The Alabama Lawyer

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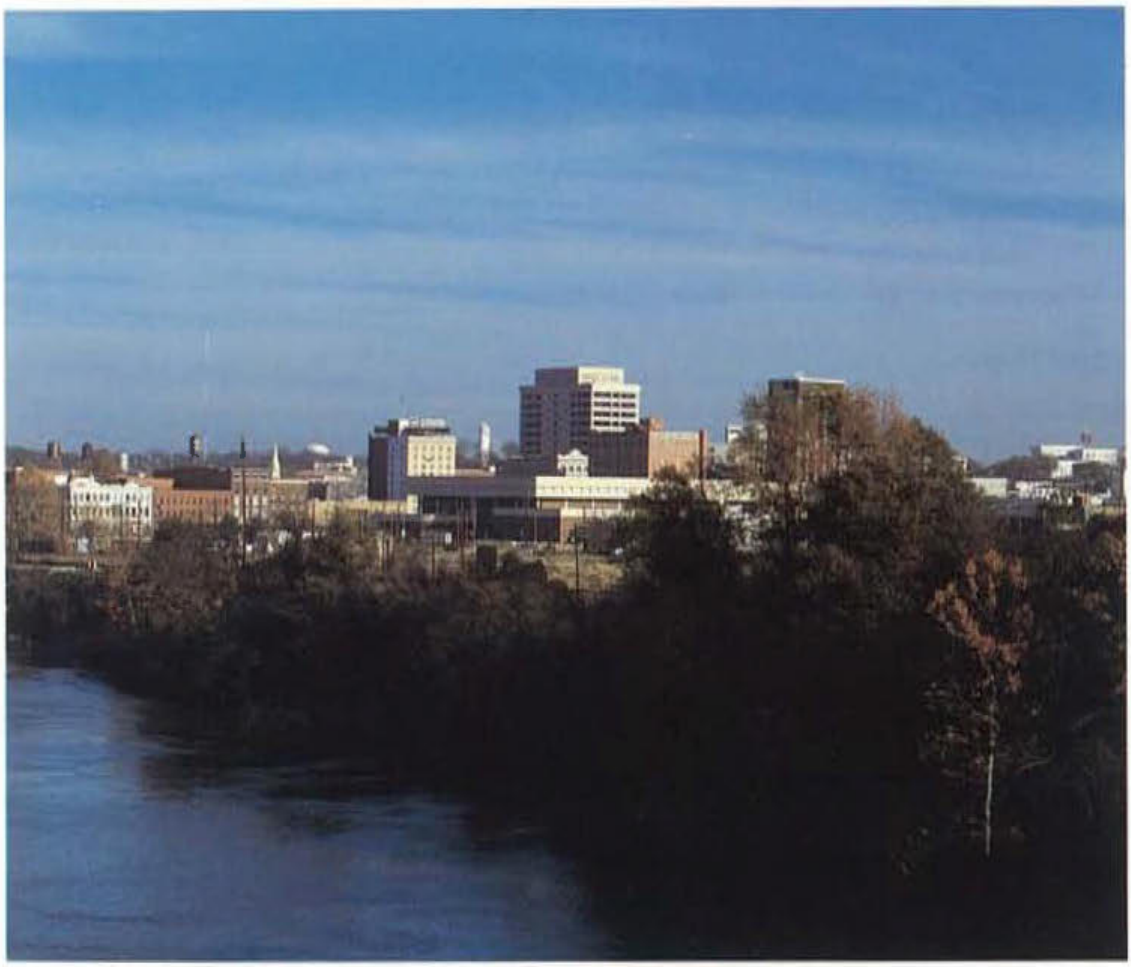

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The Alabama Lawyer

VOL. 48, NO. 1 JANUARY 1987

In Brief

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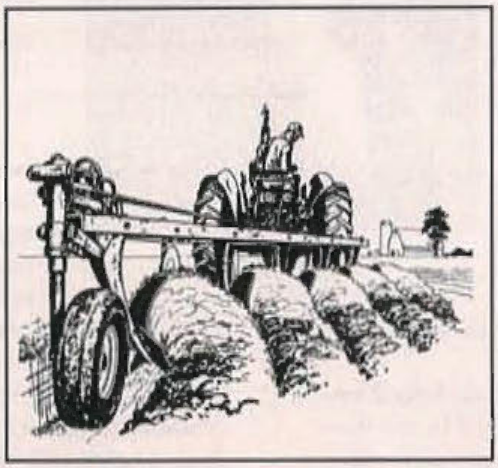
On the cover—

The Alabama State Capitol currently is under restoration. This nighttime shot is courtesy of the Alabama Power Company.



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President's Page

SCRUGGS

There is a sleeping giant in the public life of Alabama which has within its power the ability to alter events and influence the course of public affairs to a greater extent than any other group in Alabama. The lawyers of Alabama can have a dramatic and powerful influence on what happens in this state.

By definition lawyers are well-educated, excellent communicators and advocates of the highest order. They are completely familiar with the arena wherein public issues are determined. Lawyers are without equal in blending logic and emotion and separating chaff from the wheat. Lawyers constitute the most superb class of movers, shakers and "heavy hitters" that this society has or knows. They have entree to every business, every corporation, every public official and every media executive existent. With a singleness of purpose, lawyers of Alabama can do anything except declare war on a foreign country or raise the dead. Yet the fact is that these skills and powers are, to a large degree, impotent. Why?

As a group, the lawyers in this state are our largest untapped source of energy, but we are victimized by our own sense of professionalism. The problem is that lawyers rarely ever represent themselves; it is unusual to find lawyers advocating any public cause which is or could be styled self-interest. We habitually take public positions benefitting our clients rather than ourselves. We are so trained to be advocates for others that our ability to advocate for ourselves has become anesthetized, and we do not even know it.

On any controversial legislation or cause célèbre, one will find lawyers on both sides of the question ably and assiduously promoting the point of view and position of their respective clients. It is a sad fact that in many situations we are too good for our own good. We certainly can afford some degree of altruism, and, of course, we ought to advocate our clients' positions. Somewhere, though, in all of this, we need to retain some small degree of self-preservation, some modicum of self-interest, if for no other reason than to balance the continuously growing "anti-lawyer" trend.

Our brother and sister professionals, the physicians, have not lost any public esteem by taking some very blatant, but well-orchestrated, actions which clearly are self-serving. In the legal profession, a profession that you and I paid dearly to enter and have struggled continually to perfect, more often than not the "whipping boys" or the arch enemies are those who wish to rise by stepping on our necks, and we do not do anything about it. We do not because these people are our clients, it affects other lawyers, but not us personally, or we do not care.

Consider any example of major legislation of vital public interest in the Alabama Legislature, and you will find every interested group in Alabama actively working for the passage or defeat of that legislation. You will find telephone calls, letters, petitions, personal visits, background information, surveys, polls and every tool being used to urge a particular positive or negative position regarding that legislation. And, yes indeed, you will see fine, able lawyers retained by both sides to fight their clients' particular battles.

On the other hand, consider an example of legislation of direct interest to lawyers, and suddenly the "anti-lawyer" dominates the field. The rank and file of lawyers in Alabama have not been motivated sufficiently to exercise their considerable power for the passage or defeat of that legislation, principally because of our ingrained lack of self-interest or very laudible allegiance to our client instead of ourselves.

Perhaps that is as it should be. Maybe lawyers should have no interest in themselves, and perhaps the noblest path is to continue to be the ever-faithful servant to the client's interests, never stooping (or rising) to the interest of the profession, but I think not. I think lawyers have the integrity, judgment and skills to balance the interests of their profession and their clients, as well as the administration of justice. We simply have not done it of late, and the public, the client and the lawyer are all the poorer for it.

Without exception, all bar presidents under whom I have served as a bar commissioner (14 prior presidents) have observed this same phenomenon. I do not have the answer any more than they did, but we all are still looking. We need all the help from you we can get, especially in the form of comments, observations and criticism. Tell me how you feel. ■

Executive Director's Report

HAMNER

LRS Needs You! . . . Do You Need LRS?

The state bar's lawyer referral service soon will be eight years old. In today's economic climate, there is no better bargain for the participating panel member, considering the needs being met and the potential, based upon our current inability to serve a broader client population.

The lawyer referral service is a public service activity through which persons needing legal services are referred to lawyers who can assist them; clients pay for these services. Referrals are made in 25 specific types of cases and a panel member can agree to accept cases in up to ten of these areas. Panel membership costs a participating attorney $25 annually, and proof of professional liability coverage is a prerequisite. The insurance coverage has to be of minimum limits of $100,000/$300,000.

The participating attorney agrees to charge the client an initial fee of $20 for the first 30-minute consultation; however, beyond this point, the attorney and the client can enter into a mutually satisfactory employment contract.

The referral is not assignable within a firm. Each referral is personal between the attorney to whom it is made and the client desiring to be served. If a panelist finds that he or she is unable to serve the client because of a conflict, the client should be referred back to the referral service. This will not count as a referral against the attorney who then will remain at the head of the list for the next referral in this designated area. If an attorney declines a referral for other than good cause, that attorney then reverts to the end of the referral list within the county, circuit or speciality area noted.

Initially, the service provided virtually statewide coverage. The cities of Birmingham, Mobile and Huntsville were excluded because their local bar associations had existing programs. All calls to the statewide service for lawyers in those areas are referred to those local services. It may appear to some from the statistics that will follow that very few clients, in fact, are served by the LRS; however, one must consider that three of the state's largest population centers are excluded from the figures noted.

The lawyer referral service purchases a standard "Yellow Page" advertisement in almost every known telephone book published for Alabama. This year the advertising cost alone has been $10,996.28, while panel membership fees totalled $6,850 this year (274 members). For the first time, they did not meet our advertising costs. The state bar always has paid the WATS line charges and the lawyer referral service clerk's salary; as a result of this sharp decline in revenue, we are carefully reviewing the placement of ads and dropping ads in those areas with no panel members.

It is the drop in panel participation that I want to address. I realize the inability to obtain professional liability coverage caused a substantial number of our panel members to drop from the program. I am hopeful that with our newly-endorsed liability insurance program in place, a substantial number of these will reinstate their memberships in February.

The lawyers participating in the service appear quite happy with it. They regularly comment about the favorable impact the referral cases have on their practice, and I am aware of no one who does not recoup the annual fee early in each lawyer referral service year. Consultation fees to date, February through October, have totalled $5,710 according to voluntary reports attorneys return to us. One must consider that this sum of money is based upon individual billings of $20 each.

Currently, our biggest problem is participation; we are losing our statewide re-

ferral capability. We have two circuits, the second and 35th, with no lawyers available for a referral when a request is made; we have 17 counties within our 39 circuits that have no lawyers on the service; however, we attempt to refer to the nearest county or town when a local referral is not possible. The table accompanying this report shows the current statewide breakdown.

To run an effective LRS, we need broad participation. I am sure some of you have heard of the no-show appointments, the lawyer-shopping clients and the "I-thought-this-was-free" referrals. However, these problems are relatively few. Our referrals do generate fees and establish long-term attorney-client relationships and are not to be overlooked. Consider these facts: referrals for this year, February through October, number almost 8,000; the voluntary feedback reports indicate that some 838 clients already have paid fees. (These reports are not received until the services sought are completed, therefore many cases still are pending.)

Types of referrals and fees generated may be of interest. Fifty-three lawyers reported collecting fees of between $20 and $100. Four hundred and three collected fees between $101 and $500. One hundred lawyers have reported that referred cases generated fees in excess of $500. As our year-end reports are filed in January 1987, I would anticipate that the state bar's referral service will have referred to Alabama lawyers clients who have generated fees in excess of three-quarters of a million dollars, in spite of our low overall level of participation this year.

During our early phase of operation when panelists numbered almost 500 (and again I would remind you these did not include lawyers in the cities of Birmingham, Mobile and Huntsville), we had reports that fee-generating cases resulted in excess of one and one-half million dollars.

For-profit and out-of-state referral services now are operating in Alabama. I believe that as long as Alabama lawyers are meeting the public's need for legal services, they will have little to fear from those outside the profession. It is when potential clients cannot be served in traditional ways that outside forces come into play.

If you currently are not a panelist or if you have allowed your membership as a panel member to lapse, please consider rejoining the state bar's referral service. We advertise a statewide service and should be in a position to serve needs statewide. You may write for an application to Joy Meininger, Lawyer Referral Service Secretary, Alabama State Bar, P. O. Box 671, Montgomery, Alabama 36101. ■

—Reginald T. Hamner

Lawyer Referral Service

CIRCUIT	COUNTY	MEMBERS
1st — 1	Choctaw	0
	Clarke	0
	Washington	1
2nd— 0	Butler	0
	Crenshaw	0
	Lowndes	0
3rd — 3	Barbour	2
	Bullock	1
4th — 7	Bibb	1
	Dallas	3
	Hale	1
	Perry	1
	Wilcox	1
5th — 3	Chambers	1
	Macon	0
	Randolph	0
	Tallapoosa	2
6th — 25	Tuscallosa	25
7th — 13	Calhoun	13
	Cleburne	0
8th — 7	Morgan	7
9th — 4	Cherokee	0
	Dekalb	4
10th — 3**	Jefferson*	3**
11th — 19	Lauderdale	19
12th — 4	Coffee	3
	Pike	1
13th	Mobile*	
14th — 3	Walker	3
15th — 65	Montgomery	65
16th — 10	Etowah	10
17th — 5	Greene	0
	Marango	5
	Sumter	0
18th — 5	Clay	0
	Coosa	0
	Shelby	5
19th — 7	Autauga	4
	Chilton	1
	Elmore	2
20th — 13	Henry	0
	Houston	13
21st — 1	Escambia	1
22nd— 2	Convington	2
23rd	Madison*	
24th — 1	Fayette	0
	Lamar	1
	Pickens	0
25th — 7	Marion	4
	Winston	3
26th — 4	Russell	4
27th — 5	Marshall	5
28th — 5	Baldwin	5
29th — 9	Talldega	9
30th — 4	Blount	4
	St. Clair	0
31st — 3	Colbert	3
32nd— 3	Cullman	3
33rd — 4	Dale	3
	Geneva	1
34th — 2	Franklin	2
35th — 0	Conecuh	0
	Monroe	0
36th — 1	Lawrence	1
37th — 9	Lee	9
38th — 1	Jackson	1
39th — 2	Limestone	2

* Local Bar LRS ** Outside Birmingham LRS Jurisdiction

Editorial

Secretarial Subservience, Birmingham Style

(Editor's note: This letter is in response to an editorial by J. Edward Thornton of Mobile. His editorial originally appeared in the September 1986 Mobile Bar Association *Bulletin* and then in the November 1986 *Alabama Lawyer*. The views expressed here are those of the author and not necessarily those of the bar, its officers or members.)

I read with liveliest interest your editorial in the November edition of *The Alabama Lawyer*. How simply wonderful that Mobile secretaries have been granted the autonomy to choose whether or not to ask callers to disclose the nature of their business with the secretaries' bosses! To be allowed to use their own judgment in refusing to ring said callers through to said bosses! And, wonder of wonders, that Mobile secretaries have finally been granted the prestigious honor of calling up busy Mobile attorneys and then arbitrarily forcing them to hold on the line until the secretary gets around to informing her boss that his call is holding! Well, hats off—you've really come a long way babies!

That's a nice fairy tale, Mr. Thornton. But, unfortunately we secretaries live in the real world. And that real world is heavily populated with rules—said rules being laid down by the attorneys for whom we are employed. Now, I have the luck to work for two attorneys who do answer their own phones, set their own appointments, place their own calls, and generally make their own excuses. That has not, however, always been the case. Has it ever occurred to you that, in most instances, a secretary is simply following instructions when she asks you to state your business before putting through the call to her boss? Or again following orders when she states that he is "out" instead of simply telling you that he really doesn't want to talk to you at all? And, while placing a call for her busy attorney, can a secretary hog-tie her boss to his chair and place the phone out of his reach so that he can't wander off or place another call until she has connected him with his party? Be realistic, Mr. Thornton. There are indeed secretaries out there who are rude and inconsiderate to those who have business with the boss, but most of us can't afford to be. Next time you have an urge to "speak ugly to those secretaries," remember—you are speaking to someone who, in most cases, can't answer back in the same vein (we'd be fired if we did). And, believe me, we have our "lists" as well. People like you tend to be at the very bottom of ours. ■

—Lindsey R. Gravlee
Birmingham

About Members, Among Firms

ABOUT MEMBERS

Sam E. Loftin announces that his brother, **F. Patrick Loftin,** has become associated with him in the practice of law at 1705—7th Avenue, Phenix City, Alabama 36868-2566. Phone (205) 297-1870.

■

James P. Graham, Jr., is pleased to announce the relocation of his offices to 925 Broad Street, P.O. Box 3380, Phenix City, Alabama 36868-3380, (205) 291-0315. He previously was associated with the law firm of Benton & Benton in Phenix City.

■

Thomas ap Roger Jones, formerly of Pitts, Pitts & Thompson, announces the opening of his office at 900 Alabama Avenue, Selma, Alabama 36701. Phone (205) 872-8310 or 872-8311.

■

Martha Durant Hennessy announces the opening of her office for the practice of law in the Gulf Shores Office Complex, P.O. Box 781, Gulf Shores, Alabama 36542. Phone (205) 968-2653.

■

Chase R. Laurendine, attorney-at-law, announces the relocation of his offices to Regency Professional Center, 5901 Airport Boulevard, Suite A, Mobile, Alabama; mailing address: P.O. Box 850817, Mobile, Alabama 36685.

■

John D. Saxon recently graduated from the Stanford Executive Program at the Stanford University Graduate School of Business. Formerly director, corporate issues, RCA Corporation, he is now the Washington representative —RCA in the Washington corporate government relations office of **General Electric Company.**

■

David R. Freeman, formerly in private practice in Birmingham, announces his admission to the Florida Bar and association as general counsel with **Pro-Med Capital, Inc.** of North Miami Beach, Florida.

■

Roy W. Scholl, III, announces the opening of his office for the practice of law, with offices at Suite 801, Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 328-7911.

■

Patricia K. Olney, formerly of Mobile, Alabama, announces that she has joined the firm of **Spielvogel and Goldman, PA,** and now is practicing in the Cape Canaveral, Florida, area, with offices at 101 South Courtenay Parkway, Suite 201, P.O. Box 1366, Merritt Island, Florida 32952-1366. Phone (305) 453-2333.

■

H. Jere Armstrong, formerly counsel to the chief immigration judge in Washington, D.C., has been appointed as a **United States Immigration Judge** and **assistant chief immigration judge.** Judge Armstrong is a 1966 graduate of the University of Alabama School of Law and a member of the bars of Alabama, the District of Columbia and Virginia.

AMONG FIRMS

The firm of **Knight & Griffith** announces **S. Lynn Marie McKenzie** has become a member of the firm, with offices located at 409 First Avenue, Southwest, Cullman, Alabama 35056.

■

The firm of **Burr & Forman** (formerly Thomas, Taliaferro, Forman, Burr & Murray) has relocated its offices to 3000 SouthTrust Tower, 420 North 20th Street, Birmingham, Alabama 35203. Phone (205) 251-3000. Also, **Marion W. Tilson, Mark W. Bond, Curt M. Johnson** and **W. Benjamin Johnson** have become associates of the firm.

■

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor, First National Bank Building, Mobile, Alabama, announces that **Forrest C. Wilson, III; Judith L. McMillin; William B. Givhan; P. Russell Myles; Brian P. McCarthy; Walter T. Gilmer, Jr.;** and **Peter H. Williams** have become associated with the firm.

■

John S. Gonas, Jr., and **Michael J. McHale,** formerly associated with Robert Norris & Associates, PC, announce the formation of a partnership for the general practice of law, under the name of **Gonas & McHale.** Offices are located at The Van Antwerp Building, 101 Dauphin Street, Suite 208, Mobile, Alabama 36602. Phone (205) 438-4175.

■

Gordon, Silberman, Wiggins & Childs, PC, announces **Russell P. Love** and **Ann K. Norton** have become associates in the firm, with offices at 1500 Colonial Bank Building, Birmingham, Alabama 35203. Phone (205) 328-0640.

■

Henry B. Steagall, III, and **William H. Filmore** announce the formation of their professional corporation of **Steagall & Filmore, PC,** for the practice of law at 315 South Union Avenue, P.O. Box 280, Ozark, Alabama 36361. Phone (205) 774-2501.

■

Morgan & Burns announces that **Stephanie K. Alexander** has become associated with the firm, and the mailing address is P.O. Box 1583, Mobile, Alabama 36633.

■

Falkenberry, Whatley & Heidt announces that **Lisa J. Huggins,**

formerly law clerk to United States District Judge James Hughes Hancock, has become associated with the firm. Offices are located at Fifth Floor Title Building, 300 Twentyfirst Street, North, Birmingham, Alabama 35203. Phone (205) 322-1100.

■

W. Lee Pittman, Kenneth W. Hooks, David H. Marsh and **Thomas E. Dutton,** formerly partners in the firm of Emond & Vines, are pleased to announce the formation of a firm under the name of **Pittman, Hooks, Marsh & Dutton, PC,** with offices at 801 Park Place Tower, 2001 Park Place North, Birmingham, Alabama 35203. Phone (205) 322-8880.

■

The law firm of **Reid and Thomas** announces the relocation of its office to Suite 501, SouthTrust Bank, 1000 Quintard Avenue, Anniston, Alabama. Phone (205) 236-1240.

■

Ford, Caldwell, Ford & Payne announces that **Robert E. Ledyard, III,** has become associated with the firm, with offices at 218 Randolph Avenue, Huntsville, Alabama 35801.

■

Speake, Speake & Reich announces that **L.W. Patterson, Jr.,** formerly an attorney for the United States Army Ballistic Missile Defense Command, Huntsville, Alabama, has become of counsel to the firm, with offices at 101 Spring Street, Northwest, Moulton, Alabama.

■

The firm of **Humphreys, Dunlap & Wellford** announces that **David M. Dunlap** has become associated with the firm, with offices at 2200 First Tennessee Building, Memphis, Tennessee 38103. Phone (901) 523-8088.

■

The firm of **Yearout, Myers & Traylor, PC,** announces that **J. Scott Langner** and **Katherine L. Corley** have become associated with the firm, and offices are located at 1405 First Alabama Bank Building, Birmingham, Alabama 35203.

■

Longshore, Evans and Longshore announces that **D. Michael Barrett** and **Gary P. Cody** have become associates with the law firm, and its offices have relocated to 1900 City Federal Building, Birmingham, Alabama 35203. Phone (205) 252-7661.

■

The law firm of **Holt & Cooper** announces **William Kent Upshaw** has become a member of the firm, which will continue the practice of law under the name **Holt, Cooper and Upshaw.** Offices are located at 529 Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 322-4551.

■

Rushton, Stakely, Johnston & Garrett, PA, announces that **Holley F. Crim** has become associated with the firm, with offices at 184 Commerce Street, P.O. Box 270, Montgomery, Alabama 36195. Phone (205) 834-8480.

■

Stone, Granade, Crosby & Blackburn, PC, announces **Dennis M. Wright** has become associated with the firm, and the mailing address is P.O. Box 1109, Bay Minette, Alabama 36507.

■

The law firm of **Watts, Salmon, Roberts, Manning & Noojin** announces **Johnnie F. Vann** has become associated with the firm. Offices are located at 100 Jefferson Street, South, Suite 200, P.O. Box 287, Huntsville, Alabama 35801. Phone (205) 533-3500.

■

Jerry O. Lorant & Associates of Birmingham announces the addition of **M. Jack Hollingsworth** as an associate of the firm. Hollingsworth is a graduate of Cumberland School of Law.

■

United States Pipe and Foundry Company and **Jim Walter Resources, Inc.,** announces the association of **Gary C. Pears,** with offices at 3300 First Avenue, N., P.O. Box 10406, Birmingham, Alabama 35202. Phone (205) 254-7090.

■

Thomas E. Bryant, Jr., J. Gordon House, Jr., Mark R. Ulmer and **S. Rosemary de Juan,** members of the firm of **Bryant, House, Ulmer & de Juan,** announce the relocation of their offices to Suite 1107, Riverview Plaza Office Tower, 63 S. Royal Street, Mobile, Alabama 36602. Phone (205) 432-4671.

■

The firm of **Staas & Halsey** of Washington, D.C., announces that **J. Randall Beckers** has become a member of the firm, with offices at 1825 K Street, NW, Washington, D.C. 20006. Phone (202) 872-0123.

■

William E. Skinner and **William W. Gobrecht** announce the dissolution of the law firm of **Skinner & Gobrecht** effective December 31, 1986. William E. Skinner will continue his law practice as a sole practitioner at Suite 501, Hill Building, 73 Washington Avenue, Montgomery, Alabama 36104. Phone (205) 265-0201. William W. Gobrecht is retiring from the daily practice of law but will continue practice on a case-by-case basis.

■

The law firm of **Simmons, Ford and Brunson, Attorneys, PA,** is pleased to announce **Taylor Thomas Perry, Jr.,** has become an associate of the firm. Offices are located at 1411 Rainbow Drive, Gadsden, Alabama 35902-1189. Phone (205) 546-9205.

We need your help locating eye-catching, colorful covers for *The Alabama Lawyer.* Please send suggestions, photographs, slides or transparencies to the *Lawyer.* We need vertical, clear, original artwork. *Thanks.*

Farm Bankruptcy:

by Tazewell T. Shepard, III

On November 26, 1986, the new Chapter 12 became effective under Title 11 of the United States Code, referred to herein as the Bankruptcy Code. This article will compare Chapter 12 to the other chapters of the Bankruptcy Code and briefly review relevant case law to consider whether this ambitious legislation will meet its purpose of serving the "family farmers" of America.

Eligibility of the debtor

Congress was spurred to enact this legislation by a perception that the available types of bankruptcy were inadequate to meet the needs of the increasing number of insolvent farmers. Many farmers had too much debt to qualify for debt adjustment under Chapter 13, and most found reorganization under Chapter 11 too expensive and time-consuming.

The new legislation amends Section 109 of the Bankruptcy Code to limit the application of Chapter 12 to the "family farmer." However, this general term may not effectively regulate the variety of debtors seeking protection as a "farmer." For instance, one court recently concluded that a feedlot qualified as a farmer. In re Cattle Complex Corporation, 50 B.R. 50 (Bkrtcy. D. NM 1985) Another court stated that the debtor's status as a farmer remained valid almost a year after the debtor ceased operations and sold his farm. *In re Potmesil*, 42 B.R. 731 (Bkrtcy. W.D. LA 1984) Application of Chapter 12 is defined further by financial requirements. Aggregate debts must not exceed $1,500,000. At least 80 percent of the debts must arise out of a farming operation owned or operated by the debtor, who must have received more than 50 percent of his gross income from such farming operation for the preceding taxable year. However, a mortgage on the debtor's residence will not be included in the debt total unless it "arises out of a farming operation." Thus, a crop loan secured by a mortgage on the house would be included, whereas a mortgage securing funds to pay college tuition for the debtor's child would not.

If the debtor is a corporation or partnership, more than 50 percent of the stock or partnership equity must be held by the person or family conducting the farming operation, and more than 80 percent of the value of the corporation's or partnership's assets must relate to the production of agricultural products.

More narrow debt restrictions limit Chapter 13 relief to an individual with secured debts not more than $350,000 and unsecured debts not more than $100,000 under Section 109(e). Aggregate debts in a joint petition filed by a husband and wife must be within these limits. *See In re Carrera*, 2 B.R. 480 (Bkrtcy. D. CO 1979).

Both Chapters 12 and 13 apply only to a debtor with regular income. Section 101(27) defines "individual with regular income" as an individual, other than a stockbroker or a commodity broker, whose income is sufficiently stable to enable making payments under a plan. Under Section 302, a joint case may be commenced with a single petition by an eligible individual and spouse, and both debtors' incomes may be considered.

Courts considering Chapter 13 cases have been less flexible on the monetary limitations than the regular income requirement. However, contingent debts are not included in the monetary limitation. *See Matter of Pearson*, 773 F.2d 751 (6th Cir. 1986). A claim is contingent if the debtor's duty to pay does not come into existence until the occurrence of a future event. *See In re Wilson*, 56 B.R. 693 (Bkrtcy. M.D. AL 1986).

The trustee and the debtor

Section 1202 creates a Chapter 12 trustee whose administrative duties are similar to those of a Chapter 13 trustee. The Chapter 12 trustee must appear and be heard at any hearing concerning the value of property subject to a lien, confirmation of a plan, post-confirmation modification of a plan or sale of property of the estate. He also must file state and federal tax returns for the estate under Section 1231(b) for each taxable period after the case is filed. However, the Chapter 12 trustee is not required as is the Chapter 13 trustee to "advise . . . and assist the debtor in performance under the plan" under Section 1302(b)(4).

The Chapter 13 trustee always is charged under Sections 704(4) and 1302(b) with the duty to "investigate the financial affairs of the debtor." By contrast, the Chapter 12 trustee must be granted such authority by the court under Sections 1202(a)(2) and 1106(a) for cause, which is similar to that for appointment of a Chapter 11 trustee or examiner under Section 1104.

Appointment of the Chapter 12 trustee is modeled after that in Chapter 13 cases. Section 151302 authorizes the U.S. Trustee to appoint standing Chapter 13 trustees in the program districts. In the new non-program districts, the Bankruptcy Court appoints the standing Chapter 13 trustee under Section 1302(a). If there is not a sufficient volume of cases to justify a standing trustee, a trustee will be appointed in each case.

The Chapter 12 debtor is called a "debtor in possession" as under Chapter 11 and granted by Sections 1203 and 1207(b) most of the rights and duties of a Chapter 11 trustee, "including operat-

The New Chapter 12

ing the debtor's farm." This is similar but includes somewhat more authority than the Chapter 13 debtor engaged in business, who has the exclusive right to operate his business under Section 1304, lease or sell property of the estate under Section 363 and obtain unsecured credit under Section 364.

Section 1204, which has no counterpart in Chapter 11 or 13, authorizes the court to remove a Chapter 12 debtor from possession after notice and a hearing upon request of any party in interest for cause, "including fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor." However, the court may reinstate the debtor in possession after notice and a hearing upon request of any party in interest. If the debtor is removed from possession, the Chapter 12 trustee will operate the debtor's farm as he would under Chapter 11. However, the Chapter 12 trustee lacks the authority of a Chapter 11 trustee to file a reorganization plan.

Staying action against co-debtor

One of the most important forms of relief in the Bankruptcy Code is the automatic stay of Section 362(a). The stay is a court order which issues automatically upon the filing of the bankruptcy petition against all listed creditors and prohibits them from taking any action to create, perfect or enforce their lien, interest or claim against the debtor's property.

Some of the value of the automatic stay is lost if the debtor files a petition only to see a creditor immediately sue his friend or relative as a co-debtor on the obligation. Previously, only Section 1301 extended the stay under Chapter 13 to prohibit enforcement of consumer debts against an individual who is liable on the debt with the debtor, or who has given collateral to secure payment of the debt, unless the co-debtor became liable in the ordinary course of his business. This protection has been repeated in Section 1201, and under both chapters the stay of actions against a co-debtor continues until the case is closed, dismissed or converted, or until the court orders relief from the stay for cause.

A new subsection, (d), was added to Section 1301 in 1984, and it also appears in Section 1201. The subsection allows termination of the stay 20 days after a request for relief from the stay on the ground that the plan proposes not to pay the claim against the co-debtor unless the debtor or co-debtor files and serves a written objection to the termination.

Adequate protection

A secured creditor must file a motion for relief from the automatic stay to enforce its security interest against property of the estate. It may allege that because of accruing interest on the debt, decreasing collateral value or a mixture of circumstances, the creditor has little or no "adequate protection" for its debt. *See In re Mellor,* 734 F.2d 1396 (9th Cir. 1984). Although this term is not defined in the Bankruptcy Code, several examples are suggested in Section 361 for Chapter 11 and 13 cases.

Section 1205 states that Section 361 does not apply in Chapter 12 cases. Instead, Section 1205(b) outlines four ways in which the debtor or trustee may furnish adequate protection to a secured creditor. The first two methods are quite similar to those stated in Section 361. Section 1205(b)(1) and (2) allow the debtor to compensate the secured entity with periodic cash payments and additional or replacement liens to the extent of any decrease in the value of the secured property.

The third method is unique to the farming situation. Section 1205(b)(3) allows the debtor to pay "to such entity for the use of farmland the reasonable rent customary in the community where the property is located, based on the rental value, net income and earning capacity of the property . . . ."

This subsection will alter the protection necessary either to maintain the "equity cushion" of an oversecured creditor or compensate the "lost opportunity costs" of an undersecured creditor. *In re American Mariner Industries, Inc.,* 734 F.2d 426 (9th Cir. 1984); *Grun-*

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dy National Bank v. Tandem Mining Corp., 754 F.2d 1436 (4th Cir. 1985) In Chapter 11 the latter usually means cash payments to the creditor to compensate for the accruing interest on the debt, up to the value of the collateral.

Recent decisions already have slowed the momentum of the *American Mariner* view of adequate protection. *In re Timbers of Inwood Forest Assoc., Ltd.*, 793 F.2d 1380 (5th Cir. 1986) However, Congress perceived this concept as a sufficient threat to the already struggling farm bankruptcies to draft Section 1205 to replace the "indubitable equivalent" requirement of Section 361 with this much less stringent "reasonable market rent" test. Thus, Congress had made an important policy decision in favor of the farm debtor, and secured farm lenders must bear the burden.

Sale free and clear of liens

Under Section 362(f), a Chapter 7, 11, 12 or 13 trustee may sell property of the estate outside the ordinary course of business free and clear of other interests and liens only if the entities holding such interests or liens consent or the sale price is sufficient to pay all such claims in full. The section also authorizes sales when the interests or liens are disputed.

Section 1206 authorizes the Chapter 12 trustee after notice and a hearing to sell farmland or farm equipment free and clear of interests and claims, which will attach to the sale proceeds. Thus, the requirement that the creditor receive full payment or agree to accept lesser payment is eliminated for these two types of collateral.

The conference report justifies this important change by noting that many farm bankruptcies become deadlocked over the sale of unnecessary assets. The debtor often feels that he can get a better price through a private or public sale than by letting the creditor dispose of the collateral. The creditor, on the other hand, may be unwilling to release its lien on the most valuable portion of its collateral or allow a sale which would leave the balance of its debt unsecured. Congress has resolved this argument and again made a significant policy decision in favor of the farm debtor.

The report argues that several factors remain in the creditor's favor. First, the sale must be authorized by the court after notice and a hearing. This may weed out the more speculative and imprudent sale proposals. Second, the creditor's interest attaches to the proceeds, and the conference report declares that no debtor may use cash collateral without consent of the secured creditor or authorization by the court. This is intended to protect the creditor from a debtor who converts his assets to cash and hides or wastes the money before converting to Chapter 7. Third, the creditor has the right under Section 363(k) to bid at such a sale and, if successful, to offset its claims against the purchase price of the property.

The Chapter 12 plan

Under Section 1221, the debtor has the exclusive right to file a Chapter 12 plan within 90 days after the case is filed, although the court may extend this period for substantial justification. Section 1322 states only that the Chapter 13 "debtor shall file a plan," but Bankruptcy Rule 3015 requires that the plan be filed within 15 days after the petition, although the court may extend the time "for cause shown."

The Chapter 12 plan requirements of Section 1222 are similar to those for Chapter 13 under Section 1322. The Chapter 12 plan must provide for the submission of all or as much as necessary of the debtor's future income to fulfill the plan. The plan also must furnish deferred full cash payment of all priority claims, such as trustee's compensation, attorney's fees and taxes, and afford the same treatment for all claims in a class unless waived by consenting claimholders.

Section 1222(b) states how different classes of claims may be treated. The Chapter 12 plan may put consumer debts in a separate class and treat them differently from other unsecured claims. Section 1222(b)(4) allows the plan to designate that payments be made on an unsecured claim at the same time as payments on a secured claim. The plan also may modify the rights of any class of secured or unsecured claims and cure any default, while maintaining the regular payment schedule, whether the payment will finish before or after the plan. However, the right to cure default may be cut off by a foreclosure sale of the mortgaged property before the bankruptcy petition is filed. *In re Glenn*, 760 F.2d 1428 (6th Cir. 1985)

A few differences between Sections 1222 and 1322 are apparent. Chapter 12 lacks the Chapter 13 prohibition against modifying the rights of a secured creditor in the debtor's residence and the provisions of Section 1305 and 1322(b)(6) for payment of postpetition claims. Also, Section 1222(b)(8) permits the plan to provide for sale or distribution of property to secured creditors, and 1222(b)(9) specifically authorizes payment of secured claims over a longer period than the five-year maximum life of the plan.

Standards for confirmation

Sections 1128 and 1324 do not set the time for a Chapter 11 or 13 confirmation hearing, although Bankruptcy Rule 2002(b) requires the clerk to give parties at least 25 days advance notice by mail. However, the Chapter 12 confirmation hearing must be concluded within 45 days after the plan is filed "except for cause" under Section 1224. The conference report states that a busy court calendar would constitute "cause" for a later hearing but admonishes judges to sparingly use this exception.

In Chapter 11, a disclosure statement must be prepared, filed and approved by the court under Section 1125(b) before votes may be solicited. Since there is no voting process in Chapter 12 or 13, no disclosure statement is required even though the debtor is engaged in business. A creditor's acceptance or rejection of the Chapter 12 or 13 plan simply forces the debtor's plan to meet certain statutory criteria. *See In re Rushton*, 58 B.R. 36 (Bkrtcy. M.D. AL 1986).

Any party in interest, including the trustee or the U.S. Trustee, may object to confirmation of a Chapter 12 plan. If the debtor modifies the plan prior to confirmation, the modified plan becomes the plan under Section 1223. It is not necessary for a secured creditor to refile an acceptance or rejection after modification unless it affects the rights of that creditor.

Section 1225 requires the court to make six specific findings before it confirms a Chapter 12 plan, including the debtor's proposal of the plan in good faith and ability to make the scheduled payments. As under Chapter 13, the Chapter 12 plan may simply provide that unsecured creditors will receive not less than they would receive if the debtor's estate was liquidated under Chapter 7. Thus, if the debtor has limited disposable income and no equity in his assets, he could propose a total payment of 1 percent to unsecured creditors. In fact, an Alabama court has held that a Chapter 13 plan containing a zero payment to unsecured creditors provides for such claims under Section 1328(a). *In re Stollenwerck*, 8 B.R. 297 (M.D. AL 1981)

Under Section 722, a Chapter 7 debtor may redeem family or household property from a lien securing a dischargeable consumer debt if the property is exempted or abandoned. Redemption is made in one lump sum payment to the secured creditor. *In re Bell*, 700 F.2d 1053 (8th Cir. 1983) However, in Chapters 12 and 13 a secured claim is measured by the value of the collateral at confirmation, and the excess is an unsecured claim under Section 506. Thus, full payment of a secured claim under the plan achieves redemption of the secured collateral during the term of the plan.

If an unsecured creditor or the trustee objects to confirmation of the Chapter 12 plan, the court must make a further finding prior to confirmation under Section 1225(b). Either the claim of the objecting party must be paid in full under the plan, which means that every claim in its class will be paid in full, or the plan must provide that all of the debtor's disposable income will be applied to payments under the plan.

The term "disposable income" is defined as that portion of the debtor's income which is not reasonably necessary for the maintenance and support of the debtor and his dependents or for the continuation and operation of the debtor's business. The conference report notes that a debtor may have a minor business which is not related to the farming operation and states that the non-farming business expenses also may be deducted to arrive at the "disposable income" to be applied under the plan. The report leaves the definition of "minor" outside business to the court's discretion.

Post-confirmation matters

Chapter 12 confirmation is binding on each equity holder, partner and creditor of the debtor under Section 1227 whether its claim is provided for by the plan and whether it has rejected or objected to the plan. Confirmation also vests the property of the estate in the debtor, free and clear of any claim or interest provided for by the plan except for nondischargeable and long-term obligations.

Congress was concerned that the farming debtor be able to obtain post-confirmation credit as the Chapter 13 debtor may in theory under Section 1327. Thus, Section 1227 contains the same language to allow the debtor to secure

post-confirmation financing with the assets which revest in him at confirmation. Of course, this will be limited to the extent that such assets are encumbered by the plan and the confirmation order.

The Chapter 12 trustee is authorized by Sections 1202 and 1226 to collect and distribute the debtor's payments to creditors after confirmation, except as otherwise stated in the plan. Presumably, this refers to instances where tender of the money by the debtor directly to the creditor is more practical, such as regular payments on a long-term obligation. However, Section 1226 does not contain the requirement of Section 1326(a) that the debtor "commence making the payments proposed by a plan within thirty days after the plan is filed."

Section 1229 permits modification of the plan by the debtor, the trustee or any unsecured creditor at any time after confirmation and before the last payment is made. The modification may increase or reduce the amount of the payment to a class of claims, extend or reduce the life of the plan or alter the payment to a creditor to take into account any other payment received by the creditor on its claim. The statutory plan requirements, including the time limit of five years from the date of the first payment, apply to the modified plan, which becomes the confirmed plan unless disapproved by the court upon notice and a hearing.

Discharge

Under Section 1228(a), which is modeled on Section 1328(a), the court must grant the Chapter 12 debtor who completes his plan payments a discharge of all debts provided for under the plan or disallowed under Section 502 unless the debtor signed a waiver of discharge after the case was filed. Section 1222(b) prohibits discharge of any long-term debt on which the last payment is due after the date on which the final plan payment is due. However, Section 1228 does not contain the Chapter 13 exception to discharge of Section 1328(d) for a consumer debt incurred after the case was filed if the trustee's prior approval was not obtained.

The grounds of Section 727 to deny a discharge apply only to Chapter 7 cases, but Chapter 12 and 13 discharges do not bar the exceptions to discharge in Section 523(a). Thus, a plan must provide for full payment of nondischargeable debts, such as taxes, if the debtor is to receive the full benefit of the Chapter 12 or 13 discharge. *See In re Rushton, supra.*

Section 1228(b) adopts the "hardship discharge" of Section 1328(b) for a debtor whose failure to complete the payments is beyond his control. However, the court must find that the unsecured creditors actually have received as much under the plan as they would if the case had been converted to Chapter 7 and that modification of the Chapter 12 plan is not practical.

A Chapter 12 or 13 discharge may be revoked upon request of any party under Section 1228(d) or 1328(e) within one year after the discharge was granted, only if the debtor obtained his discharge through fraud which was not known to the requesting party until after the discharge was granted.

Conversion, dismissal and pending cases

The conference report for Chapter 12 urges the courts to resist routine conversion of existing Chapter 11 and 13 farm cases to Chapter 12. The most important consideration is the likelihood of success in Chapter 12, but the courts also should note whether major rulings have already been made under another chapter and the parties have already relied on existing law.

Any party in interest may request that a Chapter 13 case under Section 1307(c) or a Chapter 11 case under 1112(b) be converted to Chapter 7 or dismissed for "cause," including the debtor's unreasonable delay, denial of confirmation of a plan and debtor's material default under the terms of a confirmed plan. However, both sections contain a prohibition against involuntary conversion of a farm case to Chapter 7, although farmers have been liquidated under a Chapter 11 plan proposed by the creditors. *See Matter of Jasik,* 727 F.2d 1379 (5th Cir. 1984).

By contrast, the court may convert a Chapter 12 case to Chapter 7 under Section 1208(e) "upon a showing that the debtor has committed fraud in connection with the case. " Section 1208(c) adopts the Chapter 13 examples as cause for Chapter 12 dismissal and an additional example from Section 1112(b) of "continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation."

Conclusion

Chapter 12 clearly favors the farmer debtor over his creditors more than Chapters 11 and 13 with the "reasonable market rent" version of adequate protection and authorization to sell secured property free and clear of liens without the consent of lienholders. Still, some sections, such as that authorizing post-petition credit, may provide only theoretical aid to most debtors. Only time will tell whether Chapter 12 really meets Congress' intent of providing substantial relief to America's insolvent "family farmers." ■

MCLE News

by Mary Lyn Pike
Assistant Executive Director

1986 credit report due

All 1986 CLE reports are due by January 31, 1987. Credits earned by December 31, 1986, are to be reported (except as discussed below), and extra credits to be used for 1987 must be claimed. All 1986 courses attended must be reported in order to be used to meet the 1987 requirement; any left off a previously submitted report may be submitted as amendments, through March 1, 1987. Simply photocopy the prior report, make additions to it, mark it "Amended" and submit it to the MCLE Commission.

Late filing

If the required number of credits (12.0) was earned during 1986 but the report is filed after January 31, 1987, the reporting attorney must attach a late filing fee of $50 in the form of a check made payable to the Alabama State Bar in order to be in compliance.

Late compliance

If 12.0 credits were not earned by December 31, they may be earned between January 1 and March 1 **if a deficiency plan is submitted by January 31 and approval is obtained.** Approved courses must be listed, along with their dates and locations and the credits to be earned.

Certification for noncompliance

Attorneys whose reports or, in the alternative, deficiency plans, are not received by the MCLE Commission by January 31 will be certified to the Disciplinary Commission for noncompliance. Certification carries with it the possibility of suspension of the privilege of practicing law.

October 10 commission meeting

At its October 10 meeting in Montgomery, the MCLE Commission made the following decisions:

1. Amended Regulation 4.1.15 to read as follows:
   Beginning January 1, 1987, sponsors of approved programs must agree to submit to the commission a list of Alabama State Bar members attending each program.

Deleted was language requiring social security numbers and time spent in attendance. Numbers will be requested but not mandatory; time spent in attendance will not be recorded by sponsors.

2. Amended Regulation 4.2 to read as follows:
   A list of organizations whose continuing legal education activities are presumptively approved for credit shall be compiled and published annually by the CLE Commission. Other organizations may be added to the list as their identities and programs are confirmed by the commission.

Deleted was language requiring incorporation of the list into the regulation.

3. Granted a waiver of the 1986 CLE requirement to an attorney recovering from a heart attack;
4. Denied credit for attendance of an Alabama Law Institute Council meeting;
5. Discussed the Practice and Procedure Section's failure to meet the course evaluation requirement;
6. Approved part of the "London Institute of Comparative Advocacy," conducted by the McGeorge School of Law;
7. Postponed consideration of the "Annual Meeting," Attorneys' Liability Assurance Society, Ltd., pending distribution of course materials to commission members;
8. Approved part of a Mobile Association of Legal Assistants' seminar on the ethical use of paralegals;
9. Approved part of the "Annual Conference," Southern Association of Workers' Compensation Administrators;
10. Approved part of the "Law Office Management" seminar, Alabama Bar Institute for CLE;
11. On appeal, denied approval for the "Law Office Management—Focus on the Client" seminar, Birmingham Bar Young Lawyers' Section;
12. On appeal, approved the "Government Contract Law" course, Air Force Institute for Technology;
13. Designated approved sponsors for 1987, as follows:
    Accredited law schools (ABA, AALS)
    *Administrative Office of Courts—Alabama Judicial College
    Alabama Bar Institute for CLE
    Alabama Consortium of Legal Services Programs
    Alabama Criminal Defense Lawyers Association
    Alabama Defense Lawyers Association
    Alabama District Attorneys Association
    *Alabama Lawyers Association
    Alabama State Bar and bar sections
    Alabama Trial Lawyers Association
    *American Bar Association and bar sections
    American College of Trial Lawyers
    *American Law Institute—American Bar Association, Committee on Continuing Professional Education
    *Association of Trial Lawyers of America
    Bar associations of the sister states, the District of Columbia, Puerto Rico and the trust territories
    Birmingham Bar Association
    *Commercial Law League Fund for Public Education
    Cumberland Institute for CLE
    *Defense Research Institute
    *Federal Bar Association, Montgomery Chapter
    Federal Bar Association, North Alabama Chapter
    Huntsville-Madison County Bar Association
    *International Association of Insurance Counsel
    Legal sections, agency programs—U.S. and state governments
    Library of Congress—Congressional Research Service
    Mobile Bar Association
    Montgomery County Bar Association
    Montgomery County Trial Lawyers Association
    National Association of Bond Lawyers
    *National Bar Association
    *National College of District Attorneys
    National College of Juvenile Justice
    National Health Lawyers Association
    *National Institute for Trial Advocacy
    *National Judicial College
    National Legal Aid and Defender Association
    National Organization of Social Security Claimants' Representatives
    National Rural Electric Cooperative Association, Legal Division
    Patent Resources Group, Inc.
    *Practising Law Institute
    *Southwestern Legal Foundation
    *Transportation Lawyers Association
    Tuscaloosa County Bar Association
    Tuscaloosa Trial Lawyers Association
    *Approval contingent on more timely submission of course evaluations ■

Damages Recoverable for Wrongful Death in Alabama Under the Federal Tort Claims Act

by Dexter C. Hobbs

The Alabama practitioner is well aware that only punitive damages are recoverable under Alabama's wrongful death statute. §6-5-410, *Code of Alabama* (1975) The punitive damage award for a wrongful death is measured by the gravity of the wrong, the propriety of punishing the wrongdoer and the need to deter others from similar wrongful conduct. *Estes Health Care Centers Inc. v. Bannerman*, 411 So.2d 109, 112 (Ala. 1982) What happens, however, when a wrongful death case is brought in Alabama under the Federal Tort Claims Act which prohibits an award of punitive damages against the United States? The Alabama lawyer then must value a human life in terms of pecuniary losses. This article addresses the compensable damages recoverable under the Federal Tort Claims Act in a wrongful death case in Alabama.

Generally, a civil action for wrongful death against the United States must apply the law of the state where the wrongful act or omission occurred. 28 *U.S.C.* §1346 However, the Federal Tort Claims Act, 28 *U.S.C.* §2671, *et seq.* (hereinafter referred to as "FTCA"), expressly prohibits an award of punitive damages against the United States. 28 *U.S.C.* §2674

For some years, a claim against the United States for wrongful death which involved an application of Alabama law could not succeed, since the punitive damages allowed under Alabama law are forbidden by the FTCA. 28 *U.S.C.* §2674 In 1947, Congress remedied this unfair treatment to those bringing a FTCA case in Alabama by amending the FTCA to provide that if there is wrongful death claim under the FTCA and the applicable state law only allows punitive damages, then "the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death. . . ." 28 *U.S.C.* §2674

The practitioner, therefore, must determine what damages are included within the provision, "actual or compensatory damages, measured by the pecuniary injuries resulting from death." Is loss of consortium recoverable? Suppose the deceased suffered for a considerable time prior to his death. Does a claim for pain and suffering survive his death? How does one compute loss of future earnings or loss of future service?

Hoyt v. United States, 286 F.2d 356 (5th Cir. 1981) provides some guidance. In *Hoyt*, a seven-year-old boy was killed at Fort Rucker. The deceased child's father filed suit under the FTCA. The district court found in favor of the father, but reasoned that the only pecuniary loss to be awarded for the child's death was the funeral expense of $579.22. The district court concluded that any calculation of the pecuniary benefits the parents could reasonably have expected to receive during their lifetime and the lifetime of the deceased was too speculative to be recoverable. The Fifth Circuit correctly reversed, finding that, while such damages cannot be established with certainty, the risk of the uncertainty should fall upon the wrongdoer and not the injured party. 286 F.2d at 360-361

Hoyt established that federal law, not Alabama law, applies in determining what compensable damages are recoverable for wrongful death in Alabama under the FTCA. Federal law should be determined by referring to the Federal Employers' Liability Act, 45 *U.S.C.* §51, and the Death on the High Seas Act, 46 *U.S.C.* §761.

The *Hoyt* Court embraced the following general measure of damages:

> The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.

286 F.2d at 359, *quoting from Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489 (1916) (construing the Federal Employers' Liability Act)

Damages for loss of future earnings and services are clearly compensable and the primary source of damages. Where death is to a parent, services which are compensable include "the nurture, training, education and guidance that child would have received had not the parent been wrongfully killed." *Sea-Land Services v. Gaudet*, 414 U.S. 573, 585, *reh. denied*, 415 U.S. 986 (1974) (involving a wrongful death case brought under federal maritime law In addition, compensable services are those performed for the household or for the spouse. *Id. See Edwards v. United States*, 552 F.Supp. 635 (M.D. Ala. 1982) (both types of services compensable in FTCA case for wrongful death of housewife and mother). If the deceased was a parent, evidence should be introduced of the deceased's services and contributions to his children's development. Likewise, evidence should be admitted to show the approximate time spent and the type of services the deceased routinely performed for the household and/or the spouse. Evidence that the deceased actually rendered such services is a necessary predicate to recovering this item of damages. *Solomon v. Warren*, 540 F.2d 777 (5th Cir.), *reh. denied*, 545 F.2d 1298 (5th Cir.), *cert. dismissed* 434 U.S. 801 (1976) Damages for the loss of parental nurture to a surviving child generally cease when the child reaches majority. *Id.*

In calculating damages for loss of future earnings, it is assumed that the deceased would have continued to work and receive wages periodically until his retirement or natural death. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 534 (1983) For this reason, mortality tables should be introduced to establish what the life expectancy of the deceased was just prior to his death. Any evidence of how long the deceased had planned to work before retiring also should be introduced. The very recent Congressional act prohibiting compulsory retirement would seem to preclude

any automatic cutoff at age 65, for example. Age Discrimination and Employment Amendment of 1986 Future earnings should include not only the deceased's actual wage, but also any fringe benefits derived from pension and retirement plans, profit sharing, insurance coverage and other types of employee benefits.

The United States Supreme Court has offered the following method in calculating lost earnings:

> [T]he first stage in calculating an appropriate award for lost earnings involves an estimate of what the lost stream of income would have been. The stream may be approximated as a series of after-tax payments, one in each year of the worker's expected remaining career. In estimating what those payments would have been in an inflation-free economy, the trier of fact may begin with the worker's annual wage at the time of injury. If sufficient proof is offered, the trier of fact may increase that figure to reflect the appropriate influence of individualized factors (such as foreseeable promotions) and societal factors (such as foreseeable productivity growth within the worker's industry).

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 536 (1983)

If the deceased was a relatively young person without a long history of past earnings, a vocational expert should be retained. The vocational expert can project the deceased's future earnings, using such factors as the deceased's educational background and academic performance, age and health, life expectancy, job productivity, mental outlook and career ambitions. Some of these same factors were expressly approved by the court in *Hoyt v. United States,* 286 F.2d 356, 361 (5th Cir. 1961) and *Louisville and N.R. Co. v. Porter,* 205 Ala. 131, 87 So. 288 (1920) when computing the loss of future benefits arising from the death of a child.

It is well established that income taxes should be deducted when computing future earnings as damages under the FTCA. *Harden v. United States,* 688 F.2d 1025, 1029-1030 (5th Cir. 1982) *See Norfolk & Western R. Co. v. Liepelt,* 444 U.S. 490, 493-494, *rehearing denied,* 445 U.S. 972 (1980) (in a wrongful death action under the Federal Employers' Liability Act, after-tax income, rather than gross income before taxes, provides the only realistic measure of the loss of future earnings). Because a damage award under the FTCA is not taxable as income, this rule does not tax the plaintiff twice. Without deducting income taxes, *Harden* reasons that the award would constitute in part punitive damages which are prohibited under the FTCA. Harden does not clarify whether state income taxes are also to be deducted. In *DeLucca v. United States,* 670 F.2d 843 (9th Cir. 1982), the court affirmed a judgment deducting both state and federal income taxes from future earnings. *But see Burke v. United States,* 605 F.Supp. 981, 991 (D. Md. 1985).

In calculating future income taxes that would have been incurred by the deceased, one should allow for individual variation. *Felder v. United States,* 543 F.2d 657, 673 (9th Cir. 1976) For instance, the deceased may have had unusually large deductions on his income. If the deceased was filing jointly with his spouse and the deceased had several dependents, or if the deceased had substantial losses from some side interests, then such factors would have a considerable impact on his adjusted gross income. Of course, any projections of future income taxes must take into account the recent passage of the Tax Reform Act of 1986.

A lump sum award of loss of future earnings or future services must be discounted to present value because the lump sum can be invested to earn additional money. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 536 (1983) The discount rate should be based upon a rate of interest that would be earned on the safest available investments. *Id.* at 537-538 Obviously, the higher the interest rate used, the greater the reduction to present value; however, the market rate of interest is offset to some degree by future price inflation.

There are several approaches to calculate the discount rate. In *Pfeifer,* the United States Supreme Court refused to endorse any one formula to calculate present value, but stated that application of a discount rate between 1 percent and 3 percent would not be reversible error if the trial court explained its choice. 462 U.S. at 548-549 The Pfeifer court also refused to rule out use of the "total offset" method whereby the price inflation rate and interest rate cancel each other out. 462 U.S. at 549 Under this simple approach, there is no discount rate. The discount rate is applied to "each of the estimated installments in the lost stream of income." *Id. See Shaw v. United States,* 741 F.2d 1202, 1207-1208 (9th Cir. 1984) (error for court to apply 1 percent discount rate to the total pecuniary injuries instead of making deductions from each annual installment).

As previously stated, a calculation of loss of future earnings must be based on after-tax income. The United States Supreme Court has indicated that the lump sum damage award (which has been reduced to present value) should be increased by the amount of tax that would have to be paid on the income of the award. *Norfolk & Western R. Co. v. Liepelt,* 444 U.S. 490, 495, *reh. denied,* 445 U.S. 972 (1980) Because plaintiff presumably will invest the award, a full compensation for loss of future support should take into account the fact that income taxes must be paid on the investment earnings. *DeLucca v. United States,* 670 F.2d 843, 844-846 (9th Cir., 1982) *But see Flannery for Flannery v. United States,* 718 F.2d 108, 112 (4th Cir. 1983) (refusing to adjust a lump sum damage award under the FTCA to counter income tax effect because the award could be invested in tax-free securities). The Fifth Circuit is inclined to follow *Flannery "if* the district court took into account the lower interest rates of tax exempt securities when fashioning the damage award." *Sosa v. M/V Lago Izabal,* 736 F.2d 1028, 1034 n. 5 (5th Cir. 1984) (emphasis added)

Another important consideration is that "the FTCA's prohibition against punitive damages requires that the personal expenses of the deceased be subtracted from an award of future earnings." *Harden v. United States,* 688 F.2d 1025, 1029 (5th Cir. 1982) The compensatory loss to the decedent's family is measured by the income which the decedent would have earned had he lived, less the amount he would have consumed had he lived, in order to fairly measure that which the surviving family has pecuniarily lost due to his death. The trial court must consider the standard of living of the deceased and make a substantial deduction for what the deceased would have expended on his personal needs and purposes. *Hartz v. United States,* 415 F.2d 259, 264 (5th Cir. 1969) This same deduction is applied to compute loss of future services. *Edwards v. United States,*

552 F.Supp 635, 640 (M.D. Ala. 1982) Courts have utilized varying amounts to offset for personal consumption. *See, e.g., DeLucca v. United States,* 670 F.2d 843, 844 (9th Cir. 1982) (loss of future earnings reduced 30 percent for decedent's consumption); *Law v. Sea Drilling Corporation,* 510 F.2d 242, 251 (5th Cir.), *reh. denied,* 523 F.2d 793 (1975) (upheld trial court's 15 percent deduction for personal expenses in calculating the future earnings); *Edwards v. United States,* 552 F.Supp. 635, 640 (M.D. Ala. 1982) (10 percent reduction to loss of future household services).

A well-qualified economist is essential to tabulate loss of future earnings and/or future services. An expert economist can calculate future after-tax earnings including fringe benefits, reduce this amount to present value by applying an acceptable discount rate and deduct from this an amount for decedent's personal consumption. The expert economist should be careful to explain the bases for his calculations. An economist was effectively used in *Edwards v. United States,* 552 F.Supp. 635 (M.D. Ala. 1982) to determine the present value of the loss of future household services to the surviving family, after deducting for the time the decedent would have spent on herself.

Because FTCA cases are non-jury, the judge will grasp and apply such calculations more easily than a jury. Even so, the parties should attempt to stipulate such variables as the discount rate, effect of income taxes on decedent's future earnings, deduction for personal consumption, deceased's future income including fringe benefits and possible future promotions, etc. By doing so, the average accident trial will not become a graduate seminar on economic forecasting. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 548 (1983)

Are damages for loss of consortium recoverable in a wrongful death case in Alabama under the FTCA? Again, one must look to federal law for the answer. Consortium or society is the love, affection, attention, companionship, comfort and protection which a family shares. *Sea-Land Services v. Gaudet,* 414 U.S. 573, 585 (1983) It is well established that loss of consortium is not a "pecuniary injury" under the FTCA and, therefore, is not recoverable as damages. *Hoyt v. United States,* 286 F.2d 356, 360 (5th Cir. 1961) The court in *Hoyt* based its findings on the fact that courts construing the Death on the High Seas Act, as well as the Federal Employers' Liability Act, have denied claims for loss of consortium. The courts have not wavered from this position since Hoyt. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 620-621 (1978) (DOHSA case); *Kelsaw v. Union Pacific Railroad Company,* 686 F.2d 819 (9th Cir. 1982) (FELA case)

Damages for emotional anguish or grief suffered by the decedent's survivors are not recoverable in Alabama under the FTCA. *Hoyt v. United States,* 286 F.2d 356, 360 (5th Cir. 1961) Damages for the deceased's conscious pain and suffering, including mental anguish, occurring between the accident and his death are recoverable under the FELA, which contains a survival provision, and under federal maritime law. *Louisville and N.R. Co. v. Porter,* 205 Ala. 131, 87 So. 288 (1920) (FELA case); *Sea-Land Services v. Gaudet,* 414 U.S. 573 (1974) However, such damages are not recoverable under the DOHSA which has no survival provision. *Law v. Sea Drilling Corporation,* 510 F.2d 242, 248-249 (5th Cir. 1975) The FTCA has no survival provision, but instead looks to state law as to whether the deceased's claim for personal injury survives his death. Yet, *Hoyt* provides that federal law, not state law, determines the damages recoverable for wrongful death in Alabama under the FTCA. Thus, there is no clear answer to the recovery of damages for the deceased's pain and suffering under the FTCA in Alabama. If recoverable, plaintiff must show that the death was not instantaneous with the accident and the deceased was conscious following the accident and before his death.

Funeral expenses are recoverable by the estate. If the deceased was a minor, then the deceased's parent who is primarily liable for the funeral expenses may recover them. *Hoyt v. United States,* 286 F.2d 356, 360 n. 20 (5th Cir. 1961) Any medical expenses of the deceased incurred as a proximate result of the fatal accident are recoverable, as are any property damages. An award of pre-judgment interest is prohibited by the FTCA. 28 *U.S.C.* §2674 However, post-judgment interest is recoverable against the United States. 28 *U.S.C.* §2411(b) A prevailing plaintiff also may recover costs of the proceedings. 28 *U.S.C.* §2412 Attorney fees are not recoverable as costs.

Conclusion

Admittedly, projections of the deceased's earnings and income taxes, personal consumption, future price inflation as opposed to the interest rate, job promotions and other variables are uncertain. This is particularly so if the deceased was a child. As that American philosopher Casey Stengel once said: "Projections are always dangerous, especially when they involve the future." Nevertheless, the uncertainty of these variables does not preclude an award of loss of future earnings and future services. The trial lawyer should present some of these projections (if they cannot otherwise be stipulated) through the assistance of an economist and, particularly if the deceased was relatively young, through a vocational expert. ■

Dexter C. Hobbs is a partner in the firm of Copeland, Franco, Screws & Gill and a 1977 graduate of the University of North Carolina at Chapel Hill and a 1980 graduate of the University of Alabama School of Law.

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Arbitration of Commercial Disputes:
An Emerging Alternative in Alabama

by John M. Heacock, Jr.

I. The legal background

The use of arbitration in Alabama to resolve commercial disputes has been infrequent. This undoubtedly is due in large part to the inhospitable treatment which arbitration agreements have traditionally received in the courts of our state. "The public policy of this state is to encourage arbitration and amicable settlements of differences between parties; but public policy also holds void an agreement in advance to oust or defeat the jurisdiction of all courts, as to all differences between parties." *Wells v. Mobile County Board of Realtors, Inc.*, 387 So.2d 140, 144 (Ala. 1980) *Accord, S.S. Steele & Co., Inc. v. Pugh*, 473 So.2d 978 (Ala. 1985) *And see*, §8-1-41(3) *Code of Alabama*, 1975 ("The following obligations cannot be specifically enforced: . . . (3) An agreement to submit a controversy to arbitration;").

There is some basis for believing that the law in Alabama on this subject may be changing—or may not be as clear as once thought—as evidenced by the following observations of Justice Maddox in a dissenting opinion later adopted by the Alabama Supreme Court:

> "I would point out that the enforcement of arbitration clauses in any contract, whether involving intrastate or interstate commerce is not, in my opinion, clearly forbidden . . .
>
> The enforceability of such agreements in commercial contracts would seem to be permitted by current law and would not violate this state's public policy. On the public policy question this Court has held:
>
> > 'The true test to determine whether a contract is unenforceable because of public policy is whether the public interest is injuriously affected in such substantial manner that private rights and interests should yield to those of the public.'" *Colston v. Gulf States Paper Corp.*, 291 Ala. 423, 427, 282 So.2d 251, 255 (1973)

Ex Parte Alabama Oxygen Co., Inc., 433 So.2d 1158, 1172 (1983) (dissenting opinion, later adopted by the court, at least as to matters of federal law, in *Ex Parte Alabama Oxygen Co., Inc.*, 452 So.2d 860 [Ala. 1984]). Reinforcement for this favorable view of arbitration under Alabama law is found in the recent case of *Ex Parte Merrill, Lych, Pierce, Fenner & Smith, Inc.*, 494 So.2d 1 (Ala. 1986(where the court, after declaring in a footnote that federal law applied, nevertheless made the following comment about the status of arbitration in Alabama:

> Furthermore, plaintiff urges this Court to look to the contract law of this state when deciding whether the arbitration clause is unenforceable. In so doing we take note of Alabama's arbitration statutes, codified at Code 1975, §§6-6-1, *et sq.*, which look favorably on arbitration as a means of settling controversies.

Id. at 4.

The legacy of Alabama's historical reluctance to enforce arbitration agreements has been a general lack of familiarity by members of the Alabama State Bar with the practice of arbitration and perhaps also a significant degree of skepticism about its value as a means of resolving disputes. But this situation, or at least the unfamiliarity part of it, seems destined to change as the increasing availability of arbitration becomes more widely known.

Arbitration's emergence as a more frequently utilized method of settling commercial disagreements appears assured as a result of recent decisions of the United States Supreme Court construing, and substantially enlarging the scope of, the Federal Arbitration Act. 9 U.S.C. §1-14 (sometimes referred to hereafter as "the FAA" or "the Act")

For much of its existence, the FAA, originally enacted in 1925, was largely ignored. In 1983, however, the United States Supreme Court held in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. I, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) that the Act was a Congressional declaration of policy that favored arbitration agreements. "The effect of (§2 of the Act) is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Id.*, 103 S.Ct. at 941 The court further stated that as a matter of federal law, any doubts concerning the intended scope of an arbitration agreement were to be resolved in favor of arbitration. *Id.* Likewise, all doubts as to whether an arbitration agreement had been waived must be resolved in favor of non-waiver. *Id.* The court also observed that state courts, as much as federal courts, are obligated under § 3 of the Act to grant stays of pending litigation when the litigants before the court are parties to an arbitration agreement that comes within the coverage of the Act. *Id.*, 103 S.Ct. at 942

What type of arbitration agreements are covered by the Federal Arbitration Act? Under § 1 and 2 of the Act, such agreements must be in writing and arise from either a maritime transaction or a contract evidencing a transaction involving interstate commerce. There is every indication that interstate commerce is to be interpreted broadly for purposes of applying these sections of the Act. A significant statement on this point recently was made by the Alabama Supreme Court: "The requirement of the FAA that an arbitration agreement 'involve commerce' has been construed very broadly so that the slightest nexus of the agreement with interstate commerce will bring the agreement within the ambit of the FAA." *Ex Parte Costa and Head (Atrium), Ltd.*, 486 So.2d 1272, 1275 (Ala. 1986) Most construction projects, since they typically involve materials shipped across state boundaries, would appear to fall within that category, as would large numbers of other commercial transactions. *See, Ex Parte Costa and Head (Atrium), Ltd., supra; United States v. Neumann Caribbean International, Ltd.*, 750 F.2d 1422, 1426 (9th Cir. 1985).

If the reach of the FAA does indeed extend to all contracts that Congress could constitutionally regulate under the Commerce Clause, as indicated in *Synder v. Smith*, 736 F.2d 409, 418 (7th Cir. 1984), the potential impact of the Act is enormous. Consider, for example, the

implications of a recent United States Supreme Court opinion (not involving arbitration) which applied the Commerce Clause to the rental of a two-unit apartment. *Russell v. United States*, _____ U.S. _____, 105 S.Ct. 2455, 85 L.Ed.2d 829 (1985)

The Supreme Court in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) made clear what had been implicit in *Moses Cone*, that the Federal Arbitration Act overrides contrary state law under the supremacy clause and mandates the arbitrability of claims covered by a written arbitration agreement in a transaction involving interstate commerce. In *Southland*, the California Supreme Court had held that a state statute required judicial consideration of all claims brought under it. The United States Supreme Court reversed the state court's order denying arbitration and stated: "In enacting §2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* 104 S.Ct. at 858

Subsequent cases decided by the Supreme Court likewise have consistently favored arbitration. In *Dean Witter Reynolds, Inc. v. Byrd*, _____ U.S. _____, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) the court held that judicial enforcement of arbitration agreements is required even if there are related claims that are not arbitrable, and the result is "piecemeal" litigation. The case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, _____ U.S. _____, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) held that agreements to arbitrate Sherman Act disputes arising from international transactions are enforceable. And in *Thomas v. Union Carbide Agricultural Products Co.*, _____ U.S. _____, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) the court permitted Congress to require binding arbitration as the only means of deciding certain disputes under a federal statutory program.

II. Practical considerations

What are the most important considerations for the practicing attorney and his or her client in light of the increased availability of arbitration? The most significant is probably this: If a client does business in interstate commerce, as many do, how would he or she want potential disputes with customers, competitors and suppliers to be resolved? Would he want them submitted to a jury? Or would he prefer to specify in advance the qualifications, including experience and educational background, of the decision-makers? Arbitration affords the client an opportunity to enforce such choices by expressing them in a written arbitration clause. Such a clause, if agreed to by the parties in a transaction involving interstate commerce, constitutes a binding waiver of the right to a trial by jury and mandates that the arbitration panel be composed of persons who fulfill the requirements set forth in the parties' agreement. In short, the FAA provides contracting parties with the ability to "write their own ticket" regarding the mechanics of dispute resolution in a transaction covered by the Act.

This is no small matter in an era of increasingly sophisticated technology and complex business dealings. If one's client is involved in a specialized commercial activity and particularly if he takes pride in the quality of the services or products that he provides, it is likely that, if asked, he would want persons with similar experience and qualifications to decide disputes in which he may become embroiled. By inserting a properly worded arbitration provision in clients' contracts, an attorney can enable them to accomplish that result.

What language should an arbitration clause contain? The American Arbitration Association, a non-profit organization established in 1926 and operating through 24 regional offices across the country with a panel of over 50,000 arbitrators, recommends the following provision for insertion in general commercial contracts:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof."

This clause has sufficient breadth to cover not only contract disputes between the parties but also assertions of fraud or other tort claims related to the formation of the contract or arising out of its performance. *Blumberg v. Berland*, 678 F.2d 1068, 1071 (11th Cir. 1982) A claim of fraud in the inducement of the contract would fall within the domain of an arbitrator under this clause, unless such claim pertained *solely* to the alleged fraudulent inducement of the arbitration clause itself. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)

One should add to the foregoing language of an arbitration clause any supplemental provisions desired by the parties, including the number and qualifications of the arbitrators; the place where the arbitration hearing will be held; minimum discovery requirements, if desired; and any other special provisions that the parties or their attorneys may want.

Another important factor to consider in determining the suitability of arbitration for a client is the enforceability of an agreement concerning the location where a dispute will be heard. Some states, including Alabama, decline to honor agreements (commonly referred to as "forum selection clauses") by which parties stipulate in advance to the jurisdiction where suit may be brought. *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala. 1980) Although forum selection clauses may be enforceable in federal court in diversity cases despite contrary state law—*see Stewart Organization, Inc. v. Ricoh Corp.*, 779 F.2d 643 (11th Cir. 1986) (rehearing *en banc* granted and opinion vacated on March 14, 1986,)—one nevertheless faces the uncertainty in federal court of a discretionary transfer to another district under the *forum non conveniens* statute. 28 U.S.C. § 1404(a)

The Federal Arbitration Act contains a venue provision in 9 U.S.C. §4, but it is waivable by the parties. *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir. 1974) Accordingly, the parties' agreement establishing the site of the arbitration hearing will be honored. This, too, can become a very significant matter in an age when barriers to the assertion of *in personam* jurisdiction have fallen. For example, a party doing a nationwide business can easily find himself litigating before a jury in his adversary's home town, several thousand miles from his place of business. An arbitration clause fixing the place of the hearing can bring that dispute back home, or at least to a neutral location, before an arbitration panel composed of persons whose experience and training enable them to readily understand the issues.

Arbitration is designed to produce a speedier and more economical resolu-

tion of disputes. Parties who use the arbitration clause recommended by the American Arbitration Association will have their proceedings governed by the applicable rules of that association. Those rules are straightforward and tailored to bring disputes to a reasonably prompt conclusion in an atmosphere of privacy; copies of the rules can be obtained without charge from the AAA.

One possible deficiency in the rules, however, is that they do not automatically entitle the parties to engage in discovery. Therefore, an attorney may want to provide in the client's arbitration agreement that the arbitrator must permit the parties to take a reasonable number of depositions or conduct other forms of discovery prior to a final hearing. In that connection, § 7 of the FAA authorizes arbitrators to issue subpoenas, including subpoenas for the production of documents, and it provides that such subpoenas may be enforced by a United States district court in the district in which the arbitrator sits.

Judicial review of arbitration awards is extremely limited. The grounds for setting aside an award are set forth in § 10 and 11 of the Act and are restricted to instances of fraud or other misconduct by the arbitrators or where the arbitrators clearly exceeded their powers in rendering an award. *See Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 749-50 (8th Cir. 1986). The burden of overturning an award is made even more difficult by the fact that arbitrators are not required to, and often do not, explain the reasons for their decisions.

> "... there is also a public interest, manifested in the United States Arbitration Act, 9 U.S.C. § 1 et seq., in the proper functioning of the arbitral process. It would be destructive of that process if we approved the district judge's requirement here that the arbitrators give reasons for their decision. Arbitration may not always be the speedy and economical remedy its admirers claim it is—this case is proof enough of that. But forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process now achieves."

Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1215 (2nd Cir. 1972)

When confronted with the necessity of enforcing an arbitration agreement, some rather tricky jurisdictional issues can emerge. One thing, however, is clear: a state court with jurisdiction over the parties is obligated to enjoin litigation which violates an arbitration agreement covered by the FAA. 9 U.S.C. § 3; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra* Thus, a party armed with a binding arbitration agreement and faced with an unwelcome lawsuit initiated by another party to the agreement can stop the suit.

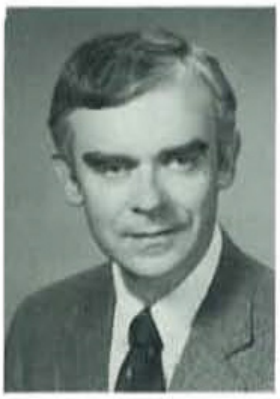
What about a party, though, who seeks to activate the arbitration process only to encounter an adversary unwilling to arbitrate? One option, of course, is for the first party to notify the second of his desire to arbitrate and then proceed with the arbitration, notwithstanding the absence of the other party. The rules of the American Arbitration Association provide for the rendering of an award when one of the parties to an arbitration agreement declines to participate. An arbitration award then can be reduced to judgment in any state or federal court designated in the arbitration agreement, or if none is designated, in the United States district court for the district where the award is made, provided an application for judgment is filed within one year after the award is rendered. 9 U.S.C. § 9

Section 4 of the FAA also authorizes a federal district court to issue an affirmative order compelling a reluctant party to arbitrate. However, it is interesting that neither that section nor § 3 of the Act (pertaining to stays of litigation) confers independent jurisdiction upon a federal court. Rather, jurisdiction first must exist by virtue of diversity of citizenship, a federal question or some other ground, in order for a federal court to enforce an arbitration agreement. *Commercial Metals Co. v. Balfour, Guthrie & Co., Ltd.*, 577 F.2d 264 (5th Cir. 1978) *See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra*, n. 32, 103 S.Ct. at 942. The United States Supreme Court has not yet addressed the question of whether a state court can affirmatively compel arbitration under §4 of the Act. Such a holding would require some rather creative construction, since §4 refers explicitly to "United States district court(s)." However, as noted in the *Moses Cone* opinion, at least one court has found that §4 of the FAA does confer such authority upon state courts. *Main v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 67 Cal.App. 3d 19, 136 Cal.Rptr. 378 (1977) *See also Commercial Metals Co. v. Balfour, Guthrie & Co., Ltd., supra*, 577 F.2d at 269. This question may be settled in Alabama as a result of the Alabama Supreme Court's recent decision in *Ex Parte Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 494 So.2d 1 (Ala. 1986). In that case the court granted a *writ of mandamus*, ordering a trial court to grant the defendant's motion to compel arbitration. It did so, however, without discussing the issue posed by the language of §4 of the FAA.

Conclusion

The use of arbitration seems destined to increase, and with it, the need for attorneys to become more knowledgeable about the arbitration process. While arbitration will not be appropriate or even an enforceable alternative for some persons, for others it offers distinct advantages that should not be ignored. Foremost among them is the opportunity that arbitration affords an attorney, in consultation with his client, to structure the method of resolving the client's disputes in a manner maximizing the prospect of a just and economical result. ■

John M. Heacock, Jr., is a partner in the Huntsville firm of Lanier, Shaver & Herring, PC. He graduated from Harvard College in 1962 and Harvard Law School in 1965.



Riding the Circuits

Baldwin County Bar Association

The Baldwin County Bar Association hosted the Alabama Supreme Court for two days, November 20-21, beginning with an Alabama River delta tour and buffet.

Friday, November 21, the supreme court was in session at Faulkner State Junior College in Bay Minette, and December 10, the Baldwin County Bar Association held its annual Christmas Party at the Lake Forest Yacht Club.

Butler County Bar Association

The Butler County Bar Association met in October at the Greenville Country Club to honor outgoing President H. Edward McFerrin and elect new officers. Elected were:

President: Lewis S. Hamilton
Vice president: Warren J. Williamson, Jr.
Secretary/treasurer: Frank A. Hickman

Dallas County Bar Association

The Dallas County Bar Association held its quarterly luncheon Thursday, October 30, 1986. Honorable H. Mark Kennedy, judge of the Circuit Court of Montgomery County, spoke to the association regarding the Alabama Children's Trust Fund. Judge Kennedy explained the creation of the Children's Trust Fund and its activities, funding and efforts on behalf of the children of Alabama.

P. Vaughan Russell, president of the association, presided over the meeting, which was attended by members of the local bench and bar, invited guests from the Department of Human Resources and the news media. Secretary-Treasurer of the Dallas County Bar Association this year is Robert E. Armstrong, III.

Escambia County Bar Association

The Escambia County Bar Association elected the following officers:

President: Everette A. Price, Jr.
Vice president: Paul D. Owens, Jr.
Secretary/treasurer: James O. Roberts

Huntsville-Madison County Bar Association

The newly elected officers of the Huntsville-Madison County Bar Association are as follows:

President: Herman Watson, Jr.
Vice President (President-elect): Douglas C. Martinson
Secretary: Albert C. Swain
Treasurer: L. Thomas McMurtrie

Automation in Alabama's Courts

As the ink quill gave way to manual typing machines, the typewriter of today is being replaced by automated equipment in court offices across Alabama.

If called to jury service in state court, it is likely that a computer selected your name at random and even produced the summons mailed to your home. In many courts, when you pay a fine an electronic cash register receipts your money.

According to Alabama Supreme Court Chief Justice C.C. Torbert, Jr., "It's all a part of the judicial system's effort to keep abreast of the times and use modern management tools to efficiently process the 600,000 cases which come before Alabama's courts each year."

Currently the State Judicial Information System (SJIS) network is providing automated services to ten courts in Mobile, Baldwin, Houston, Madison, Etowah, Tuscaloosa, Montgomery, Jefferson, Lee and Lauderdale counties. This computerized network serves courts which hear half of the state's judicial workload. Future plans call for Calhoun, Morgan, Russell and Shelby County courts to be brought into the system. To date, over 3.2 million court records have been placed into the network's index system.

Current applications include: a civil case-tracking system for circuit civil, district civil and small claims cases which generates all major court forms and dockets plus a variety of notices and management reports; an attorney system that supplies address information for notices on civil cases; a witness subpoena system for all type cases which generates subpoenas for all witnesses and, if necessary, reissues the subpoenas; a court payment system which records and receipts all transactions for restitution, alimony and child support accounts, disburses the funds, keeps disbursement histories and provides management reports on delinquent accounts; and a tracking system for all felony, misdemeanor and traffic offenses to assist the court in managing criminal cases. ■

—Administrative Office of Courts

—Of Interest—

The following is two matters of federal legislation of interest to Alabama Lawyers:

— **The Anti-Drug Abuse Act of 1986** now makes it a federal crime for a person to knowingly engage in a monetary transaction involving criminally derived property in excess of $10,000. A dilemma lawyers face is whether they should make inquiry to determine the source of funds paid to them by clients.

— An exemption repealed in the **Fair Debt Collection Practices Act,** in which lawyers were exempt under the old law, now covers lawyers who "regularly" collect consumer debts.

Bar Briefs

Alabama Supreme Court Chief Justice C. C. Torbert and former U.S. Supreme Court Chief Justice Warren E. Burger

Portrait honors Webb

Friends and colleagues of retired Circuit Court Judge Douglas S. Webb gathered to honor the former Escambia County judge by unveiling a portrait of Webb which will be hung in the main courtroom at the county courthouse.

Webb, 63, retired January 1, 1986, after serving 21 years on the bench in Escambia County. Members of the Escambia County Bar Association, family members and friends were on hand for the unveiling.

—the Brewton Standard

Torbert again in the news

Alabama's Chief Justice C.C. Torbert, Jr., has been elected chairman of the board of directors of the State Justice Institute, a private, non-profit corporation established by Congress to improve state courts.

Board members were appointed by President Reagan after confirmation by the United States Senate. Torbert was elected to serve a three-year term as chairman.

Congress authorized and funded the Institute to further the development and improvement of judicial administration in state courts. The directors will fulfill this statutory responsibility by managing a national program of financial assistance for state courts, organizations supporting and funded by state courts and non-profit organizations assisting state judicial systems.

Task Force on the U.S. Constitution's Bicentenary

The Alabama State Bar Task Force on the Bicentenary of the United States Constitution is preparing textual outlines for use by speakers during the bicentennial year. The task force is designing the materials to aid in presenting constitutional topics to adult civic groups and high school classes, and would like to hear both local bars and state bar members who would like to obtain the outlines. Indications of interest should be directed to the vice chairman of the task force as follows:

Charles D. Cole
Associate Dean and Professor of Law
Cumberland School of Law
Samford University
Birmingham, Alabama 35229

■

Opening of Court Ceremony
Appellate Courts of Alabama

October 6, 1986
Memorial Address

As Delivered by
the Honorable Charles W. Gamble
Dean and Professor of Law
The State Law School of Alabama

Mr. Chief Justice Torbert, associate justices of the Alabama Supreme Court, Presiding Judge Charles Wright and justices of the Alabama Court of Civil Appeals, Presiding Judge William Bowen and honored members of the Alabama Court of Criminal Appeals, Acting Appellate Judges Leigh Clark and Edward Scruggs, distinguished members of the clergy, aggrieved family members of those whose passing we mourn today, ladies and gentlemen. May it please the court?

It is a great honor for me to be called before you today. In a personal sense I come as a friend of each justice here assembled, and I come with great humility and appreciation for your use of *McElroy's Alabama Evidence* which has caused it to continue as the Alabama lawyer's handbook.

In an institutional sense, however, I come before you as the dean of The State Law School of Alabama. In that capacity, I would be remiss in not recognizing the great ties that exist between our law school and these courts. Six justices went to the supreme court after service on the law school faculty: Henderson M. Somerville, the first law professor; W.S. Thorington, the first dean; Ormond Somerville, serving on the court from 1911-28 after ten years on the law faculty; J. Ed Livingston, who served on the court from 1940-71 after serving the law school from 1922 to 1940 as lecturer and adjunct professor; Robert B. Harwood, who served on the court of appeals from 1945-62 and the supreme court from 1962-75 after serving on the law faculty from 1929-45; and Samuel A. Beatty, elected to the court in 1976 after faculty service from 1955-63. Justices Harwood and Beatty both served as assistant deans.

Twenty-eight justices are graduates of the law school, including five chief justices serving since 1914 and all associate justices serving since 1928, except six, and including seven members of the present court. Of the 30 judges on the court of appeals and the court of criminal appeals, 14 graduated from the law school, including three members of the current court. Of the four judges who have served on the court of civil appeals, three, who compose the present court, are all graduates of the law school.

Today we gather to mark the passing of 56 fallen comrades. Comrades at arms, if you will, who—like Don Quixote de la Mancha—have assaulted the windmills of injustice and dared to defend the most precious of humanity's possessions—property, liberty and, yes, life itself. Without a doubt, they have proven that the legal profession is second only to the ministry in its capacity to do good for mankind.

Calumet, Mulberry, Cropwell, Grove Hill, Andalusia, Fayette—these, and a host of other Alabama towns, have nurtured the lives we celebrate today. The pioneering and plantation town of Greensboro alone has given up two of her most prominent native sons—Congressman Armistead I. Selden, Jr., ambassador to New Zealand, and Prime F. Osborn, III, who merged L&N Railroad and Seaboard Coastline Railroad to form the worldwide energy and transportation conglomerate known as CSX Corporation. These two lives, along with the careers of all those whose passing we mourn at this high hour, speak in loud tones that:

> "The goal of the lawyer's ambition can be reached only by work, by hard work. Oratory cannot bring you to it, neither can birth nor family distinction. It can be reached by merit and by merit alone."[1]

Jones Law Institute, Birmingham School of Law, Cumberland Law School and the University of Alabama—each has seen its alumni ranks diminished this year by the rude working of death in our

midst. Death has been no respecter of persons—rich and poor, black and white, young and old—each has been called. Clearly, like the law itself, in this final rite of passage—life's last obstacle—all men indeed are created equal.

The great enemy of life has dared even to claim our youth. Claude Rosser, a young Montgomery attorney, father of twins and one of my very best students, passed across the bar unexpectedly and prematurely. Russell Bounds, a 28-year-old promising Mobile trial lawyer, was struck suddenly by a terminal illness.

The sting of death struck this year at the heart of our judiciary. Judges in Pell City, Guntersville, Birmingham and Jasper were called to a higher court. I would be remiss in not mentioning Judge George "Spud" Wright of Opelika, my friend, the power of whose personality served as the basis of one of today's most valiant and courageous battles with cancer.

No words in my vocabulary can form an adequate tribute to these fellow lawyers. It is the lives which they lived that constitute the most effective closing argument in this case of tribute which I lay before these honorable courts today. Let these lives speak for themselves:

(1) Abe Berkowitz—A 1928 graduate of the University of Alabama School of Law who, while operating a largely corporate practice, took a leadership role in the civil rights struggles of Birmingham.

(2) John Jackson Sparkman—senior United States Senator from Alabama whose 30 years of service was longer than any other Alabamian. He achieved great distinction in the Senate, serving as chairman of both the Banking, Housing and Urban Affairs and the Foreign Affairs Committees and was instrumental in the enactment of legislation broadening home ownership, championing small business and aiding agriculture. Notwithstanding acclaim earned throughout the world, however, (including nomination by the Democratic party in 1952 for the vice presidency of the United States), the Senator: "... always remained a man of the people, compassionate and caring, working tirelessly in behalf of his district, state and nation."[2]

(3) Judge Thomas Beaird—According to a *Daily Mountain Eagle* column, and I quote: "Beaird served with honor, integrity and with humility. But above all these accomplishments, he was a Christian who practiced his faith daily at work, at home and wherever he was."[3]

(4) Marion Lusk—Recalling the words of a fellow lawyer in Guntersville: "He was learned in the law and possessed of high ethical standards, a dynamic personality and a love for his family, his friends and his state and nation. He loved his profession and its members. He was never too busy to listen and provide constructive advice."[4]

(5) Jimmy Carter of Montgomery has been described thusly by a fellow lawyer: "In his later years Jimmy limited his practice hours so he could spend time with his lifemate, Eva, who was confined to a nursing home for several years before her death. His daily visits and ministrations for her serve as (an) eloquent statement of his personal qualities of devotion and single-mindedness of purpose. One of the nurses said of Jimmy, 'You could set your watch by the time of his arrival each morning and afternoon.'"[5]

A thread of greatness runs through all the lawyering lives we honor this hour. That common characteristic lies in their readiness and ability to be friend and servant to all. Each has dutifully served as a helmsman of the community and pilot of the state. As stated by one far more eloquent than I, they have striven to fulfill the prophecy: "... written by the hand of the Almighty on the everlasting tablets of the universe, that no nation can long endure through whose life does not run that golden thread of equal, exact and universal justice."[6]

These noble careers at the bar are our best evidence to rebut a movement in American society which is more critical of the legal profession today than ever in its history. The contributions of these fallen comrades are irrebuttable testimony against those who contend that lawyers only carve the pie of American quality of life and add nothing to it. The lives they lived speak in as clear a tone as the moving funeral oration by Robert G. Ingersol in tribute to Roscoe Conkling, and I quote:

> "He was maligned, misrepresented and misunderstood, but he would not answer. He was as silent then as he is now—and his (life), better than any form of speech, refuted every charge."[7]

Most of us in this room today can identify with the words of State Bar President Bill Scruggs who, when giving his only qualification to take the helm of our profession, said: "I love lawyers." It is this comradeship that would have caused Francis Hare, Sr., to have referred to these dead as "my learned friends." It is that depth of affiliation which causes us to bow momentarily our heads in grief and hopelessness. Yet, it is the power of the lives we mourn that, with further thought, causes us to respond adamantly in those famous and comforting words: "O death, where is thy sting? O grave, where is thy victory?"[8]

All of life comes full circle. In that belief, I end this memorial address by quoting C.M.A. Rogers of Mobile, whose son, C.M.A. Rogers, III, is one of those fine lawyers whom we honor today. Mr. Rogers was called upon to memorialize the life of his friend, Richard Clarke Foster, a Tuscaloosa lawyer who was president of the University of Alabama at his untimely death in 1941. Rogers remembered:

> "As we entered Christ Church following the flag-draped casket, the resurrection hymn was sung:
>
> 'The strife is o'er
> The battle done
> The victory of life is won
> The song of triumph has begun.
> Alleluia! Alleluia!' "

Thank you and may God bless these honorable courts.

FOOTNOTES

[1] *Albert John Farrah, Addresses, Papers and Letters*, pg. 21

[2] 47 *Alabama Lawyer* 172 (1986)

[3] 47 *Alabama Lawyer* 116 (1986)

[4] 47 *Alabama Lawyer* 170 (1986)

[5] 47 *Alabama Lawyer* 229 (1986)

[6] *Albert John Farrah, Addresses, Papers and Letters*, pg. 15

[7] *Cited in Commonwealth v. Dravecz*, 424 Pa. 582, 227 A. 2d 904 (1967); *see* C. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment*, 14 Ga. L. Rev. 27 (1979)

[8] 1 Corinthians 15:55

Opinions of the General Counsel

by William H. Morrow, Jr.

QUESTION:

May a law firm ethically include the name of a deceased or retired attorney in the firm name or on its letterhead, professional card, professional announcement, etc. if no partner or associate of the present firm was ever a partner or associate of the deceased or retired attorney although (1) there was a close relationship between a partner or associate of the present firm and the deceased or retired attorney such as father/son and (2) the present firm practices from the same office occupied by the deceased or retired attorney?

ANSWER:

The inclusion of the name of the deceased or retired attorney in the firm name or on the firm's letterhead, professional card, professional announcement, etc. would not be ethically permissible.

DISCUSSION:

Prior to October 25, 1985, Disciplinary Rule 2-102(A)(4) provided:

> "(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, similar professional notices or devices or newspapers, except that the following may be used if they are in dignified form:
>
> * * *
>
> (4) A letterhead of a lawyer identifying him by name and as a lawyer and giving his addresses, telephone numbers, the name of his law firm and any information permitted under DR 2-106. The letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired *members*. A lawyer may be designed 'Of Counsel' on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as 'General Counsel' or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of *predecessor firms* in a continuing line of succession." (emphasis added)

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

> * * *
>
> "(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name, containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain 'P.C.' or 'P.A.' or similar symbols indicating the nature of the organizations and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired *members of the firm or of a predecessor firm* in a continuing line of succession. A lawyer who assumes a full-time judicial, public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm." (emphasis added)

Present Temporary Disciplinary Rule 2-101(A) provides:

> * * *
>
> "A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (A) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;. . ."

Temporary Disciplinary Rule 2-105(A) in pertinent part provides:

> * * *
>
> "A lawyer shall not use a firm name, letterhead, or other professional designation that violates Temporary DR 2-101."
>
> * * *

The American Bar Association Committee on Ethics and Professional Responsibility in Informal Decision C-789, decided under the old Canons of Professional Responsibility of the American Bar Association, held that when listing the names of deceased or retired members it is preferable to give the dates of active participation in the firm rather than the date of birth and death of the deceased members. Informal Decision C-789 contains the following:

> "You have inquired as to the proper dates to be used in connection with the name of a deceased partner; that is, whether they should be the dates of his birth and death, or the dates of his active participation in the firm. Mr. Drinker in his Legal Ethics says: 'The name of the deceased partner may be carried with the dates of his birth and death, although it would seem more accurately informative thus to designate the dates of *his active participation in the firm*' (page 208). Our Committee's Informal Decision 111(a) reads: 'A letterhead may name the living members of the firm on one side and the deceased ones with the dates of membership on the other side.' And Informal Decision 383(a) says: 'An approved practice is to have the living members listed on the left of the letterhead with the deceased on the right with the dates of admission and

retirement.' Similarly Informal Decision C-505: 'The name of a former member who was deceased or retired may be indicated with the dates he became and ceased to be a member of the firm.' Thus it would appear that the use of either the dates of birth and death or the dates *of active participation in the firm is permissible, although the latter is preferable.*" (emphasis added)

Informal Opinion 1265 of the American Bar Association Committee on Ethics and Professional Responsibility, decided under the *Code of Professional Responsibility of the American Bar Association*, specifically DR 2-102(A)(4) and DR 2-102(B) which were identical to the corresponding Disciplinary Rules of the *Code of Professional Responsibility of the Alabama State Bar* as it existed prior to October 25, 1985, held that it is misleading and improper for each of two firms to list on letterheads the name of the senior partner of the other firm indicating a working arrangement between the two firms. There is language in this opinion which is helpful in resolving the question posed herein. The purpose of the restrictions on the content of the firm's letterhead is to insure that the public will not be misled. In Informal Opinion 1265 the Committee stated:

> "In our view, DR 2-102(A)(4) permits the listing or identification of lawyers on firm letterheads only if the lawyers are partners (or retired or deceased *firm members*) or associates or have the relationship described as 'Of Counsel' or equivalent. See Formal Opinion 330." (emphasis added)

If the new firm occupies the same physical premises as that of a deceased or retired attorney, undoubtedly many of the clients of the deceased or retired attorney, although free to employ an attorney of their choosing, will avail themselves of the services of the new firm, especially where there is a close relationship between the deceased or retired attorney and a partner or associate of the new firm such as father/son, grandfather/son, etc.

In our opinion the words "predecessor firm" as used in DR 2-102(A)(4) contemplates that one or more of the members or associates of the present firm was an actual member or associate of the "predecessor firm."

It would be very difficult to design a professional card, professional announcement card, letterhead, etc. that at least would not imply that one or more of the partners or associates of the present firm had been a partner or associate of the deceased or retired attorney.

Disciplinary Rule 2-102(C), prior to October 25, 1985, provided in part:

* * *

> "A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners."

* * *

To paraphrase and adapt that language to the present situation, it might read, "A lawyer shall not hold himself out as having had a partnership with one or more other lawyers unless they were in fact partners." ■

Please send your editorials and letters to:
The Alabama Lawyer Editorials
P.O. Box 4156
Montgomery, AL 36101
Your opinions on subjects of interest to other Alabama lawyers are always welcomed.

Legislative Wrap-up

Robert L. McCurley, Jr.

1987 legislature

When the next Legislature convenes for its 1987 regular session in April there will be less lawyers involved in the legislative process than anytime in recent memory. For the first time the governor, lieutenant governor and, possibly, the speaker of the house will not be lawyers. There will be only 11 lawyers in the Senate and nine in the House of Representatives. Therefore, there will not be enough attorneys to fill either the House or Senate Judiciary Committees.

Senator Rick Manley from Demopolis is the only new lawyer-senator, while Representative Bill Slaughter from Birmingham is the sole new lawyer-house member.

The Senate and House of Representatives will organize themselves when they convene for their "organizational" session January 13-22, 1987. At that time the speaker of the house and speaker pro-tem will be elected, and the Senate will elect a president pro-tem. The new presiding officer in each house will select the committee chairmen and name legislators to the respective committees.

Legislators take office immediately after their election. Over 130 of the new legislators met at The University of Alabama Law Center in Tuscaloosa for an orientation, November 13-14, 1986, conducted by the Alabama Law Institute and Legislative Counsel. Counsel President and Institute Vice President Representative Jim Campbell presided over the two-day event that saw Governor-elect Guy Hunt make his first address to the Legislature.

Council approved revisions

The Alabama Law Institute Council met October 31, 1986, in Birmingham and approved four new revisions. The revisions include:

—Alabama Uniform Guardian and Protective Proceedings Act
—The Uniform Condominium Act
—Powers Contained in Mortgage
—Alabama Trade Secrets Act

Powers contained in mortgage

Hugh Lloyd of Demopolis served as chairman of the Institute's Real Estate Committee and Professor Harry Cohen of the University of Alabama School of Law was the reporter; members are:

Joe Adams, Ozark
Jim Campbell, Anniston
Wayne Copeland, Gadsden
Fred Enslen, Montgomery
Bill Hairston, Jr., Birmingham
Bob Harris, Decatur
George Maynard, Birmingham
Drayton Pruitt, Jr., Livingston
Robert Russell, Montgomery
Louis Salmon, Huntsville
Yetta Samford, Opelika
Morris Savage, Jasper
James Tingle, Birmingham
Caroline Wells, Mobile

The present power of sale statute in Alabama contains provisions authorizing a power of sale to be included in a real property security instrument as part of the agreement. However, the statute also provides a power of sale where the security instrument does not include authority for a power of sale and a number of detailed rules for this statutory power of sale.

A continuing question since the late 1960s and early 1970s is whether published notice of a foreclosure under a power of sale is constitutionally sound. Although there

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is no Supreme Court of the United States decision squarely in point, there are decisions upholding published notice in a power of sale foreclosure as constitutionally sound, as long as no state official or state action is involved in the foreclosure.

It is possible that the present Alabama statute supplying a power of sale to creditors and mortgagees who have not included such a power in their real property security agreement invites constitutional attacks. The suggested Section 1, perhaps the most significant provision in the suggested legislation, merely authorizes the parties to a real property security agreement to include powers of sale in their agreement. No state action is involved in any of the suggested provisions.

The remainder of the suggested statute endeavors to set minimum standards for the notice and method of conducting the sale. It is hoped these minimum standards are not considered state action.

In subsequent editions of *The Alabama Lawyer* we will summarize the other proposed revisions. Anyone desiring a copy of one of these proposed revisions may write the Alabama Law Institute. ■

cle opportunities

january

12-13

COMMERCIAL REAL ESTATE LOAN DOCUMENTATION
Wyndham Hotel, Orlando
Executive Enterprises
Credits: 13.5 Cost: $795
(212) 645-7880

12-16

ESTATE PLANNING INSTITUTE
Sheraton Bal Harbour Hotel, Miami
Miami Law Center
Credits: 28.6
(305) 284-4762

15-16

REAL ESTATE AND THE BANKRUPTCY CODE
Holiday Inn Union Square, San Francisco
Practising Law Institute
Credits: 12.0 Cost: $390
(212) 765-5700

15-16

ANNUAL DISCLOSURE DOCUMENTS
Omni International Hotel, Atlanta
Practising Law Institute
Credits: 13.2 Cost: $425
(212) 765-5700

15-17

UNIFORM COMMERCIAL CODE INSTITUTE
Hyatt Regency, Los Angeles
Uniform Commercial Code Institute
Credits: 18.3 Cost: $585
(717) 249-6831

16 friday

ATTORNEY'S FEES IN DOMESTIC CASES
Best Western Hotel, Bessemer
Bessemer Bar Association
Credits: 1.6 Cost: none
(205) 424-5480

22 thursday

FINANCIAL PLANNING AFTER THE TAX REFORM ACT OF 1986
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6
(205) 348-6230

23 friday

APPELLATE PRACTICE
Civic Center, Montgomery
Alabama Bar Institute for CLE
Credits: 6.4 Cost: $85
(205) 348-6230

REAL ESTATE FINANCING
Holiday Inn Medical Center, Birmingham
Cumberland Institute for CLE
Credits: 7.5
(205) 870-2865

SOCIAL SECURITY
Atlanta
Institute for CLE in Georgia
(800) 422-0893

25-26

ADVANCED TAX PLANNING FOR CLOSELY HELD CORPORATIONS
Westin Peachtree, Atlanta
American Law Institute-American Bar Association
Credits: 11.7 Cost: $325
(215) 243-1600

29 thursday

EMERGING THEORIES OF LENDER LIABILITY
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6
(205) 348-6230

30 friday

REPRESENTING AGRICULTURAL CLIENTS
Ramada Inn, Greenville
University of Mississippi Center for CLE
Credits: 7.2 Cost: $85
(601) 982-6590

february

5 thursday

INCOME TAXATION OF MINOR CHILDREN AND ESTATES
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6
(205) 348-6230

6 friday

COMMERCIAL TRANSACTIONS
Wynfrey Hotel, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85
(205) 348-6230

12-13

AGRICULTURAL WORKOUTS AND BANKRUPTCIES
Colony Square Hotel, Atlanta
Practising Law Institute
Credits: 12.6 Cost: $390
(212) 765-5700

13 friday

TAX REFORM ACT OF 1986
Birmingham Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.4 Cost: $85
(205) 348-6230

REAL ESTATE PRACTICE & PROCEDURE
Atlanta
Institute for CLE in Georgia
(800) 422-0893

19 thursday

SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT 1987
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6
(205) 348-6230

21 friday

ENVIRONMENTAL LAW
Hyatt Regency, Washington, D.C.
American Law Institute-American Bar Association
(215) 243-1600

21-22

MEDICAL/LEGAL ASPECTS OF TRAUMATIC INJURY
Orlando
Medi-Legal Institute
Credits: 13.5 Cost: $400
(818) 995-7189

22-26

EXPERIENCED PROSECUTOR COURSE
Casa Sirena Resort, Channel Island
National College of District Attorneys
Cost: $145
(713) 749-1571

25-27

OIL AND GAS LAW AND TAXATION
Westin, Dallas
Southwestern Legal Foundation
(214) 690-2377

27 thursday

REPRESENTING CITY AND COUNTY GOVERNMENTS
Birmingham Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 6.2 Cost: $85
(205) 348-6230

FEDERAL APPELLATE PRACTICE AND PROCEDURE
Savannah
Institute for CLE in Georgia
(800) 422-0893

march

1-6

BASIC COURSE IN DISCOVERY & SETTLEMENT
James L. Knight Conference Center, Miami
Association of Trial Lawyers of America
Credits: 42.6 Cost: $550
(800) 424-2725

ADVANCED TRIAL ADVOCACY PROGRAM
University of Florida, Gainesville
National Institute for Trial Advocacy
Cost: $1,350
(800) 225-6482

cle opportunities

5 thursday

CIVIL TAX FRAUD
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6
(205) 348-6230

5-7

UNIFORM COMMERCIAL CODE INSTITUTE
Hilton Palacio Del Rio, San Antonio
Uniform Commercial Code Institute
Credits: 13.2 Cost: $425
(717) 249-6831

6 friday

FEDERAL APPELLATE PRACTICE AND PROCEDURE
Atlanta
Institute for CLE in Georgia
(800) 422-0893

7-14

SKI SEMINAR
Woodbridge Condominium Complex, Snowmass
Alabama Trial Lawyers' Association
Cost: $175
(205) 262-4974

9-11

EMPLOYMENT DISCRIMINATION
Doubletree Inn, Dallas
Southwestern Legal Foundation
(214) 690-2377

11 wednesday

ENGINEERING INSTITUTE
Sheraton Bal Harbour Hotel, Miami
Miami Law Center
Credits: 7.2 Cost: $125
(305) 284-4762

11-13

ADVANCED ANTITRUST WORKSHOP
Williamsburg Lodge, Williamsburg
Practising Law Institute
Credits: 15.6 Cost: $475

12-13

MEDICAL INSTITUTE
Sheraton Bal Harbour Hotel, Miami
Miami Law Center
Credits: 14.4 Cost: $275
(305) 284-4762

19 thursday

COMMERCIAL REAL ESTATE FINANCING
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6
(205) 348-6230

19-22

CURRENT ISSUES IN HEALTH LAW
Callaway Gardens, Pine Mountain
Cumberland Institute for CLE
(205) 870-2865

20-21

BRIDGE-THE-GAP
Birmingham Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

20-22

ORTHOPEDIC INJURY AND DISABILITY
Hyatt Lake Tahoe, Lake Tahoe
Medi-Legal Institute
Credits: 13.2 Cost: $400
(818) 995-7189

22-25

REPRESENTING STATE AND LOCAL GOVERNMENTS
The Antlers Hotel, Colorado Springs
National College of District Attorneys
Cost: $335
(713) 749-1571

Attorneys Admitted to Bar, Fall 1986

William Marsh Acker, III ..... *Birmingham, Alabama*
William Reid Adair, Jr. ..... *Tuscaloosa, Alabama*
Charles Bruce Adams ..... *Dothan, Alabama*
James Griffin Adams, Jr. ..... *Decatur, Alabama*
Rhonda Jean Adams ..... *Sylacauga, Alabama*
Richard Nelson Adams ..... *Decatur, Alabama*
William Bruce Alverson, Jr. ..... *Hope Hull, Alabama*
Stella Woodson Miles Anderson .. *Birmingham, Alabama*
Geralda Mae Aubry ..... *Nashville, Tennessee*
Daniel Gavin Austill ..... *Mobile, Alabama*
Milton Grady Avery ..... *Birmingham, Alabama*
Donna Elaine Baggett ..... *Birmingham, Alabama*
Douglas Brent Baker ..... *Mobile, Alabama*
Richard Crook Barineau ..... *Birmingham, Alabama*
Eaton Gaston Barnard ..... *Daphne, Alabama*
Joy Chappell Barnes ..... *Birmingham, Alabama*
Dennis Michael Barrett ..... *Birmingham, Alabama*
John Berry Baugh ..... *Florence, Alabama*
Mavanee Routt Bear ..... *Montgomery, Alabama*
Robert Gerald Boliek, Jr. ..... *Alabaster, Alabama*
Virginia Shipp Boliek ..... *Alabaster, Alabama*
Mark William Bond ..... *Birmingham, Alabama*
Bradford Wayne Botes ..... *Huntsville, Alabama*
Harold Alfred Bowron, III ..... *Birmingham, Alabama*
Kyle Russell Boyd ..... *Brewton, Alabama*
Nancy Ober Brame ..... *Birmingham, Alabama*
Marianne Battaglia Brandon ..... *Birmingham, Alabama*
Barry Owen Branum ..... *Opelika, Alabama*
Eric Joseph Breithaupt ..... *Mobile, Alabama*
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Richard James Brockman ..... *Randolph, New Jersey*
June Lee Sapp Brooks ..... *Cullman, Alabama*
Wallace Kindred Brown, Jr. ..... *Montgomery, Alabama*
Charles Augustus Bryant ..... *Birmingham, Alabama*
Rickey Lee Burgess ..... *Birmingham, Alabama*
Louis Milton Butt, Jr. ..... *New Brockton, Alabama*
Constance Ann Caldwell ..... *Montgomery, Alabama*
James Cannon, Jr. ..... *New Castle, Alabama*
Peter Adam Caro ..... *Birmingham, Alabama*
Kathryn Smith Carver ..... *Birmingham, Alabama*
Susie Taylor Carver ..... *Tuscaloosa, Alabama*
Carrie Lynn Christie ..... *Daphne, Alabama*
Julia Leigh Christie ..... *Daphne, Alabama*
Andrew Ted Citrin ..... *Mobile, Alabama*
Terry Allen Clark ..... *Greenville, South Carolina*
Ginger Dickerson Cockrell ..... *Birmingham, Alabama*
Gary Philip Cody ..... *Birmingham, Alabama*
Mina Cathryn Coker ..... *Prattville, Alabama*
Linda Lee Collins ..... *Mobile, Alabama*
Brian Keith Copeland ..... *Birmingham, Alabama*
Rudene Bailes Crowe ..... *Mobile, Alabama*
Sheila Kay Pugh Dansby ..... *Tuscaloosa, Alabama*
Gloria Jean Darby ..... *Florence, Alabama*
Mark Thomas Davis ..... *Troy, Alabama*
Mary Lee Abele Dawson ..... *Birmingham, Alabama*
Theresa Smith Dean ..... *Opelika, Alabama*
Raymond Harvey Deibert ..... *Birmingham, Alabama*
George John Dezenberg, Jr. ..... *Fort Payne, Alabama*
David Marcus Dunlap ..... *Birmingham, Alabama*
Nora Elizabeth Elder ..... *Northport, Alabama*
William Cater Elliott ..... *Montgomery, Alabama*
Gregory Houston Ellis ..... *Birmingham, Alabama*
Roger Wilson Ellis ..... *Birmingham, Alabama*
Patricia Franklin Emens ..... *Tuscaloosa, Alabama*
Jeffrey Coleman Ezell ..... *Phenix City, Alabama*
Herbert Shepherd Faught, Jr. ..... *Birmingham, Alabama*
Denise Ann Ferguson ..... *Huntsville, Alabama*
James Edmund Ferguson, III ..... *Birmingham, Alabama*
George Wheeler Finkbohner, III ..... *Mobile, Alabama*
William Tazewell Flowers ..... *Clayton, Missouri*
Patricia Shaud Francis ..... *Birmingham, Alabama*
Richard William Franklin ..... *Newport, Rhode Island*
William Spencer Frawley ..... *Birmingham, Alabama*
Gregory Scott Frazier ..... *Tuscaloosa, Alabama*
Vernie Edward Freeman, II ..... *Bessemer, Alabama*
Stuart Frentz ..... *Birmingham, Alabama*
Charles Carl Fridlin, III ..... *Birmingham, Alabama*
Rose Hannah Garrett-Johnson ..... *Daphne, Alabama*
Beth Hahn Gerwin ..... *Birmingham, Alabama*
John Alan Gibson ..... *Butler, Alabama*
Walter Thompson Gilmer, Jr. ..... *Mobile, Alabama*
William Bowman Givhan ..... *Mobile, Alabama*
Thomas Jeffery Glidewell ..... *Saraland, Alabama*
Charles Edward Grainger, Jr. ..... *Montgomery, Alabama*
Lisa Fae Grumbles ..... *Birmingham, Alabama*
John Collier Gullahorn ..... *Albertville, Alabama*
John Efstration Hagefstration, Jr. ... *Birmingham, Alabama*
Gregory Rick Hall ..... *Huntsville, Alabama*
Lewey Clayton Hammett, Jr. ..... *Pell City, Alabama*
Lynn Etheridge Hare ..... *Mobile, Alabama*
John William Hargrove ..... *Birmingham, Alabama*
Robert James Phillips Harmon, II .. *Birmingham, Alabama*
James Ronald Harris ..... *Birmingham, Alabama*
Dannie Lynn Hart ..... *Brewton, Alabama*
Kathryn McCullough Harwood ..... *Tuscaloosa, Alabama*
James Antonio Hernandez ..... *Northport, Alabama*
Michael Stephen Herring ..... *Birmingham, Alabama*
Howard Douglas Hinson ..... *Birmingham, Alabama*
William Steele Holman, II ..... *Mobile, Alabama*
Richard Hamner Holston ..... *Mobile, Alabama*
Jeana Peeler Hosch ..... *Birmingham, Alabama*
James Cicero Huckaby, Jr. ..... *Birmingham, Alabama*

John Lee Hutcheson ..... *Irondale, Alabama*
Kenneth Frank Ingram, Jr. ..... *Ashland, Alabama*
Garfield Woodrow Ivey, Jr. ..... *Birmingham, Alabama*
Richard Lynn Izzi ..... *Birmingham, Alabama*
Janet Brooks Jenkins ..... *Montgomery, Alabama*
Richard Edward Jesmonth ..... *Daphne, Alabama*
Carlton Murray Johnson, Jr. ..... *Montgomery, Alabama*
Curti Morel Johnson ..... *Lanett, Alabama*
Daniel Boyd Johnson ..... *Atlanta, Georgia*
Sandra Loe Johnson ..... *Alabaster, Alabama*
Wylie Benjamin Johnson ..... *Birmingham, Alabama*
Deborah Blackmon Johnstone .... *Birmingham, Alabama*
Suzanne Jones ..... *Montgomery, Alabama*
Leigh Ann Kaylor ..... *Gainesville, Florida*
Vera McGehee Kee ..... *Birmingham, Alabama*
Cynthia Keith Kennedy ..... *Hazel Green, Alabama*
Edward Joseph Laake ..... *Montgomery, Alabama*
Dorothy Kelley Lackeos ..... *Mobile, Alabama*
George Warren Laird, II ..... *Jasper, Alabama*
Richard Joel Laird, Jr. ..... *Birmingham, Alabama*
Wesley Lance Laird ..... *Fort Deposit, Alabama*
Mary Ellen Lamar ..... *Montgomery, Alabama*
Patrick McCarty Lamar ..... *Florence, Alabama*
Matthew Clement Lemere ..... *Birmingham, Alabama*
Robert Elisha Ledyard, III ..... *Huntsville, Alabama*
David Alan Lee ..... *Leeds, Alabama*
Scott Jay Leeds ..... *Birmingham, Alabama*
Michael Kieth Lewis ..... *Collinsville, Alabama*
Leigh Frances Lichty ..... *Birmingham, Alabama*
Roy Hamilton Liddell ..... *Jackson, Mississippi*
Bruce Mitchell Lieberman ..... *Montgomery, Alabama*
Francis Patrick Loftin ..... *Phenix City, Alabama*
Laura Katherine Loveless ..... *Montgomery, Alabama*
John Frederick Lyle, III ..... *Mobile, Alabama*
Wallace Davis Malone, III ..... *Birmingham, Alabama*
Stuart Michael Maples ..... *Huntsville, Alabama*
Julie Ann Marks ..... *Birmingham, Alabama*
Michael Dennis Mastin ..... *Anniston, Alabama*
Walter Franklin McArdle ..... *Daphne, Alabama*
Charles Alexander McCallum, III .. *Birmingham, Alabama*
Brian Patrick McCarthy ..... *Mobile, Alabama*
Caroline Chunn McCarthy ..... *Mobile, Alabama*
Julian Rushton McClees ..... *Birmingham, Alabama*
Walter Joseph McCorkle, Jr. ..... *Montgomery, Alabama*
Raymond Thaddeus McCormack .. *Birmingham, Alabama*
Sidney Monroe McCrackin ..... *Daphne, Alabama*
Weyman Williams McCranie, Jr. ..... *Mobile, Alabama*
Marcus Edward McCrory ..... *Opelika, Alabama*
Andrew Harper McElroy, III ..... *Birmingham, Alabama*
Candis Annette McGowan ..... *Stockton, Alabama*
Ricky Joe McKinney ..... *Tuscaloosa, Alabama*
Stewart Davidson McKnight, III ... *Birmingham, Alabama*
Judith Louise McMillin ..... *Mobile, Alabama*
James Randall McNeill ..... *Pine Level, Alabama*
John Tyler McShan, IV ..... *McShan, Alabama*
Coleman Foster Meador ..... *Mobile, Alabama*
Albert Schneider Miles ..... *Tuscaloosa, Alabama*
Effie Teresa Miller ..... *Montgomery, Alabama*
John Walton Miller, II ..... *Birmingham, Alabama*
Francis Kilpatrick Milwee ..... *Blountsville, Alabama*
Shelly Felton Mitchell, Jr ..... *Mobile, Alabama*
Jeffery Allen Mobley ..... *Delmar, Alabama*
Carl Dean Monroe, III ..... *Montgomery, Alabama*
Yancey Albert Moore, III ..... *Huntsville, Alabama*
James Richard Morgan ..... *Birmingham, Alabama*
Connie Jo Morrow-Fundin .... *Double Springs, Alabama*
Melinda Louise Murphy ..... *Northport, Alabama*
Phillip Russel Myles ..... *Mobile, Alabama*
Lisa Janet Naas ..... *Huntsville, Alabama*
Narissa Gay Nelson ..... *Birmingham, Alabama*
Randall Wayne Nichols ..... *Mobile, Alabama*
Arthur Christian Nilsen ..... *Homewood, Alabama*
Linda Lee Nobles ..... *Pensacola, Florida*
Steven Merrill Nolen ..... *Fayette, Alabama*
Carnella Greene Norman ..... *Birmingham, Alabama*
William Richard North ..... *Montgomery, Alabama*
Walter Mark Northcutt ..... *Homewood, Alabama*
Ann Allison Korns Norton ..... *Birmingham, Alabama*
Gregory Norris Norton ..... *Anniston, Alabama*
Timothy Haston Nunnally ..... *Florence, Alabama*
Thomas Patrick Oldweiler ..... *Mobile, Alabama*
Willie Harold Parrish, Jr ..... *Montgomery, Alabama*
Virginia Calvert Patterson ..... *Birmingham, Alabama*
Robert Norris Payne ..... *Huntsville, Alabama*
Steven Campbell Pearson ..... *Birmingham, Alabama*
Adam Kennedy Peck ..... *Birmingham, Alabama*
Laura Howard Peck ..... *Birmingham, Alabama*
John Milton Pennington ..... *Andalusia, Alabama*
Marvin Glenn Perry, Jr ..... *Birmingham, Alabama*
Taylor Thomas Perry, Jr ..... *Gadsden, Alabama*
Steven Richard Perryman ..... *Valley, Alabama*
Teresa Bearden Petelos ..... *Birmingham, Alabama*
Charles Mark Peterson ..... *Birmingham, Alabama*
Susan Hubbert Peterson ..... *Birmingham, Alabama*
Dinah Weatherford Petree ..... *Huntsville, Alabama*
Martha Fields Petrey ..... *Birmingham, Alabama*
Sidney Tingen Philips ..... *Mobile, Alabama*
Mark Anderson Pickens ..... *Birmingham, Alabama*
Thomas Kevin Pogbee ..... *Plant City, Florida*
Beverlye Nixon Pollard ..... *Auburn, Alabama*
Patricia Joy Ponder ..... *Mobile, Alabama*
Andrew James Potts ..... *Mobile, Alabama*
Charles Joseph Potts ..... *Mobile, Alabama*
Frederick Allen Purchis ..... *Birmingham, Alabama*
Joan Elizabeth Putney ..... *Birmingham, Alabama*
Wanda Marler Rabren ..... *Andalusia, Alabama*
Richard Heywood Ramsey, IV ..... *Dothan, Alabama*
Sandra Louise Rander ..... *Washington, DC*
George Johnson Rice, Jr ..... *Mobile, Alabama*
Morris Wade Richardson ..... *Gardendale, Alabama*
Thomas Boyd Richardson ..... *Birmingham, Alabama*
Kathleen Jane Robertson ..... *Tuscaloosa, Alabama*

Judith Barry Robinson ..... *Birmingham, Alabama*
Oby Thomas Rogers ..... *Mobile, Alabama*
Ansley Elizabeth Rowell ..... *Birmingham, Alabama*
Thomas Drake Samford, IV ..... *Birmingham, Alabama*
Wesley Schuessler, II ..... *Roanoke, Alabama*
Sherry Ann Scott ..... *Penn Bucks, England*
Kevin Gene Shelley ..... *Birmingham, Alabama*
Laurie-Ellen Shumaker ..... *Birmingham, Alabama*
George Alan Simmons ..... *Birmingham, Alabama*
Inger Marie Sjostrom ..... *Birmingham, Alabama*
Loretta Joyce Skelton ..... *Mobile, Alabama*
Byron Bart Slawson ..... *Birmingham, Alabama*
Alfred Franklin Smith, Jr ..... *Birmingham, Alabama*
Steven Cooper Smith ..... *Decatur, Alabama*
Leah Dawn Snell ..... *Dothan, Alabama*
Dale Wayne Snodgrass ..... *Birmingham, Alabama*
Domingo Soto ..... *Austin, Texas*
James Wesley Sowell ..... *Mobile, Alabama*
Robin Vittingl Sparks ..... *Birmingham, Alabama*
Norma Stanley ..... *Birmingham, Alabama*
Michael Allen Stewart, Sr ..... *Cullman, Alabama*
Richard James Stockham, III ..... *Birmingham, Alabama*
Jean Anne Stone ..... *Albertville, Alabama*
Garrick Lewis Stotser ..... *Huntsville, Alabama*
Richard Douglas Stratton ..... *Birmingham, Alabama*
Lisa Slay Street ..... *Mobile, Alabama*
Phillip Hampton Street ..... *Mobile, Alabama*
Betty Allbritten Strother ..... *Boaz, Alabama*
Gerald Carl Swann, Jr ..... *Montgomery, Alabama*
Will Hill Tankersley, Jr. ..... *Montgomery, Alabama*
Gary Stephen Tetrick ..... *Birmingham, Alabama*
James Patrick Thomas, III ..... *Pleasant Grove, Alabama*
James Ray Thrash ..... *Opelika, Alabama*
James Patrick Tillery, Jr ..... *Birmingham, Alabama*
Guy Larry Tipton ..... *Hoover, Alabama*
Sid Jack Trant ..... *Birmingham, Alabama*
Sonja Maria Trenkler ..... *Daleville, Alabama*
Allen Robert Trippeer, Jr ..... *Birmingham, Alabama*
Julia Lynne Truesdell ..... *Birmingham, Alabama*
Edward Davis Tumlin ..... *Birmingham, Alabama*
Johnny Mac Turner, Jr ..... *Tuscaloosa, Alabama*
Donald Charles Vaillancourt ..... *Nutley, New Jersey*
Howard Raymond Vaughan, Jr ... *Montgomery, Alabama*
Charles Emil Vercelli, Jr ..... *Montgomery, Alabama*
Oakley Kevin Vincent ..... *Columbiana, Alabama*
Cindy Stone Waid ..... *Tuscaloosa, Alabama*
John Allen Webster ..... *Selma, Alabama*
Leonard James Weil, Jr ..... *Atlanta, Georgia*
Robert Machel Weinacker, III ..... *Mobile, Alabama*
Gary Phillip Weinstein ..... *Birmingham, Alabama*
Judson William Wells ..... *Birmingham, Alabama*
Kenneth Eugene White ..... *Birmingham, Alabama*
Carolyn Faye Wiggins ..... *Tuscaloosa, Alabama*
Deah Birdsong Williams ..... *Tuscaloosa, Alabama*
Peter Harold Williams ..... *Gainesville, Florida*
John Anthony Wilmer ..... *Huntsville, Alabama*
Forrest Crowell Wilson, III ..... *Mobile, Alabama*
Gwen Leatherwood Windle ..... *Daphne, Alabama*
Michael Paul Windom ..... *Mobile, Alabama*
Robert Donald Word, III ..... *Birmingham, Alabama*
George Robinson Worman, Jr ..... *Huntsville, Alabama*
Camille Searcy Wright ..... *Atlanta, Georgia*
Louise Coker Wyman ..... *Birmingham, Alabama*
Jennifer Marie Young ..... *Birmingham, Alabama*
William Edward Zales, Jr ..... *Birmingham, Alabama*

Fall 1986 Bar Exam
Statistics of Interest

Number sitting for exam 456

Number certified to Supreme Court 275

Certification rate 60%

Certification percentages:

University of Alabama 75%

Cumberland 76%

Alabama nonaccredited law schools .. 26%

—IMPORTANT NOTICE—

New Removal Bond Procedures in Northern District

Historically, the clerk of the U.S. District Court, N.D. of Alabama, has routinely approved $500 removal bonds.

New instructions now permit routine approval of only $1,000 removal bonds. As in the past, motions to increase or decrease the amount of a bond will be considered.

FALL 1986 ADMITTEES—GROUP 1

FALL 1986 ADMITTEES—GROUP 2

Lawyers in the Family

June Lee Sapp Brooks (1986); Len D. Brooks (1981); Judge Robert A. Sapp (1950); Robert A. Sapp, Jr. (1982); and John Mark Sapp (1981) (admittee, husband, father, brother and brother)

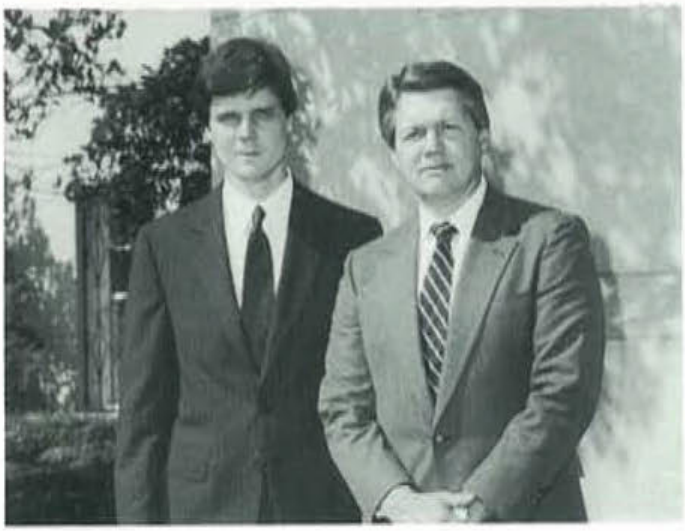
Brian Keith Copeland (1986); Buford L. Copeland (1942); Frank W. Bailey (1982); Wayne Copeland (1951); and James Milton Copeland (1985) (admittee, father, cousin, uncle and cousin)

Betty Strother (1986); Janie Baker Johnston (1985); and John Baker (1967) (admittee, cousin and cousin)

Harold A. Bowron, III (1986); Harold A. Bowron, Jr. (1955); and Ed Bowron (1985) (admittee, father and brother)

Patricia Franklin Emens (1986) and Steven C. Emens (1976) (admittee and husband)

Robin Vittingl Sparks (1986) and Daniel D. Sparks (spring 1986) (admittee and husband)



F. Patrick Loftin (1986) and Sam E. Loftin (1976) (admittee and brother)

Brian P. McCarthy (1986) and Caroline Chunn McCarthy (1986) (husband and wife admittees)

Ginger Dickerson Cockrell (1986) and Bobby H. Cockrell, Jr. (spring 1986) (admittee and husband)

Patricia Shaud Francis (1986) and J. Thomas Francis (1984) (admittee and husband)

John C. Gullahorn (1986) and William C. Gullahorn, Jr. (1957) (admittee and father)

William Marsh Acker, III (1986) and Judge William M. Acker, Jr. (1952) (admittee and father)

Gene Reese (1982); Elna Reese (1984); and Warren S. Reese, Jr. (1930) (brother, sister and father)

Kathryn McC. Harwood (1986); Robert B. Harwood, Jr., (1963); ; and Judge Robert B. Harwood (1926) (admittee, husband and father-in-law)

Sidney T. Philips (1986) and Abe Philips (1959) (admittee and father)

William S. Brewbaker, III (1986) and William S. Brewbaker, Jr. (1970) (admittee and father)

Richard H. Ramsey, IV (1986) and Richard H. Ramsey, III (1957) (admittee and father)

Fred G. Collins (1950) and Linda L. Collins (1986) (father and admittee)

Curti M. Johnson (1986) and John W. Johnson (1947) (admittee and father)

Kenneth Ingram, Jr. (1986) and Judge Kenneth Ingram (1963) (admittee and father)

David A. Lee (1986) and Marcus W. Lee (1977) (admittee and brother)

Young Lawyers' Section

Claire A. Black
YLS President

On October 21, 1986, 275 new attorneys were admitted to practice in Alabama in ceremonies held in Montgomery. If you were one of that number, you automatically became a member of the Young Lawyers' Section of the Alabama State Bar, comprising over 50 percent of the total state bar membership. In Alabama, YLS membership is free to attorneys not over the age of 36 or who have not been members of the state bar for more than three years. For the new inductees, now is the best time to show interest in your new profession by becoming an active YLS member.

The YLS, through its various officers and committees, performs service to the bar, both "young" and "senior," and the general public. Presently, there are 22 working committees, all needing volunteers. These committees change from time to time as issues arise affecting our profession and those we represent. With a veritable spectrum of activities performed by the YLS, assuredly there are several opportunities offered for many rewarding experiences. To receive a list of committees and the respective chairmen, please **call me at 349-1727.** Alabama's YLS has seen significant progress in recent years, but to further respond to the challenges faced by new attorneys and the public, we must meet the mandate for continued interest and involvement by that segment of the bar which now has grown to become the bar's majority.

In addition to the state YLS, our effectiveness only can be consequential on the national level if we increase our American Bar Association Young Lawyers' Division membership. Unlike the state organization, to become an ABA YLD member, one must complete the membership form available from the **American Bar Association, Young Lawyers' Division, 750 North Lake Shore Drive, Chicago, IL 60611.** The ABA YLD determines the number of voting delegates based on the number of YLD members within a given state. Membership is free and based on the same eligibility requirements as the state YLS. Alabama's vote within the ABA YLD is determined, then, by the simple effort needed to join the YLD.

Highlights of recent YLS events

Bar Admissions Ceremony Chairman Laura Crum of Hill, Hill, Carter, Franco, Cole & Black in Montgomery is congratulated along with the new inductees for a very successful ceremony. The motion for admission of the new attorneys was made by Mr. Douglas Arant, one of the state's most revered lawyers, who has practiced for more than 50 years. At the luncheon, 650 guests heard remarks from the Honorable Inge Johnson, a Denmark native, who was the first female circuit judge in Alabama.

At the ABA YLD Fall Affiliate Outreach Project, National Public Service Conference in Montreal, the Alabama YLS was represented by Percy Badham of Maynard, Cooper, Frierson & Gayle, Birmingham; Claire Black of Crownover & Black, Tuscaloosa; Rick Kuykendall of Cooper, Mitch & Crawford, Birmingham; Charles Mixon of Johnstone, Adams, Howard, Bailey & Gordon, Mobile; Keith Norman of Balch & Bingham, Montgomery; and past YLS President, Edmon McKinley, Thomasville. The project offered 20 workshops and six panel discussions, in addition to two leadership workshops. Many pamphlets and other written materials are disseminated at project meetings for use by local and state affiliates. In addition, there was an opportunity for southeastern states to discuss common goals and issues.

In November, the Birmingham Bar Association's YLS sponsored a district court seminar. In addition to rules and policies, topics included trial of an automobile accident case, common causes of action and post-judgement collection practices. In the past, this seminar has been attended by a record number of Birmingham attorneys.

The Legal Services to the Elderly Committee, headed by Rebecca Shows of Huie, Fernambucq & Stewart, Birmingham, has been working hand-in-hand with its senior bar committee counterpart. A resource man-

ual is being prepared, and members of the committee will be disseminating pamphlets to senior citizens centers, etc., throughout Alabama to notify the elderly of legal offices in their community providing assistance.

Upcoming YLS activities

The YLS committees are combining efforts for the celebration of the Constitution bicentennial. Chairman of the Constitution Bicentennial Committee Lynn McCain of Simmons, Ford & Brunson, Gadsden, and Keith Norman of Balch & Bingham, Montgomery, chairman of the Youth Judicial Program Committee, are working together to incorporate the Constitution bicentennial celebration with the Youth Judicial Program.

The Youth Judicial Program, which has received the first place Award of Achievement from the ABA YLD, involves several hundred high school students in local mock trial competitions, with finals held in Montgomery. This year the program will include participants, their families and the general public in the local YLS Constitution Bicentennial Project: the production of play entitled, "There's Trouble Right Here in River City." The play, including an all-lawyer cast, concerns the theme of freedom of speech in public schools and takes place in a parent/school council meeting setting.

Target cities for the mock trials and play productions include Birmingham, Mobile, Huntsville, Montgomery, Tuscaloosa, Dothan/Enterprise, the Quad Cities, Gadsden/Anniston and Auburn/Opelika. YLS Publications Committee Chairman Terry McElheny of Dominick, Fletcher, Yeilding, Wood & Lloyd, Birmingham, and Public Relations Committee Chairman Jim Sasser of Wood and Parnell, Montgomery, are drafting standardized publicity materials for use by each city representative, and Keith Norman is coordinating with Senior Bar Constitution Bicentennial Committee member Thelma Braswell of the Administrative Office of Courts, Montgomery, to prepare a mail-out on the program to be sent to all social studies teachers in Alabama.

Pat Harris of Harris & Harris, Montgomery, who chairs the Child Advocacy Committee, has undertaken to coordinate the YLS with the Montgomery County Young Lawyers to hold a Child Advocacy Seminar, dealing with representation of minors, juvenile and guardian ad litem cases and child custody. The seminar will be a one-day event held in Montgomery. ■

Back row, standing, left to right: Keith Norman, Edmon McKinley (past YLS president), Margie McKinley, Charlie Mixon Front row, seated, left to right: Claire Black, Rick Kuykendall, Nancy Kuykendall, Percy Badham, Patty Badham, Christy Mixon

Consultant's Corner

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

Litigation Support

Litigation support is a topic like morality; everyone talks about it, but few bother to define just what it is. This imprecision has led more than a few vendors to offer litigation support "programs" promising a lot for very little, while delivering (you guessed it) very little for very little. It is a bit like the ne'er-do-well college student questioned by his parent about his grades . . . "Somewhere between 0 and 100," he says. Similarly, litigation support can be defined as somewhere between "having someone carry my briefcase to the courthouse" and knowing "what question that lowlife opposing counsel is going to pose next to my witness."

Litigation support is generally agreed to cover a number of areas of pre-trial preparation, particularly the *indexing of documents* prepared both in-house and obtained through discovery. Indexing a large number of documents is not an arcane task (albeit a tedious one); the experienced litigator does it habitually. His index can vary from simple docket-like listings of single-line entries to a large deck of 5" x 8" cards, each representing one document. The point is not *whether* to utilize litigation support (you must have some sort of document control system to be effective), but whether to *automate* such a process. The answer, unfortunately, is not one guaranteed to please.

First, computerized litigation support programs are of two basic types: full text search and abstract search. Full text, as the name implies, involves the (key word) scanning of entire documents using *text processing* techniques. It clearly requires that in-house documents be available on a mass storage device attached to the text processing system. Not so obvious, (and certainly not emphasized by vendors) is the problem of material *not* created on your system. This material can only be entered into the system by rekeying or optically scanning it. Rekeying can be prohibitive in terms of time and labor cost. Optical scanning has limitations in terms of type fonts it can read and printer control characters it can recognize. On balance, full text document search has limited applicability at present, until such time as mass storage becomes significantly less expensive and optical scanning more efficient.

Abstract search involves the scanning of record-like abstracts of documents using *data processing* techniques. An abstract worksheet looks much like a 5"x8"

Bornstein

card you might prepare manually, containing date, document type, source, criticality, author, whether entered into evidence and a list of key words. Abstracts are much simpler to enter into a computer than full text. Conversely, they require time-intensive review by an experienced person *before* the abstract can be entered; i.e. How critical is it? What key words should be indexed?

Computerized products, like techniques, come in two forms: micro-computer based and mini- (or maxi-) computer based. The micro-based products are the most widely used, and usually are adequate for an abstract type of indexing. Almost any PC with a 10 or 20 Megabyte hard disk can be utilized. The software products are in the under-$2,000 range. The mini- and maxi-based products cost a great deal more (upwards of $20,000), but also allow for full text search and the distribution of access to the product among all stations connected to the main computer.

Which technique (and product) is right for you? Let's take some examples:

—If litigation comprises only a small part of your practice, then you should probably not get invested at all. Like many other technologies, if you do not use the product regularly, you probably will never get very comfortable with it.

—If you have a substantial litigation practice, one that has a high document content, then you would be well advised to consider one of the micro-based products, using an abstract based program. Experiment with it, much as you would experiment with a micro-computer, before deciding whether to buy any more of them or to invest in a mini-computer.

—If you already are using a micro-based program, require more capability *and* already have a mini computer system in-house for other purposes, then you might explore mini-based solutions rather than indiscriminately adding micros.

Finally, if you *occasionally* get involved with a matter requiring a mini- or maxi-computer based program, there are several existing *outside* resources available for such situations. Most major legal specific vendors (IBM, Barrister, Informatics, etc.) have service bureaus available for both customers and non-customers. The service can vary from installing one (or more) of their terminals in your offices to providing abstract encoders, as well. Naturally, these services carry a price tag, but it might be a better choice for you(and your client) than investing heavily in something you may not really need. Auburn University, for example, has offered time-shared access to its *STAIRS* program. STAIRS is a high level, sophisticated litigation support program that IBM had written for its *own* use in defending the antitrust case brought against it by the Justice Department in 1974.

Request For Consulting Services Office Automation Consulting Program

SCHEDULE OF FEES, TERMS AND CONDITIONS

Firm Size*	Duration**	Fee	Avg. cost/ lawyer
1	1 day	$ 500.00	$500.00
2-3	2 days	$1,000.00	$400.00
4-5	3 days	$1,500.00	$333.00
6-7	4 days	$2,000.00	$307.00
8-10	5 days	$2,500.00	$277.00
Over 10			$250.00

*Number of lawyers only (excluding *of counsel*)
**Duration refers to the planned on-premise time and does not include time spent by the consultant in his own office while preparing documentation and recommendations.

REQUEST FOR CONSULTING SERVICES
OFFICE AUTOMATION CONSULTING PROGRAM
Sponsored by Alabama State Bar

THE FIRM

Firm name _____
Address _____
City _____ _____ Zip _____ telephone # _____
Contact person _____ title _____
Number of lawyers _____ paralegals _____ secretaries _____ others _____
Offices in other cities? _____

ITS PRACTICE

Practice Areas (%)

Litigation	_____	Maritime	_____	Corporate	_____
Real Estate	_____	Collections	_____	Estate Planning	_____
Labor	_____	Tax	_____	Banking	_____
_____	_____	_____	_____	_____	_____

Number of clients handled annually _____
Number of matters handled annually _____
Number of matters presently open _____
How often do you bill? _____

EQUIPMENT

Word processing equipment (if any) _____
Data processing equipment (if any) _____
Dictation equipment (if any) _____
Copy equipment (if any) _____
Telephone equipment _____

PROGRAM

% of emphasis desired

Admin. Audit	_____	WP Needs Analysis	_____	DP Needs Analysis	_____

Preferred time (1) W/E _____ (2) W/E _____

Mail this request for service to the Alabama State Bar for scheduling. Send to the attention of Margaret Boone, executive assistant, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

Improper cross-examination of character witnesses

Hooper V. State, 3 Div. 473 (October 28, 1986)—Hooper was found guilty of two counts of rape. On appeal, he argued that the trial court erred by permitting the state to cross-examine defense character witnesses about particular acts attributed to the defendant. At trial, the defense counsel presented the testimony of 32 character witnesses who testified to the defendant's good reputation in the community. During the state's cross-examination of ten of these witnesses, the prosecutor asked the following question:

> "Would it change your opinion of Mr. Hooper's reputation if you knew that he was making his daughter, a child, watch pornographic films and then having sexual intercourse with her?"

The defense strenuously objected following each of these questions, but the objections were overruled.

The general rule is that the character, whether good or bad, can be proved only by general reputation, and evidence of particular acts or conduct is inadmissible both on direct and cross-examination, although a slightly greater latitude is allowed on cross-examination. It is not permissible for the inquiry to extend to particular facts or to isolated facts. *Lowery v. State*, 51 Ala.App. 387, 286 So.2d 62, 66, *cert. denied*, 291 Ala. 787, 286 So.2d 67 (1973) Therefore, on the cross-examination of the defense character witness, it is permissible to ask the witness if he had not heard it reported in the community that the defendant had committed certain unworthy acts, naming them, but even this is not allowed for the purpose of affecting the character of the defendant, but is evidence affecting the credibility of the witness testifying to good character. The form of the question to be asked to such a witness should be "Have you heard . . . ?" *Wedgeworth v. State*, 450 So.2d 195, 196 (Ala.Cr. App. 1984)

In reversing the trial court, Judge McMillan observed that the witnesses were not interrogated as to whether they had "heard reports, rumors or statements derogatory of the accused" which is the language of the particular cross-examination considered proper in Gamble, *McElroy's Alabama Evidence* (3rd ed. 1977). The questions were hypothesized not upon reports, rumors or statements by others, but upon *the assumed actual existence of such disreputable conduct.*

Proof of uninterrupted chain of custody still essential

Johnson V. State, 4 Div. 670 (October 28, 1986)—Johnson was convicted of violating the Controlled Substances Act. On appeal, he alleged that the state failed to prove an uninterrupted chain of custody. Judge Taylor's opinion underscores the importance of "chain of custody" evidence to the state and defendant.

In Johnson, one of the officers who had been a police officer for 19 years testified that the substance looked like marijuana. There also was an attempt to get into evidence the report from the state toxicology laboratory to prove what was in the brown paper grocery bag. While the director of the lab was listed as a state's witness, neither he nor anyone else appeared to testify that the contents were examined and found to be marijuana nor that the bag displayed in court held the same substance as that examined. No one was present to prove the report. Over defense objection, the trial court admitted the evidence.

On review, the Alabama Court of Criminal Appeals found that the proof that the substance was marijuana consisted of three things: it looked like marijuana to Officer Hutcheson, it smelled like marijuana to the informant and the seller and buyer acted as if it were marijuana. There was no foundation laid for receipt of the laboratory report of the alleged marijuana into evidence. It was merely hearsay. As an exhibit, the report went with the jury to the jury room and established a key element of the state's case—that the paper bag contained marijuana. Therefore, an essential element for proof of a violation of §20-2-70, Code of Alabama (1975) was lacking.

The appellate court critically noted there was a failure to prove that the container, the large brown paper sack, and its contents that were delivered to the crime lab in Enterprise were the same as the sack and contents appearing in court. There was a complete break in the chain of custody. *Proof of an uninterrupted chain of custody is essential.*

Marijuana possession . . .
proof of the knowledge element

McCray v. State, 1 Div. 149 (October 14, 1986)—McCray was found guilty of possession of marijuana for personal use. On appeal, she maintained that the state failed to prove a *prima facie* case.

The record indicated the defendant resided at #705 Saraland Apartments. The apartment and bills were listed in her name, women's clothing was found in the bedroom and the defendant was seen and identified at her apartment. However, the evidence did not indicate that the defendant knew *of the presence of the marijuana in her apartment.* Two small bags were found and both of them were in the kitchen area of the apartment. There was no evidence indicating how long they had been there nor that defendant knew of their existence. In fact, the uncontradicted testimony indicated that the defendant had last been seen at her apartment three days prior to the search. Such a showing, without more, is not sufficient to support a conviction of constructive possession.

Judge McMillan, speaking for a unanimous court, reversed and remanded for new trial. The opinion gives an excellent survey of the cases regarding proof of the knowledge element required in drug cases.

"A *prima facie* case of possession of a prohibited drug or substance must show constructive possession by the accused of a controlled substance plus knowledge on his part of the presence of the narcotic. *Yarbrough v. State*, 405 So.2d 721 (Ala.Cr.App. 1981); *Roberts v. State*, 349 So.2d 89 (Ala.Cr.App. 1977) . . . Constructive possession of a narcotic required proof beyond a reasonable doubt that the Defendant had knowledge of the drug's presence, *Temple v. State*, 366 So.2d 740 (Ala.Cr.App. 1978), which may be established by the surrounding facts and circumstances."

The law in Alabama is clear that where a person is in possession, but not exclusive possession, of premises, it may not be inferred that she knew of the presence of any controlled substance found there unless there are other circumstances tending to buttress the inference. In this case, there is nothing aside from the fact that the marijuana was found in her kitchen to show that the defendant was aware of the marijuana in her apartment.

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . .
Rule 50(c)(1) requires trial court to rule on motion for JNOV and the motion for a new trial

Ex parte: Handley (In Re: Handley v. City of Birmingham, 21 ABR 2672 (July 18, 1986)—Handley sued the City of Birmingham and obtained a jury verdict in her favor, and a judgment was entered in accordance with the verdict. The city filed motions for JNOV and alternatively for a new trial. The trial court granted the JNOV, but failed to rule on the motion for a new trial. Handley appealed, and the supreme court reversed the trial court's grant of the JNOV and remanded. Upon remand, the trial court granted the city a new trial, and Handley filed this appeal alleging that the trial court was without authority to order a new trial. The supreme court agreed.

The court stated that Rule 50(c)(1), A.R.Civ.P., provides that if a motion for JNOV is granted, *the court also shall rule on the motion for a new trial*, if any, by determining whether it should be granted if judgment is thereafter vacated or reversed. The court noted that the rule is mandatory, and the trial court erred in not ruling on the new trial motion. Consequently, the trial court had no discretion to grant a new trial upon remand after the supreme court's reversal of the order granting JNOV.

Therefore, if a trial court grants a JNOV and does not also rule on the motion for a new trial, the movant also must appeal from the failure of the trial court to conditionally rule on the new trial motion or waive the right to a new trial should the appellate court reverse the grant of the JNOV.

Executors and administrators . . .
a section 26-7A-1 ward must have court approval to make a valid will

Barnes v. Willis, as Executrix of the Estate of Malcolm J. Carter, Deceased, ____ ABR ____ (____). In 1980, Carter made a will leaving the bulk of his estate to his heirs. In 1981, the probate court determined that Carter was incapable of managing his affairs and property, in part due to senility, and the court appointed a curator of his estate under Section 26-7A-1, *Ala. Code* 1975. In 1982, Carter executed a second will revoking the first and left the bulk of his estate to Barnes, his niece. The circuit court invalidated the second will because the niece did not obtain a court order to allow Carter, a ward of the court, to make and execute a will.

In a case of first impression in Alabama, the supreme court was asked whether a ward for whom a curator has been appointed under Section 26-7A-1, *supra*, is legally capable of making a will without prior notice, hearing and approval by the court. The court answered no and noted that a ward of the court under Section 26-7A-1, *et seq., supra*, is someone unable to manage his or her own property for either physical or mental reasons and whose property, therefore, requires management by a court-appointed curator. Moreover, the statute expressly provides that the ward shall be wholly incapable of making any contract "or any instrument in writing" except after leave of the court.

The court stated that the phrase "any instrument in writing" clearly includes a will. The court added the "sound mind" test still remains the standard for determining testamentory capacity, and its holding merely requires a Section

26-7A-7, *supra*, hearing. Therefore, it is possible one may require a curator and still possess mental capacity to make a will.

Jurisdiction . . .
Section 12-11-33 *in rem* statute is subject also to the "minimum contacts" requirement to confer state court jurisdiction

Bearden v. Byerly, as Executor of the Estate of W. Charles McMinn, III, etc., 20 ABR 2822 (July 25, 1986)—McMinn, a Pennsylvania resident now deceased, owned and possessed an automobile in Pennsylvania. Bearden, while in Pennsylvania, acquired possession of the automobile and returned to Alabama where she resided. McMinn subsequently died in Pennsylvania and his estate demanded that Bearden surrender the automobile. Bearden refused and filed this declaratory judgment action against McMinn's estate seeking to establish the respective parties' ownership rights to the automobile.

The estate filed a Rule 12(b)(2), A.R.Civ.P., motion asserting that the trial court lacked jurisdiction of the estate because of insufficient "minimum contacts" with the State of Alabama. Bearden, however, maintained that Section 12-11-33, *Ala. Code* 1975, grants *in rem* jurisdiction rather than *in personam* jurisdiction and therefore is not subject to the "minimum contacts" requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

In a case of first impression in Alabama, the supreme court agreed with the estate and held that since *Shaffer v. Heitner*, 433 U.S. 186 (1977), the state court may exercise jurisdiction over a non-resident *only* so long as there exists "minimum contacts" between the defendant and the forum, and it is immaterial whether the jurisdiction is *in rem* or *in personam*. Although not expressly stated, Section 12-11-33, *supra*, does require "minimum contacts" for Alabama to acquire jurisdiction over a non-resident defendant. The state does not gain jurisdiction over a non-resident defendant simply because a plaintiff brings property allegedly belonging to a defendant into this state and then brings suit to resolve its ownership.

Medical malpractice . . .
municipal hospitals no longer immune from tort actions

Chandler, etc. v. Hospital Authority of the City of Huntsville, 21 ABR 172 (September 5, 1986)—The City of Huntsville Hospital refused to admit and treat the plaintiff's 15-day-old baby, and the baby subsequently died of spinal meningitis. The plaintiff filed this wrongful death action against the municipal hospital claiming the hospital breached implied and express contracts to treat. The trial court granted the hospital's motion for summary judgment on the grounds that Alabama law does not recognize a wrongful death action ex *contractu*, and Section 22-21-130, *et. seq.*, *Ala. Code* 1975, which authorizes municipal authorities to establish municipal hospitals, affords those hospitals immunity from ex *delicto* actions. The plaintiff asked the court to overrule *Geohagan v. General Motors Corporation*, 279 So.2d 436 (Ala. 1973), and also to find the enabling legislation unconstitutional as a violation of equal protection.

The Supreme Court refused to overrule *Geohagan* and affirmed that Alabama does not recognize a wrongful death action ex *contractu*. However, the court did hold that Section 22-21-137(2), *supra*, is unconstitutional, using the "rational basis" standard of review and concluding that there was no rational basis for this statutory discrimination whereby *municipal* hospitals are granted immunity from tort actions. The court reasoned that patients tortiously injured in county and public hospitals have a remedy and was unable to discern why patients tortiously injured in a municipal hospital should not have the same remedy.

Torts . . . libel
court refuses to adopt Restatement (Second) Torts, Section 611

WKRG-TV, Inc. v. Wiley, 21 ABR 288 (September 12, 1983)—Wiley, a member of the Mobile County Commission, filed a libel suit against WKRG-TV charging that WKRG libeled him in a televised report of a commission meeting in which persons accused Wiley of improper use of his office. WKRG made a motion for summary judgment contending that the broadcast was privileged because it was an accurate report of an occurrence at a public meeting pertaining to a matter of public concern and urged the supreme court to adopt Restatement of Torts (Second), §611 (1977), as the law of this state. The Restatement section protects the publisher of defamatory material even when the publisher knows that the published statement is false.

The court declined to adopt Section 611, *supra*, and stated that Section 13A-11-161, *Ala. Code* 1975, appears to correspond most closely to the Restatement rule, and that the privilege recognized in that statute is much more limited. The court noted that the Restatement rule would cloak the publication with a privilege even if the publisher knows the statement is false, as long as the report pertains to a matter of public concern and is a fair and accurate rendition of what transpires at the public meeting.

Please Note:
the next board of bar commissioners' meeting will be **FEBRUARY 6, 1987,** instead of February 13.

Since Wiley was a "public official" he might recover if he could prove *Sullivan* malice, that WKRG broadcast the allegations with knowledge of their falsity or with reckless disregard of their truth or falsity.

Voir dire . . .

***Alabama Power Company v. Bonner* overruled in part and dissenting opinion adopted**

Cooper v. Bishop Freeman Company and Russell, 21 ABR 3151 (August 22, 1986)—Cooper filed this action under the Alabama Extended Manufacturers Liability Doctrine against one of her co-employees and the manufacturer of a steampressing machine for injuries sustained at work. The jury returned a verdict for the defendants, and on appeal Cooper maintains that the trial court abused its discretion by sustaining objections to the plaintiff's proposed *voir dire* questions to the jury venire concerning potential relationships of the venire members and their families with any and all liability insurance companies. The defendants objected that the questions were overly broad, and the trial court limited the inquiry to asking if any venire member was an agent, stockholder or officer of the liability insurance carriers insuring the defendants.

The supreme court affirmed the trial court. However, in doing so, the court noted that such inquiry was sanctioned in *Alabama Power Company v. Bonner*, 459 So.2d 827 (Ala. 1984). Therefore, upon reconsideration, the court overruled this aspect of *Bonner* and restricted inquiry concerning potential insurance relationships between the venire members and defendants' insurance companies. Inquiry as to potential insurance relationships between any relatives of the venire and any other liability insurance carriers no longer is proper.

Recent Decisions of the Supreme Court of Alabama—Criminal

Satterwhite revisited . . . admission of search warrant not harmless error

McCrary v. State, 21 ABR 50 (August 29, 1986)—The Supreme Court of Alabama granted *certiorari* to review the decision of the Alabama Court of Criminal Appeals and determine whether the admission into evidence of a search warrant was harmless error.

Defendant was convicted of trafficking in marijuana. During the search author-

ized by warrant, one ounce of marijuana was found in the defendant's home. Two-hundred-ten pounds of marijuana were found at another site between the defendant's residence and another residence. The defendant was charged with the possession of the 210 pounds, as well as the one ounce actually found in his home.

The trial judge, over defense objection, allowed the search warrant into evidence. The defendant appealed, contending that the admission of the search warrant was reversible error. The court of criminal appeals affirmed, but in its opinion acknowledged that the admission of the warrant to prove a material element of the crime was improper.

The supreme court addressed the threshold issue and found that the admission of the search warrant was improper and constituted error. The closer question became whether the error was harmless or reversible. The supreme court concluded that "the test is not whether the illegal evidence influenced the jury, but whether *it might have unlawfully influenced the jury in the verdict returned.*"

In this case, the primary evidence as to the defendant's possession of the 210 pounds of marijuana, the trafficking charge, was based upon the defendant's possession of the one ounce of marijuana found in his home. The supreme court held that the improper admission of the search warrant put before the jury the fact that, prior to the search, a district judge was convinced there was probable cause to believe the defendant had marijuana at his residence. "Such evidence was likely to influence the jury in its determination of the Defendant's guilt or innocence, and this Court cannot know for certain that it did not."

Defendant's right to truthful response to questions posed to venire

Poole v. State, 20 ABR 3029 (August 15, 1986)—While Poole, a law enforcement officer, was responding to an emergency call, his vehicle collided with another vehicle. Two persons were killed. He was convicted of manslaughter and sentenced to a term of three years' imprisonment. Poole appealed to the court of criminal appeals, which affirmed his conviction.

On cert, Poole contended that the court of criminal appeals erred in failing to find that the service on the jury by two persons who had failed to respond truthfully to *voir dire* questions was prejudicial to him. At the time of the *voir dire* examination, the prospective jurors were questioned whether they had "ever had any problems or conflicts with any law enforcement officer?" Those questions elicited a negative response by all the members of the venire, including jurors Betty Johnson and Marty Keith Russell.

At some point, defense counsel learned that these two jurors had been involved in prior criminal activity, or that they had prior conflicts with the law. The defense contended that because of the prospective jurors' failure to answer the questions truthfully, the defendant was unable to utilize his jury strikes effectively, and, therefore, was prejudiced and entitled to a new trial.

The evidence reveals that juror Johnson was convicted in the district court for

the offense of sale of prohibited liquor. Juror Russell testified that he twice had been convicted of the offense of issuing worthless checks.

The supreme court, in an opinion authored by Justice Maddox, held that the failure of the two jurors to respond truthfully to the questions set in *voir dire* examination constituted prejudicial error. Justice Maddox found that the court of criminal appeals failed to follow the principles of law set in the case of *Ex Parte Ledbetter*, 404 So.2d 731 (Ala. 1981). In *Ledbetter*, the supreme court held that juror's failure to disclose an incident during which gunshots were fired at his home five months prior to trial was prejudicial. The court concluded that "the questions propounded to the prospective jurors were specific enough under the doctrine of *Ledbetter* to warrant a response." Thus, a defendant in a criminal case has a right not only to *voir dire* the prospective jurors, but the more significant right to receive truthful responses prior to exercising his peremptory challenges or challenges for cause.

Limitation on amending the charge

Wallace v. City of Dothan, 21 ABR 40 (August 29, 1986)—Wallace was convicted in Houston County circuit court of assault and criminal mischief. He was a suspect in a burglary that occurred in Ozark and was arrested in Dothan by an investigator with the Ozark Police Department. After questioning, he was placed in the back seat of a police car where he immediately started kicking the right window and frame of the door. Later, the defendant kicked one of the officers, knocking him against the dashboard.

On appeal, the defendant contended that municipal police officers from Ozark were acting outside of their authority when they arrested him in Dothan without a warrant on a felony charge of burglary. The defendant, therefore, contended that since he was illegally arrested he had the right to respond reasonably to unlawful custody.

The Supreme Court of Alabama, speaking through Justice Maddox, found that the clear and undisputed evidence was that city police officers from Ozark arrested the defendant at the Dothan City Jail on a felony charge of burglary, without a warrant. Consequently, the defendant was unlawfully arrested and, therefore, the only question for the Supreme Court's consideration was whether he used reasonable force in attempting to extricate himself from the unlawful arrest. The court found that the amount of force used by Wallace was unreasonable. However, the court reversed and remanded the case on the issue of whether the trial court erred in permitting the prosecutor to amend the information on two occasions.

The City of Dothan asked the judge to amend the *information* on two occasions; the judge allowed both amendments. The defendant cited to the Supreme Court a line of cases which held that in Alabama the indictment cannot be amended without the consent of the defendant. *Ex Parte Shoults*, 208 Ala. 598, 94 So. 777 (1922)

Justice Maddox points his readers to Rule 15.5(a), Alabama Temporary Rules of Criminal Procedures, which provides:

> "(a) *Amendment of Charge.* A charge may be amended by order of the court with the consent of the defendant in all cases except to change the offense or to charge new offenses not included in the original indictment."

In this case, the trial court allowed the prosecutor to amend the information twice: once, to change the offense and again to change the date the offense was committed. The court allowed the amendments over the defendant's objection. In doing so, the trial court erred and the court of criminal appeals erred in affirming the trial court's judgment.

Accomplice testimony and the doctrine of curative admissibility

Kennard v. State, 21 ABR 208 (September 5, 1986)—Kennard and Davis were arrested at the home of Davis' girlfriend shortly after a robbery was committed at the Highlands Bakery. Certain incriminating evidence was found at the residence, and Kennard and Davis were charged with the robbery. After his arrest, Davis gave the authorities a statement in which he admitted that he and Kennard robbed the bakery. Kennard was tried and convicted of first degree robbery.

At Kennard's trial, his attorney cross-examined one of the arresting officers about the admissions made to him by Davis. The defendant's lawyer's questions, however, did not elicit any answer which incriminated Kennard. On redirect examination of the police officer, the prosecutor responded to the cross-examination by defense counsel by asking the officer what Davis had told him about his and Kennard's involvement in the crime.

Over objection, the witness was permitted to state:

> A. "We asked Wendell Davis about the robbery. And he told us that he and Alvin Kennard committed the robbery. And he loaned Alvin Kennard his knife and his ski mask. That they stood on the corner—correction, on the alley by the bakery until a car left and went inside the bakery. And Alvin Kennard carried one of the ladies working in there to the back of the store . . . .

The court of criminal appeals reversed Kennard's convictions, holding that the statement of Davis, elicited through the testimony of the officers, violated Kennard's Sixth Amendment right to confront and cross-examine Davis as recognized in *Douglas v. Alabama*, 380 U.S. 415 (1965). The intermediate appellate court further held that the doctrine of "curative admissibility" did not allow the admission of the objectionable testimony. The Supreme Court of Alabama reversed.

The state conceded that ordinarily it cannot use the confession of an accomplice as evidence against the defendant where the accomplice is not available for cross-examination. *See Douglas v. Alabama, supra*. However, the supreme court held that the ordinarily objectionable re-direct testimony brought out by the state through the police officer fell within the parameter of the curative admissibility rule. Justice Adams observed that, "First, the testimony brought out by Kennard's counsel during cross-examination was hearsay not coming within any exception to the hearsay rule, and therefore, not admissible." Second, the cross-examination of the witness was to some extent prejudicial to the state and supported the accused's defense of alibi. Third, Justice Adams concluded, "The rebuttal testimony of the State was not excessive." Accordingly, under the doctrine of curative admissibility, if on cross-examination of a witness the party brings out a part of a transaction or conversation, the other party (herein the State) may inquire fully into the transaction or bring out the whole conversation on re-examination. ■

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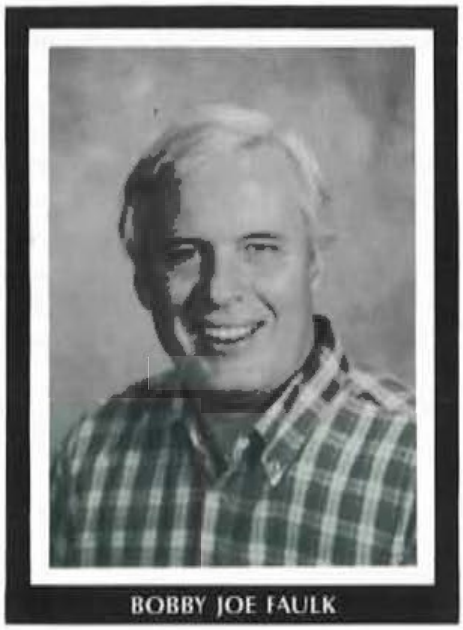

BOBBY JOE FAULK

Bobby Joe Faulk, a Phenix City attorney, died August 27, 1986, in Phenix City. He was a native of Huntsville, Alabama, and a graduate of Austin Peay College.

Following graduation, he was employed by Thiekol Chemical Corporation in Brunswick, Georgia; later, Faulk joined Boeing Aircraft Company as the youngest supervisor in the history of the company (at that time).

Faulk left Boeing to attend law school at the University of Alabama and received his degree in 1971. From 1971-72, he served as assistant district attorney of the 26th judicial circuit. In 1973, he opened his own practice.

Faulk served on the Alabama State Bar Board of Commissioners from 1980-83 and the Executive Committee of the bar commissioners; was a member of the Alabama Trial Lawyers' Association and on its board of directors; was a member of the American Bar Association and a founding member of the East Alabama Trial Lawyers' Association; was a member of American Field Services; and served as chairman of the American Cancer Society's Heart Fund in 1986. Also, Faulk was a member of the Judicial/Jail Complex Committee, which was responsible for the current renovation of the Russell County Courthouse.

He had served as chief warden and a member of the building committee of St. Thomas Episcopal Church.

Faulk was married to the former Karen Hirsch, and they have one daughter, Leslye, a student at the University of Alabama.

JAMES THEODORE JACKSON

J. Theodore Jackson died in a Dothan hospital July 30, 1986.

He graduated from Headland High School at 14 and attended Samford University where he was president of the student body; he went on to graduate from the University of Alabama Law School where, again, he served as president of the student body.

For the next two years he taught school until he turned 21 and could legally become a member of the Alabama Bar and practice law. Jackson practiced law in Dothan from 1933 until his retirement in 1976, excluding the time he served as the first district court judge of Houston County.

Judge Jackson was a deacon and Sunday school teacher at the First Baptist Church of Dothan. He was a life trustee of Samford University and a Kiwanian, serving as lieutenant governor and governor of the Alabama district.

Jackson was married to the former Lonnell Smith, who predeceased him, and has three sons, Ted Jackson of Montgomery and Edward Jackson of Dothan, both Alabama attorneys, and Smith Jackson of St. Louis, Missouri.

For those who knew him, he was perceived as a man who went about his church, civic and professional duties in a quiet, yet effective, manner. Judge Jackson was a husband, father, lawyer, judge and gentleman, whose standing in the Dothan Bar cannot be replaced.

RALPH HUNTER FORD

Ralph H. Ford, a member of the Madison County Bar, died October 16, 1986, in Huntsville at the age of 70.

He attended public school in Huntsville, graduating from Huntsville High School; he attended the University of Alabama in Tuscaloosa, receiving his B.S. degree from the University in 1939 and a LL.B. in 1941. While at the University, he was a member of Omicron Delta Kappa honorary fraternity, the "A" Club and Pi Kappa Alpha social fraternity.

During World War II Ford served in the United States Navy in the Pacific theater, being discharged as a lieutenant commander. He began the practice of law with his father's firm, Griffin and Ford, which later became Ford, Caldwell, Ford & Payne; he was its senior member at the time of his death.

During his career, he was a member of the Advisory Committee on Appellate Rules Practice for the Supreme Court of Alabama from 1971 until the present; a former president of the Huntsville-Madison County Bar Association; a member of the American Bar Association, Alabama State Bar, International Association of Insurance Counsel, Alabama Defense Lawyers Association, Federation of Insurance Counsel, American College of Trial Lawyers and International Academy of Trial Lawyers; past president of the Rotary Club; president of the Huntsville-Madison County Mental Health Board from 1969-1975; past president of the Huntsville-Madison County Chamber of Commerce; member of the Alabama Council of School Board Attorneys; attorney for Huntsville Hospital, the Madison County Board of Education, First American Federal Savings & Loan Association, the Von Braun Civic Center Board and former attorney for Madison County.

He always maintained a courteous and gracious attitude toward friends and adversaries alike and missed will be his companionable nature, gracious charm and constant good humor.

CHARLES SANDYS WHITE-SPUNNER, JR.

Charles Sandys White-Spunner, Jr., a member of the Mobile, Alabama and American Bar Associations, died September 3, 1986.

He was born in Mobile, Alabama, May 21, 1928, and was educated in the public schools of Mobile. He graduated in 1949 from Tulane University. In 1952, he received his LL.B. degree from the University of Alabama Law School and then served three years on active duty with the United States Army.

He started law practice in Mobile as an associate of the firm of Holberg, Tully and Aldridge, and later as a partner in the firm of Brown and White-Spunner.

For approximately seven years, White-Spunner served as judge, and later presiding judge, of the Municipal Court of Mobile. In 1969, he was appointed by President Nixon to serve as U.S. Attorney for the Southern District of Alabama, which he held until July 1977. Thereafter he returned to the private practice of law, which he left in October of 1983 to assume duties as assistant United States Attorney, heading the Organized Crime Drug Enforcement Task Unit.

White-Spunner was active in Republican political affairs, and served as a delegate to the 1960 Republican National Convention. On numerous occasions he served as delegate to the Alabama State Republican Convention and was vice chairman of the Alabama Republican Party. In 1980, he was co-chairman of Psesident Reagan's primary campaign for Alabama.

Charles S. White-Spunner was a member of the Spring Hill Baptist Church, the Mobile Lions Club and various other civic associations.

He is survived by his parents, Mr. and Mrs. Charles S. White-Spunner; his brother, Thomas N. White-Spunner; his three daughters, Leonora Wiggins, Betty Nicholas and Adra Smith; and two grandchildren. ■

Notice of Election

Notice is given herewith pursuant to the *Rules Governing Election of President-elect and Commissioner* for 1987.

President-elect

The Alabama State Bar will elect a president-elect in 1987 to assume the presidency of the bar in July 1988. Any candidate must be a member in good standing on March 1, 1987. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1987. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 14, 1987.

Commissioner

Bar commissioners will be elected by those lawyers with their principle offices in the following circuits: 8th, 11th, 13th, 17th, 18th, 19th, 21st, 22nd, 23rd, 30th, 31st, 33rd, 34th, 35th and 36th and the Bessemer Cut-off division of the 10th Judicial Circuit. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principle offices therein. The new commissioner petitions will be determined by a census on March 1, 1987, and vacancies certified by the secretary on March 15, 1987.

The terms of any incumbent commissioners are retained and, for 1987 only, commissioners in multiple commissioner circuits will be elected for terms as follows:

Places 2, 5, 8	1 year
Places 3, 6, 9	2 years
Places 4, 7, 10	3 years

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principle offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 24, 1987).

Ballots will be prepared and mailed to members between May 15 and June 1st. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 9, 1987) at state bar headquarters.

Et Cetera

Farm law report now available

Farmers' Legal Action Group, Inc. (FLAG) is a non-profit corporation established in 1986 to provide legal assistance, education, training and technical support to financially distressed family farmers, their attorneys and advocates in the United States. FLAG publishes a bi-monthly newsletter—The Farmers' Legal Action Report—which analyzes recent developments in farm law: statutes, regulations and court cases. In addition, the Farmers' Legal Action Report features summaries of current farm law cases.

If you are interested in receiving the Farmers' Legal Action Report for one year, mail a check for $12 made out to Farmers' Legal Action Group:

Farmers' Legal Action Group
1301 Minnesota Building
46 East 4th Street
St. Paul, Minnesota 55101

Conference on Gulf and South Atlantic Fisheries

The Gulf and South Atlantic region of the United States is a leading commercial and recreational fishing area. A major portion of the volume and value of United States fisheries resources is landed in the region, and the seafood caught in this area helps supply the needs of the nation. Commercial fishing provides a ready source of seafood to consumers, and recreational fishing not only serves as a food but also as an important leisure activity.

These fisheries exist in an atmosphere of regulation at five levels: local, state, regional, federal and international. The dynamics of fisheries management in the region lead to inevitable conflict. One important issue is the allocation of the resource among competing user groups. Another issue is the ability of the federal government to preempt state laws through federal regulation in the Fishery Conservation Zone that expressly do not preempt state laws.

The Louisiana and Mississippi-Alabama Sea Grant Legal Programs are hosting a conference to provide up-to-date, practical information on fisheries issues confronting the Gulf and South Atlantic region and an atmosphere for sharing the latest information concerning fisheries law and policy.

The Conference on Gulf and South Atlantic Fisheries Law and Policy will be held March 18-20, 1987, at the Royal Sonesta Hotel in New Orleans, Louisiana.

For more information contact Fisheries Law Conference, Sea Grant Communications, LSU Center for Wetland Resources, Baton Rouge, LA 70803-7507. ■

Disciplinary Report

Disbarment

● By order dated July 3, 1986, the Disciplinary Board ordered Atmore lawyer **Joseph Robly Tucker** disbarred from the practice of law, based upon his failure to answer disciplinary charges pending against him, which charged him with willfully neglecting certain legal matters entrusted to him, misrepresentation and failing to cooperate with the Alabama State Bar's investigation of client complaints against him. [ASB 85-112, 85-392 & 85-613]

Resignation of License

● Birmingham lawyer **Walter Lee Bragan, Jr.,** submitted a resignation of his license to practice law on August 8, 1986, and by order of August 25, 1986, the Supreme Court of Alabama cancelled and annulled Bragan's privilege to practice law in the State of Alabama and struck his name from the roll of attorneys in Alabama, effective October 6, 1986.

Suspensions

● Birmingham lawyer **Herbert P. Massie** was suspended, effective September 30, 1986, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar. [CLE 86-67]

● Jacksonville, Florida, lawyer **W. David Vaughn** was suspended, effective August 4, 1986, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar. [CLE 86-11]

● Birmingham lawyer **Thomas E. Baddley, Jr.,** was suspended from the practice of law for a period of six months, effective November 19, 1986, based upon his April 29, 1985, guilty plea in Jefferson County Circuit Court to felony marijuana possession. [ASB 83-254]

● The Supreme Court of Alabama ordered Mobile lawyer **Samuel F. Irby, Jr.,** suspended from the practice of law for a period of 30 days, effective December 18, 1986, based upon Irby's guilty plea to disciplinary charges filed against him by the Grievance Committee of the Mobile Bar Association. Irby's plea was based upon his failure to appear on behalf of a client at the appointed time for the trial of the client's lawsuit, as well as his subsequent failure to reimburse the opposing party in the lawsuit for expenses incurred in preparing for the trial. The court dismissed Irby's client's suit when Irby failed to appear, then conditionally reinstated the suit when Irby agreed to reimburse the opposing party for expenses incurred in preparation for trial. Ultimately the court entered a final dismissal against Irby's client, when Irby failed to reimburse the opposing party. [ASB 85-307] (Not the same person as Samuel W. Irby, who practices in Fairhope)

● Birmingham lawyer **Susan Clayton Moore** was suspended, effective September 30, 1986, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar. [CLE 86-45]

● Tuscaloosa lawyer **Cecile B.S. Burton** was suspended, effective September 30, 1986, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar. [CLE 86-21]

Public Censures

● Huntsville lawyer **Michael C. Moore** was publicly censured October 10, 1986, for three instances of conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(A)(6), of the *Code of Professional Responsibility* of the Alabama State Bar.

The essence of Moore's first violation consisted of his having obtained $18,800 during 1983 and the first half of 1984, by cashing legal fee checks on the "Mortgage Loan Account" of his law firm, Watson & Moore, PC, and then having paid as gifts or cash bonuses $6,000 of that amount to various law firm employees or associates, without the knowledge or consent of his partner in the professional corporation.

Further, Moore did not deposit the balance of the sum, approximately $12,800, to the law firm account, nor did he pay it out as gifts or cash bonuses, and he did not make any effort to pay his partner in the professional corporation his share of that balance until July 1984.

Moore's second violation consisted of his failure to report the $18,800 to the Internal Revenue Service or the Alabama State Department of Revenue as income to his law firm, until July 13, 1985, after he had been confronted about the matter by his partner in the professional corporation.

Moore's third violation consisted of his having drawn a check in the amount of $214.32 on the law firm's "trust account" in early November 1983 to buy jewelry for his wife. Moore did not reimburse the firm's trust account for this improper expenditure until early July 1984. [ASB 84-561]

● On October 10, 1986, Birmingham attorney **Roger D. Burton** was publicly censured for a violation of Disciplinary Rules 7-102(A)(5) and 7-102(A)(6) of the *Code of Professional Responsibility* of the Alabama State Bar. Burton was found to have knowingly filed a false affidavit in a court of law representing a client in a civil matter. [ASB 85-690]

Private Reprimands

● On October 10, 1986, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 6-101(A) and 1-102(A)(5). The Disciplinary Commission found the attorney had undertaken representation of a client in a domestic relations case and failed to file pleadings in a timely fashion and prepare and file a brief with the court, after having been requested by the court. This resulted in a dismissal of his client's case. The Disciplinary Commission determined the attorney should receive a private reprimand for these violations. [ASB 86-96]

● On October 10, 1986, an Alabama attorney received a private reprimand for violation of Disciplinary Rule 2-111(B)(2). The Disciplinary Commission determined the attorney had been discharged, in writing, by his client, but that subsequent to his discharge the attorney took several actions on behalf of his client, including the filing of a lawsuit. The Commission found the attorney's conduct violated the above-cited Disciplinary Rule and that the attorney should receive a private reprimand. [ASB 85-641] ■

Classified Notices

RATES: Members: No Charge; Nonmembers: $35 per insertion of 50 words or less. $.50 per additional word. Classified copy and payment must be received no later than the 1st day of the month prior to publication. (No exceptions). Send classified copy and payment, made out to *The Alabama Lawyer*, to: Alabama Lawyer Classifieds, c/o Margaret Lacey, P.O. Box 4156, Montgomery, AL 36101.

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ADDICTIONOLOGIST: Is your client "weaked-willed," suffering from a "bad habit" or "psychiatric illness;" or is he chemically dependent, impaired from a chronic, fatal medical disease? Physician, one of 179 certified in medicine's newest specialty—addictionology. Expert testimony and case analysis for plaintiff/defense. Alcohol, drug, nicotine, issues in criminal law, DUI, malpractice, wrongful death, personal injury, worker's compensation, family law and product liability. **Peter M. Macaluso, MD, PA, 1885 Professional Park Circle, #10, Tallahassee, Florida 32308, (904) 878-0304**

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FOR SALE

FOR SALE: Up-to-date tax library. **Contact Karl B. Benkwith, Jr., P.O. Box 5198, Montgomery, Alabama 36103, or (205) 263-9782.**

FOR SALE: Southern Reporter Second Series; Alabama Digest; CJS; Southeast Transaction Guide; Southeast Litigation Guide; Criminal Defense Techniques; Criminal Law Advocacy; Am. Jur. Legal Forms; Alabama Practice and Forms; Moore's Federal Practice; Bender's Forms of Discovery; others. Burke & Beuoy, 120 South Main Street, Arab, Alabama 35016, (205) 586-4152

WORD PROCESSING equipment—Two displaywriters: one with 256B memory (runs Textpack 4 and Reportpack), one with 224D memory (runs Textpack 3). Dual diskette units, single density diskettes, 25-line display. Also, one printer Model 5218A02 with automatic sheet feed. All in excellent condition. **Inquiries to P.O. Box 1109, Mobile, Alabama 36633.**

FOR SALE: Alabama Reporter (So.2d) v. 331-470 in 48 books (1976-1985); Southern Reporter 1st v. 1-200; AmJur 2d; AmJur Pleading & Practice; AmJur Legal Forms 2d; ALR 2, 3, 4 & Federal; U.S. Led 1 & 2; U.S.C.A.; Fletcher's Cyclopedia of Corporations; Williston on Contracts; complete Tax & Labor Library. For all your lawbook needs: **The Lawbook Exchange, Ltd. buys & sells, Master Card/Visa accepted, 135 W. 29th St., New York, NY 10001, (212) 594-4341**

LAW BOOKS: Southern Reporter 1st & 2d, Federal 1st & 2d, AmJur 2d, USCA, Tax Library, etc. All national publications. Buy & sell nationwide. **Professional Books Service, Box 366, Dayton, OH 45401, (513) 223-3734**

FOR SALE: We have, in excess of our needs, the following equipment that has been under continuing maintenance contracts and is in excellent condition: one Electra-100 telephone system with switch and 50 phones; one IBM Central Processing Unit (CPU) model 5362 with 120 megabytes of memory installed; five displaywriters (two with Textpack 3 and three with Textpack 2); and two printers with automatic sheet feed for the displaywriters. **Inquiries call Louis Slater at (205) 432-1414 or write P.O. Box 46, Mobile, Alabama 36601.**

FOR SALE: Tax Court Memorandums (TCM) Volumes 14-50 and United States Tax Court Cases, Volumes 1-86. **Contact (205) 663-0915, Walden & Walden Attorneys, P.O. Box 1610, Alabaster, Alabama 35007.**

POSITIONS OFFERED

ATTORNEY JOBS—National and Federal Legal Employment Report: highly regarded monthly detailed listing of hundreds of attorney and law-related jobs with U.S. Government, other public/private employers in Washington, D.C., throughout U.S. and abroad. $30—3 months; $50—6 months. **Federal Reports, 1010 Vermont Ave., NW, #408-AB, Washington, D.C. 20005, (202) 393-3311, Visa/MC**

GROWING BIRMINGHAM law firm interested in bankruptcy—creditors' rights attorney with three to five years' experience. Salary negotiable. All inquiries will be kept strictly confidential. **Respond to Attorney's Applications, P.O. Box 701, Birmingham, Alabama 35201.**

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ASSOCIATION WANTED: Birmingham collection attorney is desiring an association with a Mobile collection attorney for the handling of accounts for Birmingham attorney's clients who are located in Mobile and Baldwin counties. Interested attorneys should **contact John Frawley at P.O. Box 66111, Birmingham, Alabama 35210, (205) 956-9749.**

Classified Notices

SERVICES

LEGAL INVESTIGATIONS for attorneys and insurance companies. We locate witnesses and evidence and develop theories in industrial product liability, motor vehicle and other personal injury and major property damage claims. **Contact Paul Harrington or Richard Jackson at Accident Investigators of Ala., Inc., P.O. Box 19733, Birmingham, Alabama 35219. Phone (205) 945-9664.**

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LEGAL RESEARCH HELP: Attorney with seven years' experience in legal research/writing. Access to University of Alabama and Cumberland libraries, Westlaw available. Prompt deadline service. $35 hour. **Sarah Kathryn Farnell, 112 Moore Building, Montgomery, Alabama 36101, phone (205) 277-7937.** *No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.*

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LEGAL RESEARCH and writing: Experienced licensed attorney with office near Cumberland law library and access to the Jefferson County Law Library. Honor student. $35 per hour. **Richard L. Wyatt, 2932-A Crosshaven Drive, Birmingham, Alabama 35243, (205) 967-7695** *No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.*

WANTED

WANTED: Used IBM 65 dictation equipment. **Contact W. Mark Anderson, III, 461 South Court Street, Montgomery, Alabama 36104. Phone (205) 262-6694.**

Classified advertisements deadline, for the March 1987 issue, is January 30, 1987.
No exceptions will be given.

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