The Alabama Lawyer

Vol. 44, No. 3 MAY 1983

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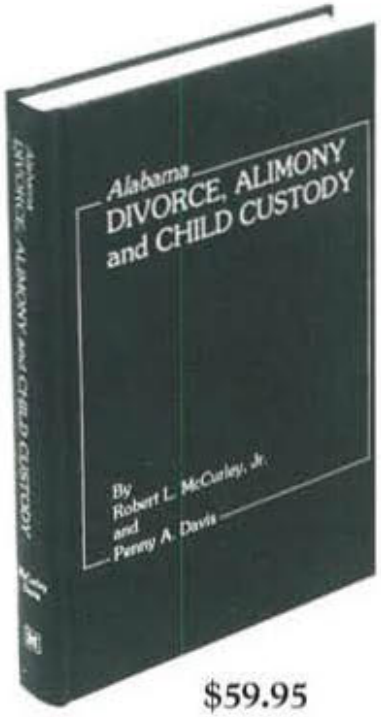

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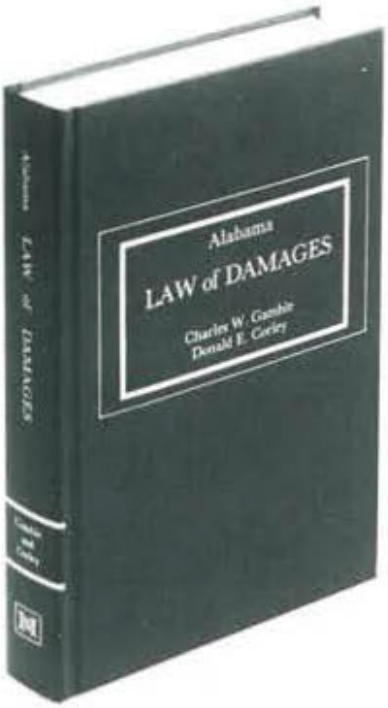

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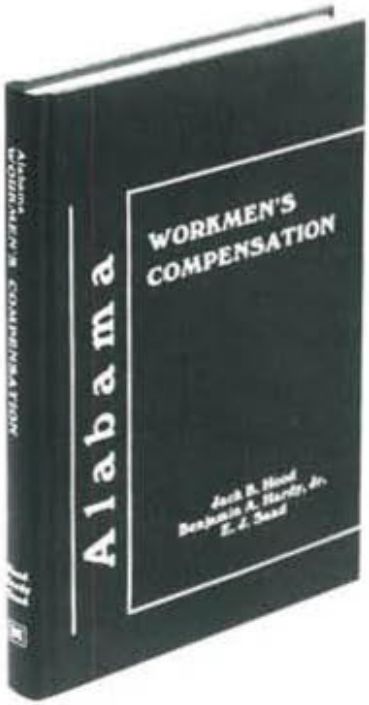

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GENERAL INFORMATION

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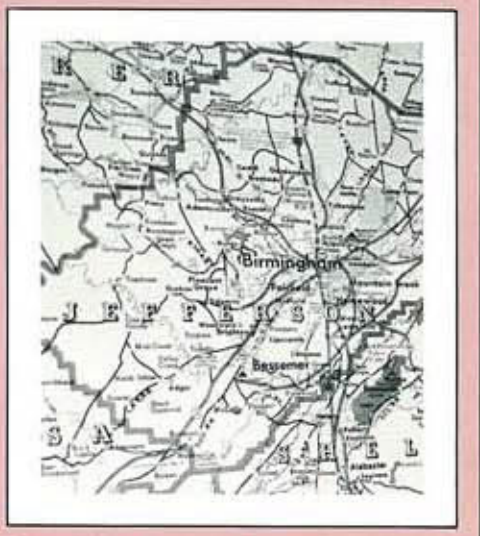
Advertising rates are available upon request. Publication of an advertisement is not to be deemed as an endorsement of any product or service offered. All advertising copy is subject to approval, and the publisher reserves the right to reject any considered objectional in appearance or content.

The Alabama Lawyer is provided to association members without charge. If a member should move, it will be necessary to submit a change of address in order to continue receiving the publication. Nonmember subscriptions: $15.00 in the United States; $20.00 elsewhere. All subscriptions must be prepaid. Single issues are $3.00, plus postage.

THE MAY 1983



Birmingham or bust

—pg. 126

Plans are underway for the Alabama State Bar 1983 Annual Meeting to be held July 21-23 in Birmingham. Take a sneak peek at what's in store. You won't want to miss it.

Legal rights of the handicapped

—pg. 128

Much legislative and judicial attention has been focused upon the rights of the handicapped. Representing the "special child" in the educational environment demands specialized legal skills.

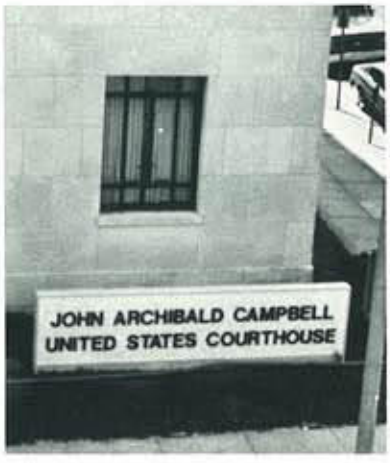
On the cover

Pictured on the front cover is the prestigious ABA Law Day Public Service Award given to the Alabama State Bar/Unified Judicial System for their outstanding Law Day effort in 1982.

ISSUE IN BRIEF

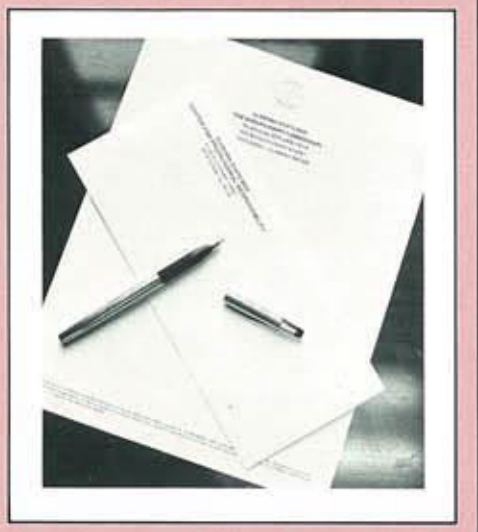
New policies in the criminal justice system —pg. 140

The insanity defense, the exclusionary rule, and the writ of habeas corpus have drawn criticism from both lawyers and the public. Are reforms needed and, if so, how can the rights of the accused be safeguarded?



Federal courthouse gets new name —pg. 154

The Federal Courthouse in Mobile was recently named in honor of John Archibald Campbell. Campbell was one of the few Alabama lawyers to serve as a Justice of the United States Supreme Court.



How to avoid the unintentional grievance

—pg. 156

A lawyer's darkest hour is the inquiry from the Grievance Committee. Adherence to simple tenets can preclude most unintentional grievances.

Regular Features

President's Page

Since our last issue our labors have continued on a more or less even keel. I would like to comment on what I shall designate "The Four C's,"—Compliance, Criticism, Committees and Convention.

Compliance. The response of the members to the reporting requirements of Mandatory Continuing Legal Education has been, as I have stated before, simply great. We do have a number of lawyers who, for one reason or another, have not complied. Each member of the Board of Bar Commissioners was furnished with a list of lawyers in his circuit who have not complied and they have been asked to personally contact those lawyers. By the time you read this, a list will have been certified to the Supreme Court of those who failed to comply and, I am confident, sanctions will be imposed as required by the Rules.

Committees. We function mainly through committees. Most of the committees have addressed their assigned task and have done a good job. Others have not. For the latter I am at least somewhat to blame in not building the necessary fire. I am convinced that, finances permitting, the bar should establish an office to coordinate committee and section work. The work load is really too burdensome for this task to be handled in the present manner.

Criticism. I have, for some time now, been concerned with unfair and unwarranted criticism of the judiciary by the news media, and to some extent, candidates for public office. The Canons of Judicial Ethics do not, nor should they, permit response by the court or the judge; and they simply do not have a forum in which to respond. I am not alone in this concern. During the year your Executive Committee has authorized one reply by me in the form of a letter to the editor of a major daily newspaper (which did not, incidentally, publish the full content of the letter). There is now in effect a program in which each Bar Commissioner has been asked to report on instances of what he considers unfair criticism. These reports will be reviewed by the Executive Committee and, if warranted, an appropriate response will be made by me in the name of the Alabama State Bar. There is no reason why individual members could not assume the same reporting task, and we do solicit your support. Please be assured that I speak not of objective, fair criticism done in a responsible manner.

Convention. More time is devoted each day to trying to put together an interesting, rewarding and entertaining get-together in July in Birmingham. We shall devote one full day (Thursday) and parts of others, to presenting programs which shall be available as MCLE credits. Alabama and Cumberland are coordinating their efforts and each of you in attendance will really be getting something for your "convention dollar." In addition, we are determined to make this a fun time and, hopefully, will succeed in lining up a number of enjoyable moments for you.

Vulcan, the world's largest iron man, overlooking Birmingham.

One departure from my outline. As a result of our investigations into abuses of the Indigent Defense Fund the Disciplinary Board has imposed, and there has been administered, one public censure. The investigations are continuing and, undoubtedly, more complaints will be filed. Many circuits, I am told, have now established some sort of peer review of claims for services. This should prevent most, if not all, of the abuses.

Hope to see you soon—especially in Birmingham in July.

Norborne C. Stone, Jr.

Executive Director's Report

Lawyer Referral Service

"You've come a long way baby" is a popular advertising slogan used in the tobacco industry. This slogan could just as easily be used when describing the Lawyer Referral Service (LRS). It might be appropriate to add further the phrase "but it took a long time."

In reviewing the records of our statewide lawyer referral service for the 1982 calendar year, I could not help but chuckle when reflecting upon the current success of the program when compared to the difficulties in getting the program instituted.

LRS was introduced as a concept to the state bar at the 1970 Annual Meeting in Birmingham. At that meeting, the chairman of the ABA Standing Committee on Lawyer Referral Services had come from Baton Rouge, Louisiana to make a presentation. The room was packed just prior to this presentation which, unfortunately, was preceded by a coffee break. As a new bar director involved with his first annual meeting, I was greatly embarrassed when our speaker addressed an audience of thirty-one people, many of whom were members of the Board of Bar Commissioners that I had encouraged to be part of the audience. The speaker that afternoon was Judge Alvin Rubin, presently U.S. circuit judge for the Fifth Circuit. I have often thought had he occupied that position in 1970, instead of a U.S. district judgeship in Louisiana, perhaps the attendance would have been better.

Undaunted by the poor attendance, Judge Rubin made a most impressive case for the establishment of a statewide lawyer referral service. Successful programs were operating in other states and through these programs the public was being assisted in employing competent counsel.

Almost eight years after Judge Rubin's presentation, the Alabama State Bar's LRS was launched at the 1978 Mid-Winter Meeting of the Alabama State Bar in Montgomery. Ernest C. "Sonny" Hornsby, Alabama State Bar president at the time, became the first state bar member to join the referral panel. In these five succeeding years, the success of the program has been one of the bar's real pluses. The public is being well served by competent attorneys, and in all candor, the paying clients referred through LRS have had a significant impact on legal economics.

The statewide system currently has 252 panel members. While this number may seem small, it should be pointed out that Birmingham, Mobile and Huntsville have local referral services and the members of the bar in the judicial circuits in which these cities are located participate in the local service. These three local referral programs have 471 panel members.

While there are panel members in each of the thirty-nine judicial circuits, there are a few counties in which there is no lawyer signed up with the service, and clients frequently must go to an adjacent county within the circuit to obtain legal advice.

All persons seeking a referral do not follow through and keep an appointment; however, 1,934 cases were documented in 1982 in which an attorney-client relationship was established. Attorneys are encouraged, but not required, to report back to the LRS Governing Board the fees earned through the referrals. This report does not entail a specific fee amount, but fees are reported in ranges. One hundred attorneys reported fees of less than $100, 582 reported fees of between $100 and $500, and 110 reported fees earned in excess of $500.

Consider the statistics for the 1982 calendar year and determine if you would like to "sign up" for LRS panel membership. The annual fee for membership is $25 and each participant may elect up to six areas of practice in which a referral will be accepted. In addition to the membership fee, a referral panel member must furnish proof of coverage under an in-force professional liability insurance policy and, further, must agree that the initial consultation, not to exceed thirty minutes, will be billed to the client at a rate of $20. Any services rendered beyond the initial consultation are to be governed by a mutually satisfactory attorney-client contract of employment.

In the first three months of 1983, we made 1,200 referrals within the state and outside the three metropolitan areas noted above.

The statewide referral system is advertised in the Yellow Pages of all phone books in the state of Alabama, and clients desiring referrals may call the state bar toll free.

If you would like to sign up as a LRS panel member or desire more information, please write:

Mrs. Gale Skinner
Alabama State Bar
P. O. Box 671
Montgomery, AL 36101

Licenses and Special Membership

I recently received the first quarterly report from the State Revenue Department for fiscal year 1982-1983 which contained the names of those attorneys who hold a current license to practice law in the state of Alabama. There are 4,151 names on this list. In reconciling the Revenue Department's list with our own records, we discovered 228 lawyers who purchased licenses last fiscal year not to be on this year's list. Fifty-one of these were repeat delinquencies from fiscal year 1981-1982.

Enforcement authority in this matter rests with the State Revenue Department; however, as a matter of courtesy, I sent a memorandum to those potentially delinquent attorneys reminding them of their licensure obligations. Since sending the memo, seventy-nine attorneys have purchased licenses which they had previously failed to purchase. A number of the lawyers whose names did not appear on the list had, in fact, purchased licenses within the required time period, but, either through failure of the local licensing authority to forward the information or through clerical problems in the Revenue Department, their names did not appear on the list. The records in this office have been corrected to reflect the proper status.

Special Membership dues have been paid by 1,546 members of the state bar, while those attorneys admitted since October 1, 1981, a total of 960, are exempt for two years from year of admittance from the purchase of a license or the payment of Special Membership dues.

We currently carry the names of 6,885 attorneys on the active roll, and some 179 applicants await the results of the February 1983 bar exam.

The bar, like the Lawyer Referral Service, has come a long way. There were slightly over 2,700 members on the roll of the bar in July 1969.

Reginald T. Hamner

Letters to the Editor

Additional judgeship needed for overwhelming caseload

A topic of conversation among the Escambia County Bar for the last couple of years has been the need to create an additional circuit judgeship for the Twenty-first Judicial Circuit. The sentiment of our bar was expressed by unanimous resolution that an additional circuit judge is needed to relieve Judge Douglas S. Webb of a work load which is fast becoming overwhelming, even for a judge of his caliber and dedication. Last year, we requested Senator Reo Kirkland, Jr., and then Representative Brooks Hines to sponsor appropriate legislation, and Senate Bill 63 was introduced. Pursuant to Section 6.12 of Amendment Number 328, Constitution of Alabama, as amended, the enabling legislation was presented to the Alabama Supreme Court for its review and comment. The Supreme Court submitted a report to the legislature based on statistics derived from the case reporting system of the Administrative Office of Courts that was unfavorable to last year's passage of the legislation; however, the court suggested in its report that the presence of Holman Prison and G. K. Fountain Correctional Facility in Escambia County warrants close monitoring of this circuit's case load. Our bar will continue its efforts to effect passage of this legislation, and we feel that such legislation will and should receive statewide support when everyone considers and appreciates the affect a maximum security prison system has on the circuit in which it is located.

For instance, it has been determined that approximately forty-five percent (45%) of the criminal cases in Escambia County originate from our (the state's) prison system. Of the three hundred twelve (312) indictments returned as true bills by Escambia County grand juries in 1982, it is estimated that one hundred forty (140) are directly related to the prison system. Although no firm statistics were available, it was reported that the prison system produces for our circuit an above average number of murder and assault cases, and any prison-related case presents a tremendous security problem for the court in the case's passage through each stage of the criminal trial process. Also, the prison system generates a large number of habeas corpus petitions and other post-appeal extraordinary writs which must be handled by and through our circuit court. As can best be determined, at least five (5) of such petitions are filed each week with the court by prisoners, and of the total number filed annually, approximately ten percent (10%) have enough facial merit to warrant a full hearing in the circuit court. Often a prisoner will desire to represent himself at these hearings (and even at a trial on the merits following indictment) which by necessity places Judge Webb in the additional role of "defense counsel."

Of course, as in every circuit, our civil case filings are increasing, but the prison related work load is expected to rapidly increase and multiply at a sharper rate due to the ever increasing prison populations caused partially by the provisions of the Habitual Offender Act and provisions of our Criminal Code mandating sentences of life without parole.

The Escambia County Bar sincerely feels that an additional circuit judge in the Twenty-first Judicial Circuit is needed and justified, and any support received from the various members of the Alabama State Bar to effect passage of necessary legislation will be greatly appreciated.*

Brewton **Edward T. Hines**

*The above statistical information was derived from the report of the Alabama Supreme Court of June 23, 1982, relative to Senate Bill 63 and from personal interviews conducted with various Escambia County court officials.

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. Readers of *The Alabama Lawyer* 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 otherwise. The editor reserves the right to select the excerpts therefrom to publish. Unless otherwise expressed by the author, 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 to the Editor should be sent to:

The Alabama Lawyer
Letters to the Editor
P.O. Box 4156
Montgomery, AL 36101

About Members Among Firms

About Members

Stephen W. Still has been transferred by Sonat Inc. to Washington, D.C. where he serves in the capacity of Staff Attorney—Government Affairs.

Tuscaloosa attorney **Slade Watson** was awarded the Alabama-Mississippi Optimist "Outstanding Lieutenant Governor" award at their district board meeting in February. Watson, an Optimist since 1968, was honored for his work in the district during 1981-82.

Among Firms

The law firm of **Howell, Johnston & Langford** is pleased to announce that **Richard Leigh Watters** is now associated with the firm. Offices are at 903 Southtrust Bank Building, P. O. Box 1643, Mobile, Alabama 36633.

Kenneth D. Wallis and **Loring S. Jones III,** are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Wallis & Jones,** that **Gary C. Pears** continues in his association with the firm, and that **W. Ronald Waldrop** is now associated with the firm. Their offices are located at Suite 107, Colonial Center, 1009 Montgomery Highway South, Vestavia Hills, Alabama 35216.

Mary E. Murchison and **Laurence P. Sutley** are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Murchison and Sutley** with offices at 224 W. Laurel Avenue, P. O. Drawer 1320, Foley, Alabama 36536.

Robert L. Bowers takes pleasure in announcing that his son, **Robert L. Bowers, Jr.,** has joined him in the practice of law under the firm name of **Bowers & Bowers,** with offices located at 401 2nd Avenue North, Clanton, Alabama 35045.

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves take pleasure in announcing that **William March Moore** and **James Donald Hughes** have become members of the firm and **David E. Hudgens** and **Allan R. Wheeler** have become associated with the firm. Offices are at 1101 Merchants National Bank Building, P. O. Box 290, Mobile, Alabama 36601.

Frederick L. Fohrell, James P. Hess and **L. Thompson McMurtrie** announce the formation of a partnership for the general practice of law under the firm name of **Fohrell, Hess & McMurtrie.** Offices are located at 221 East Side Square, Suite 1-B, P. O. Box 2210, Huntsville, Alabama 35804.

H. Lewis Gillis, former chief deputy D.A., is pleased to announce the opening of his office for the practice of law at 434 Sayre Street, Montgomery, Alabama 36104.

The law firm of **Hardin & Hollis** is pleased to announce that **Hilliard R. Reddick, Jr.,** and **R. Bradford Wash** have become associated with the firm. Offices are at 1825 Morris Avenue, Birmingham, Alabama 35203.

Stephen M. Wilson, Attorney at Law, announces his relocation to 203 East Side Square, Suite 24, Huntsville, Alabama 35801.

Eason Mitchell and **Bruce M. Green,** of the law firm of **Mitchell, Green, Pino, and Medaris,** are pleased to announce the relocation of their Calera office to Suite 205, Shelby Medical Center, Alabaster, Alabama. Phone 663-1581.

The law firm of **Foster, Brackin & Bolton, P.A.** takes pleasure in announcing that **Thack H. Dyson** has become associated with the firm. Offices are at 1715 North McKenzie Street, Foley, Alabama 36535.

The law firm of **Pappanastos & Blanchard, P.C.,** takes pleasure in announcing that **William James Samford, Jr.,** and **Richard Y. Roberts** have become members of the firm and that the firm name has been changed to **Pappanastos, Samford, Roberts & Blanchard, P.C.** Offices are located at Suite 311, One Court Square, Montgomery, Alabama 36104.

North Haskell Slaughter Young & Lewis, P.A., takes pleasure in announcing that **James J. Odom, Jr.,** formerly in private practice in Birmingham, and **David S. Dunkle, Guy V. Martin, Jr., E. Alston Ray, Robert D. Shattuck, Jr., Judson E. Tomlin, Jr.,** and **Jonathan H. Waller,** formerly associates with the firm, have become members of the firm. Offices are at 800 First National-Southern Natural Building, Birmingham, Alabama 35203. Phone 251-1000.

The law firm of **Beasley & Wilson** is pleased to announce that **James W. Traeger,** formerly an assistant to the district attorney, has become an associate of the firm. Offices are located at 418 South Hull Street, Montgomery, Alabama 36101-4537.

B. Greg Wood, W. E. Hollingsworth III, and **Jeffrey A. Willis** are pleased to announce the formation of a firm for the general practice of law under the firm name of **Wood, Hollingsworth & Willis** and that effective July 1, 1983, **James H. Sharbutt,** retired circuit judge, will be of counsel to the firm. The firm will have offices located at 118 East Street, N., P. O. Box 494, Talladega, Alabama 35160; The Sharbutt Building, 126 7th Avenue, S.W., Childersburg, Alabama 35044; and 2228 West Highland Street, Vincent, Alabama 35178.

Pumroy & Bryan takes pleasure in announcing that **Jack Wilson,** having withdrawn as a member of the firm of Wilson, Bolt, Isom, Jackson & Bailey in Anniston, has become a partner in the firm and the firm name has been changed to **Wilson, Pumroy & Bryan.** Offices are located at 1431 Leighton Avenue, P. O. Box 2333, Anniston, Alabama 36201.

H. Dean Buttram, Jr., and **Robert D. McWhorter, Jr.,** are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Buttram & McWhorter.** Offices are located at 440 West Main Street, P. O. Drawer B, Centre, Alabama 35960.

What? Imperfection at Hugo's?

No, not really. We just thought it would be fun to see if you can spot the misplaced items in the above photo.

Simply circle the *two* items that have been put in the wrong places, and present this advertisement to your waiter when you dine at Hugo's. An after-dinner drink will be on us.

While this photograph may have something wrong with it, you won't find anything amiss at Hugo's. You see, we believe a truly great restaurant should fill your senses as well as your glasses. That it should have distinctively fine cuisine. Be contemporary, yet possess a reverence for elegance. Hugo's. Experience it for yourself.

For information and reservations, call 322-1234.

HYATT BIRMINGHAM

AT CIVIC CENTER

ALABAMA STATE BAR

Registration Information

In mid-June registration materials will be sent so that you may pre-register for the Alabama State Bar 1983 Annual Meeting to be held in Birmingham July 21-23. Not only will you save money by pre-registering, but you will save time. Your tickets for the social and luncheon functions you choose to attend will be in a packet ready for you to pick up when you arrive in Birmingham. This will also help us to better plan for your convention. Cancellations with a full refund may be made through July 19.

Those unable to pre-register will find a booth set up at the Hyatt on Wednesday afternoon and through the remainder of the convention for registration, to purchase tickets for the special ticketed functions, and for general information purposes.

General Assembly

The 1983 Annual Meeting of the Alabama State Bar will begin this year on Thursday morning, July 21 with the Recent Developments in the Law seminar. Those who regularly attend the annual meeting will want to note this change in scheduling and be in Birmingham early on Thursday.

Bench and Bar Luncheon

The Bench and Bar Luncheon to be held on Thursday will feature guest speaker Morris Harrell, president of the American Bar Association. It is an honor to have Mr. Harrell at the annual meeting, and you will not want to miss this event.

Continuing Legal Education

Programs scheduled at the annual meeting will give the attorney interested in obtaining hours toward the mandatory CLE requirement the opportunity to earn credit. Those attending the Recent Developments in the Law seminar on Thursday will earn more than six hours of credit. Further information on approved CLE programs and meetings will be available closer to convention time.

Membership Reception

One of the "favorite" social events of the annual meeting is the traditional membership reception held on Thursday night. This year's reception will be held at the Birmingham-Jefferson Civic Center with a jazz band to entertain. Look forward to fabulous food, drink, and fun! The dress for this occasion is casual . . . as a matter of fact, just leave that "black tie" at home this week.

Hotel Reservations

The convention headquarters will be the Hyatt Birmingham and room reservations must be made on an individual basis by calling the hotel directly. You may call the reservation office at (205) 322-1234 or write the Hyatt Birmingham, Reservation Office, 901 North 21st Street, Birmingham, Alabama 35203. A block of rooms has been reserved and assignment of rooms will be on a first come, first serve basis. Please identify yourself as a member of the bar when making your reservation.

Those unable to get a room at the Hyatt, or upon personal preference, may contact the hotel of their choice. For convenience we suggest contacting the nearby Civic Center Holiday Inn (205) 328-6320.

Alumni Luncheons

As is customary, the University of Alabama School of Law and Cumberland School of Law will host alumni luncheons on Friday.

1983 ANNUAL MEETING

Section Meetings

Section meetings will be held on Friday afternoon and Saturday morning. Some sections will conduct business meetings and elect officers, and others will have a program planned. Members of the bar interested in a section are cordially invited to attend the meetings and programs. For those not attending section meetings, there will be other program choices available.

Fun Run

Don't forget your jogging shoes if you plan to participate in the annual fun run! The run will take place early Saturday morning and trophies will be awarded to winners in several categories.

General Business Meeting

During the general business meeting on Saturday morning, Alabama State Bar President Norborne C. Stone, Jr. will pass the gavel to President-elect William B. Hairston, Jr. to assume the presidency of the bar for the 1983-84 year. Afterwards the election of a new president-elect will take place. We encourage all members to participate in choosing the attorney to fill this important office.

Annual Dinner and Dance

The annual dinner and dance will be on Friday night. A sumptuous buffet dinner will be followed by the 50's and 60's sounds of the popular band *Chevy Six*.

Breakfasts

The Family Breakfast will be on Saturday morning following the annual fun run. Other special breakfast details, including the new 1983-84 Committee Breakfast, will be included in the registration materials.

. . . and much more

Education of the Handicapped—The Lawyer's Role

Robert H. Smith

"... But the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place as they should be ..."

—Plato

Robert H. Smith, a partner in the Mobile law firm of Collins, Galloway & Smith, is a graduate of Birmingham Southern College and received his J.D. degree from the University of Alabama.

Before you hastily leave this article in search of something you feel may be more gainful to your practice, let me invite you to stay a few moments while I try to impress upon you that every practicing lawyer in the state of Alabama needs to have some knowledge of this emerging field of educational law. Representing the handicapped not only serves a recognized need, it also provides a tremendous sense of personal satisfaction to the advocate. Do you remember in law school how you felt with unbounded idealism that you would hold the sword for the righteous and the shield for the helpless, only to find out after graduation that there were such things as a criminal bar and a civil bar—personal injury lawyers and defense lawyers, and that the days of general practice seemed to be numbered. Here is a chance to change some of that and add a new dimension to your practice.

With the expanding awareness of the legal rights of the handicapped you will most likely be called upon at some time, informally or formally, to counsel the handicapped or a member of their family. The ranks of the handicapped do not neatly follow socio-economic lines, racial lines or other patterns in our society, so the chances are you know the family of a handicapped child, a handicapped person or have a relative whom you have watched first hand struggle through the frustrations and uncertainties of trying to provide an education for their handicapped child.

While this article is limited to the law concerning the delivery of educational services to handicapped, the field is much broader and involves larger themes of public access, nondiscrimination in jobs and related matters.

Who are They?

There are approximately seventy thousand children in Alabama who are eligible to receive special education. The word "special" has no legal significance but is an administrative term used to differentiate programs provided to the so-called "regular" school population and those who are not regular. The special children served by public schools of Alabama account for approximately ten percent of the total school population. Not all of these children are handicapped in the traditional sense, because under Alabama laws concerning special children, the "bright and gifted" are also included in that count. Bright and gifted are not included under the federal statutes.

Handicapped children for purposes of the statutes and regulations involve those children who are: mentally retarded (profound, trainable and educable), hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopaedically impaired, other health impaired, deaf-blind, multi-handicapped, or those with specific learning disabilities who because of those impairments need special education and related services. The educably mentally retarded and learning disabled make up the largest identifiable handicapped group. For information purposes you should know the difference between the educational terms of mental retardation and specific learning disability. In the broadest sense, the mentally retarded are considered those who have sub-average general intellectual functioning. The learning disabled are average or near average in general intellectual functioning but have a problem in understanding or using language. The term learning disabled includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia and developmental aphasia.

Handicapped children may be receiving services in the "regular" local school population where they will receive instruction in self-contained classrooms or be "mainstreamed" with the nonhandicapped. Services may be provided in special schools identifiable within a school system, or in regional schools such as Talladega, in institutions

such as Partlow, at home or not at all. Since the advent of state and federal laws on the subject of education for the handicapped, it will be assumed that most of the handicapped children in this state have been identified and are receiving some type of service. The lawyer becomes involved with the delivery of appropriate services, although identification and evaluation may also be involved.

What Do I Need to Know?

Now that you have been introduced to your potential clients, you need to have the basic tools with which to craft a suitable result. The following list is a starter set which is essential for every advocate—developing case law will complete the kit:

1. Alabama Exceptional Child Education Act (Acts 1971, No. 106, Page 373 Section 313) *Ala. Code* 1975 § 16-39-1 et seq.
2. Rehabilitation Act of 1973, 29 U.S.C. §794, 794(a) (Commonly referred to as Section 504).
3. The Education of All Handicapped Children Act of 1975 (Commonly referred to as Public Law 94-142) 20 U.S.C. §1401, et seq.
4. The 14th Amendment to the Constitution of the United States and 42 U.S.C. §§1983, 1988.
5. Rules and Regulations issued pursuant to the Education of All Handicapped Act found in 34 CFR 300 et seq.
6. Rules and Regulations issued pursuant to the Rehabilitation Act of 1973 concerning primary and secondary education found in 45 CFR 84.31-40.
7. *Board of Education v. Rowley*, ___ U.S., ___ 73 L.Ed. 2nd 690, 106 S. Ct. (1982).
8. Policies and Procedures of the Alabama State Department of Education.
9. Another excellent source is *The Legal Rights of Handicapped Persons—Cases, Materials and Text* edited by Robert L. Bergdorf, Jr., J.D. and published by Paul H. Brookes, Publishers (Copyright 1980). This reference material is done in typical law school case book format and may be obtained for a reasonable price through Paul H. Brookes Publishers, Post Office Box 10624, Baltimore, Maryland 21204.

Highlights of the State and Federal Acts

The Alabama Exceptional Child Education Act requires that each local school board provide not less than twelve consecutive years of appropriate instruction and special services for exceptional children beginning with those six years of age. Permanent Volume 13 of the Code of Alabama of 1975, which contains Section 16, contains a significant misprint. The definition of "exceptional children" states that they are "persons between the ages of six and nineteen years . . ." Act 106 as passed and as correctly shown in the cumulative supplement pocket part provides that "exceptional children are those persons between the ages of six and *twenty-one* years . . ." This is significant because the federal laws adopt the state age limits in requiring the provision of an appropriate education. The act provides that if any local school board fails or refuses to implement a plan as described in the act, the attorney general shall upon request of the State Board of Education, or upon the request of any private citizen, bring civil injunctive actions to enforce the implementation of plans submitted by local boards to the state board for providing appropriate instructions and special services for exceptional children. Whether a private cause of action is created by this statute has not been answered. There also is some question as to the extent of relief that could be granted under a civil injunctive action as far as an individual plan for a child.

The Rehabilitation Act of 1973 . . . prohibits discrimination against otherwise qualified handicapped persons just as Title VI prohibits discrimination based on race and Title IX prohibits discrimination based upon gender.

The Rehabilitation Act of 1973 (Section 504) prohibits discrimination against otherwise qualified handicapped persons just as Title VI prohibits discrimination based on race and Title IX prohibits discrimination based upon gender. The receipt of federal financial assistance is crucial to the application of Section 504 relief. The state board and local school boards in the state of Alabama receive federal financial assistance. A private cause of action has been recognized under Section 504. Rules and regulations cited above also specifically apply to primary and secondary education. In 1978 Congress added to Section 504 all the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 and also provided for a reasonable attorney's fee for the prevailing party.

In 1975 Congress completed the amendment of several education acts and brought forth the Education of All Handicapped Children Act of 1975. Congress specifically stated that the purpose of the act was to assure that all handicapped children have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. It also assists states in delivering the appropriate education by providing funding. The act is a comprehensive method of distributing those monies to the states and contains the contract between the states and the federal government for the delivery of appropriate services and education to handicapped persons. It is this act which provides the primary tool for obtaining the services and education for the handicapped child, and the advocate should be totally familiar with its provisions and with the regulations issued thereunder.

In the summer of 1982 the Supreme Court of the United States upheld the constitutionality of Public Law 94-142 under the "spending" power of Congress and undertook to define the standards for the education of handicapped children as they are set out in the act. *Board of Education v. Rowley*, supra. The court concluded that the Congress intended to provide handicapped children a "basic floor of opportunity" which guaranteed specialized instruction and related services which are individually designed to provide educational benefit

to the handicapped child. The Court was reluctant to establish any one test which would determine when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the act. It did hold that the act did not require benefits that would guarantee "self sufficiency" of handicapped children nor such benefits that would necessarily maximize each handicapped child's potential. Four members of the Court felt the majority opinion in that case had completely misread the intent of Congress as it related to the establishment of a standard. The minority felt that the act was intended to eliminate the effects of the handicap, at least to the extent that the child should be given an equal opportunity to learn if that were reasonably possible. The standard of the minority is one of educational opportunity equal to that of nonhandicapped children.

However, the "educational benefit" standard will direct the advocate in his preparation for counseling of the handicapped child and his or her parents and at the hearings which will follow if an appropriate program is not amicably agreed upon.

Practical Applications

Now that you have mastered the terms and conditions of the essential acts and their regulations, and understanding the standards identified by the courts as they apply to these various legislative tools, you are ready to apply them in counseling and in litigating, if necessary, in an administrative and possibly judicial forum.

While the procedure you will be following is basically administrative in nature under the Federal Acts, the case should be prepared to make as full a presentment of the evidence as is possible at the initial hearing. The initial hearing comes about as a result of the parents or guardians of a handicapped child filing a complaint with the local board of education ". . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." The client is best served if the advocate is brought in during the formulation of the individual educational program for the child before any hearing. However, the attorney will most likely not be contacted until the matter is ready to proceed to a hearing. If the advocate can provide counseling at the developmental state of the Individualized Education Program (IEP) a hearing may well be averted.

An Individualized Education Program is required for each handicapped child at the beginning of each school year with periodic review of that program occurring at least annually. The IEP becomes the contract between the parent and the school. The contract is not one that guarantees the child will achieve any degree of progress, rather one that the school will deliver the services and programs set forth in that written document. The document is required to be developed with the parents or guardian, the necessary school representatives, and the handicapped child when appropriate. Parental input into this IEP is essential, although in practice it probably does not occur as it should. Some parents will be extremely good advocates for their children and will insist upon the necessary services and programs for their child. Others will lack the experience, training and confidence to feel that they can assert their feelings and desires into this program development.

The lawyer is not invited to these IEP meetings. However, regulations under Public Law 94-142 do provide that "other individuals" can attend the meeting at the discretion of the parent or agency. If the parent wishes to have someone attend this level, it is best to have an education professional attend the IEP meeting. This person may be a former teacher, either public or private, an evaluator such as a psychometrist or psychologist, or an educational specialist from the university level. These people can speak "educationalese" and will generally be familiar with the child's development and needs, which a parent may have trouble articulating. Since the school will most likely present a prepared IEP, the parent should be prepared to present their document developed with their professionals and from these two there should evolve one IEP which will be agreed upon by all parties concerned. More than one meeting may be required. The main role of the lawyer at this point is that of cheerleader, providing encouragement and substantive information on the rights of the handicapped child so that the parents will feel that they are on a par with the educational authorities.

The IEP meeting should not be confrontational but the parents should be equipped to hold their own and everything should be done to dispel an all too prevalent attitude of "we are the school board and you are not." Too many parents suffer from "schoolhouse syndrome" which dates back to that first trip or the fear of the first trip to the principal's office in which they learned to appreciate the doctrine "*in loco parentis.*" Too many parents are reluctant to challenge what they remember to be the complete authority of the school in the development and delivery of educational programs. Public Law 94-142 requires that the parents participate in the development of the program. If the parents are not satisfied with the proposed program, they are not required to sign the IEP and can then begin the administrative trek to the first hearing. Parent advocacy workshops are now being offered by some of the national organizations that represent the handicapped. The parent must be the child's first advocate.

The Hearings

If the parents or guardian cannot agree with the school authority with respect to any matter relating to the identification, evaluation, and educational placement of the child or the provision of a free appropriate public education to such child, then the parents are entitled to present a complaint to the local board. The complaint is generally in the form of a letter notifying the superintendent of the local school agency that the parents or guardian have a complaint and setting forth issues which the parents wish to raise at the hearing. The notice should also state that the hearing is being requested pursuant to Public Law 94-142, Section 504 and the Fourteenth Amendment. Once the complaint is received, the state educational agency is required to insure that not later than forty-five days after the receipt of request for a hearing a final decision is reached.

The state educational agency is charged with the responsibility of seeing

that the hearing is held and providing the space for the hearing, notice and other procedural matters. At the present time in Alabama, the state agency will appoint three hearing officers. The requirements of Public Law 94-142 and the regulations are that these hearing officers be impartial. They cannot be employees of the agency which is involved in the education or care of the child or have a personal or professional interest which would conflict with their objectivity in the hearing. The state agency is required to keep a list of the names and qualifications of those persons who serve as hearing officers. Once the panel is appointed these qualifications should immediately be obtained and if there is any question whatsoever as to the impartiality of these hearing officers an immediate objection to the appointment of the hearing officers should be made. If, upon objection, the state agency fails to change the appointment of the hearing officers, one could consider making a challenge at the hearing directly to the panel members.

Prior to the initial hearing, consideration should also be given to requesting that the hearing be held at a neutral site. Normally, the hearing will be scheduled by the state agency at the central office of the local school system. This can be very uncomfortable for teachers who are employed by the local system and even more uncomfortable for parents, particularly if they are caught by a sudden attack of "schoolhouse syndrome." Other public facilities are generally available and even private facilities at nominal cost can be arranged.

Experts and Their Use

More than likely your expert will have been identified prior to the consideration of the initial hearing. The experts and witnesses will generally be those who are closely aligned to the educational situation and include teachers in the local school system, private teachers or tutors who have dealt with the child, private psychologists or psychometrists and other educational specialists. The list will also often include physicians, nurses, and even optometrists. Great caution should be used in selecting and using these experts. Unfortunately, there are those who will victimize handicapped children's parents by taking their money with promises of miraculous results. The expert's credentials, including his standing in the professional community, should be closely checked.

Because most educational experts will not be familiar with the Supreme Court's decision concerning Amy Rowley, the standard developed in that case should be presented to the expert before he renders an opinion. See *Board of Education v. Rowley,* supra. Experts are always called upon to opine concerning the ultimate issues in question and, in the case of handicapped children, they will be called upon to suggest an appropriate educational program. There is nothing more unnerving than hearing an expert gloss over the distinction between "possible" and "probable." Likewise, in dealing with the handicapped child the expert should only suggest a program which the local board is required to implement. The expert should avoid characterizing programs as being "ideal," or as being programs which will "maximize the potential of the child" or will "make the child self-sufficient." What the record should suggest are programs which will ". . . consist of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Likewise, the IEP which will detail the specialized instructions and related services should be ". . . reasonably calculated to enable the child to receive educational benefits."

Presentation of the Case

While the format of the hearing is a mixture of the formal and informal, evidence rules are relaxed as in other administrative hearings. Great use can be made of letters, reports and other documents, such as affidavits. Even with the use of documentary evidence, live testimony is a must. The parents should prepare a statement in writing and submit it as evidence and also testify orally. The hearing will be recorded at the expense of the state agency so there will be some permanent record of the oral testimony. The written documentary testimony will also insure that the hearing officer will have evidence to review after the oral testimony has become less fixed in his mind. The hearing will be adversarial. The school board will have its attorney present and the parents and child should have their attorney present. Witnesses will be examined and cross-examined. While there are opportunities for review of this hearing, like any other case, the advocate should prepare to prevail at the trial stage and, in this case, at the initial hearing. Additional evidence can be submitted at the review hearing and even in civil actions filed in either federal or state court, but the Supreme Court has recently restricted the amount of review that will be had at the judicial level. *Board of Education v. Rowley,* supra.

Congress provided in Public Law 94-142 that a party who was dissatisfied with the initial hearing and the review hearing provided at the administrative level could bring a civil action and that the ". . . court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." The Supreme Court says that Congress intended for the courts to only review the procedural aspects of the administrative hearing and to determine whether the IEP was reasonably calculated to enable the child to receive educational benefits. It admonishes courts to avoid imposing their view of preferable educational methods upon the states. The dissent in Amy Rowley's case succinctly states that "[t]he court's discussion of the standard for judicial review is as flawed as its discussion of a 'free appropriate public education.' "

Civil Action

Assuming that the review hearing has not afforded anymore relief than the initial hearing, the parents should determine whether or not they wish to file a civil action. As previously noted, when the letter complaint is filed requesting the initial hearing, the complaint should indicate that the hearing is being requested pursuant to Public Law 94-142, Section 504 and the Fourteenth Amendment. Likewise, when the civil action is filed, there should be causes of action concerning each of those grounds. The U. S. Court of Appeals for the Eleventh Circuit has recently held that Public Law 94-142 provides the

exclusive judicial remedy and, therefore, claims under the Fourteenth Amendment and §1983 are generally not cognizable. Section 504 actions are congizable as long as a claim for discrimination can be substantiated. The usual development of the IEP and its later fine tuning will generally not involve claims outside of Public Law 94-142. See *Powell v. Defore,* No. 82-8078 (11th Cir., Mar. 2, 1983). Also, at this time, it should be determined whether the matter should proceed as a class action. If the complaint of the parents is totally concerned with the individualized program for the child, then a class action is not indicated. However, if there are certain common problems which exist system-wide in the local educational agency, such as the provision of adequate housing, instructional materials, priority systems which may relegate the handicapped to a secondary status, architectural barrier problems and the such, then the class action should certainly be considered. It would also be appropriate to look into the expenditure of monies under the federal funding which should be providing the necessary programs and materials for the handicapped child. The contract between the local and state system and the federal government as provided in Public Law 94-142 requires that the federal monies not be used to supplant the obligations of the local system. The local system is required to provide for handicapped children even without Public Law 94-142 and must demonstrate that it has so provided for handicapped children on a per capita basis as it has provided for nonhandicapped children. Only after such a demonstration can the local board use the additional federal monies which are to pay the excess cost of educating handicapped children. These excess cost monies cannot be used to provide the basics, such as buildings and other capital expenditures and those things which normally would be provided to nonhandicapped children. The funds must be reserved for program functions. This is the equal protection argument found in the act that the local board must provide to handicapped children at least what it's providing to regular classroom children before it can use the federal monies provided under the act. In a different civil rights context, the Supreme Court once held in *Brown v. Board of Education*, 347 U.S. 483, 493; 74 S. Ct. 686, 691; 98 L.Ed. 873 (1954):

> "Education is perhaps the most important function of state and local governments . . . in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide, is a right which must be available to all on equal terms."

Mediation

Once the hearing has been requested, the parties are then aligned in an adversarial position. Because of the toll that this adversarial relationship can ultimately take upon the child who is remaining in the system and the parents, the advocate and the parents should remain open to the suggestions of mediation which will be forthcoming from the state agency. It is the present practice of the state agency that after a due process hearing is requested, it will intervene to see if the dispute between the parents and the local school system can be resolved. These mediation efforts should not change the time lines for the hearings, and these time lines should be strictly maintained—otherwise the entire school year could be lost before the matter is ultimately resolved.

Caveat

Public Law 94-142 requires that during the pendency of any of the proceedings, including the civil action, unless there is an agreement to the contrary, the child shall remain in the then current educational placement of such child until all such proceedings have been completed. The unilateral withdrawal of the child from its current placement could jeopardize the later recovery of the expenditures the parent has made for private tutoring or school placement. However, if the situation provided by the local school is intolerable and the parent understands that they may not be able to claim reimbursement expenses from the local board, then withdrawal should be considered. If subjecting the child to such a situation would not be reasonably calculated to allow the child to benefit from special education, then such a unilateral withdrawal should not work against the parent or child. Such a situation could arise where a learning disabled child with average or near average intelligence is erroneously classified as educably mentally retarded or trainably retarded and is required to attend that placement during the proceedings. Since it is possible for these proceedings to last as much as two years, the detriment to the child may not be able to be undone. In such a case, application for a temporary restraining order should receive priority.

Conclusion

The use of the due process hearing system provided under Public Law 94-142 is a tremendous step forward in the protection of the rights of handicapped children and has already served to increase the awareness of local school boards and the state agency as to their obligations under the act.

This article began with a partial quote from Plato. That quote was taken from a decision of the Supreme Court entitled *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 25, 67 L.Ed. 1042 (1923). The subject of that decision was not handicapped children, but children and people who were different. The case involved a post World War I statute in the state of Nebraska which prohibited the teaching of the German language to children under the ninth grade level of school. In commenting on Plato, Mr. Justice McReynolds wrote as follows:

> "Although such measures have been deliberately approved by men of great genius, their ideas touching the relations between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both the letter and spirit of the constitution."

The Constitution, the statutes and regulations set out above and an informed and concerned body of independent lawyers will assure that Plato's proposed law will never have an opportunity to be tested.□

Riding the Circuits

Mobile County

At the regular monthly meeting of the Mobile Bar Association, March 18, 1983, two of its members were honored for their fifty years of service to the public, bench and bar of Mobile County.

Charles S. Price, one of the attorneys honored, is a native of Indiana and a graduate of the University of Alabama Law School. He took time out from his practice of law to serve with Naval Intelligence during World War II and returned to Mobile upon his discharge to resume law practice in the field of immigration, naturalization and consular affairs. Through the years he has been actively involved in many local and state civic affairs and was made an "honorary Greek" in appreciation of his work with that community.

Judge D. T. McCall and Charles S. Price (seated, left to right) are honored for fifty years of service to the bar. At the special luncheon Judge McCall presented the Mobile Bar Association (MBA) the original journal of minutes from MBA meetings dating back to 1869. James J. Duffy, Jr., (standing) president of the MBA, accepted the journal on behalf of the membership.

Daniel T. McCall, Jr., the other honoree, is also a graduate of the University of Alabama Law School. McCall practiced law in Mobile from 1933 until 1960 when he was elected circuit judge for the Thirteenth Judicial Circuit and served in that capacity until October 1969 when he was appointed as an associate justice of the Alabama Supreme Court. He was elected to that position in 1970 and served until he retired in 1975. Judge McCall is a past president of the Mobile Bar Association and has distinguished himself in the city of Mobile and the state of Alabama by his leadership and participation in civic affairs.

James J. Duffy, Jr., president of the Mobile Bar Association, presented each of these gentlemen with a certificate to commemorate this occasion. Their spouses, children, grandchildren, guests and fellow members of the bar applauded this occasion with a standing ovation.

—submitted by Barbara Rhodes

Montgomery County

The Montgomery County Bar Association (MCBA) held its regular monthly meeting jointly with the Montgomery Chapter of the Federal Bar Association on February 16, 1983. The program for this meeting was presented by a five member North Atlantic Treaty Organization (NATO) Briefing Team assigned to the Supreme Allied Commander Atlantic (SACLANT) headquartered in Norfolk, Virginia. SACLANT is the only NATO headquarters in the United States and is staffed by some four hundred officers enlisted and civilian personnel from most of the sixteen member nations of the North Atlantic Treaty Organization. The presentation covered such topics as the establishment of the NATO alliance, its organization and administration, the Soviet military threat, NATO's answer to that threat, and the Allied Commander Atlantic's role in the overall strategy.

U.S. Senator Howell Heflin speaks at February meeting of the Montgomery Young Lawyers Section.

On February 8, 1983, the Montgomery County Bar Association hosted a cocktail reception for U.S. Senator Howell Heflin at the regular monthly meeting of the Young Lawyers Section of MCBA. The senator spoke briefly about the proposed changes in the federal judiciary and the problems associated with federal bankruptcy courts. The First Alabama Bank kindly provided the facilities for the meeting and the reception.

The MCBA regular monthly meeting was held on March 16, 1983, at the Whitley Hotel. We were honored to have as our guest speaker Dean Charles Gamble, Acting Dean of the University of Alabama School of Law.

The Montgomery County Bar Association welcomes the following new members of our Association: Richardson B. McKenzie III; Fred W. Tyson; Richard Y. Roberts; William James Samford, Jr.; Eugene W. Reese; Thomas O. Kotouc; Wesley Romine; Paul E. Johnson; Winston D. Durant; Eugene P. Whitt, Jr.; M. Wayne Sabel; Joan Van Almen; Terry G. Davis; Charles H. Volz III; Mark D. Wilkerson; and J. Fairley McDonald III.

—submitted by Gloria Waites

Morgan County

On January 14, 1983, the Morgan County Bar Association convened in the Morgan County District Courtroom for the election of new officers. The new officers elected for the 1983 term are as follows:

Miles T. Powell—President
Harvey Elrod—Vice President
Kenneth M. Schuppert, Jr.—Secretary/Treasurer

Also, at this meeting, Circuit Judge Rudolph W. Slate explained how the circuit court case load would be distributed. The association was informed that all domestic relations cases will be handled by Judge C. Bennett McRae, Jr., former district judge and recently elected Morgan County circuit judge; all pre-trial considerations and non-jury trials in criminal matters will be handled by Judge Slate. All civil and criminal jury trials, however, will be handled by both Judge Hundley and Judge Slate, alternating the cases between them as they arise on the current jury docket.

—submitted by Kenneth M. Schuppert, Jr.

Local Bar Meeting Schedules

Geneva County Bar Association: Regular luncheon meetings of the Geneva County Bar Association are held on the first Monday of each month at the Chicken Box Restaurant in Geneva. Members of the state bar are invited to attend the meeting which begins at noon.

Huntsville-Madison County Bar Association: The Huntsville-Madison County Bar Association meets the first Wednesday of the month at 12:15 p.m. at the Huntsville Hilton.

Lee County Bar Association: The monthly luncheon meeting of the Lee County Bar Association is held on the third Friday of each month at the Auburn-Opelika area Elk's Club.

Mobile Bar Association: Monthly meetings of the Mobile Bar Association are held the third Friday in each month at the Mobilian, located at 1500 Government Boulevard. All attorneys, local and visiting, are invited to attend the meeting and luncheon. No reservation is required.

Montgomery County Bar Association: The monthly meetings of the Montgomery Bar Association generally are held the third Wednesday in each month at 12:00 noon at the Whitley Hotel.

Local bar associations with regular monthly meetings can have their meeting listed by sending a notice to *The Alabama Lawyer,* P. O. Box 4156, Montgomery, AL 36101. Please see deadline on back cover.

CLE News and Seminars

Mary Lyn Pike
Staff Director, MCLE Commission

MCLE NEWS

Certain Members Now Exempt

The Supreme Court of Alabama, acting on the recommendation of the Board of Commissioners of the Alabama State Bar, has amended Rules 2.A. and 3 of the Rules for Mandatory Continuing Legal Education. The effect of these amendments is to narrow the applicability of the Rules for 1983.

Both rules previously provided that every person whose qualification to practice law is subject to *Code of Alabama* (1975), Sections 40-12-49, 34-3-17 or 34-3-18, would complete twelve hours of approved continuing legal education during each calendar year. The pertinent portions of these sections follow.

Section 40-12-49. Attorneys.

Each attorney *engaged in the practice of law* shall pay an annual license tax of $100.00 to the state, but none to the county . . . [N]o lawyer shall be required to pay a license tax until the first day of October following the expiration of two years from his admission to the bar. (Emphasis added.)

Section 34-3-17. Qualified lawyers holding public office authorized to become members of Alabama bar association.

CONTINUING LEGAL EDUCATION OPPORTUNITIES

May 13-July 31, 1983

LIST OF SPONSORING ORGANIZATIONS

Sponsor Code	Sponsor Name	Telephone Number
ABANI	American Bar Association National Institutes	(312) 567-4683
ABICLE	Alabama Bar Institute for Continuing Legal Education	(205) 348-6230
AJC	Alabama Judicial College	(205) 348-7566
AlaTLA	Alabama Trial Lawyers Association	(205) 262-4974
AIFT	Alabama Institute on Federal Taxation	(205) 252-8847
ALI-ABA	American Law Institute-American Bar Association	(215) 243-1630
ASLM	American Society of Law and Medicine	(617) 262-4990
CC	Cambridge Courses U.S.A., Inc.	(415) 346-4457
CICLE	Cumberland Institute of Continuing Legal Education	(205) 870-2865
IAF	Insurance Arbitration Forums, Inc.	(212) 269-2920
ICLE	Institute of Continuing Legal Education of Georgia	(404) 542-2522
NITA	National Institute for Trial Advocacy	(612) 292-9333
NYUCLE	New York University School of Law Office of Continuing Legal Education	(212) 598-7741
PLI	Practising Law Institute	(212) 765-5700

SCHEDULE OF SEMINARS

The following list of approved CLE activities was compiled on March 17, 1983. For more current information, contact the sponsoring organizations.

Dates	Names and Places
May 13-14, 1983	Sandestin—*Alabama Young Lawyers*. ABICLE.
May 19-20, 1983	Houston—*Real Estate Bankruptcies and Workouts*. ABANI. Credits: 16.2. Cost: $300/members; $325/nonmembers.
May 20, 1983	Mobile—*Oil, Gas and Mineral Law*. ABICLE. Credits: 7.3. Cost: $65.
May 27-28, 1983	Point Clear—*Tax Seminar*. ABICLE. Credits: 10.5. Cost: $125.
June 2-3, 1983	Gulf Shores—*Juvenile Court Judges Annual Meeting*. AJC.
June 2-4, 1983	Los Angeles—*Alternative Methods in Family Dispute Resolutions*. ABANI.
June 3-4, 1983	New York—*Damages in Catastrophic Injury Cases*. PLI. Credits: 13.2 Cost: $325.
June 6-10, 1983	New York—*Basic Tax Strategies for Real Estate Transactions*. NYUCLE. Credits: 18.0. Cost: $475.
	New York—*International Litigation and Arbitration*. NYUCLE. Credits: 18.0. Cost: $450.

June 9-10, 1983	Chicago—*New Developments in Mental Health Law*. ASLM. Credits: 13.5. Cost: $200.
	Chicago—*Organizing Corporate Compliance Efforts*. ABANI. Credits: 13.2. Cost: $310/members; $340/nonmembers.
	New York—*Software Protection and Marketing*. PLI. Credits: 12.0. Cost: $350.
June 9-10, 1983	San Francisco—*Commerical Real Estate Leases*. PLI. Credits: 13.2. Cost: $315.
June 9-12, 1983	Bay Point, Florida—*Annual Seminar*. AlaTLA. Cost: $100/members; $150/nonmembers.
June 13-16, 1983	New York—*Advanced Tax Techniques in Real Estate Transactions*. NYUCLE. Credits: 14.4. Cost: $425.
June 14, 1983	Nashville—*Insurance Arbitration in the 80's*. IAF. Credits: 4.0. Cost: $80.
June 22-24, 1983	Birmingham—*7th Alabama Institute on Federal Taxation*. AIFT. Credits: 19.9. Cost: $250.
June 24-25, 1983	Denver—*Successful Personal Injury Practice*. CC. Credits: 10.8. Cost: $355-425.
	Savannah—*Admiralty Law*. ICLE. Credits: 10.0. Cost: $125/SEALI members; $175/nonmembers.
June 27-30, 1983	New York—*Corporate Tax for Corporate Lawyers*. NYUCLE. Credits: 14.4. Cost: $425.
June 27-July 1, 1983	Boulder—*Bankruptcy Code Re-examined and Updated*. ALI-ABA.
	Boulder—*Environmental Litigation*. ALI-ABA.
July 3-8, 1983	Boulder—*Advanced Litigation Session*. NITA. Credits: 63.0. Cost: $750.
July 11-12, 1983	San Francisco—*Evaluating Tax Shelter Offerings 1983*. PLI. Credits: 12.6. Cost: $375.
July 11-15, 1983	Stanford, California—*Labor and Employment Law*. ALI-ABA.
July 21, 1983	Birmingham—*Recent Developments in the Law*. Young Lawyers Section, Alabama State Bar. Credits: 6.6 Cost: Included in Alabama State Bar Convention registration fee.

MCLE News *Continued*

All lawyers who are qualified to practice law in Alabama and *who are not engaged in active practice because they are holding state or federal office that precludes them from practicing law* may become members of the Alabama bar association by paying directly to the secretary of such association an annual sum equal to 50 percent of the money collected by the state of Alabama from a lawyer as a privilege license tax to engage in the practice of law. Upon payment of said sum as prescribed in the preceding sentence, such persons shall be entitled to all the privileges and benefits common to other members of such association . . . (Emphasis added.)

Section 34-3-18. Lawyers not engaged in active practice authorized to become members of Alabama bar Association.

All lawyers who are qualified to practice law in Alabama and *who are not engaged in active practice* may become members of the Alabama bar association by paying directly to the secretary of such association an annual sum equal to 50 percent of the money collected by the state of Alabama from a lawyer as a privilege license tax to engage in the practice of law. Upon the payment of said sum as prescribed in this section, such person shall be entitled to all the privileges and benefits common to the other members of such association . . . (Emphasis added.)

Under Rules 2.A. and 3, therefore, all members of the Alabama State Bar were required to attend and report attendance of twelve hours of approved continuing legal education during 1982, unless an exemption or waiver was granted under other Rules. As a result, persons not engaged in the practice of law in Alabama, who elected to remain members of the Alabama bar association by paying $50 annually, were subject to the CLE requirement during 1982. Beginning this year, such persons are exempt from the requirement. They will be asked to claim this exemption on the 1983 reporting form but will not be required to report attendance of CLE activities.

Rule 2.C.2 was not amended. Assistant and deputy attorneys general, district attorneys, and assistant and deputy district attorneys remain subject to the requirement even though many of them elect the membership category provided for in *Code of Alabama* (1975) §34-3-17 and §34-3-18.

Exemptions are still available for persons sixty-five years of age or older, 1983 admittees to the bar, persons prohibited from private practice by virtue of their occupation of public office, members of the U.S. Congress, and individuals serving in the Armed Forces. These exemptions may also be claimed on the 1983 reporting form that will be mailed to all members of the Bar in September 1983.

Clarification

A statement made in the last issue has created some confusion regarding the carryover of CLE credits from 1981-82 to 1983. It was stated that "only credits earned in 1983 may be reported in 1983." This is accurate. As provided in Regulation 3.7, every individual should have already reported all credits earned during 1981-82, designating credits in excess of twelve as credits to be carried forward for 1983. These designated credits have been recorded and will appear on the 1983 reporting form as credits carried forward from 1981-82. Individuals will then report credits earned in 1983. Any credits in excess of twelve earned in 1983 may be designated as credits to be carried forward for 1984. Credits earned in 1981-82 that were not reported on the compliance form may not be added to the 1983 form. □

Young Lawyers' Section

J. Thomas King, Jr.
President

In the past several months the Young Lawyers' Section has been active indeed.

Conference of Professions

The Second Annual Conference of Professions sponsored by the Young Lawyers' Section was held at the Sheraton Riverfront Hotel on March 11-12 in Montgomery. The program, which was planned and coordinated by Randolph P. Reaves, YLS immediate past president, was attended by over forty individuals representing eleven professions licensed in the state of Alabama. The program included the following topics and speakers:

Recent Decisions in Professional Licensing Law and **The Professional Association and the Regulatory Board (Problems to Avoid)** by speaker Randolph P. Reaves, a member of the Montgomery law firm Wood, Minor and Parnell;

State Immunity in the Wake of the Candidate Case by attorney Joseph T. Carpenter of the firm Carpenter & Gidiere in Montgomery;

New Procedures in the 1983 Legislature by D. Patrick Harris, administrative assistant to the chief justice of the Alabama Supreme Court;

Alabama's Administrative Procedure Act—The First Year by Claude P. Rosser, Jr., of Prestwood & Rosser in Montgomery, and by Montgomery attorney Edna Brooks;

The Trial of the Disciplinary Action, Evidence and the Administrative Hearing by James S. Ward with the law firm Stuart & Ward in Birmingham; and

Appeals and/or Post-Judgment Remedies by Al Agricola and William Wasden, assistant attorneys general.

In addition to mock disciplinary hearings held at the conclusion of the conference, those in attendance were benefited at the Friday luncheon by the timely remarks of State Senator Larry Dixon.

At the Second Annual Conference of Professions, State Senator Larry Dixon talks about the financing aspects in which state licensing boards are handled.

Legislative Comment

Another topic of keen interest to lawyers arose during the last special session of the legislature in February. The Office of the State Comptroller caused to be introduced a bill designed to divert from the Fair Trial Tax Fund, as a continuing appropriation to the Office of the State Comptroller, approximately $50,000 the first year and an estimated appropriation of $90,000 annually commencing the second year after passage. This appropriation was designed to be in addition to any and all funds otherwise appropriated to the state comptroller.

The problem raised by the proposal is that, if permitted to become law, the appropriation would effectively divert such

monies from the fund which remits payments to lawyers who represent indigents. There is already an undue delay in the payment of lawyers who accept indigent appointments. It is my belief that, if this measure should ever become law, it would have a negative impact not only on lawyers, but also on the total administration of the Indigent Defense System.

I am most grateful to Lieutenant Governor Bill Baxley for his assistance in connection with the defeat of this legislation. Additionally, I am informed that Representatives Rick Manley, Jim Campbell, and Tom Nicholson made concerted efforts to defeat passage of this bill in the House and that every state senator who is an attorney was prepared to oppose this legislation had it been brought to a vote. All of these individuals merit our gratitude.

Youth Legislature Judicial Program

The Youth Legislature Judicial Program, sponsored by the Young Lawyers' Section in conjunction with the Montgomery YMCA, was held on April 8 and 9 in Montgomery. This particular program, which was planned and coordinated by James Anderson and Bernie Brannan of Montgomery, has become a significant part of the Youth Legislature Program.

In connection with this program, there was trial competition throughout the month of March at various high schools in Birmingham, Florence, Montgomery, Wetumpka, Opelika and Prattville to determine the teams to compete at the state level.

The first day of competition between the various cities was held at the Montgomery County Courthouse and the cases were tried before the Montgomery County circuit judges. A member of the Young Lawyers' Section was assigned to each team in order to assist the high school seniors in trial preparation and procedures. The actual trial, though, was handled by the participants.

Each case was automatically appealed to the Youth Supreme Court. The Young Lawyers' Section participant assigned to each team worked well into Friday night assisting the student teams in preparation of appellate briefs, as well as giving guidance for the oral arguments to be heard the following day by the Youth Supreme Court. This was the first year that the mock trials have been held in Montgomery during Youth Legislature, and it is also the initial year that jury trials have been held in the Friday competition. A total of 120 high school seniors participated in the program this year.

New Local Sections

I am pleased to report that Steve Heninger, chair of the Young Lawyers' Section Local Bar Coordinating Committee, has informed me that Tom Heflin, in the Quad-cities area, and Bob Northcutt, in Dothan, have contacted him concerning the organization of Young Lawyers' Sections in those particular locales. I would encourage anyone interested in assisting Tom and Bob in their respective efforts to contact them directly. Additionally, the state Young Lawyers' Section stands ready to render assistance in any way.

Sandestin Seminar

The Young Lawyers' Annual Seminar will be held at Sandestin, Florida on Friday, May 13 and Saturday, May 14. Caine O'Rear and his committee have planned another outstanding program. The theme this year is "Anticipated Future Developments in the Areas of Legal Economics, Office Administration and Substantive and Procedural Law." Interesting and informative programs are scheduled for both Thursday and Friday mornings and CLE credit can be earned for attending the sessions.

On the social side, a golf tournament sponsored by Commonwealth Land Title of Mobile will be held at Sandestin Friday afternoon, followed by a seafood dinner Friday evening. The entry fee for the golf tournament is five dollars; however, payment of the seminar registration fee includes two tickets to the seafood dinner. The cost of additional dinner tickets are fifteen dollars each. Music and certain refreshments are provided with a cash bar available.

Accommodations at Sandestin are available and reservations can be made by calling Sandestin at 1-800-874-3950 (toll free) or (904) 267-8160.

The seminar is a high point in the YLS year. All who participate will benefit from the sessions and enjoy a period of relaxation. □

The Criminal Justice System— A New Policy

George D. Schrader

George D. Schrader is an associate professor, Department of Criminal Justice, Auburn University at Montgomery. He received a B.S. from the University of Kentucky, J.D. and M.B.A. from the University of Dayton, and M.P.S. from Auburn University.

Policymakers in the public sector are usually cabinet level officers or department administrators or other members of the executive branch. However, we are now seeing a new or different element or elements beginning to enter the criminal justice policymaking arena. The task force or advisory council concept has been in existence for several years, but it appears that now and in the future this type of institution will have a more meaningful impact on policymaking or the changing of policy in the criminal justice arena than in the past. The Attorney General's Task Force on Violent Crime issued their final report in August 1981 and that report will be the basis for future legislation concerning the insanity defense, the exclusionary rule and habeas corpus actions as well as other subjects. The Reagan administration has, as a matter of policy, adopted many of the task force's recommendations as a part of its legislative program.

The Attorney General's Task Force on Violent Crime was appointed by U.S. Attorney General William French Smith. He instructed them to recommend specific ways in which the federal government could do more to assist in controlling violent crime without limiting its efforts against organized crime and white-collar crime. The task force was composed of the following eight members: Honorable Griffin Bell, co-chairman, former United States attorney general and judge, United States Court of Appeals for the Fifth Circuit; Honorable James Thompson, co-chairman, governor of Illinois and former United States district attorney for the Northern District of Illinois; David Armstrong, commonwealth attorney in Louisville, Kentucky, president of the National District Attorney's Association 1981-1982; William Hart, chief of police, Detroit, Michigan; Wilbur Littlefield, public defender, Los Angeles County; James Q. Wilson, professor of government, Harvard University; Frank G. Carrington, executive director of Crime Victims Legal Advocacy Institute, former executive director of Americans for Effective Law Enforcement; and Robert Edwards, director of the Division of Criminal Justice in the Florida Department of Law Enforcement.

The task force, aided by a staff of thirteen, held hearings and received written comments concerning its objectives, completing the report within the 120 days specified in the charter. The final report issued on August 17, 1981 contained sixty-four recommendations. The three recommendations of importance to this analysis are: Recommendation 39—Insanity Defense; Recommendation 40—Exclusionary Rule; and Recommendation 42—Habeas Corpus. Each of these subjects will be considered along with the recent legislation and court decisions related thereto. (The text of each of these recommendations is set forth at the conclusion of this article.)

Insanity Defense (Recommendation 39)

On April 14, 1865 President Abraham Lincoln was assassinated by John Wilkes Booth. Twelve days later John Wilkes Booth was dead. On July 7, 1865, four of Booth's conspirators were hanged. The period from crime to punishment was less than 90 days. On March 30, 1981, John Hinckley, Jr., tried to assassinate President Ronald Reagan. Twelve months later John Hinckley, Jr., remained in pre-trial confinement. Why the long delay? The defense of insanity provides the answer.

The insanity defense has its roots in two old English cases, *Hadfield* (1800) and *M'Naughten* (1843). The first case involved the man who shot at King George III. The second case concerned a defendant who shot at a man he thought was Prime Minister Sir Robert Peel, killing instead the Prime Minister's secretary, Mr. Drummond. Following M'Naughten's trial, the House of Lords debated the question of what constitutes legal insanity and adapted what has since been known as the "M'Naughten Rule." This rule which has been followed in Britain and the United States for over one hundred years provided that, if the defendant was at the time of the offense suffering from a mental defect, disease or derangement, so as to be unable to distinguish right from wrong and to adhere to the right, he could not be convicted. This rule is based on total deprivation of the required ability.

During the last few years a number of states, including Alabama, have adopted what is known as the American Law Institute's substantial capacity test. This test provides that a person is not responsible for criminal conduct if at the time of the offense he was suffering from a mental disease or defect and lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The adoption of this test leaves much discretion to the psychiatrists and psy-

chologists. If either of these disciplines were as exacting as mathematics, perhaps there would be no fear. However, the substantial capacity test invites the use of some vague behavioral examinations, opens the door for increased testimony for jurors to struggle with, and encourages the utilization of the insanity defense.

The Attorney General's Task Force has recommended the adoption of legislation which would create an additional verdict in federal criminal cases of "guilty but mentally ill." Illinois, Indiana and Michigan have adopted such legislation. This alternative would give the jury the option of finding that a defendant was in fact mentally ill, but would require that he be sentenced rather than go free. These statutes provide for evaluation and treatment as is psychiatrically indicated for the mental illness.

This reform is logical, long overdue and in the best interest of society. At least in three states, and perhaps soon in the federal system, the illogical defense on the basis of insanity will be less effective. The statute in Illinois and Indiana both still retain the optional finding of not guilty by reason of insanity, hence, the reform merely affords the jury an additional option and does not eliminate the insanity defense.

Perhaps it is time to abolish the insanity defense. Society has an obligation to protect itself from the future criminal activity of those whose defense is based on some type of behavioral pattern.

Although the recommendation of the task force has merit, it does not go far enough. The criminal justice system demands absolutes while the behavioral sciences operate in a contingency and probability environment lacking scientific precision. Added to this dilemma, the system asks a jury composed of laymen to make the ultimate decision concerning mental responsibility and guilt. The question of guilt should be decided on the facts and evidence not on an estimate of some type of diminished mental responsibility which the substantial capacity test invites. Perhaps it is time to abolish the insanity defense. Society has an obligation to protect itself from the future criminal activity of those whose defense is based on some type of behavioral pattern. If the mental status of the defendant is to be considered, let it be after conviction. If a defendant raises the issue of mental responsibility in the pre-sentencing hearing, then evaluation and treatment in such a manner as is psychiatrically indicated would be proper. This is the same option as is available under the recommendation of the task force in relation to the verdict of "guilty but mentally ill."

This recommendation is a step in the right direction and perhaps this new option will eventually find favor in our system of jurisprudence. At least until the insanity defense is abolished the "guilty but mentally ill" alternative has merit.

Exclusionary Rule (Recommendation 40)

The exclusionary rule is a phenomenon peculiar to American jurisprudence. The rule provides that evidence, regardless of how relevant or material, cannot be used against a defendant in a criminal trial if obtained in a manner which violates his or her constitutional rights under the Fourth Amendment with regard to search and seizure. The exclusionary rule is a judicially created rule which seeks to deter police misconduct by excluding from evidence the products of their labors if they have failed to comply with the mandates of the Fourth Amendment. The Supreme Court adopted the exclusionary rule for federal courts in *Weeks v. United States,* 232 U.S. 383 (1914). Forty-seven years later in *Mapp v. Ohio,* 367 U.S. 643 (1961), the Supreme Court construed the Fourteenth Amendment as compelling application of the exclusionary rule to the states.

The exclusionary rule has been subject to criticism for several years. This criticism is increasing because it is difficult to make a society that is plagued by spiraling crime rates understand the logic, if any, as to why a criminal should go free because of a technicality. The objective of the rule is to protect the constitutional rights of the citizen through the deterrence of improper police action. However, many feel that the exclusionary rule has only been used to achieve a benefit for those accused of crime. Justice Cardoza's statement "The criminal is to go free because the constable has blundered" has become the law of the land.

The task force concluded that the fundamental and legitimate purpose of the exclusionary rule has been eroded by the action of the courts barring evidence of the truth because of investigative error, however unintentional. In support of this conclusion, the task force has recommended a good-faith exception to the exclusionary rule to the extent that, if the law enforcement officer acted in reasonable good faith, he was in conformity with the Constitution, and the fruits of his labors would be admissible. This proposal, if enacted into law, could eliminate much of the criticism because there would need to be an *unreasonable* intrusion rather than a technical intrusion concerning Fourth Amendment rights in order to exclude the fruits of the search.

The concept of the good faith exception is not only embraced in the task force opinion, but it has also received judicial attention. The Kentucky Court of Appeals in the case of *Richmond v. Commonwealth,* (80-CA-1366-MR, Ky. Ct. App. July 31, 1981), adopted a good-faith exception to the exclusionary rule. In that case a Kentucky magistrate issued a warrant for a search to be conducted outside his own district. The court of appeals decided that application of the exclusionary rule would do nothing to deter further police misconduct. Hence, if no deterrent effect could result there would be no reason for the application of the rule. The majority opinion reasoned:

> The deterrent effect of the exclusionary rule is somewhat suspect in view of the myriad cases in which the conduct sought to be deterred is, in fact, not deterred. While its deterrent effect upon willful and unlawful police conduct may be suspect, we believe the rule has been a substantial factor in the erosion of public confidence in law enforcement by the courts.
>
> Since the exclusionary rule is designed to deter willful and unlawful conduct, there is increasing thought that it should not be applied to suppress evidence dis-

> covered by officers in the course of actions taken in good faith and in the reasonable, though mistaken, belief that they were authorized. Because an officer who acts reasonably and in good faith does not realize his actions are wrongful we cannot expect that his conduct would have been any different because of the exclusionary rule.

The exclusionary rule was designed to deter improper police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. Because the exclusionary rule is primarily aimed at deterring police misconduct, it seems illogical to apply it in instances where the police believe that they are acting properly when their activities later turn out to be improper. If the police have reasonable belief based on an objective view of the circumstances that they are acting in accordance with the Fourth Amendment then the fruits of their search should not be suppressed. Judicial review hindsight may be 20-20, but applying the exclusionary rule in instances of reasonable good faith reliance by the police will do little in terms of deterring misconduct by authorities in the future. In fact, such action only penalizes society.

Because the exclusionary rule is primarily aimed at deterring police misconduct, it seems illogical to apply it in instances where the police believe that they are acting properly when their activities later turn out to be improper.

The United States Court of Appeals for the Fifth Circuit sitting en banc has also adopted a good-faith exception to the exclusionary rule. The case of *United States v. Williams,* 622 F.2d 830 5th Cir. (1980), provides an extremely interesting opinion on this issue wherein the court held that "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." The majority opinion pointed out that the exclusionary rule exists to deter unreasonable conduct by the police rather than reasonable, good faith activities. The court noted that when the reason for the rule does not exist then its application should cease.

This opinion discusses the exclusionary rule considering both the technical violation and the good-faith mistake aspects citing supporting authority for both exceptions. The majority discussed several leading Supreme Court decisions and lower court decisions supporting these exceptions. In conclusion the opinion stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

Thus the United States Court of Appeals for the Fifth Circuit has established a good faith exception to the exclusionary rule and restricted its application in conformity with its underlying purpose of deterring unreasonable or bad-faith police conduct. Since the new United States Court of Appeals for the Eleventh Circuit has declared that decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to the close of business on September 30, 1981, shall be binding as precedent in the Eleventh Circuit, the rule announced in *Williams* is applicable in both circuits.

Therefore, there is growing judicial support for either a limitation to the exclusionary rule or the recognition of specific exceptions to the rule. The recommendations of the Attorney General's Task Force on Violent Crime are a reflection of this trend and an expression of the popular feeling that, unless either a legislative or judicial change in the application of the exclusionary rule is forthcoming, society, not the criminal, will continue to suffer.

The Supreme Court in November 1982 announced that it wanted to hear arguments on the question of whether the exclusionary rule should be subject to a good faith exception. In what could be the most significant Fourth Amendment case in over twenty years, *Illinois v. Gates,* 51 USLW 1123 (Feb. 15, 1983), may provide a much needed exception to the exclusionary rule.

Habeas Corpus (Recommendation 41)

> The problem in this area has long been clear. Considering the availability of *habeas corpus* in 1970, Judge Henry Friendly was moved to paraphrase Winston Churchill. He noted that after state trial, conviction, sentence, appeal, affirmance and denial of certiorari by the United States Supreme Court, the criminal process was not at an end, or even the beginning of the end, but only the end of the beginning. There were nearly 7,800 *habeas* filings by state prisoners in federal courts in the year ending in June of 1982.
>
> —William French Smith
> Jan. 30, 1982

The task force made four basic recommendations concerning habeas corpus actions. Two of these recommendations, c and d, concern the establishing of a three-year statute of limitations on habeas actions and the codifying of existing case law barring litigation of issues not properly raised in state courts unless "cause and prejudice" is shown. The enactment of such legislation should curb collateral attacks on state court decisions and insure some degree of finality in the judicial process.

In 1976 the Supreme Court, in the case of *Stone v. Powell,* 428 U.S. 465 (1976), addressed the issue of both the exclusionary rule and habeas corpus when it held that, if the state has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, the petitioner could not be granted federal habeas corpus relief. This decision provides that in order to seek federal habeas corpus relief the petitioner must show a denial of an opportunity for a full and fair litigation of his claim at trial and on direct review and also the existence of a Fourth Amendment violation. It is decisions such as *Stone v. Powell* which the task force seeks to have codified under recommendation d.

The federal habeas corpus statute provides that the petitioner must be in custody in violation of the constitution or laws or treaties of the United States and must have exhausted the remedies available in the courts of the state or that such process is not available or is ineffective. 28 U.S.C. §2254. In addition, the statute provides that a state court's determination on a factual issue shall be presumed to be correct unless the petitioner can establish that one or more of the eight statutory exceptions applies.

Recommendations a and b are designed to limit the federal court's involvement into the area of evidentiary hearings. Recommendation a provides that, if the district court determines that an evidentiary hearing is necessary under 28 U.S.C. 2254 (d), then the matter should be referred to the appropriate state court to hold the evidentiary hearing. In addition, recommendation b provides that federal courts should not hold evidentiary hearings on facts which were fully expounded and found in the state court proceeding. Thus, all four recommendations are directed at limiting federal habeas actions and returning the evidentiary hearing to the state courts.

The Supreme Court in *Summer v. Mata,* 449 U.S. 539 (1981), considered 28 U.S.C. §2254 and the limitations it imposes on the federal courts. The Court ruled that Section 2254 (d) applies to factual determinations made by a state court and establishes a "presumption of correctness."

> A writ issued at the behest of a petitioner under 28 U.S.C. §2254 is in effect overturning either the factual or legal conclusions reached by the state court system under the judgement of which the petitioner stands convicted, and friction is a likely result. The long line of our cases previously referred to accepted that friction as a necessary consequence of the Federal Habeas Act of 1867, 28 U.S.C. §2254. But it is clear that in adopting the 1966 amendments, Congress in §2254 (d) intended not only to minimize that inevitable friction but to establish that the findings made by the state court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in §2254 (d) was found to exist by the federal habeas court.

RECOMMENDATIONS

Recommendation 39—Insanity Defense

The Attorney General should support or propose legislation that would create an additional verdict in federal criminal cases of "guilty but mentally ill" modeled after the recently passed Illinois statute and establish a federal commitment procedure for defendants found incompetent to stand trial or not guilty by reason of insanity.

Recommendation 40—Exclusionary Rule

The fundamental and legimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is an investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such good faith belief. We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both. If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees.

Recommendation 42—Habeas Corpus

The Attorney General should support or propose legislation that would:

a. Require, where evidentiary hearings in habeas corpus cases are necessary in the judgement of the district court, that the district court afford the opportunity to the appropriate state court to hold the evidentiary hearing.

b. Prevent federal district courts from holding evidentiary hearings on facts which were fully expounded and found in state court proceedings.

c. Impose a 3-year statute of limitations on habeas corpus petitions. The 3-year period would commence on the latest of the following dates:

   (1) the date the state court judgement became final,
   (2) the date of pronouncement of a federal right which had not existed at the time of trial and which had been determined to be retroactive, or
   (3) the date of discovery of new evidence by the petitioner which lays the factual predicate for assertion of a federal right.

d. Codify existing case law barring litigation of issues not properly raised in state court unless "cause and prejudice" is shown, and provide a statutory definition for "cause."

In this decision the Supreme Court supported the congressional mandate by acknowledging that the petitioner must establish by convincing evidence, not by a mere preponderance of the evidence, that the factual determination of the state court was erroneous. In addition, the Court established the requirement that the habeas court include in its opinion granting the writ the reasoning which led it to conclude which of the factors listed in §2254 (d) were present.

In *Duckworth v. Serrano,* 454 U.S. 1 (1981), the Supreme Court reaffirmed the mandate in §2254 requiring the total exhaustion of state remedies. The Court noted that if such action would be futile or if there were no opportunity to obtain relief, federal habeas action is authorized. The court also addressed the total exhaustion rule in *Rose v. Lundy,* 455 U.S 509 (1982), wherein the majority again upheld this concept stating that such a rule promotes comity and does not impair a petitioner's right to relief.

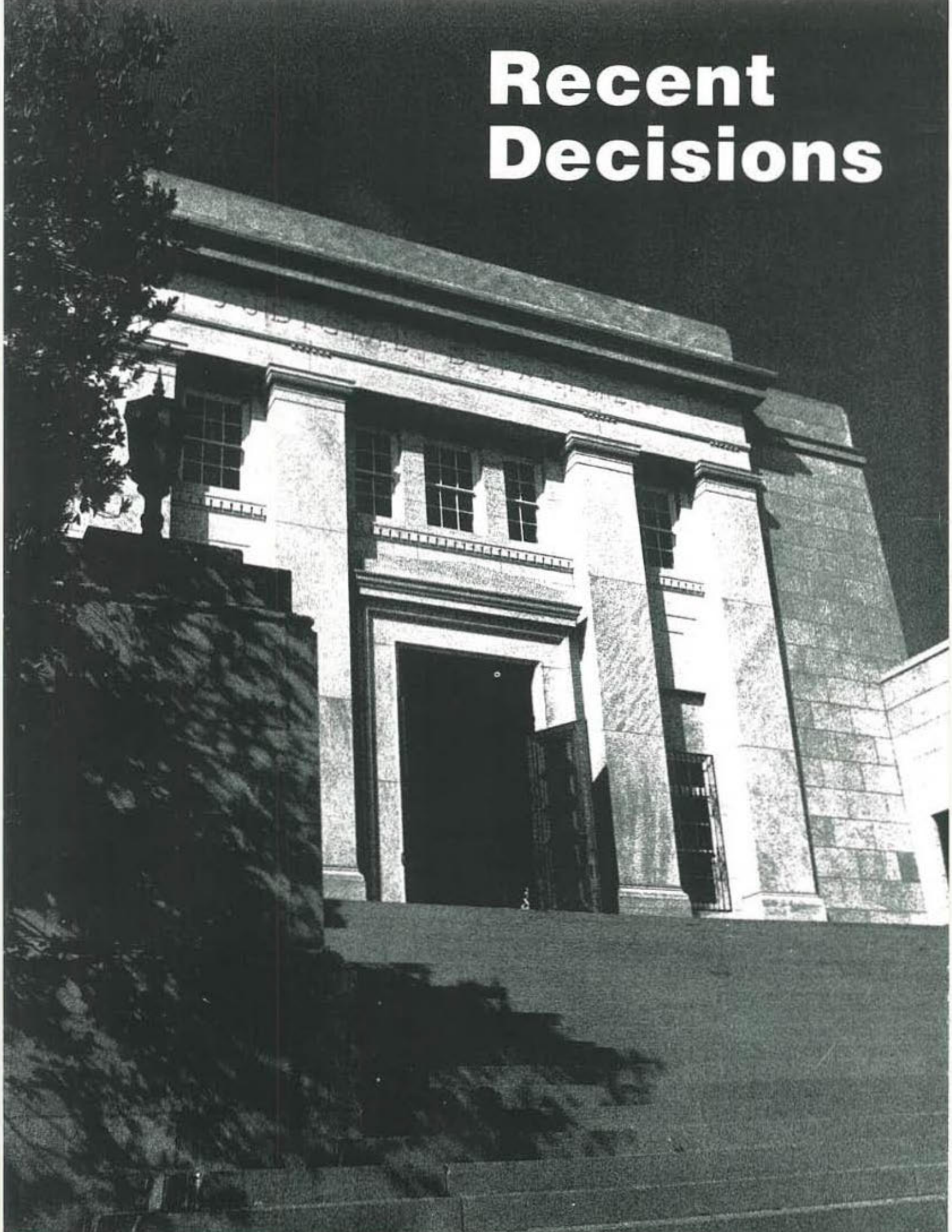
The Supreme Court has recently addressed the "cause and prejudice" rule established in *Wainwright v. Sykes*, 433 U.S. 72 (1977). In two cases decided the same day, the Court adopted one universal rule concerning collateral attack based on both state and federal convictions requiring the defendant to show cause and actual prejudice in order to perfect federal habeas action.

In discussing the use of the writ of habeas corpus, Justice O'Connor made the following observations in the majority opinion in *Engle v. Isaac*, 102 S. Ct. 1558 (1982): (1) collateral review of conviction extends the ordeal of trial for both society and the accused, (2) both the defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation and by frustrating these interests, the writ undermines the finality of litigation, (3) rather than enhancing the safeguards that surround the trial, habeas actions may diminish those safeguards, (4) habeas actions frequently cost society the right to punish admitted offenders as the passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult and even impossible, (5) habeas actions impose special costs on the federal system, (6) federal intrusion into state criminal trials frustrates the states' sovereign power to punish offenders and (7) finally, federal habeas actions exact an extra charge by undercutting the state's ability to enforce its procedural rules.

It must be noted that the companion decision *United States v. Frady*, 102 S.Ct. 1584 (1982), was rendered nineteen years after the original conviction, and in the *Engle* case seven years had passed since conviction. Both of these decisions and the others cited herein, along with the task force's recommendation and the Habeas Corpus Reform Act of 1982, collectively call for a finality in criminal litigation and seek to establish a degree of uniformity against which to measure collateral attacks. Unless the proposed legislation is enacted, the federal courts system will continue to be inundated with duplicated, overlapping and repetitive reviews of state court convictions, prolonging the quest for finality.

Chief Justice C. C. Torbert, Jr., of the Supreme Court of Alabama recently addressed the overly-broad application of federal habeas action stating:

> There are those that argue that limiting federal habeas corpus is impairing a great concept of our law. This is not so. In fact, we will be returning to a legal remedy much closer to the original limits of the writ which has been greatly distorted in its entension. Only then will habeas corpus be what it was intended, an extraordinary writ to be utilized on occasional abuses of our system of justice rather than a second mode of appeal. □


Recent
Decisions

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.

David B. Byrne, Jr., a member of the Montgomery law firm of Robison & Belser, P.A., received both his undergraduate degree and J.D. from the University of Alabama.

Mr. Byrne and Mr. Milling are co-authors of this section of ***The Alabama Lawyer*** *concerning significant decisions in the courts. Mr. Byrne will cover the criminal area and Mr. Milling the civil.*

Recent Decisions of the Supreme Court of Alabama—Civil

Attorney's fees . . . 42 U.S.C. §1988 applied in state court

Canterbury Nursing Home, Inc. v. Alabama State Health Planning and Development Agency, 17 ABR 870 (January 28, 1983). Defendants/counterclaimants prevailed in a 42 U.S.C. §1983 action in state court and claimed attorney's fees pursuant to 42 U.S.C. §1988. The trial court denied their claim for attorney's fees stating that the counterclaim was "neither necessary nor indicated," apparently reasoning that the plaintiffs/counter-defendants' suit for declaratory judgment afforded the parties adequate relief. The Supreme Court disagreed noting that the discretion of the trial court in denying attorney's fees to a prevailing party under §1988 is extremely narrow and that the prevailing party should ordinarily be awarded attorney's fees unless "special circumstances" would render the award unjust.

Commercial code . . . Section 7-2-607, *Ala. Code* 1975, notice required in breach of warranty action

Parker v. Bell Ford, Inc., 17 ABR 844, (January 28, 1983). The plaintiff appealed from a judgment entered on a directed verdict in behalf of defendants after the plaintiff failed to prove that he notified the defendants of the alleged breach of warranty. The plaintiff maintained that in warranty actions, the issue of notice *vel non* is always a question of fact and that the scintilla of evidence rule precluded the directed verdict. The Supreme Court disagreed stating that there was no evidence that notice was given. The court distinguished this situation from one where notice was given and a question existed as to the timeliness or reasonableness of such notice.

In this case, defendants' first notice was receipt of the summons and the complaint six months after the sale. Perhaps more importantly, the Supreme Court expanded on the rationale for a notice requirement, stating that notice should "enable the seller to make adjustments or replacements, or . . . suggest opportunities for cure, to the end of minimizing the buyer's loss and reducing the seller's own liability to the buyer." Previously, the court has stated that notice is "to apprise the vendor that a claim will be made against him and give him an opportunity to prepare a defense or to notify his supplier."

Commercial code . . . "reasonable expectation" test adopted

Ex parte: Morrison's Cafeteria of Montgomery, Inc. (Morrison's Cafeteria of Montgomery, Inc. v. Inez Haddox), 17 ABR 1304 (March 11, 1983). In a case of first impression in Alabama, the Supreme Court held that the "reasonable expectation" test adopted by Florida is the logical approach to determine whether food is "merchantable," "defective," or "unreasonably dangerous." The aforementioned terms focus upon the expectations of the ordinary consumer.

In this case, the plaintiff purchased a fried fish fillet which contained a one centimeter bone. Morrison's urged the court to adopt the "foreign-natural" rule which provides that processed food which contains a substance natural to the product, i.e. bone, is reasonably fit for human consumption and a consumer ought to anticipate the presence of the substance. The court of civil appeals and the Supreme Court rejected this test noting that while it may be reasonable for a consumer to expect to find a bone in a T-bone steak, it is not reasonable to expect to find a bone in hamburger meat. Instead, the Supreme Court adopted the "reasonable expectation" test where "the pivotal issue is what is reasonably expected by the consumer in the food as served, not what might be natural to the ingredients of that food prior to preparation." The Supreme Court also concluded that the trial court should have found as a matter of law that a one centimeter bone in a fish fillet does not make

that fish unfit for human consumption or unreasonably dangerous.

Fictitious parties . . . a cause of action must be stated

Columbia Engineering International, Ltd., v. Joe Ree Espey, 17 ABR 1004 (February 8, 1983). In this recent case, the Supreme Court noted the confusion that exists throughout the bar concerning what a plaintiff must allege in order to invoke the relation-back principles of Rules 9(h) and 15(c) ARCP. The court stated that a plaintiff must: (1) state a cause of action against the fictitious party in the body of the original complaint; and (2) be ignorant of the identity of the fictitious party, i.e. have no knowledge at filing that the party was in fact the party intended to be sued. Rule 9(h) is not intended to give plaintiffs additional time beyond the statute of limitations to formulate causes of action.

Simply mentioning a fictitious party in the body of the original complaint and concluding that "the aforesaid wrongful conduct of each of the defendants combined and concurred . . ." will not suffice. Plaintiff must allege the facts to establish that the fictitious party did something wrong to injure or damage the plaintiff, i.e. plaintiff must state a cause of action against the fictitious defendant.

Insurance . . . advance payments as credit against subsequent judgment

Donald G. Keating v. Contractor's Tire Service, Inc., 17 ABR 1169 (March 4, 1983). In a case of first impression, the Supreme Court held that an insurer, in the absence of a waiver or fraud, is entitled to a credit against a subsequent judgment or settlement where advance payments were made to a claimant even where there was no previous agreement that the advance payment would be credited against the subsequent judgment or settlement.

In this case, the insurer made advance payments for claimant's lost wages and also paid health care providers. Thereafter, claimant filed suit and claimed these sums as damages. Defendant pled the advance payments and set-off and the court reduced the judgment by that amount. Plaintiff appealed and argued that previous Alabama authority limited credit for advance payments to situations where the parties had agreed that the advance payments would be credited to any subsequent settlement or judgment. The Supreme Court distinguished these prior authorities stating that in the absence of conduct amounting to waiver or fraud, defendant must merely raise the issue of credit prior to or during the trial. In this case, defendant procedurally raised the issue in its answer and is entitled to credit upon proper proof.

Malicious prosecution . . . *nolle prosequi* meets "favorable disposition" requisite

Delores Chatman v. Pizitz, Inc., 17 ABR 1084 (February 25, 1983). Chatman was arrested and subsequently pled guilty to a charge of issuing a worthless check. After entry of guilty plea, the charge was *nol prossed,* and she paid the court costs and made restitution for the worthless check. Thereafter, she filed suit for malicious prosecution and abuse of process. The trial court granted Pizitz's motion for summary judgment finding that the guilty plea followed by a *nolle prosequi* necessarily negates an essential element of the tort, i.e. determination of a judicial proceeding favorably to the plaintiff.

In a case of first impression in the context of a malicious prosecution action, the Supreme Court held that a *nolle prosequi* of the charge is a judicial determination which will support the plaintiff's *prima facie* showing of the "favorable disposition" element of a malicious prosecution claim. However, the *prima facie* case may be overcome by a showing that the dismissal of the criminal charge was a component element of a settlement or compromise agreement between the parties. Where defendants' proof of compromise is unchallenged by plaintiff, notwithstanding plaintiff's proof of dismissal of the criminal charge, the defendant is entitled to a judgment as a matter of law.

Recent Decisions of the Supreme Court of Alabama—Criminal

A bargain is a bargain

Yarber v. State, 17 ABR 1254 (March 4, 1983). In a case of first impression, the Supreme Court of Alabama decided the question of whether a defendant can compel the enforcement of a plea agreement, broken by the state, where he had not yet pleaded guilty or otherwise relied on the agreement to his disadvantage. The district attorney's office withdrew the plea bargain agreement because of the strong objections voiced by the victim's family. The record is clear that the State's withdrawal of the plea bargain occurred prior to the time that the defendant entered his plea.

During the course of a pretrial motion hearing, the trial court concluded that the parties had, in fact, entered into a plea agreement. Nevertheless, the court declined to enforce the agreement and the defendant stood trial. The jury returned a verdict of guilty of murder in the second degree. The defendant received a sentence of twenty years.

Whether a defendant can compel the enforcement of a plea agreement broken by the State, where he had not yet pleaded guilty or otherwise relied on the agreement to his disadvantage, is a question of first impression before the appellate courts of this state. The United States Supreme Court noted the validity of negotiated pleas in *Brady v. United States,* 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970). In *Santobello v. New York,* 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed.2d 427 (1971), the Supreme Court acknowledged both the desirability and enforceability of a negotiated plea. The Supreme Court's consideration of the enforceability of a negotiated plea in *Santobello* arose in a setting in which the State violated the agreement *after* the defendant had pled guilty in reliance on the agreement. The Supreme Court has yet to decide the issues framed under the facts in *Yarber.*

The Alabama Supreme Court in a *per curiam* decision noted that the appellate courts which have considered the issue are split in their rationale and holdings.

Some courts decline to enforce a negotiated plea where the State has broken the agreement and where the defendant has neither pled guilty in reliance on the agreement nor cooperated with the State to his disadvantage under the agreement. *United States v. Aguilera,* 654 F.2d 352 (5th Cir. 1981); *United States v. Ocanos,* 628 F.2d 353 (5th Cir. 1980). The rationale underlying the holdings of these cases is based on a limited application of contract law to the problem of a broken plea agreement. Those courts reasoned that "absent a showing of detrimental reliance, specific performance will not lie to enforce the agreement. Thus, a defendant who has not pled guilty or otherwise detrimentally acted in reliance under the terms of the agreement cannot compel its enforcement."

The Supreme Court of Alabama declined to accept the rationale or holdings of these cases citing with approval the observations of Chief Justice Burger as to the importance of negotiated pleas in *Santobello v. New York, supra.*

Our Supreme Court noted in pertinent part as follows:

> Negotiated pleas, thus, serve a valuable role in the criminal justice system. If the integrity of that role is to be maintained, certainty must prevail. The state need not enter into a plea agreement. It may choose not to do so, and proceed to trial on any case. The United States Supreme Court states there is no constitutional right to a negotiated plea. *Weatherford v. Bursey,* 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed.2d 30 (1977). However, once the state chooses to make an agreement, it should not be allowed to repudiate that agreement with impunity. *State v. Brockman,* 277 Md. 687, 357 A.2d 376 (1976) . . . If we allow the state to dishonor at will the agreements it enters into, the result could only serve to weaken the plea negotiating system. Such a result also is inconsistent with the "honesty and integrity" encouraged by Canon 1, Alabama Code of Professional Responsibility.

The Supreme Court went further in noting that although plea bargain may be reduced to writing, the prevalent custom in Alabama is that such agreements are verbal understandings between the attorneys involved. The Supreme Court pointed out this distinction so as to dispel any suggestion that a plea agreement is unenforceable merely because it is unwritten. Finally, the court pointed out that the defendant was entitled to compel the enforcement for that which he had bargained—that is, the tender of negotiated plea, with its terms, to the trial court for its consideration.

The jurisdiction of the trial court to reconsider sentence

In Re: State of Alabama v. Barbara Green, 17 ABR 1230 (March 4, 1983). In this case, the Supreme Court reviewed whether a circuit court had jurisdiction to reconsider a sentence which had been affirmed on appeal or, in the alternative, whether a circuit court had jurisdiction to reconsider a denial of probation long after such a denial had been entered. The Supreme Court held that the circuit court did not have jurisdiction to reconsider a sentence once it had been affirmed on appeal but reached a contrary result as to the question of whether or not a circuit court had jurisdiction to reconsider a denial of probation after the appellate process had been exhausted.

The defendant, Barbara Green, was convicted in Montgomery County Circuit Court on November 16, 1978, of violating the Alabama Uniform Control Substances Act. Shortly thereafter, on December 1, 1978, the circuit court entered an order sentencing the defendant to three years imprisonment and in addition, denied her request for probation. The defendant made bond and was free while her sentence was appealed to the court of criminal appeals. That court, on July 29, 1980, affirmed. The Supreme Court denied the defendant's petition for writ of certiorari on October 31, 1980.

On November 13, 1980, the defendant moved for a stay of the judgment and order to remain free on bond while she sought review by the United States Supreme Court. The court of criminal appeals granted the stay conditioned upon the filing of the defendant's petition for writ of certiorari in the United States Supreme Court. On February 5, 1982, the court of criminal appeals learned that the writ of certiorari had never been filed and issued its certificate of judgment to the circuit court of Montgomery County. On February 16, 1982, the circuit court directed the defendant to surrender for service of her sentence. Instead of surrendering, the defendant moved the circuit court to delay execution of the sentence and for reconsideration of her sentence imposed on December 1, 1978. The trial court granted the defendant's petition and on April 9, 1982, suspended the sentence and placed the defendant on probation subject to the condition that the defendant serve six months at Tutwiler Prison for Women.

The Supreme Court held that the circuit court lacked jurisdiction to reconsider a sentence which had been affirmed on appeal relying upon § 15-17-5, *Ala. Code,* 1975, which specifically deals with the jurisdiction retained by the circuit court when a conviction has been appealed. The Supreme Court further noted as a limitation on a trial court's authority, the language contained in § 12-22-244, *Ala. Code.* Those statutes together with *Jones v. State,* 55 Ala. App. 466, 316 So.2d 713 (1975), demonstrate that the circuit court of Montgomery County lost jurisdiction to reconsider the defendant's sentence when the trial court, in February 1979, denied the defendant's motion for new trial.

Consideration of the second question as to whether the trial court has jurisdiction to reconsider denial of probation long after such denial led the Supreme Court of Alabama to a contrary result. In upholding the trial court's action, the Supreme Court articulated the following rationale:

> It has been shown that the circuit court of Montgomery County considered probation anew on the petition for reconsideration, and before the execution of the sentence. Thus that court was within its authority under §15-22-50.
>
> Although we have held that the trial court's reconsideration of defendant's *sentence* was without authority, her three-year sentence itself ultimately was unchanged. The condition of the probation, that the defendant serve six months at Tutwiler Prison, did not reduce the sentence itself because at the end of that time a review of conditions was provided for, which could include revocation of probation and service of the re-

mainder of the full term. Therefore, that aspect of this petition became moot. . .

Death case . . . defendant's right to rebut

Willie Clisby, Jr. v. State, 217 ABR 900 (February 11, 1983). Willie Clisby, Jr., was indicted and convicted for the capital offense of nighttime burglary during the course of which the victim was intentionally killed. The sentence was fixed at death. After the defendant's arrest, the district court judge ordered a psychiatric evaluation for Clisby, who was then examined by a private psychiatrist under contract with Jefferson County to evaluate prisoners. A social worker informed the court of the psychiatrist's conclusions which showed no evidence of psychosis and found Clisby competent to stand trial and able to aid in his own defense. At the sentence hearing, defense counsel argued Clisby's right to prove mitigating circumstances relating to mental capacity.

The Supreme Court granted the writ in order to consider: (1) whether Clisby's right of confrontation and cross-examination were violated by the trial court's consideration of the two letters containing the psychiatrist's conclusion as to the defendant's mental condition, and (2) whether or not Clisby should have been entitled to hire at state expense a private psychiatrist to examine him for the purpose of securing expert testimony concerning mitigating circumstances.

The Supreme Court through Justice Faulkner held in regard to the second issue that an indigent defendant in a criminal case does not enjoy a constitutional right to the appointment of an expert for his exclusive benefit at State expense. *Thigpen v. State,* 372 So.2d 375 (Ala. Crim. App.) *cert. denied,* 372 So.2d 387 (1979), *cert. denied* 444 U.S. 1206 (1980). However, the court noted that the defendant might have that right where it was necessary for an adequate defense.

As to the first issue set out above, the Supreme Court concluded that the substantive rights of the defendant had been breached as a result of the trial court's consideration of the two letter reports from the psychiatrist. In reversing, the Supreme Court adopted the rationale of the Eleventh Circuit in *Proffitt v. Wainwright,* 685 F.2d 1227 (11th Cir. 1982) which addresses the issue of the right to cross-examine adverse witnesses in capital sentence hearings. The Eleventh Circuit held that death sentences may not be imposed on the basis of information which the defendant has not been able to rebut. The court in *Proffitt* went on to say that "the right to cross-examine is essential and fundamental even though not absolute; cross-examination is a necessary tool to establish the reliability of the information presented."

Recent Decisions of the Alabama Court of Civil Appeals

Civil procedure . . . rule 13 (dc) applied

Waylon Brewer v. Maudrean Bradley, Civil Appeals No. 3203 (February 23, 1983). Applying Rule 13 (dc), Alabama Rules of Civil Procedure, the court of civil appeals held that a party is not required to file a compulsory counterclaim if the counter-claim exceeds the jurisdiction of the court. In this case, defendant dismissed its counter-claim in district court and the plaintiff proceeded on its claim and a judgment was rendered in favor of plaintiff. The defendant appealed and filed a similar counterclaim but demanded a sum far in excess of the district court's jurisdictional limits. On plaintiff's motion, the circuit court struck the counter-claim and the defendant appealed. The court of appeals noted that Rule 13 (dc) specifically provides that Rule 13 is modified in the district court so as to excuse the pleader from asserting a compulsory counterclaim when the claim is beyond the jurisdiction of the district court.

Eminent domain . . . date of taking determined

Rosie Lee Brasher v. The Water Works, Sewer and Gas Board of City of Childersburg, Civil Appeals No. 3390 (February 16, 1983). In an appeal from an eminent domain case, the court of appeals held that the date of entry is the "date of taking" where it is established that the condemnor entered the property with intent to take the property and thereafter committed an act consistent with the intent to take.

In this case, the Board, even before entering the property, formed the intent to take it if water were found. Thereafter, it drilled a test well and discovered water. The well was capped and negotiations to acquire the property were commenced. The application for condemnation was not filed until some time later and plaintiffs contended that the later date should be used to determine the date of taking.

The court of appeals disagreed stating that "the dispositive issue . . . in any eminent domain action where there has been an entry . . . prior to the filing of the application, hinges on which date constituted the date of taking and which date will give the best assurance of just compensation." Here, when the Board entered the property with the intent to take and began drilling its well, a possessory interest passed to the Board and a taking occurred.

Real estate . . . recovery fund statute construed

Alabama Real Estate Commission v. Joseph F. Bischoff, Court of Appeals No. 3417 (February 16, 1983). In a case of first impression in Alabama, the court of appeals held that the broad language of § 34-27-31(c-e), *Ala. Code,* 1975, the Real Estate Recovery Fund (RERF), does not limit recovery under the statute to wrongful acts committed in a transaction requiring a real estate license. In this case, plaintiff obtained a default judgment against defendant based upon defendant's breach of an employment contract where the defendant, acting as a licensed broker, promised to hold sales commissions due plaintiff.

After default was entered, plaintiff filed a verified claim against the RERF

and the real estate commission responded arguing that the RERF is designed to protect purchasers and sellers of real estate and is not a vehicle for recovery of a breach of employment contract. The commission also argued that a "judgment" for purposes of the RERF must involve a violation of the real estate license law. Conceding that statutes in some other states only authorize recovery when a broker performs acts for which a real estate license is required, the court of appeals noted that the Alabama Legislature failed to express such a limited intent and, therefore, the Alabama statute differs greatly from the real estate recovery schemes of the jurisdictions relied upon by the commission. The violations of the provisions of this chapter include failing to account or remit money belonging to others, § 34-27-36(a) (6), *Ala. Code*, 1975.

Recent Decisions of the Alabama Court of Criminal Appeals

A prior guilty plea cannot be used to impeach a defendant

Miliner v. State, 7 Div. 12 (February 1, 1983). The defendant pled guilty to an indictment charging robbery in the third degree. On appeal, that conviction was reversed because "the trial court did not properly apprise the defendant of the permissible range of punishment." *Miliner v. State*, 414 So. 2d 133, 135 (Ala. Crim. App. 1981).

On remand, the defendant pled not guilty and was tried by a jury. He was convicted and sentenced to twenty-five years imprisonment as an habitual offender. After the State rested its case-in-chief, the defense requested the trial court to grant a motion in limine preventing the State from introducing "anything" concerning the defendant's former guilty plea. The assistant district attorney advised the court that if the defendant took the stand, he intended to ask if he had not pled guilty.

The trial court ruled that the former guilty plea as well as any statement made by the defendant in pleading guilty was admissible in evidence. Judge Bowen, writing for a unanimous court which reversed stated:

> Here, the fact that the defendant had pled guilty to the same charge for which he was being tried was inadmissible because that conviction had been reversed on appeal. The ruling by the trial judge allowing the use of the guilty plea for impeachment purposes effectively denied the defendant his constitutional right against self-incrimination. Just as a withdrawn guilty plea cannot be used to impeach a defendant, *Broadway v. State*, 52 Ala. App. 249, 253, 291 So.2d 338, cert. denied, 292 Ala. 714, 291 So.2d 342 (1974), neither can a guilty plea which has been reversed on appeal. *People v. George*, 69 Mich. App. 403.

What constitutes a knowing and intelligent waiver?

Zeigler v. State, 7 Div. 979 (March 1, 1983). Charles Zeigler was indicted by an Etowah County grand jury on two charges arising out of the same incident, burglary in the third degree and theft in the first degree. At trial, he was acquitted of the theft charge and was convicted on the burglary count. The defendant was sentenced to twelve months and placed on probation.

On appeal, the defendant alleged that the trial court erred in admitting into evidence his oral inculpatory statement in violation of his constitutional rights.

Shortly after his arrest, the defendant was advised of his constitutional rights by an officer of the Gadsden Police Department. The appellant indicated he understood and informed the police officers that he did not desire to sign a waiver of his rights *until he could talk to an attorney*. The appellant was then asked by the officers "if he wanted to make any type statement" and he then made an oral inculpatory statement to the police. Later, the defendant advised the police that he was refusing to sign the waiver on the advice of counsel.

The pivotal point in determining the admissibility of the defendant's inculpatory oral statement is whether (1) the defendant made a voluntary, knowing and intelligent waiver of his right to assistance of counsel and to remain silent, or (2) the oral statement comes within an exception to the rule mandated by the United States Supreme Court in *Miranda*. The court of criminal appeals through Justice Barron reasoned as follows:

> The evidence is undisputed that appellant was advised of his *Miranda* rights by the police officers, and that he did not sign a written waiver of those rights. The record contains no proof suggesting that appellant made any specific oral waiver of his rights. The fact that appellant made an oral inculpatory statement immediately after effectively invoking his rights is not sufficient, without more, to establish a valid waiver of his rights. See *Brewer v. Williams*, 431 U.S. 925, 97 S. Ct. 2200 (1977); *Warrick v. State*, 409 So. 2d 984 (Ala. Crim. App. 1982).

The law is clear that the burden of proving an intentional waiver by the defendant of his constitutional rights rests upon the State. That standard in the case *sub judice* was not met. Ultimately, the appellate court held that the defendant in no way made a waiver after he effectively invoked his right to counsel and consequently, the oral inculpatory statement was inadmissible.

Recent Decisions of the Supreme Court of the United States—Criminal

Double jeopardy . . . a retreat from *Pearce v. North Carolina*

Missouri v. Hunter, 103 S. Ct. 673 (1983). The defendant was convicted of armed robbery of a supermarket during which an employee was struck and shots

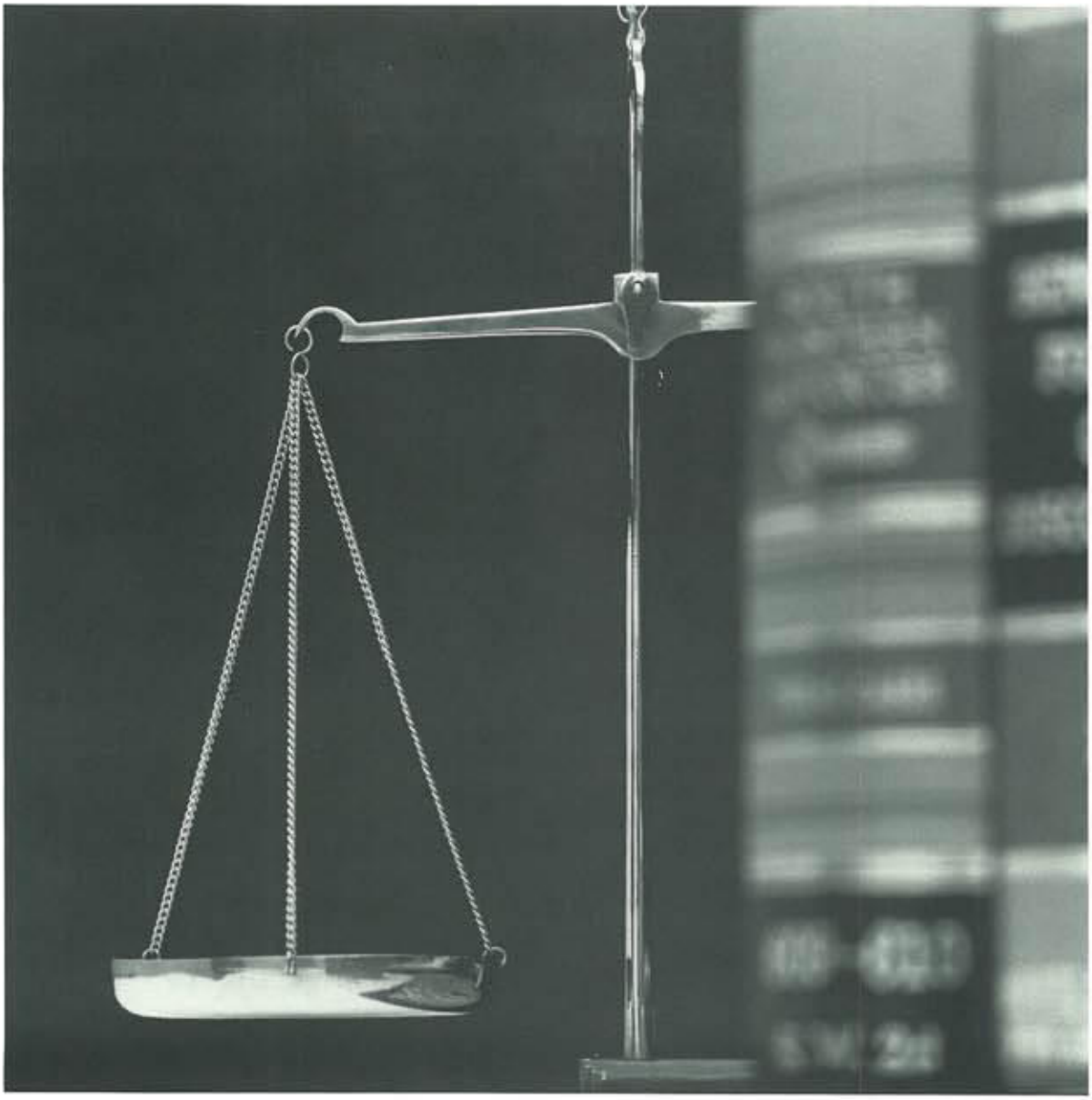
were fired. Missouri statutes provided an additional penalty when a deadly weapon was used in the commission of the offense. The defendant was sentenced to ten years for the robbery and fifteen years for his use of a deadly weapon in the commission of an offense.

On appeal the defendant raised the defense of double jeopardy; the Missouri Supreme Court reversed the armed criminal action conviction because of the statements of the Supreme Court that the double jeopardy clause also "protects against multiple punishments for the same offense," citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed.2d 656 (1969). A divided Supreme Court vacated and remanded. Chief Justice Burger, writing for the majority, noted that the Missouri Supreme Court had misperceived the nature of the double jeopardy clause's protection against multiple punishment and pointed out with respect to cumulative sentences imposed in a single trial that the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.

In *Hunter*, the Missouri Supreme Court had construed the two statutes at issue as defining the same crime thereby triggering the *Pearce* rationale, but the Supreme Court in rejecting that legal conclusion stated:

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury *may impose cumulative punishment under such statutes in a single trial.* (Emphasis added.)

Justice Marshall joined by Justice Stevens entered a strong dissent reasoning that in the context of multiple prosecution, the law is clear that the phrase, "the same offense" in the double jeopardy clause has independent content—that two crimes that do not satisfy the *Blockburger* test constitute "the same offense" under the double jeopardy clause regardless of the legislature's intent to treat them as separate offenses. Otherwise, multiple prosecutions would be permissible whenever authorized by the legislature. □



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Rachel Kulakowski

David A. Bagwell, U.S. magistrate for the Southern District of Alabama in Mobile, is a graduate of Vanderbilt University and received his J.D. degree from the University of Alabama.

The John Archibald Campbell United States Courthouse in Mobile

David A. Bagwell

By statute passed on December 29, 1981, introduced by Congressman Jack Edwards, Congress named the Federal Courthouse in Mobile the John Archibald Campbell United States Courthouse, after Justice Campbell of Mobile, one of only three Alabamians ever to serve on the United States Supreme Court. The other two Alabamians were Justice Hugo Black, who served from 1937 to 1971, and Justice John McKinley, Justice Campbell's immediate predecessor, who served from 1837 to 1852.

Campbell's career was a varied one. After graduating from college at the age of fourteen, Campbell moved to Montgomery, and was admitted to the Alabama Bar in 1830. He practiced in Montgomery seven years, married Anna Esther Goldthwaite (the sister of two Alabama Supreme Court justices) and, though he had been elected to the State legislature from Montgomery in 1836, he moved to Mobile in 1837 to seek to build a more profitable practice.

Campbell formed a law partnership in Mobile with Daniel Chandler (whose home is now used as a law office by Mobile lawyer Donald Briskman) which continued until his appointment to the United States Supreme Court. In 1844 he was again elected to the state legislature (this time from Mobile) and was twice offered a seat on the Alabama Supreme Court which he twice declined.

John Campbell had an extensive U.S. Supreme Court practice, having argued six cases there during the 1851-52 term alone. The justices were so impressed with Campbell's legal talents that upon Justice McKinley's death the justices themselves unanimously urged President Franklin Pierce to appoint Campbell to the Supreme Court. In 1853, at the age of only forty-one, Campbell was appointed to the U.S. Supreme Court and was confirmed within four days.

The northern press, though quite uneasy about the position of the new southern justice on the slavery question, was fulsome in its praise of Campbell's character and ability. One New York paper said:

> His professional learning is . . . vast, and his industry very great. Outside his profession he is most liberally cultivated, and in this respect ranks beside Story . . . His mind is singularly analytical. Added to all and crowning all, his perfect character is of the best stamp, modest, amiable, gentle, strictly temperate and inflexibly just.

Even the strongly abolitionist *New York Tribune* said of Campbell:

> He is chock full of talent, genius, industry and energy . . . For the last ten years, he has been deservedly at the head of the Alabama Bar . . . exceedingly popular, and as a jurist and a man commands the respect and confidence of everyone.

The *American Law Register* said that Campbell was "an exceedingly able man of whom the largest expectation will not be disappointed." The *Washington Union* wrote that "as a statesman and jurist his elevation is justly an occasion of congratulation for the country."

The Supreme Court decisions of Justice Campbell are of little interest to us, but it is accurate to say that they are well-written and reflect his consistent strict-constructionist and state's rights views.

During the tenure of Justice Campbell, the duties of a "circuit justice" were more mundane than the duties of a circuit justice today. Campbell, for example, regularly tried cases, charged grand juries, and performed all the other customary duties of a trial judge. He frequently sat in New Orleans, as circuit justice, and the quality of his trial court service was analyzed by a contemporary New Orleans paper in this manner:

> Our lawyers, accustomed to the delays and tediousness, and never-ending complexities of trials in the United States courts, have been greatly startled at the rapidity of Judge Campbell's decisions which, by the way, are as wise, able, and learned as they are prompt and lucid.

Although Campbell believed that the states had a constitutional right to secede from the Union, during the winter and spring of 1860-61 his efforts in opposition to secession and war were active and unremitting. Secretary of War Edwin Stanton wrote President James Buchanan one month after the Fort Sumter attack that "the judge (Campbell) has been as anxiously and patriotically anxious to preserve the Government as any man in the United States, and he has sacrificed more than any southern man, rather than yield to the secessionists." Justice Campbell regretfully resigned his position in April of 1861, and the *National Intelligencer* noted the occasion by writing that Justice Campbell was:

> . . . A learned jurist and a faithful judge, who during the entire period of his official service has illustrated the qualities which must adorn the exalted position he was called to fill, and who, in his retirement, will carry with him the admiration of his countrymen.

In 1862, Confederate Secretary of War George Randolph prevailed on Campbell to accept an unpretentious position as his assistant to help with a large number of purely administrative and legal details, mostly procurement contract work.

Campbell was involved with two meetings with President Abraham Lincoln to secure peace, both of which tainted him with a hint of treason to the South, in popular view at least. In 1864 Campbell was one of the commissioners for the Confederacy at the Hampton Roads conference to end the war and, shortly after the fall of Richmond, met personally with President Lincoln to discuss the possibility for and details of peace.

After the war Campbell was imprisoned in Fort Pulaski and was released only after Justice Benjamin R. Curtis of Massachussetts wrote President Andrew Johnson that:

> Judge Campbell, as you . . . know, was not only clear of all connection with the conspiracy to destroy the Government, but incurred great odium in the South, especially in his own state, by his opposition to it . . .

President Johnson ordered Campbell released, whereupon he went to New Orleans to practice, presumably because of the hometown odium mentioned by Justice Curtis, the wartime destruction of his Mobile property, the pre-war popularity of his New Orleans circuit justice service, and the size and commercial importance of New Orleans. Campbell and his son formed a partnership with a former Louisiana Supreme Court justice, and Campbell threw himself into his practice in a style—perhaps reflecting his appellate skills and workload—apt to be technical and quaint.

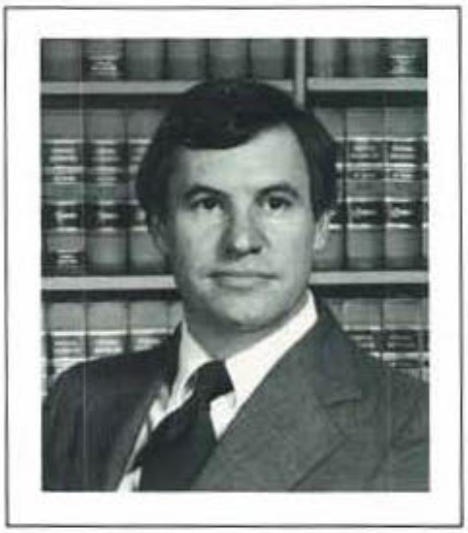
Campbell quickly resumed active Supreme Court work in line with his view of an ideal law practice: six paying cases in the U.S. Supreme Court per year, with ample time to prepare. He argued a number of Supreme Court cases, the most notable (which he lost) were the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). In one case five justices said his argument was the best they had heard during their careers, and Campbell was later elected chairman of the Bar of the U.S. Supreme Court.

In his older age, Campbell moved to Baltimore to be near his daughters, but still continued his Supreme Court practice.

Shortly before his death in 1889 at age seventy-eight, he was invited by the justices of the Supreme Court to attend the Centennial celebration of the federal judiciary but, in his last words to the Supreme Court, declined because of ill health and sent the Court's marshal back with this message, echoing the opening used in every United States Court:

> Tell the Court that I join daily in the prayer "God save the United States and bless this Honorable Court."

Justice Campbell died in 1889, and was buried in Baltimore. □



Basic Client Relations

A Primer for Avoiding the Unintentional Grievance

Gary C. Huckaby

Gary C. Huckaby, a partner in the law firm of Smith, Huckaby & Graves, P.A., in Huntsville, received his B.A. and LL.B degrees from the University of Alabama. Huckaby is a member of the Board of Commissioners of the Alabama State Bar and serves as chairman of one of the panels of the Disciplinary Board. He formerly served as chairman of the Grievance Committee of the Huntsville-Madison County Bar Association.

The darkest day in a lawyer's career occurs when a letter arrives from the grievance committee. Unfortunately, many disciplinary cases involve unintentional violations of the Code of Professional Responsibility, most of which are avoidable.

It is to the credit of the profession that it has taken upon itself the highest code of conduct for the members. In spite of its idealistic, aspirational tone, the Code of Professional Responsibility is hardly the kind of reading that busy lawyers turn to in their spare time. It is impossible in an article such as this to comprehensively treat the disciplinary code. It can only be hoped that some of the recurring problems can be discussed.

A Good Start

The genesis of a client problem is often found at the first interview with the attorney. In an adversarial matter, the client may reach the lawyer's office filled with indignation against the opposing party and with inflated expectations about the redress he or she expects from the legal system. Though a lawyer may be tempted to overstate what is obtainable, the best approach is to assess the case realistically, explaining the potential pitfalls that may exist. In the long run a candid appraisal adds to the client's confidence in the attorney and avoids embarrassing reevaluations later in the case.

Once the client has decided to retain the attorney, the employment contract should be reduced to writing. This does not necessarily mean a complex contract bound in a "blue back" cover. A simple letter from the lawyer to the client, preferably acknowledged by the client, is sufficient in most cases. The contract should always include the terms of payment of fees and expenses.

Many lawyers seem to feel that they can unilaterally withdraw at will from the representation of a client. As a matter of contract law this may not be the case unless the client has breached some provision of the contract. Thus, the client should be obligated in the agreement to cooperate with the attorney in prosecuting the case and to pay the fees and expenses on some specific conditions. Such agreements provide an attorney with a basis for withdrawal if the client fails to live up to his or her side of the bargain.

Attorney fees obviously lead to a considerable number of grievances. Clients who have had little prior experience with a lawyer usually fail to recognize that a substantial portion of the fee goes for office space, secretarial help, library, continuing education, etc. A candid explanation of the basis of the fee will go a long way in improving client understanding and establishing goodwill. If the engagement is on a time basis at an hourly rate, the client should be advised of the kind of effort which will be charged. Though it is a large portion of counsel's work, clients often do not understand that they will be charged for the time spent on the telephone.

We often presume that the client understands the mechanics of lawsuit or other legal matter and fail to inform him or her of what is happening in a form that he or she can understand.

During the Representation Communication is the Key

The single most prolific source of the unintentional grievance against lawyers is a failure to communicate with the client. This should be the first rule in every law office. We often presume that the client understands the mechanics of a lawsuit or other legal matter and fail to inform him or her of what is happening in a form that he or she can understand.

Ideally, a client should hear from his attorney at least every thirty days, even if it is only to say that there have been no developments. Such contact assures the client that his matter has not been forgotten.

Additionally, a client should receive a copy of everything the lawyer puts on paper, including pleadings, letters, briefs, telephone memoranda for record,

etc. This not only keeps the client informed, but it demonstrates the work product. A cover letter is unnecessary. A rubber stamp bearing "For Your Information" and the attorney's name serves this purpose very well. A short, handwritten note from the lawyer adds a personal touch.

Some members of the bar argue against such a practice, saying that it generates unnecessary inquiries from the client about matters he does not fully comprehend. The improvement in client relations and in the understanding of the basis for the fee is well worth the inquiries.

A word should be said about returning a client's telephone calls. There surely is not a practicing member of the bar who has not found it impossible on some occasion to return calls. A client often unconsciously thinks the lawyer has only his case to worry about and cannot understand this apparent rudeness. In such cases a call from the lawyer's secretary, explaining the problem, will prevent an irritated client. The secretary may in some instances be able to relay a question to the lawyer and then call the client back.

Failure to Perform Competently

A considerable percentage of the grievances filed against lawyers deals with violations of Canon 6, which requires an attorney to represent his client competently. It is surprising that many lawyers are not aware that misfeasance or malfeasance in a client's business is an ethical matter as well as a contractual one.

Some members of the bar get into trouble by simply accepting more work than they can competently and timely accomplish. In such cases Canon 6 requires that the engagement be declined.

Treacherous Waters

It has been my observation that there are several areas of law practice that give rise to a greater number of grievances. By identifying them, a lawyer can at least take extra precautions to observe the Code of Professional Responsibility.

• **Domestic relations cases.** The domestic relations cases first come to mind. In these matters the parties are emotionally involved and they have competing interests which do not permit a solution acceptable to either side. In such cases it is basic that a lawyer unequivocally declare which side he or she represents.

Special problems arise in uncontested divorce cases, where there is only one attorney involved. In many instances, the parties perceive that the lawyer represents both sides. Under DR5-105(C)(1) a lawyer may never represent both parties in divorce or domestic relations proceedings, whether contested or uncontested. The rules recognize that there is an inherent conflict of interest between the parties to a divorce, even if they have "reached an agreement" before seeing the lawyer. Clients often tentatively make agreements which are legally imprudent, and they are entitled to the unfettered judgment of their counsel in evaluating the settlement.

In uncontested cases where one party elects not to retain his own attorney, can the lawyer for the other side ethically draft an answer and waiver for the unrepresented party to sign? DR5-105(C)(1) contemplates that he can, but the attorney should always obtain from the unrepresented party the written acknowledgment referred to in the rule. The unrepresented party acknowledges (1) that the attorney for his or her spouse cannot serve as his or her attorney; (2) that the attorney represents only his or her client and will use his or her best efforts to protect his or her client's best interest; (3) that the nonrepresented party has the right to employ counsel of his or her own choosing and has been advised that it is in his or her best interest to do so; and (4) that having been advised of the foregoing, the nonrepresented party has requested the lawyer to prepare an answer and waiver and other pleadings and agreements as may be appropriate.

When such an acknowledgment has been obtained and filed in the proceeding, the attorney is deemed to have complied with DR5-105. Note that the filing of the acknowledgment seems to be required by the rule to create the presumption of compliance.

• **Conflicts of interest.** In cases other than domestic relations proceedings, complex ethical questions about conflicts of interest arise. We still see instances where good lawyers unintentionally violate Canon 5, which requires a lawyer to refuse employment when his independent judgment will be impaired.

Special problems arise when a lawyer is involved in a business as both counsel and investor, shareholder, officer, or director. DR5-104 prohibits a lawyer from entering into a business transaction with a client if they have differing interests and if the client expects the lawyer to exercise his professional judgment. The prohibition can be overcome by obtaining the consent of the client after full disclosure, but the prudent practice seems to dictate avoiding such situations entirely. When business judgments may be required of the attorney-officer on a daily basis, full disclosure becomes impractical.

Some lawyers innocently agree to sit on boards of directors of corporations to simply fill a seat. They do not attend meetings or actively participate in the business of the corporation. Such a situation leaves the attorney open for grievances, as well as civil liability for nonfeasance.

The better rule seems to be to decline an engagement even when the appearance of a conflict exists. In close cases it is wise to get an opinion from the General Counsel of the Alabama State Bar.

• **The guardian ad litem.** Another treacherous area for the attorney is approached when he or she serves as a guardian ad litem. On occasion a member of the bar will accept these court appointments, make little inquiry into the matter, and make a mere token appearance at the hearing. Some of the younger members of the bar, particularly, fail to understand that they have a broader obligation. The potential for liability to the minor or incompetent ward is enormous in some of these appointments. Additionally, the lawyer faces the possibility of a charge of violating the disciplinary rule which provides that a lawyer not neglect a legal matter entrusted to him [DR6-101].

• **Illegal or fraudulent acts by a client.** One last example of the unintentional grievance is worth citing. Every lawyer in private practice eventually has a client who wants to conceal assets to avoid judgment or other legal process.

Though he will seldom blatantly propose such activity to his lawyer, he will request that the documents of transfer be drawn by the attorney. When the attorney has knowledge that such a transfer is illegal or fraudulent, he must refuse to perform the legal work incidental to it [DR7-102(A)(7)].

Withdrawing From Representation

Every practicing attorney at some point finds it necessary to withdraw from a case. At times the attorney has misconceptions about his prerogatives. As mentioned above, unless the client has violated the employment agreement or one of the conditions under DR2-111 exist, the attorney may not have the right to withdraw without the client's consent.

If grounds for withdrawal exist, the attorney must take reasonable steps to avoid "foreseeable prejudice" to the rights of the client, including giving notice and allowing time for employment of other counsel.

In cases before a court or other tribunal, the lawyer must not withdraw without the tribunal's permission if required by its rules [DR2-111(A)(1)]. In my opinion it is the better practice to always obtain leave of court to withdraw.

Part of the unwritten "common law" for practicing in the profession seems to be the idea that an attorney has a lien upon the client's file for unpaid fees. On the contrary, DR2-111(A)(2) requires an attorney upon withdrawal to deliver to the client all papers and property "to which the client is entitled." In any case, the attorney should not attempt to collect a fee by refusing to deliver to the client documents or other property needed for the prosecution of his or her case.

When a lawyer withdraws, he has an ethical obligation to refund promptly any part of a fee paid in advance that has not been earned [DR2-111(A)(3)]. Since the withdrawal has frequently been caused in the first place by a deterioration in the attorney-client relationship, it is of utmost importance that this refund be made immediately, along with an appropriate accounting. Failure to do so often triggers a grievance.

By no means is this article a comprehensive treatment of the Code of Professional Responsibility. The rules mentioned are simply those that good lawyers sometimes overlook. Dry though it may be, the Code should be read in its entirety by every member of the bar. A greater sensitivity to the canons of ethics will keep the good lawyer out of trouble.□

Report of Board of Commissioners Meeting

The Alabama State Bar Board of Commissioners met on Friday, February 25, 1983, at State Bar Headquarters in Montgomery. The following actions were taken:

Election of Commissioner

Following a tribute to the late Albert W. Copeland, commissioner for the fifteenth judicial circuit, President Norborne C. Stone, Jr., noted that a vacancy existed on the board due to the death of Mr. Copeland.

Under the rules of the commission, the commission is charged with the election of a commissioner, from the judicial circuit in which the vacancy exists, to fill the unexpired term. Mr. Copeland's term would have expired June 30, 1983.

As is customary, the advice of the Montgomery County Bar Association had been sought regarding a recommendation or nomination of a person to succeed Mr. Copeland. President Stone read a letter from the president of the Montgomery County Bar Association advising that the Executive Committee of that bar had met on February 23, 1983, and recommended that Richard H. Gill be considered for election as the commissioner to succeed and fill Mr. Copeland's unexpired term.

President Stone opened the floor for nominations for the position of commissioner for the fifteenth judicial circuit. Commissioner Garrett nominated Richard Gill of the Montgomery County Bar. His nomination was seconded by Commissioner Huckaby. There being no further nominations, Commissioner Lightfoot moved that the nominations be closed and that Richard Gill be unanimously elected to succeed Albert W. Copeland as commissioner of the Alabama State Bar for the fifteenth judicial circuit. The commission, by unanimous voice vote closed the nominations and unanimously elected Mr. Gill.

MCLE Commission/Executive Committee

In view of Mr. Copeland's death, there also existed vacancies on the Mandatory Continuing Legal Education Commission (MCLE) and the State Bar Executive Committee. Richard Gill of Montgomery was elected to the MCLE Commission and A. Philip Reich II, was elected to the Executive Committee. Both terms will expire this summer.

Rule III Admission

Reginald T. Hamner, secretary of the Alabama State Bar, presented the application of Jack Brian Hood for admission to the Alabama State Bar under Rule III of the Rules Governing Admission. Professor Hood is a faculty member at the Cumberland School of Law and has met the requirements for admission under Rule III. His application had been approved by the Character and Fitness Committee, Panel I.

Commissioner Ted Taylor moved that Professor Hood be admitted under Rule III. The motion was seconded by Commissioner Huel Love and approved by unanimous voice vote.

Travel Proposals for 1983

Mr. Hamner then presented for the board's consideration a proposal from INTRAV for the bar's sponsorship of a "Dutch Waterways Adventure." The trip would operate with both Birmingham and Montgomery departures on September 25, 1983, and a return date of October 8, 1983. The cost of the trip, depending upon cabin class on the ship, double occupancy per person from New York would be $2,399 and $2,599 plus round trip air fare from Montgomery or Birmingham to New York.

INTRAV also sought board approval to offer the membership its "Main River Adventure." This trip is currently operating and vacancies exist for the two week period of June 30 through July 12, 1983. Cost per person, double occupancy, from New York is $1,999 and $2,199 depending upon cabin choice. This charge is exclusive of round trip air fare from either Birmingham or Montgomery to New York. Current rates are $211 from Birmingham and $278 from Montgomery.

Commissioner Huel Love moved that the bar sponsor the trips. Commissioner Garrett seconded the motion. The commission approved offering both trips to the members for the dates indicated by voice vote.

Legal Services Corporation

Commissioner Huckaby, co-chairman of the state bar's committee on private bar involvement in the delivery of legal services, spoke briefly regarding actions taken by his committee in seeking to encourage private bar involvement in the state of Alabama in the delivery of legal services. Commissioner Huckaby recommended that the bar become more involved in the planning phase such as the pro bono program of the Montgomery County Bar Association. He further encouraged the bar to pursue its study of interest on lawyers' trust accounts as a means of furthering the delivery of legal services. He reminded the board that an opportunity under federal statutes now presents itself for the bar to take the lead in the delivery of legal services.

In addition to Commissioner Huckaby, Wayne P. Turner of Montgomery, one of the three members appointed by the Alabama State Bar to the Legal Services Corporation of Alabama Board of Directors, reviewed a status summary of

private bar involvement as mandated by the Legal Services Corporation funding requirements.

The regulation became effective the last quarter of 1982. The Alabama private bar involvement requirement was $102,700. The expenses to date were summarized as being $223,689. The 1983 requirement will be $410,800.

Mrs. Randye Rosser, the Montgomery attorney operating the Montgomery County Bar pro bono project, made a brief report on the project and noted that it was initiated with a grant from the American Bar Association and has been continued this year with full funding from the Legal Services Corporation of Alabama, Inc.

President Stone advised the board that under new requirements the commission would shortly be asked to nominate persons to serve on the state board fulfilling the requirement that over half of the Board of Directors of the Legal Services Corporation of Alabama be appointed by the bar association. He encouraged the board to give this matter serious consideration and noted that it was an opportunity for the bar to exercise control in this area which had previously been denied it under the original establishment of the corporation.

Prepaid Legal Services/Model Code Provisions

Alex W. Jackson, general counsel, made a brief report supplemented by a memorandum to the board noting that the American Bar Association Model Code of Professional Responsibility presented problems for certain attorneys in those states where the Code had been adopted in its model form if they desired to participate in a prepaid legal service program. The Alabama State Bar did not adopt the model code, therefore, DR 2-110(B) does not present the problem found in many jurisdictions.

The basic problem involves the prohibition of an attorney from cooperating with a for-profit organization such as an insurance company which would recommend or furnish the use of an attorney in prepaid legal service plans for subscribers.

Disciplinary Panels

President Stone reminded the board of their responsibility to serve on disciplinary panels when called upon to do so. He cited some figures which reflected that slightly over one-third of the persons in the panel pool had served when called upon, and that even though there were eleven commissioners in the pool, over fifty percent of the cases involving a pool member had been handled by the same four members of the eleven member pool. He encouraged commission members to make every effort to attempt to serve when their panel is called and encouraged pool members when asked to serve to make every effort to do so.

Mandatory CLE Compliance Report

Commissioner William Scruggs, chairman of the Mandatory CLE Commission, briefed the board on the year end reports and the compliance of over ninety percent of the members of the bar. The MCLE Commission met on Thursday, February 24, 1983. There were several requests for exemptions which are being addressed by the commission.

ABA House of Delegates Report

Commissioner Gary Huckaby, one of two ABA House of Delegates members elected by the Board of Commissioners, made an interesting and informative report of actions of the House of Delegates of the American Bar Association.

The ABA House of Delegates met in early February. Mr. Huckaby covered numerous items of interest including the postponement of changes in the Model Code of Professional Responsibility, the position taken with regard to the "not guilty by reason of insanity" plea and certain actions relating to gun control. Commissioner Huckaby encouraged his fellow commissioners to take every opportunity to express themselves with regard to matters coming before the House, noting that ABA positions are formulated from comments received from lawyers throughout the country.

Legislative Report

Randolph P. Reaves, legislative counsel for the bar, briefed the commission with regard to two measures which were introduced at the second special session of the legislature.

A bill to exempt certain constitutional officers, legislators and legislative employees from the Mandatory CLE requirements passed both houses of the legislature, however, the bill was vetoed by Governor Wallace.

A bill had also been introduced by the state comptroller and had passed the House which would have taken 1.9 percent of the revenues from the Fair Trial Tax Fund for his office's use in administering the fund. This would have caused $47,500 to be taken from the fund this year and $90,000 each year thereafter. The matter died a quick death in the Senate, but Reaves added that the bill is likely to be reintroduced at the regular session of the legislature to begin on April 19, 1983.

President-elect's Report

William B. Hairston, Jr., president-elect of the bar, prepared and distributed a memorandum in which he requested the board take certain actions. Commissioner Crownover moved and Commissioner Huckaby seconded a motion that the requests of the president-elect as outlined in his memorandum be granted. The board after further discussion approved the following matters:

1. Authorized the president-elect to solicit the bar for expressions of committee interest during his tenure as president-elect and prior to becoming president.
2. Authorized the president-elect to appoint the committees of the Alabama State Bar that will be active during his term of office as president prior to the annual meeting at which he assumes the presidency provided, however, that the duties and responsibilities of the committees so appointed will not commence prior to such taking of office.

3. Authorized a breakfast for members of the incoming committees to be held in connection with the annual meeting of the Alabama State Bar beginning with the annual meeting to be held in July 1983.
4. Authorized the recognition of committee chairman by appropriate identification on the convention badges beginning with the annual meeting to be held in July 1983.
5. Authorized a mid-winter meeting of the Alabama State Bar to be held in Montgomery, Alabama in March 1984.

The board also approved a list of task forces for the 1983-84 year, reaffirmed several standing committees, and created new standing committees of the Alabama State Bar as requested by the President-elect. (A complete list of these task forces and committees was mailed to members of the bar in the Committee Preference Form. If you are interested in committee work and have not returned the form, please do so immediately.)

Secretary's Report

The secretary briefed the commission on plans for the 1983 Annual Meeting in Birmingham and reviewed the recently conducted audit for fiscal year 1979-1980, 1980-1981, and 1981-1982, a copy of which had previously been sent to each member of the commission. A copy of this audit is in the file of this meeting of the board.

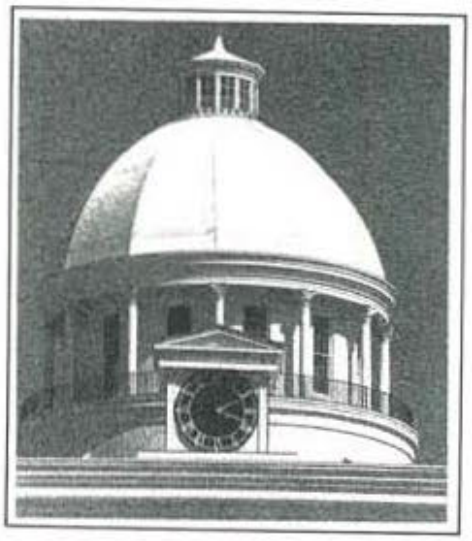
The secretary noted that appropriate floral tributes had been sent on behalf of the board to the funerals of Past President Robert B. Albritton and Commissioner Albert W. Copeland.

President's Report

President Stone advised the commission that the law suit of *Foley and Morgan vs. Alabama State Bar* had been dismissed with prejudice to the plaintiffs. This suit had involved the question of lawyer advertising in the state.

President Stone also noted that he would be meeting later on that day with the president of Legal Services Corporation of Alabama, Inc. to discuss further involvement of the bar in the affairs of the corporation as mandated by the Legal Services Corporation Act.

President Stone reminded the commission of its next meeting scheduled for May 5-6 at Gulf State Park Resort at Gulf Shores, Alabama. □



LEGISLATIVE WRAP-UP

Robert L. McCurley, Jr. Randolph P. Reaves

Revised Limited Partnership Act

The Alabama Law Institute will present at least two major revisions of law to the legislature during the 1983 regular session. These will be a revision of the Alabama Limited Partnership Act and a revision of the Professional Corporation-Professional Association law. A third major revision, the Eminent Domain law, is presently being revised. This article and the one in the next edition will review these drafts.

The review that follows is taken, in part, from the preface of the Alabama Law Institute's Revised Limited Partnership draft by Professor Howard Walthall who served as reporter for the committee.

The current Alabama Limited Partnership Act is an adaptation of the Uniform Limited Partnership Act (ULPA), which the National Conference of Commissioners on Uniform State Laws approved for recommendation to the states in 1916. The Alabama version of ULPA was enacted in 1971 replacing an Alabama limited partnership statute which dated back to 1852.

The increasing use of limited partnerships revealed a number of problems with the ULPA and generated a variety of criticisms of its provisions. In 1976, in response to such problems and criticisms, the National Conference of Commissioners on Uniform State Laws approved for recommendation to the states a Revised Uniform Limited Partnership Act (RULPA).

After the approval of RULPA for recommendation to the states by the Conference of Commissioners on Uniform State Laws, the Alabama Law Institute appointed a committee to study RULPA, looking towards adoption in Alabama. Attorney Richard Cohn serves as chairman of the committee, which consists of a number of distinguished business, tax and securities practitioners with experience in representing both general and limited partners. The roster of members of the committee is as follows:

Richard Cohn, chairman
Harold Apolinsky
Louis E. Braswell
Penny Davis
Steve Cooley
Bob Denniston
Jay Guin
Fred Helmsing
Ted Jackson
Tom Krebs
Robert McCurley
Thomas Mancuso
George Maynard
Michael Rediker
Joe Ritch
Jim Stivender
Howard Walthall
Robert Walthall

Although the committee has determined that RULPA represents a significant improvement over the old ULPA and the current Alabama limited partnership statute, its study of RULPA has, also, revealed that a number of areas of uncertainly remain. The proposed revision of the Alabama Limited Partnership Act (hereafter, revision) attempts to clarify these areas. In addition, various adjustments in RULPA were necessary to conform to Alabama practice. For example, RULPA contemplates centralized filing of certificates of limited partnership with the Office of the Secretary of State. However the revision retains the current Alabama practice of filing the certificate of limited partnership with the local probate judge. It also provides for a report, as presently required, to be filed with the Office of the Secretary of State containing certain basic information. After the initial report has been filed, further reports are not required unless there is a change in the reported information.

The revision permits a partner who makes a loan to a partnership to be treated as a creditor and to receive a security interest in partnership assets with respect to such transaction, subject to the same general principles of law which can result in subordination in the case of shareholder loans to corporations.

Article Two contains the various provisions dealing with the formation of the limited partnership and the execution and filing of certificates of amendment and cancellation. It further eliminates the requirement that all limited partners execute each amendment.

One of the most important articles is Article Three, which deals with limited partners. It expands the approach of the current Alabama provisions in providing a "safe harbor" list of activities which will not expose a limited partner to general partner liability. Added is a provision that when the certificate is amended to add a person as a limited partner, and the amendment is filed within thirty days of the person's acquisition of a limited partnership interest, such amendment relates back to the date of acquisition. It also spells out the options

open to an investor who erroneously believed himself to be a limited partner.

Article Four contains the provisions dealing with general partners. Additional general partners can be admitted only with the specific written consent of each partner unless the partnership agreement allows otherwise. General partners in a limited partnership have all the rights, powers and duties of general partners in a partnership without limited partners.

Article Five is the finance section. Here the important change is to permit contributions by limited partners to be in the form of services. It also recognizes that a contribution may be in the form of a binding promise to pay cash, convey property, or render services in the future. The treatment of such promises as a contribution is permissive rather than mandatory.

Distributions are dealt with in Article Six. Under current law there is no statute of limitations for a partner's liability to refund returned contributions necessary to meet liabilities to creditors. The revision creates a one year statute of limitations and defines a return of contribution to a partner in terms of the fair value of the partnership's assets, rather than book value.

Assignments of limited partnership interests are dealt with in Article Seven which makes clear that a partnership interest is personal property.

Article Eight deals with dissolution of a limited partnership both voluntarily and by a judicial dissolution, which is new.

The provisions of Article Nine of RULPA, providing for registration of foreign limited partnerships, deal with such an important problem that this article has already been adopted in Alabama as Act 79-212, codified in *Ala. Code* (1975) § 10-9-140 through § 10-9-147 (1975).

Article Ten establishes conditions precedent to derivative suits and otherwise regulates them in a manner similar to stockholder derivative suits.

In general the revision applies to pre-existing partnerships as well as partnerships formed under the revision, except where its applicability has been limited to partnerships formed under the revision. The exceptions to the applicability of the revision to existing partnerships are in such areas as priorities for the distribution of assets among the partners on dissolution, where vested property rights could not be altered by new legislation.

Reapportionment Plan Gets Seal of Approval

On April 11, a three-judge federal panel, composed of U.S. District Judges Truman Hobbs and Myron Thompson, and U.S. Circuit Judge Frank M. Johnson, Jr., approved the Alabama Legislature's third attempt to redraw House and Senate districts—the plan which was passed by the legislature in the special session earlier this year. Upon approving the reapportionment plan, the court has required that the term of office of all senators and representatives expire at midnight December 31, 1983; the court has ordered new elections to be held in the fall.

The approved plan puts twelve of the thirty-five incumbent senators into districts with other incumbents.

Bills Die in Special Session

Two bills of interest to lawyers in the state of Alabama were filed during the recent special sessions of the Alabama Legislature. The first was House Bill 13, by Representative Langford of Montgomery. This bill exempted lawyer legislators, constitutional officers (such as the governor, lieutenant governor, clerk of the House, and secretary of the senate), and lawyers employed by the Legislative Reference Service from the requirements of mandatory continuing legal education. The bill passed the House and was amended prior to passage in the senate to include the attorney general among the exemptions. The House concurred in the amendment and the bill achieved final passage. While most of the lawyers in both chambers abstained from voting, none voted against the bill and no other opposition arose in either the House or the senate.

When the bill went to the Governor's Office, a question was raised as to the constitutionality of the bill. The requirements for those who wish to practice, and for that matter continue the practice of law in Alabama, are embodied in the Rules of the Alabama Supreme Court. In a previous case, *Board of Commissioners of the Alabama State Bar v. State ex rel. Baxley*, 295 Ala. 100, 324 So. 2d 256 (1975), the Alabama Supreme Court spoke to the issue and struck down a legislative act that would have changed the examination process for prospective attorneys. On the basis of the constitutional problem, Governor Wallace vetoed the bill and it consequently died.

The second bill of note was House Bill 22, by Representative Holley of Enterprise. This particular bill would have taken 1.9 percent of the Fair Trial Tax Fund, which pays indigent attorney fees, and appropriated this amount per year to the State Comptroller's Office for the purpose of administering the fund. The fiscal note attached to the bill indicated that it would deplete the fund by $45,000 in the 1982-1983 fiscal year and by $90,000 every year thereafter. The bill moved rapidly through the House during the second special session. When it got to the senate, however, it met much opposition by lawyers and other concerned senators. It did not come to a vote and died when the senate adjourned *sine die*.

Robert L. McCurley, Jr., director of the Alabama Law Institute, received both his undergraduate and law 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.

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.

Bar Briefs

ABA membership hits 300,000

The American Bar Association (ABA)—the world's largest voluntary professional association—has its 300,000th member!

Morris Harrell, ABA president, and Thomas Gonser, ABA executive director, were on hand when ABA membership director Sue Wegrzyn opened the 300,000th application at the association's headquarters in Chicago on March 29.

When Robert G. Pugh, ABA membership committee chairman, called Macon, Georgia attorney Bruce K. Billman to inform him that he was the 300,000th member of the ABA, Billman said he should have joined the association sooner. "I delayed too long," he said. "I let 299,999 other lawyers get in front of me."

"The ABA is well worth joining," Billman added. "It has a lot of benefits to offer, and I intend to find out more about them at the next Annual Meeting." The Annual Meeting will be held in Atlanta from July 28 through August 4.

Back to where he started

On March 18, 1983 Governor George Wallace appointed former Montgomery Circuit Judge Sam Taylor to the Alabama Court of Criminal Appeals to fill a vacancy on the court created by the untimely death of Judge Bishop N. Barron.

Taylor's judicial service began in 1975 when he was appointed judge of the Montgomery County Court. In 1977, Taylor was elected president of the Alabama District Judges Association. He also served in the House of the Alabama Legislature from 1970-1974.

Taylor is back to the same building where he began his law career in 1959. After having earned his J.D. degree at the University of Alabama School of Law and Master of Laws at New York University, Taylor was law clerk to Alabama Supreme Court Chief Justice J. Ed Livingston. Maybe it is coincidence, or maybe it is fate, but whichever, in reflecting back to 1959, the new judge on the Alabama Court of Criminal Appeals remembers having the same parking place as he did twenty-four years ago.

In reference to his new position Judge Taylor says his ambitions are "to try to make this court as good of an appellate court as it can be."

Sam Taylor

Taylor makes two

Hubert L. Taylor has been appointed to the Alabama Court of Criminal Appeals to fill the vacancy which occurred when Judge John DeCarlo left the court to replace retiring Jefferson County District Attorney Earl Morgan.

Taylor's appointment, the second appointment by the governor to the appellate court in a two week period, was made on March 31, 1983. Previously Taylor was in private practice with the law firm of Taylor & Cunningham in Gadsden.

Having received his LL.B. degree in 1967 from the University of Alabama School of Law, Taylor became county solicitor for Walker County the following year. In 1969 he began practicing law in Decatur with the firm of former Governor Albert P. Brewer. Taylor was city attorney of Gadsden from 1972-1974 and served as the representative from Gadsden in the Alabama Legislature from 1974-1978.

Other appointments

Henry Mark Kennedy, former Montgomery County district judge, has been appointed as a Montgomery County circuit judge to fill the place vacated by Judge Sam Taylor.

Charles Price has been appointed a Montgomery County circuit judge to replace Judge Perry Hooper who has left the bench to go into private practice.

Kennedy

Price

Mylar v. State decision results in new policy

> ". . . [T]he failure to file a brief in a nonfrivolous appeal falls below the standard of competence expected and required of counsel in criminal cases and therefore constitutes ineffective assistance."

Due to the possible implications of the recent decision of *Mylar v. State* by the U.S. Eleventh Circuit Court of Appeals on the members of the criminal appellate bar of

Alabama relative to the failure to file timely briefs on behalf of appellants, the Alabama Court of Criminal Appeals has adopted a policy and orders its implementation.

The order states that in all cases except capital cases, where neither a brief nor a "no merit" letter is timely filed on behalf of an appellant, a letter prepared by the clerk's office will be mailed to the appellant's attorney immediately following the due date (including any granted extensions of time), notifying them that the appellant's brief has not been filed.

Law limits legal fees

The Alabama Unemployment Compensation Law limits fees which can be charged for representing a claimant in a benefit case. Section 25-4-139, *Ala. Code,* 1975, limits fees to ten percent of the maximum benefits at issue. The rule applies to fees which can be charged or received by an attorney or agent or by a combination of the two. Any proceeding under the unemployment compensation law, whether an administrative hearing or court action, is covered by the regulation.

When an individual files a claim for benefits and there is a report from an employer that the worker was fired for such acts, and the action is sufficiently documented, all wages with that employer for that period of employment are cancelled and the individual denied any benefits based upon those wages. Failure by an employer to properly follow through on cases involving this degree of misconduct may result in charges to his account which otherwise would not have been made.

Supreme Court amends rules

The Supreme Court of Alabama on March 1, 1983, issued an order amending Rules 50(b), 50(c)(2), and 52(b), Alabama Rules of Civil Procedure. These amendments, which will become effective July 1, 1983, were made upon the recommendation of the court's advisory committee on rules of civil procedure and are intended to make it clear that certain post-trial motions must be *filed* within thirty days—it is not sufficient to *serve* the motions within thirty days, followed by a later filing.

Specifically, Rule 50(b), as amended, provides, "Not later than thirty days after entry of judgment, a party who has moved for a directed verdict may file a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." The rule presently provides that such a party may "move" within thirty days; the amendment indicates that one "moves" for JNOV at the time of "filing" his motion rather than at the time of "serving" it. Rule 50(c)(2) presently provides that one against whom a JNOV is granted has thirty days in which to "serve" a motion for new trial; the amendment changes that to provide that such a motion must be "filed" within thirty days. Rule 52(b) presently allows a party thirty days to "make" a motion to have the court amend its findings or make additional findings; the amendment changes that rule to read "Upon motion of a party *filed* not later than thirty days after judgment. . ."

These amendments correspond to amendments made in 1982 to Rule 59(b) and (e), and are intended to further implement the principle of *City of Talladega v. McRae,* 375 So. 2d 429 (Ala. 1979). That case held that even though Rule 59(b) at that time provided that a motion for new trial must be "served not later than thirty days after the entry of the judgment," the running of the time for appeal (Rule 4, A.R.A.P.) was tolled only if the motion was also *filed* within the thirty days.

The amendments will be published in the *Southern Reporter* advance sheets and in the *Alabama Reporter.*

It Happened at the Bar

Here's the Long and Short of Court Incident

MONTGOMERY, Ala.—Have you ever said something that was taken literally, with comical consequences?

U.S. District Court Judge Myron Thompson knows the feeling.

It was 4:55 p.m. during the third day of a long, tedious trial Wednesday when Judge Thompson, hoping to make use of the remaining five minutes, asked defense lawyer Mark White of Birmingham: "Do you have a short witness you could call?"

White, defender of three Barbour County men charged with embezzling thousands of dollars from the labor union they once led, replied: "Yes-sir, if you'll promise nothing is said as he comes down."

All eyes in the courtroom turned to the witness room as White called for Roy Peters. In a few seconds, the door opened and into the courtroom walked Peters—all 4 feet and 3 inches of him.

Not wanting to insult Peters for being the punch line to a joke he hadn't heard, no one laughed out loud. But there was a general feeling of merriment, as jurors, lawyers and others in the courtroom tried to subdue their smiles.

"I thought I was going to break out laughing and not be able to stop," one courtroom observer said after it was all over. "That's the funniest thing I've seen in court in quite a while."

Peters testified as a character witness for defendant Charlie C. Greene.

When, after two minutes, Peters had finished testifying, Judge Thompson laid himself open again by asking if another "short" witness could testify. There were smiles all around.

This time, however, White acceded to the spirit of Judge Thompson's request and called six-footer Bobby Joe Greene, who took ninety seconds to tell the jury that his distant cousin Charlie is a truthful, believable man.□

This story, written by *Enquirer* staff writer John Dagley, appeared in the February 24, 1982, edition of *The Columbus Enquirer*. It has been reprinted with permission.

Pictured below is Gale Skinner, lawyer referral secretary at the Alabama State Bar, putting a lawyer and potential client together via the bar's statewide, toll free phone number. Gale answers over a hundred requests each week. In answering so many calls, you can probably imagine some of the interesting conversations that result. Well, over the past several months Gale has been able to put together the qualifications of the "ideal" attorney.

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—Is not too busy

—Is not in "cahoots" with the judges

—Will definitely win the case

—Is the "best" attorney in the state

—Is experienced

—Is willing to work for free!

How to Deal With the Press

TEN SUREFIRE WAYS TO ALIENATE REPORTERS

BY DOUGLAS LAVINE

During my career as a legal reporter, which preceded my career as a lawyer, it never ceased to amaze me how inept the most sophisticated and articulate lawyers could be when it came to fielding questions from the press. Wall Street's lions of loquacity become masters of monosyllabilism. "No comment," "See the court papers," "It's a private matter," and so forth.

I once thought that attorneys who clammed up when talking to the press were ignorant—that they didn't realize that their reticence could generate hostile publicity for their client. Now I think differently. I suspect that these lawyers' laconic behavior is deliberate—that they actually want to alienate the press. Using the same logic that Custer used to outfox the Sioux at Little Big Horn, they think that if you ignore reporters, or antagonize them, they'll go away.

So for the benefit of those lawyers, I offer my Ten Commandments on How To Deal Ineffectively with the Press.

COMMANDMENT ONE: Talk Down To Reporters

Reporters expect lawyers to be supercilious and arrogant: don't disappoint them by treating them as equals. Pepper your talk with abstruse legal concepts, marginally appropriate quotes from Holmes and Blackstone, and, of course, an occasional Latin *bon mot*. Always remember that one wellplaced "*ipse dixit*" is worth a hundred "no comments." Let's face it: most reporters aren't that bright or highly motivated, or why wouldn't they be lawyers? Chances are you can intimidate them by adopting the proper attitude. Remember to ask the reporter if he or she has legal training. If the reporter answers in the affirmative, say, "So, you couldn't hack the practice, eh?" If the reporter says no, allow an awkward moment to pass, then chuckle softly and say, "Well, let me try to keep this as simple as possible."

COMMANDMENT TWO: Confuse the Issue

Because reporters are so easily fooled, why not try to fool them? One good way to do this is to muddy the waters a bit. For example, if the reporter asks why your client pleaded guilty, just tell him that the real question is why pleabargaining is not permitted in certain Latin American nations. Maybe the reporter will become confused, forget his questions and simply shuffle away.

COMMANDMENT THREE: Tell Them It's None of the Public's Business

Make it clear from the start that lawsuits are essentially private matters between private parties and that the public has no legitimate right to know the requested information. Sometimes this position is a bit tricky to sustain—such as when a nuclear power plant leaks radiation or a dam bursts or a utility tries to jack up its rates. But after all, if lawyers wasted all their time responding to every inquiry about corporate decision-making or unavoidable mishaps, they wouldn't have time to do any house closings, would they? Reporters understand this logic—they live in houses.

COMMANDMENT FOUR: Bribe them

Reporters are all on the take. When they ask a tough question about a case or a client, try to cut a deal. Tell them you know a lot more damaging stories about other people. Offer to discuss it over a drink. Reporters will be so grateful for the opportunity to befriend someone as important as you, they'll abandon their original line of inquiry.

COMMANDMENT FIVE: Don't Supply Background Material

Make the reporter go to court records and do his own research. Most reporters are lazy and need experience at legwork anyway. Tell them it's for their own good—and be abusive about it. "You mean you don't have access to the 1963 Amendments to the Uniform Commercial Code? How big is your newspaper, anyway?"

COMMANDMENT SIX: Don't Be Too Available

Personal contact with reporters is tricky, like snakehandling. If you don't know what you're doing, you could get bitten. So do it all by phone, and keep it impersonal. Enlist your secretary's help in being aloof and unapproachable. On the reporter's first call, have the secretary say you're on another line. On the second call, that you've stepped out. On the third call, that you're out of town or, better still, abroad indefinitely.

COMMANDMENT SEVEN: Don't Explain Why You Can't Answer

Sometimes, of course, the Code of Professional Responsibility or the attorney-client privilege will legitimately prevent you from responding to a question. Don't bother to explain this: reporters are cynical and won't believe you anyway. Just tell them you don't *feel* like discussing it—period.

COMMANDMENT EIGHT: Press Your Advantage Relentlessly

Reporters will be disappointed if you appear to be too reasonable or evenhanded. What they expect to find is a hard-nosed advocate who will make light of his adversary's arguments, no matter how legitimate they might be. Always push your arguments to the limit while denigrating your opponent. Be wary of appearing too fair. Judges are supposed to be fair, not lawyers.

COMMANDMENT NINE: Stall Them

Deadlines are a myth—reporters have lots of time on their hands. Keep them on hold. Don't return their calls. Tell them to submit their questions in writing, one month in advance. Their time is worth less than yours. *They* don't bill at 75 bucks per hour, do they?

COMMANDMENT TEN: Hang This List Next to the Phone

It just might come in handy.

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Dennis R. Bailey

From the Center for Professional Responsibility

Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

"May an attorney ethically enter into an employment contract with a client providing for a contingent fee which further provides that the attorney will advance the costs of the litigation and that the client will not be liable therefor in the event there is no recovery, the contract specifically providing'. . . in the event there is no recovery, all expenses will be borne by said attorney without any cost to me. . .'?"

ANSWER:

Such contract is unethical since it is in violation of the specific language of Ethical Consideration 5-8 and Disciplinary Rule 5-103(B).

DISCUSSION:

The General Counsel and the Disciplinary Commission have written only one opinion addressing the question posed herein. However, it has come to the attention of the General Counsel that this opinion did not deal with a unique or isolated incident. Other Alabama attorneys have either entered into, or have been requested to enter into, employment contracts whereby the attorneys bear all or a portion of the costs in the event there is no recovery on behalf of the clients. Therefore, it is deemed appropriate to publish this opinion for the benefit and protection of all members of the bar.

Ethical Consideration 5-8 provides:

> "A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client, for example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer when such is the only practicable way a client can enforce and protect his legal rights to a just conclusion. Under no circumstances, however, may a lawyer promise or permit another to promise such financial assistance prior to his employment by such client. ***Always the ultimate liability for such financial assistance must be that of the client, without regard to the outcome of the litigation.***" (emphasis added)

Disciplinary Rule 5-103 (B) provides:

> DR 5-103—Avoiding Acquisition of Interest in Litigation.
>
> "(B) While representing a client in connection with contemplated or pending litigation, a lawyer may advance or guarantee emergency financial assistance to his client, ***provided that the client remains ultimately liable for such assistance without regard to the outcome of the litigation*** and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in his behalf, prior to the employment of that lawyer by that client." (emphasis added)

Disciplinary Rule 5-103(B), Code of Professional Responsibility of the American Bar Association provides:

> "(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, ***provided the client remains ultimately liable for such expenses.***" (emphasis added)

You will note that the Alabama rule appears to be somewhat more liberal than the American Bar Association rule since the Alabama rule states that a lawyer may advance or guarantee "emergency financial assistance to his client" whereas the American Bar Association rule seems to limit advances or guarantees to "expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence . . ."

We note, however, that both rules contain the language "provided the client remains ultimately liable for such expenses." The Alabama rule is even more explicit and contains the language "without regard to the outcome of the litigation."

In Formal Opinion 259 (1943), the American Bar Association Committee on Ethics and Professional Responsibility held that there is no exception permitting a lawyer to bear the costs of litigation for a client being represented gratuitously. This opinion was decided under the old Canon 42, Code of Professional Responsibility of the American Bar Association, which provided:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

One of the reasons for the rule is illustrated by the exception thereto described in Informal Opinion 1361 (1976) of the American Bar Association Committee on Ethics and Professional Responsibility. In that opinion it was held that a legal aid agency may assume responsibility for the cost of litigation, because in that case, it is the office or the agency, and not its staff attorneys, which advances the money. It was apparently reasoned that the attorney did not acquire a proprietary interest in the cause of action or subject matter of litigation which would make him ". . . an overzealous advocate with a personal interest in the outcome of the litigation." See *Bachman v. Pertschuk*, 437 F. Supp. 973 (D.D.C. 1977).

QUESTION:

"May an attorney disclose a suicide threat made by a criminal defendant, represented by said attorney, in which the defendant stated that if he were not given probation he would commit suicide, in court, by ingesting cyanide?"

ANSWER:

There would be no ethical impropriety in your revealing your client's suicide threat to the court or to other authorities that might be instrumental in preventing the client's carrying out this threat since it is the common law of England and the law of the State of Alabama that suicide is a crime and Disciplinary Rule 4-101(C) (5) expressly provides that a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."

DISCUSSION:

Although the facts as presented in the instant request for opinion may at first appear rather bizarre and unusual, criminal defendants and other clients are not infrequently mentally and emotionally disturbed, and threats of suicide are not necessarily uncommon, thus, posing a problem to attorneys.

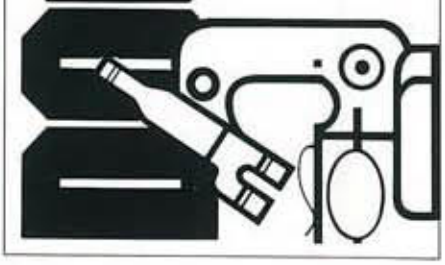
Ethical Consideration 4-1 provides in part:

> . "A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system.

Disciplinary Report

On February 25, 1983, Clanton lawyer **William D. Latham** was publicly censured for having filed overlapping claims with the state comptroller for time that he spent representing indigent criminal defendants in cases to which he had been appointed by the court, resulting in his receiving an overpayment of $720 from the State of Alabama (which he subsequently returned) in violation of DR 1-102(A) (4).

There were five private reprimands administered before the Board of Bar Commissioners on February 25, 1983.



> "The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

Disciplinary Rule 4-101(A) and (C) (5) provides:

> "(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> "(C) A lawyer may reveal:
>
> (5) The intention of his client to commit a crime and the information necessary to prevent the crime."

83 *Corpus Juris Secundum, Suicide* § 2, *Criminality*, contains the following statement:

> "Suicide was a felony at common law, punishable by forfeiture of the goods and chattels of the offender, and the ignominious burial of his body in the highway. In some jurisdictions it is still considered a felony or a crime involving moral turpitude, and the incidents of a criminal act may follow therefrom. In other jurisdictions, however, suicide itself is not a crime and is not punishable as such, and the incidents of a criminal act do not follow therefrom. Nevertheless, in such jurisdictions, self-destruction ordinarily involves moral turpitude and is regarded as being wrong, and under some statutes it is recognized as a grave public wrong."

The case of *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910) involved a murder trial wherein the court instructed that if the death of deceased was self inflicted, and was the result of a compact between the deceased and the accused that each take his own life, the accused, as survivor, was guilty of murder. In the opinion the court observed:

> "At common law self-murder was a felony; but since with us no forfeiture of estate penalizes the felon, and since the dead cannot be punished, no penalty can be inflicted upon the self-destroyer. But collateral consequences may and do, upon occasion, depend upon the feloniousness of self-murder."

The case of *Pennsylvania Mut. Life Ins. Co. v. Cobbs*, 23 Ala. App. 205, 123 So. 94 (1929), involved a suit upon a life insurance policy wherein the insurance company pled the suicide of the insured as a defense. The opinion contained the following:

> "Suicide was a felony at common law, and in Alabama is a crime involving moral turpitude."

See also *Southern Life & Health Ins. Co. v. Wynn*, 29 Ala. App. 207, 194 So. 421 (1940).

From the foregoing, it is apparent that suicide constitutes a crime under the law of Alabama. Therefore, the exceptions spelled out in DR 4-101(C) (5) would apply, and you are free to reveal your client's suicidal threat to the court or to other officials that may be instrumental in preventing the same.

Even if the common law, the law of Alabama and the exceptions spelled out in DR 4-101(C) (5) were otherwise, we simply do not feel that the reason for preserving the "confidence" or "secret" of a client apply in this case. Certainly, your client revealing this so called "confidence" or "secret" is not the type of information described in Ethical Consideration 4-1. Your revealing such information would not prevent your client from fully advising you of the facts relative to the matter in order to obtain full advantage to the client in the matter you are handling for him nor would it discourage persons from seeking early legal advice when confronted with a legal problem.

Our research reveals one Ethics Opinion which appears to be directly in point. A digest of Opinion 486 (1978) New York State Bar states as follows:

Continued on page 176

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The Final Judgment

Albert Whiting Copeland

1927-1983

Albert W. Copeland of Montgomery, died on February 20, 1983, at the too early age of fifty-five. He began the practice of law with the firm of Godbold and Hobbs in 1952 in Montgomery after graduating from the University of Alabama School of Law. He remained with the firm and its successor firms until his death.

He was an extraordinarily able trial advocate. Few lawyers could match his skill and ingenuity in devising a theory of recovery for his client, or match his powers of persuasion before court or jury. As outstanding as his abilities were, however, Albert is best remembered as the "Happy Warrior." Among his greatest admirers and among those who remember him with most affection are those who tested his mettle as trial adversaries. In almost thirty years of practicing law with Albert, I never heard anyone suggest that he had ever taken unfair advantage. A substantial part of Albert's law practice came from referrals by lawyers against whom he had tilted in the courtroom. He prized their respect and friendship.

Albert enjoyed the intellectual challenge of the law practice. He could handle more cases with greater facility than any lawyer I have known, managing with ease the most complicated products liability case, real estate closing, or bankruptcy matter. In this age of the specialist, he was the accomplished generalist. I know of no one more deserving of the accolade, "a lawyer's lawyer."

Albert loved his profession and its members. Despite the great demands of his law practice, Albert served his profession well. Young lawyers with novel and difficult problems came to him for help. He was never too busy to listen and come up with constructive advice. He was a past president of the Montgomery County Bar Association, a past president of the Alabama Trial Lawyers Association, a Fellow of the International Society of Barristers and, at the time of his death, was the bar commissioner for the Fifteenth Judicial Circuit of the Alabama State Bar. Undertaking with enthusiasm and skill the work his responsibility as bar commissioner entailed, he further held positions on the Executive Committee and the MCLE Commission.

The Alabama Bar has lost one of its great ones, and all of us who knew him feel deeply our loss at his death. In our sorrow, we extend our sympathy to Albert's wife, Ann; to his daughter, Anna; and to his sons, Harrell, Paul and Lee.

—Truman C. Hobbs

Editor's note: Lee Copeland is a member of the Alabama State Bar. Mrs. Paul Copeland (Susan), who is currently serving as a law clerk for the Alabama Court of Criminal Appeals, is a member of the Florida Bar and an applicant for admission to the Alabama State Bar.

Bishop Nordon Barron

1924-1983

Judge Bishop Barron, who rose from a municipal judge to state senator to Alabama Court of Criminal Appeals judge, died suddenly on March 9, 1983. He was fifty-eight.

Judge Barron's sudden death shocked state officials and the legal and judicial community of Alabama, as well as his family and his multitude of friends. Judge Barron worked to the very end as he had participated in hearing oral arguments in a case during the afternoon of his death which occurred at 6:46 p.m., three days prior to his first anniversary on the appeals court.

Judge Barron was one of Alabama's most prominent and respected public officials. He was learned in the law, possessed of high ethical standards, a dynamic personality and a love for his family, his friends and his state and nation. He was universally admired for his independent and conscientious public service. At the funeral of Judge Barron, the chapel was filled with people from all walks of life.

Barron, a certified public accountant, graduated from the University of Alabama in 1948 with a B.S. degree in business administration, immediately taking a job with the intelligence division of the Internal Revenue Service upon graduation. He investigated tax frauds and soon became an expert in tax matters—knowledge which later helped him with legislative fiscal issues.

He later got his law degree from Jones Law School and served as city judge in Montgomery from 1962 to 1969. He then entered state politics in 1970 when he was elected to the House of Representatives.

Barron moved to the senate in 1978, strengthening an image of being an independent who shunned political favoritism. He was appointed a judge on the Alabama Court of Criminal Appeals by Governor Fob James in March 1982 to fill a vacancy on the court. Barron was elected to a full six-year term in November 1982.

Judge Barron is survived by his wife, Evelyn, and his daughter, Brenda.

The bench and bar of Alabama will miss Judge Barron. We shall miss his companionship, his wise counsel, his good humor and his ready wit. However, even as we mourn his passing, we rejoice in the legacy he has given us. May he rest in peace.

—Oakley Melton, Jr.

J. M. Hocklander

Joseph Monroe Hocklander, retired Mobile County circuit judge, died March 18, 1983, after a two-year fight against lung cancer. He was fifty-six.

Judge Hocklander was born in Tuscaloosa on November 23, 1926. His family moved to Mobile when he was two years of age and apart from his college years and service in World War II, he spent the remainder of his life in the Port City.

In 1950, Judge Hocklander received his LL.B degree from the University of Alabama School of Law and was admitted to the bar. He began his public career as city attorney for various north Mobile municipalities—Chickasaw, Satsuma, and Mount Vernon—and served as a member of the Alabama House of Representatives.

When he was first appointed to the bench, Judge Hocklander was a relatively young man without a great deal of experience; however, he proved to be one of the outstanding judges in the city's history. As presiding judge of Mobile Circuit Court for the last ten of his twenty years on the bench, he stepped down in December 1981 for health reasons.

Judge Hocklander, known as a leader among jurists, held numerous offices in professional organizations including membership on the Court of the Judiciary, and a post on the executive committee of the National Conference of Trial Judges.

Judge Hocklander was highly admired and respected among the bench, the bar, and his community. Mobile has lost one of its finest citizens.

Survivors include his wife, Lucille Sullivan Hocklander; a son, Joseph M. Hocklander, Jr.; and two daughters, Ashley Hocklander Johnston and Leann Hocklander.

R. S. Gordon

Robert Scott Gordon of Birmingham died March 8, 1983, at the age of sixty-eight.

Mr. Gordon was born April 1, 1914, in Philadelphia, Pennsylvania, where he attended the public schools. He came to Birmingham in 1930, attended the Birmingham School of Law receiving his LL.B. degree in 1933, and devoted the following fifty years of his life to the practice of law.

Mr. Gordon, at the time of his death, was senior member of the law firm of Gordon, Silberman, Loeb, Cleveland & Gordon, P.A. His son Bruce, also an attorney, began practicing with the firm in 1965.

Mr. Gordon loved Birmingham and the surrounding community and devoted a great deal of his time to civic activities. He was a member of the board of directors of the Jefferson County Department of Pensions and Securities, the Greater Birmingham Arts Alliance, and the national panel of the American Arbitration Association. In 1951, he was a co-founder of Little League Baseball in Jefferson County and was a coach and commissioner from 1951 to 1961. He also served as a member of the national board of directors of the Little League Baseball Foundation from 1957 to 1960.

He was on the governing board of the Birmingham-Jefferson County Transit Authority from 1971 to 1981 and served as treasurer of the Transit Board from 1974 to 1981. He gave up the post to devote more time to his law practice and the presidency of the Alabama Zoological Society. Mr. Gordon was a man of action and, as one member of the Zoological Society Board put it, "he had the foresight and ability to take that first step forward." The ground work he laid during his tenure with the Alabama Zoological Society will be a legacy to be enjoyed by all visitors to the Birmingham Zoo.

Additionally, Mr. Gordon was a member of the Birmingham Child Abuse Task Force, Temple Emanu-El, the American Judicature Society, and the Birmingham, Alabama and American Bar Associations. He was a distinguished member of the Birmingham Bar and will be remembered as an outstanding lawyer.

Survivors include his wife, Beatrice S. Gordon; two children, Bruce L. Gordon and Bari Isenberg; his brother, Dr. George R. Gordon; and four grandchildren.

Albritton, William Harold, Jr.—Andalusia
Admitted: 1929 Died: April 14, 1983

Barron, Bishop Nordon—Montgomery
Admitted: 1956 Died: March 9, 1983

Copeland, Albert Whiting—Montgomery
Admitted: 1952 Died: February 20, 1983

Dortch, William Brice—Gadsden
Admitted: 1916 Died: February 20, 1983

Gordon, Robert Scott—Birmingham
Admitted: 1933 Died: March 8, 1983

Hocklander, Joseph Monroe—Mobile
Admitted: 1950 Died: March 18, 1983

Love, Joel Moore—Sheffield
Admitted: 1951 Died: November 20, 1982

Strong, Dan C.—Birmingham
Admitted: 1955 Died: November 4, 1982

Thomason, Charles Tolivar, Jr.—Anniston
Admitted: 1935 Died: February 25, 1983

Tidwell, Ira Elutha—Leeds
Admitted: 1934 Died: January 16, 1983

Williams, Jesse McKenney, Jr.—Montgomery
Admitted: 1926 Died: March 24, 1983

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

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DEADLINES

November 15 (January Issue)
January 15 (March Issue)
March 15 (May Issue)
May 15 (July Issue)
July 15 (September Issue)
September 15 (November Issue)

MAILING INFORMATION

Please send classified copy and payment to:

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et cetera

All members who reside in the 1st, 3rd, 5th, 6th, 7th, 14th, 15th, 25th, 26th, 28th, 32nd, or 37th judicial circuit have been sent notification that this is the year for the election of bar commissioner in those respective circuits. Nominating petitions are due by May 15. Election ballots will then be sent to members residing in those circuits and must be returned to the Alabama State Bar before 5:00 p.m. on Tuesday, June 7. Ballots must be signed to be counted. The term of commissioner is three years from July 1st following election.

Response to the 1983-1984 Committee Preference Form was outstanding. It is good to find the membership taking such an active interest in committee work. President-elect Bill Hairston will appoint committees well in advance of the annual meeting in July.

In April, the Alabama State Bar mailed a green booklet entitled "Mandatory Continuing Legal Education Rules and Regulations" (January 1983) to each of its members. The booklets were mailed at bulk rate and thus were not forwarded to individuals whose current addresses are different from the addresses listed in the Bar's records. Because several of the rules and regulations have been amended since January 1982, it is important that each Alabama attorney receive the 1983 booklet. To obtain a copy telephone (205) 269-1515 or write to the MCLE Commission, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

Are you interested in submitting an article for possible publication in *The Alabama Lawyer*? We encourage any member of the bar with special knowledge of an area of the law which has not recently appeared in the publication to submit a manuscript (and one extra copy). Practical how-to-do articles are especially preferred. Also we welcome suggestions of topics that you would like to see discussed. In fact, if you know a lawyer who is an expert on an area of the law you have an interest in send us his name. *The Alabama Lawyer* can best use articles that do not exceed fifteen doublespaced lettersize pages. For further information please write: Managing Editor, *The Alabama Lawyer*, P.O. Box 4156, Montgomery, Alabama 36101.

Opinions of the General Counsel *Continued from page 170*

> "A client told his lawyer that he intends to commit suicide. If the communication is 'unrelated to any legal advice which the client has sought,' the lawyer may take whatever steps he/she deems appropriate to prevent his/her client from committing suicide. If it is made in the course of representation, Canon 4 clearly applies. Attempted suicide is no longer a crime in New York, but its decriminalization was not intended to effect any basic change in the underlying common law and statutory policies of deep concern for human life and the prevention of suicide. Therefore, an 'unannounced' intention to commit suicide must be treated under DR 4-101 (C) (3) as proposed criminal conduct. Under certain circumstances the lawyer may, however, elect to remain silent. For example, when a client contemplates suicide to avoid a lengthy terminal illness. In general, a lawyer should take appropriate action to prevent his/her client from committing suicide and, for this purpose, may reveal the client's suicidal intent to others, but only when the lawyer believes that such disclosure is necessary to prevent the client from taking his/her life."

We feel that no provision of the Code of Professional Responsibility requires that you remain silent in the instant case, and since your client threatens to commit suicide in open court, your duty to reveal this threat to the court and to other proper officials is even more compelling, under the circumstances, than that of the attorney described in the New York State Bar Opinion.□

UPCOMING

1983

May 5-6
Board of Commissioners Meeting, Gulf Shores

May 13-14
YLS Annual Seminar, Sandestin, FL

July 21-23
Alabama State Bar Annual Meeting, Birmingham

July 25-27
Bar Exam, Montgomery

July 28-Aug. 4
ABA Annual Meeting, Atlanta, GA

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MAY

FRI 13 Alabama Young Lawyers, Sandestin (ABICLE)	SAT 14 Alabama Young Lawyers, Sandestin (ABICLE)	SUN 15 Petitions for Bar Commissioner Nominations Due
MON 16 Deadline for Submitting Material for July Issue of *The Alabama Lawyer* Oil, Gas and Mineral Law, Mobile (ABICLE)	FRI 27 Tax Seminar, Point Clear (ABICLE)	SAT 28 Tax Seminar, Point Clear (ABICLE)

JUNE

THURS 2-3 Juvenile Court Judges Annual Meeting, Gulf Shores (AJC)	TUES 7 Bar Commissioner Election Ballots Due	Wed 22-24 7th Alabama Institute on Federal Taxation, Birmingham (AIFT)

JULY

MON 4 Independence Day	WED 20 Board of Commissioners Meeting, Birmingham	THURS 21 Recent Developments in the Law, YLS-Birmingham, Alabama State Bar
THURS 21	FRI 22	SAT 23
STATE BAR ANNUAL MEETING Birmingham		
MON 25-27 Bar Exam, Montgomery		