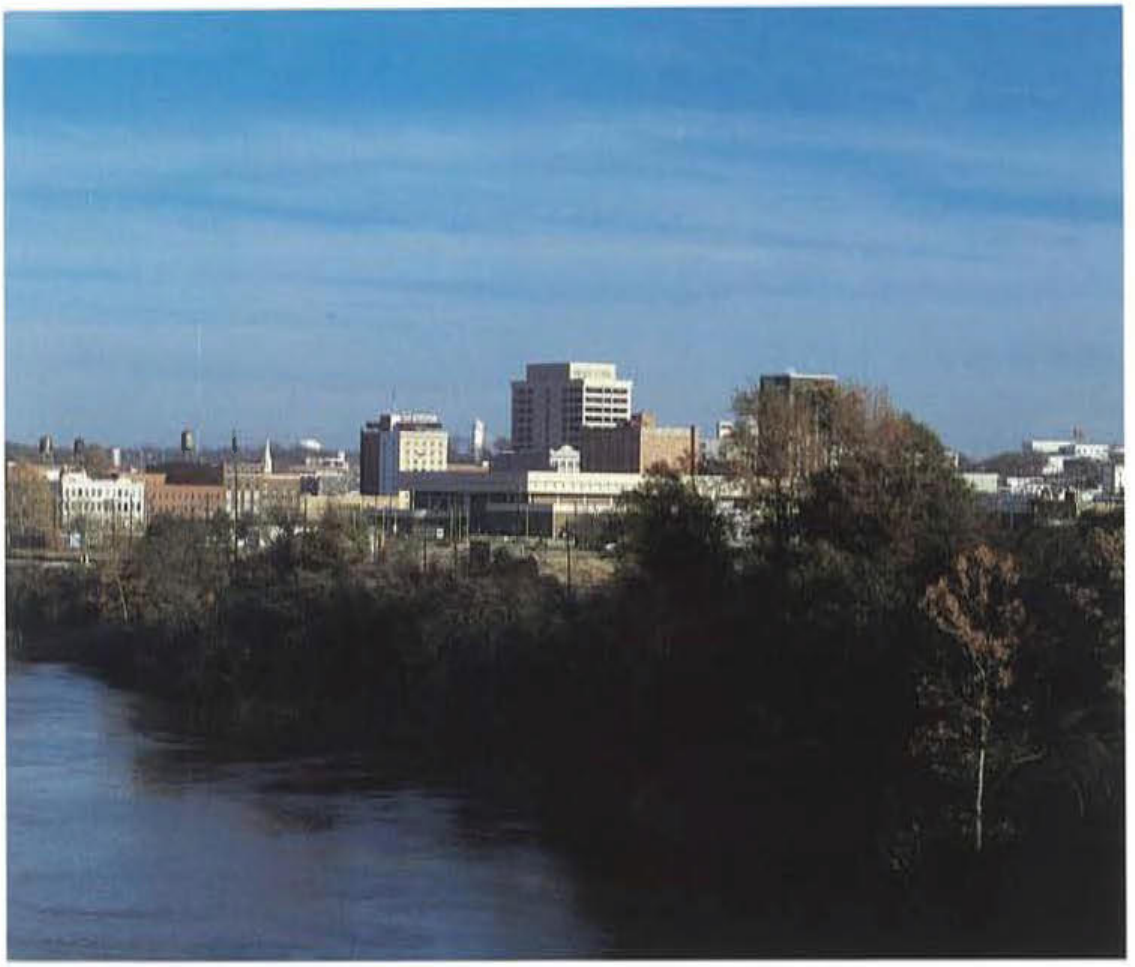
The Alabama Lawyer

Vol. 48, No. 6 November 1987

The Hugo L. Black Federal Courthouse, Birmingham



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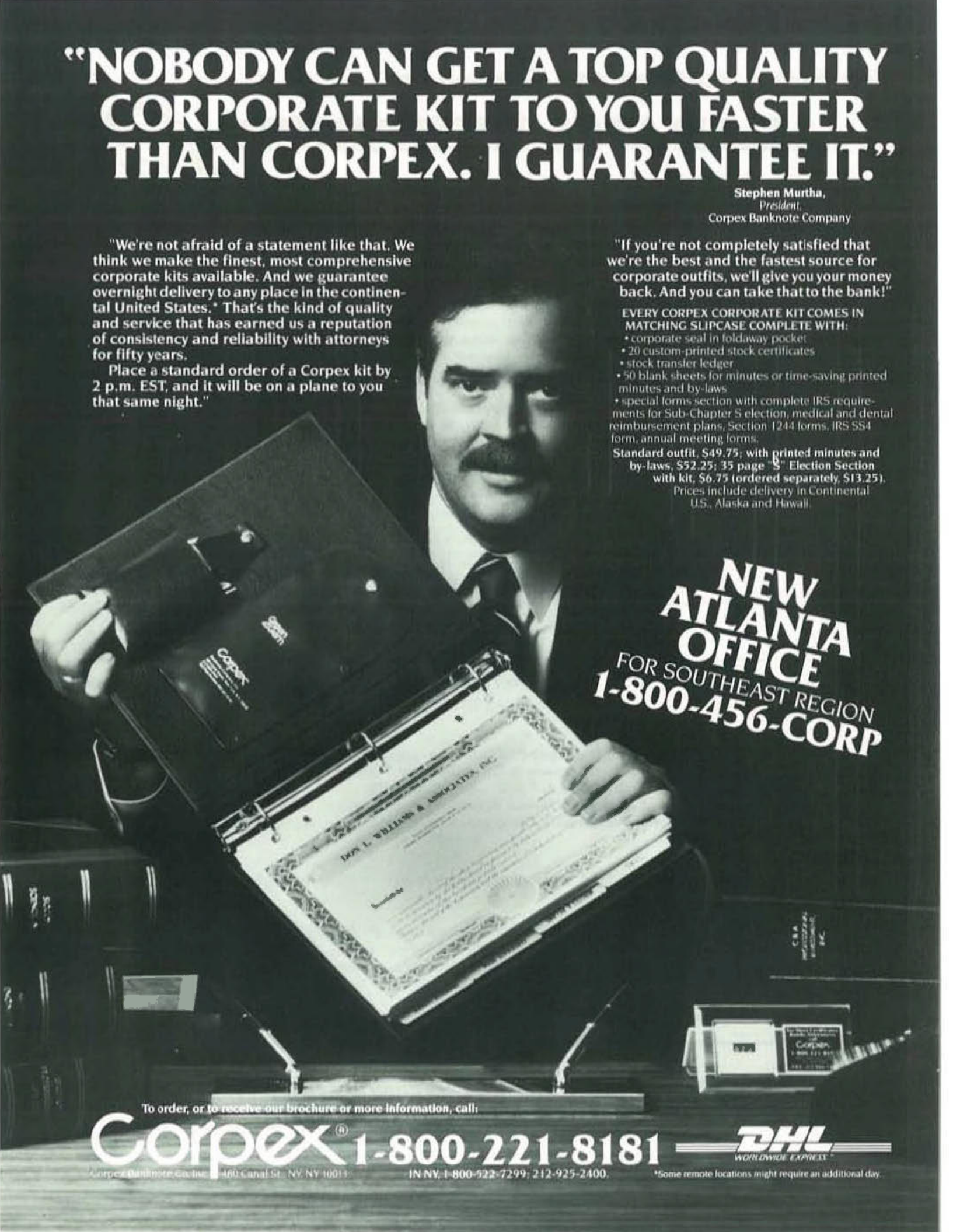

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The Alabama Lawyer

VOL. 48, NO. 6 NOVEMBER 1987

In Brief

Published seven times a year by The Alabama State Bar
P.O. Box 4156 Montgomery, AL 36101
Phone (205) 269-1515
Robert A. Huffaker—Editor
Carol Ann Smith—Associate Editor
Margaret Lacey—Managing Editor

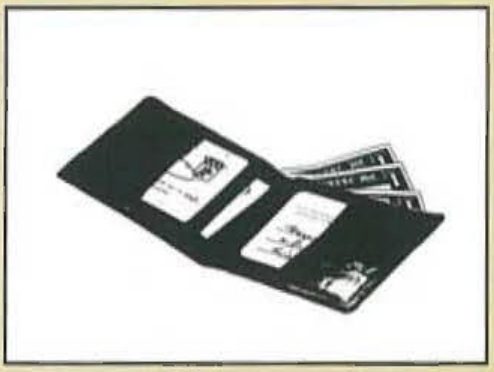
GENERAL INFORMATION **The Alabama Lawyer, (ISSN 0002-4287),** the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, July, August (bar directory edition), September and November. Views and conclusions expressed in articles herein are those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

The Alabama Lawyer is published seven times a year for $15 per year in the United States and $20 outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104. Single issues are $3, plus postage for the journal, and $15 (1987 book), plus postage, for the directory. Second-class postage paid at Montgomery, AL.

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

On the cover—

The new United States Courthouse, in Birmingham, has been occupied since June and houses the U.S. District Courts for the Northern District of Alabama. Photograph by Thomas C. McGregor, a Montgomery attorney



Review of TRA '86—Changes in Corporate and Personal Taxes—by Joseph W. Blackburn 332

The impact of the Tax Reform Act will become most noticeable in tax year 1987. The act institutes sweeping changes in the corporate and personal tax structure.

The Comprehensive General Liability Policy in Alabama—Coverage Provisions—by Christopher L. McIlwain 326

The provisions and exclusions contained in the standard form comprehensive general liability policy have been the subject of interpretation in a number of decisions rendered by the appellate courts of this state.

Building Alabama's Courthouses—by Samuel A. Rumore 338

In the first of an on-going series of articles, Sam Rumore, of the Birmingham Bar, provides an historical perspective of the courthouse of Jackson County.

INSIDE THIS ISSUE

President's Page

HARRIS

Opportunities are developing on several fronts as we move into the 1987-88 bar year. The assurance of several of my predecessors that I could count on the support of the members of the bar already has proven to be most accurate. The hard work of many of you is most evident, and the bar is indebted to you.

The newly-expanded board of bar commissioners is in place and working well. You have elected a dedicated group of new commissioners.

The IOLTA (Interest on Lawyer Trust Accounts) Committee, headed by Rowena Teague, and the Alabama Law Foundation, chaired by John Scott, have been working together to place in operation the IOLTA program. The bar commission authorized a contract with the foundation for an employee to work for the foundation. This person will develop materials needed to implement IOLTA, and you will be receiving more explanation and information.

I urge each of you to participate in IOLTA. It will be easy for you to do and it is a worthwhile program. All that will be required is the completion of one short form merely directing the bank to convert your trust account to an interest-bearing account. Otherwise, you will handle your trust account just as before. All reporting and transfer of interest earned on the account to the Alabama Law Foundation will be handled by the bank.

At its meeting on September 25, 1987, the board of commissioners authorized a short survey of the bar with respect to the formation of a captive insurance company, as a follow-up to the detailed survey of last fall. You likely will have received the survey by the time this issue of *The Alabama Lawyer* goes to press and, if you have not done so, I urge you to respond right away. The board of commissioners needs to hear from you in order to make a decision as to whether we should go forward to form a captive insurance company, owned by lawyers, to provide professional liability insurance. Capitalization of a captive will require at least $3,000,000, and start-up costs would run approximately $200,000.

Tom King, Jr., and his Committee on Local Bar Activities and Services is off and running, and members of the committee will be contacting local bar associations throughout the state. This effort will help the state bar learn from you and, I hope, assist in communications among local bars so good programs can be shared. I already am seeing projects in some areas of the state which can be adopted in other places. I commend to you this work of the Local Bar Activities and Services Committee.

I have appointed a task force to make recommendations as to a growing problem relating to representation of persons on death row. There are over 90 people under death sentence in Alabama. The bars of Florida and Georgia have developed programs to provide assistance to the civil lawyers who are being called upon by the courts to provide representation in these situations. In those states, resource centers have been developed at law schools to provide support to appointed attorneys.

In Florida, funds developed through the IOLTA program have aided in this process. This is a difficult area, but it seems the bar should have a role in seeing that inmates' rights are fully protected and, at the same time, assuring the system is not abused. The Florida approach has led to the appointment of counsel at a stage early enough to help alleviate the last-minute appeals situation.

As we go forward, I know I will be calling on more and more of you to give again of your time and talent to our profession. I know I can continue to be confident that you are more than ready, when called upon, to contribute your best efforts toward the improvement of our profession which in turn promotes the general welfare of our state and the public whom we serve. Seeing the generous contributions of so many of you makes serving as your president a pleasure. ■

Executive Director's Report

WHOA—get the horse before the cart!

HAMNER

It is hoped you have had an opportunity to read my IOLTA comments in the September 1987 *Alabama Lawyer;* if not, I urge you to do so. I also recommend you read Stanley Weissman's and Rowena Crocker's (now Teague) fine pieces on IOLTA in the September 1985 *Alabama Lawyer.* These suggestions are made to inform you about IOLTA and clear up some of the concerns raised by the bar-wide mailing of the Alabama Supreme Court's order approving an IOLTA program for Alabama lawyers.

I owe you an apology and explanation for the memorandum sent August 3, accompanying the IOLTA and Client Security Fund orders. In my haste to get the orders into your hands in sufficient time for those desiring to send comments to the supreme court by its September 1 deadline, I failed to appreciate the lack of information available to the bar and our banking community.

During our three-year effort, our task force has met with banking association officials, and, in fact, bank attorneys served as members of it. Bankers acknowledged acceptance elsewhere of IOLTA programs and indicated they expected the program to reach Alabama. Unfortunately, we did not encourage them to gear up for IOLTA since we were not sure the court would amend our *Code of Professional Responsibility* to permit interest-bearing trust accounts, and we did not know the final form an approved program would take.

While the court's action was a welcomed one, the timing for start-up has been problematical. Simply stated, we could not get our program up and running by October 1, 1987. There is no question of our doing so by October 1, 1988, and, in fact, January 1, 1988, is a realistic date, with the first interest payments being possible on March 30, 1988.

I received 203 letters in response to my memorandum transmitting the IOLTA order. Those merely expressing the desire to "opt out" numbered 158. Twenty-six criticized the program, while another 17 opted out "for the present" but expressed positive views toward the program and wanted more information. Two firms wanted to know how to immediately convert their trust accounts to the program.

Many of those opting out objected to the annual opt-out requirement and the bar will recommend that the court modify that feature. Also, there are technical banking language changes needed to describe "demand" and "interest-bearing" accounts. Of no small concern is the lack of guidelines as to "nominal amounts" and "length of time on deposit."

The state bar will undertake an intensive informational effort for financial institutions and our members. Meanwhile, I want to shed more light on the IOLTA program. I do this after receiving positive and encouraging comments from many of those who initially opted out but who, after a telephone call, have expressed support for the program.

IOLTA simply allows an attorney or firm to convert a standard trust checking account into an interest-bearing NOW type account which will generate interest income. The financial institutions will send the interest directly to the Alabama Law Foundation, Inc., which administers the IOLTA program. Interest paid, after the total administrative cost is deducted from the total interest earned, will be at the normal NOW account rate and service charges will be those routinely charged on such an account. There will be no tax consequences to the attorney, firm or client because the interest is paid directly to the tax-exempt Alabama Law Foundation, Inc., using the foundation's tax identification number (63-0951482) on all accounts (as payee of the interest).

The IOLTA program will not affect current trust account practice. Once you convert to or open an IOLTA account, you will go about your client trust practices as usual. The confidential, fiduciary relationship between attorney and client remains unchanged, and there are no new records to keep. Just as in the past, the decision whether client funds are nominal in amount or are to be held for a short period of time will rest in the sound judgment of each lawyer. When client funds are large enough or the time of deposit is long enough to justify the costs of opening, closing and administering a separate interest-bearing account,

lawyers should continue to establish individual accounts for the benefit of those clients.

IOLTA will have no effect on clients. From a client's perspective, the placement of funds is irrelevant, because the program involves funds an attorney otherwise would not invest in the client's behalf. However, if a client has questions, it should be explained the choice is between allowing funds to sit idly in a checking account or permitting those funds to generate interest to be used for worthwhile, law-related public service projects.

Virtually no time will be required of participating attorneys and firms. The mechanics of converting your account are simple, and once done, no further time or effort on your part is required. You will not need to change the way you presently account for your trust deposits, and can probably continue to use the same bank, checks and account number.

Conversion will be easy. The bar will provide you with an enrollment form as soon as the financial institutions are capable of handling the IOLTA accounts. You will send the original form to your participating bank or savings and loan association, and mail a copy of the completed enrollment form to the foundation to notify it of your participation.

There are no known legal barriers to banks or savings and loans offering the IOLTA program, but there are practical problems primarily in the data processing areas, which participating financial institutions can overcome easily. Each will need to develop and implement internal procedures for opening and maintaining the IOLTA accounts. Experience has shown the highly competitive nature of financial institutions will cause the vast majority of them to take necessary steps to offer such accounts.

We hope all lawyers and firms with eligible trust accounts will participate. Programs in 46 jurisdictions are working well. We have the benefit of their materials to assist in getting our program up and working in minimal time. Additionally, the foundation has hired an administrator, Ms. Tracy Daniel, to facilitate this process.

Again, I apologize for allowing "the cart to precede the horse" with my August 3rd transmittal. I hope we will be on the road to operational capacity when you read this. We will be contacting you in coming months to encourage participation. The interest paid to our foundation will make possible the improvement of our system of justice and its administration.

If you have any questions, please contact Tracy Daniel at bar headquarters. We would be happy to assist your financial institution in accommodating the IOLTA program.

—Reginald T. Hamner ■

LAWYERS HELPING LAWYERS

(formerly the "Buddy Program")

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

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

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Firm Name (if applicable) _____

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State _____ Zip _____ Telephone _____

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Editorial

(The views expressed here are those of the author and not necessarily those of the bar, its officers or members.)

September 25, 1987

Open Letter to Jimmy Clark
Speaker of the House of Representatives
Alabama State Legislature
Montgomery, AL

Dear Mr. Clark:

Normally when I have written open letters to the Governor or letters to the editor about politics in Alabama, I have sprinkled humor in the context of my views so those who read them would be more prone to think about the subject matter even if they disagreed with me. There will be no humor in this open letter to you because after reading the verbatim transcript of your interview with the editor of *THE BEDEVILED ADVOCATE* dated September 15 of this year, you have frightened me as a citizen and native of our great State. I am referring to your remarks concerning the upcoming election year and the five Alabama Supreme Court Justices who must run for reelection at that time. Specifically, you said:

> "NEXT YEAR, YOU HAVE FIVE OF THOSE JUSTICES UP AND IT IS GOING TO BE A KNOCK-DOWN-DRAG-OUT TO TURN THAT COURT AROUND. . . . TO HAVE A MAJORITY ON THERE. WHAT IS GOING TO HAPPEN IS THAT THE BUSINESS FOLKS ARE GOING TO FOLLOW UP JUST LIKE THEY DID ON TORT REFORM. THEY ARE GOING TO BE DAMN HOT POTATOES NEXT SPRING."
>
> "THOSE LAWYERS ARE ALL IN CAHOOTS WITH THE DAMN JUDGES, IT IS A BROTHERHOOD TYPE DEAL OUT THERE . . . PEOPLE ARE NOT AS AWED BY THOSE BLACK ROBES AS THEY HAVE BEEN IN THE PAST AND THEY ARE KIND OF WANTING TO PULL THOSE ROBES OFF AND LET'S SEE WHAT IS UNDERNEATH THERE."

The five Justices up for election, as you know, are Justices Torbert, Maddox, Beaty, Adams and Steagall, all Democrats and ALL Honorable men with nothing under their black robes but competence, character and integrity. I personally hate to have to admit that about one Democrat, much less five, but under the Canons of Judicial Ethics these men are basically defenseless because those canons of ethics prohibit them, due to their positions, from engaging you and/or your special interest groups in debate. If these "Damn Judges" are in cahoots with any lawyer or lawyers, please present your evidence to the Justice Department, the F.B.I. or better yet, the newspapers. Or maybe they're in cahoots with the judges and lawyers too! To be honest with you, Mr. Clark, your "cahoot" statement is not what bothers me, due to its absurdity. What does scare me and I hope every citizen of this State, is your plan to stack our State Supreme Court with a majority of justices that agree with YOUR ideology and that of your special interest groups. YOUR candidates, if elected, will probably have "appreciation dinners" at $1,000.00 a plate, and all of the lawyers and their clients and families who have a case pending before them if they were elected, would be invited to attend the day before their cases are decided. Judges are not legislators one lobbies for justice with the promise of votes and/or financial support in return for a preconceived agenda hidden under the guise of "philosophical perspective" which any candidate you could pay to run would ultimately hide under. At the State Court level, Appellate Judges and Justices of our Supreme Court are rarely challenged and then only for a specific reason. In 1982 there were two lawyers who challenged two of the Supreme Court Justices that will, along with three others, be up for election next year, they being Justices Adams and Maddox. Both of the candidates running against the incumbents ran as Republicans. The one that ran against Justice Adams did so because Justice Adams is black, need I say more. The other candidate ran against Justice Maddox for two primary reasons. The first being that he believed strongly in a two-party system in our state but the most important reason was that the Supreme Court, which has exclusive jurisdiction of all of the law schools in our State, had recently voted ADMINISTRATIVELY in its capacity as such to close down the non-ABA-accredited law schools, one of which was the alma mater of that candidate, who made it his primary issue. The administrative (not judicial) decision to shut down the night law schools was 5-4, with Justice Maddox voting with the majority. This candidate, or should I say the law school issue, received approximately 40 percent of the statewide vote. Since 1982 there has been only one other seat contested on the Alabama Supreme Court, by a highly respected attorney who ran against a recent appointee in a Democratic primary and who was narrowly defeated. Even in that election, competence was the issue and not judicial agenda which you have indicated will be your goal and that of your special interest groups in 1988. In closing, please forgive me for deviating a little in my promise not to add any humor to this letter, but honestly, Mr. Clark, Prime Minister Botha of South Africa needs you and your way of thinking more than the people of our State.

Sincerely yours,
Harry Lyon
Attorney
Pelham, Alabama

Please send your editorials and letters to:

The Alabama Lawyer
P.O. Box 4156
Montgomery, AL 36101

Your opinions on subjects of interest to other Alabama Lawyers are always welcomed.

About Members, Among Firms

ABOUT MEMBERS

Barbara Fox Jones announces the opening of her office for the general practice of law. Her office is located at 7070 Weibel Drive, Suite C-103B, Belleview Plaza, Fairfield, Alabama 35064. Phone (205) 786-9585.

■

Richard H. Taylor, formerly with the firm of Brown, Hudgens, Richardson, P.A., announces the opening of his office for the general practice of law. The mailing address is SouthTrust Bank Building, 61 St. Joseph Street, Seventh Floor, Suite 700, Mobile, Alabama 36602. Phone (205) 433-3131.

■

Roy W. Scholl, III, announces the relocation of his office for the practice of law to #2 Office Park Circle, Suite 200, Birmingham, Alabama 35223. Phone (205) 871-6004 or 871-6011.

■

Janie Baker Clarke announces the relocation of her law offices to the corner of Scott and McDonough streets, at 313 South McDonough Street, Montgomery, Alabama 36104. Phone (205) 264-2325.

■

William G. Nolan announces he has relocated to Central Bank of the South's Executive Financial Group, located in the Financial Center on 10th Street and 5th Avenue North, Birmingham, Alabama 35203. Phone (205) 933-3034. Nolan previously served for two years in the commercial lending department at the main office of Central Bank.

■

Miller A. Widemire, formerly regional administrator and deputy regional counsel for the United States Small Business Administration and staff assistant to United States Senator Jeremiah Denton, announces his return to the private practice of law with offices at Suite 2308, First National Bank Building, Mobile, Alabama 36602. Phone (205) 438-4100.

■

George Hugh Jones, formerly associated with the firm of Parker and Dawson of Birmingham, Alabama, announces the relocation of his office to 103A Jessup Building, Highway 31 South, P.O. Box 1391, Alabaster, Alabama 35007. Phone (205) 664-8133.

■

Rick A. Williams announces the removal of his office, effective August 1, 1987, from 300 South Hull Street to 547 South Lawrence Street, Montgomery, Alabama. Phone (205) 262-2719.

■

William G. Jones, III, announces the opening of his office at 2033 Airport Boulevard, P.O. Box 6096, Mobile, Alabama 36606. Phone (205) 476-2015.

■

Jonathan P. Gardberg announces the opening of his office at 3632 Dauphin Street, Building C, Mobile, Alabama 36608. Phone (205) 343-1111.

■

Douglas C. Freeman announces the relocation of his office to 669 South Lawrence Street, Montgomery, Alabama 36104. Phone (205) 264-2000.

■

Richard S. Sheldon announces the opening of his office at 166 Government Street, Suite 201, Mobile, Alabama 36602. Phone (205) 432-3737.

AMONG FIRMS

Effective September 30, 1987, the law firm of **Simpson, Hamilton & Ryan** was dissolved. **Fulton S. Hamilton** and **L. Thomas Ryan, Jr.,** are pleased to announce the continuation of their partnership for the general practice of law under the firm name of **Hamilton & Ryan** with new offices located at 121 Jefferson Street North, Huntsville, Alabama 35801. Phone (205) 533-7171.

■

J. Scott Vowell, Richard A. Meelheim and **Gregory J. McKay** announce they have formed the law firm of **Vowell, Meelheim & McKay, P.C.** The firm's offices are located at Suite 500, 310 North 21st Street, Birmingham, Alabama 35203. Phone (205) 252-2500.

■

Gregory B. Stein, formerly of Blacksher, Menefee & Stein, has joined in partnership with **Henry Brewster,** formerly of Legal Services Corporation of Alabama, and their offices are located at 405 Van Antwerp Building, P.O. Box 1051, Mobile, Alabama 36633-1051. Phone (205) 433-2002.

■

The members of the firm of **Miller, Hamilton, Snider & Odom** announce that **Jerome E. Speegle, Mac B. Greaves** and **William B. Garrison, Jr.,** have become members of the firm, and **Catherine L. McIntyre, Martin E. Roberts, Jr.,** and **Michael R. Mills** have become associated with the firm. Mobile offices are 254 State Street, Mobile, Alabama 36603. Phone (205) 432-1414. Montgomery offices are Suite 802, One Commerce Street, Montgomery, Alabama 36104. Phone (205) 834-5550. Washington offices

are Suite 240, 1112 Sixteenth Street, N.W., Washington, D.C. 20036. Phone (202) 429-9223.

■

The law firm of **Williams & Taliaferro** announces that **Robert C. Ledbetter** has joined the firm and the name of the firm has changed to **Williams, Taliaferro and Ledbetter.** Offices are located in the Bank of Ensley Building, 425 19th Street, Ensley, Birmingham, Alabama 35218. Phone (205) 788-3311.

■

The law offices of **Stewart and Associates, P.C.,** announces the relocation of its office to 2700 Highway 280 South, Second Floor, Birmingham, Alabama 35223. Phone (205) 871-7800.

■

The law firm of **Emond & Vines** announces that **Gary C. Smith,** formerly with the Mobile County District Attorney's Office, **Stephen D. Scorey** and **D. Bruce Petway** have become associates of the firm. Offices are located at 1900 Daniel Building, Birmingham, Alabama 35233. Phone (205) 324-4000.

■

The law firm of **Minor & Manasco** announces that **Ronald W. Wise** has become a partner, and the firm name has changed to **Minor, Manasco & Wise,** effective August 10, 1987. Offices are located at 555 South Perry Street, Suite 111, P.O. Box 5022, Montgomery, Alabama 36103. Phone (205) 263-2333.

■

R. Dale Wallace, Jr., William W. Brooke and **David F. Byers, Jr.,** announce the opening of the law offices of **Wallace, Brooke & Byers,** 2000 Southbridge Parkway, Southbridge Building, Suite 525, Birmingham, Alabama 35209. Phone (205) 870-0555.

■

Haskell, Slaughter & Young announces that **Stephen L. Poer, Thomas E. Reynolds, Thomas A. Ansley, K. Stephen Jackson, Beverly P. Baker, William W. Horton, Thomas D. Samford, IV,** and **Charles A. McCallum, III,** have become associated with the firm (Birmingham office). Offices are located at 800 First National-Southern Natural Building, Birmingham, Alabama 35203, and 1250 Bell Building, 207 Montgomery Street, Montgomery, Alabama 36104. Phone (205) 251-1000 or 265-8573.

■

The law firm of **Smith & Taylor** announces that **James C. Gray, III,** formerly associated with **Hardin & Hollis,** has become associated with the firm. Offices are located at Suite 1212, Brown Marx Tower, Birmingham, Alabama 35203.

■

Dewayne N. Morris and **James E. Vann** announce they have formed a professional corporation for the practice of law under the firm name of **Morris & Vann, P.C.,** with offices at 1707 City Federal Building, Birmingham, Alabama 35203.

■

Howell, Johnston, Langford & Watters announce that **Edward L. McRight, Jr.,** has become an associate of the firm, with offices at 61 St. Joseph Street, Suite 903, Mobile, Alabama. Phone (205) 432-2677.

■

The law offices of **Hopkins, Vaughn & Anderson,** 2701 24th Avenue, Gulfport, Mississippi 39501, announce that **Kenneth R. Watkins,** formerly an assistant attorney general for the State of Mississippi, has become associated with the firm. Phone (601) 864-2200.

■

The law firms of **Barry A. Friedman, P.C.** and **Reid & Perloff** announce the merger of their firms under the name of **Reid, Friedman & Perloff,** 257 St. Anthony Street, P.O. Box 2394, Mobile, Alabama 36652-2394. Phone (205) 432-2660 or 433-5412.

■

Armstrong & Vaughn announces that **J. Langford Floyd** has become a partner in the firm and the firm name has been changed to **Armstrong, Vaughn & Floyd,** effective June 1987. Offices are located at The Summit, Spanish Fort, Alabama 36527. Phone (205) 626-2688.

■

A. Lamar Reid, state agency director, and Mississippi Valley Title Insurance Company announce that **Vera M. Kee** has been appointed associate state counsel and will supervise attorney agents throughout Alabama. Her address is 324 North 21st Street, Birmingham, Alabama 35203.

■

Wininger & Lee, P.A. of Birmingham and Huntsville announces that **D. Deleal Wininger, Jr.,** now is associated with the firm in the home office located in the Whilldin Building, 517 North 21st Street, Birmingham, Alabama 35203. Phone (205) 322-3663.

■

Peter F. Burns announces that **Peter S. Mackey** now is associated with the firm, with offices at 50 St. Emanuel Street, P.O. Box 1583, Mobile, Alabama. Phone (205) 432-0612.

■

Copeland, Franco, Screws & Gill, P.A. of Montgomery announces that **Charles E. Vercelli, Jr.,** has joined the firm as an associate. Offices are located at 444 South Perry Street, P.O. Box 347, Montgomery, Alabama 36101-0347. Phone (205) 834-1180

■

Wertheimer & Feld, P.C. and **McCord & Hoffman** announce that they have combined their practices under the name of **Wertheimer, McCord, Feld & Hoffman, P.C.** Offices are at 2109 Third Avenue North, Third Floor, Birmingham, Alabama 35203. Phone (205) 252-2100.

The Comprehensive General Liability Policy in Alabama—Coverage Provisions

by Christopher L. McIlwain

Comprehensive general liability policies provide coverage to insureds for personal injuries and property damage suffered by third parties.

These policies, like others, sometimes have understandably been described as containing "such a bewildering array of exclusions, definitions and conditions that the result is confounding almost to the point of being unintelligible."[1] Another typical description is found in *Brainard v. Aetna Cas. & Sur. Co.*, 17 Misc.2d 810, 812, 187 N.Y.S.2d 435, 437 (1959):

> "The court cannot help but comment that the language, both in extent and ambiguity, in modern insurance policies is an abomination. Inclusion, exclusion, definitions and coverage set forth in the contracts present the most formidable type of obfuscation which no trained person, let alone a layman, can truthfully say is anything but the cant of the insurers. It is, unfortunately, not within the province of this court to order that policies be written briefly and lucidly."

The basic "insuring agreement" under a comprehensive general liability policy provides as follows:

> "I COVERAGE A—BODILY INJURY LIABILITY
> COVERAGE B—PROPERTY DAMAGE LIABILITY
> The Company will pay on behalf of the *insured* all sums which the insured shall become legally obligated to pay as damages because of
> A. *bodily injury or*
> B. *property damage*
> to which this insurance applies, caused by an *occurrence*."

No coverage exists under the policy unless this provision is triggered.

In determining whether a particular person, corporation or other legal entity is "covered" under a comprehensive general liability policy, it is helpful to analyze the policy by asking the following questions: (1) Is the person an "insured" as defined in the policy? (2) Is the injured third party claiming "bodily injury" or "property damage" and did this injury or damage occur during the policy period? (3) Was the injury or damage caused by an "accident"? (4) Was the injury or damage expected or intended by the person claiming coverage? (5) Are any exclusions under the policy applicable? This article discusses Alabama decisions construing the policy provisions relating to questions 1 through 4.

Is the person an "insured"?

The term "insured" usually is defined in the "Definitions" portion of the policy as follows:

> "'Insured' means any person or organization qualifying as an insured in the 'Persons Insured' provision of the applicable insurance coverage. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the company's liability. . . ."

The "Persons Insured" provision states:

> "II PERSONS INSURED
> Each of the following is an Insured under this insurance to the extent set forth below:
>
> (a) if the Named Insured is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor, and the spouse of the Named Insured with respect to the conduct of such a business;
>
> (b) if the Named Insured is designated in the declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to his liability as such;
>
> (c) if the Named Insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any *executive officer, director or stockholder thereof while acting within the scope of his duties as such;*
>
> (d) any person (other than an employee of the Named Insured) or organization while acting as real estate manager for the Named Insured; and
>
> (e) with respect to the operation, for the purpose of locomotion upon a public highway, of mobile equipment registered under any motor vehicle registration law,
>
> (i) an employee of the Named Insured while operating any such equipment in the course of his employment, and
>
> (ii) any other person while operating with the permission of the Named Insured any such equipment registered in the name of the Named Insured and any person or organization legally responsible for such operation, but only if there is no other valid and collectible insurance available, either on a primary or excess basis, to such person or organization;
>
> provided that no person or organization shall be an Insured under this paragraph (e) with respect to:
>
> (1) bodily injury to any fellow employee of such person injured in the course of his employment, or
>
> (2) property damage to property owned by, rented to, in charge of or occupied by the Named Insured or the employer of any person described in subparagraph (ii).
>
> This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the Insured is a partner or member and which is not designated in this policy as a Named Insured."

The bulk of the litigation relating to the term "insured" has centered on the inclusion of "executive officer" and whether particular employees of the insured constitute executive officers. The test appears to be whether the individual in question possesses managerial or policy-oriented responsibilities and is closely connected with the board of directors or governing body of the insured employer.

Applying this test, the following employees have been held not to be "executive officers" of private corporations: the assistant manager of a nightclub,[2] a foreman[3] and an assistant project manager.[4] A sewer foreman has been held to be an "executive officer."[5]

The term "executive officer" has been held to be ambiguous when applied to a municipal corporation as opposed to a private corporation.[6] The Alabama courts have held that a city traffic engineer was an "executive officer,"[7] and that a school building supervisor was an "executive officer," but that a police officer was not.[8]

Apparently as a result of holdings allowing coverage to non-employer insureds in co-employee actions,[9] the definition of "Insured" has been changed in some policies so that in connection with certain types of activities "no person or organization" is an Insured with respect to "bodily injury to any fellow employee of such injured in the course of his employment." Hence, under this so-called "fellow-employee exclusion," neither the employer nor the executive officer has coverage for co-employee suits based on injuries arising out of certain activities.[10]

Did bodily injury or property damage occur during the policy period?

The term "bodily injury" normally is defined in the "Definitions" portion of the policy as follows:

> "'bodily injury' means bodily injury, sickness or disease sustained by any person which occurs *during the policy period*, including death at any time resulting therefrom . . . ."

The term "property damage" usually is defined as:

> "(a) physical injury to or destruction of tangible property which occurs *during the policy period*, including the *loss of use* thereof at any time resulting therefrom, or (b) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period."

The term "bodily injury" has been held to include mental anguish even though there was no evidence of personal injury.[11]

The term "property damage" has been determined to include damage to a building caused by defective grout,[12] but not to loss of insurance benefits by an employee caused by an employer's failure to procure an insurance policy.[13]

It is unclear whether property damage through loss of use occurs when the insured obtains title to property from the complainant by way of fraud. In *Safeco Ins. Co. v. Sessions Co., Inc.*, 435 So.2d 5 (Ala. 1984), the issue was posed but not decided. A claim for labor and materials in connection with repairs necessitated by a defect in the insured's product does not constitute a claim for loss of use.[14]

The requirement that the injury or damage occur "during the policy period" has caused the Alabama courts considerable problems in cases where the insured's wrongful act occurs outside the policy period.

In *Utica Mut. Ins. Co. v. Tuscaloosa Motor Co., Inc.*, 295 Ala. 309, 329 So.2d. 82 (1976), a car dealer made repairs to a motor vehicle during the policy period which resulted in the car and its driver being injured and damaged after the policy expired. The supreme court held that the policy did not provide coverage for bodily injury or property damage outside the policy period even if the wrongful act or omission took place during the policy period. Justices Jones, Shores and Bloodworth, and Chief Justice Heflin dissented, contending that "public policy" required an insurance contract to fix coverage concurrent with the time of the insured's culpable conduct.

The holding in *Utica Mutual* was followed in *R. A. Owens Constr. Co., Inc., v. Emp. Ins. Co. of Ala.*, 392 So.2d 1180 (Ala. 1981), where the damage did not occur during the policy period and coverage was denied.

However, in *Wixom Bros. Co. v. Truck Ins. Exchange*, 435 So.2d 1231 (Ala. 1983), the court re-examined *Utica Mutual* and decided that the dissent's "public policy" argument had become more compelling and required that the insurer cover a claim for personal injuries and property damage occurring three years and seven months after the policy was cancelled, where the insured's wrongful conduct had occurred during the policy period. Chief Justice Torbert and Justices Maddox, Faulkner and Adams dissented.

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The court "flip-flopped" again in *U.S.F.&G. Co. v. Warwick Dev. Co., Inc.*, 446 So.2d 1021 (Ala. 1984), and overruled *Wixom*, returning to the view expressed by the majority in *Utica Mutual*. The decision in *Wixom* was subsequently reversed in *Truck Ins. Exchange v. Wixom Brothers Co.*; 460 So.2d 864 (Ala. 1984). Thus, under the "occurrence" type policy presently under consideration, the date of damage determines coverage. By way of contrast, under the "claims made" policy, the date of the claim will determine coverage.[15]

On occasion, the time when damage or injury occurs not always is clear. This is especially true in cases of continuous injury. In order to limit their exposure insurers have argued that for purposes of insurance coverage the date when injury or damage occurs should be a certain date, such as the manifestation of the injury or the date when first or last exposure to injurious conditions takes place. These efforts have met with little success. In *Mut. Fire, Marine and Inland Ins. Co. v. Safeco Ins. Co.*, 473 So.2d 1012 (Ala. 1985), the court, reaffirming *Utica Mutual*, held that a scintilla of evidence existed on the question of whether damage to a house from termites occurred during the policy period, because the complaint against the insured alleged that damage did so occur.[16] In *Comm. Union Assur. Co. v. Zurich Am. Ins. Co.*, 471 F.Supp. 1011 (S.D. Ala. 1979), the court held that bodily injury from silicosis did not merely occur on the date of the employee's last exposure to the condition causing his injury. In *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543 (11th Cir. 1985), the court held that bodily injury, as a result of asbestos-related illnesses, occurs upon exposure of the victim to asbestos hazards, rather than on manifestation of the subsequent illness.

Was the injury or damage caused by an accident?

The "insuring agreement" requires that bodily injury or property damage be caused by an "occurrence."

The standard of causation required is fairly high. In *U.S.F. & G. Co. v. Warwick Dev. Co., Inc.*, 446 So.2d 1021 (Ala. 1984), the court held that a claim of misrepresentation of the existence of defects in a house was not covered because the "property damage"—the alleged defects—were not caused by the "occurrence"—the alleged misrepresentations.

> The term "occurrence" usually is defined as follows:
>
> " 'Occurrence' means an *accident*, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*"

There is some conflict on whether fraud constitutes an accident. In *U.S.F.&G. Co. v. Warwick Dev. Co., Inc.* 446 So.2d 1021 (Ala. 1984), the court held that a misrepresentation made by the insured does not constitute an "occurrence." However, in *Cotton States Mutual Ins. Co. v. Norrell Heating & Air Cond. Co., Inc.*, 370 So.2d 270 (Ala. 1979), the court held that a claim of intentional, reckless or innocent misrepresentation constitutes an occurrence, and this holding was reaffirmed in *U.S.F.&G. Co. v. Andalusia Ready Mix, Inc.*, 436 So.2d 868 (Ala. 1983). See also, *Fowler Pest Control and Insulation, Inc. v. Hartford Ins. Co. of Ala.*, 21 ABR 4022 (Ala. 1987) (holding that a claim of unintentional fraud is covered).

Breach of a warranty does constitute an accident, at least in those policies containing products hazard coverage.[17]

Negligence is usually held to constitute an accident.[18] However, in *U.S.F.&G. Co. v. Boitz Ins. Co. of Ala.*, 424 So.2d 569 (Ala. 1982), the court held that because the insured roofer, prior to the inception of the policy, knew that a roof it had constructed had leaked for over four years despite repair attempts, and there was a real possibility that the roof would continue to leak, the damage was not "unforeseen, unexpected or unusual" and therefore was not an "accident." Thus, the court held there was no coverage even though the insured was charged only with negligence.

A trespass is not an "accident" even where the resulting damage is unintentional, as long as the acts constituting the trespass are voluntary and intentional and the injury is the natural result of the act.[19]

It is unclear whether wantonness constitutes an "accident." In *Armstrong v. Security Ins. Group*, 292 Ala. 27, 288 So.2d 134 (1973), the court quoted with approval the following language from a Fifth Circuit opinion:

> "Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen and unintended . . . ."

Id., 288 So.2d at 136

Was the injury or damage expected or intended by the person claiming coverage?

Since the 1984 case of *Ala. Farm Bur. Mut. Cas. Ins. Co., Inc., v. Dyer*, 454 So.2d 921 (Ala. 1984) (interpreting a homeowner's policy), a "purely subjective" standard has governed the determination of whether injury or damage is expected or intended from the standpoint of the insured. Under the subjective test, an injury is "intended from the standpoint of the insured" if the insured possessed the specific intent to cause bodily injury to another, whereas an injury is "expected from the standpoint of the insured" if the insured subjectively possessed a high degree of certainty that bodily injury to another would result from his or her act.[20]

Prior to 1984, it not always was clear whether an objective or subjective test was being applied in determining whether injury or damage was expected or intended. On some occasions the court would apply one or the other or even both of the tests in the same case. On other occasions the court applied neither test and appeared to base its deci-

sion solely on the theory of liability asserted against the insured in the complaint.

In *Armstrong v. Security Ins. Group*, 292 Ala. 27, 288 So.2d 134 (1973), the court held that where the owner of a sandwich shop broke up a fight using a gun, resulting in the severe injury of a patron involved in the fight, the trial court was justified in concluding that the injury was expected or intended. The court rejected as unpersuasive the insured's claim that he did not actually intend to injure the plaintiff.

In *Ladner & Co., Inc., v. Southern Guaranty Ins. Co.*, 347 So.2d 100 (Ala. 1977), the claim against the insured was that the insured "knowingly" had built homes in a flood-prone area and then sold them to the complainants. Because of the use of the word "knowingly" in the complaint, and the fact that nothing in the record indicated that the complainants were asserting any theory of liability other than intentional acts, the court held that there was no coverage. Although there was evidence that the insured did have full knowledge that the houses were in a flood-prone area, the court did not indicate that this was dispositive.

In *Lawler Mach. & Foundry Co., Inc., v. Pacific Indem. Ins. Co.*, 383 So.2d 156 (Ala. 1980), an intoxicated employee of the insured drove the insured's pickup truck into a crowded restaurant, after having an argument with the cashier and leaving the restaurant "mad." There was some evidence that the employee simply lost control of the truck due to his intoxication. Holding that the employee was not covered, the court appeared to say that both the subjective and objective tests were to be applied:

> "Was the insured's conduct so consciously and voluntarily committed as to render the resultant injuries and damages the natural and probable consequences of such conduct? Or, stated another way, did the insured, with reasonable foreseeability of injury, so consciously direct his actions that the resultant injuries are the natural or probably consequences thereof?"

Id. 383 So.2d at 158

In *Lakeshore Drive Recreation Club, Inc., v. U.S.F. & G. Co.*, So.2d 278 (Ala. 1981), the insured performed highway construction work that caused siltation of a small lake. These problems were noticed in 1974, but the project engineer decided to wait until the project was completed to take any action. When the project was completed in 1976, the insured initiated efforts to clean out the silt. These efforts were intentionally terminated in 1977 because the insured believed it had already removed more silt than it put in the lake. The court held that there was a scintilla of evidence that the cessation of restoration efforts did not cause property damage that was intended or expected. "In other words, a trier of fact could conclude that Southeast ended its restoration work because it believed it had already removed more silt than it had put in . . . ." *Id.* at 283

In *McDonald v. Royal Globe Ins. Co.*, 413 So.2d 1046 (Ala. 1982), the manager and assistant manager of the insured nightclub became involved in a fracas with some patrons who had been asked to leave. The patrons filed suit for assault and battery. The jury held that the injuries were neither expected nor intended from the standpoint of the nightclub, but the trial court granted a summary judgment in favor of the insurer and against the manager and assistant manager on this issue. The supreme court held that the grant of summary judgment was error because intent is not a necessary element of assault and battery, and because the issue of whether the assault and battery in the case at bar was intentional was a question of fact.

In *U.S.F. & G. Co. v. Bonitz Ins. Co. of Ala.*, 424 So.2d 569 (Ala. 1982), the insured entered into a contract for insulating and constructing a roof on a

gymnasium. In late 1972, after completion of the project, the roof began to leak. Repairs were attempted on several occasions, but the leaks continued until 1978 when the roof was completely replaced. Suit was filed alleging breach of contract and negligence. From 1972 through 1977, the insured had insurance through U.S.F. & G., and from 1977 through the time of trial, insurance was provided through Employer's Mutual. In determining that the damage was not intended or expected under the U.S.F. & G. policy, the supreme court relied solely on the fact that the insured was "merely charged with negligence in installing the roof." No objective or subjective test was applied.

In *Moss v. Champion Ins. Co.*, 442 So.2d 26 (Ala. 1983), the interior of a house was damaged by rain when the roof allegedly was left uncovered during a re-roofing job by the insured roofer. Reversing an *ore tenus* verdict in favor of the insurer, the supreme court employed a subjective test to the evidence before it and concluded that the damage was neither expected nor intended. The court found especially persuasive evidence that the insured had taken reasonable steps to prevent damage in the form of instructions to workers not to leave the roof uncovered. As in *Bonitz*, the court also noted that the insured roofer was charged with negligence and "not conscious acts made with intent to cause damage."

In *U.S.F. & G. Co. v. Armstrong*, 479 So.2d 1164 (Ala. 1985), a decision rendered after *Dyer*, the complainant's land was damaged when raw sewage flowed on it during replacement of a sanitary sewer system. The existing sewer line had been intentionally crushed by the insured contractor during the construction to allow work on the new line to proceed below the existing line, and this crushing blocked off the sewage, causing it to back up in the line and flow onto the complainant's property. The supreme court held that there was a duty to defend because the complaint against the insureds alleged only negligence. In order to determine whether there was a duty to pay, however, the court went further than merely examining the complaint and expressly applied the subjective test to the facts. Finding that there was no evidence to suggest that the insureds specifically intended the discharge of raw sewage on the complainant's land, the court held that U.S.F. & G. had a duty to pay.

The supreme court has construed the term "insured" quite narrowly when determining whether injuries or damages are intended or expected "from the standpoint of the insured." Even if injuries or damages are intended or expected by an employee of a corporation or sole proprietorship, this intent or expectation is not imputed to the corporation or proprietor so as to preclude coverage to the corporation or proprietor.[21] Where there is more than one insured under a single policy, the intent or expectation of one insured will not be imputed to the other, absent some evidence that the other directed or participated in the wrong.[22]

Conclusion

While the comprehensive general liability policy, at first glance, may present the "bewildering array of exclusions, definitions and conditions," the Alabama courts have provided to the practitioner definitive guidelines in the construction of the policy provisions. ■

FOOTNOTES

[1] *Maretti v. Midland Nat'l Ins. Co.*, 42 Ill. App.2d 17, 28, 190 N.E.2d 597, 602 (1953).

[2] *McDonald v. Royal Globe Ins. Co.*, 413 So.2d 1026 (Ala. 1982).

[3] *Wolsey v. Aetna Cas. & Surety Co.*, 346 So.2d 952 (Ala. 1977); *U.S.F. & G. Co. v. Warhurst*, 336 F.Supp. 1190 (N.D. Ala. 1971).

[4] *Mission Ins. Co. v. Barnett*, 476 F.Supp. 925 (S.D. Ala. 1979)(citing unpublished decision).

[5] *United States Fire Ins. Co. v. McCormick*, 286 Ala. 531, 243 So.2d 367 (1970).

[6] *Northland Ins. v. City of Montgomery*, 418 So.2d 881 (Ala. 1982).

[7] *Northland Ins. v. City of Montgomery*, 418 So.2d 881 (Ala. 1982).

[8] *Pullen v. Cincinnati Ins. Co., Inc.*, 400 So.2d 393 (Ala. 1981).

[9] *Home Indem. Co. v. Reed Equip. Co., Inc.*, 381 So.2d 45 (Ala. 1980); *United States Fire Ins. Co. v. McCormick*, 286 Ala. 531, 243 So.2d 367 (1970)(executive officer covered).

[10] *Southern Guaranty Ins. Co. v. Pittman*, 439 So.2d 7 (Ala. 1983)(person who was vice-president and owner of one-third of stock, who also was an "employee," was not covered insofar as fellow-employee claim). But see, *Mission Ins. Co. v. Barnett*, 476 F.Supp. 925 (S.D. Ala. 1979)(executive officer not an employee under fellow-employee exclusion) disapproved in *Home Indem. Co. v. Reed Equip. Co.*, 381 So.2d 45 (Ala. 1980).

[11] *Morrison Assur. Co. v. North Am. Reinsurance Corp.*, 588 F.Supp. 1324 (N.D. Ala. 1984), aff'd, 760 F.2d 279 (11th Cir. 1985).

[12] *U.S.F. & G. Co. v. Andalusia Ready Mix, Inc.*, 436 So.2d 868 (Ala. 1983).

[13] *Oxford Lumber Co. v. Lumbermens Mut. Ins. Co.*, 472 So.2d 973 (Ala. 1985).

[14] *U.S.F. & G. Co. v. Andalusia Ready Mix, Inc.*, 436 So.2d 868 (Ala. 1983).

[15] See also, *Annot.*, 37 A.L.R. 4th 382 (1985). The "claims made" trigger has been held to be in accord with Alabama public policy. *James v. Hackworth v. Continental Cas. Co.*, 522 F.Supp. 785 (N.D. Ala. 1980).

[16] Accord, *Ladner & Co., Inc., v. Southern Guaranty Ins. Co.*, 347 So.2d 100 (Ala. 1977)(complaint alleged damage during the policy period).

[17] *Fitness Equip. Co. v. Penn. General Ins. Co.*, 493 So.2d 1337 (Ala. 1985); *U.S.F. & G. Co. v. Andalusia Ready Mix, Inc.*, 436 So.2d 868 (Ala. 1983); *Cotton States Mutual Ins. Co. v. Norrell Heating & Air Cond. Co., Inc.*, 370 So.2d 270 (Ala. 1979).

[18] *Moss v. Champion Ins. Co.*, 442 So.2d 26 (Ala. 193); *U.S.F. & G. Co. v. Birmingham Oxygen Serv., Inc.*, 290 Ala. 149, 274 So.2d 615 (1973)(supply of incorrect product); *Employers Ins. Co. of Ala., Inc., v. Ala. Roofing & Siding Co., Inc.*, 271 Ala. 394, 124 So.2d 261 (1960)(roof leaks); *Emp. Ins. Co. of Ala. v. Rives*, 264 Ala. 310, 87 So.2d 653 (1955)("This court has been inclined to give a liberal construction to the word 'accident.' ").

[19] *Thomason v. U.S.F. & G. Co.*, 248 F.2d 417 (5th Cir. 1957).

[20] *Ala. Farm Bur. Mut. Cas. Ins. Co., Inc. v. Dyer*, 454 So.2d 921 (Ala. 1984).

[21] *Lawler Mach. & Foundry Co., Inc., v. Pacific Indem. Ins. Co.*, 383 So.2d 156 (Ala. 1980)(corporation); *Moss v. Champion Ins. Co.*, 442 So.2d 26 (Ala. 1983)(sole proprietorship).

[22] *Armstrong v. Security Ins. Group*, 292 Ala. 27, 288 So.2d 134 (1973)(assault by one insured not expected or intended by other insured).

Review of TRA '86 Changes in Corporate and Personal Taxes

by Joseph W. Blackburn

Introduction

Some of the biggest news in 1986 for attorneys and their clients were the sweeping corporate and individual tax changes brought about by the Tax Reform Act of 1986 (TRA '86). The reforms were so fundamental that the Internal Revenue Code of 1954 was redesignated the Internal Revenue Code of 1986. The purpose of this article is to highlight some of the more important changes. General practitioners must keep these new rules in mind while advising their clients even on such basic matters as incorporation of a business, sale of real estate with installment notes and deduction of business meals.

Implications of corporate and individual rate changes

As most are aware, the big benefit to all taxpayers under TRA '86 was an across-the-board reduction in applicable tax rates. Corporate tax rates were dropped from a high of 46 percent in 1986, to 40 percent in 1987. Such rates are scheduled to drop to a maximum of 34 percent in 1988. Likewise, individual rates have made a similar dramatic fall from 50 percent in 1986 to 38.5 percent in 1987, and ultimately, to a maximum of 28 percent in 1988. However, the effective tax rate for high income individuals may exceed 28 percent. For example, married taxpayers filing jointly with income in excess of $71,900 will have an effective tax rate of 33 percent. This 5 percent surcharge will terminate and the effective rate will drop back to 28 percent when the taxpayer's income reaches even higher levels. This level will likely be between $150,000 and $200,000 for most taxpayers.

Subject to Congress's possible postponement of the scheduled 1988 rate reduction, these reductions have major implications on basic planning. Individuals now will be paying taxes at rates lower than corporations. Therefore, for this and other reasons, many businesses may look very carefully at alternatives to the corporate form of business organization. Proprietorships, general partnerships, limited partnerships and Subchapter S corporations already have become increasingly popular.

The lowering rates also suggest other basic planning techniques, which will result in deferral of income from the higher rates applicable in 1987 to the lower tax rates available in 1988. This is sound and basic planning for corporations and individuals. Two available techniques are nonqualified deferred compensation (to defer salary) and installment sales plans (to defer gain on accounts receivable).

Impact of TRA '86 on sale and liquidation of corporations

Several different provisions of TRA '86 will have a substantial impact on tax payable upon the sale and/or liquidation of a corporation. Changes include repeal of the general utilities doctrine, limits on net operating loss carry-forward and new allocation rules for asset acquisitions.

Prior to TRA '86, a corporation's stock or assets could be sold with only one long-term capital gain tax to the seller, and a stepped-up basis in the operating assets to the buyer. Under TRA '86, a corporation which sells its assets and liquidates the sales proceeds to the shareholders now will pay two taxes. The first tax is on the corporation's sale of its assets. The second tax is on the shareholder's receipt of the proceeds in exchange for his stock. If a stockholder sells stock instead of the corporation's assets, the seller will have only one gain on sale of stock. However, the buyer cannot get a stepped-up basis in the corporation's assets without incurring a second tax. Imposition of this additional second tax now must be considered very carefully by buyers and sellers alike.

The second tax can be avoided by Subchapter S corporations if timely Subchapter S elections already have been, or can be, made. Congress changed the Subchapter S rules to cause the second tax on sale of a corporation to be imposed even on a Subchapter S corporation. However, transition rules still allow closely held corporations with a value less than $5,000,000 to elect Subchapter S before January 1, 1989, and avoid the double tax. Such a corporation also can avoid double tax on a liquidation prior to January 1, 1989.

TRA '86 also limited the amount of net operating loss carry-forward which could be utilized annually by a corporation following a change of ownership in that corporation. If, over a three-year period, a shareholder increases his stock ownership by 50 percentage points, thereafter the corporation's ability to utilize loss carry-forwards will be limited.

Asset basis allocation

Prior to TRA '86, buyers and sellers in a business asset acquisition could allocate the purchase price among the various assets by "arms-length" negotiation. Under TRA '86, both the buyer and the seller must use a mandated allocation procedure.

In representing a business client, all of these factors must be weighed. To provide basic planning for corporate clients, consider the possibility of liquidation or election of Subchapter S status before January 1, 1989. Given the double tax on repeal of the general utilities doctrine, the prescribed method for basis allocation and repeal of the deduction for long-term capital gain, many future sales of businesses will be restructured to provide for stock sales coupled with large non-compete arrangements or restructured altogether as leases.

Rules having an impact on time of recognition for income and deduction

Important sweeping changes in tax accounting rules also were made in TRA '86. Changes include important new rules which may accelerate income under installment notes and installment receivables, repeal the reserve method for deducting bad debt expenses and require changes from fiscal years to calendar years. When Congress relieved individual taxpayers of over $120 billion dollars in taxes by rate reductions, $120 billion dollars of additional revenues had to be made up from corporations. Almost 25 percent of this additional revenue is to be raised from the new accounting rules. Those figures should give a clear

idea of the importance of the new accounting rules to attorneys and their clients.

One change that will have an impact on transactions almost all lawyers routinely handle are the new rules applicable to the installment method of reporting. Installment reporting is important in two types of transactions. First, and most commonly seen by most lawyers, is the sporadic sale of an asset, such as the sale of real estate or the sale of a business where payment is to be made over time in installments. A second context, perhaps more familiar to accountants, is treating a manufacturer, wholesaler or retail client's accounts receivables as revolving credit accounts or installment receivables. In both of the foregoing transactions, use of installment reporting defers realized gain until the installment payments are actually received in future years.

For manufacturers and merchants, TRA '86 denies the installment method of accounting, and thereby eliminates deferral of income, on all revolving credit sales, e.g., credit sales on store credit cards and open charge accounts. In addition, installment reporting no longer is available for sales of securities or other assets normally traded on established securities or other similar markets.

Use of the installment methods also is limited, though not repealed, for certain other sales of real or personal property. Thus, these new limitations apply to "applicable installment obligations" arising from sales of real or personal property by dealers if made since February 28, 1986, if the sale price exceeds $150,000. Note from the foregoing effective dates that installment notes from transactions that already have been consummated are subject to the new rules. Under the new rules, a *pro rata* portion of the taxpayer's non-personal indebtedness is treated as a prepayment on the taxpayer's applicable installment obligations, thereby artificially triggering recognition of a part of the gain. Thus, whether the taxpayer is a corporation or an individual, the amount of their non-personal debt will directly influence the extent of deferral they receive from installment sales of qualifying property.

TRA '86 limits use of the cash method of accounting. Under the law a corporation, other than a Subchapter S corporation, cannot utilize the cash method of accounting if its gross receipts exceed $5,000,000. Exceptions apply only for qualified personal service corporations such as corporations formed for the practice of law, accounting, engineering, etc.

New rules also prevent deduction of bad debts on the reserve method and require that bad debts can be deducted only when they are specifically identified as worthless. Likewise, there are major changes in rules applicable to merchants, wholesalers and manufacturers which require that many costs previously deductible now be capitalized and included in the inventory account as an asset.

Depreciation and investment tax credit

Congress repealed the Investment Tax Credit effective January 1, 1986. Unused investment tax credit carryforward must be reduced by 35 percent after June 30, 1987. Investment tax credit had been available intermittently in the Code over the last 25 years and was extremely important to all business taxpayers. Its repeal will cost business taxpayers approximately $50,000,000,000 in additional taxes.

The system of depreciation of business property also was substantially modified with the most important changes falling on real estate. The depreciable life of commercial real estate was extended from 19 years to 31.5 years, and residential real estate was extended to 27.5 years. Also, real estate now can be depreciated only using the straight-line depreciation method over the new, longer depreciable lives. Accelerated methods of depreciation no longer are available for real estate placed in service after December 31, 1986. Note, of course, that pre-existing rules continue to apply to property placed in service prior to December 31, 1986.

The depreciable lives of most personal property also was extended, although the depreciation method itself was enhanced. Formerly statutory accelerated depreciation was based on 150 percent declining balance, but under TRA '86 is based on 200 percent declining balance for property whose depreciable life ranges from three to ten years. There also are new limitations on a taxpayer's ability to buy property at year's end and receive the fully allowable half-year depreciation on such property.

Important new corporate alternative minimum tax

Under prior law the corporate add-on minimum tax did not apply to very many corporations. However, the new corporate alternative minimum tax rate of 20 percent is close to the new maximum corporate tax rate of 34 percent. This small 14 percent difference between the regular tax rate and alternative tax rate is not substantial, and, given the greatly expanded list of tax preferences, the alternative minimum tax now frequently will exceed regular tax. The alternative minimum tax is applied to a corporation's taxable income increased for tax preferences. New tax preference items include use of the installment method of accounting, tax-exempt interest earned on recently issued private activity bonds, untaxed appreciation on charitable contributions of appreciated property and, very importantly, one-half of the excess of pre-tax book income over other alternative minimum taxable income.

Joseph W. Blackburn is the Palmer Professor of Law at the Cumberland School of Law in Birmingham. He also is a scholar in residence to the firm of Sirote, Permutt, McDermott, Slepian, Friend, Friedman, Held & Apolinsky. He received his undergraduate degree, with honor, from the University of Kentucky and law degree from the University of Virginia. He is a certified public accountant and a member of the Birmingham Bar Association and the Alabama State Bar.

Perhaps the greatest uncertainty with the alternative minimum tax lies in the last tax preference item. Fifty percent of the excess of income reported for financial accounting purposes over income reported for tax purposes is a tax preference. One startling example of a difference between taxable income and financial income, 50 percent of which hereafter would constitute a tax preference, is receipt of insurance proceeds on death of a shareholder. Presently, many corporate stock purchase agreements are funded by the corporations' purchase of life insurance. Upon the death of a shareholder insured, the proceeds of the insurance policy are paid to the corporation. Such proceeds are used to redeem stock from the deceased shareholder's estate. Insurance proceeds have been, and continue to be, free of regular federal income tax. However, receipt of these proceeds would constitute financial income. Thus, the insurance proceeds would create a difference between financial income and taxable income, one-half of which constitutes a tax preference. For example, if a corporation received proceeds of a $1,000,000 insurance policy it would have a $500,000 tax preference. When added to other alternative minimum taxable income, the 20 percent alternative minimum tax rate would apply. As much as 10 percent of the insurance proceeds may be consumed by the alternative minimum tax imposed on them. In designing stock purchase agreements attorneys should advise their clients of the existence of this new tax preference item and carefully weigh whether a stock purchase should be structured as a redemption by the corporation or established as a cross-purchase agreement between the shareholders. This new tax preference does not apply to a Subchapter S corporation.

General changes for individuals

In addition to rate reductions, individual taxpayers will benefit from an increased standard deduction ($5,000 for married couples filing jointly in 1988) and increased personal exemptions ($2,000 by 1989). Likewise, some former benefits have been curtailed.

The deduction for two-earner married couples was repealed along with income averaging. In addition, employee business expenses, previously deductible whether the taxpayer itemized, now have been reclassified as miscellaneous itemized deductions. All miscellaneous itemized deductions (such as expenses for tax preparation, investment advice, etc.) are deductible only to the extent in the aggregate they exceed 2 percent of a taxpayer's adjusted gross income. Thus, the only portion of a taxpayer's miscellaneous itemized deductions now which can be deducted is the excess of the total over 2 percent of adjusted gross income. Employee business expenses, investment expenses and other miscellaneous itemized deductions of a business nature should be shifted away from the individual taxpayer and into his corporation, if possible. Employee expense reimbursement plans can be established to provide this benefit to the employee without added cost to the employer.

Deductions for individual retirement accounts also have been eliminated for some taxpayers. An active participant in a qualified retirement plan whose adjusted gross income exceeds specified limits ($50,000 if married filing jointly) cannot make deductible contributions to an IRA. Nondeductible contributions still are permitted. Earnings on nondeductible contributions would continue to be tax deferred within the individual retirement account itself. Each taxpayer will have to assess their investment and retirement alternatives to determine whether non-deductible contributions still are advisable.

Meals, travel and entertainment expenses

Only 80 percent of otherwise allowable business meal and entertainment expenses can be deducted since January 1 of this year. The 80 percent limitation applies to virtually all categories of business and travel-related meals. For example, meal costs incurred while traveling away from home on business are subject to the limitation; so is the cost of a quiet business lunch with a client. Likewise, entertainment expenses, such as football tickets, are deductible only to the extent of 80 percent of their face amount. Note that entertainment expenses are limited to their face cost and not their actual cost, e.g., the deduction for a football ticket with a designated price of $15 for which the taxpayer paid $100 is $12, i.e., 80 percent of $15, not 80 percent of $100.

The test for qualifying a quiet business meal as a deduction also has been tightened. In the past a quiet meal in an environment conductive to a business discussion was deductible whether any actual business was discussed. After TRA '86 a business meal is subject to the same stringent test as entertainment expenses, i.e., the business meal must be shown to be directly related to the conduct of business or directly associated with the conduct of business. To satisfy these tests business must actually be discussed or conducted during the meal, or the meal should immediately precede or follow a substantial business meeting.

Income taxation of minor children

In the past many parents provided for their children's college education by irrevocably transferring funds to bank accounts in their children's names. Earnings on the accounts were taxed at the lower tax rates applicable to the children. Under TRA '86, the unearned income of a child under the age of 14 which exceeds $1,000 is taxed to the child at the parents' top tax rate. Whether the asset which produced the unearned income came from the child's parent or anyone else is irrelevant.

This provision, when coupled with the elimination of the "Clifford" trust (sometimes referred to as the short-term or ten-year trust), makes it extremely difficult for parents to fund their children's college education. Some insurance policies and Series EE U.S. Savings Bonds, which allow deferral of income recognition by the child until they reach age 14, should be considered as investments for minors. Many states, though not Alabama, already have adopted or are considering

Notice of Transfer to Disability Inactive Status

On August 10, 1987, Jefferson County lawyer **Cheryl Rosann Dickey** was transferred to disability inactive status, based upon her own petition asserting that she was presently incapacitated from continuing the practice of law by reason of infirmity or illness.

the establishment of prepaid tuition programs to provide tax advantages for parents saving for their children's college education.

Limits on deductibility of losses arising from passive activities

Prior law did not limit the use of deductions or credits from a particular business activity to offset income from other activities, except in certain limited circumstances. However, under TRA '86 new limitations have been imposed which, due to their nature, will change the structure of many legal transactions and likely will change taxpayer investment patterns. The Code now has created a new type of activity called a "passive activity." Income and losses from passive activities now have particular importance to taxpayers.

In the future income and losses are to be divided into one of three categories: income from passive activities, active income and portfolio income. Portfolio income generally is investment income, e.g., dividends and interest. The difficulty is distinguishing between active income and passive income. Some activities are conclusively presumed to be passive activities. Examples are ownership of a limited partnership interest in a limited partnership and, subject to narrow exceptions, all rental activities. In other situations look at all the facts and circumstances to determine the nature of the activity for a particular taxpayer.

For example, assume A and B form a Subchapter S corporation and each owns one-half of the stock. At the end of the year a portion of the income or loss from the Subchapter S corporation is allocated to A and B. The question arises for both A and B as to whether such income or loss is from a passive activity. If A only has provided capital and does not materially participate in operation of the Subchapter S business, then the entire activity is "passive" as to A. If, however, B materially participates in the operation of the corporation's business, then the income or loss would be "active" as to B. "Material participation" in an enterprise is defined as active involvement in the enterprise on a regular, continuous and substantial basis. This "material participation" standard is applied to a taypayer who owns an interest in a business (whether that interest is as a proprietor, general partner or S corporation shareholder) to determine whether the activity is passive as to that taxpayer.

As noted above, all rental activities are presumed to be passive activities. However, certain individual taxpayers can own rental real estate businesses and deduct losses up to $25,000 per year. To qualify for this deduction the taxpayer must be actively involved in the rental activity. This active participation requirement presumes that a taxpayer owns a 10 percent or more interest in the activity and is significantly and bona fidedly involved in rental of the property. The taxpayer's $25,000 deduction will be phased out at the rate of fifty cents on the dollar to the extent his adjusted gross income exceeds $100,000. Thus, a taxpayer with income under $100,000 would get the full $25,000 deduction and a taxpayer with adjusted gross income in excess of $150,000 would receive no deduction.

Once a taxpayer is determined to have engaged in a passive activity, new loss

NOTICE 1987-1988

OCCUPATIONAL LICENSE SPECIAL MEMBERSHIP DUES WERE DUE October 1, 1987

This is a reminder that all Alabama attorneys' occupational licenses and special memberships EXPIRED September 30, 1987.

Sections 40-12-49, 34-3-17 and 34-3-18, *Code of Alabama*, 1975, as amended, set forth the statutory requirements for licensing and membership in the Alabama State Bar. Licenses or special membership dues are payable between October 1 and October 31, without penalty. These dues include a $15 annual subscription to *The Alabama Lawyer*.

The occupational license should be purchased from the probate judge or revenue commissioner in the city or town in which the lawyer has his or her principal office. Special membership dues should be remitted directly to the Alabama State Bar in the amount of $75.

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

Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

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

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

Jackson County

Jackson County was created December 13, 1819, one day before Alabama achieved statehood. It is located in the northeast corner of the state, and borders both Tennessee and Georgia. The vast majority of early settlers came from these states, as well as from the Carolinas and Virginia. The Alabama Legislature named the county for General Andrew Jackson, hero of Horseshoe Bend, who had almost as many ties to Alabama as he had to Tennessee. This first legislature was assembled in Huntsville, and it chose to honor Jackson who was visiting the town at that time. He was engaged in horse racing, a popular sport of the day, at the Old Green Bottom Race Track.

The legislature of 1819 designated Sauta Cave as the temporary seat of justice of Jackson County. The county court was given power to select any other location it deemed to be more expedient. Little is known of the first courthouse except that it was four miles south of Larkinsville, and built of logs.

On December 13, 1821, the Alabama Legislature created Decatur County from land taken out of Madison and Jackson counties. The significant point for this action was that Sauta was located on the borderline of the new county, if not, in fact, placed in Decatur County. Therefore, the town of Bellefonte was selected as the second temporary county seat of Jackson County.

As a footnote of history, Decatur is sometimes called the "Lost County of Alabama." It was abolished December 28, 1825, and its territory was redivided between Madison and Jackson counties. The county seat of the former Decatur county, Woodville, is located today in Jackson County.

Although Bellefonte on the Tennessee River was selected as the second temporary seat of justice in 1822, a permanent site remained unresolved for six years. Finally, Dr. George Washington Higgins and Stephen Carter donated land at Bellefonte for a courthouse building. It was built in 1828 of locally-made brick.

In 1846 the courthouse in Bellefonte suffered fire damage, probably from a fireplace or chimney fire. However, the building was not lost, and continued to serve the county. By 1859 the building was in great need of repair, and the legislature passed an act calling for an election in May 1860 to determine whether the courthouse should be moved. If the vote was for removal, the act called for a second election in August 1860 to determine a suitable site.

In the first election, the people of Jackson County voted for removal. In the second election, four towns made an effort to obtain the courthouse—Stevenson, Larkinsville, Scottsboro and Hollywood. Stevenson won the election, but all plans for removal from Bellefonte were postponed due to the War Between the States. During the war, the Bellefonte Courthouse was burned by Federal troops.

Scottsboro at this time was smaller than either Stevenson or Larkinsville, but its founder, Robert Thomas Scott, was an enterprising visionary. He had served in the state legislature on five occasions. He acquired considerable property, and later a train depot was constructed beside his lands. Though he died in 1863, Scott's heirs pursued his goals and continued the political influence of the family patriarch.

Through the influence of Scottsboro State Senator Charles 0. Whitney, the legislature passed an act October 3, 1863, allowing the Jackson County Commission to choose the county seat. The resolution also provided that the site selected must be on the Memphis and Charleston Railroad and within eight miles of the center of the county. By this tactic, the 1860 election, in which Stevenson was chosen, became void. And, with the added restrictions, Stevenson and Larkinsville now were ineligible sites.

Jackson County Courthouse

On Saturday, September 5, 1868, the county commission met at Bellefonte. On the subject of relocating the courthouse, Scottsboro received three votes and Cowan Springs one vote. On November 13, 1868, the county records were removed to Scottsboro and the significance of the town now was secured.

An advertisement for bids on the new courthouse was published in January 1869. The courthouse was to be 50 feet and 8 inches square, made of brick and patterned after the Limestone County Courthouse. John D. Boren of Stevenson, Alabama, won the contract for $24,500.

The new courthouse was ready for use in April 1871. It was reputed to be the finest building in the county. Unfortunately, it burned in February 1879. The county decided to rebuild the structure using the original walls. By November 1879, it was reported that the courthouse once in ashes had returned to its former glory. This building continued to serve the county until 1912.

As early as 1909 there was talk of the need for a new courthouse. In 1912 the walls of the existing building were condemned, and the county commission contracted to build a new courthouse.

The citizens of Stevenson and Bridgeport, in the northeastern part of the county, vocally opposed the construction of a new courthouse unless the people voted on where it should be built. They filed an action in chancery court seeking to cancel the contract. This suit was dismissed, and the present courthouse was built in 1912 for approximately $44,000. It was this courthouse that became famous worldwide in 1931, due to the first "Scottsboro Boys" trial.

The courthouse in Scottsboro was extensively renovated and enlarged with the addition of the side wings in 1954. These improvements cost $350,000. A second significant courthouse addition was completed in 1968 at a cost of nearly $1,000,000.

A history of the Madison County Courthouse will appear in the January issue of *The Alabama Lawyer.* ■

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

Alabama State Bar
BOARD OF BAR COMMISSIONERS' ACTIONS

July 15, 1987, Mobile, Alabama

Present: Commissioners Jackson, Hamner, Crownover, Owens, Love, Coleman, Watson, Edwards, Lloyd, T. Coleman, Bland, Davis, James, Higginbotham, Hill, Cassady, Lott, Holmes, Engel, Cook, Seale, Martin, Head, Bowles, Baxley, Garrett, Albritton, Royer, Gosa, Vinson, Brassell, C. Hare, Chason, Hereford, Knight, Matthews, Bouldin, Melton, White, Adams, Proctor, Alexander; President Scruggs; President-elect Harris; past President North; YLS President Black; Executive Director Hamner; Assistant General Counsel Jackson; Assistant Executive Director Pike.

Absent: Commissioners Turner, Thornton, Reeves, F. Hare, Dillard, Laird, Gill, Manley, Rowe, Wood and Jones.

The board:

— amended the minutes of the Commission's May 15, 1987, meeting, correcting the wording of Rule 1.5(e) of the Model Rules of Professional Conduct, and approved the minutes, as amended;
— welcomed new members present;
— administered four private reprimands and two public censures;
— heard the president appoint Commissioner Proctor chairman of the Disciplinary Commission for Garrett and C. Hare;
— heard the president appoint Commissioner Proctor chairman of the Disciplinary Commission for 1987-88 and elected Commissioners C. Hare and Adams to serve as the other two members of the commission;
— elected seven of the bar's eight members on the Board of Directors of the Legal Services Corporation of Alabama, Inc., and postponed election of a southeast Alabama representative pending Commissioner Baxley's consultation with the Houston County Bar;
— received the report of the Ethics Education Committee that ethics education should be a part of any discipline imposed, any attorney applying for reinstatement should be required to pass the ethics portion of the bar examination prior to reinstatement, one additional hour of continuing legal education specifically devoted to ethics should be required of all members of the Alabama State Bar and money should be set aside for production or acquisition of an ethics education videotape or tapes;
— voted to ratify the recommendation of the executive committee to the supreme court that Rule 8(b)(2) of the Rules of Disciplinary Enforcement be amended to provide that where a grievance committee has not submitted its report of an investigation to the Disciplinary Commission within one year from the date the complaint was received or the investigation was commenced, whichever is earlier, the commission shall notify the grievance committee to submit its report within 30 days, and if the report has not been received within 30 days, the commission may order the investigation to be taken over by the general counsel;
— ratified the action of the executive committee approving merger of the Committee on Legal Services to the Elderly and the Task Force on Legal Services to the Poor;
— ratified the action of the executive committee disapproving the bar's participation in an advertisement seeking to attract business to the state of Alabama in the wake of tort reform;
— elected Milton C. Davis, Deborah J. Long and Roy J. Crawford as bar examiners;
— approved substitution of a West Indies/Panama Canal tour for the previously scheduled Virgin Islands cruise, as part of the bar's approved travel program for 1988;
— received the financial report for the three quarters ending June 30, 1987, with expenses totalling $720,352 to date and revenue exceeding expenses by $134,418;
— received a report on a bill pending in the Alabama Legislature providing for reversion to the state's general fund of money which historically has remained in the bar trust fund;
— adopted a resolution memorializing past President Alto V. Lee, III;
— heard the president's report that the supreme court had issued orders dated May 5, 1987, approving establishment of a Client Security Fund and Interest on Lawyer Trust Accounts program;
— accepted the retirement of General Counsel William H. Morrow, Jr., effective October 1, 1987, and authorized part-time employment of Holly L. Wiseman as assistant general counsel, under the terms of a personal services contract;
— designated Reginald T. Hamner acting general counsel.

July 18, 1987, Mobile, Alabama

Present: Commissioners Jackson, Hamner, Crownover, Owens, Love, A. Coleman, Watson, Edwards, Lloyd, T. Coleman, Bland, Higginbotham, Hill, Cassady, Lott, Holmes, Engel, Laird, Crook, Martin, Head, Bowles, Garrett, Albritton, Royer, Rowe, Vinson, Brassell, C. Hare, Chason, Hereford, Knight, Matthews, Melton, Adams, Proctor, Alexander; President Harris; past President Scruggs; President-elect Huckaby; YLS President Mixon; Executive Director Hamner; Assistant General Counsel Jackson; and Assistant Executive Director Pike.

Absent: Commissioners Turner, Thornton, Reeves, F. Hare, Dillard, Davis, James, Gill, Seale, Manley, Baxley, Gosa, Wood, Jones, Bouldin, White.

The board:

— accepted the resignation of W.N. Watson, commissioner from the

Ninth Judicial Circuit, and elected William D. Scruggs, Jr., as his replacement;
- received the report of the nominating committee and elected the following: Oliver P. Head, vice president; Reginald T. Hamner, secretary; Phillip Adams, Francis Hare, Harold Albritton, executive committee; Phillip Adams, Lynn Jackson, David Knight, Wade Baxley, Wayne Love, Broox Holmes, James Seale, Mason Davis, George Royer, MCLE Commission; disciplinary board members:
  Panel I—Commissioners Coleman, Jackson and Davis
  Panel II—Commissioner Gill
  Panel III—Commissioners Hill, Thornton and Gosa
  Panel IV—Commissioners Knight and Rowe
  Panel V—Commissioners Manley, Lott, Crook and Melton

September 25, 1987, Montgomery, Alabama

Present: Commissioners Jackson, Reaves, Hamner, Crownover, Owens, Love, Scruggs, Edwards, Lloyd, T. Coleman, Dillard, Bland, Davis, James, Higginbotham, Hill, Lott, Holmes, Engel, Gill, Crook, Seale, Head, Bowles, Baxley, Garrett, Royer, Rowe, Vinson, C. Hare, Chason, Wood, Jones, Melton, White, Adams, Proctor; President Harris; YLS President Mixon; Executive Director Hamner; Assistant Executive Director Pike; Local Bar Activities and Services Committee chairman Tom King, Jr.; Insurance Programs Committee chairman Henry Henzel.

Absent: Commissioners Turner, Thornton, A. Coleman, F. Hare, Cassady, Laird, Martin, Manley, Albritton, Gosa, Brassell, Hereford, Knight, Matthews, Bouldin, Alexander.

The board:
- approved minutes of the July 15 and July 18, 1987, board meetings and approved, as amended, minutes of the July 18, 1987, annual business meeting;
- administered five private reprimands;
- received an informational report on a for-profit lawyer referral service and, because such a service is not permitted under current rules, referred the matter to the Disciplinary Commission;
- elected Houston County Bar member Scott Hedeen as the eighth Alabama State Bar member of the Legal Services Corporation Board of Directors;
- received a report from the Local Bar Activities and Services Committee, Tom King, Jr., chairman, updating the board on the "Buddy Program," now known as "Lawyers Helping Lawyers," and efforts to improve communication between the state bar and local bars;
- approved the expenditure of $1,000 for an outside evaluation of the bar examination, to be conducted by Auburn University;
- received a report of the activities of the Insurance Programs Committee by chairman Henry Henzel and authorized the expenditure of $5,000 to update the year-old survey on members' willingness to participate in the capitalization of a captive professional liability insurance company;
- received an update on IOLTA activities by Alabama Law Foundation vice chairman Charles Hare; approved the recommendation that the IOLTA Task Force be made a standing committee of the bar; authorized the president to negotiate with the foundation to hire an Alabama State Bar employee to serve as its executive director, under contract with the foundation;
- was informed by the president that many of the 95 inmates on death row have no legal counsel assigned and a task force is being appointed to recommend actions the bar should take in this matter;
- heard the secretary's report that bar examination results were mailed September 25, 1987, and that 65 percent of the 369 examinees were certified to the supreme court for admission to the bar;
- adopted resolutions memorializing Mobile Bar members Daniel W. Molloy, E. Graham Gibbons and George E. Stone;
- approved a salary increase for a staff member who has taken on new responsibilities;
- authorized the executive director to enter into contracts with an airline and hotel for the bar's midyear meeting and comparative law seminar, to be conducted in Acapulco, Mexico;
- was informed that the report of the Alabama Examiners of Accounts for fiscal years 1984-85 and 1985-86 had been received and copies would be forwarded to board members. ■

cle opportunities

november

15-19

PROSECUTION OF A VIOLENT CRIME
The Monteleone, New Orleans
National College of District Attorneys
(713) 749-1571

16-17

SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEY'S FEES
The Biltmore, Los Angeles
Practising Law Institute
Credits: 13.2 Cost: $250
(212) 765-5700

16-19

FUNDAMENTALS OF GOVERNMENT CONTRACTING
Sheraton National/Arlington, Washington, D.C.
Federal Publications, Inc.
Credits: 27.3 Cost: $850
(202) 337-7000

17 tuesday

BLUE SKY LAWS
Georgia State University Urban Life Center, Atlanta
Continuing Legal Education Satellite Network
Credits: 6.6 Cost: $155
(217) 525-0744

18 wednesday

FEDERAL ESTATE AND GIFT TAXATION AND ESTATE PLANNING
Joe Wheeler State Resort, Rogersville
University of North Alabama
Credits: 7.8 Cost: $145
(205) 760-4289

19 thursday

DAMAGES
Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.8 Cost: $85
(205) 348-6230

CIVIL PROCEDURE
Sheraton, Dothan
Alabama Bar Institute for CLE
Credits: 6.3 Cost: $85
(205) 348-6230

GENERATION SKIPPING, PLANNING AND DRAFTING
Law Center, Tuscaloosa (satellite program)
Alabama Bar Institute for CLE
Credits: 4.6 Cost: $125
(800) 253-6397

BUSINESS TORTS
Ramada Civic Center Plaza, Birmingham
Cumberland Institute for CLE
Credits: 6.6 Cost: $90
(205) 870-2865

19-20

FEDERAL TAX CLINIC
Paul Bear Bryant Center, Tuscaloosa
Credits: 15.3
(205) 348-6222

PERSONNEL LAW
Terrace Garden Inn, Atlanta
Wake Forest University School of Law
Credits: 12.0 Cost: $350
(919) 761-5430

20 friday

DAMAGES
Civic Center, Montgomery
Alabama Bar Institute for CLE
Credits: 6.8 Cost: $85
(205) 348-6230

CIVIL PROCEDURE
Holiday Inn, Sheffield
Alabama Bar Institute for CLE
Credits: 6.3 Cost: $85
(205) 348-6230

CIVIL LITIGATION AND TORT REFORM
Huntsville
Alabama Trial Lawyers Association
Credits: 5.4
(205) 262-4974

CRIMINAL FEDERAL TRIAL PRACTICE
Birmingham
Birmingham Bar Association
Credits: 3.2 Cost: $25
(205) 251-8006

BUSINESS TORTS
Sheraton Riverfront, Montgomery
Cumberland Institute for CLE
Credits: 6.6 Cost: $90
(205) 870-2865

CRIMINAL DEFENSE
Ramada Renaissance, Jackson
University of Mississippi Center for Continuing Legal Education
Credits: 7.2 Cost: $110
(601) 982-6590

december

3 thursday

BANKRUPTCY
Civic Center, Birmingham
Credits: 6.9 Cost: $95
Alabama Bar Institute for CLE
(205) 348-6230

BANKING LAW AND PRACTICE
Law Center, Tuscaloosa
(satellite program)
Alabama Bar Institute for CLE
Credits: 4.6 Cost: $125
(800) 253-6397

3-4

FEDERAL TAX INSTITUTE
Opryland Hotel, Nashville
Tennessee Federal Tax Institute
Credits: 15.0 Cost: $425
(615) 822-5662

4 friday

ESTATE PLANNING
Harbert Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.6 Cost: $95
(205) 348-6230

TRIAL PRACTICE UPDATE
The Madison, Montgomery
Alabama Trial Lawyers Association
Credits: 6.3
(205) 262-4974

WINNING JURY TRIALS
Coliseum Ramada, Jackson
University of Mississippi Center for Continuing Legal Education
Credits: 7.2 Cost: $110
(601) 982-6590

4-5

BANKRUPTCY LAW AND PRACTICE
Tradewinds, St. Petersburg
Stetson University School of Law
Credits: 14.0 Cost: $250
(813) 343-1214

10 thursday

TRIAL ADVOCACY: WINNING AT TRIAL
Civic Center, Birmingham
Credits: 7.4 Cost: $95
Alabama Bar Institute for CLE
(205) 348-6230

EMPLOYEE BENEFITS IN CORPORATE TRANSACTIONS
Law Center, Tuscaloosa
(satellite program)
Alabama Bar Institute for CLE
Credits: 4.6 Cost: $125
(800) 253-6397

11 friday

TRIAL ADVOCACY: WINNING AT TRIAL
Civic Center, Montgomery
Alabama Bar Institute for CLE
Credits: 7.4 Cost: $95
(205) 348-6230

PROOF OF DAMAGES AFTER TORT REFORM
Radisson Admiral Semmes, Mobile
Alabama Trial Lawyers Association
Credits: 3.4
(205) 262-4974

14-15

FINANCE AND ACCOUNTING FOR LAWYERS
Washington, D.C.
Southern Methodist University School of Business
Credits: 10.0 Cost: $375
(214) 692-3336

16 wednesday

CIVIL PROCEDURE (video replay)
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 6.3 Cost: $85
(205) 348-6230

17 thursday

NEGOTIATION AND SETTLEMENT
Riverview Plaza Hotel, Mobile
Alabama Bar Institute for CLE
Credits: 7.5 Cost: $95
(205) 348-6230

18 friday

NEGOTIATION AND SETTLEMENT
Harbert Center, Birmingham
Alabama Bar Institute for CLE
Credits: 7.5 Cost: $95
(205) 348-6230

ADMIRALTY LAW FOR NON-ADMIRALTY LAWYERS
Mobile
Mobile Bar Association
Credits: 3.0 Cost: $25
(205) 433-9790

THE BEST OF CLE
Coliseum Ramada, Jackson
University of Mississippi Center for Continuing Legal Education
Credits: 7.2 Cost: $110
(601) 982-6590

19-20

HOW TO READ AND EFFECTIVELY USE MEDICAL RECORDS
Caesar's Palace Hotel, Las Vegas
Medi-Legal Institute
Credits: 11.0 Cost: $425
(818) 995-7189

■

Bar Briefs

CORRECTION: In the September issue of *The Alabama Lawyer,* under the section entitled "Bar Commissioners elected," the biographical sketch of George M. Higginbotham contained an error. His office address should have been listed as "Bessemer," not Birmingham, Alabama. The editors regret any inconvenience this caused.

50-year members honored

The 17th Judicial Circuit Bar Association (Sumter, Greene and Marengo counties) recently passed two resolutions honoring Joe C. Camp and David M. Hall. Both Camp and Hall have practiced law at least 50 years each.

Camp was born in Gadsden and attended high school and college in Alabama, graduating from the University of Alabama School of Law in 1937. He has practiced in Marengo County since then.

Camp served for many years as Marengo County District Attorney and devoted spare time to serving as chairman of the Marengo County Democratic Executive Committee.

He still practices in Linden.

Hall, a native of Moundville, grew up in Eutaw, Alabama, and graduated in 1936 from the University of Alabama School of Law.

He then began practicing in Demopolis and continued there until he joined the Army in 1941. He retired from the Army in 1946 at the rank of colonel and returned to the practice of law.

Hall has served both in the Alabama House of Representatives and the Senate.

He retired from the practice of law September 30, 1986.

Seven Alabamians added to Academy of Honor

Judge C.J. Coley of Alexander City, secretary of the Alabama Academy of Honor, announced that seven Alabamians were inducted into the academy August 17, 1987, in ceremonies in Montgomery.

Elected by current members, the seven new inductees are Thomas A. Bartlett; J. Claude Bennett; Edward M. Friend, Jr.; Guy Hunt; Joseph Lamar Lanier, Jr.; James C. Lee, Jr.; and Ernest G. Williams.

Bartlett, a native of Salem, Oregon, formerly was president of the American University in Cairo, Egypt, and Colgate University. From 1977 to 1982, he served as president of the Association of American Universities. He presently is chancellor of the University of Alabama System.

Bennett, a native of Birmingham, is professor and chairman of the Department of Medicine at the University of Alabama at Birmingham. He is editor-in-chief of the *American Journal of Medicine.*

Friend, a native of Birmingham, is a Brigadier General, USAR (retired). He is a practicing attorney and partner in the law firm of Sirote, Permutt, Friend, Friedman, Held and Apolinsky in Birmingham.

Hunt, a native of Holly Pond, is governor of Alabama.

Lanier, a native of Lanett, is chairman and chief executive officer of West Point Pepperell Corporation.

Lee, a native of Birmingham, is chairman and chief executive officer of Buffalo Rock Company.

Williams, a native of Macon, Mississippi, is chairman and chief executive officer of Affiliated Paper Companies, Inc. He formerly was executive vice president of Gulf States Paper Corporation. He has been a trustee of the University of Alabama for 30 years.

Standing, left to right: Bartlett; Hunt; Judge John Patterson, who serves as chairman of the academy and was a 1969 inductee; Lanier; seated: Bennett; Lee; Williams; Friend

Torbert elected to head nation's chief justices

Alabama Chief Justice C.C. Torbert, Jr., became president of the National Conference of Chief Justices August 2 at the conference's annual meeting in Rapid City, South Dakota.

Torbert

Torbert moves to the presidency from the position of president-elect. As president of the conference, he also became chairman of the board of the National Center for State Courts, the organization providing support, research and educational services for courts in the 50 states and the U.S. territories.

Torbert has served as chief justice in Alabama for the past ten-and-a-half years after service in both the Senate and House of Representatives of the state legislature.

Torbert succeeds Chief Judge Robert C. Murphy of Maryland as president.

—Administrative Office of Courts

Recent Decisions

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

Recent Decisions of the Supreme Court of Alabama—Civil

Damages . . .

recovery for permanent injury normally not allowed where expert medical evidence positively refutes claim

Jones v. Fortner, 21 ABR 2934 (May 1, 1987)—Fortner sued Jones, alleging injury to his neck, back and shoulder. Over defendant's objection, the court instructed the jury on recovery of damages for permanent injury. Plaintiff testified that he had experienced severe neck pain since the accident and was still in pain. The only expert medical evidence offered was that of an orthopedic surgeon who treated plaintiff after the accident; the doctor described plaintiff's injury as a cervical strain and testified he did not feel plaintiff had any permanent injury. The defendant raised his objection again on motion for new trial. The motion was denied and defendant appeals. The supreme court reversed.

The supreme court recognized that this precise question has not been addressed by Alabama appellate courts. The court noted that plaintiff's injuries were not obvious, and, therefore, expert evidence was required to prove whether the injury was permanent. The testimony of the medical expert was that the injury was not permanent.

When the testimony concerns matters beyond the realm of the jury's knowledge, the jury is bound by the testimony of the expert if it is uncontradicted and pertains to subjects for experts alone. The supreme court also noted a distinction between future pain and suffering, and permanent injury. Generally, it is not necessary that an injury be permanent in order for a plaintiff to recover for future pain and suffering.

Evidence . . .

spousal wiretapping subject to federal wiretapping statute

Ex parte: Wilma M. O'Daniel (RE: O'Daniel v. O'Daniel), 21 ABR 3450 (June 12, 1987)—The supreme court granted certiorari to determine whether the trial court erred in excluding from evidence re-recorded tapes of telephone conversations between the husband and his alleged paramour. The wife recorded all telephone conversations that occurred on the business telephone at the parties' real estate office. She then re-recorded conversations between the husband and his alleged paramour, deleting all business conversations. She sought to admit these tapes into evidence in the parties' divorce case. The husband objected on the basis of the Best Evidence Rule, state and federal

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.

wiretapping statutes and lack of a proper foundation. The trial court sustained the objection without stating the ground.

The court of civil appeals stated that the ground of the Best Evidence Rule was sufficient. The supreme court disagreed. However, the court concluded that the tapes were properly excluded under the federal wiretapping statute which excludes tape recordings unless the individual offering the tapes is a party to the conversation or has the prior consent of a party to the conversation.

Insurance . . .

guest passenger may not recover under both liability and UM coverages of host driver's policy when negligence of host caused accident

Sullivan v. State Farm Mutual, 21 ABR 4251 (August 14, 1987)—Sullivan was a passenger in an automobile involved in a one-vehicle accident.

The car was owned by Jones and driven by Jones' son. Sullivan was seriously injured and damages exceeded the liability limits. State Farm issued a policy to Jones providing both liability and underinsured/uninsured motorist coverage (UM).

State Farm filed this declaratory judgment action asking the trial court to declare that Sullivan, the passenger, was not entitled to both liability and UM benefits. Under the terms of the State Farm policy, Sullivan was not the named insured nor his spouse nor a relative residing in his household nor a person using the automobile with the consent of the owner or his spouse.

The State Farm policy also provided that an uninsured motor vehicle does not include the vehicle insured under the liability coverage. Sullivan maintained that this exclusion was in derogation of the UM statute and therefore void and unenforceable as against public policy. The supreme court disagreed. The court stated that the Alabama Uninsured Motorist statute does not mandate protection under the host driver's UM coverage when the cause of the accident is the negligence of the host driver.

Rule against perpetuities . . .

pre-emptive right of first refusal does not violate rule

Robertson v. Murphy, 21 ABR 3529 (June 19, 1987)—Plaintiff's father and the defendants had entered into a partnership agreement which provided that upon the death of any partner, the partnership did not terminate and the heirs of the deceased partner would be bound by the terms of the agreement. The agreement also contains a pre-emptive right of first refusal, which gave the partnership a 90-day period in which to buy the interest of any partner desiring to sell.

Plaintiff wanted to sell and filed suit seeking to have the property of the partnership sold. He did not offer his interest to the partnership. The defendants filed answers and motions for summary judgment pointing out the pre-emptive right of first refusal. Plaintiff argued that the provision was invalid because it violated the rule against perpetuities and that it contained no reference to lives in being, i.e., it was for a period longer than 21 years. The trial court disagreed and the supreme court affirmed.

The supreme court reasoned that the avowed object of the rule is to favor commerce and the circulation of property by preventing the right of absolute disposition from being tied up or restrained beyond a certain period. Pre-emptive rights, however, do not restrain or prohibit alienability of property. Therefore, the rights are not contrary to the main object of the rule. Consequently, the pre-emptive right of first refusal is exempted from the Rule Against Perpetuities.

Tort . . .

chiropractors do not come within the purview of Section 6-5-482, *et seq.*

Baker v. McCormeck, 21 ABR 3793 (July 2, 1987)—In 1983, Baker went to McCormeck, a chiropractor, to be treated for neck pain and headaches. After treatment, Baker suffered a stroke and in June 1985, filed suit alleging negligence. The trial court granted defendant's motion for summary judgment on the grounds that the claim was barred by the one-year statute of limitations. Baker appealed, arguing that the appropriate statute of limitations should be the two-year statute set out in the Medical Liability Act, Section 6-5-482, *et seq., Ala. Code 1975*. The supreme court disagreed and affirmed the trial court.

The supreme court noted that Section 6-5-482, *et seq., supra*, is limited to "any professional corporation or any person employed by physicians, dentists or hospitals who are directly involved in the delivery of health care services." McCormeck is a chiropractor. He is not licensed to practice medicine or osteopathy in Alabama and is not a dentist. The legislature could have included chiropractors in the coverage of the act if it had seen fit to do so. However, the legislature did not. Therefore, chiropractors are not subject to the two-year statute of limitations.

Tort . . .

intentional infliction of emotional distress is an action on case

Archie v. Enterprise Hospital and Nursing Home, 21 ABR 3402 (June 5, 1987)—Plaintiff filed a two-count complaint and captioned the counts "Intentional Infliction of Emotional Distress" and "Tort of Outrageous Conduct." The defendant filed a motion to dismiss the complaint based upon the one-year statute of limitations. The defendant maintained that these counts stated a cause of action of trespass on the case rather than trespass to the person. The trial court granted the defendant's motion. The plaintiff appealed and the supreme court affirmed.

The supreme court reasoned that the test for determining whether a complaint states a cause of action for trespass or for trespass on the case is whether the tort was committed by direct application of force or was accomplished indirectly. Under this analysis, the tort of intentional infliction of emotional distress will come within the provisions of Section 6-2-38(l), i.e., an indirect trespass on the case class of tort. The impetus for recognition of this tort came from situations where there was neither physical injury, (i.e., no battery or other trespass) nor even an assault threatening such injury. However, the defendant's conduct was so outrageous and the emotional harm so severe that the common law tradition of allowing new causes of action to provide a remedy for a wrong came into play.

Civil procedure . . .

court may not view property with only one party's attorney

Jones v. Henderson, 21 ABR 4302 (August 21, 1987)—Jones sued the Hen-

dersons to restrain them from denying access to a right-of-way claimed by the plaintiffs. Several weeks after a hearing, the court visited the disputed property with the Hendersons' attorney, but without giving Jones' attorney notice or an opportunity to be present. After the view, the court denied the relief requested by Jones. Jones filed a motion for new trial alleging, *inter alia*, that they were denied due process when the trial judge viewed the property with the Hendersons, but without notice to their attorney. The trial court denied the motion and Jones filed this appeal. The supreme court reversed.

The court stated that a trial court must provide due process for each party before it. Due process requires that a party receive notice, a hearing according to that notice and a judgment entered in accordance therewith. The supreme court noted that the court, in a non-jury case, may make a view, and further observed that there is no absolute requirement that the court give the parties notice it is going to view the property or afford them an opportunity to be present. However, the fundamental principles of due process require that if the court gives notice and an opportunity to be present to one party, the same notice and opportunity must be given to the other party.

Recent Decisions of the Supreme Court of Alabama—Criminal

No "murder scene exception" to the fourth amendment

Ex Parte Margie Lee Usrey, 21 ABR 2558 (March 27, 1987)—The Supreme Court of Alabama, speaking through Justice Beatty, held that there was no murder scene exception to the warrant requirement of the Fourth Amendment.

Justice Beatty, in an excellent opinion, surveyed the Fourth Amendment law from *Katz v. United States*, 389 U.S. 347 (1967), to *Thompson v. Louisiana*, 469 U.S. 17 (1984).

The court held that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. The burden is upon those who seek exemption to prove that the exigencies of the situation made that course imperative or otherwise "reasonable." The Alabama Supreme Court sought to distinguish "exigent" circumstances from those circumstances which surround any murder scene. Judge Beatty's opinion quotes at length from *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Thompson*, *supra*, as follows:

> "... We unanimously rejected the contention that one of the exceptions to the warrant clause is a 'murder scene exception.' Although we noted that police may make warrantless entries on premises where 'they reasonably believe that a person within is in need of immediate aid,' *id.*, at 437 U.S. 392, and that 'they make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises,' *ibid.*, we held that 'the murder scene exception' ... is inconsistent with the Fourth and Fourteenth Amendments—that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there."

In the case *sub judice*, the police officers conducted a four-hour search of the premises "which involved opening closets and chests of drawers, and looking under clothes and beds." During the search, evidence was seized and photographs taken of the interior of the premises. Based upon the teachings of *Mincey* and *Thompson*, the Alabama Supreme Court remanded the case to the court of criminal appeals with the observation "... the validity of the search and seizure based on exigent circumstances is clearly and unquestionably erroneous."

Admission of lay testimony on a defendant's sanity

Ex Parte John Michael Lee, 21 ABR 1853 (January 30, 1987)—The Alabama Supreme Court reversed and remanded Lee's case on the ground that the trial court abused its discretion in denying Lee the right to have lay witnesses give their opinion on the question of his sanity or insanity.

Justice Beatty, writing for a unanimous court, held, "that in Alabama, a lay witness may give his opinion on the question of a defendant's sanity or insanity as long as the proper predicate has been laid." *Williams v. State*, 291 Ala. 213, 279 So.2d 478 (1973); *Lokos v. State*, 434 So.2d 818 (Ala.Crim.App. 1982) To lay a proper predicate for the admission of such an opinion, a witness first must have testified: (1) to facts showing that he had an adequate opportunity to observe the defendant's conduct in general, and (2) to his personal observation of specific irrational conduct of the defendant.

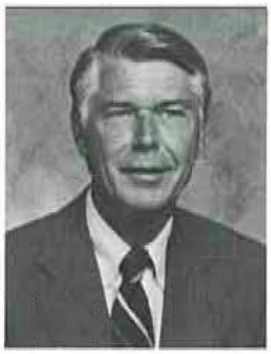
In making the determination as to whether the witness had an adequate opportunity to observe the defendant's conduct in order to render his opinion admissible, considerable latitude is left to the sound legal discretion of the trial court.

In Lee's case, the testimony clearly showed that Lee's counsel had laid a proper predicate for the admission of the officer's opinion as to whether Lee was insane. Failure to allow this opinion to be given constituted an abuse of discretion and reversible error.

The right to explain to flight

Ex Parte James Donald Lowe, ABR 3870 (July 10, 1987)—The supreme court, in a *per curiam* opinion, reversed and remanded Lowe's case because he never was allowed to present to the jury the circumstances surrounding the Birmingham Police Department's internal affairs in-

In Memoriam



1930 - 1987

SPANN W. MILNER
Insurance Specialists, Inc.
Atlanta, Georgia

The Alabama State Bar and its 8,400 members extend to his family and associates our sympathy in the untimely death of our friend. His courageous fight with leukemia ended at Houston's M.D. Anderson Hospital October 4, 1987.

vestigation. The court observed that the reason for the defendant's flight was a question properly reserved for the jury after a consideration of all of the relevant circumstances. The supreme court expressly rejected the opinion of the court of criminal appeals which had held that the exclusion of the evidence did not prejudice the substantial rights of the defendant because evidence of guilt was "overwhelming."

The Supreme Court of Alabama observed critically:

> "Furthermore, the proper inquiry here is not whether the evidence of the defendant's guilt is overwhelming but, instead, whether a substantial right of the defendant has or probably has been adversely affected. The exclusion of evidence tending to explain a flight does adversely affect a substantial right of a defendant . . . overwhelming evidence of guilt does not render prejudicial error harmless under Rule 45, Alabama Rules of Appellate Procedure."

Juror misconduct—home experiments

Ex Parte Bruce Lasley, 21 ABR 1980 (February 6, 1987)—The defendant, Lasley, was alleged to have intentionally injured Terrance and Troy Smith, age three years and four years, by placing or holding them in scalding water until they were severely burned. At the time of the alleged assault, the defendant was living with Sharon Smith, mother of the victims. The defendant testified that he was giving the children a bath when he was distracted by a knock at the door. According to his testimony, he returned to find the boys standing in scalding hot water.

The state's case was based entirely on circumstantial evidence. The state's expert, a pediatric surgeon, testified concerning immersion burns, the spans of time during which immersion burns will occur at varying temperatures and the probabilities as to how such burns can be received in household bathtubs.

The trial court, after the trial, discovered that three of the jurors had conducted separate home experiments in an attempt to test the defendant's theory of defense. The results of two of these experiments were communicated to the other jurors. One of the jurors also consulted a law book to aid her understanding of certain legal terms and concepts.

The supreme court, in reversing the conviction, held:

> "There is no doubt that the home experiments constituted juror misconduct. The only question is whether the misconduct requires a new trial. The standard for determing whether juror misconduct requires a new trial is set forth in *Roan v. State*, 225 Ala. 428, 435, 143 So. 454, 460 (1932).
>
> "The test of vitiating influence is not that it did influence a member of the jury to act without the evidence, but that it *might* have unlawfully influenced that juror and others with whom he deliberated, and *might* have unlawfully influenced its verdict rendered." (emphasis added)

Accordingly, the *Roan* test mandates reversal when juror misconduct might have influenced the verdict. This case casts a "light burden" on the defendant. *Ex Parte Troha*, 462 So.2d 953 (Ala. 1984)

Finally, the supreme court observed that "the integrity of the factfinding process is the heart and soul of our judicial system. Judicial control of the jury's knowledge of the case is fundamental. Our rules of evidence are designed, so far as humanly possible, to produce the truth and to exclude from the jury those facts and objects which tend to prejudice and confuse. Evidence presented must be subject to cross-examination and rebuttal. The defendant's constitutional rights of confrontation, of cross-examination and of counsel are at stake."

Prosecutor's comment on defendant's silence

Ex Parte Freddie Lee Wiley, 21 ABR 3875 (July 10, 1987)—Wiley was convicted of murder and sentenced to 30 years imprisonment. Prior to trial, the court granted the defendant's motion in limine prohibiting reference in any manner to the defendant's assertion of his constitutional right to remain silent. The defendant objected to the following testimony elicited from an arresting officer by the prosecutor.

> **Q.** Did he give you any explanation as to why, or . . .
>
> **A.** Yes, sir. He stated that he understood his rights, and before he gave any statement, he wished for his lawyer to be present, and he did not want to sign anything.

The supreme court, in a *per curiam* decision, held that the trial court committed error when it stated:

> Well, if he [the defendant] didn't give a statement, ever, I'm going to grant your motion for a mistrial. If he did, I'm going to listen to the circumstances surrounding it. (emphasis added)

The law is clear that a person may assert his constitutional rights at any time. He may answer questions if he wishes, but he may stop at any time. *Miranda v. Arizona*, 384 U.S. 436 (1966) It was error for the trial court to conclude in substance that when the defendant waives his right to remain silent by making a statement to the police at the scene of the crime, he could not reclaim the right to remain silent at the police station and keep that assertion from being used against him in court. The supreme court held, "The defendant's constitutional right to remain silent was violated by the State's inquiry at trial about the defendant's assertion of that right. The constitutional violation was aggravated by the trial court's statement about the effect of the defendant ever making a statement against his interest." ■

Local Bar Associations And Presidents

The following is a list of the local bars in Alabama that have presidents and the presidents' and executive directors' (where applicable) office addresses and telephone numbers. If you have any information concerning local bars (by county or circuit) not listed, please send it to *The Alabama Lawyer.*

Autauga County Bar
James T. Bachelor
P.O. Box 644
Prattville, AL 36067
361-1033

Baldwin County Bar
Samuel N. Crosby
P.O. Box 1109
Bay Minette, AL 36507
937-2417

Barbour/Bullock County Bar
Lynn Robertson Jackson
P.O. Box 10
Clayton, AL 36016
775-3508

Bessemer Bar
Arthur Green, Jr.
P.O. Box 605
Bessemer, AL 35021
424-4090

Birmingham Bar
William C. Knight
3000 SouthTrust Tower
Birmingham, AL 35203
251-3000
Beth Carmichael, executive director
109 North 20th Street
Second Floor
Birmingham, AL 35203
251-8006

Blount County Bar
Michael E. Criswell
P.O. Box 788
Oneonta, AL 35121
466-3333

Butler County Bar
Lewis S. Hamilton
P.O. Drawer 9
Greenville, AL 36037
382-3372

Calhoun/Cleburne County Bar
Jerry B. Oglesby
P.O. Box 1849
Anniston, AL 36202
237-6611

Chambers County Bar
Joel G. Holley
P.O. Drawer 606
Lanett, AL 36863
864-8823

Chilton County Bar
John M. Higgins
P.O. Drawer 769
Clanton, AL 35045
755-4242

Clay County Bar
Arthur L. Hardegree, Jr.
P.O. Box 67
Ashland, AL 36251
354-2178

Coffee County Bar
L. Merrill Shirley
341 North Court
Elba, AL 36323
897-5775

Colbert County Bar
Gene M. Hamby, Jr.
P.O. Box 328
Sheffield, AL 35660
383-6797

Coosa County Bar
Robert J. Teel, Jr.
P.O. Box 245
Rockford, AL 35136
377-4957

Covington County Bar
Francis M. James, III
P.O. Box 1061
Andalusia, AL 36420
222-1051

Cullman County Bar
Juliet G. St. John
402 9th Street, S.E.
Cullman, AL 35055
734-3542

Dale County Bar
Robert H. Brogden
P.O. Drawer 908
Ozark, AL 36360
774-5171

Dallas County Bar
John W. Kelly, III
P.O. Box 303
Selma, AL 36701
875-5770

Elmore County Bar
Lynne Riddle-Thrower
P.O. Box 160
Wetumpka, AL 36092
567-8488

Escambia County Bar
Everette A. Price
P.O. Box 616
Brewton, AL 36427
867-6222

Etowah County Bar
Benny L. Roberts
834 Chestnut Street
Gadsden, AL 35901
547-8093

Geneva County Bar
Henry F. Lee, III
P.O. Box 297
Geneva, AL 36340
684-6406

Houston County Bar
Edward M. Price
P.O. Drawer 2228
Dothan, AL 36301
793-2424

Huntsville-Madison County Bar
Douglas C. Martinson
P.O. Drawer N
Huntsville, AL 35804
533-1666

Jackson County Bar
Wallace W. Haralson
P.O. Box 248
Scottsboro, AL 35768
259-6655

Lamar County Bar
L. E. Gosa
P.O. Box 648
Vernon, AL 35592
695-7158

Lauderdale County Bar
Ralph M. Young
109 N. Court Street
Florence, AL 35630
767-7411

Lawrence County Bar
Roderick M. Alexander
P.O. Box 312
Moulton, AL 35650
344-7744

Lee County Bar
Andrew J. Gentry, Jr.
P.O. Box 2071
Auburn, AL 36830-2071
821-4941

Limestone County Bar
Dan Totten
P.O. Box 729
Athens, AL 35611
232-1287

Macon County Bar
Milton C. Davis
304 North Main Street
Tuskegee, AL 36083
727-6500

Marengo/Sumter/Greene County Bar
William T. Coplin
P.O. Box 987
Demopolis, AL 36732
289-3880

Marion County Bar
James K. Davis
P.O. Box 157
Hamilton, AL 35570
921-7878

Marshall County Bar
George M. Barnett
P.O. Box 93
Guntersville, AL 35976
582-0133

Mobile Bar
Marshall DeMouy
P.O. Box 290
Mobile, AL 36601
432-6751
Barbara Rhodes, executive director
P.O. Drawer 2005
Mobile, AL 36652
433-9790

Monroe/Conecuh County Bar
Mickey Womble
P.O. Box 725
Monroeville, AL 36460
575-7241

Montgomery County Bar
Edwin K. Livingston
30 South Perry Street
Montgomery, AL 36104-3799
834-3656
Dot Wilson, executive director
138 Adams Avenue
Montgomery, AL 36104
265-4793

Morgan County Bar
Bingham D. Edwards
211 Lee Street, N.E., Ste. A
Decatur, AL 35601
353-6323

Pike County Bar
Allen C. Jones
78 North Court Square
Troy, AL 36081
566-3605

Russell County Bar
Kenneth E. Davis
P.O. Box 939
Phenix City, AL 36867
298-6028

Shelby County Bar
Conrad M. Fowler, Jr.
P.O. Box 587
Columbiana, AL 35051
669-6783

St. Clair County Bar
Donald R. Hamlin
1900 Cogswell Avenue
Pell City, AL 35125
884-1876

Talladega County Bar
Bill Thompson
406 E. North Street
Talladega, AL 35160
362-8341

Tuscaloosa County Bar
W. Cameron Parsons
P.O. Box 65
Tuscaloosa, AL 35402
345-5564

Walker County Bar
Margaret Harris Dabbs
P.O. Box 3258
Jasper, AL 35502-3258
221-7740

Young Lawyers' Section

Charles R. Mixon
YLS President

Young Lawyers' nationwide meet

During the first week in August, the American Bar Association held its annual meeting in San Francisco. The Alabama Young Lawyers' Section was represented at the Young Lawyers' Division Assembly by a full delegation of voting delegates. Young lawyers representing Alabama as voting delegates were Claire A. Black; Charles R. Mixon, Jr.; W. Percy Badham, III; J. Terrell McElheny; Laura L. Crum; and John A. Plunk. Those delegates represented Alabama in a very positive manner. It is most important that we are represented at YLD functions so the concerns of Alabama young lawyers can be expressed to the organization representing the nation's young lawyers.

This year also was the time for election of a district representative to represent Alabama and Georgia to the executive council of the ABA-YLD. I was honored to be selected as a District 10 representative and will serve in this position for the next two years.

With our increasing involvement in ABA-YLD activities, it is an opportune time for those of you who would like to participate in YLD activities to let me know. If you have any issues you feel should be addressed by the YLD affecting young lawyers or the profession in general, let me know and I will discuss with you the methods of expressing your positions to the YLD.

Executive Committee meeting

On August 29, 1987, this year's YLS Executive Committee held its first meeting at the Stillwaters Resort on Lake Martin. The purposes of the meeting were to acquaint the new members of the executive committee with those who served last year, organize the executive committee, receive preliminary reports from the various subcommittees regarding their plans for the upcoming year, solicit input from the executive committee members on various projects and generally set the course and tone for the upcoming year.

Many of our committees already are under way toward this year's projects. The fall bar admissions ceremony, coordinated by Laura Crum, was held October 19, 1987.

Tom Heflin and Taylor Flowers have agreed to serve as liaisons between the state YLS and local Young Lawyers' sections. We want to build the network of support among our Young Lawyer affiliates throughout the state as well as initiate new groups and revitalize those which no longer meet on a regular basis. I encourage those young lawyers interested in organizing an affiliate to contact me. I will send a member of the executive committee to meet with you at an organizational meeting and provide support to your group.

Constitution bicentennial activities

In celebration of the bicentennial of the United States Constitution, the YLS Executive Committee decided to distribute materials, produced by other young lawyers throughout the country, in our local communities. The Texas Young Lawyers' Association, In connection with the ABA-YLD, produced a videotape and discussion guide entitled "Forgotten Freedoms." The videotape and program are thought-provoking, aimed at acquainting the viewer with several concepts embraced by the Bill of Rights. These programs are being distributed to high school civics teachers in several Alabama cities with the hope that the students and teachers will find these materials to be helpful in their understanding of our Constitution.

In an attempt to spread more information concerning the Constitution, the Alabama Young Lawyers also distributed an audio cassette tape, consisting of 24 one-minute segments on the Constitution and our founding fathers. This tape, produced by the Los Angeles County Bar Association Barristers, is being distributed in several Alabama communities for broadcast as public service announcements. The goal of this project is to increase public awareness and education concerning the bicentennial celebration. ■

Legislative Wrap-up

by Robert L. McCurley, Jr.

The Alabama Law Institute has completed a two-year study of the fraudulent transfer law in Alabama. Richard Ogle of Birmingham served as chairman of the committee and Professor V. Nathaniel Hansford of the University of Alabama School of Law was the reporter.

The following is the commentary written by Professor Hansford to the proposed draft:

The first legislative response to fradulent conveyance was the Statute of Elizabeth, which Parliament passed in 1570. The statute was directed against conveyances made with the purpose and intent "to delay, hinder, or defraud" creditors or purchasers. Most American jurisdictions passed legislation copied from the English model or considered the English acts part of the common law received by the colonies. In the course of time, however, the law of fraudulent conveyances became extremely confused and diversified as courts responded to the cases before them. In order to clarify and simplify the existing law on the subject, the National Conference of Commissioners on Uniform Laws decided in 1915 to draft a uniform act governing fraudulent conveyances. In 1918 the Conference approved the Uniform Fraudulent Conveyance Act (UFCA) in its final form and, subsequently, 25 states and the Virgin Islands adopted it.

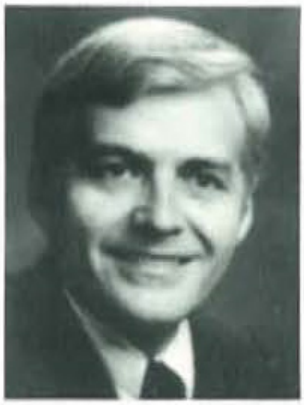
Evaluation of Alabama Fraudulant Transfer Act and present Alabama law

The new Alabama Fraudulent Transfer Act (AFTA), like its predecessor the UFCA, does not attempt to state the entire body of fraudulent conveyance law but leaves to the courts the work of fleshing out the particulars. This section provides a general comparison of the AFTA and current Alabama law of fraudulent conveyance to highlight the change that the AFTA would make on this state's law.

First, some general observations about the AFTA should be noted. The AFTA, like most comprehensive legislation, would simplify the case law of fraudulent conveyance in Alabama. The act gives concise definitions for important terms such as "claim," "creditor" and "debtor," and states in detail when a debtor makes a transfer or incurs an obligation. A problem with this state's present law is that the courts have developed it in a "spotty" fashion; there are gaps where uncertainty still exists. The AFTA would fill many of these gaps.

The next general observation about the effect of the AFTA is that it would make Alabama law uniform with many other states' laws on fraudulent transfers and Alabama law would be compatible with the Bankruptcy Code provisions dealing with this area of the law. Substantial value exists in having the Alabama law mesh with the laws of other jurisdictions because, by their very nature, fradulent conveyances often take place across state lines. A debtor hiding his property naturally will attempt to confuse matters as much as possible, and the debtor often uses interstate transfers to cover the trail. Uniformity of law allows a creditor more easily to recover the property the debtor has conveyed outside his state.

The Bankruptcy Code of 1978 grants the trustee in bankruptcy the power to avoid fraudulent transfers made within one year before the date of the filing of the petition in bankruptcy, and the Code defines a fraudulent conveyance in the same terms as sections 4 and 5 of AFTA. Moreover, the AFTA defines many of its terms with language derived from the Bankruptcy Code. Other provisions in the AFTA, although they do not use the same language as the Bankruptcy Code, incorporate the Code concepts. Section 3 of the AFTA, in its definition of value, adopts language from the Bankruptcy Code. The concept in AFTA



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.

section 6, concerning when a transfer occurs, relies heavily on bankruptcy principles. Portions of section 8, which outline the defenses, liability and protection afforded a transferee from a debtor, originate in bankruptcy law. The compelling point is that this compatibility with bankruptcy law makes the application of the law more just and uniform, since creditors and debtors will be treated alike when bankruptcy occurs and the debtor is not within the jurisdiction of the bankruptcy court. Furthermore, state courts can better protect creditors from unscrupulous debtors under the AFTA.

The Alabama Fraudulent Transfer Act would have a significant effect on the substantive law of fraudulent conveyances of the state. First, it would broaden the notion of a fraudulent conveyance and include transfers which Alabama courts previously have not categorized as fraudulent. Although the AFTA retains the concepts of actual fraud and constructive fraud, they are broader concepts than those in Alabama law.

The AFTA defines actual fraud generally in the same terms as the current Alabama law, so that in both contexts actual intent to defraud is a requirement. The AFTA, however, also identifies a list of factors the court may consider in determining the debtor's actual intent; in other words, the AFTA lists badges of fraud that aid in proving actual intent. This list of circumstances of fraud expands the operations of actual fraud to cover transfers not presently included within actual fraud. In Alabama, presently the most common instance of fraud is inadequate consideration, and the AFTA includes this factor in its list.

The AFTA includes 11 badges of actual fraud. Although the AFTA list contains the traditional common-law badge of fraud, it also includes those less commonly recognized. This expansion and explicit recognition of the usual badges of fraud by legislative act would increase the number of transfers creditors could attack as actual fraud and would make actual fraud easier to prove.

Perhaps the most significant impact of the AFTA would be in the area of constructive fraud. The essential element of a constructively fradulent transfer is inadequate consideration. If the debtor makes a voluntary transfer or a transfer of property for less than its value, a creditor may attack the transfer, regardless of actual intent to defraud. The Alabama courts have held that the insolvency of the debtor is not an issue in avoiding a transfer on the ground of constructive fraud.

Constructive fraud under the AFTA is different from the present Alabama law. The financial condition of the debtor is an element of the cause of action. Section 4(c) requires that two elements exist before the transfer is voidable for constructive fraud. The debtor must transfer the property for less than a reasonable equivalent value and the debtor must be in a precarious financial condition. AFTA section 5 identifies a similar form of constructively fradulent transfers and requires two elements similar to those required in section 4: the transfer must be for less than a reasonably equivalent value and the debtor must be insolvent.

Additionally, section 5 prohibits as constructively fraudulent another type of transfer that present Alabama law does not consider fraudulent. Under Alabama law, a preference by a debtor, regardless of who the transferee is, is valid. An Alabama debtor may favor any one of his creditors over another as long as the property transferred to the creditor is equivalent to the debt. The AFTA carves out one type of preference for treatment as a fraudulent conveyance. Section 5 brands a transfer by a debtor as fraudulent if the debtor made the transfer to an insider for an antecedent debt and the debtor was insolvent at the time. Thus, this special type of preference is voidable under the AFTA outside of the bankruptcy context.

The effect of the AFTA on the principle of constructive fraud would be to limit its area of operation in some situations and expand it in others. The AFTA's addition of the new element of the debtor's financial condition would remove from constructively fraudulent conveyances those transfers in which the financially sound debtor transfers property for less than full value. A creditor could avoid these kinds of transfers only if he proves actual fraudulent intent. Conversely, a creditor could attack preferences to relatives or other insiders outside the jurisdiction of the bankruptcy court.

The AFTA also would change the current Alabama distinction between the rights of existing and subsequent creditors. The rights of existing creditors would remain the same; the rights of

future creditors would be broadened. Generally, in Alabama an existing creditor can attack a transfer for actual fraud or constructive fraud, and a future creditor can attack only a transfer that involves actual fraud. The AFTA allows an existing or subsequent creditor to attack transfers made with actual intent to defraud. It also allows both types of creditors to attack some constructively fradulent transfers, i.e., transfers made for less than a reasonably equivalent value while the debtor is engaged in a business with remaining assets unreasonably small in relation to the transaction, or while the debtor intended or believed he would incur debts beyond his ability to pay. Only an existing creditor may avoid the kind of constructive fraud identified in section 5. Future creditors may not attack preferences to insiders and transfers for less than adequate consideration while the debtor is insolvent.

One area of confusion in the existing Alabama law is the right of the creditor to recover on the debtor's property once the debtor's transferee has reconveyed the property. Provisions of the AFTA cover this area. Whenever a creditor obtains a judgment on a claim against the debtor, he may levy on the assets in the hands of debtor's transferee or the proceeds the transferee retained from any conveyance of the asset to another person. Existing Alabama law is silent on the right of the creditor to seek satisfaction from proceeds.

Furthermore, a case has never been presented to the Alabama appellate courts that offers the courts the opportunity to confront the question of the right of a purchaser from the debtor's transferee. AFTA section 8 states that a creditor may recover the debtor's asset from the debtor's transferee and from any subsequent transferee other than a good faith transferee who took for value. Thus, the AFTA protects a good faith purchaser and forces the creditor to pursue the proceeds of the purchase that remain in the possession of the debtor's transferee. The AFTA, like the current Alabama law, protects a good faith transferee from the debtor to the extent that he gave value for the debtor's property. Section 8(d) requires the transferee who is not involved in the debtor's fraud to return that part of the debtor's property for which he did not give value.

Finally, section 9 of the AFTA does not follow the suggested statute of limitations provided in the UFTA. The statute of limitations is drafted so it will conform to the existing Alabama law on extinguishment of claims. Section 9, AFTA, addresses both limitations on claims for fradulent transfer of real and personal property.

In summary, the Alabama Fradulent Transfer Act is not a mere restatement of the present law of Alabama on fraudulent conveyances; the new act, if enacted in Alabama, would bring major changes to the law in this area. In general, the AFTA codifies an area of the law that cannot be neatly packaged. It broadens the creditors' powers to pursue a debtor's assets and also removes some of the overly technical requirements of the current law. The AFTA has considerable value because of its efforts to achieve uniformity between jurisdictions and compatibility with the Bankruptcy Code. ■

Riding the Circuits

Baldwin County Bar Association officers: back row, left to right, Samuel N. Crosby, president; Mollie P. Johnston, secretary/treasurer; H. Young Dempsey, III, vice-president; John Earle Chason, bar commissioner: front row: John Chason, Sr., first president, Baldwin County Bar Association; J.B. Blackburn, first bar commissioner, Baldwin County Bar Association.

Baldwin County Bar Association

The Baldwin County Bar Association celebrates its 40th anniversary this year. The organization came into existence shortly after legislation was enacted on August 16, 1947, establishing Baldwin County as the 28th Judicial Circuit. At the newly-formed association's earliest meetings, J.B. Blackburn was elected the first representative to the Alabama State Bar Board of Bar Commissioners and John Chason was elected the first president. In 1967, Phyllis Nesbit served as the first woman president of the association.

During its 40-year history, the Baldwin County Bar has endorsed numerous measures to improve the local court system and sponsored such programs as the historic Baldwin County term of the Alabama Supreme Court held November 21, 1986.

This year the association is instituting a mediation program for the peaceful resolution of disputes outside the court system. Also, each monthly meeting includes a program of continuing legal education for improvement of professional skills, in areas such as workers' compensation, mortgage law, civil and criminal trial practice, appellate advocacy, tax planning, family law, oil and gas law and employment law.

—Mollie P. Johnston

Covington County Bar Association

The Covington County Bar Association recently elected new officers. They are:

President: Francis M. James, III, Andalusia
Vice-president: Ashley M. McKathen, Andalusia
Secretary/treasurer: Frank McGuire, III, Opp

The association entertained its members and spouses at the lake home of Abner Powell, III, in August.

Houston County Bar Association

The new Houston County Bar Association officers, as of September 19, are as follows:

President: Edward M. Price, Jr., Dothan
Vice-president: Randy C. Brackin, Dothan
Treasurer: Eugene Paul Spencer, II, Dothan
Secretary: Banks T. Smith, Dothan

Huntsville-Madison County Bar Association

At the August meeting of the Huntsville-Madison County Bar Association, the following were elected officers for this organization:

President: Douglas C. Martinson, Huntsville
Vice-president: Robert Sellers Smith, Huntsville
Secretary: Paul Pate, Huntsville
Treasurer: Susan Tuggle, Huntsville

Marshall County Bar Association

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

President: George M. Barnett, Guntersville
Vice-president: F. Timothy Riley, Albertville
Secretary/treasurer: T. J. Carnes, Albertville

Sumter, Greene and Marengo Counties Bar Association

The 17th Judicial Circuit bar Association sponsored a continuing legal education program held in Linden, Alabama, August 19, 1987. Approximately 50 attorneys from the first, fourth and 17th Judicial Circuit bar associations attended the program and the reception that followed at the Linden Country Club.

After introductions by Drayton Pruitt, Nathaniel Hansford, acting dean of the University of Alabama School of Law, opened the program with an update on the law school, providing information on the current freshman class, the faculty, the Alabama Law Institute and the Law School Endowment.

Professor Charles Gamble, former dean of the University of Alabama School of Law and author of the revised editions of *McElroy's Alabama Evidence*, was the featured speaker. Professor Gamble's topic was "Alabama Evidence: A Comprehensive Perspective." During his presentation, Gamble presented his first attempt at providing a chart which, once it is fully developed, will give the practicing lawyer a comprehensive picture of the entire body of evidence law as it has evolved in Alabama.

At the close of the program, Joe C. Camp and David M. Hall, both members of the 17th Judicial Circuit Bar Association, were honored for 50 years of service to their local and state bar associations. *(See biographical sketches in this issue's "Bar Briefs" section.)* ■

ALABAMA BAR INSTITUTE FOR CONTINUING LEGAL EDUCATION

November and December 1987 Programs

NOVEMBER			
12	Farm Bankruptcies Under Chapter 12 (Satellite)	4.6	UA Law Center
12	Civil Procedure	6.3	Montgomery Civic Center
13	Civil Procedure	6.3	Birmingham Civic Center
19	Generation Skipping, Planning and Drafting (Satellite)	4.6	UA Law Center
19	Damages	6.8	Birmingham Civic Center
19	Civil Procedure (Video replay)	6.3	Dothan, Sheraton
20	Damages	6.8	Montgomery Civic Center
20	Civil Procedure (Video replay)	6.3	Sheffield, Holiday Inn
DECEMBER			
3	Banking Law and Practice (Satellite)	4.6	UA Law Center
3	Bankruptcy Law	6.9	Birmingham Civic Center
4	Estate Planning	6.6	Birmingham, Harbert Ctr.
10	Employee Benefits in Corporate Transactions after Tax Reform (Satellite)	4.6	UA Law Center
10	Winning Jury Trials	7.4	Birmingham Civic Center
11	Winning Jury Trials	7.4	Montgomery Civic Center
16	Civil Procedure (Video replay)	6.3	UA Law Center
17	Negotiation and Settlement	7.5	Mobile, Riverview Plaza
18	Negotiation and Settlement	7.5	Birmingham, Harbert Ctr.

Book Review

Alabama Civil Practice Forms

by Allen Windsor Howell, The Michie Co., Charlottesville, VA, pp. 563

Reviewed by Greg Ward

Few weeks go by when I do not open my mail and find a new offer for a set of form books, not just a set of form books, but *the* set of form books, generally purporting to be the last set of form books I will ever have to buy on that subject. Of course, this rarely—if ever—turns out to be the case. And, often as not, those that are purchased are a disappointment.

Not that I underestimate the need for forms—on the contrary, they are referred to around the state in terms such as "cookbooks" or "recipes." They are facts of modern practice and a necessity that no lawyer can afford to be without for much longer. The real problem lies in finding such books that were written with a specific jurisdiction in mind.

Finally, someone has written a book which attempts to tailor-make civil forms on Alabama law for the general practitioner.

Allen Windsor Howell, a member of the Alabama bar, has structured *Alabama Civil Practice Forms* so that it is one of the best books the attorney involved in a general civil practice can have at his or her fingertips. It includes nearly 400 forms covering a broad array of civil matters.

There are ten chapters: general damage actions; actions against governmental entities; equitable claims; probate court proceedings; domestic relations; execution, levy and garnishment; business organizations; real estate transactions; wills and trusts; and miscellaneous other forms.

I have not found a better single-volume book in which a new attorney should invest. Instead of having to draft each document from scratch, Howell gives an excellent point of beginning. Not only are the forms good, but law notes are also included. The notes are not extensive—in fact, they generally are very short—but they are helpful in jogging the memory and giving a quick reference point.

In light of the paucity of availability of modern forms on the subject, the chapter on probate court proceedings is especially helpful. In this section alone there is a collection of nearly 70 forms dealing with subjects as diverse as adult guardianships, adoptions and administration of estates. Each section is subdivided. For example, the section on adult guardianships is subdivided into the petition of inquisition, order setting hearing, transcript and instructions to jury, oath of jury and jury verdict, as well as all others needed for a simple guardianship (16 in all).

Alabama Civil Practice Forms fulfills another need for an increasing number of lawyers. With the rapid expansion of the number of word processors in use around the state, it is an excellent source for setting up a forms file in a word processor—a real time-saver, and one which can translate into dollar savings.

Of course, as the author points out in the book's preface, forms are not meant to be used without the necessary alterations to make them fit specific cases. They are not a panacea for the attorney who does not check the statutes and cases, but these are among the most useful materials I have seen. And, judging from the reactions I have heard, this seems to be consensus opinion.

Howell does not fill the book with much law. That is not his goal. What he does is put an excellent single-volume civil form book at your disposal—a task heretofore gone begging. ■

Greg Ward is a graduate of Auburn University and the University of Alabama School of Law. He is in private practice in Lanett, Alabama, and serves on the editorial board of The Alabama Lawyer.

Opinions of the General Counsel

by Holly L. Wiseman,
Acting Assistant General Counsel

QUESTION:

"Our firm is contemplating the preparation of a firm résumé for sons, friends, existing clients and prospective employees, as well as other persons, including prospective clients, who may inquire about the firm. In the résumé we plan to include statements describing the experience of the firm in specific areas of practice. We will not, however, be comparing the quality of those services to those offered by other law firms.

"Does such a résumé constitute advertising under Temporary Disciplinary Rule 2-102 and therefore require the disclaimer set forth in subsection (E) of that rule?"

ANSWER:

Temporary Disciplinary Rule 2-102(E) requires that, "No communication concerning a lawyer's services shall be published or broadcast unless it contains in legible and/or audible language the following: 'No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.'" As your proposed firm résumé will include information regarding the services provided by your firm, it must include the disclaimer as set out in DR 2-102(E).

DISCUSSION:

Temporary DR 2-102(E) requires that statements regarding a lawyer's services must be accompanied by a disclaimer. This provision is authorized by holdings of the United States Supreme Court which permit certain limited state regulation of so-called "commercial speech," as opposed to "pure speech," which is accorded full First Amendment protection. "Commercial speech" has been described by the United States Supreme Court as communication "related solely to the economic interest of the speaker and its audience" or speech "which does no more than propose a commercial transaction." *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Matter of National Service Corporation*, 742 Fed. 2d 859 (5th Cir. 1984). Commercial speech may be forbidden and regulated in situations where so-called pure speech may not be, *Supersign of Boca Raton, Inc. v. City of Ft. Lauderdale*, 766 Fed. 2d 1528 (11th Cir. 1985). Nevertheless, "Truthful advertising relating to lawful activities is entitled to the protections of the First Amendment." *Virginia Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)

In the case of *Matter of National Service Corporation, supra*, the Fifth Circuit Court of Appeals attempted to distinguish an example of "pure speech" from "commercial speech." A plumbing company had contracted for outdoor billboard advertising, then filed bankruptcy before it could pay for the billboards. The billboard company proposed to display the following message on billboards reserved by the plumbing company: "Beware, this company does not pay its bills." The Fifth Circuit noted that the message was not a solicitation for the sale or purchase of a product or service and that it did not constitute a "mere advertisement" since it was not published by one whose profit interests were served by the view espoused. The court also noted that the message was "not in the form of a paid advertisement." The court held that this message constituted pure speech and could not be enjoined by the bankruptcy court as harassment of the debtor.

The landmark case of *Bates v. State Bar of Arizona* extended the limited First Amendment protection, accorded to commercial speech, to advertising by lawyers. Subsequently, the Supreme Court has approved some regulation of lawyer advertising by bar associations. Most pertinently, in the recent case of *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265 (1985), the Supreme Court agreed that "warnings or disclaimers [may] be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception", citing *In re R.M.J.*, 455 U.S. at 201.

The *Code of Professional Responsibility* of the Alabama State Bar corresponds exactly to the U.S. Supreme Court holdings regarding lawyer advertising. Temporary DR 2-101 prohibits only communications concerning a lawyer's services which are false or misleading. Temporary DR 2-102 requires that any "communication concerning a lawyer's services" shall contain the following disclaimer: "No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services." The Alabama Supreme Court has upheld this disclaimer requirement in the case of *Mezrano v. Alabama State Bar*, 434 So. 2d 732 (Ala. 1983).

The proposed firm résumé clearly contains communications concerning a lawyer's services. It is appropriately regulated as "commercial speech" because it relates to the

economic interests of the firm of proposed recipients of the résumé. The information contained in the résumé clearly is intended to solicit the sale of the firm's services. Preparation of the résumé obviously will be paid for by the law firm, and it will be circulated to those who might be inclined or induced to engage the law firm's services. Under previous opinions issued by this office, direct mailings of such brochures would constitute permissible advertising rather than impermissible "solicitation" as prohibited by Temporary DR 2-103 [RO-86-49]. They must, however, contain the Temporary DR 2-102 disclaimer. Those preparing the résumé also should review Temporary DR 2-104 regarding "Communication of Fields of Practice" and Temporary DR 2-112 regarding "Advertising of Certification." Those rules forbid claims of specialization except in certain narrowly limited circumstances. ■

Pictured above are, left to right, Ray Ferraro, president of The Florida Bar and host for the 1987 Southern Conference of Bar Presidents, held in Palm Beach, Florida; Ben Harris, president of the Alabama State Bar; and Reggie Hamner, executive director of the bar. Harris and Hamner are holding a memento of their visit, which coincided with the Alabama-Florida football game in Birmingham. President Ferraro is a graduate of the University of Florida.

Consultant's Corner

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

This is the fifth 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.

Just Say No

The computer industry continues to undergo a significant shake-up, and fewer companies seem destined to "make it," at least in their present form. Virtually all vendors are turning to a strategy called "vertical marketing." This means, among other things, that almost everyone claims to be an expert in the legal field, albeit they were in the wholesale beverage distribution business three weeks ago. This raises an interesting dilemma:

—Many firms do have pressing needs for truly effective legal-specific systems, such as document production, time and billing, practice management, etc.

—There are hordes of vendors, who claim to have "revolutionary" technology.

—How to choose?

There are six types of vendors I would never buy *anything* from, regardless of their representations.

Guilt-mongers

These are among the most desperate of vendors, but the easiest to detect. They give themselves away immediately with such rehearsed phrases as, "You mean you are not interested in the best?" "You have everything you need?" "How do you know we are not the best if you will not let us make a presentation?" "You are satisfied with what you have?" Do not fall for the "reasoned response" technique. They will eat you alive. *Just say no,* (and hang up/throw them out).

Bargain-hawkers

Do not misinterpret this one. There are legitimate bargains to be had and you should pursue them, but only if you would have bought the product/service at the regularly offered price. If it was not a good value at its regular price, *it was not a good value.* Think of the cardinal rule of the marketplace: "Demand controls price." Ask yourself, "If this is such a good deal, why is it so cheap?" A sure clue to a product's true value is whether it ever sold for a non-discounted price. How to handle hawkers? Just say n__.

Bad-mouthers

It may take a bit longer to pick up on this type of vendor. He is the quintessential hustler: "That's yesterday's technology." "You mean you like that?" "Haven't you read what Bubba's Videoworld is saying about them?" After a few minutes you realize that you have heard nothing about this vendor's product, only what is wrong with everyone else's. Pointing out comparative differences between one product and another is an ethical (and effective) sales technique provided it involves more than mere competitor bashing. Ask youself what this vendor's angle really is. Answer your own question with the (now) classic "Just say ____."

Poor-mouthers

These are kin to the Bad-mouthers, but a bit more prone to elicit sympathy from a unwary buyer. "I am just three doors down the street." "Wouldn't you rather do business with a local firm?" "I know you from Elks, don't I?" "Hey, why not give me a break?" "My wife was your great-aunt's flower girl." This gets a bit sticky, even more so if your great-aunt is still alive. Nonetheless, you should not be unduly swayed by such craven appeals. What if the poor soul is unable to meet the agreed requirements? Are you going to sue your great-aunt's flower girl's husband? Is not your practice enough of a burden without this? Just sa__ ____.

Hip-shooters

They are fast, you have to concede that. No matter the question an answer is forthcoming in milliseconds. Ask about business history and you are likely to get: "History? . . History? . . . We're making it as we speak!" How about legal-specific word processing? "We got it!" Table of Citations? "Won the Kentucky Derby in '81, sired an '86 winner, Table of Authorities." What about access to Lexis or Westlaw? "Eastlaw, Westlaw, if they're out there we're compatible with 'em." That should do it. If it does not, try another question, any question, then . . . Just s____ ____.

Note-takers

These people can really drive you nuts. They are so nice, yet they make you wish you had taken up catfish farming instead of law. An indelible clue is the poised pen. These poor souls are hired by a sleazy vendor to canvass law firms (at $3.36 per hour) on behalf of "the closer." Their questions will drive you up the wall. "Oh, that sounds so exciting!" "What does a litigator do?" "Do briefs come in colors?" You get the picture. Just _____ ____. ■

MCLE News

MCLE News
by Mary Lyn Pike
Assistant Executive Director

CLE compliance due

The deadline for earning 1987 continuing legal education credits is December 31, 1987. A calendar of CLE opportunities is printed elsewhere in this issue. If you wish to attend a program not listed, call or write the MCLE Commission at state bar headquarters.

CLE transcripts

Until 1987, the MCLE Commission did not require course sponsors to submit registration or attendance lists, but required bar members to maintain their own records of course attendance. During 1986, the commission adopted Regulation 4.1.15, requiring sponsors to submit registration lists so CLE transcripts could be compiled for bar members.

This month, a transcript will be generated and mailed to each member of the bar 65 years of age and younger. It will replace the blue and white form used over the previous five years and is being mailed two months later than in years past so the attendance record will be as complete as possible.

July commission meeting

At its July 15, 1987, meeting conducted in Mobile, Alabama, the MCLE Commission conducted the following business:

1. Voted to recommend to the executive committee and the president that Commissioner Phillip Adams of Opelika be chosen chairman of the MCLE Commission for 1987-88;

2. Voted to recommend the following commissioners to the nominating committee as new MCLE Commission members: George W. Royer, Jr., J. Mason Davis, Broox G. Holmes and James R. Seale;

3. Denied a request for CLE credit for writing a chapter of a textbook to be used in graduate, internship and postgraduate college courses in forensic psychology;

4. Ruled that the governor's legal advisor and assistant legal advisor are eligible for Rule 2.C.1 exemptions from the CLE requirement;

5. Approved retroactively three 1986 programs submitted after the March 1, 1987, approval deadline, on the condition the sponsors be informed again of the necessity for complying with the commission's requirements;

6. Allowed an attorney to amend his 1986 CLE report after the March 1, 1987, amendment deadline, on the condition that the attorney not make such requests in the future;

7. Approved a seminar on controlling contract disputes, designed for both lawyers and professionals in construction and arbitration (American Arbitration Association);

8. Approved a seminar on legal issues and the handicapped, designed for lawyers, school superintendents and special education coordinators (Alabama Department of Education);

9. Approved a seminar on open network architecture designed for attorneys, utility executives, vendors, lobbyists, manufacturers and telecommunication users (Telecom Publishing Group);

10. Denied the Eastern Mineral Law Foundation's request for approved sponsor status because the organization does not limit its membership to attorneys and its educational efforts are not directed specifically to attorneys;

11. Granted approved sponsor status to the National Association of Attorneys General; and

12. Granted approved sponsor status to the Continuing Legal Education Satellite Network but excluded from presumptive approval broadcasts to law firms. Law firms wishing to receive credit for such broadcasts will be required to apply for approval of them in accordance with Regulation 4.1.14 on in-house seminars.

CORRECTION: In the September 1987 issue of the *Lawyer*, on page 282 (annual meeting highlights), Windell Owens of Monroeville was listed incorrectly as Edward Boswell of Geneva. *The Alabama Lawyer* regrets any inconvenience this may have caused Mr. Owens or Mr. Boswell.

September commission meeting

At its September 25, 1987, meeting in Montgomery, the MCLE Commission conducted the following business:

1. Recognized and welcomed new members: Commissioners Broox G. Holmes, James R. Seale, J. Mason Davis and George W. Royer, Jr.;

2. Added a second paragraph to Regulation 5.1, as follows:

Any reports received by January 31, or the next business day if January 31 is a Saturday or Sunday, will be considered timely filed. All others must be accompanied by a fifty-($50) dollar late filing fee in the form of a check made payable to the Alabama State Bar. Reports not so accompanied will be returned to the attorneys filing them and those attorneys will be deemed not in compliance until the fee is paid.

3. Adopted new Regulation 6.A.1, as follows:

Any deficiency plan received by the Alabama State Bar after January 31, or the next business day if January 31 is a Saturday or Sunday, shall not be accepted and the sanctions set forth in Rule 6.B. shall apply.

4. Approved proposed wording for the amendment of Regulation 3.6, previously approved:

The number of hours required means that the attorney must actually attend twelve (12) instructional hours of CLE per year with no credit given for introductory remarks, meal breaks or business meetings. An instructional hour will in all events contain at least **sixty (60) minutes.**

5. Approved proposed wording for new Regulation 3.1.0, previously approved:

Any bar member earning twenty-five (25) or more credits in a given year, excluding credits brought forward from the previous year and teaching credits earned, shall qualify for a continuing legal education recognition award.

6. Approved a permanent program of substitute compliance for a bar member on the basis of physical disability;

7. Denied a request for teaching credit for judging of a mock trial competition;

8. Waived the $50 late filing fee for an attorney who filed an affidavit attesting to the fact that he had mailed his 1986 CLE report to the MCLE Commission twice during the month of January 1987;

9. Waived the $50 late filing fee for another attorney who filed a similar affidavit;

10. Granted approved sponsor status to the Federal Energy Bar Association and the National Institute of Municipal Law Officers;

11. Denied approval of a labor relations symposium because it was designed primarily for nonlawyers (Constangy, Brooks and Smith);

12. Tabled a request for accreditation of a seminar designed for attorneys and doctors pending review of handouts prepared for the seminar (Mobile Bar Association);

13. Declined to approve a seminar on dealing responsibly with the chemically dependent (Huntsville Interagency Council on Chemical Dependency);

14. Approved for full credit in part and half credit in part a seminar on the utilization of legal assistants (Montgomery County Bar Association);

15. Approved for half credit a federal law office management seminar (U.S. Equal Employment Opportunity Commission);

16. Approved in part and denied in part a conference for legal executives (Cantor and Company, Inc.);

17. Declined to approve a bankruptcy seminar because the sponsor failed to submit it for advance approval, after being informed that the commission would accept no additional retroactive applications (Creditors Law Center);

18. Approved two 1987 programs on hospital law but ruled that no additional retroactive applications from the sponsor would be accepted (American Academy of Hospital Attorneys);

19. Voted to amend Regulation 3.5, effective January 1, 1988, to the effect that teachers who do not prepare handouts will receive no extra credit but, rather, will be limited to credit for actual time spent on stage;

20. Tabled consideration of the recommendation of the Ethics Education Committee that such education should be mandated, to be considered at the commission's November meeting. ■

Disciplinary Report

Suspension

● On September 15, 1987, the Supreme Court of the State of Alabama entered a final order suspending Tuskegee attorney **Calvin D. Biggers** from the practice of law for a period of 91 days, without automatic reinstatement. Biggers pleaded guilty to several charges alleging that he had neglected his clients' legal business. [ASB Nos. 86-443, 86-517, 86-520, 86-609, 86-624 & 87-31]

Public Censures

● On July 15, 1987, Mobile lawyer **Wilson M. Hawkins, Jr.,** was publicly censured for conduct adversely reflecting on his fitness to practice law, for willful neglect of a legal matter entrusted to him and for intentional failure to carry out a contract of employment with a client. Hawkins was retained by an out-of-state client in July 1986, and accepted a $250 fee to investigate a reported attempt to re-zone certain coastal property in Alabama that was located near property owned by the client. After having received no communication from Hawkins, and after numerous unsuccessful attempts to contact Hawkins by telephone, the client filed a complaint with the bar in October 1986. Thereafter, Hawkins ignored the request of the Grievance Committee of the Mobile Bar Association that he provide a response to the client's complaint. [ASB No. 86-666]

● On July 15, 1987, Montgomery lawyer **Elno A. Smith, Jr.,** was publicly censured for willfully neglecting a legal matter entrusted to him, and intentionally failing to seek the lawful objectives of a client through reasonably available means, in violation of DR 6-101(A) and DR 7-101(A)(1) of the *Code of Professional Responsibility* of the Alabama State Bar. Smith was the attorney of record for a client appealing a criminal conviction to the Alabama Court of Criminal Appeals, but failed to file a brief on behalf of the client, even after being notified by the court that the appellate brief had not been filed and was overdue. Smith also ignored two requests from the Montgomery County Bar Association Grievance Committee to provide an explanation for his failure to file a brief on behalf of his client. [ASB No. 83-522]

Private Reprimands

● On July 15, 1987, a lawyer was privately reprimanded for willful neglect and intentional failure to seek the lawful objectives of a client through reasonably available means. The lawyer was appointed by the court to represent an indigent convict on appeal, but did not file a timely appellate brief. After being notified by the clerk of the appellate court of his failure to file a brief, the lawyer filed a *pro forma* "no merit" brief, though the record on appeal contained the basis for several legitimate arguments of reversible error. [ASB No. 84-698]

● On July 15, 1987, a lawyer was privately reprimanded for engaging in conduct that adversely reflected on his fitness to practice law. The conduct essentially amounted to contributing to the delinquency of a 15 or 16-year-old minor, by allowing the minor to spend considerable time at the lawyer's residence, and making alcohol available for the minor's use. [ASB No. 85-48]

● On July 15, 1987, a lawyer was privately reprimanded for having violated Disciplinary Rules 2-111(A)(2) and 2-111(B)(2). The lawyer filed a suit on behalf of a client, and was subsequently discharged by the client. However, the lawyer did not file a withdrawal in the suit, and did not deliver to the client all of the papers in his possession to which the client was entitled. [ASB No. 86-121]

● On July 15, 1987, a lawyer was privately reprimanded for willful neglect, intentional failure to seek the lawful objectives of a client and intentionally prejudicing or damaging a client. The lawyer filed a suit on behalf of the client, and subsequently failed to comply with the trial court's order that the pleadings be amended to add additional necessary parties. The failure to amend resulted in the action being dismissed, with costs taxed against the lawyer's client. [ASB No. 86-716]

● On September 25, 1987, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law, growing out of his failure to appear at the scheduled time before the board of bar commissioners for a private reprimand in another matter. [ASB No. 86-730]

● On September 25, 1987, a lawyer was privately reprimanded for having willfully neglected a legal matter entrusted to him, and having intentionally failed to seek the lawful objectives of a client through reasonably available means. The lawyer agreed to represent a client in seeking damages arising from fraudulent representations that had been made to the client in connection with the purchase of a house. The lawyer, however, failed to file suit on the client's behalf prior to the expiration of the statutory period of limitations. [ASB No. 86-394(B)]

● On September 25, 1987, a lawyer was privately reprimanded for having violated DR 9-101(A). The lawyer, a former judge, sat as the judge on a divorce case, and several subsequent modification proceedings. After leaving the bench and entering the practice of law, the lawyer then initiated another modification proceeding, concerning child support,

as attorney for the former wife, against the former husband. [ASB No. 85-08]

● On September 25 an Alabama attorney received a private reprimand for violation of Disciplinary Rules 5-105(A), 7-101(A)(1) and 7-101(A)(2) of the *Code of Professional Responsibility*. The Disciplinary Commission found that the attorney had been retained to represent an estate in a will contest. Immediately prior to a trial on the matter the attorney advised the executor of the estate that he previously had represented the contestant and had advised the contestant on a legal matter directly related to the contest itself. Furthermore the attorney advised that he expected to be called as a witness by the contestant. The Disciplinary Commission determined that the attorney's conduct was such that he was engaged in a situation that would likely involve him in representing differing interests, and that he failed to seek the lawful objectives of his client and failed to carry out a contract of employment as required by the Rules. [ASB No. 85-387]

● On September 25, 1987, a lawyer was privately reprimanded for willfully neglecting a legal matter entrusted to him. He accepted a retainer to represent a client in appealing a civil case, but did not file a timely brief. The appeal was dismissed by the appellate court, but the lawyer took no action to have it reinstated, and did not apprise the client of the dismissal. [ASB No. 86-485(B)]

■

Memorials

John Edmund Adams—Grove Hill
Admitted: 1919
Died: September 9, 1987

John Thomas Andrews, Jr.—Birmingham
Admitted: 1964
Died: July 6, 1987

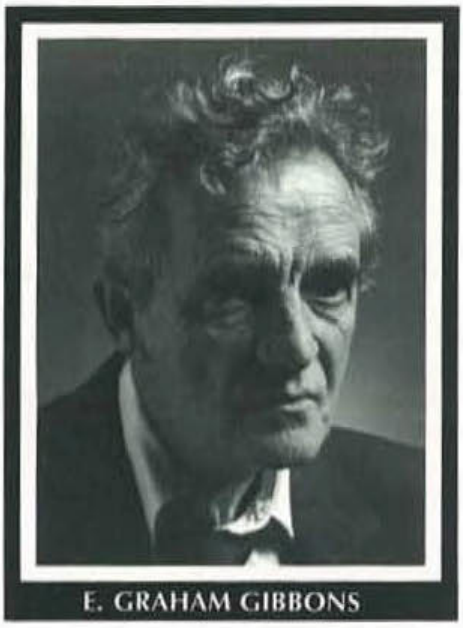
Robert Warner Dick—Montgomery
Admitted: 1974
Died: August 24, 1987

Peter A. Di Rito—Baltimore, Maryland
Admitted: 1945
Died: December 17, 1986

W. Herbert Osborne—Birmingham
Admitted: 1930
Died: September 6, 1987

Forrest Lee Treanor, Jr.—Littleton, Colorado
Admitted: 1974
Died: May 28, 1987

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.*



E. GRAHAM GIBBONS

On June 13, 1987, E. Graham Gibbons died. He was a member of the Mobile Bar Association, Alabama State Bar and American Bar Association.

Gibbons was born in Vernon, Alabama, November 11, 1925, the son of James B. Gibbons and Anne Walsh Gibbons. He was educated in the public schools of Tuscaloosa, Alabama, and received his LL.B. degree in 1951 from the University of Alabama.

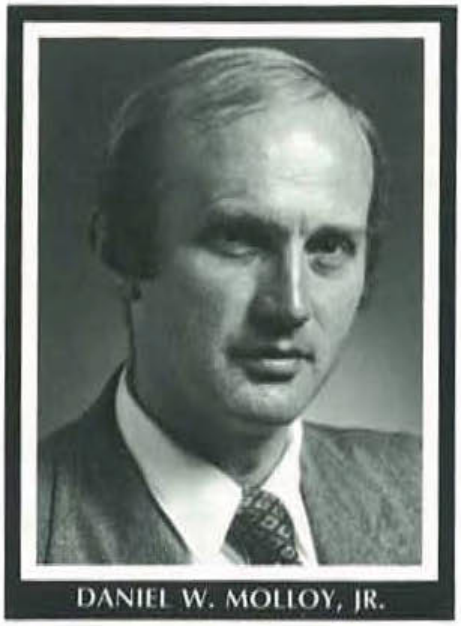
Gibbons served in the United States Army Air Force from 1943 to 1946 and was a waist gunner on a B-29 in the South Pacific during World War II. He was recalled to active duty during the Korean Conflict and served from 1951 through 1954 as a lieutenant in the Judge Advocates Office.

In 1957, he came to live in Mobile, Alabama, and taught history and civics at Barton Academy for three years; he entered the practice of law in Mobile in 1961 and thereafter continued as an active and successful trial lawyer until his death.

Many members of the bar will recall Graham's readiness to handle indigent cases without pay and also will remember that he was responsible for the landmark decision handed down by the U.S. Supreme Court in the case of *Boykin v. Alabama,* in which the Court set out criteria to be met for a judge to accept a guilty plea.

He worked actively with the youth of Mobile as a little league coach and through the Boy Scouts of America, and was active in community affairs.

Gibbons is survived by his wife, Betty W. Gibbons; a daughter, Doria Desiax Gibbons; two sons, John Duroc Gibbons and Thomas Jefferson Lannes Gibbons; and other relatives.



DANIEL W. MOLLOY, JR.

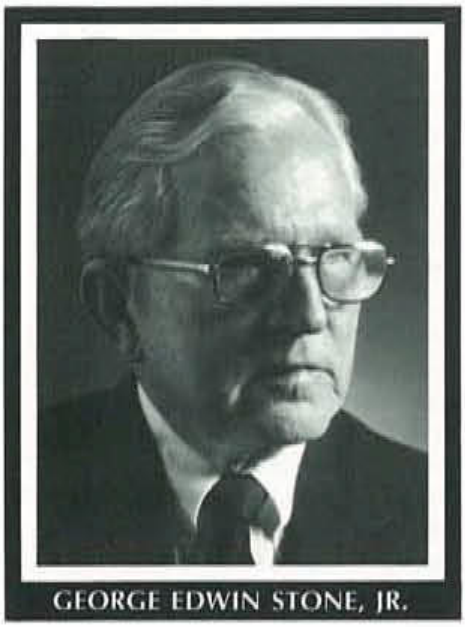
Daniel W. Molloy, Jr., was born in Birmingham, Alabama, January 10, 1949, and lived most of his life in nearby Sulli-

gent, Alabama. He died March 22, 1987, in Mobile at the age of 38.

Molloy graduated from the University of Alabama in 1971 with a B.S. degree, received his law degree in 1976 from the University of Alabama School of Law and was admitted to practice that same year.

He first came to Mobile as director of the Legal Aid Society of Mobile, serving there for four years. He then was a member of the law firm of Harris and Molloy.

He is survived by his wife, Melissa Molloy, and two children, a son, Jason, 16, and a daughter, Kate, seven.



GEORGE EDWIN STONE, JR.

On April 25, 1987, George Edwin Stone, Jr., a member of the Mobile Bar Association and the Alabama State Bar, died and the Mobile Bar Association recognizes and memoralizes his outstanding record as a prominent attorney, distinguished citizen and honored civic leader.

Stone was born in Mobile, Alabama, on January 11, 1911, the son of George Edwin Stone and Claudia Kirkpatrick Stone.

He graduated from the public schools of Mobile and later from the University of Alabama and the University of Alabama Law School, where he received his LL.B. degree in 1935. He was a member of the Phi Delta Theta and Phi Delta Phi fraternities.

On July 15, 1935, he began practicing in Mobile and in 1985 received a 50-year certificate from the Mobile Bar Association in recognition of his half-century of active practice.

From 1939 until 1951, he represented Mobile County in the Alabama House of Representatives, serving with distinction in that position. For many years, he served as attorney for the City of Prichard and for the Prichard Water Works and Sewer Board. He concluded his legal career in Mobile as house counsel for the Mobile County School Board.

He also served as a member of many leading civic associations, including the Rotary Club, and worked diligently with Contact Helpline. He was a member of various other civic, mystic and social organizations, and was a past president of the Mobile Bar Association.

At the time of his death he was a member of All Saints Episcopal Church. ■

CORRECTION: In the September issue of *The Alabama Lawyer,* the notices of deaths of Alabama lawyers incorrectly included William Borden Strickland of Birmingham. William Borden Strickland, of Mobile, is still an active member of the Alabama State Bar. The editors regret any inconvenience this caused.

Due to this mistake, no longer will *The Alabama Lawyer* publish obituaries from the Bureau of Vital Statistics, nor will we take any information over the telephone. The memorial information **must** come from a spouse, law partner/co-worker or the local bar of which the deceased was a member, and this material must be in writing, with name, return address and telephone number.

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Jan. '88 Issue— Deadline Nov. 27
March '88 Issue—Deadline Jan. 29
May '88 Issue—Deadline March 31

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Short Story Contest Revived

Once again, *The Alabama Lawyer* is sponsoring a short story contest for Alabama attorneys who "moonlight" as authors. Members are invited to participate by sending two copies of their story to the *Lawyer* NO LATER THAN February 29, 1988.

The subject matter is up to the author. Keep stories to 3,000 words or less—typed, double-spaced, on letter-size paper. A current photograph of the author must be submitted at the same time the story is sent; the photographs will be returned if requested in writing. The winning short story, and others if space permits, will appear in the May 1988 issue of the *Lawyer*.

Send stories to:

Margaret Lacey
The Alabama Lawyer
P.O. Box 4156
Montgomery, Alabama 36101

NOTICE

The wallet-size duplicates of your license for identification purposes and the special membership cards for the 1987-88 bar year will be delayed until mid-December. These cards will be computer-generated this year and our source has been delayed in providing us the computerized forms.

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An observation 200 years ago by British historian Alexander Tyler.

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