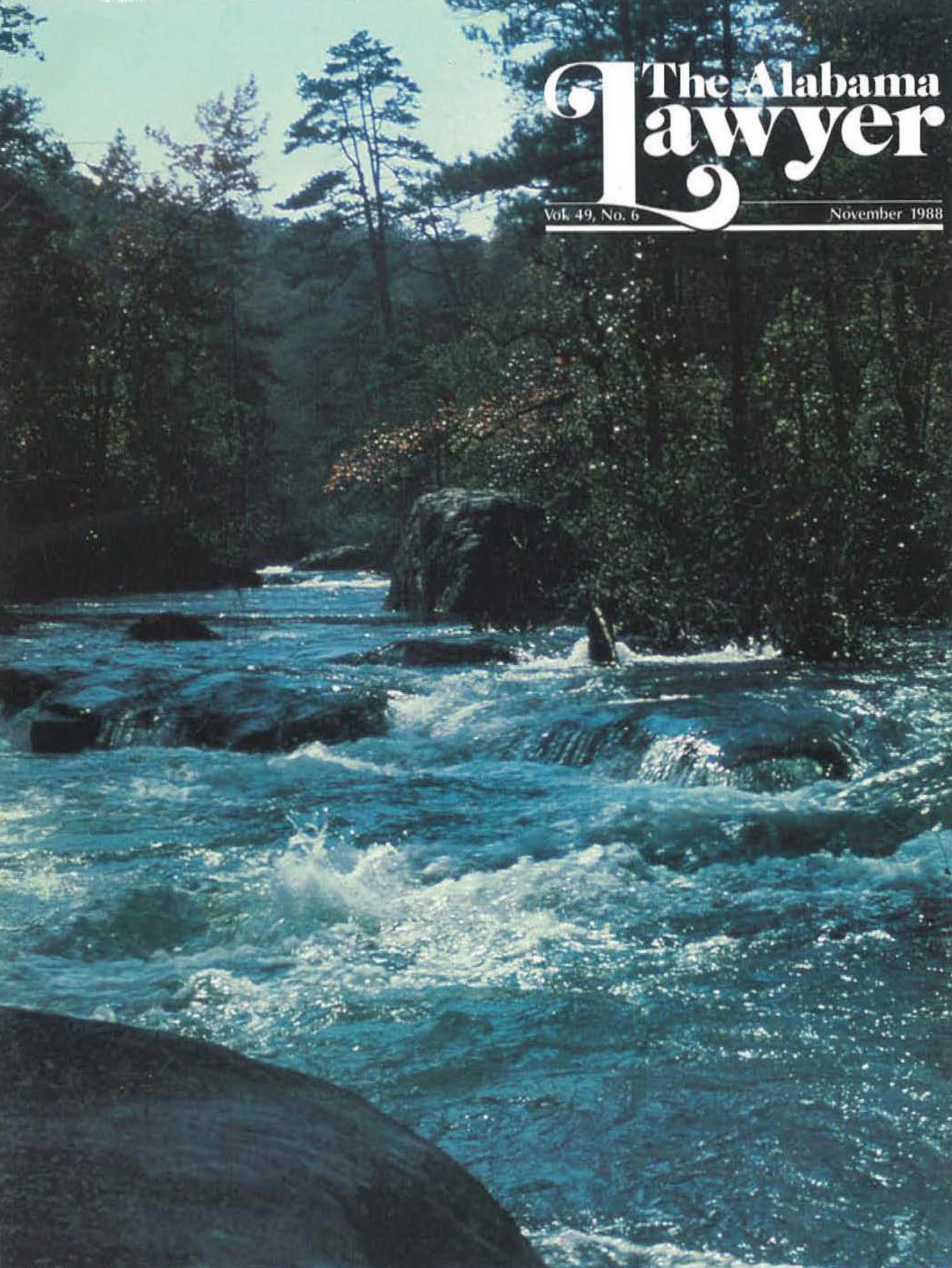

The Alabama Lawyer

Vol. 49, No. 6 November 1988

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Arlington Antebellum Home and Gardens
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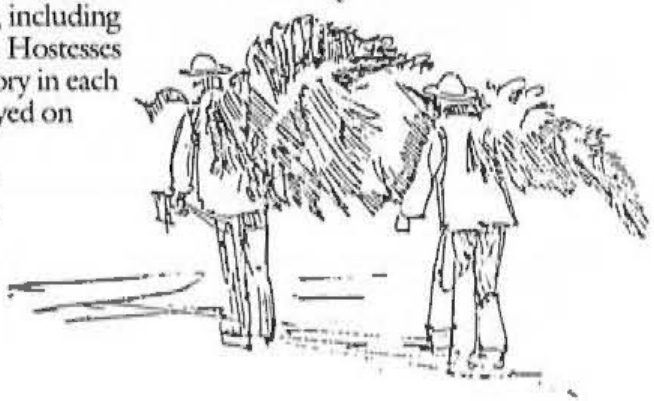
(205) 780-5656

Saturday, December 3, 1988 **10:00 a.m.-4:30 p.m.**
Sunday, December 4, 1988 **12:30 p.m.-4:30 p.m.**

Arlington is Birmingham's only surviving antebellum structure and the city's oldest museum. It will be festively decorated by 16 well-known decorators and associates to reflect the antebellum period in the south. The two-day event features Santa Claus and entertainment, including chamber music, instrumental soloists and vocal ensembles. Hostesses and children in period costumes will relate Arlington's history in each room setting. On Sunday a live nativity scene will be displayed on the grounds.

Refreshments will include hot spiced tea and Arlington's special cheese ball, served from the garden room. Arlington's gift shop will be beautifully decorated for the season and stocked with a wide variety of unique gifts.



Admission:
$2 adults/$1 students/Under 6—free

The Alabama Lawyer

VOL. 49, NO. 6 NOVEMBER 1988

In Brief

Published seven times a year by The Alabama State Bar
P.O. Box 4156 Montgomery, AL 36101
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Robert A. Huffaker—Editor
Susan Shirock DePaola—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.

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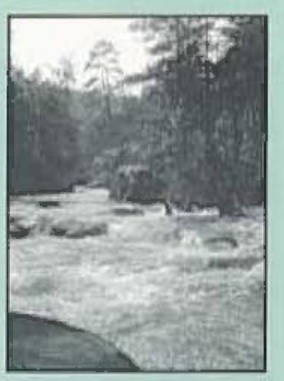
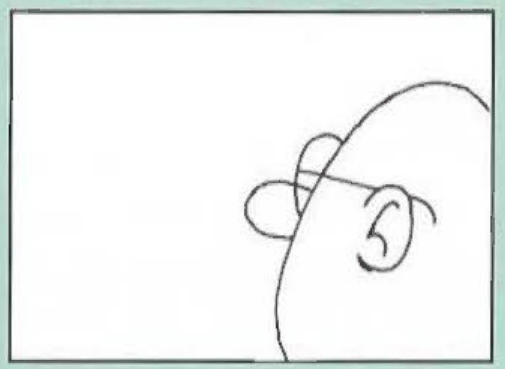
On the cover—

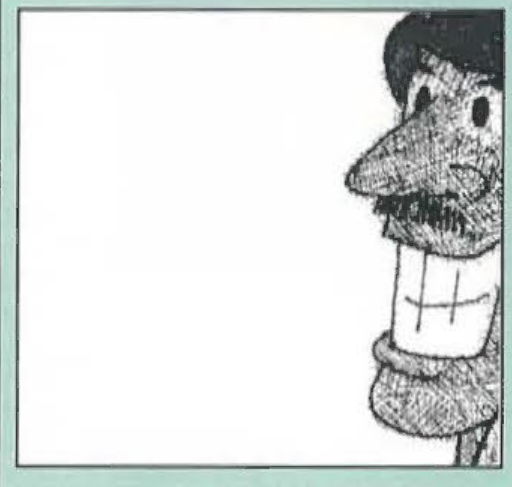


Little River canyon and falls are located in DeSoto State Park, in northeast Alabama. The canyon averages over 400 feet deep and runs its course entirely on Lookout Mountain. The 60-foot falls start the canyon and are just south of Alabama Highway 35, below Fort Payne. Photo courtesy of Alabama Department of Conservation and Natural Resources.



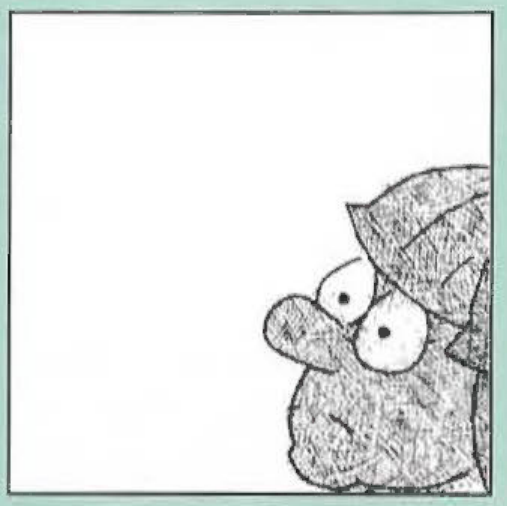
I'm the Lawyer, You're The Expert —by Lloyd W. Gathings . . . 338

Use of expert witnesses has become commonplace in civil litigation. How should the attorney best prepare the expert for his role at trial?



Beware of Colombians Bearing Gifts: What Attorneys Should Know About Currency—by Robert F. Clark and W. Lloyd Copeland 350

In an effort to curb drug trafficking, Congress has enacted legislation aimed at seizure of the "fruits" from drug sales. Attorneys representing defendants charged with drug offenses must be cognizant of these new currency reporting requirements.



Revocable Trusts—an Overview—by Jeff Kohn 332

A properly structured revocable trust can provide a client with a means of avoiding or minimizing tax liability.

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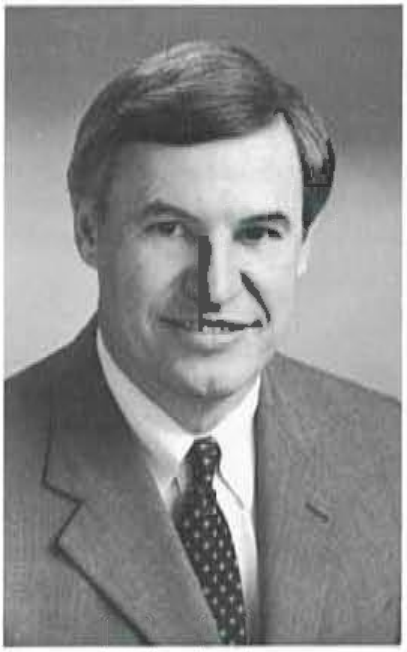

HUCKABY

As the Alabama State Bar moves into another year, there are several activities I would like to highlight in this report to the membership.

Court restructuring: There is little doubt that our appellate court system is facing increasing pressures from an ever-expanding caseload. I am told that justices on the supreme court are each handling over 150 cases a year, far too many to permit the kind of time and scholarship that should be devoted to the formulation of the terminal law of the state. We have a task force headed by Bert Nettles studying this problem, and your input is solicited.

Judicial selection: Several striking cases of problems in the judicial selection process have evolved from other states in recent years. In Alabama many members of the bench and bar have expressed concern about a growing politicization of our courts, fueled primarily by the necessity of judicial candidates to raise enormous sums of money to be elected. A task force led by Drew Redden is taking a hard look at our selection system to determine if there are ways to improve it.

Illiteracy: Our state's illiteracy statistics are embarrassing. Since the inability to read and write fundamentally affects access to our legal system, lawyers cannot ignore this spectacle. Jack Drake is chairman of a task force to seek ways to involve lawyers in the solution.

Drug awareness: As a purely public service project, I have appointed a task force under Charles Fleming to find ways that Alabama lawyers can help prevent drug abuse through public awareness. Every judge and practicing lawyer who deals with our criminal courts says that drugs are involved in an overwhelming majority of all crime. Lawyers are peculiarly equipped and knowledgeable to make a contribution to the eradication of drug abuse in our communities. When called upon, I hope you will help.

Representation in death penalty cases: Alabama has over 80 people on death row, and we have a very urgent problem in that adequate representation is not available to process the cases to finality. This dilemma contributes to extended appellate procedures and undermines public confidence in the judicial process. Our state and federal judiciary has asked the bar to assist in meeting this crisis. The state bar and the University of Alabama School of Law have cooperated in the formation of the Alabama Capital Representation Resource Center, Inc. The development committee is headed by former Governor Albert Brewer, who not only has provided his good intellect but his inspiration and enthusiasm. The center will assist those lawyers who volunteer for this laudable work with resources and personnel.

AIM (Attorneys Insurance Mutual): Most of you know by now that a so-called "captive insurance company" has been formed to write malpractice coverage for Alabama lawyers. Though the company is not a part of the state bar, its impact is very important to its membership. For years Alabama lawyers have faced a volatile market for liability coverage with dramatic increases in premiums and a lack of availability of insurance from time to time.

AIM is chaired by former State Bar President Bill Scruggs and a blue-ribbon board of directors of Alabama lawyers. The company is currently in the organizational stage, and debentures in the company are being offered. Over 1,000 lawyers have purchased debentures, but 900 more must be sold to reach the 2.5 million dollar minimum required to break escrow. The officers of the company are encouraged by the strong response of the members of the bar.

After November 30, 1988, and before January 31, 1989, debentures will be sold for $1,400, and after January 31, 1989, the cost will be $1,500. New admittees to the bar can purchase a debenture for $1,250 within 60 days after admission.

A policy form cannot be submitted to the State Department of Insurance until escrow is broken, but advisors to the company state that they would expect the coverage to be comparable to that offered in the market today.

(Continued on page 322)

Executive Director's Report

HAMNER

Our mail is a mixed bag

The letters that I receive at bar headquarters are as varied as the writers. The penmanship and communication skills range from virtually illiterate to classical. The subject matter varies, but usually it focuses on some aspect of the justice system—or the system gone wrong in the writer's view. Some letters are mildly amusing while others are exercises in frustration—either on the writer's part or mine in not being able to adequately respond.

Inmate correspondence comprises a significant part of our mail. Some writers are merely seeking assistance in obtaining a copy of a transcript or locating former counsel. Others are complaining about "ineffective counsel" or "a judge who didn't give me a fair trial," or professing complete innocence. These are the easy ones. The lack of merit in such letters is usually directly proportional to the penitential theology with which such letters are laced. I still try to answer each letter.

I always am grateful to the court clerks who patiently review records to assure I have the true facts before I respond. In those instances where I do open a line of communication, I notice shortly thereafter I will get more letters from friends of that inmate. I have become aware that my letter, in the form of a bar association response, restores some faith in the correspondent in a system with which he has become disillusioned.

Sometimes I have found that the inmate's problem indeed has been lost in an over-burdened bureaucracy.

The funniest letter recently received was from one of our constitutional officers letting me know how much was gained from a conference "we" attended and how meaningful such conferences were. Obviously, a word processor had digested an extensive registration list and was programmed to share the writer's pleasure at being with those of us listed on it. I had been forced to cancel my plans to attend, but only after this registrants' list was printed, so while the writer "enjoyed being with me," it must have been a "twin." I did not bother to respond to this letter.

Some letters from unsuccessful bar examinees could be lyrics for a hit country record. I can recall very few, if any, where the lack of success was remotely attributable to the fault of the applicant (according to the letter-writer).

You must respond gently to these persons. I usually suggest they avail themselves of the review process before filing their petition for *mandamus* or assaulting the examiners. Most persons who do objectively review their efforts learn from their failure and succeed on a subsequent exam. I am the first to realize that our office is, to a degree, a lightening rod. We try to be sensitive to the frustration, heartache and disappointment these persons feel.

The letters I really resent are from those students who want me to write their term papers or, worse still, do the research for a law review article or legal studies project. These persons are firmly directed to available resource centers and advised we do not do legal research.

Real satisfaction comes when you get results for one looking to the bar as their last resort. It is the lawyers who respond to our requests for help who are the positive image-builders in these days of lawyer-bashing.

A single mother raising two sons wrote, saying how she felt betrayed by the bankruptcy system. Her four-page chronology really "bugged" me.

For some reason, I believed every word. (I represented a former employer at creditors gatherings while an undergraduate. I recalled those experiences and understood her predicament.) One phone call to a lawyer who specializes in bankruptcy found a volunteer to review her records and, I hope, achieve the goal for which the bankruptcy system was established.

(Continued on next page)

President's Page

(Continued from page 320)

Coverage will be offered only to lawyers who hold debentures, and debentures must be in the individual name of the lawyer. A firm can be covered if all of its attorneys are insured.

All of the surveys of the bar have indicated that membership wanted coverage available from a captive company. Those who intend to purchase a debenture and have not done so are urged to promptly act.

IOLTA (Interest on Lawyers' Trust Accounts): The Alabama IOLTA program has been in effect for over a year, having been approved by our supreme court on the recommendation of the Board of Commissioners of the Alabama State Bar. This plan permits client trust accounts to earn interest which is paid to the Alabama Bar Foundation. The plan applies only to those accounts where it would be impracticable to compute and pay interest to the client. All of the states except two have similar plans.

As of this writing, 45 percent of eligible Alabama lawyers are participating in IOLTA and over $175,000 has been raised for charitable and educational purposes. The trustees of the Alabama Law Foundation will designate specific beneficiaries under the guidelines set down by the supreme court.

Lawyers who participate have no bookkeeping requirements or costs. The bank does all of this and remits the interest directly to the foundation. Since lawyers cannot use trust funds in determining compensating balances at a bank or receive interest on trust funds themselves, there is no downside to participation. It is an effortless way to provide funds for good works.

Facilities: If you have visited the state bar headquarters recently you have found that we are bursting at the seams. The bar membership has more than doubled since our present building was constructed, and our membership services have increased in an even greater proportion. Our general counsel and staff are located over a mile from the headquarters, causing a real inconvenience and lack of efficiency.

Expansion plans for the headquarters building are being formulated, and former President Bill Hairston is chairing the task force overseeing the project. An architect has been selected, and we are hopeful that a fund-raising effort can begin soon.

There are many, many other outstanding projects ongoing in your bar, but space does not permit discussion of them here. I hope you will support all of these good works by the volunteer members of our bar. ■

Report

(Continued from page 321)

The aged mother of an inmate, who was his sole remaining advocate, wrote and painted a frightening picture of small-town law enforcement. A sheriff was said to have used his position to frame her son in a suspected "triangle affair." I did not want to think such could happen, but a call to a lawyer in the town indicated the writer's concern indeed might be real. That attorney could not get involved in the matter, but another lawyer I contacted a significant distance away had, to my surprise, also heard of other reports of abuse by the sheriff. He continues to pursue the case today. The lady had no funds—this lawyer asked for none.

Genealogists frequently seek information on relatives thought to have practiced law in Alabama. These persons are referred to the Department of Archives and History where the files of deceased bar members are kept. The most disappointing letters are from persons (lawyers included) who make general allegations of professional misconduct, but "do not want to get involved." Lately, health professionals have been writing to complain of rude conduct on the part of a bar member. In most of these instances better manners on both sides would have alleviated the need to write such letters.

The letters expressing pleasure with legal services or court proceedings also come. These are the best of all. Also, it is great fun to get letters commending some employee of the bar for a job well-done; these are frequent and deserved.

Unpleasant, however, are those who look to the bar as the "court of last resort" in child custody cases.

Like you, our mail bag contains solicitations for every item or service that a lawyer, law firm or association could use.

I am encouraged by those who write the bar seeking help even though we cannot always respond, or respond as they would have hoped. In some instances, we gain pen pals who reaffirm the expression "no good deed goes unpunished." It is gratifying that our bar association is still viewed as a responsive entity and source of information.

Even though we receive far more letters from persons with real or perceived problems, we chuckle at ones like that from a recent unsuccessful candidate thanking us for a contribution we did not make toward retirement of his campaign debt, followed the next week with another letter apologizing for thanking us and blaming the goof on another word processor "gone mad."

So, "keep those cards and letters coming folks." They certainly make life interesting and help us fulfill our public responsibility. A friend, in recounting Napoleon's mail handling procedure, noted that Napoleon reputedly left all letters unopened for six months after which he found 90 percent of the problems had solved themselves. It was noted that the only problem with this procedure lay in the fact one had to be Napoleon to solve the remaining 10 percent. ■

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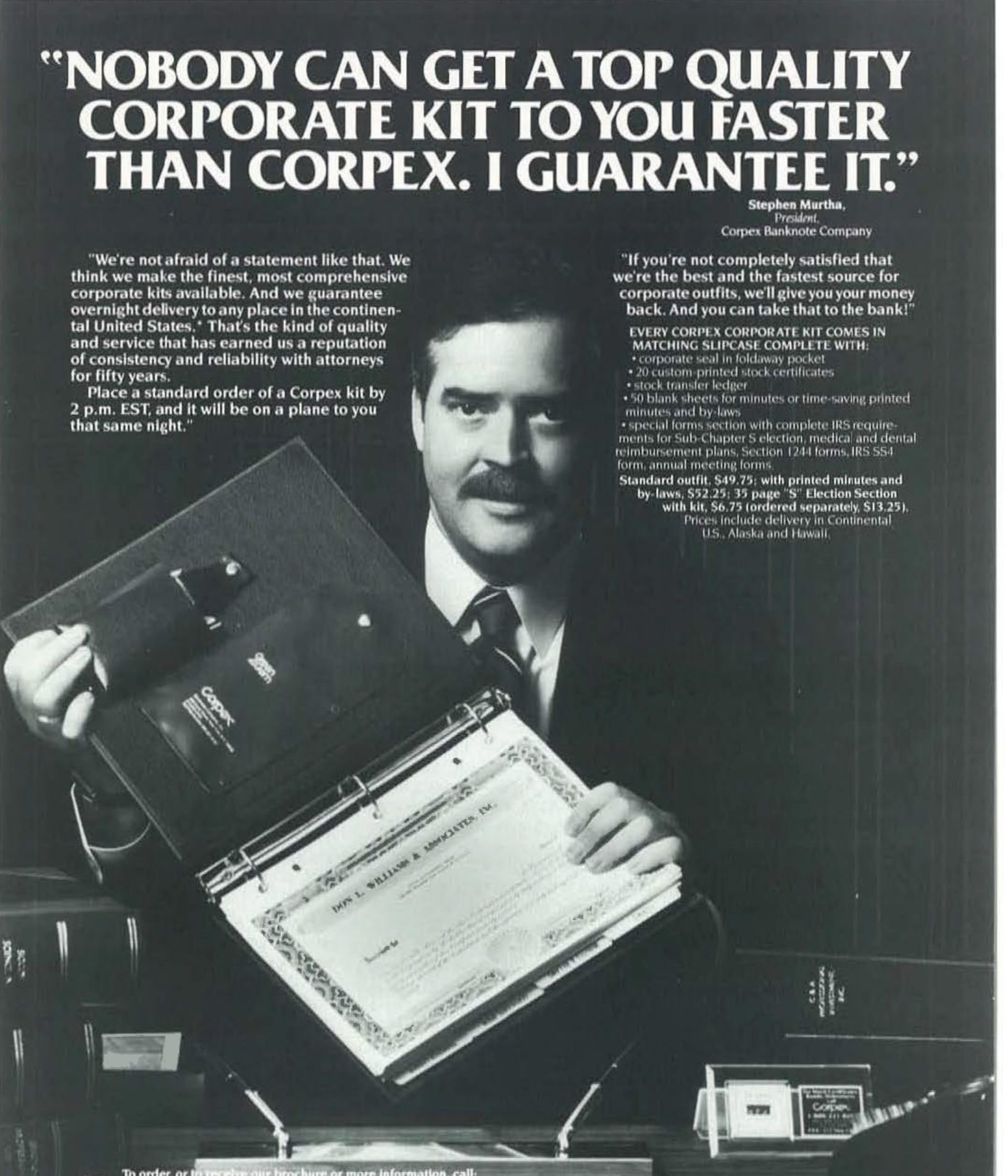

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About Members, Among Firms

ABOUT MEMBERS

G. Rodney Kleedehn announces the relocation of his office to 711 H Street, Suite 610, Anchorage, Alaska 99501. Phone (907) 276-6700.

■

William C. Daniel announces the opening of offices at Suite 2G, Lyric Square, Anniston, Alabama 36201. Phone (205) 236-8099.

■

Andrew H. McElroy, III, announces the relocation of his office to Commerce Center, Suite 1010, 2027 First Avenue, North, Birmingham, Alabama. Phone (205) 328-2869.

■

Harry B. Maring announces the opening of his office at 3940 Montclair Road, Suite 302, Birmingham, Alabama 35213. Phone (205) 870-7300.

■

Gary L. Blume announces the removal of his office to 2300 East University Boulevard, Tuscaloosa, Alabama 35404-4136. Phone (205) 556-6712.

■

Clifford M. Spencer, Jr., announces the opening of his office at 1010 Commerce Center, 2027 First Avenue, North, Birmingham, Alabama 35203. Phone (205) 322-4477.

AMONG FIRMS

Peter F. Burns and **Peter S. Mackey** announce the formation of a partnership under the name of **Burns & Mackey,** and **Randall W. Nichols** will be associated with the firm. Offices are located at 50 St. Emanuel Street, P.O. Box 1583, Mobile, Alabama. Phone (205) 432-0612.

■

The firm of **Powell, Tally & Frederick** and **Ann C. Robertson,** *of counsel,* announce the removal of their offices to Suite 700, The New South Federal Building at 2100 First Avenue, North, Birmingham, Alabama 35203, effective August 1, 1988. Phone (205) 324-4996.

The firm of **Beasley, Wilson, Allen & Mendelsohn, P.C.** announces that **Mays R. Jemison** has become *of counsel* to the firm, with offices at 10th Floor, Bell Building, 207 Montgomery Street, P.O. Box 4160, Montgomery, Alabama 36103-4160. Phone (205) 269-2343.

■

Stokes & McAtee announces that **Harry B. Bailey, III,** is now associated with the firm, effective June 1, 1988. Offices are located at 160 Congress Street, Mobile, Alabama 36603.

■

Spain, Gillon, Tate, Grooms & Blan announces that **Harold H. Goings** has joined the firm as a partner, and that **Maston E. Martin, Jr.,** and **Paul S. Leonard** have become associated with the firm. Offices are located at The Zinszer Building, 2117 Second Avenue, North, Birmingham, Alabama 35203. Phone (205) 328-4100.

■

Hill, Hill, Carter, Franco, Cole & Black announce that they have formed a professional corporation in the name of **Hill, Hill, Carter, Franco, Cole & Black, P.C.,** and that **Judkins M. Bryan, Charles A. Stewart, III,** and **Mark A. Franco** have become members of the firm, and **Edwin C. Glover** has become associated with the firm, effective July 1, 1988. Offices are located at Second Floor, Hill Building, Montgomery, Alabama 36195. Phone (205) 834-7600.

■

Capouano, Wampold, Prestwood & Sansone, P.A. announces that **Joseph N. Poole, III,** formerly judge of the district court, Butler County, Alabama, has become an associate with the firm. Offices are located at 350 Adams Avenue, P.O. Box 1910, Montgomery, Alabama 36102. Phone (205) 264-6401.

■

Charles W. Woodham and **Mary Fisher Gunter** announce the formation of a professional corporation under the name of **Woodham & Gunter, P.C.,** effective October 1, 1988. Offices are located at 113 Kirkland Street, Abbeville, Alabama 36310. Phone (205) 585-5687.

■

J. Mark White, C. Burton Dunn and **Will M. Booker, Jr.,** announce the formation of their firm, under the name of **White, Dunn & Booker.** Offices are located at 1200 1st Alabama Bank Building, Birmingham, Alabama 35203. Phone (205) 323-1888.

■

The firms of **Herbert Rubenstein & Associates, P.C., Long & Long, P.A.** and **Cleveland Thornton** announce the merger of their firms under the name of **Rubenstein & Thornton, P.C.** The firm will maintain offices in Washington, D.C.; Fairfax, Virginia; Bethesda, Maryland; Rishon Le Zion, Israel; and Paris, France.

■

Michael B. Beers, Jeffrey W. Smith, James H. Anderson and **Michael S. Jackson** announce the formation of **Beers, Anderson, Jackson & Smith, P.C.,** effective July 1, 1988. Offices are located at Forbes-Lidell Building, Suite 210, 272 Commerce Street, Montgomery, Alabama 36104. Phone (205) 834-5311.

■

Davis S. Neel, Jr., recently was named compliance officer for **Central Bank of the South's Investment Banking Division.** A Livingston native, Neel is a *cum laude* graduate of Auburn University and the Cumberland School of Law. Prior to his current position, Neel was with Black & Morgan Attorneys.

■

Parker, Coulter, Daley & White of Boston announces that **Stephen J. Flynn** has joined the firm as an associate. Flynn, a native of Mobile, was

president of the Mobile firm of Flynn & Huey. He is a 1977 graduate of the University of Alabama School of Law.

■

The firm of **Morring, Schrimsher & Riley** announces that J. **Mark Greer** has become associated with the firm. Offices are located at 117 Clinton Avenue, East, Huntsville, Alabama.

■

The firm of **Miglionico & Rumore** announces its relocation to 1230 Brown Marx Tower, Birmingham, Alabama 35203. Phone (205) 323-8957.

■

David Gespass and **Kathleen M. Johnson** announce that **Richard Izzi** has joined their practice, and they have formed the firm of **Gespass, Johnson & Izzi.** Offices are located at 3600 Clairmont Avenue, P.O. Box 550242, Birmingham, Alabama 35255. Phone (205) 323-5966.

■

Bruce M. Green and **James C. Pino** announce that **Eason Mitchell** is no longer with the firm, and the firm name has been changed to **Green & Pino, P.C.,** with offices at Suite 205, Shelby Medical Center Building, Alabaster, Alabama 35007. Phone (205) 663-1581.

■

Carlton M. Johnson, Jr., announces his association with the Pensacola, Florida, firm of **Smith, Sauer & Walker, P.A.,** P.O. Box 12446, Pensacola, Florida 32582-2446, and his admission to The Florida Bar. Phone (904) 434-2761.

■

David B. Blankenship, Charles G. Robinson and **Dinah P. Rhodes** announce the formation of a professional corporation for the practice of law under the name of **Blankenship & Robinson,** with offices to remain at 229 East Side Square, Huntsville, Alabama 35801. Phone (205) 536-7474.

■

Douglas I. Friedman, P.C., announces that **Mary Neal Reynolds,** formerly with the U.S. Attorney's Office, has become associated with the firm, and that the firm has relocated its offices to Suite 535, 2000-A Southbridge Parkway, Birmingham, Alabama 35209. Phone (205) 879-3033.

■

The firm of **Johnston, Barton, Proctor, Swedlaw & Naff** announces that **Alice Higdon Prater,** formerly judicial clerk to Hon. James H. Hancock, United States District Court, Northern District of Alabama, has joined the firm as an associate. Offices are located at 1100 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 322-0616.

■

Earle F. Lasseter, formerly with the Judge Advocate General's Corps, United States Army, and now associated with the firm of **Pope, Kellogg, McGlamry, Kilpatrick & Morrison,** of Atlanta and Columbus, Georgia, recently was elected secretary of the Section of General Practice of the American Bar Association at the annual meeting held in Toronto, Canada. Lasseter retired from the United States Army with the rank of Colonel in January of 1988 and joined the firm as an associate.

■

H. Darden Williams and **Thomas W. Harmon** announce **William B. Hardegree** has become a partner of the firm. The firm will continue in the name of Williams, Harmon & Hardegree. Offices are located at Suite 403, Quintard Tower, 1130 Quintard Avenue, P.O. Box 2644, Anniston, Alabama 36202. Phone (205) 238-8356.

■

Karl W. Leo announces the association of **Lesley Brackin** with the firm of **Leo & Associates.** Offices are located at 100 Washington Street, Suite 302, Huntsville, Alabama 35801. Phone (205) 539-6000.

■

Burr & Forman announces that **L. Tennent Lee, III, John W. Evans** and **S. Dagnal Rowe** have become partners in **Burr & Forman,** with the Huntsville offices of the firm located at Regency Center, Suite 204, 400 Meridian Street, Huntsville, Alabama 35801. Phone (205) 551-0010. The Birmingham offices are located at 3000 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 251-3000.

Burr & Forman also announces that **Sue A. Willis; Gene T. Price; Orion G. Callison, III; Jeffrey T. Baker; Paul T. Bolus; David A. Elliott; William S. Hereford; Parkey D. Jordan; Jill V. Wood;** and **Gary W. Farris** have become associated with the firm in the Birmingham office.

■

Patrick I. Gustin and **Larry E. Smith** announce they have formed a partnership, effective April 15, 1988. The office mailing address is P.O. Box 729, Jasper, Alabama 35502-0729.

■

Glidewell & Associates announces that **Dell Rollins** has joined the firm, with offices located at Suite 415, Van Antwerp Building, 103 Dauphin Street, Mobile, Alabama 36602. Phone (205) 432-3868.

■

The firm of **Mary Beth Mantiply** announces that **Julia L. Christie** and **C. Lynn Christie** have become associated, with offices at 161 Conti Street, P.O. Box 898, Mobile, Alabama 36601. Phone (205) 433-3544.

Bar Briefs

Pointer and Wells appointed to posts in ABA Section of Litigation

Judge Sam C. Pointer, Jr., and Birmingham attorney H. Thomas Wells have been named to posts in the American Bar Association's Section of Litigation.

Pointer was appointed co-chairperson of the Committee on Liaison with the Judiciary for the ABA's Section of Litigation.

He is chief judge of the United States District Court for the Northern District of Alabama. He received his law degree from the University of Alabama in 1957 and is a graduate of New York University.

Pointer just completed a term as member of the Litigation Section Council, its governing body.

Wells was appointed chairperson of the Environmental Litigation Committee. He currently is a member of the ABA Standing Committee on Environmental Law and has been a member of the Standing Committee on Professional Discipline.

He is a partner in the firm of Maynard, Cooper, Frierson & Gale, and previously served as vice-chairperson of the committee.

Wells received his law degree from the University of Alabama in 1975 and undergraduate degree in 1972.

"ACCESS TO JUSTICE" theme for Law Day U.S.A. 1989

The purpose of Law Day U.S.A., celebrated annually on May 1, is to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws." Law Day U.S.A. was established by United States Presidential Proclamation in 1958 and reaffirmed by a Joint Resolution of Congress in 1961.

The 1989 theme encourages Law Day program and event planners to direct their efforts toward increasing "ACCESS TO JUSTICE" for all Americans and urges all citizens to become better informed about the legal system.

State and local bar associations, libraries, community organizations, schools, churches, law enforcement agencies, service clubs, legal auxiliaries and scouting organizations are among the many groups sponsoring Law Day U.S.A. programs and events. The events are numerous and varied, ranging from no-cost legal consultations, mock trials conducted in schools, court ceremonies and poster and essay contests to television and radio call-in programs.

Recent programs have included coordination with sponsors of local campaigns against drunk driving, outreach programs to senior citizens and community participation in dispute resolution programs.

The American Bar Association, as the national sponsor of Law Day U.S.A., prepares a detailed planning guide to assist individuals and organizations conducting Law Day programs. In addition, the ABA makes available many reasonably priced promotional and educational/informational materials, ranging from buttons and balloons to leaflets, brochures, booklets, speech texts and mock trial scripts.

To learn more about Law Day U.S.A., write for a copy of the Law Day Planning Guide: Law Day U.S.A., American Bar Association, 8th Floor, 750 North Lake Shore Drive, Chicago, IL 60611, or telephone (312) 988-6134. (The planning guide will be ready for mailing in late January.)

Torbert to teach at UA Law School

C.C. Torbert, chief justice of the Supreme Court of Alabama, will teach at the University of Alabama School of Law next fall as holder of the Sparkman Chair of Law, Nathaniel Hansford, dean of the law school, announced.

Torbert plans to retire from the Alabama Supreme Court and is not seeking re-election this November.

The Sparkman Chair, established in honor of former Alabama Senator John J. Sparkman, is held by a distinguished visiting professor of law each year.

Torbert took office as the 25th chief justice of the Alabama Supreme Court in January 1977 and was re-elected without opposition for a second six-year term beginning in 1983.

Torbert earned his undergraduate degree at Auburn University in 1951 and his law degree at UA in 1954. He practiced law in Opelika from 1954-1977. His public career began when he was elected to the Alabama legislature in 1958 as a representative from Lee County. He was designated by the Capitol Press Corps as "the most outstanding freshman legislator" in 1959.

In 1966 he was elected to the Alabama State Senate representing Lee, Chambers and Randolph counties and in 1974 representing Lee, Chambers, Russell and Barbour counties. He was designated "most effective senator" by the Capitol Press Corps in 1969.

During his legislative tenure, Torbert served as chairperson of the Joint Highway Committee, chairperson of the Joint Committee on Code Revision and vice-chairperson of the Senate Finance and Taxation Committee. He also was a member of the Citizens' Conference on Alabama State Courts.

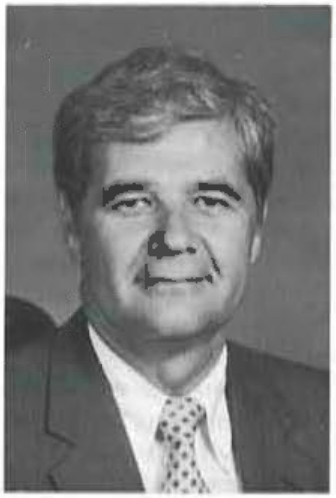
As chief justice, Torbert is chairperson of the State Justice Institute, chairperson of the Alabama Judicial Study Commission, past president of the Conference of Chief Justices, past chairperson of the National Center for State Courts and a member of the American Judicature Society. He was elected to the Alabama academy of Honor in 1979 and was awarded an honorary Doctor of Laws degree by Troy State University in 1985.

Denson elected to American College of Trial Lawyers

Opelika attorney John V. Denson, a partner in the firm of Samford, Denson, Horsley, Pettey, Martin & Barrett for 28 years, was inducted into the American College of Trial Lawyers.

Executive Director Robert A. Young said attorneys tapped for this honor "are considered to be in the top 1 percent of their profession, and the association does not admit more than 1 percent of any state's lawyer population."

Nationwide, approximately 4,400 attorneys, less than 75 of which are from Alabama, are members of the organization.



Denson

Denson has served as a member of the Auburn University Board of Trustees since 1980, when he was selected to fill the unexpired term of Ralph Jordan, the late Auburn football coach. He was reappointed by Gov. Guy Hunt in 1987 to serve a 12-year term on the board of trustees. He is a 1958 graduate of Auburn University and earned a law degree from the University of Alabama in 1960.

Proctor named chairperson-elect of ABA committee

James M. Proctor, II, of Birmingham is chairperson-elect of the Commercial Torts Committee of the Tort and Insurance Practice Section of the American Bar Association for the 1988-89 bar year.

Proctor is an associate of Maynard, Cooper, Frierson and Gale. A graduate of the University of Alabama, he received his J.D. in 1984.

He also has served as vice-chairperson of the Commercial Torts Committee and chairperson of the Sub-Committee on Securities Regulation.

The Tort and Insurance Practice Section is one of the largest and oldest sections of the American Bar Association. Its 30,000 members represent both plaintiffs and defendants, law professors, judges and counsel for insurance, transportation and other interested corporations.

Ogle elected to board of directors, American Judicature Society

Richard F. Ogle, a partner with the Birmingham firm of Schoel, Ogle, Benton, Gentle and Centeno, recently was elected to the 1988-1989 American Judicature Society Board of Directors. He is among 45 new members elected at the Society's 75th anniversary meeting, at which former United States Supreme Court Associate Justice Lewis F. Powell—an AJS member for 50 years—spoke.

A graduate of the University of Alabama Law School, Ogle is a member of the Alabama Law Institute, the Alabama State and Birmingham bar associations, the American Trial Lawyers Association and the American Judicature Society. He serves as an editorial consultant to Matthew Bender and Company and lectures at the Alabama Law Institute for Continuing Legal Education and was a former national president of Pi Kappa Alpha and president of its memorial foundation.

Founded in 1913, the American Judicature Society is a national independent organization of more than 20,000 citizens working to improve the nation's justice system. ■

Continuing Legal Education Reminder

1988 CLE Transcripts
Were Mailed
The Middle Of November.

All CLE Credits Must
Be Earned By
December 31, 1988.

All CLE Transcripts
Must Be Received By
January 31, 1989.

Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

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

Samuel A. Rumore, Jr.
Miglionico & Rumore
1230 Brown Marx Tower
Birmingham, Alabama 35203

Marshall County

Marshall County was established in January 1836 from portions of Blount and Jackson counties and lands obtained by the United States from the Cherokee Indians. The county was named for Chief Justice John Marshall who died in 1835.

The first white man to settle in the area that is now Marshall County was John Gunter. He was either a Welshman or a Scotsman who migrated from the Carolinas. He eventually settled at the southern-most point on the Tennessee River in 1785 where he had discovered a salt deposit.

Gunter traded with the Indians. One day a local Cherokee chief brought his beautiful 15-year-old daughter to exchange for Gunter's salt. Gunter agreed, took the girl as his bride and changed her Indian name to Katherine. The chief and Gunter, now his son-in-law, signed a treaty whereby the Indians could have salt "as long as the grass grows and the waters flow."

John and Katherine had seven children. At the time of his death in 1835 he had become a wealthy landowner and a person of great influence in the area because of his ties to both the white and Indian communities. One of his daughters, Elizabeth, married Martin Schrimsher. Their daughter, Mary, married Clem Vann Rogers. One of their grandsons was named Will. He died in a plane crash in 1935, exactly 100 years after the death of his great-great-grandfather, John Gunter.

The name of the settlement that grew up around Gunter's trading post was called Gunter's Landing. It was located on the south bank of the Tennessee River. When Marshall County was established, the community consisted of no more than 20 houses, a few stores and a large warehouse.

The legislative act creating Marshall County called for an election where the voters would choose their county seat. The votes were tallied as follows: Gunter's Landing—133; Gunter's—148; south side of the Tennessee River—1; Gunter's Store—4; Gunter's Warehouse—7; John Gunter's—116; north side of river—1; Warrenton—1; and Claysville—282.

The voters who cast their ballots for the "Gunter's" choices thought they were voting for the same place. However, the election officials ruled that they could not add those votes together, and they determined that Claysville received the most votes. So Claysville earned the distinction of being the first county seat of Marshall County. It was named for Henry Clay and located on the north side of the river, approximately one and one-half miles from Gunter's Landing.

By late 1838 a great number of people were complaining about the location of the county seat. Two-thirds of the voters in the county had to pay ferry charges to cross the river to conduct their business at the courthouse.

The Legislature passed an act calling for another election to choose the county seat. A committee of citizens was appointed to select one site on each side of the Tennessee River for the vote. Claysville on the north side and an area near Gunter's Landing, called Marshall, on the south side were the sites selected. Marshall won by a large majority and served as the county seat from 1838 to 1841.

Courts were held in Marshall in the loft of an old gin. This was the only building large enough to hold any size crowd. The jail for the county was a log building with a weak wooden roof. It was reported by one account that in Marshall County it was hard to get into jail but easy to leave. In one of the early trials a convicted murderer was set free by the court; three lesser criminals were put in jail and promptly escaped.

At this time in Alabama history, the Legislature seemed to be preoccupied with the Marshall County Courthouse situation. On December 22, 1840, it passed another law calling for four elections to definitely decide the site of the county seat. All voters had the right to nominate any place in the county. In the first election the top vote-getters were Warrenton, White House, Claysville and Beard's Bluff. In the second election, Beard's Bluff was eliminated. In the third elec-

Albertville

Guntersville

tion Claysville was eliminated. And, in the final vote, Warrenton was declared the winner.

Warrenton was a booming village on the south side of the river approximately five miles west of Marshall. A frame house was rented for the court. Though holding court in a house was inconvenient, it was a great improvement over the old gin at Marshall.

However, the issue of the courthouse was not laid to rest. Many citizens were not satisfied that Warrenton had fairly won the election. On January 31, 1846, the Legislature passed another act calling for an election. The issue was to be "removal" or "no removal" of the courthouse. If the vote was for "no removal," then the commissioners were to levy a tax to build a courthouse in Warrenton. If the people voted for "removal," another election would be held. True to form, the residents voted for no new taxes as they voted to remove the courthouse.

For this next election new laws were passed setting certain ground rules. Anyone caught voting illegally could be prosecuted. Also, on February 3, 1848, the Legislature incorporated the town of Guntersville. This new city included Gunter's Landing and White House. It was hoped that all intended votes for this area now would be counted. Four sites were selected for the vote, but after an eliminative election, the two nominees were Warrenton and Guntersville.

As one can see, the selection of the county seat was the political issue in the early days of Marshall County. One observer noted that, "Every man, woman, and weaned child did nothing but talk of this hot issue."

In the 1848 campaign for the Marshall County Courthouse, the promoters of Warrenton stated that if the courthouse were removed, their jail, which had cost $2,500, would have to be abandoned and, thus, would cost the county more money. Citizens of Guntersville countered by pledging to build a new jail free of charge to the county.

Warrenton then "upped the ante" by declaring that it would build a courthouse at its own expense if it were chosen. Residents of Guntersville said they would build a new courthouse and a new jail. Guntersville was determined to win the election, but it appeared to lack the necessary votes.

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.

In 1847, Captain James M. Lee set out for the Mexican War with a company of young men from the Guntersville area. At the time of the courthouse election, they were returning home and, at last report, had advanced as far as Selma. The question in everyone's mind was whether they would return in time to vote in the election. Before the voting ended on election day a bugle sounded, banners were flying and the Mexican War veterans rode into town. It was reported that every one of them voted for Guntersville. Whether these votes decided the election is unknown, but Guntersville did win and became the county seat in 1848.

The first courthouse in Guntersville was a log building constructed near the river. In January 1865, Guntersville was bombarded by federal artillery, and every building but seven was destroyed. The courthouse was burned to the ground.

It was five years before the county had recovered sufficiently from the war to construct a new courthouse. An oblong "square" of land was obtained in the center of the rebuilt town. A two-story brick courthouse was constructed costing $9,998. It was 56 feet long and 43 feet wide. The second level was reached by two stairways in the front which led to the second-floor balcony that overlooked the court square.

This courthouse was torn down in August 1895 and replaced by a larger and more elaborate building that cost $20,000. The new courthouse was completed in 1896. It consisted of three stories with a soaring five-story tower. This courthouse was a beautiful example of the Romanesque Revival style that was popular in the late 19th century for public buildings.

The Romanesque character of the building was changed in 1935 when the structure was extensively remodeled and enlarged. Later, in 1948, a $100,000 annex was added. A further modernization of the structure brought it to its present appearance in 1963.

The story of the Marshall County Courthouse took another twist in 1909. In that year the Legislature passed a local act allowing separate court facilities to be built in Albertville. The reason can be blamed on "Mother Nature."

Even though Guntersville was on the southern bank of the Tennessee River, the back waters from the river during the rainy season caused flooding which divided Marshall County into northern and southern portions. The major communities in the northern portion were Guntersville and Arab. The cities in the southern section were Albertville and Boaz. Also, the rural roads from Sand Mountain were not very good.

Because of the historical dissatisfaction of Marshall County residents with the location of their courthouse, the citizens of the southern portion persuaded the Legislature to give them their own facility. All cases rising in that area would be heard in Albertville. This city was named for Thomas A. Albert, a pioneer resident who had come to the area from Georgia in the 1850s.

Courts were first held in Albertville in a two-story building on North Main Street. The present Albertville Courthouse was constructed during 1910-11. Extensive repairs and renovations took place in 1935. Court sessions now are held in both Guntersville and Albertville. The circuit clerk maintains an office in both places.

Attempts were made in 1974 to consider consolidating the two courthouses into one modern facility because (1) flooding is no longer a problem in the area due to the Tennessee Valley Authority and (2) because the two courthouses are less than 20 miles apart and connected by U.S. Highway 431.

Land was purchased on the southern end of Guntersville, toward Albertville, with a view to constructing new county buildings. This effort caused quite an uproar. A group of citizens filed a lawsuit to keep the courthouse in the center of Guntersville. A state law was discovered that a courthouse could not be built outside the original corporate limits of the town as they existed when the courthouse was first constructed. Also, there was opposition from the residents of Albertville to closing their own courthouse building. The lawsuit was dropped in 1975, and no attempt has been made to alter the dual courthouse status quo since that time. ■

Riding the Circuits

Pike County Bar Association

The Pike County Bar Association met Thursday August 18, 1988, and elected the following new officers:

President: Frank P. Ralph, Troy
Secretary/treasurer: Timothy J. Magee, Troy

Members of the association approved a motion to meet quarterly at lunch for a general business meeting. Membership dues were established to be payable yearly, in advance, on September 1 of each year. All members of the Pike County Bar Association were urged to participate in the Interest on Lawyers' Trust Accounts (IOLTA) program.

Tallapoosa County Bar Association

At a recent meeting, the Tallapoosa County Bar Association elected officers for 1988-89. They are:

President: Charles R. Gillenwaters, Alexander City
Vice-president/treasurer: Braxton Blake Lowe, Alexander City

The bar's next scheduled meeting was September 8, 1988, with E.C. Hornsby as the keynote speaker. ■

ALABAMA STATE BAR SECTION MEMBERSHIP APPLICATION

To join one or more sections, complete this form and attach separate checks payable to each section you wish to join.

Name: _____

Firm or agency: _____

Office address: _____

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Section	Annual dues	
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_____ Corporation, Banking & Business Law	$10	
_____ Criminal Law	$0	
_____ Environmental Law	$20	
_____ Family Law	$15	
_____ Labor Law	$10	if practicing less than 5 yrs.
	$25	if practicing 5 or more yrs.
_____ Litigation	$15	
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TOTAL		

Remember:
Attach a separate check for each section.

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Sections
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Montgomery, AL 36101

Revocable Trusts—an Overview

by Jeff Kohn, Jr.

"I, King Twotonman, Great Grantor of the Upper and Lower Nile, do for all eternity place my earthly treasures in trust—REVOCABLE."

I. Introduction

As discussed herein, a revocable living trust can achieve many objectives, but it is neither a "miracle drug" nor useful to all clients. The client who is willing and able to transfer property to a revocable trust will find the trust useful. The client who is unable or unwilling to transfer ownership of property to a revocable trust during his lifetime still may achieve some benefit from its use. The client who is unwilling to name anyone other than himself as trustee of such a trust cannot be assured that any of his objectives will be attained unless his sole objective is to incur substantial legal expenses after his death. Schlessinger, "Seven Case Histories of Revocable Trusts," *U. Miami 5th Ins. on Est. Plan.* §71-1600.4 (1971).

II. In general

A. **Definition**—A revocable living (*inter vivos*) trust is a contractural relationship where one person (the grantor) transfers money, securities or other assets to one or more persons (the trustee or trustees) to be held in trust pursuant to the terms of a trust agreement. The trust agreement typically provides that (1) the income will be paid to the grantor during lifetime; (2) the trustee or trustees are authorized to distribute principal to the grantor or to utilize it for his benefit, if necessary; (3) the grantor retains the power to modify or amend all or any of the terms of the trust agreement during lifetime; (4) the grantor retains the right to revoke and terminate the trust at any

time and to receive back the assets which are then in the trust; and (5) upon the grantor's death, the trust property is either paid out to, or continued held in trust for, the grantor's designated beneficiaries.

B. **Creation**—Generally, an *inter vivos* trust is created by an agreement transferring property from the grantor to one or more trustees, but a trust can be created without a property transfer by having the owner simply declaring himself as trustee of property for the benefit of others. In such circumstances, nothing more than the manifestation to create a trust is necessary, unless the subject matter is an interest in land, in which case the Statute of Frauds requires a writing. 1 *Scott on Trusts*, §17 (4th Ed. 1987) (hereinafter cited as "Scott").

Since the grantor must outwardly manifest an intention to create a trust and impose equitable duties on the trustee to deal with the corpus for the benefit of certain person or persons, precatory expressions should be avoided. 1 *Scott* §25.

Although the grantor does not need to communicate his intention to create a trust, his failure to communicate is a strong indication of the absence of a final and definitive intention to create the trust. 1 *Scott* §24.2. Obviously, the best approach is to incorporate all of the terms and provisions of the trust arrangement into a written agreement properly executed by the grantor and trustee.

C. **Unfunded v. funded trusts**—While a revocable trust technically comes into existence when it is executed by the grantor and the trustee, its actual active operation does not normally commence until it is funded by the grantor's transfer of assets to the trust either during his lifetime or after his death by naming the trust as a beneficiary of his will, his life insurance and his employee retirement plan death benefits.

D. **Power to modify and revoke**—Generally, the grantor cannot revoke a trust if, by the terms of the trust, he did not reserve a power of revocation. When there is no provision in the instrument expressly or impliedly reserving the power to revoke the trust, the trust is deemed irrevocable. *Creel v. Birmingham Trust National Bank*, 383 F.2d 871, aff'd 510 F.2d 1363 (1974).

If the trust instrument is silent as to the grantor's retention of a power of revocation and the trust instrument does not on its face purport to include all of the terms of the trust (i.e., the trust's terms are only partially contained in the written document), then extrinsic evidence is permissible to show the other terms, including the intention of the grantor to reserve a power of revocation. 1 *Scott* §330.1. If the power to revoke the trust was omitted from the trust instrument by mistake, then the grantor may petition the court for reformation of the instrument and the court may decree its reformation by the insertion of the intended retained power to revoke. 1 *Scott* §332.

The same principles are applicable to modification of a trust as are applicable to revocation of a trust. If the grantor does not, by the terms of the trust, reserve a power to alter, amend or modify it, he has no power to do so. *Trabits v. First National Bank of Mobile*, 323 So.2d 353, 295 Al. 85 (1975). If he reserved such a power, a grantor can modify the trust to the extent such reserved power permits him. 1 *Scott* §331. Presumably, the power to revoke includes the power to modify, since a grantor can revoke the trust and create another trust containing the modified provisions. However, whether the power to modify includes the power to revoke may depend on the extent of the power of modification. If it is unlimited, then it probably does. Otherwise, it probably does not.

III. Uses and advantages

By utilizing a revocable living trust, a client can obtain any one or more of the following:

A. **Investment management**—By funding a revocable trust and naming another as sole or co-trustee, the grantor may receive professional investment experience, tax planning and recordkeeping. This can be very important for people such as a recent widow who has inherited substantial assets, an elderly individual approaching senility, a frequent traveler who is absent from the country for long periods of time, an over-burdened executive or professional, a young adult who has recently received a substantial inheritance or the sum total of many annual exclusion gifts due to the termination of a custodianship account or a recently married individual who desires to preserve inherited capital, especially if divorce proceedings may later ensue.

B. **Probate avoidance**—The probate of the assets owned by the grantor is avoided to the extent a revocable trust is funded with assets during his life. Although many states now have simplified probate procedures, it may nonetheless be beneficial to select which assets should pass through probate versus which should pass outside of probate. The revocable trust can accomplish this objective. In addition to probate avoidance, the following additional advantages also may be achieved:

Jeff Kohn is a stockholder in the Montgomery firm of Kaufman, Rothfeder & Blitz, P.C. He received his undergraduate degree from the University of Alabama, his law degree from Cumberland School of Law and a master of laws in taxation from New York University. He is a member of the Montgomery County, Alabama State and American bar associations.

1. **Maintenance of privacy**—The avoidance of probate will afford privacy as to the extent of the decedent's assets contained in the trust as well as the details of the administration of his assets and affairs. Thus, the utilization of a revocable living trust as the central core of a client's estate plan will preserve privacy as to the nature of his dispositive plan and as to the details of the administration of his trust, and thus his assets, after death. The privacy feature may be desirable when the client desires to support a lover with whom he or she is having or has had an extramarital relationship. Furthermore, the creation of several trusts may be desirable when there are several beneficiaries and the client desires to favor one beneficiary over another or he desires different treatment of each (e.g., where one beneficiary is granted limited access to principal while the others are not) while maintaining privacy among all beneficiaries with respect to the provisions of others' trusts.

2. **Avoidance of ancillary administrations**—By placing title to assets situated in other jurisdictions in an *inter vivos* trust, the client can void ancillary probate administrations in the states where such assets are located. For example, if a husband and wife own a condominium in Florida with all of their other assets being owned in Alabama, they can convey the condominium to the revocable trust during their lifetime, and upon the death of the last to die, the condominium will pass in accordance with the trust document without the necessity of a Florida administration.

3. **Reduction of legal fees**—The *inter vivos* conveyance of assets to a revocable trust will tend to reduce legal fees after death since there will be less time devoted to probate proceedings. However, the initial costs of establishing the estate plan will be greater because of the time and attention required to fund the trust. A revocable trust will alleviate the problem of securing court approval of legal fees which already were agreed upon between the client and fiduciaries.

4. **Expeditious administration**—Because a trust can be funded with certain selected assets such as publicly-traded stocks and bonds, real estate, closely-held business interests and the like, estate administration can be handled more expeditiously. For example, there may be no need to re-register publicly-traded securities after the grantor's death.

5. **Reduction of other fees**—If probate is avoided or minimized, *guardian ad litem* expenses either will be avoided or kept to a minimum.

C. **Planning for incapacity**—A funded revocable lifetime trust will be very useful in the event of the incapacity of the grantor, whether as a result of accident, sickness, age or otherwise. The trust will avoid the necessity of guardianship expenses, notoriety and red tape, while it will permit continuous, undisturbed management of the trust assets by the person or persons of the grantor's choice, both pre- and post-incapacity, as well as after death.

Although durable powers of attorney (see Section 26-1-2, *et seq., Code of Alabama* 1975) are a popular method of planning for incapacity, they are not a completely reliable alternative for a trust. Third parties are still somewhat reluctant in dealing with attorneys-in-fact and there are problems in defining the outer limits of the attorney-in-fact's powers and discretions. Thus, as a practical matter, the power of attorney is effective only to the extent that the attorney-in-fact can persuade third persons to permit the transaction of business on behalf of the principal.

D. **Defeat spousal elective rights**—The use of a funded revocable trust may be a useful tool to defeat the incentive of a surviving spouse to dissent against the will and elect to take his or her statutory share. See §43-8-70, *et seq., Code of Alabama* (1975). Whether the transfer to the trust will be effective for this purpose depends on whether the transfer to the trust was for the primary purpose of depriving the surviving spouse of his or her elective share.

E. **Avoidance of will contests**—Since will contests generally are instituted at a time when the decedent-testator is not available to defend himself, a revocable trust may be an alternative means of disposition where a will contest appears likely. The trust may be created without the eventual beneficiaries knowing about

it and if the trustee is a professional and independent of the grantor, the trustee, expressly or by implication, may be deemed to have attested to the competency of the grantor. Any contest during the grantor's life will require the contestant to initiate incompetency proceedings against the grantor and have a guardian appointed at a time when the grantor would be available to demonstrate his competence and explain his motives and objectives. If the potential contestant is made aware of the trust while the grantor is living, but does not challenge the competency of the grantor during the grantor's life, he or she will have significant legal obstacles to overcome when the challenge is made after the grantor's death.

F. **Selection of governing law**—An *inter vivos* trust will permit a grantor to choose the state of law which will govern the validity, interpretation and administration of the trust both before and after death.

G. **Consolidation of documents**—A revocable trust may permit all estate planning documents and instruments to be consolidated into one trust document and all of the assets of the grantor, upon death, will "pour over" into the trust, except for any jointly owned property passing outside of the will. By utilizing one document for the entire estate plan, the following advantages are achieved:

1. **Simplicity**—The one trust document is easy to review. If changes need to be made, there is only one document to change without requiring codicils to wills and changes of numerous beneficiary designations.

2. **Claims**—With respect to life insurance, qualified retirement plans and IRAs, the designation of the trust as beneficiary (as opposed to the estate of the grantor) may avoid subjecting these assets to creditors' claims and administration expenses. See *Love v. First National Bank*, 228 Ala. 258, 153 So.189 (1934). Furthermore, there will be no need to name contingent beneficiaries, since all beneficiaries, whether primary or contingent, are named in the trust document. Finally, the trust document may provide better management and more discretion than the settlement options permitted by the insurance companies.

H. **Pooled liquidity**—The liquidity derived from insurance proceeds and qualified plan benefits are pooled together and held by the trustee who may utilize these funds to make loans to the decedent's estate or to purchase non-liquid assets from the estate. Family members who may be named as beneficiaries of liquid assets may be reluctant to make loans to or purchases from the estate.

I. **Funding**—It may not be in the client's best interest to fully fund the revocable trust with all of the assets owned by the client. There are instances why full funding should be postponed until age dictates otherwise or until death, whichever occurs first. Some reasons for not fully funding are as follows:

1. **Management complexities**—When a third party trust is created, there are increased management complexities. Even if the grantor is also the trustee, having to deal with a third party may make life overly-complicated for the grantor.

2. **Expense**—The creation of the trust and the transfer of substantial assets can

be expensive. For example, real estate transfer fees may have to be paid, as well as legal fees for tasks such as obtaining mortgagee consents to the transfer.

If the trust is to be partially funded and full funding is to be deferred until the client becomes elderly, the utilization of a stand-by durable limited power of attorney is advisable. If the client later becomes incapacitated or seriously ill, the attorney-in-fact can complete the funding of the trust on behalf of the client. This permits the client to have effectively planned for disability or impairment without immediately relinquishing the control of his assets. The attorney-in-fact must be aware of the relationship between the revocable trust and the client's will to be sure that the funding of the trust by the attorney-in-fact under the durable power of attorney will not alter the dispositive plan embodied in the will. If the beneficiaries, or if the beneficial interests, are created differently, then the attorney-in-fact may be very reluctant to exercise the authority granted by the durable power of attorney.

J. **Coordination with "pour-over" will**—The revocable trust is only one part of the estate plan and the client should consider the execution of a "pour-over" will bequeathing all of the client's remaining assets to the trust as well as naming the trust the beneficiary of life insurance and annuity contracts and proceeds of qualified retirement plans. Under such circumstances, the revocable trust may become the central core of a client's estate plan and the trust documents, not the will, then would contain any necessary formula clauses dividing the trust into the "marital deduction share" and the "credit shelter share" as well as any dispositive provisions relating to such shares.

IV. Drafting and other considerations

A. **Definition of incapacity**—The definition of the grantor's "incapacity" should be set forth in the trust document to avoid future controversy. Because the trust will continue for the benefit of the grantor during incapacity, the rights of the grantor, or his guardian, during such period must be defined. The term "incapacity" should include not only a formal court order to that effect, but also permit an informal determination by physicians' certificates. It may be beneficial to include in the definition of incapacity the grantor's involuntary detention (a la the Iran hostages) and his disappearance (a la Jimmy Hoffa).

B. **Guardianship questions**—Obviously, the rights of the grantor to alter or amend the trust or to withdraw assets will cease upon incapacitation. A question to answer is whether or not the grantor desires such powers to be exercised by his appointed guardian. If so, a provision should be placed in the trust document permitting the personal representative of grantor to exercise the powers to which the grantor is entitled. If not, an expressed provision should be incorporated in the trust instrument limiting the exercise of the grantor's rights to the grantor personally and excluding their exercise from his guardian. Absent a prohibition, Alabama law would presumably permit the guardian to exercise all of the grantor's retained rights under the trust document. See §26-2A-108, *Code of Alabama* (1975).

C. **Specifically authorize grantor distributions**—If the grantor is unable to effect his own distributions, then the co- or successor trustee should be directed to distribute funds for the support, health and maintenance of the grantor, to discharge the legal obligations of the grantor and to make distributions for any other purpose which the successor or co-trustee deems to directly benefit the grantor.

D. **Gift tax considerations**—Under a revocable trust, the grantor retains the right to alter, amend or revoke the trust. However, upon incapacity, the grantor will no longer have such rights and, at that time, a potential may exist for the gift to the trust to be complete and gift tax liability imposed. To avoid this, a testamentary power to appoint the trust's assets among the contingent remaindermen should be inserted in the trust document to avoid any gift to the trust from becoming complete. Treas. Reg. §25.2511-2(c). Also, it will be advisable for the trust document to contain a pro-

vision stating that the disability or incapacity of the grantor will not terminate the power of revocation but merely will temporarily suspend it.

E. **Planning for disclaimers**—As a substitute for the will in the disposition of assets, the revocable trust should anticipate the possibility of a disclaimer of interest by the trust beneficiaries and should direct the disposition of the interests in a manner consistent with the grantor's intention. The trustee, during the administrative period, should be aware of disclaimer potential so that the trustee does not inadvertently deliver assets or property interests to a beneficiary in a manner disqualifying the beneficiary from later making a timely disclaimer of the property or property interests.

F. **Anticipate dissent of surviving spouse**—With respect to the interest given to the surviving spouse by the revocable trust, the client must be informed of the possibility that the surviving spouse may elect to take against the will of the decedent spouse and receive the statutory intestate share of the decedent's probate estate. The client needs to decide whether or not the revocable trust should continue for the benefit of the surviving spouse who may have elected to take against the will. If the client desires that the trust not continue, a provision must be inserted in the trust instrument which would terminate the spouse's rights as a beneficiary if she elected to take against the decedent spouse's will.

G. **Collection of insurance, payment of debts, etc.**—Generally, the provisions of the trust agreement should grant unto the trustee or trustees the power to take all steps and measures necessary to collect insurance proceeds and attend to the payment of certain obligations and taxes if the probate estate is insufficient, including the expenses of administering the estate, expenses of last illness, funeral and burial, legally enforceable debts, transfer taxes and specific bequests under the grantor's will.

H. **Restricting power to revoke**—To protect a client against the possible depredations and importuning of others, a trust which is revocable solely by the grantor does not lend much protection. This calls for a trust which is revocable only with the consent of a third party.

V. Tax considerations

A. **Gift tax**—The transfer of assets to a revocable trust is not a taxable gift because the grantor's power to revoke the transfer renders it incomplete for purposes of gift taxation. However, the transfer of assets from a revocable trust to a beneficiary other than the grantor would constitute a completed transfer upon which a gift tax could be imposed.

B. **Income tax**—During the lifetime of the grantor, the funded revocable trust provides substantially the same income tax results as though the grantor had retained the trust's assets personally. The trust and the grantor will have the same tax year, and the grantor will report the trust's income and expenses on the grantor's personal income tax return (in some cases, after filing an information return for the income and expenses of the trust). An annual form 1041 must be filed which will require a separate tax identification number, except that the separate return and the separate identification number are not required if the same individual is both the grantor and the sole trustee or co-trustee under the provisions of Treas. Reg. §1.671.4

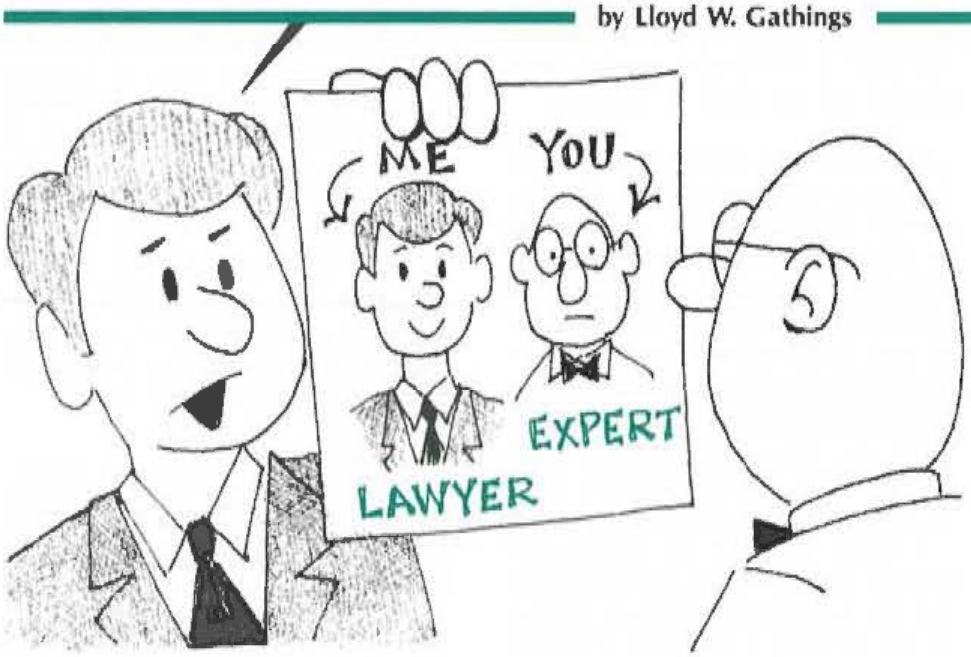
C. **Estate taxes**—Upon the grantor's death, the assets held by the revocable trust will be included in his gross estate under I.R.C. §2038 and will receive a step-up in basis under I.R.C. §1014. Thus, the grantor's estate will not derive any estate tax benefits as a result of the creation and existence of the trust. However, the trust may be established so as to avoid a second estate tax on the deaths of its prime beneficiaries. If they are merely given a life interest with a limited access to principal subject to an ascertainable standard, upon their deaths, the remaining principal (subject to the generation-skipping rules) may be made to pass to other beneficiaries tax-free.

VI. Conclusion

The various factual situations where a revocable trust may be beneficial are almost limitless and if the problems are fully thought through by the attorney and the trust is skillfully drafted, the revocable trust can be a major estate planning problem-solver. ■

I'm the Lawyer, You're the Expert

by Lloyd W. Gathings



Introduction

"I'm the lawyer, you're the expert" sounds so over-simplistic as to be humorous, especially in view of the fact that the use of experts in today's litigation is a very serious area of concern. Although many experienced trial lawyers have used experts with great success time and time again, each of those lawyers can easily recall instances in which they have been "burned" by their own experts. While the errors committed by these experts sometimes are errors of their own making, many of the errors are a result of the failure of the lawyer and the witness to understand the responsibilities represented by the simple statement, "I'm the lawyer, you're the expert."

Every seasoned trial lawyer understands that when he or she submits an expert for deposition or as a witness at trial, there is a very real potential that the expert will "drop the ball" and inflict serious damage to the lawyer's case. Unfortunately, this aspect of litigation can never be eliminated. Let's face it: the expert is the one who has to do the talking at the deposition and on the witness stand at trial, not the lawyer producing him for deposition. However, that is not to say that the risk involved in an expert dropping the ball cannot be significantly reduced.

"I'm the lawyer"

Control is the key word here. Regardless of what aspect of a case the lawyer is dealing with, the lawyer must be the one controlling the situation. The importance of this statement can be multiplied manyfold when dealing with the experts in the case.

Think about the control the lawyer exercises in all other aspects of the case. The lawyer controls the initial client interview, determines whether to accept the case, determines the investigation necessary in the case and determines the legal theories to file the case under or which are necessary in the answer and the discovery conducted in the case. At some point the lawyer also is the one who determines what type of expert is necessary and who that expert will be. On many occasions, it is at this point that the trouble starts.

Oftentimes, although not always, the lawyer who has been in total control of all of the previously mentioned aspects of the case hires a good, well-qualified expert, and for one reason or another fails to exert the same control over the expert's participation in the case. Usually, the lawyer's failure to control the situation is motivated in large part by the lawyer's having too much confidence in the expert's abilities, or the lawyer's failure to recognize and checklist his own responsibilities in preparing the expert to testify. With the exception of the next section concerning the expert's role, the remainder of this article is devoted to a discussion of various problem areas that often are not covered in the routine preparation of an expert witness to testify, although they should be.

"You're the expert"

No matter how good the expert is or how experienced he is in the particular type of litigation involved, the role of the expert is not to choose among alternative fact theories or alternative legal theories. This is the role of the lawyer. The role of the expert is to properly inform the attorney, based upon the facts of the case, of the alternative factual theories, with all pertinent details necessary to determine the relative strengths or weaknesses of the various theories. After detailed discussions concerning these theories with the attorney, it is then the attorney's role to choose which of the theories will be emphasized or de-emphasized, and the best way to handle potential defenses. Whatever decisions are made during that conference must be adhered to by the expert in all phases of his testimony. When this is properly done, the knowledge of the expert and that of the attorney has been meshed to obtain the maximum impact of an expert's testimony, again with the lawyer controlling the situation.

Types of experts

While the problem areas concerning expert testimony are present in some degree with all experts, it is important to take into consideration whether the selected expert witness falls into that group of witnesses termed by lawyers as "professional witnesses," or whether the

witness, although eminently qualified concerning the product or fact situation, has relatively little experience in testifying. Several problems arise with each type of witness which will be accentuated by their differing backgrounds. The expert witness who has a great deal of experience testifying, especially with regard to the product involved in the attorney's case, will attempt to take more control of the case and cross over into the role of the lawyer in the case. This he cannot be allowed to do. No matter what his competence level is, he is not a master of the law and certainly is not accustomed to preparing a case so that all parts of the case will mesh so as to avoid conflicts and problems and to allow for the most effective presentation of an entire case.

Most of the witnesses who have testified many times before are in substantial demand in various types of cases, and they tend to work on an overbooked schedule. As a result, the lawyer has to be very careful to be sure that they know all the significant facts of a specific case prior to submitting them to testify. In addition, such expert witnesses have testified in a number of states, most of which do not have the contributory negligence doctrine, assumption of risk or a negligence per se doctrine similar to the Alabama Extended Manufacturer's Liability Doctrine. Particular care must be taken to inform them regarding these nuances of the law in Alabama.

The second category of expert witnesses, those imminently qualified concerning the product of fact situation, but having little experience testifying. There are few witnesses, expert or otherwise, who have the skills to match a good trial lawyer. In other words, it is almost always a mismatch between the trial lawyer and the witness, with the trial lawyer usually having the advantage. This is particularly true with an expert witness who has very little experience testifying. Such witnesses have a great propensity for falling for tactics, having little or no relationship to the substance of the case, of opposing lawyers. In addition, such witnesses tend to seek too much precision in their testimony and hedge on their opinions when pressed by the opposing lawyer, resulting in ineffective testimony.

Finally, whether the witness is an experienced testifier or a novice, care must be taken with elderly expert witnesses. It is very easy for the lawyer to get caught up in the case and work very long hours with the expert prior to his testimony or allow an expert deposition to go on at great length. While a large number of the very best experts available to lawyers are elderly and do a tremendous job in presenting the case, failure to take into account their age and the limitations on their stamina is a serious error often committed by lawyers. The elderly expert witness must be brought in one or two days prior to the deposition or testimony at trial to allow extensive preparation within reasonable hours, and his testimony in deposition must be limited to a reasonable number of hours per day. Many of the witnesses, while brilliant when working reasonable hours, become fatigued and make what appear to be stupid errors when pressed beyond their physical limitations.

Basic legal concepts often misunderstood by expert witnesses

Trial lawyers often take for granted basic legal principles and fail to discuss them with expert witnesses prior to their testifying. Even with an expert witness who has testified many times in a number of jurisdictions, failure to discuss the basic legal principles with them is an invitation for disaster.

It is rare that an expert witness has any legal training and very few of them have done any reading concerning legal theories, defenses, etc., that are involved in products liability cases or other personal injury lawsuits. In addition, those expert witnesses who do have some knowledge of the law are not familiar with the nuances of the Alabama law, such as the difference between the Alabama Extended Manufacturer's Liability Doctrine and strict liability in tort, particularly as relates to the defenses of contributory negligence and assumption of risk. Therefore, prior to submitting an expert witness for deposition or for testimony at trial it is imperative that the lawyer discuss the legal principles involved in the case with the expert.

Although the following is not an exhaustive list of those principles which must be discussed with the expert witness, this list will suffice in most product liability cases in which an expert is submitted.

Burden of proof—While the general nature of burden of proof may well be understood by the witness who has testified many times, engineers, hired as expert witnesses who have little experience testifying, have difficulty in understanding this legal concept. This is particularly evident when they are asked a question prefaced by the phrase, "With a reasonable degree of engineering certainty, medical certainty, etc." The trial lawyer must explain to the expert witness the burden of proof or what is meant by reasonable degree of certainty in much the same manner that a lawyer would use in his opening statement at trial. This will prevent the engineer-type expert witness from hedging on his opinions because he knows that there is some possibility the opinion is not accurate 100 percent of the time in a given situation.

Engineers are taught to calculate things to at least four decimal points and have problems making clearly-cut statements when they get into a "gray" area. This is not being critical of engineers, but recognizes their educational background and the mathematical precision that they are taught in the educational process. The reasoning behind the burden of proof of the plaintiff in a civil trial or the defendant on affirmative defenses is a concept which is foreign to them and contrary to the educational process they have undergone. Therefore, what the author is really talking about here is re-educating the technical- or engineer-type expert witness so he will be able to testify within the framework of the burden of proof without getting overly concerned about the 5 percent exception to what he is saying.

Proximate cause—This is such a basic legal term and concept that it is hardly

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imaginable an expert would fail to recognize and appreciate that the plaintiff must prove that the defect or alleged negligence of a defendant must be proximate cause of the injuries. The same holds true for a defense expert testifying with regard to affirmative defenses. However, if this is not properly explained to expert witnesses, they can and will make admissions during their testimony which cause serious doubt on proximate causation of the injuries.

Explain to the expert, prior to his testimony, the Alabama Pattern Jury Instruction on Proximate Cause:

> "The proximate cause of an injury is that cause which in the nature and probable sequence of events, and without the intervention of any new or independent cause, produces the injury and without which such injury would not have occurred."

This charge should be explained to the expert witness, as many trial judges explain to the jury, as the direct cause. Also, along with the same lines, lawyers need to explain to the expert witness the meaning of combining and concurring negligence in a case which has multiple defendants.

Similarly, the proposition of intervening causes must be covered with the expert witness in appropriate cases. Without proper explanation by the lawyer, the expert witness may fail to recognize or understand the difference between an independent intervening cause, as referred to in the pattern jury instruction, and foreseeable conduct caused by the defendant's negligence.

Contributory negligence and assumption of risk—These two legal doctrines create problems for most experts for two reasons. First, most expert witnesses are accustomed to consulting in cases pending in comparative negligence states or in states where contributory negligence and assumption of risk are not defenses to strict liability in tort. Second, most experts do not know and are unable to discuss the application of the elements of contributory negligence and assumption of risk to the facts of the case.

Of course, the problem concerning the ignorance of an expert witness with regard to the applicability of contributory negligence and assumption of risk can

—NOTICE—

Black Lung Manual Published

Appalachian Research and Defense Fund of Kentucky, Inc., (Appalred) under the auspices of the National Clearinghouse for Legal Services, has published "Black Lung Claims Before the Department of Labor, a Manual of Substantive Law." The manual is authored by William Gottlieb, now a staff attorney with South Brooklyn Legal Services in New York. Gottlieb was a staff attorney with ARDF's Prestonsburg office in 1984-85, and specialized in black lung and pension claims. He authored the black lung manual in cooperation with ARDF as part of the requirements for an LLM Degree from the School of Law of Columbia University in New York.

The first part of the manual includes basic historical information about the organizing efforts by miners and disabled miners which resulted in passage of federal black lung legislation, as well as a basic discussion of the nature of black lung disease. The second part of the manual focuses on the substantive law involving claims before the Department of Labor. Citations in the manual are current only to approximately spring 1986, when the manual was completed. Due to lack of staff resources, Appalred has not been able to produce an update at this point.

Copies of the manual may be obtained for $15 by writing to John M. Rosenberg, Director of ARDF of KY., Inc., 205 Front Street, Prestonsburg, KY 41653. Attorneys participating on a contract or pro bono panel with a legal services program can obtain a free copy by writing to National Clearinghouse for Legal Services, Inc., 407 S. Dearborn, Suite 400, Chicago, IL 60605, and asking for a copy of the manual under Clearinghouse No. 42880.

be cured. The important point here is that both plaintiff and defense experts fully understand that any contributory negligence, no matter how slight, will suffice to bar the plaintiff's claim.

The second problem, ignorance with regard to the elements of contributory negligence and assumption of risk, again can be cured by detailed explanations of the law and its application by the lawyer producing the expert witness. Both plaintiff and defense experts must be well versed in the elements of contributory negligence and assumption of risk, and how to support or negate each element with the facts of the case.

Alabama Extended Manufacturer's Liability Doctrine—Occasionally, the opposing lawyer will ask an expert witness whether the product was inherently or unreasonably dangerous. This is terminology foreign to many experts and the wrong answer is, of course, catastrophic to the case. Again, use of the pattern jury instructions is helpful in explaining the significance of these terms to the witness:

> "It is the law that the manufacturer, supplier or seller who markets a product which is in a condition unreasonably dangerous to the ultimate user or consumer when placed on the market and which remains in substantially the same condition until used by the ultimate consumer is liable to one who may be reasonably expected to use such product when used for its intended use and who is injured as a proximate consequence of the unreasonably dangerous product."

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More important than the expert's understanding of the unreasonably dangerous terminology is the requirement that the product remain in substantially the same condition as it was when it left the defendant's possession. Plaintiff and defense expert witnesses must understand that this element is met even when substantial changes have been made if those changes were foreseeable to the defendant. When the opportunity presents itself, the plaintiff's expert must be prepared to use the foreseeability terminology in cases defended on the basis of changes made in the product.

A similar problem is presented from the expert's standpoint concerning intended uses of the product. He must understand that foreseeable uses or misuses of the product do not prevent the plaintiff from recovering under the Alabama Extended Manufacturer's Liability Doctrine. Plaintiff and defense experts must be prepared to use the foreseeability terminology in cases defended on the basis of the product's being put to an unintended use.

Lawyer tactics and pitfalls

All expert witnesses are subject to a number of tactics and pitfalls which, oftentimes, are not covered with the witness prior to his testifying. A number of these areas will be discussed below. However, the reader should be cautioned that the list provided is not an exhaustive list and must be used in addition to the usual preparation of an expert witness to testify.

Agreement with general concepts or principles—Any good lawyer, when presented with an unfavorable set of facts, will attempt to get the expert to agree with broad general principles which have little application to the case, but sound bad for the opposing party's position. This tactic is used extensively by lawyers in products liability and medical malpractice cases. The expert witness must be prepared to agree with the broad, general principle when true and must point out that the principle has no application to the case at hand. In other words, he must agree with the principle and then proceed to discuss the specific facts of the case in light of that principle.

Knowledge of facts—Some lawyers will sometimes run at experts on the basis that they have no personal knowledge of the facts involved in the accident. Of course this is true—otherwise the expert would be an eyewitness instead of a retained expert. However, some novice testifiers will actually weaken their opinions when this is pointed out to them by the opposing lawyers. The fact that lack of personal knowledge is totally insignificant should be pointed out to the witness before he testifies.

A more serious problem occurs when the lawyer producing the expert relies upon the expert's statement that he has read the depositions and other materials supplied to him and knows the facts of the case. Sometimes the experts get into a time crunch and merely scan the materials, overlooking important points, or simply do not recall significant points that they have read. Therefore, all significant facts must be discussed with the expert in the office before he testifies. In cases involving numerous witnesses, parties or dates, it is best to help the expert make notes to take into the deposition setting forth the names of the parties and a description of each, names of the witnesses and a description of each and all important dates.

Overly-defensive or limiting about qualifications—Some expert witnesses, when attacked about their qualifications, will become overly defensive and give the impression they know they really are not qualified. This can be avoided by the witness's admission of factors which are not present in his background, such as the fact that he has never designed the type of product in question, and routinely pointing out his experience which has some nexus with the product in question, such as the fact that he has designed control systems for similar products.

Other expert witnesses, when attacked about their qualifications, will take the opposite approach from the overly-defensive witness and limit their expertise to such a point as to severely minimize their use in the case. Again, this can be avoided by the witness's admission of factors which are not present in his background and routinely pointing out his experience which has some nexus with the subject of his testimony. This type of expert must be informed that he has the right to rely on knowledge gained through the depositions and other materials he has read. For example, even though the expert's opinion may involve knowledge of the operation of a machine and he has never operated that type machine, he is entitled to rely upon the operator's manual and the deposition of the manufacturer's representative for this knowledge.

Probable v. possible—Expert witnesses often use these words interchangeably, not recognizing their legal significance. This should occur less frequently if the burden of proof has been explained. However, the significance of probable v. possible still should be covered in the preparation of the expert for testimony.

Use of the term "malpractice"—In medical malpractice cases doctors retained by the plaintiff often are reluctant to testify when asked if the defendant was guilty of malpractice, although they are

perfectly willing to say he fell below the standard of care. The word "malpractice" has connotations within the medical profession which probably make it more difficult to accuse someone of than murder. Explain to the witness that "malpractice" means nothing more than that the doctor fell below the standard of care and that he should and must use this term when asked by the defense lawyer.

Paid to testify—Of course, experts are not paid to testify, but are paid for their time away from their usual activities. However, some experts will overlook this fact if not warned ahead of time.

Opinions regarding credibility, reputation or expertise of other witnesses—This is not a proper area for expert testimony. The expert witness should be instructed and not allowed to testify regarding the credibility, reputation or expertise of other witnesses.

Further information needed to support opinions—Expert witnesses must be warned with regard to this tactic. If the opposing lawyer can commit the expert to needing more information, particularly information that is not available, in order to support his opinions, then he has eliminated the expert's testimony at trial. Expert witnesses should be prepared to testify and express opinions on the basis of the information before them at the time of the deposition, although pointing out that they certainly will take into consideration any additional information provided to them.

Significance of various documents—In a substantial products liability case the expert will have reviewed a large volume of depositions and other documents in preparation for testifying. Typically, the opposing lawyer will attempt to ask the witness what the significance is of each document or what of significance is in each document. This is a game that lawyers cannot afford to play. If the expert attempts to testify as to what is significant in each document, anything he leaves out automatically will be deemed insignificant. The expert should be prepared to respond that he has read a great number of materials and cannot list from memory all significant items in the materials. In other words, in order to properly and accurately respond to the question he would have to go through all materials line by line during the deposition.

Opinions based on treatises or standards—While the expert should testify that his opinion is buttressed by the literature, he should not testify that his opinion is based on the literature. This detracts from his strength as an expert and unduly limits his testimony.

Conclusion

The areas discussed hereio certainly do not constitute an entire list of the problems with expert testimony. However, discussion of these areas with the experts before they testify usually will bring to the surface problems which could prove very damaging to the case. While it is not possible to totally insure against errors in the expert's testimony, they certainly can be reduced by proper preparation and control of the expert. ■

THOSE WHO AREN'T COMPETITIVE END UP HERE.

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The Closet Client

by Mark White,
special correspondent to the *Alabama Lawyer*

It has been a source of continuing comfort for me, for the past three years, that anything bad that occurred to me during this period could be blamed on Reggie Hamner. To have a 24-hour, seven-day-a-week scapegoat in my life has been an asset incapable of being undervalued.

I remember well the winter of 1983 when Reggie summoned me to his plush office in metropolitan Montgomery. Up to that time, it had been my great pleasure to serve as chairman of the task force which had just revamped that noteworthy publication, *The Alabama Lawyer.*

Leaning back in his designer chair, Reggie said, "You really did a great job on the new *Alabama Lawyer.* The new board of editors is aggressive, bright and dedicated. We have a new image, combining solid writing with sharp editing for a top-quality publication. Because the new board is such an auspicious and respected group, we feel compelled to guarantee the high level of competence for *The Alabama Lawyer* and, as a result, have just voted to throw you off the board!

"Regretful—but needless to say, a lot of this may be attributed to the very mediocre meanderings you have forwarded for publication by *The Alabama Lawyer.*"

I began to protest, indignantly.

"For example, Mark," he interrupted, "when we assigned you the topic 'The Insurance Crisis,' we did not anticipate your returning with some sort of syllogistic explanation as to why life insurance salesmen no longer give out decent pens and color-coded road maps. Fortunately for all of us, your concept of a pop-up picture of the Alabama Supreme Court never became public knowledge. It culminated with our printing a form rejection slip for you that states: 'We conclude that this article lacks sufficient scholarly

appeal, in view of the author's insistence that the piece submitted be read aloud, slowly.' "

I wanted to retort, but he just kept going.

"Now," he said, "here is the board's recommendation: We suggest that rather than leave you to your indirect devices, we give you a special assignment. We direct you to go undercover as a client. It's dangerous, but we trust your covert abilities. You'll infiltrate the ranks of clients and report your findings back to me...only upon written request, of course.

"I can only hope that this will be more of a noble and worthwhile endeavor than your previous dabblings. Quite naturally, we request that you leave the state to accomplish this."

"Reggie," I said, "won't I be missed?"

"Well," he replied, "In the words of that old country classic: How can we miss you, if you won't go away!"

Needless to say, role reversal was an interesting prospect. I decided that if I was to do this, I should do it all the way—I would become a client and infiltrate the yankee ranks.

A friend and client (usually the two are mutually exclusive) agreed to cooperate in what came to be the Hamner scheme, and next thing you know, off I went, lock, stock and barrel to Pittsburgh, Pennsylvania.

I feel compelled to file this dispatch even though I have had no contact with Hamner—not even a coded message in my bran cereal. I believe this part of my mission is complete (not to mention that certain parts of my anatomy are frozen), and I am ready to offer profound insight as to how clients view lawyers and what lawyers should know about clients.

Clients don't like lawyers

Alright, so it is no big revelation. But I tell you, brothers and sisters, I did not learn this without pain! I well remember the first time I sat around with a bunch of other clients, telling peace stories about lawyers. Afterwards, I felt so cheap! My transition from lawyer to client was not as smooth as one would anticipate. Within five days of assuming my role, I received a call from my ace maintenance supervisor, Franco Pastavoci. I pick up the telephone and out of the receiver comes the word, "hey," (every person Franco knew automatically acquired the first name of "hey").

"Hey," Franco said, "the cops have a warrant and want to knock down a door in one of the apartments!"

Anticipating some horrible public relations scandal, I said, "Franco, is it drug-related?"

"Naw, more serious...investment banking!"

Somewhat relieved, I immediately began forming my own mental checklist, making the mistake of assuming my prior legal mind-set:

1) Do they have a warrant?
2) Is it a valid warrant?
3) Is the person serving the warrant the duly authorized officer?
4) Have I been paid to care about the warrant?

Franco interrupts my list-making. "Hey, this door is going to cost us $761.54 to replace! Do I open it with my pass key, or do I let 'um bust it down?"

It suddenly came into clear perspective what it is to be a client. While as an advocate I had represented the parties on both sides of the door, I now found myself representing the door! Fortunately I made a smart move (by accident and while I was buying some time to think about it).

"Franco, what do you think?" I asked.

"Hey, the lease says, we got the right to enter an apartment for...um...to kill vermin! So, hey...why don't you declare... declare what you call a state of vermin emergency! I'll go get a can a' Raid and my pass key and conduct an official search for vermin. The cops can enter right with me."

"Franco, are you sure this will work?" I asked.

"Hey, don't worry," says Franco, "I'm headed out to the dumpster to get a couple a' throw-down roaches."

I will always fondly remember Franco for saving the day and the door.

Unfortunately, many clients have good reason not to like some lawyers. On approximately 20 occasions during my undercover role, part of my duties included hiring lawyers. I never ceased to be amazed....

Take New York lawyers—thank goodness they exist. God decreed that New York lawyers be created to help all other lawyers, and their clients form a common bond in that not only do all clients not like New York lawyers, all lawyers do not like New York lawyers.

I received a bill for $975 from a New York law firm for reviewing a printed form that had 17 blanks. Not only had the firm not supplied the form or the 17 words inserted in the blanks, their answer to my complaint about the bill was, "Well, it would have cost you the same if we had drafted the entire document!" For that, I was supposed to be grateful?

Mark White is a graduate of Auburn University and Cumberland School of Law. Associated with a Birmingham firm from 1974 to 1984, he then became associated with Allegheny Center Associates and Emerik Properties Corporation in Pittsburgh. In July of this year, White relocated back to Birmingham. He is a partner in the firm of White, Dunn & Booker.

Whenever I hired lawyers, I always made a point never to disclose that I had had any experience in the legal profession. I made the sorry mistake of thinking that if they believed it was my first time, they would be gentle.

On another occasion, I was forwarded a bill for review in excess of $200,000 for services rendered in a matter that was settled at an administrative level. The firm submitting the bill said that the bill was not based upon any contract but was a contingency fee based upon custom, habit and practice existing in the local legal community. When I demanded some estimate as to the hours expended on the case, the rate charged exceeded $1,000 an hour! There was no trial, no appeal, no discovery, no investigation, no research, no contract, no letter regarding the fee agreement, no time sheets and, ultimately, no payment!

Over time, though, I became impressed with lawyers who could do the following:

1) Demonstrate a sense of geography in that they could give me physical directions to the courthouse from their office. This confirmed in my mind that they had, at least on some prior occasion, actually been in the building where the dispute ultimately could be resolved.

2) I admired the lawyers who could explain in detail to me, as a client, what they proposed to do and how their billing practices and procedures would be accomplished.

3) Also impressive were those lawyers who, early in the process, demonstrated not only a willingness, but considered it a necessity, to physically go to the location of the client's business. They considered it essential to see for themselves how the client's business and operations were conducted.

I would be remiss (note: lawyers always say this just before they stick it to you) if I did not mention the work of some excellent lawyers who represented me during this assignment. In the future, I always will steal from one of them what I have come to call his "The Winter Of Our Discontent" speech. It was delivered to me after I had spent approximately an hour outlining the factual basis of the dispute that was going to require his services.

"Mr. White, it is not the best of cases, and it is not the worst of cases. It's taken you and your colleagues 18 months to create this situation! I hope you can appreciate that I cannot figure out where we are legally during the one hour that we spend together. I can also tell you that I will have some idea about where you stand within a week.

"Within two days, I will personally come to your business to review your operations. Because my schedule, like yours, changes, I will call you either at work or at home, if necessary, if I cannot meet the one-week timetable we have established. My fee for this initial evaluation will be _____. In the event you need my legal services further, they will be billed at the hourly rate of _____. I will write you a letter today that will confirm this financial arrangement. It might also be necessary for Mr. Doe or Mrs. Roe, of our office, to help me on this matter, but I will be the person who is responsible to you for the work that is accomplished. If it is to your economic advantage and could expedite the situation to utilize the services of Mr. Doe or Mrs. Roe, they will work at my direction! Please take a moment and consider what questions you might have, Mr. White, concerning what I have said. When you leave, I will give you my office and home number, and if anything comes up that you need to disclose to me, or that you would like to add, or modify, concerning what you have told me, please do not hesitate to call."

Being a client creates an instant awareness that being sued is not nearly as much fun for a client as it is for a lawyer. Nothing changes your mind about the existence of frivolous law suits quicker than being served as a party defendant by the sheriff.

Part of my territory during my mission included a shopping mall. On one lovely spring afternoon, Sir Leon Stealow elected to exit the Sears store with an electric AM/FM multi-everything device. He elected to exit at a pace that would have yielded a 9.3 hundred-yard dash. Unfortunately for Sir Leon, he encountered a city police officer in his lane. On television, Sir Leon had seen a chap vault over the rail of a shopping center mall, land lightly on his Nikes and slip away through a convenient exit. Sir Leon attempted the same maneuver with dif-

ferent results. Later, after careful reflection, Sir Leon recalled the chap on television vaulted feet first versus head first. The chap on television got his prize—Sir Leon came away with a broken jaw, fractured ankle and a lesson in aerodynamics.

Three weeks later, I am served with a complaint. Sir Leon, you say? Wrong—I expected that one (failure to warn that diving into a concrete floor can cause injury). Instead, I get popped by Doctor Noname. It seems when Sir Leon left our premises, the paramedics took him to the nearest hospital (no surprise there). Doctor Noname was the guy they got off the squash court to unfold, unbend and unmutilate Sir Leon.

Doctor Noname was aghast that Sir Leon had no major medical coverage, and began a search for a deep pocket. Somehow Doctor Noname's lawyer devised a theory that anytime anyone was transported by the city to Doctor Noname, there was an implied contract for work and labor done with whomever owned the premises that the patient was on at the time of the injury.

Fortunately, my ace general counsel, Mad Dog Kosinski, was able to use alternate dispute resolution on this case. By that I mean Mad Dog called Doctor Noname's lawyer and said, "Your alternative to dismissing this case is having us throw you off the second level terrace of the mall." I now accept that alternate dispute resolution is an effective method of resolving frivolous law suits.

Unfortunately for lawyers, clients very soon get their mind set that their lawyer will beat up the other guy's lawyer. If lawyers hold themselves out to be hired guns, they must never forget that the man who shoots from the hip sometimes hits himself in the foot.

Lawyers should never loose sight of the fact that clients see cases in one of two ways, either "we won the case" or "my lawyer lost the case." While a lawyer considers a meritorious claim to be any claim he files as a lawyer, clients consider a frivolous claim to be any claim to which the client is a party.

Usually the client confronts the lawyer only when in a stressful mental state. Angry, scared, abused, neglected and oppressed are fairly typical introductory attitudes of clients. We lawyers (I am coming in from the cold) must be mindful of the fact that our role as advocates includes the delicate manipulation of all of the human frailties.

A wise lawyer once told a client who referred to him as a mercenary, "You are mistaken using that title. Our role is most similar to that of a shepherd. Unfortunately, sometimes we act more like a sheepdog." The distinction between the roles of the shepherd and the sheepdog may be subtle to some, but when one appreciates the distinction, one then can appreciate the art form of law.

This, my first dispatch as special correspondent for The *Alabama Lawyer* to you, my brothers and sisters of the bar, should be clear evidence of my devotion to the mission bestowed upon me by Reggie Hamner. Believe me, there is even more "hot" stuff like this to follow. I leave each of you chomping at the bit for more, and I remain ever vigilant until that time you elect to further call upon me. ■

cle opportunities

november

3 thursday

CURRENT ISSUES IN ALABAMA INSURANCE & TORT LAW
Hilton, Birmingham
Professional Education Systems, Inc.
Credits: 6.0 Cost: $95
(800) 826-7155

3-5

INSTITUTE ON SECURITIES REGULATION
Waldorf-Astoria, New York
Practising Law Institute
Credits: 14.8 Cost: $545
(212) 765-5700

4 friday

BANKRUPTCY
Riverview Plaza, Mobile
Mobile Bar Association
Credits: 3.0
(205) 433-9790

CRIMINAL LAW
Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230

INSURANCE LAW FOR THE GENERAL PRACTITIONER (video replay)
Dothan
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

ARCHITECT-ENGINEER LIABILITY UNDER ALABAMA LAW
Hilton, Birmingham
The Cambridge Institute
Credits: 5.5 Cost: $295
(703) 893-8500

CURRENT ISSUES IN ALABAMA INSURANCE & TORT LAW
Civic Center, Montgomery
Professional Education Systems, Inc.
Credits: 6.0 Cost: $95
(800) 826-7155

ESTATE PLANNING
Ramada, Birmingham
Cumberland Institute for CLE
Credits: 6.5 Cost: $90
(205) 870-2865

TRIAL PRACTICE UPDATE
Dothan
Alabama Trial Lawyers Association
(205) 262-4974

10 thursday

PERSONAL INJURY
Days Inn, Mobile
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230

RECENT DEVELOPMENTS & HELPFUL TECHNIQUES FOR THE GENERAL PRACTITIONER
Attalla Holiday Inn, Gadsden
Alabama Trial Lawyers Association
(205) 262-4974

11 friday

PERSONAL INJURY
Civic Center, Montgomery
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230

11-12

PRODUCTS LIABILITY
Westin Hotel, Washington, DC
Association of Trial Lawyers of America
Credits: 11.0 Cost: $275
(800) 424-2725

17 thursday

PERSONAL INJURY
Von Braun Civic Center, Huntsville
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230

ADMIRALTY
Admiral Semmes, Mobile
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

17-18

PERSONNEL LAW SYMPOSIUM
Terrace Garden Inn, Atlanta
Wake Forest University School of Law
Credits: 12.0 Cost: $395
(919) 761-5560

FEDERAL TAX CLINIC
Bryant Conference Center, Tuscaloosa
University of Alabama
Credits: 12.0
(800) 452-5971

BASICS OF BANKRUPTCY & REORGANIZATION
Fairmont Hotel, New Orleans
Practising Law Institute
Credits: 12.0 Cost: $390
(212) 765-5700

18 friday

PERSONAL INJURY
Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230

INSURANCE LAW
Howard Johnson's Motel, Birmingham
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

TRIAL PRACTICE UPDATE-PLAINTIFF'S PERSPECTIVE
Best Western Conference Center, Auburn
Alabama Trial Lawyers Association
(205) 262-4974

29 tuesday

PROTECTION OF SECURED INTEREST IN BANKRUPTCY
Huntsville
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

december

1 thursday

BANKRUPTCY
Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230

PROTECTION OF SECURED INTEREST IN BANKRUPTCY
Mobile
National Businesses Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

2 friday

CHARACTER EVIDENCE: COMPARING STATE & FEDERAL RULES
Harbert Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

PROTECTION OF SECURED INTEREST IN BANKRUPTCY
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

ANNUAL TRIAL PRACTICE UPDATE
Madison Hotel, Montgomery
Alabama Trial Lawyers Association
(205) 262-4974

6 tuesday

BASIC REAL ESTATE LAW IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

6-9

SECURITIES REGULATION
The Westin, Dallas
Southwestern Legal Foundation
(214) 690-2377

7 wednesday

BASIC REAL ESTATE LAW IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $85
(715) 835-8525

REVISED REDEMPTION LAWS IN ALABAMA
County Courthouse, Montgomery
Montgomery County Bar Association
Credits: 1.0
(205) 265-4793

8 thursday

ESTATE PLANNING
Harbert Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

COMMERCIAL LAW
Wynfrey Hotel, Birmingham
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

EMPLOYEE BENEFITS IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

9 friday

LABOR LAW
Ramada, Birmingham
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

RECENT DEVELOPMENTS FOR THE TRIAL LAWYER
Sheraton Capstone Inn, Tuscaloosa
Alabama Trial Lawyers Association
(205) 262-4974

15 thursday

NEGOTIATION
Civic Center, Montgomery
Alabama Bar Institute for CLE
(205) 348-6230

PROFESSIONAL RESPONSIBILITY, DISCIPLINE & MALPRACTICE
Birmingham
Cumberland Institute for CLE
Credits: 6.5 Cost: $90
(205) 870-2865

16 friday

NEGOTIATION
Wynfrey Hotel, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

EXPERT WITNESSES
Riverview Plaza Hotel, Mobile
Mobile Bar Association
Credits: 3.0
(205) 433-9790

january

7-10

DIVORCE LAW UPDATE
Westin Hotel, Vail
Law Education Institute, Inc.
Credits: 13.3 Cost: $395
(414) 961-0323

9-13

ESTATE PLANNING INSTITUTE
Miami Law Center
Sheraton Bal Harbour Hotel, Miami
Credits: 23.3
(305) 284-4762

15-22

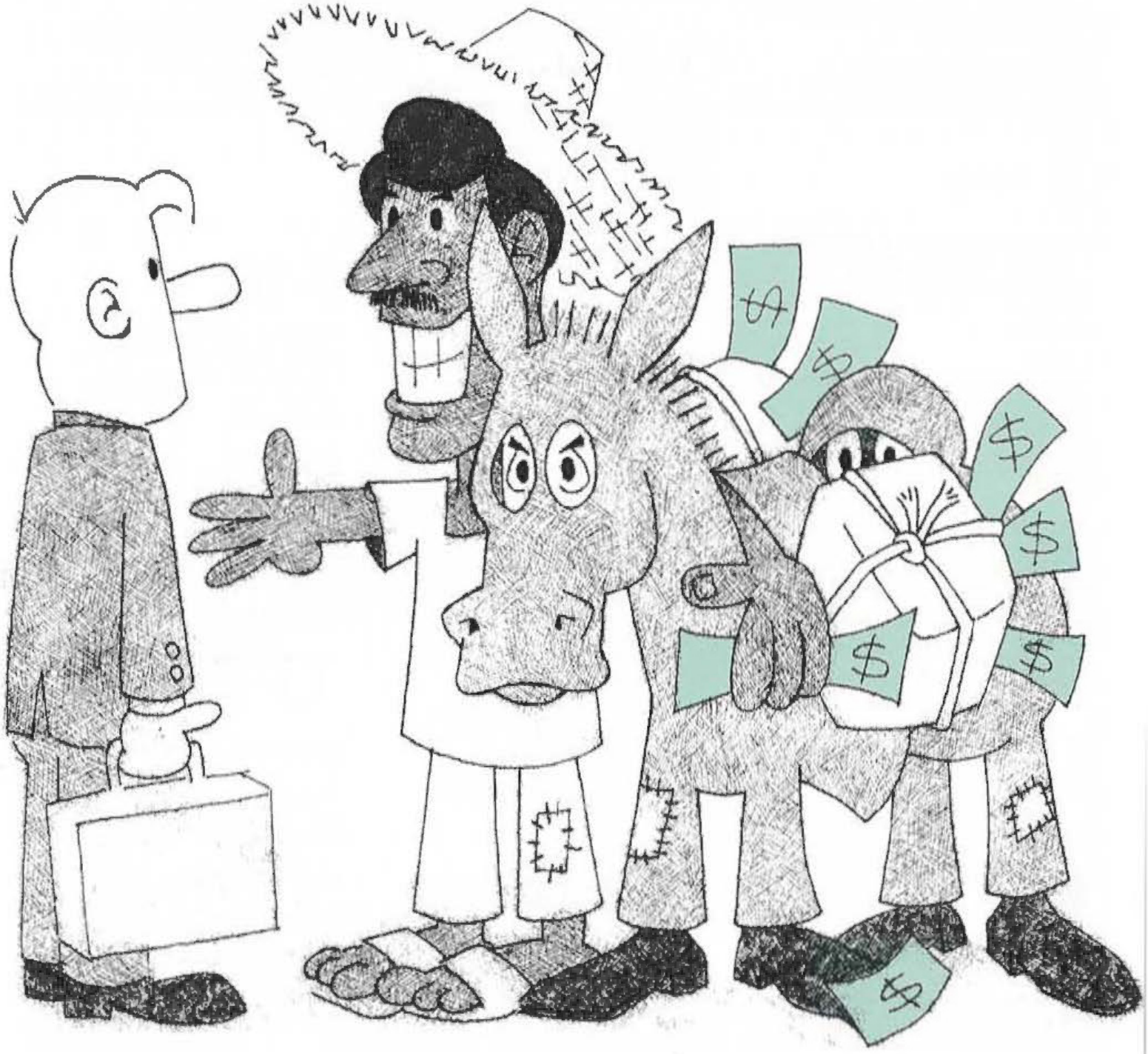
MIDWINTER CONVENTION
Royal Lancaster, London
Association of Trial Lawyers of America
(800) 424-2725

26-28

MIDWINTER CONFERENCE
Wynfrey Hotel, Birmingham
Alabama Trial Lawyers Association
(205) 262-4974

Beware of Colombians

What Attorneys Should Know about Currency Transaction Reporting Requirements



Bearing Gifts:

by Robert F. Clark
and W. Lloyd Copeland

In an unfortunately all too typical display of its usual wisdom, Congress decided in 1984 to require that all cash transactions of more than $10,000 be reported to the federal government. This reporting requirement is yet another step in the currently fashionable "drug exception" to the Bill of Rights.

We all should know, and all of us engaged in the active practice of criminal law do know, that the Fourth Amendment has been essentially nullified, while the hysteria created by drugs and drug abuse literally runs wild throughout the land. Title 26 U.S.C. Section 6050I, the Currency Transaction Reporting Act, is a further manifestation of the ongoing hysterical response to a legitimate social problem. The privacy-intrusive aspects of this statute are apparently considered unimportant due to its use as an anti-drug weapon. It has as its purpose the creation of an effective impediment for drug dealers in their attempts to use cash money received in drug transactions; those individuals dealing in drugs are far from delighted at the prospect of having the Internal Revenue Service informed they were in possession of over $10,000 of otherwise untraceable cash money. Unfortunately, the act is also laden with potential traps for the unwary attorney. Even more unfortunately, the act can be coupled with various federal criminal statutes so as to make criminal the conduct of persons not intending to violate the law. Most dangerous of all is the fact that the act is particularly susceptible to use, and in fact has been utilized, by federal law enforcement authorities to direct entrapment activities of the most offensive kind toward attorneys with no evidence of predisposition toward criminal activity.

As has often been aptly observed, those who fail to study history are destined to repeat it. It would appear that this Congress and the past few Congresses altogether have forgotten Senator Joe McCarthy in the 1950s when what we now know as the "Red Scare" almost devoured the nation—what should have been an enduring lesson in laws motivated by hysteria.

With very few exceptions, any person who in the course of his trade, business or profession receives cash in excess of $10,000 in one transaction (or two or more related transactions) is required to file a currency transaction report. It is immaterial that the person receives the cash as the agent for someone else, or in the course of his business receives cash in excess of $10,000 for the account of someone else. For example, the attorney who engages in collection of past-due accounts would be required to report if he received in excess of $10,000 cash, even though it was for the account of a client.

There are, however, certain exceptions to this reporting requirement. One exception is that a person is not required to report if (1) he receives cash in excess of $10,000 and use all the cash within 15 days in a cash transaction which would be reportable by the person receiving the cash from that person; (2) a person discloses the name, address and taxpayer identification number of the person from whom he received the cash to the person to whom he paid the cash; and, (3) a person pays the person by cash and not in some other form. For example, if an attorney receives more than $10,000 cash in trust to purchase real estate and within 15 days of receiving the $10,000, he pays the $10,000 to the seller of the real estate, provides the seller the purchaser's name, address and taxpayer identification number and pays the seller with the actual cash rather than by check, he then would not be required to make the report required by Section 6050I.

Another exception arises in the context of multiple cash payments. Under the Code of Federal Regulations promulgated to enforce this section, the receipt of cash deposits or cash installment payments relating to a single transaction (or two or more related transactions) is reportable. If the initial payment is in excess of $10,000, then the initial payment and any subsequent payments in excess of $10,000 must be reported. In other words, if an attorney charges $25,000 for services and receive in excess of $10,000 initially, he must report that transaction; when subsequent monies are paid, if they are paid in installments in excess of $10,000, each installment must be reported separately. However, if the initial payment exceeds $10,000 but no subsequent payment exceeds $10,000, he only has to report the initial payment and not any subsequent payments. Put another way, each individual payment over $10,000 must be separately reported, while in the case of individual payments of less than $10,000, only that particular payment which renders the aggregate in excess of $10,000 must be reported.

The term "cash" means the coins and currency of the United States, or of any other country, which circulates in and is customarily used and accepted as money

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Robert F. Clark is a 1970 graduate of the University of Alabama School of Law. He is the current president of the Alabama Criminal Defense Lawyers Association and was named as a Fellow of the American Board of Criminal Lawyers. Clark is a partner in the Mobile firm of Clark, Deene & Copeland, P.C.

W. Lloyd Copeland is a 1975 graduate of the University of Alabama School of Law, where he was a Hugo L. Black scholar. He has served as an assistant attorney general for the State of Alabama and as an assistant district attorney for Mobile County.

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in the country in which issued. That is to say, cash means United States coins and currency and in addition, any coins or currency of any foreign country. Payment of over $10,000 in foreign coin or currency therefore would be required to be reported as a cash transaction. However, cash does not include bank checks, travelers checks, bank drafts, wire transfers or other negotiable or monetary instruments not customarily accepted as money.

The term "transaction" includes, but is not limited to, a sale of goods or services; a sale of real property; a sale of intangible property; a rental of real or personal property; exchange of cash for other cash; the establishment or maintenance of or contribution to a custodial, trust or escrow arrangement; a payment of a preexisting debt; a conversion of cash to a negotiable instrument; a reimbursement for expenses paid; or the making or repayment of a loan. A transaction may not be divided into multiple transactions in order to avoid reporting under the statute.

As previously mentioned, the reporting requirements apply not only to any one transaction where the cash received exceeds $10,000, but also to any two or more related transactions of over $10,000 cash in the aggregate. "Related transactions" are basically any transactions where cash is received during a period of more than 24 hours, if the recipient knows or has reason to know that each transaction is one of a series of connected transactions. For example, if an attorney agrees to represent a client at an hourly rate of $100 an hour, and submits various monthly bills which are paid in cash, the attorney cannot fail to report when the aggregate of the $100 hourly fees exceeds $10,000, on the theory that the bills were sent at different times. The furnishing of legal services where cash payments exceed $10,000 is subject to the requirements of Section 6050I, and it is dangerous in the extreme to attempt to view the same or interpret the act in any manner so as to render the payments nonreportable.

There are other exceptions to the currency reporting requirement which basically deal with financial institutions and certain casinos that have revenue in excess of $1,000,000. The authors regretfully submit that most lawyers do not fall within this category. There is another exception that is of interest to practicing attorneys, and that is where cash in excess of $10,000 is received by a person other than in the course of the business or profession. For example, if a person sells a car, boat, real estate or anything else of value for cash in excess of $10,000, it does not have to be reported unless he is engaged in the business of selling such items. The only other exception of interest is that if the entire transaction takes place outside the continental United States, it does not have to be reported in this country.

The report must be made to the Internal Revenue Service within 15 days after the date the cash is received. Internal Revenue Service Form 8300 is required to be filled out and returned to the IRS. Form 8300 can be obtained from any IRS Form Distribution Center. The person reporting the transaction must verify the identity of the person transferring the cash. If the money is paid by an alien, the passport, alien identification card or other official documents evidencing nationality or residence must be examined. Verification of the identity of any other person may be made by examination of a document normally acceptable as a means of identification when cashing or accepting checks. For readers who already are thinking about using a "straw man," the Code of Federal Regulations requires that if the person making the return knows or has reason to know that an agent is conducting the cash transaction for a principal, he must identify both the principal and the agent on the form.

Anyone making these cash transaction reports must keep them for a period of five years. In addition, one must send to the person from whom he received the cash a report that sets forth the name and address of the person who made the return, the aggregate amount of reportable cash received by that person in the calendar year and the statement that the information is being turned over to the Internal Revenue Service. This report must be furnished to the person who gave the reporting individual the cash by January 31 of the year following the transaction. The penalties for failure to report a cash transaction in excess of $10,000 are found in Title 26, Section 6678, United States Code.

The matters set forth above are the basic requirements for the currency reporting transaction, but here is a caveat to those who are of the opinion that they are intellectually superior to the mere mortals constituting the remainder of the bar, and can "beat the system." The reader will recall that, earlier in this article, the authors advised that the purpose behind the reporting requirement was to make it extremely difficult for people involved in drug transactions to do *anything* with the cash money they receive. Not only is that Congress' intent, but Congress and the executive branch of the government further intend to punish in a draconian fashion those who are involved in attempting to thwart or evade the Currency Reporting Transaction Act. The authors call the reader's attention to Title 18 U.S.C. Section 1957, commonly known as the money-laundering statute, which makes it a criminal offense for anyone to "knowingly engage or attempt to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000." The real "fangs" of Title 18, Section 1957, are in subparagraph "c" thereof, which states that "in a prosecution for an offense under this section, the government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity."

What does this mean? First, it means that a person can be criminally prosecuted for accepting a cash fee without the government's being required to prove that he knew the monies were derived from a specific crime or type of crime. It also means that Congress not only has set out to prevent anyone from being able to use criminally derived cash to buy anything, but more specifically, it has set out to prevent the use of such cash to purchase legal services. Anyone can see from the above that the attorney engaging in transactions violative of the reporting requirement also can be considered to be engaged in money laundering, which would subject him or her to penalties under Title 18 U.S.C. Section 1957, of imprisonment for ten years and a fine of twice the value of the property involved in the transaction. If this does not have a chilling effect on representation of clients by those criminal defense lawyers who accept cash fees from reputed drug dealers, then nothing can. What the authors are talking about is a direct, frontal assault on the Sixth Amendment right

to counsel, and it gets worse.

Even more serious problems with failure to comply with the currency transaction reporting requirements are criminal liability under Title 18 U.S.C. Section 2, which is aiding and abetting, and Title 18 U.S.C. Section 371, which is the general conspiracy statute. Both of these statutes can be coupled with Title 18 U.S.C. Section 1001, which proscribes making false reports or causing false reports to be made to any federal agency, and with Title 18 U.S.C. Section 1343, which criminalizes wire fraud. Structuring transactions so as to evade the cash reporting requirement, or structuring transactions so that a financial institution will not have to report them under Title 31 U.S.C. Section 5311, *et seq.*, can result in severe criminal liability. In the case of *United States v. Heron*, 816 F.2d 1036 (5 Cir. 1987), a Texas banker was prosecuted even though he declined to get involved in a financial scheme to prevent the reporting of cash transactions. He had refused to succumb to the blandishments of a government informant in an IRS "sting" operation, but did put the informant in contact with another defendant. For this, he was prosecuted for conspiracy to commit wire fraud. Another very interesting case which shows the pitfalls inherent in structuring transactions so as to avoid reporting requirements is *United States v. Nersesian*, _____ F.2d _____, 41 CrL. 2310 (2 Cir. 1987), which uses a contorted logic to create a conspiracy to make false reports to the government.

The worst news yet, however, is the self-righteous abuse which the currency reporting requirements and their allied criminal statutes may be made to serve by overzealous bureaucrats. The *real* problem attorneys have today is that the federal government is literally targeting attorneys in various sting operations in order to insure compliance with currency reporting requirements by making examples of the targets. Recently, a Miami attorney was contacted by a government informant posing as an Arab sheik, who solicited help in evading the currency reporting requirements. Well-realizing that all but saints have their price, and that saints are few and far between, the informant brought $2,000,000 in cash in a suitcase to a hotel suite, where he and the attorney met and discussed in a carefully staged conversation (where the informant did 99 percent of the talking) how to avoid the currency reporting requirement. At the end of the conversation, the attorney was arrested and later indicted and tried for money laundering in violation of Title 18 U.S.C. Section 1957. The attorney eventually was acquitted under his defense of governmental entrapment, because the sting was directed against a lawyer who had no previous involvement of any kind in any criminal activity whatsoever. This is what the authors mean by the literal targeting of attorneys by overzealous governmental functionaries with a self-awarded monopoly on virtue, in order to cause compliance with the reporting requirements by the creation of examples. Incidentally, the informant was "working off" his own criminal problems by trying to set up some unsuspecting lawyer, at the direction of the government.

Be wary of Colombians bearing gifts. ■

Young Lawyers' Section

N. Gunter Guy, Jr.
YLS President

As I assume this office for the coming year, I feel very honored and excited that I have been selected as your president. It is very humbling to be a part of such a select group of individuals who have been president of the YLS over the past 50 years. Much credit and appreciation goes to Charlie Mixon for his outstanding leadership during the past year. I hope that I can continue that excellent tradition and, through my leadership, bring to our section the highest ideals of professionalism and public service. I hope to meet this goal by the continuity and development of our youth legislative judicial program, which has been a huge success in Alabama. This program is an excellent way to educate our young people and the public on the methods of our justice system. To provide a service to members of the bar, our section will continue to emphasize the development of interesting and valuable CLE programs, such as our "Bridge-the-Gap" seminar and our annual "Seminar-on-the-Gulf." Our section will continue to work to develop better relations, insight and leadership within the American Bar Association so we may be a voice in matters of interest where otherwise we might be forgotten. I also have goals to fulfill our duty to the public and create a positive image of our profession through such projects as a handbook for the elderly and a legal services pamphlet.

In his opening remarks as incoming president of the state bar, Gary Huckaby expressed a deep concern over what he considered an "ominous trend on the horizon," that is, our loss of the concept of professionalism. There is a need for all of the bar, including young lawyers, to exhibit the highest ideals of professionalism in our services to the public.

The young lawyers indeed are the foundation of this bar as we comprise almost 50 percent of the total bar membership. It is our duty to advance, preserve and foster our ideals as a profession and as a group dedicated to public service. President Huckaby mentioned in his opening remarks that history has noted that the downfall of most once-great societies is that they "forgot where they came from." We should not forget where we came from and we should work together closely, particularly as younger lawyers, to grow and develop as lawyers who symbolize the word "professional."

Recently, I had the opportunity to meet with that extremely talented group of young men and women volunteering to serve on the Executive Committee of this section. We are extremely fortunate to have a dedicated group interested in making a contribution to our section, both individuals who are experienced in the work of the Young Lawyers' Section and some who are involved in the section for the first time, but bring with them enthusiasm and energy that is helpful to us all. The Executive Committee is your sounding board and method of communication to the senior bar and to our section. It is a make-up of individuals throughout the state, and therefore, someone from your area is ready to be of service to you and your needs. Those comprising the membership of our Executive Committee for this year and the various subcommittees which they chair are:

James H. Anderson
Beers, Anderson, Jackson & Smith
P.O. Box 1988
Montgomery, Alabama 36102
President-elect

W. Percy Badham, III
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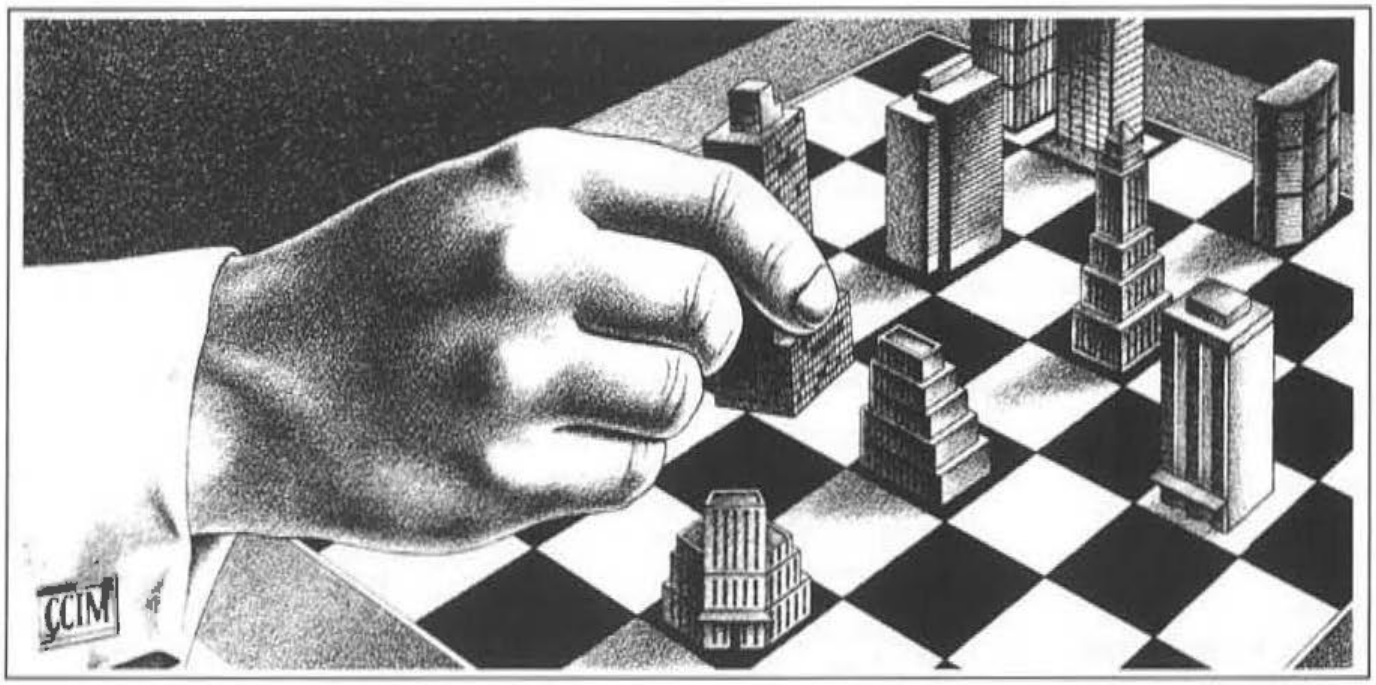
It appears that we will have another very active year for our YLS. Jim Priester of Birmingham has offered his services as chairman of one of our public service projects to develop a senior citizens' handbook. Charlie Anderson of Montgomery has taken over the Youth Judicial Project and is working to make it better than ever. Frank Potts and Amy Slayden agreed to put together another exciting annual bar meeting in Huntsville in July of 1989. Each of us, as members of the bar, owes a deep debt of gratitude to these lawyers for donating their time and helping to give our profession a brighter image in the public's eye. If you are interested in contributing to one of these projects or in helping their efforts, please contact me or the Executive Committee member in charge.

Our section has received some excellent ideas to better serve the profession and the public from the various affiliate outreach project meetings provided by the Young Lawyers' Division of the ABA. We hope to continue to send delegates to these meetings in order to ensure our recognition with the ABA and also to develop ideas for some of our future projects. This year's planned meetings for Affiliate Outreach Project seminars, a program sponsored by the ABA/YLD, are Dallas, Texas, and Memphis, Tennessee.

Please remember that the YLS offers an ideal opportunity to become an integral part of our professional association and reap its rewards. Our projects and programs offer an excellent training ground for future leadership, and I hope you can take a small amount of time and make a contribution. ■



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Joiner, J. Michael
Lagman, McBrayer & Fuhrmeister
Medaris, John E.
Morton, Wade H., Jr.
Shuleva, Richard C.
Spears, Mitchell A.
Swatek, William E.
Walden & Walden
Wallace, Ellis, Head & Fowler

SUMTER
Upchurch & Upchurch

TALLADEGA
Bell & Landers
Robbins, Ray F., II
Thompson, Bill
Wooten, Thornton, Carpenter, O'Brien & Lazenby

TUSCALOOSA
Adams, Donald R.
Barton & Maddox
Baxter & Wilson
Burns, Claude M., Jr.
Burns, Ellis, Copeland & Lisenby
Cartee, Michael J.
Cockrell & Cockrell
Corbett, Mary Ann
Crownover & Coleman
deGraffenried, Tipton & Donaldson
Dishuck, LaCoste & Black
Donald, Randall, Donald & Hamner
Drake, Knowles & Pierce
Garrett, Ginger E.
Gray, Espy & Nettles
Hardin & Wise
Harris, George W.
Hawkins, Hank
Henley, Walter
Hubbard, Waldrop, Reynolds, Davis & McIlwain
Hudson, Jerry
Kennedy, William H.
Law School Clinical Program
Lee, Barrett, Mullins, Smith & Smithart
Legal Services Corporation of Alabama
Mountain & Mountain
Phelps, Owens, Jenkins, Gibson & Fowler
Prince, McGuire & Coogler
Ray, Oliver, Ward & Parsons
Rosen, Harwood, Cook & Sledge
Smalley, Donna Wesson
Smith, James D.
Smith, Reginald W.
Tanner, Guin, Ely, Lary & Neiswender
Thompson & Stilson
Watson & Harrison
Whitehurst & Whitehurst
Williams & Pradat
Williams, Wayne L.
Williams, Williams, Williams & Williams
Wooldridge, Wooldridge & Malone
Zeanah, Hust & Summerford

WALKER
Beaird, Thomas & Higgins
Elliott & Elliott
Gustin & Smith
Maddox, MacLaurin, Nicholson & Thornley
Robinson & Nelson
Selman, Beaird & Selman
Wilson & King

WASHINGTON
Laurie, S.J.
Odom, Harold
Turner, Onderdonk & Kimbrough
Ware & Ware

WILCOX
Bonner, W.J., Jr.

WINSTON
James & Lowe
Richardson, Ann R. ■

Honor Roll of Financial Institutions

(As of September 26, 1988)

The Alabama Law Foundation, Inc. announces that the following financial institutions are participating in the IOLTA program. The foundation thanks these institutions for their participation.

Alabama Exchange Bank, Tuskegee
Altus Bank*
AmSouth Bank*
Auburn National Bank
Bank Independent, Florence
Bank of Albertville
Bank of Dadeville
Bank of Mobile
Bank of Prattville
Brantley Bank & Trust Company
Cahaba Bank & Trust
Camden National Bank
Central Bank of the South*
Central State Bank, Calera
Citizens Independent Bank
Citizen's Federal Savings Bank
Citizen's National Bank of Shawmut
City Federal Savings & Loan Assocation
Colonial Bank*
Commercial Bank of Ozark
Commercial Bank of Roanoke
Commercial National Bank, Demopolis
Commonwealth National Bank
Covington County Bank
Exchange Bank of Attalla
Farmers & Merchants Bank, Ariton
Farmers & Merchants Bank, LaFayette
Farmers & Merchants Bank, Ozark
Farmers & Merchants Bank of Russell County
First Alabama Bank*
First American Bank, Decatur
First American Bank of Pelham
First American Federal Savings & Loan, Huntsville
First Bank & Trust, Grove Hill
First Bank of Baldwin County
First Citizens Bank, Luverne
First Commercial Bank, Birmingham
First Community Bank, Chatom
First Federal Savings & Loan, Gadsden
First Federal Savings & Loan of Bessemer
First Federal Savings & Loan of Florence
First Federal Savings & Loan of Russell County
First Federal Savings Bank, Decatur
First Montgomery Bank
First National Bank, Ashland
First National Bank, Brewton
First National Bank, Opelika
First National Bank of Atmore
First National Bank of Brundidge
First National Bank of Columbiana
First National Bank of Florence
First National Bank of Hamilton
First National Bank of Jasper
First National Bank of Scottsboro
First National Bank of Talladega
First National Bank of Tuskaloosa
First National Bank of Union Springs
First State Bank of Bibb County
First State Bank of Tuscaloosa
Fort Rucker National Bank
Jacobs Bank, Scottsboro
Marion Bank & Trust Company
Merchants & Planters Bank, Montevallo
Merchants Bank, Jackson
Monroe County Bank
National Bank of Commerce, Birmingham
Peoples Bank, Elba
Peoples Bank & Trust, Selma
Peoples Bank of Cullman County
Peoples Independent Bank, Boaz
Phenix Girard Bank
Pike County Bank
Robertson Banking Company, Demopolis
Secor Bank*
Southland Bank, Clayton
Southland Bank of Dothan
SouthTrust Bank, Auburn
SouthTrust Bank, Tuskegee
SouthTrust Bank of Alabama
SouthTrust Bank of Andalusia
SouthTrust Bank of Arab
SouthTrust Bank of Baldwin County
SouthTrust Bank of Calhoun County
SouthTrust Bank of Cullman
SouthTrust Bank of Dothan
SouthTrust Bank of Elba
SouthTrust Bank of Etowah County
SouthTrust Bank of Huntsville
SouthTrust Bank of Mobile
SouthTrust Bank of Montgomery
SouthTrust Bank of Ozark
SouthTrust Bank of the Quad Cities
SouthTrust Bank of Randolph County
SouthTrust Bank of Selma
SouthTrust Bank of Talladega County
SouthTrust Bank of Tuscaloosa County
Sweet Water State Bank
The American Bank, Geneva
The Bank of Tallassee
The Choctaw Bank of Butler
The Citizens Bank, Enterprise
The Citizens Bank, Moulton
The Citizens Bank of Valley Head
The Peoples Bank, East Tallassee
The Peoples Bank & Trust, Greenville
The Peoples Savings Bank, Clanton
The Perry County Bank
Troy Bank & Trust Company
Tuskegee Federal Savings & Loan Association
Union Bank & Trust Company, Montgomery
Union State Bank, Birmingham
United Security Bank, Butler
Winfield State Bank, Winfield

*Financial institutions participating statewide ■

Sections Elect New Officers for 1988-89

One of the strengths of the Alabama State Bar is its sections. Although membership in state bar sections is high, not all lawyers are members of sections. Being a member of a bar section assists you in your particular area or areas of practice and also allows you to participate in the developments occurring in your practice areas. If you presently are not a member of a section, you are encouraged to join. Below are the sections of the state bar, their officers for 1988-89 and information about each:

Administrative Law Section

Chairperson
John T. Mooresmith
2970 Cottage Hill Road
Mobile, AL 36606
(205) 479-0953

Vice-chairperson
Ronald J. Bowden
201 Administrative Building
Montgomery, AL 36130
(205) 261-3350

Chairperson-elect
Al L. Vreeland
P.O. Box 2716
Tuscaloosa, AL 35403
(205) 345-3440

Secretary-treasurer
M. Frank Caskey
P.O. Box 1910
Montgomery, AL 36102
(205) 264-6401

Executive committee
Alvin T. Prestwood
P.O. Box 1910
Montgomery, AL 36102
(205) 264-6401

Charles Wagner
Jefferson County Courthouse
716 North 21st Street
Birmingham, AL 35263
(205) 325-5688

George E. Hutchinson
2368 Fairlane Drive, Suite E-37
Montgomery, AL 36116
(205) 270-9606

Administration Law Section members are lawyers interested in administrative proceedings at the federal and state levels. Members include government attorneys, as well as private practitioners. This section presents a program during the annual meeting of the state bar and has been active in the implementation of the Alabama Administrative Procedure Act. The section also sponsors the Eugene W. Carter Medallion, given annually to a former public servant for excellence in balancing the rights of individuals against the interests of government. Annual membership dues are $20.

Bankruptcy and Commercial Law Section

Chairperson
Lee R. Benton
P.O. Drawer 1865
Birmingham, AL 35201
(205) 324-4893

Vice-chairperson
E. Terry Brown
P.O. Box 347
Montgomery, AL 36101
(205) 834-1180

Secretary
Robert B. Rubin
P.O. Box 55727
Birmingham, AL 35255
(205) 933-7111

Treasurer
Romaine S. Scott, III
P.O. Box 306
Birmingham, AL 35201
(205) 251-8100

The primary purpose of the Bankruptcy and Commercial Law Section is to facilitate communication among its members concerning bankruptcy and commercial law matters and legal decisions, with a view toward promoting consistent application of these laws in the various districts and circuits of Alabama. The section has four standing committees: bankruptcy practice; commercial practice; CLE/annual meeting; and communications/newsletters. Additional committees are appointed on an *ad hoc* basis. The section also is involved in promoting legislation needed in the commercial law practice. The annual dues for section members are $15.

Business Torts and Antitrust Section

Chairperson
Andrew P. Campbell
425 1st Alabama Bank Building
Birmingham, AL 35203
(205) 251-5900

Vice-chairperson
Linda A. Friedman
1400 Park Place Tower
Birmingham, AL 35203
(205) 252-4500

Secretary-treasurer
Johnathan H. Waller
800 First Nat'l. Sou. Natural Bldg.
Birmingham, AL 35203
(205) 251-1000

Newsletter editor
Carol H. Stewart
3000 SouthTrust Tower
Birmingham, AL 35203
(205) 251-3000

This section is concerned with business litigation, including antitrust, trade regulation, interference with business relations, defamation of business, stockholder litigation and employment relations. An annual seminar usually is held, and meetings also are held during the annual meeting of the state bar. Section dues are $15.

Criminal Law Section

Chairperson
T. Jeff Deen, III
P.O. Box 2705
Mobile, AL 36652
(205) 433-5860

Immediate past chairperson
V. Al Pennington
P.O. Box 342
Mobile, AL 36601
(205) 432-1661

The Criminal Law Section is comprised of bar members having an interest in matters relating to the criminal justice system of our state and federal courts. No dues are required, and membership is open to all members of the state bar expressing an interest. The area of criminal law is constantly changing and provides many opportunities for active discussion and input. Involvement in this section will provide members with contacts throughout the state.

Environmental Law Section

Chairperson
T. Bruce McGowin

P.O. Box 123
Mobile, AL 36601
(205) 432-5511

Vice-chairperson
J. Ross Forman, III
3000 SouthTrust Tower
Birmingham, AL 35203
(205) 251-3000

Chairperson-elect
R. Craig Kneisel
11 South Union Street
Montgomery, AL 36130
(205) 261-7406

Secretary
Robert R. Reid, Jr.
1400 Park Place Tower
Birmingham, AL 35203
(205) 252-4500

Treasurer
O. James Goodwyn, Jr.
64 North Union Street
Montgomery, AL 36130
(205) 261-3165

Membership chairperson
Ronald W. Farley
1751 Federal Drive
Montgomery, AL 36130
(205) 271-7855

Programs chairperson
Neil C. Johnston
P.O. Box 123
Mobile, AL 36601
(205) 432-5511

Services and activities of the Environmental Law Section are professional improvement in the field of environmental law, analysis and reporting to members of developments in the field and communication with other lawyers practicing in the environmental law area. Annual dues are $15.

Family Law Section

Chairperson
G. Richard Fernambucq
Ste. 302, 2801 University Blvd.
Birmingham, AL 35223
(205) 930-9000

Past chairperson
Joseph C. Sullivan, Jr.
P.O. Box 1743
Mobile, AL 36633
(205) 432-7517

Chairperson-elect
Jerrilee P. Sutherlin
112G South Side Square
Huntsville, AL 35801
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Treasurer
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Montgomery, AL 36103
(205) 263-2333

Secretary-editor
J. Ronald Boyd
Ste. 302, 2801 University Blvd.
Birmingham, AL 35233
(205) 930-9000

The Family Law Section of the Alabama State Bar was established in 1984. It publishes a newsletter for the benefit of family law practitioners. It also has a legislation subcommittee whose function is to consider state and federal legislation in the area of family law and the law of domestic relations and suggest needed reforms. The section has a legal education subsection which presents programs for the members. Annual dues are $15.

Labor Law Section

Chairperson
W. Braxton Schell, Jr.
1400 Park Place Tower
Birmingham, AL 35203
(205) 252-4500

Vice-chairperson
J. Patrick Logan
3000 SouthTrust Tower
Birmingham, AL 35203
(205) 251-3000

Secretary-treasurer
Joe R. Whatley, Jr.
Ste. 201, 409 North 21st Street
Birmingham, AL 35203
(205) 328-9576

Executive committee
J. Richard Carrigan
P.O. Box 306
Birmingham, AL 35201
(205) 251-8100

Paul D. Myrick
P.O. Box 2846
Mobile, AL 36652
(205) 432-3444

Joseph W. Spransy
P.O. Box 10406
Birmingham, AL 35202
(205) 254-7252

John C. Falkenberry
5th Floor, 300 21st Street, North
Birmingham, AL 35203
(205) 322-1100

This section includes lawyers from throughout the state whose practice involves work in the areas of labor law, fair employment law, employee benefits law and occupational safety and health law. In addition to providing a forum for the exchange of information and ideas, the section sponsors an annual, two-day labor law seminar and, with the labor law sections of various other state bars, co-sponsors an annual multi-state labor and employment law seminar. Dues are $25 for lawyers with five or more years of practice and $10 for lawyers with less than five years of practice.

Litigation Section

Chairperson
Carroll H. Sullivan
P.O. Box 1034
Mobile, AL 36633
(205) 433-1346

Vice-chairperson
John P. Scott, Jr.
P.O. Box 306
Birmingham, AL 35201
(205) 251-8100

Secretary-treasurer
Charles M. Crook
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The Litigation Section seeks to (1) provide a forum where all trial attorneys may meet and discuss common problems; (2) provide an extensive educational program to improve the competency of the trial bar; and (3) improve the efficiency, uniformity and economy of litigation and work to curb abuses of the judicial process. Annual dues are $15.

Oil, Gas and Mineral Law Section

Chairperson
John W. Donald, Jr.
P.O. Box 1743
Mobile, AL 36633
(205) 432-7517

Vice-chairperson
Oil & Gas
David E. Hudgens
P.O. Box 290
Mobile, AL 36601
(205) 432-6751

Vice-chairperson
Hard Minerals
Harold D. Rice, Jr.
P.O. Box C-79
Birmingham, AL 35283
(205) 254-7481

Secretary
Stephen W. Still
P.O. Box 2563
Birmingham, AL 35202-2563
(205) 325-7102

Treasurer
Dabney Bragg Foshee
P.O. Box 290
Mobile, AL 36601
(205) 432-6751

The Oil, Gas and Mineral Law Section was established in 1976 and consists of an oil and gas division and a hard minerals division. The primary purpose of the section is to keep its members apprised of developments in the law, and this is accomplished by co-sponsoring with the Alabama Bar Institute for CLE an annual seminar on oil, gas and mineral law, as well as sponsoring a "mini-seminar" at the section meeting during the annual meeting of the state bar. Annual dues are $15.

Real Property, Probate and Trust Law Section

Chairperson
William K. Martin
P.O. Box 2069
Montgomery, AL 36197
(205) 262-1671

Vice-chairperson
Charles R. Smith
P.O. Box 68
Huntsville, AL 35804
(205) 533-9025

Secretary-treasurer
Romaine S. Scott, III
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Birmingham, AL 35201
(205) 251-8100

This section cooperates with and assists the Cumberland Institute for Continuing Legal Education in preparing and presenting programs relating to real property, trust and probate matters and reports other matters of current interest relating to these topics. A yearly seminar is held in conjunction with the annual meeting of the state bar. Dues are $10.

Taxation Section

Chairperson
Bruce P. Ely
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(205) 349-4300

Vice-chairperson
Roy J. Crawford
1900 First Nat'l.-Sou. Natural Bldg.
Birmingham, AL 35203
(205) 252-8800

Secretary-treasurer
Henry Hamilton Hutchinson, III
P.O. Box 2069
Montgomery, AL 36197
(205) 241-8070

Membership in this section is primarily composed of tax practitioners. The section gives special emphasis to Alabama tax matters and has been involved in changing Alabama law and assisting the Department of Revenue in writing tax regulations. A program is held each year during the annual meeting of the state bar. Section dues are $10.

Young Lawyers' Section

President
N. Gunter Guy, Jr.
P.O. Box 307
Montgomery, AL 36104
(205) 264-8118

President-elect
James H. Anderson
P.O. Box 1988
Montgomery, AL 36102
(205) 834-5311

Secretary
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Birmingham, AL 35203
(205) 252-2889

Treasurer
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Montgomery, AL 36104
(205) 269-1515

Past president
Charles R. Mixon, Jr.
P.O. Box 1988
Mobile, AL 36633
(205) 432-7682

The Young Lawyers' Section of the Alabama State Bar is composed of all lawyers who are 36 years of age and under or who have been admitted to the bar for three years or less. The section conducts various seminars throughout the state for lawyers and other professionals. It also sponsors service projects designed to aid the public in their understanding of the law and assists in solving legal problems. There are no dues since persons who are members of the Alabama State Bar and fulfill the age or admission requirements automatically are members. Anyone interested in becoming actively involved in projects of the Young Lawyers' Section should contact N. Gunter Guy, Jr., president 1988-89.

**No officers were elected for the Corporation, Banking and Business Law Section for 1988-89.*

. . . More committees and task forces

In addition to the committees and task forces appearing in the last edition of *The Alabama Lawyer*, President Huckaby appointed bar members to serve on the following committees and task forces for 1988-89:

Federal Tax Clinic

L. Lister Hill, Montgomery
Robert C. Tanner, Tuscaloosa
Jackson P. Burwell, Huntsville
L.B. Feld, Birmingham
Zebulon M.P. Inge, Mobile
William E. Shanks, Jr., Birmingham
Gerald W. Hartley, Montgomery
Richard J. Brockman, Birmingham
Scott E. Ludwig, Huntsville
Keith B. Norman, staff liaison, Montgomery

Task Force on the Annual Meeting

Robert Sellers Smith, chairperson, Huntsville
Douglas C. Martinson, Huntsville
William K. Bell, Huntsville
Paul A. Pate, Huntsville
Reginald T. Hamner, staff liaison, Montgomery

Task Force on Implications of Compulsory Bar Membership

Ben H. Harris, Jr., chairperson, Mobile
William D. Scruggs, Jr., Fort Payne
M. Roland Nachman, Jr., Montgomery
Reginald T. Hamner, staff liaison, Montgomery ■

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 ninth 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.

Operating systems

Unix? Xenix? DOS? Network DOS? MacIntosh? OS2? What can (should) a mere mortal do faced with competing claims of the relative efficacy of various operating systems? Are they truly different? Will one become "the standard" and relegate the rest to the status of "obsolete?" Does it matter?

What are operating systems?

Good question. There currently are four major operating systems competing for the title of "industry standard"—UNIX, DOS, OS2 and MacIntosh.

An operating system is a computer's traffic cop, controlling such functions as screen input, data format storage, printer (and I/O tasks), graphics support, etc. They are distinct from application software, the programs that involve the manipulation of data into files and reports. Operating systems are supposed to be "hardware independent." They are not (exactly). They are supposed to be "software independent." They are not (exactly). Taking a look at them in no particular order:

UNIX—is an operating system developed by Bell Laboratories and licensed to many other vendors under a variety of names, be it XENIX, CTIX, as along as it ends in "IX." It is the system generally regarded as the premier one for scientific and technical applications. The "knock" on UNIX-type operating systems is that they are relatively difficult to utilize (true). This is not a particularly significant consideration for engineers and scientists, but it is for mere mortals. Interestingly, two of the big-time legal industry players, Lanier and Informatics, recently have made strategic decisions to shift from UNIX to DOS. The shift does not signal abandonment of UNIX-based applications, but it does begin to toll the beginning of the end for them.

Bornstein

MacIntosh—based systems never have been a significant factor in the legal market, primarily because of the paucity of application programs that meet the particular needs of the legal profession. It is a viable (though long-shot) contender for the title of "industry standard," but not one about which the legal community should be overly concerned.

OS2—is IBM's desperate gamble to churn the PC market and try to induce users to junk whatever they have in favor of the new PS2 family of products. First, OS2 is not yet available, and may not be until next year. Second, trade sources report that OS2 currently requires 4.5 megabytes of main memory to execute. Third, not all models of the PS2 family can support OS2. There was a time when IBM could sell anything they made, simply on the strength of their reputation. That time ended with PC jr.

DOS—for all its shortcomings, this probably is going to remain as close to an industry standard as there is for the next several years. More importantly, it is the operating system for which the application vendors have written the preponderance of their user programs.

True, not all legal software is PC-based. All the major vendors have mini-computer-based systems specifically designed for "big" law firms. All these mini-based systems run under proprietary vendor-specific operating systems (Wang VS, IBM OS/VS, Barrister BOS, etc). Equally true, the so-called "super-micros" rapidly are approaching the capability of mini-computers. In this environment DOS is the dominant operating system and is likely to remain the dominant operating system for the next five years.

Summary

If you are considering a significant decision on a new computer system, whether primarily data or text, play it safe and stick with a proven foundation, an application package that is DOS compatible. Not only will you be "in the mainstream," you will be positioned to take advantage of the bountiful array of applicable, legal-specific software. ■

Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

Other acts of misconduct—*prima facie* inadmissible

Hill v. State, 7 Div. 844 (June 28, 1988)—Defendant was convicted of sexual abuse in the second degree. His conviction was predicated upon evidence that the defendant had come home drunk and combative and physically abused several of his children. His 12-year-old daughter testified that he pinched her on her breast and in the pubic area.

At trial, the State offered certain evidence for "impeachment" purposes. Among other instances, the State showed that the defendant's 11-year-old son earlier had given a statement to an investigator wherein he stated that when he was five or six years old, he was in the woods with his father, and his father tried to make him pull off his clothes, and "then he tried to stick his pecker up my tail."

Judge Taylor, writing for a unanimous court of criminal appeals, reversed and remanded.

The Supreme Court of Alabama recently has provided considerable guidance in the area of what prior bad acts may be proved against an accused person in order to prove the charge in the instant case. In *Anonymous v. State*, 507 So.2d 972 (Ala. 1987), the supreme court stated:

> "The general evidentiary principle, long adhered to in Alabama, which must be applied in this case may be stated as follows: In a prosecution for one offense, evidence of collateral crimes or acts is generally inadmissible to prove the guilt of the accused. *See Ex parte Cofer*, 440 So.2d 1121 (Ala. 1983); *Ex parte Killough*, 438 So.2d 333 (Ala. 1983) . . . In fact, it has been stated that such evidence is *prima facie* inadmissible.
>
> "As was explained in *Cofer*:
>
> 'This is a general exclusionary rule which prevents the introduction of [collateral] criminal acts for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question. This rule is generally applicable whether the other crime was committed before or after the one for which the defendant is presently being tried.'
>
> 'This exclusionary rule is simply an application of the character rule which forbids the state to prove the accused's bad character by particular deeds. The basis for the rule lies in the belief that the prejudicial effect of [collateral] crimes will far outweigh any probative value that might be gained from them. Most agree that such evidence of [collateral] crimes has almost an irreversible impact upon the minds of the jurors.'

Accordingly, the evidence of homosexual tendencies of the defendant, five or six years before the incident, is not evidence of a plan, scheme, intent or design to commit sexual abuse in the second degree upon his daughter. It amounts simply to an attempt to prove guilt on the basis of a prior bad act.

Juror misconduct—failure to respond to *voir dire*

Johnson v. State, 2 Div. 511 (September 20, 1988)—Johnson was indicted for murder following the strangulation death of his wife. Johnson asserted that the trial judge erred in denying his motion for a new trial based upon a juror's failure to respond to a question during *voir dire*.

Defense counsel explained at the outset of his *voir dire* that his question applied to family members. Johnson's lawyer asked the venire the following question: "Is there any member of the panel who is a police officer or a former police officer? That question would apply to

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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.

your wife or husband. Any kind of law enforcement: highway patrol, deputy sheriff, city police?"

At the hearing on the motion for new trial, a juror testified that his sister-in-law was a Pickens County Deputy Sheriff and was so employed when the defendant's trial took place. The juror further observed that his sister-in-law sat in the courtroom during the entire trial. Judge Tyson, in a carefully-worded opinion, reversed Johnson's conviction.

At the outset, the court of appeals critically noted that "not every failure of a venireman to respond correctly to a *voir dire* question will entitle the losing party to a new trial." Citing *Freeman v. Hall*, 286 Ala. 161, 238 So.2d 330 (1970). In *Johnson*, the juror was the brother-in-law of the Deputy Sheriff of Pickens County. The juror's failure to disclose this relationship was highly material in light of the defendant's defense that the Pickens County Sheriff's Department, from the beginning, centered its entire investigation on the defendant and did not investigate any other suspects. Judge Tyson also noted that the fact that the juror testified at the hearing on motion for new trial that his relationship to the deputy sheriff did not affect his ability to judge the defendant fairly would not overcome the apparent prejudice to the accused.

Juror experiment—ex *parte* Lasley reaffirmed

Reed v. State, 1 Div. 636 (August 23, 1988)—Defendant was convicted for the sale of cocaine. On appeal, defendant argued that his motion for new trial should have been granted because a juror conducted a home experiment. A unanimous court of criminal appeals agreed and reversed.

At trial a police corroborated a witness' identification of the defendant and testified that he observed the transaction, which occurred at night, through the tinted windows of a van. After the jury had begun its deliberations, it was recessed for the night. During the recess, one of the jurors returned home and "looked out [her] van to see if you could see out windows that were tinted at night because [t]here was a question in [her] mind as to whether the officer could see out the window of the van, a tinted van at night." She stated that before she looked through the windows she was having "some problems" with the police officer's testimony.

The juror further explained that she told the other members of the jury about her experiment only after the verdict had been returned. She stated, "The other man asked me why had I changed my verdict and I told him. I felt the man was guilty to start with."

Presiding Judge Bowen, in reversing, relied upon the legal principle set forth in *Ex parte Lasley*, 505 F.2d 1263, 1264 (Ala. 1987). In *Lasley, supra*, the Alabama Supreme Court critically focused the issue as follows:

> "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 determining 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."

In this case, the juror testified that even though she felt the defendant was guilty "to start with," she changed her "verdict" after conducting the home experiment.

Sentencing error jurisdictional and not subject to waiver

Blair v. State, 7 Div. 901 (June 28, 1988)—Defendant was convicted for the sale of cocaine and sentenced to life imprisonment under the provision of the Habitual Felony Offender Act. During the sentencing phase of defendant's trial, his counsel did not object to the defendant's being sentenced under the Habitual Felony Offender Act. Counsel did make objections as to the remoteness of some of the prior convictions and to some of the information contained in the pre-sentence report. However, counsel did not object, based upon the Alabama Supreme Court's ruling of *Ex parte Chambers*, wherein Judge Beatty stated that only the Alabama Uniform Control Substances Act, §20-2-1 *et seq.*, controls enhancement of sentence in drug cases.

Judge Taylor noted that the precise issue raised in *Chambers* was not preserved for appellate review. However, a unanimous court of criminal appeals held that they considered the sentencing error jurisdictional and, therefore, not subject to the waiver doctrine under *Ex parte Biddie*, _____So.2d_____(Ala. 1987).

Accomplice testimony compounded not enough to establish corroboration as a matter of law

Hasberry v. State, 2 Div. 620 (June 28, 1988)—Defendant was convicted of receiving stolen property in the second degree and second degree arson. Defendant contended on appeal that he was convicted solely on the testimony of two accomplices. One of the accomplices, Scott, first stated to the police that he set the house on fire, and then he said he did it at the direction of defendant. Later Scott stated that he started the fire to protect the defendant. The second accomplice, Oden, who pled guilty to the offenses of burglary and arson of the house in question, testified that he discussed burning down the house, but that finally the defendant did it. The testimony of defendant's use of an accelerant to start the fire was contradicted by fire investigators who found no evidence of gasoline or other accelerant at the fire scene.

A unanimous court of criminal appeals reversed and rendered defendant's arson conviction with the observation that defendant was convicted solely on uncorroborated accomplice testimony.

Section 12-21-222, *Code of Alabama* (1975), provides in pertinent part as follows:

> "A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

In this case, the law's requirement of corroboration was not met by the compounding of accomplice testimony.

Prosecutorial misconduct—cross-examination of uncharged acts of misconduct without factual basis

Daniel v. State, 5 Div. 339 (June 28, 1988)—Defendant was convicted of two counts of sexual abuse. The single issue in his appeal related to prosecutorial misconduct occurring during the cross-examination of the accused.

On cross-examination, the defendant was asked the following question:

> Q: Isn't it a fact—let me ask you this first of all: isn't it a fact that you got Willie Frank Parker to offer Helen March two thousand dollars to drop these charges?
> A: No, I didn't.
> Q: That's not true?
> A: It's not true.

Trial defense counsel immediately moved for mistrial.

The court of criminal appeals reversed and remanded and stated that the alleged prosecutorial misconduct consisted of making prejudicial allegations without being able to prove them by lawful evidence. The "lawful evidence" standard applies in Alabama, and the good faith of prosecutor or lack thereof is not the test.

Judge Taylor, writing for a unanimous court, reasoned that this case was governed by the principles set forth in *Wysinger v. State*, 448 So.2d 435 (Ala.Crim. App. 1983). In *Wysinger, supra*, the court held that for the State's attorney to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by the evidence is unprofessional conduct. *See also Bezotte v. State*, 358 So.2d 521, 525 (Ala.Crim.App. 1978).

Constructive possession drug case—awareness of narcotic nature of substance

Perry v. State, 7 Div. 991 (June 28, 1988)—In *Perry*, the Alabama Court of Criminal Appeals reversed and rendered Perry's conviction for possession of Talwin. On appeal, the only evidence before the court established the defendant's presence in the car and the visibility of the pills. Nothing was presented by the State establishing any statements or conduct by the accused or any other evidence indicating that the defendant knew of the narcotic nature of the pills.

Judge Patterson, writing for a unanimous court, reasoned as follows:

> "To establish constructive possession, the state must prove beyond a reasonable doubt that the accused had knowledge of the presence of the illegal substance. *Yarbrough v. State*, 405 So.2d 721 (Ala.Crim.App.), *cert. denied*, 405 So.2d 725 (Ala. 1981). An essential element of the defendant's knowledge of the presence of the illegal substance is his awareness of the narcotic nature of the substance which may be shown by direct or circumstantial evidence."

The court observed that there was no evidence to connect the defendant with the pills, other than his presence in the automobile. Close proximity to an illegal substance is not enough alone to establish constructive possession.

Entitlement to lesser-included offense charge

Allen v. State, 4 Div. 699 (September 20, 1988)—Defendant was convicted of murder and sentenced to a term of 40 years' imprisonment.

Judge McMillan, writing for a unanimous court, reversed and remanded because the record of the case contained evidence which, if believed by a jury, could reasonably support a conviction of manslaughter. In this case, a charge on the lesser included offense, which was refused by the trial judge, should have been given.

Judge McMillan succinctly set forth the legal principle as follows:

> "An accused is entitled to have the court charge on lesser included offenses where there is a reasonable theory from the evidence to support his position, 'regardless of whether the State or the defendant offers the evidence.' *Pruitt v. State*, 457 So.2d 454, 457 (Ala.Crim.App. 1984)."

Indeed, "every accused is entitled to have charges given which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however weak, or doubtful in credibility." *Ex Parte Stork*, 475 So.2d 623 (Ala. 1985).

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . section 6-3-21.1 applied, *"forum non-conveniens"*

Ex Parte: Smith (In Re: Smith v. K.J. & R., Inc.), 22 ABR 3011 (July 29, 1988). Smith petitioned the supreme court for a writ of mandamus directing the Madison County Circuit Court to vacate an order transferring a case from Madison County to Lauderdale County. The supreme court denied the writ based upon Section 6-3-21.1, *Code of Alabama*.

Smith filed suit alleging *inter alia* a count for work and labor. He alleged that a substantial portion of the work was performed in Madison County and he could elect to bring suit in Madison County under Section 6-3-3, *Code of Alabama*, which provides that "in all actions for work and labor done . . . the action may be commenced in the county in which the work was done . . . ." The defendant corporation filed a motion to transfer the case to Lauderdale County based on the convenience of the parties. The defendant did business in Lauderdale County, but did not do business in Madison County. The contract which was the subject of the suit concerned employment in Lauderdale County. Affirming the trial court, the supreme court noted that on July 11, 1987, Section 6-3-21.1, *Code of Alabama*, became effective and provides that a court "for the convenience of the parties and witnesses, or in the interest of justice" shall transfer any civil action to any court in which the action might have been properly filed in the first place. The court stated that the trial court did not abuse its discretion by transferring this case, and, therefore, the writ would not issue.

Estates . . . co-executors and co-administrators must sue and be sued jointly

Stone, as Co-executrix v. Jones and AmSouth Bank, N.A., as Co-executors, 22 ABR 3122 (August 5, 1988). Co-executrix Stone filed a claim on behalf of her mother's estate against the co-executors of another estate. The other co-executor of the mother's estate refused to join in the claim. The defendants filed a motion for summary judgment alleging that Stone was without authority to file the claim because the other co-executrix refused to join in or concur in the filing of the claim. The trial court granted the motion for summary judgment.

In a case of initial impression in Alabama, the supreme court stated that the co-executors must jointly file the claim. The court noted that it is generally recognized one co-executor may act alone *only* in matters which are of a ministerial nature. Acts which call for exercise of

judgment and discretion require unanimous action. Consequently, the supreme court held that in cases involving the use of discretion in decision-making not within the regular course of administering the estate, co-executors must act unanimously in reaching those decisions. The filing of a lawsuit is discretionary, not ministerial, in nature. If a co-executor refuses to voluntarily join in the filing of a suit, the co-executor might petition the court either to compel the joinder of the co-executor pursuant to Rule 19, Ala.R. Civ.P., or to dismiss the co-executor from his or her duties through a judgment of severance, thereby allowing the lone co-executor to proceed.

Evidence . . .

tax records of non-party expert enjoy qualified privilege from discovery

Ex Parte: Morris (In Re: Morris v. Craddock, et al.), 22 ABR 2898 (July 22, 1988). Morris filed a medical malpractice action against respondents. Respondents through discovery sought federal and state income tax records from the plaintiff's expert witnesses. The trial court ordered the production of the tax records, and petitioner field this writ of mandamus asking the supreme court to vacate the trial court's order. The court granted the writ and vacated the order compelling plaintiff's expert to produce their financial records and income tax returns.

The supreme court stated that the question of whether an expert witness's income tax records are "privileged" is a question of first impression in Alabama and looked to the federal courts for guidance. The court first noted that the United States Supreme Court has held that tax records are not absolutely privileged. Nevertheless, the federal courts have recognized the sensitive nature of tax records and not ordered production unless clearly required in the interest of justice. The Alabama Supreme Court weighed the liberal policy of the discovery rules against the emerging qualified privilege disfavoring disclosure of one's income tax records. The incremental value that such information would provide respondent for purpose of showing bias is substantially outweighed by the prejudice that would be imposed on a person not a party to the proceedings.

Insurance . . .

"backpay" awarded in Title VII covered in policy affording coverage for discrimination

National Union Fire Ins. Co. v. City of Leeds, 22 ABR 2920 (July 22, 1988). Leeds was sued under Title VII of the civil rights act by a former city employee. He claimed he had been wrongfully discharged from his job and sought reinstatement and backpay. The trial court ruled in his favor, and the City sought payment from National Union. National Union denied the claim and brought this suit seeking a declaration of its rights under its policy. National Union's policy required it to pay damages as a result of discrimination and defined "damages" to mean monetary damages, but not to include "equitable relief." National Union contended that federal courts have held that "backpay" is equitable relief and, therefore, excluded. The trial court disagreed, and the supreme court affirmed.

In a case of first impression in Alabama, the supreme court noted that the policy provisions must be construed in the light of interpretation that ordinary men would place on the language used therein. The definition of damages includes monetary damages and, therefore, was broad enough to cover the monetary award of backpay, even though the award could be classified as equitable relief. To allow the insurance carrier to escape liability on a technical legal definition would be contrary to what the parties reasonably expected.

Property . . .

statute of limitations for libel and slander applicable to slander of title

Hosey v. Central Bank of Birmingham, Inc., 22 ABR 2554 (July 7, 1988). Central Bank obtained a judgment against Hosey's son and attempted to collect that judgment by selling property that was believed to have belonged to the son. Central Bank purchased the property, and sheriff's deed was executed and filed May 14, 1982. The Hoseys subsequently learned this fact and informed Central Bank of the mistake. In January 1986, the Hoseys filed suit for slander of title. The bank pled the statute of limitations as a defense claiming that the statute for libel and slander was applicable to an action for slander of title. The trial court granted the bank's motion for summary judgment, and the supreme court affirmed.

The supreme court held that the statute of limitations for libel and slander is applicable to actions for slander of title. The court noted that the weight of authority from other jurisdictions holds that in the absence of a statute expressly made applicable to such actions, the statute of limitations for libel and slander is applicable. The supreme court also held that the cause of action accrued, and the statute began to run May 14, 1982, the date the sheriff's deed was recorded. At that point, there was a cloud on the Hoseys' title even though the full measure of damages was unknown.

Worker's compensation . . .

lump sum attorney's fee must be based on compensation award reduced to present value

Ex Parte: St. Regis Corporation (In Re: St. Regis Corp. v. Parnell), 22 ABR 2822 (July 15, 1988). Parnell was injured on the job and filed a worker's compensation action. He received temporary total and permanent total benefits prior to trial. After trial, the trial court found Parnell to be permanently totally disabled and awarded him future benefits at a certain rate for the rest of his life. The court found that his life expectancy was 40.64 years. Parnell's lawyer filed a motion for a lump sum award of his attorney's fee, and the court, acting within its discretion, awarded the lump sum attorney's fee pursuant to Section 25-5-90, *Code of Alabama*, in the amount of $62,957.60. The court of civil appeals affirmed the trial court, and the supreme court granted certiorari and reversed the court of civil appeals to the extent that it did not reduce the lump sum award of attorney's fees to its present value.

The supreme court noted that the trial court may commute accrued compensation benefits to a lump sum payment using an annual discount rate of 6 percent, Section 25-5-83, *Code of Alabama*. The court reasoned that the provisions of Section 25-5-83, *supra*, also are available to the attorney's part of the award. Consequently, for purposes of figuring the lump sum attorney's fee, the trial court should reduce the compensation award to its present value, and the attorney is entitled to a maximum of 15 percent of that figure as his or her fee. ■

Legislative Wrap-up

by Robert L. McCurley, Jr.

First Special Session 1988

Unable to pass appropriation bills to fund education and state government during the 1988 regular session, the Legislature was called into a special session. This session, although dominated with efforts to raise revenue and pass budgets, also included a new campaign disclosure law and the passage of four Law Institute drafted bills.

Powers contained in mortgages

Currently, Alabama authorizes the inclusion of a power of sale agreement in mortgages (§35-10-1). The statute further provides for a foreclosure with notice by publication when there is no power of sale contained in mortgage or deed. (§35-10-2 and 3). Some "experts" felt that the inclusion of statutory language allowing for the foreclosure by publication that was not contracted for by the parties might be deemed "state action." Therefore, to protect the constitutionality of article 1 of chapter 10 of title 35, the article was revised.

The Institute took the position that it would be best to continue the current law as is for the mortgage currently in existence. New mortgages after January 1, 1989, would be governed by the new power of sale laws, which would be added as article 1(A) of chapter 10, title 35, *Code of Alabama*.

Essentially, the new law merely restates the current law regarding those mortgages that include a power-of-sale provision. However, the new law does not carry forward the provisions of the old law that allowed for a foreclosure with notice by publication in mortgages without power-of-sale provisions. The effect of this will be to require creditors and mortgagees who did not include a power-of-sale provision in their mortgage or deeds to use a judicial foreclosure. This bill (House Bill 9) was sponsored by Representative Jim Campbell and Senator Rick Manley. Chairperson of the Drafting Committee was Hugh Lloyd of Demopolis, and Professor Harry Cohen of the University of Alabama School of Law was the reporter.

Trade names

In 1977, Alabama enacted a trademark registration statute. This act amends this law to add trade names. Under both Alabama and federal law, trademarks and service marks are registrable. Such marks, however, must be the names of products or services. Names under which persons or companies are known and do business are not registrable. (If the same name identifies both a product and a business it may be registered as a trademark, but not as a trade name). Thus, there is no effective means for a business to put others on notice of its claims to its business name. Twenty-four states, including Georgia, Louisiana and South Carolina, recently provide for trade names.

Existing trade names are unaffected. The act, however, revises the classifications which is in keeping with recent revisions in the federal and international trademark classifications systems. Therefore, trademark renewals, which are required every ten years, must be classified under this act.

This is a registration statute only, and the common law of first use still prevails for use. The act is effective January 1, 1989.

This bill was sponsored by Senator Earl Hilliard and Representative Beth Marietta. Chairperson of the drafting committee was Vastine Stabler of Birmingham with Professor Harold See of the University of Alabama School of Law as the reporter.

Guardianship and conservatorship amendments

This bill makes clarifying amendments to the "Uniform Guardianship and Protective Proceedings" bill passed last year. These amendments were required by the Department

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.

Memorials

William Headley Card, Jr.—Mobile
Admitted: 1960
Died: August 1, 1988

Wyman Oscar Gilmore—Grove Hill
Admitted: 1951
Died: October 3, 1988

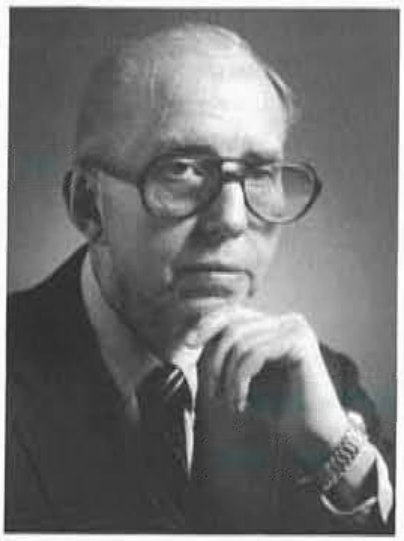
Alexander Williamson Jones—Birmingham
Admitted: 1938
Died: October 10, 1988

John Edgar Lunsford—Birmingham
Admitted: 1933
Died: September 8, 1988

Dabney Ramseur, Jr.—Panama City, Florida
Admitted: 1965
Died: August 19, 1988

Merrill Crawford Wall—Wetumpka
Admitted: 1937
Died: September 30, 1988

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.*



WILLIAM H. CARD, JR.

WHEREAS, William H. Card, Jr., son of William Headley Card and Mabel Jefferies Card, was born in Tuscaloosa, Alabama, October 4, 1932, moved to Mobile at a tender age and lived his life in service to his adopted community and to his profession.

WHEREAS, the Mobile Bar Association desires to remember his name and recognize his contributions to our profession and to this community;

NOW, THEREFORE, BE IT KNOWN, that William H. Card, Jr., departed this life August 1, 1988. During his high school years Card attended U.M.S., Citronelle High School and Anchorage Private School in Anchorage, Kentucky. He earned an A.B. in history and economics from the University of Alabama in 1954. He also attended the University of Alabama School of Law from 1957 until 1958. He received an LLB degree from Jones Law School in Montgomery, Alabama, in 1960, where he was employed as a law clerk to the now-deceased Honorable David F. Stakely, associate justice of the supreme court. He became licensed to practice law in the State of Alabama that same year, and was associated with Alex Foreman and Alton Brown, practicing under the firm name of Foreman and Brown from 1960 through 1962. He was also partners with Keener T. Blackmarr from 1962 through 1964, and with John Tyson from 1964 through 1966. Card served as special assistant to the Attorney General of the State of Alabama and on the Governor's staff from 1964 until 1972. He was a sole practitioner from 1966 until his death.

Card served three years in the United States Naval Reserve, one year in the Alabama Army National Guard, four years in the Reserve Officers Training Corps, two years in the United States Army as a lieutenant, five years in the Alabama National Guard and United States Army Reserve as a captain and four years in the United States Air Force Reserve as captain.

He was a member of St. Paul's Episcopal Church located on Old Shell Road, and a member of the Full Gospel Businessmen's Association. Card also was a member of many local and professional organizations including, but not limited to, the Mobile Area Chamber of Commerce, American Bar Association, Alabama Alumni Association, Alabama State Bar, Trial Lawyers Association, Navy League of the United States, Mobile County Navy League and National Federation of Independent Businessmen.

Card was a member of the We Care Board of Directors and devoted a considerable amount of time to charitable work with relations organizations and other deserving organizations, including charitable legal work for Life Church, We Care, Winds of Life and the Girl Scouts. He also belonged to the legal assistance program sponsored by Legal Services.

He was an able lawyer possessed of a quiet dignity, sincerity and integrity which were outstanding. He pursued his client's objectives, yet always stayed within the bounds of ethical considerations. He was a gentlemen and a compassionate individual who will be greatly missed by his family and by his many friends, to all of whom we extend our sincere and deepest sympathy.

THEREFORE, we, the members of the Mobile Bar Association, do hereby honor

Please Help Us . . .

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

the memory of our friend and fellow member, and request that this resolution be spread upon the minutes of this association and of the Alabama State Bar and that a copy be presented to the family of William H. Card, Jr.

—Samuel L. Stockman
President, Mobile Bar Association

DONALD WILLIAM DAVIS

On May 17, following a successful outcome in a labor case in Decatur, Alabama, Don Davis was on the way to lunch with his client when he suffered a severe heart attack. He was flown to the University of Alabama-Birmingham Hospital, where he underwent bypass surgery and valiantly fought back on a respirator until he died July 25, 1988.

Don's grandfather, William C. Davis, practiced law with Senator Bankhead in Jasper, and his great-uncle, Edward Livingston, was chief justice of the Alabama Supreme Court for many years.

Don graduated from Ramsay High School in Birmingham and then from the University of Virginia with an undergraduate and law degree. He received his ROTC commission immediately after law school and was an armor captain in Vietnam. His administrative assignment was not to his liking, so he volunteered for attachment to the 5th ARVN Ranger Batallion. He served with distinction in the field until 1969, when he returned to be Judge Frank McFadden's first law clerk. Don worked with the National Labor Relations Board in Atlanta and Birmingham from 1970 to 1977, and then entered private practice in Birmingham as a labor lawyer.

Don Davis believed in a "level playing field," and went about preparing and trying his cases with a quiet competence and toughness. Lawyers of the Birmingham Bar remember him with admiration and deep respect. It is especially tragic when a member of the bar, a family man with deep local roots, passes away in the flower of his practice of natural causes that usually strike us in later years. Richard Ogle, Alva Caine, Bill Smith, Bob Moorer, Butch Powell, Peyton Lacy and so many others who knew Don as both a fellow professional and sometime-adversary recognized his passionate belief in fair play within the adversary system and his firm belief in the excellence of the Birmingham bench and bar.

Lawyers and friends of his generation were particularly stunned at his passing. Everyone who knew him will miss him deeply. He was an ideal of integrity with a fine moral compass who practiced by traditional standards. For those who did not know him, please trust that the Alabama State Bar suffered a true loss at his death.

—Douglass Culp
Birmingham, Alabama

—NOTICE—

Client Security Fund

The Client Security Fund of the Alabama State Bar is now funded and operational. A committee has been appointed to process and determine the eligibility and validity of any claim filed. The state bar headquarters, as well as local bar associations, have brochures explaining the fund, the rules of the fund and claim forms.

If you want any information about the fund or how it operates, contact either the state bar headquarters at (205) 269-1515 or your local bar association.

REMINDER

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT IN THE
SUPREME COURT OF ALABAMA
OCTOBER 1, 1984

The Honorable William H. Morrow, General Counsel for the Alabama State Bar, has presented to the Supreme Court a request for an interpretation of Disciplinary Rule 2-11 (A)(2) of the Code of Professional Responsibility of the Alabama State Bar as to whether on termination of an attorney-client relationship, a court-appointed attorney should upon request by an indigent criminal defendant, return to that defendant the copy of the transcript furnished at the expense of the State pursuant to Section 12-22-197, Code 1975.

IT IS CONSIDERED AND DETERMINED by the Court that it is appropriate for an attorney in this situation to return the transcript to the defendant.

Torbert, C.J., Maddox, Faulkner, Jones, Shores, and Adams, JJ., concur. Almon, Embry, and Beatty, JJ., not sitting.

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Disciplinary Report

Suspension

● Birmingham lawyer **Mark A. Duncan** was suspended from the practice of law for a period of 60 days, effective October 4, 1988, by order of the Supreme Court of Alabama. By failing to file any answer to formal disciplinary charges that were pending against him, Duncan admitted that he had collected some $468.75 on behalf of a client, but failed to deliver the funds to the client. [ASB No. 87-514]

Public Censures

● On July 20, 1988, former Birmingham lawyer **Herbert P. Massie** was publicly censured for having engaged in unethical conduct, in violation of *the Code of Professional Responsibility.* Massie accepted an attorney's fee and a filing fee to initiate a bankruptcy proceeding on behalf of certain clients, but failed to file the bankruptcy petition on the clients' behalf and failed to communicate with the clients about the matter. [ASB No. 87-178]

● On July 20, 1988, former Bessemer and Oneonta lawyer **Judy D. Thomas** was publicly censured for having engaged in conduct that adversely reflects on her fitness to practice law, in violation of the *Code of Professional Responsibility.* Thomas accepted a retainer to seek to obtain legal relief in federal court on behalf of a convict, but failed to pursue the matter for the client. [ASB No. 87-235]

Private Reprimands

● On July 20, 1988, a lawyer was privately reprimanded for violation of Disciplinary Rules 7-101(A)(2) and 7-101(A)(3). It was determined that the lawyer in question had undertaken representation of a client in a worker's compensation case and failed to file notice of appeal in the case even though aware of the time for filing the same, and to the prejudice of the client. The Disciplinary Commission determined that the attorney should receive a private reprimand for these violations of the *Code.* [ASB No. 87-743]

● On July 20, 1988, a lawyer was privately reprimanded for engaging in conduct involving dishonesty, fraud, deceit, misrepresentation, willful misconduct and other conduct that adversely reflects on his fitness to practice law. The lawyer was further reprimanded for failing to deposit funds of a client in an insured depository trust account, for misappropriating the funds of his client and for failing to disburse a client's funds. The lawyer told his client that cases pending against the client had been settled for $800, plus a $200 attorney's fee. The client paid the $1,000 to the lawyer. The lawyer then placed $400 of these funds in his personal checking account and failed to adequately represent his client as agreed, resulting in default judgments being entered against the client. [ASB No. 87-136]

● On July 20, 1988, a lawyer was privately reprimanded for failing to carry out a contract of employment entered into with a client for professional services, for willfully neglecting a legal matter entrusted to him and for failing to promptly refund a fee paid in advance that had not been earned. The lawyer accepted a $1,400 retainer fee to handle a criminal matter for a client. The attorney failed to perform the services as promised and failed to refund the $1,400 retainer fee. [ASB No. 87-457]

● On July 20, 1988, a lawyer was privately reprimanded for willful neglect and for intentional failure to seek the lawful objectives of a client, for having failed to file a timely brief or any other pleading in a criminal appeal in which he was the attorney of record. The lawyer also ignored his local grievance committee's request that he provide an explanation for his failure to file a brief on behalf of his client. [ASB No. 88-134]

LEGISLATIVE SUMMARY —AVAILABLE—

At the end of the Legislative session, regular or special, the Legislative Reference Service compiles a summary of the general laws enacted and Constitutional amendments proposed.

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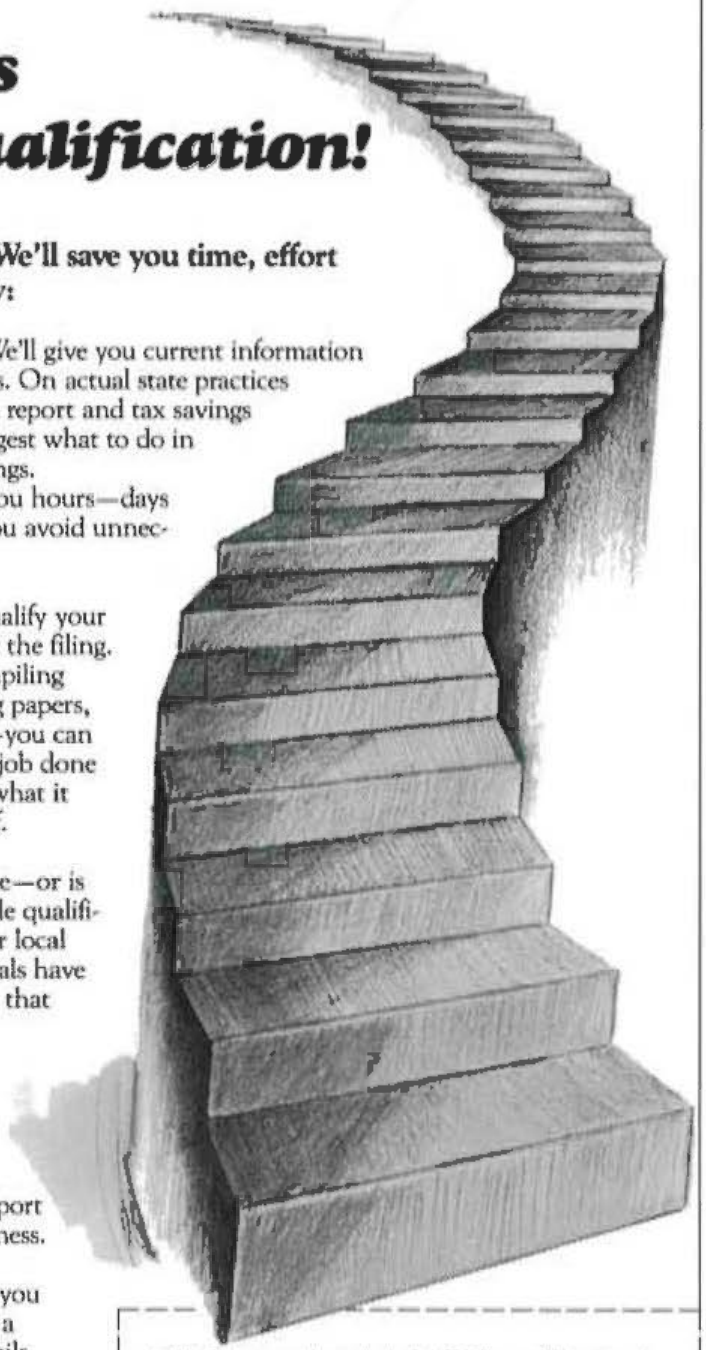

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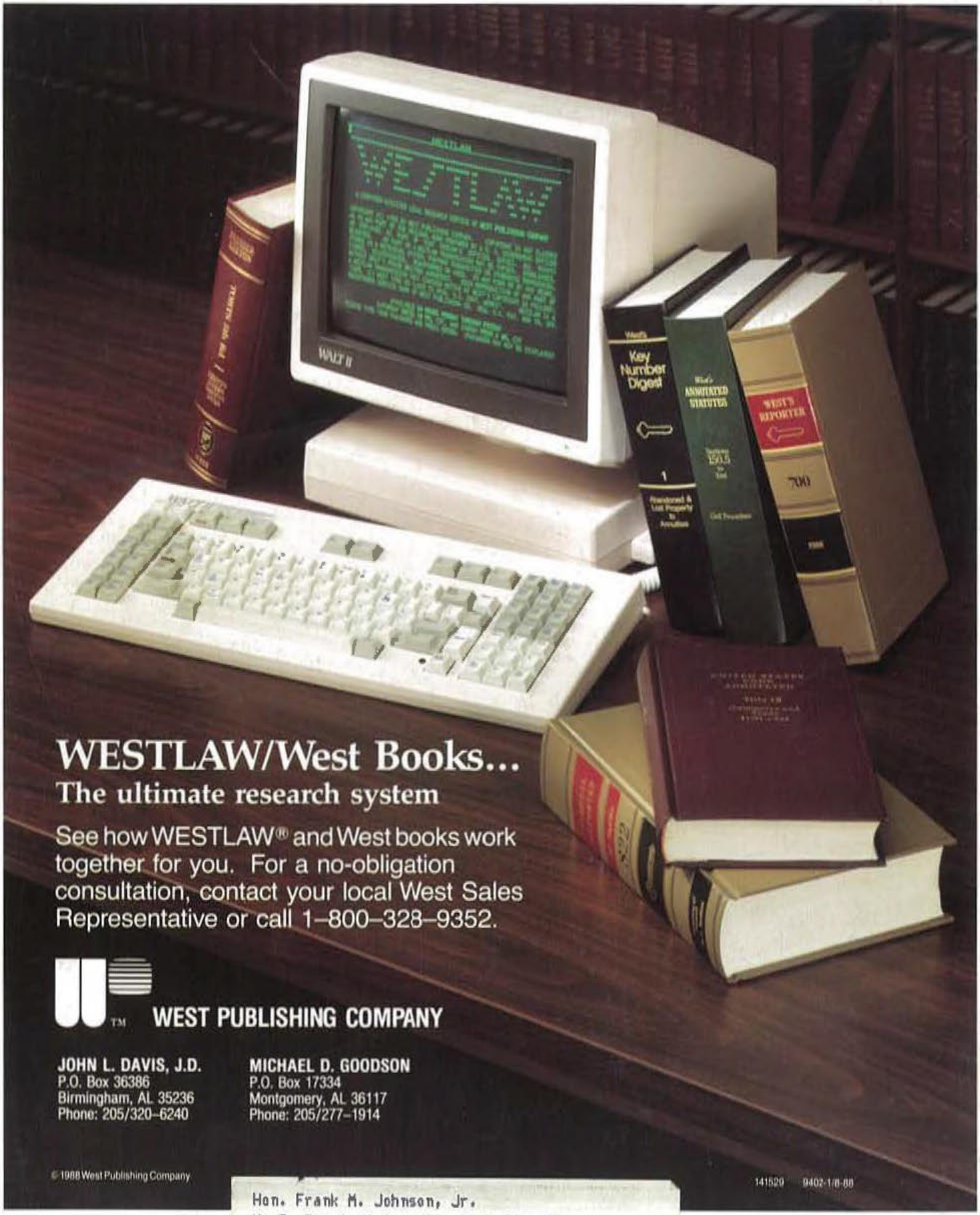

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