

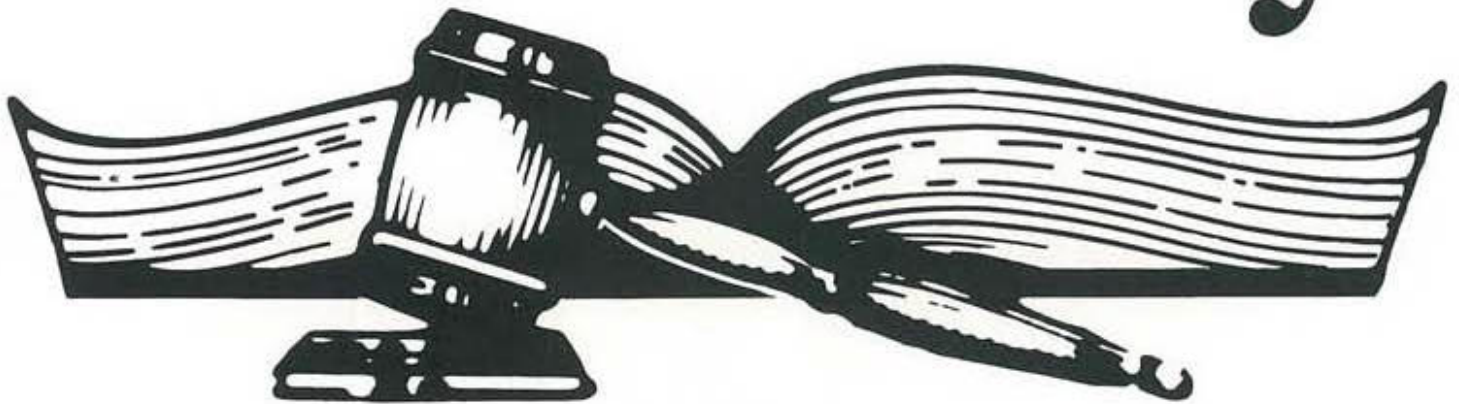
The Alabama Lawyer

Vol. 45, No. 3

MAY 1984



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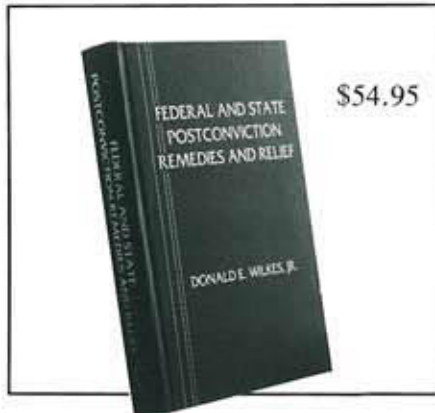
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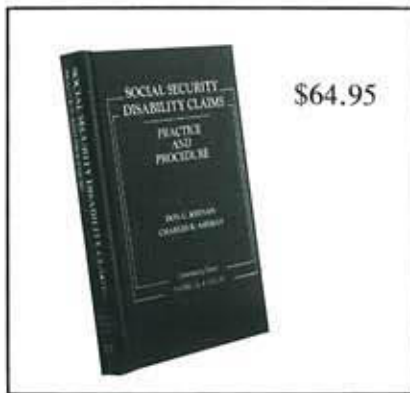


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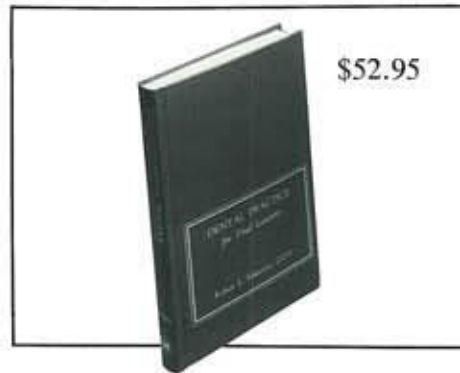


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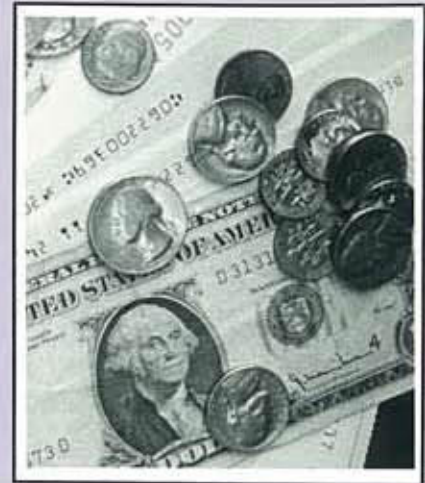
GENERAL INFORMATION

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Proving the Fee

— pg. 127

By contract and statutes the prevailing party is frequently allowed to recover attorney's fees. There are specific criteria that must be proven to justify an award of attorney's fees.

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On the Cover

Pictured in connection with this special issue focusing on "old buildings for modern uses" are several historic structures being used as law offices. On the cover are the offices of:

- 1) Russell L. Irby — Eufaula
- 2) Smith and Smith — Phenix City
- 3) Stout & Roebuck — Mobile
- 4) Kracke, Woodward & Thompson — Birmingham
- 5) Fulford, Pope & Natter — Birmingham
- 6) Drinkard & Sherling — Mobile
- 7) Rushton, Stakely, Johnston & Garrett — Montgomery
- 8) Pilgrim & Hope — Montgomery
- 9) Johnson & Thorington — Montgomery

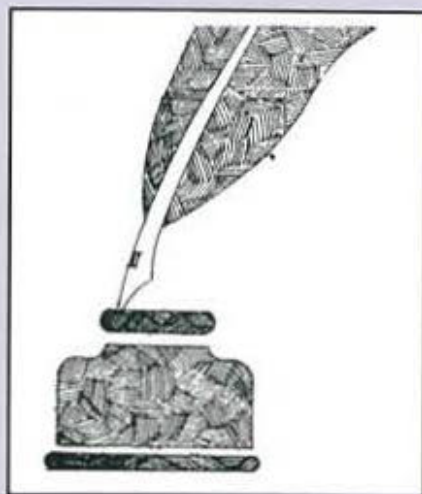


Midyear Conference Highlights

— pg. 132

The reinstatement of the Mid-Winter Meeting of the Alabama State Bar, renamed the Midyear Conference, was quite a success. Highlights of the March 9-10 meeting inside.

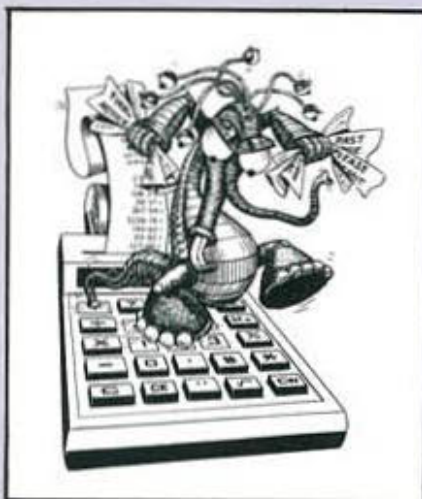
ISSUE IN BRIEF



The Decision Made

— pg. 135

Congratulations to Walter G. Ward, the winner of *The Alabama Lawyer* Short Story Contest. His entry, *The Decision*, based on a Chambers County trial, is published inside.



Rejection of Collective Bargaining Agreements

— pg. 154

The United States Supreme Court ruled in *In Re Bildisco* that a bankruptcy court may permit rejection of a collective bargaining agreement. This decision may foreshadow future legislative or judicial action in the bankruptcy arena.



Rehabilitation Projects Making Ties with Past

— pg. 165

Renovation of historic structures for law office use has become an increasingly popular means of preserving our architectural heritage. There are significant tax and financing benefits available to the attorney or firm who undertake such projects.

Upcoming

May 18-19
YLS Annual Seminar
Sandestin, Florida

July 12-14
Alabama State Bar Convention
Mobile, Alabama

August 2-9
ABA Annual Meeting
Chicago, Illinois

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

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HAIRSTON

President's Page

One of the many functions of *The Alabama Lawyer* is to keep us informed about things of interest to Alabama lawyers. The only function of the President's Page, the Executive Director's Report and the MCLE director's report is to inform about activities, problems and coming events. It is the only way I know to communicate with some 7,000 lawyers. I hope you will take time to give these articles some time.

It's a little late, but it is the first time I have had the opportunity to publicly thank Dexter Hobbs of Montgomery, the entire Committee on the Mid-Winter Conference, the folks at Bar Headquarters, the members of the various committees, and all you wonderful people for the smashing success of the Mid-year Conference in March. This revival of an old custom was on a trial basis. From the comments I have received, the Board of Bar Commissioners has no choice but to continue it as a permanent part of our annual activities.

Saturday morning of the conference was spent reviewing committee reports. And what reports they were! Lots of great programs are in the works. We will be the better for it. The substance of the reports has been furnished each local bar president so as to be available to all the membership.

Rushton, Stakely, Johnston and Garrett; Robison and Belser; Webb, Crumpton and McGregor; and Jones, Murray,

Stewart and Yarbrough opened their offices for our enjoyment. These are some offices! I bet these firms have trouble getting their lawyers to leave such enjoyable surroundings over the weekends. If you haven't visited these offices you should try and do so the next time you are in Montgomery. They are something.

Our next membership meeting is in Mobile, July 12th through July 14th. The program is shaping up as a blue ribbon affair. There will be several changes in the format that I think you and your spouse will enjoy.

I thank each one of you who accepted the invitation to comment on the MCLE program. You made some excellent suggestions. The Commission will take up each suggestion in a continuing effort to make the program one that fits the needs of the Bar.

I personally would like to see the day soon when the Alabama State Bar could go on video tape with both basic and advanced CLE programs that could go anyplace in Alabama that the bus goes. That way it wouldn't make any difference if you had two or twenty lawyers. And the programs could be enjoyed at a time and place that met the local bar's convenience.

One thing I learned from the MCLE survey — we would have a better Bar if we had some way to get more input from the members. This is especially

true as to membership needs. Walter Byars is busy putting together an exciting program for next year. He will emphasize every member participation. You can help him with your suggestions. Keep those cards and letters coming.

In response to a continuing concern by the Birmingham Bar Association we have appointed a committee on government under the chairmanship of Commissioner Gary Huckaby. This committee will look into all aspects of Bar administration including the size and makeup of the Board of Bar Commissioners, the number of lawyers represented by each commissioner, and the way we nominate and elect our president. This is a follow-up on the work of a like committee chaired by Harold Herring in the mid-seventies.

By the time this gets to you we will have acquired approximately a hundred new members. We welcome each of them to the practice of law. We look forward to working with them. To each we extend an invitation to become involved in the affairs of the Bar. We do remind them that the practice of law is a profession and charge them to keep it so. As I told the last group of inductees — you were educated to the purple; now live to the purple. What other nobility is left in America? □

William B. Hairston, Jr.

Executive Director's Report



HAMNER

Midyear Conference

Lawyers from throughout the state, and some Alabama State Bar members residing outside of Alabama, participated in the reinstatement of the "Mid-Winter Meeting" on March 9-10, 1984. Two hundred thirty-eight (238) lawyers registered for this year's meeting. The conference planning committee did a superb job. I've never received more complimentary letters and comments from an annual meeting.

From a personal standpoint, the comments following our committee reports were the most rewarding. I enjoyed watching the excitement of Bar members as they acknowledged the splendid work of our committees. It is too often said that our committees are the lifeblood of the Bar but, I fear, not truly believed or appreciated. Those present at this meeting know we are in excellent health and that the prognosis for 1985 is bright.

Annual Meeting

Plans for the July 12-14 meeting in Mobile are almost complete. You'll note some changes in this year's meeting format — the biggest being the elimination of the Annual Dinner. Friday night is free insofar as formal dinner plans are concerned. Participants will have a cocktail hour starting at 5:30 p.m. to be hosted by Insurance Specialists in the lobby of the Riverview Plaza. You will

be free to dine in the restaurant of your choice or partake of some of the hospitality planned by members of the Mobile Bar. A new convention feature, a Nightcap Party with desserts and after dinner drinks, will begin at 9:30 p.m. and will feature, by popular request, the return of Mac Frampton.

Thursday will be a CLE day with CBS Legal Correspondent Fred Graham featured at the Bench and Bar Luncheon. The Membership Reception will be informal, on the Riverview Veranda, with entertainment by the popular "Three on a String." The Young Lawyers Section will party on the *USS Alabama* with music by the "Cruise-matics."

A champagne brunch will start off Saturday the 14th, followed by our business session and principal address by a nationally prominent legal personality.

Remember the dates — July 12-14. The place — the Riverview Plaza, Mobile, Alabama. Hotel reservations must be made through the Bar at the time you register for the convention. Please do not call or write for the hotel reservations until that time.

Licenses and Membership Cards

Regrettably, more than three hundred lawyers were delinquent with license purchases on the October 31, 1983 deadline. Many deficiencies have been corrected, but far too many remain. Don't forget, your 1984 Membership

Card is available by sending us a copy of the 1983-84 professional license.

New Codes Available

The Code of Professional Responsibility and Rules of Disciplinary Enforcement have been reprinted with all amendments through January 1984. They are available for \$1.75 each — plus postage if mailed (\$1.05 Third Class, \$1.56 First Class). Please address your requests for copies to Gale Skinner.

Travel Programs

The Board of Commissioners has approved five travel offerings for 1985. One sure to be popular is a two-week trip to Ireland, Scotland and England. The real plus of this trip is that the England portion will take place during the American Bar Association's convention there. These will be promoted by INTRAV.

Incidentally, your Bar incurs no expense in promoting these trips. No free trips are taken; however, in lieu of complimentary trips, a cash equivalent of incentive seats is paid to the State Bar Foundation so that each member benefits equally.

Help . . . Help . . . Help

The Alabama Lawyer wants and needs news of local bar activities. Please write to our editor. I know all of our

(Continued on page 178)

ALABAMA STATE BAR ANNUAL MEETING

July 12-14, 1984

Speakers:

Mort Herold — Professional Memory Specialist
Fred Graham — Legal Correspondent CBS News and
other nationally known speakers

and

Programs:

Analyzing Tax Shelter Investments
Prepaid Legal Services Workshop
"Collectibles Seminar" at Point Clear for Spouses

and

Socials:

Membership Reception Riverview's Veranda
featuring "Three on a String"
YLS Party aboard *USS Alabama*
featuring "The Cruisematics"
Nightcap Party with Desserts and After-Dinner Drinks
featuring pianist Mac Frampton

... and much more!

— Riverview Plaza —
MOBILE

Hotel Reservation Request Will Accompany Convention Registration

Proving Attorneys' Fees in Alabama

by Richard H. Gill

A Florida appellate court judge, some twenty years ago, in *Lyle v. Lyle*, 167 So.2d 256 (Fla. 1964), wrote:

Nothing tends to quicken the pulse of the members of the bar faster than a good discussion on fees. Such discussions generally are spirited and lively, direct and to the point, and preponderate on the positive side rather than the negative. Lawyers can disagree on almost any subject to be mentioned but on the question of fees they usually stand united. Few lawyers practice law for pleasure; very few can afford to, and the subject of fees is rightfully of universal interest to the bar but the subject is often neglected and taken for granted despite its importance to those who earn their daily living in court.

This same judge correctly pointed out: "There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields." That patently true fact is frequently forgotten.

The once familiar and routine practice of calling a lawyer friend to come over to the courthouse to testify about a fee in a divorce case or a promissory note case (once nearly the only occasions on which fees were recoverable) has now passed into history along with such beloved and lamented things as demurrers, minimum fee schedules,

and, apparently, causes of action. Not only have new federal statutes (and old ones, too, such as the antitrust laws) spawned numerous proceedings to recover fees, but procedural devices such as class actions, and shifting economic times and tougher contractual bargaining have also made the litigation of fees far more commonplace. Few well-drafted commercial contracts of any sort now fail to contain a provision for reasonable attorney's fees; all brokerage, warehouse and shipping contracts so provide, as do virtually all contracts of indemnity.

In some litigation, the attorney's-fee "tail" has clearly wagged the litigation "dog." The older equivalent is illustrated in the story of the Selma attorney who represented a widow, suing the railroad to recover the value of the

widow's cow which had been killed by a train. After a trial, in which the attorney was successful in recovering \$150 for the value of the cow, the attorney billed the widow \$100. When the widow protested the amount of the fee, the attorney offered to submit the reasonableness of his fee to the court, and told the widow, "Mrs. Jones, I am confident that any group of attorneys would testify that my fee is very reasonable." To which the widow replied, "Lawyer Brown, I am not interested in what a group of attorneys would say. I would like to hear the testimony of a group of widows."

In a recent case in the Middle District of Alabama, *Pearson v. Colonial Financial Service*, CV. 80-117-N, the amount recoverable under the Truth-in-Lending Act was only \$2,000.00, but based on a



Richard H. Gill received his undergraduate degree from Vanderbilt University and LL.B. from the University of Virginia School of Law in 1965. He is a partner in the Montgomery law firm of Copeland, Franco, Screws & Gill.

claim of 337 hours of attorney's time, a fee petition was submitted for \$31,594.50. The district court was compelled to hold a hearing and rehearing and to issue two lengthy orders. Noting the disparity between the fee sought and the amount recoverable, the court, with justifiable acerbity, awarded a fee of \$6,000.00, commenting, "Somewhere along the line, a certain sense of proportion has been lost."

The U.S. Supreme Court has recently characterized disputes over lawyer's fees as "one of the least socially productive types of litigation imaginable," *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983), and the Alabama Supreme Court has twice in the last year undertaken to define the appropriate bases for measuring attorney's fees, *Eagerton v. Williams*, 433 So.2d 436 (Ala. 1983), and *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983).

Most practitioners are familiar with the landmark case setting out criteria for fees, *Johnson v. Georgia Hwy. Express*, 488 F.2d 714 (5th Cir. 1974), but probably fewer are aware of Alabama's own similar case of *King v. Keith*, 257 Ala. 463, 60 So.2d 47 (1952). The clear teachings of both the recent decisions and the older guidelines are: (1) proving attorney's fees is not a mere matter of a fellow attorney's ballpark judgment as to a "reasonable" fee; (2) probably no other single factor or combination of factors is as important as the results obtained; and (3) a mere totalling up of hours times customary rates will not be sufficient to sustain a significant fee award.

The Alabama Supreme Court has plainly said, "We must beware of slavish adherence to the time criterion to the exclusion of other criteria," 439 So.2d at 141.

For example, in *Peebles v. Miley*, supra, the court indicated that a fee in the range between \$7,500 and \$26,700 would be reasonable, on proof of 8-10 hours of attorney's time: i.e., a fee of from \$937.50 to \$3,337.50 per hour, clearly based on the efficient and effective result obtained. At the same time, the court made it clear that it was not *only* the result which had to be considered. On the other hand, in *Pearson*, the hourly rate was \$17.80 per hour, because the court regarded the hours as having

been unproductive in light of the size of the recovery.

Equally plainly, the U.S. Supreme Court, in *Hensley*, held, "[T]he most critical factor is the degree of success

"Lawyers can disagree on almost any subject to be mentioned, but on the question of fees they usually stand united."

obtained," 103 S.Ct. at 1941, and, "The result is what matters." *Ibid* at 1940.

In *Peebles v. Miley*, supra, the Alabama court expanded the list of criteria which had been set out in *King v. Keith*, supra, from seven to twelve. Those twelve guideposts are:

- (1) The nature and value of the subject-matter of the employment;
- (2) The learning, skill and labor requisite to its proper discharge;
- (3) The time consumed;
- (4) The professional experience and reputation of the attorney;
- (5) The weight of the attorney's responsibility;
- (6) The measure of the success obtained;
- (7) The reasonable expenses incurred by the attorney;
- (8) Whether a fee is fixed or contingent;
- (9) The nature and length of a professional relationship;
- (10) The fee customarily charged in the locality for similar legal services;
- (11) The likelihood that a particular employment may preclude other employment.
- (12) The time limitations imposed by the client or by the circumstances.

If a fellow attorney is asked to testify as an expert on a fee, it is imperative that he be furnished with the necessary background information to allow his opinion to be formed with these twelve criteria in mind. He may or may not find that all twelve have a material bearing on his final opinion, but the raw materials should be furnished to him. He should not merely be told the number of hours and the petitioning attorney's usual hourly rate, but should have an opportunity to review the entire file, to understand the nature, difficulty, novelty and complexity of the

case, and to understand the relation between the result obtained and both the issues and labor involved. Often the attorney "expert" is treated almost as an afterthought, without consideration either of thorough preparation or of his area of expertise. The work of attorneys is not fungible, and a personal injury trial specialist is not necessarily a qualified expert in a Truth-in-Lending case, or vice versa. The common areas where fees are recoverable are commercial disputes, Truth-in-Lending, civil rights, domestic cases, estates, environmental and antitrust actions, and class action litigation of all kinds. Some thought should be given to the experience of the "expert" in the type of case in which he is testifying, not merely as a licensed practitioner.

The criteria listed do not determine how the fee would be expressed — i.e., as a total dollar amount, an hourly rate, or a percentage figure. While a total dollar amount is the most common expression, the Alabama Supreme Court recently approved a percentage figure. In *Eagerton v. Williams*, supra, a taxpayer class action, the court affirmed a fee award to the attorneys for the plaintiff class of 50% of the first \$500,000 of tax refunds and 30% of all refunds in excess of \$500,000. Percentage fees are useful in cases such as *Eagerton*, since the plaintiff class members would each recover different amounts of taxes, and a dollar figure could not readily be prorated otherwise.

The courts rarely focus on each of the twelve elements separately, but some aspects ought to be considered on each of them:

(1) The nature and value of the subject matter. Nowhere is this better illustrated — in a negative sense — than in the *Pearson* decision. Given the minimal value of the subject matter, it was plainly unreasonable to expend \$31,594 of legal time on it. By the same token, the subject matter may be of great societal or other value even though of little monetary concern. The legislative history of 42 U.S.C. §1988 points to the Congressional recognition that the "value" of the subject matter is not to be denigrated merely "because the rights involved may be nonpecuniary in nature." Senate Report 6, U.S. Code

Cong. and Admin. News 1976, p. 5913. While the social worth of all litigation to the resolution of disputes can be argued, this factor would rarely weigh heavily in a promissory note case or the like, but much "private" litigation possesses public policy or "private attorney general" aspects which should be emphasized. That is virtually the entire rationale behind the statutory award of fees in civil rights, environmental and similar litigation.

(2) The learning, skill, and labor requisite to the proper discharge of the employment. The courts recognize that an experienced and skilled practitioner may, by the application of his acquired skills, accomplish the work rapidly. Although this element sounds immodest, it is important not to let the skill and efficiency of the lawyer wind up penalizing him because very few hours are required. But *Pearson* points to the risk of bringing more "learning" and "labor" to the task than is "requisite" to its "proper" discharge. Dr. DeBaKey may be hired for surgery in which he performs only ten crucial minutes of the operation, but few would contend he should be paid at the rates of a third-year resident.

(3) The time consumed. This factor, which once occupied so prominent a role, has been relegated to less and less significance. Despite Lincoln's famous dictum about a lawyer's stock in trade, the emphasis on hours alone is both misplaced and demeaning. It puts the work, skill and judgment of the professional on the same basis as an assembly line worker, without regard to almost everything that is important to the attorney's role: it supposes that, as between two clients with identical problems, the one is better served whose attorney takes longer to accomplish the client's business; it fails to distinguish between the anguished hours at midnight during a trial going over a critical cross-examination and the "review of file" time so frequently recorded; it gives no credence to an inspired solution to a hopeless situation versus hours proofreading a set of routine interrogatories. Nonetheless, hours *are* important, and records should be rea-

sonably kept *from the outset* in any case where the issue of a fee may ultimately be contested. Many cases first arrive at an hourly rate, referred to as a "lode-star," then multiply it by some factor to produce the final fee. See e.g. *Copper Liquor, Inc. v. Adolph Coors, Inc.*, 684 F.2d 1087 (5th Cir. 1982). How a sleep-

"Obviously, high hourly rates reflect to some extent the attorney's professional training, but surely more is at stake than mere hours..."

less night going over a closing argument in your mind, or the ravages of an ulcer from wrestling with saving a client's livelihood or family can be so recorded is difficult to answer. Although this article is not a forum for one lawyer's "philosophy," I suggest that, in all but routine matters, we do our clients, ourselves and our profession a disservice to seek compensation from a court as if we were piece-workers turning out widgets. Obviously, high hourly rates reflect to some extent the attorney's professional training, but surely more is at stake than mere hours — a measure which puts a premium on *inefficiency*, make-work and delay.

(4) The professional experience and reputation of the attorney. I doubt if there is much practical difference between this factor and the "skill and learning" factor, but perhaps there is some distinction. Few, if any, great results are achieved on reputation alone, and often a young practitioner whose consciousness of his inexperience leads him to work harder and more single-mindedly on a case will do as much or more than many "lions of the bar." Albert Jenner of Chicago is reported to earn over \$300 per hour. Clearly, his reputation helps to justify such a fee, but it is a reputation built on skill, learning and experience, and those factors justify the fee, not reputation alone.

(5) The weight of the attorney's responsibility. A personal example of

the meaning of this factor was found in recent litigation in which the plaintiffs' attorneys represented a class of trust beneficiaries who had suffered losses from imprudent trust investments. *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So.2d 415 (Ala. 1983). The absent class was largely composed of widows, elderly people and dependent children. Clearly, the weight of the attorney's responsibility was greater than in some other types of litigation and should have been (and was) considered by the court. Similar considerations would apply whenever, for example, a child's future is at stake, or a prisoner's life, etc. The Supreme Court pointed to this feature in *Peebles v. Miley*, supra, where the court noted that there are cases which "involve the lives and fortunes of larger numbers of people and have a greater public value than other cases... In class action cases, a lawyer may represent hundreds of thousands of people."

(6) The measure of success obtained. The Supreme Court has announced loudly and clearly that this factor must now assume the first position. Logically, it should always have been more important than mere hours, or than the reputation of the attorney. Since *successful* representation is the goal of all representation anyway, it is the most laudable of measurements of the fee. The courts have held that the court may make a fee award based wholly or in part on the court's own observation of the conduct of the case and its own position as an "expert" on legal fees. *Campbell v. Green*, 112 F.2d 143 (5th Cir. 1940). This applies to a number of factors, such as the com-

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plexity or difficulty of the case, and can be uniquely helpful in the court's assessment of the results obtained.

(7) The reasonable expenses incurred. Whenever a fee is uncertain of recovery, an additional element of the risk is the investment by the attorney of large sums of his own funds towards expert fees, depositions, etc. A lawyer who must advance \$10,000 or \$50,000 (as may easily occur in modern products, securities, medical negligence or class action cases) should receive consideration for that risk. In 1973, in a products case against General Motors, the plaintiffs' attorneys advanced over \$50,000; in 1981, in a will contest, the expenses were \$40,000; in 1982, in a class action with 1,200 class members, the costs were \$35,000 exclusive of the cost of notice to the class; in 1983, in a defective drug case, the expenses approached \$100,000. The attorney who takes such risks, and succeeds, should be given comparative credit by the fee-setting judge.

(8) Whether a fee is fixed or contingent. This category is somewhat puzzling, since a petition to a court for allowance of a fee almost presupposes some contingency. It would be rare, indeed, for a fee to be awarded unless the attorney represented the prevailing side, making the contingency of winning a central consideration. However, it is clear that the risk of obtaining *no* fee is an important consideration for the courts: "Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended, and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning

cases than they would if they charged an hourly rate," *Hensley v. Eckerhart*, 103 U.S. at 1947.

(9) The nature and length of a professional relationship. The courts use this factor rarely, and it is generally interpreted to mean that an attorney is justified in expecting a *higher* fee from a one-time client versus one whose business is regular and can be counted on for repeat employment.

(10) The fee customarily charged in the locality for similar legal services. This factor embodies the dangerous concept of the "locality" rule, and needs to be carefully dealt with. Is it the "locality" of the lawyer's practice, or the "locality" of the client, or the "locality" of the court? A Birmingham attorney customarily charging \$100 per hour should not be penalized because a client from a locale where \$60 is customary chooses the Birmingham lawyer's services. The experience, skill and reputation of the Birmingham lawyer which merit his hourly rates may well be the very things which draw the client to employ him. Nor is his overhead less because the case is heard in Camden or Chatom. The demise of "minimum fee" schedules, and the ruling in *Goldfarb v. Va. State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) would be a caution against too rigid a use of "customary" fees.

(11) The likelihood that a particular employment may preclude other employment. The surface meaning of this criterion is merely that of doing work for client A instead of client B. Unless an attorney were otherwise unemployed, there would be very

little substance to this yardstick. The more important meaning relates to the "desirability" of the work — that is, will it cause others not to employ the attorney? An example from the case law is that of an attorney who sued a police officer, and was thereby unlikely to be hired by other officers. The same could be said of suing any large corporation, bank, institution or profession (such as doctors) — the attorney may well find that he is precluded from being hired by those who are associated with the opposing party.

(12) The time limitations imposed by the client or the circumstances. If the case requires immediate attention, emergency procedures, dropping other work, etc., then the fee should reflect those demands.

The "lesson," if you will, is merely that, where attorney's fees are a litigated issue, the same care, preparation, and analysis should be brought to bear as on other crucial factual issues. While we should not devote *more* care to fees than to the client's business, we need to do more than perhaps has customarily been done in Alabama. There are many cases where the issue was merely submitted to the court without any testimony, and others where the submission was only by affidavit. The court is no more bound by a fee expert than by any other, but it should be given a full and thoughtful presentation to support a fair finding. This may include offering not only oral testimony, but all of the non-privileged file, depositions, correspondence, time slips, etc. A record which is inadequate under *Peebles v. Miley*, *Johnson v. Ga. Hwy. Express* or *Hensley v. Eckerhart* may no longer stand scrutiny. □

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1 Among the numerous committees that held meetings on Friday morning at the Alabama State Bar Midyear Conference on March 9-10, was the Alabama Lawyer Referral Service Board of Trustees. Pictured are Reuben Cook, Boyd Whigham, Charles Law, Gale Skinner (Alabama State Bar Lawyer Referral Secretary), Walter Kennedy, and Bill Nichols.



3 Loretta O. Malandro's seminar entitled "Psychology of a Trial" was as much entertaining as informative. Danny Drennen is amused as . . .

1984 Midyear Conference Highlights



2 John Daniel Reaves delighted those attending Friday's luncheon with his portrayal of "The Kingfish," a play based on the life of the late Huey P. Long, former governor of Louisiana.



4 . . . Loretta Malandro asks the audience to choose which of these lawyers should be cast in the role of the banker, the good guy, the bad guy, and the town drunk in a western film. This was to illustrate preconceived impressions jurors often make in the courtroom setting. What choices would you make? *Materials from this seminar can be purchased from the Alabama State Bar.*



5 Commissioners Bruce Sherrill and Gary Huckaby enter the new Commerce Street law office of Webb, Crumpton, and McGregor during the Progressive Cocktail Supper held on Friday night.



6 Bill Howell, Frank Head, and Gregg and Laurin Everett enjoy the cocktail party in the beautiful law office of Jones, Murray, Stewart & Yarbrough. Other participating law offices were Robison & Belser and Rushton, Stakely, Johnston & Garrett.



8-9

At the General Assembly Alabama Supreme Court Chief Justice C.C. (Bo) Torbert and President Bill Hairston give reports on the State of the Judiciary and State of the Bar.



11 Featured at the concluding luncheon was George Saunders, leading counsel for AT&T in its recent divestiture, who spoke of the events leading to the break-up of what was the world's largest corporation.



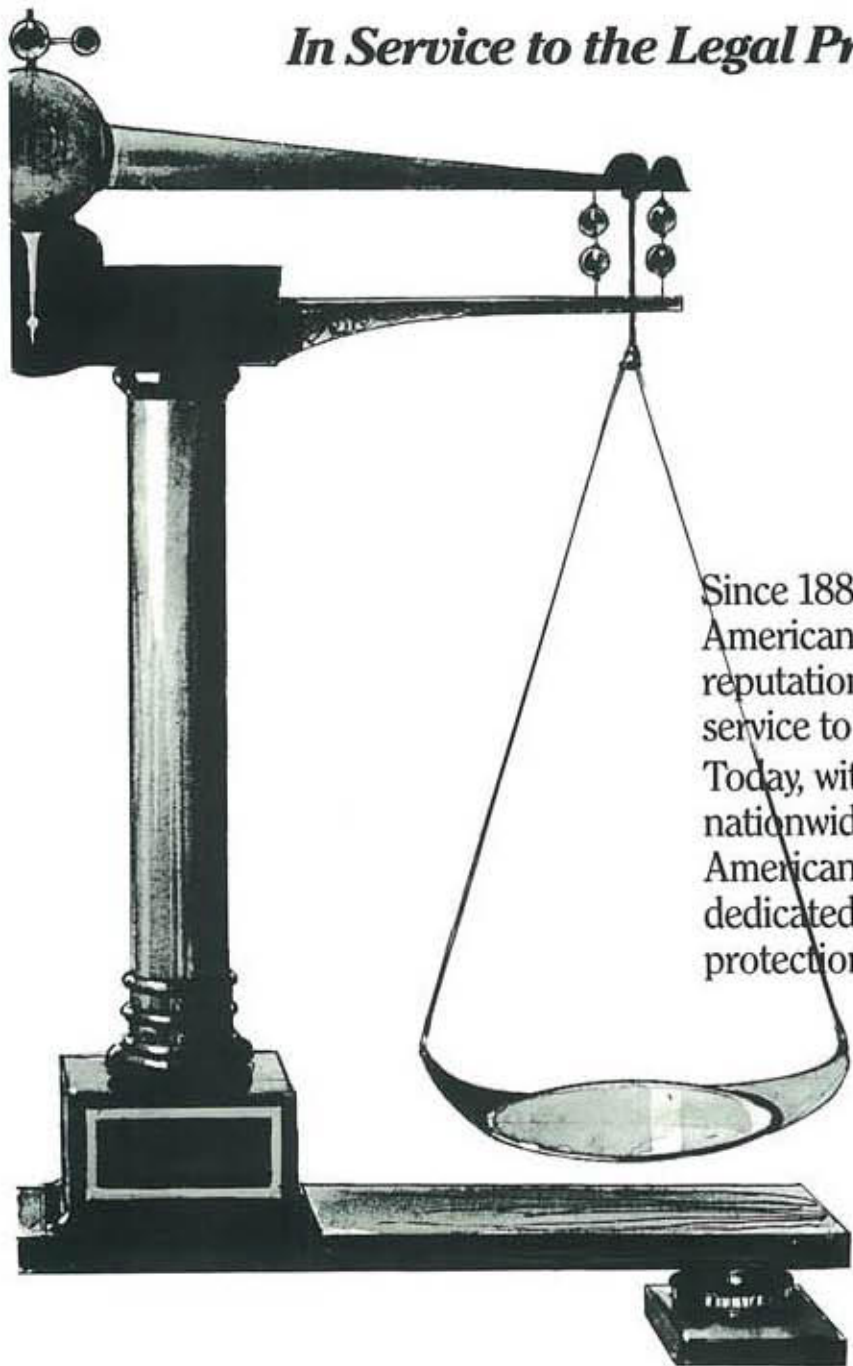
7 On Saturday morning at the Nurse's Station Breakfast, State Bar President Bill Hairston has his heart rate and temperature checked and is then given a hearty breakfast to pull him through the final hours of the Midyear Conference.

10 Jim Hart, chairman of the Lawyer Public Relations, Information and Media Relations Committee, reports on the work of his committee over the last several months. Numerous committees made reports reflecting the "good health" of the association.



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The Decision

by Walter G. Ward

The judge rocked back in the old oak porch swing, picked up the cloth which had been lying beside him and casually mopped the perspiration that had collected on his forehead.

Blasted hot weather, he thought. It only makes it worse.

Fingering his dark framed glasses he looked out through the white slats and the screen that enclosed his back porch and took in the view of the hills behind the house filled with pine trees of all kinds, as well as poplars, oaks, sweetgum and cedar trees. The evergreens were darker than they had been a few short months earlier and the other trees had begun showing the flaming colors of the coming autumn.

He remembered with the realization of creeping middle age the days of his youth when he had carelessly meandered through the woods before him now. He had known them like he knew the back of his hand. And well he should: they were in his blood.

The white frame two-story house that he was sitting in was on the edge of those woods and was the same one he had been born in thirty-five years ago and the one his father had been born in before that. The old house had held two genera-

tions of judges, lawyers, their wives, friends, partners, relatives and children. His father, the original Judge Woods, had even died there nearly five years ago.

And so much had come to pass in the meantime. Since the elder Judge Woods had passed on, the younger Judge Woods had been appointed by the governor to replace him and to fulfill the five years left on his six year term. His appointment was now nearly up and on top of everything else he had the pressures of the upcoming election to think of.

How time flies, he thought, the strain showing in the deepening furrows of his forehead.

Not that anyone had ever doubted that the younger Judge Woods — then known simply as Bill — would one day ascend to the bench to replace his dad. Rumors had been strong that that would probably take place after this term; and neither of them had done anything to quiet the rumors. It was obvious to all that the elder Judge Woods' hearing was going, his eyelids drooped much lower than they once had and his steps were slower than they had been when he was just a spry young country judge. He also had known — and had confided to very few — that the arthritis in his shoulder,

"my old friend Arthur" as he spoke of it, had gotten progressively worse in the past few years.

So it was expected that he would step down at the end of this term and let his son run in his place and be swept into office the way his dad had done for so many years. But it was not to be and his dad never got the chance to hunt and fish with the grandchildren as he hoped he would.

He died late one Saturday evening while he was preparing his evening meal just like he had done every night since his wife died of cancer ten years before. They found him the next day when Bill and his family arrived for their regular Sunday after church dinner. No one answered when Bill and the family went in the front door and Bill had gone through the house looking for his dad until he came upon him on the floor in the kitchen. He was dead, his old heart finally giving out.

The funeral was three days later and one of the most heavily attended in the memory of Oak Ridge County's eldest citizens.

The governor had appointed Bill to take his dad's place within three weeks of the funeral. Bill had been willed the old home place as the only child and had moved in within two months, just like he had discussed with his dad so many times before.

Five years. Had it been that long? He thought about the crow's feet that were encroaching around his eyes and the new gray hairs he had found just this morning and he realized something: it had. He took his after-dinner cigar out of his pocket, clipped it, and lit it as he sat back. It glowed faintly as the rising gray smoke trailed behind him.

When he first ascended he had luckily drawn mostly simple cases. But time passed and the cases he drew became tougher. Just the luck of the draw.

The slap of flesh on flesh was sharp as he struck the mosquito he saw perched atop his left forearm just about to sink its hungry little needle into his skin.

Overhead in the early evening sky with twilight a short time away he saw a hawk circling above what he knew to be the field he and his dad had shot doves together in so many times before.

The sun was lowering its gaze behind the trees on the hill just to his left and he



Walter G. Ward, the First Place winner of The Alabama Lawyer Short Story Contest, is a 1984 graduate of the University of Alabama School of Law. He is the research editor for the Law and Psychology Review and has been published in numerous legal and literary works. Mr. Ward will take the Alabama bar exam this summer and clerk for Judge Bradley on the Court of Civil Appeals in Montgomery.

saw white shafts of light as they hit part of Bald Rock — the name given to the mountain, more a large hill, really — directly, whoeing the trees on the eastern side of the hill to be darker as though they had finally escaped from the sun and the heat.

I'd like to escape from some of the heat myself, he thought as he heard the porch swing squeak at its joints. He silently reached to the stool on his left, lifted his glass of ice tea, moved the sprig of mint out of his way, and took a long sip. It was cool on his lips and felt very good as it traced into his stomach.

He wanted to escape the heat all right. But not the physical heat; he could escape that by going inside under the central air conditioning that had been installed eight years ago.

No, he wanted to be out of the heat of the Roosevelt murder trial. It was the first murder trial in Oak Ridge county in twenty-five years in which the district attorney had asked for the death penalty. In fact, there had been no case like this one since his father had been a newly-elected circuit judge in a one-judge one-county circuit and had heard the now famous Smith trial. No chance for dad to get out of that case, thank you. He had to take whatever came along.

The younger Judge Woods had not wanted to hear this case. At all. But he had to take the luck of the draw — if "luck" was the appropriate term.

Blast. The word was clear against the glassy silence around him.

He sat his tea back down, pushed himself into a more comfortable position, and closed his eyes remembering.

He had strongly hoped he could get out of trying this case and tried to find a conflict to justify recusal. The victim was Charley Johnson, an amiable house painter who did a lot of work around the county — when he could be found sober. But he was a good enough fellow and an excellent worker. Only Judge Woods had had very little contact with the man and could find no conflict of interest.

And there were the alleged perpetrators, Albert Lee Jenkins and Tony Franklin Roosevelt. Just two drifters who had heard the apocryphal tales of money stuffed into the mattresses of old Nadine Peabody's house and decided to investigate them for themselves.

Only they had not calculated on one

Congratulations
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Short Story Contest Winners

First Place: Mr. Walter G. Ward
"The Decision" featured
in this issue

Runner-up: Judge Robert L. Hodges
"Annabelle's Dilemma"
To be published in
the November issue

Thank you to all of those participating in *The Alabama Lawyer* Short Story Contest. Other entries will be published in future issues for your enjoyment.

thing: old Charley was working there and when he was sober he was up with the chickens and at work early. He had indeed gone to work early the morning he was murdered leaving home in his old paint-spotted Chevrolet pickup about 6:30 after kissing his wife goodbye for what was to be the last time ever.

But Judge Woods had never had any dealings with these two either so he could not come up with a conflict. He couldn't get out of hearing the case.

The luck of the draw had fallen on him. It felt more like lightning.

Blast! he said again, this time accenting it with a punch of his fist into the arm rest of the swing with enough force to interrupt the swing's pattern and scrape some skin off his middle knuckle. There was a small, sharp pain that he barely felt.

He was glad that Virginia and the kids had gone away for a few days. Actually, they had been sent away after the judge had gotten more than his usual number of angry phone calls and letters about what would happen to him or his family if he dared set Roosevelt free/give him life in prison instead of the death penalty/-condemn him to the electric chair. To be on the safe side he had sent them away for the first time in his life, telling the kids and his wife that they needed a rest before school began.

He looked up and noticed the hawk had finished circling and was just about to begin to dive on its prey in the fields below. The temperature had begun dropping and he could tell that it really would

be autumn before long by the bit of a chill in the air as the sun began to set and by the beginnings of goose bumps on his arms.

The trial of Roosevelt had been difficult from the outset. He and Jenkins had both been charged with first degree murder but due to lack of witnesses and good direct evidence it was the opinion of the DA's office that they would be well advised to ask for life imprisonment.

But Jenkins had finally turned state's evidence and told the story in all of its gory detail. He and Roosevelt had been in the house when Johnson drove up. Roosevelt, Jenkins said, said that he was going to "kill that fellow" as soon as he saw him get out of the truck. Jenkins testified that he wanted to stop Roosevelt but that he was afraid of the much bigger man.

At the last minute a neighbor came forward and admitted that he had seen two men he identified as Roosevelt and Jenkins running from the Peabody house after hearing screams from that direction.

The testimony of the coroner was that Johnson had been stabbed between twenty and thirty times; the stabs were so run together that he could not be certain of the exact number.

The pictures of the mutilated body and the blood-stained walls were admitted into evidence and shown to the jury, many of whom could stand to take no more than a quick look. Two of the women had begun sobbing softly. The three black jurors had adopted a dis-

gusted look when they saw the pictures.

In short, it took the jury less than one hour to decide on Roosevelt's guilt and less than another hour to vote 11-1 to give him the death penalty. The one vote against was from a young woman who said later that she opposed the death penalty unless there was more and better evidence. Much of the hour was a wasted attempt to convince her to change her mind.

Now it was up to him. He had to decide whether to follow the jury's recommendation or to be lenient and give Roosevelt life without parole. It was all up to him. Only him.

The sentencing hearing had turned up little that was helpful for Roosevelt. He had been abandoned by his parents when he was very young and had been raised by his maternal grandmother. He had been in and out of reform school and later the county jail for all of his life.

The judge had found that there were two aggravating circumstances — that the killing was avoidable and that it was done during the commission of a crime — and no real mitigating circumstances.

So now the judge had to sentence him for what he had done to old Charley Johnson. The jury had recommended the death penalty. The heat was on; and it was on him.

As if to punctuate the thought he felt the moisture under both armpits and a trickle down his sideburns. The increasing coolness around him told him that his perspiration — sweat was the term he actually preferred — was from internal and not external sources.

A breeze swayed the rose bushes in front of the porch. Those roses had been his father's pride and joy, winning garden club and county fair awards for as long as Bill could remember. But Bill had not shared this interest with his dad and in the interval the neglect had caused the bushes to lose much of their lustre. At this time of year they had long since lost their flowers and were now nearly inert, just waiting for the cold winter to envelop them.

Death. The word, even though it had sounded only in his mind, carried with it a great tone of formality. You could give much back to a man. If a thief stole he could make restitution; if someone injures someone else he could be made to pay; if you convicted the wrong person

you could give him back whatever was left of his life. But a life could never be restored. Ever.

What about Charley Johnson's life? he thought. This person had taken it without reason, with premeditation, and in the face of pleas for mercy.

The words had run true when they were spoken by R.B. Walls, the DA who had prosecuted the case. Give him the death penalty, he had thundered to the jury, or we should let him go free.

The murder had been violent. But Roosevelt had not been arrested in two years and had seemed to be doing better. But no one really doubted he murdered Charley Johnson. *I believe he did it too,* the judge said aloud.

But what good would giving him the death penalty really do? Would it deter others? Some said it would; others that it would not. But the elder Judge Woods had called all of that much ado about nothing. Sometimes we just need justice, he had said, so the community can get a feeling of relief.

But the finality of the thing bothered him still. *What if we are wrong, even though it is highly unlikely,* he asked himself. Hard and fast cases had been blown open by the discovery of new evidence. But that was rare, the exception to the rule.

So now it was up to him. The spotlight was on; and he felt the pressure. The press had been dropping by to get his comments and he had even seen himself on the six o'clock news. His name had appeared in the headlines: "Judge Woods to Sentence Convicted Murderer Next Week," and "Death Or Life The Only Remaining Issue."

Forget the headlines and the upcoming election. The judge just wanted to do the right thing.

What about the biblical idea of an eye for an eye? *The Old Testament,* he thought, and *hadn't the New Testament been all about forgiveness?* But as his father had said: biblical forgiveness can come from the individual or from society or from God. The last kind you ask directly for, the second kind should always be given and the first kind could be given without taking society's duty to punish away. Society had to defend itself.

What would he do if he were here? he asked aloud. *What would dad have done?*

His mind went back to when Bill was just little Billy, age 8, and Judge Woods was just "dad." It was an early spring day and they had been on a turkey hunt, just the two of them. Dad had armed himself with his favorite 12 gauge double barrel and little Billy had carried his 20 gauge pump.

They were in a blind near the heart of the woods for little Billy's first real turkey hunt ever and dad had been calling for about five minutes in the early morning darkness when an old gobbler answered. Before long Billy could see the brush about 125 yards away begin to move. Flushed with excitement because he had been promised first shot, he began raising his gun to aim at the bush. Dad's hand had come down quickly onto the top of the barrel. "Don't aim at anything unless you can see what you're aiming at and intend to kill it," he admonished.

Billy lowered the barrel and waited, afraid the gobbler had heard his dad. The fears were without justification and in a few minutes the old gobbler appeared in the open. Billy raised his gun to fire, his stomach suddenly in his throat and his heart about to explode.

As he was readying himself to squeeze the trigger he noticed something funny about the bird. It was crippled. Its left foot was badly mangled and its right side was torn and scarred, the only visible remains of a fight of an earlier season. Billy felt pity for the bird.

But should he still shoot it?

In its condition it couldn't fly and would probably be killed before long anyway. But what had his dad told him about life and its cycles; about the balance of mercy and harshness in the wild. The decision was his alone and he knew that he did not have time to consult anyone. He had to think quickly and act decisively.

The man in the porch swing smiled, no longer little Billy, but Judge Woods. And he knew that no one, not even his dad could make up his mind for him.

The rays of the sun could now only be seen in the highest part of the sky. Venus was clearly visible just above the amber horizon. No breeze stirred now but it was cool on the porch.

The judge felt a sense of release. Now he knew what it was he had to do.

He stood up, took a deep breath, and walked into the house. The night would pass better now. □

About Members Among Firms

About Members

Barbara A. Handley, a 1983 admittee to the Alabama State Bar, has joined the legal department of BE&K, Inc. Miss Handley was employed at BE&K in 1972 as an administrative assistant and the company's first employee. Since then BE&K has grown to become one of the nation's largest engineering and construction firms.

Richard C. Bentley, formerly of Montgomery, is practicing law in Abilene, Texas with Hanna, Bentley & Hanna, 302 Chestnut Street, P.O. Box 3819, Abilene, Texas 79604. Phone (915) 673-3792.

Alex T. Howard, a Mobile attorney, has been appointed an associate editor of *American Maritime Cases*, which is a collection of all published decisions by courts in the federal and state courts of the United States that involve matters of interest to the admiralty bar.

Brewton attorney **Jim Hart** was elected the 39th president of the 16,000 member Alabama Cattlemen's Association during the association's annual meeting in February. Hart presently serves as the chairman of the Alabama Bar Association's public relations committee.

Alabama Supreme Court **Chief Justice C.C. Torbert, Jr.**, has been named the 1983 recipient of the Distinguished Service Award by the Opelika Jaycees.

Edward S. Sledge III, of the Mobile law firm of Hand, Arendall, Bedsole, Greaves & Johnston, has been appointed as Alabama State Chairman of the Defense Research Institute for the 1984-85 term of office. **Harold F. Herring**, of the Huntsville law firm of Lanier, Shaver & Herring, has been reappointed as Alabama Northern Area State Chairman for the 1984-85 term. **Robert H. Smith**, of the Mobile law firm of Collins, Gallo-way & Smith, was reappointed as Alabama Southern Area State Chairman for the Defense Research Institute for the 1984-85 term of office.

Among Firms

Marvin H. Campbell, formerly a member of the Birmingham firm of Berkowitz, Lefkovits, Patrick, Isom, Edwards & Kushner, has recently opened law offices in Montgomery at 322 Alabama Street, Montgomery, Alabama 36103.

Cartledge W. Blackwell, Jr., and **J. Parke Keith** are pleased to announce the formation of a partnership for the practice of law under the firm name of **Blackwell & Keith**. The firm is located at 619 Alabama Avenue, P.O. Box 592, Selma, Alabama 36701. Phone 872-6272.

Bell, Richardson & Herrington, P.A., and **Sparkman & Shepard, P.A.**, are pleased to announce the merger of their law practices as **Bell, Richardson, Herrington, Sparkman & Shepard, P.A.** Offices are

located at 972 Central Bank Building, P.O. Box 2008, Huntsville, Alabama 35804. Phone 533-1421. The firm is also pleased to announce the association of **Barbara S. Corner** as associate and of **Donald W. Davis** as counsel.

Amy M. Wilkinson is pleased to announce the opening of her office for the general practice of law at 2925 Montgomery Highway, P.O. Box 37, Pelham, Alabama 35124.

George C. Hawkins and **George C. Day, Jr.**, announce the formation of a partnership for the practice of law under the firm name of **Hawkins & Day**. Offices are located at 826 Chestnut Street, Gadsden, Alabama 35901. Phone 543-7200.

John T. Mooresmith, having withdrawn as a shareholder of the Mobile law firm of Brown, Hudgens, Richardson, Whitfield & Gillion, P.C., announces that he has opened an office for the general practice of law under the firm name of **John T. Mooresmith**. Offices are at the La-Clede Hotel, Suite 3001-A, 150 Government Street, Mobile, Alabama 36602. Phone 432-1261.

Lewis H. Hamner, P.A., announces the relocation of its offices to 202 East Main Street, Roanoke, Alabama. Phone 863-2105.

Donald Lee Heflin announces the opening of his office for the private practice of law at 55 Central Bank Building, P.O. Box 875, Huntsville, Alabama 35804. Phone 533-1724.

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor-First National Bank Building, Mobile, Alabama, takes pleasure in announcing that **Orrin K. Ames III** has become associated with the firm.

The firm of **Barnett, Bugg & Lee** is pleased to announce that **John B. Barnett III** has become a member of

the firm. Offices are located in the Monroe County Bank Building, Suite 200, Monroeville, Alabama. Phone 743-3386 or 743-3387.

James Robert Beard, Steven A. Thomas and William K. Higgins, Jr., are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Beard, Thomas & Higgins**. Offices are located at 102 Bankhead Byars Building, 1816 Third Avenue, Jasper, Alabama 35501 and Blanton Annex Second Floor, Jasper, Alabama 35501. Phone 387-0332 or 387-1447.

Bruce A. Burttram and Hugh C. Henderson are pleased to announce the formation of a partnership for the general practice of law. The firm, **Burttram and Henderson**, is located at Suite 101, Lindley Building, Birmingham, Alabama 35234.

The firm of **Gaillard, Little, Hume & Sullivan** is pleased to announce the relocation of their offices to the 10th Floor, Merchants National Bank Building, Mobile, Alabama.

George F. Maynard, N. Lee Cooper, Meade Frierson III, Fournier J. Gale III, Douglas T. Arendall, Kirby Sevier, George G. Lynn, J. Hobson Presley, Jr., Cathy S. Wright, H. Thomas Wells, Jr., and John D. Johns, formerly partners in Cabaniss, Johnston, Gardner, Dumas & O'Neal, announce the formation of a professional corporation for the practice of law under the name **Maynard, Cooper, Frierson & Gale, P.C.** Offices are located at Twelfth Floor, Watts Building, Birmingham, Alabama 35203. Phone 252-2889.

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Robert G. Robison takes pleasure in announcing the location of his office in Southeast Alabama located in Newton, Alabama. P.O. Box 86, 36352. Phone 299-3521.

Brown, Hudgens, Richardson, Whitfield & Gillion, P.C., takes pleasure in announcing that **Caroline E. Wells**, formerly a member of Gallalee, Denniston & Cherniak, has become associated with the firm. Offices are located at Executive Plaza, Second Floor, 601 Bel Air Boulevard, Mobile, Alabama.

David P. Broome and Edward B. McDonough, Jr., announce the formation of a partnership for the practice of law under the firm name **McDonough & Broome**. Offices are at 1400 First National Bank Building, P.O. Box 1943, Mobile, Alabama 36633. Phone 432-3296. □

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Riding the Circuits



Calhoun-Cleburne County Bar Association

Officers of the Calhoun-Cleburne County Bar Association for the 1984 year are as follows:

President: John Norton
 Vice president: Joe Estep
 Secretary: Vaughn Stewart
 Treasurer: Brenda Stedham

Other positions include Kirk Davenport as chairman of Law Week, and Joe Estep as chairman of the Law Library Committee. The Executive Committee is composed of Richard Cater, Tom Dick, Bill Jackson, Jim Main and John Phillips.

Mobile Bar Association

At the regular monthly meeting on March 19, 1984, the Mobile Bar Association applauded three men who have given a total of 150 years of counsel to the community — to quote the *Azalea City News & Review*, "150 years of lawyer-



Pictured are Mobile Bar Association President G. Sage Lyons and Fifty Year honorees C.A.L. Johnstone, Jr., Winston F. Groom, and J. Edward Thornton. Photo courtesy of *The Azalea City News & Review*.

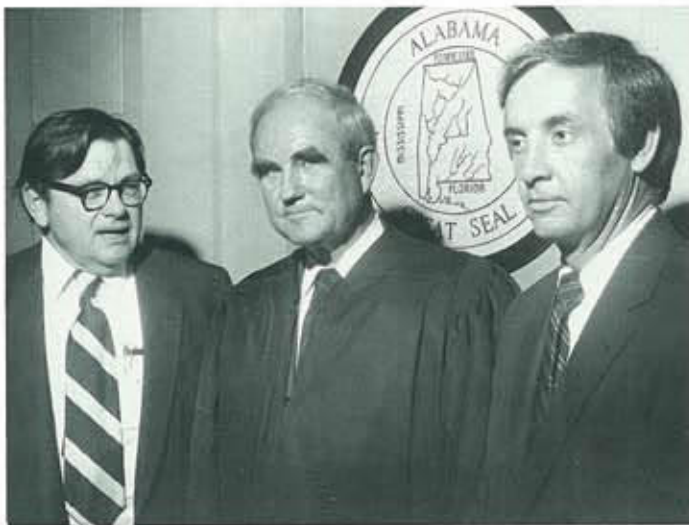
ing." Certificates in recognition of and appreciation for fifty years of service to the public, bench and bar of Mobile County were presented to Winston F. Groom, C.A.L. John-



Congratulations to the "Battling Barristers" of the Mobile Bar Association, who walked off with the trophy for the City Basketball League in March. Team members pictured include: 1st row, Pete Mackey and Norman Waldrop holding trophy; 2nd row, George Brown, Coach Chris Hume, and Sid Jackson; 3rd row, George Walker, Eddie Green, and Bob Wills; 4th row, Ferrell Anders and Jim Barter.

stone, Jr., and J. Edward Thornton. G. Sage Lyons, president of the local bar, made the presentation. These gentlemen shared this occasion surrounded by family, close friends and associates. Upon accepting his award, Mr. Thornton, claiming to have lost his voice and with tongue in cheek, said he owed it all to "good clean living and minding my own business."

Montgomery County Bar Association



Following the appointment of former Governor John Patterson to the Court of Criminal Appeals, a public investiture ceremony was held in the Supreme Court Building and a lovely reception hosted by the Montgomery County Bar Association. Pictured at the April 9 event are (L to R) Bill Hairston, president of the Alabama State Bar; Judge Patterson; and Henry Chappell, president of the Montgomery County Bar Association.



Many friends and associates attended the investiture and congratulated Judge Patterson on his appointment to the bench, which he stated is "a culmination of a life's ambition." He said that being attorney general and governor of Alabama was a side-track to his dream of being a lawyer and a judge.

Judge Pelham J. Merrill receives award



On Monday, April 2, 1984, Judge Pelham J. Merrill (center) received the Eugene W. Carter Medallion Award given annually by the Administrative Law Section of the Alabama State Bar. The award is in recognition of individuals who have, while in full-time public service, demonstrated meritorious service by unselfishly weighing the interests of government against the rights of individuals. Pictured with Judge Merrill are John J. Breckenridge, chairman of the Administrative Law Section (left) and (right) Alabama Supreme Court Chief Justice C.C. "Bo" Torbert.

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Third Judicial Circuit Bar Association

On Friday, April 6, 1984, students at the Eufaula High School enjoyed a learning experience of a different kind. Through efforts initiated by the Third Judicial Circuit Bar Association (comprised of Barbour and Bullock counties), the Supreme Court of Alabama sat in special session before some 1,500 students in the high school gymnasium. Pre-



(L to R) Dr. Daniel Parker, Superintendent of Eufaula City School System; Alabama Supreme Court Chief Justice C.C. "Bo" Torbert; and Jimmy Calton, president of the Third Judicial Circuit Bar Association, talk after the special session of the Supreme Court held in the Eufaula High School gym in April.

vious to the court session, students and teachers had become familiar with the background of the two cases (one civil and one criminal) presented, as well as the rules of court decorum. Twice yearly the Alabama Supreme Court conducts special sessions outside of Montgomery, mostly at educational institutions.

The court session was planned to coincide with the beautiful city's annual historic pilgrimage. On Thursday night preceding the court session a reception sponsored by the local bar was held at the Shorter Mansion and a CLE seminar on appellate practice followed on Friday afternoon.



The Supreme Court of Alabama sits in special session on the basketball "court" in the Eufaula High School gymnasium. The setting was unique but students and lawyers knew it was definitely "the real McCoy." □

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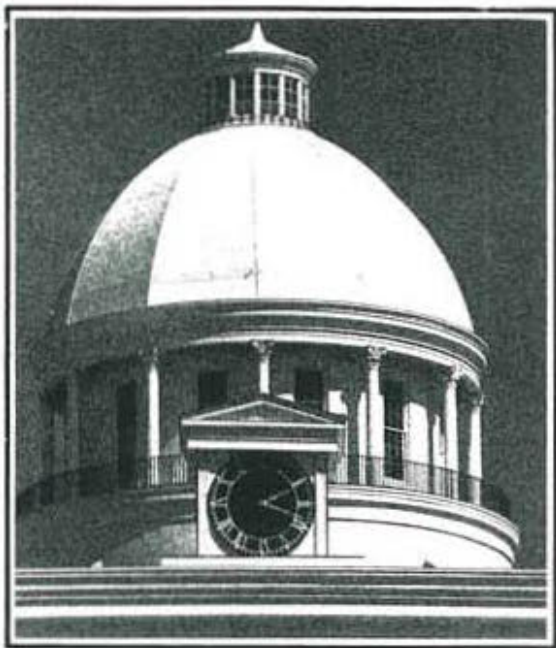
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LEGISLATIVE WRAP-UP

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

This report comes to you well into the 1984 Regular Session of the Alabama Legislature. It was written following the 14th legislative day of the 30-day regular session. Due to the delays involved in printing and distribution, the status of some bills reported may have changed significantly.

Alabama State Bar Bills

The Board of Bar Commissioners endorsed several bills for introduction in this year's regular session. Two bills were approved which will, if passed, increase annual license fees to \$150 per year and remove the exemption for first and second year lawyers. These bills were introduced in both chambers. Sponsors in the House are Jim Campbell of Anniston and Beth Marietta of Mobile. The Senate sponsor is Charles Langford of Montgomery.

The two changes were introduced separately; however, the sponsors have decided to substitute one bill incorporating both changes. This has already been accomplished in the Senate and the remaining bill is number 107. In the House, both #146 and #147 are on the calendar and a substitute is ready when the bills reach the floor.

The Board of Commissioners also approved a proposal to make changes in the state's indigent defense fund statute. The approved changes included an increase in hourly fees to \$25/\$50, removal of the \$1,000 cap on the trial of habitual offender and capital cases, an additional possible \$1,000 in appellate fees for cases granted certiorari, and diversion of a percentage of these funds to the Comptroller's office to cover the costs of administration.

At the beginning of the session, however, negotiations with the Comptroller's office broke down creating an uncertain future for any of the changes. The latest word from the Committee indicates the Comptroller has agreed to all changes other than the increase in hourly fees, which he

feels will endanger the fund. As of this writing, no bill has been introduced to effectuate any of these changes.

Also approved by the Commissioners in principle was legislation to create a client security fund. The need for such a fund and a proposed plan to create one was illuminated in the last issue of *The Alabama Lawyer*.

Constitutional Revisions Proposed

Both Lieutenant Governor Baxley and Senator Ryan deGraffenried want a new constitution for Alabama. They were sidetracked in their efforts last year by an adverse Supreme Court ruling. This year Senator deGraffenried introduced approximately a dozen bills to effect similar changes in the single bill which passed last year. These bills call for voter approval of the repeal of portions of the 1901 Constitution and replacement with a slimmed down version.

Other Bills of Interest

As of the 14th day, 1204 bills were introduced in the House and Senate. Included among these bills are at least a hundred more crime bills, some left over from last year's crime package. None of these bills has produced the kind of controversy as the passage of changes to Alabama's DUI laws in the last regular session.

Certainly of interest to Alabama's trial lawyers is H.B. 81, commonly referred to as the "minimum limits" bill. This bill would raise the minimum amount of liability insurance required under a motor vehicle liability policy under the Motor Vehicle Safety-Responsibility Act. Its companion in the Senate is S.B. 298. At this writing both bills were out of committee, but neither had reached the floor.

An important bill for domestic practitioners is S.B. 86 by

Jim Smith of Huntsville. This bill provides for court ordered continuing income withholding by employers as a means of child support enforcement.

There have been an unusually large number of state tax bills introduced this session. These include proposals to increase individual and corporate income taxes. There are a dozen different versions of these proposals presently pending in one house or the other.

Law Institute Bills Pending in the Legislature

The Alabama Law Institute has presented one major revision, the Revised Non-Profit Corporation Act, and some minor amendments to the Probate Code and Administrative Procedure Act to the Legislature.

Non-Profit Corporation. This bill is sponsored in the Senate by Senator Ryan deGraffenried (S.B. 130) and in the House by Representative Michael Onderdonk, Jim Campbell and Beth Marietta (H.B. 216). It will not be effective until January 1, 1985. For a review of this bill see the Legislative Wrap-Up in the March 1984 edition of *The Alabama Lawyer*.

Probate Amendments. The Probate Code has been in effect since January 1, 1983. While working with this new code, which was placed in Chapter 8 of Title 43 of the Code of Alabama (1982 Supplement), it was determined that inconsistencies existed within the Code and Chapter 2 of Title 43, which basically deals with probate procedure. The proposed amendments bring Chapter 2 in conformity with the Probate Code by deleting references to dower and clarifying that "property" refers to both real and personal property.

These amendments are sponsored by Senator Jim Smith (S.B. 84) and Representatives John Tanner, Jim Campbell, Bill Fuller, Phil Poole, Beth Marietta, Michael Onderdonk and Michael Box (H.B. 185).

Administrative Procedure. The Administrative Procedure Act became effective over a graduated three year period. The Legislative Reference Service began receiving rules in its Administrative Procedure Office on October 1, 1981. Agency proceedings were governed by the Act as of October 1, 1982. All agency rules must have been filed in the Legislative Reference Service Office by October 1, 1983 otherwise they are void.

During the past several years, as agencies have been working with the administrative procedure law, the need for several clarifying amendments became apparent. This bill is the result of recommended changes from lawyers and state agencies. It clarifies the effective date provisions. The bill is sponsored by Senator Mac Parsons (S.B. 357) and Representative Jim Campbell (H.B. 94).

Institute Revisions Under Study

Condominium Law. Alabama enacted its present Condominium Law in 1971, six years before the Model Condominium Act was approved by the National Commissioners of State Laws. After ten years' experience of dealing with condominiums in Alabama, the Institute has undertaken to update, revise and complete Alabama's Con-

dominium Law. The committee, chaired by Albert Tully of Mobile, became acutely aware of the need for revision with the rapid development of condominiums in Gulf Shores after the devastation of Hurricane Frederick. After several years of slow real estate development, interest rates and prices are dropping causing developers to convert apartments in several of the major cities into condominiums. Professor Gerald Gibbons is the reporter for this project. The committee is not expected to complete their initial draft until September 1984.

Guardianship Revision/Probate Code. With the completion and enactment of the "intestate succession and wills" portion of the Probate Code, the probate revision committee has chosen to review Alabama laws dealing with guardianships. This corresponds to Article 5 of the Uniform Probate Code. The review separates guardianship of the person from a conservator of the property. It fills the gap in our present law and clarifies conflicting and overlapping statutes dealing with curators, guardianships, limited guardianships and other statutes dealing with protective persons. The committee should complete their draft in 1985. Mr. E.T. Brown serves as chairman of the committee while Professor Tom Jones is the reporter. □

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



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



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Recent Decisions

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

Recent Decisions of the Alabama Court of Civil Appeals

Juvenile procedure . . . rule 59.1(dc), ARCP, applicable

In Re: Hicks (Hicks v. Cornelius), Civil Appeals No. 3993 (February 15, 1984). In this case, the Alabama Court of Civil Appeals noted a hiatus in the court rules regulating the review of juvenile cases. Despite the fact that the Supreme Court drastically altered the juvenile court system in March, 1982 (it no longer matters whether the proceeding is in district court or circuit court), the Supreme Court left Rule 59.1(dc) intact. Hence, the applicable time limit for ruling on a post-trial motion in a juvenile proceeding depends on whether one is in district court or circuit court. In this case, the parties were in district court and waited more than fourteen (14) days from the date when the post-trial motion was deemed denied. The court of appeals could ascertain no reason why the time limit should be different depending on the court, but noted that Rule 59.1(dc) is very clear and can be changed only by the Supreme Court.

Public works contracts . . . section 39-2-4 forfeiture affirmed

Clarke Construction Co. v. State of Alabama Highway Department, Civil Appeals No. 3761 (January 25, 1984). A contractor filed suit to have its bid rescinded and its bid bond returned due to a unilateral mistake in one bid item. The bid used the figure "\$386,000.00" immediately preceded by the words

"Three Hundred Eighty Six," mistakenly deleting the word "Thousand." While acknowledging the general law allowing equitable rescission of contracts for unilateral mistake, the Alabama Court of Civil Appeals held that this equitable doctrine does not apply to bids on public works contracts. Section 39-2-7, *Ala. Code* 1975, provides the specific rule of construction in the event of a discrepancy between amounts expressed in figures and words. Further, Section 39-2-4 provides for a specific penalty to be imposed upon a low bidder who for any reason does not accept a contract as awarded, i.e., a forfeiture of the bid bond posted.

Truth in lending . . . open account not subject to TILA even though finance charge imposed

Staples v. Jenkins Builders, Inc., Civil Appeals No. 4092 (February 22, 1984). Jenkins filed suit on an open account for certain building materials purchased by the defendant. The purchase terms were "Net cash, First of the month following purchase." The defendant did not pay on the first of the following month, and Jenkins sent a second statement providing that a finance charge would be imposed if the balance were not paid by the tenth of the month. The balance was not paid by the tenth of the month. The defendant maintained that the transaction was subject to the Truth in Lending Act (TILA) since he was permitted to pay in installments and a finance charge was imposed. The Court of Civil Appeals disagreed stating that Section 8-8-8, *Ala. Code* 1975, mandates that open accounts bear interest from the date the open account is deemed closed, i.e., the date the last item was entered. The TILA encom-

passes only consumer credit transactions, and its purpose is to protect the consumer by disclosing the terms of credit.

Workmen's compensation . . . employer may be estopped to deny employer/employee relationship

Ala. Miss. Enterprises, Inc. v. Beasley, Civil Appeals No. 3946 (February 15, 1984). In a case of first impression in Alabama, the Court of Civil Appeals held that an alleged employer may be estopped to deny that an employer/employee relationship existed despite the fact that the traditional tests of an employer/employee relationship do not exist. Specifically, the court found that Ala.-Miss., by deducting for workmen's compensation coverage for monies owed the plaintiff, elected to treat the plaintiff as its employee. The court of appeals reached its decision in part by way of analogy to general principles of insurance law but hastened to add that the court was not expanding the definition of "employee" to include, in every instance, anyone for whom deductions are made.

Recent Decisions of the Alabama Court of Criminal Appeals

Defense of intoxication . . . idiocy is not the standard

Dixon v. State, 6 Div. 834 (January 31, 1984). The defendant was convicted of the first degree theft of a farm tractor and was sentenced to life imprisonment under the Habitual Felony Offenders' Act. At trial, the defendant contended that he was either unconscious, not present, or too intoxicated to form an intent during the occurrence of all of the events critical to the commission of the crime. At the close of the evidence, the trial judge undertook to charge the jury on the affirmative defense of involuntary intoxication. The court charged in pertinent part:

No person can go out here and voluntarily get drunk and come into this court and use that as an excuse for you, ladies and gentlemen, to say he

is not guilty. We just don't operate the law in that fashion. However, if he becomes so intoxicated that his mind ceases to function as a mind and he becomes an idiot, if he is not oriented as to who he is or where he is or things of that nature, if he is idiotic, then of course, that could be an excuse to commit a crime . . .

Judge Sam Taylor writing for a unanimous Court of Criminal Appeals reversed the case. Judge Taylor wrote:

This charge incorrectly states the law; idiocy is not the measurement to be employed by the jury. The court erred to reversal in giving this charge.

Multiple defendant representation . . . conflict of interest

Sellers v. State, 4 Div. 249 (March 20, 1984). Sellers filed a *pro se* petition for writ of error coram nobis, based upon the issue of ineffective counsel. He was indicted for burglary along with two other defendants. The petitioner was convicted of second degree burglary, but the indictments against his codefendants were dismissed.

Included in Sellers' petition for writ of error coram nobis was a letter written to him by his trial attorney who was also the trial attorney for one of the codefendants. The attorney's letter read in part:

Jerald Carter told me that he and Dick Harris would testify that they committed the burglary while you were sleeping in a motel. I did not call them for two reasons. First, I did not know of any legal procedure to have them produced for trial since they were incarcerated in Georgia. Second, since I represented Jerald, I could not advise him to testify for you and receive a sure sentence since there was a good possibility the State would never try him or Dick . . .

Judge Hubert Taylor writing for a unanimous court reversed and remanded the case. The court held that the attorneys' letter affirmatively showed a conflict of interest. "When a conflict of interest exists, there is a denial of the right to effective representation *even without the showing of specific prejudice.*" As a result of the Sellers case, the Court of Criminal Appeals has adopted a "per se" rule of ineffective representation where a conflict of interest exists. (Emphasis ours.)

Recent Decisions of the Supreme Court of Alabama—Civil

Insurance . . .

***Wixom* overruled and *Utica* reinstated**

United States Fidelity & Guaranty Company v. Warwick Development Co., Inc., 18 ABR 1086 (February 2, 1984). USF&G issued a comprehensive general liability policy to a housing contractor. The policy was in effect when the house was built, but the policy had expired at the time of the accrual of the cause of action, i.e., at the time damage occurred. USF&G denied coverage for alleged faulty workmanship because no insurable loss occurred within the policy period. The policy contained the customary definition of "occurrence" which requires damage to occur during the policy period.

USF&G asserted, and the Supreme Court agreed, that as a general rule the time of an "occurrence" of an accident within the meaning of an indemnity policy is the time the complaining party is actually damaged rather than the time the wrongful act was committed. Therefore, the insurance that is in force when the property damage occurs is applicable rather than the insurance that was in force when the work was performed.

Civil procedure . . .

new rule 54(b) certification procedure announced

Foster v. Greer and Sons, Inc., 18 ABR 871 (January 27, 1984). In this case, the Supreme Court of Alabama took the opportunity to announce a new procedure in Rule 54(b) certification cases. The Supreme Court stated that when it appears from the record that the appeal was taken from an order which was not final but which could have been made final by a Rule 54(b) certification, rather than dismiss the appeal the Supreme Court will remand the case for a determination by the trial court as to whether to certify the order as final pursuant to Rule 54(b), and if so, to enter an order and to supplement

the record to reflect certification. The judgment will be taken as final as of the date the 54(b) certification is entered. Adoption of this procedure would advance the policy considerations underlying Rule 54(b) by speeding up the process of reaching the merits in a proper case.

Civil procedure . . . rule 4(f) amended

Gonzales v. U-J Chevrolet Co., Inc., 18 ABR 1205 (February 24, 1984). Upon recommendation of the Supreme Court Advisory Committee, Rule 4(f), ARCP, was amended effective March 1, 1982, to provide that, when there are multiple defendants and the complaint has not been served on all defendants, the plaintiff may proceed to trial and judgment as to those served, and judgment against those served is *final* and a timely appeal must be taken. The purpose of the amendment was to harmonize the provisions of Rule 4(f) with those portions of Rule 54(b), ARCP, which provide for finality of judgments against fewer than all parties.

Restatement section 402A . . . comment k applicable in an Alabama extended manufacturer liability doctrine action

Stone v. Smith, Kline & French Laboratories, 18 ABR 1322 (March 9, 1984). The plaintiff had an emotional condition for which Thoraizine was prescribed by a doctor. She took the medication over a period of time and subsequently developed Thoraizine-induced hepatitis. She sued the drug manufacturer under the Alabama Extended Manufacturer Liability Doctrine. The federal district court, as a matter of law, found that Thoraizine, a prescription drug, was an "unavoidably unsafe product" as prescribed in Comment k to Section 402A of the *Restatement of Torts* and held that, as such, the product is neither defective nor unreasonably dangerous if the product is properly prepared and is accompanied by proper directions and warnings. The court also found that where a drug warning adequately warns a prescribing physician of the potential dangers

of a drug, there is no duty for additional warnings to foreseeable, ultimate users, i.e., consuming patients.

In a certified question case, the Supreme Court agreed with the federal district court that in accordance with Comment k, *supra*, an "unavoidably unsafe" yet properly prepared drug is not defective or unreasonably dangerous within the Alabama Extended Manufacturer Liability Doctrine if there is an adequate warning accompanying the drug. The Supreme Court also agreed that the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of potential dangers.

Torts . . .

employer not responsible for work release inmates' torts outside scope of employment

Roberson v. Allied Foundry & Machinery Co., 18 ABR 1294 (March 9, 1984). In a case of first impression, the Supreme Court held that an employer of work release inmates has no "special duty" to supervise or control these inmates outside the scope of their employment. In this case, the plaintiff operated a convenience store located near the employer's premises. During working hours all employees, including work release inmates, were permitted to patronize the convenience store. One evening, two inmates purchased spirits from the store, became intoxicated, and subsequently assaulted the plaintiff. Although sympathetic with the plaintiff's plight, the Supreme Court felt constrained to follow the general rule that one has no duty to protect another from criminal attack by a third party.

Workmen's compensation . . . comp. carrier is not a "real party in interest"

Ex Parte: Howell (Howell v. Leiman), 18 ABR 1050 (February 2, 1984). The Supreme Court was asked to consider whether a workmen's compensation carrier which paid benefits to an employee is a "real party in interest" under Rule 17(a), ARCP, and accordingly, required to be joined in an employee's third-party action under Section 25-5-11, *Ala. Code* 1975. Rule 17(a)

provides that in subrogation cases the action *shall* be brought in the name of the subrogee. The Supreme Court distinguished the workmen's compensation carrier situation from the usual subrogation insurance cases reasoning that the "real party in interest" is the one owning the substantive right to be enforced *against the tortfeasor*.

In third-party actions under Section 25-5-11, however, when the employee exercises his statutory rights against the tortfeasor, his rights are exclusive if he files suit within the one-year period and the workmen's compensation carrier's interest is limited to whatever recovery the employee recovers from the tortfeasor. During the one-year period, Section 25-5-11 gives the insurer *no* substantive right to enforce against the tortfeasor. Since the workmen's compensation carrier is not a "real party in interest" under Rule 17(a), the carrier is not required to be joined under Rule 19(a), ARCP.

Recent Decisions of the Supreme Court of Alabama—Criminal

Prosecutor's reference to defendant's failure to testify constitutes ineradicable prejudicial error

Ex parte Tucker, 18 ABR 1301 (March 9, 1984). The Supreme Court of Alabama granted the writ of certiorari in order to review whether the trial court erred in denying Tucker's motion for mistrial based upon the alleged impropriety of certain comments made by the prosecutor. During the direct examination of a defense witness, the record reflects the following colloquy:

Q. "What did she state to you?"

Mr. Stephens: "We object to what she stated to him. *She's here*, may it please the court. She can tell *what she told him*."

Mr. Culpepper: "Judge, we object to the remark just made by Mr. Stephens."

On appeal the State argued that any prejudicial impact was eradicated by the trial court's instruction to disre-

gard the comment. The Supreme Court considered the comments to be so prejudicial as to be ineradicable.

Jury request to view the defendant after submission of the case is error

Ex parte: Batteaste, 18 ABR 998 (February 3, 1984). The Supreme Court of Alabama granted certiorari to review the decision of the Court of Criminal Appeals, which decided that the trial court did not err when it permitted the jury, over objection, to view the defendant's face to see if he had a scar on it after the case had been submitted to the jury. The Supreme Court, in a unanimous opinion, disagreed with the rationale of the intermediate appellate court citing the principle of law in *Harnage v. State*, 290 Ala. 142, 274 So.2d 352 (1972).

In *Harnage*, the court ruled "that a jury request to view the hands of the defendant, who was charged with murder by strangulation, came too late because the case had already been presented to the jury and any member of the jury had had the opportunity to observe the defendant's hands during the trial, particularly while the defendant was testifying in his own behalf."

In *Batteaste*, the Supreme Court was further concerned with the fact that the defendant did not take the stand which further compounded the error, because he was forced to stand before the jury and show both sides of his face.

Knock and announce . . . still required

Ex parte Gannaway, 18 ABR 1031 (February 10, 1984). In this case, certiorari was granted to ascertain whether the overruling of the defendant's motion to suppress based upon the failure of the police officers to comply with the requisites of the "knock and announce statute" while executing a search warrant was reversible error.

Here, the officers asked some children who were inside the screened porch the whereabouts of their father. Upon being told that he was in the house, the officers, seeing the defendant inside at the time, entered the residence and, displaying identification,

handed the defendant a copy of the search warrant. It was clear from the record that the officers who entered the defendant's home through the front screen door neither "knocked nor announced."

The Supreme Court through Justice Beatty rejected the State's argument that the officers had talked to the two children before entering and that in any case literal compliance with Section 15-5-9 has never been required. The court found that these circumstances did not justify the entry of the officers through the front door absent compliance with the requirement of Section 15-5-9, *Ala. Code*. In reversing the trial court, Justice Beatty noted that "the record did not demonstrate any necessity for an unannounced entry. The officers saw the defendant approaching the screen porch from the living room. There was no evidence that any announcement or delay on their part would alert him or place them in peril, or that the defendant knew their identity and purpose or that the officers entertained a reasonable belief that any announcement of purpose would lead to destruction of the evidence . . ."

Witherspoon reversal affects sentence only

Beck v. State, 18 ABR 1063 (February 10, 1984). On retrial, the defendant, Beck, was convicted of the capital offense of robbery-intentional killing in violation of Section 13-11-2(a)(2). Thereafter, he was sentenced to death.

The Court of Criminal Appeals remanded this case to the trial court for an additional inquiry under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). After remand, the Court of Criminal Appeals entered a decision reversing both the conviction and the sentence of death because a juror had been improperly excused for cause as a result of her opposition to the death penalty. The Supreme Court granted the State's petition for a writ of certiorari.

The sole issue raised by the State was whether the jury exclusion error under *Witherspoon v. Illinois* necessitated a new guilt stage trial when, under Alabama's bifurcated procedure,

a separate sentence proceeding is required.

The Supreme Court of Alabama through Justice Adams held that only a *new sentence proceeding* is required on remand to the trial court. Justice Adams reasoned:

We are aware of no decisions of the Supreme Court of the United States or the lower federal courts that support respondent's proposed interpretation of Section 13-11-2(a), *Code of Alabama*, 1975. In *Witherspoon v. Illinois*, the Supreme Court of the United States made it clear that its holding regarding jury exclusion error did not render invalid the petitioner's conviction, but only his sentence of death.

Jury charge . . . the difference between intentional murder and universal malice

Washington v. State, 18 ABR 1285 (March 9, 1984). The defendant was indicted on a one count indictment charging that he intentionally murdered Walker. He was convicted of murder and his conviction was affirmed by the Court of Criminal Appeals.

During the trial court's oral charge, the judge gave a lengthy charge as to the definition of "recklessness" and told the jury that they could convict the defendant of murder if they found that he acted "recklessly." The one-count indictment, however, only alleged that the defendant acted "intentionally" in causing the death of the victim.

Chief Justice Torbert, writing for a unanimous court, reversed and held that the court erred in giving an instruction on "universal malice" murder where the offense charged in the indictment was intentional murder. The court stated in pertinent part:

The difference between homicide by reckless conduct manifesting extreme indifference to human life, sometimes referred to as "universal malice murder" and "purposeful" or "knowing murder" was set forth in *Northington v. State*, 413 So.2d 1169, 1170 (Ala. Crim. App. 1981).

[T]here are several differences between intentional murder, Section 13A-6-2(a) (1) and reckless murder, Section 13A-6-2(a) (2).

Section 13A-6-2(a)(1) requires intentional conduct and Section 13A-6-2(a)(2) requires reckless conduct. On the other hand, Section 13A-6-2(a)(2) [universal malice murder] requires a showing that the defendant's conduct was directed at human life in general as opposed to a particular individual. This additional difference between the offense the defendant was indicted for, intentional murder, and universal malice precludes the latter [universal malice murder] from being a lesser and included offense since it can be established only by a showing of facts not required in order to be convicted of intentional murder.

Recent Decisions of the Supreme Court of the United States

Hobson's choice . . . probation revocation or the fifth amendment

Minnesota v. Murphy, No. 82-827, 52 U.S.L.W. 4246 (February 22, 1984). In 1980, the defendant pled guilty to a sex-related charge in Minnesota and was given a suspended prison sentence and placed on probation. The terms of his probation required him to participate in a treatment program for sexual offenders, to report to his probation officer periodically, and to be truthful with the officer "in all matters." During the course of a meeting with his probation officer, the defendant was questioned about his participation in a 1974 rape and murder. During questioning without benefit of Miranda Warnings, he admitted that he had committed the rape and murder. The defendant was later indicted for first degree murder and he sought to suppress the confession made to the probation officer on the ground that it was obtained in violation of his Fifth and Fourteenth Amendments. The Minnesota trial court found that the defendant was not in custody at the time of the confession and that the confession was neither compelled nor involuntary despite the absence of Miranda Warn-

ings. The Minnesota Supreme Court reversed.

On writ of certiorari, the United States Supreme Court held that a statement obtained by a probation officer in a noncustodial setting from a probationer who fails to assert the privilege against self-incrimination may be introduced against him in a subsequent criminal prosecution so long as the officer does not induce the response by improper threats. The Court further reasoned that the probation officer is not required to give Miranda Warnings before setting out to obtain incriminating statements.

Mr. Justice White's opinion reasoned that the defendant's general obligation to appear before his probation officer and answer questions truthfully did not in itself convert his otherwise voluntary statements into compelled ones within the meaning of the Fifth Amendment.

Records of a sole proprietorship and the fifth amendment

United States v. John Doe, 82-786 decided, 52 U.S.L.W. 4296 (February 28, 1984). The respondent was the owner of several sole proprietorships. In late 1980 a grand jury, during the course of an investigation of corruption in awarding county and municipal contracts, served five subpoenas on the respondent.

The respondent filed a motion in the Federal District Court seeking to quash the subpoenas. The District Court granted the motion except with respect to those documents and records required by law to be kept or disclosed to a public agency. The District Court focused the issue by stating: "The relevant inquiry is . . . whether the act of producing the documents has communicative aspects which warrant Fifth Amendment protection." The Court of Appeals for the Third Circuit affirmed.

The Supreme Court in a split decision affirmed in part and reversed in part and remanded. Justice Powell's decision extends the rationale of *Fisher v. United States*, 425 U.S. 391 (1976) to sole proprietorships. In *Fisher* the Supreme Court held that the contents of

business records ordinarily are not privileged because they are created voluntarily and without compulsion. The Court reasoned as follows:

As we noted in *Fisher*, the Fifth Amendment only protects the person asserting the privilege from compelled self-incrimination.

Where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of documents does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat or affirm the truth of the contents of the document sought. "This reasoning applies with equal force here." In this case the respondent did not claim that he prepared the records involuntarily or that the subpoenas would force him to restate, repeat, or affirm the truth of the records' contents. The fact that the records are in his possession is irrelevant to the determination of whether the creation of the records was compelled.

No retroactive application of *Edwards v. Arizona*

Solem v. Stumes, No. 81-2149, 52 U.S.L.W. 4307 (February 29, 1984). Stumes, a homicide suspect, when arrested on unrelated charges, made incriminating statements to the police about the homicide after the police had twice renewed interrogation despite Stumes' invocation of his right to counsel. While Stumes' appeal was pending, the Supreme Court held that once a suspect had invoked his right to counsel, any subsequent conversation

must be initiated by him. *Edwards v. Arizona*. Applying *Edwards* to this case, the Court of Appeals for the Eighth Circuit found that the police had acted unconstitutionally and reversed the conviction. In another split decision the Supreme Court reversed and remanded, holding that *Edwards v. Arizona* should not be applied retroactively.

This decision presents some startling language. On the one hand the Supreme Court recognizes that, as a rule, judicial decisions apply "retroactively." *Robinson v. Neil*, 409 U.S. 505, 507-508 (1973). "Indeed, a legal system based on precedent has a **built-in presumption** of retroactivity." (Emphasis ours). On the other hand, Justice White in this case stated:

The retroactive application of *Edwards* would have a disruptive effect on the administration of justice. We can only guess at the number of cases where *Edwards* might make a difference in the admissibility of statements made to the police, but the number is surely significant. In all of those, some inquiry would be required to assess the substantiality of any *Edwards* claim. That investigation, and the possible retrial, would be hampered by problems of lost evidence, faulty memory and missing witnesses.

In sum, *Edwards* has little to do with the truth-finding function of the criminal trial, and the rights it is designed to protect may still be claimed by those whose convictions preceded the decision. It would be unreasonable to expect law enforcement authorities to have conducted themselves in accordance with its brightline rule prior to its announcement; and retroactive application would disrupt the administration of justice. □



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

cle opportunities

may

14-18

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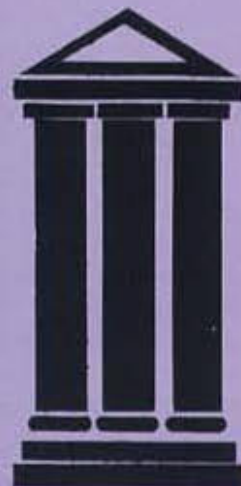
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CLE News



by Mary Lyn Pike
Staff Director, MCLE Commission

Problems dealt with as they occur stand the best chance of being solved effectively. As President Hairston knew when he composed the memorandum sent to bar members on March 6, 1984, some criticisms and suggestions regarding mandatory continuing legal education had not previously been directed to the leadership of the Bar or the providers of CLE activities. Those lawyers who took the time to write thoughtful, informative letters did themselves, the MCLE Commission, and the Bar a service.

The MCLE Commission, composed of nine Bar Commissioners elected by their peers, supervises the administration of the CLE rules by the Bar's staff. The MCLE Commission does not sponsor or conduct continuing legal education activities. It meets four to six times annually to develop policies to further the letter and intent of the CLE rules adopted by the Supreme Court of Alabama. At those times, it considers requests for seminar and sponsor approvals, requests for exemptions and waivers, and problems brought to its attention. The day to day administrative functions are carried out by two members of the Bar's staff, with guidance from the Bar's executive director, the president, and the chairman of the MCLE Commission.

All activities approved for credit must meet certain standards. For example, an activity's primary objective must be

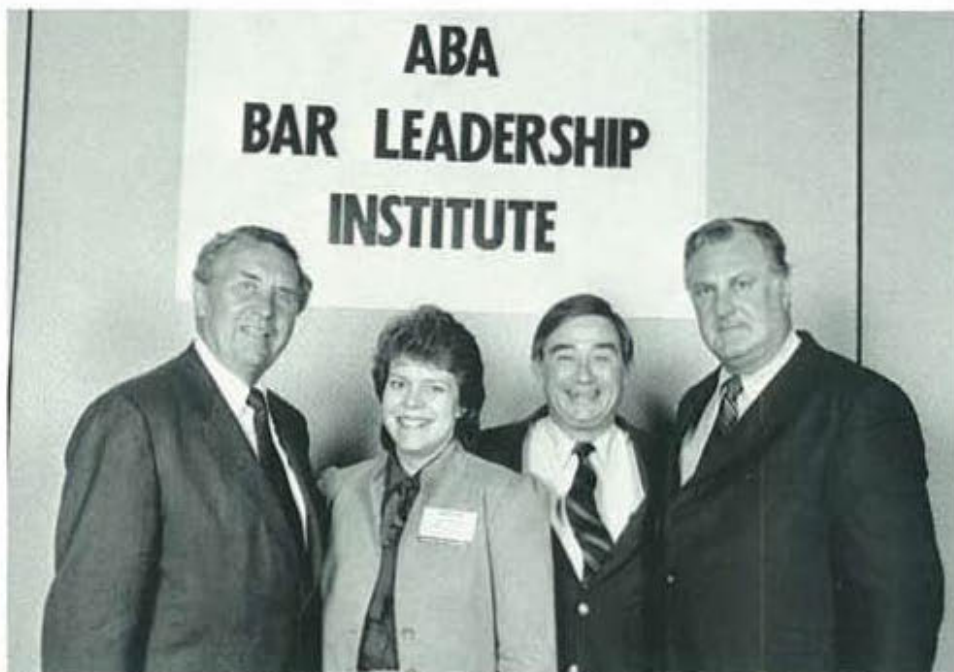
to increase the competence of attorneys and not others. This holds unless the interests and expertise of the others are sufficiently similar to those of attorneys to warrant approval of a course on a cross-discipline basis.

Quality written materials, complete with citations where appropriate, must be given to all participants in accredited activities. Lecturers who do not

prepare materials are short-changing their audiences. Concerns in this area should be directed to the lecturers, the seminar sponsors, and the MCLE Commission.

Participants in an approved activity must be given the opportunity to evaluate the effectiveness and usefulness of the activity and a summary of the results must be forwarded to the Commission. Participants who take the time to complete the questionnaires are promoting the accountability of sponsors to their lawyer-consumers and to the membership of the Alabama State Bar as a whole. The MCLE Commission is diligent in requiring these evaluations of all sponsors, including the State Bar, and acts without delay when problems are revealed.

Attorneys owe it to themselves and to their clients to attend programs relevant to their areas of practice. Attending courses in haste at the end of the year just to "get credit" or attendance of only parts of programs where full credit is claimed defeats the goal of improved competence to practice law. Credits are not an end in themselves but merely a measure of approved instruction. □



Mary Lyn Pike, staff director of the MCLE Commission and committee liaison of the Alabama State Bar, joined with 165 other local and state bar officials from across the country to participate in the ABA's annual Bar Leadership Institute in Chicago, March 15-17. Those attending reviewed law-related issues affecting the legal profession and the public and learned techniques for improving bar association management of such issues. Pictured with Mary Lyn Pike are (L to R) John C. Shepherd, president-elect of the ABA; Walter R. Byars, president-elect of the Alabama State Bar; and Wallace D. Riley, ABA president.



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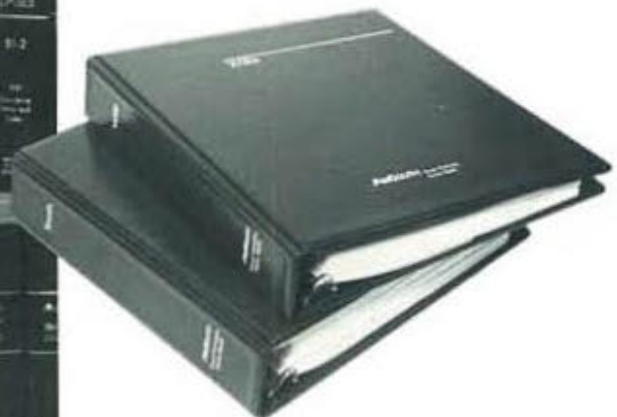
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Rejection of Collective Bargaining Agreements:

An Analysis of *In re Bildisco*

by

Tazewell T. Shepard

and

John A. Wilmer

On February 22, 1984, the Supreme Court of the United States handed down its landmark decision of *In re Bildisco*, 465 U.S. ____ (1984), which addressed the obvious conflicts between the National Labor Relations Act (NLRA) and the Bankruptcy Code (Code). Amid much publicity and commentary from union and management advocates, the Court ruled unanimously that a bankruptcy court may permit rejection of a collective bargaining agreement if the debtor-employer can show that the agreement is burdensome and that equities balance in favor of rejection.

In a more controversial five-man majority decision, the Court also ruled that a debtor-employer does not commit an unfair labor practice by implementing a rejection or modification before obtaining formal approval of the bankruptcy court. Accordingly, the National Labor Relations Board (Board) may not enforce the agreement by a charge of unfair labor practices against the debtor.

A great deal of misinformation has been spread about this decision. It is hailed alternatively as a godsend for struggling businesses or a dire example of "union-busting" by the highest court of this country. However, a careful examination of the relevant statutes and prior case law will reveal that the Supreme Court's decision was neither unprecedented nor surprising to bankruptcy practitioners.

Applicable Bankruptcy Law:

When a petition for reorganization is filed under Chapter 11 of the Code, an automatic stay issues from the bankruptcy court to halt all acts or proceedings to collect, assess or recover a claim against the debtor arising before the petition was filed. 11 U.S.C. Section



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Tazewell T. Shepard is a member of the Huntsville law firm of Bell, Richardson, Herrington, Sparkman & Shepard, P.A. He holds a B.A. from Dartmouth College and a J.D. from the University of Alabama. He has served as a Trustee in Bankruptcy for four years and is secretary of the State Bar Committee on Bankruptcy Law.

362(a). The purpose of the automatic stay is to give the debtor temporary relief from the pressure of its creditors and an opportunity to create and implement a reorganization plan under which its unsecured creditors would receive more than by liquidation under Chapter 7. Reorganization provides the opportunity to try a variety of measures, such as paying off open account debts over a period of several years, renegotiating the amount and frequency of mortgage payments and rejecting unexpired leases and executory contracts.

Section 365 of the Code provides authority and guidelines for the assumption or rejection of an executory contract or an unexpired lease by the trustee or Chapter 11 debtor-in-possession. Such action may be taken, subject to approval by the U.S. Bankruptcy Court, at any time before the confirmation of a plan of reorganization, or it may be included as a provision of the plan. 11 U.S.C. Sections 365(d)(2) and 1123(b)(2). If neither approach is taken by the debtor-in-possession, the other party to a contract or lease may apply to the Court for an order directing that the contract or lease be assumed or rejected within a reasonable period of time. See *Philadelphia Co. v. Dipple*, 312 U.S. 168 (1941).

The authority of bankruptcy courts over executory contracts and unexpired leases has been recognized as far back as the Bankruptcy Act of 1898. Section 313(1) of that Act stated that upon the filing of a petition for reorganization "the Court may . . . permit the rejection of the executory contracts of the debtor . . ." 11 U.S.C. Section 713(1) (repealed). As used in the old Bankruptcy Act, the terms "assumption" and "rejection" gained clear working definitions. Assumption of a contract or lease signifies that the debtor-in-possession "has agreed to perform the obligations thereunder, and that any breach of such obligations will give rise to an allowable claim against the estate having priority as an expense of administration over the claims of unsecured general creditors. Rejection of an executory contract or unexpired lease constitutes an election . . . to breach the contract or lease, and subjects the property of the estate to an allowable claim for dam-

ages arising from such breach." *Collier on Bankruptcy*, Section 68.02 (15th ed. 1981). See 11 U.S.C. Sections 365(g) and 502(g).

Only within the last fifteen years has there been a concerted effort by courts and commentators to arrive at a practical definition of the term "executory contract" for use with Section 365 or its predecessor, Section 313. It has been defined as "a contract that has not as yet been fully completed or performed . . . the obligation of which relates to the future." *Black's Law Dictionary* (5th ed. 1979) at 395. However, Professor Vern Countryman of Harvard Law School proposes a better definition for bankruptcy purposes, that there must be currently unperformed material obligations by both the debtor and the non-debtor party to the contract. In accord, the legislative history on Section 365 states that "performance remains due to some extent on both sides." Thus, a promissory note cannot qualify as an "executory contract" under Section 365 because one party has already performed fully.

Union advocates have repeatedly argued that Congress did not intend for Section 365 to apply to collective bargaining agreements. Unfortunately, the legislative history of Section 365 does not reveal Congress's true intent. However, three years prior to the 1978 enactment of the Code, the U.S. Court of Appeals for the Second Circuit decided in two frequently cited cases that a collective bargaining agreement could be rejected as an executory contract under Section 313 of the old Bankruptcy Act, predecessor to Section 365. The failure of Congress to take any action to nullify these decisions when it enacted the Code is significant. See *Shopman's Local Union v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975); *Brotherhood of Railway, Airline, and Steamship Clerks v. REA Express*, 523 F.2d 164 (2d Cir. 1975) cert. denied 423 U.S. 1017 (1975).

It is equally significant that Congress did give special treatment to other types of contracts in the Code. Section 1167 protects a collective bargaining agreement that is subject to the Railway Labor Act. The legislative history of this section reflects that Congress intended to specifically exempt

RLA collective bargaining contracts from the purview of Section 365. "The subject of railway labor is too delicate and has too long a history for this Code to upset established relationships." H.R. Rep. No. 595, 95th Cong., 1st Ses. 423 (1977). Other types of contracts specifically excepted by Congress as executory contracts are shopping center leases, 11 U.S.C. Section 365(b)(3), and commodities futures contracts, 11 U.S.C. Sections 765 and 766.

Applicable Labor Law:

Employers who ignore collective bargaining agreements commit unfair labor practices and subject themselves to investigation by the Board. In effect, the National Labor Relations Board enforces terms of a collective bargaining agreement by permitting unfair labor practices against parties who unilaterally modify or terminate the agreement. Cf. *NLRB v. Katz*, 369 U.S. 736 (1962).

Mid-term cancellation or modification of a collective bargaining agreement has been held by the Supreme Court to expressly violate the NLRA. See *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 488 (1960); and *H.K. Porter Company v. NLRB*, 397 U.S. 99, 108 (1969). Section 8(d) of the NLRA, 29 U.S.C. Section 158(d), provides that mid-term modification or termination of a collective bargaining agreement is prohibited unless the party:

- (1) Serves a written notice upon the other party to the contract . . . ;
- (2) Offers to meet and confer with the other party . . . ;
- (3) Notifies the Federal Mediation and Conciliation Service . . . ;
- (4) And continues in full force and effect without resorting to strike or lockout all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later . . .

Although other terms of an agreement are enforced under Section 8(d), the Board has recently refused to apply the charge of unfair labor practices beyond express contractual language. In *Milwaukee Spring, Division of Illi-*

nois Coil Spring Company, 268 NLRB No. 87 (1984), the Board held that because a collective bargaining agreement did not expressly prohibit the transfer of bargaining unit work, the employer was not required to obtain the union's consent before transferring it.

However, the continuing duty to bargain during the life of a contract has been strictly enforced since the early days of the NLRA. *NLRB v. Sands Manufacturing Company*, 306 U.S. 332 (1939). The courts have long held that the exceptions to 8(d) do not relieve an employer of the duty to bargain, even if the subjects were neither discussed nor embodied in any terms and conditions of the contract between the parties. See *NLRB v. Jacobs Manufacturing Company*, 196 F.2d 680 (2d Cir. 1952), and *NLRB v. Lyon Oil Company*, 352 U.S. 282 (1957). In *Katz, supra*, at 739, an employer's unilateral changes during the term of the contract were condemned by the Supreme Court:

A refusal to negotiate in fact as to any subject which is within Section 8(d) and about which the union seeks to negotiate, violates 8(a) (5) even though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in all good faith bargains to that end.

Although the Federal courts have developed distinctions between mandatory and permissive subjects for bargaining, subjects that "vitally affect" employees are always obligatory subjects. See *NLRB v. Borg-Warner*, 356 U.S. 342 (1958); *NLRB v. American National Insurance Company*, 343 U.S. 395 (1952). Mandatory subjects include "rates of pay, wages, hours of employment or other conditions of employment." *Borg-Warner, supra*, at 360.

The last obstacle to modifying a collective bargaining agreement is establishing the existence of an impasse. After parties have properly engaged in "exhaustive good faith negotiations" to reach "irreconcilable differences," an impasse is said to exist. Compare *Felzer Television, Inc. v. NLRB*, 317 F.2d 420 (6th Cir. 1962). When an impasse occurs, the employer may make unilateral changes consistent with its offers to the union. Compare *NLRB v. Katz, supra*.

Previous Decisions:

"New Entity" Theory

In response to the apparent conflict between Section 365 of the Code and Section 8(d) of the NLRA, Federal appellate courts during the 1970's evolved "the new entity" concept. The U.S. Court of Appeals for the Second Circuit was the first to argue that a Chapter 11 debtor is not the same legal entity as the pre-petition business but rather "a new entity . . . with its own rights and duties subject to the supervision of the Bankruptcy Court." *Shopman's Local Union v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975). The new entity was not a party to the collective bargaining agreement; thus, it is not bound by the requirements of Section 8(d) of the NLRA. Thus, it is free to seek rejection of the agreement by the bankruptcy court under Section 365 of the Code. This concept placed the debtor-in-possession in the position of a successor employer, who is required to negotiate with the collective bargaining unit but is not bound by the basic terms of the prior agreement to which it was not a party.

More recent decisions have attempted to limit or do away with the "new entity" theory. In a 1976 case, the Second Circuit restricted the theory's application to collective bargaining agreements, but this did little to cure the weakness of this legal fiction. As Professor Countryman points out, it is unacceptable "that rights accorded to employees pursuant to a collective bargaining agreement executed pursuant to and protected by Federal labor law can be destroyed by the casual application of a theory devised and applied solely for the purpose of destroying those rights." 57 Am. Bankr. L.J. 302.

In April 1983, the Eleventh Circuit was the first to reject the "new entity" theory in favor of the obvious Congressional intent for bankruptcy law to overrule labor law in certain situations. *In re Brada Miller Freight Systems, Inc.* 702 F.2d 890, (11th Cir. 1983). Judge Tuttle stated at page 897 for the Court:

We do not contemplate that Congress intended the ultimate fate of a corporation under Chapter 11 to rest so

largely in the hands of the company's protected employees. There simply exist too many other critical interests, those of other employees, creditors, and shareholders, the protection of which provides the stimulus for the bankruptcy laws, for this Court to conclude that the collective bargaining agreement was meant to hold a stranglehold position, totally immune from the flexibility proved by Section 365.

The protection of the employees' interests, as the Court pointed out, lies not in deference to Section 8(d) of the NLRA, as urged by the unions, but in the test applied by the bankruptcy court in deciding whether to allow rejection of the collective bargaining agreement.

The Rejection Test

A debtor need only present evidence of burdensomeness to reject an ordinary commercial contract, but both courts and commentators have agreed for years that this "business judgment" test is insufficient to protect the rights of employees under a collective bargaining agreement. However, the for-

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mulation of an acceptable test for that situation has been difficult. In *Kevin Steel, supra*, the Second Circuit declared that a bankruptcy court may approve the rejection of employment contracts only after careful scrutiny and balancing the equities on both sides. In a case decided only a few months later, the same court added the additional requirement that the bankruptcy court must find that the burdensome collective bargaining agreement would otherwise defeat efforts to save the failing company from collapse. *Brotherhood of Railway, Airline, and Steamship Clerks v. REA Express*, 523 F.2d 164 (2d Cir. 1975), cert. denied 423 U.S. 1017 (1975). Apparently the Court did not realize that this strict requirement makes it almost impossible for a bankruptcy court to balance the interests of employees, creditors, shareholders and other parties of interest.

In its decision in *In re Bildisco*, 682 F.2d 72, cert. granted 103 S. Ct. 784 (3d Cir. 1982), the Third Circuit noted the inconsistent requirements of these Second Circuit decisions and rejected the additional test of *REA Express* for two reasons. First, the courts noted that it may be impossible to predict the success of a reorganization until very late in the proceedings. Second, the court observed that the *REA Express* requirement "unduly exalts perpetuation of the collective bargaining agreement over the more pragmatic consideration of whether the employees will continue to have jobs at all." *Id.* at 80. This position was also adopted by the Eleventh Circuit in *Brada Miller, supra*, as the only view consistent with the Federal bankruptcy policies underlying the Code.

The *Bildisco* Decision:

In April 1980, Bildisco and Bildisco, a New Jersey partnership which distributed building supplies, filed a voluntary petition for reorganization under Chapter 11 and was authorized by the bankruptcy court to continue operating its business as a debtor-in-possession. When the petition was filed, almost half of the debtor's employees were represented by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, with whom the debtor had

negotiated a collective bargaining agreement that would expire in April 1982. Since January 1980, the debtor had failed to meet several of its obligations under the agreement, including the payment of health and pension benefits and the remittance to the union of dues collected, and in May 1980, the debtor refused to pay wage increases called for in the agreement. Instead, the debtor requested and received permission from the bankruptcy court to reject the agreement, and the union was allowed thirty days in which to file a claim for damages stemming from the rejection. The U.S. District Court upheld the order approving rejection.

In the summer of 1980, the union filed unfair labor practice charges with the Board, which found that the debtor had violated Sections 8(a)(5) and 8(a)(1) of the NLRA by unilaterally changing the terms of the collective bargaining agreement and by refusing to negotiate with the union. The Board ordered the debtor to make the pension and health contributions and to remit dues to the union.

Consolidating the union's appeal from the District Court's order and the Board's petition for enforcement of its order, the Third Circuit held that a collective bargaining agreement is an "executory contract" subject to rejection by a debtor-in-possession under Section 365(a) of the Code; that the debtor's rejection of the agreement was not qualified by Section 8(d) of the NLRA; and that to obtain rejection a debtor-in-possession must show that the agreement burdens the estate and that the equities balance in favor of rejection. The Court refused to enforce the Board's order, holding that under the Code a debtor-in-possession is a "new entity" not bound by the debtor's prior collective bargaining agreement. Both the union and the Board appealed.

On February 22, 1984, the Supreme Court affirmed the decision of the Third Circuit. Justice Rehnquist delivered an opinion in which the Court was unanimous on Parts I and II. Justice Brennan filed an opinion which concurred on Parts I and II and dissented on Part III. He was joined in his dissent by Justices White, Marshall and Blackmun.

In the unanimous portion of the deci-

sion, the Supreme Court found that the language "executory contract" in Section 365 includes collective bargaining agreements and that the test for rejection should be whether the debtor can show that the agreement burdens the estate and that the equities are in favor of rejection. The Court stated:

The standard adopted by the Court of Appeals for the Second Circuit in *REA Express* is fundamentally at odds with the policies of flexibility and equity built into Chapter 11 . . . We agree with the Court of Appeals below, and with the Court of Appeals for the Eleventh Circuit in a related case, *Brada-Miller* . . . that the Bankruptcy Court should permit rejection of a collective bargaining agreement under Section 365(a) of the Bankruptcy Code if the debtor can show that the collective bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract. The standard which we think Congress intended is a higher one than that of the "business judgment" rule, but a lesser one than that embodied in the *REA Express* opinion

The Supreme Court declared that the policies of the NLRA are adequately served if the bankruptcy judge finds that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory result. The bankruptcy court must then determine that the policy of Chapter 11 would be served by rejection of the collective bargaining contract. In balancing the interests of the debtor, the creditors and the employees, the Court "must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection upon the employees."

In the second portion of the Rehnquist opinion, a five member majority of the Court held that a debtor-in-possession does not commit an unfair labor practice when it rejects or modifies a collective bargaining agreement before such action is approved by the bankruptcy court. The Court pointed to the difference between a Chapter 11 reorganization, in which the debtor has

until plan confirmation to accept or reject an executory contract, and a Chapter 7 liquidation, in which the trustee has only sixty days after the petition is filed in which to make such a decision. Justice Rehnquist wrote: "This difference between the two types of proceedings reflects the considered judgment of Congress that a debtor-in-possession seeking to reorganize should be granted more latitude in deciding whether to reject a contract than should a trustee in liquidation." The Court also noted that since the claim of damages arising out of rejection of a collective bargaining agreement must be made through the bankruptcy court, the Board is necessarily precluded from enforcing the agreement by filing an unfair labor practice charge against the debtor. The majority opinion reasoned that from the filing of a bankruptcy petition until formal acceptance, the collective bargaining agreement is not an enforceable contract within the meaning of Section 8(d). Thus, the debtor need not comply with Section 8(d) or bargain to impasse under Section 8(a)(5) before seeking the bankruptcy court's permission to reject the agreement.

In the majority opinion, Justice Brennan approved the Court's repudiation of the *REA Express* rejection requirement and the "new entity" legal fiction but argued that permitting a debtor to alter a collective bargaining agreement prior to court review seriously undermines the goals of the NLRA. He found no legal basis for the majority conclusion that the collective bargaining agreement is not an enforceable contract within the meaning of Section 8(d), stating on pages 11 and 12:

[I]f the debtor-in-possession assumes the contract, that assumption relates back to the time that the bankruptcy petition was filed . . . If the contract is eventually rejected, rejection constitutes a breach effective immediately before the date of the filing of the petition . . . Therefore, whether the contract is accepted or rejected, it will support a claim that arises out of the debtor's obligations in the post-petition period.

In addition to the intent of Congress as he saw it in the relevant bankruptcy and labor statutes, Justice Brennan based his conclusion on two question-

able considerations. The first is the position of the Board that Section 8(d) should remain applicable after a petition is filed, which he found compelling because of the Board's "special understanding of 'the actualities of industrial relations.'" *Id.* at 15. The second consideration is the "threat to labor peace" which Brennan saw in application of the majority opinion. In a footnote, Brennan cited with considerable alarm a newspaper article describing the strikes which followed unilateral wage reductions by Chapter 11 debtors Continental Airlines and Wilson Foods Corporation. Brennan closed his opinion with the comment "I do not think that the prospects for a successful reorganization will be seriously impaired by holding that Section 8(d) continues to apply." *Id.* at 20.

Conclusion:

In the *Bildisco* decision, the Supreme Court gave its approval to the most sensible portions of recent appellate court decisions in this area. Whether this rational and practical approach

will be allowed to stand is uncertain, however, as Congress is already being lobbied heavily by union representatives to pass remedial legislation. Congressman Rodino of New Jersey has promised to introduce a bill which would set a more strict standard for rejection than that heretofore applied by any court.

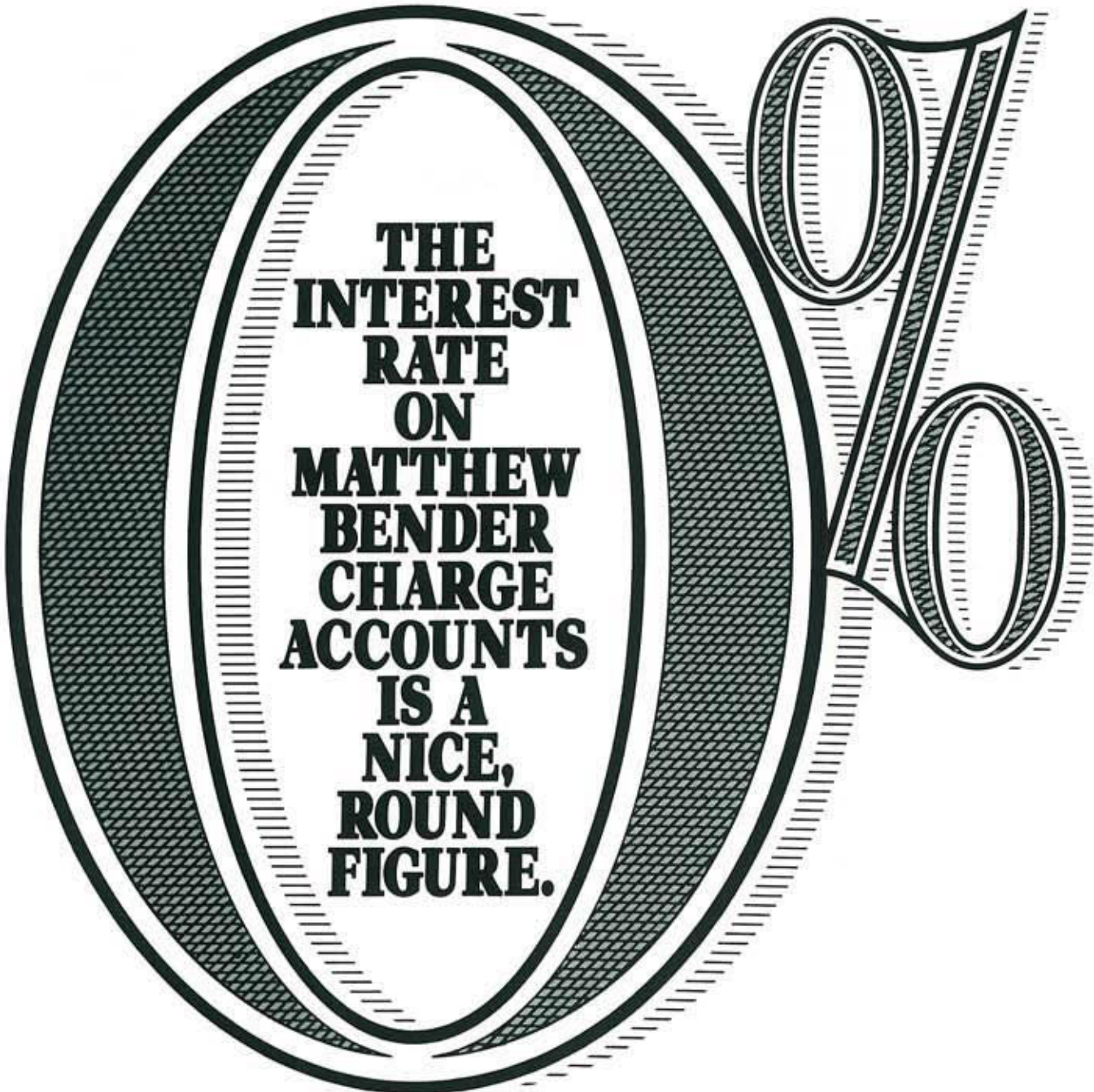
In the meantime, Federal courts will consider many related issues, such as whether the Norris-La Guardia Act prevents a bankruptcy court from enjoining employees from striking against a Chapter 11 debtor, *Cf. Matter of Crowe and Associates, Inc.*, 713 F.2d 211 (6th Cir. 1983) (dissolving a bankruptcy court injunction) and what right, if any, a union has as the collective bargaining representative of the employees to participate as a party-in-interest in the bankruptcy case of the debtor-employer. *Cf. In re Altair Airlines, Inc.*, BK No. 82-53399G, Memorandum Opinion (denying the application of the Air Line Pilots Association to join the committee of unsecured creditors). Undoubtedly, there is much more to come. □

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Bar Briefs

Survey results say yea

In March the entire membership of the bar was surveyed in order to learn the consensus of Alabama attorneys concerning mandatory continuing legal education.

Sixty-three percent of those surveyed responded to the mail ballot with 75.9% (3,456) approving MCLE and 24.1% (1,101) disapproving of the mandatory requirement set by the Alabama Supreme Court in 1981.

In 1980, previous to the court's mandate, another membership poll was taken with 59% of those responding favoring the implementation of the proposed mandatory continuing legal education program.

Former governor appointed to appeals court

On Monday, April 2, 1984, former Governor John M. Patterson was appointed to the Alabama Court of Criminal Appeals by Governor George Wallace. The appointment came after Hubert Taylor, Wallace's brother-in-law who had served on the court just over a year, announced his resignation.

Patterson, a 1949 graduate of the University of Alabama School of Law,

opened a law office in Montgomery in 1963 after completing his term as governor. Patterson, who has wanted to serve on the appellate bench a number of years, says his appointment to the court is "a culmination of a life's ambition."

Patterson officially became judge the Tuesday following the appointment after taking an oath of office before Alabama Supreme Court Chief Justice C.C. "Bo" Torbert. The public investiture ceremony was on Monday, April 9, in the Supreme Court Room.

Budget cut may affect services to lawyers

Many Alabama attorneys may have noticed a recent curtailment in the services of the Corporate Division of the Secretary of State's Office. According to Secretary of State Don Siegelman, the cut in services is due to inadequate funding which would assure their continuation.

Siegelman says the Secretary of State's Office has been underfunded since the adoption of the Business Corporations Act. They are making an effort to computerize name reservations, registered agents and other information essential to Alabama attorneys.

ABA London meeting, July 14-20, 1985

The American Bar Association will shortly be sending out the registration forms for the 1985 Annual Meeting in London. This extended meeting will follow the stateside meeting in Washington, D.C. which convenes July 4th.

The Alabama State Bar will not have a charter flight to this meeting. Travel arrangements have been contracted to American Express Travel Services by the ABA. They will handle the movement of all persons desiring to attend the ABA meeting and it is strongly recommended that you make your arrangements through the ABA travel services program due to the rooming requirements attendant thereto and the fact that lodging in the more desirable hotels is blocked through the ABA.

It is anticipated that registrations will be heavy as always and you should not delay in registering. It is much easier to cancel than it is to make arrangements later. You should direct any inquiries regarding travel to and from the London meeting to American Express Travel Related Services, P.O. Box 790459, Dallas, Texas 75379.

American Express has made travel arrangements commencing from a wide range of gateway cities. Atlanta is one of those cities. There are also limited accommodations between New York and Southampton on the *Queen Elizabeth II*. You may also contact American Express by calling the toll free number which is 1-800-527-0297.

The State Bar has arranged an IN-TRAV Adventure which will include tours of Ireland and Scotland with the concluding four-day portion of the tour in London during the ABA meeting. These plans negate your having to do other than register for the ABA meeting and purchase tickets to such ABA events as you desire since travel

and lodging are included in the IN-TRAV program. The cost will be approximately \$2,400 per person for the two week trip.

Medical examiners adopt rules for p.c.'s

The State Board of Medical Examiners, at its March 21, 1984 meeting, adopted final rules for professional corporations incorporated by physicians under the revised Alabama Professional Corporation Act, which became effective January 1, 1984. The rules require that professional corporations created by physicians and osteopaths file copies of incorporation documents and non-financial portions of annual reports with the State Board of Medical Examiners.

Attorneys and other persons interested in obtaining copies of the rules should address requests to Executive Director, State Board of Medical Examiners, P.O. Box 946, Montgomery, Alabama 36102 (205-261-4116).

New section on family law

The Alabama State Bar Committee on Family Law has determined the need for a new Section on Family Law and the Law of Domestic Relations. The committee has adopted by-laws, has elected officers, has petitioned the Board of Bar Commissioners for Section status, and has made plans for a program at the Alabama State Bar Annual Meeting in July. The first edition of a regularly issued newsletter will be forthcoming shortly and the committee is now soliciting charter members.

The Family Law Committee invites you to join the Section and ask that

you send the initial dues in the amount of \$15. These dues will be used to publish the newsletter and to obtain speakers in the Family Law area. Send your checks in the amount of \$15 payable to the Family Law Section, P.O. Box 2141, Birmingham, Alabama 35201-2141.

The first officers of the Section are Sam Rumore, Jr., of Birmingham, chairman; Vanzetta Penn Durant of Montgomery, vice president; Jerrilee Sutherlin of Huntsville, secretary; and Steve Arnold of Birmingham, treasurer.

Malandro materials available

Comments from "best seminar I have ever attended" to "super, could have spent the whole day" to "I wish all CLE were this interesting" followed Loretta Malandro's *Psychology of a Trial* seminar presented at the Midyear Conference of the Alabama State Bar.

Malandro, who has conducted extensive research into the visual details which influence jurors and that may ultimately affect the outcome of trials, advised lawyers on how they and their clients and witnesses can make favorable impressions in the courtroom.

Materials printed in connection with this seminar, including topics on linguistic techniques for persuasion, kinesic and verbal behaviors indicating emotion or situational anxiety, and motivating jurors through opening statements, are available through the Alabama State Bar. Send your check for \$5.00 made out to the Alabama State Bar to P.O. Box 671, Montgomery, Alabama 36101. *The Psychology of a Trial — Behavior Strategies for Rapport, Power, and Persuasion* booklet will only be available while the current supply lasts, so order soon.



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Committee Work to Continue

by Mary Lyn Pike

The close of the 1983-84 committee year is approaching. Continuity has been assured by limiting membership on committees to those who expressed a desire to serve the Bar in particular areas of concern, staggered terms for committee members, and excellent record-keeping by committee secretaries.

President-elect Walter R. Byars has already begun to build on the foundation laid by President Hairston. A committee preference questionnaire was sent to all members last month. Included were questions soliciting members' opinions on services provided by the Bar and services needed. Committee appointments for 1984-85 will be made this month and committee members will be invited to the "kickoff" breakfast to be held on Friday, July 13, during the Bar's annual meeting.

Focus on the Profession

The results of the efforts of the **Committee on the 1984 Midyear Meeting** were obvious to anyone who attended the meeting March 9-10 in Montgomery. Dexter Hobbs of Montgomery served as chairman. Serving with him were Cliff Heard, Keith Norman, Victor Price, and Jerome Smith of Montgomery, Eddie Raymon of Tuskegee, and Bob Meadows of Auburn. Reggie Hamner served as staff liaison to the committee.

The **1984 Annual Meeting Committee** is hard at work on plans for the Bar's gathering at the Riverview Plaza in Mobile, July 12-14. The Young Lawyers Section will present a very practical CLE seminar on July 12 and will sponsor a party aboard the *USS Alabama* that night. Last year's successful "kickoff" breakfast for committees will be repeated on Friday. The general sessions will focus on tax shelters for lawyers and memory improvement. There will be a workshop on prepaid legal services, the inaugural presentations of the Family Law Committee and the new Bankruptcy and Commercial Law Section as well as the usual informative meetings of other sections. In lieu of the traditional Friday night dinner and dance, participants will be treated to a nightcap party featuring an array of desserts and after dinner drinks and the music of Mac Frampton. Saturday will begin with a breakfast for all participants, followed by the presentation of awards, the president's address, a speaker of national prominence, and the annual business meeting. Bar members should receive the convention program within a month.

The **Committee on Legal Education and Admission to the Bar** is considering surveying a representative sample of the Bar, seeking opinions regarding law school courses and curricula. The committee is also studying

the feasibility of a mandatory internship program for law school graduates. It has voted unanimously to support the Bar's decision to limit admissions to graduates of accredited law schools.

The **Task Force to Evaluate the Lawyer Explosion** recently turned its attention to law school applications and admissions patterns. Interviews with the deans of admissions of the two accredited law schools completed the task force's information gathering sessions and formal observations and recommendations will be presented to the Board at its May meeting.

The **Task Force on Peer Review** is gathering information from prior Bar committees that have dealt with questions of continuing legal education, specialization, advertising, and other matters that relate to the peer review issue. It is also making inquiries to other bars and to the medical and accounting communities regarding their practices and procedures. According to Chairman L.B. Feld, the task force's emphasis will be on developing a program that is both voluntary and objective.

The **Task Force on the Establishment of a Litigation Section** recently reported its opinion that such a section should be formed to provide an interdisciplinary forum for the trial bar as a whole. Efforts to form a section are being made. Interested persons should contact Chairman L. Tennent Lee at P.O. Box 68, Huntsville, Alabama, 35804. (205) 533-9025.

Chairman Richard Carmody and members of the **Bankruptcy Law Committee** were commended by President Hairston as their work culminated in the formation of the Bankruptcy and Commercial Law Section of the Alabama State Bar on March 8, 1984. The section will hold its organizational meeting during the annual meeting of the Alabama State Bar, July 12-14 in Mobile. Persons interested in becoming charter members of the section should contact Robert P. Reynolds, P.O. Box 2427, Tuscaloosa, Alabama, 35403. (205) 345-6789. Initial dues are \$15, payable to the section.

Members of the **Legislative Liaison Committee** are working to obtain

favorable legislative action on bills introduced on behalf of the Alabama State Bar. One bill removes the two year license fee exemption granted to new members of the Bar; the second raises the annual license tax from \$100 to \$150 annually. The bills are needed because it has been seven years since license fees were raised and, despite efficient operating procedures, inflation has caught up with the organization. For more information, see 45 *Alabama Lawyer* 74 (1984).

The Task Force to Study Political Action Committees has addressed the legality of state bar PAC's, the scope of permissible activities, the desirability of an Alabama State Bar PAC and possible organization, functioning, and governance of such a committee. Members have reviewed the structure and functioning of lawyer political action committees in Florida, Michigan, Washington, South Dakota, Illinois, Ohio and Minnesota. The task force will report to the Board of Bar Commissioners this month.

Bench-Bar Relations

Representatives of the **Federal Bankruptcy Courts Liaison Committee** have met with most of the judges on the bankruptcy bench in Alabama, gathering information on how the committee might help both the bench and the bar. The committee has also met with Arthur Briskman, counsel to the Senate committee charged with resolving the plight of U.S. Bankruptcy Courts. This committee will continue its work within the structure of the new Bankruptcy and Commercial Law Section.

Members of the **Federal Judiciary Liaison Committee** have met with federal judges across the state. In its preliminary report to the Board of Bar Commissioners, the committee recommended that federal judges support the State-Federal Judicial Council and that the Council be invited to meet during the annual meeting of the State Bar. It further recommended that the admission procedure of the Northern District be adopted by all three federal district courts, that a uniform procedure for admission *pro hac vice* be adopted, and that a uniform method of dealing with

the discipline and disbarment of lawyers be adopted. Lastly, the committee proposed a new procedure for the appointment of lawyers to represent indigent plaintiffs in civil rights cases.

Public Service

The Alabama Lawyer Referral Service Board of Trustees is seeking to increase the number of attorneys participating in the service. Education of the Bar as to the advantages of participation is a high priority. Attention is also being focused on the twelve counties that have no attorneys participating in the service. For additional information, see 45 *Alabama Lawyer* 85 (1984) or call 1-800-392-5660.

One of the goals set by the **Task Force on Citizenship Education** is to assist the Alabama Judicial College in reinstating its law-related education program for secondary school

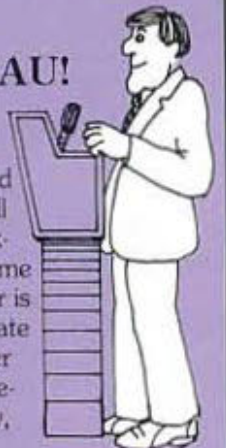
teachers. According to Chairman Larry B. Childs, the task force believes that teachers are a great resource for counteracting an unprecedented lack of understanding about the system of law and government in this country.

The Task Force to Evaluate the Proposed Constitution submitted its report to the Board of Bar Commissioners in October 1983. President Hairston recently requested that the task force continue its service, in view of present legislative efforts at constitutional reform.

The Committee on Legal Services for the Elderly has formed subcommittees on the legal needs of the elderly, education, projects in other states, legislation, liaison with other professions, and finances. Members of the subcommittees are in the process of developing plans of action on the particular topics. □

WE WANT YOU TO JOIN OUR SPEAKERS BUREAU!

The Committee on Lawyer Public Relations, Information and Media Relations is instituting a statewide speaker's bureau to provide speakers for civic organizations, schools, churches and other interested groups. The committee will compile a list of all lawyers in the state who are interested in serving on the speaker's bureau and will endeavor to provide speakers from the same community or general area from which a request for a speaker is received. All requests will be handled through the Alabama State Bar Headquarters. If you are interested in serving as a member of the speaker's bureau please fill out the following form and return it to the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101.



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Tax and Financing Benefits in the Renovation of Historic Buildings

By J. Theodore Jackson

In the last few years there seems to have been an increased interest by lawyers in owning the buildings where their offices are located. Part of this interest results from a desire to avoid significant future increases in rental costs for office space. Part of this interest results from the desire and need of many lawyers for tax deductions generated by a tax shelter.

As a group, lawyers are almost ideally positioned to take advantage of the tremendous tax benefits resulting from the renovation of older structures. Most lawyers wish to be located in the downtown area close to the courthouse. The oldest structures in town are normally located in that area and are the structures which qualify for special tax credits. While not a definitive discussion, this article will review the special tax benefits available for the renovation of historic structures and touch on Historical Preservation Authority financing.

The Historical Renovation Investment Tax Credit

As most lawyers know, the rent for the use of office space is deductible for income tax purposes. However, a dollar has to be paid out in order to receive a deduction of a dollar. No extra or additional tax benefits are available from

the rental of office space and the lawyer does not build up any ownership interest in the office space he is renting. However, if the lawyer buys or constructs a building, he becomes entitled to an interest deduction for money borrowed to acquire or build the building and for depreciation deductions resulting from the ownership of the building.

For several years after the acquisition or construction of the building, the ownership of the building will normally produce a "tax loss" which will generate deductions which the lawyer can use to offset income from his practice or other sources. In addition, Con-

gress has granted special tax credits to persons who renovate existing buildings for commercial use. Although these incentives have varied in the last few years, presently a special investment tax credit is available equal to 15% of the rehabilitation cost for a building at least thirty years old, 20% for the rehabilitation cost of a building at least forty years old and 25% of the rehabilitation cost of a certified historic structure.

This special investment tax credit is available to lawyers who own buildings in which they practice or who lease a building for more than fifteen years and incur renovation costs. The lawyers rehabilitation expenditures must exceed the greater of \$5,000 or his adjusted basis in the building under Internal Revenue Code (I.R.C.) §48(g)(1)(C)(i). The balance of this article will focus on the 25% investment tax credit for the rehabilitation cost of certified historic structures but the same rules will generally apply to the credit for buildings of younger vintage.

A certified historic structure is one that has been listed on the National Register of Historic Places maintained by the United States Secretary of Interior or is a building located in a Historic District that has been listed in the National Register if the building is certified by the Secretary of Interior as being of historic significance to the District. Normally, a building cannot achieve this certification unless it is at least fifty years old.

In order to obtain a listing of the building or of a Historic District on the

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National Register, application is made through the Alabama Historical Commission. The Secretary of Interior has appointed the Alabama Historical Commission as his agent in Alabama for National Register listings. The Historical Commission provides advice and guidance to persons wishing to list a building or district on the National Register. The application is made to the Historical Commission and is screened and, if approved, forwarded by the Commission to the Department of Interior with a recommendation for listing. The Historical Commission is most helpful in guiding the property owner through this process. Obtaining the listing normally will take from three to six months.

After a building is listed on the National Register, the renovation must be conducted in accordance with the standards for historic rehabilitation promulgated by the Department of Interior. Most architects are either familiar with these standards or can easily become familiar with them. It is important to take these standards into account in the early stages of planning for the rehabilitation, so that any problems with the desires and plans of the owner that may conflict with the standards can be identified at an early date. The Alabama Historical Commission is also quite helpful in advising property owners on the consistency of their plans for renovation with the standards. In my experience, the standards are not overly restrictive and few renovation plans have had to be significantly modified in order to comply with the standards.

After renovation is complete, the property owner must obtain a certification from the Secretary of Interior that the renovation work qualifies for the historic investment tax credit. This certification is obtained through the Alabama Historical Commission which will approve the renovation work and recommend the approval of the Secretary of Interior.

The historical investment tax credit cannot be taken on the cost of acquiring the original building in its unrenovated condition or on the cost of land on which it is located. The credit is also not available for any expenditures to enlarge or add on to the building. Al-

though regulations have not been promulgated under I.R.C. §48(g), most planners have been confident that the credit is available on the cost of all materials purchased for the renovation, on the cost of labor in performing the renovation and installing any new materials, on the cost of installing modern plumbing, electrical wiring and fixtures, heating and air-conditioning systems and improvements required by local building or fire codes. In addition, the credit should be available for the cost of architectural and engineering fees, site survey fees, legal expenses in connection with the renovation, builder's risk type insurance during construction and other rehabilitation related costs.

A not uncommon example of the relative costs qualifying for the credit would be a building and land costing \$50,000 to purchase and \$200,000 to renovate. In this example, the credit would be computed on \$200,000 and would generate a historical investment tax credit of \$50,000. The credit is not a deduction, but a credit. Consequently, after the lawyer computed his taxes due in the year that the building was completed, he could then take this \$50,000 credit against the taxes he would otherwise owe the government. If he did not owe enough to absorb the credit, the credit can be carried back three years and forward fifteen years and the lawyer would receive a refund of prior taxes paid or reduce future taxes that will be owed.

There are certain additional rules associated with the historical investment tax credit which the lawyer must keep in mind. One requirement is that the taxpayer taking the historical investment tax credit must depreciate the building on the straight-line method rather than on an accelerated method of depreciation. However, the taxpayer can still use the fifteen year useful life permitted by the accelerated cost recovery rules for depreciation.

Another applicable rule is that the owner of the thirty and forty year old buildings must reduce his basis or investment in the property for depreciation purposes by 100% of the allowable renovation credit. For certified historic structures, the owner must reduce his basis by one-half of the amount of the

credit. In addition, in some circumstances, the alternative minimum tax will reduce the benefits to the taxpayer of the credit.

Also, if the taxpayer sells or disposes of the building within five years, he will have to pay back to the government a portion of the credit taken. Disposition in one year requires repayment of all of the credit. For dispositions thereafter, the recapture percentage decreases 20% per year. I.R.C. §47(a)(5). In addition, disposition of the building can also result in recapture of some depreciation which will result in some of the gain on sale of the building being taxed as ordinary income, rather than capital gains.

These rules do not make the lawyer who renovates a historic structure in a worse position than he would have been without having renovated the structure in the first place. Nor do these rules make the construction of a new building or renovation of a non-qualifying building more advantageous than renovating a historic structure. From a tax standpoint, even if the lawyer sold his building within a few years after renovation, he would still receive significant tax benefits from the renovation not available from the construction of a new building or the renovation of a non-qualifying building.

Preservation Easement Charitable Contribution Deduction

Another tax benefit potentially available to a lawyer renovating a historic structure is the availability of a deduction for a Preservation Easement under I.R.C. 170(h). To establish a Preservation Easement, the property owner executes an easement with a charitable organization such as a city, a local historical preservation organization or the Alabama Historical Commission. The owner agrees to maintain the structural aspects and appearance of the building's facade and may also agree to maintain certain interior features of the building. A qualified appraiser then determines the value of the building free of the easement and the value of the building after being subject to the easement. The difference constitutes a charitable contribution deduction for income tax purposes. The owner and

successor owners will be obligated to adequately maintain the features of the building covered by the easement. In many instances, such an easement will not impose a restriction which the owner considers an undue burden. He will expect to maintain and preserve the features covered by the easement anyway. However, it should be noted, that a subsequent change in desires for the use of the building may be prohibited by the easement. If the owner or a successor owner wishes to demolish the building to build a high-rise skyscraper on the site, the easement will restrict him from doing this.

Some Preservation Easements have been valued as high as 40% of the value of the building. Bear in mind, however, that the value of the charitable contribution for a Preservation Easement requires a corresponding deduction in the taxpayer's basis or investment in the building which will qualify for future depreciation. Consequently, the Preservation Easement does not give the taxpayer a new deduction but simply "accelerates" deductions that would otherwise have been received in the form of depreciation deductions. The charitable contribution of a Preservation Easement may also constitute a partial disposition of a rehabilitated building resulting in partial recapture of the historical investment tax credit. Consequently, careful thought should be given to making such a contribution prior to the expiration of the recapture period which is five years from the date the building was renovated and placed in service. However, this easement can be executed at any time and may be a unique benefit to a lawyer who is seeking to offset income taxes in a given year in which his income is extraordinarily high.

Historical Preservation Authority Financing

Many building renovations have been financed through the issuance of Historical Preservation bonds. These debt instruments are issued by a local Historical Preservation Authority established under §41-10-135 of the Code of Alabama. The local Authority can be organized for a given city or county or group of counties. A number of authorities have been organized for specific cit-

ies or counties in Alabama. The organization of these authorities is not a massive undertaking.

The Historical Preservation Authority issues its bonds or notes to a lender located by the property owner. Although public offerings of bonds or notes can be made through underwriters, virtually all Historical Preservation Authority financings in Alabama have been private placements with a bank or other institution or a small number of individuals. The lender lends money to the Authority and the Authority uses the funds to acquire, renovate, equip and furnish a certified historic structure. The Authority would lease the land, building, equipment and furnishings to the lawyer. Under the lease, the lawyer agrees to pay all debt service on the debt issued by the Authority and to maintain and insure the building. The lawyer also normally personally guarantees repayment of the debt to the lender. The lease provides an option in favor of the lessee to purchase the project for a nominal price when the financing is paid off. Thus, when the financing is paid off, the lawyer owns the building. He is entitled to deductions for interest, depreciation and historical investment tax credit as though he owned the building outright during the financing period.

Interest paid on Historical Preservation bonds or notes are exempt from Federal and State income taxation when received by the lender. Because this interest income is tax exempt to the lender, the lender will give the Authority (and indirectly the property owner) a lower interest rate than is otherwise available. Consequently, the debt service on the loan is lower than it would be without the use of Historical Preservation financing. Interest rates on Historical Preservation Authority financing usually run two to five percentage points below conventional rates. In addition, projects financed through Historical Preservation Authorities frequently qualify for ad valorem property tax exemptions and for exemptions from State and local sales taxes on the cost of materials, equipment and furnishings purchased for the rehabilitated structure.

Historical Preservation Authorities have no money to lend or grant on their

own. They are simply a conduit or vehicle for obtaining a lower interest rate and possible tax exemptions for the property owner. It is the responsibility of the property owner to find the lender and to negotiate the terms of the financing.

In recent weeks, the availability of Historic Preservation Authority financing for newly proposed projects has been greatly clouded by proposed Federal tax legislation. We may not know for several months whether this financing will continue to be available. However, if it is available in the future, this form of financing is highly beneficial to the property owner. This financing is normally not feasible for small amounts of money being borrowed. Although there is no rule of thumb, financings of less than \$75,000 and, in some instances somewhat more, are not large enough to warrant the use of this financing.

Conclusion

The availability of the historic investment tax credit for the renovation of historic structures makes historic renovation projects among the best tax shelters available. By virtue of the credit, the Federal government pays about one-fourth of the cost of renovation in the year the renovated building is placed in service. Lawyers desiring to own their office building should seriously consider acquiring and renovating a historic structure. The credit can make the acquisition and renovation of a historic structure significantly cheaper than the acquisition or construction of a newer office building.

In addition, many lawyers have taken great pride in restoring and maintaining a magnificent landmark for current and future generations to see and enjoy. For many buildings, the quality of the materials and the decorative features of a renovated historic building are simply not available in new construction. The rewards of historic renovation include these psychic benefits in addition to the tax benefits and the possible cheaper cost of acquiring office space by virtue of the tax benefits. If Historical Preservation Authority financing continues to be available, such financing even further reduces the cost of the acquisition of such office space. □

Lawyers 'Rehabilitating' Statewide

by Jen Nowell

Alabama has many beautiful, old historic cities and towns. A decade ago, with the help of preservationists who effectively lobbied to promote their interests in preserving a part of our past, Congress passed acts providing federal tax incentives to those inclined to take a part in the preservation effort.

Until less than a decade ago, new construction of homes and offices had a financial advantage over the rehabilitation of older historic structures. For many, many years these structures were left untouched and some even demolished, but now there is an enticing financial alternative and rehabilitation of older structures has become a

trend. More and more of these older buildings are finding new life, and our cities and towns are benefitting as we refurbish these ties with our past.

The U.S. Department of the Interior has published guidelines for those interested in buying older structures and taking advantage of these tax incentives. In these guidelines rehabilitation is defined as "the process of returning the property to a state of utility, through repair or alterations which makes possible an efficient contemporary use while preserving those portions and features of the property which are significant to its historical, architectural and cultural values." In the past several years, lawyers have been the lead-



Houston and Martin — Eufaula

ers in the adaptive reuse of old buildings — rehabilitating old buildings for modern uses. Let's take a look at some of these law offices statewide.

A more beautiful town than Eufaula could not be found this time of year as dogwoods, azaleas, and crepe myrtle are in full bloom and splash the town with vivid color. Amidst the beauty of nature are dozens of southern homes nearly as lovely. Two Eufaula law offices, with interestingly similar historic ties, enhance the town's southern flavor. One is the law office of **Russell L. Irby**, formerly the home of Governor Chauncey Sparks who served as governor of Alabama from 1943 to 1947. The house was built in 1857, and after it was acquired by Governor Sparks he lived there until his death in 1969. Attorney Russell Irby bought the house in 1982 to use as his law office. The change in the structure from home to office required only minor alterations and, for the most part, the building remains quite similar today as when it was built well over a century ago.

Governor Chauncey Sparks was not only a politician, but was also a practicing attorney and, at a time, was a judge of the Court of Common Pleas in Barbour County. He practiced law for a number of years in what now are the law offices of **Houston and Martin**.

In the 1850s this two-story building of fine architecture was built for use as the McNab Bank. It is one of the oldest bank buildings in Alabama. The walls are three feet thick — *perhaps to hinder a nineteenth century, Butch Cassidy type of bank robbery* — and the rooms have eighteen-foot ceilings. The exterior has heavy ornamental iron grillwork plat-



Russell L. Irby — Eufaula



Myron K. Allenstein — Gadsden

forms, steps, and railings on the front and side. Iron grillwork is also used on the second floor balcony and windows. The windows are twelve feet high and most have the original panes.

This office has been used by Gorman Houston as a law office since 1965 and by Houston and Martin, P.C., since James L. Martin joined the firm in 1974. This building was featured in the September 1978 issue of *Antiques* and the October/November 1978 issue of *American Preservation*. The offices of Houston and Martin, P.C., and Russell L. Irby are located on Broad Street in downtown Eufaula and are both listed on the National Register of Historic Places.

North of Eufaula, in Phenix City, is the law office of **Smith & Smith**, orig-



Sikes & Kelly — Selma

inally built in 1896 by Dr. R.S. Watkins, an early Phenix City physician. The office, pictured on the front cover, was renovated for use as law offices in 1980. In renovating the house for the law office, attorney Sydney S. Smith says "every effort was made to retain its original features and to let the house 'speak for itself,'" which according to the Interior Department is the name of the game in the rehabilitation of older structures.

A former residence known as the Phillips-Acton Home now houses the law offices of **Myron K. Allenstein**, a Gadsden attorney. The two-story frame structure of Victorian influence was built between 1883 and 1897 as the home of Gadsden businessman W.R. Phillips. The structure was constructed on a lot purchased from Colonel Robert B. Kyle who was instrumental in the emergence of Gadsden as a city. He was also organizer of Confederate troops during the Civil War and served as a colonel in the Confederate Army.

In 1943, after changing hands two times, Gadsden merchant William Mitchell Acton purchased the house where he and his wife resided for many years. In 1976 Myron K. Allenstein purchased the home for use as his law office and it, since, has been placed in

the Alabama Register of Landmarks and Heritage. Until she died, Mrs. Acton would call attorney Allenstein's secretary each spring to see how her azaleas and other plants were doing, upon which she had lavished such great care and concern for thirty years.

In the Old Town District in Selma, a historic area which is included on the National Register of Historic Places, are the law offices of **Sikes & Kelly**. John Kelly says their firm is one of the many businesses that have undertaken restoration projects in this district. The main portion of this Victorian cottage is believed to have been originally constructed at Cahaba and moved by mule-drawn wagon train to Selma in the late 1800s. This structure was the only Selma office building to be included in the 1984 Selma Pilgrimage in March.

In Birmingham several law firms have boarded the renovation/restoration bandwagon. One of the first rehabilitation efforts in the area by a law firm was that of **Kracke, Woodward & Thompson** on Highland Avenue



Kracke, Woodward & Thompson — Birmingham

where, since, several other firms have followed suit. Bob Kracke points out that their project was more of a "renovation" as opposed to a restoration inasmuch as the front porch and back porch of the structure were eliminated which altered its exterior architectural lines.

Historically, the home was built by the Merritt family in Birmingham in 1913. The brick used to build the home was fired in a kiln owned by Mr. Merritt in Clanton and is smaller than regulation size which created many problems in the renovation in replacement



Innes T. Tartt, Martha Jane Patton, and Benjamin G. Cohen — Birmingham

of the brick needed where the porches were removed. The building was completed in July 1976, and the structure was awarded the 1977 Award of Merit by the Alabama Historical Commission and has received much public notoriety.

A couple of blocks down the street are the law offices of sole practitioners **Innes T. Tartt, Martha Jane Patton, and Benjamin G. Cohen**. This turn-of-the-century structure, originally the residence of the W.S. Yeilding family, is viewed by many joggers and strollers along historic and picturesque Highland Avenue on Birmingham's



Engel, Hairston, Moses & Johanson — Birmingham

Southside. Many original architectural features retain their 1913 flavor, including the mosaic tile porch, leaded glass entrance and wood beamed ceilings.

The law firm of **Engel, Hairston, Moses & Johanson** has just recently moved their offices around the corner from the Watts Building in downtown Birmingham to the Nabers, Morrow and Sinnige Building. The men for which this building is named were partners in the wholesale and retail drug business and built the structure around 1895. Around 1918, Thompson's Cafe opened on the ground floor and is still operating there today.

This five-story structure is located on the site of the first City Hall and fire station in Birmingham. The handsome white brick building is trimmed with terra cotta. It is an example of the simplified French Renaissance style.

One reason many lawyers prefer their offices in the downtown areas is the close proximity to the courthouses usually located in the center of town. Most historic structures are also located in the older areas of town in or close to downtown, rather than in the more recently developed suburbs.

The law offices of **Winger & Lee** are located a block and a half from the Jefferson County Courthouse and two blocks from the Federal Courthouse in downtown Birmingham. David Winger says he observed the building for eighteen years as he walked up and

down 21st Street on the way to the courthouse and had always thought it would be perfect for a law office. The opportunity presented itself and he acquired it in early 1982. Winger & Lee occupies approximately fifty percent of the building on the ground floor. The remainder of the building is leased to two other law firms.

The building was built in the early 1920s by D. O. Whilldin, an architect who used it for his own office. One of the beautiful exterior features of this office is the finely detailed terra cotta lunette at the entrance, designed by Whilldin. Supported by heavy brackets, it features a beribboned wreath of acanthus leaves framing a cartouche in blue, green and light ochre terra cotta with a stippled surface.

Another interesting Birmingham renovation is the Bradford Building on Second Avenue North which houses the law offices of **David Chip Schwartz**. This building was constructed in 1870 and was recently sold



Winger & Lee — Birmingham

and restored by the new owner Phil Hontzas, proprietor of the well-known John's Restaurant. The office leased by the Schwartz firm is in the central business district, also just a few blocks from the courthouse.

Hank Fannin, a Talladega attorney, has made the use of an 1890 structure built by the Clardy family for his law practice. It has remained unchanged except for a renovation in the late 1940s when two front porches were removed and the entrance installed as it looks today. This old building has been used through the years as a residence, parsonage, boarding house, funeral home, and since 1978 as a law office.



Hank Fannin — Talladega

A Tuscaloosa home built in 1887 on the southwest corner of the intersection of Sixth Street and Twenty Seventh Avenue houses the law offices of **Kennedy, Andres & Adams**.

The original owners were Fred and Lucy Maxwell, who in about 1907 moved the house to the west 60 feet and built a larger, more sumptuous home where this one stood. University of Alabama Electrical Engineering Professor Emeritus Fred Maxwell, Jr., was born in this house and regularly returns to reflect and reminisce.

As with many of these older structures that were originally residences, there are fireplaces in each room.

The architectural influence of some of Frank Lloyd Wright's early work is



Kennedy, Andres & Adams — Tuscaloosa

found in one of the older homes constructed on Leighton Avenue in Anniston. The Bell House, completed in 1908, was occupied by the Charles R. Bell family until the early 1970s. It was restored in the fall of 1978 for use as an architectural design studio and offices. It is part of Alabama's Preserved Architectural Heritage. In 1983 **Wilson, Pumroy and Bryan** purchased the structure for use as their law offices.



Wilson, Pumroy and Bryan — Anniston

In concluding this look at some of the law firms statewide that have taken a vital part in the preservation of older, historic structures, let's take a brief look at a Montgomery law firm on Adams Avenue which was constructed in 1901 during a period of great activity in the city. Originally this building, now the law offices of **Capell, Howard, Knabe & Cobbs**, was a transient boarding house attracting young men trying to make a start in business or a profession in Montgomery.

This downtown office building, through the years, has housed a varied

list of tenants including some young ladies who were members of the world's oldest profession, doctors, the Alabama Education Association, the Montgomery Real Estate Board, and the Jones Law School to name only a few.

In 1942 Jack Capell opened a one room law office on the ground floor. In 1962 he acquired title to the building and, presently, the offices of Capell, Howard, Knabe & Cobbs fill the entire structure.

Across the street from the 57 Adams Building stands the venerable old First Presbyterian Church — the oldest structure in the neighborhood and the undisputed Queen of the Block. In an article written by John B. Scott, Jr., a member of the firm, he enacts a dialogue which might take place between



Capell, Howard, Knabe & Cobbs — Montgomery

these two old buildings on a moonlit night, when the busy downtown traffic has subsided and the street is quiet:

Fifty-seven Adams might sigh over all their friendly old neighbor buildings lost to parking lots and new construction, and the old church building might reply: "Hang in there, sister. Keep your mortar tight and your floor joists from sagging. You still have a long way to go." To which those of us who work under its sheltering eaves would add, "Amen." □

In the next issue, renovations will be continued with a look at a couple of other Montgomery rehabilitations and several in the Mobile area.

Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

"Is it ethical for an attorney or an investigator or other person acting on behalf of an attorney to make recordings or conversations with clients, other attorneys, witnesses or others without prior knowledge and consent of all parties to the conversations?"

ANSWER:

It is unethical for an attorney or an investigator or other person acting on behalf of an attorney to make recordings of conversations with any persons, be they clients, other attorneys, witnesses or others without prior knowledge and consent of all parties to the conversations.

DISCUSSION:

Disciplinary Rule 1-102(A) (4) provides:

"(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, nor be guilty of willful misconduct."

Disciplinary Rule 1-102(A) (6) provides:

"(A) A lawyer shall not:

(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Canon 9 provides:

"A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Ethical Consideration 9-2 in part provides:

"When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidences in the integrity and efficiency of the legal system and the legal profession."

In Formal Opinion 150 (1936) the American Bar Association Committee on Ethics and Professional Responsibility

was called upon to interpret Canon 22, Canons of Professional Responsibility of the American Bar Association, which in part provided:

"The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes."

The Committee held that a conversation between a defendant in custody and his attorney is a confidential communication, and a prosecuting attorney may not ethically use a recording of such conversation without the knowledge and consent of the parties thereto in evidence in the prosecution of the defendant although the conversation might be admissible in evidence as a matter of law.

In Informal Opinion 1008 (1967) the American Bar Association Committee on Ethics and Professional Responsibility, again interpreting Canon 22, held that it is unethical for a lawyer to make a recording of a conversation with his client without the client's knowledge or without warning the client. In the opinion the Committee stated:

"Is it appropriate for a lawyer to make a recording of a conversation with a client without the client's knowledge or without warning the client even though this conversation would not be disclosed to outsiders in violation of the attorney-client privilege and would only be disclosed to outsiders as an exception to the privilege?"

Canon 22 on candor and fairness dealing principally with candor to the court and to other lawyers has been interpreted by this Committee to impose an obligation upon the lawyer to be candid with his client as well.

The making of such a record would be a violation of the obligation of candor and fairness. Therefore, we think that there is an obligation on the lawyer to be candid and fair with his client when he is making a verbatim record of the conversation, and not to make such recording without such disclosure."

In Informal Opinion 1009 (1967) the American Bar Association Committee on Ethics and Professional Responsibility, again interpreting Canon 22, held that it is unethical for a lawyer to record a telephone conversation with another lawyer without advance disclosure and warning to such other lawyer.

In Formal Opinion 337 (1974) the American Bar Association Committee on Ethics and Professional Responsibility held that it is unethical for an attorney to make recordings of conversations with any persons, be they clients, other attorneys, witnesses or others without prior knowledge and consent of all parties. The Committee relied primarily upon Canon 9 and Disciplinary Rule 1-102(A) (4) of the Code of Professional Responsibility of the American Bar Association. The Committee cited Information Opinion 1008 and Information Opinion 1009 and observed:

"So far as clients and other attorneys are concerned, the prior Informal Opinions make the conclusion clear. Attorneys must not make recordings without the consent of these parties to the conversation.

...

While the law is not clear or uniform as to recording by lawyers of conversations of 'other persons,' it is difficult to make a distinction in principle. If undisclosed recording is unethical when the party is a client or

a fellow lawyer, should it not be unethical if the recorded person is a layperson? Certainly the layperson will not be likely to perceive the ground for distinction.

...

DR 1-102(A) (4) of the Code of Professional Responsibility states that, 'A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.' This disciplinary rule is substantially equivalent to, but somewhat broader than, Canon 22 of the former Canons of Ethics which imposed on an attorney an obligation to be candid and fair 'before the Court and with other lawyers.'

...

The conduct proscribed in DR 1-102(A) (4), i.e., conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recording without the consent of all parties."

In Informal Opinion 1320 (1975) the American Bar Association Committee on Ethics and Professional Responsibility held that an attorney could not permit his investigator to surreptitiously record a conversation with a witness without the knowledge and consent of the witness.

The opinions of state and local ethics committees appear to be in virtually unanimous agreement with the foregoing opinions of the American Bar Association Committee on Ethics and Professional Responsibility. Cf., Texas Opinion 84, 16 *Texas Bar Journal* 701 (1953).

In view of the foregoing authorities and the reasons set forth therein, we conclude that you could not record the conversations described in your request for opinion without prior knowledge and consent of all parties thereto. □

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Disciplinary Report

On March 8, 1984, the following disciplinary proceedings took place before the Board of Commissioners of the Alabama State Bar:

Private Reprimand

A lawyer was privately reprimanded for having violated DR 1-102 (A)(4), by misrepresenting a material fact in his response to a complaint that a client had filed against him with the Disciplinary Commission of the State Bar.

Public Censures

Tuscaloosa lawyer **Richard O. Fant, Jr.**, was publicly censured for having violated DR 5-101(C) by having represented a client in connection with a petition to modify a divorce decree, after having previously represented that client's former spouse in connection with an earlier petition to modify the same divorce decree. Mr. Fant was also publicly censured for having violated DR 1-102 (A) (5), DR 1-102(A) (6), and DR 7-102 (A) (7), by having advised a bankruptcy client to transfer ownership of a motor vehicle to the client's mother prior to filing for bankruptcy in order to prevent the loss of the vehicle through the bankruptcy proceedings. Mr. Fant prepared a bill of sale from the client to his mother for the vehicle, failed to list the vehicle on any of the bankruptcy schedules which he prepared for the client, and advised the client to make no mention of the motor vehicle during his testimony in connection with the bankruptcy proceedings.

Gulf Shores attorney **Samuel McKerall** was publicly censured before the Board of Commissioners of the Alabama State Bar for violation of Disciplinary Rules 1-102(A)(4), 1-102(A)(5), 1-102(A)(6), 7-102(A)(5), 7-102(A)(7) and 7-102(A)(8) of the Code of Professional Responsibility. It was found that Mr. McKerall had stated falsely under oath, in his capacity as a notary public, that an instrument had been executed in his presence, when, in fact, the instrument had been signed earlier, outside of

his presence, by a person other than the person whose name was affixed to the instrument and to whose signature he attested. Mr. McKerall admitted that the instrument already had a signature affixed when it was presented to him, and that it was not presented to him by the person that purportedly signed the document, but that he nonetheless attested to the signature.

Decatur attorney **Joe B. Powell** was publicly censured before the Board of Commissioners of the Alabama State Bar for violation of Disciplinary Rule 9-102(A)(1) of the Code of Professional Responsibility. Mr. Powell admitted that he had commingled his personal funds with those of his clients in his attorney's trust account in violation of the Disciplinary Rule cited above which requires that attorneys maintain clients' funds in an identifiable bank account, and that these clients' funds be kept separate and apart from the attorney's personal funds.

Birmingham attorney **Lawrence B. Sheffield, Jr.**, was publicly censured for having violated DR 6-101, DR 7-101(A) (1), and DR 7-101(A) (2), by having willfully neglected a legal matter entrusted to him, having intentionally failed to seek the lawful objectives of his client, and having intentionally failed to carry out a contract of employment entered into with the client in connection with a civil suit that Mr. Sheffield filed and then virtually ignored for over six years.

Suspension

Birmingham lawyer **G. Bennett Haynes, Jr.**, was suspended from the practice of law for a period of 120 days, effective April 30, 1984. Mr. Haynes' suspension results from the Disciplinary Board's findings that Mr. Haynes violated DR 6-101(A), and DR 7-101(A) of the Code of Professional Responsibility of the Alabama State Bar, by willfully failing to respond to a federal judge's order that he show cause, by a specified date, why a civil suit that he had filed should not be dismissed for want of prosecution.

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The Final Judgment



C.E. Porter

Charles Edward Porter, a distinguished trial lawyer and legal advocate, died on February 6, 1984, after a lengthy

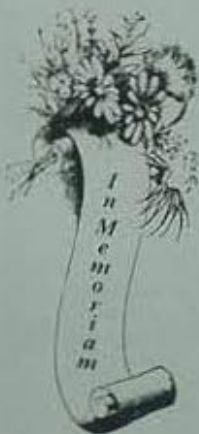
illness. He was fifty-six at the time of his death.

Charlie was born in Georgianna on March 8, 1927. He attended undergraduate school at Auburn University and North Carolina State College and received his LL.B. degree from the University of Alabama Law School in 1950. While in law school, he served as a member of the *Alabama Law Review* and was elected to Farrah Order of Jurisprudence. After graduation from law school, he began his lifelong devotion to the law as a member of the Montgomery law firm of Rushton, Stakely, Johnston & Garrett. During his practice, Charlie served as a member of many state and local bar committees and was elected president of the Montgomery County Bar Association in 1973. His service to his community was equally

distinguished. He was a member of the First United Methodist Church of Montgomery and served as chairman of its administrative board.

Charlie's skills as a trial advocate were well known and respected by his clients and his adversaries. He was meticulous in his preparation for the trial arena, always exhibiting a tenacious grasp of all factual details involved in the controversy. His trial skills led to his selection as a Fellow of the American College of Trial Lawyers in 1981.

Charlie left a proud heritage for his wife, Helen, and two children, Maibeth, a practicing attorney in Birmingham, and Charlie, a medical student at the University of Alabama Medical School. Charlie's law firm, his fellow lawyers, and his community will long miss this devoted servant of the law.



Baker, Martin Dilmus—Guntersville
Admitted: 1979 Died: March 16, 1984

Martin, John Clark—Tuscumbia
Admitted: 1938 Died: March 9, 1984

Mayhall, Roy—Jasper
Admitted: 1923 Died: March 11, 1984

Oliver, William Seth—Panola
Admitted: 1948 Died: March 14, 1984

Pruitt, Ira Drayton—Livingston
Admitted: 1933 Died: February 6, 1984

Rowe, Braxton Bragg, Sr.—Enterprise
Admitted: 1911 Died: March 13, 1984

Rudolph, Edward Maynard—Albertville
Admitted: 1949 Died: March 1, 1984

St. John, Finis Ewing, Jr.—Cullman
Admitted: 1931 Died: March 6, 1984

Stolsworth, Carl Wayne—Tuscumbia
Admitted: 1975 Died: February 12, 1984

Walters, Wallace Darby—Montgomery
Admitted: 1928 Died: December 31, 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 appreciate your assistance in providing biographical information for *The Alabama Lawyer*.



B.B. Rowe, Sr.

Braxton Bragg Rowe of Enterprise died on March 13, 1984. He was seventy-three.

"Brac" Rowe was born on March 13, 1911, in New Brockton, Alabama. He attended Troy State University and the University of Alabama and earned his law degree from the University of Alabama School of Law in 1942.

"Brac" was a member of the Coffee County, Alabama and American Bar Association. In addition to his activities as a member of the legal profession, he was a long time member of the Enterprise Rotary Club and the First United Methodist Church of Enterprise.

"Brac" was a lawyer's lawyer and was a peoples lawyer, and proud of it. His interests were the practice of law and his family. He was an uncommon lawyer and an uncommon man. He had an old-fashioned sense of duty toward his clients which compelled him to be not just their lawyer, but their friend.

Friends of "Brac" prized his superior mind, his crisp yet positive wit, and his mastery of the anecdote. The Bar, his partner, and his family are richer for having had Braxton B. Rowe with them these years, yet he leaves an empty place in the hearts and minds of those who have lost a true and trusted friend. His companionship and gracious charm will be missed.

In September, "Brac" celebrated his fiftieth wedding anniversary with his wife, Pearl Lewis Rowe, who survives him. He is also survived by two sons, Braxton B. Rowe, Jr., of Athens, Georgia, and Charles Warren Rowe, who was in the practice of law with his father in the Enterprise firm of Rowe,

Rowe, and Sawyer. His daughter is Margaret Ann Rowe Fogleman, also of Enterprise.



F.E. St. John, Jr.

Finis Ewing St. John, Jr., of Cullman died on March 6, 1984. He was seventy-four.

Finis Ewing St. John, Jr., was born in Cullman on October 14, 1909. He attended Howard College (now Samford University) in Birmingham and graduated from the University of Alabama School of Law in 1931. He then went into the practice of law in Cullman with his father, Finis Ewing St. John, Sr., who in 1895 founded the law firm where the younger St. John practiced until his death. His son, Finis III; grandson, Finis IV; and daughter-in-law, Juliet G. St. John joined the firm in the years that followed.

Mr. St. John served two terms in the Alabama State Senate beginning his first term in 1939 and was a member of the Alabama Code Committee of 1940. His grandfather, father, uncle, cousin and son also served in the Alabama Legislature dating back to the year 1852.

For many years Mr. St. John was city attorney for the City of Cullman. He was a past president of the Kiwanis Club and the Cullman County Bar Association. He was a Fellow of the American College of Trial Lawyers and a member of both the Alabama and American Bar Associations. He also served as president of Improved Sav-

ings and Loan and as a director of the Parker Bank.

Finis St. John, Jr., was a great lawyer with a keen mind, an understanding of human nature, great wit and capacity for hard work. Sympathy is expressed to his wife, Mary Jackson St. John and two sons, Finis III and Warren. He will be greatly missed by his family, friends and fellow members of the bar.



J.H. Curry

John Hardy Curry of Carrollton died on January 14, 1984. He was eighty-two.

"Mr. John," as he was affectionately called, was a 1925 graduate of the University of Alabama School of Law. After admission to the bar, he began practice with his father, M.B. Curry, in the law partnership of Curry & Curry. From 1935 to 1940 he worked with the U.S. Government in the legal department of the U.S. Department of Agriculture in Montgomery. He then returned to Carrollton to resume practice with his father until the senior Curry's death. In 1969, Mr. Curry and W.O. (Buddy) Kirk, Jr., began the firm of Curry and Kirk and there he remained until his recent death.

Mr. Curry was a member of the Carrollton Baptist Church where he served faithfully as a deacon and leader of the Men's Bible Class for over thirty years. He was a man of God and expressed this in his daily life. His generosity in services and material means for the cause of Christianity was widely felt through his church and his community.

At his death, Mr. Curry was serving

as a member of the Board of Directors of the Pickens County Hospital Association and had served on this board consecutively for more than twenty-five years.

Mr. Curry was endowed with the basic gifts of love, honesty and loyalty, and invested these qualities among his acquaintances who soon became friends. He leaves behind a legacy of hard work, accomplishments, love and service to his fellow citizens and to God.

Sympathy is expressed to his wife of forty-nine years, Lola B. Curry, and to his many friends.

Ted died on Christmas day 1983 after an illness of almost ten years. He retired from the active practice of law in 1976. Even though we mourn the death of Ted Hoffmann eight full years after his retirement, there are many of us here with clear and affectionate memories of him. He distinguished himself in our hearts and minds as an unswerving yet honorable competitor, a straight charging yet compassionate mediator, a dignified loser, yet, more often, a graceful winner.

Ted taught many of today's Montgomery lawyers at Jones Law Institute in the subjects of torts and trial advocacy. He was active in the State Bar Association and was on the Board of Directors of the Alabama Defense Lawyers Association for three years.

Ted loved practicing law more than any endeavor of his life. It was very

telling indeed to listen to Ted — an expert equestrian, an exceptional athlete, a professional baseball player — to hear him talk about the high points of his life. Invariably he spoke of his trials and the men and women of his profession that he respected and loved.

In his twelve short years of practice, Ted managed to impart to us an extra degree of pride in being a lawyer, because he had so much himself. He was able to convey to us through his own quiet assurance that hard work and justice do walk together before a jury. Ted was able to leave with us a measure of his courage, his dignity and his grace.

The Alabama Bar is better for Ted's life and we join with his wife, Martha, and his children, John, Paige, Norma, Martha and Suzanna, in our sorrow for his death. □



T.H. Hoffmann

Theodore "Ted" Henry Hoffmann of Montgomery died on December 25, 1983. He was forty-nine.

Ted earned his undergraduate degree in commerce from the University of Virginia. He received his law degree from the University of Alabama School of Law and was admitted to the Alabama Bar in 1964.

His first responsibility as a lawyer was as clerk to Justice Robert B. Harwood. He then began the private practice of law in Montgomery and was one of Montgomery's truly fine lawyers. Ted was a trial lawyer. He made no secret of that preference. His fellow advocates uniformly called him a gifted trial lawyer.

Executive Director's Report

(Continued from page 125)

local bars are more active now than ever before.

It is painfully embarrassing to write to a bar member and learn that he or she is recently deceased. I would appreciate receiving notice of any members' death. Don't assume that someone else will write or call — they usually don't.

Character affidavits for bar applicants are the applicants' responsibility. Far too frequently students leave forms with our members who assure them that the attorneys will forward the affidavits to us, but the affidavits don't get mailed. The student is penalized since our deadlines are firm and, unfortunately, many students wait until the last minute to file. As a result, some students must wait an extra six months to sit for the Bar exam.

Finally

I was recently struck by the sage advice penned by Indiana State Bar President John Carroll. In his "President's Message" he addressed the "Reach Out" program of that association, concerned with outreach to the

bar, the bench and the public, and the high import to be placed on outreach to the public. He wrote:

Each lawyer should be concerned about how he is viewed by his clients, his friends and everyone he meets for their perceptions of him will be translated into general perceptions of the profession. Thus, each of us should look to our own habits and manners in all our dealings. ***Each of us must accept the fact that we, ourselves, are the principal shapers of our public image.*** (Emphasis added).

Reginald T. Hamner

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FOR SALE: Criminal Law Series, \$400; AmJur Proof of Facts, \$1,100; AmJur Legal Forms, \$400; Southeastern Transaction Guide, \$675; Federal Procedure Forms, \$300; AmJur Trials, \$450; Personal Injury, \$800; R&J Figit Desk Edition, \$85; Art of Advocacy (x2), \$70; Anatomy Charts (large), \$150; Anatomy Charts (desk), \$75. Contact Alice J. Hancock, 212 South Jefferson Street, P.O. Box 729, Athens, Alabama 35611. Phone 232-1287.

FOR SALE: Southern Reporter 2d, volumes 22-150; ALR Annotated 2d, volumes 1-93; ALR Annotated 3d, volumes 1-36. Contact James Weaver, 521 Frank Nelson Bldg., Birmingham, Alabama 35203. Phone 324-6541.

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miscellaneous

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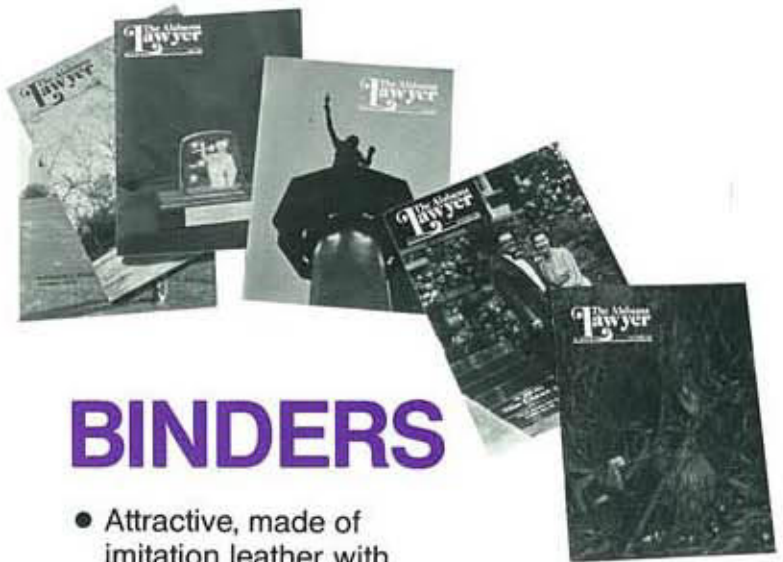
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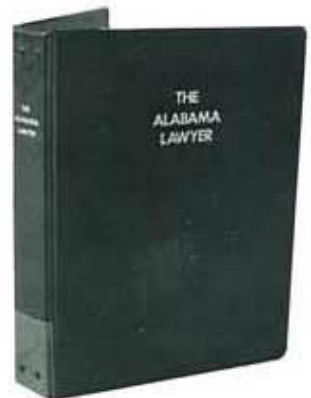
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