At least one important aspect of the statute remains wide open, even though *Sedima* may have answered some questions about RICO. The *Sedima* court, not appearing altogether happy with the form in which RICO has evolved, challenged both the legislature and the courts to develop a meaningful concept of pattern. Whether such a concept will unfold cannot be answered now, as yet another chapter in RICO's short but confused history remains to be written. ■


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*Sally S. Reilly, an associate with Lange, Simpson, Robinson & Somerville, received her undergraduate and law degrees from Duke University.*

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# Opinions of the General Counsel

by William H. Morrow, Jr.

## QUESTION:

"Is the disclaimer contained in Temporary 2-102(E), namely, 'No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services' required in all attorney advertisements or only in those describing certain specific legal services?"

## ANSWER:

The disclaimer is required only in attorney advertisements describing certain specific legal services.

## DISCUSSION:

Prior to October 25, 1985, Disciplinary Rule 2-102(A)(2) provided:

"(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, similar professional notices or devices or newspapers, except that the following may be used if they are in dignified form:

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(2) A brief professional announcement card stating (1) new or (2) changed associations or (3) addresses, (4) change of firm name, (5) or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-106." (parenthetical numbers added)

Prior to January 26, 1983, Disciplinary Rule 2-102 (A) (7) (f) provided:

"No advertisement shall be published unless it contains, in legible print, the following language:

"No representation is made about the quality of legal services to be performed or the expertise of the lawyer performing such services."

On January 26, 1983, Disciplinary Rule 2-102 (A) (7) (f) was amended to provide:

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"(7) \*\*\*

(f) Except in an advertisement containing only that information permitted by DR 2-102 (A) (2) announcing the formation or change of partnership or association or change in location of the attorney's office, no advertisement shall be published unless it contains in legible print, the following language:

"No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services."

On October 25, 1985, the Supreme Court of Alabama rescinded Disciplinary Rules 2-101 through 2-106 and adopted Temporary Disciplinary Rules 2-101 through 2-106.

Temporary DR 2-101 in pertinent part provides:

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"A lawyer shall not make or cause to be made a false or misleading communication about (1) *the lawyer* or (2) *the lawyer's services*." (emphasis and parenthetical numbers added)

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Prior to January 6, 1986, Temporary DR 2-102 (E) provided:

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"Any lawyer who advertises concerning legal services shall comply with the following:

(E) No communication concerning a *lawyer's services* shall be published or broadcast unless it contains the following language as an integral and prominent part of the presentation: 'No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.'" (emphasis added)

On January 6, 1986, the Supreme Court of Alabama amended Temporary Disciplinary Rule 2-102 (E) to read as follows:

"No communication concerning a *lawyer's services* shall be published or broadcast unless it contains in legible and/or audible language the following: 'No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.'" (emphasis added)

The case of *Mezrano v. Alabama State Bar*, 434 So. 2d 732 (1983) involved a challenge to the constitutionality of DR 2-102 (A) (7) (f) as it existed subsequent to January 26, 1983. The court held the disclaimer requirement is constitutional. The court discussed the cases of *Bates v. State Bar of Arizona*, 433 U.S. 350 and the case of *In the Matter of R.M.J.*, 455 U.S. 191. Considering the disclaimer, the court observed:

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"The appellant lawyer in R.M.J. had been found guilty of violating several advertising provisions of the Missouri Canons of Professional Responsibility, including a requirement that lawyer advertisements include a specified disclaimer of certification of expertise following any listing of *specific areas of practice*. Although no challenge was made to the constitutionality of the disclaimer requirement, the Court did note that the Bates decision suggested the use of disclaimer requirements to protect the public from misleading lawyer advertising. The Court noted:



"Even as to price advertising the [Bates] Court suggested that some regulation would be permissible. For example, . . . the bar could require disclaimers or explanations to avoid false hopes. . . .*Id.*, 455 U.S. at 200, 102 S.Ct. at 936, 71 L.Ed. 2d at 72, n. 11."(emphasis added)

In the case of *Lyon and Blalock v. Alabama State Bar*, 451 So. 2d 1367 the court was called upon to rule upon the constitutionality of DR 2-102 (A) (7) (f) prior to its amendment on January 26, 1983 (the amendment of January 26, 1983, made no substantive change as to the precise issue in either *Mezrano* or *Lyon and Blalock*).

In *Lyon and Blalock* the court again discussed *Bates v. State Bar of Arizona*, *supra*, and *In the Matter of R.M.J.*, *supra*. The court also quoted from the case of *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 as follows:

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"To answer that question, we turn

to the test which was formulated in *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed. 2d 341 (1980) quoted in *In the Matter of R.M.J.*, 455 U.S. at 203-04, 102 S.Ct. at 937-38:

"In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

In ruling that the disclaimer provision is constitutional the court observed:

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" . . . it is reasonable to assume that some readers of an advertisement, such as the one presently before us, might believe that the attorney is a specialist or has greater expertise in performing the services advertised than attorneys who do not advertise. Accordingly, we upheld that disclaimer requirement in *Mezrano* because of the Bar's substantial interest in preventing the public from being misled. This restriction meets the requirements of *Central Gas* and *R.M.J.* because the disclaimer is directly related to that interest, and is not more extensive than necessary to serve that interest." (emphasis added)

Numerous inquiries have been directed to the Office of the General Counsel inquiring as to whether the disclaimer is required in certain advertisements. The disclaimer is required only in attorney advertisements describing certain specific legal services. This opinion may serve to clarify that point. ■

## Disciplinary Report

### Public Censure

● Escambia County lawyer **Joseph Robly Tucker** was publicly censured May 30, 1986, for having been found guilty of willful neglect. He failed to file a brief with the court of criminal appeals for a client he was representing, in violation of DR 6-101(A), *Code of Professional Responsibility of the Alabama State Bar*. [ASB 85-615]

### Suspensions

● Birmingham lawyer **Charles T. Bradshaw** was suspended, effective June 30, 1986, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar.

● Huntsville lawyer **James M. Holmes** was suspended, effective June 30, 1986, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar. ■

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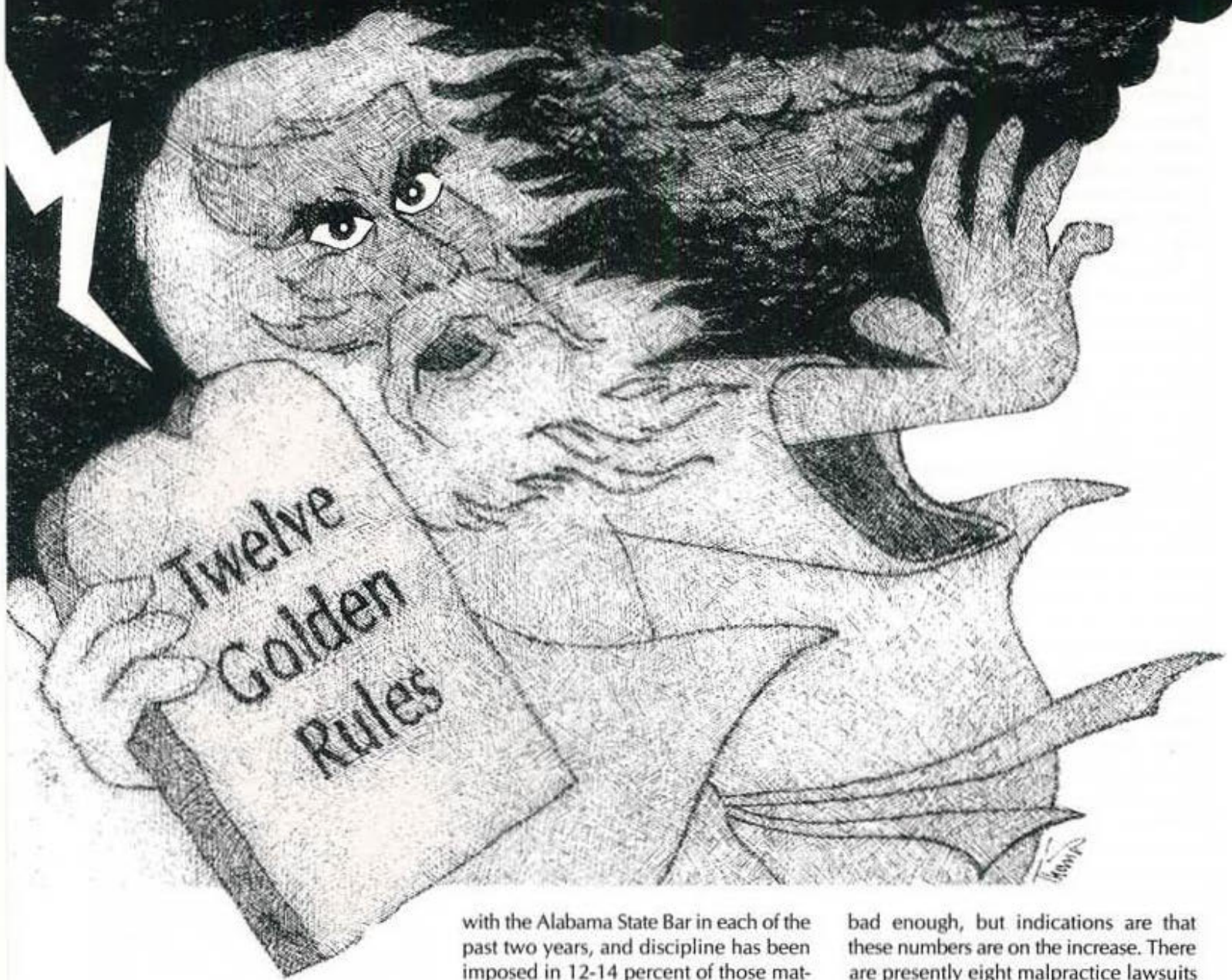
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# Avoiding Malpractice and Client Complaints



*editor's note: This is a reprint of a presentation given during the Alabama State Bar's 1986 Annual Meeting in Birmingham.*

by Alex W. Jackson

## **Why bother? Malpractice lawsuits and ethics complaints happen to "other people."**

This is wrong. Malpractice lawsuits and ethics complaints are becoming increasingly common and serious. Nearly 900 ethics complaints have been filed

with the Alabama State Bar in each of the past two years, and discipline has been imposed in 12-14 percent of those matters (more than 100 cases each year). The growth rate in ethics complaints filed has, in five of the last six years, greatly exceeded the growth in the number of new lawyers.

Malpractice lawsuits and recoveries against Alabama lawyers also are increasing, as are insurance rates. Lawyers are quite willing to sue other lawyers, and the frequency of recovery seems to be rapidly increasing. In a recent year (fiscal '84-'85) we know of 27 recoveries against Alabama lawyers, with one case being settled for more than \$1,000,000, and the other 26 averaging a recovery of \$5,200. These figures are

bad enough, but indications are that these numbers are on the increase. There are presently eight malpractice lawsuits on the docket of the Montgomery County Circuit Court.

These statistics point out one thing about the practice of law—it is becoming more risky every day.

## **What is causing this increase?**

As might be expected, numerous causes are in play. One obvious cause is the dramatic growth in the legal profession—there are more lawyers to get in trouble and more willing (anxious?) to do something about it. The public is more aware of the right to sue or complain, and society as a whole seems to be more litigious. Disciplinary matters and judg-



ments against lawyers are more widely publicized. Thus, public awareness and increased access to courts and disciplinary agencies have played a part.

These external causes have been analyzed, but there is little that can be done by the legal profession to "turn back the hands of time." In fact, most studies have shown that the publicity attendant to these matters has an overall favorable impact on the public in that it encourages the perception there is justice in this world and the legal profession is attempting to police itself.

There is not much reason to believe lawyers are worse today than in the "good old days." But, accepting there is little lawyers or bar associations can do about the "external causes" of client complaints, then the emphasis must be on attacking the "internal causes" of these complaints.

Toward that goal various studies have been conducted by or on behalf of state bar associations in an effort to identify both high risk lawyers and the root causes of client complaints. One such study was conducted by the Ethics Education Committee of the Alabama State Bar, using disciplinary data developed over several years. Recently the American Bar Association has made certain raw disciplinary data available covering nearly every disciplinary jurisdiction in the United States confirming in virtually every category the data developed in Alabama.

Both the ABA and the Alabama studies sought to identify those areas of practice in which client complaints were most common and the types of conduct that led to the complaints. Suffice it to say a lawyer is more at risk when dealing directly with a client in a matter in which that client has an intense family, financial or liberty interest.

Unfortunately, both studies also show that lawyers, or at least some lawyers, do engage in illegal conduct and a significant percentage of disbarments and resignations are attributed to felonious conduct (nationwide, 11 percent of disbarments and 13 percent of resignations in 1985). Thus, one contributing factor to client complaints is illegal/felonious conduct.

In both studies the primary underlying cause of client complaints is GENERAL NEGLIGENCE. Regardless of the area of prac-

tice GENERAL NEGLIGENCE leads all other allegations of misconduct and is also the number one offense in those disciplinary matters in which discipline is imposed. Numbers two and three are, in order, FAILURE TO COMMUNICATE and GENERAL MISREPRESENTATION TO CLIENT.

Numbers four and five also are related to each other, perhaps less so to the first three, and are MISAPPROPRIATION and COMMINGLING. Obviously MISAPPROPRIATION and COMMINGLING take on something of the character of the felonious conduct mentioned earlier in that they are more in the form of a conscious, willful misconduct. Few people, and no disciplinary agencies, are going to believe a lawyer simply forgot that it is improper to steal a client's funds.

There is little to be done by the legal profession to identify and help lawyers who will stoop to theft, at least prior to their getting caught. Perhaps bars could and should develop more, and better, programs to identify and help this small, sad group, but in actuality the number of lawyers who engage in such totally outrageous conduct is relatively small, and the causes of the conduct cover the full spectrum of the human condition from drug addiction to greed.

Nonetheless, these people do exist, in Alabama and elsewhere, and they greatly harm themselves, their clients and all who are proud of this profession. Disciplinary agencies are dealing with this problem in the only fashion open to them, the imposition of swift and severe sanctions. If it is possible to discourage any lawyer from illegal conduct by warning of the dire consequences, then please stand warned; if caught, one will be punished.

On a more positive note, there is every reason to believe that the most common root causes of client complaints, GENERAL NEGLIGENCE, FAILURE TO COMMUNICATE and GENERAL MISREPRESENTATION TO CLIENT, can be dealt with by education and the liberal application of common sense. It is not necessary to draw a distinction between malpractice and unethical conduct, as the root causes of each seemingly apply across the board and the distinction between the two is becoming increasingly blurred. There are countless factual

scenarios in which conduct might be one or the other, but not both. Such scenarios are becoming less common.

If GENERAL NEGLIGENCE, FAILURE TO COMMUNICATE and GENERAL MISREPRESENTATION TO CLIENT could be eliminated, then over one-half of all client complaints probably never would develop. Alabama State Bar research indicates that some lawyers develop bad work habits and are a grievance or lawsuit waiting to happen. Lawyers like to make money, and some lawyers will accept clients and causes, for money, when they know or should know they cannot deliver as expected or promised. Some lawyers are simply too busy and, yet, are afraid for any number of reasons to turn down a prospective client. Lawyers often underestimate, to themselves, the amount of time and work that a particular matter might require. Before they know what has happened, they have more than they can do. They also may discover that they have worked beyond the fee charged, or with more work to be done and a need to generate revenue for the office. If this sounds familiar, then you are a typical lawyer and you have one question on your mind, to wit:

## How do I avoid client complaints and/or malpractice lawsuits?

### The Twelve Golden Rules

**1. Place all client's funds in a trust account.** This is required by the *Code of Professional Responsibility* of the Alabama State Bar (and every other disciplinary jurisdiction) and also is common sense. If a dispute arises over your right to a portion of the funds held by you in trust, then those disputed funds should be held intact until the dispute is resolved.

**2. When you disburse funds to or for a client, keep complete records** and within a reasonable time after disbursing those funds, furnish an account to the client. When sizable amounts of money or property are involved, written disbursement statements are recommended, and the same should be explained to the reasonable satisfaction of the client (with the explanation and the fact of the disbursement, acknowledged by the client). If your client requests an accounting from you relating to funds you have



received or disbursed for him, the *Code of Professional Responsibility* requires that you furnish it to him.

**3. Keep funds separate and apart from those of the client.** Commingling is prohibited by the *Code*. You should only place enough of your own funds in your clients'/trust account to pay anticipated bank charges for the operation of the account.

**4. Settle cases only with the informed consent of your client.** Explain to the client his options (if any) and why you do or do not recommend settlement. When possible and practical, do this in writing and have the client execute an acknowledgment of the explanation. An informed client is usually less suspicious and less likely to turn on the lawyer at some later date, but obviously full disclosure will be more effective in some cases than in others and should not be viewed as a panacea.

**5. During the pendency of a matter, keep the client informed** and, if possible, furnish copies of all pleadings, documents, letters, etc. A surprised client is frequently an unhappy client. Generally, clients have no appreciation of the amount or nature of work being performed for them. Once again, this may not work in all cases, but the potential benefits outweigh the potential problems.

**6. Stay out of business transactions with clients,** particularly those in which your clients are also relying on you, as their lawyer, to protect or oversee their interests. The *Code* imposes tight guidelines in this area, but an even better practice is to altogether avoid such relationships.

**7. Avoid conflicts of interest**—real, potential or perceived. The *Code* and the case law of this state deal at length with conflicts of interest. Generally, if it feels bad it is bad and should be avoided at all costs. If, however, you are caught up in a "gray" area, seek advice before becoming too involved. The mere fact that you are concerned that a conflict of interest exists may be a sufficient indication to tell you to stay out of a particular matter.

**8. Be realistic in dealings with clients,** and in particular, when assessing the chances for success or when success is assured, the grandeur of that success. Put simply, do not lead clients into unrealistic expectations.

**9. Use written employment contracts,** particularly in cases involving a contingency fee or the payment of costs/expenses by the client at certain specific times. Such a contract should deal frankly with fees and expenses and also should be as specific as possible as to the nature of the employment, the goals of the representation and the duration of the same (for example, will the lawyer handle the appellate work and, if so, what about fees). This, of course, is not a practical approach to all matters brought to an attorney, but, where possible, such a contract can be a great benefit to both lawyer and client.

**10. Keep open the lines of communication.** Most lawyers cannot afford to speak with every client every time the client calls, and most cannot see each client who "drops by" without an appointment. You each know how available you are, or will be, to a particular client, and it is up to you to communicate that to the client. If you do not generally accept telephone calls, you might advise that messages should be left with the secretary, and important calls will be returned as soon as possible. Or, you might set aside a portion of each day to return calls (say 11 a.m.-noon and/or 4:30 - 5). Do not hide from your clients; if you have unpleasant news, deliver it as diplomatically as possible, but do it.

**11. Do not lie to your client,** the court or other lawyers. Such conduct is strictly prohibited by the *Code* and common sense. Few lies work, and few liars manage not to get caught.

**12. Last, but certainly not least, do not take on more than you can do** and do not neglect what you do take. Lawyers are under economic pressure and, on oc-

casions, have been known to take cases they did not want (or could not handle), because a nice retainer was offered. The *Code* mandates that a lawyer shall not willfully neglect a legal matter entrusted to him. The supreme court of this state has interpreted the term "willful neglect" on several occasions, most recently in the 1984 case of *Haynes v. Alabama State Bar*, 447 So. 2d 675 (Ala. 1984). Quoting an earlier Alabama case, the court stated:

"The law governing the lawyer-client relationship may be stated, in the context of the instant case and Disciplinary Rule 6-101(A), *Code of Professional Responsibility*, as follows: Whenever a person consults a lawyer, advising him of the facts concerning a legal claim, and the lawyer agrees to 'take the case' and thereafter assures such person that he is handling the case and that it will be heard at a future date, a lawyer-client relationship is established; and the lawyer is guilty of willfully neglecting a legal matter entrusted to him if he takes no action on client's behalf."

These 12 "golden rules" are intended to provide guidance to the lawyer concerned about avoiding malpractice lawsuits and client complaints. Unfortunately, there is no step-by-step primer on the subject, and given the almost unbelievable diversity of clients and lawyers, one probably never will be developed.

A lawyer would do as well by simply obeying the Ten Commandments and the Golden Rule, and applying a little dose of common sense to any situations not otherwise covered.

Whatever you do, do not drift into patterns of conduct making clients unhappy, the courts mad and the bar suspicious. ■

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*Alex W. Jackson has served since 1980 as an assistant general counsel for the Alabama State Bar. He is a graduate of the University of North Carolina in Chapel Hill and the University of Alabama School of Law. Before joining the bar staff, he was in private practice in Clanton with his brother, under the name of Jackson & Jackson.*





# Alabama Wrongful Death Damages No Longer Taxable

by Craig S. Bonnell  
and Christopher W. Weller

As a result of an IRS ruling (Rev. Rul. 84-108, 1984-2 C.B.), Alabama became the only state in which wrongful death damages were fully taxable for federal income tax purposes. This ruling reversed the service's previous policy, embodied in Revenue Ruling 75-45, 1975-1 C.B. 47 and G.C.M. 35967, that such proceeds were not includable in the recipient's gross income.

In addition to violating the technical requirement of uniformity of application of federal tax statutes, the ruling worked an unjustified and inequitably discriminatory hardship upon persons already suffering from the loss of a loved one as the result of a wrongful death.

In May 1985, *The Alabama Lawyer* published an article written by David M. Wooldridge, "Income Taxation of Wrongful Death Proceeds in Alabama." The article called for reversal of the IRS's position that damages for wrongful death in Alabama were fully taxable to the recipient for federal income tax purposes.

Parity with respect to bereaved families has returned to Alabama as the federal district court for the northern district of Alabama recently afforded welcome relief in the decision of *Burford v. United States*, No. CV85-L-3138-S (N.D. Ala. filed July 29, 1986, Lynne, J.), reversing IRS Revenue Ruling 84-108 1984-2 C.B. 32.

In *Burford*, the plaintiff instituted a wrongful death action against the University of Alabama—Birmingham, alleging her husband died as a result of negligent treatment at UAB Hospital. The claim was settled out of court, and the plaintiff received \$62,203 from the settlement.

This sum was included in her gross income on her 1984 federal income tax return. She subsequently filed an amended return for 1984 on which she excluded from her gross income her portion of the

wrongful death proceeds, resulting in her claim for refund in the amount of \$19,961. After the six-month statutory period elapsed, the plaintiff filed suit to recover the refund.

The gravamen of the case concerned the interpretation of the term "any damages received. . . on account of personal injuries" as set forth in section 104(a)(2) of the Internal Revenue Code. Section 104(a)(2) provides "gross income does not include. . . (b) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness. . . ."

Judge Seybourn Lynne, senior judge for the federal district court, northern district of Alabama, held that section 104(a)(2) of the Internal Revenue Code excluded from gross income any damages, whether compensatory or punitive, received because of personal injury or sickness. In granting the plaintiff's motion for summary judgment, Judge Lynne reasoned that the language of section 104(a)(2) was not facially ambiguous.

Furthermore, although exemptions from taxation are subject to strict construction, Judge Lynne noted that the legislative history, in addition to the plain language of the statute, thoroughly supported the plaintiff's assertion that the intent of Congress was to exempt from the additional burden of taxation any damages resulting from personal injury or sickness and not just compensatory awards.

Although the government insisted that the true nature of Alabama punitive damage awards in wrongful death suits was punitive and as such could not be tax exempt, Judge Lynne stated that a straightforward reading of the statute precluded any discussion of this issue. Rather, he maintained that whether compensatory or punitive in nature, such damages nonetheless were exempted from federal taxation.

Additionally, Judge Lynne rejected the government's argument that punitive damages are not received due to personal injury because they are based on the culpability of the defendant. Refusing to accept this legal fiction, Judge Lynne noted whether the damage award was based on culpability, punitive damages still are received as a result of the injury or illness. He reasoned, "To contend such proceeds are received only because of the tortfeasor's wrongful conduct and not because of a personal injury is neither logical or realistic."

Finally, the court noted that although *Glenshaw Glass v. Commissioner*, 328 U.S. 426 (1955), held that punitive damages generally are included in gross income, the service's reliance on that decision was misplaced because damages awarded because of personal injuries are expressly excluded from taxation by statute, unlike the antitrust damages considered in *Glenshaw*.

An appeal to the 11th Circuit Court of Appeals is anticipated, and it is hoped the district court's ruling will be upheld and Alabama will achieve tax equality with the rest of the nation. ■

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*Christopher W. Weller is a third-year law student at Cumberland School of Law and the present casenotes editor of The Cumberland Law Review.*

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# Recent Decisions

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

## Recent Decisions of the Supreme Court of Alabama—Civil

### Civil procedure. . .

#### Rule 17(d) A.R.Civ. P. permits appointment of only one guardian *ad litem*

*Clement v. The Merchants National Bank of Mobile*, 20 ABR 2113 (May 16, 1986)—Clement initiated the proceedings by filing a declaratory judgment action against Jessica and Frances McCall and Merchants National Bank, asking the court to declare that Jessica was not the biological child of James McCall and, consequently, not a beneficiary of certain estates and trusts. The court appointed four guardians *ad litem* to represent Jessica.

Jessica and Frances, however, did not file an answer, and Clement filed a Rule 41(a) (1) (i) A.R.Civ.P. notice of dismissal which the court denied. Clement then amended her complaint to add Melissa McCall and requested a Rule 35 A.R.Civ.P. physical exam seeking a blood test.

The case went to trial, and the court declared Jessica the biological child of the settlor of the trust and awarded the four guardians *ad litem* \$200,000. Clement raised several procedural is-

sues on appeal.

First, she maintained the court erred in denying her Rule 41(a) (1) motion for voluntary dismissal. The supreme court agreed with her and stated Rule 41(a) (1) affords the plaintiff an unqualified right to dismissal because she filed the notice of dismissal before Jessica or Frances filed an answer or motion for summary judgment.

Next she alleged the court erred in failing to order Melissa to submit to a Rule 35 blood test.

The supreme court disagreed, stating the record revealed that Melissa was added solely for discovery purposes and one can never be joined for such purpose. Therefore, since Melissa was not a proper party, a Rule 35

blood test was improper because Rule 35 only applies to a "party" or situations where a person is under the control of a party.

Finally, the plaintiff asserted the court erred in appointing guardians *ad litem*. The supreme court agreed and stated that Rule 17(d) A.R.Civ.P., which prescribes the authority for the appointment of guardians *ad litem*, does not provide for the appointment of more than one guardian *ad litem*, the rule using the singular form in all phrases where the term is used.

### Insurance. . .

#### the 30-day notice provision void

*Hopkins v. Lawyers Title Ins. Corp.*, 20 ABR 2250 (May 30, 1986)—Hop-



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kings purchased a lot and house in a subdivision which was subject to flooding. Hopkins sued the City of Mobile, seeking compensation for flood damage, and for the first time became aware of a recorded release agreement wherein the developer of the subdivision agreed to waive all rights to recover damages from the city because of flooding.

Lawyers Title issued a title policy which made no mention of the recorded release agreement, and Hopkins sued Lawyers Title claiming the release agreement was an encumbrance on their title and caused the title to be "unmarketable."

Lawyers Title filed an answer alleging that Hopkins failed to provide adequate notice of the loss as required by the title policy. Lawyers Title also denied the release agreement was an encumbrance. The trial court agreed and granted a summary judgment.

The supreme court disagreed and reversed. The title policy provided that the insured must give notice in writing of any loss, and no suit can be brought until 30 days after the notice has been furnished. The supreme court found the summons and complaint was sufficient notice in writing of the loss and the 30-day limitation for suit was void by virtue of §6-2-15, *Ala. Code* 1975.

This section provides that any agreement to limit the time for filing suit to a period less than that prescribed by law is void. The title policy attempted to limit suit to 30 days and therefore is void.

The supreme court also found the release agreement was an "encumbrance" upon the property and Hopkins was entitled to maintain an action for breach of the policy.

#### Tort. . .

##### "full measure of damages rule" is limited to asbestos exposure cases

*American Mutual Liberty Ins. Co. v. Phillips*, 20 ABR 2219 (May 30, 1986)—Phillips worked for Avondale from 1973 until November 1977, when she was diagnosed as having byssinosis, a lung disease caused by exposure to cotton fibers. Because of the byssinosis diagnosis she was moved to another plant where there were no cotton materials.

She worked at that plant until it closed in August 1982 and subsequently returned to the cotton mill and worked

once in September 1982. This was the last day she worked and the last day she was exposed to cotton fibers.

She filed this negligent inspection and co-employee suit in May 1983, and the defendants filed motions for partial summary judgment seeking to limit the plaintiff's potential recovery to only those damages which occurred within the period of limitations (i.e., the year next preceding the filing of this lawsuit).

The trial court denied the defendants' motions and held that the "full measure of damages rule" announced in *Cazales v. Johns-Manville* should be applied to all continuous exposure cases, not just asbestos cases. The supreme court disagreed and reversed.

The supreme court noted that the "full measure of damages rule" was the result of a legislative enactment limited to asbestos exposure cases. The court also noted it had previously rejected the "discovery rule" (and by implication the full measure of damages rule) in a radiation exposure case as well as the full measure of damages rule in a silicosis and tuberculosis case. The court stated it felt constrained to follow the holdings of these continuous exposure cases and said the matter is properly one for the legislature.

#### UCC. . .

##### Section 7-2-314 creates a warranty of commercial fitness and suitability

*Shell v. Union Oil Co.*, 20 ABR 2078 (May 9, 1986)—Shell, an employee of Goodyear, became ill after coming in contact with a naphtha product, a known carcinogen. The product was supplied by Union Oil and purchased by Goodyear based on Goodyear's specifications. Union Oil warned that extensive inhaling of vapors or prolonged contact with skin may be harmful.

Shell sued for breach of warranty of merchantability, §7-2-314(2) (c), *Ala. Code* 1975, and breach of warranty for fitness for a particular purpose, §7-2-315, *Ala. Code* 1975. He maintained that since the naphtha product causes cancer it was "unreasonably dangerous" and therefore could not be "fit for the ordinary purposes for which such goods are used." Consequently, Shell argued the product could not be "merchantable."

Both the trial court and the supreme court disagreed.

The supreme court stated the question of whether this product was "unreasonably dangerous" is not addressed in a §7-2-314 action. Since the product was made to Goodyear's specifications, performed the job it was intended to do and the manufacturer warned Goodyear of its inherent dangers, there was no breach of warranty of merchantability.

The implied warranty mandated by §7-2-314 is one of commercial fitness and suitability, and a potential right of action is afforded only where the user is injured by a breach of that warranty. The UCC does not impose upon the seller the broader obligation to warrant against health hazards inherent in the use of the product when the warranty of commercial fitness has been met. Those injured by the use of such a product must find their remedy outside of the UCC warranty remedies.

The supreme court also stated Shell's theory of breach of warranty of fitness for a particular purpose was without merit. Since Goodyear set the specifications for this product, it did not rely on "the seller's skill or judgment to select or furnish suitable goods," and therefore no duty on the part of Union Oil arose under this section of the *Code*.

#### Recent Decisions of the Supreme Court of Alabama—Criminal

##### Inadequate number of jurors. . . a basis for severance?

*Ex Parte: Anthony Dale Speaks*, 20 ABR 2099 (May 9, 1986)—In *Speaks, certiorari* was granted to determine whether a trial judge could order a severance of jointly indicted defendants immediately before trial because of an insufficient number of jurors. The Supreme Court of Alabama, speaking through Justice Almon, answered no and reversed.

The trial court ordered a severance of the cases on the day of the trial, after it determined that 36 prospective jurors were not present. See Alabama Rules of Criminal Procedure, 15.4(h). The trial judge asked counsel for both defendants if they would consent to striking a jury with less than 36 jurors. *Speaks'* lawyer objected and requested a continuance. Counsel further stated he had prepared the case to be tried jointly and severance



would dramatically change his trial strategy.

The supreme court concluded that Rule 15.4(d) did not authorize severance under those circumstances.

### Santobello right to withdraw a guilty plea may be triggered by indications as to sentence

*Ex Parte Donald R. Otinger*, 20 ABR 2391 (June 13, 1986)—Otinger was indicted on two counts of assault in the first degree and one count of assault in the second degree. He pleaded guilty to all three charges.

Defense counsel, at the time the pleas were entered, testified it is the practice of the district attorney's office in Etowah County not to engage in plea bargaining. Rather, lawyers who are considering the possibility of a guilty plea for their clients discuss the case with the trial judge to obtain "some sort of indication as to what to expect."

Otinger's lawyer testified he discussed the charges with his client and then told the judge about Otinger's prior record and sought some indication as to what

kind of sentence he could expect. The lawyer testified that the judge indicated he would consider a sentence from four to seven years, and that the defendant would be a "good candidate for a split sentence."

When Otinger's lawyer told him about the judge's discussions, Otinger liked the idea of a "split sentence" and agreed to plead guilty.

However, at the sentencing hearing, the trial judge learned of other criminal convictions from a pre-sentence investigation, in addition to the prior record disclosed by the defendant's lawyer. Thereafter, the trial judge sentenced the defendant to ten years on each charge with the sentences to run concurrently. Otinger moved, unsuccessfully, for permission to withdraw his guilty plea. The court of criminal appeals affirmed.

The supreme court, through Justice Houston, reversed. The court held that the trial judge's "indication" that the defendant would receive a split sentence with probation was a material inducement to his plea of guilty. The court further reasoned that once the trial judge

determined he would not sentence him in accordance with his earlier discussions, the defendant should have been afforded the opportunity to withdraw his plea.

The law is clear that when the trial judge decides not to carry out an agreement reached between the prosecutor and defense counsel, the accused must be afforded the opportunity to withdraw his or her guilty plea on motion promptly made. The law is not different where the trial judge deals directly with defense counsel and gives his "indication" as to an expected sentence.

### Recent Decisions of the Supreme Court of the United States

#### Confrontation. . .

#### the inter-locking confession problem

*Lee v. Illinois*, 54 U.S.L.W. 4555 (June 3, 1986)—Lee and a co-defendant were charged with committing a double murder; they were tried jointly in an Illinois court in a bench trial in which neither defendant testified. The trial judge found

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Lee guilty of both murders. In finding Lee guilty, the trial judge expressly relied on portions of the co-defendant's confession obtained by the police at the time of arrest.

The Supreme Court granted *certiorari* to determine whether the reliance by the trial judge on the co-defendant's confession violated Lee's rights as secured by the confrontation clause of the Sixth Amendment as applied to the states through the 14th Amendment. Justice Brennan, writing for the majority, reversed the conviction.

The Supreme Court reasoned that the trial court's reliance upon the co-defendant's confession as substantive evidence violated her rights under the confrontation clause. The right of cross-examination is included in an accused's right to confront the witness against him; the right to confront and cross-examine witnesses is primarily a functional right promoting reliability in criminal trials.

The truth-finding function of the confrontation clause is uniquely threatened when an accomplice's confession is introduced against a defendant without the benefit of cross-examination. Such a confession is classic hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally, and the accomplice may have a strong motivation to implicate the defendant and exonerate himself or mitigate punishment.

Significantly, Justice Brennan held that accomplices' confessions incriminating their co-defendant are presumptively unreliable. The court found the co-defendant's confession in the present case did not bear sufficient independent "indicia of reliability" within the meaning of *Ohio v. Roberts*, 448 U.S. 56, 66, to rebut the presumption of reliability.

#### **Voluntariness of a confession. . . a jury question**

*Crane v. Kentucky*, 54 U.S.L.W. 4598 (June 9, 1986)—May a state forbid a defendant from trying to impeach his confession with evidence of coercion after a trial judge already has ruled that the confession was voluntary? The Supreme Court unanimously said no and reversed.

Crane, a 16-year-old minor, was arrested in 1981 and charged with taking part in a holdup. After his arrest, Crane confessed to a host of other crimes, but later

contended the confession had been involuntary. The trial judge rejected that argument.

At trial, Crane sought to introduce testimony describing the length of the interrogation and the manner in which it was conducted. In attempting to introduce such testimony, the defendant hoped to show that his confession, which was the principal component of the state's case, was unworthy of belief. The trial court ruled the testimony pertained solely to the issue of voluntariness and was, therefore, inadmissible.

The evidence should have been admitted, Justice O'Connor's opinion held. In reaching its conclusion, the Supreme Court held the exclusion of the testimony about the circumstances of Crane's confession deprived him of his fundamental constitutional rights under the due process clause of the 14th Amendment or his rights under the Sixth Amendment to compulsory process and a fair opportunity to present a defense.

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Evidence about the manner in which a confession is secured, in addition to bearing on its voluntariness, often bears on its credibility, a matter exclusively for the jury to assess. The physical and psychological environment that yielded a confession is not only relevant to the legal question of voluntariness, but also can be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence, especially in a case like Crane where there apparently was no physical evidence to link the defendant to the crime.

#### **The Eighth Amendment bans the death penalty upon an insane prisoner**

In 1974, Ford was convicted of murder and sentenced to death. The record of trial does not suggest Ford was incompetent at the time of the offense, at trial or at sentencing. However, subsequently, Ford began to manifest changes in behavior indicating a mental disorder. His mental condition led to extensive separate examinations by two psychiatrists at the request of his defense counsel. One of the psychiatrists concluded that Ford was not competent to suffer execution. Like 26 other states, Florida prohibits execution of the insane.

Accordingly, counsel then invoked the Florida statute governing the determination of a condemned prisoner's competency. Following the statutory procedures, the state appointed three psychiatrists who together interviewed the defendant for 30 minutes in the presence of eight other people, including the defendant's counsel, the state's attorneys and certain correctional officials. The governor's order directed that the attorneys should not participate in the examination in any adversarial manner.

Each psychiatrist filed a separate report with the governor, to whom the statute delegates the final decisions. The reports on Ford reached conflicting diagnoses, but were in accord on the question of the defendant's competency.

Ford's lawyer then attempted to submit to the governor other written materials, including the reports of the two psychiatrists who previously had examined the defendant. The governor's office refused to inform counsel whether the submission would be considered. Thereafter, the governor subsequently signed the death



warrant without explanation or statement.

Ultimately, Ford's lawyer filed a *habeas corpus* proceeding in federal district court seeking an evidentiary hearing. The district court denied the petition without a hearing and the 11th Circuit affirmed. The Supreme Court, speaking through Justice Marshall, reversed and remanded.

In concluding that the Eighth Amendment prohibits a state from inflicting the death penalty upon a prisoner who is insane, Mr. Justice Marshall traced the reasons at common law for not condoning the execution of the insane. The justice reasoned such an execution has questionable retributive value and little deterrence value and simply offends humanity. "Whether the aim is to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."

Justice Marshall, joined by Justices Brennan, Blackmun and Stevens, found the Florida statutory procedures for determining a condemned prisoner's sanity provides an inadequate assurance of accuracy as required in *Townsend v. Sain*, 372 U.S. 293.

Specifically, the justices found the Florida procedures were flawed in their failure to include the prisoner in the truth-seeking process, in its failure to permit counsel to challenge or impeach the state-appointed psychiatrist's opinions and, finally, in the abdication of the ultimate decision solely to the extensive branch of government.

#### Fair trial. . .

##### extra security in the courtroom

*Holbrook v. Flynn*, 54 U.S.L.W. 4315 (March 26, 1986)—Holbrook and others were indicted for armed robbery and because of the nature of the crime, were held without bail. When the trial was about to begin, four uniformed state troopers were seated in the front row to supplement the customary security forces.

The defendant's lawyer objected to the troopers' presence. The objection was overruled by the trial judge primarily on the basis of *voir dire* responses made during the selection of the jury to the effect that the troopers' presence would not af-

fect their ability to give Holbrook a fair trial.

Holbrook was convicted; the Rhode Island Supreme Court affirmed. Thereafter, the defendant brought a *habeas corpus* proceeding in federal district court which also rejected his contentions regarding the troopers' presence at trial. The United States Court of Appeals reversed, holding the trial judge had failed to consider whether the particular circumstances of the defendant's trial had called for the troopers' presence and that the trial judge had improperly relied on the jurors' *voir dire* responses to rebut any suggestion of prejudice to the defendant.

The Supreme Court of the United States reversed the court of appeals and upheld the conviction.

Justice Marshall delivered the opinion for a unanimous court and held that the deployment of uniformed law enforce-

ment officers in a courtroom during a criminal trial for reasons of security is not so inherently prejudicial as to require justification by an essential state interest. The court reasoned such a presence need not be interpreted as a sign the defendant is particularly dangerous or culpable. Jurors may just as easily believe the guards were there to prevent outside disruptions or eruptions of violence in the courtroom. Reason, principle and human experience counsel against a presumption that any use of identifiable guards in a courtroom is inherently prejudicial.

Significantly, the Supreme Court in *Holbrook* fashioned yet another "bright line" test, i.e., "whenever a courtroom arrangement is challenged as inherently prejudicial, the question is not whether the jurors articulated a consciousness of some prejudicial effect, but rather whether there was unacceptable risk of prejudice." ■

## WE WANT YOU TO JOIN OUR SPEAKERS BUREAU!

The Committee on Lawyer Public Relations, Information and Media Relations is instituting a statewide speaker's bureau to provide speakers for civic organizations, schools, churches and other interested groups. The committee will compile a list of all lawyers in the state who are interested in serving on the speaker's bureau and will endeavor to provide speakers from the same community or general area from which a request for a speaker is received. All requests will be handled through the Alabama State Bar Headquarters. If you are interested in serving as a member of the speaker's bureau please fill out the following form and return it to the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101.



### SPEAKER'S BUREAU APPLICATION

Name \_\_\_\_\_

Firm Name (if applicable) \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone \_\_\_\_\_

Please list subjects on which you are willing to speak:

1) \_\_\_\_\_

2) \_\_\_\_\_

3) \_\_\_\_\_



# Alabama State Bar 1986 Annual Meeting

photos by Alex Jackson and Margaret Lacey



**2** Thursday morning's Family Law Section meeting featured Judge Sandra H. Ross, Birmingham, and Judge Richard C. Dorough, Montgomery, on child custody and . . .



**4** The first meeting of the newly-formed Litigation Section was chaired by L. Tennent Lee, Huntsville, with . . .

**1** "And it's only Thursday morning!" Alabama State Bar staff members Margaret Boone and Gale Skinner looked almost overwhelmed by the huge turnout for the convention.



**3** . . . American Bar Association Family Law Section representative Mel Frumkes on certification as a family law practitioner.



**5** . . . Albert H. Parnell, Atlanta, presenting "Show and Tell: Effective Closing Arguments."



**6** An overflow crowd gathered to hear the Real Property, Probate and Trust Law Section's program on real property financing transactions, moderated by Ralph A. Franco, chairman (left).





**7** At the pre-luncheon Bloody Mary party, Birmingham bar executive Beth Carmichael seemed amused by James C. Barton's storytelling.



**8** Kay Scruggs, N. Lee Cooper and Lettie Lane North also shared a story or two as . . .



**9** . . . Joe Davis chatted with Marthur Houston.



**10** At the traditional Bench and Bar luncheon, Birmingham Bar President Roderick Beddow, Jr., welcomed state bar members to the host city.



**11** Vice president W. Harold Albritton, III, offered the state bar's thanks for Birmingham's hospitality.



**12** President James L. North (right) presented a memento of the state to luncheon speaker Joseph R. Davis, assistant director of the FBI.



**13** The Bankruptcy and Commercial Law Section heard a presentation on developing Chapter 11 plans for small- to medium-sized debtors.



**14** Labor Law Section members heard a talk by A. Brand Walton, Birmingham, on the the evolving law of employee benefits.





**15** Carolyn L. Duncan of Birmingham (right) spoke to the Administrative Law Section on recent developments in the law. (Al L. Vreeland, chairman, is at left.)



**16** Justice Janie L. Shores brought Practice and Procedure Section members up to date on recent Alabama appellate court decisions.



**17** "Regulation of Groundwater—Your Drinking Water of Tomorrow" was the subject for the Environmental Law Section's presentation by EPA, ADEM and LEAF representatives.



**18** Outgoing Young Lawyers' Section President Bernie L. Brannan made closing remarks as incoming President Claire A. Black (left) contemplated the challenge ahead of her.



**19** Among the brightly attired and cheerful party-goers Thursday evening were President-elect William D. Scruggs, Fort Payne, his wife, Kay, and their daughter, Shannon.



**20** Faithful conventioners—The Bill Brians and the Frank Hollifields of Montgomery



**21** Forgetting that he wasn't running again, President North charmed "future" bar member Finis St. John, V, as Mrs. North joined in the fun.





**22** Party host Spann W. Milner, Insurance Specialists, Inc., and 1987 President-elect Ben H. Harris of Mobile paused for the camera . . .



**23** . . . as did ASB staff counsel Alex Jackson, wife Mary and outgoing commissioner John B. Scott and wife Bettie of Montgomery.



**24** Reception guests admired the fruit and cheese presentation Thursday night.



**25** Chief Justice C.C. "Bo" Torbert shared a laugh with U.S. District Judge Bert Haltom, as daughter Dixie Torbert listened.



**26** Friday morning, past Presidents (bottom row, left to right) Hornsby, Clark, Roberts, (top row, left to right) Hairston, Garrett, Byars, Brown, Tipler, Redden, Stone and Nachman gathered for their annual breakfast.



**27** Past President Bibb Allen's late arrival garnered an individual shot.



**28** President-elect Scruggs welcomed almost 700 participants to "Update '86", sponsored by the Young Lawyers' Section, James H. Miller, CLE chairman (right).



**29** Among the informative speakers was Professor Howard Walthall of Birmingham.



**30** Commissioner spouse Tommy Jackson enjoyed the Spouses' Brunch as the lone male attendee.



**31** Former bar first lady Louise Allen models a sweater which proved to be a "roaring" success.





**32** Commentator Audry Lindquist describes high fashions at the Spouses' Brunch.



**33** YLS President Claire A. Black moderated the afternoon session of the seminar.



**34** ASB Assistant General Counsel Alex W. Jackson briefed attendees on avoiding malpractice and client complaints.



**35** Recent Alabama legislative developments were discussed by Representative Jim Campbell of Anniston.



**36** Birmingham attorney Michael L. Edwards spoke on securities law.



**37** Prior to Friday night's dinner, reigning Miss Alabama Angela Callahan was greeted by President and Mrs. North and President-elect Scruggs.



**38** After dinner, she played a Gershwin medley, her title-winning performance in the statewide contest.





**39** Margo Rubin, a future Chicago Christmas Spirit with her mother, Audrey



**40** Chicago Bar Association members brought their famous "Christmas Spirits" road show to Birmingham with Gary Saipe's rehearsal of "Putting on the Fritz"...



**41** ... and the polished performance.



**42** Bagwan bagged in Oregon



**43** "Pavin' Roads Again"—Phil Citrin's crowd-pleaser as Wiley Nelson



**44** Phil-I-I-I Don...hue—Julian Frazin and Chloe Arlan's takeoff



**45** President North and President-elect Scruggs joined in the annual committee kick-off breakfast on Saturday morning...



**46** ... when Senator Roger Bedford, Jr., of Russellville accepted his father's certificate of appreciation for chairing the Ethics Education Committee.



**47** Among the other chairmen recognized were Henry Henzel of the Insurance Programs Committee (he also received a 1986 Award of Merit)...



**48** ... and Tony Ciccio, who accepted his "Tony" as Task Force on Lawyer Public Relations chairman.



**49** At the annual meeting, ASB Executive Director Hamner won the door prize, but insisted that he draw another's winning number.



**50** Patrick Graves of Huntsville received the Walter P. Gewin CLE award, presented by director Steven C. Emens on behalf of ABICLE.





**51** Congressman and ASB member Richard C. Shelby made brief remarks to fellow members, in pursuit of a U.S. Senate seat.



**52** Receiving 50-year membership certificates were Judge Telfair Mashburn of Bay Minette and . . .



**53** . . . Marshall Neilson of Birmingham. (See list of other 50-year members on page 256 of this issue.)



**54** Immediate past President Walter R. Byars presented a sterling plaque to Jim and Lettie Lane North thanking them for their hard work and service to the ASB.



**55** John B. Scott of Montgomery . . .



**56** . . . and Justice Gorman Houston of Eufaula were among the former commissioners honored with a special medallion for their service.



**57** Receiving the Alabama State Bar's Award of Merit were Gary C. Huckaby of Huntsville . . .



**58** . . . and Robert L. Potts of Tuscaloosa.



**59** President William D. Scruggs performed his first official duty by convening the post-convention board of commissioners' meeting.



# Young Lawyers' Section

Since this is the beginning of the bar year and this column is the means by which Young Lawyers' Section members are addressed, it seems appropriate to identify the lawyers comprising our section.

The YLS is the largest section of the Alabama State Bar, with membership numbering approximately 2,000 of the total 8,100 Alabama State Bar members.

Membership in the state organization (Alabama State Bar/Young Lawyers' Section), as opposed to the national organization (American Bar Association/Young Lawyers' Division), is automatic. To become a member of our YLS, one must be a member in good standing of the Alabama State Bar and must not be over the age of 36 or must not have been a member of the Alabama State Bar for more than three years. No other action on the part of a lawyer is necessary to become a member of the YLS. Phasing out of the YLS occurs at the end of the annual meeting after the member turns 36 or has been a member of the Alabama State Bar for three years.

Although the YLS constitution and by-laws contain six rather eloquently stated purposes and objectives of the section, there is one ideal permeating throughout—service. Service to each other as "young lawyers," both individually and through close relationships with local YLS affiliates; service to the state bar and the American Bar Association/Young Lawyers' Division by active membership and devotion

of time, talents and enthusiasm; and, moreover, service to the community through public service endeavors—all these reflect the philosophy of the section to strengthen and promote the honor of the profession.

The real work of the YLS is done through its state officers and committees and participation by our state delegates at the national level of the ABA/YLD. The names, addresses and telephone numbers of officers and Executive Committee chairmen follow, with a short description of the work done by each committee. After reading the list, please call these chairmen to become a member of a committee. There will be adequate opportunities for participation, and you will find that becoming involved in YLS activities is one of the most rewarding experiences a young lawyer can have.

**Public Relations Committee:** This committee seeks to improve the profession's image by publicizing public service activities of the YLS (arranging new conferences in connection with public service activities, producing public service announcements for use by affiliates, etc.).

Mr. James T. Sasser, chairman  
Wood & Parnell  
P.O. Box 4189  
Montgomery, AL 36103  
832-4202

**Grants Committee:** Assistance is given by this committee in securing



Claire A. Black  
YLS President

funding from charitable institutions, public and private entities and other individuals to fund YLS programs.

Mr. Percy Badham, chairman  
Maynard, Cooper, Frierson & Gale  
12th Floor Watts Bldg.  
3rd Ave. N. & 20th St.  
Birmingham, AL 35203  
252-2889

**Annual Seminar on the Gulf Committee:** The YLS Annual Seminar on the Gulf, attracting more than 200 participants yearly, is produced by the work of two committees.

(1) **Arrangements Committee:** This committee assists in securing facilities, planning social events and handling other miscellaneous details involved with the seminar.

Mr. Preston Bolt, chairman  
Hand, Arendall, Bedsole,  
Greaves & Johnston  
P.O. Box 123  
Mobile, AL 36601  
432-5511

Caine O'Rear of Hand, Arendall, Bedsole, Greaves & Johnston in Mobile has served for several years as this committee's chairman. He has done an excellent job, and some south



Alabama helpers are needed to continue this committee's work.

**(2) Speaker and Program Committee:** The seminar topics to be included in the program and the securing of speakers are the work of this committee.

Mr. Sidney W. Jackson, III, chairman  
Nettles, Barker & Janecky  
P.O. Box 2987  
Mobile, AL 36652  
432-8786

**Bar Admissions Committee:** The two annual admissions ceremonies are produced by this committee.

Ms. Laura Crum, chairman  
Hill, Hill, Carter, Franco,  
Cole & Black  
P.O. Box 116  
Montgomery, AL 36195  
834-7600

**Disaster Legal Assistance Committee:** This committee provides legal assistance to victims of natural disasters.

Mr. Edward A. Dean, chairman  
Armbrecht, Jackson, DeMouy,  
Crowe, Holmes & Reeves  
P.O. Box 290  
Mobile, AL 36601  
432-6751

**Senior Bar Administrative Liaison Committee:** The members of this committee assist in the flow of information and cooperation between the YLS and the Alabama State Bar staff.

Mr. Ronald Forehand, chairman  
Assistant Attorney General  
250 Administrative Building  
Montgomery, AL 36130  
261-7300

**Child Advocacy Committee:** Efforts to encourage volunteer representation, technical assistance in development of legal education materials and programs for child advocacy are coordinated by this committee.

Mr. D. Patrick Harris, chairman  
Harris & Harris, PA  
200 South Lawrence Street  
Montgomery, AL 36104  
265-0251

**Issues Affecting the Legal Profession Committee:** This committee will focus

on identifying, analyzing and acting upon significant current issues affecting the legal profession.

Mr. H. Thomas Heflin, Jr., chairman  
Hare, Wynn, Newell & Newton  
700 City Federal Building  
Birmingham, AL 35203  
328-5330

**Constitution Bicentennial Committee and Youth Legislature Judicial Program Committee:** Each year throughout various cities, the YLS, in conjunction with the YMCA, produces a mock trial competition for high school students, with a culminating competition in Montgomery in late spring.

This year, in addition, the YLS will join in celebrating the bicentennial of the Constitution by producing a play with an all-lawyer cast entitled, "There's Trouble Right Here in River City." The plays will be held in each city in which a mock trial competition is held.

At the Montgomery competition, there will be a well-known speaker who will deliver a public address tying in with the Constitution bicentennial theme.

This is a most substantial undertaking of the YLS, and members statewide will be needed to act in the play, coordinate mock trials and publicity and assist in other phases of the committee work. Sign up for one or both of these committees—your help is needed.

Ms. Lynn McCain, chairman  
Constitution Bicentennial Committee  
Simmons, Ford & Brunson  
P.O. Box 1189  
Gadsden, AL 35902  
546-9205

Mr. Keith Norman, chairman  
Youth Legislature Judicial Program  
Balch & Bingham  
P.O. Box 78  
Montgomery, AL 36101  
834-6500

**Publications Committee:** This committee studies the need for and undertakes the writing and publishing of material of interest to young lawyers and the public.

Mr. J. Terrell McElheny, chairman  
Dominick, Fletcher, Yeilding,  
Wood & Lloyd  
P.O. Box 1387  
Birmingham, AL 35201  
939-0033

**By-Laws Committee:** This committee studies recommended changes in by-laws and drafts amendments to by-laws of the YLS.

Mr. John Plunk, chairman  
Alexander, Corder & Plunk  
P.O. Box 809  
Athens, AL 35611  
232-1130

**Alternate Dispute Resolution Committee:** To alleviate court congestion and reduce court costs, this committee promotes the development of dispute settlement outside of the courtroom.

Mr. James P. Rea, chairman  
Hogan, Smith, Alspaugh,  
Samples & Pratt  
10th Floor, City Federal Bldg.  
Birmingham, AL 35203  
324-5635

**Continuing Legal Education Committee:** This committee coordinates all continuing legal education activities of the section, including basic legal skills, Annual Meeting "Update" and miscellaneous seminars.

Mr. Stephen A. Rowe, chairman  
Lange, Simpson, Robinson & Somerville  
1700 First Alabama Bank Building  
Birmingham, AL 35203  
250-5000

**Domestic Abuse Committee:** This committee is a sister committee to the Child Advocacy Committee and works to prevent domestic abuse and assist domestic abuse victims.

Ms. Colleen M. Samples, chairman  
Attorney-at-Law  
18 City Federal Building  
Birmingham, AL 35203  
254-5000

**Law Week Committee:** This committee works closely with state and local media and bar associations to increase community awareness of legal issues and coordinate law week events.

Mr. Stephen W. Shaw, chairman  
Redden, Mills & Clark  
940 First Alabama Bank Building  
Birmingham, AL 35203  
322-0457

**Legal Services to the Elderly Committee:** This committee seeks to stimulate young



lawyer interest in providing legal services to the elderly by promoting community education and acting as a clearinghouse of information to assist the elderly.

Ms. Rebecca L. Shows, chairman  
Huie, Fernambucq & Stewart  
825 First Alabama Bank Building  
Birmingham, AL 35203  
251-1193

**Local Bar Liaison Committee:** A network of bar leaders at the local level is developed through the efforts of this committee.

Ms. Amy Slayden, chairman  
Attorney-at-Law  
407 Franklin Street  
Huntsville, AL 35801  
533-7178

**Law Student Liaison Committee:** The coordination with students at state law schools on various projects and events is handled by this committee.

Mr. William H. Traeger, III, chairman  
Manley & Traeger  
P.O. Drawer U  
Demopolis, AL 36732  
289-1384

**Meeting Arrangements Committee:** Facilities for YLS Executive Committee meetings are secured by this committee.

Mr. James H. Wettermark, chairman  
Burge & Wettermark  
1230 First Alabama Bank Building  
Birmingham, AL 35203  
251-9729

**The American Bar Association/Young Lawyers' Division liaison is:**

Mr. Frederick T. Kuykendall, III  
Cooper, Mitch & Crawford  
Suite 201, 409 North 21st Street  
Birmingham, AL 35203  
328-9576

He will serve to keep the YLS informed of ABA/YLD events and vice versa. Other officers for the section are:

Mr. Charles R. Mixon, Jr.  
Johnstone, Adams, Howard,  
Bailey & Gordon  
P.O. Box 1988  
Mobile, AL 36633  
432-7682  
President-elect

Mr. N. Gunter Guy, Jr.  
P.O. Box 1111  
Montgomery, AL 36192  
241-2050  
Secretary

Mr. James Anderson  
Hill, Hill, Carter, Franco,  
Cole & Black  
P.O. Box 116  
Montgomery, AL 36195  
834-7600  
Treasurer

Mr. J. Bernard Brannan, Jr.  
P.O. Box 307  
Montgomery, AL 36101  
264-8118  
Immediate past president, ASB/YLS

The section was led this past year by Bernie Brannan. Despite an incredible work load, he was able to keep the machinery of the YLS flowing smoothly, and he is to be congratulated for his contributions.

**Highlights of Recent YLS Events:** Recent YLS activities include:

—Sponsoring the Annual Seminar on the Gulf May 15-17, at the Sandestin Inn, Sandestin, Florida. Over 200 attendees combined CLE with poolside partying thanks to the gracious help of the Soul Practitioners, an all-lawyer band of great talent whose members include Bob Norman, Jr.; Jim Burford; Mike Wright; John Chiles; John Hall; Braxton Schell; Charlie Beavers; and Vaughn Blalock. YLS members responsible for the seminar were Caine O'Rear and Charlie Mixon.

—Producing a fine admissions ceremony and luncheon—Laura Crum's efforts and Conrad Fowler's address made this a memorable event for all the inductees.

—Providing CLE opportunities for more than 700 lawyers who signed up for the Update '86 Seminar held during the Annual Meeting July 18, at the Wynfrey Hotel, Birmingham—Much informative and useful material was presented by Dean Charles W. Gamble of the University of Alabama School of Law, "Update on Evidence"; Richard F. Ogle of Denaburg, Schoel, Meyerson, Ogle, Zarzaur & Max, "Real Property Law: A Review of Significant Events"; Professor Howard P. Walhall of Cumberland School of Law, "Update: Corporate and Commercial Law";

Representative James M. Campbell of Anniston, "Legislative Update: A Review of Recent Legislation of Interest to Lawyers"; Michael L. Edwards of Balch & Bingham, "Claims and Defenses Under the Securities Act of Alabama"; and Alex W. Jackson, assistant general counsel, Alabama State Bar, "Update on Ethics: Avoiding Malpractice and Client Complaints." Also, retiring CLE chairman Jim Miller of Balch & Bingham, Birmingham, is thanked for his substantial services as CLE chairman over the past years.

—Co-sponsoring, with the Birmingham Young Lawyers, a party at the Annual Meeting featuring our favorite band, the Soul Practitioners—Steve Shaw, a member of the YLS Executive Committee and the Birmingham Young Lawyers, dealt with the details of the successful party.

**Upcoming YLS Activities:**

—Sponsoring the two admissions ceremonies;

—Providing CLE opportunities through a bridge-the-gap seminar designed to assist both new and practicing attorneys; the Conference of the Professions to be held in Gulf Shores; the Annual Seminar on the Gulf in Destin, Florida; and, the Update '87 Seminar to be held at the 1987 Annual Meeting. Additionally, plans are under way for the Alabama YLS to co-sponsor with the ABA/YLD and Cumberland School of Law a regional seminar in Birmingham in the fall.

—Participating in the celebration of the Constitution bicentennial by producing an all-lawyer-actor play entitled, "There's Trouble Right Here in River City." This First Amendment theme ties in with the existing mock trial competition of the Youth Legislature Judicial Program held in various cities throughout the state, with final competition in Montgomery, at which time we hope to have a nationally-known speaker to address the public on a constitutional theme.

Alabama has the good fortune to have as its YLS officers and Executive Committee members some of the truly finest lawyers and workers anywhere, but our impact cannot be felt at the national level



# Memorials



**Ballard, John Thomas—Mobile**

Admitted: 1950  
Died: April 24, 1986

**Burnett, Joseph Gaines—Clanton**

Admitted: 1943  
Died: May 23, 1986

**Carroll, Harry L.—Mobile**

Admitted: 1937  
Died: March 28, 1986

**Gordon, Harris Milton—Columbiana**

Admitted: 1938  
Died: February 1, 1986

**Grass, Melvin Encell—Guntersville**

Admitted: 1941  
Died: September 23, 1985

**Hardeman, Benjamin—Montgomery**

Admitted: 1926  
Died: May 31, 1986

**Murray, Vanderhorst Bonneau, Jr.—Montgomery**

Admitted: 1932  
Died: May 7, 1986

**Wilson, William Joseph—Piedmont**

Admitted: 1949  
Died: April 22, 1986

**Winn, Ellene Glenn—Birmingham**

Admitted: 1941  
Died: May 30, 1986

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

## Young Lawyers' Section *Continued*

unless we take time to become members of the ABA/YLD.

This past February in Baltimore, we were able to succeed in keeping YLD membership free to all young lawyers, and after this hard-fought battle, we need to show our support by joining the ABA/YLD. Alabama's voice on the na-

tional scene is determined by the number of ABA/YLD members—it is not enough to be an automatic member of the Alabama YLS. Please take advantage of ABA/YLD membership, and in so doing, you will be helping Alabama to be heard on the various issues affecting our practice and clients. ■

### Coming in November!

**An interview with William Doyle Scruggs, Jr.,  
110th President of the Alabama State Bar**

### BE A BUDDY

With the number of new attorneys increasing and the number of jobs decreasing, more and more attorneys are going into practice on their own and miss the benefit of the counseling of more experienced practitioners. The Alabama State Bar Committee on Local Bar Activities and Services is sponsoring a "Buddy Program" to provide newer bar members a fellow-lawyer they may consult if they confront a problem, need to ask a question, or simply want directions to the courthouse.

If you are a lawyer who has recently begun a practice and would like to meet a lawyer in your area to call on occasionally for a hand, or if you are the more experienced practitioner with valuable information and advice you're willing to share, please complete and return the form below. Your participation in this program will certainly benefit the bar as a whole.



### Local Bar Activities and Services Buddy Program Application

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Firm Name (if applicable) \_\_\_\_\_

Address \_\_\_\_\_

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Please return to: Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101.



# 1986-87

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# Et Cetera

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The directory will be available in December 1986, and listing applications from firms are still being accepted. For complete information and listing applications, contact Robyn Sturm, *Ford's National Referral Directory*, 5 West 36th Street, New York, NY 10018-7912, or call (212) 244-0360.

## Liability & Insurance Bulletin newsletter launched

A weekly newsletter on the liability and insurance crisis was launched in July by Buraff Publications, Inc.

*The Bulletin* will provide coverage on soaring premiums for liability insurance for business, governments, doctors, lawyers and others; shrinking coverage, or in some cases, no coverage at all; federal and state legislation redefining and constructing liability; trend-setting verdicts and settlements; and the intense political campaigns being waged by insurance companies, some lawyers' groups and other interested parties.

The publication monitors what federal and state governments, insurers and insureds, lawyers, industries, courts and

professions are doing about the liability and insurance crisis.

The charter subscription price for *Liability & Insurance Bulletin* is \$375 until September 30, 1986, after which the price will be \$425.

For more information, call George Lesser, publisher, at (202) 452-4428.

## AIDS-related discrimination

A majority of lawyers questioned believe many restrictions imposed on AIDS victims are illegal. Most lawyers agreed that AIDS victims may not be denied medical or dental services; evicted from their apartments; denied access to housing, city facilities and services or public accommodations; fired from their jobs or denied job opportunities.

The only area in which AIDS victims may be singled out, according to a majority of lawyers, is the military. Sixty-five percent think AIDS victims may be kept out of the military and 56 percent think they may be discharged.

## Tort reform push

Across the country, states are addressing changes in their tort systems, with provisions covering everything from limits on damage awards to the qualifications of expert witnesses, according to "Tort Reform: The Year's Hottest Issue," in the July-August issue of *Bar Leader*.

About 44 states have introduced bills modifying their laws providing for compensation of injured parties. Most proposed legislation has dealt with medical malpractice; at the federal level, bills have been introduced to limit damage awards in tort cases.

The "litigation explosion," increasing damage awards, sky-rocketing insurance rates and the inability of many professions and municipalities to secure insurance have promoted legislatures to re-evaluate their tort systems.

## Dispute resolution

Alternatives to the formal court process, such as mediation and arbitration, continue to grow in popularity. Applica-

tion of these techniques to big cases has led to the development of a number of alternatives used to resolve pending litigation.

*Arbitration/Big Case: ABC's of Dispute Resolution* provides information on what new approaches are available, when they are useful and/or appropriate and how they have worked.

The book is a compilation of papers and presentations from a variety of programs sponsored by the Special Committee since October 1983.

Copies are available for \$10.50, plus \$2 for shipping and handling, from the ABA, Order Fulfillment Department, 750 North Lake Shore Drive, Chicago, Illinois 60611.

## Redress for Japanese Americans

The ABA has asked Congress to provide appropriate redress, including monetary compensation, to Americans of Japanese ancestry interred during World War II. Testifying at an April House Judiciary hearing, ABA spokesman William L. Robinson noted that the courts, a Congressional Commission and the American people all seem to be reaching a consensus that a "grave injustice" was done to Japanese Americans removed from their homes and detained in internment camps without individual court review of any evidence against them.

He told committee members that "based on alleged 'military necessity,' more than 110,000 persons of Japanese-American ancestry, more than 70,000 of whom were American citizens, were herded into detention camps."

## Representation to the poor and disadvantaged

The American Bar Association selected four lawyers to receive the third annual Pro Bono Publico Award for devotion to the cause of legal service for the poor and disadvantaged in the United States. Chosen were Scott J. Atlas of Houston; Robert L. Harris of San Francisco; Dale



Reesman of Boonville, Missouri; and Nett Steele, Jr., of Baltimore.

The lawyers were recognized at an August 10 luncheon during the 1986 ABA Annual Meeting in New York City.

Additional information about the award recipients and the awards program and luncheon is available from Dorothy Jackson, staff assistant to the ABA committee, at (312) 988-5766.

### Nurse-attorneys' annual symposium

The American Association of Nurse-Attorneys will hold its fifth annual National Conference and Educational Symposium, entitled "Nurse Entrepreneurs—Expanding Legal Horizons," in San Francisco October 16-19, 1986. The featured speaker is Carolyn K. Davis, Ph.D., national and international health care advisor and former director of the Health Care Financing Administration. The symposium is open to all nurse-attorneys, attorneys, nurses, nurse practitioners and interested members of the general public.

The association is headquartered at 113 West Franklin Street, Baltimore, Maryland, 21201; telephone (301) 752-3318.

### El Paso County and North Carolina State Bars honored for legal services

The El Paso County Bar Association in Colorado Springs, Colorado, and the North Carolina Bar Association were recipients of the 1986 Harrison Tweed Award, recognizing significant programs to improve availability of legal services to poor persons.

The award is presented by the American Bar Association Standing Committee on Legal Aid and Indigent Defendants and the National Legal Aid and Defender Association.

There are 420 lawyers in the El Paso County bar association available to provide legal services to the poor (excluding those bar members who are retired or are judges, public defenders or district attorneys), and 260 have volunteered to accept referrals of low-income persons.

The bar also has enrolled 88 percent of its members in a program to provide funding to legal assistance programs.

The North Carolina Bar Association was nominated, in recognition of a ten-year commitment to the cause, with 12 geographically-based programs serving 83 counties and three special client programs.

During 1985, the 100 attorneys employed by LSNC handled 23,000 cases.

### Division of Disability Determination

The Division of Disability Determination has resumed the continuing disability review process. A face-to-face evidentiary hearing now will be incorporated into the reconsideration process. Informational packets will be available, as well as representatives to address groups on request. For further information please contact Steve Scruggs at 933-9300 (Birmingham area) or 1-800-292-8106 (statewide).

### Nuclear Deterrence

There is no shortage of questions about nuclear weapons and nuclear war—or responses and answers from strategists, politicians, philosophers and concerned citizens, but there is a noticeable lack of consensus among these groups—especially between strategists and philosophers.

Surprisingly, a conference held September 1984 bringing together members of the two groups, also revealed there is a striking amount of diversity within each group. *Nuclear Deterrence*, drawing most of its contents from that conference, illuminates the positions and views of strategists and philosophers.

A review copy of *Nuclear Deterrence* is available upon request, by contacting:

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