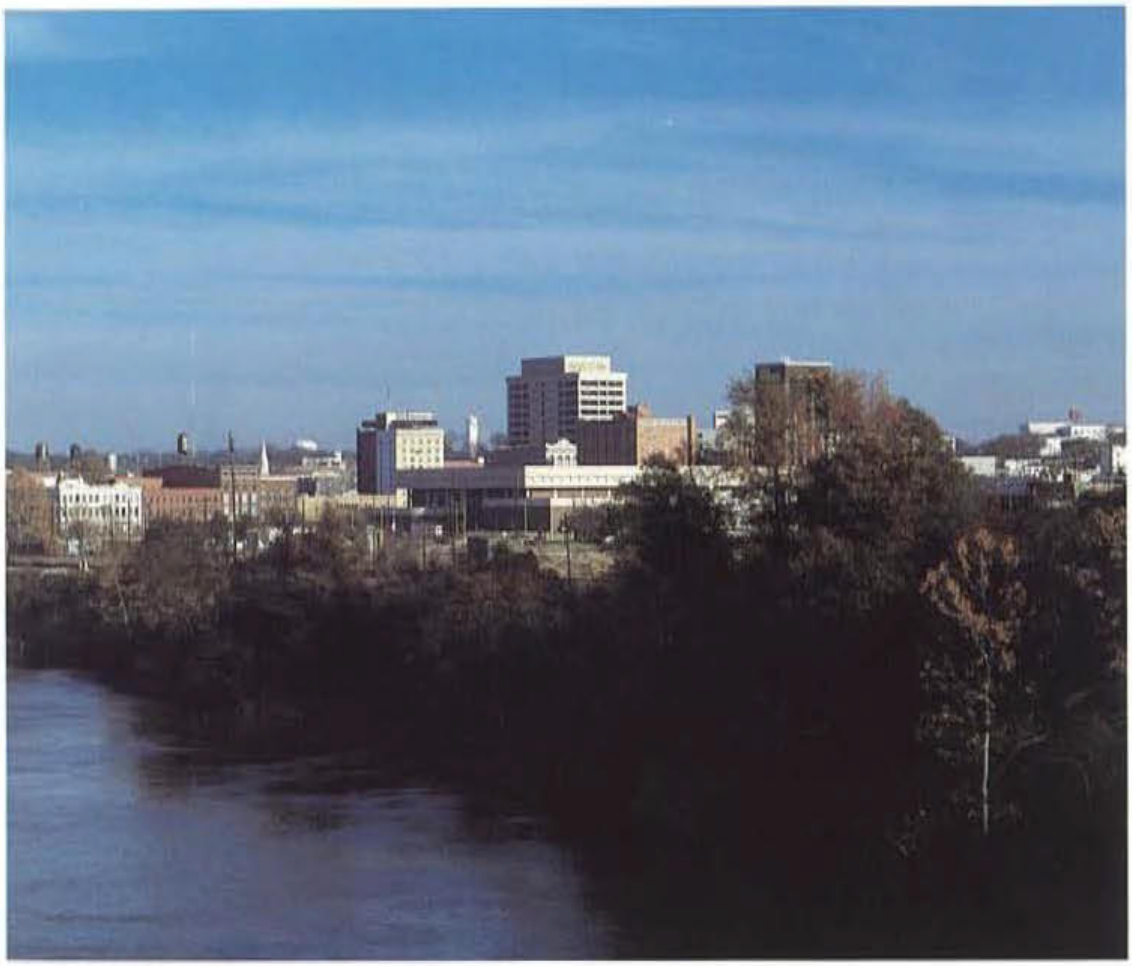
The Alabama Lawyer

Vol. 48, No. 3 May 1987



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The Alabama Lawyer

VOL. 48, NO. 3 MAY 1987

In Brief

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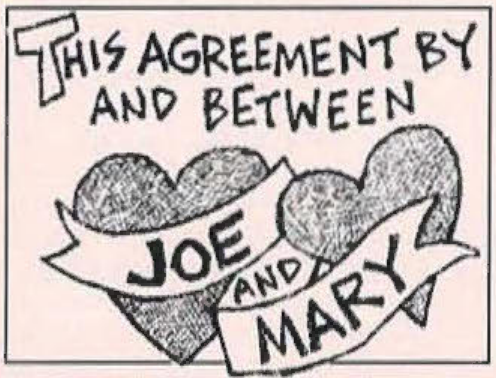
On the cover—

An afternoon view of the new Montgomery County Courthouse, scheduled for operation this month—*photograph by Paul Robertson, Sr.*



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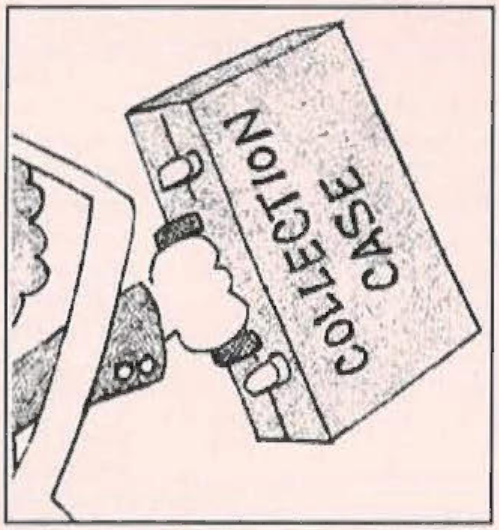

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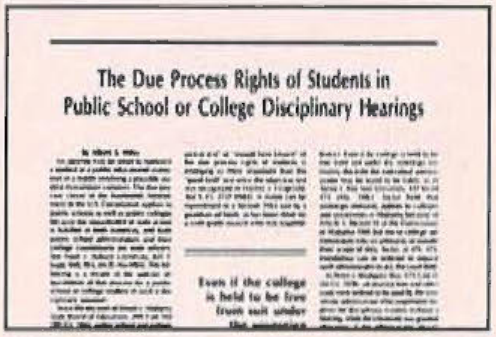
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Public institutions contemplating disciplinary actions against students must act within the confines of law. Due process protections extend to student disciplinary hearings.

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Interview With Bill Scruggs

Once the new president of the Alabama State Bar officially takes over and begins to get a real grasp of the office and its responsibilities, **The Alabama Lawyer** *attempts to interview him. Unfortunately, due to scheduling conflicts, the editor of the* **Lawyer,** *Robert Huffaker, and 1986-87 bar president William D. Scruggs, Jr., have been unable to discuss Scruggs' term until last month.*

BIOGRAPHY: William Doyle Scruggs, Jr., born May 29, 1943, Fort Payne, Alabama; son of Dr. and Mrs. William D. Scruggs, Sr.; attended Baylor School in Chattanooga, TN; graduated from University of Alabama, 1964; received law degree from University's School of Law, 1968; after brief period of sole practice, partner in firm of Kellett & Scruggs, Fort Payne; September 1975 formed Scruggs, Rains & Wilson; following election of Rains and Wilson to bench, formed Scruggs & Brownfield.

Served in U.S. Army; continuous member board of bar commissioners since 1974; 2nd vice president, Alabama State Bar, 1978-79; vice president 1981-82; chairman, MCLE Committee, 1979-81; chairman, MCLE Commission, 1981-84; member, ASB Executive Committee, 1978-84; member, ASB Supreme Court Liaison Committee, 1981; chairman, ASB Supreme Court Liaison Committee, 1983; recipient, ASB Award of Merit, 1982; member, (advisory board) board of bar examiners, 1981-85; judge, Alabama Court of the Judiciary, 1984-present; former member Young Lawyers' Section, ASB; four consecutive terms, Executive Committee, YLS.

Married to former Kay Malone, learning disabilities instructor; one daughter, Shannon Harriette Scruggs, freshman, University of Alabama; primary outside interest—big game hunting—with trips to Africa, Europe, South America, Iran.

AL: Now that you are nearly three-quarters of the way through your term, is the job as president of the state bar what you expected?

Scruggs: I have had the benefit of serving under 13 presidents as a bar commissioner, but quite frankly, it does take more time and travel than I thought.

AL: I am sure you set some goals when you took over as president, and now that you are well into your term, what do you think have been the major accomplishments of your administration?

Scruggs: I hope we will have the IOLTA and the Clients' Security Fund programs in place this year, and our bar-sponsored malpractice insurance program is back on track. These programs, of course, were commenced by previous presidents, and just now are coming to fruition. I believe we will complete a major revision of the committee, task force and section system this year, which should pay dividends in the future. Some committees are simply too large, and we desperately need to improve the continuity of projects and committees from president to president.

AL: What is the status on the malpractice insurance coverage?

Scruggs: We have a malpractice policy written by The Home Insurance Company, endorsed by the Alabama State Bar and, by the language of the policy, it is probably the best in the industry. The rates are competitive in the sense they are not more than other companies typically charge. They are not good rates because they are high, but at least they are not out of line with other high rates. We, of course, are continuing to study the possibility of formation of a captive insurance company in Alabama to protect lawyers.

AL: I guess that would be similar to MASA, like the doctors have?

Scruggs: Yes, it should be similar to that plan. There are some technical problems that we have because the bar is a state agency, and we do not have the legislative authority to form insurance companies. There also are some problems regarding receiving money or expending funds for the formation costs. These are problems unique to the bar and will take some time to solve.

AL: Is there some sort of task force to continue to monitor this situation?

Scruggs: There is. We have in place an insurance committee under the chairmanship of Henry Henzel. They have devoted an extraordinary amount of time and energy to the whole problem. They were instrumental in securing the participation of The Home Insurance Company, and it also is the same committee presently charged with the responsibility of looking further into the captive insurance market.

Kay, Bill and Shannon Scruggs

AL: Do you know what percentage of lawyers in the state have their malpractice coverage through the bar's endorsed carrier?

Scruggs: We do not have that precise information because there are a variety of anniversary dates for policies, and we have no reliable information about the total number of lawyers in Alabama who have no coverage at all. We do know a substantial number of our members do not have any malpractice insurance coverage, and the figure would be somewhere between 15 and 30 percent.

AL: There were discussions a year or so ago about setting up a fund to provide payments for clients who have suffered losses as a result of lawyer malpractice. What is the status of that?

Scruggs: The Clients' Security Fund will be the subject of a hearing before the supreme court in April. This fund covers a gap in client protection. Malpractice policies generally exclude, for instance, willful thefts of clients' money, and the Clients' Security Fund would offer some protection to the public. Payments from this fund would be a matter of grace and not a matter of right, and the fund would be available to cover intentional theft and intentional fraudulent acts of a lawyer if there were no other source of recovery. The client would have to exhaust all other remedies before the claim could be considered.

AL: Would that require legislation?

Scruggs: In our opinion it would not. It would be, in effect, a dues increase to be held by the bar for the payment of those claims.

AL: Do you see the implementation of that program in the near future?

Scruggs: I hope it is implemented in April. I trust the supreme court approves that rule.

AL: Earlier, you mentioned tort reform. What has been the state bar's position on that?

Scruggs: Traditionally, the Alabama State Bar has not taken a position with respect to controversial legislation. We generally have stayed out of

the legislative process. The feeling of the board of bar commissioners was recently expressed, however, when they unanimously voted to participate in and respond to the various "tort reform" problems. The commission believes the proposed changes directly affect the administration of justice to such a degree that the bar should respond. The state bar, therefore, will participate in or at least comment on the various bills and packages.

AL: Is the position pro-plaintiff or pro-business or somewhere in the middle?

Scruggs: We hope it is simply pro-justice. Frankly, there are some changes that a majority of lawyers in Alabama would favor. It is very important that the end result be workable and reasonable for all sides. I have been pleasantly surprised that lawyers from the plaintiff's bar and the defense bar whom I have talked with and had meetings with generally have, if not a consensus of opinion, at least a plurality of opinion as to what response we should give to the various positions. I have been pleasantly surprised by the reasonableness and thoughtfulness everyone has shown.

AL: Let me ask you about some of the specific bills. Undoubtedly one of the bills to be offered will call for the abolition of the scintilla rule. What is the bar's position on that?

Scruggs: The board of bar commissioners will meet April 15 to go over all these positions. If I had to hazard a prediction I would say, generally, the bar would not have any opposition to the abolition of the scintilla rule.

AL: What about the venue bill which, in essence, would adopt something similar to the *forum non-conveniens* doctrine in federal court?

Scruggs: I think as a general statement the bar would not be opposed to a *forum non-conveniens* rule so the trial court could refer a case to a more convenient location.

AL: What do you see as the bar's position with respect to legislation imposing a cap on damage awards?

Scruggs: I think the bar would be opposed to caps. Caps may become floors. Caps, at least in jury trials, may be unconstitutional, and may be higher than the limits of policies. There have been caps on personal injury claims against municipalities for years, yet the insurance premiums for cities have continued to rise.

AL: Will the bar's position be that there should be insurance reform as a condition for obtaining any tort reform?

Scruggs: I cannot speak for the commission, but I doubt if the bar will concern itself with insurance reform at this time.

AL: What is the status of the reapportionment of the membership of the board of bar commissioners?

Scruggs: It has been reapportioned. We have the lawyer population certified, and currently candidates are running for the increased seats on the board of bar commissioners. The first reapportioned commission will be constituted July 1987 in Mobile. That already has been accomplished.

AL: Do you think the bar commissioners, as a whole, are responsive to the needs of Alabama lawyers?

Scruggs: I think the bar commission is quite responsive. Based on my knowledge and conversations with bar presidents from around the country, the Alabama Bar is within the top three or four bar associations in the country, and no one group of lawyers dominates the

board of bar commissioners. In my opinion, it is the best deliberative body in this state.

AL: Do you foresee our bar is going to become more publicly active in issues such as tort reform and, specifically, do you think the bar should become involved in evaluating candidates for judicial office?

Scruggs: I do not think the bar should become involved in evaluating candidates for judicial office. The bar commission has looked at various proposals over the years, and they all have been soundly defeated. We have not seen a system that does not have some inherent vice or that is not subject to abuse. As a practical matter, members of the bar informally particpate in the evaluation of judges, because most knowledgeable voters will ask their attorney or lawyer friends what they think about a particular candidate for a judicial office, so lawyers already have great input into that process.

AL: Do you think the bar should support legislation providing for non-partisan selection and election of judges?

Scruggs: Two years ago, the bar commission approved and recommended the non-partisan election system for judges. There was no great support for this bill among members of the judiciary, and until the judges themselves want to change the system, there will not be any movement on this legislation.

AL: Are there any other areas the bar will be supporting in the legislative arena in the upcoming session?

Scruggs: Other than having a position on the issues involved in tort reform, we have no legislative program for April and May.

AL: Every issue of *The Alabama Lawyer* carries reports of lawyer censures, disbarments and other disciplinary actions. Do you believe the disciplinary proceedings are adequate to police lawyer abuses?

Scruggs: I have a small task force looking at that situation right now, and one of the questions we have is whether the publication of public censures and disbarments in newspapers is productive or counter-productive. We have had the position that we want to be open about lawyer discipline, but we have some second thoughts as to whether that should be published in newspapers. Obviously notices still would need to be published in the *Lawyer*. On the question of discipline, we also are looking at increasing the number of choices a disciplinary panel may have in punishing a lawyer, possibly to put two more steps at points in the process. Currently, we have a private informal admonition, a private reprimand, a public censure . . . and then suspension or disbarment. There is some feeling we need one or two more options in those levels of punishment. Generally speaking, the system we have in Alabama for lawyer discipline has been copied in whole and in part by a number of other states, and nationally we have a reputation as having one of the better systems of lawyer discipline in the country.

AL: Since a large segment of the bar is composed of attorneys under the age of 35, do you think the bar is responsive to the needs of its younger members?

Scruggs: Especially with reapportionment of the board of bar commissioners, you are going to see more and more influence from younger members of the bar. There are more members of the Alabama bar who are under the age of 35 than there are over 35. These younger members have the skills, energies and abilities to direct the state bar and they will, in fact, do so.

AL: Lawyer advertising is becoming more prevalent. What is the status of advertising and specialization of lawyers?

Scruggs: Specialization *is* advertising. You cannot have specialization without advertising that specialty, so it is the same thing. The bar historically has limited advertising to the limits set by the United States Supreme Court. Whatever the court permits is as far as the state bar has ever gone. The right of commercial free speech is an evolutionary right, the limits of which have not been completely established by the court. Our most recent survey of the members of the state bar revealed 84 percent are opposed to advertising. Advertising is very difficult to police, and you cannot write a rule that requires good taste in the ad.

AL: Are there any unachieved goals you hope to accomplish in your remaining three or four months of service?

Scruggs: It will depend on the supreme court's hearing on IOLTA, the interest on lawyers' trust accounts and the client security fund. We also have the continual problem of the non-accredited law schools. Under rule 4(c) of the rules of admission it appears there cannot be any resolution of that continuing problem within the next three to four months. It should be noted the IOLTA and client security fund are programs started prior to my being the president and involve a long history of work by prior presidents and committees. Obviously it takes more than one year for some of these things to be accomplished. I might add the new governance system we now have has the additional advantage in that, if there is no contested election, we know by March 1 who the president-elect

will be and we do not have to wait until the July bar convention. So, for the first time we will have at least two and one-third years of continuity. We know who the president-elect will be in July, Ben Harris, and we know Gary Huckaby will be the president a year from July, so there is an opportunity to coordinate all these various projects with a lot more foresight and planning.

AL: You mentioned unaccredited law schools, and that has been a problem for a number of years. Do you see that being resolved any time in the future?

Scruggs: Frankly, I do not. There are three unaccredited law schools in this state, and two accredited. The sheer number of lawyers admitted is not the real problem; the actual problem lies in the quality of the education our law students are receiving, and the number of people who spend substantial amounts of time and money at an unaccredited law school and cannot pass the bar exam. These are really serious problems to us and, unfortunately, I do not see any change in the near future.

AL: Do you think the public perception of lawyers has changed any in the last several years?

Scruggs: We have spent a lot of money and time in the last 15 years on surveys and public relations to improve the lawyers' image. We always come back to the fact people like their own lawyer and dislike other lawyers. It is endemic in our adversarial system that there is a lawyer "on the other side," and human nature being what it is, people do not like their opponents and they never will. Interestingly enough, people who have never dealt with lawyers still have a high opinion of the profession. In reality, there probably has been no change in the public's perception of lawyers in the last 15 years. ■

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Consultant's Corner

The following is a review of and commentary on an office automation issue with current importance to the legal community, prepared by the office automation consultant to the state bar, Paul Bornstein, whose views are not necessarily those of the state bar.

This is the third article in our Consultant's Corner series. We would like to hear from you, both in critique of the article written and suggesting topics for future articles.

Telephone Charges

Here comes the bill. More than 30 days after you have made a client-chargeable long distance telephone call, your bookkeeper dumps a sheaf of call detail slips on your desk with the cheerful reminder, "We cannot close out billing for the month until the phone charges are allocated." You toy with the idea of a mid-career change, perhaps a position with the telephone company. You reject that (narrowly) and return your attention to the pile of detail slips, beginning a laborious task of matching your time slip notations of long distance calls to an infuriating list of dates, area codes and exchanges. But there is more—what about the call you made from the airport, using your personal credit card? The collect call you accepted at home on a Saturday afternoon? The calls made on MCI? (This is just the AT&T bill.) Do not change careers—there are alternatives.

Ignore it

This can be tempting. After all, why waste an hour (or more) of a lawyer's time chasing small change? You should for the same reason you ought to chase copier charges (see March issue); they add up to a significant bottom-line profit contribution. Our studies reveal that law firms incur more than $150 per lawyer per month in phone costs that should be recoverable from clients. Ignoring does save the lawyer's time, but it allows more than twice the cost to slip away as missed profit opportunity.

Fold it into your rates

This is done with some overhead factors, such as the cost of word processing. On that basis, you should raise your rates about $1 per hour, clearly an impractical notion. Five dollars would be outrageous and cause you more grief than profit. That aside, clients are not as accepting of rate increases as they once were; in fact, one is hard pressed to find any client who is not downright resistant to rate increases. On the other hand, charges billed as an adjunct cost of business are traditional and generally acceptable to clients. After all, they make phone calls (and copies and mail packages, etc.).

High tech it

The key to capturing phone charges with a minimum of effort is to record the entire transaction at the time it occurs. As you place a call to a client you obviously know whom you are calling and on what matter. What you do not know is the long distance charge your long distance carrier is running up for you. Conversely, the telephone company knows the charges but not the client's name or matter number. Enter high tech—some telephone switches have a feature called SMDR (station message distribution reporting). The feature accumulates a record of who (which station) placed a long distance call and how many minutes the call lasted. This listing begins to get together the two pieces of the equation. With some creativity, you can enter client/matter number through a phone instrument, prior to dialing the number. The SMDR record produces a monthly list for manual entry into the billing system.

Taking the process a step further, for a price, some vendors of legal-specific billing programs offer some interface software that dynamically captures SMDR information and automatically updates a client's billing record. This is a technique only for medium and large firms. It requires a digital telephone switch, SMDR, a mini-computer-based billing system and a great deal of discipline. The discipline involves having to dial in client and matter number as a condition of accessing the long distance line. Needless to say, some lawyers find that a bit much.

Low tech it

If you are not a large firm, nor interested in acquiring a digital telephone switch nor a mini-computer, there is a perfectly sound procedure you can adopt, and it does not cost anything. Assign a standard cost to long distance telephone calls, and automatically trigger the toll charge as you habitually fill out the slip for your professional time. A standard cost is simply an average that is easily computed by dividing total long distance charges by the number of calls made. If you are a typical firm your average cost will be in the $1.50 to $2.50 range and not an unfair burden for a client involved with a brief conversation. If you do not habitually charge for time spent on phone calls, there is a quick calculation that should instantly disabuse you of that practice: how much fee income is lost from ignoring 15 minutes per day (at $80 per hour)? Would you believe $5,000 per year?

The single professional time charge you now habitually generate pursuant to a client phone conversation becomes two transactions, one for your time and one for a standard long distance charge. It does become necessary to distinguish these dual transactions from those where the client calls you or from local calls. Consider a trigger such as "STD LDTC" on your time slip. You have locked in billable long distance charges to your professional timekeeping. Now you can smirk at the bookkeeper. ■

Executive Director's Report

HAMNER

Professionalism and a Shrinking Volunteer Base

President-elect Ben Harris, Jr., and I attended the tenth annual Bar Leadership Institute sponsored by the American Bar Association in mid-March. This is a work-intensive session for incoming presidents of state and local bar associations where they are briefed on emerging issues within our profession and, through workshop participation, are given an opportunity to learn how others have met challenges of the profession in times past. They also learn of current programs for meeting the profession's public and professional responsibilities today and in the future.

This was the ninth BLI I have attended. I was privileged to serve as a charter member of the ABA Standing Committee on Bar Activities and Services that created the institute and, since my term on the committee expired, I often have been invited to be a program participant. I always enjoy meeting with my counterparts throughout the country, though I leave the BLI more appreciative than ever of the volunteers who in reality give up a year or two of their practice to serve their fellow lawyers. This year was no exception.

An issue never before raised in the institutes, but which received considerable attention this year, was the "shrinking volunteer base," a fancy way of saying there are fewer workers willing or able to assume the numerous service and leadership roles within bar associations.

Reasons for this new phenomenon are varied. Specialty bar, minority bar and local bar interests are supplanting state bar activities in some jurisdictions. This is essentially fragmentation within the profession. The cost to the volunteer in actual out-of-pocket expense, not to mention a loss of billable hours, was another suspected cause. Civic endeavors and other outside interests proved more attractive to others. In some non-professional activities the specter of personal liability for one's actions deterred others.

In *The Alabama Lawyer*, March 1987, President Scruggs noted, "The majority of accomplishments and success of our association is due to the volunteer committee work of our membership." Our bar has a history of unselfish service and extraordinary leadership. I urge you to insure that we do not face the shrinking volunteer base that others are experiencing.

As I prepared these comments, I received the sad news of Marvin Albritton's death. Marvin was over 70 and actively serving our profession. He had done so much—and yet he maintained a successful and very active practice. He always found time to share good times with his family, and Andalusia had a first-class citizen who made it a better place in which to live.

Following his service of nine years as bar commissioner from the twenty-second judicial circuit, he was one of Alabama's representatives in the House of Delegates of the American Bar Association for six years. Last year he accepted the bar's nomination as a judge on the court of the judiciary. These were not just offices, titles or mere fillers for his Martindale listing. These were opportunities to serve his profession, which he did well.

Marvin Albritton was special, as is his family. I actually was reading the history of his firm when news of his death reached me. His firm has been in continuous existence for 100 years; in the last 18 alone, it has given us a state bar president in his brother Bob, a bar examiner in his brother Bill, another bar commissioner and state bar vice president in his nephew Harold and, in the newest generation, a committee member in great-nephew Hal. The Alabama bar will never suffer a shrinking volunteer base as long as there are Albrittons and those of equal commitment who continue to serve.

To those who would demur that they, too, could give time with significant support from a firm, I would point to such sole practitioners as Milton Davis, city attorney Rowena Crocker and past presidents Hornsby, Roberts and North and, yes, our current president, Bill Scruggs.

Former President Bill Hairston, Jr., once described a professional as "one who puts in more than he takes out." Elsewhere in this issue you have an opportunity to respond to Ben Harris' call for volunteers; history tells me you will respond magnificently.

There will be special calls for help throughout the coming year. I know circumstances will exist when you legitimately cannot respond, but there will be other opportunities which should not be lost. Likewise, if you accept a job—do it. The one concern that I have from observing this year's bar's activities is a higher than desirable percentage of absences at scheduled committee meetings.

In this day of concern for images, ours will never be better than when we exhibit true professionalism. Now is the time to "put in more."

P.S. Have you organized or reactivated a local bar lately?

—Reginald T. Hamner

Editorial

A bit of relief

Editor:

For a number of years I have been a layman subscriber to your interesting publication. While I recently retired 100 percent from the insurance agency field, I still am interested in keeping up with the ever-developing statutory and case law in Alabama.

(I might add that my grandfather was a president of the Mobile Bar Association back in the 1880s.)

The following is a very brief recount of a famous "lawsuit" of the 1870s, in light of today's verdicts. It occurred to me that you might find a spot in an edition to afford a bit of relief from the constantly increasing problems of the day.

—Stephens G. Croom, CPCU
Mobile, Alabama
March 6, 1987

Multi-million dollar verdicts are not new

All the headlines in recent months about liability verdicts soaring into the multi-million dollar levels are written and read as news, as if it was the first ever, but such stories completely ignore history.

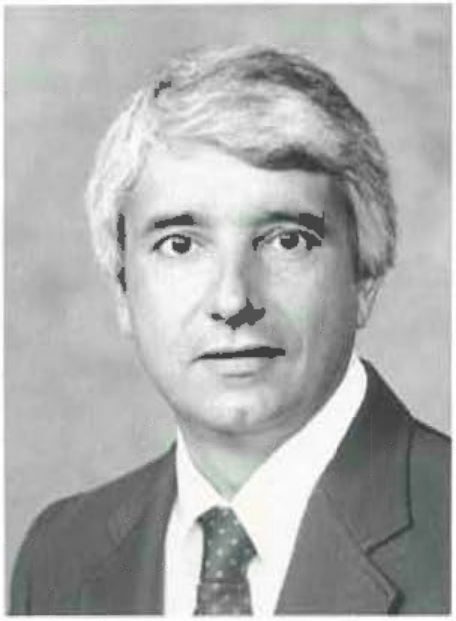
Some include a reference to a county in Alabama as home of one of the three most expensive verdicts in the nation in the medical malpractice area, but they never mention the fact that one of the world's first multi-million dollar liability "lawsuits" was settled over 100 years ago, and *also* involved Alabama. This was the historically famous "ALABAMA CLAIMS" case, *United States vs. England,* for the losses, suffered by our merchant fleet during the Civil War, caused by ships of war built in England and sold to the Confederate States of America. The best known of such warships was the CSS ALABAMA commanded by Raphael Semmes.

The claim was heard in Geneva, Switzerland, and resulted in England's paying the United States the sum of $15 million. Of course, what they called "reparations" in those days would have been "damages" today. Nevertheless, what is most signficant is that $15 million in the 1870s would equal somewhere in the *multi-billion dollar* range today, if you could find an index table dating back over 100 years. ■

Bar examiners begin four-year terms

New bar examiners, elected recently by the board of bar commissioners, included E.L. McCafferty, III; George M. Taylor, III; Michael A. O'Brien; and Michael S. Burroughs. The new examiners began their four-year terms with the February bar examination. A brief biographical sketch of each follows:

McCafferty



O'Brien

McCafferty

E.L. McCafferty, III, is a native of Mobile and a partner in the firm of Inge, Twitty, Duffy & Prince.

He attended University Military School in Mobile, Southwestern at Memphis, the University of Alabama and the University's School of Law. He was admitted to the state bar in 1970.

After graduation from law school, he was employed in the trust department of a Mobile bank and then clerked for Alabama Supreme Court Justice Robert B. Harwood.

McCafferty is a member of the Mobile Bar Association, Alabama State Bar, American Bar Association, Alabama Defense Lawyers' Association, Southeastern Admiralty Law Institute and Defense Research Institute.

He is married to the former Betsy Corwin and the father of a daughter and son.

Taylor

George M. Taylor, III, grew up in Prattville and graduated, *summa cum laude*, in 1975 from the University of the South in Sewanee, Tennessee. In 1978, he received his law degree from Vanderbilt University School of Law in Nashville.

After law school, Taylor clerked for Chief Judge Frank H. McFadden, United States Court for the Northern District, and then began working with the Birmingham firm of Thomas, Taliaferro, Forman, Burr & Murray (now Burr & Forman), where he is a partner.

Taylor is married to the former Judy Grace Howell of Dothan.

O'Brien

Michael A. O'Brien is a native of Birmingham and a partner with the Talladega firm of Wooten, Boyett, Thornton, Carpenter & O'Brien. He joined the firm upon graduation from law school.

O'Brien received his undergraduate degree in 1972 from the University of Alabama and law degree in 1976 from the University's School of Law. He is a member of the Alabama State Bar, the Real Property Probate and Trust Section of the state bar and the Talladega County Bar Association.

He also is a member of the Kiwanis Club of Talladega and the board of directors of the Talladega Chamber of Commerce.

O'Brien is married to the former Janet L. Fievet and they have a son and a daughter.

Burroughs

Michael S. Burroughs is a native of Tuscaloosa and a partner with the firm of Phelps, Owens, Jenkins, Gibson & Fowler, where he has practiced since 1982.

He graduated from the University of Alabama in 1976 and the University's School of Law in 1979.

Burroughs is married to the former Joy Lamon of Tuscaloosa, and they have two daughters. ■

About Members, Among Firms

ABOUT MEMBERS

W. Caffey Norman, III, formerly senior counsel for banking at the Department of the Treasury, has become a member of the Washington, D.C., law firm of **Heron, Burchette, Ruckert & Rothwell.**

■

Marilyn C. Newhouse, formerly practicing in Phenix City, announces that she has relocated her practice to Washington, D.C.

■

Andrew Harper McElroy, III, announces the opening of his office at 1720 City Federal Building, Second Avenue, North, and Twenty-First Street, P.O. Box 10232, Birmingham, Alabama. Phone (205) 328-2869.

■

Luther J. Strange, III, has been named director, federal affairs for **Sonat, Inc.,** in charge of Sonat's Washington, D.C., office, 1100 15th Street, N.W., Suite 700, Washington, D.C. 20005.

■

L. Thompson McMurtrie, a Huntsville attorney, was recently named "Boss of the Year" by the Huntsville Legal Secretaries Association at their fifth annual Bosses' Night Celebration.

■

Locke, Purnell, Boren, Laney & Neely, of Dallas, Texas, announces that **Gary R. Powell,** formerly law clerk to Hon. Joe Fish, United States District Judge for the Northern District of Texas at Dallas, and Hon. John M. Roper, United States Magistrate for the Southern District of Mississippi at Biloxi, has become an associate with the firm, with offices located at 3600 Republic Bank Tower, Dallas, Texas 75201-3989. Phone (214) 754-7400.

■

Julia Smeds Stewart announces the opening of her law office at 2160 Highland Avenue, Birmingham, Alabama 35205. Phone (205) 933-9433.

■

Bruce H.S. Anderson, formerly district counsel for the United States Army Corps of Engineers' Memphis District, has been appointed deputy chief counsel for **NASA's Goddard Space Flight Center** in Greenbelt, Maryland. He is a 1975 graduate of the University of Alabama School of Law and a member of the bars of Alabama and Tennessee.

■

Herman D. Padgett announces that he is a sole practitioner, with offices located at 5 Dauphin Street, P.O. Box 2885, Mobile, Alabama 36652.

■

Mobile attorney **Donald F. Pierce** recently was elected president of the **Defense Research Institute (DRI).** The goal of DRI includes promoting improvements in the administration of civil justice, encouraging prompt and fair resolution of tort claims in the public interest, and serving as a clearing house of information for its supporting members. DRI is composed of 13,000 members and headquartered in Chicago.

■

Effective February 1, 1986, the law firm of Baxley, Beck, Dillard & Dauphin was dissolved. **George Beck** announces the formation of George L. Beck, Jr., P.C., and the location of his office at 22 Scott Street, P.O. Box 5019, Montgomery, AL 36103-5019. Phone (205) 832-4878.

■

Correction: In the March 1987 issue of *The Alabama Lawyer,* **Joe Walker's** name was listed incorrectly as "Joseph W. Walker." Please note the correct spelling.

AMONG FIRMS

The law firm of **Dishuck & Rodenberry, P.C.** announces **Claire A. Black** has become a partner in the firm effective March 15, 1987, under the firm name of **Dishuck, Rodenberry & Black, P.C.** Offices are located at 810 27th Avenue, and the mailing address is P.O. Drawer 7, Tuscaloosa, AL 35402. Phone (205) 758-9044.

■

The law firm of **Johnson, Huskey, Hornsby & Etheredge** announces that **Lexa Dowling,** a former associate, has become a partner in the firm. Offices are located at 131 North Oates Street, Dothan, Alabama 36302. Phone (205) 793-3377.

■

The law firm of **Goggans, McInnish, Bright & Chambless, P.C.,** has relocated its offices to 540 South Perry Street, second floor, Montgomery, Alabama 36104. Phone (205) 263-0003.

■

Michael T. Murphy and **Barre C. Dumas** announce the relocation of their offices from 156 State Street, Mobile, Alabama 36603, to The Le Clede Building, Suite 1004, 150 Government Street, Mobile, Alabama 36602.

■

Howell, Johnston & Langford announce the change of the firm's name to **Howell, Johnston, Langford & Watters,** with offices at 61 St. Joseph Street, Suite 903, Mobile, Alabama 36602. Phone (205) 432-2677.

■

Eyster, Key, Tubb, Weaver & Roth, 402 E. Moulton Street, Decatur, Alabama 35601, announces that **J. Witty Allen** has become a partner in the firm.

■

Ronnie L. Williams and **Larry C. Moorer** announce the formation of a partnership under the name of **Williams and Moorer,** with offices at 814

St. Francis Street, P.O. Box 2811, Mobile, Alabama 36602. Phone (205) 432-6985.

■

Yearout, Myers & Traylor, P.C., announce that **Deborah S. Braden** has become a member of the firm and their offices have been relocated to 2700 SouthTrust Tower, 420 North 20th Street, Birmingham, Alabama 35203. Phone (205) 326-6111.

■

Owen, Ball and Simon announce that **Richard M. Kemmer, Jr.,** formerly associated with the firm, has become a member. The firm will continue to practice under the name of **Owen, Ball, Simon and Kemmer,** with offices at 410 Courthouse Square, Bay Minette, Alabama 36507.

■

Ramsey, Flynn & Middlebrooks, P.C. announce the relocation of their offices to the 16th floor of the SouthTrust Bank Building, 61 St. Joseph Street, Mobile, Alabama 36602 and that **Charles J. Fleming** has joined the firm and **Michael G. Huey** has become associated with the firm. Phone (205) 433-8100.

■

Myron K. Allenstein, formerly a sole practitioner, and **Charles Centerfit Hart,** formerly an assistant district attorney for Etowah County, announce the formation of a partnership under the name of **Allenstein & Hart** with offices located at 141 South 9th Street, Gadsden, Alabama 35901. Phone (205) 546-6314.

■

The firm of **Moore, Kendrick, Glassroth, Harris, Bush & White,** Montgomery, has renamed itself **Moore, Kendrick, Glassroth, Harris & White,** effective December 8, 1986. On that date, **John Bush** left the firm to accept an appointment from Governor Wallace as a circuit judge in the 19th Judicial Circuit (Elmore, Autauga and Chilton counties).

■

Copeland, Franco, Screws & Gill, P.A., of Montgomery announces that **Dan W. Taliaferro** has joined the firm as an associate.

■

Arthur J. Madden, III, and **Domingo Soto** announce the formation of a partnership, **Madden and Soto,** 465 Dauphin Street, Mobile, Alabama 36605. Phone (205) 432-0280.

■

The law firm of **Rives & Peterson** announces that **Bennett L. Pugh** has become an associate of the firm. Offices are located at 1700 Financial Center, Birmingham, AL 35203. Phone (205) 328-8141.

■

James W. Fuhrmeister, formerly assistant district attorney for the 18th Judicial Circuit, announces the opening of his office in association with **Henry E. Lagman & John A. McBrayer.** The firm, **Lagman, McBrayer & Fuhrmeister, P.C.,** is located at Suite 102, 200 Cahaba Park, S., Birmingham, Alabama 35243. Phone (205) 995-0220.

■

Church, Trussell & Robinson, P.C., of Pell City, announces that **W. Van Davis** has left the firm to serve as district attorney for the 30th Judicial Circuit (St. Clair and Blount counties).

■

Reeves & Stewart announce that **Robert E. Armstrong, III,** has become associated with the firm. Offices are located on the 2nd Floor, First Alabama Bank Building, 101 Church Street, P.O. Box 457, Selma, Alabama 36702-0457. Phone (205) 875-7236.

■

C. R. Lewis and **Steven K. Brackin,** of the firm of **Lewis & Brackin,** announce that **D. Taylor Flowers,** formerly with **Buntin & Cobb,** Dothan, Alabama, has become a partner of the firm. The firm name now is **Lewis, Brackin & Flowers,** at 114 South Oates Street, P.O. Box 1165, Dothan, Alabama 36302. Phone (205) 792-5157.

■

The firm of **Rhea, Boyd & Rhea** announces that **William H. Rhea, III,** has left the firm to serve as a circuit judge in the 16th Judicial Circuit. The firm will continue to operate under the name of **Rhea, Boyd & Rhea** with offices at 930 Forrest Avenue, Gadsden, Alabama 35901. Phone (205) 547-6801.

Riding the Circuits

Barbour-Bullock County Bar Association

At the annual meeting of the 3rd Judicial Circuit Bar (comprised of Barbour and Bullock counties) in November 1986, the following officers were elected for this year:

President: Lynn Jackson, Clayton
Vice president: W. Thomas Gaither, Eufaula
Secretary/treasurer: Lynn W. Jinks, III, Union Springs

Chilton County Bar Association

At its monthly meeting on February 24, the Chilton County Bar elected new officers. Re-elected were John M. Higgins, president, and Robert L. Bowers, Jr., secretary-treasurer. Joel Rogers was elected vice president.

In addition, presiding circuit judge Walter C. Hayden, Jr., appointed Higgins (and his successors) to serve also as custodian of the county law library; Bowers (and his successors) were chosen to serve as trustee of the county law library fund. Judge Hayden appointed a law library advisory committee comprised of Bill Speaks, chairman; Robert L. Bowers, Jr.; Richard Moore; Sibley Reynolds; Joel Rogers and circuit clerk Eloise W. Mims.

Cullman County Bar Association

On January 14 the Cullman County Bar Association held a luncheon honoring Julian Bland for his many years of public service. The guest speaker was the Honorable Newton B. Powell, supernumerary circuit judge, who was the presiding circuit judge of the 8th Judicial Circuit when Bland became county solicitor of Cullman County in 1947.

Bland served as county solicitor until 1955; during such time, he was ordered to Phenix City to prosecute those in Russell County whose crimes and wrongdoings culminated with the assassination of Albert Patterson, the attorney general-elect for the State of Alabama. As a result of his prosecutorial services in Phenix City, the State of Alabama awarded to Bland both the Alabama Commendation Medal for meritorious service and the Phenix City Civil Disturbance Medal.

In 1955, he and his brother, Ralph, formed a partnership for the general practice of law. In 1971, Bland was elected to serve as district attorney of the 32nd Judicial Circuit and served with distinction in such capacity for 16 years. He was regarded as a tenacious, successful and fair prosecutor who had the respect of his fellow attorneys at the Cullman Bar.

Julian Bland (left) and Judge Newton B. Powell, supernumerary circuit judge

Bar Briefs

Sharp honored and elected

Charles E. Sharp, of the Birmingham firm of Sadler, Sullivan, Sharp & Stutts, P.C., was recently elected to the International Society of Barristers, in Ann Arbor, Michigan.

This society is comprised of 600 trial lawyers throughout the world.

In addition, he was named one of THE BEST LAWYERS IN AMERICA by his colleagues in the publication honoring the top 1 percent of practicing attorneys representing 15 specialties in 50 states.

Sharp is a member of the Birmingham, Alabama State, Federal and American Bar Associations, the International Association of Insurance Counsel and the Alabama Defense Lawyers' Association.

He received his undergraduate degree in commerce and his law degree from the University of Alabama.

Stivender

Albritton

Harwood

Stivender chosen "Lawyer of the Year"

The Gadsden Legal Secretaries Association announced February 26 that James C. Stivender, Jr., a Gadsden attorney, was named "Lawyer of the Year" by the organization.

Each legal secretary was invited to submit a letter nominating an attorney to the association, omitting from that letter any identifying information. These letters were judged and, based upon the letter submitted, the winner was selected and then named at the luncheon. Stivender was chosen based upon a letter nominating him by his secretary, Charlene Clifton, who has worked with him for 30 years.

Stivender has been a practicing attorney in Gadsden for 35 years. He is married to the former Stella Walker and the father of four children. His parents were Dr. and Mrs. James C. Stivender, Sr.

He is a member of the law firm of Inzer, Suttle, Swann & Stivender, and a member of the Etowah County Bar Association, the Alabama State Bar and the American Bar Association. He is a former Gadsden Municipal Judge and assistant district attorney. He is a Trustee of Samford University, past president of the Gadsden Kiwanis Club, past president of the Etowah County Bar Association, past chairman of the Etowah County Red Cross Chapter, past captain of the Gadsden Quarterback Club and past chairman of the board of deacons, First Baptist Church, and is an active member of First Baptist Church and a teacher of the men's Sunday school class.

Albritton and Harwood honored

W. Harold Albritton, III, of Andalusia and R. Bernard Harwood, Jr., of Tuscaloosa were inducted recently into the American College of Trial Lawyers.

Albritton, of the firm of Albrittons, Givhan & Clifton, is a 1960 graduate of the University of Alabama School of Law. He is a member of both the Practice & Procedure Section and the Litigation Section of the state bar and serves as chairman of the Supreme Court Liaison Committee. Albritton also is a member of the board of bar commissioners, representing the 22nd Circuit, and the Proposed Judicial Building Task Force.

Harwood is a partner with Rosen, Harwood, Cook & Sledge. He graduated from the University of Alabama School of Law in 1963.

He is a member of the Alabama Law Institute's Alabama Uniform Arbitration Committee and the Alabama Supreme Court's Standing Committee on Alabama Rules of Appellate Procedure and the Advisory Committee on Municipal Courts.

Judges overloaded

Judges of the Alabama Court of Criminal Appeals have contended with a 117.3 percent increase in their caseload, but there has been no increase in the membership of the court since 1971. (By Act No. 75, Acts of Alabama 1971, the legislature created a five-judge court.)

These were the findings of a seven-year survey summary by Judge John C. Tyson, III, of the court of criminal appeals.

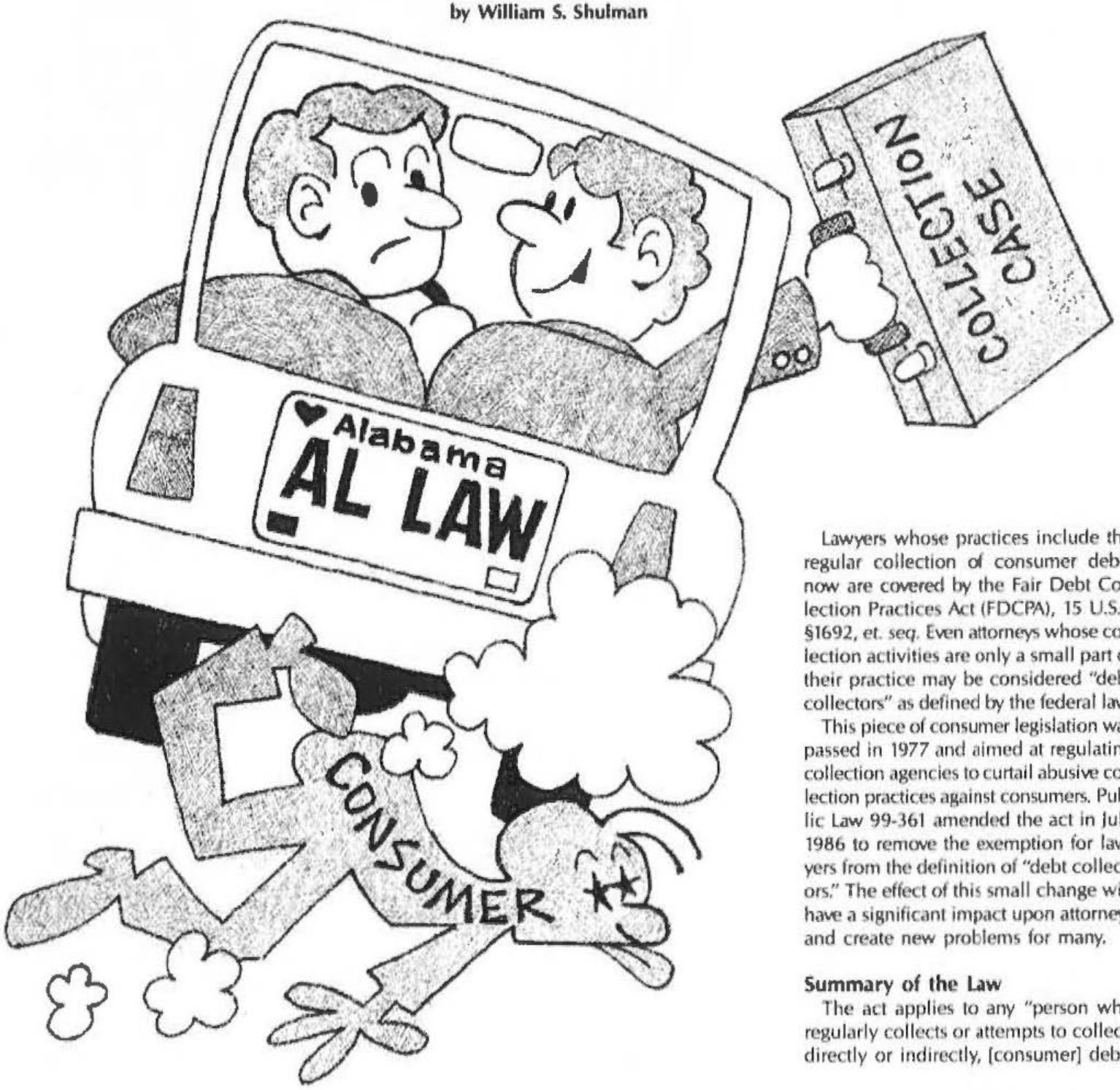
During the period examined, three judges retired, one died and one resigned.

Other than the hiring of two staff attorneys in 1982, no additional judges have been named to ease the workload.

Term	With Opinions	Without Opinions	En Banc	Dispositions
'79-80	349	248	206	803
'80-81	419	365	188	972
'81-82	408	446	190	1044
'82-83	511	595	227	1333
'83-84	578	665	228	1471
'84-85	504	633	287	1424
'85-86	534	942	269	1745

Attorney Liability Under the Fair Debt Collection Practices Act

by William S. Shulman



Lawyers whose practices include the regular collection of consumer debts now are covered by the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C §1692, *et. seq.* Even attorneys whose collection activities are only a small part of their practice may be considered "debt collectors" as defined by the federal law.

This piece of consumer legislation was passed in 1977 and aimed at regulating collection agencies to curtail abusive collection practices against consumers. Public Law 99-361 amended the act in July 1986 to remove the exemption for lawyers from the definition of "debt collectors." The effect of this small change will have a significant impact upon attorneys and create new problems for many.

Summary of the Law

The act applies to any "person who regularly collects or attempts to collect, directly or indirectly, [consumer] debts

owed or due or asserted to be owed or due another." 15 U.S.C. §1692(a)(6) This includes attorneys. Even though the act does not define "regularly," most lawyers should assume that any collection of consumer debts is covered by the act. The legislative history of this amendment indicates that any attorney who handles more than a handful of consumer collection cases will come within the confines of the FDCPA. Thus, even those attorneys who collect consumer debts on an occasional basis, or the firms which may collect debts only incidental to the general practice of law, are covered.

The term "debt" is defined in the act as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. §1692a(5)

The definition calls for interpretation of the word "primarily." Presumably, that would mean that it was for more than one-half of the purpose of the obligation. Additionally, the attorney must look to the purpose for which the obligation was incurred. Thus, while the obvious type of consumer obligations (consumer retail contracts, installment loans, credit cards, certain services and purchases) are covered, other obligations may be trickier to categorize. Debts which arise out of business obligations are not covered. However, if someone is investing their money for personal purposes, such as an individual who invests in the futures market, the distinction may grow fuzzy. If that same person is sued later by the investment firm for failure to pay after a margin call has been made, a determination must be made as to whether the transaction was primarily a personal investment or a business investment.

The act also covers other areas that will cause attorneys to change their method of collection practice. The FDCPA includes venue provisions which in certain instances are different from those provided in the Alabama Rules of Civil Procedure. Further, certain communications with third parties now are limited and raise special issues within the context of discovery procedures.

The act also requires the lawyer to send specific information along with, or within five days after, the lawyer's initial "communication" with the consumer. New restrictions are placed on the lawyer with respect to certain oral and written communications with or about the debtor. The act also restricts certain practices, such as the receipt of postdated checks.

Finally, the attorney now may be subject to statutory liability. The act provides

that lawsuits may be brought by the Federal Trade Commission and by individual consumers acting alone or as a class action, and further provides that damages, attorney's fees and court costs may be awarded against the violating "debt collector," which includes an attorney collecting a debt against a consumer.

This act not only creates new attorney liability, but poses new ethical problems as well. However, the scope of this article will be limited to the problems of interpretation of certain sections of the act and those provisions which will have the most impact on attorneys engaging in collections.

Notice and validation of debt

The portion of the act with which most lawyers have interpretation problems is found in Section 1692g. Since attorneys are now included within the definition of a "debt collector," they must comply with this section which provides as follows:

> (a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing:
> (1) the amount of the debt;
> (2) the name of the creditor to whom the debt is owed;
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.
>
> (b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification of judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.
>
> (c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

The threshold interpretation problem involves the word "communication." The term is defined in the act to mean "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. §1692a(2) In a litigation context, the notice and validation may be required if the complaint is the initial communication.

The Federal Trade Commission has published its non-binding proposed official staff commentary to the act found at 51 Fed. Reg. 8019, *et. seq.* It states that "a debt collector's institution of formal legal action against a consumer is not a 'communication in connection with the collection of any debt' and thus does not confer §809 [§1692g] notice-and-validation rights on the consumer." 51 Fed. Reg. at 8028 While the commentary seems logical, at least one article has criticized that view. See, *NCIC Reports*, Vol. 5 (September/October, 1986). Obviously, a great deal of information is conveyed by a complaint, and therefore it could be considered a "communication." Further, there is little question that instituting a suit is "in connection with the collection of any debt."

To interpret a "communication" to include a lawsuit would imply that a consumer could halt the processing of a complaint under §1692c(c), which states as follows:

> (c) Ceasing communication—If a consumer notified a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except:
>
> (1) to advise the consumer that the debt collector's further efforts are being terminated;
>
> (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which ordinarily are invoked by such debt collector or creditor; or
>
> (3) where applicable to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

It is not consistent with other sections of the FDCPA to interpret a lawsuit to be a communication. First, it would presume that a consumer would have the ultimate right to prevent a suit from being taken to judgment, and secondly, §1692(c)(3) allows a debt collector to notify the consumer that he intends to invoke a specified remedy, which could be implied or interpreted to mean a lawsuit, among other remedies. Until the courts rule on this issue, it will remain fertile ground for litigation and potential liability.

One way to avoid the problem may be to send a demand letter with the required notice provisions. However, certain problems are posed by a demand letter containing such a notice and the subsequent filing of a complaint. For example, is an attorney required to wait 30 days after sending a demand letter before initiating suit? There is no doubt that a consumer may be confused after receiving a notice indicating that he has 30 days to dispute a debt, only to find out that a lawsuit has been filed against him within the 30-day time period. It has been suggested that such a practice that is confusing to consumers may be held to be an unfair trade practice on that basis alone. *Bingham*, "When Lawyers Act as Debt Collectors," *Legal Times*, September 29, 1986 The FTC proposed commentary indicates that "a debt collector need not cease normal collection activities within the consumer's 30-day period to give notice of a dis-

pute until he receives a notice from the consumer." Further, an FTC staff attorney suggested to the author that the lawyer could insert in his demand notice letters a provision to the effect that the FDCPA does not preclude institution of any legal action prior to the expiration of the 30-day period mentioned in the letter.

Another possible solution is to include the information required by §1692g(b) in the complaint, along with a verification attached to the complaint and the name and address of the original creditor, if different from the client. This is already the practice in many instances where a suit is being filed based on an itemized verified account. Since a Mini-Code affidavit is required anyway, the attorney simply may wish to make sure the affidavit contains the information required by §1692g(b). By doing so, the argument can be made that if the lawsuit is considered to be the initial communication, the consumer is receiving all that he would have been entitled to receive in the event the first communication had been in a form other than a lawsuit and the consumer had exercised his rights under §1692g(b).

If the courts or the FTC (through a formal advisory opinion of the commission) decide a lawsuit is a communication under the act, the attorney may be faced with other problems when representing a client seeking a prejudgment remedy. For example, if the attorney sends the debtor a letter in order to comply with the 30-day notice provision prior to a prejudgment attachment, the consumer may decide to leave town prior to the expiration of the 30 days, taking the collateral with him and hindering the efforts of the creditor to repossess the goods. Further problems can result if a tenant who is in default receives the ten-day notice required for an unlawful detainer and also is advised he has 30 days to dispute the debt. Certainly, there is no reason why the written notice required by §1692g(a) could not be included with the ten-day notice to terminate the lease or the notice requiring the tenant to vacate the premises, but the seemingly conflicting time requirements are likely to cause confusion.

For attorneys representing clients seeking to foreclose residential mortgages, the notice requirement could be included in the acceleration letter the attorney sends to the mortgagor. If the attorney begins publication for foreclosure within 30 days of the notice, it is unclear whether the consumer may cause the publication to cease by making a request under §1692g(b) which says in part that, "if the consumer notifies the debt collector in writing within the thirty-day period . . . that the debt is disputed . . the debt collector shall cease collection of the debt . . . ."

Since there is no "good faith" requirement under the act required of the consumer, such a request for information on a "disputed" debt possibly could interrupt the foreclosure process and buy time for the mortgagor. Likewise, the same problem can arise where a consumer makes the same request in those instances where the required notice is sent along with a demand letter, with suit being filed prior to the expiration of the 30 days. Since the debt collector must cease collection of the debt upon receiving a written request or notice of dispute from the consumer, a default judgment which is entered prior to the debt collector's sending a verification of the debt to the consumer may be invalid. Attorneys should have some type of "red flag" built into their collection procedure to avoid an inadvertent default judgment from being taken under these circumstances which could lead to liability under the FDCPA.

As previously stated, §1692g requires the debt collector to obtain a verification of the debt, or a copy of the judgment, upon the written request by the consumer. The act does not define the word "verification." It is defined in *Black's Law Dictionary* as a "confirmation of correctness, truth, or authenticity by affidavit, oath, or deposition." The safe course to follow would be to assume that verification should be made under oath. However, a copy of the note or statement of the account detailing the amounts due could qualify. A certified copy of a judgment should be sufficient. One article has suggested that, by including a verification of the debt with the initial communication letter, the collection lawyer can stop or render moot any implied 30-day waiting period. Presumably, the same could be said for the attorney who attaches a verification to the complaint

as previously noted. However, this has not yet been determined by a court or through a formal advisory opinion of the FTC. T. Bingham and G. Bonenberger, "Attorney Liability," *The National Law Journal*, October 27, 1986

Finally, the FTC commentary indicates that the act imposes no requirements as to form, sequence, location or type size of the notice. However, an illegible notice does not comply with this provision. 51 Fed. Reg. at 8028 One court has held that the validation notice required by the FDCPA was not improper in form and wording because it was placed on the back of a form debt collection letter or because it had no reference on the front of the letter to refer the debtor to the reverse side. *Blackwell v. Professional Business Services of Georgia, Inc.*, 526 F.Supp. 535 (N.D. Ga. 1981) However, for another opinion embracing an opposite view, see *Ost v. Collection Bureau, Inc.*, 493 F.Supp. 701 (D. N.D. 1980). In addition, for those collection attorneys who may make the initial contact with a consumer by telephone rather than through a written notice, the proposed FTC commentary indicates that the debt collector may make the disclosures orally at that time and he need not send a written notice. 51 Fed. Reg. at 8028

Third-party contacts

Perhaps the most surprising provision of the FDCPA and the most restrictive is §1692c regarding communication with the consumer. Basically, subsection (a) states that the debt collector may not communicate with the consumer (1) at any unusual time or place which is known to be inconvenient to the consumer, (2) if the consumer is represented by an attorney with respect to the debt, contact must be made with that attorney and (3) the consumer may not be contacted at his place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits such communications.

This may pose serious problems if the courts determine that a lawsuit is a communication under the act. For example, the debtor often is served with legal process at work. If a suit is considered to be a communication, it is unclear whether the attorney must take additional steps to determine whether the employer prohibits its employees from receiving such communications, i.e., lawsuits. For purposes of §1692c, the definition of a "consumer" also includes the consumer's spouse, parent, guardian, executor or administrator.

As referred to above, §1692c(c) further restricts communications between a debt collector and the consumer after the consumer sends written notice that he refuses to pay the debt. Does this mean the suit cannot be filed if the attorney receives a written notice of a dispute? There is a strong argument to the effect that §1692c(c) does not prohibit a lawsuit from being filed after the collection attorney receives such written notice from a consumer. Indeed, since the debt collector may notify the consumer that he intends to "invoke a specified remedy" it seems implicit that for an attorney collector this would mean a lawsuit. Any other reading of the section would be illogical when reading the act as a whole.

Section 1692c(b) has far-reaching consequences and states as follows:

> "Without the prior consent of the consumer . . . or the permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney . . . the creditor, the attorney of the creditor, or the attorney of the debt collector."

For an extreme example, those attorneys who receive consumer collection cases from collection agencies conceivably could be prohibited from communicating with the collection agent regarding the collection of the debt, since the collection agency is neither the creditor nor one of the other exceptions listed.

Even more disturbing, however, is the potential limitation on formal discovery and informal conversations with witnesses. For example, if the attorney is collecting a debt for a bank and wishes to speak to a former employee of the bank regarding circumstances surrounding the execution of a loan document (where the debtor may be raising the defense that it is not his signature), the communication would appear to be prohibited unless permission first was obtained from the consumer or the court prior to discussing the case with the witness. Such a ramification seems absurd and only acts as a roadblock for attorneys to properly prepare cases for their clients. Certainly, permission may be obtained from a court, but the extra steps seem an waste of effort.

Section 1692c(b) can invoke a myriad of other problems for the attorney. For example, it is unclear whether the act prohibits a communication which is initiated by the third party rather than the debt collector. Suppose an attorney represents a second mortgagee who is foreclosing a residential mortgage. Can the attorney contact the first mortgagee to determine a payoff amount? Is such a communication made in connection with the collection of a debt? It would not appear to fit within the exclusion of effectuating a postjudgment judicial remedy. Obviously, the fact situations may be unlimited. Simply put, attorneys should beware!

Venue requirements

When an attorney brings a legal action to enforce an interest in real property securing the consumer's obligation, §1692i states it may be initiated only in the judicial district in which the real property is located. Further, if the action does not involve real property, the suit must be brought only in the judicial district in which the consumer signed the contract sued upon or in which the consumer resides at the commencement of the action.

This is a significant departure from Rule 82 of the Alabama Rules of Civil Procedure which provides that an action against a resident individual "must be brought in the county where the defendant or any material defendant resides at the commencement of the action . . . ." Since a debt collector may sue only where the consumer lives or where the consumer signed the contract, the attorney collector may not be able to join a maker and a co-signer of a promissory note as defendants to a suit filed in the district of the maker's residence, unless the co-signer also lives there or signed the contract there.

Further, the proposed FTC commentary indicates where services were provided pursuant to an oral agreement, the debt collector may sue only where the consumer resides and not where the services were performed (if that is different from the consumer's residence). 51 Fed. Reg. at 8028 This provision changes existing Alabama venue procedure as found in §6-3-3, *Code of Alabama* (1975) which

states that in actions for work and labor done or breaches of contracts or covenants as to easements or rights-of-way, the action may be commenced in the county in which the work was done or the land is situated.

Civil liability of attorneys

The FDCPA imposes civil liability in the form of actual damages, discretionary penalties, costs and attorney's fees. A lawsuit for violation of the act may be brought by the FTC or individual consumers acting alone or as a class. Section 1692k(a)(2)(A) entitles an individual consumer to actual damages, plus statutory damages not exceeding $1,000. In the event of a class action, the maximum statutory damages are limited to the lesser of $500,000 or 1 percent of the net worth of the debt collector, plus actual damages, attorney's fees and costs.

It is further provided that an action to enforce any liability created by the subchapter may be brought within one year from the date on which the violation occurs. Also, a party may act in reliance on a formal advisory opinion of the commission pursuant to 16 CFR §§1.1-1.4, without risk of civil liability. The proposed staff commentary points out this protection does not extend to reliance on said proposed commentary or other informal staff interpretations. 51 Fed. Reg. at 8029

Miscellaneous provisions and pitfalls

Other provisions of the FDCPA may apply to an attorney's efforts to collect a consumer debt. Attorneys who employ skip tracers or initiate skip tracing activity within their office should be aware of §1692b relating to debt collectors communicating with persons other than the consumer for the purpose of acquiring location information. Specific requirements are placed on those seeking location information.

Sixteen different examples of false or misleading representations prohibited by the act are found at §1692e. One of the examples considered a violation of the act is "the threat to take any action that cannot legally be taken or that is not intended to be taken" (emphasis added). The proposed commentary indicates that a debt collector's implication, as well as a direct statement, of planned legal action may be an unlawful deception if not actually intended. Lack of intent may be inferred when the amount of the debt is so small as to make the action totally unfeasible or when the debt collector is unable to take the action because the creditor has not authorized him to do so. 51 Fed. Reg. at 8026

Subsection 11 of §1692e states it is a violation to fail to disclose "clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." This may imply that such types of disclosures must be included in the complaint or other pleadings.

The use of any false representation or deceptive means to collect a debt is another prohibition under §1692e. Examples found in the proposed commentary show that it is considered a false statement or implication when a debt collector states or implies he has counseled the creditor to sue when he has not. Since some clients simply want a demand letter to be sent without any intention of filing suit, a false implication or statement in the letter that suit will be filed may be considered a violation.

A statement by the attorney that the entire amount is due when there is no acceleration clause, or that no partial payments will be accepted when the attorney is, in fact, authorized to accept them, are other examples of violations. Before an attorney sends a demand letter on a promissory note, it would be wise to verify that it has an acceleration clause or the act may be unwittingly violated.

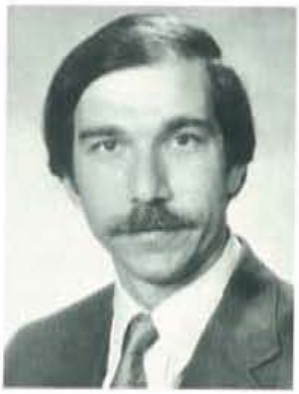
Those attorneys who are an in-house counsel or employees of a party covered by the definition of a debt collector may not send a consumer an "attorney-at-law" letterhead without referring to his employer. To do otherwise would imply falsely to the consumer that the debt collector had retained a private attorney to bring suit on the account. 51 Fed. Reg. at 8026

Section 1692f prohibits the acceptance by an attorney of any check postdated by more than five days unless the debtor is notified in writing of when the attorney intends to deposit the check. Notice must be given between three and ten business days before the check is deposited.

If a consumer owes multiple debts and makes a single payment to the attorney, the payment must not be applied to any debt which is disputed by the consumer and the attorney shall apply the payment in accordance with the consumer's directions. §1692h

Conclusion

When the Fair Debt Collection Practices Act was enacted in 1977, it was not intended to apply to attorneys collecting debts on behalf of their clients. With the recent amendment deleting the exemption for attorneys, lawyers whose practices include the collection of consumer debts now face new restrictions and potential liability. Further amendments are urgently needed to clarify the ambiguities existing in the law's present form. As it now stands, attorneys must change the ways in which they previously collected debts. Greater care must be utilized, and office staff who assist in debt collection should be made aware of the new restrictions. Until the law is amended further, the floodgates of litigation may be open. ■



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Antenuptial Agreements

by Herndon Inge, Jr.

Antenuptial or premarital agreements are becoming increasingly popular by couples contemplating marriage. Those who have been married previously and have considerable property wish to control its disposition. No longer are antenuptial agreements only for an affluent prospective spouse who is uncertain whether the forthcoming marriage will last or who questions the equity of conferring a statutory share of the estate on the surviving spouse when there are other deserving objects of his bounty. Many couples who have been married before who have children by previous marriages can provide both spouses and their children with the assurance that a later marriage can be entered into with an agreement concerning the disposition of the property of each spouse.

In this country where marriage is the culmination of romantic love, prenuptial property agreements are not standard marital equipment. Traditionally the parties to marriage, except in isolated instances, entered into the bliss of marriage without a thought of their assets, the fact that the marriage may fail or that current laws confer a statutory share of each spouse's estate on the survivor. The old rules have been abolished by statute in most states, including Alabama.

Alabama sanctions antenuptial or premarital agreements. *Barnhill v. Barnhill*, 386 So.2d 749 Ala.Civ.App. (1980) To be valid an agreement anticipates that there is no legal impediment to the proposed marriage, it is relevant to the particular marriage, the consideration is adequate, or in the alternative, there is full and fair disclosure, the form is correct, there is mutual consent and that the parties are competent. Independent legal counsel is a requirement, although this may be waived if there is a full and complete disclosure by each of the parties and the consideration is adequate and fair.

An antenuptial agreement must be in writing and entered into freely,

understandably and without fraud by persons legally competent to contract. The provisions of such agreement must be just and reasonable. The confidential relationship which generally, though not always, is deemed to exist between the prospective husband and wife requires the utmost good faith and a high degree of fairness. Marriage, or an agreement or promise of marriage, is a valuable consideration sufficient to support an antenuptial contract. Simply stated, premarital agreements between parties contemplating marriage are defined as agreements between prospective spouses made in contemplation of marriage and to be effective upon marriage.

The requirement that the agreement must be in writing is to comply with the Statute of Frauds. Section 8-9-2, *Code of Alabama* (1975), provides that promises made in consideration of marriage must be in writing and signed by the party to be charged. This provision is in most statutes of frauds because of the risk of hasty and ill-considered promises when marriage is contemplated. The requirement of a writing presumably would reduce these risks. If the consideration for an antenuptial contract is either wholly or in part the marriage of the parties, it is unenforceable unless in writing.

In *Barnhill* the court held that antenuptial agreements are valid, and a study of the related cases gives ample precedent for the lawyer preparing one. However, courts may be called upon to scrutinize such agreements to determine whether they are just and reasonable. An antenuptial agreement will be held valid as just and reasonable if the party seeking to uphold the agreement can show certain conditions have been met. If the husband is relying on the agreement, he has the burden to show that the consideration was adequate and the entire transaction was fair, just and equitable from the other's point of view or that the agreement was fully and voluntarily entered into by the other with competent independent advice or the opportunity to consult with independent counsel and full knowledge of her interest in the estate and its approximate value. Meeting the requirements of either of these tests is sufficient to give effect to an antenuptial agreement.

In *Allison v. Stevens*, 269 Ala. 288, 112 So.2d 451 (1959), the court held:

> "It is clear that an antenuptial agreement of one party to release rights and interests in the estate of the other party in consideration of marriage or supported by other valuable consideration is enforceable in equity. Because of the confidential relationship of the two parties, such contracts are scrutinized by the courts to determine their justice and reasonableness. Where an antenuptial agreement is asserted as barring the wife's share in the estate of her husband, the husband or his representatives has the burden of showing that the consideration was adequate and that the entire transaction was fair, just and equitable from the wife's point of view or that the agreement was freely and voluntarily entered into by the wife with competent independent advice and full knowledge of her interest in the estate and its approximate value. *Merchants' Nat. Bank v. Hubbard*, 222 Ala. 518, 133 So. 723, 74 A.L.R. 646; *Norrell v. Thompson*, 252 Ala. 603, 42 So.2d 461; *Collier v. Tatum*, 230 Ala. 218, 160 So. 530; 17A Am.Jur., Dower § 172; 26 Amjur., Husband and Wife §§ 282, 288; 41 C.J.S. Husband and Wife § 80; 27 A.L.R.2d 883"

Though antenuptial agreements are valid in Alabama they have been held to be invalid and not binding on the parties in the event of a divorce if the agreement was unfair to the wife. *Reynolds v. Reynolds*, 376 So.2d, 732 Ala.Civ.App. (1979) Therefore, the preparer of an antenuptial agreement should make sure it is fair and just in the light of the scrutiny that a court may give it. In Alabama, trial courts have wide discretion in making a property division or awarding alimony. This discretion is, of course, to be exercised in a judicial and not arbitrary manner and subject to review on appeal. The holding must not necessarily be equal but it must be equitable. Therefore, the terms of an antenuptial agreement settling matters in the event of a divorce must be carefully and studiously prepared to insure it is sustained if challenged.

Husbands in Alabama now can dissent from the wills of their wives and the surviving spouse to homestead allowance, exempt property or family allowance and may elect to waive these rights either before or after marriage. The provisions in the antenuptial agreement concerning these matters should be given careful consideration.

When either or both parties have been married previously and acquired assets during that marriage they may wish to see the assets go to the children of the first marriage. This desire can be achieved by having the second spouse waive all statutory rights to share in the other spouse's estate in a premarital contract. Section 43-8-72, *Code of Alabama* (1975) provides that:

> "The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or a waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of 'all rights' (or equivalent language) in the property or estate of a present or prospective spouse . . . is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other at death and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement."

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Essential parts of the agreement

The antenuptial agreement, of course, must be in writing and signed by the parties. There must be a full and fair disclosure that contains sufficient financial data giving the other party full knowledge of his or her interest in the estate and its approximate value. *Barnhill v. Barnhill, supra* In addition there must be sufficient consideration. The impending marriage between the parties can satisfy the requirement of consideration for the proposed agreement. *McDonald v. McDonald,* 215 Ala. 179, 110 So. 291 (1928); *Allison v. Stevens, supra* Since the parties occupy a confidential relationship, each spouse should receive competent independent advice. *Norrell v. Thompson,* 252 Ala. 603, 42 So.2d 461 (1949) An attorney should not attempt to mediate an antenuptial agreement or in any way undertake to represent both parties. If a party refuses to obtain representation, then it should be noted clearly in the agreement that the party was encouraged to get representation and knowingly and willfully waived his or her right to be represented.

Adequate time is required to represent a client in the preparation of an antenuptial agreement. If an individual consults the lawyer two weeks or less prior to the proposed marriage, there may not be sufficient time to adequately put together an agreement. It is not wise to try to prepare an agreement on very short notice and hope that ultimately it will survive a challenge. You must weigh the question of whether it is more upsetting to tell people they have to cancel their wedding plans or have a client come back several years later with an agreement that now is under attack. It may look weak because there was not adequate time to negotiate free of pressure or duress.

The agreement must not be unconscionable. The enforceability of the agreement, to a large extent, will depend upon whether it is fair. It is difficult for an attorney to determine when an agreement becomes unconscionable. The best method to accomplish this is to try to prepare an agreement you believe is fair and reasonable under all the circumstances. Consider how the agreement may look years from now when a court is examining it. If you look at it through the eyes of a court would you think it was unconscionable? If so, it is back to the drawing board.

Agreements prior to marriage must be entered into voluntarily. Free choice must not be lacking, and coercion and duress can affect voluntariness. This is related directly to the timing question previously mentioned. An agreement could be hurriedly entered into and presented to a future spouse shortly before a wedding date. Such an attempt at an antenuptial agreement does not offer much help that it will be binding in the future.

Conclusion

The lawyer drafting the antenuptial agreement must be sure there is a full understanding of the agreement by the parties. This essentially means all of the agreements and promises between the parties are included in the agreement. There must be nothing outside the scope of the agreement. The parties must have had an opportunity to review the final draft with counsel and have all of their questions answered.

Before attempting to prepare an antenuptial agreement the lawyer should look at the requirements of Section 43-8-72, *Code of Alabama* (1975), *Barnhill v. Barnhill* and the other cases cited herein.

ANTENUPTIAL AGREEMENT: SAMPLE

THIS AGREEMENT made this _____ day of _____, 19____, by and between _____, sometimes hereinafter referred to as husband, and _____, sometimes hereinafter referred to as wife, both of _____, Alabama,

W I T N E S S E T H:

WHEREAS, the parties to this agreement contemplate entering into the marriage relation with each other, and;

WHEREAS, each of the parties individually owns certain tangible and intangible property, a list of which is set out hereinafter in Exhibit "A", the nature and extent of which has been disclosed to the other, and each desires that all property now owned or hereafter acquired by either shall be free, for purposes of testamentary disposition, divorce or otherwise, from any claim of the other that may arise by reason of their contemplated marriage, other than as set out herein;

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, it is agreed as follows:

1. Both before and after the solemnization of the marriage between the parties, each shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, including all interest, rents and profits which may accrue or result in any manner from increases in value of present or future owned property, and each shall have the absolute and unrestricted right to dispose of his or her property, free from any claim that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them, whether such disposition be made by gift, conveyance, sale, lease; by will or codicil or other testamentary means; by laws of intestacy; or otherwise, other than set out in paragraph 9 hereof.

2. Each party disclaims, waives and releases all rights and interest (statutory or otherwise) which either may have or acquire as surviving spouse in all property and estate of the other, including without limitation:

(a) The right to elect to take against the will of the other, whether heretofore or hereafter made;

(b) The right to take a distributive share in the event of intestacy;

(c) The right to share in the other's estate by way of dower, curtesy, widow's or widower's allowance, statutory distribution, homestead or otherwise; and

(d) The right to act as an administrator, administratrix, executor or executrix of the other's estate.

3. Neither party shall have nor make any claim against the other or against the property or estate of the other, as spouse or former spouse, in the event the marriage shall become dissolved for any reason, other than set out in paragraph 9 hereof.

4. Nothing herein contained shall prevent either party from making any gift, devise or bequest by his or her will to or for the other party, nor affect the validity of same.

5. Each of the parties shall have the sole and absolute right to manage, convey by deed or otherwise dispose of, or

otherwise deal with, any of his or her property now separately owned or hereafter separately acquired in any manner whatsoever.

6. Each party shall, upon request of the other, execute, acknowledge and deliver any additional instruments that may be reasonably required to carry the intention of this agreement into effect, including such instruments that may be required by the laws of any state of jurisdiction, now in effect or hereafter enacted, which may affect the property rights of the respective parties as between themselves or with others, and including any deeds, mortgages or leases in which the party upon whom such request is made shall not incur any liability or obligation by complying with such request.

7. Each party has examined the financial statements attached hereto and made a part hereof as Exhibit "A", and has had the opportunity to question and examine all items therein, and acknowledges that fair disclosure has been made by the other party as contemplated under the provisions of Section 43-8-72, *Code of Alabama* (1975), as amended. Each certifies that he or she has had independent and separate counsel and has been independently advised and has been given, without limitation, all information requested. Each further certifies that counsel has advised and informed him or her of the legal effects of this document.

8. Except as provided in paragraph 9 hereof, in the event of the death of the husband or wife or the granting of a final divorce decree, neither party shall have any right to any claim against the other party or his or her estate based on spousal or marital rights including, but not limited to maintenance, support, or property settlements, by reason of or on account of dissolution of the marriage, or by reason of death.

9. The other provisions of this agreement to the contrary notwithstanding, the following provisions shall apply:

(NOTE: All preceding paragraphs completely nullify all marital and spousal rights during marriage, in divorce and after death. The parties must negotiate any rights to be preserved and set them forth in this paragraph.)

A. During the period of marriage, the husband shall be obligated to provide reasonable support for the wife, taking into consideration the financial and economic means available to the husband, etc. (Set out any other agreements.)

B. In the event of a separation or divorce, the wife shall have no right or claim against the husband for support, alimony, attorney's fees, costs of division of property insofar as such rights may be legally forfeited or waived, except that . . . . (Set out here their agreement.)

10. The parties hereto reserve the absolute and unconditional right to alter, amend or revoke this document, in whole or in part, at any time and from time to time, in writing.

11. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legatees, devisees, legal representatives and assigns.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day hereinabove first written.

_____ (SEAL)

_____ (SEAL)

SEPARATE ACKNOWLEDGEMENT
FOR *EACH* PARTY

CERTIFICATE OF INDEPENDENT
COUNSEL

I, _____, certify that I prepared this instrument as independent counsel for my client, _____, and recommend *her/his* execution of same.

WITNESS my hand this _____ day of _____, 19____.

_____

■

The Due Process Rights of Students in Public School or College Disciplinary Hearings

by Albert S. Miles

An attorney may be asked to represent a student or a public educational institution in a matter involving a possible student misconduct violation. The due process clause of the Fourteenth Amendment of the U.S. Constitution applies to public schools as well as public colleges because the requirement of state action is fulfilled in both instances, and both public school administrators and their college counterparts are state officers. See *Nash v. Auburn University*, 621 F. Supp. 948, 955, (M.D. Ala.1985). The following is a review of the specific requirements of due process for a public school or college student in such a disciplinary situation.

Since the decision of *Dixon v. Alabama State Board of Education*, 294 F.2d 159 (5th Cir. 1961), public school and college students have been considered by the courts to have constitutional rights. The rudimentary rights of due process set forth in *Dixon* are that the student receive notice, a hearing and an explanation before being suspended or expelled from a public school. In *Dixon*, students who had been expelled without notice or hearing from the Alabama state college claimed that they had a constitutional right to due process. The court ruled for the students. The recent decision in *Nash v. Auburn University*, 621 F. Supp. 948 (M.D. Ala. 1985), upholding the due process used by the University in a dismissal for cheating, supports *Dixon* and clarifies what specific due process rights are due students.

If administrators violate the due process rights of students, the administrator and the school or college can be sued under 42 U.S.C. 1983. See *Wood v. Stricklin*, 420 U.S. 308 (1975). The "objective test" of "should have known" of the due process rights of students is emerging as more important than the "good faith" test since the objective test was recognized in *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982). A minor can be represented in a Section 1983 suit by a guardian *ad litem*, as has been done for a sixth grade student who was suspended, without a hearing, for disciplinary reasons. See *Carey v. Piphus*, 98 S. Ct. 1042, 1045 (1978).

Even if the college is held to be free from suit under the sovereign immunity doctrine, the individual administrator may be found to be liable

The court may grant sovereign immunity to a college or university, as did the Alabama Supreme Court in *Sarradett v. University of South Alabama*, 484 So.2d 426 (Ala. 1986), but it is not likely a court will give sovereign immunity to a school district. Even if the college is held to be free from suit under the sovereign immunity doctrine, the individual administrator may be found to be liable, as in *Taylor v. Troy State University*, 437 So.2d 472 (Ala. 1983). *Taylor* held that sovereign immunity applies to colleges and universities in Alabama because of Article 1, Section 14 of the Constitution of Alabama 1901, but not to college administrators who act arbitrarily or outside their scope of duty, *Taylor*, at 474, 475. Mandamus can be ordered to require such administrators to act, the court held.

In *Perez v. Rodriguez Boa*, 575 F.2d 21 (1st Cir. 1978), all attorney fees and other costs were ordered to be paid by the University administrator who suspended students for disciplinary reasons without a hearing, while the University was granted immunity. If the administrator should have known the due process rights of students, as set forth in *Goss v. Lopez*, 419 U.S. 565 (1975), then he or she can be held to be personally liable for all costs which spring from his/her violating the student's due process rights, *Perez* held.

In a case recently decided by the Alabama Supreme Court, *Prescott v. Pritchett* No. 85-935 (Ala. Sup. Ct. March 6, 1987), the court of civil appeals had upheld compensatory damages, including emotional pain and suffering, against two officers of a state agency, whom the plaintiff had sued in a Section 1983 action. The Alabama Supreme Court granted certiorari to consider whether the court of civil appeals was correct in holding the petitioners liable under 42 U.S.C. 1983. The court found there was no evidence of a Section 1983 violation, and thus found it unnecessary to address the issue of whether money damages can be upheld in a Section 1983 action in

Alabama, or other issues raised by the petitioners. Thus, implicitly, the *Taylor* precedent, allowing only mandamus and injunctive actions against individuals found to have violated Section 1983, was upheld.

The terms *procedural due process* and *substantive due process* are used in this article. Procedural due process "contemplates the rudimentary requirements of fair play, which includes a fair and open hearing." *Almon v. Morgan County*, 245 Ala. 241, 246, 16 So.2d 511, 515 (1946) Substantive due process, or the substance of the school's decision being reasonable, is achieved if the decision is not "a substantial departure from academic norms." *Regents of The University of Michigan v. Ewing*, 106 S. Ct. 507 (1985)

The following 11 points address the circumstances in which due process is applicable in a public school or college student disciplinary hearing and, once it is determined that due process applies, the specifics of what kind of due process is owed to students.

1. The general rule is that only students in public schools and colleges have due process rights. See *VanLook v. Curran*, 489 So.2d 525, 528 (Ala. 1986). The gateway to the due process clause in the 14th amendment of the U.S. Constitution is "state action." Since *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), "state action" has not been construed as a private school's receiving a great amount of government support, but "state action" usually applies only to students in public, not private schools. However, in *VanLook v. Curran*, the Alabama Supreme Court held that while only state action invokes the procedural due process clause, if a private school's contract with the parents or student includes terms that call for the use of due process, then the private school must grant the student due process. This is because the school included a right to due process in the terms of the contract, even though it did not have to.

2. Immediate temporary suspensions comport with due process where a student's presence "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process", and if the necessary notice and hearing "follow as soon as is practicable." *Goss v. Lopez*, at 583 The *Goss* decision agrees with the district court's guidelines in this case that in such a suspension, a hearing should be held within 72 hours of a student's removal.

3. Less stringent procedural due process is required when there is an academic dismissal, which results from academic evaluations, than when there is a dismissal for disciplinary reasons where facts are questioned, such as for cheating or non-academic misconduct. The dismissal of a student for poor academic performance comports with the requirements of procedural due process if the student had prior notice of the faculty dissatisfaction with his performance and the possibility of dismissal, and the decision to dismiss was careful and deliberate. No formal hearing is required. *The Board of Curators of The University of Missouri v. Horowitz*, 435 U.S. 78, 85 (1978)

Just as *Horowitz* spoke to the procedural due process required in an academic dismissal, *Regents of The University of Michigan v. Ewing*, 108 S. Ct. 507 (1985), addressed substantive due process in academic expulsions. *Ewing* held that a student's substantive due process rights are not violated, if the academic dismissal was not "a substantial departure from academic norms." Ewing at 514

In *Haberle v. The University of Alabama in Birmingham*, 803 F.2d 1536 (11th Cir. 1986), the court mentioned both *Horowitz* and *Ewing* and used the procedural due process standards of *Horowitz* and the substantive due process standards of *Ewing* to decide this academic dismissal case in favor of the University.

Recently, a case which held that less formal pre-dismissal procedures are required where the dismissal was for academic reasons was denied certiorari by the U.S. Supreme Court. *Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46 (3d Cir. 1986), cert. denied, 55 U.S.L.W. 3232 (U.S. Oct. 6, 1986)

4. In disciplinary dismissals, as well as in academic dismissals, both substantive and procedural due process are needed. Substantive due process in a disciplinary dismissal was considered in *Krasnow v. Virginia Polytechnic Institute*, 414 F. Supp. (W.D. Va. 1976). The court held that the college's use of a rule allowing for disciplinary penalties for off-campus violations did not violate a student's substantive due process rights. *Dixon's* "rudiments" of notice, hearing and explanation are a good guideline to procedural due process. Procedural due process refers to the implementation of the rule's being fair. The *Mathews v. Eldridge*, 424 U.S. 310, 334 (1976), balancing test applies here. Due process will adapt itself to the situation; it is not rigid. *Nash* at 955 makes the point that due process applies to public high school, undergraduate and graduate students, and allows for variations according to the type of student.

Albert S. Miles is professor, administration in higher education, at the University of Alabama, where he received his law degree. He also is a graduate of Duke University (undergraduate degree), Columbia University (master's), Cornell University (Ph.D.) and Harvard Business School.

5. Some notice is required in procedural due process in a school or college disciplinary setting. *Nash* holds that as long as the charges and their implications are made known before the hearing, the list of witnesses and their expected testimony can be given to the accused student at the hearing itself in a case concerning cheating. Notice can be oral or written, and can be given immediately before the hearing. *Nash* at 954 "The notice should contain a statement of the specific charges and grounds." *Dixon* at 158

6. There usually is no absolute right to have an attorney present to present the student's case in procedural due process, *Nash* held, at 957. Auburn University allowed plaintiffs to have counsel present during the hearing, but the counsel was allowed only to advise plaintiffs and was not permitted to actively participate in the hearing. The *Nash* court stated that Auburn, by allowing plaintiffs to have counsel present, afforded the plaintiffs more due process than the Constitution requires. *Nash* cites *Gabrilowitz v. Newman*, 582 F.2d 100, 104 (Ist Cir., 1978), to illustrate that this First Circuit ruling allowed a student to have an attorney present during a school disciplinary hearing because the same student was involved in a pending separate criminal action. In *Gabrilowitz*, this unusual circumstance justified the attorney's being present at the hearing. Still, the student was allowed to have counsel present only in an advisory capacity to lessen the danger of self-incrimination.

In *French v. Bashful*, 303 F. Supp. 1333 (E.D. La 1969), the court held that a student had a right to have a retained (not appointed) counsel present at a disciplinary hearing for suspension or expulsion if the university was represented by a third-year law student, or someone else with legal training.

Dixon is silent on the question of legal representation at student disciplinary hearings.

7. The rules of a student disciplinary hearing can be informal. Counsel often are allowed to students during disciplinary hearings, albeit with restrictions noted above, and often are reminded of this quote from *Board of Curators v. Horowitz*, at 88, "(a) school is an academic institution, not a courtroom or administrative hearing room."

In *Boykins v. Fairfield Board of Education*, 492 F.2d 697, 701 (5th Cir. 1974), the court allowed the use of hearsay at a hearing and noted that laymen in such a student disciplinary hearing are not bound by the common law rules of evidence. *Aaron v. Alabama State Tenure Commission*, 407 So.2d 136, 138, Ala. Civ. App. (1981) held, "The (hearing) Board is allowed to admit and consider evidence of probative value, even though it might not be admissible in a court of law."

At the hearing, the student has the right to present his defense against the charges and "to produce other oral testimony or written affidavits of witnesses in his behalf." *Dixon* at 159

8. The form and nature of the hearing can be before one administrator or a committee. The "timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S. 565, 579 (1975) The student has a right to an impartial tribunal, but *Nash* states at 957 that "the law in this circuit is settled that previous contact with the incident and even with the initial investigation does not automatically disqualify one from hearing and deciding a case in a college disciplinary proceeding."

9. No right to cross-examination exists in a student misconduct hearing, *Nash* states at 955. *Nash* states that the *Dixon* standards do not require the opportunity of cross-examination. *Nash* notes that the procedure Auburn University allowed, which was to allow the plaintiffs to ask the adverse witnesses questions by directing their questions through the chief hearing officer, was more procedural due process than called for in *Dixon*. *Nash* at 955

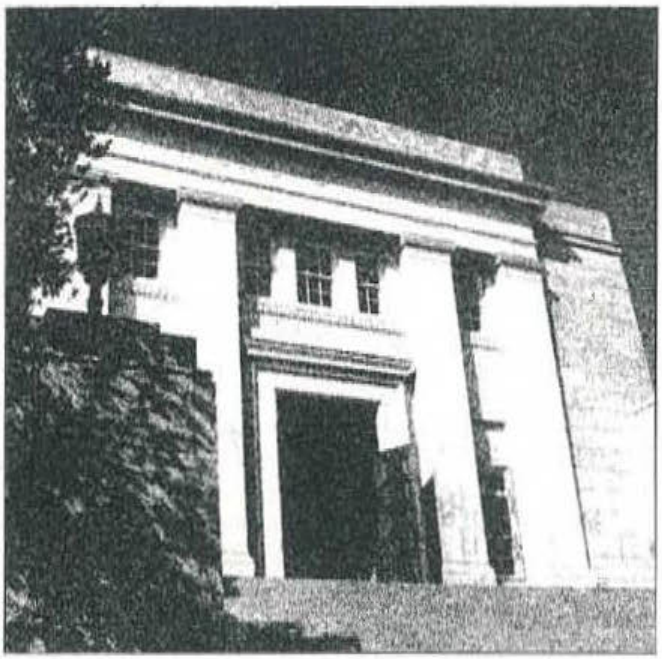
10. Students are entitled to an explanation of the results of the hearing and the implications of the decision. *Dixon* held at 159, "If the hearing is not before the Board (of Education) directly, the results and findings of the hearing should be presented in a report open to the student's inspection." *Wright v. Texas Southern University*, 392 F.2d 728, 729 (5th Cir. 1968), held that after the hearing, the findings should be presented to the student in a report. Also, see *French v. Bashful* at 1338.

11. No right to an appeal from the decision of a student hearing is called for, according to *Nash* at 957. "All that due process requires is notice and an opportunity for hearing," and cites *Goss v. Lopez* at 579, and *Dixon* at 158-159. Thus, *Nash*, at 957 concludes regarding the plaintiff's complaint of no meaningful appeal, that "this court cannot find a violation of a non-existent right."

Conclusion

Nash v. Auburn University upholds *Dixon* as the law in this circuit concerning due process in student misconduct hearings. Once a public school or college student is given what is seen as fair notice, hearing and explanation for a disciplinary dismissal, or notice and careful deliberation by faculty in an academic dismissal, no further appeal or other procedures are necessary in order for the administrator or school to afford due process to the student involved. Failure to observe the rudiments of due process when the administrator "knows" or "should have known" what those rudiments are can subject both the administrator and the school to liability, under 42 U.S.C. 1983. Thus, an administrator is well advised to know, publish and follow due process as set forth in *Dixon*, *Nash* and by the U.S. Supreme Court.

It is wise to realize that due process is not a rigid set of rules, and "fairness" is important. Thus, it is a good idea for a school or college to grant as much due process as it thinks is allowable, given a balance between the circumstances, the educational mission of the school and the rights of the student. ■



Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

Batson applied in Alabama

Cliff v. State, 1 Div. 246 (February 24, 1987), *Nickerson v. State*, 6 Div. 627 (February 24, 1987), *Owes v. State*, 1 Div. 228 (February 24, 1987)—In *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), the supreme court ruled that a state criminal defendant could establish a *prima facie* case of racial discrimination, violative of the Fourteenth Amendment based upon the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire, and that once the defendant had made the *prima facie* showing, the burden shifted to the prosecution to come forward with race-neutral explanations for those challenges. Thereafter, the court determined that the *Batson* decision was to be retroactively applied. *Griffith v. Kentucky*, (No. 85-5221, January 13, 1987)

The Alabama Supreme Court also determined that the *Batson* decision is to be applied retroactively under the Alabama Constitution. *Ex Parte Jackson*, (Ms. 84-1112, December 19, 1986) ___ So. 2d ___ (Ala. 1986)

Applying *Batson* retroactively, the trial court must give the district attorney an opportunity to come forward with race-neutral explanations for his use of peremptory strikes. If he is unable to do so and the trial court determines that the facts established a *prima facie* case of purposeful discrimination, a defendant is entitled to a new trial. *See also Ex Parte Owens* (Ms. 85-1008, January 19, 1987).

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . Rule 60(b)

Tolleson, 21 ABR 1620 (January 9, 1987)—The plaintiff filed this tort action, and the defendant filed an answer and motion for summary judgment based upon the pleadings and an affidavit. The motion was set for a hearing. The plaintiff's attorney filed no counter affidavit and failed to appear at the hearing, and the court granted the defendant's motion. The plaintiff obtained new counsel and filed a motion pursuant to Rule 60(b)(6), ARCP, alleging inadequate representation by former counsel. The motion was overruled and this appeal was taken. The supreme court affirmed.

The court stated that in ordinary cases relief will not be accorded on a complaint of ineffective or incompetent counsel. Relief may be granted

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only where extraordinary circumstances exist, as where "the personal problems or psychological disorders of an attorney cause him to neglect a case to the extent that a default or summary judgment is entered against the unsuspecting client." It is not enough to point to the mere fact that one's attorney was absent from a scheduled hearing or merely negligent.

Civil procedure . . .
J.N.O.V. v. motion for new trial

Luker v. City of Brantley, 21 ABR 1629 (January 9, 1987)—In this case, the supreme court seized the opportunity to discuss the motion for J.N.O.V. and the alternative motion for new trial. The court noted that there has been some confusion as to the proper use of these two motions. A motion for J.N.O.V. is properly granted only when the movant would be entitled to a directed verdict. On the other hand, a new trial may be granted merely where the verdict is inconsistent, contradictory or where erroneous charges are given.

The court also announced a new practice on post-trial motions. When a trial court grants a motion for J.N.O.V., the appellate court may then: (1) order entry of judgment on the verdict; (2) order a new trial; or, (3) remand the case to the trial court for reconsideration of the motion for new trial. Consequently, where an alternative motion for new trial was made and argued but was not ruled on by the trial court, the appellate court may *ex mero motu* remand the case to the trial court with directions to reconsider and rule upon the motion for new trial.

Civil procedure . . .
Rule 56(e)

Welch v. Houston County Hospital Board, 21 ABR 1598 (January 2, 1987)—Mrs. Welch died while a patient at a hospital owned and operated by the Houston County Hospital Board. Her husband filed suit alleging that her death was the result of the hospital's negligent administration of certain drugs.

The hospital filed its motion for summary judgment supported by its administrator's answers to the plaintiff's interrogatories. In those answers the administrator listed the drugs given and identified each physician ordering the drugs. The trial court also considered the deposition of Dr. Smith, one of the deceased's attending physicians. Smith testified that the deceased received the medications he ordered and in the appropriate doses. The trial court granted the defendant's motion for summary judgment, and the supreme court reversed.

The court stated that Rule 56(e), ARCP requires that evidence in support of motions for summary judgment must be "admissible at trial." That is, the deponent or the person signing the interrogatory answers must have "personal knowledge" of the facts or set forth facts that would be admissible in evidence. In this case, the hospital administrator was relying exclusively on the hospital records. However, neither the medical records nor certified copies thereof were made exhibits to the interrogatory answers. In such case, Rule 56(e) requires that sworn or certified copies of all documents relied upon be attached to the interrogatory answers. Without the hospital records the interrogatory answers are mere hearsay and inadmissible at trial. Regarding Smith's deposition, the supreme court found that his opinions were based upon "a review of the chart" and "interviews with hospital personnel" and, consequently, his testimony is merely hearsay because the chart was not made an exhibit to his deposition and there were no affidavits or depositions of the various personnel he interviewed—Smith's expert opinions were not based upon his examination of the deceased or any matters within his personal knowledge.

Contracts . . .
court finds breach of implied promise not to hinder or delay performance by other party establishes actual breach of contract

Eager Beaver Buick, Inc. v. Burt, 21 ABR 1588 (January 2, 1987)—Burt entered into a 12-month employment contract to act as the defendant's sales manager. During the course of the contract, the defendant told Burt to instruct his salesmen to engage in certain illegal and unlawful acts. Burt refused and the defendant suggested that he look for other employment. Eventually, the situation deteriorated to the point where Burt resigned. Subsequently, he filed suit alleging "conspiracy and interference with a contract." The jury found in favor of Burt for breach of contract. The supreme court affirmed.

Citing *Corbin on Contracts,* Sections 571 and 947, the court stated that generally contracting parties impliedly promise not to hinder, prevent or make burdensome the other's performance. A breach of this implied promise may be construed as an actual breach of the contract, thereby giving the other party a cause of action on the contract. It is immaterial whether the implied promise is a fiction of the court or is a justifiable inference of fact. In some cases, the wrongful conduct may be treated as a tort. In this case, Burt was harassed and antagonized to the point he was no longer able to perform his job and left with no choice but to resign. This amounted to an actual breach of contract.

Torts . . .
Section 339, Restatement (Second) of Torts, again adopted

Motes v. Mathews, 21 ABR 1233 (November 9, 1986)—A father brought suit for the wrongful death of his 12-year-old son which occurred on premises owned by the defendant and which had been negligently excavated, leaving large holes with steep embankments. The defendant filed a motion for summary judgment alleging the child was a trespasser and, therefore, his only duty was not to willfully or wantonly injure him or to put traps or pitfalls in his way, and to warn him of a known danger only after knowledge of his presence. The trial court granted the defendant's motion for summary judgment, and the plaintiff appeals.

The supreme court recognized that the defendant's motion for summary judgment was based upon what has been called the "conventional duty" and also recognized Alabama has applied that theory of liability over the years. The court, however, stated where trespassers were children, and the condition is artificial rather than natural, a more humanitarian doctrine should be used. Therefore, the supreme court stated that from henceforth the duty which an occupier of property owes to a trespassing child is set forth in Section 339, *Restatement (Second) of Torts,* as follows:

> "A possessor (occupier) of land is subject to children trespassing thereon caused by an artificial condition upon the land if

"(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

"(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children." (emphasis supplied)

Recent Decisions of the Supreme Court of Alabama-Criminal

Motion for continuance—the legal standard

State v. Saranthus, 21 ABR 1189 (November 1986)—Saranthus had six cases pending against him which were docketed for trial on May 2, 1984. According to the motion for continuance filed by the defendant's attorney, the district attorney had represented to her that the state would not try the instant case on May 2, but would proceed on three or four other cases. Defense counsel stated she relied on the district attorney's representations and prepared for the other cases. At a bench conference on the motion for continuance, the defendant testified he needed time to subpoena two witnesses who would give evidence tending to clear him of the charge.

The supreme court, speaking through Justice Almon, reversed the conviction and set forth the legal standard to be applied, as follows:

"A motion for continuance is addressed to the discretion of the Court and the Court's ruling on it will not be disturbed unless there is an abuse of discretion. *Fletcher v. State*, 291 Ala. 67, 277 So.2d 882 (1973). If the following principles are satisfied, a trial court *should grant a motion for continuance* on the ground that a witness or evidence is absent: (1) the expected evidence must be material and competent; (2) there must be a probability that the evidence will be forthcoming if the case is continued; and (3) the moving party must have exercised due diligence to secure the evidence. *Knowles v. Blue*, 209 Ala. 27, 32, 95 So. 481, 485-86 (1923)"

Applying that standard to the facts of this case, the trial court's denial of the continuance was an abuse of discretion. Justice Almon concluded that the district attorney's statement that the witnesses did not exist, standing alone, was not competent evidence and the trial court should have accorded it no weight at all.

Prosecutor's closing argument—the hint of missing facts

Washington v. State, 21 ABR 1225 (December 1986)—Washington was convicted of two offenses of murder and sentenced to serve two consecutive 99-year terms in prison. The supreme court granted *certiorari* to determine whether the court correctly determined that certain remarks made by the prosecutor during closing argument did not require reversal.

During summation by the prosecutor, he stated the following:

[Mr. Copeland]: And there are certain things, because of our rules that we cannot present to you, but you heard Sergeant Williams—

Mr. Irby: Your Honor—

Mr. Copeland: —telling you—

Mr. Irby: — excuse me. At this time, may I approach the Bench?

Mr. Copeland: Well, if you've got an objection, will you—

(at bench)

Mr. Irby: Judge, we got an objection to the District Attorney referring to the fact that under the rules of law, it is certain evidence that's—under the rules of law the jury is being forbidden to hear certain evidence to infer some negative prejudicial remarks towards this defendant.

Mr. Copeland: No, I didn't intend it that way. If it was interpreted that way, you know, I apologize.

Mr. Irby: The inference was made to the jury and I'd just like to note it for the record.

The Court: Okay. I overrule the objection.

The Supreme Court of Alabama, speaking through Justice Beatty, reversed Washington's conviction. The supreme court noted, "It has long been the rule in Alabama that, although counsel should be given considerable latitude in drawing reasonable inferences from the evidence, they may not argue as a fact that which is not supported by the evidence. " *Brown v. State*, 374 So.2d 395 (Ala. 1979); *Espey v. State*, 270 Ala. 669, 120 So.2d 904 (1960), etc. Notwithstanding that latitude, Justice Beatty, in a sharply-worded opinion, found that the prosecutor was making reference to certain facts which were not in evidence, but which, as he argued to the jury, he would have introduced if not for the existence of our evidentiary rules.

Recent Decisions of the Supreme Court of the United States

Inventory search—impounded vehicle

Colorado v. Bertine, 93 L.Ed.2d 739; 55 LW 4105 (January 14, 1987)—A Boulder, Colorado, police officer arrested Bertine for driving his van while under the influence of alcohol. After the defendant was taken into custody and before a tow truck arrived to take the van to an impoundment lot, another officer, acting in accordance with local police practice, inventoried the van's contents. The officer opened a closed backpack in which he found various containers holding controlled substances, cocaine, drug paraphernalia and a large amount of cash.

Prior to Bertine's trial on charges including drug offenses, the state trial judge granted the defendant's motion to suppress the evidence found during the inventory search. The state court determined the search did not violate the defendant's rights under the Fourth Amendment of the Federal Constitution. However, it held that the search violated the Colorado Constitution. The Colorado Supreme Court affirmed on the Federal Constitutional violation.

On *certiorari*, the Supreme Court was asked to decide whether the Fourth Amendment prohibits the state from proving the drug charges with evidence discovered during the inventory of Bertine's van. Chief Justice Rehnquist held that the search of the closed backpack found in an impounded vehicle during a warrantless inventory search of the

vehicle did not violate the Fourth Amendment of the Constitution.

The Supreme Court ruled that Bertine's case was controlled by the principles governing inventory searches of automobiles as set forth in *South Dakota v. Opperman*, 428 U.S. 364 (1976), and *Illinois v. Lafayette*, 462 U.S. 640 (1983), *rather than those* governing searches of closed trunks and suitcases conducted solely for the purpose of investigating criminal conduct. See *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979), which were distinguished.

Justice Rehnquist reasoned that the policies behind the warrant requirement and the related concept of probable cause are not implicated in an inventory search, "which serves the strong governmental interest in protecting an owner's property while it is in police custody, thereby insuring against claims of lost, stolen or vandalized property and guarding the police from danger." The court further noted there was no showing that the police, who were following standardized care-taking procedures, acted in bad faith or for the sole purpose of investigation. Moreover, the court said that police, before inventorying a container, are not required to weigh the strength of the individual's privacy interest in the container against the possibility the container might serve as a repository for dangerous or valuable items.

Affirmative defense—burden of proof

Martin v. Ohio (February 1987)—May a state require that a defendant bear the burden of proving self-defense in a murder case? The Supreme Court, in a five-to-four decision, said yes.

In all states except Ohio and South Carolina, the prosecution must disprove a self-defense claim once a defendant has raised it. Those two states have retained the common law rule self-defense is an affirmative defense that the defendant must demonstrate by a preponderance of the evidence. (emphasis added)

The opinion by Justice White upholds the state's right to require the defendant to prove the claim of self-defense by a preponderance of the evidence.

Justice Powell, joined by Justices Brennan, Marshall and Blackmun, dissented. Powell argued that the requirement that a defendant prove self-defense often will conflict with the requirement that the prosecution prove premeditated intent to kill, implying, thereby, a shift in the overall burden of proof.

Retroactive effect of Batson

Griffith v. Kentucky, Brown v. United States, 55 LW 4089 (January 13, 1987)—In *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), the court ruled that a state criminal defendant could establish a *prima facie* case of racial discrimination violative of the Fourteenth Amendment based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire. Also, once the defendant has made the prima facie showing, the burden shifts to the prosecution to come forward with a neutral explanation for the use of its peremptory challenges.

The Supreme Court, speaking through Justice Blackmun, held that a new rule for the conduct of criminal prosecutions, such as the ruling in *Batson, supra*, applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. The "clear break" exception creates an equal protection problem of not treating similarly situated defendants the same. "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule."

Capital murder—sympathy instruction

California v. Brown, 55 LW 4155 (January 27, 1987)—Does California's jury instruction ordering jurors not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" go too far in narrowing a panel's discretion in imposing the death penalty? The Supreme Court, in a five-to-four decision, said no.

A jury found Brown guilty of forcible rape and first-degree murder in his California State Court trial. At the penalty phase, the trial court instructed the jury to consider and weigh the aggravating and mitigating circumstances, but cautioned that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."

On automatic appeal, the California Supreme Court reversed Brown's death sentence, holding that the quoted instruction violated federal Constitutional law by denying the defendant the right to have "sympathy factors" raised by the evidence considered by the jury when determining an appropriate penalty.

A sharply divided Supreme Court held the instruction did not violate the Eighth and Fourteenth Amendments when given during the penalty phase of a capital murder trial.

The key vote in the case belonged to Justice Sandra Day O'Connor. The instruction standing by itself, she wrote in her concurring opinion, gives the jury needed guidance. However, taken in the context of the jury instructions as a whole, along with the prosecutor's closing argument, Justice O'Connor concluded the anti-sympathy instruction might go too far in restricting the jury's ability to take into account "any relevant mitigating evidence regarding the defendant's character or background."

Miranda—advise suspect of all accusations

Colorado v. Spring, 55 LW 4162 (January 27, 1987)—Must a suspect be informed of all accusations about which police will question him for a *Miranda* waiver to be valid? The Supreme Court, split seven to two, said no.

In February 1979, Spring and a companion shot and killed Donald Walker during a hunting trip in Colorado. Based upon information received from an informant regarding the defendant's involvement in the interstate transportation of stolen firearms, ATF agents set up an undercover purchase of firearms from the defendant and arrested him. After being advised of his *Miranda* rights, Spring signed a statement that he understood and waived his rights and was willing to answer questions. The agents then questioned him about the firearms violation that led to his arrest and, in addition, asked him whether he had ever shot anyone. In answer, Spring stated that he had "shot another guy once." Approximately a month later, Colorado law enforcement officers again gave Spring his *Miranda* warnings and he again signed a statement that he understood his rights

and was willing to waive them. He then confessed to the Colorado murder of Walker and signed a statement to that effect.

Spring was charged in a Colorado State Court with first-degree murder; he moved to suppress both the March 30 and May 26 statements on the ground that his waiver of *Miranda* rights was invalid. The trial court held that the ATF agents' failure to inform the defendant, before the March 30 interview, that they would question him about the murder did not affect the waiver and, therefore, the March 30 statement should not be suppressed.

The Colorado Court of Appeals reversed holding the defendant's waiver of his *Miranda* rights before the March 30 statement was invalid because he was not informed that he would be questioned about the murder case, and the state had failed to prove the May 26 statement was not the product of the prior illegal statement. The Colorado Supreme Court affirmed.

Justice Powell delivered the opinion of the court. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the court held that a suspect's waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly and intelligently. *Miranda*, at page 444 The *Spring* case presents the question of whether the suspect's awareness of all the crimes about which he may be questioned is relevant in determining the validity of his decision to waive the Fifth Amendment privilege.

The Supreme Court held that a suspect's awareness of all the crimes about which he may be questioned is not relevant to determining the validity of his decision to waive the Fifth Amendment privilege; accordingly, the ATF agents' failure to inform Spring of the subject matter of the interrogation could not affect his decision to waive the privilege in a constitutionally significant manner. "The *Miranda* warning tells a suspect that 'anything' he says may be used against him . . . that is warning enough and police officers need not tell a suspect exactly what they intend to question him about . . . ."

Miranda—invocation of right to counsel

Connecticut v. Barrett, 55 LW 4151 (January 27, 1987)—May police question a suspect after he says he will make an oral statement, but will not make a written statement without a lawyer? The Supreme Court, divided seven to two, said yes.

Barrett was arrested and charged with sexual assault. While in custody, he was advised three times of his *Miranda* rights. On each occasion, after signing and dating an acknowledgment that he had been given those rights, Barrett indicated to the police he would not make a written statement, but he was willing to talk about the incident leading to his arrest. On the second and third occasions, he added that he would not make a written statement outside the presence of counsel; thereafter, he then orally admitted his involvement in the sexual assault.

Chief Justice Rehnquist delivered the opinion of the court and held that the Constitution did not require suppression of Barrett's incriminating statement. The court reasoned that the defendant's statements to the police made clear his willingness to talk about the sexual assault, and there being no evidence that he was "threatened, tricked or cajoled" into speaking to the police, the trial court properly found his decision to do so constituted a voluntary waiver of his right to counsel. Specifically, the defendant's invocation of his right to counsel was limited in the opinion of the Supreme Court by its terms to the making of written statements and did not prohibit all further discussion with the police. However, the Supreme Court noted that "request for counsel must be given broad, all-inclusive effect only when the defendant's words, understood as ordinary people would understand them, are ambiguous." ■

NOTICE

Effective March 16, 1987, the United States Court of Appeals for the Eleventh Circuit has returned to its permanent headquarters at the United States Court of Appeals Building, 56 Forsyth Street, N.W., Atlanta, Georgia 30303.

Offices affected by this move include resident circuit judges James C. Hill, Thomas A. Clark and J. L. Edmondson; senior circuit judges Elbert P. Tuttle and Albert J. Henderson; and the offices of the circuit executive, clerk of court, staff attorneys and circuit library. Please make a note of the new address and mailing zip code.

cle opportunities

may

12 tuesday

IMMIGRATION REFORM: NEW OBLIGATION FOR EMPLOYERS
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 5.6 (satellite)
(205) 348-6230

13-15

WORKER'S COMPENSATION
Mobile
Alabama Department of Industrial Relations
Credits: 10.9
(205) 261-2868

14-15

CONSTRUCTION CONTRACTS AND LITIGATION
Fairmont Hotel, New Orleans
Practising Law Institute
Credits: 13.2 Cost: $425
(212) 765-5700

COMPUTER CONTRACTS AND CURRENT ISSUES
Ritz-Carlton Hotel, Boston
American Law Institute-American Bar Association
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(215) 243-1600

15-16

INVESTIGATION & TRIAL OF A NEGLIGENCE CASE
The Parkview Hotel, Hartford
Association of Trial Lawyers of America
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YOUNG LAWYERS' ANNUAL SEMINAR ON THE GULF
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Alabama Bar Institute for CLE
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19 tuesday

BASIC PROBATE IN ALABAMA
Montgomery
National Business Institute
Credits: 7.2 Cost: $86
(715) 835-7909

20 wednesday

BASIC PROBATE IN ALABAMA
Birmingham
National Business Institute
Credits: 7.2 Cost: $86
(715) 835-7909

21 thursday

SOUTHEASTERN TRIAL INSTITUTE
Phenix City
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85 (video replay)
(205) 348-6230

LEGAL MALPRACTICE
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6 (satellite)
(205) 348-6230

22 friday

SOUTHEASTERN TRIAL INSTITUTE
Sheraton, Dothan
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85 (video replay)
(205) 348-6230

29 friday

TECHNOLOGY IN THE LAW OFFICE: COMPUTERS AND BEYOND
Birmingham-Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 4.0
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may-june

31-5

FAMILY LAW: THE CRUCIAL ISSUES
University of Nevada, Reno
National College of Juvenile Justice
(702) 784-6012

june

4 tuesday

PENSION LAW
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6 (satellite)
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4-5

TECHNIQUES FOR EFFECTIVE LITIGATION MANAGEMENT
Hyatt Regency, Chicago
American Bar Association
Credits: 14.1 Cost: $400
(312) 988-5000

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Defense Research Institute
Credits: 16.0 Cost: $395
(312) 944-0575

THE CLOSELY HELD BUSINESS
The Ambassador West Hotel, Chicago
Practising Law Institute
Credits: 13.2 Cost: $390
(212) 765-5700

4-6

SOUTHEASTERN TAX INSTITUTE
Grand Hotel, Point Clear
Alabama Bar Institute for CLE
Credits: 12.0
(205) 348-6230

7-8

ASBESTOSIS & OTHER RELATED LUNG DISORDERS
Hotel Intercontinental, San Diego
Medi-Legal Institute
Credits: 13.5 Cost: $425
(818) 995-7189

7-12

TORT LITIGATION: NEW THEORIES, NEW TACTICS
The Royal Lahaina Resort, Maui
Association of Trial Lawyers of America
Credits: 18.9 Cost: $300
1-800-424-2725

10-20

SOUTHERN REGIONAL TRIAL ADVOCACY INSTITUTE
SMU School of Law, Dallas
National Institute for Trial Advocacy
Credits: 75.0 Cost: $1,350
1-800-225-6482

11-12

CONSTRUCTION CONTRACTS AND LITIGATION
Holiday Inn Union Square, San Francisco
Practising Law Institute
Credits: 13.2 Cost: $425
(212) 765-5700

MEDICAL MALPRACTICE & RISK MANAGEMENT
Mark Hopkins Hotel, San Francisco
Medi-Legal Institute
Credits: 13.5 Cost: $425
(818) 995-7189

REAL ESTATE INVESTMENT VEHICLES
St. Moritz on the Park, New York
Practising Law Institute
Credits: 13.8 Cost: $450
(212) 765-5700

11-13

EMPLOYMENT DISCRIMINATION & CIVIL RIGHTS ACTIONS
Grand Hyatt Hotel, New York
American Law Institute-American Bar Association
Credits: 20.1 Cost: $375
(215) 243-1600

11-14

ANNUAL SEMINAR
Sandestin, Destin
Alabama Trial Lawyers Association
(205) 262-4974

11-26

CAREER PROSECUTOR COURSE
Houston
National College of District Attorneys
(713) 749-1571

15-16

CURRENT EMPLOYMENT LAW ISSUES
The Drake Hotel, Chicago
Wake Forest University School of Law
Credits: 14.4 Cost: $350
(919) 761-5430

17-19

AMERICAN INSTITUTE ON FEDERAL TAXATION
Wynfrey Hotel, Birmingham
American Institute on Federal Taxation
Credits: 20.0 Cost: $300
(205) 251-1000

18 thursday

SOUTHEASTERN TRIAL INSTITUTE
Holiday Inn, Decatur
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85 (video replay)
(205) 348-6230

DISPUTE RESOLUTION
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6 (satellite)
(205) 348-6230

18-19

COMMERCIAL REAL ESTATE LEASES
Century Plaza Hotel, Los Angeles
Practising Law Institute
Credits: 13.2 Cost: $390
(212) 765-5700

cle opportunities

18-20

REAL ESTATE REORGANIZATION AND FORECLOSURE CONFERENCE
Atlanta
National Business Institute, Inc.
Credits: 21.6 Cost: $296
(715) 835-8525

19 friday

SOUTHEASTERN TRIAL INSTITUTE
UNA Media Center, Florence
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $85 (video replay)
(205) 348-6230

TAKING DEPOSITIONS
Omni Parker House, Boston
American Bar Association
Credits: 6.9 Cost: $250
(312) 988-5000

FORECLOSURE AND REPOSSESSION
Days Inn, Mobile
National Business Institute, Inc.
Credits: 7.2 Cost: $96
(715) 835-8525

19-21

ORTHOPEDIC INJURY & DISABILITY
Caesar's Palace Hotel, Las Vegas
Medi-Legal Institute
Credits: 16.5 Cost: $425
(818) 995-7189

22-26

POST-MORTEM PLANNING & ESTATE ADMINISTRATION
Wisconsin Law School, Madison
American Law Institute-American Bar Association
Credits: 35.1 Cost: $600
(215) 243-1600

25-26

ADVANCED WILL DRAFTING
Golden Tulip Barbizon, New York
Practising Law Institute
Credits: 12.6 Cost: $425
(212) 765-5700

PATENT LAW INSTITUTE
Hilton Inn, Dallas
Southwestern Legal Foundation
(214) 690-2377

26 friday

FORECLOSURE AND REPOSESSION
Sheraton Riverfront Station, Montgomery
National Business Institute, Inc.
Credits: 7.2 Cost: $96
(715) 835-8525

july

7-10

FUNDAMENTALS OF GOVERNMENT CONTRACTING
Kona Kai Club, San Diego
Federal Publications, Inc.
Credits: 27.3 Cost: $850
(202) 337-7000

9-10

ANTITRUST INSTITUTE
The Stanford Court, San Francisco
Practising Law Institute
Credits: 13.2 Cost: $425
(212) 765-5700

16-18

ANNUAL MEETING
Riverview Plaza, Mobile
Alabama State Bar
Credits: 13.0
(205) 269-1515

20-27

TAX I AGAIN
Law Center, Tuscaloosa
University of Alabama School of Law
Credits: 31.2
(205) 348-6230

25-26

ANATOMY FOR ATTORNEYS
Hotel Intercontinental, Hilton Head
Medi-Legal Institute
Credits: 13.5 Cost: $425
(818) 995-7189

31 friday

DRUG TESTING: THE LEGAL ISSUES
Hyatt Regency, Nashville
Irwin Associates, Inc.
Credits: 7.8 Cost: $150
(919) 229-9184

Attorney Discipline and the Role of the Local Grievance Committee

by Alex W. Jackson
Assistant General Counsel,
Alabama State Bar

Attorney discipline is a subject little understood by most lawyers. Sweeping changes in procedures and responsibilities over the past decade have made re-education desirable for those whose knowledge, based upon experience or study, is now out of date, and for newer lawyers who have had little access to the inner workings of the disciplinary system.

Not too many years ago Alabama elected to move into the "disciplinary mainstream" by developing a disciplinary system more in keeping with practice in other jurisdictions. The results of this effort were new ethics rules, as embodied in the *Code of Professional Responsibility* of the Alabama State Bar, and new procedural rules as embodied in the Rules of Disciplinary Enforcement (ARDE). The *Code* and the ARDE were adopted on May 6, 1974, had an effective date of October 1, 1974, and were based upon models developed by the American Bar Association. All attorney discipline in Alabama is subject to the jurisdiction of the Supreme Court of Alabama and the Disciplinary Board of the Alabama State Bar, as established and defined by the ARDE. While the system now utilized is not overly complex, it can be confusing to the uninitiated.

Unfortunately, many lawyers first become involved with the system by having to respond to a grievance inquiry, and others by serving on a local bar grievance committee, many without a working knowledge of the *Code* and the ARDE. Approximately 900 grievances were filed against Alabama lawyers last year. A substantial percentage of these were investigated, at least initially, by local grievance committees as authorized by Rule 8(b) of the ARDE. Thus, on sheer numbers alone, the local grievance committee system is a very important and integral part of the overall disciplinary process.

The ARDE provide that a circuit, county or city bar association may form a grievance committee, subject to approval by the Alabama State Bar or its board of commissioners, and that any such committee shall have the power and authority to investigate any alleged professional misconduct of a member of the state bar, whether charges or a complaint are made or referred to the local grievance committee. Rule 8(b)(2) goes on to grant to the office of the general counsel parallel authority to investigate and/or prosecute charges, stating specifically that the failure of any local grievance committee to take or recommend action against an attorney shall not act as a bar to the prosecution of charges by the general counsel of the Alabama State Bar.

A properly formed local grievance committee has the authority to investigate allegations of professional misconduct against any member of the Alabama State Bar, not just members of the local association. Most often this "long-arm" jurisdiction applies to acts or omissions by a nonmember attorney that occur in the city, county or circuit where the grievance committee sits. The rule quite specifically states that neither the grievance committee nor the general counsel need have charges or a specific complaint in order to conduct an investigation. There is no requirement that a complaint exist, so, of course, there is no requirement that the complaint be in writing, or that it be notarized, or that it be in the form of a legal pleading, all of which are objections frequently raised by attorneys in their initial response to a grievance.

The justification for this rule is that the initial investigatory process is a probable-cause type of investigation, with procedural rules adopted pursuant to rules 4(g) and 6(b) of the ARDE providing for the preparation and submission of a written report (Form C-3 Report of Completed Investigation and Recommendation) to the Disciplinary Commission of the Alabama State Bar for an initial determination as to appropriate action. While a local grievance committee may bring formal disciplinary charges, any other or lesser recommendations by the local committee are subject to the review and/or modification by the Disciplinary Commission.

The Disciplinary Commission, which is established by Rule 6 of the rules, acts as a grand jury. Its three members review every grievance filed in Alabama, whether that grievance is investigated by the office of the general counsel or by a local grievance committee and, with the exception of those cases in which a local grievance committee determines that formal charges be filed, the commission has the authority to make an initial determination as to the appropriate action to be taken. The commission has a large range of options available, including outright dismissal, a letter of private informal admonition, a private reprimand, a public censure, suspension and disbarment. The commission generally does not conduct hearings, and does not hear

live testimony, relying rather upon the final reports prepared and submitted by the local grievance committees and/or the general counsel. When a grievance has been investigated, a final report has been submitted to the Disciplinary Commission with a recommendation for the imposition of some form of discipline, with the commission concurring, then, due process considerations cause the ARDE to provide for hearing procedures, and for the filing of formal charges which specify with particularity alleged acts or omissions by the attorney.

All hearings are conducted before panels of the Disciplinary Board, as established by Rule 4 of the ARDE and these panels have subpoena power, as do the Disciplinary Commission, the general counsel and local grievance committees, all as authorized under Rule 8. Appeals from orders by the Disciplinary Boards are made directly to the supreme court as provided by Rule 8(d).

Given this backdrop the question then becomes what is the role of a local grievance committee and how should that committee best approach its task? The local grievance committees are an investigative arm of the Disciplinary Commission. Their role is to investigate allegations of misconduct, prepare reports regarding those investigations and submit those reports to the commission. The local grievance committees have the right to bring formal disciplinary charges against an accused attorney and have the right, in cooperation with the general counsel, to prosecute to decision those charges. But local grievance committees do not have final say as to whether discipline is to be imposed in a particular matter. Their recommendations are considered, but the final determination lies either with the Disciplinary Commission, a panel of the Disciplinary Board or the supreme court.

Some local grievance committees use a panel system, whereby attorneys, complainants and other witnesses are summoned before a panel of lawyers serving on the committee and statements are taken. While a respondent has the right to be represented by counsel, these panel "hearings" are not adversarial in nature, and cross-examination of witnesses generally is not appropriate. Some local grievance committees assign an individual investigator to a case, who in turn will interview all of the parties and submit a report to a panel or a committee of the grievance committee, which in turn will formulate a report for the Disciplinary Commission. Investigators for local grievance committees may compel by subpoena the attendance of witnesses and the production of documents. Subpoenas so issued may be enforced in the circuit court. Discovery otherwise generally is governed by the Alabama Rules of Civil Procedure.

All disciplinary investigations are confidential pursuant to Rule 22, and all proceedings remain confidential until and unless the accused attorney waives confidentiality or there is a decision for the imposition of public discipline, (public censure, suspension, disbarment), or transfer to disability inactive status by the Disciplinary Commission or a panel of the Disciplinary Board. All disciplinary investigations are to be conducted in such a way as to preserve the confidentiality of the proceeding. Complainants are not considered parties to a disciplinary matter and, therefore, are cloaked by the confidentiality rules. Unless an attorney receives public discipline, complainants are advised that the matter has been dismissed, or dismissed after "appropriate action has been taken," but no specific factual findings generally are provided.

As might be surmised, local grievance committees are accountable to the Disciplinary Commission, and should an investigation fail to be timely concluded, the commission may request that the investigation be taken over by the general counsel. Such occurrences are rare, but have been known to happen.

During the course of its investigation, a local grievance committee's primary responsibility is to determine whether the conduct of the lawyer in question has fallen so far below the standards mandated by the *Code* as to indicate the necessity for the imposition of discipline and provide to the Disciplinary Commission the factual basis for those findings. The *Code* contains nine "Canons," and each canon contains "Ethical Considerations," which are aspirational in nature, and "Disciplinary Rules," which are mandatory in nature.

An attorney may not be disciplined for violation of the ethical considerations contained in the *Code*. An attorney may be disciplined for acts or omissions which violate the *Code of Professional Responsibility* or the attorney's oath of office, whether the act or omission occurred in the course of an attorney-client relationship. Rule 2 of the ARDE specifically provides that conduct outside of the course of an attorney-client relationship may constitute grounds for the imposition of discipline. Thus, the duty that an attorney has to comply with the *Code* extends beyond his clients and beyond the courts, although there is no clearly cut authority as to exactly how far that duty extends and what the jurisdictional limits are.

Local grievance committees are granted immunity by Rule 9, as are attorneys who, acting in compliance with DR 1-103, disclose information regarding alleged unethical activities by an attorney. Clerical, procedural and legal channels of communication exist between the various local committees and office of the general counsel. The office of the general counsel is located in the bar's Center for Professional Responsibility in Montgomery, and disciplinary records are maintained there for the Disciplinary Commission and Disciplinary Boards.

Local grievance committees have an important and often misunderstood role in the disciplinary process. Investigators for the local committees provide an invaluable service to the Alabama State Bar, and it is through the efforts of all of these volunteers that complaints can be thoroughly investigated, justice can be served and the bar can continue its policy of effective self-regulation. The system would not work without them. ■

Disciplinary Report

Disbarment

● On February 18, 1987, **Dan C. Alexander,** an attorney of the State of Alabama, was disbarred by consent by an order of the Supreme Court of Alabama. The effective date of his disbarment is 12:01 a.m. January 22, 1987.

Public Censures

● Talladega County lawyer **James J. Clinton** was publicly censured on February 6, 1987, for having been guilty of misrepresentation and conduct adversely reflecting on his fitness to practice law, and willful neglect of a legal matter. Clinton accepted a retainer to initiate court action on behalf of clients, but failed to initiate the court action, falsely represented to the clients that he had initiated court action on their behalf and failed to refund the retainer until the clients had obtained a court judgment against him for the amount of the retainer. [ASB No. 83-400]

● Birmingham lawyer **Charles Eugene Caldwell** was publicly censured for willful misconduct and conduct adversely reflecting on his fitness to practice law, in violation of the *Code of Professional Responsibility of the Alabama State Bar.* Caldwell pleaded guilty to assaulting seven different persons, interfering in the prosecution efforts of one of the victims by threat or intimidation and failing to obey the lawful order of a police officer. [ASB No. 85-183]

● On February 6, 1987, Mobile attorney **A. Holmes Whiddon** was publicly censured by the president of the Alabama State Bar before the board of commissioners for violation of Disciplinary Rule 1-102(A)(6). It was determined that officers of the Mobile Police Department had discussed the referral of an accident case with Whiddon and he had failed to advise those officers that referral of a case might constitute a violation of the *Code of Professional Responsibility.* The Disciplinary Commission determined that his conduct adversely reflected on his fitness to practice law. [ASB No. 83-460]

● On February 6, 1987, Birmingham attorney **Robert Lowell Austin** received a public censure for violation of Disciplinary Rules 6-101(A), 7-101(A)(1) and 9-102(B)(4) of the *Code of Professional Responsibility.* Austin accepted employment in a domestic relations matter and over a period of several months failed to file pleadings reflecting a settlement of the matter effectuated by the parties. In addition, he failed to promptly pay to the clerk of the court the court costs paid to him by the parties. [ASB No. 86-246]

Private Reprimands

● On February 6, 1987, a lawyer was privately reprimanded for having violated DR 4-101(B)(1) and DR 5-105(B), by having communicated secret or confidential information concerning one corporate client who was engaged in mortgage-related activites to another corporate client who was also engaged in mortgage-related activities, after a conflict of interest had developed between the two clients. [ASB No. 85-418]

● On February 6, 1987, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 6-101(A). The Disciplinary Commission determined that the attorney willfully neglected a legal matter entrusted to him by failing to close out a simple estate in a period of two and a half years. The Disciplinary Commission further found that there was no reasonable excuse for the lawyer's failure to act promptly and close the estate. [ASB No. 85-569]

● On February 6, 1987, a lawyer was privately reprimanded for having engaged in conduct prejudicial to the administration of justice and that adversely reflected on his fitness to practice law.

The lawyer, in the representation of a client, took action on behalf of the client when the lawyer knew or when it was obvious that such action would serve merely to harass or maliciously injure another. The lawyer prepared a deed for a client and acknowledged the client's signature on that deed, by which deed the client conveyed certain real property to his new wife, despite the lawyer's knowledge that the client was required, under a valid divorce decree, to bequeath the property in question, in trust, for the use and benefit of his former wife and his children by his former wife. [ASB No. 85-575]

● On February 6, 1987, an Alabama attorney received a private reprimand for violation of Disciplinary Rules 9-102(A)(2) and 9-102(B)(1). The Disciplinary Commission determined that the attorney received from the register of a circuit court in this state a cash settlement check payable to the attorney and his client and that, without the client's knowledge or consent, the attorney endorsed the check for the client, placed the check in his trust account and paid himself a large legal fee. The Disciplinary Commission determined that the attorney failed to promptly notify his client of the receipt of funds received from the court and, furthermore, that the attorney withdrew from his trust account funds belonging in part to a client and in part presently or potentially to the lawyer, with the ownership thereof being in dispute. The Commission determined the attorney should receive a private reprimand for these violations. [ASB No. 86-438]

Reinstatement

● **Charles Jackson Fleming** was reinstated by Panel IV of the Disciplinary Board of the Alabama State Bar, effective January 9, 1987.

Committees

1986-87 committees report progress

Recently, President Scruggs asked committee and task force chairmen for midyear reports, to be used by the **Committee on Programs and Priorities** and the bar's elected leaders in planning the 1987-88 bar year. Highlights of some of those are reported here.

Editor Robert A. Huffaker reports *The Alabama Lawyer* remains on sound financial footing with advertising revenue and the quarterly state bar stipend being sufficient to cover expenses of publication. Serving with Huffaker are 16 other volunteer lawyers from around the state.

Professional responsibility classes at Cumberland and the University of Alabama Schools of Law have been visited by **Lawyer Alcohol and Drug Abuse Committee** chairman Walter J. Price, who reports he was "pleasantly surprised by the interest and seriousness with which the students responded" to his talk. Committee members have joined the Alabama Alliance of Concerned Professionals, a group representing several professions and their committees on alcohol and other substance abuse.

A legislative article has been prepared by the **Task Force to Consider Proposed Revisions of the Alabama Constitution of 1901,** Charles D. Cole, chairman, and is to be presented to the board of bar commissioners this summer. Additional articles on finance and taxation and the executive branch of state government are being developed.

Almost three years in the works, the **Future of the Profession Committee's** study of the demographic and economic status of Alabama lawyers is reported elsewhere in this issue. Chaired initially by Dr. Richard A. Thigpen, then by James B. Kierce and now by John A. Owens, the committee plans to evaluate the report and make recommendations to the board based on it. Bar members wishing to make suggestions to the committee may address them to Mary Lyn Pike, staff liaison to the committee, Alabama State Bar, P.O. Box 671, Montgomery, Alabama, 36101.

Also published elsewhere in this issue are rules governing election of the president-elect and commissioners, adopted by the board December 5, 1986. The product of three years' effort by the **Committee on Governance of the Alabama State Bar** and the board, the rules implement changes in Alabama statutes on the organization and authority of the state bar. See Sections 34-3-16 and 34-3-40 through 43, *Code of Alabama* (1975). Simply put, the changes provide for election of the president-elect by mail ballot, rather than by a vote of members registered for the annual meeting, and expand representation on the board of bar commissioners for circuits having 300 or more members.

In October 1986, the **Committee on Meeting Criticism of the Bench and Courts,** under the leadership of R. Kent Henslee, proposed to the board a policy for handling such criticism and it was adopted. Developed in consultation with judges at all levels of the state's judiciary, the policy is that the executive committee of the board and the commissioner from the involved circuit will develop a response (1) when the criticism is directed toward the judicial system or the rule of law that governs the system and (2) when a response provides the opportunity to educate the public about an important aspect of the administration of justice and the judicial system. The president of the bar will make the response after consultation with those previously mentioned.

No response will be made when the criticism is essentially political in nature, when it is of such a local nature as to have little or no impact on the state judicial system or when the committee believes there is no compelling reason to make a response.

1987-88 volunteers sought

A committee preference questionnaire appears on the next page. President-elect Ben H. Harris, Jr., seeks volunteers willing to commit time and resources to the work of these and other committees and task forces of our bar. If you are willing to serve, please complete the questionnaire and mail it to him in care of the Alabama State Bar.

The 1987-88 committees will conduct their first meeting of the new bar year during the annual "kick-off" breakfast to be held during the bar's meeting in Mobile, July 16-18. All members whose terms do not expire in 1987 should mark their calendars now for Saturday morning, July 18 at the Riverview Plaza in Mobile. ■

ALABAMA STATE BAR 1987-88 COMMITTEE PREFERENCE QUESTIONNAIRE

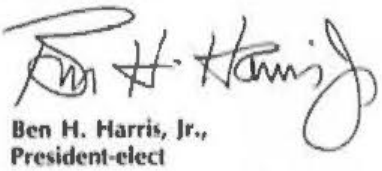
Dear Fellow Lawyers:

Committees and task forces are the backbone of our association, developing projects and addressing problems for both the public and the membership. Volunteering for them means a commitment of time and may require travel, but the rewards are many.

If you are willing to serve, please use the space below to inform the state bar of your preferred assignments. Because the bar year begins on July 18, 1987, we will need to hear from you no later than June 1.

With your help, the Alabama State Bar will have another productive year.

Sincerely yours,



Ben H. Harris, Jr.,
President-elect

(Places available in parentheses)

PUBLIC SERVICE

Task Force on Alternative Methods of Dispute Resolution (8)
Committee on Correctional Institutions and Procedures (7)
Task Force on Citizenship Education (3)
Task Force to Consider Revisions of the Constitution of 1901 (3)
Committee on a Client Security Fund (1)
Committee on Access to Legal Services (5)
Committee on Indigent Defense (4)
Lawyer Referral Service Board of Trustees (7)
Law Day Committee (6)
Committee on Prepaid Legal Services (3)

BENCH AND BAR

Task Force to Consider Possible Restructuring of Alabama's Appellate Courts (3)
Task Force on the Proposed Judicial Building (3)

FOCUS ON THE PROFESSION

Committee on Lawyer Advertising and Solicitation (8)
Committee on Lawyer Alcohol and Drug Abuse (4)
Character and Fitness Committee (3)
Ethics Education Committee (5)
Committee on the Future of the Profession (5)
Permanent Commission on the *Code of Professional Responsibility* (4)
Committee on Professional Economics (4)
Committee on Lawyer Public Relations, Information & Media Relations (6)

BAR SERVICES, MANAGEMENT AND INTEREST GROUPS

Military Law Committee (5)
Federal Tax Clinic (4)
Board of Editors, *The Alabama Lawyer* (1)
The Alabama Lawyer Bar Directory Committee (3)
Finance Committee (3)
Insurance Programs Committee (6)
Legislative Liaison Committee (4)
Local Bar Activities & Services Committee (5)

PLEASE RETURN BY JUNE 1, 1987

Name: _____

Firm, agency or other employer: _____

Office mailing address: _____

City: _____ State: _____ Zip Code: _____

Office telephone number: _____ Year of admission to bar: _____

Yes, I would like to serve. My preferences are:

1. _____
2. _____
3. _____

I am currently a member of the following state bar committee or task force: _____

_____

Comments or suggestions: _____

_____

_____

_____

MAIL TO: Ben H. Harris, Jr., President-elect
Alabama State Bar P.O. Box 671 Montgomery, AL 36101

A Survey of Alabama Lawyers: 1986

by
Samuel H. Fisher, III
Research Associate

James G. Stovall
Co-Director

Patrick R. Cotter
Co-Director

Capstone Poll
University of Alabama
March 1987

The Capstone Poll is an independent survey organization jointly sponsored by the Institute for Social Science Research and the School of Communication at the University of Alabama.

The authors of this report are Dr. Patrick Cotter, associate professor of political science and co-director of the Capstone Poll; Dr. James Stovall, co-director of the Capstone Poll and director of the Communication Research and Service Center; and Samuel H. Fisher, III, research associate for the Capstone Poll.

Copies of the full report are available from the Alabama State Bar, P.O. Box 671, Montgomery, AL 36101.

INTRODUCTION

The results of a survey of attorneys in Alabama are presented in this report. In the study, data collected concerned the socio-demographic characteristics of lawyers in Alabama, information about the administration and economics of private law practices in Alabama, opinions of lawyers concerning a number of issues related to the legal profession and attitudes concerning several topics related to the performance of the Alabama State Bar.

The survey was sponsored by the Alabama State Bar and conducted by the University of Alabama's Capstone Poll. The questionnaire used in the survey was designed by the Capstone Poll from a list of suggested questions selected by the bar's Committee on the Future of the Profession and provided by the American Bar Association.

In the survey, telephone interviews were completed with a random sample of 407 lawyers selected from the in-state membership of the Alabama State Bar. Prior to the study, the state bar mailed a letter to lawyers selected to participate, explaining its purpose and asking them to participate. Next, Capstone Poll interviewers telephoned each individual in the sample in order to arrange a time to conduct the interview. Finally, a Capstone Poll interviewer called the respondents and conducted a 20- to 30-minute interview. The interviews were completed between June 19 and August 1, 1986. Only four individuals in the sample refused to participate in the study.

Many of the reported statistics in the text are the median average which means that half of the responses are "higher" and half are "lower." The median average is used since the figure is not distorted by extremely high or extremely low values. All probability samples contain some sampling error—the extent to which respondents' views differ from the views held by the entire population from which the sample was selected. Sampling error can be expressed in terms of the relative confidence one can have in a sample result. For the current Capstone Poll survey, one can be 95 percent confident a result is not more than 5 percent different from that of the entire population from which the sample was selected. Sampling error does not reflect other sources of error found in surveys.

I. SOCIO-DEMOGRAPHIC CHARACTERISTICS OF ALABAMA LAWYERS

Lawyers in Alabama are overwhelmingly white and male. As seen in Figures 1 and 2 only 11 percent of the state's attorneys are female and only 1 percent are black. Four out of five lawyers are married. Among those married, the median number of children is two; almost one-third (30 percent) have no children. Most Alabama lawyers live in the state's larger cities. In particular, about 60 percent of the attorneys live in cities with populations of more than 50,000. The highest concentration of lawyers is found in Jefferson County where about four out of ten attorneys in Alabama reside (Figure 3). Substantial numbers of lawyers are also found in Montgomery (11 percent), Mobile (10 percent), Tuscaloosa (5 percent) and Madison (4 percent) counties.

The median age of attorneys in Alabama is 38. About three-fifths of the respondents are 40 years old or younger, while 9 percent are more than 60 years old (Figure 4).

Figure 1
Race of Alabama Lawyers

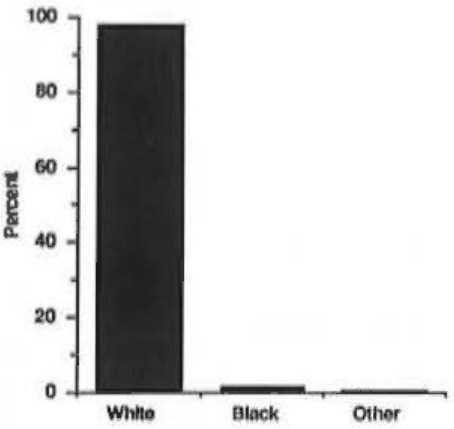


Figure 2
Sex of Alabama Lawyers

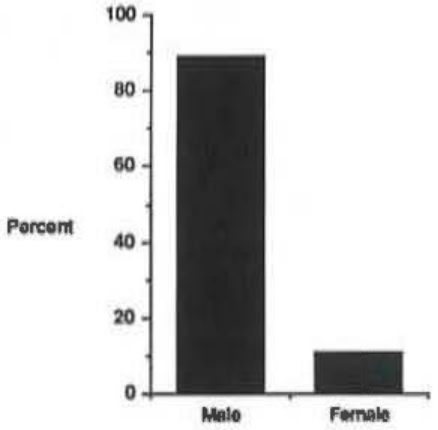


Figure 3
County in Which Law Office is Located

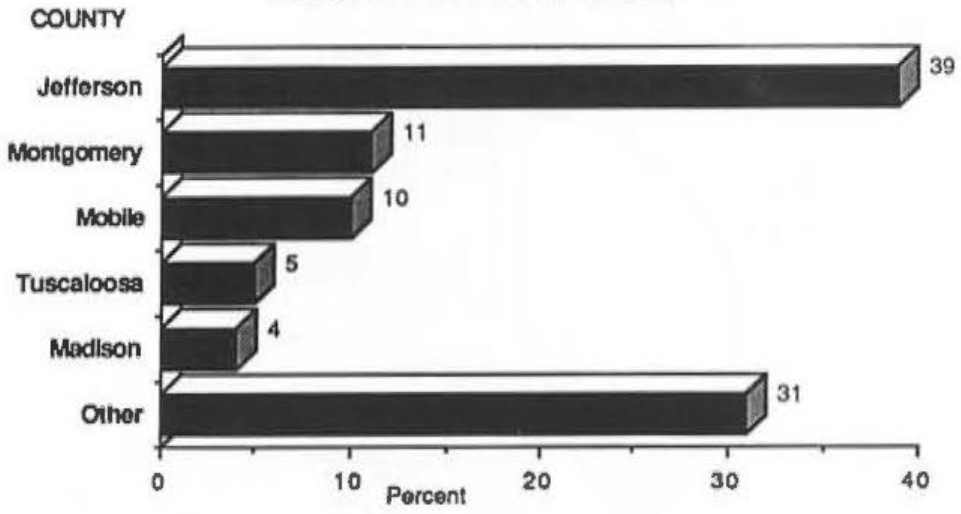
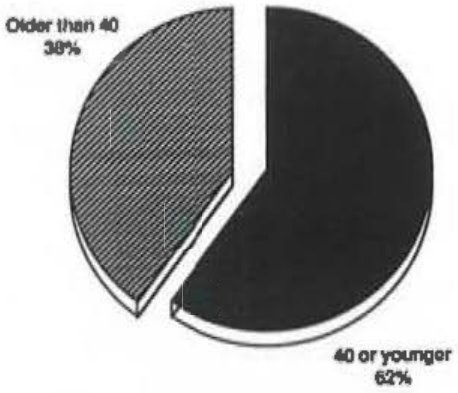


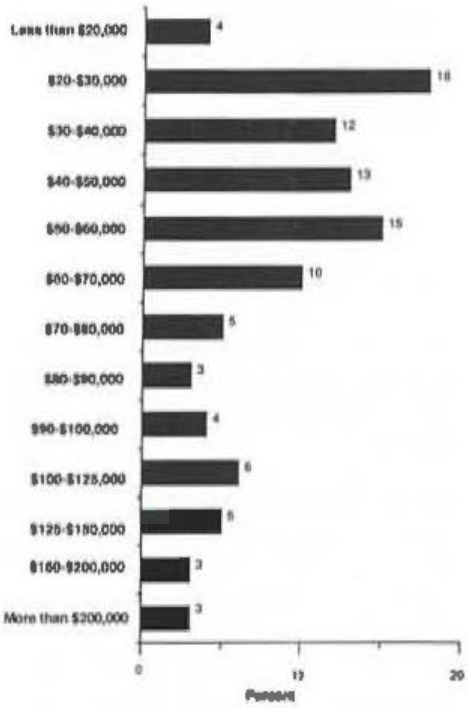
Figure 4
Age of Attorneys in Alabama



Nearly one-third of the state's attorneys have been admitted to the bar since 1981 (Figure 5) and an additional one-third (37 percent) were admitted during the 1970s, thus almost 70 percent of the lawyers in Alabama were admitted within the last 15 years (1971-1986).

Among those who estimated their annual income after business expenses about one-fifth say they make less than $30,000 per year (Figure 6). About one-third (29 percent) earn more than $70,000 per year. The median annual income of those responding is about $55,000. About one-half (48 percent) of these individuals say all their 1985 income came from law-related work.

Figure 6
Income of Alabama Lawyers



Most Alabama lawyers (72 percent) are in private practice (Figure 7). Substantially fewer women are in private practice than men: three-fourths of the male respondents say they are in private practice, while only one-half of the females are in private practice.

About 12 percent of the lawyers in Alabama work for the judiciary or government and about 9 percent work for corporations or businesses. Of those

Figure 5 When Alabama Attorneys were Admitted to the Bar

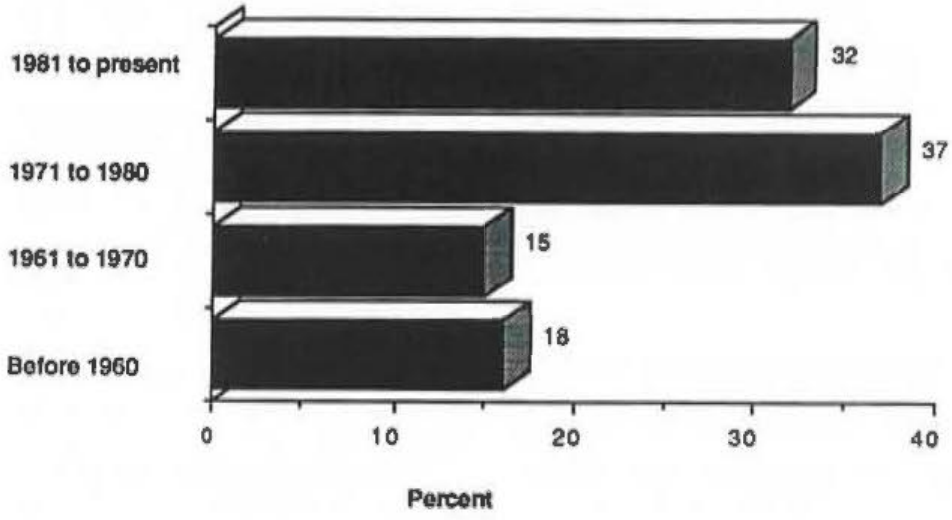
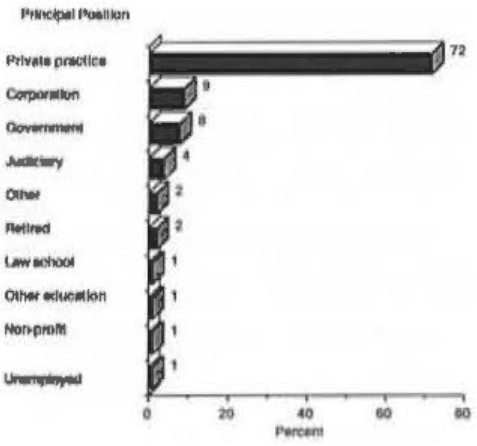


Figure 7
Principal Positions of Alabama Lawyers



working for the government or the judiciary, 23 percent work at the federal level and 69 percent are at the state level.

Approximately one-tenth of the attorneys are employed in a business or corporation. About 2 percent of lawyers in the sample are retired and 1 percent are unemployed. About 1 percent work for law schools and another 1 percent work for non-profit organizations.

Lawyers in private practice have a higher annual income than those employed elsewhere. The median income of those in private practice is about $55,000. Among other employed attorneys, the median income is about $45,000.

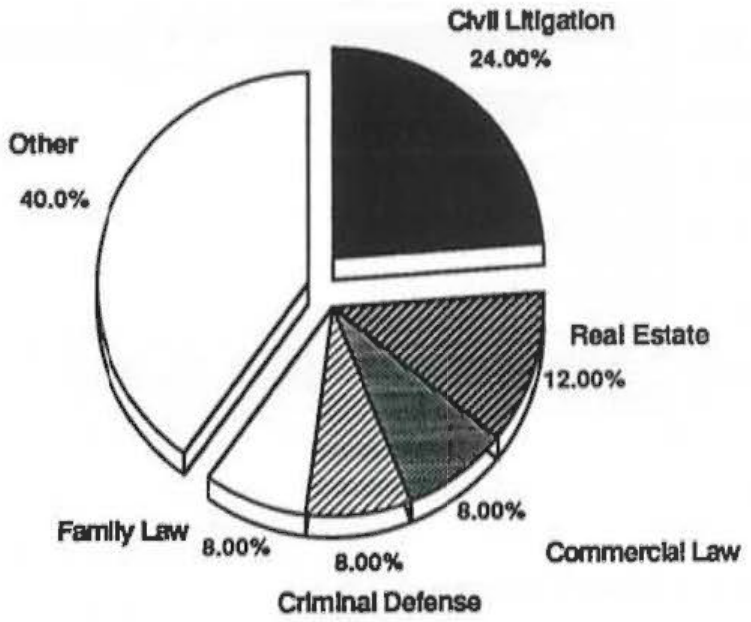
The information collected concerning the socio-demographic characteristics of lawyers suggests a profile of a typical Alabama attorney. He is white, married and has two children. He is in his upper 30s and was admitted to the bar in the late 1970s. The typical attorney has a private practice in one of the state's larger metropolitan areas. About 90 percent of his $50,000 income comes from legal work.

II. ADMINISTRATION AND ECONOMICS OF PRIVATE PRACTICE

Area of practice

Private practice attorneys in the sample were asked a number of questions designed to obtain information about their activities and the administration and economics of the firms for which they work. First, private practice attorneys were asked to specify the area of law that represents the bulk of their practice (Figure 8). Civil litigation is the most frequently mentioned area of practice; about 24 percent say this is their major activity. The second most frequently mentioned area is real estate (12 percent), followed by "general personal matters not otherwise covered" (10 percent). Approximately 8 percent are involved primarily in "commercial law and contracts for corporate transactions," another 8 percent work mainly with criminal defense and 8 percent report working in "family law, divorce, adoptions, mental health and juveniles." The balance of respondents are scattered in a wide variety of areas.

Figure 8
Major Area of Practice



Work activities

About 72 percent of the lawyers in private practice work more than 40 hours a week; most of these work 41 to 60 hours per week. About 13 percent of private practice attorneys report civil litigation occupies 100 percent of their time. About a quarter say civil litigation takes up from 51 to 99 percent of their work time. Fifty-four percent spent 1 to 50 percent of their work time on litigation while about 6 percent spent no time on civil litigation.

About 31 percent of the private practice attorneys say they have "more work than they can handle." About 60 percent report having "about the right amount" of work while 7 percent feel underemployed.

About 27 percent of lawyers in private practice say their firm has more work than it can handle. About 6 percent say their firm does not have enough work and 64 percent believe their organization has about the right amount of work to do.

Composition of private practice firms

The results of the survey show private practice law firms in Alabama range from very small operations to large organizations with a variety of positions.

About 43 percent of the private practice attorneys have worked for their current organization for ten years or more. About the same number (47 percent) have been with their present organization for five years or less.

When asked about the number of solo practitioners or proprietors in their organization, about 60 percent of the private practice lawyers say there are none, while 25 percent report one solo practitioner or proprietor.

When asked how many partners or shareholders are in their organization, 30 percent reported none. About 24 percent say their organization has six or more shareholders or partners. The median number of shareholders or partners is two.

Slightly more than half (53 percent) say their organization has no associates. Seventeen percent say that their organization has one person who is an associate, while 19 percent report their organization has five or more associates. The median number of associates in a firm is one.

Three-quarters of the respondents report having no lawyers of counsel in their organization.

When asked about paralegals and law clerks in the organization, about 62 per-

cent report their firm has no paralegals and 70 percent say their firm has no law clerks. About 70 percent of the attorneys say their organization has no non-lawyer administrators. Twenty percent have one non-lawyer administrator. A higher number of attorneys say their organization has an accountant and bookkeeper; however, about half (52 percent) of the private practice attorneys say their organization does not have an accountant or bookkeeper.

An overwhelming majority (94 percent) of the respondents say their organization has one or more people in secretarial or clerical positions. About 33 percent say their organization has five or more individuals working in a secretarial or clerical position. Of those lawyers reporting that their organization uses secretarial or clerical help, the median number of employees is three.

When asked about the number of messengers many (61 percent) of the lawyers say their organization has none. Similarly, most (88 percent) private practice lawyers say their firm does not employ any investigators.

Use of paralegals

The 38 percent of private practice attorneys who report that their organization employs paralegals were asked a series of questions about how these individuals are used. Seventy-six percent of these respondents use paralegals in litigation. More than half use paralegals in commercial law (53 percent) and real estate (55 percent). Use of paralegals in corporate, probate and estate work is reported by about 50 percent of the respondents.

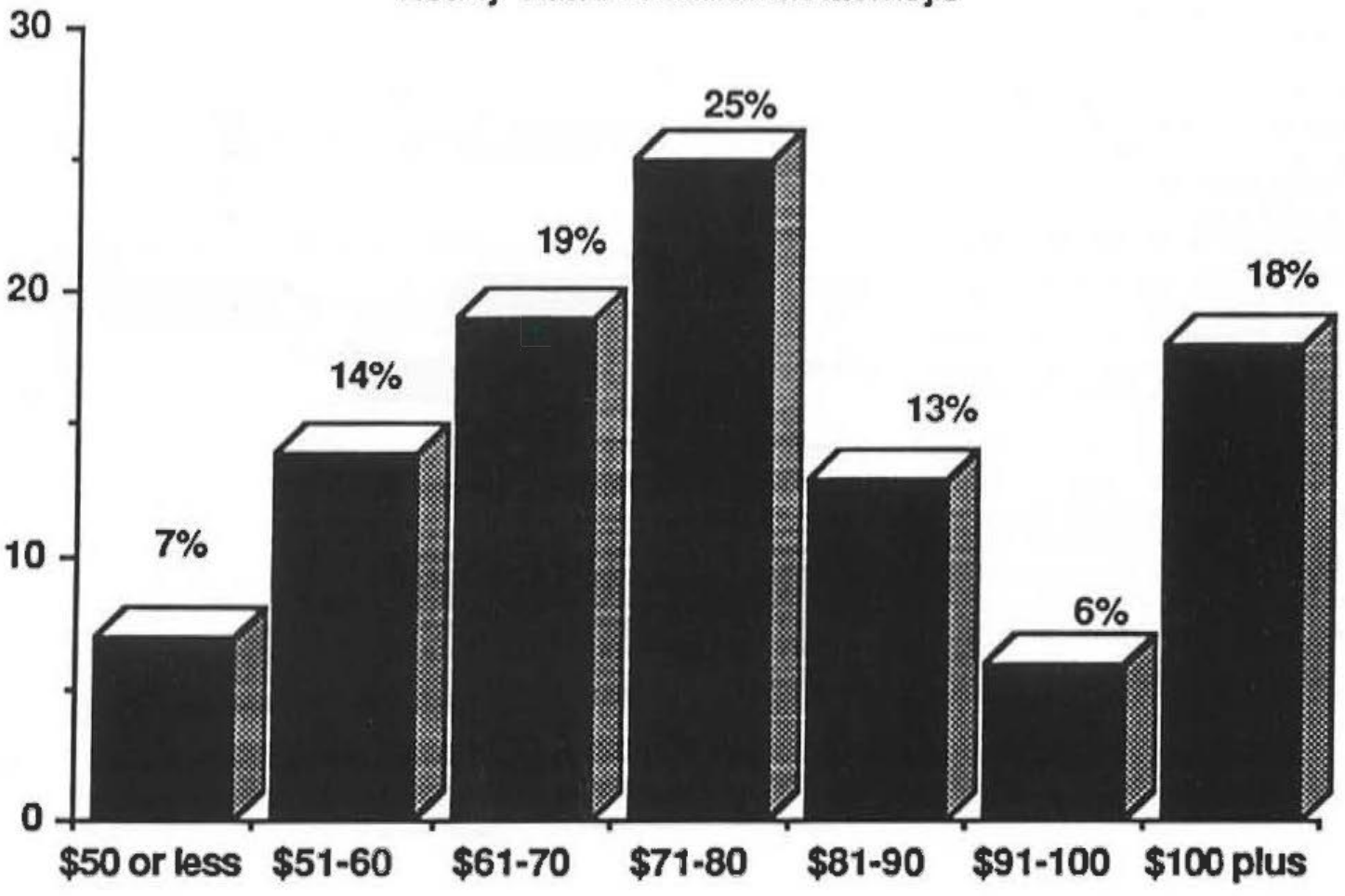
Fees

Private practice attorneys were asked what hourly rate they charge their clients (Figure 9). About one-fourth of these lawyers say they charge between $71 and $80 an hour. About 19 percent charge between $61 and $70 an hour, while 18 percent say they charge more than $100 an hour. The average hourly charge is $75.

Among the few private practice attorneys who charge on a daily basis (16 percent) about 26 percent say they charge clients $500 per day. The average daily charge is $560.

Private practice attorneys say the most important factor affecting the fees which they charge is the amount of time spent on a project. About 64 percent say the amount of time spent has a "very important" impact on the amount a client is charged. The experience of the lawyer

Figure 9
Hourly Rates of Alabama Attorneys



working on the project is said to have a very important impact on the amount charged by 29 percent of the respondents and an important effect by 58 percent. Additionally, the client's ability to pay, the results or size of settlement and the custom of the community are said to have either a very important or important impact on the amount charged by about three-quarters of the private practice attorneys.

About 27 percent of the lawyers in private practice say they always use employment contracts with their clients (Figure 10). An additional 50 percent sometimes use employment contracts.

Almost nine in ten (86 percent) of the private practice attorneys say their organization charges clients for travel expenses. About 80 percent bill clients for long-distance telephone charges. Fewer respondents report charging clients for time spent on the telephone (68 percent), duplicating and photocopying (54 percent), extra postage (40 percent), paralegals' time (30 percent) or secretarial and word processing time (24 percent).

About 56 percent of private practice attorneys say they keep time records always or most of the time (Figure 11). An additional 16 percent say they always keep time records except for contingent fee cases.

When asked about using time records for billing about 37 percent say they always use time records, while 29 percent use them most of the time.

Many (60 percent) of the attorneys in private practice say their organization bills clients on a monthly basis while a smaller number (10 percent) charge quarterly (Figure 12).

Nearly 40 percent of private practice lawyers say between 1 and 5 percent of their organization's fees were uncollected during the last year. Twenty-seven percent say between 6 and 10 percent of their organization's charged fees remain uncollected. About 12 percent of these respondents say more than 20 percent of the fees charged by their organization have not been collected.

There are a variety of methods firms use to collect unpaid fees. About three-quarters of the private practice attorneys say their organization attempts to negotiate with the client. A slightly smaller number (65 percent) say their organization sends dunning letters to delinquent clients. About 29 percent say their organizations sue to collect unpaid fees. Relatively few report that their organizations use fee arbitration (10 percent) or collection agencies (9 percent) to collect unpaid fees.

Overhead

Private practice attorneys were asked what percent of their organization's gross income went to covering overhead costs (Figure 13). Thirty percent of these lawyers say their firm spends 30 percent or less of its income on overhead. About 29 percent say their firm spends between 31 to 40 percent for overhead, while about the same number (28 percent) say overhead consumes between 41 to 50 percent of their firm's income.

Equipment

Private practice attorneys were asked if their organization owned, rented or shared different types of office equipment. Substantial numbers of respondents say their organization owns or rents a photocopy machine (90 percent), a word processor (76 percent), an electronic or computerized phone system (74 percent), teleconferencing capability (73 percent) or a magnetic-memory or memory typewriter (64 percent). About half the respondents say their organization has a postage meter, while 47 percent say their firm has a computer used for data processing or recordkeeping.

Computerized legal research

About 42 percent of the private practice lawyers say their organization used computerized research service during 1985. Of those who reported the use of such a service, about 64 percent said their organization used Westlaw while 20 percent used Lexis and 12 percent used Juris.

Figure 10
Use of Employment Contract

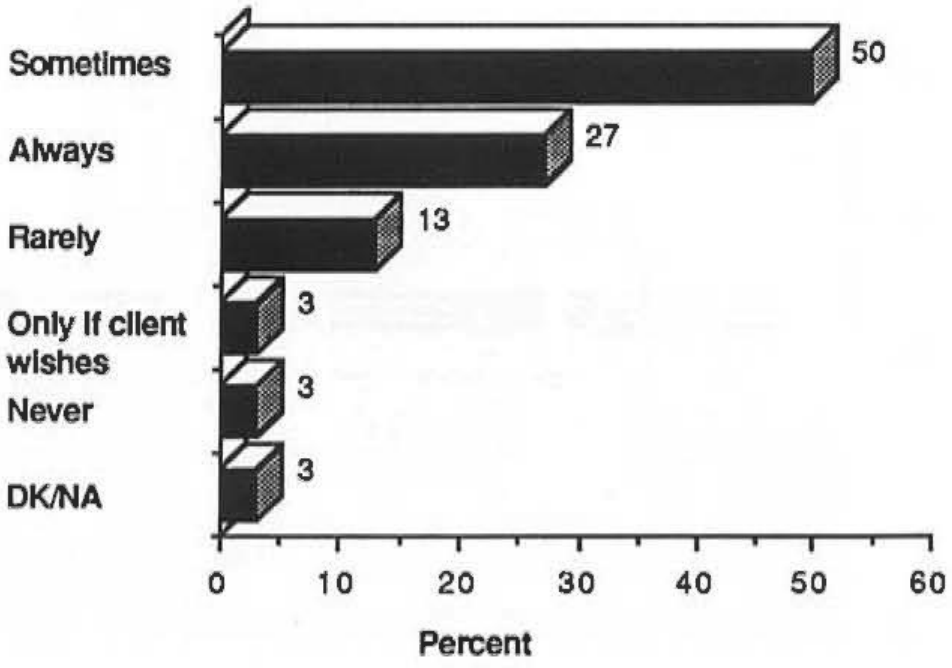


Figure 11
Maintenance and Use of Time Records

Maintenance of Time Records

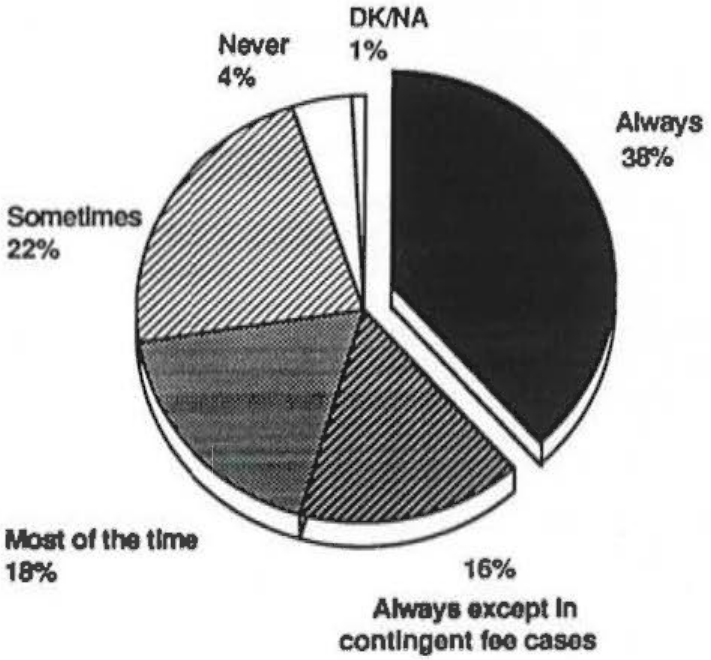
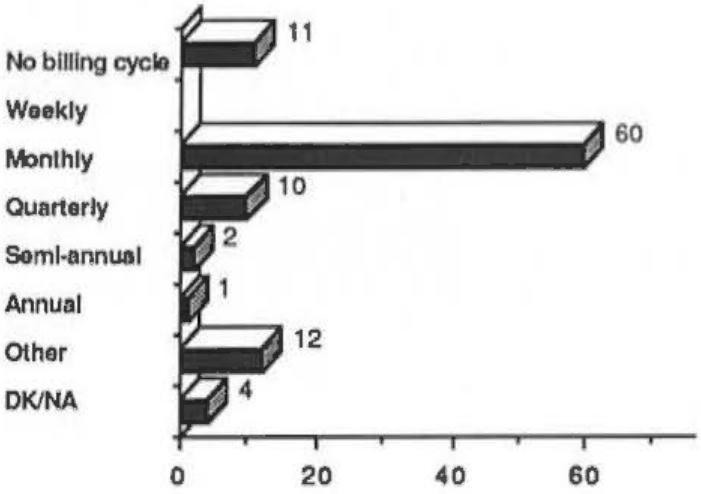


Figure 12
Billing Cycles



Use of Time Records

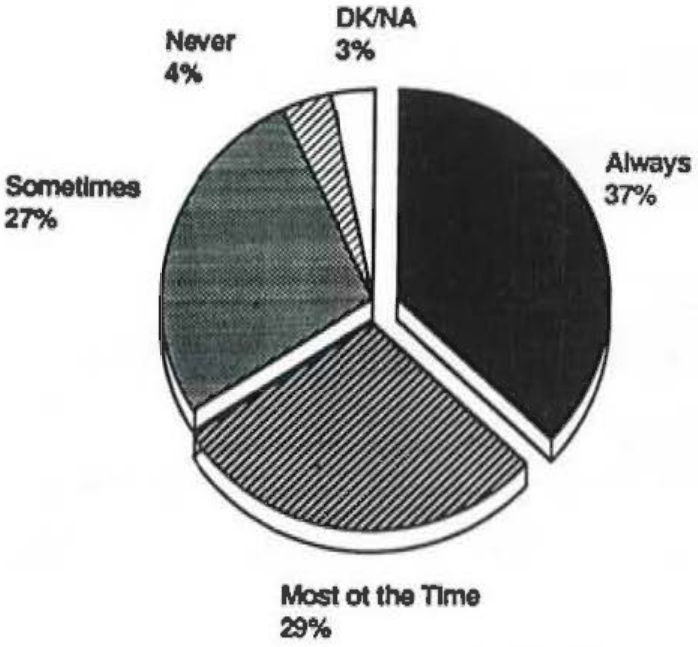
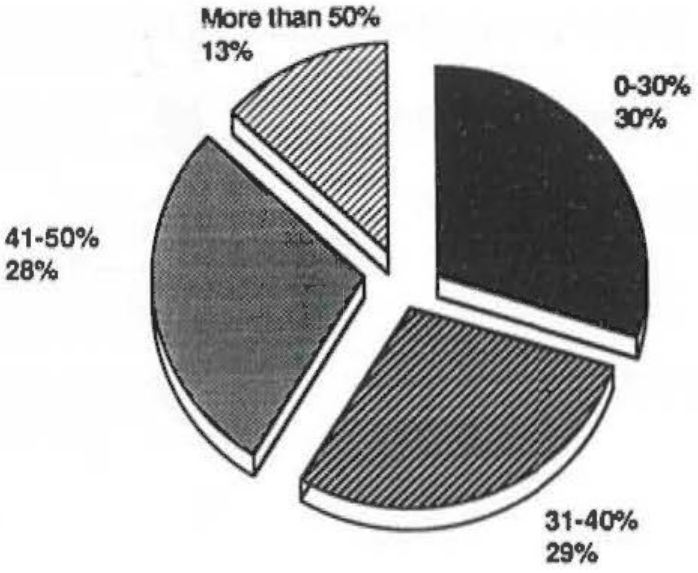


Figure13
Percent of Gross Income as Overhead Costs



Docket/calendar control

Very few private practice lawyers (6 percent) say their organization uses a computerized system to keep track of the docket and the calendar (Figure 14). These lawyers are more likely to say their firm uses an office-wide central calendar (18 percent) or a double diary system (14 percent) to keep track of such activities.

Salaries

The private practice lawyers in this survey were asked several questions concerning the starting and average salaries paid to employees in their organization. As seen in Figure 15, about 20 percent of those responding say the starting salary for a paralegal in their organization is between $14,000 and $15,000. About 21 percent report the beginning salary for a paralegal is between $15,000 and $16,000. The average beginning salary for a paralegal is $14,000. For a paralegal starting work in a larger city (over 50,000 people) the median starting salary is $15,000, compared to $12,000 for those in smaller cities or towns.

About 19 percent of the private practice attorneys responding say the average annual salary currently paid by their organization to paralegals is more than $19,000. The average annual salary paid to paralegals is $16,000. Paralegals in large cities have an average salary of $16,000 compared to $14,000 paid to those in smaller cities or towns.

Figure 14
Type of Docket and/or Calendar Control System

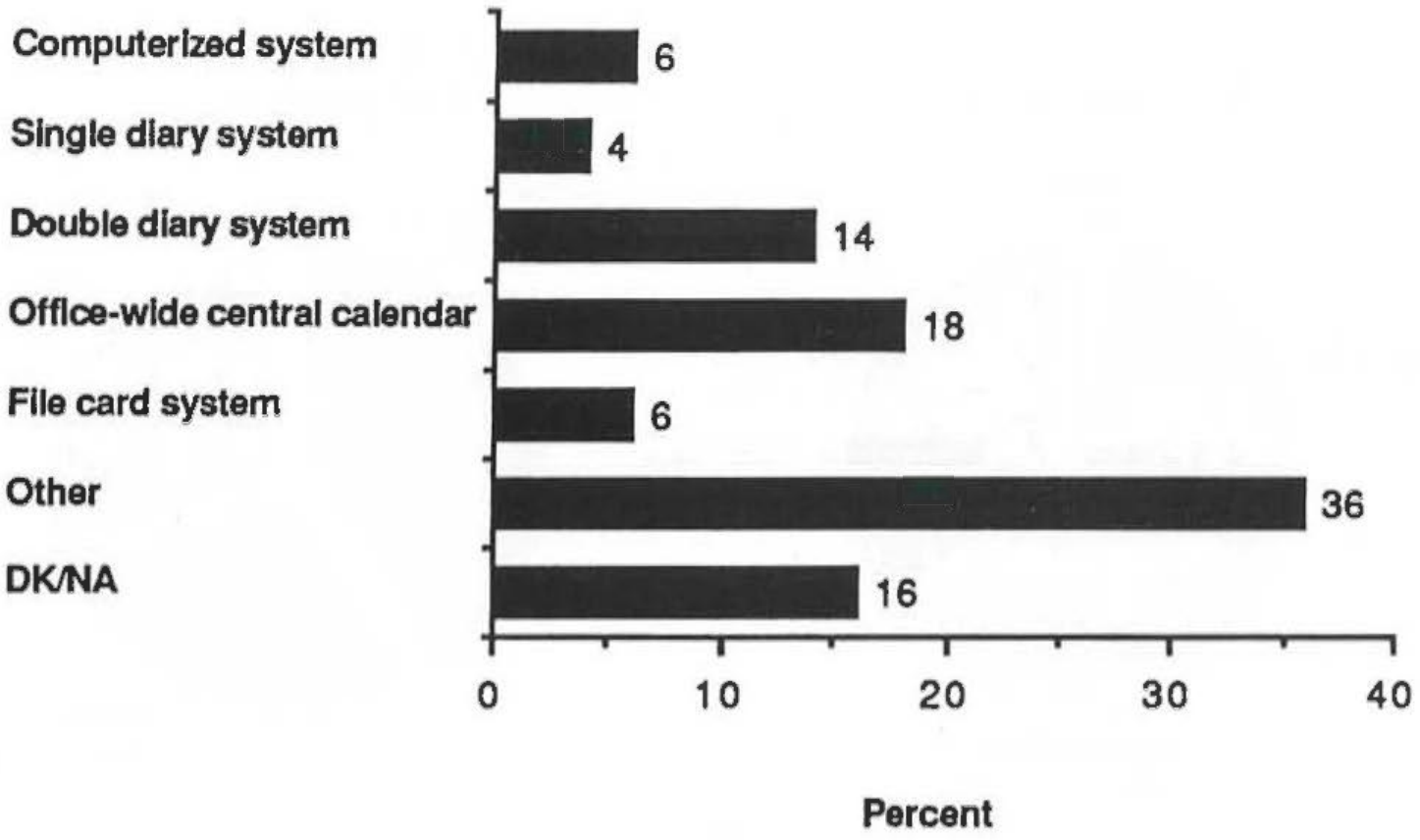
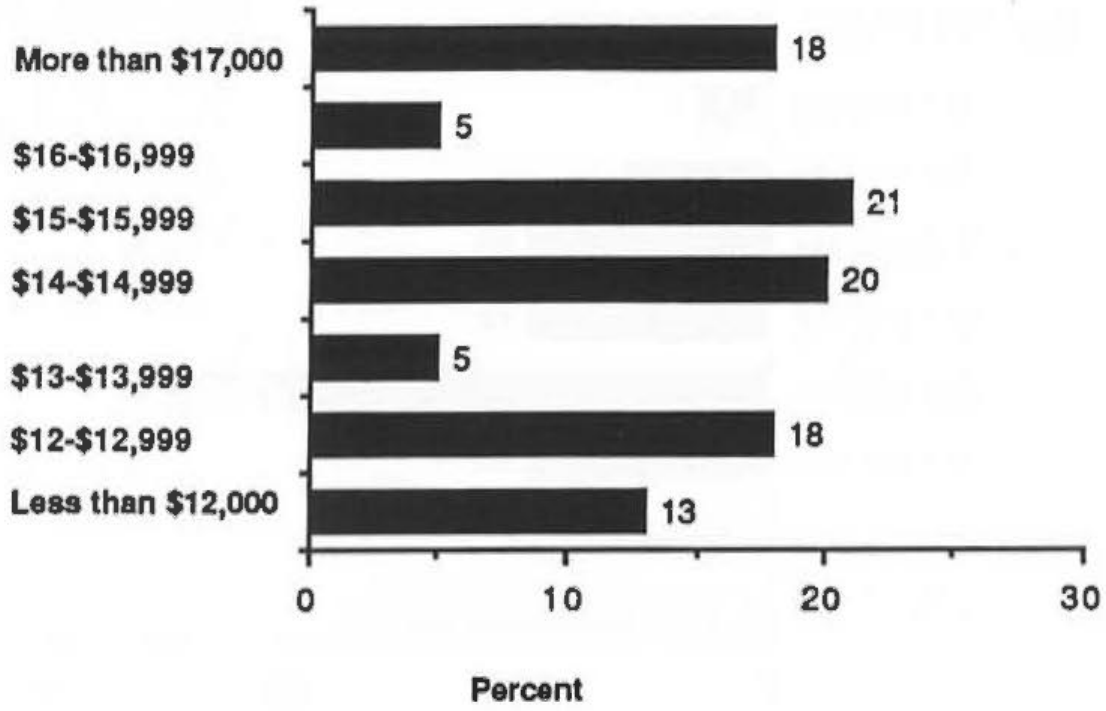


Figure 15

Starting and Annual Salaries of Paralegals

Starting salaries



Annual salaries

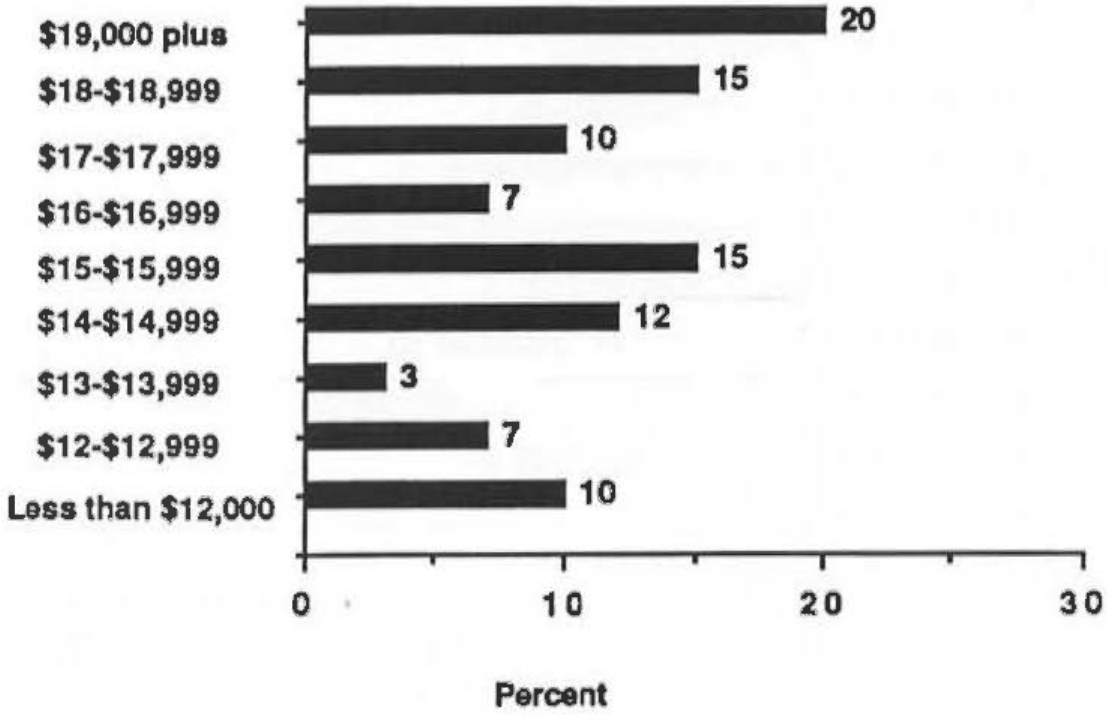
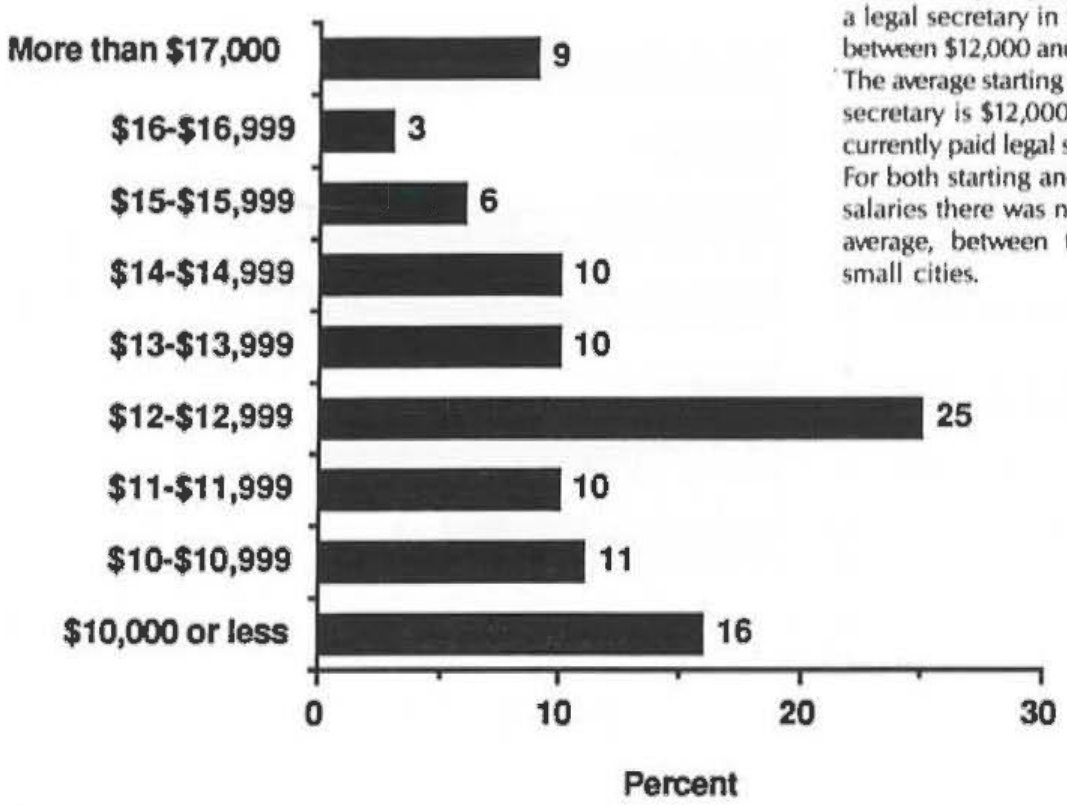


Figure 16
Starting and Annual Salaries for Full-Time Legal Secretaries

Starting salaries

About 25 percent of the private practice attorneys say the starting salary for a legal secretary in their organization is between $12,000 and $13,000 (Figure 16). The average starting salary paid to a legal secretary is $12,000. The average salary currently paid legal secretaries is $14,000. For both starting and current secretarial salaries there was no difference, on the average, between those in large and small cities.



Annual salaries

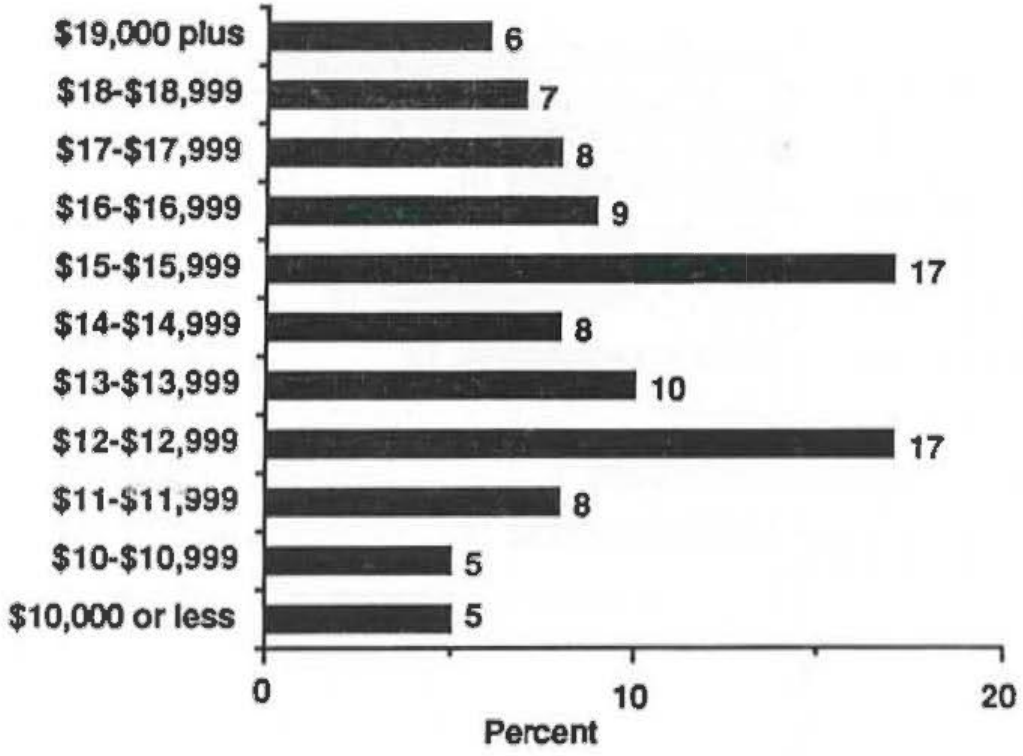


Figure 17
Compensation for Beginning Lawyers

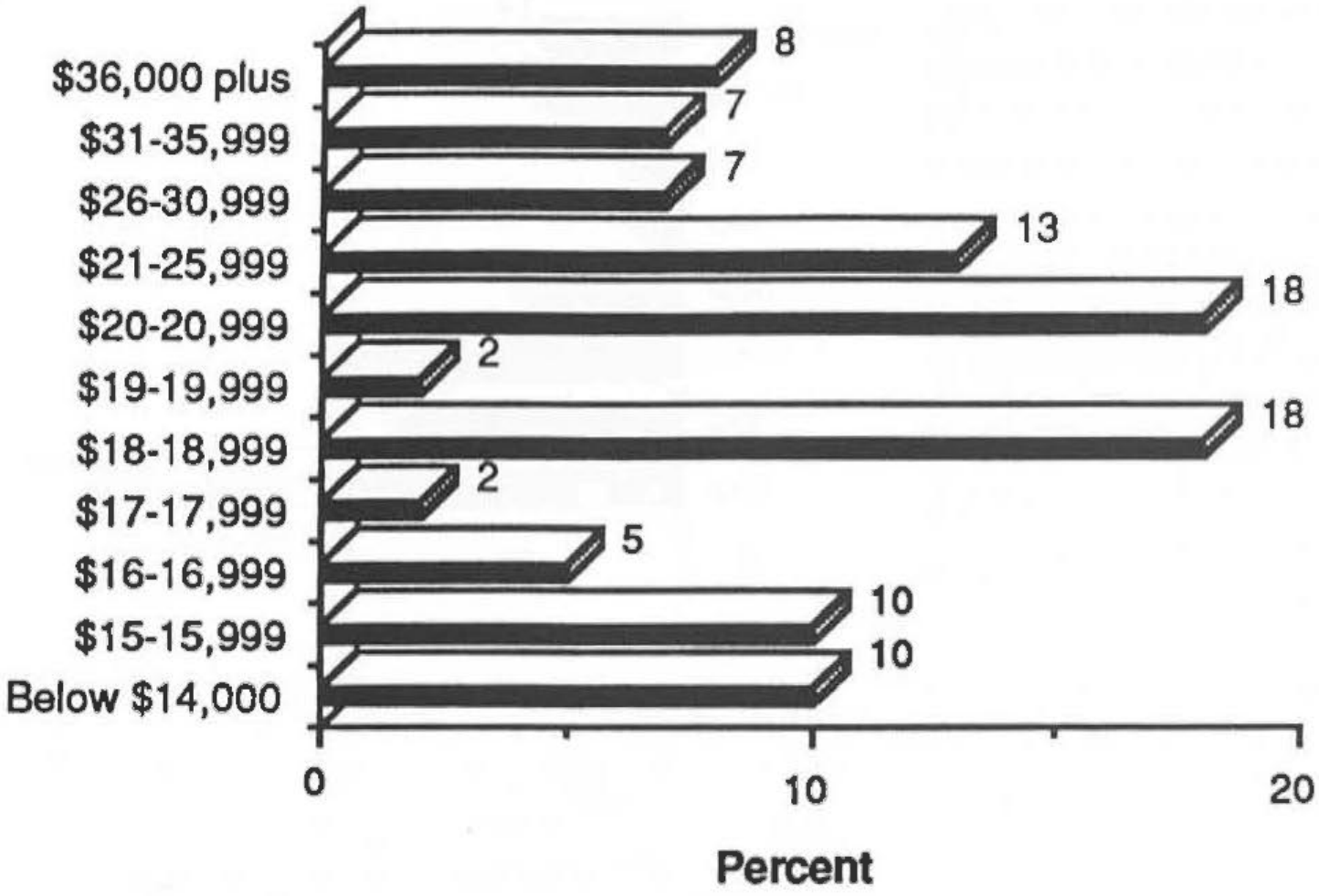
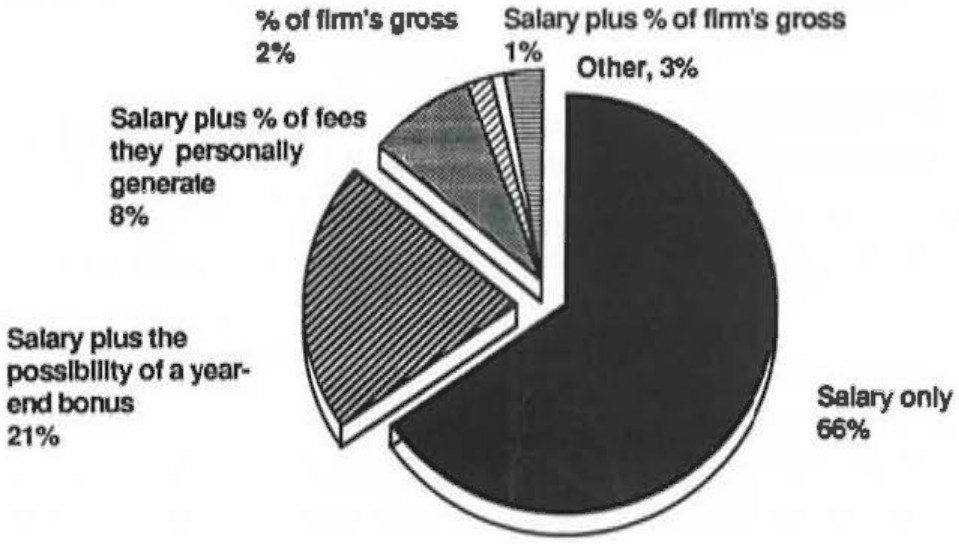


Figure 18
Method of Compensation of Alabama Law Firm Associates



As seen in Figure 17, about 18 percent of the private practice attorneys say their firm would pay a beginning attorney between $20,000 and $21,000 per year. An equal number say the salary for a new lawyer within their organization is between $18,000 and $19,000. The average salary for a beginning lawyer is $21,000. In larger cities the average starting salary is about $20,000 while in smaller cities it is about $18,000.

Private practice attorneys also were asked on what basis associates were paid in their organization (Figure 18). Salary only is the most frequently mentioned form of compensation for associates (66 percent). About 21 percent say salary with the possibility of a year-end bonus is the method used by their firm.

Fringe benefits

Private practice attorneys were asked what type of fringe benefits are provided to the lawyer and non-lawyer employees in their organizations. Regarding benefits for attorneys, most of the private practice attorneys say their organization pays for professional membership dues (72 percent) and educational courses and programs (76 percent). Paid vacations (66 percent), paid holidays (65 percent), expenses for entertaining clients (62 percent) and paid sick leave (60 percent) are the next most frequently provided benefits. Private practice law firms are less likely to provide disability insurance (29 percent), paid sabbaticals (25 percent), dental insurance for the individual (15 percent) and dental insurance for a lawyer's family (12 percent).

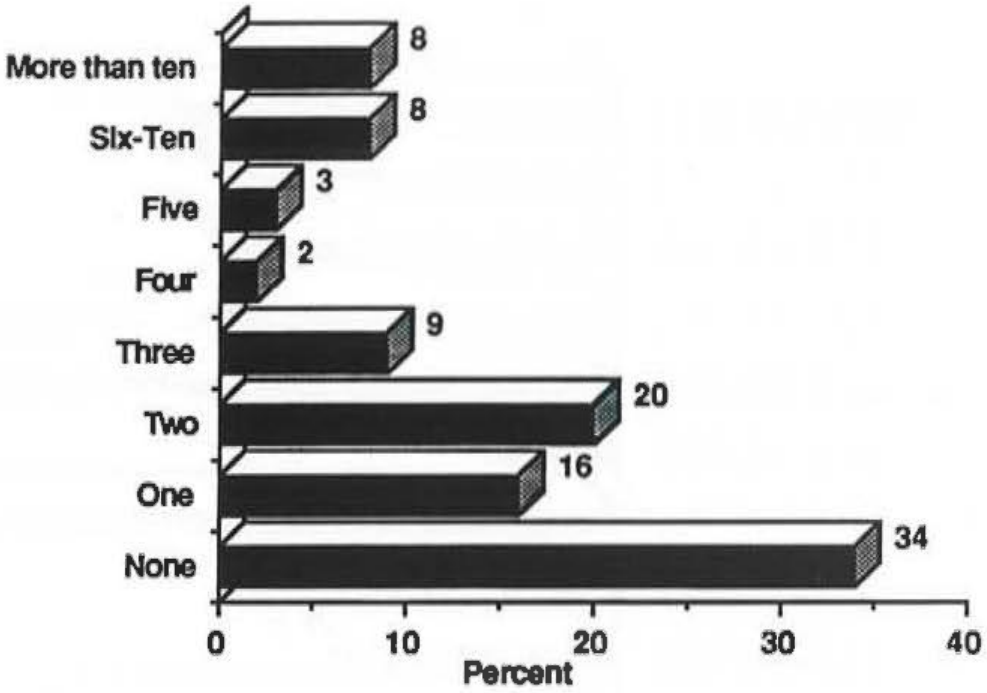
The four most frequently provided fringe benefits for non-lawyers are paid vacation (72 percent), paid holidays (70 percent), paid sick leave (67 percent) and medical insurance (51 percent). Less than half the respondents say their firm provides medical insurance for the family, dental insurance, disability insurance, life insurance, a pension plan, expenses for education courses and programs for non-lawyers.

Hiring new lawyers

The private practice attorneys also were asked whether their organization plans to hire any new lawyers within the next five years (Figure 19). About a third of these respondents say their firm plans to hire no new lawyers in the next five years. About 16 percent say their firm will hire one new lawyer, while 20 percent will hire two lawyers. About 8 percent say their organization will hire more than ten new lawyers in the next five years. Lawyers from larger cities reported the median number of associates to be added in the next five years is two, while those from smaller cities said only one associate would be hired.

Private practice attorneys also were asked how many lawyers had left their firm in the past five years without being replaced. About three-quarters report no unfilled vacancies.

Figure 19
Plans for Additional Lawyers



Personal problems

There are a number of personal problems that may arise in a law practice. Private practice attorneys were asked if in the past five years any attorney in their office had experienced a physical disability, alcoholism or drug dependency, mental or emotional disability, death or divorce. Divorce is the most mentioned of the five problems (32 percent). The development of a physical disability (13 percent) and death (13 percent) are the next most mentioned problems. About 6 percent report problems involving alcoholism or drug dependency.

Malpractice insurance

The final topic related to private practice examined in the survey is malpractice insurance. About 82 percent of the private practice attorneys report having malpractice insurance. About 15 percent have no insurance.

III. ISSUES FACING THE BAR

Continuing Legal Education

Attorneys generally are satisfied with the overall quality of continuing legal education programs in Alabama. Nearly a third of the attorneys rate CLE programs as excellent, and more than half say they are good. Only 13 percent say they are either fair or poor.

Alabama lawyers are split over the question of increasing the mandatory CLE credits to include an ethics education requirement. Some 42 percent support such a change while 56 percent are opposed. Of those who favor an ethics requirement, 38 percent support a one- or two-credit requirement, while 36 percent want a three-credit requirement and 25 percent favor a four- or more credit ethics requirement.

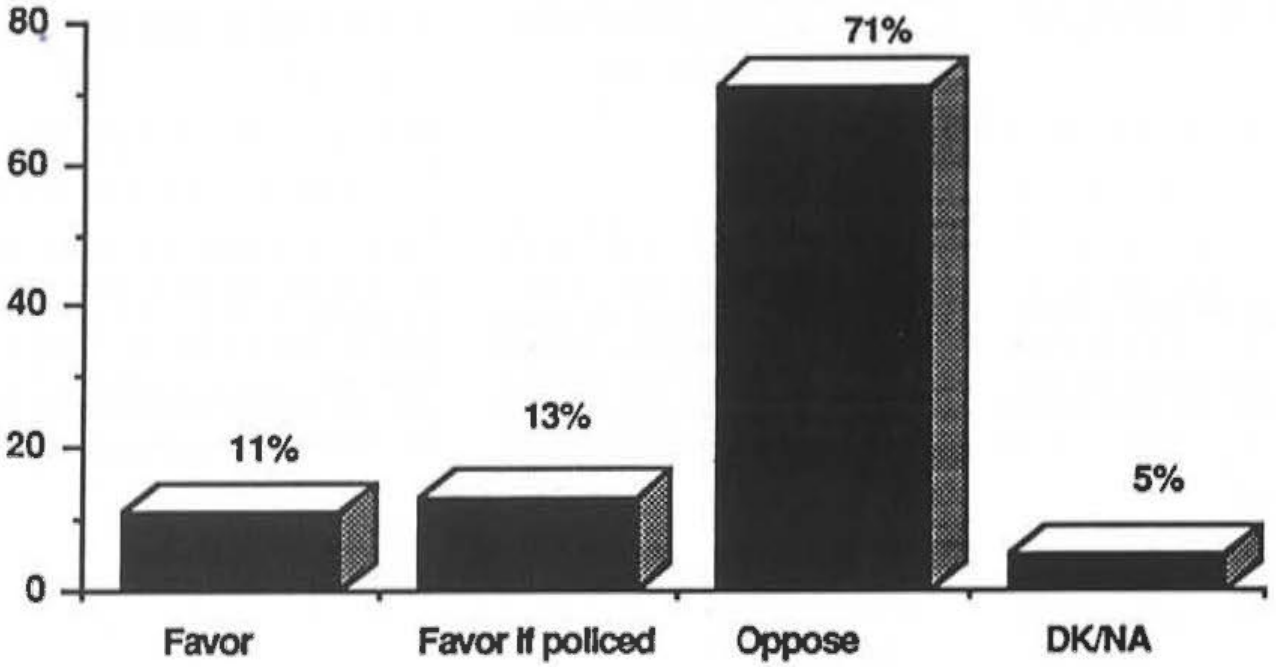
Advertising

Most Alabama lawyers—nearly three-fourths—oppose advertising by attorneys (Figure 20). Only 11 percent favor it. About 13 percent would favor advertising by lawyers if it is policed by the bar. Only 4 percent of the sample report they or their firm has advertised in any manner other than a standard listing in a classified telephone directory.

Specialization

The question of implementing a specialization plan has substantial numbers of supporters and opponents among

Figure 20
Attitudes Toward Advertising and Use of Advertising



Question:
Do you favor advertising by lawyers, favor if policed by the bar, or do you oppose advertising by lawyers?

Question:
Have you or your organization done any advertising other than a standard listing in a classified telephone directory?

the sample (Figure 21). Slightly more than half favor a specialization plan, and a third are opposed to it. Of those who are in favor of it, two-thirds said it should be based on a combination examination and peer review. Only 10 percent said it should be based on self-designation.

Pro bono services

Nearly half the sample (46 percent) say their employers have a policy that encourages them to devote time to providing free legal services for low income individuals. About 39 percent say they have no such policy. Among those responding, 72 percent of the lawyers reported spending 50 or fewer hours during the year providing legal services for which no fee was charged. This figure suggests the typical lawyer in Alabama spends less than one hour per week on *pro bono* services.

IV. BAR SERVICES AND RESPONSIBILITIES

In the questionnaire Alabama lawyers were asked a number of questions about the state bar association and its activities. The state's attorneys generally have positive feelings about the association.

The Alabama Lawyer

Specifically, 45 percent say *The Alabama Lawyer* is fulfilling its responsibility very well in providing information and substantive articles of interest to members of the association. Some 51 percent say this publication is fulfilling its responsibility adequately.

Ethics enforcement

The state's attorneys are satisfied with the way the bar investigates and prosecutes ethics violations. About 30 percent say the bar accomplishes this responsibility very well, and another 41 percent say this responsibility is carried out well. There is some dissatisfaction in this regard, however; nearly 20 percent say the bar is doing not very well or not at all well.

Bar staff

Nearly two-thirds of the sample say they are familiar with the state bar's staff and functions. Among these, about 90 percent believe the staff is courteous and helpful and well-organized. About two-thirds say the staff is about the right size, while 10 percent say it is not large enough.

Almost half the entire sample has visited or called the bar office during the past year, and an overwhelming number of those (96 percent) were satisfied with that contact.

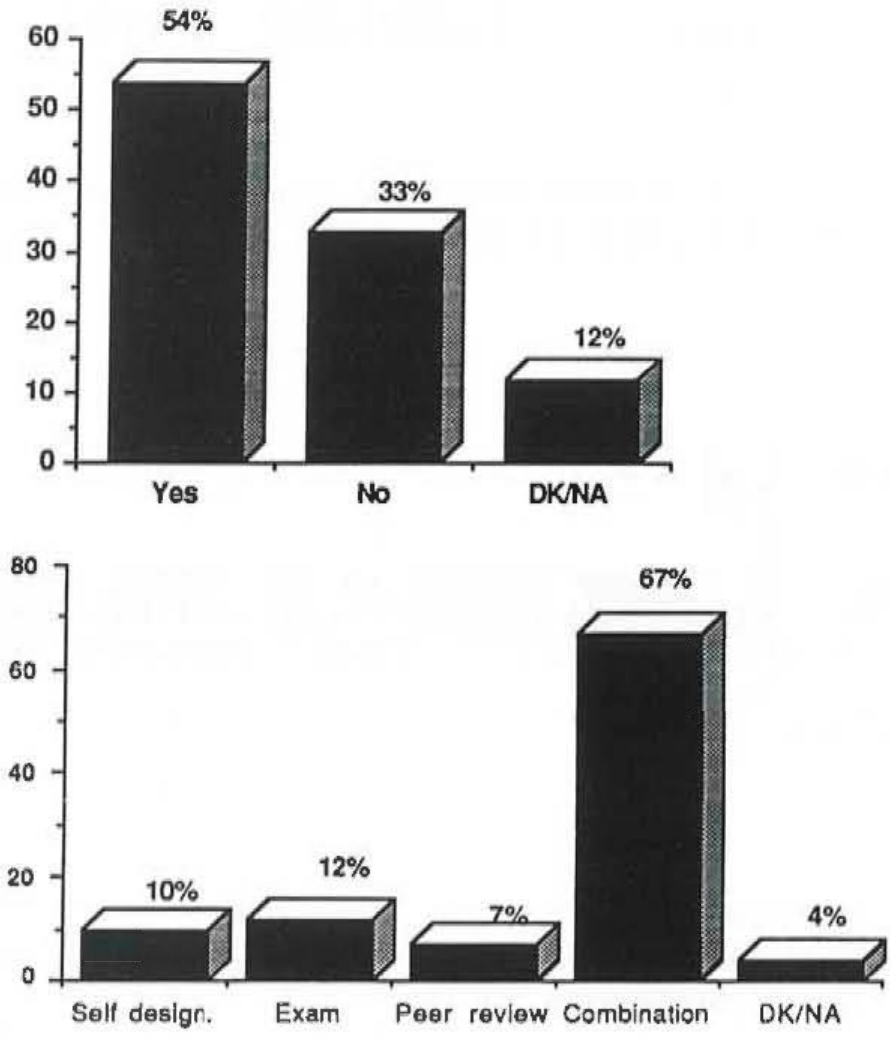
Annual meetings

About 42 percent of the lawyers have attended at least two state bar annual meetings in the last five years. However, one-third have not attended any annual meetings in the last five years and only 3 percent attended all five meetings. Some 17 percent of the sample said they were at the 1985 meeting in Huntsville.

Those who did not attend were asked several questions about why they did not go to the 1985 meeting. A conflict in schedule is the most frequently cited reason. About 66 percent say this is the reason they did not attend the 1985 meeting. A lack of interest, high cost of attending, meeting not educational enough and location are cited as the reason for not attending by fewer than 25 percent of the lawyers. Only 4 percent say the reason for not attending was poor social events.

Finally, respondents were asked what type of speaker they would like to appear at the annual meetings. Nationally recognized attorneys (83 percent), bar leaders (69 percent), humorous speakers (61 percent) and national political figures (60 percent) were mentioned frequently. ■

Figure 21
Should Specialization Be Implemented



Young Lawyers' Section

Claire A. Black
YLS President

Annual "Seminar on the Gulf" Approaches

As in years past, the Sandestin Inn Resort will be the setting for the Young Lawyers' Section annual Seminar on the Gulf, May 15 and 16. Attendance has increased almost every year, and this year's event promises to be one of the best. The combination of CLE credit and social opportunities makes this one of the most popular annual seminars.

Program Chairman Sid Jackson and Arrangements Chairman Preston Bolt, working with President-elect Charlie Mixon, all of Mobile, have developed a substantive program format with entertainment guaranteed to please all attendees. Opening at 9 a.m. on Friday, May 15, the CLE segment will include Warren Lightfoot with opening statements from the defense viewpoint and Jere Beasley from the plaintiff viewpoint. In addition, both lawyers will deliver an opening statement from a hypothetical case.

Selecting experts in workers' compensation cases will be discussed by Roy Scholl. Rick Alvis and Roger Lucas will cover the topic of underinsured motorist coverage, and Richard Dorman will speak on recent developments in secured transactions, UCC and banking law. Judge Joel Dubina will advise attendees on what judges expect from lawyers.

Following the Friday program, there will be a golf tournament beginning at 1 p.m., with prizes for numerous categories, including low gross, low net and longest drive. Those not too exhausted from golfing will have an opportunity to enjoy a Friday night cocktail party and hors d'oeuvres, shrimp and oysters poolside, hosted by Hare, Wynn, Newell and Newton, Birmingham before hearing "The South Practitioners," an all-lawyer band. Saturday, the CLE program reconvenes from 9 a.m. until noon, after which attendees can enjoy all the Destin area has to offer. The last planned event will be a cocktail party from 5:30 to 7:30, given by Emond and Vines.

CLE credit given for the seminar will be six hours. Although registration will not be taken by telephone, there will be registration at the door for those without advance arrangements. For accommodations, call the **Sandestin Inn Resort at 1-800-874-3110.**

Results of Young Lawyers' Section's poll on specialization

Responding to a proposal to the board of bar commissioners by the Family Law Section, the Young Lawyers' Section recently polled its entire membership, regarding specialization. The poll and results compilated are as follows:

CERTIFICATION PROPOSAL FOR FAMILY LAW PRACTITIONERS

The Family Law Section has proposed to the bar commissioners that the section become the certifying body of Marital and Family Law Practitioners. No such certification presently exists for those practitioners. Requirements have been proposed as the basis for granting or denying the proposed certification. To assist the Young Lawyers' Section in responding to the following proposals made by the section, please indicate your favor or disfavor:

1. At least five years of actual practice of law of which at least 30 percent has been spent in active participation in marital and family law. These five years of practice shall be immediately preceding application.
AGREE 117 (28%) DISAGREE 284 (69%) NO OPINION 11 (3%)

2. The trial of a minimum of 25 contested marital and family law cases in circuit courts during the five years immediately preceding application. All such cases must have involved substantial legal or factual issues other than the dissolution of marriage. In each of these 25 cases, the applicant shall have been responsible for all or a majority of the presentation of evidence and representation of the client. At least ten of the 25 cases must have been submitted to the trier of fact for resolution of one or more contested issues. On good cause shown, for satisfaction in part of the requirement of the 25 contested

marital and family law cases, the Marital and Family Law Certification Committee may consider involvement in protracted litigation.

AGREE 91 (22%) DISAGREE 307 (75%)
NO OPINION 12 (3%)

Steve Rowe, past president, Birmingham YLS, at Birmingham downtown firehouse shelter

Birmingham YLS members (left to right) Ralph Yielding, Norman Jetmundsen, Terri Lorant, Charlie Lorant and Billy Dodson prepare meal for shelter.

3. Within three years immediately preceding application, the applicant shall have substantial involvement in contested marital and family law cases sufficient to demonstrate special competence as a marital and family practitioner. Substantial involvement includes active participation in client interviewing, counseling and investigating; preparation of pleadings; participation in discovery; taking of testimony; presentation of evidence; negotiation of settlement; drafting and preparation of marital settlement agreements; preparation and drafting of both pre- and postnuptial contracts; and argument and trial of marital and family law cases. Substantial involvement also includes active participation in the appeal of marital and family law cases.

AGREE 161 (40%) DISAGREE 227 (57%)
NO OPINION 13 (3%)

4. The applicant shall select and submit names and addresses of six lawyers, not associates or partners, as references to attest to the applicant's involvement in marital and family law and shall be familiar with the applicant's practice. No less than two shall be judges of circuit courts in the state of Alabama before whom the applicant has appeared as an advocate in a trial of a marital and family law case in the two years immediately preceding the application. In addition, the Marital and Family Law Certification Committee may, at its option, send reference forms to other attorneys and judges, and make such other investigation as necessary.

AGREE 133 (32%) DISAGREE 259 (63%)
NO OPINION 18 (4%)

5. The applicant shall make a satisfactory showing that within the three years immediately preceding application he has minimum approved postgraduate educational experience in the field of marital and family law. Such experience shall be at:

(a) teaching a course in marital and family law;

(b) completion of a course in marital and family law;

(c) participation as a panelist or speaker in a symposium or similar program in marital and family law;
(d) attendance at a lecture series or similar program concerning marital and family law, sponsored by a qualified educational institution or bar group
(e) authorship of a book or article on marital and family law, published in a professional publication or journal;
(f) such other educational experience as the Marital and Family Law Certification Committee shall approve.

For applications filed in 1987, there shall be a minimum of 40 hours. For applications filed in the year 1988 and thereafter, there shall be a minimum of 50 hours.

AGREE 93 (23%) DISAGREE 257 (63%)
NO OPINION 18 (4%)

7. The applicant's performance of the requirements stated in 1-6 above, as well as the review and examination required, shall be performed by the Certification Committee of the Family Law Section of the Alabama State Bar.

AGREE 148 (36%) DISAGREE 229 (56%)
NO OPINION 35 (8%)

With the Young Lawyers' Section now constituting approximately 45 percent of the entire Alabama State Bar, the survey results are obviously significant. Each of the Family Law Section proposals met with disagreement from the lawyers participating in the survey, indicating that those responding reject the Section's proposals by a majority, ranging from a low of 56 percent to a high of 75 percent. The results of the survey, in response to the supreme court's invitation for comments to the proposed amendments to Canon 2 of the *Code of Professional Responsibility* of the Alabama State Bar regarding advertising of certification, have been submitted to the court.

Birmingham Bar Association Young Lawyers

Officers and Executive Committee members recently elected for the Birmingham Bar Association Young Lawyers include president-Jay Juliano; president-elect-Rebecca Shows; vice-president-Scott Boudreaux; secretary-Bob Norman; treasurer-Tom Young; assistant treasurer-Laura Petro; and executive committee members Claire Burge, Jim Gray, Tom Heflin, Roger Lucas, Spin Spires, Marda Sydnor, James Bradford, Jay Rea, Julia Stewart, LaBella Alvis, Mitch Damsky, William Gant, Tony Miller, Sammye Ray and Steve Shaw.

The Birmingham Young Lawyers' Section is now sponsoring a monthly meal for residents of the downtown firehouse shelter. Local young lawyers prepare and serve these meals, and they should be congratulated for this worthwhile contribution to their city.

Bar induction ceremony to be held

On May 26, the Young Lawyers' Section will sponsor the bar induction ceremonies in Montgomery. Chaired by Laura Crum, Montgomery, the program will include an address by Lee Cooper, Birmingham, who currently serves as Alabama's delegate to the American Bar Association. ■

Something to be thinking about . . .

This year's annual meeting in Mobile promises to be one of the best ever, and one reason is the speaker for the Bench & Bar luncheon, July 16, 1987.

Stephen H. Sachs was born in Baltimore January 31, 1934. He received his undergraduate degree from Haverford College in 1954, won a Fulbright Scholarship to New College, Oxford University and spent two years in the United States Army before graduating from Yale Law School in 1960.

During his last year in law school, Sachs was an assistant instructor in Constitutional law at Yale. He served as a law clerk to the late Judge Henry Edgerton of the U.S. Court of Appeals for the District of Columbia Circuit from 1960-61 and in 1961, Attorney General Robert Kennedy appointed him an assistant U.S. Attorney. He served in that capacity until 1964.

From 1964 to 1967, Sachs was an associate and partner in the law firm of Tydings, Rosenberg & Gallagher. He served as reporter to the Committee on State Finance and Taxation of the State of Maryland Constitutional Convention Commission from 1965 to 1967.

Stephen H. Sachs

After appointment as United States Attorney for Maryland by President Johnson in 1967, Sachs concentrated on the prosecution of cases involving white collar crime and public corruption. From 1970 until his election as attorney general in November 1978, he was in private law practice in Baltimore. For the six years prior to his election he was a partner in the firm of Frank, Bernstein, Conaway & Goldman.

Sachs, a Democrat, became Maryland's 40th attorney general January 2, 1979 and was re-elected in 1982.

He was admitted to the Maryland Bar in 1960 and the Supreme Court Bar in 1965. He has served on the boards of the Baltimore Urban Coalition, Sinai Hospital, the Enoch Pratt Free Library, the Baltimore Regional Red Cross and the Baltimore Bar Foundation, Inc., and taught criminal procedure and trial practice at the University of Maryland Law School from 1969 to 1976.

Sachs, a fellow of The American College of Trial Lawyers, is the recipient of awards from numerous civic organizations and educational institutions.

He is the author of "The Exclusionary Rule: A Prosecutor's Defense," Criminal Justice Ethics, summer/fall 1982, and the co-author (with John P. Roche) of "The Bureaucrat and the Enthusiast: A Study in the Leadership of Social Movements," Western Political Quarterly, July 1955.

Sachs and wife Sheila, an attorney, reside in Baltimore with their two children, Elisabeth and Leon. ■

Winter 1986 Admittees Alabama State Bar

CARLSON, William Tunstall Jr.
400 Poydras Street, Su. 2600
New Orleans, LA 70130

IRIS, Herbert Allen
6509 Sugar Creek Dr. S.
Mobile, AL 36609

MANNING, Kevin Michael
P. O. Box 208
Abilene, TX 79604

MOOR, Karl Roy
412 Meadow Drive
Birmingham, AL 35243

RUSS, Susan Elizabeth
1301 S. McDonough St.
Montgomery, AL 36204

SCHOEN, David
789 Madison Avenue
New York, NY 10021

SCULLY, William Edward Jr.
60 Woodwind N.
Hinesville, GA 31313

SMITH, James Timothy
942 5th Avenue N.W.
Alabaster, AL 35007

SMITH, Thomas Verner
P. O. Box 2103
Jackson, TN 38302-2103

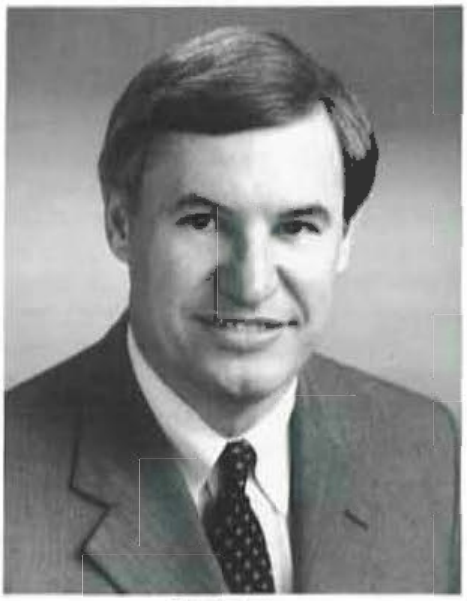
STEWART, Charles Calloway, Jr.
P. O. Box 70
Blakely, GA 31723

STRICKLIN, Michael Wayne
Route 1, Box 498A
Hanceville, AL 35077

TALKINGTON, Scott Randall
3040-B Southmall Cir.
Montgomery, AL 36116

WAGGONER, Mark Thomas
1829 Mission Road
Birmingham, AL 35216

Profile



Huckaby

Gary Carlton Huckaby President-elect 1987-88

Pursuant to the Alabama State Bar's rules governing the election of the president-elect, the following is a brief biographical sketch of Gary Carlton Huckaby of Huntsville, Alabama. Huckaby is the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 1987-88 term.

Education and early career years

Huckaby, a native of Lanett, Alabama, is a partner with the firm of Bradley, Arant, Rose & White. He received his undergraduate degree in 1960 from the University of Alabama and law degree in 1962 from the University's School of Law. For three years, 1963-66, he served in the United States Air Force, leaving as a captain (JAG Corps).

Local bar service

He has served as president of the Huntsville-Madison County Bar Association, 1977-78, and was a member of the Madison County Judicial Selection Commission, 1975-81, and the Judicial Selection Panel for U.S. Magistrate, 1983. He was chosen chairman of the Grievance Committee, 1976; Bench & Bar Relations Committee, 1981; Convention Host Committee, 1971; and Law Day Committee, 1968.

State bar activities

Huckaby presently is a member of the board of bar commissioners (elected in 1981), and the Disciplinary Commission; he also is the chairman of the MCLE Commission (a member since 1981). He chaired the Governance Committee, 1983-86, and received the state bar's Award of Merit last year for that effort. He also devoted time to the editorial advisory board of *The Alabama Lawyer* (1970-71), the Citizenship Education Committee (1971-73) and the Executive Committee (1982-83 and 1984-85).

American Bar Association work

Huckaby's work with the ABA has included serving as chairman of the Standing Committee on Lawyer Referral and Information Services (1982-85) and the Special Committee on Delivery of Legal Services (1976-79). He also has served in the House of Delegates (state bar representative 1982-present) and as a member of the Consortium on Legal Services and the Public (1976-79, 1982-85), the Task Force on Public Education (1978) and the Standing Committee on Lawyers in the Armed Forces (1971-73). He currently is serving on the ABA Annual Fund Committee.

Other professional and civic activities

Huckaby has devoted time to the board of directors of the Alabama Law School Foundation (1981-present), the Alabama Law Institute (council member 1979-present) and as a member of the American Judicature Society and 1977 chairman of the Farrah Law Society.

The Madison County Elected Officials Salary Commission, the Citizens Committee on Higher Education of Alabama, the Huntsville High School Task Force and the Huntsville-Madison County Local Government Study Committee (Judicial Section) have counted him as a member. Huckaby has been a director of the Mental Health Association of Madison County (1970-78), the Tennessee Valley Boy Scouts of America (1975-79) and the Council for International Visitors of Huntsville-Madison County (1983-present), and was president of the Huntsville-Madison County Mental Health Board from 1977-80 (member 1974-80) and the Madison County Heart Association. He has given time as senior warden of the Episcopal Church of the Nativity in Huntsville.

He is married to the former Jeanne Davey, and they have three sons: Gary, Jr., John and Michael. ■

Alabama State Bar Rules Governing Election of President-elect and Commissioners

Adopted by the Alabama State Bar Board of Bar Commissioners and approved December 5, 1986

Statement of Purpose

These rules are adopted to govern election of the president-elect and commissioners of the Alabama State Bar, pursuant to Sections 34-3-16 and 34-3-40 through 43, *Code of Alabama* (1975). In adopting these rules, the Board of Commissioners of the Alabama State Bar expresses its intent that they supersede all previous rules and policies on these matters.

Election of President-elect

The president-elect of the Alabama State Bar is chosen annually and takes office as president-elect at the end of the annual meeting held during the year of such election.

I. Qualifications of candidates

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of March 1 of the year of the election. They shall possess a current privilege license or special membership.

II. Nominations

Candidates must be nominated by petition of at least 25 (twenty-five) Alabama State Bar members in good standing. Such petitions are to be filed with the secretary of the Alabama State Bar on or before March 1 preceding the election. Petitions filed after March 1 shall not be accepted and the member will not be qualified as a candidate for the office of president-elect.

III. Publication of candidacy

Also by March 1, a candidate for the office of president-elect will submit to the secretary biographical and professional data and a black and white photograph. If received by March 1, this information will be published in the May issue of *The Alabama Lawyer*, as an announcement of the candidacy. Any information received after March 1 shall not be published.

IV. Campaigns

A. Candidates shall not campaign prior to February 1 of the election year but they may announce their candidacy at any time.

B. Each candidate shall be entitled to one bar-wide mailing of campaign literature, at his or her expense, through the state bar.

C. Candidates shall avoid mailings by groups with which they may be associated, such as alumni or specialty bars.

D. Excessive use of telephone solicitation by persons other than candidates should be avoided.

E. Solicitation by mail or support for a nominee by an individual lawyer is proper, provided such letter be on the lawyer's personal stationery or the law firm's stationery, to his or her personal friends, at his or her own expense. With the exception of nonspecialty county or circuit bar associations, two or more lawyers shall not jointly solicit support by mail of any candidate.

F. Candidates shall refrain from seeking or publicizing endorsements by groups. With the exception of nonspecialty county or circuit bar associations, no candidate or anyone acting on his or her behalf shall solicit votes by mailing to selected groups within the bar or specialty bars.

G. The executive council of the Alabama State Bar shall serve as the election supervisory committee to ensure compliance with these campaign rules.

H. The committee shall resolve any complaints or challenges with respect to campaign practices. Such complaints or challenges must be in affidavit form, filed with the secretary of the Alabama State Bar no later than 15 (fifteen) days after the close of the annual meeting.

V. Election procedures

A. The secretary shall announce the election by publication in the January and March issues of *The Alabama Lawyer* each year. In the May issue, biographical and professional data and photographs of the candidates shall be published.

B. The secretary shall prepare a ballot containing the name of each qualified candidate for the office of president-elect.

C. A ballot, plain envelope and return envelope with space for a signature shall be mailed to each member in good standing between May 15 and June 1 each year.

D. Each ballot shall be marked by the recipient member, placed in the plain envelope provided and both shall be placed in the return envelope provided. The return envelope shall be signed by the member, in the space provided, certifying it as the member's vote for the office of president-elect and certifying that the member is qualified to vote, i.e. is in good standing with the Alabama State Bar. Only one ballot may be returned in each certification envelope.

E. Ballots may be mailed or delivered to the Alabama State Bar, provided they are received by 5 p.m. on the Tuesday preceding the annual meeting of the state bar. Ballots received at state bar headquarters after the preceding deadline shall be null and void.

F. The secretary, or designee, shall maintain a polling list, checking off each member's ballot as it is received at state bar headquarters.

G. On the third day of the annual meeting, an elections committee composed of two bar commissioners appointed by the president and the secretary, or designee, shall certify the results of the balloting.

VI. Assumption of office, duties

The successful candidate for president-elect shall assume office at the conclusion of the annual meeting following the election and shall serve as a member of the executive council of the board of commissioners.

Election of Commissioners

The Board of Commissioners of the Alabama State Bar is composed of at least one member from each judicial circuit, a member from that part of the Tenth Judicial Circuit known as the "Bessemer Cut-off" electoral district and one additional commissioner for each 300 members of the state bar who maintain their principal office in a circuit as of March 1 of each year, up to ten commissioners per circuit.

I. Qualifications of candidates and members

A. Each candidate shall be a member in good standing of the Alabama State Bar and maintain his or her principal office in the circuit he or she seeks to represent.

B. Each commissioner shall maintain his or her principal office in the circuit represented. Should an incumbent commissioner's principal office be removed from the circuit represented, the position of commissioner shall be declared vacant and the unexpired term shall be filled in accordance with Section 34-3-43(a)(8) *Code of Alabama* (1975).

II. Nominations

A. One or more candidates may be nominated on one petition. Each petition must be signed by five or more members in good standing maintaining their principal offices in the circuits where the nominees maintain their principal offices.

B. A member in good standing may become a candidate from the circuit of his or her principal office by filing a written declaration of candidacy.

C. Each candidate must be nominated or declared for a designated position; however, all elections in multi-commissioner circuits shall be at-large elections.

D. Nominating petitions or declarations of candidacy shall be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. of the last Friday in April of the election year and shall be null and void after that date.

III. Campaigns

A. Each candidate and his or her supporters should make a reasonable effort to represent the candidacy in a dignified manner.

B. Each candidate may receive, free of charge, a list of those persons eligible to vote in his or her circuit. Additional lists shall be provided at reasonable cost.

C. The executive council of the Alabama State Bar shall resolve any complaints or challenges with respect to campaign practices. Such complaints or challenges must be in affidavit form, filed with the secretary of the Alabama State Bar no later than June 30 of the election year.

IV. Election procedures

A. By March 15 of each year, the secretary shall certify to the board the number of members in good standing maintaining their principal office in each circuit and in the "Bessemer Cut-off" electoral district. (A home address shall be used only when the member in good standing maintains no office.)

B. Places and Terms

1. Based on the census, the secretary shall certify to the board the number of commissioners to which each circuit is entitled.

2. If a circuit is entitled to fewer commissioners than it had the previous year, the most recently created place will be eliminated as of June 30 of the census year.

3. If a circuit is entitled to more commissioners than it had the previous year, one or more places shall be created and a commissioner or commissioners shall be elected for a three-year term.

4. Beginning in 1987, places will be designated "Place number 1" (the present commissioner position), "Place number 2" (the next commissioner position) and so on. All elections in multicommissioner circuits shall be at-large elections; however, each candidate must be nominated or declared for a designated position.

5. Terms of incumbent commissioners are hereby retained. Terms of commissioners for a particular circuit should not expire simultaneously, therefore, for the 1987 election only, commissioners elected to the following places shall be elected for the terms specified. Regardless of the length of the initial term, subsequent terms shall be three years.

Place Number	Term
2	1 year
3	2 years
4	3 years
5	1 year
6	2 years
7	3 years
8	1 year
9	2 years
10	3 years

C. Notice of Election

In the January and March issues of *The Alabama Lawyer* each year, the secretary shall give notice of the circuits due to elect commissioners that year, with a disclaimer that some places might change as a result of the annual March 1 census.

D. Balloting

1. After the last Friday in April, the secretary shall prepare a ballot for each circuit election.

2. Between May 15 and June 1 of each year, a ballot, a plain envelope and a return envelope with space for a signature shall be mailed to each member in good standing in the circuits electing commissioners.

3. Each ballot shall be marked by the recipient member and placed in the plain envelopes. Both shall be placed in the return envelope and it shall be signed in the space provided, certifying it as the member's vote for a commissioner or commissioners and certifying that the member is qualified to vote, i.e. is in good standing with the bar and maintains his or her principal office in the circuit where the election is occurring. Only one ballot may be returned in each certification envelope.

4. Ballots must be received in the office of the Alabama State Bar by 5:00 p.m. on the second Tuesday in June of each election year. Ballots received after the preceding deadline shall be null and void.

5. The elections committee appointed for counting of president-elect ballots shall count the ballots for commissioners' elections and certify the results on the Monday following the second Tuesday in June each year.

V. Assumption of office, duties

Successful candidates for commissioner shall assume office on July 1 following the election and carry out those duties specified in Section 34-3-43, *Code of Alabama* (1975). ■

Legislative Wrap-up

by Robert L. McCurley, Jr.

The 1987 regular session of the legislature began April 21, 1987. Top on the agenda is "tort reform." The primary tort reform bills under consideration deal with the following subjects:

1. medical malpractice;
2. venue;
   a. non-qualified corporations,
   b. transfer of cases to county more convenient for witnesses and in interest of justice,
   c. claims arising outside of Alabama amend *Ala. Code* section 6-5-430;
3. punitive damage cap equal to compensatory damages but not greater than $100,000;
4. frivolous lawsuits allow judges to award attorney fees and court costs to defendant payable by the plaintiff or plaintiff's lawyer;
5. abolish scintilla rule;
6. abolish collateral source rule;
7. reduce statute of limitations for "1983" actions from six years to two years.

Law Institute bills

The Law Institute will present five bills to the legislature for consideration. One concerns guardianship, one trade secrets and three real estate.

Alabama Uniform Guardians and Protective Proceedings Act

This comprehensive bill distinguishes between "guardians" of the person and "conservators" of the estate of wards. Prior to this act, Alabama used one term, "guardian," to characterize the duties and responsibilities of both offices. See *Alabama Lawyer*, March 1987, for a review of this bill.

Trade secrets

The protection of trade secrets in Alabama has been left to the courts. At common law the definition of "trade secrets" is not clearly defined; this act *does* define it. To qualify as a trade secret the secret (1) must be used, or if not used, intended for use, in a trade or business; (2) must be included or embodied in a formula, pattern, compilation, computer software, etc.; (3) is not publically known and not generally known in the trade or business; (4) cannot readily be ascertained or derived from public information; and (5) has significant economic value. Also, reasonable efforts must be made to maintain its secrecy.

The act further defines "improper means" of obtaining the information and what constitutes misappropriation of the trade secret.

The act provides for injunctive relief, recovery of profits, attorneys' fees and exemplary damages.

Deeds in lieu of foreclosure

The Real Estate Committee, chaired by Hugh Lloyd of Demopolis, with Professor Harry Cohen of the University of Alabama School of Law, completed a statute addressing "Deeds in Lieu of Foreclosure." Professor Cohen explains that numerous instruments often styled as a "Deed in Lieu of Foreclosure" have been recorded in Alabama. Usually these documents are conveyances from a mortgagor to a mortgagee of the equity of redemption. The practice has caused a great deal of confusion among real estate people, lawyers, title examiners and the general population. It has been said these conveyances are foreclosure deeds, from which the statutory right of redemption emerges, and that they preclude other lien holders from redeeming the property to protect their interests.

There is little doubt these conveyances are not foreclosure deeds, and they do not give rise to the statutory

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

right of redemption. In addition, such deeds do not adversely affect the rights of persons who are not parties to the instrument.

The suggested statute is an effort to explain and rationalize the subsequent release of a mortgagor's equity of redemption to the mortgagee. The statute clearly describes the law which exists, that deeds from mortgagors to mortgagees affect only the rights and obligations of the parties to the deed. Because the instrument is a private transaction between the mortgagor and the mortgagee, there is no foreclosure of the security interest and no statutory right of redemption arises. The rights of other lien holders, judgment creditors or other interests are not affected.

Redemption of real property

This proposed act basically does three things: 1) establishes who can redeem and the priority of redemption; (2) defines allowable charges; and (3) provides that for commercial ventures which are foreclosed by judicial sale rather than under a power of sale, there is no redemption, provided this does not apply to agricultural loans or dwellings with one to four units occupied by the mortgagor as a residence. See *Alabama Lawyer*, January 1986, for a review of this bill.

Powers contained in mortgages

Published notice of foreclosure has been under attack as being constitutionally unsound, but has been upheld where there is no state official or state action involved in the foreclosure. This act clarifies this issue for Alabama for there to be no state action in foreclosures. See *Alabama Lawyer*, January 1987, for a review of this bill.

Anyone desiring a copy of these proposed revisions may write the Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486. ■

1987 Annual Meeting
July 16-18
in
MOBILE

Opinions of the General Counsel

by William H. Morrow, Jr.

QUESTION:

May a law firm continue to practice under a firm name containing the name or names of one or more deceased or retired attorneys if the name or names of one or more of the deceased or retired attorneys of the firm or of a predecessor firm is used in a continuing line of succession, although no present partner or associate was ever a partner or associate of one or more of the deceased or retired attorneys?

ANSWER:

Yes. The name or names of one or more deceased or retired attorneys may be included in the firm name if the name or names of one or more of the deceased or retired members of the firm or of a predecessor firm is used in a continuing line of succession, although no present member or associate of the firm was ever a partner or associate of one or more of the deceased or retired attorneys.

DISCUSSION:

In 1937 Canon 33 of the old Canons of Professional Ethics of the American Bar Association was amended to read as follows:

> "Partnerships among lawyers for the practice of their profession are very common and are not to be condemned. In the formation of partnerships and the use of partnership names, care should be taken not to violate any law, custom, or rule of court locally applicable. Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the state, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline. In the selection and use of a firm name, no false, misleading, assumed or trade name should be used. The continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this use. When a member of the firm, on becoming a judge, is precluded from practicing law, his name should not be continued in the firm name.
>
> "Partnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." (emphasis added)

Prior to October 25, 1985, Disciplinary Rule 2-102(B), in pertinent part, provided:

> ". . . if otherwise lawful a firm name may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession . . . ."

On October 25, 1985, the Supreme Court of Alabama rescinded Disciplinary Rules 2-101 through 2-106 and replaced them with certain Temporary Disciplinary Rules, 2-101(A) and 2-106(A).

Temporary Disciplinary Rule 2-101(A) provides:

> "A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
> (A) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

Temporary Disciplinary Rule 2-105(A) provides:

> (A) "A lawyer shall not use a firm name, letterhead, or other professional designation that violates Temporary DR 2-101. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable organization and is not otherwise in violation of Temporary DR 2-101 or Temporary DR 2-104."

(Temporary Disciplinary Rule 2-104 deals with an attorney's designating himself as "patent attorney", "admiralty" or "proctor in admiralty.")

Prior to the amendment of old Canon 33 of the Canons of Professional Ethics of the American Bar Association, which added the language placed in italics, the American Bar Association in Formal Opinion (6) 1925 held that a law firm may continue to include in its name the name of a deceased partner if the local custom is to do so and such practice does not result in misleading the public to believe that the deceased partner is still alive and a factor in the business of the firm.

One purpose of this opinion is to clarify the opinion published in the January 1987 issue of *The Alabama Lawyer.* That opinion was intended to apply to a very limited fact situation.

For example: A lawyer or lawyers practice under a specific firm name. The lawyer or lawyers die or retire and another lawyer or lawyers who have had no association as partners or associates with the deceased or retired lawyer or lawyers want to occupy the office and continue to practice under the old firm name.

The use of a firm name composed of the surnames of certain lawyers who are deceased or retired, when the present

partners or associates were never partners or associates of the deceased or retired lawyer or lawyers, contemplates a continuity and the use of this name by successive partners. Certainly there are firms practicing under the names of one or more deceased lawyers when none of the present partners or associates were ever partners or associates of the attorney or attorneys under whose name they practice. This will clarify any misunderstanding created by the opinion published in *The Alabama Lawyer*, although on the narrow fact situation contemplated we feel that that opinion is sound.

Although the cited opinion of the American Bar Association Committee on Ethics and Professional Responsibility construed the Canons of Professional Ethics of the American Bar Association, we find nothing in the present *Code of Professional Responsibility of the Alabama State Bar* which persuades us to a different conclusion. ■

Memorials

Aird, James Williams—Anniston
Admitted: 1928
Died: November 24, 1986

Barber, William C.—Birmingham
Died: December 14, 1986

Beinert, Wesley George—Tuscaloosa
Admitted: 1934
Died: January 3, 1987

Bewley, Luther Boone—Vestavia
Admitted: 1927
Died: January 29, 1987

Fletcher, Gordon Augustus—Mobile
Admitted: 1931
Died: September 26, 1986

Flowers, Walter Winkler, Sr.—Northport
Admitted: 1932
Died: August I, 1986

Fortenberry, Joseph Edwin—Wash., D.C.
Admitted: 1969
Died: February 3, 1987

Graves, Eugene Hamiter, Jr.—Eufaula
Admitted: 1950
Died: August 29, 1986

Hamlet, Andy, Jr.—Scottsboro
Admitted: 1949
Died: June 29, 1986

Holliman, Cecil Rhodes—Birmingham
Admitted: 1925
Died: February 17, 1986

Johnston, William Edward—Mobile
Admitted: 1939
Died: January 12, 1987

Jones, Upshaw Griffin—Wetumpka
Admitted: 1930
Died: January 3, 1987

McKinley, Reuben Floyd—Baldwin County
Admitted: 1951
Died: December 22, 1986

Molloy, Daniel Wilson, Jr.—Mobile
Admitted: 1976
Died: March 22, 1987

Monagham, Bernard Andrew—Birmingham
Admitted: 1937
Died: February 22, 1987

Newby, William Arthur—Prattville
Admitted: 1949
Died: January 16, 1987

Nichols, Albert Hughes—Birmingham
Admitted: 1929
Died: November 23, 1985

Roberts, Escar Lee—Gadsden
Admitted: 1933
Died: November 16, 1986

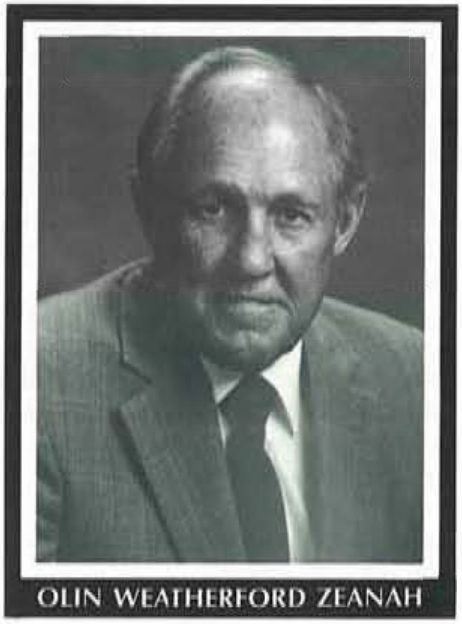
Spain, Frank E.—Greensboro
Died: October 22, 1986

Spencer, William F.—Birmingham
Died: March 4, 1986

Sullivan, Michael Harold—Gulf Shores
Admitted: 1982
Died: August 20, 1986

Williams, Marvin, Jr.—Birmingham
Admitted: 1940
Died: March 3, 1987

Zeanah, Olin Weatherford—Tuscaloosa
Admitted: 1949
Died: March 18, 1987



OLIN WEATHERFORD ZEANAH

March 18, 1987, marked the passing of a respected and distinguished member of the bar, Olin Weatherford Zeanah.

Zeanah was born October 26, 1922, and raised in Holt, Alabama. He served as a company commander in the Pacific Theatre from 1943 until 1946 and received the Presidential Unit Citation. He returned to Tuscaloosa and earned his undergraduate degree in chemical engineering from the University of Alabama. He received his law degree in 1949 and began practice in Tuscaloosa that year.

Zeanah served as district attorney for Tuscaloosa from 1955 until 1959 when he returned to private practice to begin his own firm. At the time of his death he was the senior partner in Zeanah, Hust & Summerford.

During his career Zeanah served as president of the Tuscaloosa County Bar Association and chairman of the Alabama State Bar Grievance Committee. He also was on the Advisory Council of the Alabama Law Institute and the National Panel of Arbitration Association.

Zeanah was a Fellow in the American College of Trial Lawyers and a member of the Federation of Insurance Counsel, the International Association of Insurance Counsel, the Farrah Law Society

and the Tuscaloosa County, Alabama State and American Bar Associations. He also was admitted to practice before the United States Court of Claims and the United States Supreme Court.

He was a past president of the Tuscaloosa Exchange Club and the Eastwood Parent/Teacher Association, past chairman of the Red Cross Blood Drive and a member of the Warrior-Tombigbee Development Association. He served on the board of directors of First Alabama Bank of Tuscaloosa and later on the board of directors of First State Bank of Tuscaloosa. Zeanah attended Alberta Baptist Church where he taught Sunday school for many years.

He is survived by his wife, Dorothy Ingram Zeanah, and two daughters, Terry Zeanah and Karen Stokes. He was a devoted husband, father and grandfather.

Olin Weatherford Zeanah will be remembered by friend and foe alike for his integrity, his superior capabilities and his famous tenacity. He was a living example of the creed on his office wall that hard work, not cleverness, is the secret of success.

JOSEPH E. FORTENBERRY

Joseph E. Fortenberry, 42, a trial lawyer for the United States Justice Department's antitrust division and co-chairman of the D.C. Bar Association's antitrust committee, died of occlusive coronary atherosclerosis February 3 in Georgetown University Hospital. He lived in Washington.

Fortenberry was born in Washington, but raised in Oxford, Mississippi. He received a bachelor's degree from Harvard University and a law degree from Yale University law school.

After receiving his law degree, Fortenberry worked for a year as a law clerk for Judge John C. Godbold of the U.S. Court of Appeals for the Fifth Circuit in Alabama, before joining the law firm of Rushton, Stakely, Johnston & Garrett in Montgomery, Alabama, as an associate lawyer.

His next move was to New York as a senior associate in the corporate law firm of Donovan, Leisure, Newton & Irvine.

In 1979, Fortenberry joined the Justice Department as a trial lawyer responsible for investigating and prosecuting cases under federal antitrust laws; he held this position at the time of his death.

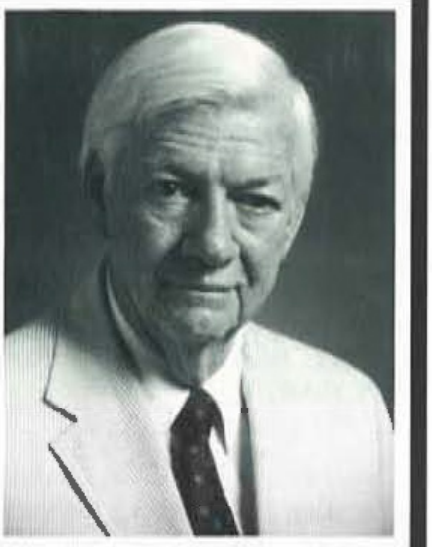
"He enjoyed working on antitrust cases. That's why he wanted to work for the Justice Department," said his wife, Ashley Doherty Fortenberry.

He was a member of St. Margaret's Episcopal Church in Washington, the American Economic Association and the Selden Society, a legal history organization. He was also the author of many articles on federal antitrust laws that appeared in various law journals.

He is survived by his wife and a daughter, Dorothy Fortenberry, both of Washington; his parents, Nolan and Mae Fortenberry of Auburn, Alabama; and a brother, Charles Fortenberry of Jackson, Mississippi.

The family suggests that expressions of sympathy be in the form of contributions to the Washington Opera Guild, the Yale Law School Fund or the Fortenberry Scholarship Fund, c/o the Political Science Department, Auburn University, Auburn, Alabama.

—reprinted from **The Washington Times**



WILLIAM EDWARDS JOHNSTON

William Edwards Johnston, a member of the Mobile, the Alabama State and the American Bar Associations died January 12, 1987.

He was born in Mobile, Alabama, in 1915, the son of Samuel McCoy Johnston and Ruth Ulmer Johnston, and was educated in the public schools of Mobile and received his LL.B. degree in 1939 from the University of Alabama. At the University, he was a member of Delta Kappa Epsilon fraternity, where he was affectionately known as "Slugger Bill."

In 1939, Johnston began practicing law in Mobile with his father's firm and continued as an active and successful trial lawyer, practicing with his brother and nephews, until his death.

He was a second lieutenant in the United States Army and served his country during World War II. He was a member of Dauphinway United Methodist Church, active in civic groups and served on the Alabama Democratic Executive Committee. Johnston also was a member of numerous committees of the Alabama State and Mobile Bar Associations.

He is survived by his wife, Margaret Anne Gibson Johnston; two daughters, Anne Johnston Oppenheimer and Melissa Johnston Oswald; five grandchildren; and other relatives. ■

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

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POSITIONS OFFERED

STAFF ATTORNEY and Director of Sea Grant Coastal and Marine Law Research Program at University of Mississippi Law Center beginning July 1, 1987. Salary $33,000. Application deadline: May 15, 1987. **Contact: William Hooper, Jr., Law Center Room 518, University, MS 38677. Telephone: (601) 232-7775. Equal Opportunity Employer.**

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OCCUPATIONAL INFORMATION: *Pro-se* law clerk is a staff position, hired by and reporting to the clerk of the United States District Court. A *pro-se* law clerk performs duties and responsibilities such as the following: examines all prisoner petitions and complaints, including state habeas corpus petitions, motions to vacate sentence and civil rights complaints, determining if they are proper for filing; reviews and records all correspondence relating to such petitions and complaints; performs substantive screening after filing of all prisoner petitions and motions, including state habeas corpus petitions, motions to vacate sentence and civil rights complaints and of other *pro-se* litigations, such as social security and equal employment opportunity complaints; drafts appropriate recommendations and orders for the court's signature; reviews all complaints, petitions and pleadings that have been filed to determine issues involved and basis for relief; performs research as required, to assist the court in preparing opinions; evaluates and determines that complaints, petitions and pleadings meet the requirements of federal and local procedural rules, form, payment of fees and service; returns those documents not conforming to the statutes or rules, with instructions for necessary correction or compliance; corresponds with petitioners and complainants regarding procedural requirements, supplying them with appropriate forms, documents and instructions, as required; and performs necessary clerical work to accomplish other duties.

MINIMUM QUALIFICATIONS: To qualify for the position of *pro-se* law clerk a person must be a law school graduate (or have completed all law school studies and merely awaiting conferment of degree), for entry level requirements.

DESIRABLE EXPERIENCE: This court is interested in an applicant who would qualify for the highest grade which would require that person to be a member of the bar of a state, territorial or federal court of general jurisdiction, and who has at least two years of specialized experience in the practice of law, legal research, legal administration or equivalent experience received after graduation from law school.

SUBMIT APPLICATION AND RESUME TO: Thomas C. Caver, Clerk, U.S. District Court, U.S. Courthouse, P.O. Box 711, Montgomery, Alabama 36101. Phone (205) 832-7308. Names of persons applying will not be published, and applications will be considered confidential.

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Applications received for this position may be considered for any similar vacancy which may occur within 90 days. ■

MCLE News

by Mary Lyn Pike
Assistant Executive Director

CLE now mandated in majority of states

Continuing legal education is now mandatory in 27 states and pending or under study in 12 others. In the south and southeast, Texas, Louisiana, Mississippi, Alabama, Georgia, Tennessee, South Carolina, Virginia and West Virginia have adopted MCLE. Florida's plan is pending before its supreme court; Arkansas and North Carolina are considering adopting a requirement.

The plans are somewhat varied in detail but uniform in substance. The annual requirement varies from a low of eight hours per year in Virginia to a high of 15 per year in several states. Many states, especially in the southeast, use a 60-minute hour for calculating credits, unlike Alabama, which uses a 50-minute hour.

An increasingly common feature is an annual ethics education requirement. There are two basic approaches; the first requires an attorney to earn a certain portion of the annual credits by taking ethics education courses. The second puts the burden on CLE sponsors to weave ethics education into their accredited programs.

1986 Alabama compliance data

As usual, more than 99 percent of those subject to the CLE requirement met the compliance deadline or obtained permission to make up a deficiency and did so. Only 120 individuals were certified to the Disciplinary Commission for noncompliance; at least 20 of these had sufficient carryover credits from 1985 to meet the 1986 requirement but overlooked the necessity of submitting the annual report.

Over 150 members took advantage of the new deficiency plan procedure, submitting their plans by January 31 and making up their credits by March 1. It is hoped that this number will dwindle rather than increase with the passage of time.

Recent MCLE Commission decisions

At its February 6 meeting the mandatory CLE commission took the following actions:

1. Voted to construe Rule 5A as requiring the filing of an annual report only if an attorney is subject to the 12-hour requirement. Accordingly, it voted to waive the 1986 late filing fee for exempt members and modify Regulation 5.1 so that filing by exempt members will be optional, unless credits are to be carried forward.

2. Commended MCLE Commission secretary Diane Weldon for her diligent performance during the administrator's month-long absence.

3. Acknowledged a complaint about the imposition of late compliance and late filing fees.

4. Granted two waivers of the 1986 CLE requirement on the basis of physical disability and authorized another on the basis of emotional disability, pending receipt of a physician's statement.

5. Granted an extension of the 1986 compliance deadline on the basis of financial difficulties.

6. Granted a retroactive special membership to a nonpracticing attorney who purchased an active license on the incorrect advice of a state bar staff member.

7. Authorized return of a late filing fee paid by an exempt attorney.

8. Declined to accept a deficiency plan filed after the January 31 deadline.

9. Awarded partial teaching credit to an attorney who prepared a handout but was unable to present it.

10. Continued the approved sponsor status of the Morgan County Bar Young Lawyers' Section.

11. Approved for half credit a seminar on law office technology (ABICLE).

12. Approved a Franco-American legal study tour (Professional Seminar Consultants).

13. Approved advertising of a real estate reorganization and foreclosure practice seminar without the "designed primarily for attorneys" announcement usually required of the sponsor (National Business Institute).

14. Set its next meeting for 9 a.m., Friday, April 3, 1987. ■

1987 Alabama State Bar Annual Meeting

— MOBILE—

July 16, 17 & 18

Ex Arguendo . . .

"A democracy cannot exist as a permanent form of government. It can only exist until the voters discover they can vote themselves largess out of the public treasury. From that moment on the majority will always vote for the candidate promising the most from the public treasury — with the result that democracy will collapse over a loose fiscal policy, always to be followed by dictatorship."

An observation 200 years ago by British historian Alexander Tyler.

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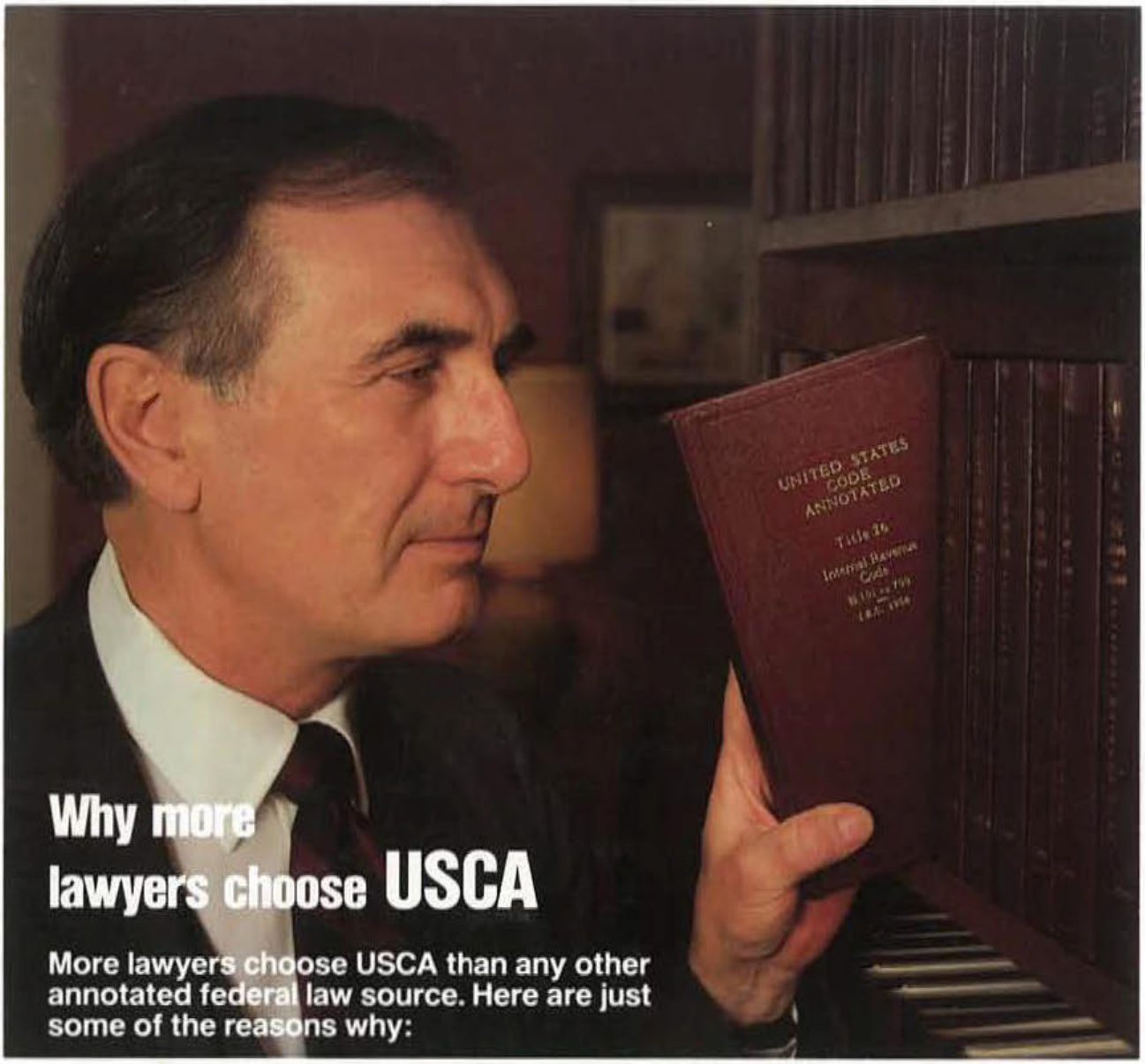

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