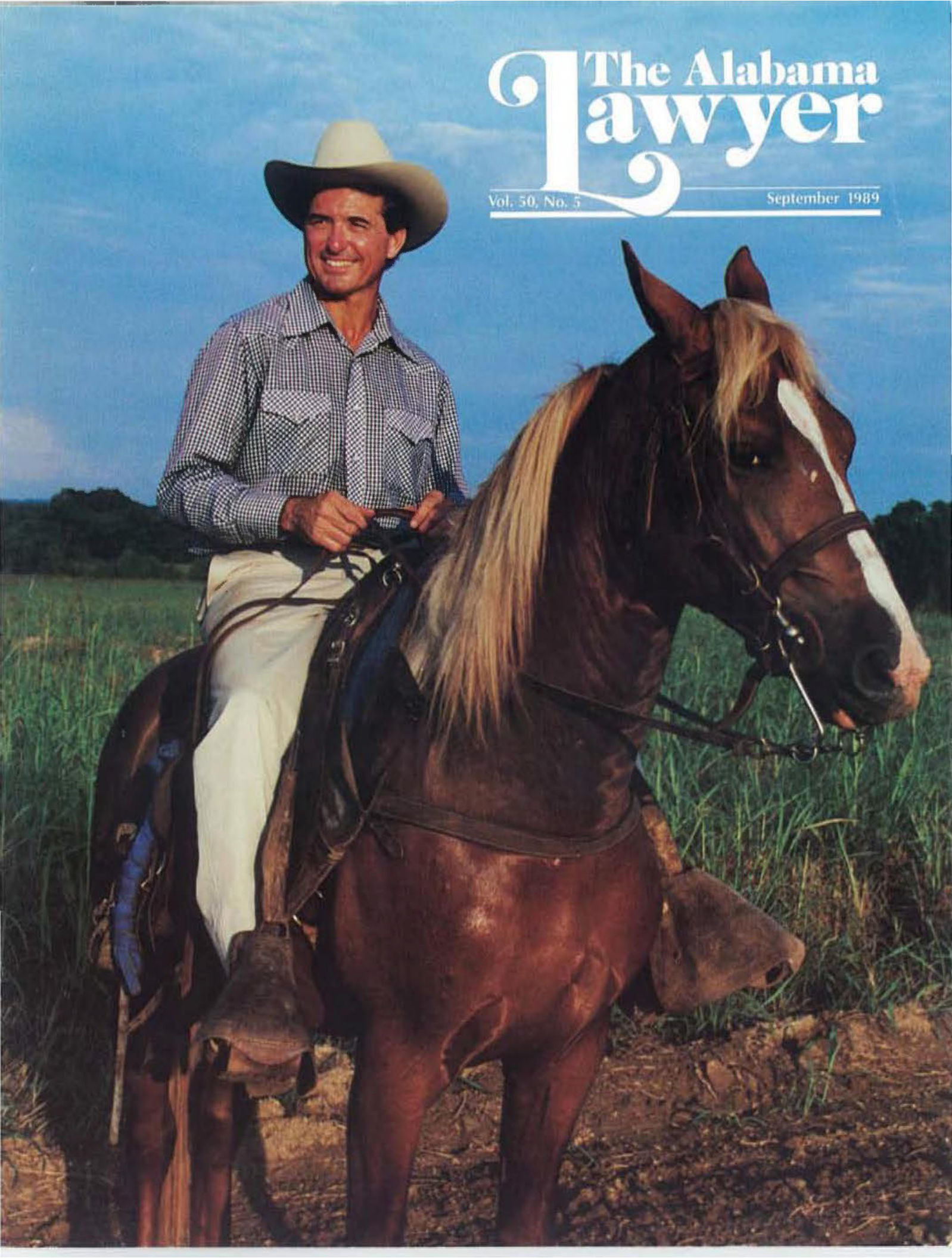


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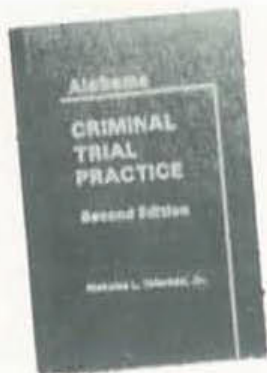
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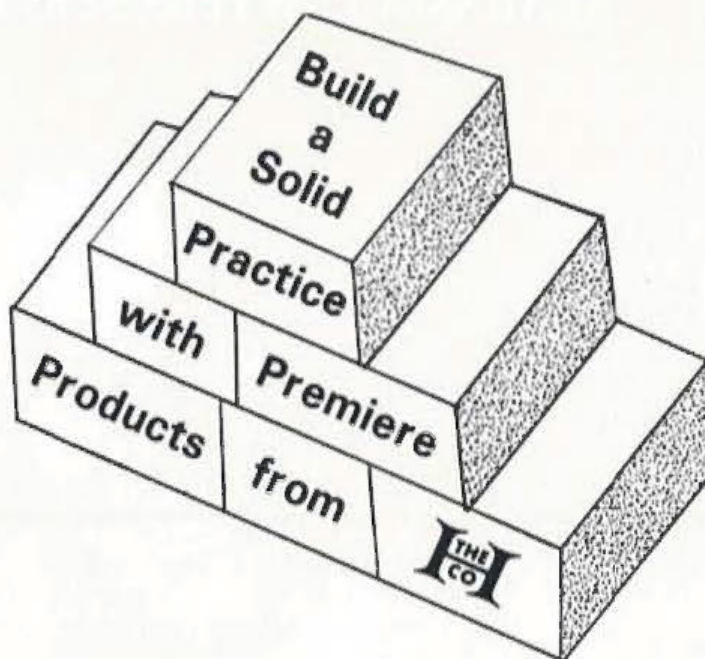
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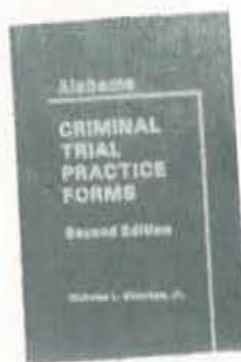
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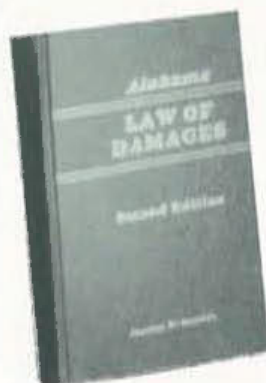
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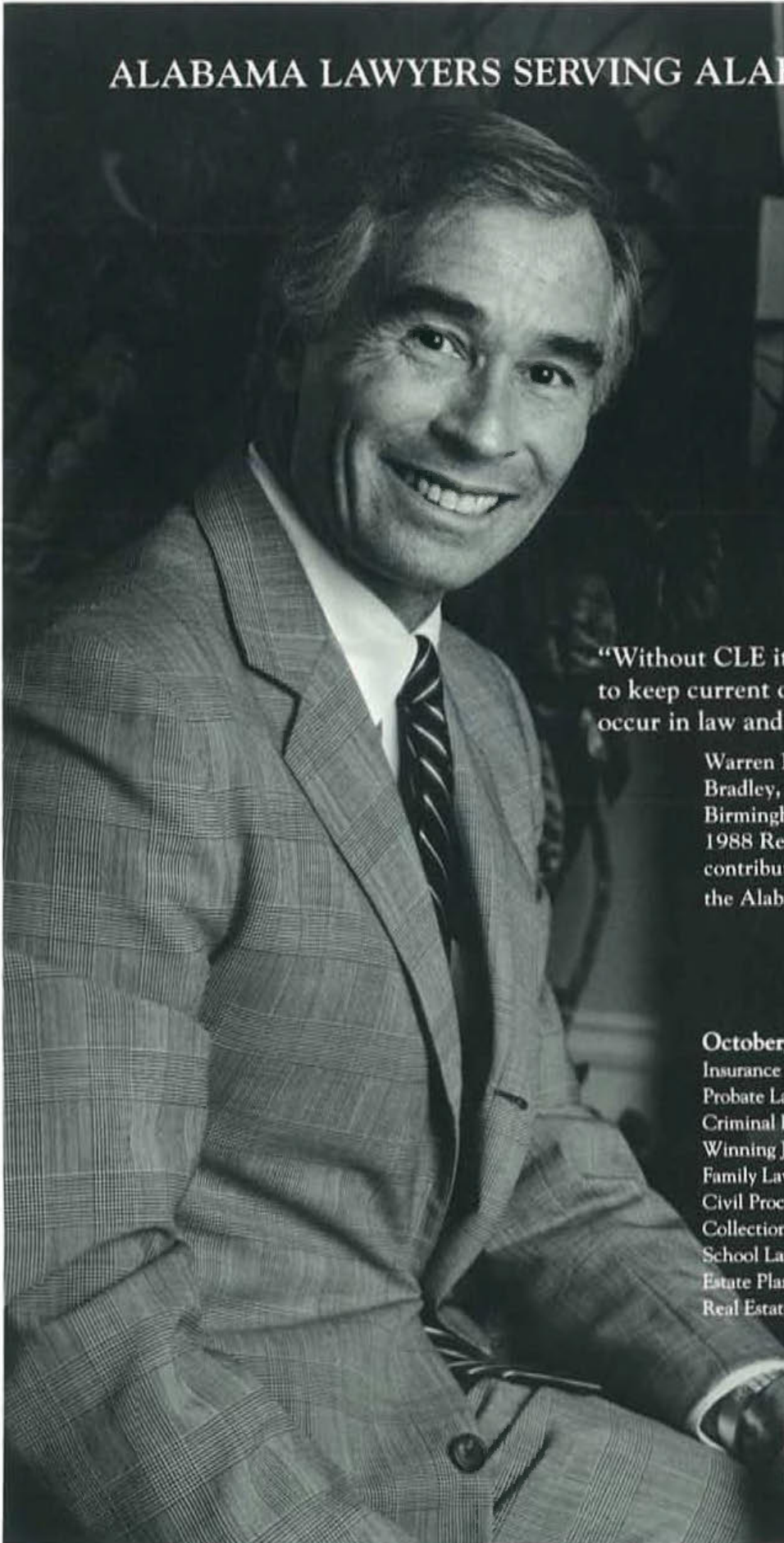
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In Brief

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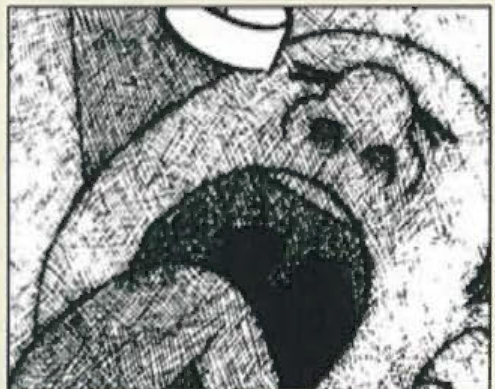
On the cover—

Alva C. Caine, the 1989-90 president of the Alabama State Bar, is shown riding Brandy, one of his favorite past-times. The photograph, by Jim Ware, was taken at the Caine farm near Safford, Alabama.



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President's Page

Address of Alva C. Caine upon installation as president of the Alabama State Bar

July 22, 1989

Having to follow such an accomplished speaker as our great Chief Justice Sonny Hornsby makes me wish I were an orator like him. Lacking that talent, I'd like to talk with you today almost informally about three areas of concern—three areas on which I intend to focus my energy in the next year as president of your bar.

As I studied what I would say to you in my first brief remarks to the bar, I was reminded of my boyhood days on a Dallas County farm. An old farmer had a cow that we wanted to buy. We went over to visit him and asked about the cow's pedigree. The old farmer didn't know what a pedigree meant! We asked him about the cow's butter fat production. He told us that he hadn't any idea what it was. Finally, we asked him if he knew how many gallons of milk the cow produced annually. The farmer just shook his head and said, "I don't know. But I'll tell you this—this here is an honest old cow and she'll give you all the milk she has." Ladies and gentlemen, I can't promise you excellence or even success. I can just promise to give you the best that's in me.

Our state bar was organized in 1879—110 years ago. I knew we were one of the oldest. I did not realize it was this long. In this vast span of time, the organized bar has accomplished much. Nevertheless, we are still on the side of the hill. In order to see the horizon, we must continue to climb until we reach the top.

Winston Churchill, whose fondness for drink was well-known, was scheduled to make a speech before a small gathering. In a moment of levity the chairman introduced him by saying, "If all the spirits consumed by Sir Winston were poured into this room, it would reach up to here on the wall." He drew a line with his finger about level with his eyes. Churchill got up to speak. He glanced at the im-



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aginary line on the wall. He looked up at the ceiling, and made a mathematical calculation with his fingers. Then he said, "Ah, so much to be done, and so little time in which to do it."

Certainly we have much to do. It has been said that a journey of a thousand miles begins with the next step. We are assembled here today to take part in yet another step in the long and historic journey of the Alabama State Bar. Oliver Wendell Holmes once noted that, "The great thing in this world is not so much where we are, but in what direction we are going." As we take this next step together, we have the benefit of the many lessons from our vintage past. We face the future with 110 years of experience—few organizations of any type in this country can say that. This wealth of experience is not only a cause for Alabama lawyers to be proud, it is also a cause for confidence

in our future. I have every confidence that our journey will be a success and our adventure fulfilling.

I come to this position from a background somewhat different from that of many of my predecessors in office. I have discovered much to my delight that this really makes no difference. I practice in a firm which primarily represents the plaintiff. It is a firm that was founded by Francis Hare, your bar president in 1950. Mr. Hare, like many of the great lawyers of his day, had strong feelings about the sacred importance of being a lawyer. I am deeply proud of my heritage and of my partners who carry on the tradition of our firm. I am also grateful for the instruction of Mr. Hare, my great mentor. The memory of his model guides my life today.

There are three areas of my concern for our bar that I want to talk about with you today. They are:

- First: making a renewed commitment to the ideals and objectives of the American legal system;
- Second: legal education; and,
- Third: a continued return to professionalism.

(continued on page 206)

Executive Director's Report

Convention thoughts

Please reflect with me for a moment on our state bar conventions. Our 1989 Huntsville meeting was the 20th such meeting in which I have been more than a little involved. Like most conventions, I have my favorite aspects of each meeting. I am never personally satisfied with a convention plan until it evolves into one I want very much to attend myself.

Our president is the chief architect of our state bar meetings. The convention is the crowning event of the incumbent administration. Convention planning begins with the assumption of office by each new president and develops through the first six months in office.

Through the years, the substantive content and the social activities reflect the taste and interests of our leadership and the "host committee" in the convention city.

In Alabama, we have been fortunate in that the routine cost for food and lodging, as well as meeting space itself, is still rather low compared to many cities. It is not unusual to see other state bars charging \$150-plus for registration alone, while individual events are ticketed at \$30 each for luncheons and \$75 each for dinners. This year our registration fee was raised from \$55 to \$80 for advance registrants, and no event cost over \$27.50. One could have paid the registration fee of \$80, attended no social functions and still have obtained most of their MCLE hourly requirement for the year.

A disturbing trend has been noted in

recent years. While total registrations are remaining constant for the most part in each of our three convention sites, Birmingham, Mobile and Huntsville, participation in social activities is continuing to decline. In recent years more registrants are coming without spouses and staying for usually one night. Very few people brought children to our conventions in past years.

"Bread-and-butter" CLE programs and top-notch section programming have been the dominant programming forum in the last five or six years. Attendance, generally, has been excellent at these sessions. Because of a modest amount of simultaneous meeting space, we are virtually limited to the three previously noted locations because of the concentration of such space near quality accommodations. I realize that finding new and different things to do in these cities year after year is a challenge since many of you go to these cities at other-than-convention time.

We are unable to always line up several face-card speakers, though through the years we have had our share. Our July meeting date is making this task more difficult. In the very recent past, our plenary sessions have lost their joint-spousal appeal as they have been cut in to with more CLE program time.

We have not tried to conduct golf or tennis tournaments in conjunction with our meetings, again, because of time constraints.

I am aware, with the increase in female lawyers, that a substantial



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number of male non-lawyer spouses have been "overlooked" by local committees planning spousal activities. These events need to be less stereotyped and more universal in appeal.

Our meetings are scheduled for Mobile in 1990, Orange Beach (Perdido Beach Hilton) in 1991 and Birmingham in 1992. The Perdido Beach meeting is still tentative, contingent upon the addition of more public meeting space. Montgomery offers much in the way of new things to do, but is at a severe disadvantage in that it lacks an adequate concentration of first-class convention hotel rooms near its civic center.

Oftentimes I am asked, "Why can't we go out of state?" We did in 1972-73 and

President's Page

(continued from page 204)

Report

were subjected to threats by certain persons in the legislative leadership at that time. The state bar is a state agency, and we were not viewed favorably for taking "our money" across state lines. Several of our neighboring states have recently been holding their meetings in other jurisdictions.

I think it is appropriate to note that the Alabama State Bar still has one of the highest percentages of its total membership in attendance at its meetings of any other state bar.

As planning is underway for the 1990 meeting, I solicit your suggestions of new things to do at our meetings as well as format changes that would appeal to you. Would you like to see our annual meeting held at a different time of the year? Should we extend the meetings through Saturday evening?

Attendance drops at our social activities and meal functions continue to concern me. If you do not attend them, or the convention itself, I would like to know why—and better still—what we can do to make such convention activities more attractive.

The staff and I always appreciate the kind remarks and compliments we receive during and immediately after a meeting; however, we still see some downward trends which make us know something is not just right. It is also interesting that an activity that is a real winner in one place may be less than successful when repeated in another convention locale.

For me, the convention is my favorite bar activity. I have missed only the 1966 and 1967 meetings (when I was on active duty) since being admitted to the bar. I still have to go some to equal James Bradford of the Birmingham Bar who attended his 38th meeting recently in Huntsville. I would welcome his "conventional wisdom"—and yours. ■

I. A renewed commitment to the legal process

Looking out over this distinguished audience, I see lawyers from literally every field of practice. Some started many years ago and others are just out of school. However, we all had the same starting point, that day when we raised our hand and took the oath to become a lawyer. Time does not diminish the strength and effect of this oath. It still directs our course today! Each of us was a commissioned officer of the court—this involves a sacred and solemn responsibility which we all strive to uphold. We promised to support the Constitution and the laws of the land. It also included something else which we must not forget and that is to support the legal process of our unique judicial system.

I believe that it is perhaps more important today than at any other time for us to renew our individual commitment to support the legal process. Laymen and lawyers alike share a common understanding of the law, that the very existence of our free society is dependent upon the operation of a legal system that embraces the objectives of fair play, due process and substantial justice for all.

I recall an experience visiting a famous kennel in south Alabama many years ago with my young son for the purpose of buying a new puppy. The owner of the kennel was a fine old gentleman. He was happy to see us and graciously let the young dogs out so that we might examine them and make our selection. While I was talking with the owner, we heard a sudden yelp from one of the puppies. Turning around I observed my son pulling on the puppy's ear. I immediately admonished him not to hurt the little animal. The old gentleman quietly intervened telling me not to worry, that little boys and little puppies understood one another and that the only way the puppy could truly be hurt would be to ignore him.

We face a number of threats today which we cannot ignore:

Between 30 and 40 percent of our workforce is functionally illiterate, which means they do not function at an eighth-grade level.

Alabama has the second highest drop-out rate in the nation which means nearly 40 percent of the students who enter school this fall will not finish high school.

Drug-related crimes have increased in the last decade by 40 percent.

Alabama judges are the lowest paid in the south and some of the lowest in the nation.

The population of our bar has tripled in the last 20 years with current membership just under 9,000 lawyers.

Partisan election of judges to our highest courts has required a war chest of nearly \$1,000,000.

Our state has been sued because black citizens are not equally represented in our judiciary.

For the first time in 200 years in our state, only one of the top five elected officials in the executive branch of government has formal legal training. This list of concerns could go on and on.

There is no question that a lawyer has a professional responsibility to vigorously represent the client. However, we have an equally important duty to the legal system, that is to insure that the legal system works and works for the greater good of society as a whole. Joseph F. Newton once wrote, "A duty dodged is like a debt unpaid; it is only deferred, and we must come back and settle the account at last." On the occasion of his inauguration as president of this state bar, Ed Thornton of Mobile commented that, "Every lawyer holds in trust the legal rights of the public." That is a common bond, a common duty, two common debts shared by everyone in this room.

Public trust in the legal process is not simply a desired objective—it is an absolute must. Our nation made the decision to settle its disputes peacefully in the courthouse—not violently in the streets. The people of this country accepted the decision on faith, on faith that the legal process would constitute an acceptable substitute for private vengeance, on faith that the rule of law would reflect equal respect for the interest of every citizen,

on faith that our system of law would be administered fairly and impartially. It is our highest duty as a profession to protect and preserve the public's faith in our legal system.

We are assembled here today on the eve of the bicentennial celebration of the American Bill of Rights. We inherited a great legacy of freedom which cannot and should not be allowed to erode. Recent events in China have caused us to pause for a moment to reflect on how fragile and easily lost freedom can be. It has been said that only when the metal is hot can it be molded. I believe that the cries for freedom coming from China today give us a new opportunity in America to rekindle our own love of liberty.

We can be proud that the lawyers of Alabama have faithfully served their watch and have proven to be good and faithful servants of this great heritage. It is often referred to as one of the finest moments in the history of our state bar when under the leadership of President Bill Scruggs, the board of bar commissioners unanimously passed a resolution to make comment to the state Legislature concerning the proposed tort reform legislation—one of the most talked about issues our state has witnessed in recent years. Your commissioners courageously came to the defense of the legal process and made available to the Legislature for its consideration the real impact of certain tort reform legislation on the system of justice. The foundation of this decision was grounded on the principle that the public has a right to know how their legal rights will be affected by legislation. The great sister professions of law and medicine cannot stand idly by refusing to settle their differences. Both must work together and seek solutions for the betterment of society as a whole.

The people of this state have a right to expect this type of attitude from all its professions. It was certainly one of the finest hours of the Alabama State Bar when its officers stepped forward with carefully researched impartial comments geared toward making the legal process work for everyone. This was accomplished because lawyers responded to their commitment to come together as professionals leaving their coats of self-interest in the closet outside and entering into discussion on what would be

right and just for all citizens, irrespective of the special interest of their customary clients. I know of two senators whose minds had been made up weeks in advance on certain aspects of the tort reform legislation. I personally witnessed them reconsider their positions in light of the forceful and impartial response of the bar. Perhaps we need to remind ourselves, as well as our legislature, of the line from the popular movie "Walking Tall" as Sheriff Pussar was addressing his deputies for the first time after his election. He said, "I don't mind a little drink or a little fun, but the law of the land is not for sale."

I believe lawyers want to come together again to help solve the great issues facing our state and nation. We have an opportunity to provide a forum which will attract all professions to sit down and seek solutions. We now know that it will work.

Our task is to have the dedication necessary to bring this to fruition. We cannot and must not limit our thinking to plaintiff or defendant, prosecutor or defense lawyer. Each has its own importance, but standing isolated from the rest of the bar, these individual interests ultimately will fail. The risks are too great and the damage too permanent to allow an elitist attitude to block our course. Private agendas must be set aside for the greater good of society. Equal access to the courts by all people can be and must be a reality and not merely a theoretical dream. Discrimination against even the smallest minority darkens the hall of our citadels of justice and entraps all of us in a hopeless spiral toward lack of faith in our legal institutions. If we, as human beings, can focus the attention of the world on the effort to save two California whales trapped in a grave of ice near Barrow, Alaska, we certainly can do no less in supporting the legal process which keeps us free.

II. Legal education

Next, I want to say a word or two about legal education.

Legal education is vital to our outgoing efforts to support and advance the objectives of our judicial system. However, in my judgment, we must not only continue to educate ourselves in the law. I sense a growing need to educate the

public about the law, about our legal system, to reconfirm that the law is a servant of the people, that the law, not power or privilege, is their most potent ally. This will not be an easy task. Nevertheless, I sense a danger that if we do not succeed in this task, the people may lose faith in our legal system, lose faith that our legal system does indeed provide "equal justice to all."

The story is told of a city lawyer who was trying a case before a justice of the peace in a rural community. After long discussion over a certain point, the justice ruled against the lawyer, who thereupon rose and began, "If Your Honor please—" "Stop right there, young man. You might just as well sit down. I've already made up my mind and I will never change it. I know law and I don't need nobody to tell me nothing. I am right, I know it and there is nothing else to it." "Why, Your Honor," said the lawyer, "of course you are right. I merely wanted to show you what a big fool Blackstone was."

The mystery of the law must be replaced by knowledge and understanding. When someone asks how it is that a lawyer can defend someone who is guilty of murder or child molestation, we should not take this as a personal affront to lawyers but rather an acknowledgement that the person asking the question is in need of understanding of the legal process. Under our law, all persons are presumed innocent until proven guilty in a court of law. This has, and always will be, the genius of the American jury system and the public must not lose faith in this high principle. The English writer Gilbert K. Chesterton once made an important observation about trial by jury. He said, "Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be entrusted to trained men. When it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I feel in the jury box. When it wants a library catalogued, or a solar system discovered, or any trifle of that kind, it uses up its specialist. But when it wishes anything done which is really serious, it collects 23 of the ordinary men standing around. The same thing was done, if I remember right, by the founder of Christianity."

III. A continued return to professionalism

As it has been true in years past, our bar faces ever-increasing problems and we know that we cannot rely upon mere luck for the solutions. I am reminded of the story of the grocer who, while out delivering orders, ran over and terribly injured a young woman. The woman sued and was awarded an amount large enough to put the man out of business. After great effort and sacrifice, he managed to get the grocery going again. But, a few months after opening his doors, he struck an old gentleman with his delivery truck. The gentleman sued and again the verdict exceeded the merchant's assets. On a peaceful Sunday, the grocer was sitting in his living room when his little boy ran in and hollered, "Daddy! Daddy! Momma has been run over by a great big Greyhound bus." The grocer's eyes filled with tears and in a voice trembling with emotion, he cried, "Thank the Lord. My luck has changed at last."

I attended the American Bar Association Leadership Conference held in Chicago this past spring. Each person in attendance was asked to list in importance the problems facing the bar which he or she felt was the most pressing. It was not surprising to learn that the decline in professionalism and the image of lawyers in society topped the lists.

This is one of the most difficult challenges facing lawyers today.

There is a growing tendency to regard the practice of law as no different from any other commercial activity. Clearly there is a growing tendency to ignore the ideals and the commitment to ideals that distinguish the practice of law from the conduct of a business whose sole purpose and objective is to make a profit. Economic consequences are not the sole, or even the paramount, objective of our profession. As lawyers, we serve a greater goal. We serve together in the administration of justice.

There are many causes, of course, and some of the changes that have led to the decline of professionalism are irreversible. Some changes are simply an unavoidable product of the times. For example, we all know that the commitment to the ideals of professionalism are invariably compromised by a breakdown in

the personal rapport between attorney and client. We are not going to eliminate huge, impersonal law firms or advertising or specialization or copy machines and computers and the other things that lead to de-personalization and a corresponding loss of professionalism. It is merely an exercise in nostalgia to wish for return to an earlier, simpler time. Instead, the challenge is to maintain the ideals of our profession given the world as it is! The answer, dear Brutus, is not in the stars, but in ourselves.

I do not believe the solution lies in hiring a public relations firm to come in and spruce up our image and put a good face on the legal profession. We can regain public respect the old-fashioned way. We can earn it through service, service that begins and ends with a commitment to the historic ideals of our profession, service that is offered and implemented by lawyers who regard themselves as professionals—not employees governed by the morals of the market place.

The ideals of our profession are our most important birthright. Sacrificing them for reasons of expedience, for materialistic reasons, is simply not good business, contrary opinions notwithstanding. We must not commit the sin of Esau and sell our birthright for a bowl of porridge. The phrase "you cannot eat ethics" is repugnant to our sense of professionalism and should be rebuked with disgust.

As Dean John Reed teaches us, professional responsibility is much more than merely abiding by a series of rules. It is a state of mind. Even more, it is a set of basic values. It is something like the difference between the Ten Commandments and the Golden Rule: a person who abides by the Ten Commandments is an essentially worthy person, but it seems a higher morality to go beyond and do unto others as you would have them do unto you, a value system that sets a goal always slightly beyond reach. It has been said that there is a difference between the morality of obligation, which is abiding by the rules, and the morality of aspiration, which is doing what you ought to do to make things better.

We do not have to look beyond the borders of our own state to recapture the high sense of professionalism to which

we all aspire. The image of a lawyer was perhaps best illustrated by Harper Lee, an Alabama lawyer from Monroeville, in her famous novel, *To Kill A Mockingbird*. The scene she described was a jury returning its verdict in a case in which her father (Atticus) was defending a black man accused of raping a white woman in a small southern community. Lee describes the jury returning with its verdict and the foreman handing a piece of paper to the clerk who handed it to the judge. As she described it:

"I shut my eyes. Judge Taylor was polling the jury:

"'Guilty . . . guilty . . . guilty . . . guilty . . .' I peeked at Jim: his hands were white from gripping the balcony rail, and his shoulders jerked as if each 'guilty' was a separate stab between them.

"Judge Taylor was saying something. His gavel was in his fist, but he wasn't using it. Dimly, I saw Atticus pushing papers from the table into his briefcase. He snapped it shut, went to the court reporter and said something, nodded to Mr. Gilmer, and then went to Tom Robinson and whispered something to him. Atticus put his hand on Tom's shoulder as he whispered. Atticus took his coat off the back of his chair and pulled it over his shoulder. Then he left the courtroom, but not by his usual exit. He must have wanted to go home the short way, because he walked quickly down the middle aisle toward the south exit. I followed the top of his head as he made his way to the door. He did not look up.

"Someone was punching me, but I was reluctant to take my eyes from the people below us, and from the image of Atticus's lonely walk down the aisle.

"'Miss Jean Louise?'

"I looked around. They were standing. All around us and in the balcony on the opposite wall, the black people were getting to their feet. Reverend Sykes's voice was as distant as Judge Taylor's.

"'Miss Jean Louise, stand up child. Your father's passing.'"

Conclusion

I look forward to serving our state bar as your next president. It is my hope and dream that we will once again recapture the spirit embodied in the three finest words I know, "my fellow lawyer." ■

ALABAMA STATE BAR

1989-1990 DUES NOTICE

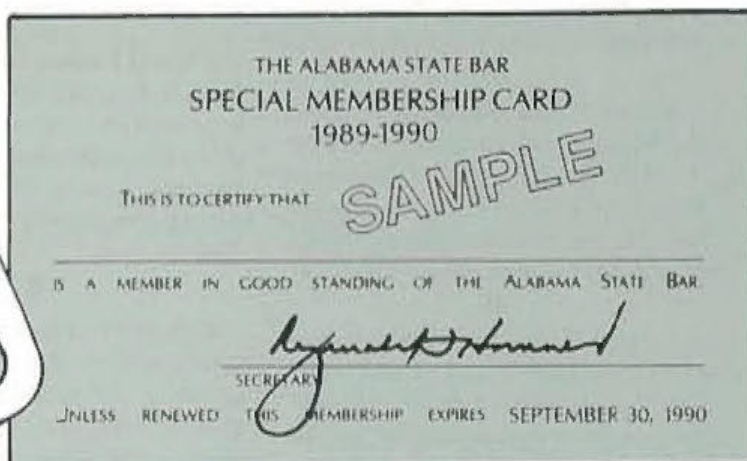
(All Alabama attorney occupational licenses and special memberships expire September 30, 1989)

Annual License—Special Membership Dues

Due October 1, 1989 ★ Delinquent After October 31, 1989



License



Special Member

If you are admitted to the Alabama State Bar and engaged in the practice of law, you are required to purchase an annual occupational license. Section 40-12-49, *Code of Alabama* (1975), as amended. This license gives you the right to practice law in the state of Alabama through September 30, 1990. The cost of the license is \$150, plus the nominal issuance fee, and may be purchased from the probate judge or license commissioner (where applicable) in the county in which you primarily practice. In addition to the state license, all practicing attorneys should check with their municipal revenue departments to be sure that the licensing requirements of the city or town are also being met. By sending the Alabama State Bar a copy of the license when it is purchased, you will receive a wallet-size duplicate of your license (pictured above) for identification purposes during the 1989-1990 license year.

Special membership status is acquired pursuant to Section 34-3-17 or Section 34-3-18, *Code of Alabama* (1975), as amended. Federal and state judges, district attorneys, United States attorneys and other government attorneys who are prohibited from practicing privately by virtue of their positions are eligible for this membership status. Likewise, persons admitted to the bar of Alabama who are not engaged in the practice of law or are employed in a position not otherwise requiring a license are eligible to be special members. Attorneys admitted to the bar of Alabama who reside outside the state of Alabama who do not practice in the state of Alabama also are eligible for this status. With the exception of state attorneys and district attorneys, special members are exempt from mandatory continuing legal education requirements; however, this annual exemption must be claimed on the reporting form. Special membership dues are paid directly to the Alabama State Bar. Membership cards, as shown in the sample above, are issued upon receipt of the dues and good for the license year. Special membership dues are \$75.

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 Alice Jo Hendrix, Membership Services Director, at (205) 269-1515 or 1-800-392-5660 (in-state WATS).

About Members, Among Firms

ABOUT MEMBERS

Richard S. Sheldon announces the relocation of his offices to First National Bank Building, 107 St. Francis Street, Suite 2301, Mobile, Alabama 36602. Phone (205) 432-3737.

Sheldon Perhacs announces the relocation of his office to Cambridge Row, 1607-21st Street, S., Birmingham, Alabama 35205. Phone (205) 939-3039.

Donna Wesson Smalley announces the relocation of her offices as of June 1, 1989, to Suite 180, Courthouse Plaza, 600 Lurleen B. Wallace Boulevard, S., Tuscaloosa, Alabama 35401. Phone (205) 758-5576 or 758-5590.

Carolyn B. Nelson, formerly executive vice-president and general counsel of Metropolitan Properties, Inc. and senior vice-president and general counsel of Brookwood Health Services, Inc., announces the opening of her office for the practice of law at 831 First Avenue, North, Birmingham, Alabama 35201. Phone (205) 251-9922 or 252-3107.

Jo Alison Taylor announces the opening of her offices at 509 Brown Marx Tower, Birmingham, Alabama 35203. Phone (205) 328-2606.

Jonathan E. Iyerly announces the relocation of his offices to 3575 Lorna Ridge Drive, Birmingham, Alabama 35216. Phone (205) 979-2121.

W. Donald Bolton, Jr., formerly with the firm of Foster, Bolton & Dyson, P.A., Foley, Alabama, announces the relocation of his office to 307 South McKenzie Street, Foley, Alabama 36535, P.O. Box 259, Foley, Alabama 36536. Phone (205) 943-3860.

David F. Ovson announces, effective July 1, the removal of his offices to Suite 120, 728 Shades Creek Parkway, Birmingham, Alabama 35209. Phone (205) 870-1511.

Mark T. Smyth announces the relocation of his practice of law to 105 East Fourth Street, Luverne, Alabama 36049. Phone (205) 335-6524/6525.

J. David Jordan, formerly of Sintz, Campbell, Duke, Taylor & Cunningham, Mobile, announces the opening of his firm with offices located at 401 Evergreen Avenue, P.O. Box 403, Brewton, Alabama 36427. Phone (205) 867-7184.

Richard N. Adams announces the opening of his offices for the practice of law at 217 Grant Street, S.E., P.O. Box 43, Decatur, Alabama 35602. Phone (205) 353-7570.

Stephen P. Bussman announces the relocation of his practice to 212 Alabama Avenue, S., P.O. Box 925, Fort Payne, Alabama 35967. Phone (205) 845-7900.

AMONG FIRMS

Bryant & Chambers announces that **Wesley H. Blacksher** has become associated with the firm, with offices at Riverview Plaza Office Tower, 63 South Royal Street, Suite 1107, P.O. Box 1465, Mobile, Alabama 36633.

Alston & Bird announces that **Ralph F. MacDonald, III**, became a member of the firm on August 1, 1988. Atlanta/downtown offices are located at One Atlantic Center, 1201 West Peachtree Street, Atlanta, Georgia 30309-3424. Phone (404) 881-7000.

Farmer, Price, Smith & Weatherford announces that **Ernest H. Hornsby** has become a partner in the firm. The firm name has been changed to **Farmer, Price, Smith, Hornsby & Weatherford** with offices located at 115 West Adams Street, Dothan, Alabama 36303. The mailing address is P.O. Drawer 2228, Dothan, Alabama 36302. Phone (205) 793-2424.

Roy W. Scholl, Jr., and Roy W. Scholl, III, announce the formation of a partnership under the firm name of **Scholl & Scholl**, with offices at #2 Office Park Circle, Suite 200, Birmingham, Alabama 35223. Phone (205) 871-6604 or 871-6011.

Griffin, Allison & May announces that **W. Barry Alvis** has become a member of the firm, and the firm name has been changed to **Griffin, Allison, May & Alvis**. Offices are located at 4513 Valleydale Road, Suite 1, Birmingham, Alabama 35242. Phone (205) 991-6367.

Barbara F. Olschner announces the opening of her law offices, **Barbara F. Olschner, P.C.**, and that **Douglas H. Scofield** has become associated with the firm. Offices are located at 2001 Park Place, N., Suite 300, Birmingham, Alabama 35203. Phone (205) 251-8245.

The firm of **Dominick, Fletcher, Yeilding, Wood & Lloyd, P.A.** announces that **Sammye Oden Ray** has become a member of the firm, and **Kendall Walton Maddox** has become an associate of the firm. Offices are located at 2121 Highland Avenue, P.O. Box 1387, Birmingham, Alabama 35201. Phone (205) 939-0033.

The firm of **Cherry, Givens & Tarver** announces that **Gary L. Aldridge**, formerly a partner of Emond & Vines, has joined the firm as a partner. The firm will operate under the name of **Cherry, Givens, Tarver & Aldridge**. The Birmingham office is located at 2100 A SouthBridge Parkway, Suite 570, Birmingham, Alabama 35209; phone 870-1555. The Dothan office is located at 125 West Main Street, P.O. Box 927, Dothan, Alabama 36302; phone (205) 793-1555.

The firm of **Blackburn & Maloney** announces that the name of the firm has been changed to **Blackburn, Maloney & Schuppert, P.C.**, and that **B. Allison Blackburn** has become a member of the firm. Offices are located at 201 Second Avenue, S.E., P.O. Box 1469, Decatur, Alabama 35602. Phone (205) 353-7826.

The firm of **John T. Mooresmith, P.C.**, has moved to Four Metroplex Drive, Suite 202, Birmingham, Alabama 35209. Phone (205) 871-3437.

Robin F. Clark, formerly with Sirote & Permutt in Huntsville, has joined the legal department of **American Airlines, Inc.**, MD 2E30, P.O. Box 619616, Dallas/Fort Worth Airport, Texas 75261-9616.

Geddes, Roper & Associates, P.C., announces that **Christopher Kern**, formerly law clerk to Honorable Arthur B. Briskman, U.S. Bankruptcy Judge, Southern District of Alabama, has become an associate in the firm's Mobile office, located at 209 St. Louis Street, Mobile, Alabama 36602. In addition to its Mobile location, the firm has an office in Decatur, Alabama.

The firm of **Love, Love & Love, P.C.** announces that **D. Leigh Love** and **Jack E. Swinford** have become associated with the firm. Offices are located at 117 East North Street, P.O. Box 517, Talladega, Alabama. Phone (205) 362-6670.

Charles L. Parks announces the association of **Raymond C. Bryan** in the practice of law with offices at 1108 Wilmer Avenue, P.O. Box 1709, Anniston, Alabama 36202. Phone (205) 237-6645.

J. Todd Caldwell announces that **R. Joel Laird, Jr.**, formerly with the firm of Bolt, Isom, Jackson & Bailey, P.C., has joined him in the practice of law, and also announces the formation of the firm **Caldwell & Laird**, with offices located at Suite 407, SouthTrust Bank Building, P.O. Box 2314, Anniston, Alabama 36202. Phone (205) 237-6671.

David B. Cauthen and **Britt Cauthen** announce the formation of a partnership for the general practice of law. The name of the firm is **Cauthen & Cauthen** with offices at 217 East Moulton Street, Decatur, Alabama 35601. Phone (205) 353-1691.

The firm of **Burdine & Bernauer** announces that **Gregory Keith Burdine** has become a partner, with offices at 412 First Federal Building, 102 South Court Street, Florence, Alabama 35630. Phone (205) 767-5930.

Kenneth P. Robertson, Jr., joined **Frank W. Bailey** in the formation of **Bailey & Robertson**, with offices at 826 Chestnut Street, Gadsden, Alabama 35901. Phone (205) 546-5666.

H.E. Nix, Jr., and **Alex L. Holtsford, Jr.**, both formerly with the firm of Hill, Hill, Carter, Franco, Cole & Black, P.C., announce the formation of a partnership for the practice of law effective June 1, 1989, under the name of **Nix & Holtsford**. The offices are located in the Bell Building, 207 Montgomery Street, Suite 225, P.O. Box 4128, Montgomery, Alabama 36103. Phone (205) 262-2006.

Prince, McGuire & Coogler, P.C. announces that **Lisa L. Woods** has become an associate in the firm. **William Bankhead McGuire, Jr.**, has left

the firm, and effective June 1, 1989, the new name of the firm will be **Prince, Coogler, Turner & Nolen, P.C.** with offices at 2501 6th Street, Tuscaloosa, Alabama 35401, Phone (205) 345-1105.

Edward H. Pradat announces that **Jody L. Wise** has joined him in the practice of law, and also announces the formation of the firm **Pradat & Wise**, with offices located at 2902 6th Street, Tuscaloosa, Alabama 35401. Phone (205) 345-2442.

Potts & Young announces that **R. Wyatt Howell**, formerly associated with the firm of Fite, Davis, Atkinson & Bentley in Hamilton, has become associated with the firm in their Florence office located at 107 E. College Street, P.O. Box 1760, Florence, Alabama 35631. Phone (205) 764-7142.

The firm of **Tanner, Guin, Ely, Lary & Neiswender, P.C.** announces the association of **Laura K. Gregory** and **Sheree Martin**, both of whom are admitted to practice before The Florida Bar. The firm's offices are located at 2711 University Boulevard, Suite 700, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

The firm of **Roberts, Davidson, Wiggins & Crowder** announces that **William B. McGuire, Jr.**, has become associated with the firm with offices located at 2625 8th Street, P.O. Box 1939, Tuscaloosa, Alabama 35403-1939. Phone (205) 759-5771.

Thomas L. Read, formerly a special assistant United States Attorney for the Northern District of Alabama, civil division, announces his appointment as assistant regional counsel for the **Federal Bureau of Prisons**. Offices are located at 523 McDonough Boulevard, S.E., Atlanta, Georgia 30315. Phone (404) 624-5204.

The Birmingham firm of **Rives & Peterson** announces that **Sanford W. Faulkner** and **F. Wilson Myers** have joined the firm. Offices are located at 1700 Financial Center, Birmingham, Alabama 35203-2607. Phone (205) 328-8141.



Otto A. Thompson, Jr., has become Pacific area counsel for the **Naval Supply Systems Command**. The Pacific

area includes Hawaii, Japan, Hong Kong, Singapore, New Zealand, the Republic of the Philippines and other locations. He is assigned as counsel, U.S. Naval Supply Depot, Yokosuka, Japan. This is a civilian position within the Office of the General Counsel of the Navy. His address is NSD (OOL), Box 11, FPO Seattle 98762-1500. Phone 81-0468-26-1911 (ext. 7735).



Ross Diamond, III, and **James E. Hasser, Jr.**, announce that **James H. Frost** has joined the firm as a partner, and the name of the firm has been changed to **Diamond, Hasser & Frost**. They also announce the relocation of their offices to One South Royal Street, Mobile, Alabama. The mailing address and telephone number will remain the same: P.O. Box 2008, Mobile, Alabama 36652. Phone (205) 432-3362.

Supreme Court of Alabama

—NOTICE—

Important Information Regarding Second Copy of Record on Appeal and Exhibits

Return of second copy of record on appeal

In the event a second copy of the record has been filed pursuant to Rule 30(g), Alabama Rules of Appellate Procedure, any party or attorney desiring to receive the second copy of the record should make a *written request* to the clerk of the supreme court *within 30 days from date of decision*. Otherwise, the second copy of the record will be destroyed.

Return of exhibits

Any party or attorney may make a *written request* to the clerk of the supreme court for return of exhibits prior to the expiration of the periods set out in the records retention schedule of the Supreme Court of Alabama as indicated below.

Destruction of exhibits

Pursuant to the Records Retention Schedule of this court, all original exhibits contained in separate volumes of the record on appeal, or sent to the court under separate cover (including charts, maps, depositions and physical exhibits) will be destroyed as follows:

At the end of one year
after decision
destroy all exhibits in
affirmed cases,

At the end of two years
after decision
destroy all exhibits in
reversed cases.

Bar Briefs

Bookout reelected president of Woodmen

John G. Bookout, a native of Birmingham, was unanimously reelected national president of the Woodmen of the World Life Insurance Society at its 41st national convention, July 16-20, in Omaha, Nebraska.

Nearly 250 delegates from throughout the United States cast a unanimous ballot for the incumbent officers. The delegates represent 930,000 Woodmen members nationwide.

Other officers reelected were Executive Vice-president W. Wayne Graham, national Secretary James L. Mounce and national Treasurer Curtis L. Owen, all of Omaha.

Among the trustees reelected was Thomas T. Gallion, III, of Montgomery. All officers will serve four-year terms.

Bookout



Bookout served as president of the Woodmen Alabama Jurisdiction from 1977 to 1979, and was chairperson of the society's National Legislative Committee prior to being elected national sentry in 1979.

He was elected national watchman in 1980, national trustee in 1981 and national escort in 1982. He then moved to Omaha to serve as vice-president and general counsel. He also served as administration assistant to the president from October 1982 until his election as president in 1985.

Bookout attended the University of Alabama where he earned undergraduate and law degrees. He was appointed an assistant attorney general of Alabama at age 23, and later served as chief assistant and deputy attorney general from 1959 to 1971. He was Alabama Commissioner of Insurance from 1971 to 1975 and judge on the Alabama Court of Criminal Appeals from 1975 to 1982.

He retired as an appellate judge in 1982, when he moved to Omaha. He is a member of the Alabama, Nebraska and American bar associations, and the United States Supreme Court Bar.

Woodmen of the World, the largest nonsectarian fraternal benefit society in the United States, was founded in 1890. The Woodmen has more than \$20 billion of life insurance in force.

Russell named to court of civil appeals

On April 15, Robert J. Russell assumed the unexpired term of Judge Richard Holmes on the Court of Civil Appeals of Alabama by appointment of Governor Guy Hunt on March 3. He expects to run for re-election to the position in 1990.

Russell practiced law in Montgomery for 22 years before his recent appointment.

Russell



He made his first entry into politics last year by running statewide to fill the vacancy of the Honorable Robert Bradley,

who retired from the court. A newcomer to any political party, and except for President George Bush, he polled 526,526 votes (45 percent) to be the Republican party's strongest and most popular candidate, polling from 49 percent to 62 percent of the vote in most metropolitan and contiguous county areas, statewide.

He was reared in Montgomery and educated in the Alabama public school system. He attended the University of Alabama and then Auburn University where he received his bachelor's degree in general studies and master's degree in business. A law school classmate of Judge Kenneth Ingram's, presiding judge of the court of civil appeals, he is a 1965 graduate of Jones Law School, where he received his law degree. He is also a graduate of the Institute for Organization Management at Michigan State University.

He is admitted to practice law in all state and federal district courts, the U.S. Court of Appeals for the 5th and 11th circuits, the U.S. Bankruptcy Court and the U.S. Supreme Court, and has served as a special assistant attorney general, State of Alabama.

He is a member of the Montgomery, Alabama and American bar associations, American Judicature Society and Defense Research Institute; he is a member of several committees of the Alabama Law Institute and has served as a member of the Department of Industrial Relations Advisory Council, State of Alabama.

He served his church, Trinity Presbyterian Church of Montgomery, 21 years as a deacon, is past president of the Men of Trinity, taught Sunday School there for over ten years and performed trial and appellate legal services for the church. He is a member of the Montgomery Rotary Club and is an active supporter of

numerous other civic and cultural organizations.

He has one son, Robert J. Russell, who served as a law clerk to then-Circuit Judge Mark Kennedy and as city attorney of Montgomery for over two years.

Jackson named chairperson of association

William P. Jackson, Jr., of the Arlington, Virginia, firm of Jackson & Jessup, was recently elected chairperson of the District of Columbia Chapter of the Association of Transportation Practitioners. He also was named chairperson of the Legislative Committee for that association.

Judges receive certificates for judicial education

Twenty-one Alabama judges have been presented certificates by Alabama Chief Justice Sonny Hornsby for completion of at least 100 hours of judicial education within a four-year period.

Five of the 21 have completed a 200-hour course of study within five years under the Alabama Judicial College's continuing education program.

The college's certificate program was initiated in 1984, and 79 judges have

been awarded certificates for 100 hours of education study.

The five judges who have completed the 200-hour program are the first to achieve this level. They are:

Circuit Judge William W. Cardwell of Gadsden
Circuit Judge Joe Colquitt of Tuscaloosa
Circuit Judge Leslie Johnson of Florence
District Judge John Coggin of Centre
District Judge Charles Wayne Owen of Gadsden

Judges presented certificates this year for 100 hours of study include:

District Judge John Alsbrooks of Birmingham
Circuit Judge Ralph Cook of Bessemer
Circuit Judge Richard Dorrough of Montgomery
District Judge Ralph Grider of Scottsboro
District Judge Hartwell Lutz of Huntsville
Retired Circuit Judge Telfair Mashburn of Bay Minette
Circuit Judge Claud Neilson of Demopolis

Retired Circuit Judge Carl Nesmith of Oneonta
Circuit Judge Jack Riley of Cullman
District Judge Marise Sandidge of Clanton
Circuit Judge Dale Segrest of Dadeville
District Judge Tommy Stowe of Wetumpka
Circuit Judge Ned Suttle of Florence
Circuit Judge Wayne Thorn of Birmingham
District Judge Gerald Topazi of Birmingham
District Judge Thomas Woodard of Carrollton

—Administrative Office of Courts

Circuit, district judges elect association officers

Circuit Judge Tom Younger of Huntsville and District Judge Gerald Topazi of Birmingham have been elected presidents of their respective judges' associations for the upcoming year.

Judge Younger succeeds Circuit Judge Ferrill McRae of Mobile and Judge Topazi succeeds Judge Aubrey Ford of Tuskegee as leaders of their associations. The judges were elected at a recent judicial education conference sponsored by the Alabama Judicial College.



State Chief Justice Sonny Hornsby (right) was presented the first annual James V. Thompson Alabama American Legion's Boys State Distinguished Alumnus Award at the 52nd Annual Boys State Convention in Birmingham June 11, 1989. Chief Justice Hornsby, a 1954 alumnus of Boys State, served as its lieutenant governor and as one of the state's two delegates to Boys Nation. Presenting the award were Circuit Judge John Bryan, presiding judge, 10th Judicial Circuit (left); Jefferson County District Judge Pete Johnson, who serves as director of Boys State (middle); and Chief Justice Hornsby.



The Alabama Law Foundation, Inc. has awarded a \$7,500 grant to the Alabama Young Lawyers/YMCA Youth Judicial Program. The Youth Judicial Program educates high school students about the judicial system through participation in mock trials, and is the largest service project of the Alabama State Bar Young Lawyers' Section. Students serve as judges, lawyers and jurors, enabling them to learn firsthand the role each plays in the justice system. Approximately 400 students throughout the state participated in the program in 1988. Above, left to right, are Charles Anderson, chairperson, Youth Judicial Program; William Chandler, general director, Montgomery YMCA; and John Scott, Foundation trustee.

Other officers elected by the Association of Circuit Judges were Circuit Judge Randall Cole of Fort Payne, first vice-president; Circuit Judge John Bryan of Birmingham, second vice-president; and Circuit Judge Hardie Kimbrough of Grove Hill, secretary/treasurer.

Other officers elected by the Association of District Judges were District Judge Eddie Hardaway, jr., of Livingston, president-elect; District Judge Deborah Paseur of Florence, first vice-president; District Judge Lionel Layden of Mobile, secretary; and District Judge Jim White of Centreville, treasurer.

—AOC

Retired Chief Justice Torbert honored

Clement Clay Torbert, Jr., former chief justice of the Supreme Court of Alabama, received a Distinguished Service Award from the National Center for State Courts for his contributions to bettering the administration of justice in the state courts.

Torbert was presented the award by NCSC president Edward B. McConnell and Virginia Chief Justice Harry L. Carrico, NCSC chairman-elect and president-elect of the Conference of Chief Justices, on Monday, July 24, during special ceremonies presided over by current Alabama Chief Justice Hornsby at the Supreme Court in Montgomery.

Torbert took office as Alabama's 25th chief justice on January 18, 1977, and was reelected without opposition for a second six-year term beginning January 18, 1983. He did not seek reelection after his second term and left office in January 1989.

President Reagan appointed Torbert to serve as the first chairperson of the State Justice Institute from 1986 to 1988 and reappointed him in 1988. Torbert's current term as State Justice Institute chairperson expires in 1991.

From 1980 to 1989, Torbert sat on the board of directors of the Conference of Chief Justices, serving as its president from 1987 to 1988. While president of the Conference of Chief Justices, Torbert was also chairperson of the board of directors of NCSC. He also has been chairperson of the Alabama Judicial Study Commission and on the board of directors of the American Judicature Society.

Since retiring as chief justice, Torbert has returned to the private practice of law in Montgomery, Alabama.

Torbert attended the U.S. Naval Academy from 1948 to 1949 before receiving a bachelor's degree from Auburn University in 1951. He attended the University of Maryland Law School and graduated in 1954 from the University of Alabama Law School.

Bar Commissioners elected

The following highlights those commissioners elected during the past year, where biographical sketches and photographs were available. Also included is a list of the remaining commissioners and their circuits.

7th Circuit

ARTHUR F. FITE, III, born December 12, 1944, Louisiana; attended school in Jasper, Alabama; undergraduate degree from Vanderbilt University, 1967; law degree from University of Alabama School of Law, 1970; summer studies, Lincoln College, Oxford University, 1969.

Law clerk, Justice Pelham J. Merrill, Alabama Supreme Court, 1970-71; associate, Knox, Jones, Wolf & Merrill, 1971-74; partner, Merrill, Porch, Doster & Dillon, 1974-88; partner, Merrill, Porch, Dillon & Fite, 1989.

Member, Alabama Supreme Court Standing Committee to Revise Rules of Civil Procedure; vice-president of Anniston YMCA; member, board of directors, Calhoun County Cancer Society.

Married to former Pam Etnire; one child, Freeman.



Fite



Grocholski



Hart



Landers

24th Circuit

W. ALLEN GROCHOLSKI, born September 18, 1946, Fayette County, Alabama; graduated, *cum laude*, from Livingston

University, 1971; law degree from Cumberland School of Law, 1972.

Law clerk to supreme court justices Pelham Merrill and Robert Harwood.

Served as municipal judge, Elba and Fayette, Alabama.

21st Circuit

JAMES E. HART, JR., born March 26, 1942, Escambia County, Alabama; graduated from Marion Military Institute, Auburn University, Cumberland School of Law, *cum laude*, 1970. Managing editor of *Cumberland-Samford University Law Review*, 1969-70.

Served two-and-a-half years U.S. Army, discharged as captain.

Sole practitioner in Brewton since 1970. Admitted to The Florida Bar 1972.

Past chairperson, Committee on Lawyer Public Relations and Oil, Gas & Mineral Law Section; past president, Escambia County Bar; member, American Bar Association, Alabama Trial Lawyers Association, American Trial Lawyers Association.

Past president, Brewton-East Brewton United Way, Brewton Rotary Club, Escambia County Auburn Club, Alabama Cattlemen's Association.

Married to former Patricia W. Taylor, Bartow, Florida; two sons, James E. Hart, III, and John Webb Hart.

29th Circuit

MICHAEL W. LANDERS, born July 30, 1956, Sylacauga, Alabama; graduated from University of Alabama, 1977, University's School of Law, 1980. Sole

practitioner, Sylacauga, 1980-85; partner, Bell & Landers, 1986-present. Member, Talladega County Chapter of American Cancer Society, South Talladega County Association for Retarded Citizens (past president), Sylacauga Rotary Club (past director), Sylacauga Chamber of Commerce. Director, SouthTrust Bank of Talladega County. Member, Talladega County Bar Association, American Bar Association.

One son, Charles Seth-Michael Landers.

39th Circuit

WINSTON V. LEGGE, JR., born July 4, 1939, Athens, Alabama; graduated from University of Alabama, 1962, Cumberland School of Law, *cum laude*, 1969, University of Alabama School of Law (master of laws in taxation).

Partner, Patton, Latham, Legge & Cole.

Served as member of board of bar examiners, past president of Limestone County Bar Association.

Married to Jennie Lazenby Legge, Monroeville, Alabama; one daughter, Alice Winston Legge.



Nix

15th Circuit, Place #4

H.E. NIX, JR., born July 26, 1948, Montgomery, Alabama, graduate, Auburn University, 1970, University of Alabama School of Law, 1973.

Law clerk, Judge John Tyson and Justice Reneau P. Almon, 1973; law clerk to Judge Robert Varner, 1974; partner, Hill, Hill, Carter, Franco, Cole & Black, 1975-89; partner, Nix & Holtsford.

Professor, Jones School of Law, 1975-88; instructor, Huntingdon College, 1980-82.

Member, Alabama Defense Lawyers Association (legislative chairperson 1983-87, vice-president 1985-87, secretary/treasurer 1987-88, president-elect 1989); International Association of Defense Counsel; Montgomery County Bar Association (board of directors 1988); Alabama State Bar (Law Day Committee chairperson 1988-89).

Montgomery Lions Club Board of Directors, 1987; YMCA Planning Branch Board, 1986-present; Jimmy Hitchcock Memorial Award Board of Directors, 1975-present; Alabama Music Hall of Fame Board, 1983-85; YMCA Boys Work Committee, 1975-present; Youth Legislature Board of Directors, 1986-present; Baptist Health Care Foundation Board, 1987-present; Montgomery County Republican Party Committee member, 1984-present.

Married to Michelle Rundell Nix; two sons, H.E. Nix, III, and Davis Martin Nix.

13th Circuit, Place #4

BENJAMIN T. ROWE, born February 19, 1945, Carrollton, Georgia; graduated from University of Alabama, 1967, University's School of Law, 1972.

Managing board, *Alabama Law Review* and Order of the Coif. Practices with Cabaniss, Johnston, Gardner, Dumas & O'Neal, Mobile, Alabama.

Member, Mobile Bar Association, American Bar Association, American Law Institute, Alabama Law Institute.

Married to former Ann H. Wolfe; three children.



Rowe



Sims

13th Circuit, Place #3

LARRY U. SIMS, born 1941, Moundville, Alabama; graduated from University of Alabama, 1962, University's School of Law, 1965, member, Farrah Order of Jurisprudence/Order of the Coif. Partner, Hand, Arendall, Bedsole, Greaves & Johnston, 1965-77; partner, Coale, Helmsing, Lyons, Sims & Leach, 1977-present.

Member, Alabama Defense Lawyers Association, Alabama Trial Lawyers Association, Vice-president, University of Alabama Alumni Association.

Married to Nancy Keese Sims, Chattanooga, Tennessee; three children, Lawrence, Susan and Mary Keese.

10th Circuit, Place #9

CATHY S. WRIGHT, born March 19, 1949, Massachusetts; graduated from University of Alabama School of Law, 1975, Alabama editor of the *Alabama Law Review*.

Partner, Maynard, Cooper, Frierson & Gale, Birmingham. Served as law clerk to Honorable Frank M. Johnson, Jr.

Married to Michael L. Hall, with Johnston, Barton, Proctor, Swedlaw & Naff, Birmingham; two sons, David and Nathan.



Wright



Dillon

5th Circuit

JOHN F. DILLON, IV, born November 15, 1930, Alexander City, Alabama, graduated University of Alabama, University's School of Law, 1954, on board of editors, *Alabama Law Review*.

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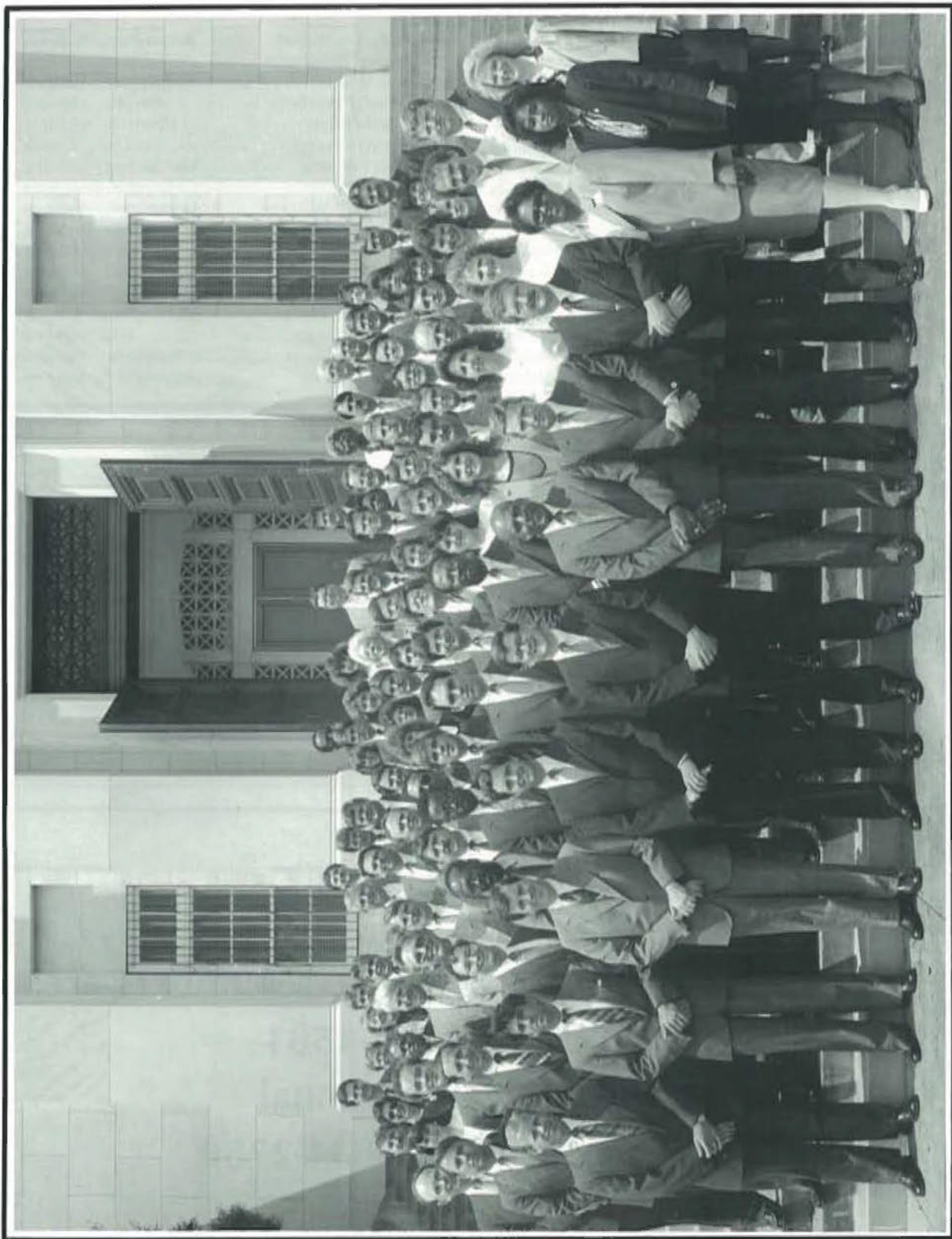
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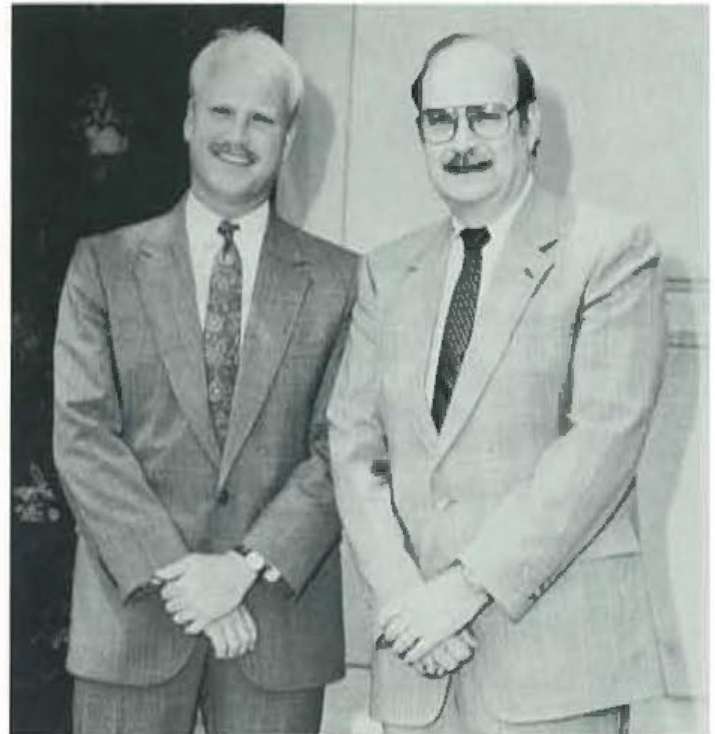
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White Collar Crime and the Role of Defense Counsel

by Pamela H. Bucy

There is white collar crime in Alabama and at least some of it is being investigated and prosecuted. For example, a federal grand jury in Mobile recently charged seven Mobile business and civic leaders with racketeering, conspiracy, extortion, mail fraud and obstruction of justice.¹ A federal grand jury in Montgomery recently returned an indictment charging three state legislators and one former state legislator with extortion.² In Birmingham, state prosecutors recently convicted a Birmingham attorney for defrauding an elderly client.³

Moreover, if national trends are followed white collar crime should receive increasingly aggressive attention from federal and state prosecutors in Alabama. Since the mid-1970s pursuit of white collar crime has been designated a top priority by federal and state prosecutors. Currently, white collar crime is described as the "fastest growing subspecialty in law."⁴

This article discusses the strategy for representing the business client who has become the target of a white collar criminal investigation. Most targets of white collar criminal investigations have rarely had any prior involvement with the criminal law. They have, on the other hand, often had substantial contact with civil law on issues such as labor relations, business and individual tax and pension planning, drafting and negotiation of business contracts. The first, and one of the most significant, things defense counsel should help a client realize when the client has become the target of a white collar criminal investigation, is that this new legal problem is entirely different from any legal problem with which the client has previously dealt.

As with any legal problem, effective representation requires an appreciation of the adversary's position. Thus, section I of this article describes the unique nature of white collar crime and the problems

it presents for the prosecutor. Section II addresses various strategies defense counsel should consider in representing the white collar client who is now the target of a criminal investigation.

I. The nature of white collar crime: from the prosecutor's perspective

White collar crime is deceit, concealment or deception committed for economic gain by professionals who are in a position of trust toward their victims.⁵

White collar crime is different from street crime in three major ways: (1) unlike the victim of a street crime, the victim of a white collar crime is often unaware that a crime has occurred, (2) white collar crimes are more difficult to investigate than street crimes, and (3) white collar crimes involve and relate to civil law to a much greater extent than do street crimes.⁶

The victim of a white collar crime often is unaware that a crime has been committed or that he or she is the victim of a crime. Primarily this is due to the position of trust which the putative defendant holds toward the victim. Because of this position of trust, the victim, who in other contexts is careful and attentive toward business transactions, fails to become suspicious when exposed to signs of irregular activity. By comparison, of course, the victim of street crime is very aware that he or she is the victim of a crime: one cannot help but notice that she has been assaulted or that his car has been stolen.

This lack of awareness by the victim of a white collar crime contributes to the

Professor Bucy is an associate professor of law at the University of Alabama School of Law where she teaches white collar crime, criminal law and criminal procedure. From 1980-1987 she served as an assistant U.S. Attorney in St. Louis, Missouri, where she specialized in prosecutions of white collar crime.

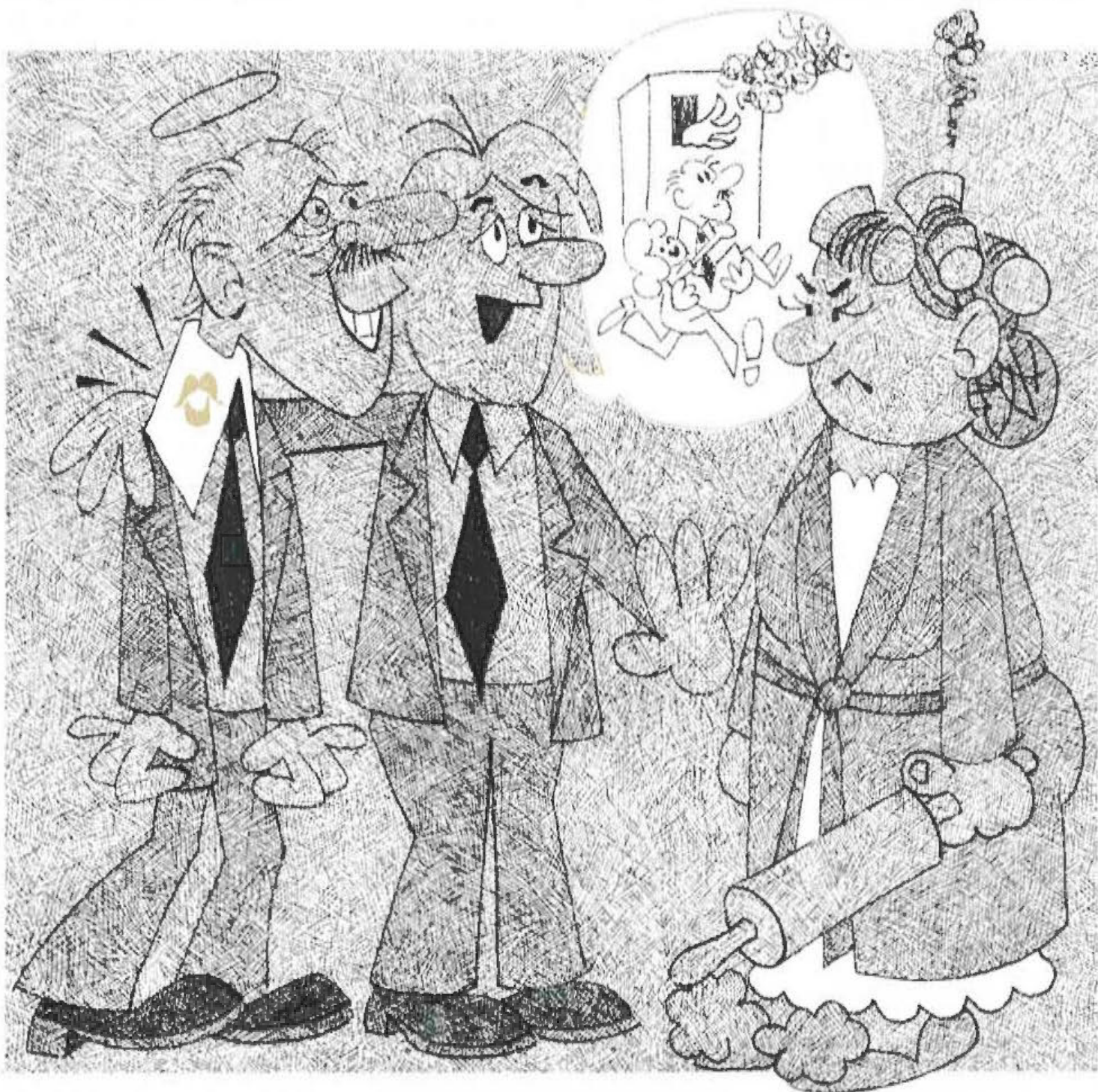


second characteristic of white collar crime which distinguishes it from street crime: white collar crime is difficult to investigate and prove. This is for several reasons. First, because the unaware victim is not gathering evidence or even alerting law enforcement that an offense has occurred, most white collar investigations attempt to reconstruct events which occurred months, even years before. Second, usually these events are not straightforward, but are complex transac-

tions composed of many steps and involving many participants and documents. Third, such crimes are often hidden within an organization and it is necessary to pierce the bureaucratic structure of the organization to decipher who did what and who knew what.

The third major difference between street crime and white collar crime is that white collar crime blurs the distinction between civil and criminal law. This is because the same facts which give rise

to the criminal action often also give rise to civil or administrative actions. For example, the criminal trial of a health care provider may involve the same acts for which patients of that provider have civil malpractice causes of action. The criminal trial of a businessperson may involve the same contracts or business deals for which clients of the businessperson have tort or breach of contract actions. The engineer or architect who has been convicted of criminal fraud charges may lose



his or her professional license after administrative hearings.

The fact that viable civil remedies exist for the victim of white collar crime or for governmental agencies which oversee a defendant's activity is significant for a defense counsel. The criminal trial presents a fruitful discovery opportunity for the civil plaintiff who is suing, or may sue, the criminal defendant. While advantageous to the civil plaintiff, the exposure on civil claims which a criminal trial provides can be devastating to the criminal/civil defendant. Part of defense counsel's job in effectively representing the white collar criminal is to limit this exposure.

Also, defense counsel should be aware that the existence of civil remedies for victims of white collar crime affects the exercise of prosecutorial discretion. Prosecutive and judicial resources are limited and expending these resources to pursue one case necessarily means other cases will never be investigated or prosecuted. As a gatekeeper to these resources, the prosecutor will consider the availability of civil remedies for victims in deciding whether to pursue a criminal case, even when all elements of the criminal offense can be proven. When the case involves only one or a few victims who are capable of pursuing civil remedies the chances that prosecution will be declined are better than when the case involves many victims, none of which are cognizant of or capable of pursuing their civil remedies. The criminal defense counsel should attempt to convince a prosecutor that prosecution is appropriately declined in favor of civil remedies.

In short, while the white collar criminal case presents unique problems of investigation, proof and judgment for prosecutors, it also presents special opportunities for defense counsel.

II. Representing the client who has become the target of a white collar criminal investigation

Because of the unique character of white collar crime, defense counsel can and should play a more important role in the pre-indictment stage of the white collar crime than is customary in the pre-indictment stage of the street crime. Defense counsel for the target of a white collar criminal investigation should get

involved in the grand jury or agency investigation, help ascertain what went on, and put the facts in the most favorable light for the client. Defense counsel's goal at this stage is to convince the prosecutor that there is no crime involved, or if there is, that counsel's client has no criminal liability. Such a goal is not unrealistic. Because of the difficulties in investigating white collar crimes many grand jury investigations, which are initiated upon legitimate and concrete suspicion of illegality, terminate when a more complete understanding of the facts indicate that no criminal offense occurred. Obviously, defense counsel should make every effort to facilitate this resolution since, realistically, once the client has been indicted, irreparable damage has been done. Even if an acquittal is won later, the taint to a professional's reputation, the public disclosure of improprieties which may alert potential civil plaintiffs, and the considerable financial and emotional expense for a client who undergoes a lengthy criminal trial, never can be repaired or regained.

However, failing this optimal outcome, defense counsel still can achieve substantial damage control for the indicted client.

A. Grand jury subpoena duces tecum

Targets of a grand jury or agency investigation, as well as businesses operated by the target, sometimes receive subpoenae duces tecum which require production of voluminous records which are privileged and/or essential to the continued operation of the target's businesses. Defense counsel should carefully assess the privilege issues raised by such subpoenae and ensure that privileged material is not produced, by filing appropriate motions to quash and carefully excluding privileged material from any documents which are produced.

The fifth amendment privilege regarding the act of production as well as the contents of the records may be asserted by an individual-target.⁷ The fifth amendment privilege as to the act of production but not as to the content of business records, may be asserted by a sole proprietorship.⁸ No fifth amendment privilege may be asserted by corporations or partnerships as to either the act of production or contents of business records.⁹ Other privileges which may be asserted in the typical white collar criminal investigation include attorney-client, attorney work-product, spousal and physician-patient.

Even if privilege issues are not raised, compliance with subpoenae duces tecum may be extremely difficult for the client who needs the records requested to operate its business and file its tax returns. Defense counsel may be able to alleviate some of the burden of subpoenae duces tecum addressed to client-target, however, it may not be strategically wise to file a motion to quash the grand jury subpoena on the ground that compliance with it is burdensome. This is for two reasons.

First, rarely will such a motion to quash be granted. Generally it is not necessary for the grand jury to make any showing of relevancy or need when issuing a subpoena,¹⁰ and it is difficult to prove that a subpoena is extremely burdensome.¹¹

Second, by filing a motion to quash defense counsel closes the door on what

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can be extremely helpful to effective pre-indictment representation of the client-target: open lines of communication with the prosecutor.

To this end the burdensome subpoena should be viewed as an opportunity which defense counsel should seize to begin learning about the investigation. Upon receipt of such a subpoena, defense counsel should contact the prosecutor handling the investigation, explain the problems that compliance with the subpoena creates for the client-target, and pursue avenues by which the grand jury can get the information it needs with as little disruption to client's business as possible. There are usually many less disruptive possibilities, such as making copies of the subpoenaed records or arranging a more flexible schedule for production. More likely than not the prosecutor is not specifically aware, until defense counsel explains how and why, that compliance with the subpoena is burdensome. Generally, the prosecutor who is experienced in white collar criminal investigations will be willing to honor defense counsel's request for accommodation when there is no disruption to the grand jury's investigation.

The prosecutor's willingness to be accommodating is not the function of a pleasant personality, but a matter of judgment. As any experienced prosecutor knows, the investigation of a white collar crime may terminate without any indictments, or without indictments of all targets. Aside from fundamental fairness, a prosecutor who routinely handles grand jury white collar investigations will not want the court which supervises grand jury matters to sense that there is a pattern of issuing unnecessary burdensome grand jury subpoenas.

In conclusion, by negotiating an accommodation on production of subpoenaed records with the prosecutor, defense counsel obtains two advantages. The client's money and counsel's time is not used on litigating an unsuccessful motion to quash but is saved for the more significant steps which lie ahead. More importantly, however, by discussing the options for production and reasons why or why not such options are workable from the prosecutor's standpoint, defense counsel begins to acquire essential insight into the criminal investigation and

client's perceived role in the transactions being investigated.

B. Grand jury witnesses

The government probably will present a number of witnesses to the grand jury. Because in a white collar criminal investigation these witnesses often will be employees or business associates of the client-target, defense counsel may know in advance who the grand jury witnesses are. There are serious conflict of interest problems for counsel who is representing the client-target to also represent such witnesses.¹² Moreover, even if defense counsel does not represent these witnesses but is given the opportunity to speak to the witnesses before or after their grand jury appearance, there could be potential obstruction of justice¹³ or aiding and abetting perjury¹⁴ problems for counsel if the witness perceives, or if in fact counsel, however inadvertently, threatens the witness or suggests testimony for the witness. Taking care to avoid these problems, however, it is possible when the witness is willing for defense counsel to speak with grand jury witnesses before and after their appearance in the grand jury and thereby further ascertain where the investigation is going, on what and whom it is focusing, and what weak points exist in the criminal case.

Under some circumstances defense counsel should consider requesting that the grand jury hear exculpatory witnesses. Usually, the government is under no obligation to present exculpatory testimony to the grand jury.¹⁵ However the prosecutor generally will agree to put such witnesses into the grand jury, for by doing so he gets a look at defense witnesses and defense theory. This strategy is risky for the grand jury target and should be undertaken only when defense counsel is certain of two things: (1) there is still a question whether the client-target will be indicted and thus, that such testimony may make a difference, and (2) the testimony of such witnesses can only help the client-target.

To be certain of these two points defense counsel must have a clear idea of where the investigation is going and what the government perceives to be the weak points in the government's case. Disasters can easily happen if defense counsel is not fully cognizant of the investigation's

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scope. For example, testimony which seems innocuous regarding the transaction at issue may inculpate the client when the grand jury views this testimony in light of other evidence of which defense counsel is unaware. Or, defense counsel may believe that the investigation is focusing on certain transactions and in fact the witness can provide exculpatory testimony on these transactions, but unknown to defense counsel the grand jury also is focusing on additional transactions, and testimony by this same witness may inculpate the client-target on these other transactions.

The most risky witness for defense counsel to allow to testify before the grand jury is the client-target. By testifying the target will, realistically, expose himself to potential perjury charges. Also, the target who testifies will reveal the defense theory, give the prosecutor an opportunity to evaluate the target's abilities as a witness, and possibly may waive privileges to which the target is otherwise entitled. Only if defense counsel is fully cognizant of the investigation's scope and confident that the tar-

get's appearance before the grand jury will have a good chance of persuading the grand jury not to indict, should defense counsel allow the client-target to testify before the grand jury. Very rarely will all of these circumstances exist.

In conclusion, defense counsel should tread carefully with regard to witnesses appearing before the grand jury. Defense counsel may be aware of and have access to witnesses called by the government to appear before the grand jury. Briefing and debriefing these witnesses can provide essential insight for defense counsel into the parameters of the investigation, but can also create ethical and legal problems for defense counsel. Whereas defense counsel can proffer exculpatory witnesses, including the target, for the grand jury this too is fraught with such serious potential problems that the risks rarely outweigh the benefit.

C. Restitution

Ensuring that the client-target makes restitution can be one of the most shrewd and advantageous strategies defense counsel can suggest to the client.

One option is to make restitution as soon as possible *after the investigation begins*. To use this tactic several conditions must exist. First, the case must be one where the grand jury or prosecutor is struggling over the question whether the transaction(s) at issue involves criminal liability. Only when defense counsel has an informed and complete knowledge of the investigation can counsel assess whether this is true and whether restitution may affect the decision to indict. Second, the client-target must be willing to admit civil liability. Third, the amount of restitution at issue must be ascertainable and finite. Obviously, defense counsel should not expose the client-target to endless, good faith or bad faith, civil claims for restitution. Last, it is essential in making such restitution that the client, while conceding civil liability, explicitly disavow criminal liability.

Once restitution has been made, defense counsel should request that such facts be presented to the grand jury. This restitution tactic can have a powerful psychological impact not only on the grand jury but also on the prosecutor. An experienced prosecutor knows how difficult it is to walk into a courtroom and convince a jury or judge that there is

criminal liability in many white collar cases. This difficulty is compounded when the defendant has repaid all the money at issue to all the alleged victims. Moreover, often the sentence given to the convicted white collar criminal consists only of restitution, fines and minimal jail time, if any. Thus, even when a prosecutor is persuaded that criminal liability exists, restitution by the target may convince a prosecutor that criminal justice resources are better spent pursuing other defendants.

Even after a client has been indicted, pleads guilty or is convicted after a trial (but not yet sentenced), restitution may be advantageous in one major respect: it may ward off imprisonment. The rationale of this strategy is two-fold: (1) the court may be so favorably impressed by the defendant who takes the initiative to make restitution that it does not impose a sentence of imprisonment, and (2) there is, generally, nothing to lose since the sentences of many white collar criminals include restitution anyway.¹⁶

D. Negotiation of a plea of guilty

It may be wise to negotiate the plea of guilty prior to indictment if defense counsel is aware of the progress of the grand jury investigation and is certain that client-target will be indicted. Such an agreement works as follows: if the prosecutor indicates that it is likely that the client-target will be indicted on, for example, 20 five-year felony counts, an agreement could be reached wherein client-target waives indictment and is charged by information on only two felony counts, with the understanding that client-target will plead guilty at arraignment to both counts.

By using this procedure client-target foregoes a number of constitutional and procedural rights including the chance to file pretrial motions. However, this procedure is advantageous to a defendant because it limits publicity, criminal culpability, trial expenses, exposure to criminal fines and imprisonment, and emotional trauma. By minimizing publicity and criminal culpability, defense counsel also minimizes the opportunity for civil plaintiffs to learn of their causes of action and for existing, or future, civil plaintiffs to use the criminal trial as a discovery device or the criminal verdict as collateral estoppel.

Because many white collar defendants are professionals who hold professional licenses, defense counsel should be especially aware of various licensing requirements when negotiating the number or type of charges to which a client will plead. For example, physicians, chiropractors and other practitioners of the healing arts automatically lose their licenses upon conviction for a felony, but lose their licenses only for misdemeanor convictions which involve violation of controlled substances laws or which reflect on the practitioner's ability to care for patients.¹⁷ By comparison, architects in Alabama lose their licenses for any felony or misdemeanor conviction which involves moral turpitude.¹⁸ Attorneys automatically lose their licenses for the conviction of a felony but only for conviction of misdemeanors which involve moral turpitude.¹⁹ Civil engineers lose their licenses for certain acts of fraud, regardless of whether the acts are felonies or misdemeanors.²⁰ Needless to say, when dealing with a client who faces professional disciplinary action, defense counsel should endeavor to negotiate a plea of guilty to charges which jeopardize professional credentials as little as possible.

A pre-indictment plea agreement is advantageous to the government because the government will know, prior to indictment, that it will not need to prepare a complex, time-consuming case for trial. Since much of the preparation for a white collar criminal trial is necessarily done prior to indictment such an agreement is a favorite of prosecutors specializing in white collar crimes.

It should be emphasized, however, that a pre-indictment negotiation of a plea of guilty is appropriate only when defense counsel is fully aware of the content and status of grand jury investigation, when there are no significant issues which may be successful for a defendant if raised in pretrial motions, and when a plea of guilty is otherwise appropriate (i.e., the defendant can honestly admit guilt).

Once a client has been indicted, defense counsel has lost the opportunity to bargain on the number or substance of the offenses with which the client-target initially will be charged, but a plea of guilty still retains all the advantages to a defendant of a pre-indictment plea of

guilty, and the defendant retains the opportunity to raise issues in pretrial motions.

E. The trial

In many ways there are more similarities between civil trials and white collar criminal trials than there are between the criminal trials of street crimes and criminal trials of white collar crimes. The logistics, length and some of the evidentiary issues of the white collar criminal trial will be similar to a civil trial. Primarily this is due to the documentary nature of the evidence in the white collar criminal case. There will be voluminous exhibits and lengthy exhibit lists, detailed stipulations and many custodian witnesses or other witnesses whose testimonial function primarily is interpretation of documents. The evidentiary issues associated with documentary and complex financial transactions will be similar to a civil trial: authentication, hearsay exceptions for records, summary exhibits, summary witnesses, charts and expert witnesses.

In several significant respects, however, the criminal trial is different from the civil trial. Because criminal cases take priority over civil matters, the docketed criminal trial generally will proceed to trial more quickly than will docketed civil cases.²¹ Moreover, rarely will there be depositions of substantive witnesses in lieu of personal appearances, and there will be less reliance on substantive stipulation between the parties. In addition, hearsay which is not usually admitted in a civil matter may well be admitted in the criminal matter as a statement of a co-conspirator. The Federal Rules of Evidence (FRE) do not, of course, limit use of co-conspirator statements to criminal matters²² but, practically speaking, the criminal plaintiff is more accustomed and able to collect evidence supporting admission of co-conspirator statements than is the civil plaintiff. Last, again because of the resources of the criminal plaintiff, it is more likely that FRE 404(b) evidence (other crimes, wrongs, acts) will be collected, introduced and admitted in criminal trials than in civil trials.

Aside from evidentiary issues, another important difference between civil trials and white collar criminal trials is the type of defense often employed in the criminal case. A standard defense concedes

everything except criminal intent. Using this approach, defense counsel argues that while defendant did the acts alleged, and may even be guilty of civil fraud, defendant did not have criminal intent and is not guilty of criminal fraud. Such a defense usually analogizes defendant's action to that taken by other participants in the transactions at issue or to customary dealings in the defendant's business, arguing that the defendant's actions were within accepted, and allowed, parameters of conduct.

A variation on this defense also admits that the acts alleged took place but argues there is no criminal intent because defendant was "confused" by the factual scenario or by applicable law. With this defense, counsel argues that the laws, rules, regulations or transactions at issue were confusing to the defendant, and any criminal violation was due to the defendant's confusion rather than to a criminal intent to defraud. It enhances the jury's empathy with the defendant if defense counsel can confuse the presentation of the government's case.

Both of these defenses can be powerful and successful, or border on ineffective assistance of counsel. A defense counsel who is experienced in criminal fraud cases is best able to walk this line.

F. The pre-sentence report

The pre-sentence report is prepared by the probation office for the sentencing court and contains biographical and social information about the defendant, details about the offense and information on the harm suffered by the victims of the offense.²³ Effective input into this pre-sentence report by defense counsel is imperative.

Defense counsel should supplement this pre-sentence report with as many meaningful letters of support for the client as possible. These letters can come from anyone who knows and is able to say good things about client. Community leaders, pastors or priests, co-workers or employers, neighbors, social friends and family can provide letters which may favorably impress the sentencing court. Scores of detailed letters by people who

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obviously and sincerely continue to care about (and trust) the defendant rarely fail to make a favorable impression.

It may also be helpful, with the right client, for the client to submit a letter to the court in the pre-sentence report. It may be less traumatic for the defendant to communicate with the sentencing judge in this manner than through the other option given a defendant, speaking in open court at the sentencing hearing. To be effective in any post-conviction statements or letters, however, the defendant should be contrite, admit fault and describe the anguish and pain which the defendant, and his or her family, has already suffered because of the publicity and embarrassment of the criminal charges and conviction. The convicted defendant who insists on denying guilt or blaming others is better off not communicating with the sentencing court.

Conclusion

The white collar criminal case is neither "fish nor fowl." It is unlike most criminal matters because of the documentary type of evidence routinely em-

ployed, the complexity of the transactions at issue, the genuine question which often arises as to whether the transactions involve criminal liability, and the type of clients represented by defense counsel. In these respects it resembles the civil case and yet its criminal nature creates special hazards, both for defense

counsel and client. However, as this article has attempted to point out, also because of its uniquely hybrid and complex nature, the criminal white collar case presents special opportunities for defense counsel to effectively and successfully represent the client who faces potential criminal liability. ■

FOOTNOTES

1. *The Mobile Press Register* July 4, 1989, at 1.
2. *The Birmingham Post Herald* May 16, 1989, at 1.
3. *The Birmingham News* July 14, 1989, at 1E.
4. Paul R. Conolly, chairperson of the Section on Litigation of the American Bar Association (1977), quoted in M. Feeley, *The Process is the Punishment* (1979).
5. A. Reiss and A. Bideman, *Data Sources on White Collar Law-Breaking* 44 (1980).
6. Bucy, *Fraud by Frigate: White Collar Crime by Health Care Providers* 67 N.C.L. Rev. 871-881 (April 1989).
7. U.S. Const. amend. V; *U.S. v. White*, 322 U.S. 694 (1944).
8. *U.S. v. Doe*, 465 U.S. 605, 617 (1984).
9. *Braswell v. United States*, 108 S. Ct. 2284 (1988); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir. 1985).
10. See, e.g., *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982); *In re Grand Jury Proceedings, Balliro*, 558 F.2d 1177, 1179 (5th Cir. 1977).
11. See, e.g., *In re Honowitz*, 482 F.2d 72, (2nd Cir. 1973); *U.S. v. Blasi*, 462 F.Supp. 373, 374 (M.D. Al. 1979).
12. See, e.g., *U.S. v. Martinez*, 630 F.2d 361, (5th Cir. 1980) cert. denied 450 U.S. 922 (1981); *In re Matter of Investigative Grand Jury*, 480 F.Supp. 162, 166-68 (N.D. Ohio 1979); P.W. Tague, *Multiple Representation of Targets and Witnesses During a Grand Jury Investigation*, 17 Am. Crim. L. Rev. 301, 306-310 (1980).
13. *U.S. v. Schaffner*, 771 F.2d 149 (6th Cir. 1985); *U.S. v. Fayer*, 523 F.2d 661, 662 NA (2nd Cir. 1975); *U.S. v. Poppers*, 635 F.Supp. 1034, 1036-1037 (N.D. Ill. 1986) (the defendants who were convicted for attempting to "coach" a witness were not attorneys).
14. *Cf. Tedesco v. Mishkin*, 629 F.Supp. 1474, 1482 (S.D. N.Y. 1986).
15. *U.S. v. Smith*, 595 F.2d 1176, 1181 (9th Cir. 1979); *U.S. v. Smith*, 552 F.2d 257, 261 (8th Cir. 1977); *U.S. v. Gardner*, 516 F.2d 334, 338-339 (7th Cir. 1975) cert. denied 422 U.S. 861 (1976); but see *U.S. v. Carcaise*, 442 F.Supp. 1209, 1211 (M.D. Fla. 1978).
16. Victim and Witness Protection Act, 18 U.S.C. §3579; Alabama Temporary Rule of Criminal Procedure 10.
17. Ala. Code §34-24-360(4), (5), (6).
18. Ala. Code §34-2-34(3).
19. Alabama Rules of Disciplinary Procedure, Rule 4.
20. Ala. Code §34-11-11.
21. 18 U.S.C. §3161 et seq.
22. Federal Rule of Evidence 801(d)(2)(E).
23. 18 U.S.C. §3552; Federal Rule of Criminal Procedure 32(C); Ala. Code §34A-5-5; Alabama Temporary Rule of Criminal Procedure 3.

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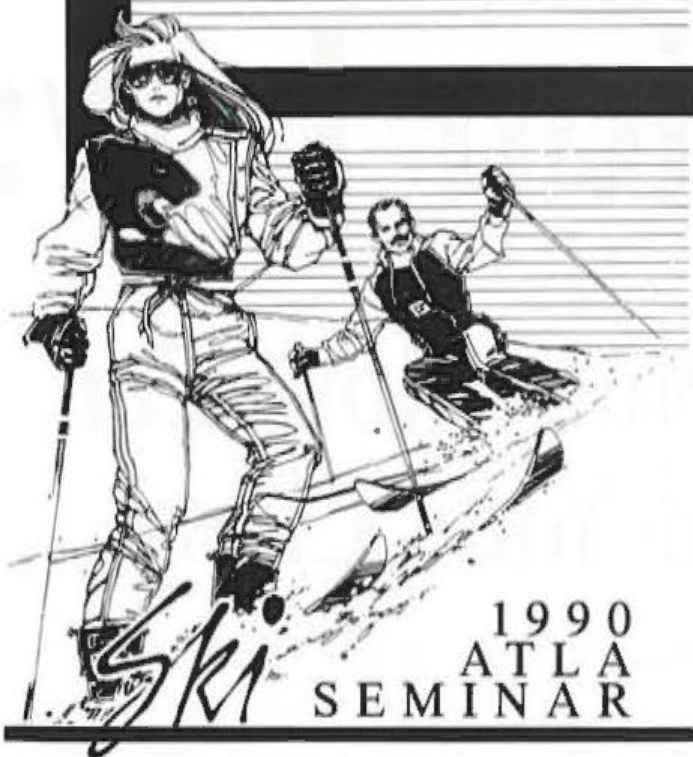
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Immigration Law:

What You Do Not Know Can Hurt You—and Your Client

by Karon O. Bowdre

Dateline: ATLANTA. The Atlanta district office of the Immigration and Naturalization Service (INS) has issued thirty-two notices of intent to fine employers for violations of the Immigration Reform and Control Act of 1986 (IRCA). That Act requires all employers to keep a record of the citizenship status of their new employees and prohibits the knowing employment of unauthorized aliens. The fines levied in the Atlanta district, which includes Georgia, Alabama, South Carolina and North Carolina, totalled \$349,550 as of March 3, 1989.

Thomas Fischer, the Atlanta district director, makes no bones that the INS is in a phase of stepped-up enforcement. The office has increased its en-

forcement staff from eight investigators a year ago to 20 investigators. Although the Atlanta office has the fewest number of investigators of the eight INS districts, the Atlanta district ranks second nationally in the amount of fines levied, and the number of fines for hiring violations and paperwork violations.¹

Why should an attorney in Alabama be concerned with immigration law? The answer should be obvious. The Immigration and Naturalization Service district office in Atlanta has become zealous in its enforcement of the Immigration Reform and Control Act of 1986 (IRCA).² Many Alabama businesses are still ignorant of the fact that every employer is now required to verify that each em-

ployee hired after November 6, 1986, is a United States citizen or an alien legally authorized to work. The civil and criminal fines imposed for knowing employment of an unauthorized alien or for failure to comply with the "paperwork requirements" can be costly.

The Ninth Circuit Court of Appeals recently became the first court to review sanctions imposed on an employer in a contested proceeding. In *Mester Manufacturing v. INS*, _____ F.2d _____ (9th Cir. No. 88-7296, June 23, 1989), the court affirmed the imposition by an administrative law judge of civil fines of \$500 each on six counts of knowing employment of unauthorized aliens. The court also rejected a challenge to the constitutionality of IRCA.

Lawyers must be prepared to advise their business clients concerning compliance with IRCA law and what to do when the INS pays a visit. Individual lawyers and firms also must be certain of their own compliance with IRCA. This article will examine the most significant provisions of IRCA applicable to employers—the "paperwork" requirements, employer sanctions for hiring illegal aliens and the anti-discrimination provisions. IRCA and INS regulations are complex and no attempt is made to provide an exhaustive analysis. The act and INS regulations should be consulted by the practitioner faced with interpreting and applying IRCA in a specific situation.

Karon O. Bowdre graduated from Samford University and Cumberland School of Law. She served as a law clerk to J. Foy Guin, Jr., federal judge for the Northern District of Alabama. Bowdre is a member of the Birmingham firm of Rives & Peterson.



Overview of IRCA

Concerned with the increasing problem of illegal aliens in this country, Congress passed the Immigration Reform and Control Act of 1986, often referred to as "IRCA." The most sweeping immigration act of the century, IRCA is at once a labor law, an immigration law, a civil rights law and a de facto statement of U.S. foreign policy. One of the most widely publicized aspects of IRCA was the opportunity it gave illegal immigrants to legalize their status through the one-time only amnesty process. The amnesty provision was applicable only to individuals who could prove that they illegally entered the United States prior to January 1, 1982, and who met certain other requirements. In excess of 1.7 million applications for legalization were filed before the May 4, 1988, deadline. As of the

end of February 1989, INS has approved 1.3 million applications and denied 33,000 requests for legalization. IRCA also established a similar program for special agricultural workers.

The continuing effect of IRCA will be felt most strongly in the employment arena. To cut out the availability of jobs—the principal reason immigrants come to the U.S. illegally—IRCA for the first time makes it illegal to knowingly employ unauthorized aliens.³ IRCA defines "unauthorized alien" as an alien not lawfully admitted for permanent residence (a "green card" holder) or not authorized to work, either through the Immigration and Naturalization Act, or by the INS.⁴ An alien is anyone who is not a citizen or national of the United States. The complexities of determining who is and who is not authorized to work will be subsequently discussed.



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To accomplish the desires of Congress and reduce the flow of illegal immigrants into the United States, IRCA in effect deputizes employers as "junior immigration inspectors."⁵ Employers are called upon to review certain documents, including INS documents concerning immigration status, to determine whether an individual is legally authorized to work. The effect on employers is three-fold: (1) fines of up to \$10,000 per unauthorized alien, and imprisonment can be imposed for knowingly employing illegal aliens; (2) new verification and record-keeping requirements apply to all employees hired after November 6, 1986, even if a United States citizen; and (3) employers are precluded from discrimination in hiring or firing on the basis of a person's national origin or citizenship status.

The paperwork requirements and employment sanctions of IRCA apply to all employers regardless of size. The antidiscrimination prohibition applies to all employers who employ more than three employees. IRCA exempts two categories of employees: casual domestic employees

and independent contractors. INS regulations limit the exemption for casual employment to only individuals who provide "domestic service in a private home that is sporadic, irregular, or intermittent."⁶ The "sporadic, irregular or intermittent" use of a maid or babysitter would not require a family to verify employment authorization. The regular employment of that same person as a maid or babysitter would require verification of work authorization and could subject the family to sanctions for violation of IRCA. Although INS officials have stated they will not harass families concerning domestic workers,⁷ one Atlanta family was fined \$1,000 when it filed a labor certification for its unauthorized alien housekeeper. Likewise, the law firm who employs part-time office help, even "sporadic," must comply with IRCA since the service is neither domestic nor provided in a home.

The exception of independent contractors may be deceptive because IRCA specifically precludes the use of a contractor or subcontractor to knowingly obtain the labor of an unauthorized alien.⁸ Thus,

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the use of an individual contractor may not insulate the business from liability. Related definitions of "employee" and "independent contractor" as used by the National Labor Relations Act and the Internal Revenue Service might be helpful in determining the nature of the relationship in a specific circumstance. To determine whether a particular business relationship qualifies for the independent contractor exception, counsel should study the related INS regulations.⁹

IRCA sanctions also do not apply to employees hired before November 7, 1986. Thus, an employer may continue to employ an illegal alien hired prior to that date without fear of violating IRCA. "Grandfathered" workers, however, are not conferred any special legal status or work authorization. Such aliens are still subject to apprehension by INS and subsequent deportation. Only one employer—the present one—can employ them without violating the law. These grandfathered alien workers are therefore in a predicament and subject to exploitation by their employers.

Verification requirements

One requirement of IRCA which affects virtually all employers regardless of the citizenship status of the employees concerns verification and documentation that the employees are authorized to work in the United States. IRCA requires all employers to (1) verify the authorization to work of each employee hired after November 6, 1986; (2) keep appropriate records to establish that the employer in fact made such verification; and (3) present these records upon request to agents of INS or the Department of Labor ("DOL"). These "paperwork requirements" apply to U.S. citizens as well as alien employees, and compliance is required of all employers.

The employer must verify both the identity of the employee and his authorization to work. An employee can demonstrate those facts through presentation of certain documents. The employer must certify on INS Form I-9, under penalty of perjury, that each person hired after November 6, 1986, is not an unauthorized alien. The person hired also must certify on the same form, under penalty of perjury, that he is not an unauthorized alien.

The I-9 form contains two sections. The first section regarding biographical information must be supplied by the employee under penalty of perjury. The employee, by checking the appropriate box and signing his name, must state that he is either (1) a citizen or national of the United States; (2) an alien lawfully admitted for permanent residence, in which case the alien registration number must be provided; or (3) an alien authorized by the INS to work in the United States, in which case the alien identification number or admission number must be supplied, along with the expiration date, if any, of the employment authorization.

The second section of the I-9 form contains three lists of documents the employer must use to validate that the appropriate documentation of identity and eligibility to work were examined. That portion of the form is reproduced below.

//2/ EMPLOYER REVIEW AND VERIFICATION: (To be completed and signed by employer.)

Instructions:

Examine one document from List A and check the appropriate box, OR examine one document from List B and one from List C and check the appropriate boxes. Provide the Document Identification Number and Expiration Date for the document checked.

List A

- Documents that Establish Identity and Employment Eligibility
- //1. United States Passport
 - //2. Certificate of United States Citizenship
 - //3. Certificate of Naturalization
 - //4. Unexpired foreign passport with attached Employment Authorization
 - //5. Alien Registration Card with photograph

Document Identification

Expiration Date (if any)

- List B
Documents that Establish Identify
- //1. A State-issued driver's license or a State-issued I.D. card with a photo-

graph, or information, including name, sex, date of birth, height, weight, and color of eyes.

(Specify State) _____

//2. U.S. Military Card

//3. Other (Specify document and issuing authority)

Document Identification

Expiration Date (if any)

List C

Documents that Establish Employment Eligibility

- //1. Original Social Security Number Card (other than a card stating it is not valid for employment)
- //2. A birth certificate issued by State, county, or municipal authority bearing a seal or other certification.
- //3. Unexpired INS Employment Authorization

Specify form

Document Identification

Expiration Date (if any)

CERTIFICATION: I attest, under penalty of perjury, that I have examined the documents presented by the above individual, that they appear to be genuine and to relate to the individual named, and that the individual, to the best of my knowledge, is eligible to work in the United States.

Signature Name (Print or Type) Title

Employer Name Address Date

Form I-9(05/07/87) U.S. Dept. of Justice

OMB NO. 1115-0136

Immigration and Naturalization Service

Employers confused by the various immigration documents will find no help from the INS in determining who is or is not authorized to work. INS has taken the position that it will not respond to requests from employers to verify the employment of individuals. Before opting for the easy way and refusing to hire anyone who is not a United States citizen, employers must recognize that IRCA also precludes discrimination in employment based on national origin or citizenship.

Of course, an employer must reject an applicant or terminate an employee who is an unauthorized alien. The antidiscrimination provisions will be discussed in more detail subsequently.

It may be difficult for an employer, or even an attorney, unschooled in immigration law to determine just what documents can be used for "INS employment authorization" as referenced in "List C" on the I-9 form. The INS regulations list the following types of documents which reflect INS employment authorization: unexpired re-entry permit, INS Form I-327; unexpired refugee travel documents, INS Form I-571; Certification of Birth issued by the Department of State, Form FS-545; Certification of Birth Abroad issued by the Department of

State, Form DS-1350; native American tribal document; U.S. citizen identification card, INS Form I-197; identification card for use of resident citizen of the United States, INS Form I-179; and any "employment authorization document issued by" the INS.¹⁰

This latter category may cause additional confusion because 26 classes of aliens are authorized to be employed merely because of their status.¹¹ Aliens in 11 of those classes can accept employment without any restriction as to the employer, although the period of employment may be limited in duration. Examples of aliens in these classes include refugees, asylees and aliens admitted as fiancé(e)s of U.S. citizens. Aliens within these classes should have an INS docu-

ment, such as form I-94, evidencing employment authorization. The other 15 classes of aliens authorized to accept employment by virtue of their status can only be employed by specific employers. Examples of these classes include non-immigrant temporary workers with an "H" visa or inter-company transferees with an "L" visa whose employers filed petitions on their behalf; non-immigrant diplomats and representatives of international organizations; and non-immigrants with "E" visas in the United States as investors or traders pursuant to treaties with the alien's country. For each of these classes, the evidence of the particular immigration status provides authority to work. These categories can also pose further problems to the uneducated employer. For example, an alien with an H-1 non-immigrant visa as a person of distinguished merit and ability is authorized to work, but only for a particular employer and only for a limited time. If that alien applies for a different job, presenting a social security card and valid driver's license, that potential employer will have no reason to know the alien is not authorized to accept that job.

To further complicate the verification process, there are 15 other categories of aliens who may apply for work authorization on a case-by-case basis. Examples include asylum applicants, applicants for adjustment to lawful permanent resident alien status, applicants for suspension of deportation, and foreign students who qualify for practical training. If granted employment authorization, these aliens are normally issued an INS Form I-94, or INS Form I-201D for foreign students, with an endorsement noting work authorization. Although normally unrestricted as to employer, in certain cases employment authorization may be limited to a specific employer.

If an employee is unable to produce verification documents within three business days of hire, he may present a receipt showing that application has been made for the document. The document must then be produced within 21 business days of the date of hire.¹² Under the literal reading of the regulations, if the document is not presented within 21 days, the employment must be terminated. Such results appear harsh since in many cases the issuing authority will not respond to a request for the document



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within 21 days. This is especially true if INS is the issuing agency. Termination may present a larger business risk than technical non-compliance with the regulations. Before terminating an employee in such a situation, the employer should secure legal advice.

After reviewing the documents presented by the employee, the employer must check the appropriate box on the I-9 form and provide the document identification number and expiration date of any of the document examined. The employer must certify, under penalty of perjury, that the documents presented appear to be genuine, that they appear to relate to the named individual, and that the individual is eligible to work in the United States to the best of the employer's knowledge. The employer is not charged with being an expert on the authentication of immigration documents, but only must certify that the documents reasonably appear to be genuine. An employer cannot require the employee to produce a particular type of documentation.¹³ Instead, the employer must accept the document tendered by the employee if it appears genuine and is listed on the I-9 form or INS regulations. The individual signing the form on behalf of the employer must have actually seen the documentation presented by the employee.

Although not required, IRCA authorizes an employer to photocopy the verification documents. Some immigration documents, such as certificates of naturalization and citizenship, ordinarily may not be copied. That prohibition has been waived if the documents are photocopied as part of the verification process. If copies are made, they must be attached to the I-9, retained with it and used solely for the purpose of compliance with IRCA. There is some debate among immigration attorneys as to the advisability of photocopying these verification documents. The retention of these documents take up additional space and may generate questions from INS concerning the authenticity of the documents. Also, inconsistency in retention of documentation could lead to a discrimination charge. On the other hand, most immigration lawyers recommend retention of copies of the employees' documents for several reasons: (1) it proves that the employer actually examined the documents;

(2) it shows a good faith effort to comply; and (3) it provides evidence if compliance is later challenged.

The completed I-9 forms must be retained for at least three years from date of hire or one year after the termination of the employment, whichever is later. INS regulations do allow the retention of I-9s on microfilm or microfiche under certain circumstances.¹⁴ Although I-9s must be produced upon request to INS or DOL officials, other personnel records are not subject to inspection. It is thus wise to keep I-9s separate from other personnel or business records. Such a procedure would avoid giving INS or DOL access to other documents as well as facilitate compliance with inspection requests. No subpoena or warrant is re-

quired for inspection of I-9s, although three business days' notice must be given to the employer.¹⁵

IRCA paperwork requirements apply to all employees hired after November 6, 1986. During the initial phase-in of the requirements, employers were given until September 1, 1987, to complete I-9s for all employees hired after November 6, 1986, who were still employed as of May 31, 1987. I-9s for individuals hired after June 1, 1987, are to be completed within three business days of the date of hire. Employers who do not have completed I-9s for their employees are in violation of IRCA and subject to fines from \$100 to \$1,000 for each employee for whom there is no I-9. A fine may be levied regardless of whether the em-



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ployer has ever hired an illegal alien. Mitigating factors to be considered in determining the amount of the fine include the size of the business, the good faith of the employers, whether or not an unauthorized alien was employed, and any previous violations.¹⁶ Unlike the criminal penalties for hiring illegal aliens, there are no corresponding penalties for repeated violations of the paperwork requirements.

"Knowingly" hiring unauthorized workers

To put teeth into the provisions of IRCA, Congress established a system of civil and criminal penalties for the knowing employment of illegal aliens. These sanctions apply to all employers, regardless of size. The civil fines range from \$250 to \$2,000 per unauthorized alien for first violations. Fines for second violations range from \$2,000 to \$5,000 per unauthorized alien, with fines rising to a minimum of \$3,000 and a maximum of \$10,000 per unauthorized alien for subsequent violations. Criminal penalties

of imprisonment for up to six months and/or \$3,000 fine per unauthorized alien may be imposed for persons engaged in a "pattern or practice" of IRCA violations. For purposes of determining the number of violations per employer for fixing a fine, independent subdivisions count as separate employers under certain circumstances. The subdivision must be a physically separate subdivision with autonomy in employment practices.¹⁷

IRCA prohibits employers from "knowingly" hiring or continuing to employ an unauthorized alien. The sanctions only apply to "knowing" violations. Consequently, "knowing" may well be the most important word in the entire employer sanctions portion of IRCA. Unfortunately, neither IRCA nor the INS regulations define "knowing." The nuances of that term will have to be determined on a case-by-case basis by administrative law judges and federal courts. Presumably, from the legislative history and the statutory scheme, more than mere negligence should be required. The traditional

requirement of actual knowledge, as opposed to objective "reason-to-know" standard, should apply.

The prohibition of continuing employment¹⁸ of an alien who is originally authorized to work but who has become unauthorized presents a special problem for the employer. Several types of work authorization have limited duration. Employers who have submitted nonimmigrant petitions for temporary works ("H" visa holders) or intercompany transferees ("L" visa holders) or trainees under exchange programs (J-1) must keep up with the expiration dates. The employer will be deemed to have actual knowledge of the expiration of the period of work authorization and will be in violation of IRCA if the employment is not terminated.

Antidiscrimination provisions

The antidiscrimination provisions of IRCA extend the preclusion of national origin discrimination to employers with four to 14 employees who would not be covered by Title VII.¹⁹ IRCA does allow an employer to select a United States citizen over an authorized alien if both are "equally qualified."

Complaints of discrimination in violation of IRCA must be filed initially with the special counsel for Immigration-Related Unfair Employment Practices within the Department of Justice within 180 days of the alleged discriminatory act. Private parties or INS officers may make such complaint. Special counsel must decide within 120 days whether to file a complaint with an administrative law judge. If no complaint is filed by special counsel, the individual (but not INS) may file a complaint with the administrative law judge.

If unlawful discrimination is found by the ALJ to have occurred, the following may be ordered: cease and desist order; hiring the affected individual(s) with or without back pay; and fines of up to \$1,000 per individual for first violations and up to \$2,000 per individual in the case of repeat offenses. As with employer sanctions, separate corporate subdivisions are treated individually for determining the number of violations.

Conclusion

The complex system of immigration used in this country makes compliance

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with IRCA difficult. An underground market for falsified social security cards and immigration documents is spreading through the country. Spotting bogus documents may be easy for INS inspectors but difficult for employers. Attorneys have an obligation to inform clients of the need to comply with IRCA and must be prepared to provide competent assistance to them in the difficult decisions they may face.

FOOTNOTES

1. Compiled from: INS Atlanta District Memorandum re: Employer Sanctions Operations, from Neil Jacobs to Thomas P. Fischer, March 3, 1989; Fulton County Daily Report, Nov. 1, 1988.
2. Pub. L. No. 99-603, 100 Stat. 3359 (codified in various sections of B USCA) (Supp. 1988).
3. IRCA applies to any entity that recruits or refers for a fee applicants for employment, as well as the actual employer. B USCA §1324(a)(1)(A)(Supp. 1988). Under INS regulations, however, recruiters and referrers for a fee are only required to verify the status of individuals actually hired by the employer. B C.F.R. §274a.2(b)(1)(iv)(1988). In most cases, this will mean merely obtaining a copy of the verification form (I-9) from the employer. This article will only focus on IRCA as it applies to employers.
4. B USCA §1324a(h)(3) (Supp. 1988).
5. Robert & Yale-Loehler, "Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act", 21 Int'l Law. 1013 (1987).
6. B C.F.R. §274a.1(b) (1988).
7. N.Y. Times, Oct. 26, 1986, at A16, col. 1.
8. INA §274A(a)(4); B C.F.R. §279a.5 (1988).
9. B C.F.R. §274a.1(j)(g) (1988).
10. B C.F.R. §274a.2(b)(1)(v)(C) (1988).
11. B C.F.R. §274a.12(a), (b) (1988), as amended at 53 Fed. Reg. 8,614 (1988).
12. B C.F.R. §274a.2(b)(1)(vi) (1988), as amended by 53 Fed. Reg. 8,613 (1988).
13. B C.F.R. §274a.2(b)(1)(v) (1988), as amended by 53 Fed. Reg. 8,612-13 (1988).
14. B C.F.R. §274a.2(b)(2)(ii) (1988).
15. B C.F.R. §274a.2(b)(2)(iii) (1988).
16. B USCA §1324a(e)(5)(Supp. 1988).
17. B USCA §1324a(e)(4)(Supp. 1988).
18. B USCA §1324a(a)(2)(Supp. 1988).
19. B USCA §1324b(a)(1)(Supp. 1988).



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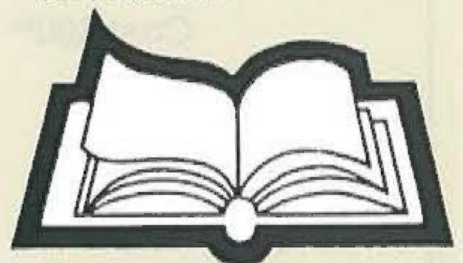
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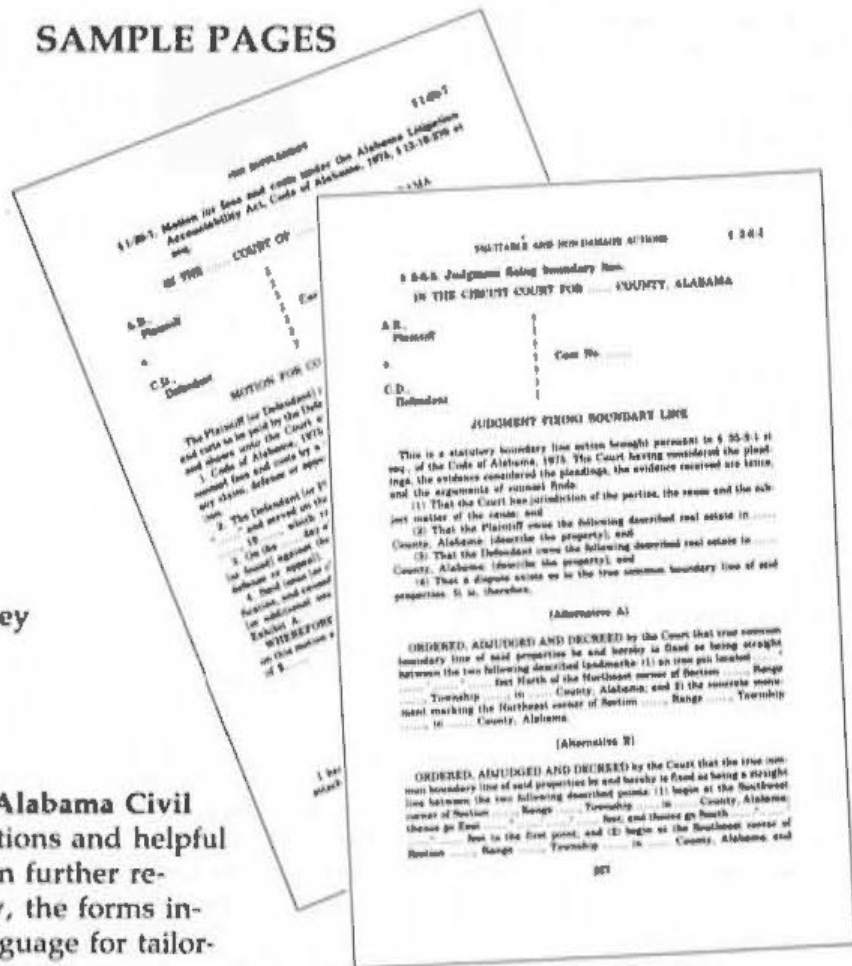
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Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

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

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MARION

Marion County

Marion County was created in 1818 by the Alabama Territorial Legislature. The original county lines included the present-day counties of Marion, Lamar, Pickens, Greene, Sumter, Fayette, Walker, Winston and parts of Tuscaloosa and Choctaw. The county was reduced in size in 1820 by an act of the Legislature, and further reduced in 1824 and 1850. The current boundary was created in 1866 when Lamar County was carved from the counties of Marion and Fayette. The county was named for General Francis Marion, the "Swamp Fox" of the American Revolution. Many of the first settlers came from South Carolina, Marion's home state. This name reflects the South Carolina influence on west Alabama. Other counties named for South Carolina heroes are Pickens, Greene and Sumter.

On December 6, 1819, election precincts were established by the Legislature for Marion County, and the home of Henry Greer (Grier) near Buttahatchee was designated the first courthouse. On December 19, 1820, a six-member commission was appointed to select a permanent county seat. The town of Pikeville was chosen by the commissioners, and the courthouse remained there for the next 62 years.

Pikeville was once a very important town. Few records exist today, but some sources state that early Pikeville had a hat factory, a bakery, several stores, hotels, saloons and over 300 people. An important telegraph line passed through the town. One account reported that Pikeville, in the early days, had as much promise as Chicago, and more people.

Local tradition says that two or possibly three courthouses were constructed in Pikeville. No records or evidence exist concerning their size, location or description. Pikeville today is a ghost town. The area is located approximately midway between Guin and Hamilton.

An interesting accident of Alabama geography surrounds the site of Pikeville. When present-day Lamar County was created by the Legislature, land was taken from Marion and Fayette counties. Unwittingly, the Legislature placed the county seat of Pikeville just across the northeast corner of the newly created county. Thus, the Marion County Courthouse was unknowingly removed from Marion County.

The next Legislature adjusted the situation by returning one square mile back to Marion County. Present-day maps still show a tiny nick in the northeast corner of Lamar County. That nick is the location of Pikeville.

Pikeville was the home of longtime Marion County Probate Judge John E. Terrell, Jr. Terrell was the son of a delegate to the original Alabama Constitutional Convention. His father was later a state

senator, and a state representative. Judge Terrell, commonly called Jack, was an excellent politician in his own right. He served as probate judge for over 40 years. Judge Terrell was also a practicing physician. It was reported that he made house calls all over Marion County, but never charged fees; he earned his livelihood as probate judge. His grateful, non-paying patients always assured that he was re-elected.

Shortly after the Civil War, one of Judge Terrell's daughters, Mary Louise, married a former Confederate officer, Captain Albert James Hamilton. As a wedding gift Judge Terrell gave the couple \$1,000. They used the money to purchase 1,000 acres of farm land near a little hamlet known as Toll Gate. Toll Gate was originally established around 1818, serving as a toll station on the Washington, D.C.-to-New Orleans road.

Judge Terrell's son-in-law became a successful planter and merchant. Captain Hamilton also served in the state legislature and was an important politician. Since Pikeville was no longer centrally located in post-Civil War Marion Coun-



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



Marion County Courthouse

ty, he led an effort to move the county seat. In 1882 a vote was taken between Toll Gate and the geographical center of the county, called Center, located three miles east of Toll Gate. In the election, Toll Gate was selected by the voters. Captain Hamilton then donated 40 acres of land to be divided into lots and sold at public auction to finance the construction of a courthouse. Inadvertently, Hamilton's own residence was located in the 40-acre tract. He had to buy back his

own home at the public sale. On November 17, 1882, the name Toll Gate was changed to Hamilton in honor of the town's generous benefactor.

A wooden courthouse was built in Hamilton in 1882. It was constructed of heart pine, and had four brick chimneys and wide porches on the north and south sides. It had both up and down stairs for the use of the public. This first courthouse in Hamilton was destroyed by fire in April 1887.

The second Hamilton courthouse also was of wood, and it served the county until 1902. Then the structure was moved west across the court square and converted into a hotel. This building burned in a fire in 1912.

The cornerstone of the next courthouse was laid in 1900. Judge William R. White was probate judge. This building was constructed in the Richardsonian Romanesque style which was popular in that day. The courthouse was built of rough sandstone and featured a massive five-story clock tower. It was completed in 1902.

In 1940 the county undertook an extensive renovation of the courthouse which was completed in 1941. Charles H. McCauley of Birmingham designed the plans. He added an east and west wing with Greek Revival style porticoes gracing each entrance. The clock tower was retained.

The courthouse was again modernized and enlarged in 1960. This time the clock tower was removed and the roof line leveled. Offices were added to the north and south sides, thus completely surrounding the 1902 courthouse. Modern facades replaced the Greek Revival entrances. The contractor for this project was the Renfroe Construction Company. Again the architect was Charles H. McCauley of Birmingham. ■

MCLE News

by
Keith B. Norman

The Mandatory CLE Commission held its July 19, 1989, meeting during the Alabama State Bar meeting at the Hilton Hotel in Huntsville. At this meeting the Commission:

1. Recommended to the nominating committee of the board of bar commissioners and the president the names of commissioners to succeed Phillip E. Adams of Opelika and H. Wayne Love of Anniston as members of the MCLE Commission; (Charles M. Crook of Montgomery and Arthur F. Fite, III, of Anniston were selected by the board of bar commissioners to fill these vacancies);

2. Recommended to the nominating committee of the board of bar commissioners and the president that MCLE Commission member James R. Seale of Montgomery be appointed chairperson;

3. Approved a waiver of Regulation 5.2 on a one-time basis for an out-of-state bar member holding a regular membership;

4. Approved for CLE credit the following mixed-audience seminars offered by a presumptively approved sponsor: Estate Planning, 6.0 credits; the S Corporation, 6.0 credits; and Emerging Issues in Health Care Law, 6.0 credits;

5. Approved for 12.3 CLE credits a

mixed-audience seminar on hospital law;

6. On appeal by the sponsor, upheld the director's decision denying accreditation to a mixed-audience seminar on vocational disability.

The MCLE Commission considered and approved several regulation changes. Additionally, the commission recommended a modification to the MCLE rules for the Alabama Supreme Court's consideration. These regulation changes and proposed rule changes will be included in the November issue of *The Alabama Lawyer*. ■

Litigation After Bankruptcy or Relief is Only a Court (or Two Away)

by
Romaine S. Scott, III

Litigators face a dilemma. Put simply, what does a lawyer do when a defendant in a pending state or federal court case files bankruptcy? That dilemma has become even more perplexing as a result of a recent, unpublished Eleventh Circuit Court of Appeals opinion that may mean the same case will have to be tried at least twice: once before the bankruptcy court and then before the nonbankruptcy court.

Consider this: A complaint is filed by a number of plaintiffs in a United States District Court asserting state and federal law claims against several defendants. The case has been pending for more than one year and has had issues decided on appeal by the circuit court of appeals even before discovery has begun. The way is cleared finally to initiate discovery in the case which seeks millions of dollars in compensatory and punitive damages when one of the key defendants files

bankruptcy. The plaintiffs receive a notice or suggestion of stay on bankruptcy, and the entire case comes to a halt while the various parties try to sort out where the case goes from that point.

This article will discuss what the bankruptcy and nonbankruptcy lawyer alike should know about the requirements for obtaining relief to proceed with a case against a bankruptcy debtor-defendant in the nonbankruptcy forum, including the ramifications of a recent United States Eleventh Circuit Court of Appeals opinion which appears to increase the likelihood that the case will have to be tried, at least in part, before both courts.

The law

The underlying basis for the cessation of any pending state or federal court action against a debtor in bankruptcy is 11 U.S.C.A. §362(a)(1), which, upon the filing of a debtor's bankruptcy petition,

gives rise to an immediate, automatic stay of "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this Title [Title 11 of the United States Code], or to recover a claim against the debtor that arose before the commencement of the case under this Title . . ." 11 U.S.C.A. §362(a)(1).

The first step in seeking relief to proceed with a pending nonbankruptcy court action against the debtor is to file a motion under Bankruptcy Code §362(d)(1). That section provides that relief from the automatic stay ". . . such as by terminating, annulling, modifying, or conditioning such stay" shall be granted "(1) for cause . . ." 11 U.S.C.A. §§362(d) and 362(d)(1). The word "cause" has been variously defined by numerous courts, many of which have looked to the legislative history behind the code section for guidance. See *In re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1986); *Matter of Holtkamp*, 669 F.2d 505 (7th Cir. 1982); *In re: Newport Offshore, Ltd.*, 59 B.R. 283 (Bkrcty. D.R.I. 1986); *Matter of Rabin*, 53 B.R. 529 (Bkrcty., N.J. 1985), and *In re Rounseville*, 20 B.R. 892 (Bkrcty. D.R.I. 1982).

The Rhode Island Bankruptcy Court, in *In re Newport Offshore, Ltd.*, discussed the congressional policy and general rule of law as follows:

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Congress recognized that it would be proper for the automatic stay to be lifted under certain circumstances:

"[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere."

H.R. Rep. 595, 95th Cong., 1st Sess. 341 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 50 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6297

" . . . It has not been demonstrated that a major purpose of Sec. 362, the prevention of dissipation of the debtor's assets during the pendency of the case, and avoidance of multiplicity of claims against the estate in different courts, see *Carter v. Larkham* (*In re Larkham*), 31 B.R. 273, 276 (Bankr. D. Vt. 1983), would be furthered by denying Mattingly's motion for relief from the stay. To the contrary, all present indications are that the litigation of this dispute in the state court will not delay administration of the estate or have any other detrimental impact on this Chapter 11 case.

"When neither prejudice to the bankruptcy estate nor interference with the bankruptcy proceeding is demonstrated, the *desire* of a stayed party to proceed in another forum is sufficient cause to warrant lifting the stay. (Emphasis added)."

Id. at 276 (relief from stay granted to permit plaintiff to proceed with employment discrimination action against debtors, pending in federal district court).

59 B.R. at 285. See *In re Unioil*, 54 B.R. 192 (Bkrcty. D. Colo. 1985); *Matter of Rabin*, 53 B.R. 529; *In re Humphreys Pest Control Co., Inc.*, 35 B.R. 712 (Bkrcty. E.D. Pa. 1984); *In re Hoffman*, 33 B.R. 937 (Bkrcty. W.D. Okla. 1983), and *In re Rounseville*, 20 B.R. 892, in each of which the bankruptcy courts granted creditors relief to proceed in federal or state court against a debtor in bankruptcy.



The court, in *Unioil*, set out an extensive set of factors to be considered in determining whether "cause" exists to grant relief from the stay to allow a case to proceed against a debtor to liquidate a claim in a nonbankruptcy court:

Although "cause" is not defined in the Bankruptcy Code, case precedent establishes certain factors to be considered in deciding whether to lift a stay. The court in *Curtis* set forth 12 such factors. These factors include:

- (1) Whether the relief will result in a partial or complete resolution of the issues.
- (2) The lack of any connection with or interference with the bankruptcy case.
- (3) Whether the foreign proceeding involves the debtor as a fiduciary.
- (4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases.
- (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation.
- (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question.
- (7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.
- (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c).
- (9) Whether the movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f).
- (10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties.
- (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.
- (12) The impact of the stay on the parties would balance the hurt.

54 B.R. at 194 (citing *In re Curtis*, 40 B.R. 795 [Bkrcty. D. Utah 1984]). The court decided that not all factors should be applied in every case, considered four of the factors and went on to add a factor in reaching a conclusion that relief from the stay should be granted in the case. *Id.* at 195-96.

The additional factor considered by the court was the misconduct of the debtor. See *id.* at 195. In discussing misconduct as a factor, the court quoted *In re Highcrest Management Co., Inc.*, 30 B.R. 776, as follows:

"Cause may include misconduct The class action in the District Court is predicated on alleged misconduct and bad faith on the part of the debtors. The automatic stay should not be used as a shield to protect conduct which can only be fully and finally adjudicated in a case pending in the District Court."

Id. at 195.

In *Matter of Rabin*, the court summarized all of the usual legal criteria necessary to find "cause" sufficient to support granting relief from stay:

" . . . where the civil action is not connected, nor interfering with the bankruptcy proceedings, to lift the stay would not thwart the underlying purpose of the automatic stay, namely to preserve the Debtor's estate and to provide a systematic and equitable plan for repayment and reorganization; further, that the expertise of the Bankruptcy Court was not necessary to a determination of the pending civil action; and, finally, that the interest of judicial economy warranted lifting of the stay because of the eminence of the trial."

53 B.R. at 532. When construed together, the holdings in each of the cases quoted hereinabove stand for the proposition that a bankruptcy court shall grant relief for "cause" when the relief is sought by a creditor to proceed in a nonbankruptcy court with a state law cause of action or a nonbankruptcy federal cause of action, the proceeding would not prejudice the bankruptcy estate and judicial economy would be served because the parties have

prepared for the nonbankruptcy proceedings or because the duplicitous litigation would result otherwise, and the expertise of the bankruptcy court is not necessary to a determination of the pending litigation. See generally, *In re Todd Shipyards Corporation*, 92 B.R. 600 (Bkrcty. D. N.J. 1988); *In re Turner*, 55 B.R. 498 (Bkrcty. N.D. Ohio 1985); *In re Unioil*, 54 B.R. 192; *In re 343 East 43rd Street Holding Corp.*, 46 B.R. 562 (S.D. N.Y. 1985); *In re Humphreys Pest Control Co., Inc.*, 35 B.R. 712; *In re Steffens Farm Supply, Inc.*, 35 B.R. 73 (Bkrcty. N.D. Iowa 1983); *In re Highcrest Management Co., Inc.*, 30 B.R. 776, and *Matter of McGraw*, 18 B.R. 140 (Bkrcty. W.D. Wis. 1982).

Nondischargeability as a factor

Other courts have applied various factors within the *Curtis* list but none appears to have required a showing that the debt sought to be liquidated in the nonbankruptcy court is nondischargeable under 11 U.S.C.A. §523. See, e.g., *In re Olmstead*, 608 F.2d 1365 (10th Cir. 1979); *In re Turner*, 55 B.R. 498 (Bkrcty. N.D. Ohio 1985); *In re Unioil*, 54 B.R. 192; *In re 343 East 43rd Street Holding Corp.*, 46 B.R. 562 (S.D. N.Y. 1985); *In re Humphreys Pest Control Co., Inc.* 35 B.R. 712; *In re Steffens Farm Supply, Inc.*, 35 B.R. 73 (Bkrcty. N.D. Iowa 1983); *In re Hoffman*, 33 B.R. 937 (Bkrcty. W.D. Okla. 1983), and *Matter of McGraw*, 18 B.R. 140 (Bkrcty. W.D. Wis. 1982). This observation is significant because it is the nondischargeability factor that was implicitly addressed by the Eleventh Circuit Court of Appeals recently in an unpublished opinion affirming a district court's and a bankruptcy court's decision that would require plaintiffs to prove any judgment they might receive in a pending nonbankruptcy court case against the debtor would be nondischargeable as a prerequisite to being allowed to proceed to judgment in the nonbankruptcy court case. See *In re: Robert Jennings Underwood; Richard Durham, et al. v. Robert J. Underwood*, No. 88-7385 (11th Cir. February 14, 1989).

In that case, 18 plaintiffs filed a lawsuit in federal district court against eight defendants, asserting the Racketeering Influenced Corrupt Organizations Act ("RICO"), state law fraud and securities violations. The case had been pending

for 14 months and had been to the Eleventh Circuit Court of Appeals on some issues when one of the key defendants filed his petition under Chapter 7 of the Bankruptcy Code. The plaintiffs filed a motion for relief from the automatic stay of 11 U.S.C.A. §362(a)(1) seeking to proceed to judgment in the federal district court case but providing specifically that no action to execute on any judgment obtained against the debtor would be taken without approval of the bankruptcy court.

The bankruptcy court held in its order denying the relief sought by the plaintiffs that:

"It has not yet been demonstrated to the satisfaction of this Court that the claims of Movants against Debtor are nondischargeable, and only in the event of such nondischargeability would it be meaningful for the Movants to pursue their claims against the Debtor in the litigation presently pending in the United States District Court for this District. The issues on dischargeability are narrower in most instances than the scope of litigation in the District Court which includes asserted civil liability under RICO and the securities acts.

"Movants may file a complaint in an adversary proceeding to determine the dischargeability of any of the claims they have against the Debtor. Despite their protest to the contrary, the Court considers that the proof of dischargeability would be less burdensome than proving the entire substantive case against the Debtor and others."

In the Matter of: Robert Jennings Underwood, case no. 87-10133 (Bkrcty. N.D. Ala. January 26, 1988). The findings of the bankruptcy court as set forth hereinabove indicate the court considered nondischargeability to be a factor in determining whether relief from the stay should be granted and imply that any creditor seeking relief to proceed in a nonbankruptcy forum must first prove that the creditor's claim, once liquidated by the nonbankruptcy court, will yield a nondischargeable debt.

The import of such a ruling is that any creditor caught in the middle of pending nonbankruptcy court litigation when a

defendant files bankruptcy must then immediately file, in addition to a motion for relief from a stay, an adversary proceeding in the bankruptcy court alleging that the debt it might liquidate in the non-bankruptcy court will be nondischargeable under 11 U.S.C.A. §523. Section 523 provides several enumerated reasons why a debt may not be discharged through the debtor's bankruptcy case so that the debtor remains liable to pay the debt even after the bankruptcy case has been concluded. See 11 U.S.C.A. §523. Nondischargeability of such debts usually is predicated on the debts having been incurred by fraud or as a result of willful or malicious injury to another or another's property. See 11 U.S.C.A. §§523(a)(2) and 523(a)(6).

The plaintiffs in *Underwood* argued that bankruptcy law does not require a determination of nondischargeability prior to granting relief from the stay. See generally, *Casperone v. Landmark Oil & Gas Corp.*, 819 F.2d 112 (5th Cir. 1987) (determination of nondischargeability rightfully reserved by bankruptcy court after granting relief from stay to proceed

with RICO claim in District Court); *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982) (dissolving injunction against state criminal proceeding indicating proceeding should go forward in state court even if debt later determined dischargeable by bankruptcy court); *In re Olmstead*, 608 F.2d 1365 (10th Cir. 1979); *In re Hoffman*, 33 B.R. 937 (Bkrcty. W.D. Okla. 1983). See also, *In re Turner*, 55 B.R. 498 (Bkrcty. N.D. Ohio 1985); *In re Unioil*, 54 B.R. 192; *In re 343 East 43rd Street Holding Corp.*, 46 B.R. 562 (S.D. N.Y. 1985); *In re Humphreys Pest Control Co., Inc.*, 35 B.R. 712; *In re Steffens Farm Supply, Inc.*, 35 B.R. 73 (Bkrcty. N.D. Iowa 1983); *In re Highcrest Management Co., Inc.*, 30 B.R. 776, and *Matter of McGraw*, 18 B.R. 140 (Bkrcty. W.D. Wis. 1982), all of which granted creditors relief to proceed in federal or state court without requiring any showing as to the nondischargeability of the debt sought to be liquidated in the nonbankruptcy court.

Even if the debt is dischargeable, the creditor has a right to liquidate it and to share in whatever distribution is made to holders of unsecured claims. See *In re*

Olmstead, 608 F.2d 1356; *In re Wheeler Group, Inc.*, 75 B.R. 200 (Bkrcty. S.D. Ohio 1987) ("The liquidation of claims is a necessary step in bringing any bankruptcy case to a conclusion"), and *In re Philadelphia Athletic Club, Inc.*, 9 B.R. 280 (Bkrcty. E.D. Pa. 1981).

In *Philadelphia Athletic Club*, the court made the following observations regarding the creditor's right to liquidate a claim:

"At the present, the state court plaintiff has only an unliquidated claim against the debtor. That claim must be liquidated in order for the debtor's case under chapter 11 to proceed. The question is what will be the most expeditious and fair way to liquidate that claim. In the instant case there have already been lengthy proceedings in the state court. To require the state court plaintiff to start those proceedings all over again in this court will clearly be a waste of judicial and legal time and effort.

"Consequently, we will modify the stay to permit the state court plaintiff

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to continue the state court action against the debtor and other defendants to its conclusion for the purpose of liquidating her claim against the debtor. If the plaintiff is successful in that action and obtains a final judgment against the debtor and the other defendants, however, she will still be stayed by the order accompanying this opinion from proceeding on that judgment against the debtor or its property. She would, instead, be required to file her liquidated claim in this court against the debtor so that she would receive the same rate of dividend as other creditors in her class."

9 B.R. at 282-83. The plaintiffs in *Underwood* did argue that a creditor's claim must be liquidated regardless of whether the debt is dischargeable and that adding nondischargeability as a prerequisite to relief from the stay to proceed with litigation outside the bankruptcy court does violence to one of the very few opportunities a creditor has to recover any of a debt owed by virtue of causes of action which can be liquidated only through an order entered by a nonbankruptcy court.

The plaintiffs also argued that requiring a showing that the debt is nondischargeable as a precondition to relief from the stay to proceed with a lawsuit against a debtor in a nonbankruptcy court denies plaintiffs the opportunity to liquidate a debt if it is shown to be dischargeable. The net result would be that such potential judgment creditors of a debtor will be unable to participate in the distribution of assets from the debtor's estate that will go to all other unsecured creditors holding dischargeable debts.

Cost of debtor's defense as a factor

The debtor in *Underwood* argued that the crux of the matter was that the equities, when considering the hardship on the debtor resulting from the physical strenuousness on the debtor and the costs of litigating the nonbankruptcy case in comparison to the hardships on the plaintiffs, weighed in favor of the debtor. The bankruptcy court agreed:

"Based upon the testimony received, the Court considers that the equities balance in favor of maintaining the stay in place. The litigation which the

movants desire to pursue is burdensome and will impose a substantial burden on the Debtor to provide for a defense for himself. The Debtor is without income and is physically in poor health. His prospects for employment are not presently very promising. If he is required to defend this litigation, he would probably have to do so without counsel. He would be denied the fresh start to which he is entitled under the Bankruptcy Code."

In the Matter of: Robert Jennings Underwood, case no. 87-10133 (Bkrtcy. N.D. Ala. January 26, 1988).

The plaintiffs responded that the cases dealing with the subject of a debtor's defense costs hold that such costs of defense do not constitute a burden sufficient to deny relief from the automatic stay. See *In re Todd Shipyards Corporation*, 92 B.R. 600; *In re Unioil*, 54 B.R. 192; *In re Steffens Farm Supply, Inc.*, 35 B.R. 73; *In re Hunter*, 32 B.R. 140 (Bkrtcy. S.D. Fla. 1983) and *Matter of McGraw*, 18 B.R. 140 (Bkrtcy. W.D. Wis. 1982). The role also is true in cases dealing with RICO claims. See *In re Turner*, 55 B.R. 498 (Bkrtcy. N.D. Ohio 1985) and *In re Hoffman*, 33 B.R. 937 (Bkrtcy. W.D. Okla. 1983).

The *Unioil* court addressed the high costs of defending against a securities-based case and found:

"The debtor has pointed out that the securities litigation would entail great expense, in terms of both time and money, that could otherwise be utilized towards affecting [sic] a successful reorganization. However, the high cost of defending securities litigation is not sufficient, by itself, to constitute "great prejudice," which would preclude modification of the stay. [Citations omitted]. Furthermore, the presence of co-defendants may reduce the debtor's legal expenses since it would be able to draw upon the efforts of its co-defendants in defending against the securities prosecution."

54 B.R. at 195. The bankruptcy court and the district court did not discuss what effect denial of relief to proceed would have on the plaintiffs or what part that effect played in weighing the equities in the case.

Misconduct as a factor

Certain causes of action have inherent in them special considerations that must be taken into account when determining whether "cause" exists for relief from the automatic stay to proceed in a nonbankruptcy forum to prosecute those actions. Although the bankruptcy court in *Underwood* considered the securities and RICO causes, it did so only in terms of the debtor's burden of defending against such litigation in a forum not designed with the debtor in mind.

RICO, securities violations, fraud and other actions present unique questions of the debtor's conduct as an element in weighing the equities. See generally, *Burger King Corporation v. B-K of Kansas, Inc.*, 64 B.R. 728 (D. Kansas 1986); *In re Hartley*, 55 B.R. 781 (Bkrtcy. N.D. Ohio 1985); *Unioil*, 54 B.R. 192; *343 East 43rd Street Holding Corp.*, 46 B.R. 562 (Bkrtcy. S.D. N.Y. 1985); *In re Turner*, 55 B.R. 498 (Bkrtcy. N.D. Ohio 1985); *In re Humphreys Pest Control Company, Inc.*, 35 B.R. 712 (Bkrtcy. E.D. Pa. 1984); *In re Hoffman*, 33 B.R. 937 (Bkrtcy. W.D. Okla. 1983), and *In re Highcrest Management Co., Inc.*, 30 B.R. 776 (S.D. N.Y. 1983). See also *In re Cinnabar 2000 Haircutters, Inc.*, 20 B.R. 575 (Bkrtcy. S.D. N.Y. 1982).

Until the Eleventh Circuit Court of Appeals affirmed the lower courts' decisions in *Underwood*, it appeared that there was a strong policy to allow cases involving alleged misconduct by the debtor to go forward in the original forum to avoid having bankruptcy used as a shield to protect the debtor against full and final adjudication. See *Highcrest Management*, 30 B.R. at 778. Yet, neither the bankruptcy court nor the district court in *Underwood* applied this factor to the RICO, securities law violations and common law fraud case before them.²

Jurisdictional considerations

Finally, there is the question of whether a bankruptcy court has the jurisdiction to liquidate claims against a debtor that are based on state and federal nonbankruptcy law. Several courts have held that cases involving nonbankruptcy law causes of action are not subject to the bankruptcy court's jurisdiction. In *In re Hartley*, 55 B.R. 781, the court was faced with a motion for withdrawal of the reference of an adversary proceeding in the bankruptcy court alleging fraudulent

transfers, RICO violations and other misconduct. The motion to withdraw was premised on 28 U.S.C.A. §157(d) which requires mandatory withdrawal of matters involving interstate commerce. In discussing its conclusion, the court stated:

"This opinion is based upon the jurisdictional limitations of §157 of the Bankruptcy Code.

...

"Accordingly the Court finds that the record of this case supports an affirmative determination that resolution of the instant adversary proceeding would require substantial and material consideration of both Title 11 and non-bankruptcy federal statutes regulating organizations or activities affecting interstate commerce, therefore making withdrawal of the reference mandatory under 28 U.S.C.A. §157(d)

....

"The Court agrees with *Collier* and finds that the parties may not consent to confer jurisdiction to the Bankruptcy Court matters which are excluded by §157(d).

"Judicial economy requires that a Bankruptcy Judge not be forced to hear a case for which the Court is denied jurisdiction by §157(d)."

Id. at 784-785. The court in *Burger King*, 64 B.R. 728, another mandatory withdrawal case, agreed:

"Burger King's remaining claim of trademark infringement, along with the debtors' antitrust and RICO counterclaims, entail material and substantial consideration of non-Code federal law. These latter claims will require consideration of laws regulating activities affecting interstate commerce

"There is no question this case is the type provided for by the second sentence of section 157 which requires mandatory withdrawal by the District Court. [Quoting *Hartley, supra*]."

Id. at 731. Other courts, in finding that relief from the stay should be granted when nonbankruptcy law actions are involved, have held that the most a bankruptcy court could do would be to render proposed findings of fact and conclu-

sions of law to assist the district court in entering a ruling but such proposed findings and conclusions would not be binding. See *In re Turner*, 55 B.R. 498 (a motion for relief case that discussed the import of mandatory withdrawal in determining "cause" for relief); *In re Humphreys Pest Control Co., Inc.*, 35 B.R. 712, and *In re Highcrest Management Co., Inc.*, 30 B.R. 776. Those cases recognize that, even should the parties agree to have such a case involving state and federal law actions heard by the bankruptcy court, the district court still would have to make the final determination and, further, if the action were brought in the bankruptcy court without the consent of the opposing party, it would be subject to mandatory withdrawal to the district court.

The Eleventh Circuit Court of Appeals in *Underwood* appears to disagree. In dealing with the questions of jurisdiction, misconduct, costs of litigation and other factors, the court's discussion was limited as follows:

"The record does not suggest that the findings of the bankruptcy court were clearly erroneous, nor was the court's decision not to lift the stay an abuse of discretion. Appellants may prove the nondischargeability of their claims against appellee in the bankruptcy court and then renew their motion for relief from the automatic stay.

"Appellants [sic] other arguments are without merit. The bankruptcy court does not propose to try the securities fraud or RICO claims. Instead, it will determine the dischargeability of those claims under section 523. Some issues may overlap, and this may put the appellants to greater expense and effort, but dischargeability is itself a question for the bankruptcy court."

In re: Robert Jennings Underwood; Richard Durham, et al., v. Robert J. Underwood, No. 88-7385 at pages 3-4.

Conclusion

Where does the Eleventh Circuit Court of Appeals leave the litigator who simply wants to proceed in a nonbankruptcy court to liquidate the state or federal law claims of his client against a defendant who files bankruptcy? While the opinion of the court of appeals was specifically

designated "do not publish," its conclusion and existence appear to indicate that a plaintiff will have to prove, in addition to other factors discussed herein, that its claims are nondischargeable. That may require presenting the case on the merits in the bankruptcy court, then seeking relief from the stay and finally, if the relief is granted, proceeding to prove its case again before the nonbankruptcy court to obtain a judgment.

If the claim is found by the bankruptcy court to be dischargeable, the plaintiff may not have any claim at all unless the bankruptcy court agrees to estimate the claim under 11 U.S.C.A. §502(c) which could well require that the plaintiff present to the bankruptcy court its nonbankruptcy case on the merits. Either way, the result appears to be that federal and state nonbankruptcy law cases will be put before the bankruptcy court notwithstanding the question of jurisdiction.

Ultimately, weighing or balancing the equities very likely is the answer to the question although the Eleventh Circuit's opinion does not provide much guidance. *Underwood* indicates the factors considered in the balancing process are subject to change based on the debtor involved without regard to the potential judgment creditor. Finally, the debtor's fresh start, although not even listed as a factor, may be the heaviest consideration on the scales. ■

FOOTNOTES

1. The Bankruptcy Rules of Procedure provide specifically that an objection to discharge must be brought as a separate action by filing an Adversary Proceeding. See Bankruptcy Rules 4004 and 7001. A side effect of the Bankruptcy Court's approach in *Underwood*, suggesting a demonstration of nondischargeability of the debt should have been made by the plaintiffs at hearing on their motion for relief, would be to require parties seeking relief from the stay to attempt to object to discharge through their motion for relief, a practice not allowed by the Bankruptcy Code or the Bankruptcy Rules. See *In re Dahlquist*, 34 B.R. 476, 482 (Bk. Cr. Ct. S.D. 1983); 11 U.S.C.A. §523(d) and Bankruptcy Rules 4004 and 7001.
2. On April 28, 1989, the Eleventh Circuit Court of Appeals rendered an opinion that "cause" under §362(d)(1) includes the bad faith filing of the bankruptcy petition by a debtor. See *In re Dixie Broadcasting, Inc.*, to be reported at: 871 F.2d 1023 (11th Cir. 1989). The Court did consider the misconduct of the debtor in filing its petition to stop a state court from rendering an unfavorable verdict in nonbankruptcy litigation pending when the bankruptcy case was filed but it did not indicate that misconduct is anything other than a factor in determining whether a bankruptcy petition is filed in bad faith. In short, in the Eleventh Circuit at least, bad faith appears to constitute "cause" for relief but misconduct does not unless it translates into bad faith filing of a bankruptcy petition. See *id.*

Riding the Circuits

Baldwin County Bar Association

The Baldwin County Bar Association recently elected new officers for the 1989-90 term. They are as follows:

President: Mollie P. Johnston,
Fairhope

Vice-president: Mary E. Murchison,
Foley

Secretary/treasurer: Fred K. Granade,
Bay Minette

Birmingham Bar Association

The Young Lawyers' Section of the Birmingham Bar Association has set up a speakers bureau. Tim Smith, of Thompson, Griffis & Hooper, is chairperson of the bureau. Smith has been in contact with approximately 500 organizations in the Jefferson County area and is averaging approximately one call per day requesting a speaker.

Approximately 30 to 35 Birmingham young lawyers have volunteered to speak to civic clubs and high schools; during Law Week, members of the speaker's bureau spoke to approximately 16 different classes in the Jefferson County area.



Smith

The Birmingham YLS also started a scholarship program for their primary service project, the Downtown Firehouse Mission. The scholarship program was started with donations from Birmingham attorneys and the YLS to develop a program to allow men living at the old Firehouse shelter to run their own fishing lure business.

Mitch Damsky heads the committee which was formed after the donations were made. Damsky met with the staff at the shelter to find an appropriate use for the money.

The men receive training from Damsky, who has made lures for about five years. In addition, members of the Birmingham Fly Fishers and the Shades Valley Chapter of Trout Unlimited have volunteered to provide training. The men already have made a substantial number of lures which sell for \$2.50 a piece and will be displayed at a local sporting goods store.

Also this year, the Birmingham YLS donated a television and VCR to the Jefferson County jail. The equipment is being used for inmates to work on their GEDs through the use of video programs.

Mike Wright, John Herndon and Fred McCallum agreed to co-chair the 1989 YLS fundraiser for the Alabama Council on Epilepsy. The Legal Secretaries Association and Birmingham YLS get prizes donated and put together an evening to benefit the Alabama Council on Epilepsy.

Choctaw County Bar Association

The Choctaw County Bar Association held its annual meeting in Butler, Alabama, May 11, and elected officers for 1989-90. Officers are:

President: Joseph W.
Hutchinson,
Butler

Vice-president: John W. Sharbrough,
Butler-Mobile

Secretary/treasurer: J. Lee McPhearson,
Butler

Escambia County Bar Association

At a recent meeting, the Escambia County Bar Association elected officers for 1989-91. The officers elected are:

President: Paul Owens,
Brewton

Vice-president: Broox Garrett, Jr.,
Brewton

Secretary/treasurer: James Michael Perry,
Brewton

The Escambia County Bar Association sponsored several activities in observance of Law Day. The bar arranged for all high school seniors in Escambia

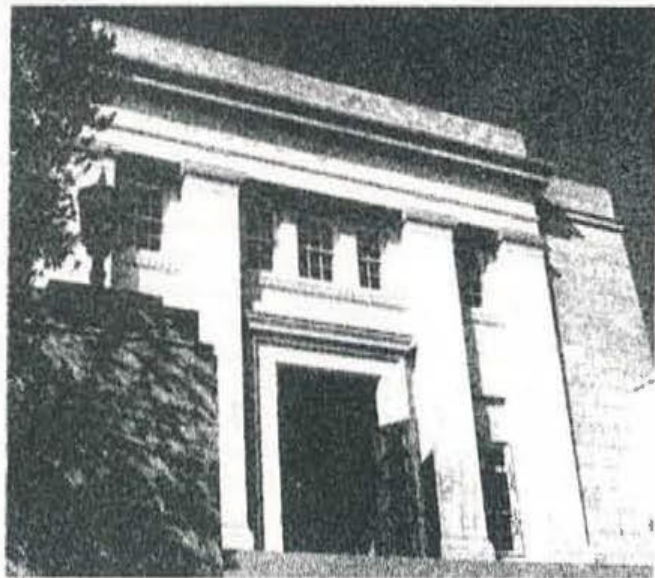
County to be summoned for jury duty. A jury selected from the seniors at Escambia County High School, Flomaton High School and Escambia Academy heard the trial of an actual criminal case May 2. A jury selected from the seniors at T.R. Miller High School, W.S. Neal High School and Southern Normal High School heard a different criminal case May 3. These trials involved actual pending criminal cases and, by agreement of the parties, the senior jurors decided each case. The remaining seniors observed the trial. Prior to reporting for jury duty, the seniors at each high school were given a juror orientation program by various members of the Escambia County Bar, and each senior was served with a juror summons by an Escambia County deputy.

During the week of May 1-5, members of the Escambia County Bar appeared each day on various radio stations throughout the county to discuss particular areas of the law and answer questions called in by the listeners. Some of the topics covered were estate planning, probate, domestic relations, criminal prosecutions, personal injury litigation and small claims court.



Key, left, & Owens

On May 4, a Law Day banquet was held at the Brewton Country Club. Retired Circuit Judge Robert E.L. Key of the 35th Judicial Circuit was the keynote speaker and was presented with a special gift from the Escambia County Bar in recognition of his many years of distinguished service. ■



Recent Decisions

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

Recent Decisions of the Supreme Court of Alabama

Actions . . .

in commercial setting where only product is injured, plaintiff's remedy limited to contract

Lloyd Wood Coal Co. v. Clark Equipment Co., 23 ABR 1789 (April 7, 1989). Lloyd bought a front-end loader manufactured by Clark Equipment Company. A hydraulic hose ruptured, causing a fire that resulted in substantial damage to the loader. No one was injured and no other property was damaged. Lloyd sued Clark and others in tort, claiming that the equipment was negligently designed and also claiming under theories of wantonness and strict liability. The defendants filed motions for summary judgment maintaining that there is no tort action where there is a commercial product and a defect or malfunction results in damage only to the product itself. The trial court granted defendants' motion for summary judgment, and Lloyd appealed. The supreme court affirmed.

In a case of initial impression in Alabama, the supreme court held that the plaintiff's remedy in such case is limited to a contract action. The court noted that the majority rule is that a

manufacturer in a commercial relationship has no duty under either negligence or strict products liability theory to prevent a product from injuring itself. Damage to a product is most naturally understood as a warranty claim. Of course, an action in tort would have arisen had there been personal injury or injury to property other than to the product itself. To the extent that *Joe Sartain Ford, Inc. v. American Indemnity Company*, 399 So.2d 281 (Ala. 1981), is in conflict with this opinion, it is hereby overruled.

Courts . . .

unofficial transcript of hearing not admissible as evidence



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



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

motion for summary judgment. The court of civil appeals affirmed and on certiorari to the supreme court, the supreme court reversed.

The court noted that while §12-12-2(c), *Ala. Code* (1975), allows any party to employ a reporter or provide for a transcript of a district court proceeding, it, however, does not say for what purpose the transcript may be used. Nor does Rule 80, *Ala.R.Civ.P.*, answer the question. Indeed, this rule applies to an official stenographer. The court reasoned that §§12-17-270 through 277 control this issue and held that an unofficial transcript prepared by a person not duly appointed an official court reporter pursuant to said sections, or approved by the adverse party, is inadmissible in a subsequent trial. Since the transcript was not admissible, it could not be considered in support of a motion for summary judgment. An unofficial transcript could be used to "revive a forgotten train of thought" or for impeachment.

Insurance . . .

plaintiff has burden of proving that tort-feasor is uninsured

Ogle v. Long, 23 ABR 2040 (April 28, 1989). Plaintiffs were injured in a vehi-

cle accident with Long. Plaintiffs sued Long and attempted service by mail. The complaint was returned, however, marked "unclaimed," and plaintiff made service by publication. Long failed to answer, and plaintiffs took a default. Plaintiffs notified their uninsured motorist carrier, Preferred Risk, of their intention to file a UM claim. Preferred Risk moved to intervene and set aside the default. The trial court granted both motions. The trial proceeded and, at the close of the plaintiffs' case, Preferred Risk moved for a directed verdict on the grounds that the plaintiffs had failed to prove that Long was uninsured. The trial court granted Preferred Risk's motion, and plaintiffs appealed. The supreme court affirmed.

The court stated that although §32-7-23, *Ala. Code* (1975), is silent as to who has the burden of proving the uninsured status of the defendant, it generally is recognized that the plaintiff bears this burden. An exception is recognized, however, if the plaintiff used reasonable diligence to ascertain the uninsured status of the tort-feasor and such information was unobtainable. The burden of going forward with the evidence then is cast upon the defendant. Plaintiffs undertook no investigation of Long to determine his status. The mere filing of a lawsuit and taking a default does not demonstrate "reasonable diligence" in ascertaining the tort-feasor's insurance status. Thus, the burden of going forward did not shift to Preferred Risk.

Insurance . . .

payment of insurance benefits admissible as admission against interest

Universal Underwriters Ins. Co. v. Sherrill, 23 ABR 1766 (April 7, 1989). Sherrill was a passenger injured in an automobile driven by Scott. Scott was employed by Edwards Dodge and driving one of its vehicles when the accident occurred. Edwards Dodge was insured by Universal Underwriters. Universal denied coverage and filed this declaratory judgment action contending that Scott had deviated from the scope of his permissive use when the accident occurred. Universal's policy had a medical payments provision which allowed payment only if the driver of the automobile was acting within the scope of his permission at the time of the accident. Universal investigated the accident and after an investigation paid medical benefits to Sherrill and Scott's widow. Over the objection of Universal, the trial court permitted Sherrill to introduce evidence of the medical payments. Universal maintains that the trial court erred. The supreme court disagreed.

In a case of first impression in Alabama, the court stated that evidence of payment of benefits under a policy of insurance, made after a thorough and complete investigation of coverage, is admissible as an admission against interest.

Torts . . .

Alabama recognizes cause of action for tortious transmission of genital herpes

Berner v. Caldwell, 23 ABR 1901 (April 12, 1989). Plaintiff alleged that defendant negligently transmitted genital herpes to her during the course of a sexual relationship and sought damages. Plaintiff claimed that near the end of the relationship, defendant developed an infection, which a doctor said was genital herpes.

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The defendant denied knowledge that he was infected and pled assumption of the risk. The trial court granted defendant's motion for summary judgment, and plaintiff appealed. The supreme court reversed.

The court expressly recognized a cause of action for the tortious transmittal of genital herpes. The court noted that its holding is in line with the public policy of Alabama as evidenced by §12-11-21(c), *Ala. Code* (1975), which makes it a misdemeanor to knowingly transmit a sexually transmitted disease. Without outlining the specific elements, the court held that "one who knows or should know that he or she is infected with genital herpes is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them." The court further noted that liability could also be imposed in Alabama for the transmittal of other sexually transmitted diseases.

Worker's compensation . . .

Section 8-8-10 applies to worker's compensation judgments

Ex parte Stanton (Re: The Second Injury Trust Fund v. Stanton), 23 ABR 1498 (March 17, 1989). Stanton was awarded worker's compensation benefits and a lump sum attorney's fee was awarded to his lawyer, Daniel McCleave. The attorney fee award was affirmed on appeal. McCleave demanded that the Trust Fund pay interest on the attorney fee award under §8-8-10, *Ala. Code* (1975), which authorizes interest on judgments for the payment of money. The trial court ruled that §8-8-10 applied and ordered payment of interest. The Trust Fund appealed to the court of civil appeals which reversed,

stating that the Worker's Compensation Act controls and does not provide for the payment of interest in such situations. On certiorari, the supreme court reversed.

The court noted that the Worker's Compensation Act is not entirely exclusive to the extent that no other statute can ever apply. The court distinguished cases dealing with pre-judgment interest and reaffirmed that pre-judgment interest cannot be awarded in a worker's compensation case unless the act expressly provides for it. Pre-judgment interest would be part of a claimant's "rights and remedies" governed exclusively by the act. Post-judgment interest is on the judgment, not on a "right or remedy." Section 8-8-10 provides for interest on "judgments for payment of money . . ." The interest in this case is on a judgment and, therefore, §8-8-10 applies to worker's compensation awards.

Recent Decisions of the Supreme Court of the United States

Presumption does not equal intent

Carella v. California, case no. 87-6997 (June 15, 1989)—Was a man convicted unfairly of stealing a rental car because jurors were instructed that they could presume that his failure to return the car amounted to the requisite intent to commit theft? The Supreme Court, in a unanimous opinion, said yes.

The justices, in an unsigned opinion, said the jury instruction could have led to a guilty verdict without any finding beyond a reasonable doubt that the man intended to commit a crime.

The court also rejected the prosecutors' argument that such an error was harmless. In the opinion of the court, the instruction relating to the resumption impressibly shifted the burden of proof borne by the state as to each of the requisite elements of the offense.

Double jeopardy

Jones v. Thomas, case no. 88-420 (June 15, 1989)—Did a federal appellate court correctly overturn a criminal defendant's life sentence after ruling that his double-jeopardy protection had been violated? The Supreme Court, in a five-to-four decision, said no.

The defendant had been sentenced to 15 years in prison for attempted robbery and to life in prison for felony murder, with both charges stemming from the same crime and course of conduct. A state court ruled that the multiple sentences were not authorized by state law, i.e., multiplicitous for sentencing purposes. The state court credited the time the defendant had served on the robbery sentence to his murder sentence, but the

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Eighth Circuit ruled that the life sentence had to be thrown out.

Justice Kennedy, writing for a bare majority of the court disagreed, stating, "Neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls." Justice Kennedy added that the state court's action provided suitable protection for the defendant's double-jeopardy rights.

Seizure and forfeiture v. Sixth Amendment Right to Counsel

Caplin & Drysdale v. U.S., case no. 87-1729, *U.S. v. Monsanto*, case no. 88-454 (June 22, 1989)—May the government seize the money and property of a criminal defendant facing trial even if those assets were intended to pay for legal help? The Supreme Court, in a five-to-four decision, said yes.

Led by Justice White, the court said in a pair of decisions that a federal drug proceeds forfeiture law does not violate fair-trial rights. Hence, the right to an attorney in criminal trials is not violated when prosecutors obtain court orders allowing them to freeze a defendant's assets, in-

cluding the funds used or intended to be used to hire the attorney of his choice.

Justice White observed, "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the attorney of his choice."

Miranda weakened

Duckworth v. Egan, case no. 88-317 (June 22, 1989)—May police who warn criminal suspects of their right to remain silent and have a lawyer's help include language informing the suspects that free legal help will not be available until their first court appearance? The Supreme Court, in a close five-to-four decision, said yes.

The court in *Duckworth* held that police may modify the *Miranda* warnings they give criminal suspects by telling them lawyers only will be appointed for them if they go to court. The decision reversed a Seventh Circuit ruling that found the *Miranda* warning variation too confusing for suspects who might be led to believe they had to talk to police with-

out a lawyer's help if too poor to hire one.

Chief Justice Rehnquist said, "In our view, the court of appeals misapprehended the effect of the inclusion of the 'if and when you go to court' language in the *Miranda* warnings."

No right to appellate counsel following direct appeal

Murray v. Giarratano, case No. 88-411 (June 22, 1989)—Is a state required to provide free counsel for indigent death row inmates who lost their initial rounds of appeals? The Supreme Court, in a sharply divided opinion, said no.

The Supreme Court ruled that the Constitution's due-process and Eighth Amendment guarantees do not entitle capital defendants to free legal help in state habeas actions. In the Supreme Court's view, "The additional safeguards imposed . . . at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed."

Minority and the death penalty

Stanford v. Kentucky, case no. 87-5765, *Wilkins v. Missouri*, case no. 87-6026

1989 Annual Meeting Highlights

1. Thursday morning meetings got started with an Alabama Law Foundation trustees' breakfast. 2. State bar staff members Diane Weldon (left) and Margaret Boone at the registration table. 3. Ten exhibitors had displays in Huntsville. 4. General Counsel Robert Norris and wife Martha at Thursday's Bloody Mary party. 5. Federal District Judge Seybourne Lynne, co-recipient of this year's Judicial Award of Merit, at the Bench and Bar luncheon . . . 6. . . and co-recipient retired Circuit Judge James O. Haley. 7. Robert Sellers Smith welcomed the 1989 convention to Huntsville. 8. Robert Raven, president of the ABA, was the luncheon guest speaker. 9. Jim Campbell was recognized for his successful sponsorship of several bills during this Legislative session. 10. Bill Clark, 1989 recipient of the Walter P. Gewin award. 11. Former Governor Albert Brewer, along with Dennis Balske (not pictured), this year's recipients of the Award of Merit. 12. Marriage counselor John Compere hosted a marriage enrichment seminar Thursday afternoon. 13. This year's membership reception was held at the Space and Rocket Center. 14. NASA astronaut Jan Davis made a special appearance at the reception, on the 20th anniversary of man's first walk on the moon. 15. Friday morning's Past Presidents' breakfast attendees. 16. Some of the spouses going on the Boaz shopping spree. 17. Oakley Melton (left) and Alabama Court of Criminal Appeals Judge and former Governor John Patterson at Update '89. 18. Supreme Court Associate Justice Gorman Houston gave the civil law update. 19. Andy Campbell, chairperson, Business Torts and Antitrust Section. 20. President Gary Huckaby presents Reggie Hamner with an engraved clock, recognizing his 20 years of service to the bar. 21. Reggie Hamner gives Virginia Ball, Gary Huckaby's secretary, a certificate of appreciation. 22. Gary Huckaby (center) with Jeanne Huckaby (right) and past President Jim North (left) at Friday night's dinner/dance. 23. President-elect Alva Caine and Kathryn Caine. 24. Commissioner and President-elect designate Harold Albritton dances with wife Jane . . . 25. . . as Supreme Court Associate Justice Hugh Maddox dances with wife Virginia. 26. State bar staff member Jenny Williams gets assistant general counsel Tony McLain ready for Saturday's Fun Run. 27. President-elect Caine made a good showing at the finish line! 28. Race winners were, left to right, front row, Alston Keith, Sarah Grace and overall winner John Evans. Back row, Katherine Spransy, Rennie Moody, Mary Murchison, Tennent Lee, Martha Harris, Bill Hairston and Gordon Godwin. 29. President Huckaby and President-elect Caine at Saturday's Committees' Breakfast. 30. Wanda Devereaux receives a certificate of appreciation for work on the Character and Fitness Committee. 31. Lee C. Bradley, Jr., was recognized as the oldest member of a committee. 32. Chief Justice Sonny Hornsby gave the state of the judiciary address during the plenary session. 33. Gary Huckaby gives his farewell remarks. 34. President-elect Albritton addresses the morning audience. 35. Richard Brown won the mink stroller. 36. Former commissioner Wayne Love received a medallion for service on the board of bar commissioners. 37. Grady Jackson Long was among the 50-year certificate recipients. 38. Bill Blanchard, vice-chairperson of the Indigent Defense Committee, accepts the award of merit for Dennis Balske. 39. From left are Gary Huckaby, Jr.; Brenda Huckaby; John Huckaby; Jeanne Huckaby; and Michael Huckaby at Saturday's plenary session. In the row above are William Caine, Kathryn Caine, Eleanor Caine and Alva Caine, Jr.

(See photographs pages 272-275)

(June 28, 1989)—May the death penalty be imposed on convicted murderers who were 16 years of age when they committed their crime? The Supreme Court, in a five-to-four decision, said yes.

The Court produced a distinct five-four split among the justices, with Justice O'Connor casting the controlling vote in a concurring opinion. Writing for the Court, Justice Scalia said no national consensus exists that would make the practice a violation of the Eighth Amendment. The justices, in effect, drew the allowable line for capital punishment at age 16 when last year they refused to uphold the death sentence of a killer who was 15 when he committed the crime. In this ruling the court said that those 16 and 17 at the time of their crimes may be executed.

More limits on victim impact statements

South Carolina v. Gathers, case no. 88-305 (June 12, 1989)—May a jury choosing between the death penalty and a life prison term for a convicted killer be told about the victim's personal characteristics? The Supreme Court, in a five-to-four decision, said no.

The justices ruled that a South Carolina murderer unfairly was sentenced to death because a prosecutor told the jury that the victim was a religious and community-minded person. Justice Brennan, writing for the court, held that prosecutors cannot use testimonials about the character of murder victims to persuade juries during sentencing hearings to impose the death penalty. His opinion relied heavily on the Court's 1987 decision in *Booth v. Marilyn*, 482 U.S. 496

(1987), in which the court, in a five-to-four decision, banned "victim impact statements" from capital sentencing trials.

In the South Carolina case, a prosecutor discussed what could be inferred from papers—religious tracts and a voter registration card—found near the victim's body. Justice Brennan observed, "The content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous, and cannot provide any information relevant to the defendant's moral culpability."

Of great significance is the fact that Chief Justice Rehnquist and justices O'Connor, Scalia and Kennedy dissented, stating that they were ready to overturn *Booth*.

Magistrates cannot preside over jury selection

Gomez v. U.S., case no. 88-5014 (June 12, 1989)—May federal magistrates preside, without a defendant's consent, over jury selection in felony trials when delegated such duty by federal trial judges? The Supreme Court, in a unanimous decision, said no.

Writing for the Court, Justice Stevens said a 1968 law, the Federal Magistrates Act, does not authorize such duty by magistrates. The court also rejected the government's argument that such an error in this case was harmless.

"Among those basic fair-trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury," he said. "Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside."

Enhancement of sentence

Alabama v. Smith, case no. 88-333 (June 12, 1989)—Does a presumption of judicial vindictiveness apply when a judge imposes a harsher sentence on a criminal defendant convicted after backing out of a plea-bargained agreement that called for a lighter sentence? The Supreme Court, in an eight-to-one decision, said no.

In a pair of 1969 decisions, the Supreme Court limited judges' power to impose more stringent sentences for defendants who withdraw guilty pleas or who are resentenced after successfully appealing convictions or sentences. The Supreme Court's rationale in those cases was that sentence enhancement had a "chilling effect" upon the appellate process.

Alabama v. Smith, *supra*, reversed one of the 1969 decisions and makes a distinction between two circumstances. Chief Justice Rehnquist wrote, "There is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea." ■

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Legislative Wrap-up

by Robert L. McCurley, Jr.

The Alabama Law Institute held its annual meeting at the state bar meeting in Huntsville, Alabama. The following officers and executive committee were elected:

President: Oakley Melton, Jr., Montgomery
Vice-president: Jim Campbell, Anniston
Secretary: Bob McCurley, Tuscaloosa
Executive Committee: George Maynard, Birmingham
Rick Manley, Demopolis
Yetta Samford, Opelika
Ryan deGraffenried, Jr., Tuscaloosa
E.C. Hornsby, Tallassee

It is reported that since the last annual meeting of the Institute the Legislature passed the following acts:

Alabama Fraudulent Transfers Act
Power of Sales in Mortgages
Memorandum of Lease
Statute of Non-Claims
Registration of Federal Liens
Alabama Trademark and Tradename Act
Amendments to the Uniform Guardianship and Protective Proceedings Act

Legislators recognized at the annual Bench and Bar Luncheon for their sponsorship of Institute bills were senators Ryan deGraffenried, Jr.; Frank Ellis; Earl Hilliard; Rick Manley; and Jim Smith. Also recognized were representatives Jim Campbell, Mike Box, Morris J. Brooks, Jr., Bill Fuller, Mike Hill, Beth Marietta, Demetrius Newton, Phil Poole and Bill Slaughter.

Other revisions completed by the Institute to be presented to the 1990 Legislature deal with condominium law, chaired by E.B. Peebles of Mobile with Professor Gerald Gibbons as reporter; adoption law, chaired by Bill Clark of Birmingham with Professor Camille Cook as reporter; and the Alabama Securities Act, chaired by Burton Barnes of Birmingham with Professor Manning Warren as reporter.

The Alabama Law Institute presently has revision underway in the following areas:

Probate Procedure, chaired by E.T. Brown of Birmingham, Professor Tom Jones as reporter;
Business Corporation Act, chaired by George Maynard of Birmingham, Professor Howard Walthall and Professor Richard Thigpen as co-reporters;
Rules of Evidence, chaired by Pat Graves of Huntsville, Dean Charles Gamble as reporter;
and Article 2A of the UCC, chaired by Bob Fleenor of

Birmingham, Professor Peter Alces as reporter.

A committee of the Institute, chaired by Judge Joe Colquitt of Tuscaloosa, is revising the pattern criminal jury instructions. These will be distributed to each trial judge by the Administrative Office of Courts and made available to practicing attorneys through the Alabama Institute of Continuing Legal Education.

In conjunction with the Alabama School of Law and the League of Municipalities, model city ordinances are being drafted. These ordinances will serve as a model for small cities as they develop their city codes.

Publications recently completed by the Institute and available are:

Alabama Legislation, Statutes and Cases, 2nd edition (1989);

The Legislative Process, A Teacher's Guide to the Alabama Legislature, 2nd edition (1989);

Handbook for Alabama County Commissioners, 6th edition (1989);

Handbook for Alabama Probate Judges, 5th edition (1989);

The Legislative Process—A Handbook for Alabama Legislators, 4th edition (1987); and

Legislative Process Film, "Be It Enacted . . ." (1988)

Also completed but distributed by the Administrative Office of Courts and Office of Prosecution Services during the past year was a new *Indictment and Warrant Manual*.

The Alabama Supreme Court, after years of study, has just announced their adoption of the Alabama Rules of Criminal Procedure. These rules will be distributed in December 1989 with a June 1, 1990, effective date. ■



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.

Opinions of the General Counsel

by Alex W. Jackson, assistant general counsel

Attorney Disqualification: application of the Substantial Relationship Test

Several recent ethics opinions have involved the issue of accepting representation of a client in a matter adverse to a former client. Recurring situations involve proposed representation of one party to a divorce when the attorney, in fact, has represented the married couple during the course of the marriage. Another typical situation occurs when an attorney is approached about accepting representation against a public board or agency that in the past he has represented. Among the ethical concerns considered by the Disciplinary Commission and the Office of the General Counsel in answering these queries is the "Substantial Relationship Test."

The so-called "Substantial Relationship Test" is best defined on a functional basis. For example, Opinion RO-89-51 states as follows:

"... an attorney may undertake representation against a former client, but only when such representation bears no substantial relationship to the previous representation, when there is no opportunity for the use or misuse of confidences and secrets obtained during the representation of the former client and when there is no substantial likelihood that the former client will be at an unfair disadvantage as a result of the contemplated representation."

An opinion published in the January 1986 *Alabama Lawyer*, and quoted with favor in Opinion RO-89-35, expanded upon the confidential or secret information concept and stated that:

"If there is a 'substantial relationship' between the issues in the prior representation of the former client and the issues in the contemplated suit against or position adverse to the former client such that the attorney could have learned of a 'confidence' or 'secret' of the former client that he can use adversely to the former client and favorably to the new client, the attorney cannot ethically proceed against the former client. To preclude action against a former client it is not necessary that the attorney did, in fact, receive such a 'confidence' or 'secret'."

In Opinion RO-87-108 the Commission held that an attorney who handled a wrongful death action for a married couple could ethically handle a consent divorce between them even though "...the proceeds of the wrongful death action settlement would constitute a marital asset, [since] the issues involved in that case are not substantially related to the issues in the marital proceeding. So long as the spouse whom you do not represent in the divorce proceeding con-

sents to your representation of the other, you may ethically handle the divorce proceeding."

Seeking to pull together these ideas, Opinion RO-89-62 stated in part that:

"... there must be no substantial relationship between the subject matter of the previous representation(s) and the [present representation]. Secondly, there must be no opportunity to use, or misuse, confidences or secrets of the adverse party to the advantage of the represented party, or to the disadvantage of the non-represented party, or the embarrassment of the non-represented party. Questions involving what is or is not a confidence or secret of the client, and what is or is not damaging or embarrassing to the non-represented party, should be resolved in favor of the non-represented party. The third test to be applied has to do with the dilution of loyalty on the part of the attorney. In essence this test requires the attorney to ask himself whether his relationship with the non-represented party, or his desire to have a future relationship with the non-represented party, is of such a character as to dilute to any degree his loyalty to his present client. Disciplinary Rule 5-101(A) requires that a lawyer decline employment, absent consent after full disclosure, if his professional judgment on behalf of that client will be, or reasonably may be affected by his own financial, business, property, or personal interests. The fourth test applied has to do with the appearance of impropriety. Canon 9 provides that a lawyer should avoid even the appearance of professional impropriety and Ethical Consideration 9-2 says, in pertinent part, that when explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence and the integrity and efficiency of the legal system and the legal profession."

The Supreme Court of Alabama also has had occasion to consider the "substantial relationship" notion, most notably in *Ex parte Taylor Coal Company, Inc.*, 401 So.2d (Ala. 1981). In that opinion the court adopted a majority view as expressed in *T.C. & Theater Corporation v. Warner Brothers Pictures, Inc.*, 113 F.Supp. 265, 268-69 (S.D.N.Y., 1953), and as stated as follows:

"[T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the

former client. The court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into the nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

"To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule [protecting client confidences]."

The court went on to state, however, that, "This is not to say that whenever a substantial relationship is found the lawyer is automatically disqualified." (*Taylor, supra*, p.7) The court, in fact, found in the *Taylor* case that there was a "substantial relationship," but concluded that there was no violation of canon 4 or 9 of the *Code of Professional Responsibility*, and no disqualification followed.

Alabama ethics opinions and case law are consistent in that, in application, a substantial relationship, standing alone, is not enough to bring about attorney disqualification. Something more must be present, and that something must pose or constitute a threat to the former client. Functionally, ethical disqualification is going to occur when, in addition to the substantial relationship, some particular applicability exists between the information possessed by the attorney, by virtue of the former representation, and the contemplated representation. In some instances ethics opinions allow waiver to cure conflict and/or confidentiality problems; in some, the substantial relationship is so "substantial" that the disqualification of 5-101(C) is applied. In the lat-

ter instance, by definition, the former cause of action has been found not just substantially related to the present cause of action, but rather to be a part of the same cause of action. Disciplinary Rule 5-101(C) provides that a lawyer shall not represent a party to a cause or his successor after having previously represented an adverse party or interest in connection therewith.

These standards applied to the most common questions that occur indicate that representation of one spouse in a divorce action, when the attorney has in the past represented the couple, is permissible but that waiver might be required. Waiver can, functionally, cure insubstantial conflicts, as in the previous example of RO 87-108, where the likelihood of prejudice or damage to the unrepresented former client is slight. Waiver of more substantial conflicts decreases in effect as the potential for harm and the appearance of professional impropriety increase. It is, for example, doubtful that waiver by the non-represented party would be effective, from an ethical perspective, when the attorney possesses confidences or secrets material to the present representation, the disclosure of which could be harmful, prejudicial or embarrassing to the non-represented party. From both case law and ethics opinions we know that the burden cannot be shifted to the former client to prove possible damage, once the substantial relationship is established.

Somewhat different considerations arise in regard to accepting representation against a formerly represented public board or agency. Here the substantial relationship test is applied more stringently due to the language of DR 9-101(A) and (B), which state:

"(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

"(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Former judicial officials and former public employees must clear not only the "substantial relationship" test, but also

the "substantial responsibility" test. These tests are most often not cumulative in application, but nonetheless impose additional standards for these certain attorneys.

For the private attorney the contention most often made by the board or agency in seeking disqualification is that the attorney, by virtue of his former representation, learned confidences or secrets of the agency or board, relating to operational policies or procedures, such as to put the agency or board at a disadvantage. For example it might be contended that an attorney who, in the past, had represented a state agency in regard to litigation to terminate parental rights could not later represent another party or interest against this state agency on any matter involving parental rights. Such a contention cannot be supported by a reasonable application of case law or ethical standards. If one parental rights case is substantially related to the other, then disqualification would probably ensue; if one case is merely similar to the other, that is to say the same type of cause of action, then disqualification is unlikely absent a showing of misuse of confidential information. Thus, any disqualification flowing from the latter example is more properly attributable to this confidentiality problem than to a substantial relationship. Public policy alone would indicate that the consumer of legal services cannot unreasonably be denied access to competent counsel, even if that counsel's "education" came at the expense of the former client. Would anyone contend that Coach Dye is disqualified from coaching at Auburn University because he learned part of his craft under Coach Bryant at the University of Alabama?

Thus, in application, the substantial relationship test is not simple nor is it entirely subjective. Neither the Disciplinary Commission nor the Office of the General Counsel would encourage an attorney to accept or seek representation adverse to former clients, but the bar is not absolute. As in all things, wisdom is the better part of virtue and great care should be utilized before entering into such a representation. ■

Task Force Reports and Recommendations to the Board of Bar Commissioners

Final Report of the Task Force on Judicial Selection

This task force, chaired by Drew Redden of Birmingham, made the following report and recommendations:

The Task Force on Judicial Selection met July 12, 1988; October 29, 1988; April 1, 1989; and June 24, 1989.

The task force has monitored the ongoing litigation challenging the at-large selection of judges, and has engaged in discussions relative to the impact of this litigation on possible changes in the method of selection of state court judges in Alabama.

It is the view of the task force that there is little likelihood of legislative approval of changes in the method of selection unless the recommendation for such changes emanates from a broadly based citizens group, in which all points of view may be represented, rather than from a narrowly chosen committee or task force of the Alabama State Bar. In that connection, the task force has studied the "Texas Plan" and the "Louisiana Plan," under which citizens' groups were formed to consider changes in the method of judicial selection.

Our view is that our task force should not be a "recommending" body, but that it should function as a catalyst/resource group, promoting the appointment of the larger body—the citizens' group. Once the group is formed, it will be the function of the task force to articulate to it the possible courses of action with reference to changes in judicial selection.

We are of the opinion that the next step should be the forming of the citizens' group, and to that end, we request the president and board of bar commissioners to authorize this task force to contact such individuals and groups as it deems appropriate to participate in the larger group and to recommend other participants therein. We also request permission to investigate possible sources of financial and other assistance to support the proceedings of this group.

At its July 19, 1989, meeting, the Alabama State Bar Board of Bar Commissioners voted to accept the task force's report and recommendations.

Final Report of the Task Force on Possible Restructuring of the Appellate Courts

This task force, chaired by Bert Nettles of Birmingham, made the following report and recommendations:

This task force was formed by appointment of President Gary Huckaby upon his assuming office in July 1988. Sub-committees of the task force met with all of the appellate judges of the state of Alabama soliciting suggestions and general input. In addition, the task force has reviewed previous reports and recommendations, including those of the Harris Commission, the Thomas B. Marvell Report of December 1985 prepared jointly by the Appellate Justice Center and the Institute of Judicial Administration, and the 1973 report on the Appellate Process in Alabama prepared by David Halperin of the National Center for State Courts. The task force is particularly appreciative of the assistance received from Chief Justice E.C. Hornsby, former Chief Justice C.C. Torbert, Associate Justice Hugh Maddox, (who attended our January meeting), Associate Justice Sam Beatty (who is a member of the task force), Judge William Bowen of the court of criminal appeals (who is a member of the task force), Judge Sam Taylor of the court of criminal appeals (who attended one of the meetings of the task force), Associate Justice Willis B. Hunt of the Georgia Supreme Court (who attended the January task force meeting), and all of the other appellate judges of this state who contributed to the information gathering process.

The task force is convinced that a critical need exists for immediate restructuring of Alabama's appellate courts. The problem is particularly acute with the workload presently thrust upon the members of the Alabama Supreme Court, who are now called upon to handle caseloads more than 125 percent above that recommended by appellate court experts. As Justice Hunt stated in reviewing recent changes in the Georgia Appellate Court system, appellate judges should be more than just a paper grader for law clerks. In addition to the presently increasing caseload of the supreme court, any necessary changes should be made now in order to

allow for proper utilization of the new Alabama Judicial Building for which plans are currently being drawn.

The task force has divided its recommendations into two areas, those pertaining to the supreme court and those presently pertaining to the intermediate appellate courts.

Recommendations with respect to the Alabama Supreme Court

1. Jurisdiction of the supreme court should be limited to certiorari jurisdiction.

However, direct appeals should be allowed as presently provided by statute in utility rate cases and lawyer disciplinary matters. Further, appeals should be allowed as a matter of right from the court of criminal appeals with respect to cases for which the death penalty has been imposed. Further, the task force would consider provisions for other direct appeals or appeals as a matter of right where such action is now specially authorized by statute.

2. The supreme court should have "reach-down" authority. Such reach-down authority should be limited to matters raised on the supreme court's own motion.

3. Certification of particular appeals or questions, such as constitutional issues of first impression, should be available to the intermediate appellate courts.

4. The membership of the supreme court should be reduced from nine to seven justices, by attrition.

5. The supreme court should sit as an *en banc* court, with no panels or divisions.

Intermediate courts of appeals

1. The present distinction between the Alabama Court of Criminal Appeals and the Alabama Court of Civil Appeals should be maintained.

2. In view of the greatly expanded workload that will result from the above recommended changes of the supreme court, the task force recommends that the members of the court of civil appeals be increased from three to 12 judges, with three to be appointed for two-year terms, three elected for four-year terms and three elected for six-year terms.

3. Due to the probable need for still additional judges in the future on the court of civil appeals and also the court of criminal appeals, the task force recommends that a special commission or possibly an existing group such as the Judicial Study Commission Session be directed to provide periodic recommendations as may be appropriate with respect to the number of judges on both courts.

4. Judicial panels should be authorized in order that either of the intermediate court of appeals could sit in panels of three or more judges as may be necessary. However, all courts and panels of courts should avoid geographic divisions, and they should be available for *en banc* hearings as may be appropriate.

5. The intermediate courts of appeal should have the authority to decline issuing written opinions, as they may deem appropriate.

Implementation

1. All recommended changes should become effective in January 1991.

2. Upon approval of the Alabama Board of Bar Commissioners, the Chief Justice of the Alabama Supreme Court and the Administrative Office of Courts should be asked to supervise the drafting of legislation necessary to implement the recommended recommendations.

3. The proposed statutory and/or constitutional changes should be pre-cleared with the U.S. Department of Justice.

4. The task force volunteers and recommends that it remain available to assist in the implementation of those recommendations. Specifically, the task force recommends that any changes in these recommendations deemed necessary or appropriate be made as soon as possible by the board of bar commissioners rather than referring these recommendations to any other or further committee, commission or task force.

In conclusion, the task force recommends the consideration and implementation of these recommendations as a highest priority of the Alabama State Bar.

At its July 19, 1989, meeting, the Alabama State Board of Bar Commissioners voted to table the report until its next meeting.

Final Report of the Task Force on Substance Abuse in Society

This task force was chaired by Charles Fleming of Mobile. Included below is a brief portion of the task force report.

Work of the task force

The members of the task force collectively and individually commend Gary Huckaby for recognizing that the Alabama State Bar has heretofore had little or no participation, in an organized way, in assisting the public in confronting the mounting problems associated with substance abuse. By charging this task force to develop and foster programs to make the public aware of the dangers of substance abuse and to assist in the elimination of this problem in our society, Mr. Huckaby has started what the task force hopes will be a giant step toward bar and individual lawyer participation in substance abuse awareness programs.

Lawyers should be interested in substance abuse in society. Lawyers and their families have as much interest in combatting substance abuse as any other group in society. Lawyers are concerned about their children. Lawyers are concerned about the criminal element involved with drugs and the wasted lives affected by alcoholism. Lawyers should not be concerned about these problems simply because we are lawyers but because we are members of society.

In carrying out this charge, the task force has met with representatives of the Attorney General's Community Alliance Network, the Governor's Office of Drug Abuse Policy and the Medical Association of the State of Alabama. We have reviewed (and borrowed from) programs sponsored by The Florida Bar and the American Bar Association Advisory Commission on Youth, and community and professional alcohol and drug problems. We also met with and received valuable counseling from John Eades, a psychologist in Mobile specializing in the treatment of addictive diseases.

Based on mailing lists obtained from various state agencies, we sent out approximately 400 questionnaires to individuals and companies involved in "hands-on" substance abuse activities across the state. We learned from the responses to the questionnaire that there are lawyers and judges scattered across

the state who presently give legal advice and practical help to some of those surveyed as well as patients of some of those surveyed.

Those responding to the survey expressed gratitude for the bar's efforts to help and pointed out specific areas where those surveyed could use assistance from lawyers. The mailing lists and the responses received accompany these recommendations.

The task force also explored the production and/or purchase of television spots on substance abuse awareness. Enclosed with the package of material accompanying these recommendations are letter reports from committee member Lee Osborn concerning this aspect, including the costs involved and the willingness of some television stations to run spots as a public service. Also included in the package are actual video spots run by The Florida Bar.

The task force also responded to a questionnaire from the American Bar Association on alcohol and drug issues, a copy of which is in the package accompanying these recommendations. The task force examined and reviewed a substantial amount of printed substance awareness material. Since one of the recommendations of the task force is that the bar print and distribute drug awareness material, some of this material is included in the package of documents accompanying these recommendations as examples.

The recommendations below are the result of many hours of work of the task force members whose chairperson hereby expresses his appreciation to them for their efforts.

Recommendations

Establishment and duties of permanent state bar Committee on Substance Abuse in Society

The task force recommends that the state bar establish a permanent committee on substance abuse in society. This committee will be represented by at least one member from each of the judicial districts in Alabama. It is suggested that committee members, to the extent possible, consist of individuals who are known to have an interest in the substance abuse area and who will commit to spending more time than might normally be expected of a bar committee member, at least initially. It is suggested that persons who might most fit this description are lawyers recovering from drug addiction or alcoholism, lawyers who represent treatment facilities or lawyers who serve on advisory boards of community substance awareness groups.

At its July 19, 1989, meeting, the board of bar commissioners voted to accept this recommendation of the task force. ■

Committees and Task Forces of the Alabama State Bar 1989-90

The following state bar members were named by President Alva C. Caine to serve on 29 committees and 14 task forces for the 1989-90 bar year.

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1989 Annual Meeting Highlights



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Consultant's Corner

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

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

Looking back

As we begin our fourth year of writing this column I will reflect on some of the significant technological advances that have occurred in this relatively short time span. They include PC architecture, Network architecture and Wordperfect.

PC architecture

PC architecture has stabilized for the past three years and is likely to remain stabilized on 286 AT CPUs for the next two or three years. I do think that Unix will eventually replace it as the standard, even in the legal industry, but not for several years yet. By the way, for anything to remain in vogue for five or more years in this business is just about dynastic.

For the first time market forces are driving product development. Consumers (I hate the term "users") have finally learned to "just say no"—no to overpowering CPUs they just do not need, no to advanced systems that purport to fix something that is not broken yet.

Network architecture

Network software, from a few vendors at least, finally works. No, you still cannot connect five work stations to an XT node and expect to do legal word processing, but you can do it on a reasonably priced file server with several megs of main memory. True, a decently configured file server costs more than a good stand-alone PC. Equally true, you can now install responsive network clusters for \$6,000 to \$8,000 per work station, down significantly from the

processing, time and billings, docket control, conflict resolution or case management. Equally gratifying, most of these network systems work! A word of caution, however—word processing is the most CPU-dominant task on a PC. Be cautious about trying to do too much at 3 p.m. on Friday.

Wordperfect

Wordperfect has come of age in the legal marketplace. It is the dominant factor and is likely to continue its dominance as long as Microsoft continues to be financially strong and well-managed.

Aside from the fact that it is the premier legal-specific product on the market, it has spawned a family of complementary vendors. These independents, recognizing a winner when they see one, and taking advantage of Wordperfect's macro capability, have developed an array of ancillary programs.

These programs, while actually operating in a Wordperfect mode, replicate programs heretofore written in a data processing mode. Now you can do billing, conflict checking, docketing and case management without ever leaving Wordperfect or having to learn the mysteries of data processing programs.

True, these word processing macro-based data management programs are only designed for small practices (typically one to three timekeepers), but these are precisely the practitioners who can benefit most from using them. Finally, pound for pound, these pseudo-data processing programs are significantly less expensive than their pure data processing counterparts. ■



Bornstein

\$8,000 to \$10,000 price tag of a couple of years ago.

Not surprisingly, most vendors these days are offering networked versions of their legal products, be they word pro-



Disciplinary Report

Reinstatement

● Birmingham lawyer **Leonard Kenneth Moore** was reinstated to the practice of law effective June 1, 1989. [Pet No. 89-01]

Suspensions

● On May 24, 1989, the Supreme Court of the State of Alabama entered an order suspending **Sallie M. McConnell** from the practice of law for non-compliance with the mandatory continuing legal education requirements of the Alabama State Bar with an effective date of said suspension to be April 1, 1989. [CLE No. 88-74]

● On May 31, 1989, the Supreme Court of the State of Alabama entered an order suspending **Kenneth H. Millican** from the practice of law for non-compliance with the mandatory continuing legal education requirements of the Alabama State Bar with an effective date of said suspension to be April 1, 1989. [CLE No. 88-37]

● By order of the Supreme Court of Alabama, Huntsville lawyer **Dan Moran** was suspended from the practice of law for a period of 91 days, effective June 15, 1989. Moran's suspension is based upon his conviction before the Disciplinary Board of the Alabama State Bar of unethical conduct. In two separate cases, Moran was found to be guilty of engaging in illegal conduct involving moral turpitude, dishonesty, fraud, deceit, misrepresentation or willful misconduct; willfully neglecting a legal matter entrusted to him and failing to seek the lawful objectives of his client; and that he prejudiced or damaged his client during the course of the professional relationship. In the second case, Moran again was found guilty of each of the above-stated ethical violations, and in addition thereto, was found to have misappropriated the funds of a client entrusted to him in that he failed to deposit said funds in an insured trust account and, further, failed to timely pay these monies of the client, upon receipt thereof, to the client. [ASB Nos. 86-20 and 87-47]

● Sylacauga lawyer **William Kenneth Rogers, Jr.**, was suspended from the practice of law for a period of 90 days, effective June 2, 1989, by order of the Supreme Court of Alabama. Said suspension was based upon Rogers' being found guilty by the Disciplinary Board of the Alabama State Bar of various ethics violations. Specifically, Rogers was found to have been guilty of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation or willful misconduct; of engaging in conduct that adversely reflects on his fitness to practice law; of accepting employment wherein his professional judgment on behalf of his client would be or reasonably might have been affected by his own financial, business, property or personal interest; and, of entering into a business transaction with a client where he had differing interests therein, without consent of the client after full disclosure. [ASB No. 88-33]

Public Censures

● On May 19, 1989, Anniston lawyer **James A. Mitchell** was censured for unprofessional conduct, in violation of four Disciplinary Rules of the *Code of Professional Responsibility*. Mitchell accepted employment, an attorney's fee and court costs from a client to file two suits on behalf of a client in small claims court. Mitchell, nonetheless, neglected the matters and failed to file suit for approximately 11 months, at which point neither defendant could be located at the addresses that had been provided to Mitchell by his client at the time of employment. [ASB No. 87-582]

● On May 19, 1989, Huntsville lawyer **William R. Self, II**, was censured for having willfully neglected a legal matter entrusted to him, in violation of the *Code of Professional Responsibility of the Alabama State Bar*. Self was hired and accepted a \$500 retainer to defend a client in a DUI case, but thereafter failed to contact the client about the matter, despite numerous efforts by the client to contact him and numerous messages left at his office by the client. Before the trial date in the DUI case, the client dismissed Self, and requested that he refund the full \$500 retainer paid, but Self did not refund any portion of the pre-paid retainer fee. [ASB No. 88-256]

● On May 19, 1989, Huntsville lawyer **William R. Self, II**, was censured for having engaged in conduct adversely reflecting on his fitness to practice law, having willfully neglected a legal matter entrusted to him, and having intentionally failed to carry out a contract of employment entered into with a client. Self was retained and paid a \$500 retainer fee to represent a client who had received a motor vehicle citation on Redstone Arsenal. Self appeared in court at the first setting of the case in September 1987 and requested a 30-day continuance, which was granted. He failed to appear at the next setting in October 1987, and the court granted his client another 30-day continuance. Thereafter, Self did not contact the client about the matter, and failed or refused to respond to numerous messages from the client requesting that he contact her and deliver her file to her. In December 1987 the client had to represent herself in court without assistance of counsel. [ASB No. 88-401]

● On May 19, 1989, Huntsville lawyer **William R. Self, II**, was censured for willfully neglecting a legal matter entrusted to him and failing to carry out a contract of employment entered into with a client for professional services, in violation of the *Code of Professional Responsibility*. Upon receipt of one-half of a retainer to represent a client in a divorce action, Self promised the client that he would immediately write to the attorney for the client's wife. A week later, the client received a letter from the wife's attorney inquiring as to why said attorney had not received a response from Self. After two weeks of unsuccessful attempts to meet and/or talk with Self, the client informed Self's secretary that he no longer desired

the services of Self and requested a refund of the retainer. Self never contacted the client nor did he refund the retainer. [ASB No. 88-343]

● On Friday, May 19, 1989, Huntsville attorney **William Self, II**, was publicly censured by the Alabama State Bar for violation of Disciplinary Rules 6-101(A), 7-101(A)(1)(2) and (3), and 9-102(A)(2). Self was found to have willfully and intentionally neglected a legal matter entrusted to him, to have failed to carry out a contract of employment with his client and to have, by his neglect, prejudiced or damaged his client. Additionally, it was determined that Self had, in violation of bar rules, withdrawn and applied to his own use funds belonging in part to the client and in part potentially to the lawyer while a dispute existed regarding the possession of the funds. [ASB No. 88-295]

Private Reprimands

● On May 19, 1989, a lawyer was privately reprimanded for having violated

DR 1-102(A)(4), DR 1-102(A)(6), DR 7-102(A)(7) and DR 7-102(B)(1). The lawyer represented a client who had been charged in municipal court with driving under the influence of alcohol. The client informed the lawyer that he had given a fraudulent name to the arresting police officer, but the lawyer, nonetheless, appeared with the client in municipal court as his attorney, and allowed the client to plead guilty to the charge under the fraudulent name. The lawyer did not withdraw, despite his knowledge that the client intended to perpetrate a fraud upon the court, and he did not instruct the client to rectify the fraud. [ASB No. 87-314]

● On May 19, 1989, a lawyer was privately reprimanded for having engaged in conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(5). The lawyer appeared in open court under the influence of alcohol, while representing the defendant in a capital murder case. The trial judge held the lawyer in contempt and had him

jailed until the next day. [ASB No. 88-678]

● On May 19, 1989, an Alabama lawyer was privately reprimanded for engaging in conduct that adversely reflected on his fitness to practice law. The lawyer, when questioned by a client as to a matter which the lawyer had handled, wrote the client stating, "The only mistake I have made is accepting a senile old fool like you for a client." [ASB No. 86-419]

● On May 19, 1989, an Alabama lawyer received a private reprimand for failing to refund promptly any part of a fee paid in advance that had not been earned upon the attorney's withdrawal from employment. The lawyer had received prepayment of an executor's fee after naming himself as executor in a will drafted by the lawyer for the client. Following a dispute over the matter, the client filed a grievance against the lawyer. Only then did the lawyer refund the unearned executor's fee to the client. [ASB No. 86-419] ■

—NOTICE—

In the Circuit Court of the Tenth Judicial Circuit
Bessemer Division
in Equity

Administrative Order 89-1

In all domestic relations cases, effective October 1, 1989, all motions for temporary relief (i.e., motions for temporary custody, motions for use and possession of the homeplace and personal property) shall be submitted upon affidavit of the movant. The motion and all affidavits shall be served upon the opposing parties who shall be granted five days from the date of service to submit affidavits in opposition. Thereupon, the motion shall be ruled upon by the court without a hearing unless the court determines that a hearing is necessary.

Done and ordered this the 7th day of July 1989.

—Roger Halcomb, Circuit Judge

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Died: July 12, 1989

Thaddeus Jones Davis, Jr.—Marion

Admitted: 1949
Died: March 30, 1989

Horace Livingston Flurry—Montgomery

Admitted: 1932
Died: March 29, 1989

James Walter Henson—Hoover

Admitted: 1979
Died: February 13, 1989

William Ernest Hollingsworth, Jr.—Talladega

Admitted: 1950
Died: June 2, 1989

Paul William Jevne—Marengo, Illinois

Admitted: 1934
Died: February 3, 1989

James Mylas Jolly, Jr.—Homewood

Admitted: 1958
Died: April 21, 1989

Carl George Moebes—Birmingham

Admitted: 1931
Died: February 18, 1989

Michael Alan Stephens—Birmingham

Admitted: 1984
Died: July 13, 1989

Sterling Franklin Stoudenmire, Jr.—Mobile

Admitted: 1955
Died: July 6, 1989

Janella Jackson Wood—Mobile

Admitted: 1935
Died: July 28, 1989

He was a former president of the Eastern Shore Chamber of Commerce, Eastern Shore United Fund, Reveler's Club and the Fairhope Rotary Club. He also served as commander of the Fairhope Power Squadron and as a national officer in the U.S. Power Squadron. Bailey was chairperson of the Baldwin County Boy Scouts Committee for many years and a member of the Mobile Area Council, Boy Scouts of America. He was a member of St. James Episcopal Church and served on the vestry and as senior warden for a number of years.

Survivors include his wife, Laura R. Bailey, of Fairhope; two sons, William M. Bailey of Oaktown, Virginia, and Ernest M. Bailey, Jr., of Fort Hood, Texas. He also has several stepchildren and grandchildren.

—Marion E. Wynne, Jr.
Fairhope, Alabama



ERNEST MINGE BAILEY

Ernest Minge Bailey, 72, died at his home on Fish River in Baldwin County, Alabama, July 4, 1989. He was born in Demopolis, and has been an attorney in Fairhope since 1954. He graduated from the University of Alabama Law School.

Bailey entered the service of his country in the United States Army as an enlisted man and retired as a lieutenant colonel in the artillery division prior to entering his law practice in Fairhope.

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*.

FINIS MURLAND SMITH

Judge Finis Murland Smith, former presiding judge of the 22nd Judicial Circuit, passed away April 14, 1989. Judge Smith was first elected to the bench in 1958 and took office in October of that year to complete his predecessor's unexpired term before entering, in January 1959, upon the term for which he was elected. At the time of his election, the 22nd Judicial Circuit was comprised of Covington and Geneva counties. Subsequently, Geneva County and Dale County were combined as the 33rd Judicial Circuit and only Covington County remained in the 22nd Circuit.

Judge Smith served on the bench for more than 30 years and retired at the completion of his fifth term in January 1989.

He was born on his family's farm in Covington County on August 23, 1919, and was graduated from Red Level High School in 1938. After graduation he entered the University of Alabama and earned his undergraduate degree in the spring of 1942.

Immediately thereafter, he entered the army, received his commission as a 2nd Lieutenant and was assigned to a tank company in the 2nd Armored Division. As a tank commander, and later as one of the youngest company commanders in his division, he saw heavy combat duty in North Africa, Sicily, Italy and France. On August 25, 1944, two days after his 25th birthday, as a young captain, he was severely wounded in France near the Seine River. After nearly two years of hospitalization, he was separated from the service in April 1946. During his military service, he was awarded the Silver Star, the Purple Heart, a Presidential Unit Citation and four Campaign Stars.

In 1945, he married the former Nan Holmes of Gantt, Alabama.

Upon leaving the service, he returned to the University of Alabama and entered law school. He received his law degree in 1949 and subsequently "hung out his shingle" in Andalusia, Alabama.

He acquired his family's farm in the Loango Community in Covington County and made his home there the last 30 years of his life. He was an avid hunter and fisherman, as well as an expert gardener.

He was a devoted member of the Mobley Creek Baptist Church where he

served as a deacon, Sunday School teacher and superintendent of the Sunday School.

During his service on the bench, Judge Smith earned a reputation for his knowledge of the law and was known for his unusual judicial temperament. Although he conducted his court with a firm hand, he was never known to raise his voice or to embarrass anyone participating in a trial before him. He was particularly patient with and helpful to young lawyers in his circuit. He was greatly respected by his fellow judges and all of the lawyers who had occasion to appear in his court.

Of his life it can truly be said that he devoted it to service to his Maker, his country, his family and his fellow man.

Judge Smith's wife of 41 years predeceased him in 1986. He is survived by two daughters, Elaine S. Manning and Gail S. Jones, and one granddaughter, Alexa Jones, all of Andalusia, Alabama.

—Griffin Sikes
Andalusia, Alabama



Please Help Us . . .

We have no way of knowing when one of our membership is deceased unless we are notified. Do not wait for someone else to do it; if you know of the death of one of our members, please let us know. Memorial information **must be in writing** with name, return address and telephone number.

Young Lawyers' Section

The Young Lawyers' Section of the Alabama State Bar convened its 10th annual meeting of the Seminar-on-the-Beach at Sandestin, Florida. The Continuing Legal Education program offered a wide variety of topics to the more than 200 young lawyers who attended, and included such speakers as Bill Baxley and Lanny Vines. There were numerous social activities including a golf tournament, a Friday night cocktail party sponsored by Pittman, Hooks, Marsh, Dutton & Hollis, P.C., and a Saturday night cocktail party and band party, sponsored by Emond & Vines. A special thanks to those two firms which helped make the Sandestin meeting a success.

In noting that my appreciation goes to Sid Jackson, Frank Woodson and Preston Bolt for their fine effort in putting together the Sandestin seminar, I have been requested to retract a small error in the May article for *The Alabama Lawyer*. In that section, I noted that Donald Partridge was currently president of the Mobile Young Lawyers' Section Affiliate. In fact, Sid Jackson currently leads that organization in its endeavors, and everyone looks forward to the events of the annual state bar meeting in Mobile next year.

The annual meeting of the Alabama State Bar convened Thursday, July 20, 1989. The Young Lawyers' Section, as per usual custom, hosted a social function that Thursday evening with music provided by "Chevy 6." The party was a success, and many thanks go to Amy Slayden and Frank Potts for their efforts.

The YLS also convened its annual business meeting Friday, July 21,

1989, and a new slate of officers was duly elected. They are President—James Anderson; President-elect—Percy Badham; Secretary—Keith Norman; and Treasurer—Sid Jackson. Congratulations to those new leaders of the YLS. James Anderson will be forming his executive committee for the coming year and also will be forming other committees to serve the YLS. For those interested, please contact James at his office in Montgomery.

As I begin to write this, my last article as president of the YLS, I sit in my hotel room in Huntsville, Alabama, at the 111th meeting of the Alabama State Bar. It is hard to believe that it was only four years ago in this very city that I was elected as treasurer of the YLS, and only one short year ago that I began my term as president. In taking this opportunity to look back on the accomplishments of this section for the last year, I feel gratified that it has been a very good year. This is due in large part to the excellent and untiring support I received from the members of my executive committee.

Our section continued to excel in the area of public service as evidenced by the continuing growth and popularity of our Youth Judicial Program, which was ably chaired by Charlie Anderson. Our section continued to provide valuable support and insight to the new lawyers coming into our profession as evidenced by the successful admission ceremonies headed by Rebecca Shows Bryan, and the ever-popular continuing legal education series that was chaired by Steve Shaw. Of course, our annual Seminar-on-the-Beach, chaired by Sid Jackson and Preston Bolt, was another success-



N. Gunter Guy, Jr.
1988-89 YLS President

ful and enjoyable event.

Not only did the YLS accomplish much in its duties to the bar and to the public this year, but the groundwork has been laid for many more successful accomplishments which lie ahead. A special thanks goes to Gary Huckaby, past president of the Alabama State Bar, who provided unselfish and continued support to our organization. My thanks also go to Reginald Hamner and his staff at the Alabama State Bar headquarters for their support whenever I called upon them.

It is my belief that the young lawyers of this state have a YLS of which they can be proud and a state bar of which they can be proud. This is due in large part to the dedicated individuals who serve our profession on a daily basis. I also am confident that both the YLS and the Alabama State Bar will continue to enjoy and experience many more accomplishments under the new leadership of Alva Caine and James Anderson. I pledge to them my support, and I wish them well in the year ahead.

It has been a great honor for me to have had the opportunity to serve the young lawyers of this state; I hope I have served you well, and I thank you for allowing me to do so. ■

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The Alabama Law Foundation, Inc. has applications available for 1990 grants of IOLTA funds. The deadline for submitting applications is December 30, 1989, with grants being awarded in March 1990. For more information contact Tracy Daniel, Alabama Law Foundation, Inc., P.O. Box 671, Montgomery, Alabama 36101.

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