

# The Alabama Lawyer

Vol. 47, No. 6

\* November 1986



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by Nathaniel Hansford

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

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# In Brief

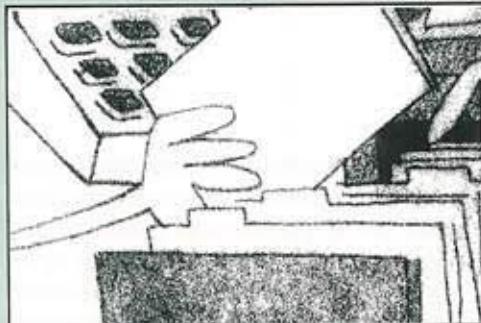
## On the cover—

Fall shows its true colors deep in a forest in Clarke County, Alabama. Cover photograph courtesy of Alabama Forests magazine, Alabama Forestry Association



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Based on a chapter from the forthcoming book, W. SCHROEDER, J. HOFFMAN and R. THIGPEN, *ALABAMA EVIDENCE* (1986), to be published by the Harrison Company, this article provides new insights to the litigation practitioner.



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Look and see.  
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See Jack file ba

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# President's Page

Oftentimes bar presidents, commissioners and committee chairmen are so harried with problems and what seems to be a never-ending series of minor crises, catastrophes and dilemmas that we fail to realize or appreciate the good things, the successes of the Alabama State Bar.

In August I attended the National Conference of Bar Presidents and the Southern Conference of Bar Presidents held in conjunction with the annual meeting of the American Bar Association in New York. In a word, when compared to other state bars, the Alabama State Bar is in great shape.

This freedom from institutional illness is due to a very long history of devoted service to the Alabama State Bar by a large number of people, and this happy situation is something for which I claim no personal credit. Let me explain some of the problems we do not have.

In 1875 the Alabama State Bar became the nation's first state bar association to adopt a *Code of Professional Responsibility*. These ethical rules were used as the basis for first canons promulgated by the American Bar Association. This national leadership in bar activities has remained unchanged and unbroken for more than 100 years, and it is something we occasionally need to recall and of which we can be proud. The disciplinary process used in Alabama is considered a model for other states today. Although we constantly are trying to "fine tune" the process, we are head and shoulders above most other jurisdictions.

In the areas of communication and member response, no other state bar in America has a membership responding as quickly to surveys and questionnaires or with a greater degree of input than the membership of the state bar. Our outside experts were astounded at the percentage of response to the recent Feasibility Study and questionnaire on the formation of a lawyers' mutual insurance company. Most state bars are pleased if ten percent of their membership responds to a survey; in Alabama, it is not



SCRUGGS

unusual for 40 to 60 percent of the lawyers to respond.

An additional problem with which we are not afflicted is polarization. The membership of the Alabama State Bar is not as polarized as the membership of other state bars which seem to have defense lawyer—trial lawyer and metropolitan vs. rural domination troubles. We are quite fortunate Alabama lawyers are still lawyers first and not "hyphenated." Moreover, in some states it is difficult to determine who the bar is because several have two bars, usually designated as "The State Bar of . . ." and "The bar of the State of . . ." Usually one association has some strictly limited official function and the other a broader social function. The net result of this organizational dichotomy is a diffusion of energy and re-

sources of both organizations.

From a financial standpoint, the state bar certainly is not wealthy, but it does have adequate funding to fulfill the essential core of its responsibilities. The state bars of some larger states depend entirely on voluntary contributions from their members to maintain service and quasi-judicial functions. Again, the self-taxation method of bar financing in our state is by far the best method to insure adequate performance levels from year to year.

I firmly believe the Alabama State Bar discharges its official functions in character and fitness investigations, bar examinations, continuing legal education, discipline and legislation better than any other state. The responsibilities and duties of the Alabama State Bar are administered directly by the bar itself. In most jurisdictions, these duties and responsibilities are administered directly by a state supreme court or through a number of fragmented, specially-constructed boards, panels and commissions requiring general appropriations from various state legislatures. Thus, these suffer from at least some degree of interference from special interest groups, and most operate in the general political arena. In Alabama, we have

operate in the general political arena. In Alabama, we have a blend of authority, both from the judicial and legislative branches of government, and historically we have been very fortunate to have had, in general terms, the cooperation and aid of the executive branch of the government.

No bar in this nation can be successful without a highly competent, permanent, professional staff. The staff of the Alabama State Bar is acknowledged to be one of the finest in the U.S. It is refreshing to hear the compliments and accolades

given to the staff concerning general administration of bar activities, computerization, discipline, admissions and publications. Our professional staff members have very respected roles in the various ABA conferences on these subjects. We can and should be immensely proud of this fact. Typically, my conversations with other state bar presidents would begin with their making the statement, "We are having this problem in our state, and we have heard that you do not have that in Alabama. How do you handle it?"

The answer is that many people in this

state care about their state bar. For the last one hundred years or more, many very talented and able people have made a sacrifice to their profession for the betterment of this bar, the State of Alabama and the general public whom we serve. That quality of character and professionalism is still alive in Alabama, and those bar leaders and members five, 15, 20 and 50 years ago must be given the credit for where we are today. The challenge now before us is to preserve this heritage. ■

—William D. Scruggs, Jr.

# Editorial

## Professional etiquette, Mobile style

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

I still have a list of lawyers in Mobile who will not return a telephone call. I discovered another last month. Do you suppose I should identify them, or are they already known in the bar?

There are a lot more lawyers I can get only through a secretary. I suppose that is all right, because if all calls for the busy lawyer go directly to the lawyer from the switchboard, he could be kept busy, answering the phone. I will make a note of that, and some day I will make all the callers for me go through not only the switchboard operator, but also my secretary. This will interrupt her work terribly, but I will thus get in line with the rest of the Mobile lawyers.

But one thing I will not take is to disclose to the secretary what I want to talk to her boss about. I am making a list of secretaries who seek to get this from me before I can speak to her boss. I usually answer that I want to know if he wants a million dollars from me, or some other flippant remark, and then have the secretary tell me her boss is out . . . I speak ugly to those secretaries. She

knows when her phone rings whether or not her boss is there. Well, why doesn't she say so, rather than seek to invade my privacy, and then inform me he isn't in? I do have a list of those secretaries.

Then, there are the lawyers whose secretaries call me, and when I admit that she has me, she then asks me to wait for her boss, who then seems to amble up

to the phone and ask me who I am, and then engages me in conversation. I think I will start doing that. It will make everyone realize how considerate I am of my time.

Is there no cure for this? I think I will speak to the Grievance Committee about it. ■

—J. E. Thornton

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# Executive Director's Report

## *Do you measure up?—a freshman's yardstick*

The father of a freshman law student recently shared a letter he had written to his son on his first day in law school. He asked my thoughts on its content. I found it to be full of advice, common sense, affection and challenge. I obtained his permission to share parts with you.

The letter gave evidence of a good relationship, parental respect and pride in the son's accomplishments and goals. It was written on a day I recall as one of anxiety, doubt and ultimate bewilderment. I know it had to be a welcomed communique upon its receipt.

In addition to urging the son to heed well the orientation advice, the father reminded him, "What habits you form and what hard work you do this first month will set the stage for the first semester, this year, and all your three years." Implicit was the view these habits should guide his legal career.

It was the businessman-father's description of the "market place" in which he worked every day—and the many lawyers with whom he worked—that placed a challenge before his lawyer-aspirant son I found to be a worthy standard of measure.

"Some (lawyers) are good—some are better—and some are the best. I can tell you, without exception, which ones are the best and most successful—they are always the ones that 'do their homework.' When they make their presentations, they are well-prepared.

They have a broad spectrum of knowledge, because they take the time and put out the effort to know 'what's going on.' They are polished gentlemen, well groomed, and are honorable men. Jim, I'm not 'putting you on'—I know this for a fact.

"Now why am I telling you this? Here is why. There are many lawyers in the 'market place' today. Some are successful and some are just hanging on. The best way I can explain this to you is 'people's choice.' After all, they pay the bill . . . In simple language, you will not be successful if you are going to be simply 'a lawyer.' You have got to be a good one and there is no better place to start than right now—where you are.

"Son, if you will notice, I'm not giving you advice on when to study, where to study, how much to study. You are a man now and if you can't discipline yourself with these habits, then you've got no business being a lawyer.

"One of the most important attributes you will have, next to knowledge of law, is character . . . It is not something you put on and off. It is something deeply ingrained within you . . . a man of character is one whom others can count on because he is truthful, of good report, loves and respects his fellow man, and is always pressing to obtain the good and worthwhile things of this life. He does not advance by stepping on his fellow man, but does honest, hard work for what he accumulates."

This father discussed the spiritual foundations upon which his son could



HAMNER

build. He also reminded his son "... you can't make it on hamburgers and pizza and Coke. Ulcers and nerves will surely do you in."

The letter concludes, "We love you very much. Give it your best shot and you will be OK.—Much love, Dad"

This father acknowledged that his son's first day in law school was the culmination of earlier school years and freely admitted not knowing all that had gone on in his son's mind in preparation for his big challenge, but that he knew "it didn't just happen." He acknowledged the son had worked hard and planned. He expressed pride in his son, the freshman. I can't help but believe his son, the lawyer, will make him equally proud.

—Reginald T. Hamner

# About Members, Among Firms

## ABOUT MEMBERS

**Steven M. Nolen** is pleased to announce the opening of his office at 14 Court Square, Fayette, Alabama 35555. Phone (205) 932-5204.

**J. Edmund Odum, Jr.**, is pleased to announce the relocation of his offices to Suite 824 of the Brown-Marx Tower at the corner of First Avenue, North, and 20th Street, Birmingham, Alabama 35203. Phone (205) 252-9734.

**George M. Van Tassel, Jr.**, of the Birmingham firm of **Sadler, Sullivan, Sharp & Stutts, PC**, was elected to the executive committee of the National Association of Railroad Trial Counsel at the association's recent annual convention.

Van Tassel previously served as chairman of the association's occupational disease claims committee and co-authored a booklet on the topic.

A University of Alabama graduate, Van Tassel received his bachelor's degree in 1969 and law degree in 1972.

## AMONG FIRMS

The law firm of **Gaines & Cleckler, PC**, announces **Michael H. Cleckler** has left the firm to prepare for the Episcopal ministry. The firm takes pleasure in announcing **Robert B. Barnett, Jr.**, has become a member of the firm, which will continue the practice of law under the name **Gaines, Gaines & Barnett, PC**. The firm also is pleased to announce **Tommy E. Tucker**, formerly assistant U.S. attorney, Birmingham, now is associated with the firm. Offices are located at 127 North Street, Talladega, Alabama 35160. Phone (205) 362-2386.

**J. Vernon Patrick, Jr., & Associates, PC**, is pleased to announce Alexander

**S. Lacy**, formerly vice president, secretary and attorney for Energen Corporation, Alabama Gas Corporation and their subsidiaries, has become associated with the firm and after October 1, 1986, the firm will be known as **Patrick & Lacy, PC**. Offices are at 1201 Financial Center, Birmingham, Alabama 35203. Phone (205) 323-5665.

The law firm of **Blacksher, Menefee & Stein** has opened an office in Birmingham on the fifth floor of the Title Building, 300 21st Street, North, 35203. Phone (205) 322-7300 or 7313.

**Jerry R. Barksdale** and **James D. Moffatt** of 212 South Marion Street, Athens, Alabama, take pleasure in announcing the opening of a second office located at 203 East Side Square, Huntsville, Alabama 35801.

**Shores & Booker** is pleased to announce **Michael R. O'Donnell** and **Byron A. Lassiter** have become associates of the firm, with O'Donnell in Birmingham and Lassiter in Fairhope. Office addresses are 2157 14th Avenue, South, Birmingham, Alabama 35205, and 21 South Section Street, P.O. Box 995, Fairhope, Alabama 36533.

The firm of **Johnston & Johnston** and **Christopher G. Hume, III**, formerly a member of the firm of **Hume & Sullivan**, announce their formation of a partnership under the firm name of **Johnston, Hume & Johnston**, with offices located in The Bayport Building, 5 Dauphin Street, Mobile, Alabama 36602; the mailing address of the firm is P.O. Box 550, Mobile, Alabama 36601. Phone (205) 432-1811.

**Albert J. Tully** and **James A. Philips** announce their association under the name of **Tully and Philips**, 1110 Montlimar Place, Suite 870, P.O. Box 81437, Mobile, Alabama 36689. Phone (205) 344-2814.

**Daniel A. Pike, PC**, attorney-at-law, is pleased to announce **Glenn L. Davidson**, formerly assistant state attorney general for the State of Alabama, has become a member of the staff, and the firm continues general practice of law at its new location, 962 Dauphin Street, Mobile, Alabama 36604. Phone (205) 432-2620.

**Patrick M. Sigler** is pleased to announce the association of **Stephen C. Moore** and the relocation of the **Law Offices of Patrick M. Sigler, PC**, to the Riverview Plaza Office Tower, Suite 709, 63 South Royal Street, Mobile, Alabama 36602. Phone (205) 438-2482.

**David L. Hirsch**, attorney-at-law, PC, announces the association of **Vincent W. Roses, Jr.**, as an associate member of the firm. Roses has been a trial attorney with the Equal Employment Opportunity Commission and is a graduate of Cumberland School of Law.

**J. William Lewis, Guy V. Martin, F. Gerald Burnett** and **David S. Dunkle** are pleased to announce the formation of a professional corporation for the practice of law under the name of **Lewis, Martin, Burnett & Dunkle**, with offices at 1900 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 322-8000.

# Offering and Objecting

by Jerome A. Hoffman  
and William A. Schroeder

Evidence may take the form of either oral testimony or tangibles (i.e., writings, depictions or objects). As the characteristics of these two kinds of evidence differ, so the procedures for offering them differ. However, as a general proposition, the trial court has broad discretion in all evidentiary matters, *State v. Askew*, 455 So. 2d 36, 37 (Ala. Crim. App. 1984), including the discovery phase of the trial, *Hancock v. City of Montgomery*, 428 So. 2d 29, 33 (Ala. 1983). In particular, the decision to admit a particular item of evidence rests largely in the discretion of the trial court whose ruling will not be disturbed on appeal, absent a gross abuse of discretion, see *Raines v. Williams*, 397 So. 2d 86, 88 (Ala. 1981). Similarly, it is within the discretion of the trial judge to allow the withdrawal of evidence, *Harrell v. State*, 470 So. 2d 1303, 1306 (Ala. Crim. App. 1984) aff'd, *Ex parte Harrell*, 470 So. 2d 1309 (Ala.), cert. denied, 106 S. Ct. 269 (1985).

## Offering evidence

**A. Oral testimony**—A proponent offers oral testimony by calling a witness to the witness stand, causing him to be sworn in and asking questions evoking oral testimony. If an opponent objects that the proffered witness should not be allowed or required to testify at all, or a certain question should be stricken and no answer permitted, the proponent must, under prescribed circumstances and in a prescribed manner, "make an offer of proof." That is, the proponent must reveal to the court and for the record the substance of the testimony to be elicited from the challenged witness or the response he expects the witness would make to the challenged question, *McDonald's Corp. v. Grissom*, 402 So. 2d 953, 956 (Ala. 1981); *Turner v. State*, 473 So. 2d 639, 642 (Ala. Crim. App. 1985).

In addition, unless it is quite clear from the question and context, the proponent also must show the evidence offered is relevant, *Bessemer Executive Aviation Inc. v. Barnett*, 469 So. 2d 1283, 1284-85 (Ala. 1985).

If the proponent fails to make an offer of proof, he may suffer one or both of the following adverse consequences. First, the trial judge may persist in ruling a solicited testimonial answer inadmissible, whereas he might have changed his mind if fully apprised of its content and purpose. Second, when the trial judge has sustained an opponent's objection and the proponent fails to get an offer of proof into the trial record, an appellate court usually will decline to review the trial judge's ruling on the ground that the proponent-appellant has not shown the ruling, even if erroneous, to have caused harm. See *Allstate Ins. Co. v. Portis*, 472 So. 2d 997, 1000 (Ala. 1985).

These propositions seem to be contradicted by section 12-21-139 of the Alabama Code, which reads as follows:

In the examination of witnesses and the introduction of evidence, it shall not be necessary to state or disclose to the court the substance of the anticipated answer of the witness or of the evidence sought to be introduced by the question in order to put the court in error in its ruling on objection to the question unless the court requests that counsel disclose to the court the evidence sought by the question.

Furthermore, certain Alabama cases have said that an offer of proof need not be made to preserve error on appeal if the response the witness would have made is obvious from the question and the context. *Cherry v. Hill*, 283 Ala. 74, 214 So. 2d 427, 430 (1968). Nonetheless, in a criminal case a party has a constitutional right to make an offer of proof, see *Ex parte Fields*, 382 So. 2d 598, 599 (Ala. 1980), and, in a civil case, Rule 43(c) of

the Alabama Rules of Civil Procedure provides for the making of such an offer.

For the following reasons, the careful practitioner will make an offer of proof virtually whenever an objection has been sustained against him. First, the Alabama Supreme Court has effectively read section 12-21-139 out of the Code. In *Strickling v. Whiteside*, 242 Ala. 29, 4 So. 2d 416 (1941), for example, the court said:

It is necessary in order to review a trial court's ruling sustaining objection to a question which does not on its face show what is the expected answer, that attention be called to the proposed answer and show that such answer would be relevant evidence, notwithstanding section 445, Title 7, Code of 1940 [now section 12-21-139].

Cases both before and since are in accord, see, e.g., *McDonald's Corp. v. Grissom*, 402 So. 2d 953, 956 (Ala. 1981); *Alaga Coach Line v. McCarroll*, 227 Ala. 686, 151 So. 834, 835-36 (1933).

Second, the court has not always agreed with the proponents' judgment that the answer expected was obvious from the question asked. See, e.g., *McDonald's Corp. v. Grissom*, 402 So. 2d 953, 956 (Ala. 1981). Thus, proponents who have thought no offer of proof necessary to preserve error too often have learned on appeal that they were wrong. The preventive medicine for such terminal disappointment is to suppose that little, if anything, will be obvious to the justices on appeal and make one's offers of proof accordingly.

A party making an offer of proof must state the purpose for which the challenged proof is offered, particularly if such proof is admissible for one purpose but inadmissible for another, or admissible against one opponent but not against another. When offered proof is admissible for one purpose but inadmissible for another, the trial court may exclude it upon general objection to the whole, see *Archer v. Sibley*, 201 Ala. 495, 78 So. 849,

# to Evidence in Alabama



850 (1981), unless the proponent offers it expressly for the admissible purpose, *Garrett v. State*, 268 Ala. 299, 105 So. 2d 541, 546 (1985).

When offered proof is admissible against one opponent but inadmissible against another, the trial court may exclude it upon general objection, unless the proponent offers it expressly against the opponent against whom it is admissi-

ble, see *Kriewitz v. Savoy Heating & Air Conditioning Co.*, 396 So. 2d 49, 51-52 (Ala. 1981). Likewise, when only part of offered proof is admissible, the trial court may exclude it all upon general objection, *Vickery v. Baggett*, 20 Ala. 143, 144, 101 So. 102, 104, rev'd on other grounds, 211 Ala. 610, 101 So. 104 (1924), unless the proponent excises the admissible part and offers it alone, see *Banner Welders,*

*Inc. v. Knighton*, 425 So. 2d 441, 447 (Ala. 1982).

On the other hand, the trial judge also may admit the offered proof over general objection in each of the situations described, see *Pickett v. State*, 456 So. 2d 330, 334 (Ala. Crim. App. 1982), cert. denied, 456 So. 2d 330 (Ala. 1983); *Walker v. Jones*, 33 Ala. App. 348, 34 So. 2d 608, 613 (1947) (on rehearing), and if

he does the party disadvantaged thereby should request a limiting instruction, see *Sims v. Struthers*, 267 Ala. 80, 100 So. 2d 23, 27-28 (1957).

Whether a trial judge admits or excludes evidence that is admissible only for a limited purpose or only against a limited number of opponents, he generally will not be reversed on appeal. *Garrett v. State*, 268 Ala. 299, 105 So. 2d 541, 546 (1958) This permissive but perhaps necessary general rule of judicial review reinforces the distribution of responsibility and motive power thought essential to the proper and effective operation of the adversary system. Beneath its shadow, neither proponents nor opponents can put the trial court in error by failing to discharge the duties of an adversary advocate, and thus, both proponents and opponents are relieved of this temptation to induce or perpetuate error as a hedge against defeat at trial.

**B. Tangible evidence**—A proponent offers a tangible item of evidence as follows. First, a "foundation must be laid" for the writing, depiction or object to be offered. That is, a tangible item of evidence, with rare exceptions, must be authenticated by oral testimony that the item is what the proponent claims it to be. This foundational oral testimony will be offered in the manner generally described for oral testimony. The witness who gives it often will have other testimony to give as well, although he occasionally will have been called solely to authenticate the proffered tangible. When this foundational step has been taken, the proponent completes his offer of the tangible item by showing it to the opponent and presenting it to the trial judge with words indicating that he wishes the item, as identified and marked by the clerk, admitted into evidence. Although it is wise to observe all the formalities described, substantial informality has been permitted. The court of criminal appeals has said, for example, that:

Articles of personal property may be considered evidence after being exhibited to the jury and commented upon although they may not have been previously marked for identification or formally introduced into evidence. *Freeman v. State*, 46 Ala. App. 640, 641,

247 So. 2d 682, 682-83 (Crim. App. 1971)

If the trial court sustains an objection to a proffered item, however, the proponent should, if he has not already, cause the item to be marked formally for identification. See *Palmer v. Hoffman*, 318 U.S. 109, 116, 63 S. Ct. 477, 482, 87 L. Ed. 645, 651 (1943). Although a writing, depiction or object may be held to bespeak its own significance, the proponent should, even if the item can accompany the record on appeal, insure that the trial record contains a description of the item sufficient to apprise the appellate court of its significance to the proponent's case. This task is anticipated in Rule 43(c) of the Alabama Rules of Civil Procedure which provides: "The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon."

### Objecting to evidence

Although the trial judge has discretionary authority to exclude plainly objectionable evidence on his own motion, see *Brown v. Brown*, 277 Ala. 217, 168 So. 2d 247, 249-50 (1964), ordinarily he will not exclude evidence unless the opponent asserts an objection to it, and appellate courts ordinarily will not review the judge's failure to exclude on his own motion, see, e.g., *Record Date Int'l, Inc. v. Nichols*, 381 So. 2d 1, 4 (Ala. 1979); *Bell v. State*, 466 So. 2d 167, 172 (Ala. Crim. App. 1985). The failure of a party to object to the admission of inadmissible evidence amounts to a waiver of any error resulting from such admission, *Costarides v. Miller*, 374 So. 2d 1335, 1337 (Ala. 1979), and where evidence is received without objection, it is legal evidence, even though it might be inadmissible for one or more reasons. *Bell v. State*, 466 So. 2d 167, 172 (Ala. Crim. App. 1985) (quoting *Watson v. State*, 398 So. 2d 320, 325 [Ala. Crim. App. 1980], cert. denied, 398 So. 2d 332 [Ala.], cert. denied, 452 U.S. 941 [1981])

Moreover, despite the failure to object, the non-objecting party may introduce illegal evidence in rebuttal. *Wyrick v. State*, 409 So. 2d 969, 975 (Ala. Crim. App. 1981) cert. denied, 409 So. 2d 969

(Ala. 1982) Then the parties may try their case on illegal evidence, absent objections thereto.

When excludable evidence is offered, the opponent wishing to bar its admission must assert a timely and adequate objection. *Bell v. State*, 466 So. 2d 167, 172 (Ala. Crim. App. 1985) An objection ordinarily is timely only when asserted as soon as the ground for objection becomes apparent. *Leverett v. State*, 462 So. 2d 972, 979 (Ala. Crim. App. 1984), cert. denied, 462 So. 2d 972 (Ala. 1985)

Usually an opportunity to object exists immediately after the objectionable question is asked and before a responsive answer is given. If an objection is made and sustained no further action is necessary since the asking of an objectionable question ordinarily is not reversible error in and of itself, see *Watson v. McGee*, 348 So. 2d 461, 464-65 (Ala. 1977), unless counsel persists in trying to put before the jury evidence which he knows, or which the court has ruled, is inadmissible. *Marshall v. Kopesky*, 361 So. 2d 76, 80 (Ala. 1978); *Crook v. State*, 469 So. 2d 690, 694-95 (Ala. Crim. App.) (citing cases), cert. denied, 469 So. 2d 690 (Ala. 1985)

If a timely objection is overruled, neither a motion to exclude, see *Code of Ala. § 12-21-140* (1975), nor an exception, *Swain v. Terry*, 454 So. 2d 948, 953 (Ala. 1984) Ala. R. Civ. P. 46, ordinarily is necessary to preserve error. However, if a party withdraws an objection he waives any alleged error, see *Blair v. State*, 453 So. 2d 1092, 1095 (Ala. Crim. App.), cert. denied, 453 So. 2d 1092 (Ala. 1984), and there is no reversible error if an improper question is answered in the negative, *Wyrick v. State*, 409 So. 2d 969, 974 (Ala. Crim. App. 1981), cert. denied, 409 So. 2d 969 (Ala. 1982).

A party has a right to make an objection, but it is within the discretion of the court to permit argument on the issues raised by the objection. *State Realty Co. v. Ligon*, 218 Ala. 541, 119 So. 672, 673 (1929) If no ruling is made on an objection, nothing is preserved for appellate review, unless the objector requests a ruling or objects to the court's failure to rule. *Moore v. State*, 457 So. 2d 981, 988 (Ala. Crim. App.), cert. denied, 457 So. 2d 981

(Ala. 1984), cert. denied, 105 S. Ct. 1757 (1985)

Ordinarily, an objection not coming until after the witness gives a responsive answer comes too late. *Davis v. Balthrop*, 456 So. 2d 42, 45 (Ala. 1984). However, if a witness deprives the opponent of the opportunity to object by answering too quickly, see *Green v. Standard Fire Ins. Co. of Ala.*, 398 So. 2d 671, 674-675 (Ala. 1981), if a ground for objection becomes apparent only when the answer was given, see *Strickland v. Strickland*, 285 Ala. 693, 235 So. 2d 833, 836 (1970), when other evidence becomes known, see *Watson v. State*, 398 So. 2d 320, 325 (Ala. Crim. App. 1980) (citing cases), cert. denied, 398 So. 2d 332 (Ala.), cert. denied, 452 U.S. 941 (1981), or when the witness gives a non-responsive answer, see *Southern Ry. v. Jarvis*, 266 Ala. 440, 97 So. 2d 549, 552 (1957), the objectionable answer will be in the record.

Therefore, to avoid an implied waiver of his objection, the opponent should both object and move the trial court to exclude or strike the answer from the record. *Green v. Standard Fire Ins. Co. of*

Ala.

398 So. 2d 671, 674 (Ala. 1981). He also may move that the jury be instructed to disregard the answer. Absent the exceptional circumstances just described, a party failing to interpose a timely objection cannot obtain relief or preserve error by later making a motion to exclude. Similarly, motions for a directed verdict, *Paragon Eng'r, Inc. v. Rhodes*, 451 So. 2d 274, 277 (Ala. 1984), for a mistrial, *Jefferson v. State*, 449 So. 2d 1280, 1282 (Ala. Crim. App. 1984) or for a new trial, *Pugh v. State*, 355 So. 2d 386, 390 (Ala. Crim. App.), cert. denied, 355 So. 2d 392 (Ala. 1977), will not suffice as substitutes for a timely objection.

A timely objection preserves error as to the question immediately preceding it, but has no effect on prior questions and answers, *Davis v. Balthrop*, 456 So. 2d 42, 45 (Ala. 1984), nor on subsequent questions differing from the question objected to first. *State v. Garris*, 292 Ala. 495, 296 So. 2d 712, 714 (1974). However, a timely objection does preserve error as to subsequent questions which are the same as, or part and parcel of the same "package" as, the question asked.

*Ex Parte American Carpet Sales, Inc.*, 477 So. 2d 973, 974 (Ala. 1985)

An objection ordinarily is adequate only when it specifically states a precise and definite ground upon which the challenged proof is sought to be excluded. See *Davis v. Southland Corp.*, 465 So. 2d 397, 401 (Ala. 1985); *Satterwhite v. State*, 364 So. 2d 359, 360 (Ala. 1978); see also Ala. R. Civ. P. 46. Requiring specific objections insures that the trial court makes an informed decision, *Wyerrick v. State*, 409 So. 2d 969, 974 (Ala. Crim. App. 1981), cert. denied, 409 So. 2d 969 (Ala. 1982), and allows the judge and opposing counsel to take whatever corrective action is needed before the case is submitted to the jury. See *Ex parte Knight*, 453 So. 2d 754, 756 (Ala. 1984).

Consistent with this purpose, grounds not specified are waived, see *Reeves v. State*, 456 So. 2d 1156, 1160-61 (Ala. Crim. App. 1984), and cases cited therein, and a party is bound by the grounds specified, even when the evidence is inadmissible on some other grounds, *McDonald v. State*, 448 So. 2d 460, 463 (Ala. Crim. App. 1984). Where



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the proof is offered against more than one opponent, an adequate objection must state the opponent as to whom it is sought to be excluded. See *Kriewitz v. Savoy Heating & Air Conditioning Co.*, 396 So. 2d 49, 51-52 (Ala. 1981). Where part of the proof offered is inadmissible, an adequate objection must state the part to be excluded, and if a party objects as a unit to a document that is admissible in part and inadmissible in part, the trial court is justified in overruling the objection and admitting the entire document. *Pickett v. State*, 456 So. 2d 330, 334 (Ala. Crim. App.), cert. denied, 456 U.S. 2d 330, 334 (Ala. 1983).

An objection not limited as previously described is known as a general objection. Trial courts may, and often do, sustain general objections. See, e.g., *Southern Ry. v. Jarvis*, 266 Ala. 440, 97 So. 2d 549, 552 (1957). Thus, a casual attorney can often muddle through by relying upon a simple general objection such as "I object" or upon the more impressive sounding, but usually mindless, general objection that evidence is "irrelevant, incompetent and immaterial," taking his chances that a conscientious trial judge will do his job for him by excluding evidence that really is irrelevant to any material issue or properly excludable on some specific, though unasserted, ground. However, no rule compels a trial court to uphold, or even consider, a general objection, and when a trial court rules proof admissible over a general objection, the appellate court usually will decline to review the ruling. See, e.g., *Record Data Int'l Inc. v. Nichols*, 381 So. 2d 1, 4 (Ala. 1979).

Even though a general objection theoretically operates as a waiver of any available specific grounds, see *Granberry v. Gilbert*, 276 Ala. 486, 163 So. 2d 641, 644 (1964), a general objection may preserve error on appeal where (1) the specific ground for exclusion is obvious; *Samuel v. State*, 455 So. 2d 250, 252 (Ala. Crim. App.), cert. denied, 455 So. 2d 250 (Ala. 1984); see also *Jay v. Sears, Roebuck & Co.*, 340 So. 2d 456, 458 (Ala. Civ. App. 1976); (2) the evidence opposed is not admissible on any theory or for any purpose, *Lawrence v. State*, 409 So. 2d 987, 989 (Ala. Crim. App. 1982); see also *Satterwhite v. State*, 364 So. 2d 359, 360

(Ala. 1978); (3) the proponent could not have avoided the omitted specific ground of objection (e.g., by restating his question) even if timely apprised of the objection, see *Sidwell v. Wooten*, 473 So. 2d 1036, 1039 (Ala. 1985); *Caldwell v. State*, 282 Ala. 713, 213 So. 2d 919, 923 (1968); or (4) admitting the evidence amounts to an error so fundamental that failing to correct it would deprive a criminal defendant of a fair trial. See *Nolen v. State*, 469 So. 2d 1326, 1330 (Ala. Crim. App.), cert. denied, 469 So. 2d 1326 (Ala. 1985).

Neither a general nor specific objection will result in reversal on appeal if the ruling of the trial court is correct for any reason, *Collier v. State*, 413 So. 2d 396, 403 (Ala. Crim. App. 1981) (on rehearing), aff'd, 413 So. 2d 403 (Ala. 1982), or supportable on any legal ground. *Tucker v. Nichols*, 431 So. 2d 1263, 1265 (Ala. 1983). Moreover, it is axiomatic in Alabama that matters not raised in the trial court cannot be raised for the first time on appeal, *Costarides v. Miller*, 374 So. 2d 1335, 1337 (Ala. 1979); *Bell v. State*, 466 So. 2d 167, 172 (Ala. Crim. App. 1985), and when an objection is made on specific grounds other grounds cannot be raised on appeal. *Osborne Truck Lines, Inc. v. Langston*, 454 So. 2d 1317, 1323 (Ala. 1984); *Blackmon v. State*, 449 So. 2d 1264, 1266 (Ala. Crim. App. 1984). Indeed, even claims involving constitutional rights must be seasonably raised in the trial court before they will be considered on appeal. *Home Indem. Co. v. Anders*, 459 So. 2d 836, 840 (Ala. 1984); *Steele v. State*, 289 Ala. 186, 189, 266 So. 2d 746, 749 (1972). Only where there is a lack of subject matter jurisdiction, *Trimble v. City of Prichard*, 438 So. 2d 745, 746 (Ala. 1983); see also Ala. R. Civ. P. 12(h)(3); Ala. R. Crim. P. Temp. R. 16.2(d), or, where a party had no opportunity to object to a ruling or order, will the absence of an objection not prejudice him. Ala. R. Civ. P. 46.

As a general rule any errors committed by the trial court must be affirmatively demonstrated by the record filed on appeal, *Mobile Wrecker Owners Ass'n, Inc. v. City of Mobile*, 461 So. 2d 1303, 1306 (Ala. 1984); *State v. Askew*, 455 So. 2d 36, 37 (Ala. Civ. App. 1984), and where no record is presented for review, an ap-

pellate court may not reverse. *In re Coleman*, 469 So. 2d 638, 639 (Ala. Civ. App. 1985). The burden is on the appealing party to insure that an adequate record is available for review on appeal, *Ex parte Olson*, 472 So. 2d 437, 438 (Ala. 1985). See also Ala. R. App. P. 10. Evidence not in the transcript, *Gaines v. Gaines*, 472 So. 2d 1033, 1033 (Ala. 1985), and matters not shown in the record cannot be reviewed on appeal, *Ex parte Olson*, 472 So. 2d 437, 438 (Ala. 1985); *Fuller v. State*, 472 So. 2d 452, 454 (Ala. Crim. App. 1985), and a party cannot introduce new evidence on appeal by way of statements in his brief, *Bechtel v. Crown Central Petrol. Corp.*, 451 So. 2d 793, 795 (Ala. 1984), exhibits attached to his brief, *Martin v. State*, 449 So. 2d 801, 801 (Ala. Crim. App. 1984) affidavits, *Butler v. State*, 285 Ala. 387, 393, 232 So. 2d 631, 635-36 (1970), cert. dism'd, 406 U.S. 939 (1972) or otherwise.

Except in death penalty cases, issues and alleged errors not argued in an appellant's brief ordinarily are deemed waived, *Ex parte Riley*, 464 So. 2d 92, 94 (Ala. 1985); *W.C. Management Co. v. Lanningham*, 472 So. 2d 1065, 1066 (Ala. Civ. App. 1985); see also Ala. R. App. P. 45B, and since January 1, 1982, the court of criminal appeals has been under no obligation to consider questions or issues not raised in the briefs on appeal. *Ex parte Scott*, 460 So. 2d 1371, 1374-75 (Ala. 1981); Ala. R. App. P. 45B. Although it has been said that the court of criminal appeals may consider obvious errors not argued on appeal, *Ex parte Scott*, 460 So. 2d 1371, 1374-75 (Ala. 1981), Alabama formally recognizes a plain error doctrine only in death penalty cases, *McCennis v. State*, 382 So. 2d 605, 607 (Ala. Crim. App. 1979), cert. denied, 382 So. 2d 609 (Ala. 1980); Ala. R. App. P. 39(k), 45A, where the court may invoke the plain error rule if it finds substantial prejudice. *Ex parte Kennedy*, 472 So. 2d 1106, 1111-12 (Ala. 1985).

Rule 45 of the Alabama Rules of Appellate Procedure allows for a new trial or reversal of a judgment only if "the error complained of has probably injuriously affected substantial rights of the parties." Error in the admission or exclusion of evidence does not justify reversal if its admission was harmless or not

prejudicial. *Leverett v. State*, 462 So. 2d 972, 977 (Ala. Crim. App. 1984), cert. denied, 462 So. 2d 972 (Ala. 1985). See also *Ala. R. Civ. P.* 61.

Prejudicial error may not be predicated upon the admission of evidence admitted at some other stage of the trial without objection, *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667, 673 (Ala. 1979), or when the same facts can be inferred from or are proven by legal evidence admitted prior or subsequent to the illegal evidence. *Ex parte Bush*, 474 So. 2d 168, 171 (Ala. 1985).

Conversely, an error in excluding evidence as to a certain fact ordinarily is harmless where the fact is established by other evidence. *Harper v. Baptist Medical Center—Princeton*, 341 So. 2d 133, 135 (Ala. 1976); *Woodard v. State*, 253 Ala. 259, 264-65, 44 So. 2d 241, 245 (1950).

Of course, a party cannot introduce evidence in a case and then on appeal assert that the court committed reversible error by admitting the evidence, *Murray v. Alabama Power Co.*, 413 So. 2d 1109, 1115 (Ala. 1982), nor may a party object

on appeal to an error invited by him or that was a natural consequence of his own actions at trial. *Leverett v. State*, 462 So. 2d 972, 976-77 (Ala. Crim. App. 1984), cert. denied, 465 So. 2d 972 (Ala. 1985).

Finally, a party cannot predicate an appeal on an error which applies only to another party who did not appeal therefrom, *Sho-Me Motor Lodges v. Jehle-Slauson Constr. Co.*, 466 So. 2d 83, 88 (Ala. 1985), and where a defendant is acquitted of an offense with respect to which improper evidence was introduced, there is no reversible error even though he is convicted of another offense at the same trial. *Leverett v. State*, 462 So. 2d 972, 977 (Ala. Crim. App. 1984), cert. denied, 462 So. 2d 972 (Ala. 1985).

#### Mistrial

A motion for a mistrial does not serve the same function as a mere objection or a motion to strike, and it does not include a motion to strike or exclude testimony as a lesser prayer for relief. *Hunt v. State*, 453 So. 2d 1083, 1086 (Ala. Crim. App.), cert. denied, 453 So. 2d

1083 (Ala. 1984). Because entry of a mistrial implies not mere error, *Thomas v. Ware*, 44 Ala. App. 157, 161, 204 So. 2d 501, 504 (1967), but a miscarriage of justice, *McMurphy v. State*, 455 So. 2d 924, 930 (Ala. Crim. App.) cert. quashed, 455 So. 2d 924 (Ala. 1984), it is an extreme measure, *Fleming v. State*, 470 So. 2d 1343, 1345 (Ala. Crim. App.), cert. denied, 470 So. 2d 1343 (Ala.), cert. denied, 106 S. Ct. 164 (1985), not to be taken lightly, and a high degree of "manifest necessity" must be demonstrated before a mistrial should be granted. *Hunt v. State*, 453 So. 2d 1083, 1085-86 (Ala. Crim. App.), cert. denied, 453 So. 2d 1083 (Ala. 1984). See also *Code of Ala. § 12-16-233* (1975) (manifest necessity or when the ends of justice would otherwise be defeated). A mistrial should be entered only as a last resort in cases of otherwise ineradicable prejudice, *Hunt v. State*, 453 So. 2d 1083, 1085 (Ala. Crim. App.), cert. denied, 453 So. 2d 1083 (Ala. 1984) (quoting *Thomas v. Ware*, 44 Ala. App. 157, 161, 204 So. 2d 501, 504 (1967)), where it is clear that justice cannot be afforded if the trial con-

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tinues. *McMurphy v. State*, 455 So. 2d 924, 930 (Ala. Crim. App.), cert. quashed, 455 So. 2d 924 (Ala. 1984).

Whether to grant a mistrial is a matter within the discretion of the trial court, and while the trial court's ruling is reviewable on appeal, that ruling will not be reversed absent a clear abuse of discretion. *Ex parte Jefferson*, 473 So. 2d 1110, 1114 (Ala. 1985). However, it is the duty of the trial court to attempt to salvage the trial if possible by curing error. *Davis v. State*, 457 So. 2d 992, 994 (Ala. Crim. App. 1984), and the court's determination that its actions have provided an antidote should be given great weight. *Burnett v. State*, 453 So. 2d 371, 373 (Ala. Crim. App.), cert. denied, 453 So. 2d 371 (Ala. 1984). When the trial court immediately instructs the jury to disregard an impropriety, that instruction in effect removes the matter from the jury's consideration and raises a *prima facie* presumption against error. *Scott v. State*, 473 So. 2d 1167, 1174 (Ala. Crim. App.), cert. denied, 473 So. 2d 1167 (Ala. 1985). In that event the prejudicial effect of the error is deemed to be cured, *Bradley v. State*, 450 So. 2d 173, 176 (Ala. Crim. App. 1983), cert. denied, 450 So. 2d 173 (Ala. 1984), unless the matter was of such nature that it created ineradicable bias or prejudice. *Montgomery v. State*, 446 So. 2d 697, 703 (Ala. Crim. App. 1983), cert. denied, 446 So. 2d 697 (Ala.), cert. denied, 105 S. Ct. 291 (1984).

#### Motion for new trial

Under some circumstances, error in the admission or exclusion of evidence

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may warrant a new trial. If a motion is made within 30 days from entry of judgment, a new trial may be granted in both civil, *Code of Ala.* § 12-13-11 (1975), see also *Ala. R. Civ. P.* 59, 59.1, and criminal, *Code of Ala.* § 15-17-5 (1975); see also *Ala. R. Crim. P. Temp. R.* 13(a), cases for (1) irregularities in the proceedings of the court or any order of the court or any abuse of discretion preventing a party from having a fair trial, or (2) any error of law occurring at the trial and properly preserved by the party making the application. A motion for a new trial cannot take the place of a proper objection, see *Leverett v. State*, 462 So. 2d 972, 979-80 (Ala. Crim. App. 1984), cert. denied, 462 So. 2d 972 (Ala. 1985), and grounds urged for a new trial ordinarily must have been preserved at trial by timely and sufficient objection, *Trawick v. State*, 431 So. 2d 574, 578-79 (Ala. Crim. App.), cert. denied, 431 So. 2d 574 (Ala. 1983).

Objection is not necessary, however, if the error was unknown until after the verdict and could not have been discovered by reasonable diligence or, if the error is of such a fundamental nature as to invalidate the trial, *Leverett v. State*, 462 So. 2d 972, 980 (Ala. Crim. App. 1984), cert. denied, 462 So. 2d 972 (Ala. 1985).

The power to grant a new trial should be exercised hesitantly, *Lee v. Moore*, 282 Ala. 461, 213 So. 2d 197, 198 (1968), and the error or defect complained of must be one affecting the substantial rights of the parties. *Ala. R. Civ. P.* 61. However, the trial judge has broad discretion in deciding whether to grant or deny a new trial and, once made, his decision is assumed to be correct. See *Taylor v. Birmingham News Co.*, 341 So. 2d 689, 690 (Ala. 1977); *Baker v. State*, 477 So. 2d 496, 504 (Ala. Crim. App.), cert. quashed, 477 So. 2d 496 (Ala. 1985). Unless he has abused his discretion, a trial judge will not be reversed on appeal for denying a motion for a new trial. See, e.g., *Sidwell v. Wooten*, 473 So. 2d 1036, 1039 (Ala. 1985); *Smiley v. State*, 435 So. 2d 202, 206 (Ala. Crim. App. 1983).

Conversely, unless his decision is plainly and palpably wrong, a trial judge will not be reversed for granting a new trial. See, e.g., *Taylor v. Birmingham News Co.*, 341 So. 2d 689, 690 (Ala. 1977). If a new trial is granted without specifying any ground, the ruling will be sustained on appeal if any good ground was presented, *U-Haul Co. of Ala. v. Turner*, 355 So. 2d 384, 385 (Ala. Civ. App. 1978), and if one of the grounds presented in the motion was that the verdict was contrary to the evidence, it will be assumed that the motion was granted on that ground. *Lee v. Moore*, 282 Ala. 461, 213 So. 2d 197, 199 (1968).

#### Conclusion

In offering evidence the practitioner should be prepared to make an offer of proof whenever an objection is sustained against him. Conversely, a party opposing an offer of evidence should be prepared with a timely and thoughtful objection if he is to be successful in excluding the evidence, and preserving his rights on appeal should he be unsuccessful.

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# A Thousand Days, A Billion Bytes: Computer-Assisted Legal Research Revisited

by Lynne B. Kitchens



In the September 1983 issue of *The Alabama Lawyer* Paul E. Holcomb introduced readers to LEXIS and WESTLAW, the two principal computer-assisted legal research (CALR) services available to the general public. Since then, both systems have incorporated many changes, in the size and scope of their data banks and the refinement and enhancement of search techniques. Because there has been a concomitant increase in the use of LEXIS and WESTLAW in Alabama over the past three years, now is an appropriate time to expand upon Holcomb's information and bring the reader up-to-date on the developments of CALR of the last thousand days.

### Why attorneys use CALR

While an ever-increasing number of law school graduates have been exposed to LEXIS or WESTLAW, it is likely that neither they nor many veteran practitioners are fully aware of the many uses of CALR. Some of its capabilities are suggested by its definition: a non-indexed, full-text, online, interactive computer-assisted legal research service.<sup>2</sup> Access to a **nonindexed** system frees researchers from the constraints of published digests and descriptive word indexes and allows them to create, in essence, a unique index for each issue.

The **full text** service enables one to examine an entire opinion, including concurrences, dissents, footnotes and appendices. WESTLAW, in addition, includes editorial enhancements—West Publishing Company's synopses and headnotes—which may be searched in conjunction with the opinions or separately.

An **online interactive** system calls for mutual feedback between researcher and computer. Modifying, editing or canceling queries, transferring to Auto-Cite, Insta-Cite or Shepard's,<sup>3</sup> examining search results in various modes and

changing libraries or databases are all examples of this.

Finally, **computer-assisted** legal research may be distinguished from **computerized** research in the sense that the attorney, not the computer, must identify the legal issues, formulate the queries to be used and analyze the material retrieved. Used judiciously, CALR can be fast, flexible and efficient.

Two obvious time-saving features of CALR are cite-checking and Shepardizing. Both Auto-Cite and Insta-Cite enable one quickly to verify the style of an opinion, parallel citations, court, date and both prior and subsequent history. From either of these services, one can easily transfer a citation to Shepard's Citations to verify the full history and treatment of various issues. It also is possible on either system to view a "history" case listed in Shepard's by using a single command.

In some instances, a researcher may want to find the greatest possible number of opinions relevant to an issue. There have been studies concerning the number of documents retrieved by parallel queries on LEXIS and WESTLAW, and depending upon the nature of the search, each system has claimed some advan-

tage over the other.<sup>4</sup> Keep in mind, however, that the two data banks vary somewhat in overall scope and content. Whichever system used, it is probable that a variety of searches and approaches will insure that the maximum number of relevant opinions online will be retrieved.

Many attorneys resort to CALR to assure that their manual research is complete, or to update research projects. Both systems do an excellent job of providing current material, with the lag time varying according to the court. Both may be used as citators to locate recent opinions which cite a particular case but are either unpublished or too recent to appear in Shepard's. For example, this is particularly useful for finding state cases citing recent United States Supreme Court opinions because such cases cannot be found in the United States Shepard's until the Supreme Court opinion is approximately 18 months old.<sup>5</sup> LEXIS and WESTLAW also provide specific commands for updating research at regular intervals.

There is, of course, the occasional need to turn to CALR to determine where to begin research or as a last resort when

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traditional research produces little or nothing. Issues not easily indexed are prime candidates for CALR; half-remembered cases; the name of a party, counsel or judge; an unusual word or phrase (such as a phrase from a contract); a seemingly insignificant detail; a concurrence or dissent—all easily may be searched online, singly or in combination. Also searchable through CALR are law reviews, slip opinions, federal regulatory material, the United States Code and some state codes (or parts of codes) and other materials not otherwise easily accessible. To some extent, WESTLAW's capability of digest-searching puts "the Decennial and General Digests at one's fingertips, unrestricted by conventional word indexes or even by topic and key number.<sup>7</sup>

Finally, nonlegal materials are sometimes useful to attorneys in some areas of practice. Access to national, regional and local newspapers; wire services; and news magazines and other publications can alert one to new trends in the law, particularly where no decisions have been appealed, to cases which have been appealed and settled, to verdicts and judgments where no written opinion is available and to local coverage of trials. Such sources can provide useful information about state and local legislation, biographical and economic data on current and potential clients or pertinent information on opponents. Again, although content and scope vary, news sources are accessible through both systems.<sup>8</sup>

### Changes in CALR since 1983

Since 1983 computer-assisted legal research has undergone changes in hardware, library/database content and scope and search techniques, and it is reasonable to assume that changes will continue. Both LEXIS and WESTLAW publish monthly updates for subscribers and note new offerings online when one logs on to the system, so the frequent user should be able to keep up with developments.

Changes in computer hardware have increased accessibility to and ease of use

of LEXIS and WESTLAW. In 1983, LEXIS was available only on a customized terminal while one could access WESTLAW via several computer terminals and word processors. Now, each system has incorporated the advantages of the other: LEXIS now may be accessed through several kinds of computers and WESTLAW offers the user the option of a customized terminal. The special dedicated terminals are extremely user-friendly, require few keystrokes for most commands and, moreover, are fun to use. On the other hand, accessing the services with equipment already in place reduces initial costs, saves space and allows equipment to be used for other purposes.

The "language" of CALR is no more difficult to master than chapter one of any first-year foreign language text. Once a few connectors are learned, the rest follows easily; online help is available at any point during a search through HELP command. Both systems now automatically generate plurals and possessives (with irregular plurals on WESTLAW) and have standardized both the universal character (\*), which can represent any single letter (except an initial one), and the root expander (!), which allows for various additions to the end of a root word. Furthermore, in 1983, LEXIS used numerical connectors (w/n, pre/n where n is any number between 1 and 255), while WESTLAW employed only grammatical connectors (/s or +s [same sentence] and /p or +p [same paragraph]). WESTLAW now accepts numerical as well as grammatical connectors. Finally, one may use parentheses to combine operations or alter the order in which they are processed.

Both systems gradually have been extending their coverage of state and federal case law retrospectively as well as refining and restructuring some of the libraries or databases. On LEXIS one may research case law in a single state, combination of states or all state opinions in the massive STATES;OMNI file.

The same is true of federal cases: one may limit a search to a single level of courts or search all federal cases in the

comprehensive GENFED;CASES file. Topical files in the federal libraries also help one to focus a search more precisely.

A final useful feature is the time-saving "stacking" of commands; this shortcut allows one to enter library, file and query at the same time. On WESTLAW one may now search, in addition to the regional reporters, a single state as well as ALLSTATES. Individual state and ALLSTATES databases also may be searched topically, a real timesaver. On the federal level, it now is possible to search, in addition to district or circuit court cases (with the latter searchable by circuit), all federal cases online in the ALLFEDS database or limited by topic in the federal topical databases. It should be noted, however, that both ALLFEDS and the federal topical databases are divided into OLD (before 1945) and NEW databases.

Other enhancements since 1983 include extensive additions to the data banks. Law reviews, for example, are available on both systems, but the number, scope and content vary,<sup>9</sup> and the Legal Resource Index can be accessed through both systems.<sup>10</sup> In addition to a massive amount of non-legal material, such as medical journals and drug information, LEXIS has both organized more topical divisions and added legal materials in several areas, such as many of the specialized reporters published by the Bureau of National Affairs (BNA) and Commerce Clearing House (CCH).

Two areas of particular interest include insurance law and A.L.R.<sup>11</sup> The insurance library includes all state insurance codes as well as proceedings of the National Association of Insurance Commissioners (NAIC). Of more general application is the addition of the A.L.R. library. Consisting of A.L.R. 3d, A.L.R. 4th and A.L.R. Fed (with A.L.R. 2d to be added soon), this library alerts one to cases both within and beyond the scope of the data banks. Like WESTLAW's editorial enhancements, A.L.R. annotations use more general and conceptual language than is found in the text of many opinions, thereby directing the researcher to more

relevant case law. Furthermore, queries run in the GENFED;CASES or the STATES; OMNI files automatically generate A.L.R. citations.

New on WESTLAW are many BNA and CCH specialized reporters, the organization of specialized or topical databases on both the federal and state level and "gateway" access to DOW JONES NEWS/RETRIEVAL, VUTEXT and DIALOG.<sup>12</sup>

Both services provide for instant case retrieval generated by the LEXSEE (LEXIS) or FIND (WESTLAW) commands plus the citation. This may be done before, during or after a search. One may just as easily verify citations on Auto-Cite or Insta-Cite as well as Shepardize opinions.

On WESTLAW, the ADDED DATE command allows one to update research to include material added to the database after a specified date, and the MAP command "maps out" the searches and sub-searches performed, allowing one to return immediately to any prior step in the series. Search status, i.e., the number of documents retrieved, is reported at 30-second intervals during the course of a search. Finally, new software packages have the effect of customizing some computer terminals, providing the "user-friendly" keyboard of the dedicated terminal and allowing for material to be downloaded, subject, of course, to contractual restrictions.<sup>13</sup>

The changes of the past thousand days portend an even more rapid growth of CALR. Those described above are by no means comprehensive but, rather, intended to provide an overview and perhaps an indication of what lies ahead; only two decades ago, what we now find commonplace with CALR was merely a dream.

#### Some cost-effective search techniques

Since the cost structures of LEXIS and WESTLAW differ considerably, the budget-conscious researcher must tailor search techniques to adapt to the system used. Those accustomed to using one system invariably will find themselves running up unnecessary charges when

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using the other. An awareness of the differences in pricing and, consequently, the different approaches to searching, will help alleviate this problem. Basically, cost-effective searching involves four factors: knowing when to turn to CALR, doing one's homework before logging on, acquiring some familiarity with the system and its limitations and, for the infrequent user, consulting with someone familiar with the system who can help formulate the queries, deal with the unexpected and avoid unnecessary searches or extra online time.

Both LEXIS and WESTLAW offer free online tutorials; these cover the rudiments of query formulation, search commands and related matters. It is worthwhile to work through these as well as consult the user's manual, even if another person operates the terminal. Although there have been studies of the comparative costs of the two services, they become less relevant in the light of the different search strategies for each system and the varying scope of the libraries or databases.

The hourly charge for LEXIS presently is \$30, but there is an additional charge (\$10 to \$19) for each search. Queries may be modified for \$3, and a new search fee is charged each time the same query is run in a new file. Such a pricing arrangement encourages online browsing, for once the search is completed, one may examine the documents at the low hourly rate. Consequently, the cost-conscious researcher should try to structure the research session so that the initial query is as broad as feasible and the file or files searched are as comprehensive as necessary. Searching with levels of specificity, for LEXIS users, is a skill well worth acquiring. It is often possible to combine queries in a single search and use the modification strategy to separate them, or to use the pertinent topical files or segments within files. One should be aware that in some files it costs less to view material in the CITE format than it does in other formats, and since there is a \$1.50 charge per citation run in Auto-Cite, Shepard's or LEXSEE, being sure to

enter the correct citation as well as knowing the scope of these services can save money. LEXIS offers a significant reduction in search charges during off-peak (generally, nonbusiness) hours, a considerable savings for those who work late.<sup>14</sup>

The WESTLAW user, on the other hand, pays a rather high hourly charge (\$140 with a three-hour monthly minimum) for computer time spent in a database, both while the search is being performed and the material retrieved is examined. Cost-effective search techniques, therefore, differ somewhat from those for LEXIS.

First of all, WESTLAW offers several "freebies," such as the 1300 +- screen database menu. In addition to providing valuable information about database identifiers and scope, the menu (accessed by the commands DB or MAPI) is the place to spend "thinking time" to reformulate a query or study a printout. The high hourly charge tends to discourage all but the most rudimentary online browsing; rather, one probably should run a fairly narrow query, examine the first few opinions for relevance, then either print a list of citations and go to the books or edit the query and try again. It is wise to print each query as it is run to avoid repeating a search.

WESTLAW also offers the PRACTICE database, which consists of three years of federal courts of appeals opinions; PRACTICE is extremely valuable for "testing" some kinds of queries.

Another time-saving feature is the judicious use of field searching.<sup>15</sup> For example, to help insure that a query will deal with an issue rather than tangentially-related matter, one may limit a search to the SYNOPSIS, DIGEST or HEADNOTE fields. Since these tend to be written in more general and conceptual language, a field search may pick up more relevant cases than would a search of only the opinion. Furthermore, one may combine different fields in a single search as well as use the topical databases to help focus a search more precisely. Although a vast amount of material may be searched in the ALL-

STATES and ALLFEDS databases, there is a 50 percent surcharge for the time. However, if the search can be limited topically to one of the multistate topical databases or specialized federal databases, one is charged at the regular rate.

Two final time-saving suggestions are using date restrictions where feasible when searching the larger databases and using the LOCATE command to reach more quickly the pertinent parts of opinions retrieved.

Whichever system is used, if the researcher is familiar with what is online, knows how to formulate appropriate queries and adapts the search strategy to the pricing structure, CALR will become an even more cost-effective use of research time.

### Some caveats

Although computer-assisted legal research has vast capabilities, it also has some limitations. Some of these may be dealt with by a general understanding of legal terminology, awareness of CALR's overall approach to problem-solving and some experience with online searching; others, however, require an awareness of what is not available online or what, although available, may not be readily apparent.

First of all, one must be aware of the scope of online material. Both services emphasize the extent of federal case coverage, yet the case law of many states (including, unfortunately, Alabama) goes back little more than 20 years. LEXIS and WESTLAW both supply scope information online and in printed form, and the researcher should consult one of these when working in an unfamiliar area.

The scope of Shepard's also varies greatly, depending upon both the service and the reporter used.<sup>16</sup> On LEXIS, the scope of each Shepard's used is listed on the first screen of the displayed citation; on WESTLAW, however, one must consult the SCOPE screen (an additional step) for each publication desired. Furthermore, it is useful to verify a citation on Auto-Cite or Insta-Cite before Shep-

ardizing, which requires being aware of the scope of those services also.

Equally important is the time spent before going online to analyze the legal issue and frame the query, as well as decide which libraries or databases to search. There may be a relevant statute, rule, related case or (on WESTLAW) topic and key number.

Finding synonyms for certain terms or expressions also is important. For example, the query "jury instructions" will eliminate opinions in which "instructions to jurors" or "jury charges" are discussed and therefore must be framed with such alternatives in mind.<sup>17</sup> And, opinions defining words or concepts are extremely difficult to search because definitions are expressed in so many different ways. When a dictionary of legal terms does not suffice, *Words and Phrases* remains the best source for definitions.<sup>18</sup>

One also must consider, in at least two instances, what is online but often not apparent. When, for example, one scans an opinion using KWIC or FULL on LEXIS or in the TERM mode on WESTLAW, he should keep in mind that the material displayed may be from a dissent, concurrence, quotation or even a footnote. It often is necessary to examine adjacent screens in order to determine exactly what has been retrieved.

Next, when searching for state case law in the state libraries or databases, one does not retrieve federal diversity cases in which state law has been applied.<sup>19</sup> Although this information does appear in state digests and secondary sources, as well as in A.L.R., one must remember in appropriate instances to perform the additional searches (with revised queries using court restrictions) needed to locate relevant federal cases applying state law.

Finally, one should be aware of the following when searching WESTLAW's topic and key number system. Particularly in conjunction with additional words or phrases or with the % ("but not") command, such searches are fast and generally retrieve relevant opinions. At present, however, there is no easy way to account

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for the occasional revamping and reassignment or redistribution of topics and key numbers or the addition of new ones. In addition, an issue might have been classified under topics and key numbers other than the one selected.

To deal with these problems, one might formulate a word search in the DIGEST field, a particularly useful approach for difficult-to-classify issues. Alternatively, one might confine a query to the TOPIC field using the topic name (rather than the WESTLAW-assigned number) and retrieve cases classified under that topic as either a heading or a subheading.<sup>20</sup> A third option is to combine two or more TOPICS to find cases

dealing with specific combinations of issues. Finally, one must remember that searching the "editorial" fields generally will not retrieve slip or unpublished opinions because the editorial enhancements are not included until publication.

### Looking ahead

Given the developments of computer-assisted legal research of the last 20 years and, indeed, its astronomical growth during the past three, the wildest predictions for CALR's technological future cannot be summarily dismissed. Indeed, with the increasing accessibility of CALR services and the rise of legal malpractice lit-

igation, use of CALR might become the norm.<sup>21</sup> Whether an attorney will at some point have a duty to use CALR, inform a client of the availability of CALR or refer a client to another attorney who has access to CALR is purely speculative. Nevertheless, even now CALR is accessible to all Alabama attorneys, either through local bar associations or individual attorneys or organizations undertaking legal research for others.<sup>22</sup>

In the mid-1980s, computer-assisted legal research clearly is becoming an integral part of our legal system. Who knows what the next thousand days have in store? ■

#### FOOTNOTES

<sup>1</sup> Holcomb, "Computer-assisted legal research: Two methods," 44 *Alabama Lawyer* 256 (Sept. 1983). LEXIS is available through Mead Data Central, Dayton, Ohio; WESTLAW is a service of West Publishing Company, St. Paul, Minnesota.

<sup>2</sup> This definition was developed in 1966 by the Ohio State Bar Association's computer-assisted legal research project, precursor of LEXIS; it still applies to CALR services today. See Harrington, "A Brief History of Computer-assisted Legal Research," 77 *Law Library Journal* 543 (1984-85).

<sup>3</sup> Auto-Cite is a service of the Lawyers Co-operative Publishing Company and its affiliate, Bancroft-Whitney, and is available through LEXIS. Insta-Cite is a service of West Publishing Company available through WESTLAW. Shepard's Citations is a service of Shepard's/McGraw-Hill.

<sup>4</sup> See, e.g., Sproul, "The Latest on Westlaw, Lexis and Dialog," 70 *A.B.A. Journal* 85, 88 (1984); Coco, "Full-text plus editorial additions: Comparative Retrieval Effectiveness of the LEXIS and WESTLAW Systems," 4 *Legal Reference Services Quarterly* 27 (Sum. 1984); Dabney, "The Curse of Thamus: An Analysis of Full-Text Document Retrieval," 78 *Law Library Journal* 5 (1986), the responses to the curse in 78 *Law Library Journal* at 337 and 345 (1986), and Dabney's reply in 78 *Law Library Journal* 349 (1986).

<sup>5</sup> In order to find references to state cases in Shepard's, one must shepardize the official reporter (U.S. Reports). Approximately 18 months elapse before a United States Supreme Court opinion has a U.S. cite.

<sup>6</sup> The scope of digest coverage of course, is limited to the scope of the individual state database coverage. It is useful to know that even though the Northeastern and Southwestern Digests are no longer in print, they still may be searched online, as may individual state digests.

<sup>7</sup> One can, with practice, search the DIGEST, TOPIC and HEADNOTE fields quite creatively to find opinions which address certain combinations of issues.

<sup>8</sup> NEXIS, available through LEXIS or separately, is probably the most comprehensive service of this type. WESTLAW offers access to VUTEXT, a service of the Knight-Rider Company, which also may be accessed separately. For examples of this application of CALR, see Farley, "Beyond

Traditional Sources of Legal Research," 31 *Practical Lawyer* 37 (June 1, 1985) and Blodgett, "Client Development," 72 *A.B.A. Journal* 22 (August 1, 1986).

<sup>9</sup> Presently, LEXIS has online all articles from 40 law reviews dating generally from 1982. WESTLAW offers selected articles from more than 200 law reviews, the subjects corresponding roughly to the topical organization of the federal and state databases. More law reviews are being added periodically to both services.

<sup>10</sup> The Legal Resource Index, jointly sponsored by Information Access Company and the American Association of Law Libraries, indexes more than 700 law journals and five legal newspapers dating from 1980. LRI may be accessed on LEXIS through its REFSRV service and on WESTLAW through DIALOG. WESTLAW also is planning to include both the Legal Resource Index and the Index to Legal Periodicals as part of the regular database.

<sup>11</sup> American Law Reports, published by Lawyers Co-operative Publishing Company, Rochester, NY. #A.L.R. and Auto-Cite also may be accessed through Veralex, a service of Lawyer's Co-op. For a review of Veralex, see Harrington, "New Entry in the Legal Research Field: Veralex Joins Lexis, Westlaw," *National Law Journal*, June 23, 1986, p. 14.

<sup>12</sup> DIALOG Information Services, Inc., Palo Alto, California, contains a variety of databases from various publishers, government agencies, corporations and associations. Most of the documents online are in summary or abstract form. One may subscribe to DIALOG and VUTEXT without going through WESTLAW.

<sup>13</sup> For a review of the telecommunications software packages, see Gates and Slinger, "Westmate and the LEXIS Communication Package: Dueling Dialups," 9 *database* 51 (June 1986).

<sup>14</sup> LEXIS recently announced a new pricing arrangement for government subscribers: a fixed hourly rate comparable (but not identical) to that of WESTLAW with no search or citation service surcharge.

<sup>15</sup> Fields on WESTLAW (and segments on LEXIS) are defined as the naturally occurring divisions of a document. These vary according to document type (e.g., opinion, code, regulation, etc.).

<sup>16</sup> Shepard's online can be a trap for the unwary. For Alabama cases, for example, LEXIS offers the complete Alabama Shepard's and the Southern Shepard's from 59

So. 2d. For complete citation coverage, it is safer to use the "official" cite. On WESTLAW, however, the Alabama Shepard's is not now available, but the Southern Shepard's is now complete back to volume one of the first series. Also, on WESTLAW, one should note that when two or more opinions appear on the same page, the order in which they are listed on Insta-Cite is not necessarily the order in which they appear in Shepard's.

<sup>17</sup> A possible query would be, on LEXIS, jury or juror w/ charg or instruct; and, on WESTLAW, jury juror /7 charg! instruct! There are several other possibilities, including limiting the WESTLAW search to the DIGEST field.

<sup>18</sup> West Publishing Company, St. Paul, MN. WESTLAW is beginning to incorporate references to Words and Phrases in its DIGEST field to facilitate searching for definitions. This works, but only sometimes.

<sup>19</sup> For an excellent discussion of this problem, see Jacobstein, "The Erie Railroad Doctrine and Computer-assisted Legal Research," 3(3) *Legal Reference Services Quarterly* 99 (fall 1983) and "The Erie Railroad Doctrine and Computer-assisted Legal Research Revisited," 5(2/3) *Legal Reference Services Quarterly* 229 (summer/fall 1985).

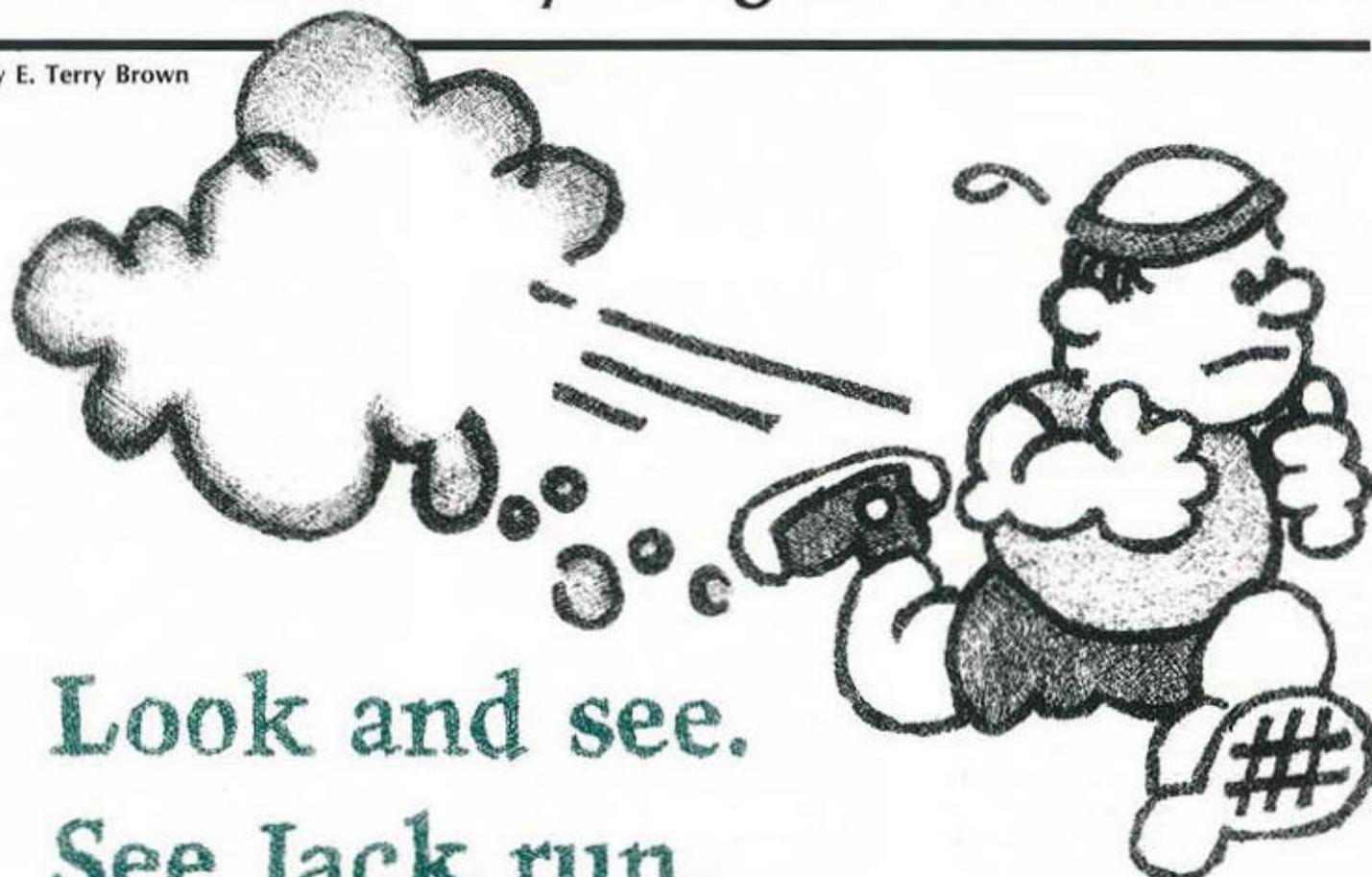
<sup>20</sup> A recent search, for example, involving the oral rescission of a contract, using the query TOPIC(CONTRACT) /p oral\*\* /5 rescind\*\*, retrieved headnotes classified under seven different key numbers under CONTRACTS, four different key numbers under STATUTE OF FRAUDS and one key number each under LANDLORD AND TENANT and APPEAL AND ERROR.

<sup>21</sup> See, e.g., Bering, "Terminal Awareness," 5 *California Lawyer* 15 (Nov. 1985), and O'Connell, "Legal Malpractice: Does the Lawyer Have a Duty to Use Computerized Research?" 35 *Federation of Insurance Counsel Quarterly* 77 (1984). In a related area, see Griffith, "Do Lawyers Have a Duty to Automate?", *National Law Journal* July 21, 1986, p. 16.

<sup>22</sup> Houston, Lauderdale, Mobile and Montgomery County Bar Associations, as well as the City of Birmingham, have either shared use or public WESTLAW terminals; cost and requirements for use vary. Attorneys also may have WESTLAW searches done through the law school library at the University of Alabama, and several legal research services advertising in *The Alabama Lawyer* have access to LEXIS or WESTLAW. And, LEXIS recently has announced a distributorship program for bar associations and law libraries for the benefit of the only "occasional" user of CALR.

# Automatic Stay Litigation: a Primer

by E. Terry Brown



Look and see.  
See Jack run.  
See Jack file bankruptcy.  
See 11 U.S.C. § 362.

Every lawyer at one time or another, whether a specialist in bankruptcy or simply a trusted lawyer of a creditor, finds himself thrust into automatic stay litigation.

The automatic stay is, in effect, an automatic preliminary injunction arising by operation of law when a debtor files a petition in bankruptcy. 11 U.S.C. § 362. In general, this injunction forbids creditors of the debtor from taking any further steps to collect their debt, secure

or improve their position in regard to that debt or obtain possession of the collateral underlying the debt. Id. § 362(a).

There are exceptions, of course, found under § 362(b). Unless an exception is applicable, however, a creditor is well advised not to do anything further regarding the debt until or unless the automatic stay expires or is lifted or modified. Debtors injured by a willful violation of the automatic stay may recover actual damages, costs and at-

torney fees and in appropriate circumstances may recover punitive damages. Id. § 362(h); *Re Tel-A-Communications Consultants, Inc.*, 50 B.R. 250 (B.C.D.C.Conn. 1985).

Basically, there are three types of bankruptcy relief available to a debtor<sup>1</sup>: Chapter 7, simply a liquidation bankruptcy; Chapter 13, a wage-earner bankruptcy allowing the debtor up to five years in certain circumstances to pay off short-term debts; and Chapter 11, allowing a

debtor to reorganize his business or individual financial situation. See *In re: Moog*, 774 F.2d 1073 (11th Cir. 1985). The automatic stay of § 362 applies in all of these bankruptcy cases and, unless the stay is lifted by order of the court, enjoins all creditors from any actions whatsoever against the debtor until the debtor is discharged, the case dismissed or the case closed. Id. § 362(c)<sup>2</sup>

Moreover, the stay against acts to property continues until the property is no longer a part of the bankruptcy estate. Id. § 362(c). Thus, in almost all cases, the earliest and most preferable event from the creditor's standpoint is the entry of an order by the court relieving the creditor from the automatic stay.

Generally, the automatic stay is lifted by a court only for the purpose of allowing the creditor to pursue its collateral<sup>3</sup>. Thus, the scope of this article largely is limited to the situation where a secured creditor seeks relief from the stay to obtain possession or control of its collateral. How, then, does a secured creditor go about seeking an order relieving it from the automatic stay?

A tautology that every creditor in a bankruptcy case must understand is that very little occurs in a bankruptcy case favorable to the creditor unless the creditor asks for it. In order to have the court lift the automatic stay so a creditor might foreclose or otherwise obtain possession of its collateral, a motion to lift the stay must be filed with the bankruptcy court. Id. § 362(d), Bankruptcy Rules (hereinafter B.R.) 9014, 4001. Until recently, relief from the automatic stay was an adversary proceeding requiring a creditor to file a complaint with the bankruptcy court. See former B.R. 701. Now the rules merely require that a mo-

tion be filed with the court and served upon the debtor, the debtor's attorney and any other party in interest, such as the trustee, if one has been appointed. B.R. 4001, 9014, 9013, 7004(b)

Stay litigation is a favored exercise in the view of Congress. It is intended to be an expeditious and economical remedy for creditors. If the bankruptcy court fails to set down the motion for a hearing within 30 days of its filing, the stay lifts automatically. 11 U.S.C. § 362(e)

In the rare, complex case, the bankruptcy court merely may enter a preliminary ruling within the 30-day period, after a preliminary hearing, but the court must find that there is a reasonable likelihood the debtor will prevail at the final hearing. In even those cases the final hearing must be held within 30 days after the preliminary hearing. Id. § 362(e). If the court does not rule within 30 days of the final hearing, the stay lifts automatically. B.R. 4001(b)

In the extreme case where the creditor's interest in the collateral is subject to irreparable harm before a hearing may be held, that creditor may seek ex parte and immediate relief from the automatic stay under 11 U.S.C. § 362(f). See B.R. 4001(c). The procedure in such a case is virtually identical with that under Rule 65, F.R.Civ.P. regarding temporary restraining orders. The marked difference is that the movant is asking the court to remove the restraint, not impose it. There also is no bond requirement.

One should note that in Chapter 13 cases co-debtors also are protected by an automatic stay. 11 U.S.C. § 1301. Stay litigation involving co-debtors in wage-earner cases will be governed by that statute.

Unfortunately, for the practitioner the simplicity or complexity of stay litigation in the bankruptcy courts of Alabama varies greatly from one judge to another. It may be of benefit to point out some pitfalls that may be experienced in each of the particular courts. A list of "do's and don'ts" for the bankruptcy practitioner obviously is a subjective exercise fraught with the danger of errors and omissions. Therefore, the following are offered only as illustrations.

In drafting the motion for relief of the automatic stay, remember the best motion generally is a simple one. Save eloquence and erudition for the hearing. Prudent allegations are (1) the identification of the movant; (2) the identification and attachment of the underlying promissory note and mortgage or security agreement; (3) the allegation of debt (i.e. amount); (4) the statement of the value of the property securing the debt; and (5) the allegation of the "cause" or grounds that exist for the lifting of the stay.

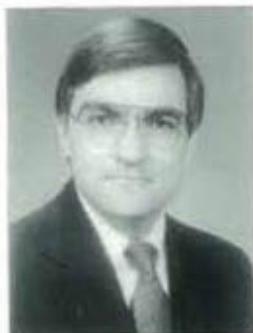
The original motion for relief of stay should be filed with the bankruptcy court with service copies to the debtor, the debtor's attorney and the trustee, if any. B.R. 9014, 7004(b)(9). Some movants think that service on the debtor's attorney is all that is required and sometimes get by without it. However, a close reading of the bankruptcy rule indicates that service also must be effected upon the debtor and the trustee. B.R. 7004(b)(9).

While some courts require that responses be filed by the debtor, others do not. B.R. 9014. Close attention to the notice of hearing sent by the court to all parties will reveal whether the debtor must file a response.

A hearing, or at least a preliminary hearing, must be held within 30 days of filing. 11 U.S.C. § 362(c). Some bankruptcy judges set preliminary hearings as a matter of course and at that hearing postpone the matter for a final hearing at a later date. Such a procedure is arguably not in keeping with § 362 or its legislative history, indicating that only complex matters are to be routinely set over, and only then after the court has found that it appears the debtor would prevail at a final hearing. See House Report No. 95-595, 95th Cong., 1st Session 344 (1977); Cf. Senate Report No.

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95-989, 95th Cong., 2d Sess. 53-55 (1978).

Nevertheless, most of the bankruptcy judges throughout the state routinely set down the matter for a hearing, whether it is styled preliminary or final, within 30 days and make an immediate decision as a result of that hearing.

Discovery is available in automatic stay litigation. B.R. 9014, 7026. However, discovery is an expensive and burdensome exercise in stay litigation, and is especially cumbersome given the informal nature of the remedy. Nevertheless, it is an option, though rarely exercised, available to both debtor and creditor.

If its use is desired, but the delay in the hearing date it may cause is not, the proponent should seek a reduction in the 30-day period for responses under Rules 33, 34 and 36, F.R.Civ.P. Filing of discovery by a creditor without seeking a reduction of time for response may be considered by the court a waiver of the 30-day rule of Section 362(e).

While both parties should be prepared to give live testimony at any hearing on the motion for relief from the automatic stay, not all judges routinely require it. Most judges will hear testimony if offered or require it if it is helpful, but generally are disposed to rule based on the attorneys' representations and the court's review of the motion and file of the debtor. This is true especially when the debtor does not appear at the hearing and has presented no excuse for his absence. Nevertheless, attorneys for both sides in automatic stay litigation should have their witness or client present and prepared to give testimony if such is required by the court.

From the debtor's standpoint, it is absolutely essential that the debtor appear at the hearing. Courts are much more favorably disposed toward a debtor who shows a modicum of interest in keeping possession of his property.

In preparing the witness for the hearing, it must be remembered there are essentially three grounds for granting a creditor relief from the automatic stay. First, neither the debtor nor the estate possesses equity in the property serving as collateral for the creditor's debt. If there is no equity in the property, then the court must lift the automatic stay and allow the creditor to foreclose or other-

wise take possession of its collateral. This is not true, however, in a Chapter 11 case where the property is necessary for an effective reorganization. 11 U.S.C. § 362(d)(2)(B). In such a case the creditor may rely on one of the alternative grounds.

Obviously, if the property is worth more than the pay-off on the mortgage or security agreement, there is equity in the property. If the debt exceeds the value of the property there is no equity. However, where there is a genuine dispute, the creditor, who has the burden of proof, must show that there is no equity in the property. If the pay-off on the debt is greater than the original purchase price, the creditor has, arguably, made out a *prima facie* case.

In the event the pay-off is less, the creditor must offer a witness who is qualified by education or experience to give an opinion on the fair market value of the particular property. A debtor, who is the owner of the property, need not possess such qualifications to give an opinion on the value. Rule 701, F.R.Ev.; *Dietz v. Consolidated Oil & Gas, Inc.*, 643 F.2d 1088 (5th Cir. 1981). Of course, a court may give the debtor's opinion its proper weight in contrasting it to the qualified testimony of the creditor's witness. *Re: Jug End in Berkshires, Inc.*, 46 B.R. 892 (B.C.D.C. Mass. 1985).

The second ground, applying even if there is no equity, is that the creditor's interest in the property is not adequately protected. Some examples of lack of adequate protection would be an uninsured automobile or house or a piece of property depreciating in value. See *In re Sombrero Reef Club, Inc.*, 7 B.R. 480 (S.D.Fla. 1980); *Re Chism*, 50 B.R. 55 (B.C.M.D. Ala. 1985).

Another example might be the failure of the debtor to maintain regular monthly payments on the debt. *Re Hagendorfer*, 42 B.R. 13 (B.C.S.D. Ala.) aff'd 42 B.R. 17 (S.D. Ala. 1984). In the event that adequate protection is not present, the court must lift the stay or fashion a remedy adequately protecting the creditor while the stay remains in effect. 11 U.S.C. § 361.

Adequate protection is a "serbonian bog" through which no one has fully found a predictable and stable path to date. Generally, courts attempt to provide adequate protection by requiring

the debtor make periodic payments to the creditor. Id. § 361(1). From the creditor's viewpoint, periodic payments should at least equal the regular payments called for in the note. The creditor also may argue for additional sums to reduce any pre-petition arrearage. cf. Id. 1322 (b)(2), (3)

On the other hand, the debtor may argue that the purpose of adequate protection is to protect the status quo and, therefore, only interest payments should be required. Both parties should keep in mind some courts hold that if there is an equity cushion present in the property, the creditor may be adequately protected by that cushion alone. *Re Digby*, 47 B.R. 614 (B.C.N.D.Ala. 1985) *In re Pitts*, 2 B.R. 476 (C.D.Cal. 1979). Other courts will look to the size of the equity cushion. See e.g. *Re Hagendorfer*, *supra* (12.2 percent equity cushion is not adequate).

Regarding adequate protection, the creditor should provide a witness who is able and competent to give testimony on whether the property is insured; whether the debtor is making regular payments; whether the property is depreciating; whether the debtor is in possession of the property; and, in short, anything showing the creditor's position is adversely affected by the stay continuing in effect.

Of course, because the debtor has the burden on these issues, he should be prepared to counter such adverse testimony. If the debtor questions the creditor's evidence that payments are not being made, he should have receipts ready to produce. Nothing is more damaging to the debtor's case, or more embarrassing to the debtor's attorney, than for a debtor to tell the court he did not bring his receipts.

A third ground or, rather, an area of additional or alternative grounds, for relief from the automatic stay is implicit from the language of § 362(d)(1), stating that the automatic stay may be lifted "for cause, including the lack of adequate protection . . ." (emphasis added)

Eleven U.S.C. § 102(3) states the term "including" is not limiting. Thus, a too-rarely explored area of grounds for relief of stay exists for the creative lawyer. An exhaustive list is not possible, but some courts have ruled that the failure of a

Continued on page 324

# cle opportunities

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**11-12****TRYING CASES TO WIN (ADVANCED)**

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Chapter 13 debtor to make planned payments to a creditor constitutes "cause" for lifting the stay, even where an equity cushion is present. *In re: Janice Quinlan*, 12 B.R. 516 (W.D.Wis. 1981). Furthermore, in a Chapter 11 case the inability of the debtor to present a plan of reorganization capable of confirmation may constitute "cause." See e.g. *In re Mary Harpley Builders, Inc.*, 44 B.R. 151 (N.D.Ohio 1984); *In re: Sulzer*, 2 B.R. 630, 636 (S.D.N.Y. 1980). Another ground could be the bad faith of the debtor in filing his petition in bankruptcy. *In re: Yukon Enters, Inc.*, 39 B.R. 919 (C.D.Cal. 1984) (The court lists several badges of bad faith.)

Keeping in mind the above grounds, a debtor usually must show, at a minimum, that the creditor's interest in the property is adequately protected, and the creditor must be able to show it is not. Theoretically, in automatic stay litigation, the only burden the creditor has to show, other than the existence of his debt and validity of his lien, is that

there is no equity in the property. 11 U.S.C. § 362(g)(1). The debtor has the burden on all other issues including adequate protection. However, practically speaking, the creditor always has the burden of persuading the court that it should lift the stay, and mere reliance on the debtor's burden of proof, without more, will gain the creditor little but the court's appreciation of the attorney's procedural expertise.

The client or witness must understand that his testimony is under oath and therefore should not be exaggerated. The court generally does not have much trouble recognizing this and generally is not disposed to applaud his efforts, but, by the same token, the witness should not underestimate his position.

If the property clearly has no equity, if the debtor clearly is unable to adequately protect the creditor and if the debtor clearly is heading for defeat in the stay litigation, the debtor should not fail to throw himself on the mercy of the court. Judges are human and sometimes are touched by the anguished plea of the debtor for another chance. This is especially true when that appeal can be bol-

stered by a recent hospitalization, "a shutdown at the mill" or other natural or unnatural catastrophes which may have recently befallen him. Again, do not over-exaggerate and do not fabricate.

If the debtor's attorney knows his client does not have a strong position and that the court probably will lift or modify the automatic stay, he should contact the creditor's attorney in advance of the hearing and offer to compromise. There is usually enough uncertainty involved in bankruptcy practice to make an attempt at compromise productive. If a creditor can save its attorney's fees in traveling to the hearing and get some definite agreement or stipulation from the debtor, it often will welcome a settlement of the matter.

On the other hand, a creditor should avoid filing a weak motion as it never wants to gain a reputation for "crying wolf." Whether the motion is good or bad, the creditor also might obtain a satisfactory resolution of the controversy by contacting the debtor's attorney before the hearing. As a rule, debtor's attorneys are not remunerated sufficiently to welcome trips to court to fight auto-

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matic stay motions, often he will welcome an offer of compromise. It also must be noted that the courts are appreciative of counsels' efforts to confer and dispose of matters prior to the hearing so it may employ time and energy in hearing cases of genuine dispute.

Once the hearing is completed, the court must enter an order within 30 days. If the court fails, the stay automatically lifts. B.R. 4001 While a creditor generally seeks an unconditional termination of the automatic stay, the court has, under 11 U.S.C. § 362(d), the options of annulling, modifying or conditioning the automatic stay. It also can leave the stay in effect by denying the motion. An order of the court annulling the automatic stay is rare.

Such an order, in essence, avoids the stay *ab initio*. An example of its usefulness is when a creditor has repossessed its collateral after the bankruptcy petition

was filed but before it had notice of that filing. *In re: Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984) An order "modifying or conditioning" the automatic stay gives the court room to do equity. An example of such an order is the long-standing practice in the middle district of Alabama entering "drop-dead" orders, automatically lifting the stay at the end of a set period of time if the debtor has not cured his default.

The order granting, denying or otherwise disposing of a motion for relief from the automatic stay has been treated as a final order for purposes of appeal. *Borg Warner Acceptance Corp. v. Hall*, 684 F.2d 1306 (11th Cir. 1982); *In re: American Mariner Ind.*, 734 F.2d 426 (9th Cir. 1984); *In re: Comer*, 716 F.2d 168 (3rd Cir. 1983). Appeal is to the United States district court for the district in which the bankruptcy judge is sitting. 28 U.S.C. § 158

Under Bankruptcy Rule 8002, a notice of appeal must be filed with the clerk of the bankruptcy court within ten days of entry of the order. Other appeal requirements are found in B.R. 8001, 8003-8019. Hence, a party must move, and move quickly, after entry of an adverse order if desiring to appeal.<sup>4</sup> Most parties find an appeal from stay litigation generally a waste of time and money because subsequent events often render the appeal moot long before the appeal is decided. Examples are dismissal of the bankruptcy case, discharge of the debtor and abandonment of the collateral and subsequent stay litigation, a more favorable outcome.

Unfortunately, the very fact that appeals from stay litigation are rare has resulted in a lack of uniformity among the various bankruptcy courts in approach to and disposition of automatic stay litigation. These differences appear to be becoming greater with the passage of time. Because of the rarity of higher court review of automatic stay litigation procedures, it is felt that only the adoption of uniform local rules will enable a first-time bankruptcy practitioner to walk into any bankruptcy court within the state of Alabama and be able to predict what will occur within that forum.

## Summary

This article attempted to provide a brief overview of automatic stay litigation in the bankruptcy courts of Alabama.

Anyone involved in stay litigation is encouraged to review and study the authorities cited herein and the resource materials available. ■

## FOOTNOTES

<sup>1</sup> A fourth type, chapter 9, concerns only bankruptcies by municipalities. 11 U.S.C. § 901, et seq.

<sup>2</sup> It must be noted, however, that if the debtor is discharged a permanent injunction of acts against the debtor or on account of a pre-petition debt arises in place of automatic stay. 11 U.S.C. § 524(a). The exception arises if the court has rendered the debt non-dischargeable or if the debt is non-dischargeable as a matter of law. 11 U.S.C. § 523. Thus, for all intents and purposes a creditor may not take any action against the debtor personally unless his case is dismissed, the stay lifted, the debt non-dischargeable or the stay not applicable under § 362(b).

<sup>3</sup> An exception would be the lifting of the stay for the purpose of allowing the creditor to prosecute to a conclusion a pending lawsuit against the debtor in order to liquidate his claim *In re Curtis*, 40 B.R. 795 (D. Utah 1984)

<sup>4</sup> A debtor must keep in mind that there is no ten-day stay of execution of an order lifting, etc., the automatic stay of 11 U.S.C. § 362. Compare B.R. 7062 with Rule 62(a), F.R.Civ.P.

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# Young Lawyers' Section



Claire A. Black  
YLS President

## YLS receives award of achievement

The Young Lawyers' Section recently received the first place Award of Achievement from the Young Lawyers' Division of the American Bar Association. The service-to-the-public category for which the honor was given was the Alabama Youth Judicial Program sponsored by the YLS in conjunction with the state Young Men's Christian Association.

In the Youth Judicial Program, mock trials are conducted by high school students, giving them a first-hand opportunity to experience the judicial process by participating as attorneys, judges, witnesses and jurors. The program, conceived in 1979 by the Honorable Hugh Maddox, Alabama Supreme Court senior associate justice, was implemented as a counterpart to the Alabama Youth Legislative Program. Initially, the program was limited to high schools in Montgomery, but the number participating increased to 15 high schools (from 11 cities) in local competition and eight high schools from five cities at the state competition level, involving more than 700 students and 80 young lawyer advisers.

This past year, the Youth Judicial Program was headed by YLS Chairman Keith B. Norman of Montgomery. His efforts and diligence are responsible for the YLS' receiving this

award, and he is to be commended for the service to the students and bar.

### Highlights of recent YLS events

The "rising of the curtain" for this year's YLS Executive Committee took place August 22-24 at NorthRiver Yacht Club in Tuscaloosa. Members attending were Charlie Mixon, James Anderson, Percy Badham, Laura Crum, Tom Heflin, Rick Kuykendall,

Terry McElheny, Keith Norman, John Plunk, Jay Rea, Steve Rowe, Jim Sasser, Steve Shaw, Rebecca Shows, Amy Slayden and Claire Black.

The Montgomery YLS has been active in child advocacy, cosponsoring a child advocacy seminar with the Montgomery County District Attorney's Office. The section, with approximately 60 members, is headed



YLS Executive Committee members attending the August 22-24 meeting at the NorthRiver Yacht Club in Tuscaloosa were, back row, left to right, Charlie Mixon, Jim Sasser, Steve Rowe, Rick Kuykendall, Percy Badham, Jay Rea, James Anderson and Keith Norman. On the front row, left to right, were John Plunk, Terry McElheny, Claire Black, Amy Slayden, Laura Crum, Rebecca Shows and Steve Shaw.

by Pat Harris, Harris & Harris, PC, president; Keith Norman, Balch & Bingham, vice president; and Leah Harper, Hill, Hill, Carter, Franco, Cole & Black, secretary/treasurer. Board of directors members include John Thrower, Ball, Ball, Duke & Matthews; Robert T. Childers, Turner, Wilson & Christian; Billy Addison, Reese & Addison; Pete Yates; Laura Crum, Hill, Hill, Carter, Franco, Cole & Black; James Anderson, immediate past president, Hill, Hill, Carter, Franco, Cole & Black.

The YLS has a goal of increasing membership in the ABA Young Lawyers' Division by a joint project with the ABA/YLD to target non-ABA/YLD members in Alabama and encourage their joining the ABA/YLD. Not only is membership in the ABA/YLD free, but the number of delegates afforded Alabama is a function of the number of ABA/YLD members. Please commit your name to the roster to help our voice be heard on the national level.

Thanks to the state bar computer and the mathematical efforts of Mary Lyn Pike, Mandatory Continuing Legal Education director and assistant executive director of the bar, the tally of members of the Alabama YLS has been computed. With 4,159 YLS members of the total active state bar membership of 7,798, this section comprises over 53 percent of the entire bar. There are abounding opportunities for individual involvement in the various committees and projects of the YLS, and I will be glad to discuss with anyone calling me at 349-1727 how to become active. ■

## Riding the Circuits

### Houston County Bar Association

The Houston County Bar Association recently held its annual banquet and installation of officers at the Dothan Country Club. Newly-elected officers for 1986-87 are:

President: Edward Jackson

Vice president: Edward M. Price, Jr.

Secretary: Peter A. McInnis

Treasurer: Lexa E. Dowling ■

# Bar Briefs

### Torbert president-elect of National Conference of Chief Justices

Alabama Chief Justice C.C. Torbert, Jr., is the new president-elect of the National Conference of Chief Justices.

The conference is composed of the highest judicial officer of each state, the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Territories.

Torbert



Torbert has been a member of the conference since he became the state's chief justice in 1977 and has served on its board of directors since 1980.

Torbert, who succeeds Robert C. Murphy of Maryland as president-elect, will become president of the conference in 1987.

### Godbold steps aside as chief judge

Chief Judge John C. Godbold of the Eleventh Circuit Court of Appeals stepped aside as chief judge, effective September 3, 1986, and was succeeded in the position by Judge Paul H. Roney of St. Petersburg, Florida.

Godbold notified the chief justice of the United States that he desired to exercise his option to continue as an active circuit judge without the duties of chief judge, and Roney, as the

judge of the circuit court next in seniority and under 65 years of age, automatically became chief judge upon Judge Godbold's giving up the position.

A native of Montgomery, Alabama, Godbold served as chief judge of the Fifth Circuit Court of Appeals, and, upon its division into two circuits, became the first chief judge of the new Eleventh Circuit, consisting of Alabama, Florida and Georgia. He is the only federal judge to have been chief judge of two circuits.

Godbold explained, "I had planned to step down in the spring of 1987. A few days from now Judge Roney will reach age 65, which would disqualify him from becoming chief judge. I have, therefore, advanced the date of stepping aside because the circuit should not lose the benefit of the experience and leadership Judge Roney will bring to the position."

Judge Roney served on the U.S. Court of Appeals for the Fifth Circuit from 1970 to 1981 and the new Eleventh Circuit from 1981 to the present. He is a graduate of the University of Pennsylvania and the Harvard Law School and earned an LL.M. at the law school of the University of Virginia.



Godbold

# Sorry for the delay . . . but we wanted your deskbook to be the *best*. Look for it in the mail soon— it's worth the wait!

## License/Special Membership Notice

1986-87 Occupational License or  
Special Membership Dues were  
due **October 1, 1986**

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

Special membership dues should be remitted directly to the Alabama State Bar in the amount of **\$75.00**. The occupational license should be purchased from the probate judge or revenue commissioner in the city or town in which the lawyer has his or her principal office.

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

## CONFIDENTIAL HELP FROM FELLOW PROFESSIONALS IS A PHONE CALL AWAY

If you or someone you know suffers from the effects of alcohol and chemical abuse and is in need of special assistance, call toll-free:

1-800-237-5828

## ASK FOR THE CONCERNED LAWYERS' FOUNDATION PROGRAM.

This program is independent of the Alabama State Bar and does not police, report, discipline or threaten the career or reputation of any attorney or judge.

All inquiries are confidential. Professional counselors are on call 24 hours a day.

CLF

CONCERNED LAWYERS' FOUNDATION, INC.

# 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 presently open \_\_\_\_\_  
Number of matters handled annually \_\_\_\_\_ 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.

# Opinions of the General Counsel

by William H. Morrow, Jr.

## QUESTION:

When an attorney acts as administrator or executor of an estate, may the attorney also act as attorney for the estate and ethically receive a fee in his capacity as administrator or executor and a separate fee in his capacity as attorney?

## ANSWER:

Although certain situations might present conflicts of interest preventing an attorney from acting in the dual capacities of administrator or executor and attorney for the estate, there is nothing unethical, per se, in an attorney's acting in both capacities and receiving a separate fee for each capacity. The attorney, however, should reveal to the court and the beneficiaries of the estate that he is acting in these dual capacities and make a good faith professional judgment that any legal work he performs is necessary and will enure to the benefit of the estate.

## DISCUSSION:

Ethical Consideration 5-17 in part provides:

"Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent."

Disciplinary Rule 5-101(A) provides:

"(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

The Code of Professional Responsibility of the Alabama State Bar contains no specific provision directly bearing upon the question posed.

Although there is some authority to the contrary, it appears that a vast majority of the courts and ethics committees have determined there is nothing unethical, per se, in an attorney's acting as administrator or executor for an estate and also as attorney for the estate.

A committee of the North Carolina State Bar (1962) held that an attorney who, as administrator of an estate, performs professional services justifying retention of counsel, may receive attorney's fees from the estate at the discretion of the court.

A committee of the Oklahoma State Bar (1937) refused to answer a question such as that posed, holding that the question of whether an attorney who is executor of an estate may charge the estate with attorney's fees as well as executor's fees

is a legal question properly to be decided by the courts. A committee of the Texas State Bar (1963) held that a lawyer-executor may receive, in addition to a commission as executor, a legal fee for services rendered to the estate that are outside the scope of duties as executor.

A committee of the North Carolina Bar (1967) held that an attorney may both represent an estate in a suit and be the estate's administrator and collect fees for services rendered in both capacities, provided that he inform the court of the dual capacities and ask the court for an order setting proper fees.

A committee of the Illinois State Bar (1975) held that a lawyer who is an executor or administrator and also an attorney for the estate may charge fees for services rendered in each capacity.

A committee of the South Carolina State Bar (1976) held it is proper for an attorney-executor to act in the dual capacities and obtain a fee in each capacity if the guidelines set down in the case of *In Re James*, 229 S.E. 2d 594 (S.C. 1976) are followed. In this case the court stated:

"In order to act properly in his capacity as executor/lawyer respondent would have to have (1) determined in good faith, after exhausting all nonlitigative means (as executor), that the insurance company would not voluntarily pay the benefits due, (2) explained this fact fully and disclosed the fee arrangement with the estate beneficiaries, (3) obtained the consent of the estate beneficiaries to act in the dual capacity, and (4) fully disclosed all relevant facts to the court approving his fee and the court approving the accounting rendered."

In the case of *In Re James*, *supra*, the attorney filed a lawsuit, which appeared to be entirely unnecessary, against an insurance company, merely for the purpose of collecting a fee in his capacity as attorney. The attorney was suspended indefinitely from the practice of law.

We find little or no Alabama case authority on the point. In the case of *John V. Sharpe et al.*, 148 Ala. 665 41 So. 635 (1906), the Supreme Court of Alabama held as follows:

"It is the opinion of a majority of the members of the court that where an administrator, being an attorney at law, finding it necessary to institute a suit in behalf of the estate, associates another attorney with him, and they—himself and such other attorney—jointly render professional services to the estate in the institution and prosecution of such suit, the administrator is entitled to a credit on the settlement of the administration in the probate court to the extent of the reasonable value of such services."

In conclusion, we find nothing unethical, per se, in an attorney's acting as administrator or executor for an estate and as attorney for an estate and charging a fee for services in both capacities. ■

# MCLE News

by Mary Lyn Pike  
Assistant Executive Director

## CLE compliance due

The deadline for earning 1986 continuing legal education credits is December 31, 1986. A calendar for remaining in-state CLE opportunities is printed on pages 322 and 323. If you wish to attend an out-of-state program, call or write the MCLE Commission at state bar headquarters for a list of seminars available in the state or city of your choice.

## Rule changes affecting compliance

Printed on page 332 of this issue is an order by the Supreme Court of Alabama, dated September 2, 1986, making several important changes in the CLE rules.

Alabama attorneys still are required to earn their CLE credits between January 1 and **December 31** of each year. However, the period of time for filing the report of compliance with the MCLE Commission has been extended to **January 31** of the following year. This change allows attorneys and their secretaries to avoid the usual year-end rush and panic over the reports.

Any attorney filing the required report after **January 31** will be required to attach it to a **late filing fee** in the form of a check for \$50 made payable to the Alabama State Bar. The commission's staff will be required to return to the attorney any such reports not accompanied by the fee, and until the report and fee are filed together, that attorney will be deemed not in compliance with 1986 CLE requirements.

To accommodate those few attorneys not able to earn 12 approved CLE credits during 1986 and subsequent years, the court has adopted a **deficiency plan** procedure, patterned after that of the Georgia State Bar. Attorneys who have not earned their credits by December 31 may submit to the commission a letter stating the titles, sponsors, dates and locations of courses that will be attended and cred-

its that will be earned between December 31, 1986, and March 1, 1987. Courses listed must be accredited already by the MCLE Commission and not require submission of an application by a sponsor.

The plan must be received by **January 31**. A decision on its acceptability will be made, and the attorney will be notified without delay.

A deficiency plan must be completed, i.e. all credits must be earned, by **March 1**. The report of completion of the plan will be made by way of the 1986 MCLE form 1, "Annual Report of Compliance," mailed to each bar member. The report and a \$50 late compliance fee must be received by the commission by **March 15**. If both are not received by that date, the commission will be required to certify the attorney to the Disciplinary Commission for noncompliance.

The imposition of fees for late filing and late compliance shifts the extra expense of handling such problems to those who cause the problems. Those 92 percent of bar members who comply on-time and file on-time no longer will have their bar dues expended on recalcitrant or neglectful members—an average of 500 attorneys per year over the last four years (8 percent of the bar).

## Changes in MCLE regulations

Attorneys requesting permanent substitute programs, waivers and exemptions based on physical disability now are required to submit a physician's statement addressing the necessity of such exceptions.

Speakers serving as panelists in approved CLE activities are required to divide the time equally when calculating teaching credits earned, unless they advise the commission otherwise. However, no panelist will receive less than one credit for each hour of individual presentation or service on a panel.

Credit may be earned through teaching a course in any law school approved by the commission. Following the Supreme Court of Alabama's decision in *Ex Parte*

*Jones School of Law*, the commission has approved Jones School of Law, Birmingham School of Law and Miles College of Law as additional law schools where teachers may earn CLE credit.

Activities submitted for credit may be approved only if they are designed primarily for lawyers, not nonlawyers. Additionally, they must deal primarily with substantive legal issues, professional responsibility, ethical obligations and, in limited circumstances, practice management.

Satellite and teleconferenced CLE programs either must have telephone hookups to instructors at the broadcast location or an instructor present at the receiving site, to comment and answer questions.

Courses sponsored by law firms and corporations may be approved if the usual standards for accreditation and certain additional requirements are met. Applications for approval must be submitted at least 30 days in advance; applications submitted less than 30 days in advance or after the programs will not be approved. At least half the instruction must be provided by persons outside the firm or corporation. A qualified instructor outside the firm or corporation must be present for audio- and videotaped presentations.

Beginning January 1, 1987, sponsors of approved programs will be required to submit a list of Alabama State Bar members attending each program. Not intended to police members, this requirement permits the commission to maintain cumulative records of possible credits earned by members throughout the year. At the end of the year, a transcript will be sent to each member and, after corrections, additions and deletions, each will sign and return it as their report for the year.

It is important to note that exact records of time spent in attendance will not be kept or required, and the burden will be on each member to make a record of seminars not fully attended and decrease

the credits posted by the proper amount.

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

Finally, no 1986 CLE program submitted for accreditation after March 1, 1987, can be approved. Any attorney seeking

accreditation of a 1986 program should ensure that the sponsor submits the application at least 30 days in advance of the program and certainly no later than March 1, 1987.

In the words of John B. Scott, Jr., immediate past chairman of the commission, "...these changes represent a backlog of needed adjustments in policy and in operating procedures . . . the

MCLE Commission is a collection of 'independent thinkers' so every proposed change had to run the gauntlet." Additionally, all were submitted to the board of bar commissioners, and unanimous approval was obtained. Opportunity for comment by bar members was given in the March 1986 issue of this journal, and only one objection to one proposed change was received. ■

## ORDER

WHEREAS, the Mandatory Continuing Legal Education Commission and the Board of Bar Commissioners of the Alabama State Bar have recommended changes in the Rules for Mandatory Continuing Legal Education, and those recommended changes having been considered by the court.

IT IS ORDERED that Rule 1 of the Rules for Mandatory Continuing Legal Education be amended to read as follows:

### "RULE 1. Continuing Legal Education Commission

"There is hereby established the Continuing Legal Education Commission. The Commission shall consist of nine (9) members, who shall be chosen from the members of the Board of Bar Commissioners. The members of the Commission shall be elected by the Board of Bar Commissioners and shall serve at its pleasure.

"The Commission shall have the following duties:

"A. To exercise general supervisory authority over the administration of these rules;

"B. To adopt regulations consistent with these rules."

IT IS FURTHER ORDERED that Rule 5 of the Rules for Mandatory Continuing Legal Education be amended to read as follows:

### "RULE 5. Annual Report

"A. On or before January 31 of each year, each attorney admitted to practice in the state shall make a written report to the Commission, in such form as the Commission shall prescribe, concerning his or her completion of accredited legal education during the previous calendar year.

"B. An attorney who, for whatever reason, files the report after January 31 shall pay a fifty-(50) dollar late filing fee. This payment shall be attached to and submitted with the report."

IT IS FURTHER ORDERED that Rule 6 of the Rules for Mandatory Continuing

Legal Education be amended to read as follows:

### "RULE 6. NONCOMPLIANCE AND SANCTIONS

"A. An attorney who fails to earn twelve (12) approved CLE credits by December 31 of a particular year will be deemed not in compliance for that year. A plan for making up the deficiency by March 1 will be accepted if approved courses are listed and if the plan is received by January 31. Completion of the requirement shall be reported no later than March 15, and a fifty-(50) dollar late compliance fee shall be attached to the report. Failure to complete the plan by March 1 and to submit the report and fee by March 15 shall invoke the sanctions set forth in Rule 6B.

"B. As soon as practical after January 31 of each year, the Chairman of the Commission on Continuing Legal Education shall furnish to the Secretary of the Alabama State Bar a list of those attorneys who have failed to file either an annual report for the previous calendar year, as required by Rule 5, or a plan for making up the deficiency, as permitted by Rule 6A.

"The Secretary shall thereupon forward this list of attorneys to the Chairman of the Disciplinary Commission.

"The Chairman of the Disciplinary Commission shall then serve, by certified mail, each attorney whose name appears on the list with an order to show cause within sixty (60) days (i.e., within 60 days from the date of the order) why the attorney's license should not be suspended at the expiration of the sixty (60) days. Any such attorney may within the 60 days furnish the Disciplinary Commission with an affidavit (a) indicating that the attorney has in fact earned the 12 required CLE credits during the preceding calendar year or has since that date earned sufficient credits to make up any deficiency for the previous calendar year or (b) setting forth a valid excuse (illness or other good cause) for failure to comply with the requirement.

"As soon as practical after March 15 of each year, the Chairman of the Commission on Continuing Legal Education

shall furnish to the Secretary of the Alabama State Bar a supplemental list of any attorneys who filed a deficiency plan as permitted by Rule 6A, but who have failed either to carry out such plan or to meet the reporting requirements of Rule 6A. The same procedures, requirements, and sanctions applicable to the attorneys on the initial delinquent list shall apply to the attorneys on this supplemental list.

"At the expiration of sixty (60) days from the date of the order to show cause, the Disciplinary Commission shall enter an order suspending the law license of each attorney whose name appears on one of the lists and who has not, pursuant to the third paragraph of this Rule 6B, filed an affidavit that the Disciplinary Commission considers satisfactory.

"At any time within three months after the order of suspension, an attorney may file with the Disciplinary Commission an affidavit indicating that the attorney has earned 12 approved CLE credits (or the number of credits for which the attorney was deficient) and wants them assigned to the year for which the attorney was in noncompliance with Rule 3; and, if the Disciplinary Commission finds the affidavit satisfactory, it shall forthwith enter an order reinstating the attorney.

"At any time beyond three months from the order of suspension, an attorney may file with the Disciplinary Board an affidavit like that described in the preceding paragraph, but such an attorney must file with that affidavit a petition for reinstatement (see Rule 19, Alabama Rules for Disciplinary Enforcement).

"An attorney may appeal to the Disciplinary Board from an order of suspension or an order denying reinstatement entered by the Disciplinary Commission. Additionally, any affected attorney may appeal any action of the Disciplinary Board to the Supreme Court in accordance with the Rules of Disciplinary Enforcement."

IT IS FURTHER ORDERED that these amendments become effective September 2, 1986. ■

**MANDATORY CONTINUING LEGAL EDUCATION COMMISSION**

M MCLE Commission  
A Alabama State Bar  
I P.O. Box 671  
L Montgomery, AL 36101

ALABAMA STATE BAR

**1986 MCLE FORM 1**

## **ANNUAL REPORT OF COMPLIANCE**

T Telephone:  
O (205) 269-1515

**Earn all credits by December 31, 1986  
Submit this form by January 31, 1987**

**Please keep a copy for your records**

**1986 CREDIT REPORT**  
List only 1986 courses

**A. ATTENDANCE**

	Sponsor	Course or Seminar Title	Date(s)	City	Credits Earned
(1)			/ /		
(2)			/ /		
(3)			/ /		
(4)			/ /		
(5)			/ /		
(6)			/ /		

TOTAL:

**B. TEACHING**

	Sponsor	Subject(s) Taught	Date(s)	City	Hours Taught	Credits Claimed
(1)			/ /			
(2)			/ /			
(3)			/ /			
(4)			/ /			

TOTAL:

I affirm that the information given above is, to the best of my knowledge, accurate and complete.

Signature \_\_\_\_\_

Date \_\_\_\_\_

1. On or before **January 31** of each year, each attorney admitted to practice in the state shall make a written report to the Commission concerning his or her completion of accredited legal education during **the previous calendar year**.
2. An attorney who, for whatever reason, files the report after **January 31** shall pay a **fifty (50) dollar late filing fee**. This payment shall be attached to and submitted with the report.
3. An attorney who fails to earn twelve (12) approved CLE credits by December 31 of a particular year will be deemed not in compliance for that year. A plan for making up the deficiency by March 1 will be accepted if approved courses are listed and if the plan is received by **January 31**. Completion of the requirement shall be reported no later than March 15, and a **fifty (50) dollar late compliance fee** shall be attached to the report. Failure to complete the plan by March 1 and to submit the report and fee by March 15 shall invoke the sanctions set forth in Rule 6B, Rules for Mandatory Continuing Legal Education.



# Recent Decisions

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

## Recent Decisions of the Alabama Court of Criminal Appeals

### The right to cross-exam on the "deal"

*Dawkins v. State*, 6 Div. 761 (July 15, 1986)—Dawkins was indicted for the unlawful sale of cocaine and was found guilty of trafficking in cocaine. On appeal, the defendant raised as error the trial court's refusal to permit his defense counsel to show the terms of punishment which the codefendant, Arrington, was to receive under his plea bargain agreement.

The court of criminal appeals reversed and held that where the state had brought out on direct examination the fact that there had been a plea bargain agreement entered into by the state with Arrington in return for his testimony, the full terms of this agreement must be allowed to be placed before the jury in passing upon the credibility, as well as the possible bias or motive, of the defendant's accomplice in testifying for the state.

### DUI will support probation revocation

*Moore v. State*, 8 Div. 422 (July 15, 1986)—Moore appealed to the court

of criminal appeals from an order of the circuit court revoking his probation. On January 7, 1985, Moore was arrested and charged with driving under the influence of alcohol. He was convicted on the charge in municipal court and failed to appear in circuit court on the date set for the *de novo* trial of his appeal. Moore's probation officer filed a delinquency report; the circuit judge ordered Moore's probation revoked.

The defendant contended on appeal that the act of driving under the influence of alcohol and a conviction for that offense did not violate any condition of his probation.

Judge Taylor, writing for a unanimous court, focused the issue as follows:

"Is driving under the influence of alcohol violative of a usual or implied condition of probation?" The court answered yes. Judge Taylor reasoned that beyond any expressed condition of probation there exists the implied condition that the probationer live and remain at liberty without violating the law.

### Satterwhite Affirmed

*Townley v. State*, 7 Div. 504 (July 15, 1986)—Following a consolidated jury trial, the defendants were convicted of trafficking in marijuana in violation of

§ 20-2-80, *Code of Alabama* (1975). During the state's case in chief, the trial judge overruled the defense counsel's objection to the admissibility of the search warrant and the affidavit in support of that warrant. The execution of this warrant at the defendants' home resulted in seizure of approximately 15 pounds of marijuana. The affidavit and warrant were part of the same document and contained the factual basis for a finding of probable cause by the magistrate.

The defense objected to the introduction of the affidavit on the ground it contained the hearsay statements of the confidential informant. The objection was overruled, and the entire document was admitted into evidence for the jury's consideration.

The Alabama Court of Criminal Appeals reaffirmed the doctrine set forth in *Satterwhite v. State*, 364 So. 2d 345 (Ala. 1978). The Alabama courts consistently have held the admission of hearsay information contained in an affidavit in support of a search warrant constitutes reversible error.

### The prosecutor's comment on the defendant's failure to call his co-defendant as a witness

*Middleton v. State*, 4 Div. 430 (Sep-

tember 9, 1986)—Middleton was found guilty of possession of controlled substances and sentenced to 15 years under the Habitual Offender Statute. On appeal, the defendant alleged the remarks made by the prosecutor in his closing argument denied him his right to a fair trial and, thus, his motion for mistrial should have been granted by the trial judge.

During closing arguments, the prosecutor remarked, "Where is Hall? Why didn't he testify?" Hall was the co-defendant. The defense counsel objected and moved for a mistrial stating, "The DA knows that the witness would invoke the Fifth Amendment, and he is equally available to call him and let him invoke the Fifth Amendment." The court denied the motion.

Judge McMillan, writing for a unanimous court, held that the prosecutor's comment to the effect, "Where is Hall? Why didn't he testify?" drew an unfavorable inference to the defendant because of his failure to call the co-defendant to testify. "It is the general rule that one party may not comment unfavorably on the other party's failure to produce a witness supposedly favorable to that party if the witness is equally available (or as in the case at bar unavailable) or accessible to both sides." *Waller v. State*, 242 Ala. 1, 4 So.2d 911, cert. denied, 242 Ala. 90, 4 So.2d 917 (Ala. 1941).

In the Middleton case, the concept of availability becomes determinative of the propriety of the prosecutor's comment and clearly means more than merely available or accessible for service of subpoena.

In resolving the issue of availability, the court of criminal appeals set forth a two-prong test:

First, did the appellant have superior means of knowing of the existence and identity of the absent witness, and second, would the witness's relationship with the appellant affect the witness's personal interest in the outcome of the appellant's trial, thus making it natural that he would testify against the State and in favor of the appellant? *Hunt v. State*, 453 So.2d 1083, 1088 (Ala. Cr. App. 1984).

Judge McMillan concluded that where the absent witness is the co-defendant, it is clear he may have a personal interest in the outcome of the trial; however, it also is probable he would claim his con-

stitutional right to remain silent, regardless of whether the state or the defendant called him to testify.

### Revocation of a juvenile's probation requires a petition

*Tolbert v. State*, 3 Div. 384 (July 15, 1986)—Tolbert, a juvenile, was adjudicated a delinquent based upon allegations of escape, assault on a police officer and resisting arrest. He was placed on probation for one year. Thereafter, Tolbert's probation officer filed an unverified petition asking that Tolbert's probation be revoked. He alleged that the juvenile had been absent from school, had been suspended from school and was failing his academic subjects. The trial judge found the allegations sufficient to revoke his probation.

On appeal, Tolbert alleged the juvenile court lacked jurisdiction because the petition filed against him was unverified.

The court of criminal appeals, in construing § 12-15-75 and § 12-15-52, *Code of Alabama* (1975), held that from a plain reading of the statute, it is apparent that the legislature intended that the petition be verified. Because in this case the petition lacked verification, the lower court lacked jurisdiction to consider this case. As a result, the proceeding and orders resulting from them are void. *Ex Parte Dison*, 469 So.2d. 662 (Ala. 1984). However, this case is the likely subject of a cert petition by the state in light of the supreme court's recent decision in *City of Dothan v. Holloway*.

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

#### Attorney-client privilege . . . privilege waived if communication injected as issue in case

*Ex parte: Malone Freightlines, Inc. (In Re: Coad v. Malone Freightlines, Inc.)*, 20 ABR 2417 (June 20, 1986)—The plaintiff sued Malone to enforce a New York judgment. Malone filed an answer contending that the judgment had been procured by fraud, preventing Malone from receiving an adversarial trial.

Specifically, in an affidavit, New York counsel stated that Malone's driver, the plaintiff's husband, had met with the

plaintiff's attorney and subsequently changed his version of the accident made on the basis of the New York judgment.

The plaintiff served a request for production of documents asking for Malone's New York trial counsel's entire file, including all correspondence from New York counsel to Malone, as well as pre-trial reports prepared by counsel. The trial judge ordered Malone to produce the documents, and Malone filed this petition for *writ of mandamus* asserting that the documents are subject to attorney-client privilege under the "work product" doctrine.

In a case of first impression in Alabama, the supreme court examined two New York cases and decided that they correctly state the Alabama law. Specifically, the attorney-client privilege may be waived if the privileged communication is injected as an issue in the case by the party enjoying its protection.

In this case, the affidavit of Malone's New York counsel injected privileged material into the case as an issue. Therefore, the plaintiff is entitled to discover all material relating to the possibility of fraud in the prior action.

#### Domestic relations . . . non-custodial parents standard of proof reviewed

*Ex parte: Jonathan M. Terry (In Re: Terry v. Sweat)*, 20 ABR 2528 (June 27, 1986)—Petitioner's (Terry's) ex-wife was awarded custody of their 18-month-old daughter with liberal visitation rights granted to petitioner, the father. Subsequently, the mother and daughter moved in with Sweat, the mother's father. Eventually, the mother relinquished physical custody of the child to Sweat, the grandfather. Thereafter, both petitioner and the grandfather asked the court to modify the divorce decree, each seeking legal custody of the child.

The trial court rejected the father's contention that there is a presumption in favor of the parent over a non-parent and found that the best interest of the child would be served by continuing her custody with the grandfather. The court of appeals agreed, relying on *Ex parte: McLendon*.

The supreme court disagreed and reversed, noting that the issue was whether a father, who was not awarded custody by a prior decree but who had not been found *unfit*, has thereby lost his *prima*

facie right of custody in a subsequent custody proceeding as against the rights of a non-parent (grandfather) with whom the mother has placed physical custody of the child.

The supreme court answered this question in the negative and held that the parent is entitled to the presumption unless he is guilty of misconduct or neglect rendering him unfit to be entrusted with custody of the child. Since petitioner was not found to be unfit, nor has there been a prior decree awarding custody to a non-parent, the father is entitled to the presumption and he does not have the burden to "show that a change of custody will materially promote the child's welfare."

### **Insurance . . . "entrustment" as used in a policy exclusion defined**

*Ho Brothers Restaurant, Inc. v. Aetna Casualty and Surety Co.*, 20 ABR 2521 (July 27, 1986)—Aetna issued a comprehensive general liability policy to the restaurant excluding coverage for "property . . . entrusted to the insured for storage or safekeeping."

One evening a customer of the restaurant left approximately \$17,000 in cash in the restroom. At closing, the money was discovered and the cashier placed it in a storage area for safekeeping. Later that evening the manager discovered that the money was missing from the storage area.

The customer returned the next day and demanded the money, subsequently suing the restaurant for the loss of the money. Aetna denied coverage and refused to defend, based upon its policy exclusion. The trial court granted Aetna's motion for summary judgment, and the restaurant appealed.

Neither the supreme court nor the parties were able to find any cases interpreting the term "entrusted" as used in this policy exclusion. The supreme court, however, did find a line of cases defining the term in other exclusions, and the court specifically adopted a Texas court's construction of that term.

The Texas court stated "the word entrust . . . mean[s] to commit something to another with a certain confidence regarding his care, use or disposal of it." Therefore, implicit in the term is the requirement of some expectation on the part of

each party as to how each will act with respect to the "entrusted" property.

### **State Ethics Commission . . . commission may not make reprimands public**

*Ethics Commission of State of Alabama . . . , etc. v. State of Alabama Ex Rel., etc.*, 20 ABR 2449 (June 20, 1986)—The plaintiff, a chief of police, was investigated by the State Ethics Commission and found to have violated no laws. However, the commission issued a public statement reprimanding him, and the plaintiff filed suit to require the commission to retract its statement. The trial court granted the plaintiff's motion for summary judgment and ordered a retraction; the commission appealed.

The issue was whether §36-24-4(13), Ala. Code 1975, authorizes commission members to issue public reprimands when no state law was violated.

The supreme court affirmed the trial court and stated that nowhere does §36-24-4, *supra*, authorize the Ethics Commission to issue public reprimands in the form of a public written opinion in complaint cases. Only where there is a finding of a "suspected violation" of State Ethics laws is the commission authorized to make a report, and then the report is to be made only to the appropriate law enforcement authorities. Subsection (13), *supra*, is designed to protect innocent individuals under investigation from the harm that could result if information regarding the investigation were released to the public.

### **Teacher Tenure Act . . . Section 16-24-8, et seq., construed**

*Alabama Association of School Boards v. Walker*, 20 ABR 2568 (July 3, 1986)—The plaintiff was a tenured teacher prior to beginning the 1983-84 school year. On or about August 17, 1983, the plaintiff notified the school that she had suffered a serious injury and would be out of work indefinitely.

Without notifying the plaintiff, the school board met September 6, 1983, determined that the plaintiff had "abandoned" her contract, the board acquiesced in her abandonment and her contract was cancelled. Thereafter, in January 1984 the plaintiff attempted to

return to work but was refused. An evidentiary hearing was demanded without response.

On March 1, 1984, the plaintiff filed suit in the circuit court seeking to enjoin the board from cancelling her contract and requesting an evidentiary hearing. The circuit court ordered the board to hold a hearing so the matter could proceed through the administrative procedures of the Teacher Tenure Act. Both parties appealed.

The threshold issue was whether the circuit court was the proper forum to resolve this case. The supreme court answered this question in the negative. The circuit court's jurisdiction is limited to cases where the issue is whether the teacher has acquired tenure status. The ultimate issue here is simply whether the contract was legally cancelled. In such cases, an administrative remedy exists and the plaintiff should appeal first to the tenure commission and then seek review in the circuit court.

The second issue was whether the plaintiff was entitled to notice and a hearing concerning her contract. The board maintained that no hearing was necessary since the plaintiff "abandoned" her contract and the board acquiesced. The supreme court disagreed, stating that the board effectively cancelled her contract against her will and gave abandonment as the reason for cancellation. While abandonment can be a valid reason for cancellation of a contract, the board must afford the plaintiff a remedy to determine whether the abandonment amounted to a "neglect of duty" authorizing cancellation under §16-24-8, Ala. Code 1975.

### **Torts . . .**

#### **trial court must state factors considered in granting or denying new trial based on excessiveness or inadequacy of verdict**

*Hammond v. City of Gadsden*, 20 ABR 2620 (July 11, 1986)—The plaintiff, the spouse of a deceased city employee, sued the City of Gadsden for fraud based upon representations concerning the continued existence of certain health insurance coverage which existed by virtue of her husband's previous employment with the city. The plaintiff claimed damages for medical expenses and mental anguish, and the undisputed evidence showed she

incurred \$4,829.97 in medical expenses after her insurance through the city expired. During this same period she would have paid between \$2,624 and \$4,118 in premiums for coverage.

The jury awarded her \$12,000, and the trial court ordered a remittitur of all but \$2,000, without an explanation for its arriving at this particular sum. The plaintiff appealed.

In this opinion, the supreme court recognized that it had a duty to require trial courts to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so when the ground is excessiveness of damages based on bias, passion, prejudice, corruption or other improper motive.

While not attempting to enumerate all the factors which may be considered by the trial court, the supreme court noted some factors which are appropriate, namely: (1) the culpability of the defendant's conduct; (2) the desirability of discouraging others from similar conduct; (3) the impact upon the parties; and, (4) the impact upon innocent third parties. In adopting this rule, the supreme court hastened to add that no substantive rule of law is changed, and by requiring the trial court to state its reasons for its ruling the court could more adequately discharge its role of appellate review.

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

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#### The defendant's right to present to the court the terms of the plea bargain prior to the entry of a plea or conviction

*State v. Sides*, 20 ABR 2486 (June 20, 1986)—The supreme court granted *certiorari* to determine whether an alleged plea bargain entered into in accordance with § 20-2-81(b), Ala. Code 1975, must be presented to the trial judge as required by *Ex parte Yarber*, 437 So.2d 1330 (Ala. 1983), prior to the defendant's plea of guilty or trial and conviction.

The defendant was indicted for trafficking in cocaine. After entering a plea of not guilty, defendant entered into a plea bargain with the state wherein he agreed to work as an undercover agent in exchange for consideration in his pending trial. The

plea bargain arrangement was entered into under the auspices of § 20-2-81(b), which reads:

(b) The prosecuting attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this article and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

The court held a hearing to consider the defendant's motion to dismiss the indictment and his motion for enforcement of the agreement. Based upon testimony at the hearing, information from the defendant led to the conviction of one person and would have led to more convictions except for inaction by law enforcement officers.

The trial court denied both of the defendant's motions, stating that the motion for enforcement of the agreement was premature in light of the language in the statute. Thereafter, the defendant filed a petition for *writ of mandamus* with the court of criminal appeals, which ultimately denied the writ, holding that "the requirements for mandamus are not present and no relief is available under § 20-2-81(b) until after the defendant has been found guilty." Thereafter, defendant filed his *writ of certiorari* with the supreme court.

In the *Sides* case, the supreme court was faced with an apparent conflict between the statute (§ 20-2-81(b)) and the supreme court's holding in *Yarber* and *Congo*. According to the language of § 20-2-81(b), there must be a conviction before the statute is triggered, and after the conviction the prosecutor may or may not move the court to reduce or suspend the defendant's sentence.

The supreme court reversed and held that a defendant has the right to have whatever agreement was made by the state and him considered by the court prior to the entry of a plea or conviction.

In *Ex parte Yarber*, the supreme court held that the terms of a plea bargain must be considered by the trial court if the de-

fendant so requests, even if no plea has been entered. In the *Yarber* case, no plea was entered and there was no evidence that the defendant had acted in reliance upon the alleged agreement, but it still had to be submitted for the court's consideration. In the *Sides* case, there was proof that the defendant had placed his life and liberty in danger on more than one occasion in his attempts to procure the arrests of members of the Tuscaloosa drug culture. The court reasoned that "it would undermine all notions of fairness not to require the state to tell the court the agreement made by the defendant and the state because the defendant's motion to consider the agreement was arguably made too early."

In resolving the conflict between the statute and the decisions of *Yarber* and *Congo*, the supreme court held, "We are of the opinion that the trial court should have considered the terms of the plea bargain at the defendant's request, notwithstanding the language in the statute. Indeed, to hold otherwise would have a chilling effect on the purpose and spirit of our holding in *Yarber* . . . . The determination of whether the defendant substantially complied with an agreement is better left to the trial court once it has had an opportunity to examine the terms of the plea agreement."

#### The last word on *Dison* . . .

#### the difference between *in personam* jurisdiction and subject matter jurisdiction

*City of Dothan v. Holloway*, 20 ABR 2747 (July 25, 1986)—Holloway was arrested March 5, 1984, and charged with driving under the influence, pursuant to an Alabama Uniform Traffic Ticket and Complaint. Holloway pleaded guilty and paid a fine. On May 7, 1984, Holloway was arrested and charged with driving while license or privilege suspended, the charge being pursuant to a Uniform Traffic Citation. She also pleaded guilty to this offense and paid a fine. Although each of these tickets was signed by the arresting officer, neither ticket was sworn to and acknowledged before a judge or magistrate.

Following the supreme court's decision in *Ex parte Dison*, 469 So.2d 662 (Ala. 1984), Holloway filed a proceeding in the circuit court of Houston County to have

the two convictions set aside and vacated and sought a refund of the fines she had paid. The trial court granted the relief sought, and the court of criminal appeals summarily denied the City of Dothan's petition for a *writ of mandamus*, based on *Dison*.

The supreme court granted the City of Dothan's *writ of certiorari* in order to determine whether the holding in *Dison* should be applied retroactively. The supreme court concluded that the *Dison* case was decided incorrectly.

The rationale of *Dison* concluded that the lack of verification of the ticket prevented the district court, and subsequently the circuit court on appeal, from obtaining subject matter jurisdiction, and thus, that the defendant's conviction was void. The supreme court recognized, however, there were numerous cases decided prior to *Dison* holding that the lack of verification of the ticket would only affect the trial court's ability to obtain jurisdiction over the person and not its ability to obtain jurisdiction of the subject mat-

ter. In that respect, the supreme court observed the failure to have the ticket verified is a defect that could be waived by the defendant by proceeding to trial in the district or municipal court without objecting to the defect at that time.

In overruling the *Dison* opinion, the supreme court held, "That if the UTTC is not verified and the defendant does not object to this defect before trial, then the

objection to the court's personal jurisdiction of the defendant has been waived." By reaching that result, the supreme court necessarily held that those persons who were convicted of traffic infractions pursuant to an unverified citation and who did not object to that defect at the appropriate time, are not entitled to have their convictions vacated or the fines they paid refunded. ■



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



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

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# Legislative Wrap-up

by Robert L. McCurley, Jr.

## First special session of 1986

Governor Wallace called the legislature into special session September 8, 1986, to deal with funding shortages in several state agencies. The governor had seven bills in his call, which require a simple majority vote for passage. Other legislation must be approved by a two-thirds majority. Of the 269 bills considered, the legislature passed several bills of interest to lawyers. These will not be included in the pocket part of your Code until approximately December 1987. If you would like a copy of these or any other acts write the secretary of the senate for senate bills and the clerk of the house of representatives for house bills, State House, Montgomery, Alabama 36130.

## Uniform Foreign Judgements Act (H-25, Act No. 86-713)

It was sponsored by Representative Jim Campbell and Senators Charles Langford and Steve Cooley. Alabama joins 30 states adopting the "Uniform Enforcement of Foreign Judgements Act," including neighbors Tennessee, Mississippi and Florida. This act became effective October 2, 1986, and permits a copy of any authenticated foreign judgment to be filed in the office of the clerk of any circuit court of Alabama. The clerk will note the filing in a special docket set up for foreign judgments. At the time of filing the judgment, a creditor or his lawyer must file an affidavit setting forth the name and address of the debtor with a statement that the judgment is valid, enforceable and unsatisfied. Immediately the clerk will mail notice of the filing to the judgment debtor. No process of enforcement can be issued 30 (thirty) days after the judgment is filed. The judgment debtor may stay execution by showing the court an appeal from the foreign judgment is pending or stay has been granted on any ground upon which enforcement of a judgment of any circuit court in Alabama would be stayed.

This act does not apply to any order of income-withholding to enforce support obligations of other jurisdictions. These actions must be maintained under Act No. 85-992 (Ala. Code 30-5-90).

## Child Support and Alimony

The Department of Human Resources proposed three bills in an attempt to bring Alabama within full compliance

with federal monetary guidelines for child support enforcement. They are as follows:

(1) Spousal Support (S-68, Act 86-709)—This amends Ala. Code Section 38-10-2 to expand the definition of "support" to read "support of a minor child and spousal support when such spousal support is incidental to child support as required by Title IV-D of the Social Security Act." The department is given the authority to administer income-withholding in accordance with the procedures it establishes. The department is authorized further to designate or contract with a private collection agency to administer the income-withholding statute.

The person receiving aid for his or her child assigns his right, by operation of law, for alimony and child support to the Department of Human Resources. Other Code sections amended by this act are Ala. Code §§ 38-10-4 through 38-10-9.

(2) Assignment to Department of Human Resources for Support for Foster Care Maintenance (S-69, Act No. 86-686)—This provides for an assignment to the Department of Human Resources for the right of any support owed to or for a child who is in the care of the department and receiving foster care or foster care maintenance payments.



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

This assignment is by operation of law and is effective for both current and accrued support obligations.

(3) Support Payor May Post Bond (S-71, Act No. 86-699)—This gives the court authority to require a bond or security or some other guarantee assuring the payment of overdue support. Support is defined to include both child support and spousal support. The act further provides the court could require a party to post bond to assure visitations rights.

These three acts become effective when signed by the governor.

## Miscellaneous

### Dismissal of Appeals From District to Circuit Court (H-33, Act No. 86-723)

This act, proposed by the Administrative Office of Courts, amends Ala. Code Section 12-12-70 to provide that a defendant who appeals from a final judgment in district court and who fails to show up in circuit court may be arrested, without a warrant, as being an escapee. It further

provides the procedure for an involuntary dismissal of the appeal when the defendant is a "no-show". Moreover, it provides for appearance bonds on such appeals and the place of confinement when the sentence includes a term of imprisonment.

### Bonds for Probate Judges (H-46, Act No. 86-682)

This amends Ala. Code Section 12-13-33 increasing the official bond of probate judges. The amount of bond depends on the annual collections in the office. ■

# Memorials



JOHN THOMAS BALLARD

John Thomas Ballard, a member of the Mobile Bar Association, died April 24, 1986.

Ballard was born in Mobile, Alabama, December 20, 1926, the son of John Lee Ballard and Edith W. Ballard. He graduated from the University Military School in 1944, and entered the United States Merchant Marine Service. He later joined the U.S. Army during World War II and received an honorable discharge in 1945.

Thereafter, he obtained a degree in accounting at the University of Alabama, and, in 1953, he was awarded an LL.B. degree.

Following graduation from law school, he became an aide to U.S. Senator John Sparkman in Washington, DC, and served in that capacity for four years.

In 1957 he married Doddie Hall in Washington, then returned to Mobile and became affiliated with Rite Tile Company, d/b/a Styron of Mobile, and later became president of that corporation. He remained in that capacity until his retirement in 1984.

In 1969 he commenced the practice of law with the firm of Gibbons, Stokes & Clark and continued on a part-time basis until his retirement in 1984.

He was a member of St. John's Episcopal Church, Home Builders' Association of Mobile and a local Mardi Gras society and was affiliated with the Tile Council of America.

He had many friends in the tile business, as well as the architectural, contracting and legal professions.

Ballard was a highly respected and loved person by his friends and colleagues, and his death is mourned by all.

He is survived by his wife, Delores Hall Ballard; son Michael E. Ballard, who is a member of the Mobile bar; two sisters, Mary C. Schwallenberg and Edith L. Gordon; and other relatives. ■

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

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# Et Cetera

## Survey shows lawyers work 46.5 hours a week

A majority of lawyers (70.8 percent) questioned in a recent LawPoll survey indicated they work more than 40 hours a week (on an average, 46.5 hours a week) and bill 31.1 hours a week. Almost 60 percent would choose a legal career again, and 42.4 percent would encourage their children to become lawyers.

When asked why they studied law, 58.4 percent said because the subject interested them, and more than half did so in the expectation that their work as lawyers would be interesting.

Almost half chose law because its income potential appealed to them, and another large group revealed that the prestige of a legal career helped draw them to the profession.

About a third had no complaints about what they do, and those who had complaints most frequently mentioned their incomes and long hours.

Complete survey results are published in the September issue of the *ABA Journal*.

## Essay contest on Constitution to award \$10,000 to law student

West Publishing Company, in cooperation with the Commission on the Bicentennial of the United States Constitution, is sponsoring an essay competition for law school students.

First prize will be \$10,000, second, \$2,500 and third, \$1,000. Each regional winner will receive a three-volume set of *Treatise on Constitution Law: Substance and Procedure*, published by West. All cash prizes will also be furnished by West.

The competition is open to all students enrolled in a J.D. or LL.B. degree program in an ABA or state-approved law school. The subject for the essay is:

"Does the allocation of power between the federal and state governments and among the branches of the federal government contribute to the preservation

of individual liberty and the functioning of our government?"

All entries must be postmarked by April 15, 1987, and should consist of no more than 5,000 words, including footnotes. Complete rules, as well as entry forms, are available from: Education Program, Commission on the Bicentennial of the U.S. Constitution, 736 Jackson Place, NW, Washington, DC 20503.

All entries must be submitted to the clerk of court, United States Court of Appeals for the federal judicial circuit in which the law school attended is located. Regional judging will be by a panel of judges approved by the members of the national judging committee. All regional winners will advance to the national level. Winners will be announced in September 1987.

## Growth of U.S. legal profession

From 1980-85, the legal profession in the United States grew by 21 percent, increasing from 542,205 in 1980 to 655,191 by the start of 1985. The national population/lawyer ratio increased from 418/1 in 1980 to 360/1 in just five years. In 1985 the population/lawyer ratio ranged from a high of 22/1 in the District of Columbia to a low of 689/1 in West Virginia (at 244/1 New York has the highest state population/lawyer ratio). The median age for lawyers in 1985 was 40, compared to 39 in 1980; however, the median age for women lawyers in 1985 was just 33 while for males it was 41.

Eighty-seven percent of the 1985 lawyer population were men and 13 percent women. Because of the increased number of women entering the legal profession during the 1970s and '80s, women continue to have greater representation among younger lawyers than older.

In 1985, 70 percent of lawyers were engaged in private practice, and less than 4 percent employed in the judiciary.

The number of law firms in the United States also grew from 38,482 in 1980 to 42,318 in 1985.

These statistics are a sample of the current data available in *The Supplement to the Lawyer Statistical Report: The U.S. Legal Profession in 1985*.

Copies of the *Supplement* may be ordered from the American Bar Foundation, 750 North Lake Shore Drive, Chicago, Illinois 60611.

## "Supreme Court Today" launched

*The United States Law Week* and BNA ONLINE, the electronic publishing division of The Bureau of National Affairs, Inc., launched a new electronic information service providing immediate coverage of all United States Supreme Court actions. The new service, "Supreme Court Today," offers *U.S. Law Week* summaries of decisions, grants of review and other Supreme Court orders within hours of their announcement. Information can be retrieved by docket number, case name or subject matter.

For further information, call BNA ONLINE at (800) 862-4636 or (202) 452-4132 in Washington, DC.

## Lawyers support fines, not prison, for corporate fraud

Lawyers tend to support fines rather than prison terms as punishment for corporate fraud, according to a recent survey. Forty-one percent thought the corporation itself ought to be fined, while 33 percent thought the individuals responsible for the offense should bear the financial penalty. Support for prison sentences reached only a modest level, the strongest support coming from attorneys living in cities of less than 50,000, sole practitioners and litigators. As the city size increased, enthusiasm for prison terms decreased.

Lawyers overwhelmingly endorsed criminal prosecution, however, when corporate officials engaged in conduct violating health or safety standards in the workplace. Eighty percent agreed that criminal prosecution was appropriate in those circumstances, and 87 percent supported the imposition of punitive damages.

## Mediation resolves custody battles out of court

To spare divorcing couples and their children the great emotional and financial cost of litigation, a new ruling in DeKalb County (metropolitan Atlanta) mandates that all cases involving children—

nearly all of which are custody disputes—be referred first to the Neighborhood Justice Center for mediation.

The non-profit center offers the services of more than 100 trained mediators—free of charge. Unlike litigation, mediation is a process benefiting parents, children and the courts; 86 percent of cases involving voluntary mediation have been resolved.

For more information, contact Jan Turner at (404) 727-6216.

### Alabama Attorneys for Animals

Alabama Attorneys for Animals, consisting of 31 attorneys licensed to practice in Alabama, will hold its first annual meeting December 6, 1986, in Birmingham. The group's goal is establishment of a new bar section dealing with animal cruelty matters as seen through the eyes of the law. For more information contact Mark Rowe, at Hogan, Smith, Alspaugh, Samples & Pratt, 10th floor City Federal Bldg., Birmingham, AL 35203.

### Publications

#### Child sexual abuse focus of new book

*THE SEXUAL EXPLOITATION OF CHILDREN: A Practical Guide to Assessment, Investigation, and Intervention* will be released in December 1986 and provide professionals in the fields of law enforcement and criminal justice with a comprehensive approach to the investigation and prosecution of child sexual abuse cases, based on the latest field-tested techniques.

*THE SEXUAL EXPLOITATION OF CHILDREN* is the result of three years of preparation and revision by Seth L. Goldstein, 16-year police veteran, based on his own experiences relating to the investigation of juvenile sexual assault cases and knowledge from law enforcement agencies and crisis centers across the country.

For more information about the content and availability of *THE SEXUAL EXPLOITATION OF CHILDREN: A Practical Guide to Assessment, Investigation, and*

*Intervention*, contact David Dionne, senior marketing manager, at Elsevier Science Publishing Company in New York; (212) 916-1010.

#### Directory of state courts, judges and clerks

BNA Books, a division of The Bureau of National Affairs, Inc., announces the publication of the *Directory of State Courts, Judges, and Clerks: A State-by-State Listing*, with the names of more than 13,000 judges and clerks and telephone numbers and addresses for more than 2,000 state courts.

The book offers access to the names, addresses, telephone numbers and geographic jurisdiction for the top three court levels in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands and American Samoa. A personal name index is included to assist in locating any judge, clerk or administrator, with court title and location. In addition, there is an appendix of court administrators, with addresses and telephone numbers.

BNA's *Directory of State Courts, Judges and Clerks: A State-by-State Listing* is available from BNA Books Distribution Center, 300 Raritan Center Parkway, C.N. 94, Edison, New Jersey 08818. For telephone orders, call (201) 225-1900.

#### POWER OF ATTORNEY: The Rise of the Giant Law Firms

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# Disciplinary Report

## Public Censures

• July 16, 1986, Anniston attorney James A. Mitchell, Jr., was publicly censured by the Board of Bar Commissioners of the Alabama State Bar for violation of Disciplinary Rules 6-101(A), DR 1-102(A)(5) and DR 1-102(A)(6). The commission determined that Mitchell had undertaken employment in a civil matter and willfully neglected his client's case. After having been discharged, he failed to refund the unearned portion of the attorney's fee within a reasonable period of time, after having promised to do so. The Disciplinary Commission determined that Mitchell should receive a public censure for this violation. [ASB No. 85-683]

• July 16, 1986, Mobile lawyer John A. Courtney was publicly censured for having engaged in conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(A)(6), *Code of Professional Responsibility* of the Alabama State Bar. Courtney proposed illicit sexual relations to a female client and fondled the client in a sexually suggestive manner, without her consent, while she was in his law office to discuss litigation in which he was representing her and her minor daughter. [ASB 85-29] (Not the same person as J.P. "Rick" Courtney, III, who practices with Lyons, Pipes & Cook, in Mobile)

## Private Reprimands

• July 16, 1986, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 1-102(A)(5), 1-102(A)(6), 6-101(A), 7-101(A)(1), 7-101(A)(3), 7-106 (A) and 7-106(B)(3) of the *Code of Professional Responsibility*. The attorney was attorney of record for two defendants on an appeal pending before the 11th Circuit Court of Appeals and failed to comply with the orders of the court regarding timely filing of an amended brief and record excerpts. The attorney was removed from the list of approved attorneys allowed to practice before the 11th Circuit, and the Disciplinary Board determined

that the attorney should receive a private reprimand. [ASB No. 83-346]

• July 16, 1986, an Alabama attorney received a private reprimand for violation of Disciplinary Rules 1-102(A)(4) and 1-102(A)(5) of the *Code of Professional Responsibility*. The state comptroller complained that the attorney had filed duplicate and overlapping billings on at least two occasions, and after investigation the Disciplinary Commission determined that, while there was no evidence of intent to defraud on the part of the attorney, there was evidence of insufficient supervision and recordkeeping and he should receive a private reprimand for violation of the rules mentioned. [ASB 85-712]

• July 16, 1986, an Alabama attorney received a private reprimand for failing to promptly correct legal documents he previously had prepared in connection with a real estate closing. After having been requested by his clients and another attorney to prepare corrected instruments, the attorney nonetheless waited until after a grievance had been filed against him to take corrective action. The Disciplinary Commission determined that the attorney had violated Disciplinary Rule 6-101(A) by willfully neglecting a legal matter entrusted to him and further decided he should receive a private reprimand for that violation. [ASB 84-334]

• July 16, 1986, an Alabama attorney received a private reprimand for violation of Disciplinary Rules 2-102(A), 2-103 and 3-103(A) of the *Code of Professional Responsibility*. The Disciplinary Commission determined that this lawyer had entered into an exclusive legal services contract with an abstract company. The nature of the relationship was such that the lawyer was involved in improper advertising involving solicitation, allowed solicitation to be conducted on his behalf by a third party (when a significant motive for this was his own pecuniary gain) and that he had formed a partnership with a non-lawyer when one activity of the partnership consisted of the practice of law. The Disciplinary Commission determined that the lawyer should receive a private reprimand for these violations. [ASB 85-624(A)] ■

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**FOR SALE:** Alabama Reports Vols. 1-270 and Alabama Appellate Court Reports Vols. 1-38. Contact Ruth Henry (205) 749-7141, Lee County Justice Center, 2311 Hamilton Rd., Opelika, Alabama 36801.

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