

1,000 Plaintiffs Sue Over Insecticide 'Dumping' in Alabama Nov. 23, 1981

A Town, a River and DDT

By KATHRYN STREEVER

Special to The National Law Journal

FOR THE citizens of Triana, Ala., most of them poor blacks, Indian Creek was a kind of lifeline. Until 1978 the creek was not only a gathering spot for the community and a minor tourist attraction but, most important of all, the source of the fish that were the mainstay of the Triana residents' diet.

Then, in December 1978, an anonymous phone call alerted Mayor Clyde Foster that the fish in Indian Creek contained more than 40 times the federally determined safety limits of DDT.

From that one phone call has sprung litigation involving more than 1,000 different plaintiffs seeking more than \$1 billion in damages. It is among the largest pending litigations involving hazardous waste sites around the country, and the town recently was listed by the federal government as one of the most hazardous waste sites in the U.S.

Mayor Foster says he began "associating things" right after he received the call:

"We knew wildlife was scarce. Birds had disappeared from the area. We remembered times when the river would just be full of dead fish. We've caught fish with sores and thrown



ON THE MARCH: Residents of Triana, Ala., protesting the health risks posed by the high levels of DDT found in the fish that they ate. The protest earlier this year also sought to draw attention to their suit against the Olin Corp., producer of the DDT. Sign at right reads, 'Why us, Olin?'

them back. Plus, we had a lot of sickness. Things made more sense when we finally found out about the DDT."

When Mayor Foster began in-

vestigating the situation, he learned that more than 837 tons of DDT were on the bottom of Huntsville Spring Branch a few miles upriver from
Continued on page 10

newspaper now owns its own data bank
letters are claiming infringement of

ration

page 19

g system can be a valuable addition to
o disrupt traditional work patterns and
g employees. This week's Law Office
blems. Also in the section is an analysis
ary in the automated law office.

page 39

umerals, they can add up different ways.
ng, for example. Many Illinois teenagers
d, and the phone calls they made to a cou-
ompany's ears ringing.

Law Schools	p. 4
Letters	p. 12
On Trial	p. 13
Riding the Circuits	p. 30
State Court Roundup	p. 37

year's California
bar examination will give aspiring
lawyers 50 percent more time to
answer some essay questions and will
likely boost the lagging pass rates of
the last decade.

The change in the February and
July tests came about after a recently
released report showed that some 800
applicants averaged four points more
per question when they were given the
extra time for certain questions on the
July 1980 examination.

"My guess is that we could expect a
10 to 15 percent increase in the number
of people who will pass next year,"
said Jane Peterson, director for ex-
aminations of the State Bar of Califor-
nia's Committee of Bar Examiners.

Only about half the 12,000 appli-
cants in each of the last few years have
passed the state bar test. Still Califor-
nia boasts the largest number of
lawyers — 72,500 — of any state.

On next year's examinations, all

applicants will have 90 minutes for
each of four essay questions and the
standard 60 minutes for the remaining
five questions. The extra time will
make the total examination, which in-
cludes the multiple-choice Multistate
Bar Examination, a three-day affair.
It has been 2½ days long.

"Our research indicates that if the
four-point spread held for all nine
questions [a 36-point increase], about
25 percent more applicants would
pass," Ms. Peterson said.

Empirical Effort

The 28-page report is the first of a
series expected to come out in the next
year detailing the findings from ex-
periments run during the July 1980
test.

"California is the only state doing a
major empirical effort, major
Continued on page 25

State Investigating Law Firm's Fees

CHICAGO — A special Illinois
legislative committee has been formed
to investigate the propriety of state
legal contracts with Winston & Strawn,
a large firm here that once employed
Gov. James R. Thompson and where
Mr. Thompson's former chief of staff
is now a partner.

Specifically, the committee — an-
nounced by Democratic House Leader
Michael J. Madigan — will look into
\$272,000 paid to the law firm for three
months' work in drafting a public trans-
portation funding package that
Governor Thompson never submitted
to the legislature.

Since the disclosure of that pay-
ment earlier this month, published
reports have also disclosed that the
firm received \$308,000 for legal work
for another state agency.

OFF THE RECORD

By Mark Winwood

the Inner Circle of
ffs' personal injury
t one million-dollar
ers in 33 states and
added three new
James Nance of
J. Moody of Ports-
verdict in August
who earned a \$3.1
Leonard Decof of
7 million award last
phlesinger of Fort
ep-another seven-
family of three

FIRM NOTES. Jackson, Lewis, Schnitzler & Krupman, a
labor relations law firm engaged exclusively in the
representation of management, will open an office in
White Plains, N.Y. The 80-lawyer firm is based in New
York City and has offices in San Francisco, Los Angeles,
Atlanta and Baltimore. The new White Plains office,
staffed by eight attorneys, will cover the suburbs north
of New York City as well as southern New England. . . .
John J. O'Connor III, U.S. Supreme Court Justice
Sandra Day O'Connor's husband and a senior partner of
Phoenix, Ariz.'s Fennemore, Craig, von Ammon &
Udall, will join the Washington, D.C., firm of Miller &
Chevalier on Jan. 1. He had reportedly been looking for a
position in the nation's capital ever since his wife's con-
firmation in September as the first woman on the court.



HEALTH FOOD: Triana residents Marvalene Freeman and her son in their garden last summer. Garden was planted to replace locally caught fish as the mainstay of their diet. The fish had been found to contain high levels of DDT.

Triana's War Against DDT

Continued from page 1

Triana. The DDT was waste left by an Olin Corp. plant that had produced the insecticide about six miles upriver from 1947 until 1971.

Mayor Foster's next step was to call the federal Center for Disease Control in Atlanta, which responded by sending Dr. Kathleen Kreiss to study the medical effects of the DDT.

"We expected to find higher-than-average levels of DDT because levels tend to be higher in rural black populations," said Dr. Kreiss. "But Triana levels are higher even than levels in workers who are covered with DDT every day. This was a total surprise. The levels are extraordinarily high."

In fact, Dr. Kreiss' studies showed that one Triana resident had DDT levels twice as high as any previously reported in medical literature, and 11 others had levels comparable to those in the most heavily exposed workers involved in DDT manufacture.

"There are some physical effects in the sense that people with high DDT levels have higher blood pressure and liver-enzyme readings and higher cholesterol. These findings might be correlated with higher disease rates for long-term DDT exposure. But we really hadn't even begun to address that question before leaving Triana," Dr. Kreiss said. "We do know that the exposure to DDT in Triana is from eating the fish and that age and agricultural work experience make very little difference."

High Levels of Cancer

Triana residents are disquieted by the silent presence of the DDT within them, even those who have no unusual physical problems.

"All we know right now is that mentally speaking, most of the people in this town are sick. We know we have high levels of cancer. But we can't afford to go out and spend \$100 on a physical," says Marvalene Freeman, a Triana resident and one of the plaintiffs in the suits against Olin.

"I can tell you that I lost three sisters in the last three years. The oldest was 37 and the youngest was 27. I'm 36 myself and I don't think you can

really understand the dread unless you live here."

Although Dr. Kreiss herself admits that her studies are inconclusive, Triana residents are unhappy about her finding that DDT levels in the residents studied were not associated with prevalence of disease in the preceding year, the use of medication or medical care, or a history of heart disease, hypertension or diabetes.

Mayor Foster, for one, will not accept that finding as evidence that DDT has not harmed the townspeople:

"You know what they asked us? They asked us whether we went to a doctor in the past year, whether we lost time from our normal activities and whether we had cancer, diabetes, high blood pressure and some other diseases."

"Our whole problem is that we don't have any money to go to the doctor," he says. "We don't know if anything's the matter with us. Even if we are sick, we aren't the kind of people who can just take off from work. We just do the best we can. We've had seven people die of cancer in the past year. There are possibly three other active cases of cancer right now. These are just the ones we know about informally, without any monitoring or health checks. I don't know how many there are that we just haven't found out about."

The mayor's cancer death tally, even assuming a rather generous population of 1,000 residents estimate for Triana, puts the town's cancer death rate at 0.7 percent, almost four times the national rate of 0.18 percent.

According to a U.S. Environmental Protection Agency official in Atlanta, no one really knows much about the long-term effects of DDT. "It does have an effect on the central nervous system," he said. "At least that's how it kills bugs."

Case Management

The difficulties of pinning down medical evidence are more than matched by the complications of case management with such an unwieldy number of plaintiffs and such a wide range of claims.

The largest group of plaintiffs, more than 800 mostly indigent residents of Triana, is represented by Robert Shields and A. Stephens Clay, both partners in Atlanta's Kilpatrick & Cody. The lawyers have decided not to seek class action status, although many of the cases against Olin have been consolidated for discovery in U.S. District Court in Birmingham, Ala. *Cloud v. Olin Corp.*, CV-79-M-5128-NE.

The case has already generated well over 100,000 pieces of paper, and answers to the defendant's interrogatories have not yet been filed. Mr. Shields estimates that individual answers to the interrogatories could take approximately 3,600 hours of lawyer time and could create 50,000 pages to be filed with the court.

For this reason, Messrs. Shields and Clay and the other plaintiffs' lawyers involved in the consolidated cases are trying to hammer out a case management proposal that would allow the trial of a sample number of plaintiffs and limit discovery accordingly.

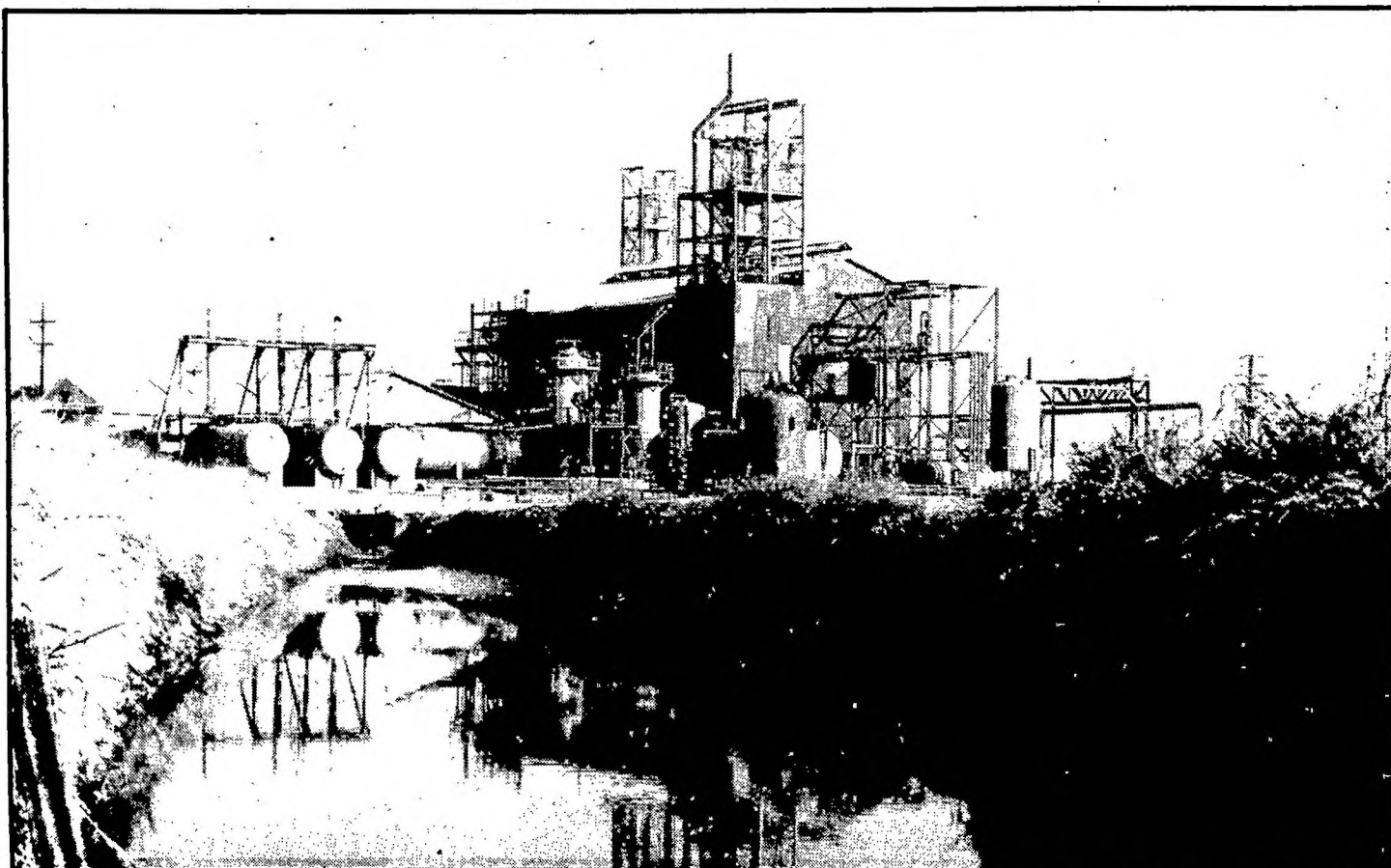
"We want to break up the case, either separating trials for liability and damages or just trying some test cases before we go to all the expense of answering interrogatories in every case," Mr. Shields said.

One possibility is trying a range of cases, from that of a child with high levels of DDT but no apparent medical effects to an older person with life-long exposure and high blood pressure, Mr. Clay said.

These suggestions, incorporated in the plaintiffs' first case management proposal, resulted in the defendant's attorneys accusing the plaintiffs of trying to "pick their most pathetic members in the hope of prejudicing the jury on the interrogatory answers."

Plaintiffs' attorneys say that's not it at all. "We'd like to try some test cases before getting into discovery on every single plaintiff. We'd even be willing to try a case where the

Continued on following page



THE SOURCE: Olin Corp.'s DDT plant at Redstone Arsenal, Ala., shortly before it ceased production in 1971, leaving behind 837 tons of the insecticide on the bottom of a waterway a few miles upriver from Triana.

Photos by Robert Dunnavant Jr.

Publications Battle New York Times, Say Its Abstracts Infringe Copyrights

By DAVID LAUTER
National Law Journal Staff Reporter

FOUR YEARS AGO, the New York Times Co., charging infringement of copyright, sought an injunction against the owner of a data bank who had the temerity to publish a recasted version of the New York Times Index.

But times have changed. Now the newspaper owns its own data bank, the New York Times Information Service, and the publishers of small circulation newsletters are claiming infringement of their copyrights.

The dispute, which may become a suit before the year is out, poses a delicate question of copyright law: where to draw the line between facts, which are not protected by copyright law, and the expression of facts, which the law does protect. The line has become steadily more important in recent years as computer technology has allowed companies to expand indexes far beyond simple listings of dates and subject matter.

In the earlier case, *New York Times v. Roxbury Data Interface*, 434 F. Supp. 217 (1977), the Times lost when it tried to stop another company from taking the New York Times Index from several past years and recombining the index items into multi-year subject matter lists. The court held that while a compilation of facts, such as a telephone book, cannot be copied verbatim without infringement, the facts in a compilation can be

freely taken, recombined, repackaged and resold.

The current dispute involves the "key issues tracking" portion of the New York Times Information Service, a system that provides citations and brief three-line abstracts of articles from more than 30 newspapers, magazines and newsletters.

For newspaper and magazine publishers, that sort of abstract causes no problems, but for many brief newsletter articles, "it's difficult to compress them further," said Grant Stockdale, associate publisher of the Energy Daily in Washington, D.C., one of the complaining newsletters. Many of the Times' abstracts are "just lifts" from his pages, Mr. Stockdale charged.

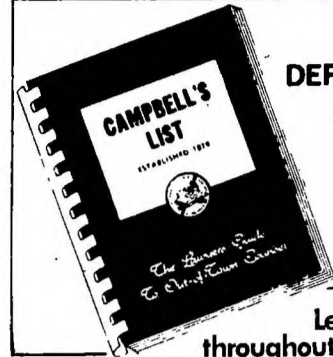
Times attorney Truman Eustis con-

ceded that "the line gets very fine when you're dealing with newsletters," but, he maintained, the Times stays on the correct side of the line. "There is no expression copied," Mr. Eustis said.

Copyright law experts agree that the dispute hinges on exactly how much of the newsletter's material appears in the abstract. "You've really got to compare virtually with a fine-tooth comb," said New York University Law Prof. Alan Latman.

Whether an abstract violates a copyright "depends on how abstract it is," said UCLA Prof. Melville Nimmer. Newsletter publishers may find, Mr. Nimmer suggested, that as they pare their items down to "just the facts," they pare away their legal protections.

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Judge Confirms Fund's Existence

DETROIT — Federal court officials confirmed here last week that refrigerators, televisions and other items were purchased from an unauthorized fund created under the stewardship of a former U.S. District Court clerk from copying fees that should have been turned over to the U.S. Treasury.

At a rare news conference in his chambers, U.S. District Chief Judge John W. Feikens and executive clerk John Mayer confirmed the existence of the fund, which was first disclosed by *The National Law Journal*. (NLJ, Nov. 16.)

They said television sets as well as "a couple of refrigerators" had been purchased for use in both the juror lounge and the court employees' lunch room.

"I'm sure they were purchased from that fund," Mr. Mayer said.

The *National Law Journal* reported that an alleged "slush fund" created from fees paid for copying documents had aroused the interest of the Federal Bureau of Investigation and other officials looking into charges of on-the-job sex, drunkenness and corruption at the U.S. Bankruptcy Court here.

Sources told the *Law Journal* that the alleged slush fund violated 18 U.S.C. Sec. 649, which creates a crime of "embezzlement" for a custodian of U.S. funds who fails to deposit the money with the U.S. Treasury.

Mr. Mayer said that when he assumed the clerk's job after the departure of Henry R. Hanssen in 1978, there was still about \$2,700 in the fund.

Mr. Mayer said he began depositing the funds as required "by the book" in April 1979.

Judge Feikens said at the news
Continued on page 26



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be interested in short-term profit, Prudential is buying for the long term.

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IN A BIND: 'Our whole problem,' says Triana Mayor Clyde Foster, 'is that we don't have any money to go to the doctor. We don't know if anything's the matter with us.'

Continued from preceding page

damages were minimal. For instance, one of our plaintiffs is only claiming damages due to the emotional distress she feels over having high levels of DDT in her system," said Mr. Clay, who was added to the plaintiffs' team specifically because of his experience with complex litigation, both in the course of representing all retail grocery stores in the Eastern United States in a nationwide class action known as the Eastern Sugar Litigation, and as special representative to President Carter for mediation of Indian land claims in Maine and Massachusetts.

Closer to Agreement

An Oct. 6 hearing may have brought the parties closer to agreement, at least on discovery issues.

At that hearing, Chief U.S. District Judge Frank McFadden indicated that a plan should be adopted that would allow the trial of several specially selected individual claims sometime in the next four to six months, Mr. Clay said.

"The next step is some kind of joint case management proposal that will combine the maximum number of issues that can be adjudicated in a single trial," Mr. Shields added. "The main thing is to avoid having the selection of the test plaintiffs become so complicated that you might as well have done three or four years of discovery."

In addition to the Triana residents, about 40 commercial fishermen's claims are among the cases being consolidated for discovery. They are claiming damages based on both loss of income and health problems. (The U.S. Food and Drug Administration has banned the sale of fish caught along a large stretch of the river, and Triana residents stopped eating local fish soon after the DDT publicity began.)

Most recently, about 100 residents of the surrounding "contaminated area" have filed their own suit against Olin in an Alabama state court — and that suit, *Charest v. Olin*, CU-81-434-P (Morgan County), may be just a prelude to many more. Their claims, \$75 million for mental anguish based

on knowing or suspecting that they have high body levels of DDT, are based on a recent Alabama decision, *Taylor v. Baptist Medical Center*, 400 So. 2d 369 (1981), which for the first time allowed recovery in Alabama for emotional damages without proof of actual physical harm.

Cleaning Up

Beyond recovering damages, residents of the surrounding area face another serious problem: how to clean it up. A recently completed Army report indicates that just monitoring the DDT for leaching will cost at least \$300,000 a year. The clean-up problem has prompted speculation about the possible application of President Carter's Superfund legislation.

The most recent Superfund action came Oct. 23, when the EPA released a list of the most hazardous waste sites in the country — including Triana. The list rated dumps on the basis of their potential danger to health and drinking water supplies.

Among the suits consolidated in the *Cloud v. Olin* litigation is the federal government's claim for recovery of

the money it has already spent to clean up the river, restock the fish and wildlife, investigate the damage and file the suit.

"Total government expenses amounted to in excess of \$3½ million in December 1980," says Kenneth Reich, a Justice Department lawyer who handles only environmental cases. "I really have no idea what they are now."

Mr. Reich added that the government has recently added a claim under Superfund legislation to its suit.

Mayor Foster, meanwhile, has been trying to get Triana designated a disaster area, with no success. "The State of Alabama just refuses to recognize DDT as harmful to humans," he says. "One government doctor even told me that he sprinkles it on his cereal every morning. We have no educational program going on, no health monitoring, no nothing. It just doesn't make sense."

Mrs. Freeman, a storekeeper in Triana, says she "just can't believe that they never told us about the DDT. The way we first heard about this was because the government was doing

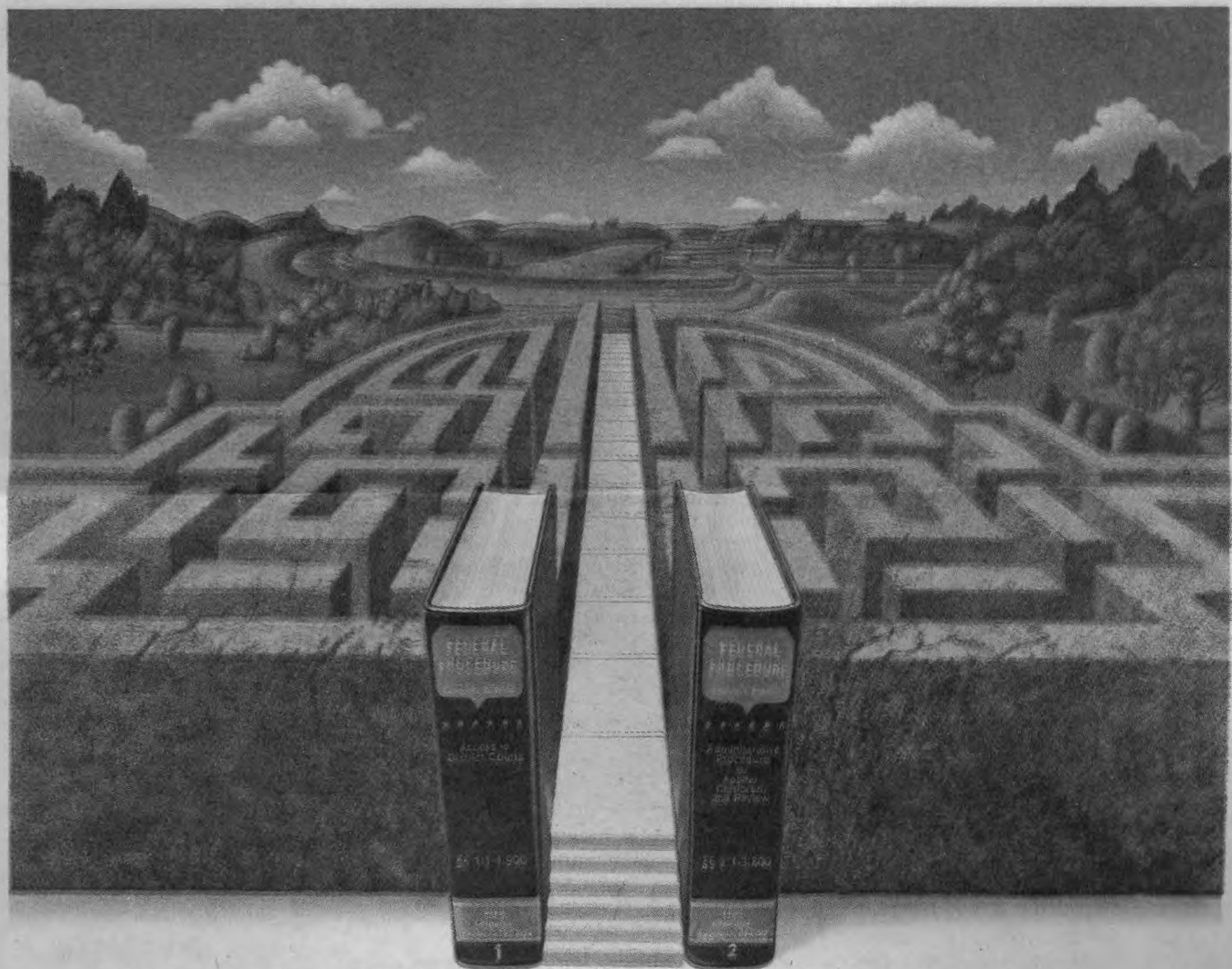
tests on animals, fish and rabbits. They were more interested in animals than in us. I keep wondering if the dumping was deliberate because they knew we were poor and black and couldn't do anything about it."

Asked whether Olin made any effort to warn Triana residents of potential DDT hazards, company spokesman Charles Dana said, "The plant closing was in the national and local media. We made no efforts to inform individuals."

"The purpose of the plant was to produce DDT. It wouldn't make sense to just dump it. We followed the acceptable clean-up procedures at the time."

Far From Spotless Record

Olin Corp.'s past environmental record is far from spotless. Its answers to interrogatories reveal a 1979 New York conviction for violation of the Water Pollution Control Act, for which it was fined \$70,000. And from 1973 to 1975, Olin listed at least 10 other indictments, all resulting in fines, on charges of air pollution, water pollution and dumping.



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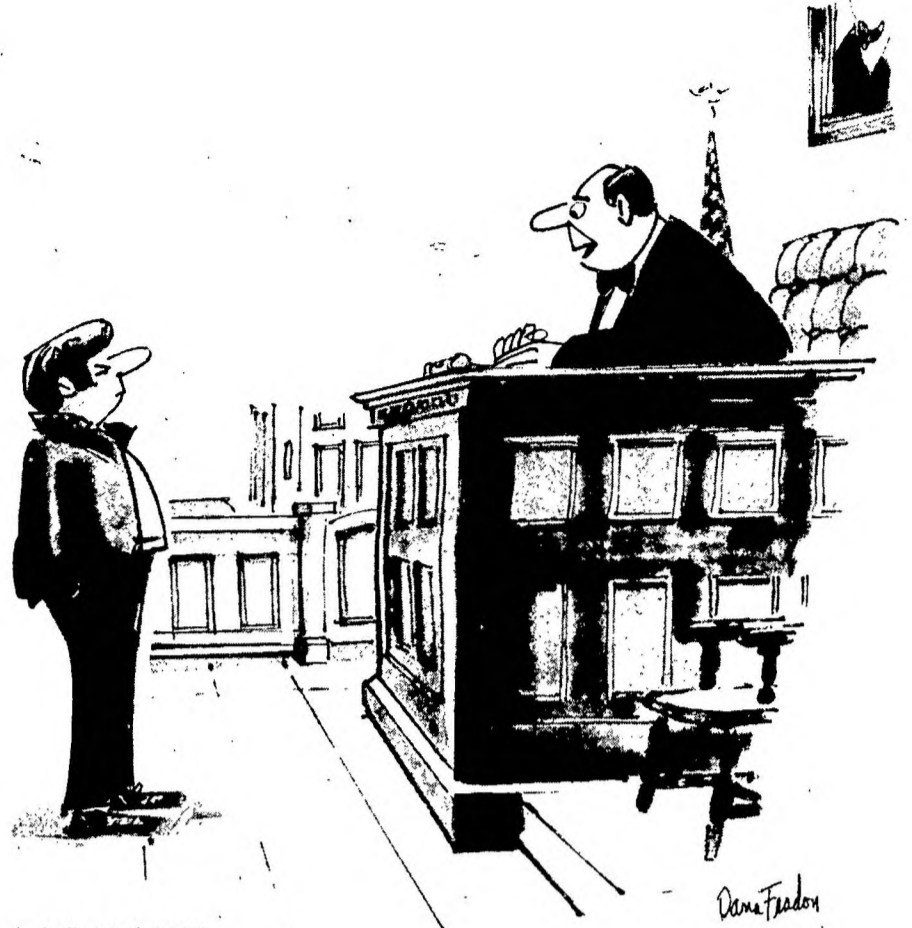
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Drawing by Dana Fradon: 1981
The New Yorker Magazine, Inc.

"I find you not guilty because the criminal justice system just isn't working."

Non-Tax Access

FEDERAL CRIMINAL investigators have been complaining since the passage of the 1976 Tax Reform Act about the restrictions that were placed on access to data gathered by the Internal Revenue Service.

Included in that law was a provision to protect taxpayers' privacy after disclosures that the Nixon administration had used the revenue service to harass what it considered its "enemies." The attempt to protect privacy was laudable, but, in practice, it has hampered prosecutors and other federal law enforcement agents needlessly.

As Deputy Attorney General Edward C. Schmults told a Senate panel last week:

"In many cases, IRS agents have uncovered evidence of serious non-tax federal crimes unknown to federal law enforcement agencies and have reported these offenses to IRS headquarters. The reported crimes, however, go unpunished because of the disclosure restrictions of the 1976 law."

Such an outcome is ridiculous for a federal law enforcement machinery that is supposedly unified in its approach toward crime. New legislation being proposed by the Reagan administration that would relax the access rules — while not without its remaining problems — should be acted upon by Congress as soon as possible. Tax-return data should be handled with care, but non-tax crimes found by agents should not remain unreported altogether.

Right to Counsel

SERIOUS QUESTIONS are raised by the decision of a New York federal judge to bar a Detroit attorney from representing a woman under investigation in connection with the alleged Weather Underground terrorist assault on an armored car.

The judge granted a prosecutor's motion to disqualify the attorney, citing, among other reasons, the attorney's political ideology, as well as his behavior on the witness stand. The attorney, Chokwe Lumumba, is a member of the Republic of New Africa, an organization that has as its stated purpose to set up — by force, if necessary — a separate government for blacks in several Deep South states.

The issue confronted by the judge requires serious, deliberate consideration by an appellate panel, because it brings into question the freedom of attorneys to move from one area of the country to another to appear before various courts. Usually liberally granted, such motions to appear in a particular court should not get wrapped up in political ideology or rhetoric.

If there is ever a need for an attorney in good standing in a bar to be disqualified before appearing in another state, the reasons should be spelled out crystal-clear in formal court rules or appellate opinions — and not based on disagreement with the attorney's political ideals in a particular case.

LETTERS

The Doctor-Lawyers: Are They Frustrated?

LARRY TELL'S Oct. 12 profile of William J. Curran ("The Lawyer Who Treats the Medical Profession") highlights the need for highly trained attorneys in the areas of health law and medicolegal litigation.

And although we at Connors, Fiscina, Swartz and Zimmerly agree that obtaining graduate medical and law degrees is an "arduous and demanding" task, it is not without significant benefit to both attorney and client.

A recent example from our office illustrates my point. A potential client presented at the office with medical records and sought advice regarding a possible malpractice claim for failure to diagnose lung cancer. Within an hour, two of our attorneys, a board-certified thoracic surgeon and a board-certified radiologist, determined that there was probably negligent medical care and we accepted the case.

Although Professor Curran's experience with attorney-physicians in an academic or analytic setting may have led him to conclude that JD-MDs are frustrated, I can speak with perhaps a bit more insight. As managing partner at Connors Fiscina, I work with 12 JD-MDs. The key is work!

The significance of our firm is not merely the fact that it has the greatest concentration of JD-MDs in the country, but that Connors Fiscina has 12 lawyers who actively pursue trial practices in addition to their medical activities.

Most JD-MDs do not litigate, if they practice law at all. But our attorney-physicians not only try cases, they practice and teach medicine, edit medical journals and lecture to such groups as the American Bar Association and the Association of Trial Lawyers of America. Dr. Salvatore F.

Fiscina even found time to co-author the West casebook "Law and Medicine."

If, as Professor Curran contends, the legal profession must "have our feet in both camps," then it is highly desirable to be in both camps. Connors Fiscina has achieved that unique amalgamation which has resulted in a highly specialized team of medicolegal experts. And, contrary to Professor Curran's 1971 study, our JD-MDs are not "frustrated."

Dean E. Swartz
Connors, Fiscina,
Swartz and Zimmerly, P.A.
Rockville, Md.

PATCO Litigation: A Clarification

FOR YOUR information, I'd like to correct a misimpression given by an article in your Nov. 16 issue, "Litigation Involving PATCO Is Still Up in the Air."

In the last paragraph of the article, it is mentioned that PATCO had asked the Multidistrict Litigation Panel to consolidate the removals ("firings") of air traffic controllers. Actually, we asked the panel to consolidate the close-to-100 injunction cases throughout the country, and it is that that the panel declined to do.

We have a similar motion before the Merit Systems Protection Board to consolidate the approximately 11,000 appeals by air traffic controllers of the Federal Aviation Administration's removal of them from their positions. We have not received a decision on that motion from the MSPB, but the FAA is opposing it.

Don't feel bad — even I have difficulty in keeping up with it.

Richard J. Leighton
Leighton Conklin Lemov
Jacobs and Buckley
Washington, D.C.