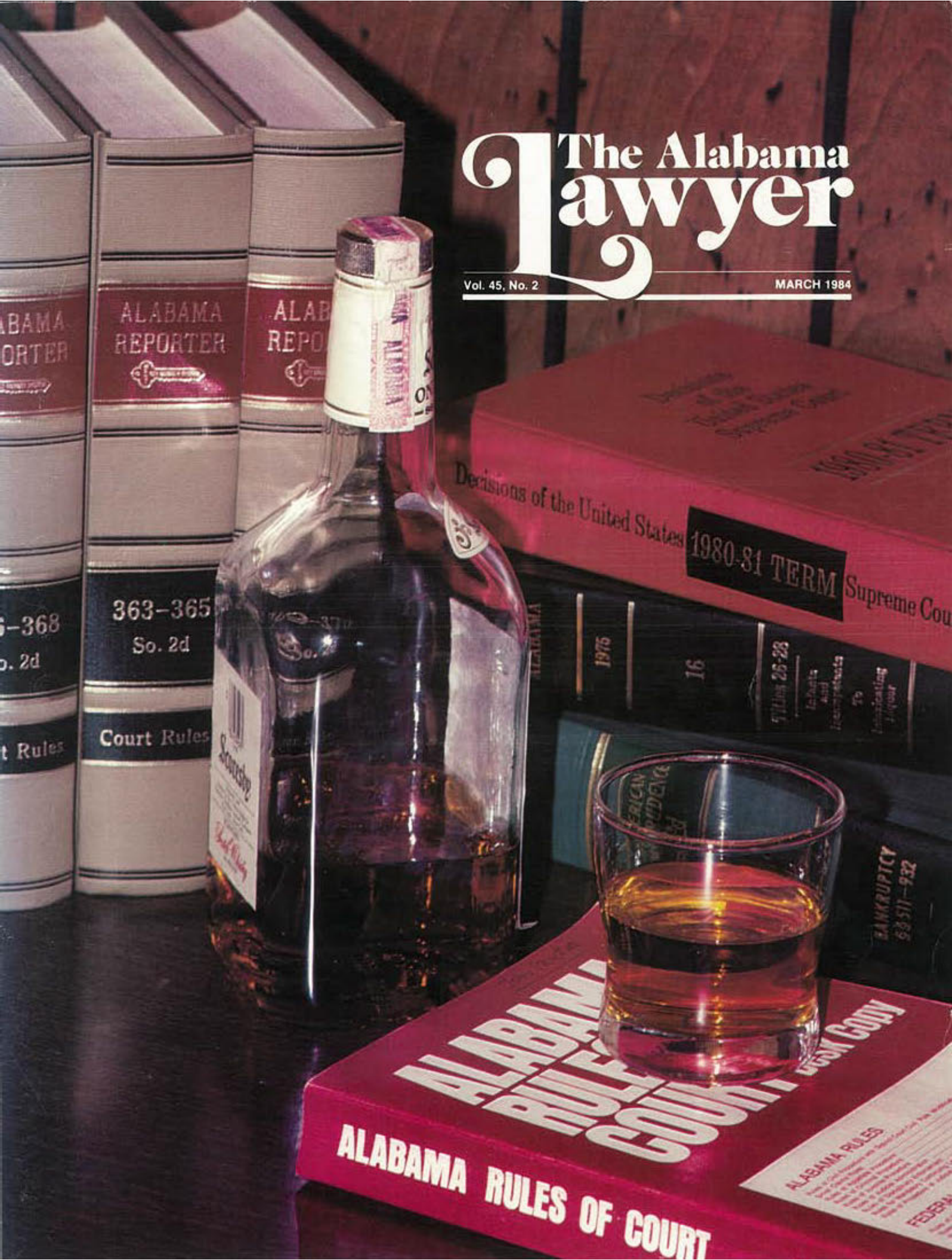


# The Alabama Lawyer

Vol. 45, No. 2

MARCH 1984



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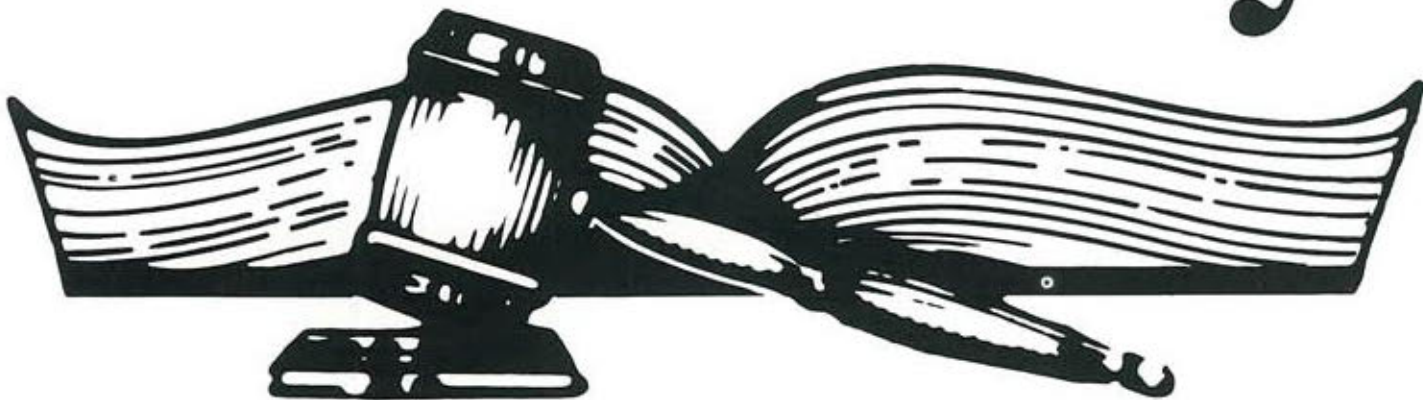
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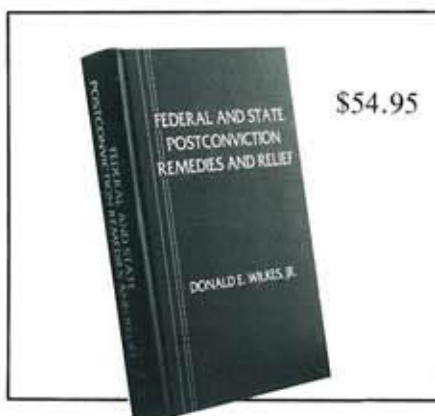
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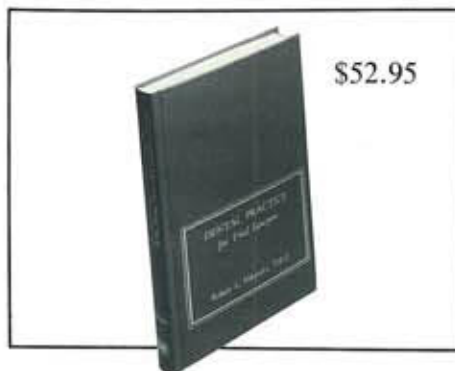


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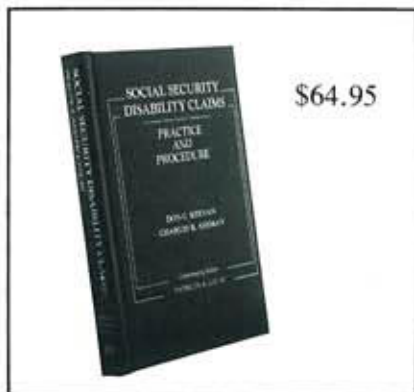


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**THE HARRISON COMPANY, PUBLISHERS**  
 3110 Crossing Park • Norcross, Georgia 30071 (404) 447-9150



Published Bimonthly by  
The Alabama State Bar

P.O. Box 4156 - Montgomery, AL 36101  
Phone (205) 269-1515

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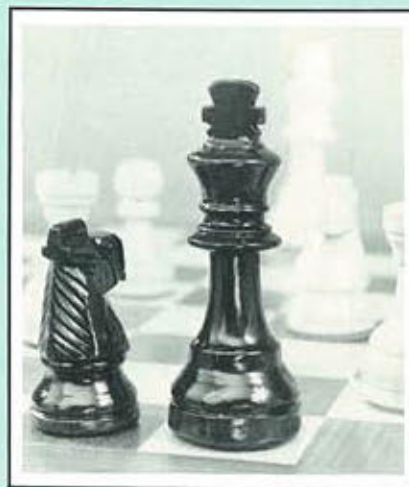
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Subscriptions: Alabama State Bar members receive The Alabama Lawyer as part of their annual dues payment. Non-member subscriptions are \$15 a year in the United States, otherwise \$20, and must be prepaid. Single issues are \$3, plus postage.

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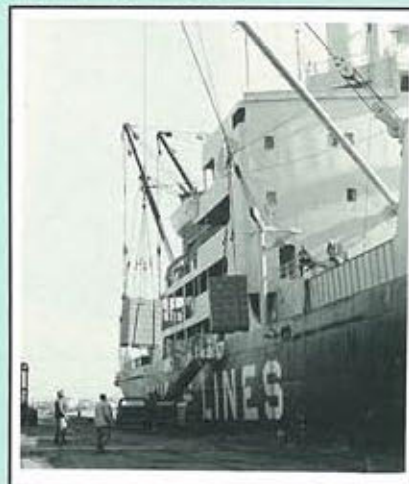
# THE MARCH 1984



## A Strategic Move

— pg. 73

Earlier this year the Alabama State Bar inaugurated its new professional liability insurance program. Alabama attorneys are urged to consider this program. Details inside.



## Co-employee Immunity among Alabama Longshoremen and Harborworkers

— pg. 76

Longshoremen in Alabama have both federal and state law remedies available in pursuing third party actions. The inherent conflict in these remedies will require ultimate resolution by the U.S. Supreme Court.



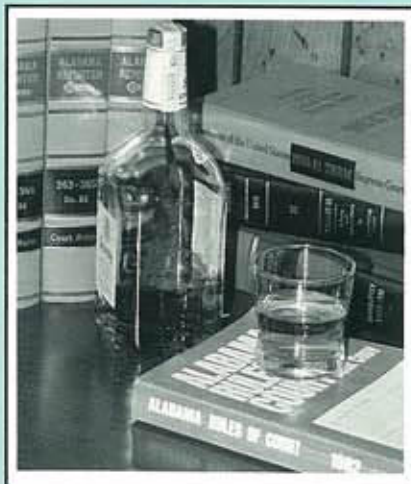
## Compensating Clients for Wrongful Acts

— pg. 67

Alabama is one of a few states, if not the only, which does not have in operation an active Client Security Fund. Legislation is necessary to implement this most needed reform.



# ISSUE IN BRIEF



## On the Cover

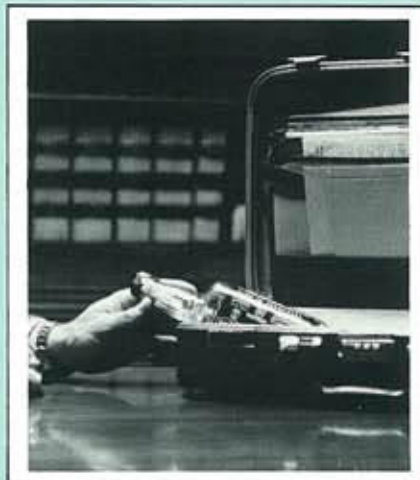
John Proctor, bar commissioner from the 38th Judicial Circuit, is the photographer of the front photograph, taken in connection with the special emphasis on alcohol in this issue. Proctor is with the law firm Thomas & Proctor in Scottsboro.



## Bar Committees Seeking Answers

— pg. 94

Many issues facing the bar are presently being handled by several committees of our association. Each Alabama lawyer will be affected by their work, taking place statewide.



## We Have Met the Enemy

— pg. 102

Although lawyers and judges are no more prone to alcohol abuse than the general population, it is estimated that nearly 700 Alabama lawyers are alcoholics. This alarming number has spurred the bar's task force on alcoholism and drug abuse to action, needing and wanting to help those confronting this disease.

## Upcoming

### March 9-10

Alabama State Bar Midyear Conference, Montgomery

### April 5-8

ADLA Annual Meeting, Palm Beach, Florida

### May 18-19

Young Lawyers' Annual Seminar, Sandestin, Florida

### July 12-14

Alabama State Bar Convention, Mobile

Lawyer groups wishing to have meetings listed in this column should contact the Alabama State Bar.

## Regular Features

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HAIRSTON

## President's Page

In this issue of *The Alabama Lawyer* you will find a report by Mary Lyn Pike on the work of some of the committees of the Alabama State Bar. We have about one committee meeting every third day. An average of two thirds of the committee members attend each meeting. When you consider that the members are spread across the state and the conflicts that lawyers are heir to, this record is truly remarkable.

We, as a profession, are in debt to these lawyers who give so generously of their time and talent. As we each go about our busy, busy "business" of practicing law, we might offer a little prayer of thanksgiving to those of our membership who give of themselves to our profession.

As I consider the generosity of the gift of these dedicated professionals, I am reminded of three great statements:

Albert Einstein wrote:

Strange is our situation here on earth. Each of us comes for a short visit, not knowing why, yet sometimes seeming to divine a purpose. Many times a day I realize how much of my own outer and inner life is built upon the labors of my fellow men, both living and dead, and how earnestly I must exert myself in order to give and return as much as I have received. My peace of mind is often troubled by the depressive sense

that I have borrowed too heavily from the work of other men.

The late Bernard Shaw defined a gentleman as one who refuses to take out more than he receives.

And finally the words of our own Mr. T.B. Hill of the Montgomery Bar:

Ours is a noble profession. From its ranks have come, throughout the history of the Republic, the leadership which guided and directed the destiny of our ship of state in times of peace and sustained us in time of crises.

It is wonderful to work with lawyers and for our profession. If you haven't enjoyed the experience of participating in the outreach of your profession, now is the time. Walter Byars will soon be knocking on your door. Pleasure yourself! Give opportunity a chance.

I wish I could end this report right here saying everything is great — let's get together and make it even greater. I can't — it ain't.

We do have problems. I echo two concerns that were shared with the Montgomery Bar at its last annual meeting. Concerns of such major importance that they could drag our profession under.

First and foremost is discipline. How do we cope with that growing segment of our profession who are not prepared to live within the standards that we, as

practicing lawyers, adopt to guide us? How do we put a halt to this ever growing disciplinary problem?

As a profession we have the responsibility of disciplining ourselves. This has become a monumental task. It is quickly reaching the proportion of diminishing returns. Forget, if you can, the bad apple. Consider the thousand of lawyer hours that are spent by the members of the local grievance committee in investigating complaints; the size of our disciplinary staff; the work of the Disciplinary Commission in separating the chaff from the grain; hearing after hearing of the Disciplinary Panels composed of the members of the Board of Bar Commissioners. We are throwing away thousands of hours and tens of thousands of dollars trying to protect the public from our shortcomings.

Look at the other side. What if we could use all these hours — all this mental energy — to move our profession forward? These are dedicated hands that if relieved of their house-cleaning chores would serve in a more positive capacity.

What are we going to do about it? Let's take a page out of the DUI battle. Revise our rules so that public censure is the minimal sanction for the viola-

*(Continued on page 112)*



# Executive Director's Report



HAMNER

**Y**ou are still more than a number at the state bar, even in an advancing age of technology. The membership list has been computerized but you haven't become a mere number. We still know your name, your address, the year you were born, the year you were first licensed to practice (in the jurisdiction of your original admission) and your membership category, be it licensed, special or exempt (those persons admitted in Alabama less than two years).

It is hoped that you have received a data verification card by now so that the personal information used for each member can be verified. We have attempted a hand audit of the 7,200 membership records put into the system; however, it is possible that we have used incorrect information or that it has been coded improperly. Please examine the label on this *Alabama Lawyer* to insure that it reflects the address at which you wish to receive bar mailings.

Because of space limitations, we are using the shortest and most exact address for each member, i.e. a post office box, or street address if a post office box is not available. We have also deleted firm names. While we prefer to use the standard first name — middle initial — last name sequence, this is not always practical since a substantial number of our members have identical first and last names and in most

instances, the middle name must be used to avoid confusion. The use of suffixes (i.e., Sr., Jr., II, III, etc.) is essential due to the significant number of second and third generation practitioners within our bar. The use of year of birth and year of admission will permit the bar to compile selective mailing lists where a person's age or number of years in practice is significant. This will particularly benefit the Young Lawyers Section of the bar as well as those bar committees who from time to time need to survey the membership.

We are asking that changes of address be requested in writing. Frequently, a firm will relocate its offices and a single member will write asking that that member's address be changed. Because many of our members choose to use a home address instead of an office address, we will not automatically change the addresses of the other members of the firm unless specifically requesting multiple changes. We plan to put changes into the system on the 25th day of each month; however, we will attempt to have all changes made prior to any bar-wide mailing if the number of changes warrants earlier action.

To borrow a phrase from Hugh Downs of ABC's 20/20, "You stay in touch, and we'll be in touch." The vast majority of our mailings are sent under

a bulk permit. This mail is not forwarded by the post office and, due to the cost to the bar, we cannot guarantee return postage on undelivered mail. To insure receipt of your mail, be sure we have your current address.

This new system will significantly reduce our mailing costs plus speed up the processing of all bar mailings. It costs the bar ten cents to accomplish each address change but this does not seem unreasonable in view of the number of address changes we receive each day. We recently changed over 120 addresses in a single week.

The bar has absolute control of the mailing list. The mailing service will not make it available except upon written direction from this office. It will not be sold for commercial purposes and will not be made available for any commercial solicitation except those member benefit programs sponsored or endorsed by the state bar. Limited use of the list can be made available to candidates who have qualified for state judicial offices and attorney general. Of course, those candidates must pay for the cost of preparing such a list. It is also customary to allow each candidate seeking the office of president elect of the bar to use the list for one mailing.

Send changes of address to: The Alabama State Bar, P.O. Box 671, Montgomery, AL 36101. □

— Reginald T. Hamner



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### Reflections

"Reflections of the Reflective Roundtable" was outstanding. Lawyers like John Caddell, Robert Adams, Douglas Arant, Jimmy Carter, Guy Hardwick, Judge Harwood and Judge Lynne have my respect and admiration, not so much because they are so successful and so dedicated to our profession (many lawyers and judges have these qualities), but because they have a dry wit and charm which I associate with the most gifted "trial lawyers." These gentlemen are, in my opinion, at the top of our profession because they have this entertaining ability to "tell a story," a knack which guarantees anyone — lawyer, judge, juror, witness or the average man or woman on the street — the rapt attention of others.

Congratulations to *The Alabama Lawyer* for sharing these reflections with those of us who missed them in person.

**Bill Baxley**  
Lieutenant Governor  
of Alabama

### Alabama's Oldest Lawyer?

I have just completed reading the January 1984 edition of *The Alabama Lawyer*. The make-up and content of the publication is most attractive, enlightening and entertaining. You and others responsible for this good work are deserving of the heartiest congratulations from every recipient of *The Alabama Lawyer*.

I was particularly interested in the

article entitled, "Who is Alabama's Oldest Lawyer?" I would like to know your criteria. If you are going to base your findings on how one feels or the number of scars one possesses or the mileage attained by a lawyer, I would like to submit my name for your consideration. On the other hand, if you're going strictly by years, Mr. Douglas Arant, Bibb Allen and maybe one or two other members of the Bar can defeat my claim to the title.

Tuscaloosa      **Hugh W. Roberts, Jr.**

### LETTERS TO THE EDITOR

The purpose of the Letters to the Editor column is to provide a forum for the expression of the readers' views. Members of the Alabama State Bar are invited to submit short letters, not exceeding 250 words, expressing their opinions or giving information as to any matter appearing in the publication or of concern to the bar membership. The editor reserves the right to select excerpts therefrom to publish. All letters specifically addressed as Letters to the Editor will be candidates for publication in *The Alabama Lawyer*. The publication of a letter does not, however, constitute an endorsement of the views expressed. Letters should be sent to: The Alabama Lawyer, Letters to the Editor, P.O. Box 4156, Montgomery, Alabama 36101.



# Why Alabama Needs a Client Security Fund

by James S. Ward



*James S. Ward, a member of the Birmingham law firm of Ward & McKnight, received his B.A. degree from the University of Minnesota and J.D. from the University of Alabama. He is presently the chairman of the Alabama State Bar's Task Force on a Client Security Fund.*

---

**A**labama is one of a few states, if not the only, which does not have in operation an active Client Security Fund. In an effort to remedy this situation, our current Bar Association president formed a Task Force on a Client Security Fund which was charged with determining a means whereby the Alabama State Bar Association could operate a Client Security Fund and a procedure for the funding of such a fund. Armed with this charge and its concomitant duty, the task force began to meet and develop proposals for a Client Security Fund of the Alabama State Bar. The end result of these efforts has been the drafting by the task force of proposed rules establishing a Client Security Fund Committee and defining procedures to govern proceedings conducted upon an application for reimbursement from the proposed Client Security Fund. Additionally, a proposed application form for reimbursement and an informational pamphlet have been drafted. It is stressed that these are proposals only and are subject to the approval of the Board of Bar Commissioners before implementation. Additionally, funding for the Client Security Fund is contingent upon the drafting of appropriate legislation and legislative authorization.

*This article is intended to briefly outline these proposals. It is not the author's intention to provide a detailed analysis but rather a summary and overview of pertinent provisions.*

---

## Why the need for a Client Security Fund?

National statistics developed in a 1981 study of the National Center for State Courts show that an average of three lawyers out of one thousand embezzle their clients' money. There is no



procedure presently in the state of Alabama to compensate clients for this defalcation on the part of lawyers. Some lawyers object that compensating a client is not solely the responsibility of the legal profession. However, more and more, bar associations perceive this responsibility as their own as is clearly evidenced by the existence of Client Security Funds in virtually every state.

It cannot be gainsaid that we depend upon the trust of our clients. Unfortunately, there may be cases where a few attorneys breach that trust. Nonetheless, it is important that our profession's reputation for honesty be maintained and protected. A Client Security Fund will serve this function by providing reimbursement to clients whose money or property has been wrongfully taken by attorneys admitted to practice in this state.

### **How will the Proposed Client Security Fund Be Funded?**

At this time, the anticipated means of creating and funding the Client Security Fund is through the legislative process. It is intended that legislation will be drafted and introduced granting to the Board of Bar Commissioners explicit authority to establish a Client Security Fund and to provide for its funding. Through this method, the Board of Bar Commissioners will have needed flexibility in this important area.

### **How will the Fund Operate?**

A Client Security Fund Committee will be responsible for all proceedings conducted on applications for reimbursement from the Client Security Fund. As proposed, the Client Security Fund Committee of the Alabama State Bar will consist of seven lawyers who are members of the Alabama State Bar Association. The chairman of the committee will be the president-elect of the association while the remaining six members of the committee will be appointed by the president of the association, all members to serve without compensation. The initial members' terms will be staggered in length and

all subsequent terms will be for three years.

A proposed application form for reimbursement has been prepared. This form must be completed by any individual seeking reimbursement from the fund. While the form is quite lengthy, it attempts to elicit necessary information about the alleged loss, including the date of the loss, the amount, the lawyer involved and all facts relating to the loss. Each application form will contain the following language in bold type:

In establishing the Clients' Security Fund, the Alabama State Bar Association did not create nor acknowledge any legal responsibility for the acts of individual lawyers in the practice of law. All reimbursements of losses of the Clients' Security Fund shall be a matter of grace in the sole discretion of the committee administering the fund and not as a matter of right. No client or member of the public shall have any right in the Clients' Security Fund as a third party beneficiary or otherwise.

The application form shall be sworn to and executed by the claimant under penalty of perjury.

One may recover only for a "reimbursable" loss. "Reimbursable losses" are only those losses of money or other property of clients of lawyers which meet the following tests:

- (a) The dishonest conduct which occasioned the loss occurred on or after the effective date of the rules establishing the Client Security Fund.
- (b) The loss was caused by the dishonest conduct of a lawyer acting either as an attorney or as a fiduciary in the matter in which the loss arose.
- (c) The lawyer shall have died, been adjudicated a bankrupt, been adjudicated an incompetent, been disbarred or suspended from the practice of law, voluntarily resigned from the practice of law, become a judgment debtor of the plaintiff, shall have been adjudged guilty of a crime, which judgment or judgments shall have been predicated upon the dishonest conduct of the lawyer, left the jurisdiction or cannot be found or the committee on Client Security Fund shall have by its investigation determined that the claim is an appropriate case for consideration because the loss was caused by the dishonest conduct of a member of the Alabama State Bar Association.

Dishonest conduct would be defined as wrongful acts committed by a law-

yer against a person in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of money, property or other things of value.

Not all losses are reimbursable under the proposed rules. Examples of non-reimbursable losses are those of a spouse, child, parent, grandparent, sibling, partner, associate or employee of the attorney causing the losses; losses covered by any bond, surety agreement or insurance contract to the extent covered thereby; losses of any financial institution which could be recoverable under a "banker's blanket bond" or similar insurance or surety contract; losses which are recoverable from some other source and losses which are barred under applicable statute of limitations.

Once an application is received by the committee, there are several options. The committee may, in its absolute discretion, after investigation, require exhaustion of some or all civil remedies before processing or adjudicating the application or paying any claims. If the accused lawyer is a member in good standing of the Alabama State Bar, the applicant's cooperation in grievance proceedings by the Bar against such lawyer shall be a prerequisite to the granting of relief to such applicant from the fund. The committee may require that an applicant prosecute or cooperate in appropriate civil proceedings against the accused lawyer as a prerequisite to the granting of relief of such applicant from the fund.

The committee has the authority to hold such meetings and conduct such investigations as it deems necessary in order to determine whether the claim is for a reimbursable loss, as previously defined, and to guide the committee in determining the extent, if any, to which the claimant should be reimbursed. If it is determined by the committee that the claim is clearly not for a reimbursable loss, no further investigation shall need be conducted and such determination will constitute a rejection of the application. If the committee determines that it is necessary to hear the claimant and the attorney or to receive other evidence on behalf of the claimant, then and in that event the com-



mittee shall have the authority to request the appearance of such individuals and the receipt of such additional evidence as may be required. In all cases, the lawyer charged shall be given an opportunity to be heard by the committee if he so requests.

The committee, in its sole discretion, is charged with the responsibility of determining the amount of loss, if any, which any client shall be reimbursed. In making this determination, the committee is required to consider various factors set forth in the rules which include the negligence, if any, of the applicant which contributed to the loss, the comparative hardship of the client suffered by the loss, the total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the fund, and the total amount of reimbursable losses of the clients of any one lawyer or association of lawyers. Furthermore, in determining whether or not any *payment* will be made on the claim, the committee may consider the condition of the fund, the nature and size of the claim presented

and such other factors as to the committee may seem just and proper.

The rules will provide both a maximum amount which any one claimant may recover from the fund arising from an instance or course of dishonest conduct and an aggregate maximum amount which all claimants may recover arising from an instance or course of dishonest conduct.

Applications, proceedings and reports involving applications for reimbursement are to be confidential until the committee authorizes reimbursement to the claimant, except in limited situations described in the rules. A member of the committee who has or has had a lawyer-client relationship or financial relationship with a claimant or lawyer who is the subject of a claim cannot participate in the investigation or adjudication of a claim involving that claimant or lawyer. Absolute immunity from civil liability for all acts in the course of their official duties is extended to members of the committee and staff persons assisting those members. If reimbursement is made, the fund shall be subrogated in the

amount of the reimbursement and the committee may bring such action as is deemed advisable against the lawyer or the lawyer's estate. Prior to payment of the claim, the claimant shall be required to execute a subrogation agreement.

In connection with the proposed rules establishing a Client Security Fund, a brief pamphlet has been prepared for the benefit of the public. This pamphlet is informational and explains the Client Security Fund, why it was established, how it is financed, how it is administered, what losses are covered, and where a claim is to be filed and what happens to the claim after it is filed.

It certainly is desirable to assure the public that the Alabama State Bar Association is concerned when lawyers mishandle their clients' funds. The establishment of the Client Security Fund discussed in this article will demonstrate the Alabama State Bar's desire to place in operation an effective procedure for dealing with this problem. Hopefully, the need for payments from the fund will be rare. □

## MEDICAL & HOSPITAL MALPRACTICE

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# About Members Among Firms

## About Members

At the tenth annual meeting of the National Conference of Appellate Court Clerks, **John H. Wilkerson, Jr.**, clerk of the Alabama Court of Civil Appeals, was elected president of the organization.

**B. Dawn Wiggins**, formerly law clerk to the Honorable Daniel H. Thomas, U.S. district judge for the Southern District of Alabama, has become associated with the Pensacola, Florida law firm of Levin, Warfield, Middlebrooks, Mabie, Thomas, Mayes & Mitchell.

**John A. Carey**, formerly chief attorney of the State Oil and Gas Board of Alabama, has become associated with the law firm of McDavid and Noblin in Jackson, Mississippi.

**William R. Lane, Jr.**, formerly of Anniston, has become associated with the firm of Jacobs, Robbins, Gaynor, Burton, Hampp, Burns, Cole & Shasteen, P.A., with offices in St. Petersburg, Tampa, and Clearwater, Florida. Mr. Lane has also been appointed Adjunct Professor of Law by Stetson University College of Law.

**John D. Saxon**, formerly counsel, U.S. Senate Select Committee on Ethics, has become director, Corporate Issues, RCA Corporation. He will be the chief public policy analyst and issues manager for the New York-based broadcasting, electronics, telecommunications, entertainment, and aerospace company.

**Donald F. Pierce**, of the Mobile law firm of Hand, Arendall, Bedsole, Greaves and Johnston, was elected vice president of public relations of

the Defense Research Institute at their annual meeting held January 23-25 in Palm Springs. Pierce was elected to the post after having completed a three-year term on the institute's Board of Directors. He will be responsible for overseeing the public relations program of the national 12,000 member attorney association during the 1984-85 term of office.

## Among Firms

**Thomas L. Foster** and **Harold O. McDonald, Jr.**, are pleased to announce their association in the practice of law. Offices are located at 513 North Twenty-first Street, Birmingham, Alabama 35203.

The firm of **Steagall & Adams** is pleased to announce that **William H. Filmore** is now associated with the firm. Offices are located at 315 South Union Avenue in Ozark (Phone 774-2501) and Suite G, Executive Center, Daleville, Alabama (Phone 598-8220).

**Hand, Arendall, Bedsole, Greaves & Johnston**, 30th Floor, First National Bank Building, Mobile, Alabama, takes pleasure in announcing that **Kathryn A. Eckerlein** and **Henry A. Callaway** have become associated with the firm.

**Milton E. Barker, Jr.**, and **Robert P. Bynon, Jr.**, are pleased to announce the formation of a partnership for the general practice of law to be known as **Barker & Bynon** and the association of **Robert G. Saunders** at the new address of: **Barker & Bynon, Attorneys at Law**, 2205 Forestdale Blvd., Birmingham, Alabama 35214. Phone 791-2021.

The law firm of **Wilkins & Druhan** announces that **Thomas P. Olinger, Jr.**, has become a partner and that **Robert D. Johnston, Jr.**, has become associated with the firm. Offices are located at Hannah Houses, 157-159 North Conception Street, Mobile, Alabama.

The law firm of **Leitman, Siegal & Payne, P.A.**, takes pleasure in announcing that **W. Clark Watson** has become a member of the firm and **Maston E. Martin, Jr.**, and **James C. Reilly** have become associated with the firm. Offices are located at 425 First Alabama Bank Building, Birmingham, Alabama 35203.

**Merrill, Porch, Doster & Dillon, P.A.**, takes pleasure in announcing that **Brenda Smith Stedhan** and **Randall M. Woodrow** have joined the firm in the practice of law. Offices are located at Suite 500, SouthTrust Bank Building, 1000 Quintard Avenue, Anniston, Alabama.

**Ken W. Gilchrist** is pleased to announce to his colleagues his resumption of the general practice of law. Offices are at 6th Street, P.O. Box 143, Ashville, Alabama 36853. Office phone, 594-7108; Residence phone, 594-7607.

**Tom F. Young, Jr.**, announces the opening of his office for the general practice of law (and in association with **Carter & Lewis**) at 604 South 38th Street, Birmingham, Alabama 35222.

**John C. Calhoun, Jr.**, announces the relocation of his law office to 1275 Center Point Road, Birmingham, Alabama.



**Harris & Harris** takes pleasure in announcing that **D. Patrick Harris**, former administrative assistant for Alabama Supreme Court Chief Justice C.C. Torbert, Jr., has become associated with the firm in the general practice of law. Offices are at 200 South Lawrence Street, Montgomery, Alabama 36104.

**W. Sidney Fuller**, formerly a partner in the Andalusia firm of Tipler & Fuller, announces the opening of his offices for the practice of law at 218 South Three Notch Street, Suite Two. The mailing address is P.O. Drawer 1637, Andalusia, Alabama. Phone 222-4196.

**Michael Scheuermann** wishes to announce the relocation of his office to 4315 Downtowner Loop North, Mobile, Alabama. Phone 343-5384.

**Jerry R. Barksdale** is pleased to announce that **James D. Moffatt** is now a partner under the firm name of **Barksdale and Moffatt** with offices located at 212 South Marion Street, Athens, Alabama 35611.

The law firm of **McMillan & Spratling** is pleased to announce that **Michael G. Graffeo**, formerly administrative assistant to the Honorable Richard Arrington, Jr., mayor of the city of Birmingham, has become associated with the firm in the practice of law. Offices are located at 1550 First National, Southern Natural Building, Birmingham, Alabama 35203. Phone 328-2927.

The firm of **Armbrrecht, Jackson, DeMouy, Crowe, Holmes & Reeves** is pleased to announce the relocation of their offices to 1300

AmSouth Center, Mobile, Alabama 36602. The firm is, also, pleased to announce that **James L. Parris, James Dale Smith, William H. Philpot, Jr., George M. Simmerman, Jr., and Michael E. Upchurch** have become associated with the firm.

The firm of **Jaffe and Stein** is pleased to announce the relocation of their offices to 22 Manchester Street, London W1M 5PG, England.

**Harold T. Ackerman** is pleased to announce the association of **Donald L. Colee, Jr.**, former deputy district attorney for Jefferson County, for the general practice of law at Center Point Village, 1220 Center Point Parkway, Birmingham, Alabama 35215.

**Kenneth J. Gomany**, former deputy district attorney for Jefferson County, is pleased to announce his association in the general practice of law with **Harold P. Knight**. Offices are located in Suite 410, Frank Nelson Building, Birmingham, Alabama 35203.

**John W. Cooper**, Attorney at Law, is pleased to announce the opening of his office at 1 Commerce Street, P.O. Box 261, Valley Head, Alabama 35989. Phone 635-6555.

**Hogan, Smith & Alspaugh**, P.C., takes pleasure in announcing that **Stephen Shay Samples** and **James R. Pratt III** have become members of the firm. The name of the firm is now **Hogan, Smith, Alspaugh, Samples & Pratt**, P.C. Offices are located at 1000 City Federal Building, Birmingham, Alabama 35203. Phone 324-5635.

The Tuscaloosa firm of **Hubbard, Waldrop & Tanner** is pleased to announce that **Junius F. Guin III** and **Robert P. Reynolds** have become partners of the firm.

**Gaillard, Little, Hume & Sullivan** takes pleasure in announcing that **Mary Beth Mantipty** has become a member of the firm. Offices are located at 258 State Street, Mobile, Alabama 36601. Phone 432-1832.

**Edwina E. Miller**, Attorney at Law, announces the relocation of her office for the general practice of law to 2909 7th Street, Tuscaloosa, Alabama 35401. Phone 752-0053.

**Don L. Hardeman, Nancy F. McClellan, and B. Greg Copeland** are pleased to announce the formation of a partnership, **Hardeman, McClellan & Copeland**, for the general practice of law and the opening of their offices at 502 Third Street, Southeast, Cullman, Alabama 35055. Phone 739-5087.

**Owen & Simpson** takes pleasure in announcing that **Oliver J. Latour, Jr.**, having withdrawn as a member of the firm of Reams, Vollmer, Philips, Killion, Brooks, & Schell in Mobile, has become a partner in the firm and the firm name has been changed to **Owens, Latour & Simpson**. Offices are located at the Dahlberg Building, Bay Minette, Alabama 36507.

**Dennis N. Balske** has been named legal director of the Southern Poverty Law Center, succeeding John L. Carroll, who has served in that capacity since 1977. Carroll has begun private practice with the Montgomery firm of **Mandell and Boyd**. □

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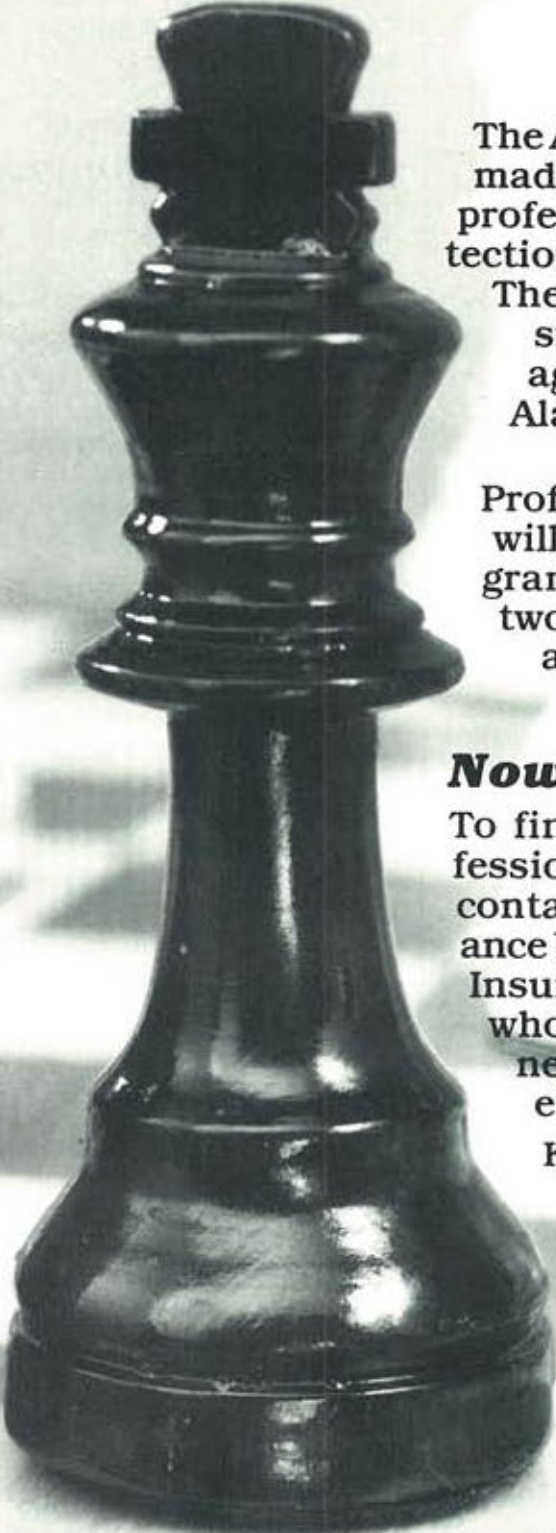
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# Bar Endorses New Professional Liability Insurance Program

by Duke Nordlinger Stern

Earlier this year the Alabama State Bar inaugurated its new endorsed professional liability insurance program. This unique concept combines significantly expanded coverages with favorable rates tied solely to Alabama's claims experience plus possible participation in excess program profits. Policies are issued through Dependable Insurance Company, a Best's rated A+ insurer, and the reinsurance is through Lloyd's of London. The program is marketed by independent Alabama insurance agents and is managed by Professional Liability Insurance, Inc., an administrator experienced in legal malpractice insurance.

The need to explore alternative markets resulted when the Bar's previously endorsed carrier made a corporate decision to limit its writings to medical liability insurance. The new program was endorsed by the Board of Bar Commissioners after a three month investigation by the Bar's Insurance

Programs Committee which included a detailed analysis of proposals from six insurers.

## The New Policy

The Lloyd's/Dependable policy provides automatic full prior acts protection which facilitates the switching from other insurance programs without a gap in coverage and in most instances without the need to purchase an extended reporting endorsement (risk tail protection) from the prior insurer. Other policy features include a broader definition of the insured, full personal injury protection, broad fiduciary coverage, protection for innocent insureds in instances of excluded acts, and automatic first dollar defense coverage which applies the deductible only to loss payments.

There is no penalty for refusal to consent to a settlement, and both the insured and the carrier must agree on the selection of defense counsel. The extended reporting endorsement is pro-

vided without cost if an insured dies or after a lawyer has been covered under the Lloyd's/Dependable program for five years, with the effect of converting this claims policy back to an occurrence form after this period. Other policy features include the preferred policy period deductible versus the per incident alternative, non-cancellation of the policy during its term except for non-payment of premium or deductible, defense coverage for most excluded acts, endorsements for many lawyer related activities, and an incident discovery notice provision which provides coverage even after the policy terminates.

## Premium Costs

The rates for the Lloyd's/Dependable coverage are extremely reasonable since they are based only on Alabama losses and utilize individual versus average reserving. Experience rate increases, if any, are governed by a stated formula with the Bar having the right to examine reserves. Since the program has fewer steps in its rating scale, lawyers will have fewer automatic annual rate increases than with other available insurers. A formula has been established which will return excess profits.

## Risk Management

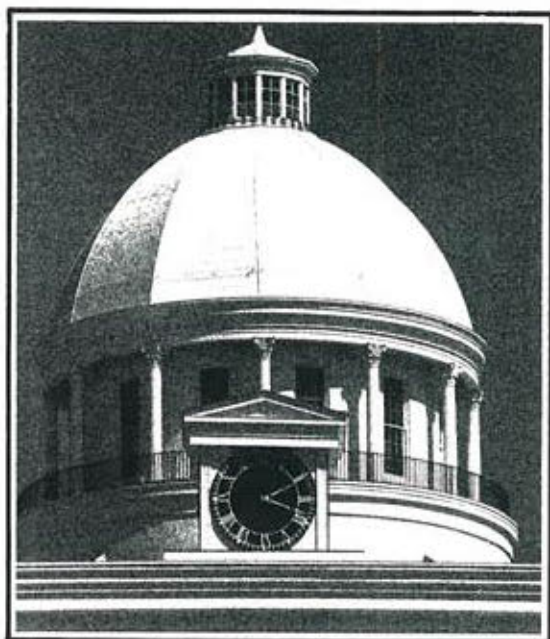
The new endorsed program will continue the Bar's risk management efforts which include the claims prevention seminars and articles in *The Alabama Lawyer*. Attorneys will still be able to utilize the wats line individual consultation service for concerns relating to claims prevention, insurance coverages and claims repair.

Alabama attorneys are urged to consider the new endorsed professional liability insurance program. They or their insurance agents can obtain information by calling the Bar's administrator, Professional Liability Insurance, Inc., at (800) 441-9385. □

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*Duke Nordlinger Stern serves as the Alabama State Bar's Risk Manager. The individual attorney consultation service can be utilized by Alabama lawyers by calling (800) 237-8903.*





# LEGISLATIVE WRAP-UP

by Randolph P. Reeves  
and Robert L. McCurley, Jr.

## Increase in License Fees, One of Three Bills Introduced by Association During Regular Session

**T**his regular session of the state legislature is an important one for the Alabama State Bar. It has been seven years since license fees were raised, and despite extremely efficient operating procedures, inflation has finally caught up with our organization.

As you know, the State Bar operates fiscally as a department of the State of Alabama. However, its revenues are placed in a separate fund and its operating expenses are paid out of that fund. The basic source of revenue is license fees which presently account for 64% of the Bar's income.

In the years prior to 1982 operating revenues consistently exceeded expenses, and at the beginning of fiscal year 1982-83 a healthy surplus of \$184,757 had been accumulated in the State Bar fund. However, due to general inflation and increased services, the State Bar sustained a substantial operating deficit in fiscal year 1982-83, and a further deficit is projected for the current fiscal year. The budget adopted for fiscal year 1984-85 will exceed anticipated revenues by approximately \$46,000 and will result in a projected balance of only \$51,274 in the State Bar fund at the end of that fiscal year.

Obviously, something has to give. There appear to be three alternatives: cut services, increase dues or file under Chapter 11 of the Bankruptcy Code. None of these alternatives is too inviting but the responsible course seems to be to raise annual license fees. The Finance Committee of the State Bar recommended that bills be introduced in the legislature which would raise the annual license fee from \$100 to \$150 and remove the exemption currently granted to new members of the Bar so that they would be required to purchase licenses on October 1 following their admission to the Bar. These recommendations were approved at the January 20 meeting of the Board of Commissioners.

Bills to effectuate these changes were introduced on Feb-

ruary 7, 1984, the first day of the regular session. The bills were introduced in the House by Rep. Jim Campbell of Anniston and in the Senate by Charles Langford of Montgomery. These additional funds are needed in order to continue to provide the level and quality of services we are so fortunate to enjoy. Please join us in supporting these bills.

### Indigent Defense Fees

Also on tap for the regular session is a bill to make significant changes in the indigent defense laws of the state. At the recommendation of the Indigent Defense Committee and with the approval of the Bar Commissioners, a bill has been prepared which, if passed, will effect four changes in our current law.

First, indigent defense fees would be raised to \$50 per hour for in-court time and \$25 per hour for out-of-court time. The \$1,000 cap on indigent trials would remain, ex-

**Randy Reeves, Alabama State Bar legislative counsel, and Representative Jim Campbell look over bar bills which have been introduced during the 1984 Regular Session of the legislature.**





cept in habitual offender and capital cases. In cases in which a defendant could get life without parole, or the death penalty, the new bill will allow payments of additional trial fees, if approved by the trial court. The \$1,000 cap would remain on such cases that were not actually tried.

A third change involves the cap on appellate fees. Currently there is a \$1,000 maximum for all state appellate work. The proposed changes will allow an additional \$1,000 in fees if certiorari is granted by the Alabama Supreme Court.

Another change involves the costs of administering these funds. A percentage of the funds being generated will be paid to the State Comptroller's Office in order to offset the rising costs associated with indigent defense reimbursement.

### Client Security Fund

A possibility for the regular session is a bill to create a client security fund. The final planning has not been done on this bill and it may have to wait until another session. Efforts will, of course, be made to support the endeavors of the Alabama Law Institute, and particularly its planned revision of the state's non-profit corporation law.

## Revision of Nonprofit Corporation Act Presented to State Lawmakers

The Alabama Law Institute will present to the Legislature during the 1984 Regular Session a revision of Alabama's Nonprofit Corporation Law. In 1980 the Legislature revised the Alabama Business Corporation Act, the first major revision in corporate law in twenty-five years. Last year the Legislature revised the Professional Corporation Act and the Limited Partnership Law. With the consideration of the Revised Nonprofit Corporation Act

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*Randolph P. Reaves, a graduate of the University of Alabama and University of Alabama School of Law, practices with the Montgomery firm of Wood, Minor & Parnell, P.A. He presently serves as legislative counsel for the Alabama State Bar.*



*Robert L. McCurley, Jr., director of the Alabama Law Institute, received his B.S. and LL.B. degrees from the University of Alabama. In this regular column, Mr. McCurley will keep us updated on legislation of interest and importance to Alabama attorneys.*



we will complete the modernization of the business organization laws of our state and make them more compatible with each other. The Institute worked with the general premise that if a lawyer knows how to form and operate under the Business Corporation law the same general law should apply in other forms of business organizations except where modified to meet particular differences and purposes.

Attorney Yetta Samford of Opelika serves as chairman of the committee which consists of a number of distinguished practitioners. The roster members of the committee are as follows:

**Yetta Samford**, chairman  
**Harold Albritton**, Andalusia  
**Pat Burnham**, Anniston  
**Sidney Cook**, Tuscaloosa  
**Penny Davis**, Tuscaloosa  
**Ralph Gaines**, Talladega  
**Bill Hause**, Dothan  
**Ed Hines**, Brewton  
**George Maynard**, Birmingham  
**Ernest Potter**, Huntsville  
**Watson Smith**, Mobile

The review that follows is taken, in part, from the preface of the Alabama Law Institute's proposed Alabama Non-profit Corporation Act drafted by Professor L.B. Feld who served as reporter for the committee.

The current Nonprofit Corporation Act is based on the 1952 Model Nonprofit Act (found in Chapter 3 of Title 10 of the Code of Alabama). This act is based on the 1964 Model Nonprofit Corporation Act drafted by the committee on Corporate laws of the section of Corporation, Banking and Business law of the American Bar Association. It reflects a policy of parallelism in that it follows as closely as permitted by the differences in subject matter corresponding provisions of the Alabama Business Corporation Act, Alabama Code Section 10-2A-1 et. seq. Provisions in regard to stock are omitted and certain variations of practice are permitted for Nonprofit Corporations that are not customary or appropriate for business organizations, but otherwise this Act is deliberately and closely parallel of the provisions of the Alabama Business Corporation Act. It follows that decisions of the Alabama Business Corporation Act, or commentaries on it, which greatly outnumber those with regard to Nonprofit Corporations, should become increasingly helpful in the interpretation and application of this Act.

The most difficult decisions of policy and drafting this Act dealt with the question of applicability, centralized filing, name reservation and annual reporting. The opinion of the drafting committee was that the ease and simplicity of the present filing procedure outweighed the adoption of any parallelism with the Business Corporation Act. Thus the proposed Act makes no provision for filing of annual reports by Nonprofit Corporations domestic or foreign, nor does it provide for annual reports to be filed with the Secretary of State's Office.

The revision provides that an original and two copies of

*(Continued on page 97)*



# Commentary: Co-Employee Immunity Among Alabama Longshoremen and Harborworkers

by Gregory C. Buffalow

## Introduction

Following the 1978 decision of the Supreme Court of Alabama in *Grantham v. Denke*, 359 So. 2d 785 (Ala. 1978), the previous ban on co-employee damage suits under Alabama Workers' Compensation Law was lifted. Thus, after 1978, Alabama workers were able to supplement compensation benefits awarded under the

Alabama Act, with damages actions against supervisors, various other co-employees and, in certain circumstances, workers' compensation insurance carriers.<sup>1</sup>

Subsequently, in 1980, the Supreme Court of the United States indicated in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 65 L. Ed.2d 458, 100 S. Ct. 2432 (1980), (hereinafter referred to as *Sun Ship*), that there may be some de-

gree of concurrent jurisdiction between State Workers' Compensation laws and the Federal Longshoremen's and Harborworkers' Compensation Act.<sup>2</sup> Given these developments, the question has frequently arisen for the substantial number of Alabama workers who were covered by both the Alabama Workers' Compensation Act<sup>3</sup> and the Federal Act, whether those workers who were covered by the more liberal benefits under the Federal Act<sup>4</sup> could also take advantage of this concurrent jurisdiction to pursue the co-employee damages suit cause of action provided by the common law of Alabama — in addition to the compensation benefits under the Federal Act. This is also an important issue for longshoremen and harborworkers in the significant number of other states which allow co-employee liability for damages similar to that recognized in Alabama by *Grantham* which include, for example, Arkansas, Maryland and Missouri.<sup>5</sup>

On January 27, 1984, the Alabama Supreme Court resolved this question and ruled that *Sun Ship* permitted only a limited degree of concurrent LHWCA-State jurisdiction so that the LHWCA co-employee immunity provisions must take precedence over conflicting co-employee damages liability permitted by Alabama common law. *Fillinger v. Foster*, (No. 82-297, January 27, 1984) (hereinafter referred to as *Fillinger*). The holding of the Alabama Supreme Court was as follows:

*[T]he concurrent jurisdiction for pursuit of benefits under a state's workmen's compensation scheme does not include common law suits for damages against co-employees.*

*Id.*, slip op. at 9.

It should be recognized, however, that this LHWCA-State law conflict has not been uniformly resolved by other state courts considering it and has not been given a definitive answer by the Supreme Court of the United States which will, no doubt, eventually be called upon to resolve the differing interpretations by the states. For that reason, the purpose of this article is to analyze the conflicting case law on this issue, and the *Fillinger* decision, and to suggest that other courts considering it after *Sun Ship* and *Fillinger* should follow the lead of the Alabama



*Gregory C. Buffalow is a member of the Mobile Law firm of Hamilton, Butler, Tarlton & Allen, P.A. He received his B.A. and J.D. degrees from the University of Alabama and his LL.M. from New York University.*



Supreme Court by recognizing the preemptive effect of the co-employee immunity provisions in §933(i) of the LHWCA on the inconsistent damages provisions of state law.

### Definitions of Covered Employees Under the LHWCA and State Law, and the Potential Overlap

A considerable number of employees covered by state workers' compensation law, such as the coverage provisions of the Alabama Act at §§25-5-1(6) and 25-5-50 *Ala. Code* 1975, may also come within the definition of covered employees in the Federal Act.<sup>6</sup> Covered employees under the LHWCA include "any person engaged in maritime employment, including any longshoremen . . . any harborworker including a ship repairman, ship builder, and ship breaker . . ." See 33 U.S.C. § 902(3).

Employees covered by the LHWCA must meet a two-pronged test, however, which requires occupation in maritime employment, i.e. maritime status,<sup>7</sup> and in addition, occupation at a maritime location, i.e. a maritime situs.<sup>8</sup> It should be noted that the listing of traditional maritime occupations, and the maritime situs illustrations in the Federal Act at 33 U.S.C. §§902(3), 902(4), have not been considered to be exhaustive and have, thus, been liberally construed by the courts and Benefits Review Board to include a number of occupations in inland areas and occupations not specifically enumerated in the Act.<sup>9</sup> For example, security guards,<sup>10</sup> persons working on land engaged in loading and unloading cargo containers,<sup>11</sup> and certain employees of manufacturers of component parts of vessels.<sup>12</sup>

Thus, given the trend towards a liberal interpretation of covered employers and employees under the Federal Act, the potential for overlapping coverage of the Federal Act and State Acts is great.<sup>13</sup> Although this might generally be considered to be limited to shipyards and ship repair facilities, the recent expansion of the LHWCA inward into "any adjoining pier, wharf, dry dock . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a

vessel"<sup>14</sup> can easily apply to workers in inland areas customarily engaged in loading, unloading, supplying and repairing (over navigable waters or in adjoining areas), associated with river transportation systems.

It is also possible that certain manufacturing operations, which have loading facilities over navigable waters (or connected with navigable water facilities by a marine railway), or which are engaged in the manufacture of component parts which may ultimately be installed into vessels elsewhere, are also covered. Such an illustration of an inland extension of the Federal Act was recently applied in a series of LHWCA cases arising at a Texas plant of United States Steel Corporation located on the banks of the Sabine River, *Alford v. U.S. Steel Corp.*<sup>15</sup> In *Alford*, maritime situs and status was found because some of the workers at the plant were producing metal signs and other component parts of barges — even though the actual shipyard, at which the barge components were assembled, was several miles away.

Thus, given the inland extension of the LHWCA following the 1972 amendments, and subsequent case law, the potential for overlap between the federal and state schemes in the states listed above should arise with increasing regularity.

### Pre-1972 Concurrence Between the LHWCA and State Compensation Law — the "Twilight Zone"

Prior to the 1972 amendments, §903(a) of the Federal Act contained a limitation that the LHWCA applied "[i]f recovery . . . through workmen's compensation proceedings may not be validly provided by state law." This provision had, at one time, been interpreted to mean that there was no permissible overlap between the LHWCA and state workers' compensation law, so that state compensation law could not apply to occupations and employment within the exclusive zone of coverage of the LHWCA. See *Davis v. Department of Labor*, 317 U.S. 249, 87 L. Ed. 246, 63 S. Ct. 225 (1942), at 317 U.S. 253-256, and Gilmore & Black, *The Law of Admiralty*, §§6-49 et seq. (2d Ed.

1975). This was eventually altered by the United States Supreme Court in a series of pre-1972 cases which found there was a zone of "maritime but local" activity in which an election of remedies could be made between overlapping state and federal compensation law; this overlapping area became known as the "twilight zone." See *Davis*, Gilmore & Black, *supra*, and *Calbeck v. Traveler's Insurance Co.*, 317 U.S. 114, 8 L. Ed.2d. 363, 82 S. Ct. 1196 (1926).

Since these "twilight zone" cases may continue to be of significance in resolving LHWCA-state law conflicts, a brief discussion of this is provided. The compromise achieved in the *Davis*, *Calbeck*, and "twilight zone" line of cases was unsatisfactory, however, as it could result in a situation in which a worker, uninformed as to a choice between overlapping benefit schemes, might accept an employer's voluntary payment of less generous state law benefits,<sup>16</sup> and later be estopped from seeking more generous LHWCA benefits, due to an election of remedies in favor of state law.<sup>17</sup> In the only published federal court decision which involved a pre-1972 twilight zone employee at an Alabama location, specifically a Mobile, Alabama shipyard, the election of remedies rationale was also followed — although the court found that a "binding compromise agreement" rather than "[m]ere acceptance of . . . voluntary payments" was required to impose such an election of remedies. *Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc.*, 306 F.2d 369, 373 (5th Cir. 1962). Otherwise, prior to the development of the "twilight zone" doctrine allowing some overlap, the Supreme Court of Alabama had previously recognized total preclusion of the Alabama Act where there was a finding of maritime employment. *Baker Tow Boat Co. v. Langner*, 218 Ala. 34 (1928).

In other areas of the United States, the courts refused to apply the election of remedies rationale and permitted subsequent applications for LHWCA benefits, notwithstanding previous benefit awards under state law.<sup>18</sup> Significantly, however, the majority of these cases allowed a crediting against the LHWCA award for all sums pre-



viously paid under state compensation schemes.<sup>19</sup> In the former Fifth Circuit and in Alabama, as noted in *Holland* and *Baker Tow Boat Co.*, *supra*, although there could be an election of remedies, provided the parties had reached a "binding compromise agreement," no such election, presumably even with a binding compromise agreement, could be made if there was a finding of exclusive jurisdiction under the LHWCA.<sup>20</sup> Thus, the election of remedies doctrine was only applicable where LHWCA and state law coverage was "concurrent," i.e. in the twilight zone, or where state law *only* applied.<sup>21</sup> Otherwise, where distinctions could be found, supplemental benefit awards were freely permitted under the LHWCA giving credit, however, for previous state benefit payments.<sup>22</sup>

Later on, however, the election of remedies possibility was virtually eliminated by the Fifth Circuit in *Landry v. Carlson Mooring Service*, 643 F.2d 1080 (5th Cir. April 27, 1981), and by the Supreme Court of the United States in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 65 L. Ed.2d 757, 100 S. Ct. 2647 (1980) (hereinafter referred to as *Washington Gas*). In *Landry*, the basis for the Fifth Circuit's holding that an election of remedies was "irrelevant" was the United States Supreme Court decision in *Sun Ship*. The Fifth Circuit also determined that, absent an "indisputable Texas preclusion of recourse to LHWCA remedies . . . there is simply no basis for finding an election of remedies between mutually exclusive alternatives."<sup>23</sup> *Landry* was further based on the holding of *Sun Ship* that workers "will generally be able to make up the difference between state and federal benefit levels by seeking relief under the Longshoreman's [sic] Act, if the latter applies."<sup>24</sup>

### Changes in LHWCA-State Concurrence, if any, Affected by Sun Ship?

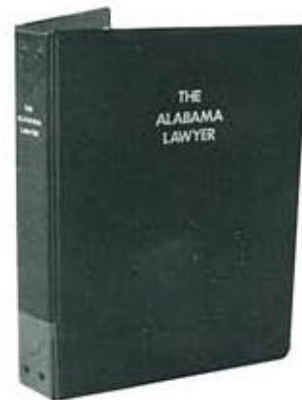
In *Sun Ship*, the Supreme Court of the United States attempted to clarify the exact implications of the removal of the previously quoted language from Section 903(a) of the LHWCA which had been responsible for the development of the so-called "twilight zone" cases. The court found that the dele-

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tion of this language reaffirmed its analysis in *Calbeck, supra*, and held as follows:

[W]orkers who commence their actions under State law will generally be able to make up the difference between State and Federal benefit levels by seeking relief under the Longshoremen's Act, if the latter applies.<sup>25</sup>

Thus, given the reaffirmation of *Calbeck*,<sup>26</sup> and this language, it would appear that, insofar as concerns state and federal "benefit levels," *Sun Ship* means that employees are free to make up the difference in benefits without regard to an election of remedies possibility, with employers receiving a credit for previous state law or LHWCA payments, against the supplemental benefits awarded under either system. The court has also indicated in *dictum*, that the hypothetical, indisputable preclusion of recourse to the LHWCA noted in *Landry*, will not be given effect and will, instead, be preempted.<sup>27</sup> Thus, it is suggested that the impact of *Sun Ship* was to eliminate the uncertainty with respect to election of remedies between the LHWCA and state compensation benefits, and thus to provide for a freedom of access between the federal and state compensation benefit schemes in the extended, post-1972 areas of coverage of the Federal Act.

Throughout *Sun Ship* and *Landry*, the courts have limited their analysis, however, to the permissible degree of overlap between concurrent or consistent federal and state schemes with respect to compensation benefits.<sup>28</sup> Significantly, nowhere do these cases purport to deal with a potential conflict between inconsistent federal and state remedies, for example: the conflict between the inconsistent provisions with respect to damage suits against co-employees and other third parties. Thus, it is believed by this writer and was recognized by the Alabama Supreme Court in *Fillinger* (See Part V) than in *Sun Ship*, the court did not consider or could not possibly have had in mind the question in Alabama and other similar states — whether there may continue to be some areas of mutually exclusive inconsistent provisions of the LHWCA and state law with respect to co-employee damages actions.

## The LHWCA-State Conflict

The conflict between state workers' compensation law and the LHWCA, where each are applicable, is derived from the provisions of §933(i) of the LHWCA which grant co-employee immunity and the provisions of §§905(a) and 905(b) of the LHWCA which allow damages actions against a limited number of third persons other than co-employees or the employer.<sup>29</sup>

With respect to co-employee immunity, the LHWCA provides the following:

The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured . . . by the negligence or wrong of any other person or persons in the same employ.

33 U.S.C. §933(i). Thus, given this co-employee immunity, the LHWCA is in direct conflict with *Grantham* and the laws of the states noted above which permit workers to sue fellow employees for damages.

This conflict which is presented would appear to be a matter for analysis under traditional preemption principles. Thus, whether §933(i) should be given preemptive effect over this inconsistent state law should depend, generally, on whether there is a serious degree of conflict between federal and state law, and whether the Congress has expressed an unmistakable intent for the Federal law to take precedence in the field or to have full preemptive effect. See generally *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 10 L.Ed.2d 248 (1963) and *Pennsylvania v. Nelson*, 350 U.S. 397, 100 L.Ed. 640 (1956). The most recent decisions to restate these principles are *Local 926 v. Jones*, 460 U.S. \_\_\_\_ , 75 L.Ed.2d 368, 103 S. Ct. \_\_\_\_ (1983), and *Ex Parte Alabama Oxygen Co., Inc.*, 17 ABR 2032 (May 13, 1983).

## The Fillinger Decision and Suggested Treatment of This Issue

As noted, the Alabama Supreme Court has been the first court to consider this issue in a published decision subsequent to *Sun Ship*,<sup>30</sup> and in the writer's view, other courts confronted with this issue should follow the interpretation of *Sun Ship* by the Alabama

Supreme Court with a similar finding of partial preemption of the inconsistent aspects of state law which conflict with the co-employee immunity provisions in §933(i) of the LHWCA.

The *Fillinger* decision relied on the prior Fifth Circuit cases construing §933(i) (See Part VI) and quoted extensively from the legislative history of §933, *Id.*, slip op. at 8. The court was also influenced by an earlier decision from the Supreme Court of South Carolina which reached the same result even though arising prior to *Sun Ship*. *Smalls v. Blackmon*, 239 S.E. 2d 640 (S.C. 1977). *Smalls* was summarized by the Alabama Court as follows: "The Supreme Court of South Carolina held the LHWCA was the 'sole and exclusive remedy' of a plaintiff suing a co-employee in a negligence action." *Fillinger*, slip op. at 7.

*Fillinger* was also based, in large measure, on a reading of *Sun Ship* and *Washington Gas* which concluded that these cases did not consider the possibility for overlapping compensation plus damages awards between two applicable compensation schemes. As the Alabama Court stated:

Neither *Sun Ship, supra*, nor *Washington Gas Light Co., supra*, however, involved the precise question before us today — whether there can be concurrent jurisdiction to award damages to an injured plaintiff.

*Fillinger*, slip op. at 6 (Emphasis in original). Thus, considering this issue for the first time, and in light of the statements in *Sun Ship* that, in the proper situation, federal law would preempt, for example, a state compensation exclusivity clause, *Id.*, slip op. at 7, the Alabama Court concluded that, as a matter of preemption, concurrent LHWCA-State jurisdiction applied only to benefits and not damages:

We are sensitive to the statement made in *Sun Ship, supra*, that a state may apply its workers' compensation scheme to land based injuries that fall within the coverage of the LHWCA, but we believe the concurrent jurisdiction for pursuit of benefits under a state's workmen's compensation scheme does not include common law suits for damages against co-employees.

*Id.*, slip op. at 9



Although not specifically relied on in *Fillinger* as a basis for the holding, this view is in line with the traditional distinction between "benefits" and "damages" in the LHWCA and in prior Fifth Circuit case law considering it. This distinction provides additional support and justification for the *Fillinger* analysis and asserted interpretation of *Sun Ship*. Accordingly, a brief discussion is provided.

In the law of workers' compensation, and in the LHWCA, there is a well recognized and limited meaning for "compensation benefits," based on the contrast recognized in the LHWCA and throughout workers' compensation law, between (A) compensation or disability "benefits," based on workers' compensation schemes, and (B) "damages," based on traditional tort liability concepts. See e.g., 2 Larson, *Workmen's Compensation Law*, §§57.10, 57.11 (1981).

As noted in *Larson, supra*, such benefits or compensation are awarded only by virtue of the unique species of liability created by statute in various workers' compensation schemes. Thus, there is a clear difference between workers' compensation "benefits" and "damages." The latter are generally awarded only as a matter of tort liability, and are not generally thought of as part of a compensation benefits scheme, *Larson, supra*. The LHWCA, as noted, has also recognized this distinction as the "compensation" benefits defined in

§§902(12) and 904 of the Federal Act, are not considered to be damages.<sup>31</sup> This distinction between compensation and damages in the LHWCA has also been recognized by the Fifth Circuit in *Johnson v. American Mutual Liability Insurance Co.*, 559 F.2d 382 (5th Cir. 1977) which stated "[t]hey differ as night differs from the day." *Id.* at 390.

The Federal Act also specifically regulates the damages that may be claimed by covered employees. In doing this, as noted in *Johnson*, the Federal Act specifies that the liability of an employer for "compensation" identified in § 904 is in the place of damages. Case law construing the LHWCA has also recognized that no such damages may be recovered against the employer "directly or indirectly." Thus, in *Perez v. Ayra National Shipping Line, Ltd.*, 468 F. Supp. 799 (S.D. N.Y. 1979), affirmed 622 F.2d 575 (2d Cir. 1980), an employer covered by the LHWCA was prevented from indemnifying third parties from damages obtained against them since this would, in effect, impose indirect liability on the employer in violation of § 905(a) of the LHWCA. Similarly, the Fifth Circuit has stated with respect to employers and their LHWCA insurance carriers, "[t]here is completely absent from the Act any indication that either entity was to be liable for both compensation and damages." *Johnson, supra*, at 390. Thus, given the precise language of the Fed-

eral Act and case law noted above, which distinguishes between damages and benefits, the choice of terminology by the United States Supreme Court which limited the holding of *Sun Ship* to a discussion of overlapping "benefits," is of significance. Consequently, it should be clear that the *Sun Ship* decision was intentionally limited to the narrow question presented, involving an overlap of benefits only between consistent provisions of Pennsylvania law and the LHWCA with respect to compensation "benefits." For that reason, it is suggested that there should be no doubt that the Alabama Supreme Court's reading of *Sun Ship* in *Fillinger* is correct that *Sun Ship* does not stand for the broad proposition that there is overall concurrent jurisdiction for all remedies between the LHWCA and State law which would include concurrent jurisdiction between inconsistent damages provisions of each of these schemes.

Further support for the *Fillinger* analysis is provided by the discussion of partial preemption in *Sun Ship* in which the United States Supreme Court specifically left open the potential for such "partial preemption" in *dictum* which noted, where LHWCA-State conflicts should arise, the least disruptive approach would be to find a partial preemption of the inconsistent aspects of state law.<sup>32</sup> Also, in a subsequent United States Supreme Court decision allowing successive compensation

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awards under the Virginia and District of Columbia Acts, *Washington Gas, supra*, an even clearer limitation on the permissible extent of successive compensation awards was made in which a plurality opinion specifically noted that inconsistent damages actions may not be allowed.<sup>33</sup> Indeed, it may be observed that this statement alone without further elaboration, is evidence of the fact that the United States Supreme Court did foresee that, in certain situations, notwithstanding the availability of concurrent benefits, federal preemption would be necessary when other provisions of federal and state compensation law were in clear conflict. The *Washington Gas* decision should also be considered as precedent under the LHWCA since the District of Columbia Compensation Act which was involved in that case, is based on and incorporates by reference the terms of the LHWCA. See D.C. Code §§501-502 (1968). The possibility of exclusivity given a conflict between inconsistent provisions is also implicitly recognized in *Landry*.<sup>34</sup> Although the Alabama Supreme Court cited *Washington Gas* in *Fillinger*, this aspect of it pertaining to damages awards was not discussed.

It should also be mentioned that, although not discussed in *Fillinger*, the suggested resolution of this conflict and the *Fillinger* result, by finding partial preemption of co-employee damage actions does not result in a wholesale elimination of all potential third-party damage remedies by Alabama longshoremen and harborworkers. Instead, as noted, §905(b) of the Federal Act would continue to allow damage actions against certain negligent third parties.

Further justification for *Fillinger*, not relied on by the Alabama Supreme Court, can be found in yet another decision, i.e. the United States Supreme Court precedent in *Jones & Laughlin Steel Corp. v. Pfeiffer*, 51 U.S.L.W. 4795 (June 15, 1983), which supports the principle of giving preemptive effect to the LHWCA in a conflict between inconsistent damages provisions of the Federal Act and state law. In the *Jones & Laughlin* decision, the conflict considered was whether to apply a state law formula, or a different LHWCA

formula, for assessing a damages award in a §905(b) third party action. Significantly, the court found that because the LHWCA involves a special class of workers protected by federal law, the paramount interests of uniformity of principles under the Federal Act required that a uniform federal standard under the LHWCA, rather than the asserted state standards, should apply.<sup>35</sup> Thus, it is suggested that ample support for the *Fillinger* analysis can be found not only in the decision itself, but also in related LHWCA case law and in traditional workers' compensation concepts.

### Previous Case Law Involving State Law Conflicts with §933(i) Co-Employee Indemnity

It should be noted that other courts considering this issue, in cases outside of Alabama, arising prior to *Sun Ship* and *Fillinger*, have not been uniform in their treatment of it. Two state courts, and three federal court decisions in the Fifth Circuit have considered it. The state court decisions are *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976), appeal dismissed *sub nom. Territo v. Poche*, 434 U.S. 803, 54 L. Ed.2d 60, 98 S. Ct. 31 (1977); *Umbehagan v. Equitable Equipment Co.*, 329 So. 2d 245 (La. App. 1976); and *Johnson v. Texas Employers Insurance Assoc.*, 558 S.W. 2d 47 (Tex. 1977). The Fifth Circuit decisions are *Hughes v. Chitty*, 415 F.2d 1150 (5th Cir. 1969); *Keller v. Dravo Corp.*, 441 F. 2d 1239 (5th Cir. 1971), cert. den. 404 U.S. 1017, 30 L. Ed. 2d 665, 92 S. Ct. 679 (1972); and *Nations v. Morris*, 331 F. Supp. 771 (E.D. La. 1971), affirmed 483 F. 2d 577 (5th Cir. 1973), cert. den. 414 U.S. 1071, 38 L. Ed. 2d 477, 94 S. Ct. 584 (1973). There was also a discussion of the preclusion of a co-employee damages suit against a covered employer's LHWCA insurance carrier in *Johnson, supra*.

Each of the prior state court decisions declined to find LHWCA preemption of state co-employee damages actions, but the federal court cases reached an opposite result finding, for example, that §933(i) simply abolished inconsistent state co-employee damages

actions, *Keller, supra*, at 1242, and that, even if state law purported to allow a co-employee damages suit, if the defendant co-employees were also covered by the LHWCA, they must receive the benefits of their federal rights to co-employee immunity in §933(i). *Chitty, supra*, at 1152 and *Nations, supra*, at 586.

As noted, the prior, contrary state case law, arose in Louisiana and Texas. The Louisiana Supreme Court in *Poche* found that the LHWCA remedies and state law remedies were intended to be concurrent and, thus, based on a free election of remedies between the two, state law benefits as well as damages could be added to the compensation benefits received under the LHWCA, *Poche, supra*, at 1221.

This analysis in *Poche*, however, was recognized by the Alabama court in *Fillinger* to be faulty as it was premised on the "election of remedies" doctrine which had since been virtually eliminated by the subsequent decisions in *Sun Ship*, *Washington Gas* and *Landry*. See *Fillinger*, slip op. at 6. Although not discussed in *Fillinger*, *Poche* is further questionable because it allowed two wholly inconsistent results even under an election of remedies rationale. For example, the *Poche* court held that one of the claimants, Mr. Adams, could be proven (on remand) to have elected the LHWCA system to the exclusion of any state remedies — presumably even those which would not be supplemental under *Sun Ship*. However, *Poche* also held that the other claimants, a widow and children of Mr. Poche, had made an election of remedies in favor of state law compensation benefits (and damages) to the exclusion of the LHWCA.

Significantly, such a voluntary waiver of LHWCA benefits by the *Poche* family is expressly disallowed by §915(b) of the Federal Act which provides as follows:

No agreement by an employee to waive his right to compensation under this Act shall be valid.

33 U.S.C. §915(b). There was no discussion, however, by the Louisiana State Court in *Poche* of the effect of §915(b), which was clearly in conflict with the court's decision.

The Texas Supreme Court's consid-



eration of the §933(i) issue is also subject to criticism. Similar to *Poche*, the Texas court in *Johnson*, found that in the LHWCA, Congress had not intended to preclude the operation of state damages law. As noted in the dissent, however, such a reading of the LHWCA requires one to ignore the clear statement of Congressional intent in the LHWCA that "liability of an employer prescribed in Section 904 of this title shall be *exclusive* and in place of all other liability of such employer to the employee..." *Johnson, supra*, at 54 quoting 33 U.S.C. §905 (Emphasis in original) (Keith, J., dissenting). As the dissent also observed, "[i]n order to achieve this result, it is necessary for plaintiff to excise from the Act the provisions of §905..." *Id.*

Thus, it is submitted that these state court cases outside of Alabama have ignored the conflict between the LHWCA co-employee immunity in §933(i) and inconsistent provisions of state law. These cases would also appear to ignore the clear expressions of an intended preemptive effect in *Perez, supra*, and §905(b), with respect to attempts to impose direct or indirect liability for damages on an employer, in addition to the compensation for which he is liable under §904 of the Act. The state law decisions prior to *Fillinger* also chose to ignore the precedent from the Fifth Circuit, precisely on point, which was recognized and applied in *Fillinger*, which found that the inconsistent state damages law must give way to the co-employee immunity in §933(i). It should therefore be clear that the better view of the impact of §933(i) on state law, where each are applicable, is the one most recently expressed by the Alabama Supreme Court in *Fillinger* which, as noted, recognized the "serious conflict" between federal and state law which necessitated the court's holding:

We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his co-employee because he was land-based maritime worker, and a maritime worker injured on a navigable waterway would be precluded from maintaining such a suit...

*Id.*, slip op. at 9. In any event, regardless of *Fillinger*, because this question

with respect to the coverage and preemptive effect of the LHWCA involves an interpretation of federal statutes, it would appear that the federal court decisions on point should carry more persuasive weight as authority.<sup>36</sup>

### Conclusion

Perhaps all of the cases with a result differing from that of the Alabama Supreme Court in *Fillinger* can be distinguished by the fact that they arose prior to the United States Supreme Court decisions of *Sun Ship*, *Jones & Laughlin* and *Washington Gas* which provide a more recent evaluation of the post-1972 degree of LHWCA-State concurrence and the uniformity required by the LHWCA. Given the limited degree of concurrence allowed in *Sun Ship*, i.e. concurrent jurisdiction with respect to the ability to make up the difference between benefit levels only, and given the even more recent requirement of preeminence of the LHWCA over state law with respect to the formula for computing an award of damages against third parties, and the United States Supreme Court's further

statements that successive damages claims may not be allowed, it is suggested that when other courts consider this issue, a partial preemption of the inconsistent state law, giving effect to co-employee immunity of longshoremen, should be allowed just as was recently done by the Alabama Supreme Court.

To decide otherwise would result in a new twilight zone of maritime but local employers who would be exposed to a series of multiple and inconsistent liability involving damages and benefits for which it would be difficult to assess the proper award of credit, if any, and which would, in the writer's opinion, contravene or upset the series of trade-offs or compromises in the federal scheme. In sum, the unique provision of Alabama common law and elsewhere allowing one employee to sue another would appear to be precisely the type of legal balkanization and local variation that Congress intended to preclude by imposing a uniform scheme of compensation for the special class of workers covered by the LHWCA. □

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## FOOTNOTES

<sup>1</sup>For a thorough discussion of *Grantham*, and subsequent cases construing it. See e.g., Comment, *Election and Co-Employee Immunity under Alabama Workmen's Compensation Act*, 31 Ala. L. Rev. 2 (1979), and Comments, *Co-Employee and Workmen's Compensation Carrier Suits-Common Law Assault on Workmen's Compensation Exclusivity in Alabama*, 11 Cum. L. Rev. 639 (1980).

<sup>2</sup>33 U.S.C. §§901 et seq. (hereinafter referred to as "the Federal Act" or "the LHWCA.") See also Note 6, *infra*.

<sup>3</sup>Ala. Code §§25-5-1, (1975) et seq. (hereinafter referred to as "the Alabama Act.") See also §§25-5-1(6) and 25-5-50.

<sup>4</sup>The fact that the LHWCA provides more liberal compensation benefits than most State compensation systems is noted in *Sun Ship, supra*, at 67 L. Ed. 2d 465 n. 5, and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L. Ed.2d 320, 97 S. Ct. 2348 (1977), at 53 L. Ed.2d 332, in which Congressional recognition of significantly lower State rates of compensation is discussed.

<sup>5</sup>According to the Larson treatise, at least nine other States, and the provisions of the Federal Employees' Compensation Act, allow similar liability of co-employees; these States are: Arizona, Arkansas, Maryland, Minnesota, Missouri, Nebraska, Rhode Island, South Dakota and Vermont. 2A Larson, *Workmen's Compensation Law*, §72.11 n. 13.1 (1982). It also appears that the law of Texas and Louisiana allows a similar result. See discussion of this in Part VI, *infra*.

<sup>6</sup>Covered employees under the Federal Act are defined at 33 U.S.C. §902(3).

<sup>7</sup>The maritime status requirement is derived from the language at 33 U.S.C. §902(3) which specifies coverage for persons "engaged in maritime employment." See also 33 U.S.C. §902(4).

<sup>8</sup>The maritime situs requirement is derived from the language at 33 U.S.C. §902(4) which lists several representative maritime locations, for example: "maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." For a further discussion of the situs and status requirements. See *Longshoremen, Longshoring Operations and Marine Employment, a Dual Test of Status after Northeast Terminal v. Caputo*, 64 Va. L. Rev. 99 (1978), cited with approval by the Fifth Circuit in *Holcomb v. Kirk*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981).

<sup>9</sup>The United States Supreme Court has recognized that the list of illustrations of maritime employment in the LHWCA "does not speak to all situations." *Caputo, supra*, at 53 L. Ed.2d 335 and 335 n. 28.

<sup>10</sup>*Holcomb, supra*. In that case the Fifth Circuit noted, however, that not all security guards would necessarily be covered. See also the thorough analysis of security guard cases from other circuits noted therein.

<sup>11</sup>*Caputo, supra*, and *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (10-80) (extension of coverage to container mechanic).

<sup>12</sup>*Alford v. U.S. Steel Corp.*, 7 BRBS 484

(1978), reversed 642 F.2d 807 (5th Cir. 1981), modified in part on rehearing, 655 F.2d 86 (5th Cir. 1981) (further extension of coverage), cert. denied 455 U.S. 927, 71 L. Ed.2d 472, 102 S. Ct. 1292 (1982).

<sup>13</sup>A good discussion of the extent of coverage of the LHWCA can be found in a freely available publication from the U.S. Dept. of Labor, Office of Workers' Compensation Programs, entitled *Longshore Desk Book*.

<sup>14</sup>33 U.S.C. §902(4) (Emphasis supplied). The quoted language was added in a series of amendments to the Act in 1972 and represented an extensive inland extension. For a discussion of the full impact of the 1972 amendments and inland extension contained in it, see Gorman, *The Longshoremen's and Harbor Workers' Compensation Act - After the 1972 Amendments*, 6 Journal of Maritime Law & Commerce 1 (1974).

<sup>15</sup>See Note 12, *supra*.

<sup>16</sup>The Supreme Court was critical of such a result and, in 1980, found that the removal of the language from §903(a) quoted above, meant that "workers who commence their actions under state law will generally be able to make up the difference between state and federal benefit levels by seeking relief under the Longshoremen's Act, if the latter applies." *Sun Ship, supra*, at 65 L. Ed.2d 465 (Emphasis supplied).

<sup>17</sup>This was the result in *Arvidson v. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972) and *Windrem v. Bethlehem Steel Corp.*, 293 F. Supp. 1 (D.N.J. 1968). See also *Murphy v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authority*, 545 F.2d 235 (1st Cir. 1976).

<sup>18</sup>See, e.g., *Newport News Shipbuilding & Drydock v. O'Hearne*, 192 F.2d 968 (4th Cir. 1951); *Harney v. Moore Building Corp.*, 359 F.2d 649 (2nd Cir. 1966); *Peter v. Arrien*, 463 F.2d 252 (3rd Cir. 1972); *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 260 (W.D. Wash. 1966); and *Beasley v. O'Hearne*, 250 F. Supp. 49 (S.D. W. Va. 1966).

<sup>19</sup>*Id.*, But See *U.S. Fidelity & Guaranty Co. v. Lawson*, 15 F. Supp. 116 (S.D. Ga. 1936). Prior State proceeding was described as a "nullity" and "absolutely void" presumably resulting in a denial of credit for such award against the later LHWCA benefits. *Id.* at 120-121.

<sup>20</sup>*Baker Tow Boat Co., supra*; *Noah v. Liberty Mutual Insurance Co.*, 267 F.2d 219 (5th Cir. 1959); and *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973). See also *Globe Indemnity Co. v. Calbeck*, 230 F. Supp. 9 (S.D. Tex. 1959) and *Gulf Oil Corp. v. O'Keefe*, 242 F. Supp. 881 (E.D.S.C. 1965).

<sup>21</sup>See *Globe Indemnity Co.* and additional authorities at Note 20, *supra*.

<sup>22</sup>See Notes 18, 19, *supra*.

<sup>23</sup>*Landry, supra*, at 1087-1088.

<sup>24</sup>*Id.*, relying on *Sun Ship, supra*, at 477 U.S. 723 (Emphasis in original).

<sup>25</sup>*Sun Ship, supra*, at 65 L. Ed.2d 465.

<sup>26</sup>The Court also observed "Congress may simply have endeavored to reaffirm the correctness of the Calbeck result by removing possibly contradictory language." *Id.* at 464 n. 2.

<sup>27</sup>Referring to such a State law provision, the Court noted "if federal preclusion ever need be implied to cope with this remote contingency, a less disruptive approach would be to

pre-empt the entire state compensation exclusivity clause, rather than to pre-empt the entire state compensation statute as appellant suggests." *Sun Ship, supra*, at 65 L. Ed.2d 465 n. 6.

<sup>28</sup>The language in *Sun Ship, supra*, is specifically limited to compensation "benefits." Reference is made to the need to "upgrade the benefits," *Id.* at 465; the ability "to make up the difference between . . . benefits," *Id.*; the mishap that could result in "no benefits," *Id.* at n. 6; and the "disparity between . . . benefits," *Id.* at 466.

<sup>29</sup>It should be noted, however, that there is a limited exception which allows §904 compensation and a §905(b) damages action against an employer covered by the LHWCA in the limited situation where the employer-stevedore is also the owner of the vessel on which the claimant-longshoreman was injured. See *Cavalier v. T. Smith and Son, Inc.*, 668 F.2d. 861 (5th Cir. 1982).

<sup>30</sup>The writer is aware, however, of several unpublished Federal Court decisions in the Southern District of Alabama in which the same result as in *Fillinger* occurred.

<sup>31</sup>33 U.S.C. §902(12) provides the following: " 'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein." The Act further clarifies that the "compensation" noted in §§902(12), 904 "shall be . . . in place of all other liability" to various persons "otherwise" entitled to recover damages." 33 U.S.C. §905(a) (Emphasis supplied).

<sup>32</sup>The Court stated: "we observe that if federal preclusion ever need be implied . . . a less disruptive approach would be to pre-empt the state compensation exclusivity clause, rather than to pre-empt the entire state compensation statute . . ." *Sun Ship, supra*, at 465 n. 6. This language in *Sun Ship* on partial pre-emption which dealt with the specific topic of State exclusivity clauses would, nevertheless, appear to be applicable to damages actions under State law which are inconsistent with co-employee immunity in §933(i), or perhaps, the limited degree of third-party actions allowed in §905(b). Thus, these other inconsistent provisions should be subject to partial pre-emption as well.

<sup>33</sup>*Washington Gas, supra*, at 65 L. Ed.2d 777 where concurring Justices were critical of the possibility that "[t]he plurality's analysis would seem to permit the plaintiff to obtain a subsequent judgment in a second forum for damages exceeding the first forum's liability limit."

<sup>34</sup>See discussion of "mutually exclusive alternatives" in *Landry, supra*, at 1088.

<sup>35</sup>"[T]he reasons which may support the adoption of the rule for a State's entire judicial system . . . are not necessarily applicable to the special class of workers covered by this Act." *Jones & Laughlin, supra*, at 51 U.S.L.W. 4802.

<sup>36</sup>In view of the fact that the LHWCA is Federal law, these Federal Court cases should be more persuasive. See generally Restatement (Second) of Conflict of Laws §2 (1971) which notes that authoritative decisions of Federal Courts in areas of national law, in general, should be recognized by States by operation of the Supremacy Clause. Article VI, U.S. Constitution.





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TA3-4

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# Bar Briefs

## Bankruptcy section being formed

The Alabama State Bar Committee on Bankruptcy Law has determined that there is a need for the formation of a new section of the state bar to be named the Bankruptcy and Commercial Law Section. The committee is soliciting your membership.

The organizational meeting of the section, and its first election of officers, will occur at the Alabama State Bar Annual Meeting to be held in Mobile, July 12-14. The committee has organized an educational program, with nationally recognized speakers, to be presented at the meeting. The new section will participate in educational matters, legislative matters, judicial matters, and act as a voice of the state bar commercial and bankruptcy lawyers.

The bankruptcy committee invites you to join the section and asks that you send the initial dues in the amount of \$15. The payment of dues will assist the bankruptcy committee in providing high caliber quality programs at the annual meeting in Mobile.

Please reply to: Robert P. Reynolds, P.O. Box 2427, Tuscaloosa, Alabama 35403. Phone: 345-6789.

## District court judges appointed

In January, John H. Alsbrooks, Jr., and Orsen L. "Pete" Johnson, were appointed district judges for Jefferson County.

Alsbrooks is a graduate of the University of Alabama and received his law degree from Cum-

berland School of Law in 1974. Prior to his appointment he was associated with the Birmingham law firm of Levine & Levine. He replaces Judge Arnold Drennen, on the district civil bench, who retired December 31, 1983.

Johnson is a graduate of the University of Alabama and received his law degree from Cumberland School of Law in 1974. Prior to his appointment he was in the private practice of law in Birmingham. He takes the place of Judge Robert H. Gwin, on the district criminal bench, who also retired on December 31, 1983.

## Eight suspended for noncompliance

On January 17, 1984, the Supreme Court of Alabama suspended eight Alabama attorneys who failed to comply with the mandatory continuing legal education requirement adopted by the court on May 4, 1981. Those suspended did not report credits for the 1982 year.

Noncompliers were contacted several times by the MCLE Commission and the Disciplinary Commission of the bar who informed them of the consequences of not earning or reporting hours. Each delinquent was given the opportunity to show cause for non-compliance or obtain the proper number of CLE credits.

Those suspended, at any time within three months of the suspension, may file an affidavit with the Disciplinary Commission indicating compliance. If satisfactory, the commission will enter an order reinstating the attorney.

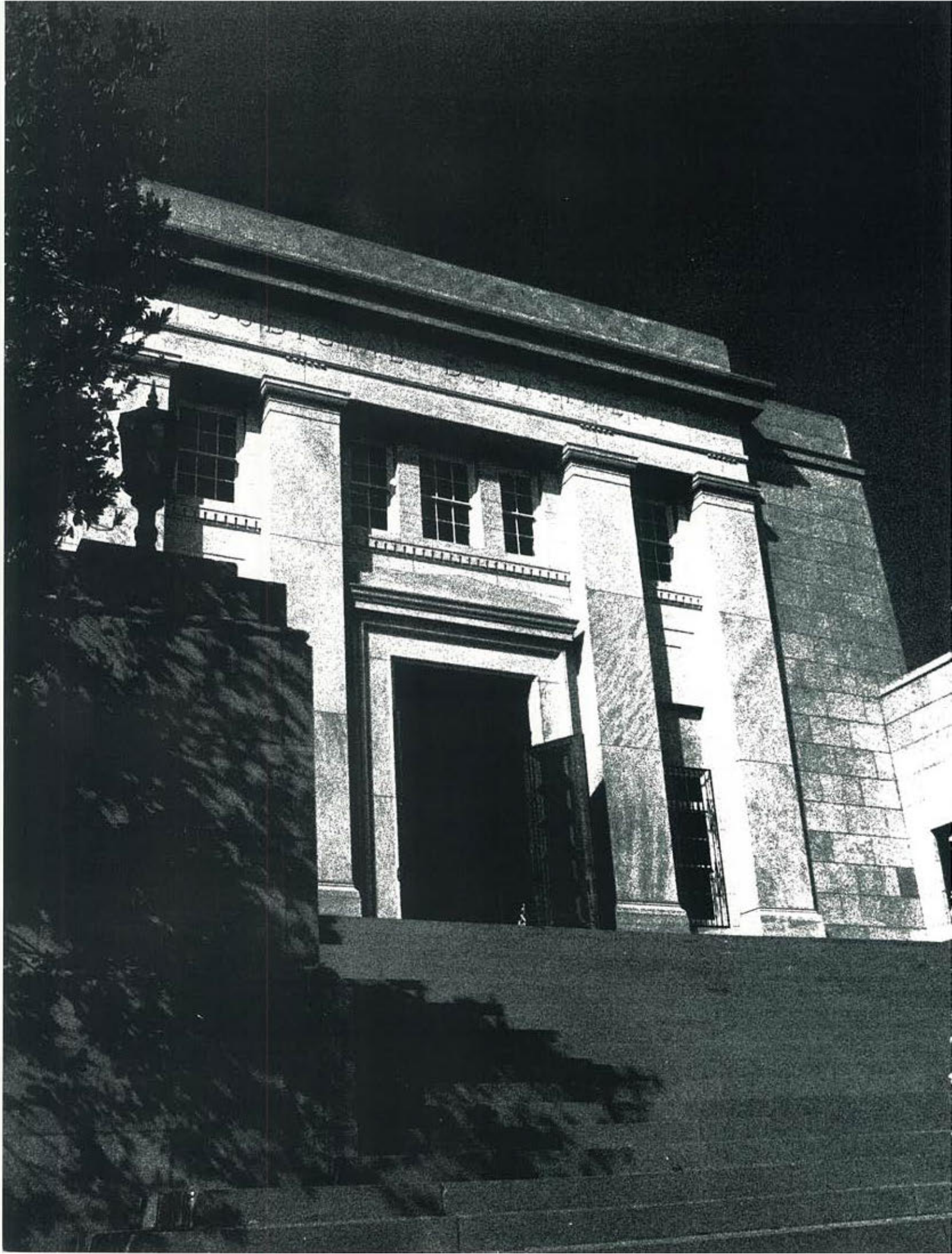
## Putting clients in touch

Do you want to make more money? For the small sum of \$25 you can join the Alabama State Bar Lawyer Referral Service, which refers paying clients to you. The service is advertised in telephone books across the state and a toll-free line is available for prospective clients to call in free of charge. Presently less than 250 attorneys have signed up for the service statewide and there are several counties where no attorney is on the referral list. For more information write or call Gale Skinner, Lawyer Referral Secretary, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101. Phone: 269-1515 or 1-800-392-5660.

## Additional attorneys admitted

The following new attorneys were admitted to the Alabama bar in December. Their names were not received in time to be included with other Fall 1983 admittees listed in the January 1984 issue of *The Alabama Lawyer*. They are William H. Caughran, Jr., Des Moines, Iowa; Coyne Drew Demaray, Birmingham; Donald Eugene Given, Tuscaloosa; Timothy Charles Halstrom, Montgomery; Gregory Hascal Hawley, Birmingham; Peter Scott Mackey, Mobile; F. Gerald Maples, Pascagoula, Mississippi; James William Martin, Jr., Birmingham; Roderick K. Nelson, Birmingham; Julia Angeline Spain, Jasper; Sandra Kathryn Tullis, Birmingham; and Michael Owen Vann, Birmingham.







# Recent Decisions

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

## Recent Decisions of the Alabama Court of Criminal Appeals

### Probation revocation requires the trial judge to set out in writing the reasons for revocation

*King v. State*, 1st Div. 608 (January 10, 1984). The defendant was convicted of various offenses and placed on probation. He was subsequently charged with a new offense.

The trial judge, after a hearing, issued an order revoking the defendant's probation. On appeal, the defendant raised the issue that his probation revocation must be reversed because the trial judge did not make a written statement as to the evidence relied upon and the reasons for revoking probation. Judge Taylor, writing for a unanimous Court of Criminal Appeals, reversed and remanded the case to the trial court. Judge Taylor found that:

"A search of the record reveals that the trial judge did, in fact, fail to prepare a written statement of his findings. In revoking probation, the trial judge *must* make a written statement as to his findings." *Taylor v. State*, 405 So.2d 55 (Ala. Crim. App. 1981); *Borst v. State*, 377 So.2d 3 (Ala. Crim. App. 1979). (Emphasis the Court's.)

### Close but no cigar!

*Oliver v. State*, 8th Div. 875 (January 10, 1984). The defendant was convicted of buying, receiving or concealing stolen property. The victim testified that a Sears Kenmore microwave oven was taken from her home on March 1, 1982,

and was returned to her husband by a police officer some time later. The state's evidence tended to show that the defendant was involved in a sale of a microwave oven on approximately the same date. There was *no* evidence presented at trial that the microwave oven sold by Oliver was the same microwave oven taken from Mrs. McBride.

A unanimous Court of Criminal Appeals reversed Oliver's conviction and found that the state utterly failed to make out a case of buying, receiving or concealing stolen property. In reaching its decision the court relied upon *Parker v. State*, 386 So.2d 495, 596 (Ala. Crim. App. 1980). In *Parker*, supra, the Court of Criminal Appeals said:

"There *must be some evidence* of common characteristics other than color, make, and model . . . in order to establish identity . . . The identity of the property received or concealed with that alleged in the indictment to be stolen must be established beyond a reasonable doubt to support a conviction . . ."

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

### Section 1983 claim for compensatory damages . . . does not survive

*Carter v. City of Birmingham*, 18 ABR 669 (December 16, 1983). The decedent was shot and killed by a Birmingham police officer, and her ad-

ministrators filed a Section 1983 action for compensatory and punitive damages and a wrongful death action against the City and the police officer. The 1983 action was dismissed on motion of the defendants and the plaintiff appealed.

In a case of first impression in the Alabama State courts, the Supreme Court adopted the reasoning and holding of the District Court in *Brown v. Morgan County*, 518 F.Supp. 661 (N.D. Ala. 1981), and affirmed the trial court's grant of summary judgment as to the plaintiff's 1983 claim for compensatory damages for personal injury and pain and suffering of the deceased prior to her death. The Supreme Court noted that where the injured party dies as a result of the wrongful act, Alabama law only permits a wrongful death action and only punitive damages are recoverable. Further, because the City was sued and because the United States Supreme Court has recently held that cities are immune from punitive damages under Section 1983, the Supreme Court held that summary judgment as to the City on the plaintiff's 1983 claim was proper both as to the compensatory as well as the punitive damages claimed.

### Domestic relations . . . disabled child due support beyond minority

*Ex parte Brewington (Blair v. Brewington)*, 18 ABR 683 (December 16, 1983). The Supreme Court granted certiorari and seized the opportunity to overrule *Reynolds v. Reynolds*, 149 So.2d 770 (Ala. 1963), which had held that Section 30-3-3, *Ala. Code* 1975, applied only to minor children, and therefore that a trial court was without jurisdiction to order a parent to support an *adult* child. The trial court in this case did not follow *Reynolds*, and ordered the father of a permanently disabled child to support the child past the age of minority.

The Supreme Court recognized that the majority trend in the United States is to recognize an exception to the common law rule that a non-custodial parent has no obligation to support his adult child. The exception arises when the adult child is so mentally and/or



physically disabled as to be unable to support himself. The Court recognized that while Section 30-3-1, *Ala. Code* 1975, does not express this limitation, the legislature intended that support be provided for *dependent* children regardless of whether dependency results from minority (age) or from physical and/or mental disabilities which render the child incapable of self-support beyond minority.

### **Civil procedure . . . motion to reconsider post-trial motion does not suspend time for appeal**

*Sunshine Homes, Inc. v. Newton*, 18 ABR 658 (December 22, 1983). In this case, the court was asked to consider whether the plaintiff's motion for reconsideration of the trial court's order *granting* the defendant's Rule 59 motion for a new trial tolled the time for taking an appeal. In a case of first impression, the Supreme Court held that it did not. The court reasoned that a motion to reconsider a ruling on a Rule 59 motion is not itself a post-judgment motion contemplated by the Alabama Rules of Civil Procedure. While a Rule 59 motion tolls the time for taking an appeal, a subsequent request, by whatever label, seeking the trial court's reconsideration of its ruling on the former Rule 59 motion, does not operate to further toll the time for the appeal.

### **Section 1983 action . . . plaintiff due attorneys fees under section 1988**

*Davis d/b/a Damar's Tea House v. Everett*, 18 ABR 585 (December 22, 1983). The plaintiff was denied an alcoholic beverage license and sued the Mayor and the Commissioners in their official capacities alleging equal protection and due process violations under the Alabama and United States Constitutions. The trial court found that the defendants had violated the Alabama Constitution and ordered them to issue a license to the plaintiff. The trial court denied the plaintiff's claim for damages and attorneys fees, and the plaintiff appealed this ruling. The

initial issue was whether the plaintiff was a "prevailing party" under Section 1988 in view of the fact that relief was granted on the state constitutional claim rather than the federal claim. The Supreme Court held that the plaintiff was entitled to attorneys fees since the federal and state claims "arise from a common nucleus of operative facts" and since the relief could have just as easily been based upon federal claim.

The court was also asked to determine whether the trial court properly applied *Ott v. Everett*, 420 So.2d 258 (Ala. 1982), which held that neither the mayor nor the city commissioners are liable in damages on account of their exercise of their quasi-judicial powers. The Supreme Court held that *Ott* was not properly applied because *Ott* provided for a qualified immunity for *damages*, and an award of attorneys fees is an award of *costs*, not damages.

### **Torts . . . municipality immune for unlawful imprisonment**

*Boyette v. City of Mobile*, 18 ABR 375 (December 2, 1983). In this case, the Supreme Court *refused* to expand the scope of Section 11-47-190, *Ala. Code* 1975, to include actions against a municipality for unlawful imprisonment. In two recent decisions, the court refused to extend the scope of the statute to include actions against a municipality for unlawful arrest and malicious prosecution. The Supreme Court recognized that although its recent decisions have not addressed this specific issue, an action for unlawful imprisonment is premised upon the existence of an illegal arrest, and therefore, municipal immunity from unlawful arrest actions necessarily implies municipal immunity from unlawful imprisonment.

### **Torts . . . trade secrets doctrine recognized**

*Drill Parts and Service Company, Inc. v. Joy Manufacturing Co.*, 17 ABR 3780 (September 23, 1983). In a case of first impression, the Supreme Court

recognized the Trade Secrets Doctrine in Alabama, *Restatement of Torts*, Section 757 (1939). The *Restatement* provides that one who discloses or uses another's trade secret without privilege is liable if (a) he discovered the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence, or (c) he learned the secret from a third person with notice that it was a secret and that the third person's disclosure of it by improper means or that the third person's disclosure of it was a breach of his duty to the owner, or (d) he learned the secret with notice that it was a secret and that its disclosure was made to him by mistake.

Comments to the *Restatement* note that the exact definition of a trade secret is not possible. Furthermore, a determination of what constitutes trade secret is a question of fact for the court. A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

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

### **Formal arraignment . . . can be waived sometimes**

*Watts v. State*, 18 ABR 514 (December 9, 1983). The defendant was originally indicted and arraigned under a two count indictment for trafficking in marijuana and unlawful possession of

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methoqualone. In a pretrial conference on the date of trial, the original indictment was nol-prossed with defendant's consent. A substituted indictment was served on the defendant, apparently in open court, but no formal arraignment occurred and no plea was entered.

Thereafter, both sides announced "ready" and the case proceeded to trial. The jury returned a guilty verdict for the offense of trafficking in marijuana.

The Supreme Court of Alabama was called upon to decide whether arraignment and plea can be waived by a defendant by failing to object until after a jury returns a verdict. A unanimous Supreme Court of Alabama ruled that arraignment and plea could be waived under the circumstances presented.

Justice Faulkner in reviewing nearly a century and a half of precedent found only one case which squarely addressed the issue. *Fernandez and White v. State*, 7 Ala. 511 (1845).

Justice Faulkner's opinion cites with approval the following language quoted from *Fernandez and White*:

It is not indispensable to the regularity of the conviction, that the accused should be formally arraigned. If he is advised of the offense with which he is charged, and is prepared, without hearing the indictment read, to answer it, he may plead. Here, it seems, that the prisoners were in Court, and when the solicitor announced the State ready to proceed with the case, their counsel answered, that they were also ready for trial. This amounts to a recognition, that they were the persons charged in the indictment in the case called, and were prepared to defend themselves against it. ***This was equivalent to, an in law, a sufficient substitute for an arraignment in due form.*** (Emphasis ours.)

Justice Faulkner further reasoned that the holding in *Fernandez and White* also met the due process test enunciated by the Supreme Court in *Garland v. Washington*, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772 (1914). The Supreme Court in *Garland* stated that:

"Due process of law . . . does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had a sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution."

## Recent Decisions of the Supreme Court of the United States

### Arson investigation not exempted from the warrant requirement

*Michigan v. Clifford*, No. 82-357 (January 11, 1984). In a plurality opinion, the Supreme Court concluded that where reasonable expectations of privacy remain in a fire-damaged house, administrative searches into the cause and origin of a fire are subject to the warrant requirement of the Fourth Amendment absent consent or exigent circumstances.

The defendant's private residence was damaged by an early morning fire while they were out of town. Firefighters extinguished the blaze at 7:00 a.m., at which time all fire officials and police left the premises. Five hours later, a team of arson investigators arrived at the residence for the first time to investigate the *cause of the blaze*.

The arson investigators entered the residence and conducted an extensive search without obtaining either consent or an administrative warrant. Their search of the basement disclosed two Coleman fuel cans and a crock pot attached to an electrical timer. The arson squad determined that the fire had been caused by the crock pot and timer and had been set deliberately. After seizing the evidence found in the basement, the investigators extended their search to the upper portion of the house where they found additional evidence of arson.

The defendants were charged with arson and moved to suppress all the evidence seized in the warrantless search on the grounds that it was obtained in violation of their rights under the Fourth and Fourteenth Amendments. The Michigan trial court denied the motion to suppress on the grounds that exigent circumstances justified the search. On appeal, the Michigan Court of Appeals found that no exigent circumstances existed and reversed.

Justice Powell held that where reasonable expectations of privacy remained in a fire-damaged premises, administrative searches into the cause and origin of a fire are subject to the warrant requirement of the Fourth Amendment absent consent or exigent circumstances. The plurality opinion reasoned that there were especially strong "expectations of privacy" in a private residence and that the defendants retained a significant privacy interest in their fire-damaged home by reason of their request to the insurance agent to secure the house.

The Supreme Court in suppressing the fruits of the warrantless search of the basement and upper areas of the defendants' home further refined the distinction between administrative and criminal searches. The Court held:

"Where a warrant is necessary to search fire-damaged premises, an administrative warrant suffices if the *primary object of the search is to determine the cause and origin of the fire*, but a criminal search warrant, obtained upon a showing of probable cause, is required if the primary object of the search is to gather evidence of criminal activity." □



*John M. Milling, Jr., a member of the Montgomery law firm of Hill, Hill, Carter Franco, Cole & Black, received his B.S. degree from Spring Hill College and J.D. from the University of Alabama. As a co-author of significant recent decisions, he covers the civil portion.*



*David B. Byrne, Jr., a member of the Montgomery law firm of Robison & Belser, received his B.S. and LL.B. degrees from the University of Alabama. He covers the criminal law portion of significant recent decisions.*



# cle opportunities



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### 28 wednesday

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## 18 friday

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## 24-26

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## 25 friday

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## 31 thursday

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For Information: (205) 348-6230





by Mary Lyn Pike  
Staff Director, MCLE Commission

## MCLE now in thirteen states

Georgia has become the thirteenth state to adopt minimum continuing education requirements for the continued competence of its bar. Beginning in January 1984, Georgia's 13,000 lawyers will earn at least twelve hours of approved continuing education per lawyer per year. Six hours must be devoted to the study of professional responsibility matters every three years. Unlike Alabama, Georgia's attorneys will pay a one time start up fee of ten dollars for the administration of the program. Those lawyers wishing to obtain accreditation of programs conducted outside Georgia will be required to pay an accreditation fee of \$1.25 per hour accredited. In-state providers of CLE will pay a fee of \$1.25 per hour for each Georgia lawyer attending a program.

Minnesota, Iowa, Wisconsin, and Washington adopted mandatory CLE requirements in 1975. North Dakota and Wyoming became the fifth and sixth states to adopt the concept in 1977. Colorado (1978), Idaho (1979), and South Carolina (1979) followed suit and Alabama became the tenth state in 1981. Since then, Nevada and Montana have joined the ranks of the MCLE states. The bars of Kentucky, Mississippi, Arkansas, Tennessee, West Virginia, Kansas, Nebraska, Oklahoma, Oregon, Pennsylvania, and Vermont are considering adopting the concept. Florida, Texas and California have specialization/designation programs with continuing education components.

## New CLE regulations adopted

At its meeting on December 2, 1983, the Board of Bar Commissioners adopted two new regulations for mandatory continuing legal education in Alabama, formalizing policies recommended by the MCLE Commission:

**Regulation 4.1.12** Activities dealing with law office automation and management may be approved for one-half credit per hour of instruction. Activities designed to sell services or equipment or to enhance law office profits will not be approved.

The adoption of this regulation follows two years of evaluating such courses. It is believed that the new policy will allow for the overlap between studying to improve client services and to enhance law office profits. The effects of the regulation and response of the Bar will be monitored.

**Regulation 5.2** The Commission will permit amendments of reports of compliance through the last day of February of the year immediately succeeding the reporting year. Requests for amendments must be written and must specify the titles, sponsors, dates, and locations of the additions, as well as the credits earned. All credits must, however, be earned by December 31 of the reporting year. (Former Regulation 5.2 is now Regulation 5.3)

*(Continued on page 112)*

## Approved Organizations for 1984

**Regulation 4.2** For 1984, continuing legal education activities sponsored by the following organizations are presumptively approved for credit, provided that the standards for course approval (Regulations 4.1.1. through 4.1.12) are met:

- |  |   |
|--|---|
| Accredited law schools (ABA, AALS)   | Huntsville-Madison County Bar Association                           |
| Administrative Office of Courts — The Judicial College   | International Association of Insurance Counsel                      |
| Alabama Consortium of Legal Services Programs  | International Society of Barristers                                 |
| Alabama Criminal Defense Lawyers Association   | Legal sections, agency programs — U.S. and state governments        |
| Alabama Defense Lawyers Association  | Library of Congress — Congressional Research Service                |
| Alabama District Attorneys Association   | Maritime Law Association  |
| Alabama Institute for Continuing Legal Education   | Mobile County Bar Association                                       |
| Alabama Lawyers Association  | Montgomery County Bar Association                                   |
| Alabama State Bar and Bar Sections   | Montgomery Trial Lawyers Association                                |
| Alabama Trial Lawyers Association  | Motor Carrier Lawyers Association                                   |
| American Academy of Judicial Education   | National Association of Bond Lawyers                                |
| American Bar and Bar Sections  | National Bar Association  |
| American College of Trial Lawyers  | National College of District Attorneys                              |
| American Law Institute-American Bar Association Committee on Continuing Professional Education         | National College of Juvenile Justice                                |
| Association of Trial Lawyers of America  | National District Attorneys Association                             |
| Bar associations of the sister states, the District of Columbia, Puerto Rico and the Trust Territories | National Health Lawyers Association                                 |
| Birmingham Bar Association   | National Institute for Trial Advocacy                               |
| Commercial Law League of America   | National Judicial College   |
| Cumberland Institute for Continuing Legal Education  | National Organization of Social Security Claimants' Representatives |
| Defense Research Institute   | National Rural Electric Cooperative Association Legal Division      |
| Federal Bar Association  | Patent Resources Group, Inc.  |
| Federal Publications, Inc.   | Practising Law Institute  |
|  | Rocky Mountain Mineral Law Foundation                               |
|  | Southwestern Legal Foundation                                       |
|  | Trial Lawyers Association of Madison County                         |
|  | Tuscaloosa County Bar Association                                   |
|  | Tuscaloosa Trial Lawyers Association                                |





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# Bar Committees Seeking Answers

by Mary Lyn Pike

Under the leadership of President William B. Hairston, Jr., the Alabama State Bar has experienced a revitalization of its committee activity. A record number of members are serving on fifty committees. Committee meetings have averaged nine per month since August 1983, and attendance has averaged over sixty percent per meeting.

Chairman Wade Morton, Jr., presented the report of the **Task Force to Evaluate Lawyer Advertising and Solicitation in Alabama** to the Board of Bar Commissioners at its January 20 meeting. The committee informed the Board that it found that no valid distinction could be made between allowing honest and truthful legal advertising in print media and not allowing it in broadcast media. After reviewing the committee's extensive report, the Board voted to recommend to the Supreme Court of Alabama amendments to the Code of Professional Responsibility relative to Disciplinary Rule 2, to provide for the inclusion of electronic media advertising.

Acting on the recommendation of the **Task Force on Disciplinary Functions of the Alabama State Bar**, the Board of Bar Commissioners recently approved the appointment of the **Permanent Code Commission**. With Hugh Nash as chairman and Norborne Stone as vice chairman, the

Commission has been given the task of reviewing and evaluating the Code of Professional Responsibility and the Rules of Disciplinary Procedure. Within the scope of the Commission's charge is the recommendation of amendments and possible changes in the Bar's disciplinary efforts. Alex Jackson, assistant general counsel, will serve as staff liaison to the Commission.

**The Committee on Prepaid Legal Services** has met and reviewed the history and status of prepaid legal services plans in Alabama. Chairman Robert Sasser passed on information gained through his attendance of the third annual Educational Conference on Prepaid Legal Services in early November 1983. Although the Alabama Department of Insurance is responsible for regulating prepaid legal servi-

ces plans, participation by attorneys is subject to the standards set out in the Code of Professional Responsibility. Subcommittees have been formed so that the committee can make recommendations regarding the organized bar's role in such plans.

The **Committee on the Alabama State Bar Foundation, Inc.** will propose the establishment of the "Alabama Law Foundation, Inc." to the Board of Commissioners at its March 8 meeting. As proposed, the non-profit corporation will qualify as a tax-exempt organization under Section 501(c)(3) of the U.S. Internal Revenue Code of 1954, organized exclusively for charitable, educational and scientific purposes.

The **Professional Economics Committee** has met and formed sub-



Members of the Bankruptcy Law Committee met in January and, among other topics, discussed the formation of a new bar section. Pictured are David Jones, Taze Shepard, Bob Moorer, Ted Hall, Bob Rubin, Romaine Scott, Richard Carmody (chairman), and Larry Voit.



committees on law office automation, economics and efficiency, and establishment of a law practice. The committee is charged with assisting the members of the Alabama State Bar in maintaining the economics in their law practices through CLE programs, *The Alabama Lawyer*, local bar associations, and the 1984 Annual Meeting.

On January 10, 1984, President Hairston appointed a **Medical Liaison Committee** for the Alabama State Bar. Tennent Lee (chairman), Boyd Reeves, Stencil Starnes and Cliff Emond are to meet with the Medical Association's counterpart committee to discuss matters of interest that affect both professions. According to President Hairston, "The institution of this committee gives recognition to the fact that a substantial part of the practice of law and of medicine is concerned with the problems of persons who are in need of the combined services of a lawyer and a physician, and that the interests of both the public and the individual are best served by the cooperative efforts of both disciplines."

Chairman Tom Boggs and members of the **Committee on Local Bar Activities and Services** have undertaken the task of polling county bar associations regarding their current level of activity, to be followed by the recommendation and implementation of efforts to revitalize less active associations. The committee will also seek to strengthen the relationship between the State Bar and local bars.


At its meeting on January 20, the Board of Bar Commissioners approved proposed legislation submitted by the **Indigent Defense Committee**, authorizing the use of part of the Fair Trial Tax Fund to offset the cost of administering the fund. The proposed bill also increases attorneys' fees for indigent defense cases by twenty five percent. At the same time, the Board authorized the dissemination of uniform guidelines for attorneys handling indigent defense cases and a simplified fee declaration form, also developed by the committee.

President Hairston has expanded his charge to the **Committee on Correctional Institutions and Procedures** to include its working with the Department of Criminal Justice at the University of Alabama in Birmingham and the Alabama Department of Corrections to evaluate the supervised intensive restitution program recently authorized by the Alabama Legislature. The goal of the study is to determine the advantages and disadvantages of the program as an instrument of punishment and/or rehabilitation of those convicted of criminal activities.

At its meeting on March 8, the Board of Bar Commissioners will consider a request by the **Committee on Bankruptcy Law** that an Alabama State Bar section on bankruptcy and commercial law be established. Persons interested in becoming charter members of the section, should it be approved, will find pertinent information under "Bar Briefs." If approved, the organizational meeting of the section and its first election of officers will occur at the annual meeting of the State Bar, July 12-14, 1984, in Mobile.

The **Energy Law Committee**, under the leadership of Tom DeBray, has taken on two tasks for 1984. Members of the committee will contribute an article on the nuts and bolts of various energy law topics for publication in the July 1984 issue of this journal. In an effort to meet an educational need, the committee, along with one of the primary CLE providers, will undertake the sponsorship of a coal law conference. Suggestions for speakers and topics are welcome and should be forwarded to Chairman DeBray at P.O. Box 4189, Montgomery, Alabama 36101.

A confidential questionnaire seeking information and guidance from Alabama's district, circuit, and appellate judges has been distributed by the **Committee on Meeting Unjust Criticism of Bench and Courts**. The Committee hopes to learn what problems exist, how those problems are perceived by the members of the judiciary, and how they might be helpfully addressed by the Bar. □



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## Escambia County Bar Association

Officers of the Escambia County Bar Association for 1983-84 are:

President: John Thaddeus Moore  
 President-elect: James E. Hart, Jr.  
 Secretary/Treasurer: William R. Stokes, Jr.

The Escambia County Bar is spearheading a move to renovate the second floor of the Escambia County Courthouse. The local bar has discussed this matter with the Escambia County Commission, and it has agreed to hire an architect to determine the feasibility of enlarging the second floor of the courthouse to add a new district courtroom, district court office and new law library. Plans are also being made to move the public defender's office onto the second floor of the courthouse. The goal is to locate the courtrooms and all judicial offices on the same courthouse floor and provide much-needed additional space for judicial administration.

## Barbour County Bar Association

In October 1983, new officers were elected to serve the bar association serving the Third Judicial circuit. They are as follows:

President: Jimmy S. Calton  
 Vice president: Louis C. Rutland  
 Secretary/Treasurer: Tommy Gaither



Calton

On Friday, April 6, 1984, the Barbour County Bar Association, with the assistance of the City of Eufaula School System, will host the Supreme Court of Alabama. The court will convene at 9:15 a.m. in the Eufaula High School gymnasium and will hear arguments in two cases. It is anticipated that approximately seven hundred students will attend each of the two cases argued. The session will be open to the public and the judges will explain procedure as the session is in progress.

## Covington County Bar Association

The Covington County Bar Association held its annual meeting in November 1983, and the following were elected officers for the 1984 year:

President: Earl V. Johnson  
 Vice president: Timothy B. Loggins  
 Secretary/Treasurer: Linda S. James

## Marshall County Bar Association

The following are officers for the local bar association in the Twenty-Seventh Judicial Circuit:

President: Franklin J. Allen II  
 Vice president: Clark E. Johnson III  
 Secretary/Treasurer: T.J. Carnes

## Montgomery County Bar Association

The Montgomery County Bar Association has continued to provide excellent monthly luncheon programs and attendance by our members has increased with each meeting. Wanda Devereaux is to be commended for these most interesting and informative programs. The special guests at our October 19, 1983, luncheon were the Honorable John C. Godbold, the Honorable Frank M. Johnson, Jr., and the Honorable Paul H. Roney of the Eleventh Circuit. Also present was the Honorable Edward S. Smith of the United States Court of Appeals for the Federal Circuit. Judge Smith was sitting as a special judge on the Eleventh Circuit which held court that week in Montgomery. Each of these four judges gave a short and informative talk on matters pertaining to the affairs of the Eleventh and Federal Circuit Courts.

Prior to our October 1983 meeting, our association hosted a cocktail dinner in honor of the judges of the Eleventh Circuit. This affair was held at the Sheraton Riverfront and was attended by approximately eighty members of our association.

Our November 23, 1983, luncheon meeting was jointly held by the Montgomery County Bar Association and the Montgomery Trial Lawyers Association. Honorable Truman Hobbs, United States district judge, was the luncheon speaker. Judge Hobbs' report and comments on the trials and tribulations of U.S. district judges was warmly received and was of great benefit to those members of the Bar who practice in the federal system.



Larry Kloess was program chairman for the December 21, 1983, meeting. The association had its annual cocktail hour prior to the meeting. This was a most impressive meeting wherein Larry presented a composite picture of all Montgomery County Bar presidents since 1930. A distinguished past president gave brief remarks on the practice of law and the status of our association for each decade since 1930. These remarks and anecdotes were thoroughly enjoyed by all. George Jones talked about the 1930's, Jack Crenshaw about the 1940's, Jack Capell about the 1950's, Bill Moore about the 1960's, Oakley Melton about the 1970's and Richard Jordan about the 1980's. We had approximately 105 members attend our December luncheon.

The Montgomery County Bar Association hosted a reception on January 5, 1984, in the foyer of the Supreme Court of Alabama, in honor of and following the investiture of Bob Esdale, our new supreme court clerk.

The annual meeting of the Montgomery County Bar Association was held on January 18, 1984. Bill Hairston, president of the Alabama State Bar Association, was our guest speaker. Officers chosen for the year 1984 were: Henry C. Chappell, Jr., president; David B. Byrne, Jr., vice-president; and James R. Seale, secretary-treasurer. Wanda D. Devereaux, J. Floyd Minor, and Edwin K. Livingston were elected to the Board of Directors.

On the social calendar, our association hosted a reception for the federal circuit judges who are on the Court of Appeals for the Federal Circuit. This circuit held court in Montgomery on February 6-9, 1984, and this was the first time the court had set in Alabama. Members of the Alabama Bar were afforded admission to that court during its session in Montgomery.

The Montgomery County Bar Association was a very active association during the year 1983. Perhaps the most important activity of the association last year was reviving the *MCBA Docket*, our quarterly news publication, and this was only possible by the many hard hours and excellent work of our co-editors, Craig Cornwell and Lister Hubbard.



**Robert G. (Bob) Esdale, new clerk of the Supreme Court of Alabama, and his wife, Suzanne, gather with friends and associates at his investiture and at the reception following, given in his honor by the Montgomery County Bar Association.**

The Montgomery County Bar Association's special activities increased during 1983 with a Law Day cocktail party in lieu of the traditional banquet, an improved annual barbeque, receptions for both retired and newly elected and/or appointed circuit judges, a reception for the Federal Court of Appeals judges, etc. The luncheon meetings during 1983 were the best ever, and this was the direct result of the efforts of Wanda Devereaux and her excellent program selection.

Fellow lawyers from surrounding counties are urged to come to our monthly luncheons, after calling our association's headquarters, 265-4793, for reservations. The meetings are held on the third Wednesday of each month at the Whitley Hotel. □

—submitted by Euel A. Screws, Jr.



**Henry C. Chappell, Jr., (left) became president of the Montgomery County Bar Association at their January 18th annual meeting, taking the place of immediate past president Euel A. Screws, Jr. Chappell is with the Montgomery law firm of Rushton, Stakely, Johnston & Garrett.**

## LEGISLATIVE WRAP-UP

(continued from page 75)

the Nonprofit Corporation is filed with the Probate Office, one copy being sent to the Secretary of State's Office, there to be kept in an alphabetical listing of domestic corporations. Any change in registered agent of the corporation must be filed with the probate judge, who in turn will send a copy to the secretary of state. This central registry will for the first time in Alabama enable persons dealing with Nonprofit Corporations to be able to check with the Secretary of State's Office to determine the place of incorporation and present registered agent without being required to communicate with each of the sixty-seven counties in Alabama to determine the place of incorporation.

Entirely new to the Alabama law are sections providing that foreign Nonprofit Corporations must obtain a certificate of authority to conduct in Alabama any affairs. This is consistent and parallel with Alabama Business Corporation Act. □



# Young Lawyer's Section



Edmon H. McKinley  
President

## Young Lawyers Bridging the Gap

In my opinion, one of the most important functions which the Young Lawyers' Section of the Alabama Bar Association performs for our profession and for the young lawyers of Alabama are the seminars which our section sponsors throughout the year. I have mentioned these seminars previously; however, I am now pleased to give you greater details on two of these.

On March 30, 1984, the YLS subcommittee on Continuing Legal Education will sponsor the annual "Bridge the Gap" seminar at the Birmingham-Jefferson Civic Center in Birmingham. This seminar will endeavor to familiarize the new young lawyers and to "polish" the skills of younger lawyers in those areas which are most often encountered by the members of our section. Carol Ann Smith, the chairperson of this sub-committee, has done an outstanding job of putting together a seminar which will give the young lawyers a vast amount of experience in one day. An unmeasurable amount of time has been expended in putting this seminar together, and I think it is worthwhile in this space to elaborate on the various topics which will be presented.

Richard Jaffe will discuss the basic criminal practice and all of its ramifications, including discovery, plea bargaining, trial tactics, attorney's fees, and the defense of the indigent. The maze of divorce practice will be simplified by Judith S. Crittenden as she carries the young lawyers through annulment, legal separation, post-divorce remedies, and child custody. Howard Walthall of the Cumberland Law School will present a checklist for incorporating a business under Alabama's new corporate law. James Lloyd will explain how municipal courts work, the handling of traffic cases, and the defense of drunk driving cases. The rapidly growing bankruptcy practice and debtor's court matters will be discussed by Andre Toffel. This part of the seminar will discuss when and how to file, preparation of documents, exemptions, and counseling the client.

The very important matter of setting up and planning a law practice will be discussed by Robert Tanner. He will emphasize avoiding malpractice, client satisfaction, common problems, financing, and successful billing through the good management of the law practice. One of the "bread and butter" areas of the law — collections — will be discussed by Alan Levine. This portion of the day will be devoted to collections, execution and exemptions.

For those young lawyers interested in the trial areas of the practice of law, Carol has two outstanding programs. John Tally, Jr., will present a discussion of finding and deposing an expert. His discussion will cover locating and evaluating an expert, preparing the expert for trial, and the examination of the expert witness. Second, Clay Alspaugh will discuss the ever-increasing area of medical malpractice and how to take a medical deposition. The seminar will be concluded by Robert M. Girardeau with the basics of workmen's compensation law.

*Carol has asked me to emphasize that all of the speakers will provide forms for each of the topics I have mentioned which should be of extra interest to young lawyers.* I encourage all young lawyers and other lawyers who are interested in these areas to please count on attending this seminar on March 30.

## Sandestin Seminar Provides Best of Both Worlds

Caine O'Rear and Charlie Mixon, who are the co-chairmen of our subcommittee which develops the annual seminar held at Sandestin resort, have been very busy working on the arrangements for this seminar. This has traditionally been the best-attended seminar put on by our section. This seminar offers the best of both worlds, both for the lawyers who attend and their families. Besides an



always outstanding academic program, this seminar offers the lawyers and their families a delightful opportunity to enjoy one of the prettiest areas of the Gulf Coast and to use the magnificent golf, tennis, fishing, sailing, and swimming facilities of this resort.

This year the seminar will be held on May 18 and 19. This seminar will focus on topics of current interests. Several speakers have already agreed to speak. Among those are Judge Haley, who will speak on the recent developments in Alabama Civil Procedure. The nuances of civil procedure are always important and their developments are especially rewarding to the civil practitioner. John Carey, formerly the attorney for the Alabama Oil and Gas Board, will discuss the regulatory aspects of the oil and gas practice. John will bring a tremendous amount of experience and expertise to the seminar; and for those interested in this area, this is a discussion that should not be missed. Fred Daniels, of Birmingham, will discuss the tax considerations in forming a new corporation. This is an area of the law that is often-times overlooked but is vitally important to our clients. In addition, other speakers will discuss criminal rules, federal practice and labor law. Plans are well under way to have a social event on Friday night that will match the tropical splendor of last year's dinner party.

### Conference for the Professions Upcoming

Randy Reaves serves as chairman of the young lawyers subcommittee which organizes and sponsors the Conference for the Professions. Randy, who was the founder of this seminar, has advised me that plans are well under way for another excellent seminar this year. The seminar will be presented in April, and I encourage any of you who are affiliated with any of the professional organizations and who are interested in representing clients before these regulated professions and groups to be watching for the announcement of this seminar.

### Young Lawyers Assist in Disaster Areas

One of the subcommittees which our section has that—thankfully—gets called upon very seldom is the subcommittee on Disaster Emergency Legal Assistance. John Donald, of Mobile, is chairman of this committee, and we always laugh at his report that there have been no emergencies and no disasters. Unfortunately, on December 7, 1983, several counties in Alabama were hit by tornadoes and floods. Tornadoes did the most damage in Dallas and Calhoun Counties, and flooding wreaked havoc in Jefferson County. John Donald's committee went to work within twenty-four hours and, with the fine cooperation of the Alabama State Bar Headquarters and the Birmingham Bar Association, started informing the public of the availability of legal services which were available to these disaster victims. Working with John on this was Carleta Roberts who is chairperson of the Alabama Bar Information Subcommittee and Newspaper, Television and Radio Subcommittee. Carleta notified newspapers throughout the disaster areas of the availability of legal services and provided

them with a public service notice. I congratulate both of these committees for their response, time and dedication.

### Port City Young Lawyers Making Convention Plans

Looking forward to the annual convention in Mobile, I am pleased to report that John Donald, whom I have previously mentioned and who serves as liaison between the YLS Executive Committee and the Mobile young lawyers, has been working with Jim Newman, who is this year's president of the Mobile young lawyers, on the young lawyers social function to be held during the meeting. I understand that this social event will be held on the fantail of the *USS Alabama* and that there will be a well-known band livening up the bay waters with the music of the 50's and early 60's. The Mobile young lawyers always do a very fine job with their endeavors, and I am sure that this will be no exception.

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# Facing My Most Difficult Trial





**W**ho am I? The name is not important. I am an experienced trial lawyer, but the important thing is that I am an alcoholic.

I have not had a drink of anything alcoholic for more than twenty-three years, but I do not say I **was** an alcoholic — I **am** an alcoholic. I know that if I took just one drink, I would no longer have control over alcohol and would end up drinking more. I am still only one drink away from a drunk. It has been so well said that for an alcoholic "one drink is too many and a thousand drinks are not enough."

I am honored to serve on the bar association Task Force on Lawyer Alcoholism and Drug Abuse. We have one message for anyone to whom alcohol or drugs are causing a problem and, that is, the message of hope. **THERE IS A SOLUTION.** This is a solution which has been found by me and millions of other alcoholics around the world.

Each of us is unique, but we also have many common characteristics. Characteristics of the practicing alcoholic are the hopelessness and the loneliness. It is such a relief to learn that you are not alone, there are many others in the same situation and there is a solution which can result in a happy, productive, sober life. Practically no alcoholic finds that solution by himself, but there are hands reaching out, wanting to help.

No man can live more than one day at a time. The burdens and regrets of yesterday and the fears of tomorrow are too much for anyone. But we can each take it easy and face each problem as it arises this one day. If I do not take that first drink this one day, I keep this one man sober.

Alcoholics Anonymous was formed thirty-five years ago on the principle of one drunk helping another and putting into action this simple program. Bar associations in other states have enlarged this to make it "Lawyers Helping Lawyers." That is what we are trying to do in Alabama. While there may be exceptions, ordinarily the alcoholic needs outside help such as I received years ago, and we want to make that help available to anyone who will take advantage of it.

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***I and millions of other recovering alcoholics are living proof that there is a solution.***

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I know about all of the pressures on trial lawyers and the temptation to relax over a drink or two. My mother's father was a lawyer, my father was a lawyer, and I started out practicing in his law office. Dad liked to take a drink and he could drink like a gentleman. In those days we knew nothing about the disease concept of alcoholism, but it was easy for him to see and to try to tell me that I could not handle alcohol. For thirty-eight years I tried to prove he was wrong and I fell flat on my face.

There is something about my physical make-up which will not let me take

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***It has been so well said that for an alcoholic one drink is too many and a thousand drinks are not enough.***

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just one drink and stop. I remember so well one time when my friend, Tommy Greaves, was catching a plane back to Mobile. He bought a drink and drank it. The plane was delayed and we bought another drink. He drank about a third of it and shoved it aside. I commented to him that that was the difference between him and me, because I could never have stopped leaving that or any other drink unfinished.

Like many lawyers, I thought I had to wine and dine clients. I learned the hard way that they did not mind drinking all night with me, but they wanted a sober lawyer the next morning. At one time I represented one of the largest corporations in Alabama and wine and dined the vice president. One night at a masked ball, I shot off my drunken mouth and the next day he had changed to a sober lawyer.

I know what it is like to come before the judge at 8:30 in the morning after a bar association party, with a crimson complexion and alcoholic sweat pouring out of every pore. I know what it is

like to prepare for final argument in federal court by staying out half the night drinking and having my client pay for my lack of preparation.

I will never forget the case Lucian and I tried together in the federal court, where I had the shakes so bad that when the foreman of the jury looked me in the eye my eyes starting shaking. Happily we reversed the case on appeal and on remandment were successful.

I know what it is like to work all night on an important brief on application for rehearing and realize the next day that I had spent hours repeating meaningless phrases. I had not intended to get drunk. I had only wanted to take one or two drinks to relax. But, you see, I am an alcoholic and when I take that first drink, I have no control over my drinking from then on. Happily for me, I found that solution, that help that is available to anyone who will reach out and take the hand of help which is being offered.

The successful practice of law demands the best that is in each of us and that cannot be achieved by drinking too much and suffering from hangovers. One of the mysteries is why the practicing alcoholic feels he has to give the competition an unfair advantage. Practicing law is hard enough at its best, but there is no question that it is easier to think and speak clearly when sober rather than with a hangover.

I and millions of other recovering alcoholics are living proof that there is a solution — a new way of life, a better life, a happy life, and a sober life. Many of you who read this issue are not alcoholics, but probably know some who are. **WON'T YOU LET US HELP THOSE LAWYERS WHO NEED HELP?** □

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**The anonymous writer of this article is a highly respected Alabama lawyer, who for several years was under the destructive power of alcohol. He now lives a sober life and shares the message that there is hope for those whose lives and professions could be virtually ruined because of a dependency on alcohol. He knows. He's been there.**



# We Have Met the Enemy and He is Us

by Judge Val L. McGee

One of the classic lines from *Pogo*, the comic strip with "gentle" satire of a few years back, was a paraphrase of Commodore Perry's famous boast. Pogo, the whimsical little possum, is shown with a serious expression saying, "We have met the enemy and he is us!" Of course, the humor in the line lies in the sudden shift from pomposity to humility; but, the real genius of the line, as in all of cartoonist Walt Kelly's offerings, is the earthy message that we humans can, in rare instances, stop our posturings and see ourselves as we really are. This is the basic need as we address

the problem of alcohol and drug abuse in our nation, in our state, and in our state bar association. If we could clearly see and admit that the problem is inside us, that the stumbling block is on our attitudes toward alcohol and drugs, then we could begin a process toward a solution.

The press and electronic media are literally bombarding us today with the message — alcoholism and drug addiction have become a virtual epidemic in our land. Many of us are moved to do something, but the problem is so complex it defies us to "find a handle." If the offending chemicals could be made

to just disappear, we would have a simple solution; however, in 1920 the Eighteenth Amendment and the Volstead Act began our noble experiment with prohibition and by 1933 the Twenty-first Amendment passed readily as an abject admission that we cannot cure the ills of alcohol and chemicals with constitutional amendments and legislation. The solutions will be found when we have changed our attitudes, when we have sought an understanding of the danger, and when we have acquired the mind-set and determination to do something to alleviate it.

There is no hard evidence that law-trained professionals have a higher incidence rate of addiction to alcohol or drugs than other segments of our population. Apparently, lawyers and judges succumb to such addictions at about the standard rate within the population — a high percentage of us drink, and about 10% of us will become alcoholics. The best estimates are that there are approximately 10 million alcoholics in the U.S. of which about 50,000 are lawyers and judges, and that there are about 150,000 alcoholics in Alabama, of which about 700 are lawyers or judges.

There may be some members of the Bar who would take comfort in these figures indicating, as they do, that lawyers and judges, with the well-known stress and demands of the profession, are no more prone to substance abuse and addiction than the general population. But this sentiment ignores the fact that we law-trained professionals consider ourselves, with some justification, as selected from the "best and the brightest." As a matter of fact, there is a considerable body of research evidence that the incidence of abuse of alcohol and drugs, and the rate of true addiction among users and abusers, reaches and inflicts all of us alike — the rich and the poor, the educated and uneducated, the talented and the untalented.

Any tendency toward complacency should be curtailed by a cursory reflection of the substantial harm to our profession which can be inflicted by only a few alcoholics and drug addicts at the Bar and, more importantly, the ines-



timable damage which can be done to the rights and causes of clients. It is estimated that each alcoholic adversely affects at least four other people — included within this sphere of persons are spouses, relatives, and co-workers. Therefore, the number who suffer from alcoholism far exceeds the number of alcoholics. The California and New York bars estimated in 1979 that two-thirds of their disciplinary actions were directly related to the abuse of alcohol and drugs. The Florida bar estimates that of their serious disciplinary actions 40% are tied in with problems with alcohol or drugs. In Alabama, it is estimated that we are about average in the fifty states in the percentage of disciplinary proceedings which could be traceable to alcoholism or drug addiction.

Beginning with California in 1973, more than thirty state bar associations have now taken formal action through special committees to reduce alcoholism and drug abuse within their organizations. Last summer our incoming State Bar president, Bill Hairston, appointed a task force to address the problem in Alabama and to make recommendations to the Bar. The task force has made some progress and a few preliminary suggestions, but as of this date we have not fully organized any "self-help" groups such as a "lawyers helping lawyers" network over the state, as has been done in many of the state bars which preceded us in the struggle. The use of a considerable portion of this issue of *The Alabama Lawyer* is a part of the task force plan, the objective being to start an educational process within the Bar as to the scope and nature of the problem, and to ask for help from the membership of the Bar.

The most serious aspect of the substance-abuse problem is that, by our condescending, "holier than thou" attitudes, we actually interfere with or even prevent alcoholics from seeking help with their addiction. It is imperative that all of us strive to learn more about the affliction and to cease viewing the alcoholic as weak-willed and morally depraved. The alcoholic is always capable of change if change is truly desired. This elimination of the stigma can be attained if we adopt the

enlightened, modern view of alcoholism as a "disease" or illness.

The disease concept of alcoholism is now firmly entrenched in all professional groups which have studied and made pronouncements on the subject. Alcoholism is recognized as a disease

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***It is imperative that all of us strive to learn more about the affliction and to cease viewing the alcoholic as weak-willed and morally depraved.***

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— a treatable illness — by the American Medical Association, the American Bar Association, the American Hospital Association, the World Health Association, the American Psychiatric Association and many other prestigious groups. In a recent article, "The Disease of Chemical Dependence," published in *The Counselor*, Dr. C. Douglas Talbott, a leading expert in the addictive disease field, writes:

America has been reluctant to look at alcoholism or for that matter the other drug addictions as a disease, regarding them instead as a moral or ethical issue, bad habit, a lack of will power, or discipline. We have learned more about these illnesses in the past five years than in the past five

hundred years and it is now evident that alcoholism and other drug addictions are truly psycho-social biogenetic diseases.

In the sixties, the Supreme Court of the United States found addiction to be a disease in the classic cases, *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417 (1962) (criminal punishment of a heroin addict), and *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145 (1968) (public intoxication of a chronic alcoholic).

As early as 1966, the Fourth Circuit ordered North Carolina to release on constitutional grounds a chronic alcoholic arrested (for the 200th-plus time) for public drunkenness. *Driver v. Hinant*, 356 F.2d 761. The court stated:

This addiction — chronic alcoholism — is now almost universally accepted medically as a disease.

The concept was voiced by the Fifth Circuit in *Martin v. N.Y. Life Insurance Company*, 621 F.2d 159 (5th Cir. 1980) which adopted the district court decision authored by Judge Frank M. Johnson:

The policy defines disability in terms of "bodily injury or disease." Whether chronic alcoholism is a "disease" cannot be resolved against the plaintiff as a matter of law as it often was a generation ago. There is now a substantial body of opinion, recognized by the courts, that alcoholism is properly deemed a disease in certain cases . . .

A substantial body of case law recognizing alcoholism as a disease has



*The Honorable Val L. McGee serves as judge of the District Court of Dale County. He is a 1949 graduate of the University of Alabama School of Law. Presently, Judge McGee is chairman of the Alabama State Bar's Task Force on Lawyer Alcohol and Drug Abuse.*



developed in connection with claims for federal social security disability benefits. The earlier cases echoed the prevalent notions that alcoholism was voluntary, and was a mere "personality disorder." In recent years, due to the advances made in the understanding of, and diagnosis of, chronic alcoholism, six of the federal circuits have now permitted claimants to establish disability due to alcoholism. In 1981 the Fifth Circuit stated in *Ferguson v. Schweiker*, 641 F.2d 243 (5th Cir. 1981):

It is well-settled that alcoholism, alone or combined with other causes, can constitute a disability if it prevents a claimant from engaging in substantial gainful activity.

The federal courts have even recognized the classic "denial syndrome" of alcoholics. In *Adams v. Weinberger*, 548 F.2d 239 (8th Cir. 1977), the claimant was a pathetic alcoholic who testified, nevertheless, that "the quitting drinking, there is no great problem there. Well, I enjoy it, and I don't — I don't think the beer hurts me particularly." The administrative law judge and the district court both held that this testimony showed that the plaintiff wanted to continue his drinking habits, and that under these circumstances he was not entitled to disability benefits. The eighth circuit reversed, holding:

The comment on abstaining from booze and giving up drugs and the speculation on claimant's motivation do not address squarely the crucial issue of whether or not Adams has the capacity or can be motivated to be rehabilitated from chronic alcoholism, with or without outside psychiatric help.

Such testimony may be relevant if, medically, the claimant has the power to control his alcoholism; otherwise, the statement represents the rationalizations of a sick individual who does not realize the extent of his illness.

In addition to the many professional associations, and the courts, which have acknowledged alcoholism as a disease, there are hundreds of prominent former alcoholics who are promoting a campaign for an enlightened approach, and one which would encourage early intervention and treatment for alcoholics. Among these car-

ing people are Jim Kemper, Jr., chairman of the board of a major insurance and financial services corporation, actors and actresses such as Jason Robards, Dana Andrews, Sid Caesar and Mercedes McCambridge, former congressman Wilbur Mills, former first lady Betty Ford, Joan Kennedy and many others.

Alcoholism can be described as "insidious, progressive and fatal if not treated." All of us know members of the Bar who have suffered and then died an untimely death because of alcohol addiction. Some members of a local bar in a medium-sized Alabama city recently reflected on this tragic

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*It is elemental humanitarianism for us to develop intervention techniques for persuading suffering alcoholic Bar members to seek treatment and to conquer their addiction.*

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statistic and counted nearly one lawyer death each year for the past twenty years from alcohol abuse. And with the relatively recent inroads being made by drugs such as cocaine, the total problem of chemical abuse is most certainly growing more ominous.

To obtain a sense of the urgency of the problem is probably the easy part of this inquiry. The more difficult phase is determining a strategy to stem the tragic tide, to curtail the illnesses and unnecessary death. It is elemental humanitarianism for us to develop intervention techniques for persuading suffering alcoholic Bar members to seek treatment and to conquer their addiction. However, we must not use all of our energies saving those who are presently floundering and "drowning;" we **must** devote a substantial part of our resources and efforts to stopping those who are, innocently yet unwisely, jumping into the flood upstream.

I certainly do not pretend to know the answers, nor do I tender any fixed

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strategy for the Alabama State Bar to adopt in its battle against this affliction. I do suggest, however, that we aggressively enter the fray; that we face the issues boldly and without apology, remembering that it is a disease — an illness — even though it begins with a voluntary act; and that we join the fight with an affirmative approach, and an expectation of success. We must continue to assess our situation and modify our strategy and techniques, but I would call for the following as our "opening volley:"

1. Provide a block of time at each annual Bar convention for educational and inspirational seminars on alcoholism and drug abuse.
  - a. We could arrange for nationally-known speakers, perhaps some of a celebrity category.
  - b. We should have programs centering on the problems of wives and children of suffering alcoholics.
  - c. A sufficient variety of programs could be maintained in order to keep a fresh approach each year.
2. Create and perfect a skillful intervention system, based on the "Lawyers Helping Lawyers" format used in many other states.
  - a. The costs should be relatively conservative, but the basic provisions for communications — such as the telephone "hotline" approach, and minimum consultant fees — must be funded from the start.
  - b. Whether the intervention mechanism performs as a committee of the State Bar or as a Bar-sponsored separate non-profit corporation, there must be provisions for complete confidentiality as one caring lawyer helps another who is suffering.

The fight against alcoholism in Alabama, as elsewhere, has been spearheaded primarily by recovering alcoholics, through excellent Alcoholics Anonymous chapters, and a fine network of treatment and counseling centers. We are fortunate to have had these wonderful people — these recovering alcoholics who care about those who still suffer, and who daily give generously of their time and resources in the battle against abuse. But why aren't those of us who have never been victims of alcoholism taking a leadership role in this fight? It was not merely the victims of poliomyelitis

who finally organized the effort which conquered that dread disease in the United States (although many polio victims, including President Franklin Delano Roosevelt, were effective in the

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***There are about 150,000 alcoholics in Alabama of which about seven hundred are lawyers or judges.***

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various efforts). Millions of non-victims worked in the March of Dimes crusades and led in the fight which in the 1950s eradicated polio as a scourge of our youth and of many adults. In a


similar manner, the fight against alcoholism and drug addiction should be aggressively supported and led by those of us who, by the grace of God, have not become victims of this dread disease.

As chairman of the Alabama State Bar task force on alcoholism, I would appreciate your thoughts, suggestions and offers of help of any kind. I am not an expert on alcoholism; like most of our Bar members, I am somewhat overwhelmed by the size and complexity of the problem. However, we all know that the problem will not go away and will not even be diminished without a united and motivated effort. Therefore, I urge all members of the Bar to respond to this call of arms; if we become excited and committed we can make substantial and significant progress. □

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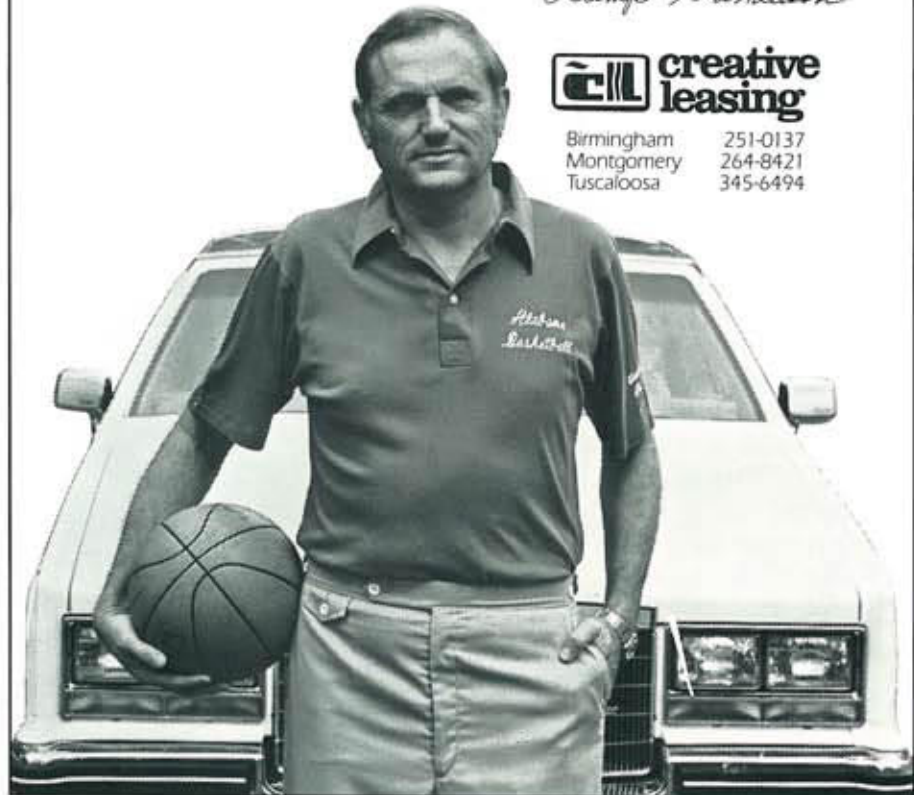
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# Am I My Brother's Keeper?

by Thomas H. Claunch, Jr.

**A** signer of the Declaration of Independence, Dr. Benjamin Rush, in 1785, wrote in his medical papers of the "disease of alcoholism."<sup>1</sup> The famed Philadelphia physician left his name and influence on many revolutionary aspects of medicine, but failed to communicate this important concept that is still misunderstood almost two hundred years later. No other disease today attracts so much professional and lay controversy, confusion, and Monday morning quarterbacking. Few can be found who do not have a ready opinion as to the cause, extent, prognosis, and treatment of alcoholism,\* or, for that matter, the alcoholic.

There is little or no question as to the major adverse and devastating effect alcoholism and poly-drug addiction have on our society. While it is, unfortunately, true that many uninformed laymen still question the medical/disease precept of alcoholism, national medical authorities,<sup>2</sup> the United States Government,<sup>3</sup> the United States courts,<sup>4</sup> business and industry leaders,<sup>5</sup> the American Bar Association,<sup>6</sup> and major health care reimbursement companies<sup>7</sup> clearly understand three very pertinent facts:

- A. Alcoholism is a disease.
- B. Alcoholism is a treatable disease.

\***Alcoholism** will be used as a generic term to include such common usage phrases as addictive disease, poly-drug abuse, chemical dependency, sedativism, etc., where the use of beverage alcohol is the primary usage agent in the disease diagnosis/evaluation in combination with or without other psycho-active chemicals.

C. Proper alcoholism treatment is effective.

Dr. Doug Talbott, an internationally renowned authority, in a recent article<sup>8</sup> presents five major issues, the lack of understanding and ignorance of which perpetuate the reluctance and inability of many to accept the disease precept of alcoholism:

1. Alcoholism is not related to volume, dose, duration, or degree of intoxication. Of five abusers (heavy drinkers), only one crosses the wall and develops the disease; yet, two of the five abusers may drink more, drink more often, and get more intoxicated for longer periods of time. Alcoholism comes in people, not in bottles; it is not due solely to abusive drinking but to a complex biogenetic predisposition.
2. There are two (parts) brains: the primitive instinctual brain and the

new brain, which includes the cerebral cortex, the cerebellum, and the medulla and the other new brain sections. It is now apparent that these two brains are intimately related to the disease of alcoholism. In the non-alcoholic, the cognitive decision to drink or not to drink is made and controlled in the new brain. In the alcoholic, the message, which comes from the primitive instinctual brain, relays a different message: "I need a drink, I must drink, I will drink independent (regardless) of the consequences." Compulsion, the number one primary symptom of the disease, is now to the alcoholic the supreme and overriding stimulus coming from the hypothalamic instinctual control center, the primitive, old, survival brain.

3. Compulsivity, the primary disease symptom, is due to altered brain chemistry. Compulsivity, as it relates to alcoholism and other drug addictions, arises from the old survival brain. Currently there is evidence that chemical deficiencies in certain specific areas of the hypothalamic instinctual primitive brain lead to compulsive drinking. Recovery begins with the endogenous (internal) replacement of these chemicals through abstinence and the building of non-chemical coping defenses against the further depletion of endorphin-enkephalin systems.
4. Alcoholism is not a primary psychiatric disorder. In a triage of over six hundred patients assessed with exquisite diagnostic methods of psychological, psychiatric, and addictive disease teams, it was shown the 93% of the alcoholics studied have no primary psychiatric disease, albeit the majority have emotional problems, secondary to their addictions.



*Thomas (Tom) H. Claunch, Jr., is a native Alabamian. An international authority on alcoholism and drug abuse, Tom currently serves as president of the National Association of Alcoholism and Drug Abuse Counselors. He is a certified alcoholism counselor and has traveled widely as a speaker and lecturer. Tom participates on the Summer School of Alcohol Studies staff of four universities, and presented a paper at the World Conference on Alcoholism held in London in the spring of 1983. Tom serves on numerous national and local boards and committees in the addictive disease field, has served as a consultant to the National Institute of Alcohol Abuse and Alcoholism and is associated with Baptist Medical Center in Montgomery.*



The conclusion is inevitable that compulsivity is of disease origin.

5. The disease of alcoholism is a biogenetic disease; alcoholics are born, not made. Current evidence indicates that certain individuals have a genetic predisposition. Their XY chromosome abnormality determines whether they are the one in ten drinkers that will cross the wall into alcoholism.

The best current data from a variety of sources, including studies of twins,<sup>9</sup> adoption,<sup>10</sup> and sons of alcoholics,<sup>11</sup> support the studies of Dr. Talbott and other researchers, studies which in the implication indicate that perhaps one in ten people have an inherited "X" factor that predisposes them to drinking problems when they choose to start drinking.

We live in a society that is very geared to the use of beverage alcohol, and, to a lesser extent, to other mood-changing, mind-altering drugs. A 1979 national survey<sup>12</sup> reported that 68% of the adult population drinks, with 75% of 12th grade<sup>13</sup> students drinking (32.1% moderate/heavy to heavy). What this means, of course, is that almost everyone with the "X" factor will have a chance to activate his or her illness. The whole issue is further complicated by many other issues when applied to particular groups or professions.

In some professional groups the co-factors of stress and social pressure increase apparent vulnerability to drinking problems and alcoholism. No proven cause-and-effect relation exists between stress and alcoholism. No cause-and-effect relation exists between drinking incidence and alcohol-related problems,<sup>14</sup> such as medical consequences, pancreatitis, cardio-vascular condition, cirrhosis, gastritis, and duodenitis, general neglect; job-related problems; legal problems, such as domestic violence, child abuse, driving under the influence, vehicular homicide, drug-related abuse, and crime in general; and other addictions.<sup>15</sup> Hence, although we cannot state that an increase in drinking incidence causes alcoholism, we can say it may be a contributing factor and that it is certainly a warning sign.

A useful (but unscientific) model to simplify a very complicated and as yet undetermined relationship might be:

Drinking + stress → increased incidence → drinking problems  
danger + X factor = alcoholism.

Biogenetic and environmental factors affect all human beings alike, regardless of race, color, creed, socioeconomic status, etc. In fact, alcoholism can be said to be an "equal opportunity disease" — the affirmative action program for one's equal opportunity is to start drinking. But, helping professionals\*\* have two unique conditions in addition to these biogenetic and environmental factors. These conditions result from the professionals' better than average education and their

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***The disease of alcoholism is a biogenetic disease; alcoholics are born, not made.***

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better than average opportunity to contact people with problems.

Education can, in a strange way, become a barrier to helping. Professionals, by the very definition of the word, become specialists in specific areas of knowledge. People-helping professionals develop great skills at solving people problems. Lawyers by training and experience are the answer to legal problems, doctors serve our medical requirements, and the clergy is the normal source to satisfy spiritual needs. The very complex syndrome of alcoholism creates problems in the whole person: physical, mental-behavioral, and spiritual. During the progressive course of the disease many problems typically result for the alcoholic, his or her family, and society as a whole. In fact, the working definition of alcoholism used by this author is, "If drinking causes problems, it is a problem. Do something about the problem."

All too often the alcoholic does not do something about the problem, but with expert professional help does something about the many attendant prob-

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\*\*Helping professional refers to those people-helping professionals such as the lawyer, physician, clergyman, etc.

lems. The **professionals** then, in carrying out to the best of their ability their responsibility to their client, inadvertently become **enablers**. An enabler is, within the alcoholism field, commonly defined as "a person (or agency) who solves problems for the alcoholic that allows him or her to escape or avoid the consequences of their drinking." In the classic pamphlet *A Merry-Go-Round Named Denial*,<sup>16</sup> Dr. Joseph L. Kellermann states:

"The role of the professional — clergyman, doctor, lawyer, or social worker — can be most destructive, if it conditions the family to reduce the crisis rather than to use it to initiate a recovery program."

How can professionals avoid this trap? The attorneys must represent their clients, the doctors must treat the physical needs of their patients, and the clergymen must serve as best as God will direct in ministering to the needs of their flocks. These and the other helping professionals are often (1) well skilled to deal with the presenting problem, (2) out of contact with other helpers, (3) misled by the hurting person, and (4) reluctant to tread on unfamiliar ground.

Even if a drinking problem is suspected or known, an additional barrier to effective help is the fear that to disclose the socially stigmatized problem is to risk loss of the relationship. This then would sever any opportunity to effect a change, do a job, or help the person. Professional ego may also be involved in some cases. Professionals, because of their much better than average opportunity to contact people with problems, also have a greater chance to be adversely affected by these contacts.

The whole concept of the co-dependent, the family disease, indeed the reason for the irreplaceable Al-Anon family groups, is that people constantly in contact with practicing alcoholics are themselves adversely affected. Broken promises, erratic behavior, non-response to direction, repetitive problems, manipulation, con jobs, and deception are a way of life with the active alcoholic. Socially unacceptable behavior like child abuse, DUI, fighting, crime, and wife-battering are difficult to separate from the sick persons



themselves. Actions like these and the frustration of continued lack of success in correcting the behavior, presenting symptoms, and problems of the alcoholic, begin to distort the point of view of the helping professional. This phenomenon is significant enough that the U.S. Civil Service once published a booklet called *A Guide to Troubled Supervisors*. This booklet explains how supervisors, in trying to help, get snared in the denial, cover-up, rationalizing, etc., of the problem employees they are trying to help, to the extent that their own job performance is impaired.

An additional feature of frequent contact with the problem drinker is that in this constant bombardment of trouble, the bad and negative builds its own self-fulfilling prophecy of defeat.

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***An alcoholic is a sick person needing to be well, not a bad person needing to be good.***

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If all one sees is active alcoholics in trouble — sick suffering alcoholics in all their infamy — then the goal of the recovered alcoholic is obscured so as to appear non-existent. This helps to perpetuate the old stereotype of what an alcoholic is supposed to look and act like. The old saying “familiarity breeds contempt” is true in spades in such situations. Sometimes the simple but typical alcoholic behavior of not paying bills when due also exacerbates already strained relationships.

An important additional consideration confronting the helping professional is that as a result of the two conditions just discussed the professional often develops a feeling of personal invincibility when it comes to drinking problems very close at hand, i.e., in their own business, their own family, or their own personal lives. The constant focus outward on **them** creates a feeling of, “It can't happen to me or mine.” The stereotype veils the true condition of the person of the next appointment, next office, next door, or next room. We see only what we look

for and fail to see what we think is not there.

Should a professional become involved in what some would consider the personal areas of their clients' lives?

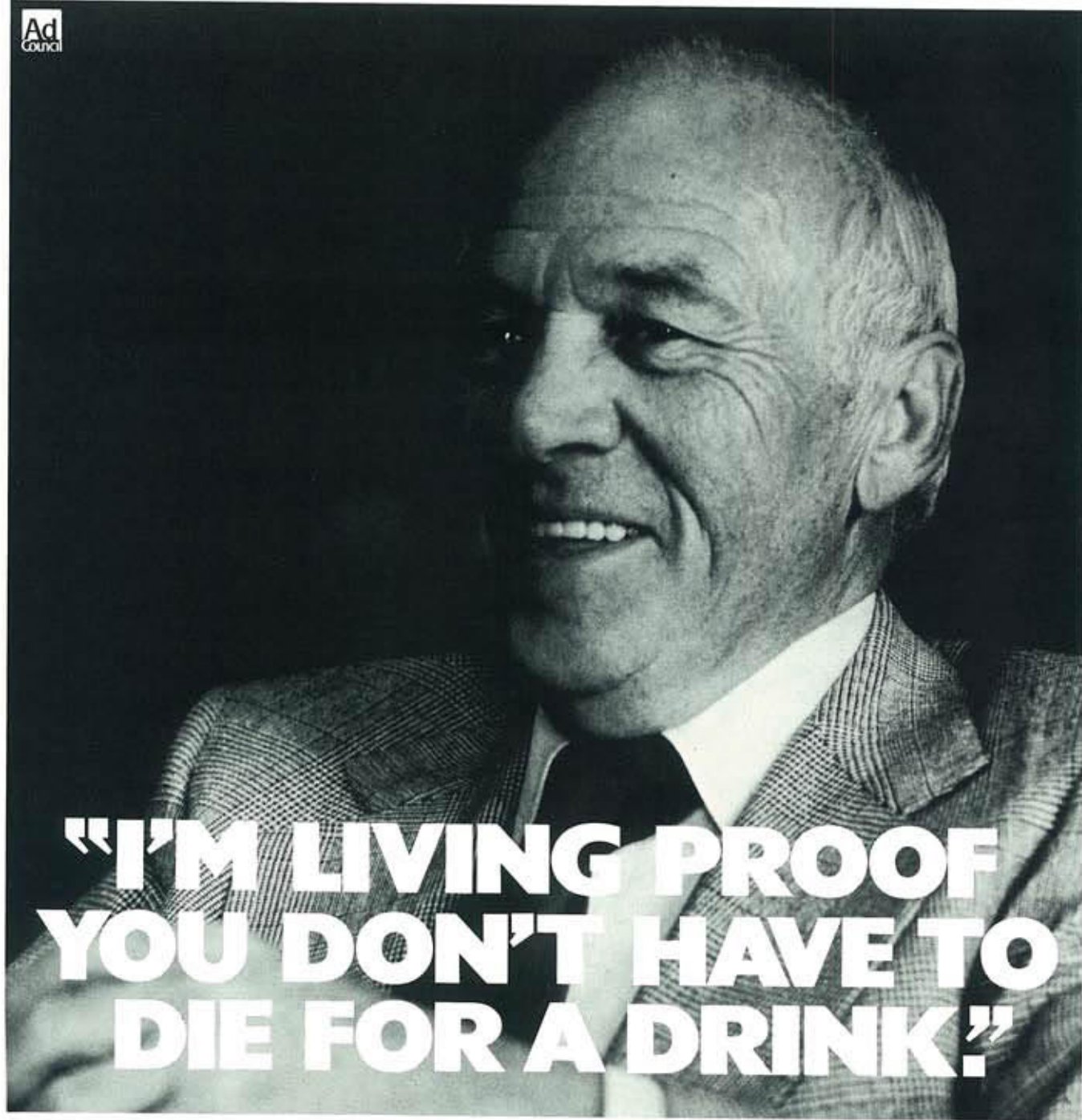
A simple four-step plan will equip anyone to better serve and help the estimated eight million alcoholics in our country.

1. **Learn to recognize an alcohol problem.** Specific education and knowledge of alcoholism and its indicators are the key. Contact recognized experts in the field of addiction for information and educational opportunities. When trying to recognize an alcohol problem, one must look past the parts and see the whole. A very successful person in business may be having major family problems because of drinking. Look for and at the types of problems — family and matrimonial, DUI, assaults, spouse abuse, business failure, employment changes, and loss, debts, and irrational purchases, bankruptcy, bad checks, burglary, shoplifting, and tax problems; all these are important indicators. Changes in behavior, standards, values, and inter-personal relationships, when viewed against the person's own past performance, will reveal declining patterns. Look for a long-term, progressive downward.
2. **Confront, and discuss in a non-pejorative manner, your new awareness and knowledge.** An alcoholic does not have to want help to receive help. However, help in the form of reality must be presented in a manner acceptable to the alcoholic. Learn and use the new intervention strategies. The Johnson Institute “family intervention” model and the job-based “employee assistance” or “impaired professional” model both work 80 to 90% of the time if done according to the basic premise of each. Family intervention is a learned and practiced strategy whereby the “significant others” surround the problem drinker, and in love and concern reveal how they have observed the actual drinking behavior and how it made them feel. The entire enabling structure, often including friends, fellow workers, and professionals, prepares to withdraw support if help is not sought. The work based “employee assistance” program (EAP) is now used by 50% of the Fortune 500 companies and by many professional groups across the country. EAP's are based on documented job performance. The successful “impaired physician, lawyer, clergy” and other

peer-conducted professional programs combine elements of the family and the EAP intervention model. They work. Families, careers, and lives are being saved in gratifyingly large numbers.

3. **Make it easy for someone to receive your help** in any situation where a drinking problem is confronted, discussed, or intervened in, an attitude of loving concern must be projected. Break down the stereotypes and needless stigma attached to the alcoholic. The alcoholic is a sick person needing to be well, not a bad person needing to be good. Help the problem person maintain some dignity and self-respect. Teach and educate about the disease, its symptoms, signs, and progression, and where and how help can be found.
4. **Refer to an alcoholism expert.** A large field specializing in alcoholism and other addictive diseases is growing to fill the prevention, intervention, and treatment needs of our communities. Information, educational, and referral services are available at treatment programs and public agencies. Find and contact a quality program in your area to be used in case of need. Visit such programs and learn about treatment, if normal contact with alcoholics or other drug addicted people is frequent. Treatment works! The modern discreet, non-drug, abstinence based, and twelve step compatible programs have excellent recovery rates. Programs staffed by multi-disciplinary treatment teams, including certified alcoholism counselors, expect 70 to 80% long-term recovery rates. Inpatient programs are hospital based or free standing, and most are eligible to receive health insurance benefits. Some qualify for Medicare, Champus, and other third party reimbursement plans. Publicly funded programs exist for those not having insurance, and for the indigent or needy. No one needing treatment needs to go without. Out-patient programs are available in some communities. In these programs patients need not miss work to receive proper care and treatment. A word of caution: out-patient services may vary greatly in programs offered and effectiveness. An out-patient program should be carefully investigated. The program must be of the new “primary day care/night care” type with a highly structured and demanding format, to be considered viable. Family treatment and long-term continuing care programs (after care) are a must for both in-patient and out-patient treatment. Some treatment programs even specialize in certain





**"I'M LIVING PROOF  
YOU DON'T HAVE TO  
DIE FOR A DRINK."**

"I'm Jim Kemper Jr., Chairman of the Board of a major insurance and financial services corporation, and I'm alcoholic. I'm not alone. The facts show that there are many more like me. In fact 10% of the work force in this country is alcoholic.

"If you are in a managerial position, you have probably lost or fired many people like me. Decisions based on lack of information can be as dangerous as the disease itself. Alcoholism has nothing to do with weakness of character. It's a very complicated disease that can strike anyone who drinks, whether you work on an assembly line, in the mailroom, or the executive suite. And it can be fatal, if not treated.

"Most companies don't know how to deal with this disease. But it's much easier than you think. That's why the National Council on Alcoholism has

written a manual so you can set up an "Employee Alcoholism Program," within your company to protect your people, as well as your investment in them. These programs work. I haven't had a drink in 28 years. Who knows, the next person you help may be your next Chairman of the Board."

To: THE NATIONAL COUNCIL ON ALCOHOLISM,  
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I am enclosing \$6.00 for the National Council on Alcoholism's manual that will show me how to set up an Employee Alcoholism Program within my company.

My name is \_\_\_\_\_

My address is \_\_\_\_\_  
\_\_\_\_\_



professional groups or other special need groups.

Above all available help is the great fellowship of Alcoholics Anonymous. AA, founded in 1935, has stood the test of time and demonstrated the proof of success. AA is found almost everywhere and is free for the asking. "The only requirement for membership is a desire to stop drinking."<sup>17</sup> All good treatment programs are built around the Twelve Steps of AA as the long-term recovery pattern and way of life. Treatment is not necessary for recovery, but AA is critical. Few maintain long-term, successful, and happy recovery in the absence of the principles of the AA Twelve Steps and recovery program.

Many other effective self-help groups have grown from the Twelve Steps of AA, Al-Anon Family Groups for family members of people with drinking problems and Alateen for children of alcoholics are of special value. Narcotics Anonymous and Nar-Anon groups are growing to meet the needs of families with problems resulting from drugs other than alcohol. These wonderful self-help groups provide the necessary loving, caring, and supporting atmosphere to insure long-term (lifetime) recovery from a chronic (lifetime) disease. AA meetings range from neighborhood groups of three or four to special round-ups of thousands. Over thirty thousand recovering alcoholics and family members filled half the Louisiana Superdome for the 1980 International Conference of AA.

What a positive image to behold — over thirty thousand people recovering from a recently considered hopeless situation. How many drove cars drunk? Broke the law? Abused their wives and children? Violated socially accepted behavior norms? I think most of them in their disease and suffering did these things and more. The great news is that they no longer do! In recovery, life is normal, great, and sometimes better than that. Some even speak of being "weller" than well.

Recovery many times comes as the result of a caring person's using education and action to create a contrived and controlled crisis, thus precipitating a call for help — a call for help answered.

### The Twelve Steps of Alcoholics Anonymous

1. We admitted we were powerless over alcohol — that our lives had become unmanageable.
2. Came to believe that a Power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God **as we understood Him**.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves and to another human being the exact nature of our wrongs.
6. Were entirely ready to have God remove all these defects of character.
7. Humbly asked Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.
9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
10. Continued to take personal inventory and when we were wrong promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God, **as we understood Him**, praying only for knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics and to practice these principles in all our affairs.

"Am I my brother's keeper?"<sup>18</sup> Only if I love enough.

Helping professionals occupy a unique slot that enables them to join in an effective battle, combating the devastating effect of alcoholism on our country. The marching orders are: (1) Learn and accept the disease precept; (2) understand your special role; (3) study and support intervention; (4) focus on the successes, in order to mobilize resolve; and (5) love enough to risk action. □

#### NOTES

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# President's Page

(Continued from page 4)

tion of our rules of professional conduct. Nothing else seems to work; maybe the glaring light of publicity would.

And the next concern is the ever rising cost of legal services. Pick up a magazine and chances are some article will concern itself with the cost of legal services. The message is clear — clients and potential clients are concerned. Changes are in the works. Slowly maybe, but changes nevertheless. Corporations are increasing both the size and responsibility of in-house counsel. Governmental regulation is increasing both in fact and in threat. Non-lawyers increasingly fill traditional legal functions. The public, the legislatures, and even the courts, are looking for substitutes for our traditional dispute settlement programs. These are forces that can transform the legal "business."

What causes this increased cost? Many things, but "discovery" heads the list. We need to stop and consider what it takes to get the simplest case ready for trial. Why so much? Discovery — that's why!

And what can we do about it? One suggestion is that we insist that our rules relating to summary judgment have real meaning. And maybe that is not enough. We need to return to some form of common law pleading. At least to the extent that a party has to plead a justifiable action before discovery begins.

With its ups and downs, aggressive steps and plaguing problems, ours is a viable Bar. With our membership we can and we will do that which is necessary to continue a system of justice that will meet the needs of the Republic. □

— William B. Hairston, Jr.

## CLE NEWS

(continued from page 92)

To assist Alabama's attorneys in meeting their CLE obligations or amending their reports after timely filing of them, the MCLE Commission published a duplicate of the 1983 reporting form on page thirty-two of the January 1984 issue of this journal.

### Local Bar programs may be eligible for credit

The Committee on Local Bar Activities and Services reminds local bar CLE committees that their educational programs may be eligible for approval by the MCLE Commission. Information may be obtained by calling this writer at (205) 269-1515 at least one month in advance of planned programs.

### Attendance records, individual's responsibility

Alabama attorneys are reminded that neither the MCLE Commission nor the Board of Bar Commissioners require that sponsoring organizations report individual attendance. It is and always has been each individual's responsibility to maintain his or her own records and report to the Commission annually. Credits earned are a matter of individual honesty. Full credit is earned for attendance of entire programs. Any portion of a program that is missed must be deducted from the credit available for the program at a rate of one credit per fifty minutes of instruction.

### Corrections: CLE opportunities

A seminar entitled "Negotiation and Alternative Dispute Resolution" was incorrectly listed in the January CLE calendar (45 *Alabama Lawyer* 31). The Alabama Institute for Continuing Legal Education is conducting this program which has been rescheduled for March 22 through 24, not March 2 as previously published. Credits are 18.9 and the cost is \$300. Registration is limited. Call 348-6230 for additional information.

Additionally, the title of the March 28 activity was inadvertently omitted. It is the Institute's annual "Banking Law" seminar. Credits are 6.3 and the cost is \$65 for those who pre-register. □

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# Opinions of the General Counsel

William H. Morrow, Jr.

## QUESTION:

"May an attorney who is issuing agent for a title insurance company and represents one of the parties to a real estate transaction recommend mortgagee's title insurance and/or owner's title insurance to the parties thereto?"

## ANSWER:

There would be no ethical impropriety in an attorney who is issuing agent for a title insurance company recommending mortgagee's title insurance and/or owner's title insurance to the parties to a real estate transaction if (1) an attorney-client relationship exists between the attorney and one or more parties to the transaction, (2) a full disclosure is made to the parties to the transaction that the attorney is issuing agent for the title insurance company and has a financial interest in the issuance of the policy, namely, receipt of a portion of the premium, (3) the attorney's office letterhead, etc., contain no indication that he is issuing agent for the insurance company and the letterhead, etc., and (4) the attorney's position as issuing agent for the insurance company is not used as a cloak for solicitation of legal work or as a feeder to his law practice.

## DISCUSSION:

Disciplinary Rule 2-102(E) provides:

"A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business."

Disciplinary Rule 2-103(A)(4) provides:

"A lawyer shall not:

(4) Publicly and regularly engage in any other business, occupation, or profession which is used as a cloak for solicitation of legal work or as a feeder to his law practice."

Disciplinary Rule 5-107(A)(2) provides:

"Except with the consent of his client after full disclosure, a lawyer shall not:

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client."

The American Bar Association Committee on Ethics and Professional Responsibility was heretofore requested to give an opinion on the propriety of an attorney acting as issuing agent for a title insurance company. In Formal Opinion 304 (1964) the Committee held that an attorney may not receive a commission for recommending or selling title insurance without fully disclosing to the client his financial interest in the transaction. The Committee further held that there is nothing unethical in recommending title insurance to buttress a lawyer's opinion or to provide for contingencies beyond his knowledge. It was further held that an attorney connected with a title insurance company could not be named in advertising of the insurance company, nor could he indicate the use of such insurance on his letterhead, etc. The Grievance Committee to the Alabama State Bar by resolution dated November 19, 1965, adopted Formal Opinion 304 as its own.

Opinion 304 was issued under old Canon 38, Canons of the American Bar Association. However, we find nothing in the present Code of Professional Responsibility that would persuade us to depart from any of the conclusions contained in that opinion.

Opinion 304 does not appear to draw any distinction between a mortgagee's policy of title insurance and an owner's policy of title insurance.

In a recent opinion the office of the General Counsel and



the Disciplinary Commission reaffirmed the action of the Grievance Committee in adopting Formal Opinion 304 of the American Bar Association Committee on Ethics and Professional Responsibility.



## QUESTION:

"When an attorney enters into a contingent fee contract with a client, and, after the attorney-client relationship has been established it is discovered that the damages recoverable by the client are far less than anticipated by the attorney and the client, may the attorney ethically present to the client a choice of (1) permitting the attorney to withdraw or (2) entering into a new contingent fee contract increasing the attorney's fee?"

## ANSWER:

An attorney's presenting to a client the choice described in the request for opinion would be improper for at least two reasons. First, DR 7-101(A)(2) provides that an attorney shall not intentionally fail to carry out a contract of employment entered into with a client for professional services. Second, if the sole basis for the increase in the attorney's fee in the proposed second contract is the fact that the damages recoverable are less than at first anticipated, there would be no consideration to support the increase in the attorney's fee, the attorney's obligation to the client remaining the same under either contract, namely, to represent the client zealously within the bounds of the law.

## DISCUSSION:

From the question posed, it is assumed that the client is not guilty of any fraud or misrepresentation. The damages simply are not as great as had been anticipated.

Disciplinary Rule 2-111 sets forth the grounds which are the basis for permitting an attorney to withdraw from the representation of a client. The fact that a law suit will not produce a recovery as large as had been anticipated is not one of the grounds permitting an attorney to withdraw.

The question not only poses a question of ethics, but a question of basic contract law.

In general, the relation of attorney and client is a matter of contract, and general rules as to the making of a contract govern in determining whether or not the relationship has been created. Although governed by general principles of contract law, when the attorney-client relationship is established, the attorney occupies a fiduciary relationship toward his client and the courts will carefully scrutinize any new agreement between the attorney and client, especially where as a result of the new contract the attorney's fee is increased.

Ethical Consideration 2-17 provides:

"The determination of a proper fee requires consideration of the interests of both client and

lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal services would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to service his client effectively and to preserve the integrity and independence of the profession."

Ethical Consideration 2-18 provides:

"The determination of the reasonableness of a fee requires consideration of all relevant circumstances and a lawyer should not enter into an agreement or charge, or collect an illegal or clearly excessive fee. *A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.*" (emphasis added)

Ethical Consideration 2-19 provides:

"As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee agreement he proposes."

Ethical Consideration 2-23 provides:

"A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably and differences on the subject."

Disciplinary Rule 7-101(A)(2) provides:

"A lawyer shall not intentionally:

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-111, DR 5-102, and DR 5-105."

Basic contract law dictates that where one party to an existing contract promises something in addition to his obligation under the original agreement there must be adequate consideration to support the new promise. This principle was well stated in *Williston on Contracts*, Section 130, quoting with approval from *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S.W. 844:

"What we hold is that when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it a *nudum pactum*, and will not lend its process to aid the wrong.



The doctrine was applied when an attorney agreed in writing to perform services at ten percent of the recovery and later claimed one-third thereof under an oral agreement."

See: *Quarture v. Allegheny County*, 14 A.2d 575; *Penton v. Mitchell*, 262 S.W. 2d 639; *Presnell v. Cox*, 350 S.W. 374; *Avellone v. John Weisert Tobacco Co.*, 213 S.W. 2d 230; *Nebraska State Bar Assoc. v. Dunker*, 71 N.W. 2d 502; and *Powell v. Wandel*, 146 A.2d 61.

The courts draw a distinction between the initial fee contract which establishes the attorney-client relationship and a fee contract entered into between the attorney and client which contract is negotiated after the attorney-client relationship has been established. Contracts between attorney and client made after the relation has been established are construed most strongly against the attorney and are regarded with suspicion and jealousy by the courts. 7 Am. Jur. 2d, *Attorneys at Law*, Sections 210 and 211 clearly draws this distinction in the following language:

210. *Effect of presumptions arising from attorney-client relationship.* Prior to the establishment of an attorney-client relationship, the parties may deal with each other at arm's length, and the attorney may then contract with reference to compensation for his services. It is not presumed that such contracts are the result of overreaching or improper influence on the part of the attorney; such presumption exists only as to contracts made between an attorney and client after the relation has been established. A contract prior to the establishment of an attorney-client relationship is as valid and unobjectionable as if made between persons who do not occupy a fiduciary relation to each other and who are competent to contract with each other, provided it is fair and reasonable, is not champertous, and does not otherwise contravene public policy."

The old case of *Lecatt v. Sallee*, 3 Porter 115 (Ala. 1836) held that an agreement made by a client with his attorney after the latter has been employed to handle a specific matter by which the original contract is varied and greater compensation is secured by the attorney than that agreed upon in the original contract is invalid and cannot be enforced. The court observed:

"Upon these facts, the question arises, can an attorney, during the connection between his client and himself, make with his client, a binding contract to secure to himself greater compensation for his services than was agreed upon, when their relation commenced?"

In this case, the fee for the services was settled by the contract between the parties: the same contract, by which the attorney undertook to bring the suits for the complainant. The complainant knew, with certainty, what he would be bound to pay, in case of success in all his suits, or in any other event.

As the contract which produced the relation between the parties in this case, ascertained the fee of the defendant, it was as irrevocably settled, as though a rule of law, which tolerated no contract upon the matter, had fixed it."

Under your existing contingent fee contract, you are obligated to represent your client zealously within the bounds of the law. Under a new contract increasing your fee you would still be obligated to represent your client zealously within the bounds of the law. No new consideration would flow from you to the client to support the increase in the fee. You simply do not anticipate as large a recovery as was originally contemplated.

In the case of *Dodd v. Board of Commissioners of the Alabama State Bar*, 350 So.2d 700 (1977), the court held that an attorney violated DR 7-101(A)(2) when he entered into a contingent fee contract with the mother of a minor to seek recovery for injuries sustained by the minor; caused the minor's disability of non-age to be removed and then induced the minor to enter into a new contract increasing his contingent fee.

For the foregoing reasons, it is our conclusion that your proposed negotiation of an increase in your fee with your client would not only violate the Ethical Considerations, and Disciplinary Rules which govern situations in which an attorney may withdraw from representation, but also raises serious questions of basic contract law. □

**J. Massey Relfe, Jr.**, of Birmingham, was transferred to disability inactive status by order of the Disciplinary Board, dated January 16, 1984, based upon Relfe's petition to the Board, filed January 6, 1984, in which he asserted that he suffered "an emotional infirmity which renders him medically disabled from practicing law."

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# The Final Judgment



**H. T. Foster**

Harold Thomas Foster, Sr., of Scottsboro died on August 31, 1983. He was eighty-two.

Mr. Foster was born on August 22, 1901, in Scottsboro and remained there until his death. He came to practice law later in life than most — in his 30's — having been a school teacher for several years. He was a graduate of the Cumberland Law School.

For almost a half century Mr. Foster counseled his people in Jackson County. He was an uncommon lawyer and an uncommon man. He had an old-fash-

ioned sense of duty toward his client which compelled him to be not just their lawyer but their friend.

As a trial lawyer, he did not just work a courtroom, he possessed it. He had that uncanny sense of timing which separates the great trial lawyers from the good ones. His wit and humor delighted all his company, his legal mind was like a steel trap, and he believed deeply in basic fairness. He was a people lawyer and proud of it. He had no relish for representing corporations, but he did relish doing battle with large insurance companies and the Southern Railroad, and his clients were assured of a fair fight no matter how well-heeled their corporate opponent.

Harold Foster died on August 31, 1983, leaving an empty place in the hearts and minds of his people from all walks of life who have lost a true and trusted friend.

Sympathy is expressed to his wife, Lorine Hardwick Foster of Scottsboro; his son, Dr. H.T. Foster, Jr., of Scottsboro; and his daughter, Mrs. Jimmy Lou Boulton of Tampa, Florida.



**C. W. Gross**

Charles William Gross of Tuscaloosa died on November 7, 1983. He was seventy-nine.

Mr. Gross was born in Wedowee on January 7, 1904. He graduated from Howard College (now Samford University) in 1924. He taught school for two years at Brundidge High School where he coached basketball.

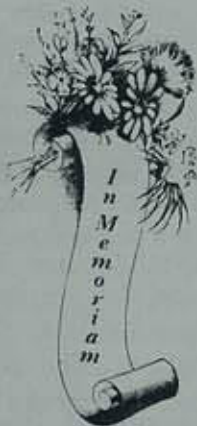
In 1928, Mr. Gross graduated from the University of Alabama Law School and began his law practice in Tuscaloosa which spanned over fifty-five years.

He served his community and profession well and attained many honors in his years of service. He was a past president and district lieutenant governor of the Civitan Club and was named Tuscaloosa Civitan Club Citizen of the Year in 1968. He served on various committees of the Red Cross, United Fund and YMCA, and served for twenty-two years as chairman of the Selective Service Board for which he received recognition from the governor of Alabama and president of the United States.

Mr. Gross received the "Alumnus of the Year Award" from Samford University in 1964 where he served as a trustee for over twenty-three years.

He is a past vice-president of the Alabama State Bar Association; a past secretary-treasurer, vice-president, and president of the Tuscaloosa County Bar Association; and a member of the American Bar Association.

Mr. Gross was a Christian and loved and devoted much of his time and effort to his church, the First Baptist



**Burke, Ozmus Sigler** — Moundville  
Admitted: 1938 Died: February 1, 1984

**Curry, John Hardy** — Carrollton  
Admitted: 1925 Died: January 14, 1984

**Hoffman, Theodore Henry** — Fitzpatrick  
Admitted: 1964 Died: December 25, 1983

**Martin, John James** — Dothan  
Admitted: 1930 Died: December 21, 1983

**McDowell, Thomas Francis** — Birmingham  
Admitted: 1932 Died: January 4, 1984

**Porter, Charles Edward** — Montgomery  
Admitted: 1950 Died: February 6, 1984



Church of Tuscaloosa, where he served as a Sunday school teacher, deacon, trustee, and member of numerous committees.

Mr. Gross always maintained a courteous and gracious attitude toward friend and adversary alike. He enjoyed the admiration and respect of his fellow lawyers and fellow citizens. His companionship and gracious charm will be missed.

Sympathy is expressed to his wife, Mrs. Susie Finnell Gross, his two daughters, Mrs. Margaret G. McCain and Mrs. Bobby Joe Kemp, and other relatives and friends.



## C. A. Stewart, Jr.

Charles Andrew (Chuck) Stewart, Jr., of Birmingham died on November 15, 1983. He was fifty-nine.

Mr. Stewart was born on November 29, 1923. He served in the United States Navy in the Pacific Theatre during World War II and received the Distinguished Flying Cross for a rescue of two fellow servicemen under hostile enemy fire.

He graduated from the University of Alabama School of Law in 1949 and began the practice of law in Birmingham shortly thereafter.

In the years to follow his admission to the Alabama bar, Mr. Stewart became one of the most well-known and respected civil defense lawyers in the state of Alabama. He handled some of the earliest product liability defense cases in the state and specialized in that field until his death.

Mr. Stewart was a partner in the

firm of Huie, Fernambucq and Stewart. He held offices and was active in the Alabama Defense Lawyers Association and the American Judicature Society. He was a Fellow in the International Association of Insurance Counsel and a member of the Law Science Academy of America. He belonged to the Birmingham, Alabama, and American Bar Associations. In 1974, Mr. Stewart was elected Lawyer of the Year by the Birmingham Legal Secretaries Association.

Chuck Stewart leaves a large void to replace in the civil courtrooms of the state of Alabama. He leaves with all of us, however, fond memories of a warm and gentle man who loved his work, his fellow lawyers, his family and his friends.

Survivors include his wife, Mrs. Barbara Richbourg Stewart; a son, Charles A. Stewart III; a daughter, Miss Jaclyn Stewart; two stepsons, John and Scott Langley; and a stepdaughter, Laura Langley, all of Birmingham.



## S. R. Starnes

Stancel Rose (Stan) Starnes died quietly at home on Lake Martin on December 16, 1983. He was sixty-one.

Stan was an honor student at the University of Alabama, where he graduated from Law School in 1949. He practiced for a while in Oneonta, Alabama, before relocating in Birmingham, where he spent the major part of his professional life.

He was an accomplished trial lawyer who tried and handled cases in every court in the land. His abilities were

recognized nationally. He was invited to become a member of the American College of Trial Lawyers, the International Academy of Trial Lawyers and the American Bar Foundation. His acceptance surely enriched these organizations.

Stan, by training, courage and character, was peculiarly fitted to be a trial lawyer. He could analyze and simplify the most complicated facts and then present them to a jury in an orderly and logical manner. He knew, understood and practiced the art of persuasion as well as any lawyer in America. Death removed from the scene one of the most talented attorneys ever to serve the Alabama Bar.

Devoted to serving the law, Stan found time to be President of both the Alabama Defense Lawyers Association and the Birmingham Bar Association. He used his fine talents and abilities to lead and influence lawyers. Not only as an officer in the two named organizations, but by serving the Alabama Bar in any capacity where he was called to serve; and often that was.

In a few short years, Stan built one of the most respected law firms in the state. Although this has been a long-time ambition, perhaps his greatest joy was the opportunity to practice with his sons: first Stan, and later James. He lived to see both of them firmly entrenched in the law, building fine reputations of their own.

Stan loved the great outdoors, and that was where he spent his short vacations. He loved fishing and boating and playing golf. Nothing pleased Stan more than to have his friends visit him on weekends and relax with him at his home.

His friends remember his outstretched hand when a helping hand was needed. And his charm, dignity, and wit were ever an inspiration, and Stan would be proud to know in these things he will not be forgotten. A fine lawyer. A perfect friend. A devoted father and husband. A happy man.

He is survived by his wife, Mrs. Mary M. Starnes; two sons, James H. and W. Stancel Starnes, both of Birmingham; a daughter, Mrs. Harris Stewart, Tuscaloosa; a sister, Mrs. Eloise Norrell, a brother, Herman Starnes, both of Guntersville.



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# Setting it Straight

*The Alabama Lawyer* wishes to correct errors that appear in the publication whether they be our mistakes or those of our sources. We ask that readers promptly bring notable errors to our attention.

Due to poor sound quality, when transcribing excerpts from "The Reflective Roundtable" program, an unfortunate mistake occurred in the story told by Judge Seybourn Lynne. Judge Lynne refers to a dear friend of his **Butch Clements** who was pleading with him to give a fellow probation. Well, actually Butch Clements was not a friend of Judge Lynne's — Butch was a mistake. That dear friend was **Foots Clement**, who was a prominent Tuscaloosa lawyer. The correct identity should add familiarity and flavor to an already enjoyable story.

\*\*\*

In the Executive Director's Report, a

list appeared of those who made special gift contributions to the Center for Professional Responsibility. The G.P. Benton Memorial Garden was given by **A.G. Gaston Enterprises**, rather than **A.B. Gaston Enterprises** as published.

\*\*\*

The Birmingham Bar Association has elected a new secretary-treasurer and it's not **M. Clay Osball** as you read in the January issue's Riding the Circuits column. It's **M. Clay Alspaugh** although he says he may be known at times as an "Oddsball." We thank Mr. Alspaugh for being such a sport and congratulate him on his office with the Birmingham Bar Association.

\*\*\*

Those of you wishing to earn CLE credit on March 28 will be interested to know that the seminar listed under "CLE Opportunities" is entitled "**Banking Law**." That important information was inadvertently omitted.

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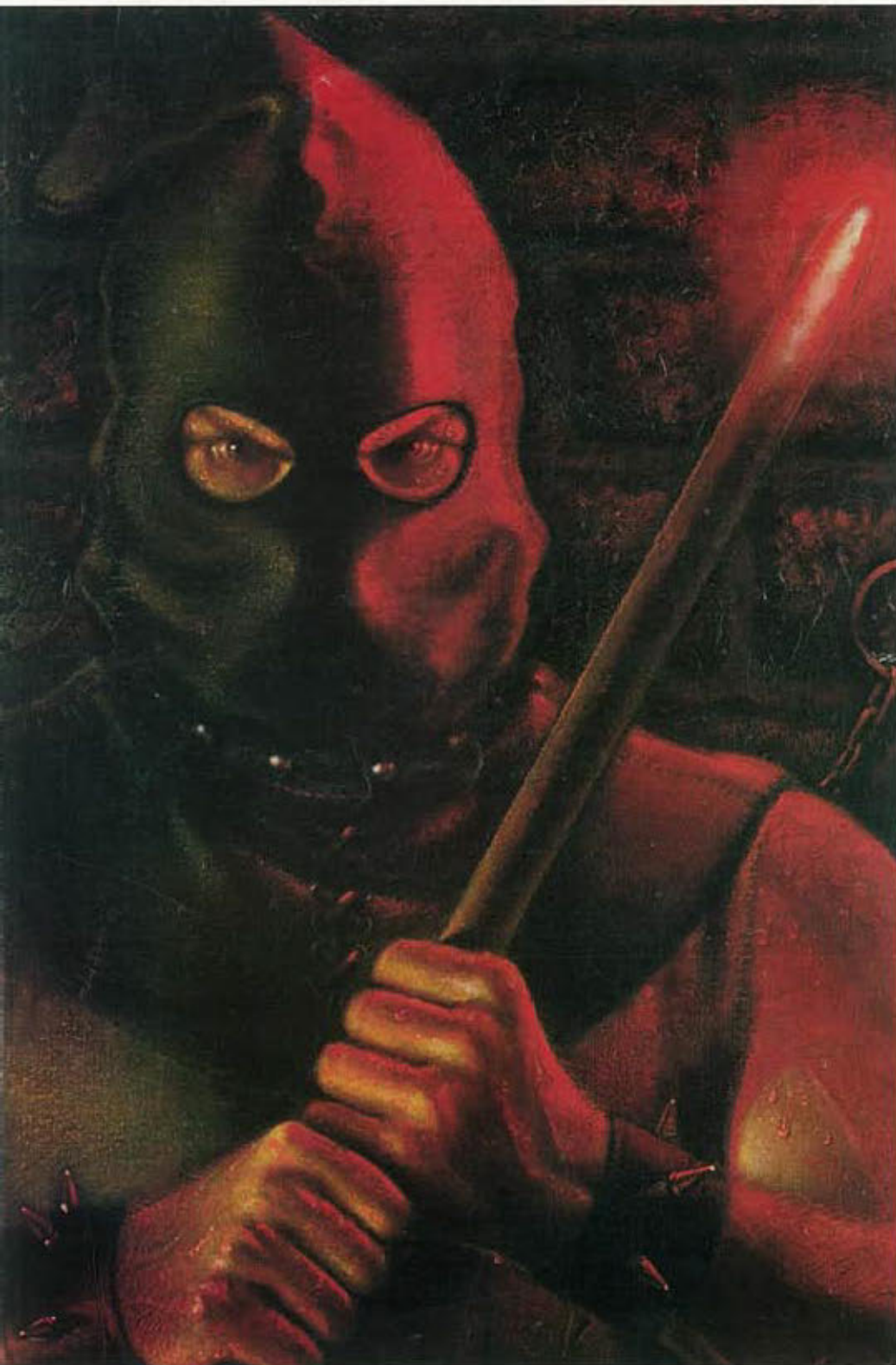
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