

The Alabama Lawyer

Vol. 44, No. 4

JULY 1983



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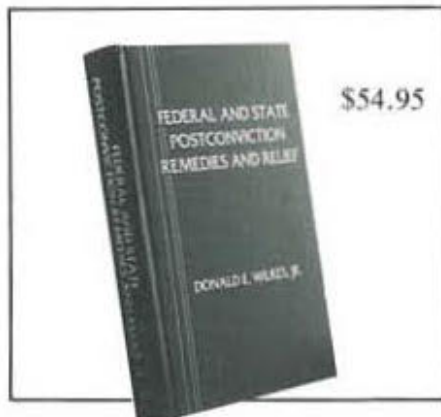
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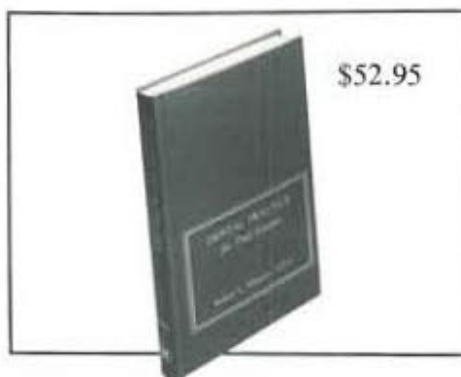
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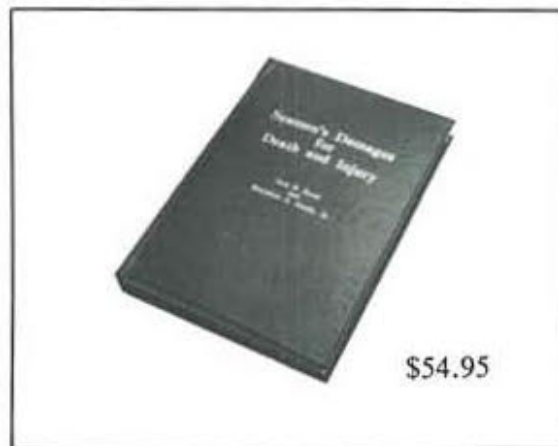
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with Patricia A. Lucas, Contributing Editor



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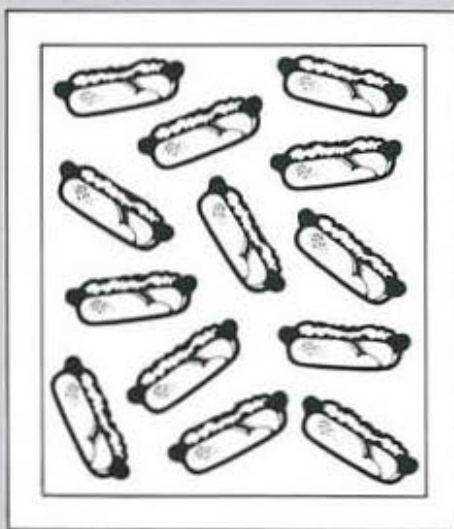
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Time share ownership of condominiums

—pg. 183

Resort condominiums are proliferating at an ever-increasing rate. Time share ownership of condominiums presents novel legal ramifications.



Birmingham—much more than the hot dog capital

—pg. 188

While in Birmingham for the 1983 Alabama State Bar Annual Meeting in July, you may want to visit some of the attractions the Magic City has to offer. Birmingham lawyer Gary P. Smith suggests some of these hot spots.



On the cover

The Vulcan, Birmingham's most familiar landmark, overlooks the city at dusk. This photograph was taken by Montgomery attorney Tom McGregor with the firm Webb, Crumpton & McGregor.

ISSUE IN BRIEF



It's July—it's convention time!
—pg. 187

We hope to see you July 21-23 at the annual meeting in Birmingham. Inside you'll find a brief program outline—great speakers and seminars, exciting social events. Pre-register today!

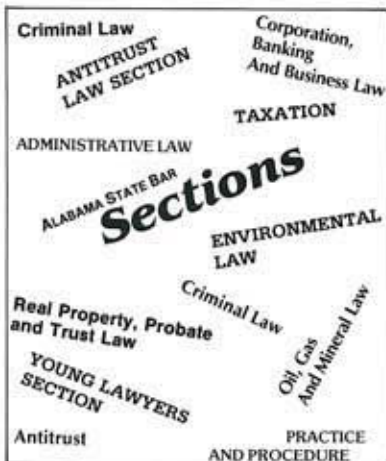


Membership increases with spring admittees
—pg. 200

In May, ninety-three new members were admitted to the bar after successfully completing the February bar exam. Names, pictures, and statistics of interest inside.

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Are you a section member?
—pg. 190

State bar sections report on year's activities. You may want to get involved by joining the section in your area of practice.



President's Page

Among the privileges of my office is that of addressing the lawyers just prior to their investiture. The thrust of my remarks has been generally to congratulate them, remind them of the honorable nature of our profession, the need for devotion to hard work and, last, but not least, the rewards they can expect from active participation in bar activities.

To me the greatest reward has been the opportunity to make enduring friendships with lawyers who are devoted to our profession and who give unhesitatingly and untiringly of their time and talents for the good of our profession and the resulting benefit to each of us.

To name those who come to mind would be a serious mistake for I would surely fail to mention some. They are older lawyers ("the giants of our profession") and they are younger lawyers ("the shining lights"). And except for active participation in bar activities they would only be names and not dear friends.

Permit me to allude once again to the quality of our organization. There are, of course, larger integrated or unified bars; but, have no doubt that the Alabama State Bar stands tall among the organized bars of this nation. This is the direct result of the quality of our leadership in years past and the contributions

of many fine lawyers. You can be proud to be a member.

We have structured our convention this year so that on Thursday every lawyer in attendance at the "Recent Developments" seminar will receive 6.6 hours of CLE credit. We have accomplished this *without* a separate charge in addition to the convention registration fee. Moreover, attendance at the section meetings on Friday can mean an additional credit of from one to two hours depending on which meeting you attend.

Hairston to the presidency, alone, portends a year of success founded on hard work and constant attention to the task at hand. The opportunity to work with Bill and to assist him in his efforts is one which will reap the rewards of which I have spoken.

I would be remiss in this my last "message" if I failed to again publicly express my deep gratitude to the lawyers of Alabama for according me the privilege of holding this high office. I am especially grateful to the members of the Board of Bar Commissioners and to Reggie

I would be remiss in this my last "message" if I failed to again publicly express my deep gratitude to the lawyers of Alabama for according me the privilege of holding this high office.

In addition to the CLE opportunity, entertaining and informative sessions are planned and I am confident that everyone in attendance will enjoy their stay.

The coming year is going to be an exciting one. The elevation of Bill

Hamner and all of the staff members in Montgomery who have rendered such fine service. And most certainly my partners, Charles C. Partin, Fred K. Granade and Samuel N. Crosby.

Norborne C. Stone, Jr.

Executive Director's Report



July is the month of bar exams and the annual bar meeting. In addition, it is the month when a new administrative year begins. Needless to say, it is a month of great activity at bar headquarters.

Convention

The convention in Birmingham will begin on Thursday morning, July 21st. Registration will open on Wednesday afternoon. This schedule change is to accommodate a whole day of Continuing Legal Education. The Recent Developments Seminar will be outstanding and, where this event has normally required an extra registration fee, this year the cost is included in the general convention registration fee. One should pre-register in order to insure adequate printed materials will be available.

Two fees will again be used for the convention. There will be a lesser fee for pre-registration. The registration fee at the convention will be \$10 higher than that charged pre-registrants. Pre-registration not only saves you money, it enables us to execute convention plans more efficiently, particularly as to space and food requirements.

One must be registered at the convention to participate in the business meeting on Saturday morning. Registration will be open until 6:00 p.m. on Wednesday and Thursday, 4:00 p.m. on Friday, and 10:30 a.m. on Saturday.

Some changes this year: Convention-wide Bloody Mary Party on Thursday at 11:00 a.m.; Spouses Brunch

instead of luncheon on Friday; the Annual Dinner will be served buffet style.

Perry Pearce and Jim North of the Birmingham Bar are organizing this year's convention Fun Run—the "Vulcan Too! Run." Register early for T-shirts and race packets. The two mile run will start at 6:30 a.m., July 23, from the Birmingham Hyatt Hotel. Trophies will be awarded to winners at the Family Breakfast.

Your convention is important. It is a large financial undertaking. Let me urge you to pre-register to assist in keeping individual cost to a minimum.

Next year's meeting will be in Mobile—July 12-14 at the new Riverview Plaza. The new facility is truly a "world class" hotel. NOTE: The convention next year will be the second Thursday through Saturday instead of the traditional third Thursday through Saturday in the month of July.

Next year, the association will control all rooms and reservations will be made at the time of pre-registration. This new procedure has been instituted to eliminate recent problems occasioned by the reservation of large blocks of rooms in one name. This keeps other members desiring to come to the convention from obtaining confirmed reservations. Usually these blocked rooms are released at the last minute after persons, earlier turned away for lack of rooms, have made plans other than to attend the convention. Room reservations must be

made individually. No blocks will be reserved.

Bar Examination

The bar exam this summer will begin Monday, July 25th, immediately following the bar convention. At this writing, there are 435 applications awaiting approval. This represents a decrease in applications for the second year in a row.

The Board of Bar Examiners held their first-ever retreat in late May in Eufaula. Dean Joe Covington of the National Conference of Bar Examiners Testing Service spent two days working with the board in reviewing its past work and discussing future changes in the examination to improve the procedures. In the ten years that Alabama has utilized the multi-state/essay combination exam, the results in Alabama have been consistently at the top among all jurisdictions in statistical correlations.

Alabama also has one of the youngest boards of examiners, age-wise, in the nation. All except one current member were required to take the exam for admission to the bar.

1983-84 Bar Year

The incoming administration of Bill Hairston has already generated tremendous interest within the bar. Over a

Continued on page 102

Letters to the Editor



Dear Editor:

My worst fears as to what might be proposed in the Governor's budget for the Secretary of State's Office were, unfortunately, too optimistic.

The Governor and the Alabama House of Representatives (by way of House Bill 236, sponsored by Rep. Tom Coburn, of Tuscumbia) have now cut the Secretary of State's \$812,434 budget request to \$574,952. This is unfair to you and your clients who depend on the services of this office and will have a counter-productive effect on the State's general fund as well as a devastating effect on the state's business community, if not rectified by the State Senate.

According to the State Comptroller, the Secretary of State's Office deposits more than \$926,000 annually into the State general fund. These deposits are the fees paid by you and your clients, corporations, lending institutions and citizens for the services rendered by our Corporations, Uniform Commercial Code, Trademarks and other divisions.

The Governor's cut will cripple the Secretary of State's office. Layoffs will be necessary, creating inevitable backlogs in our ability to file and retrieve documents; the State general fund will experience a loss of revenue far beyond that saved by the budget reductions; and the business community will be unnecessarily damaged.

Attorneys, individually and collectively through the Bar Association, must let the Governor and legislative leaders know that this short-sighted and unfair treatment would do substantial harm to the business community and must be reversed immediately. At a time when state government is facing serious financial difficulties, priorities must be set. Essential state services which have a direct effect on the state's business image and economic climate must be funded.

I am asking that you **take action now** to help protect the services provided by the Secretary of State's Of-

ice. Please communicate directly with the Governor, Lt. Gov. Bill Baxley, Speaker of The House Tom Drake, Rep. Tom Coburn (Chairman of the Ways and Means Committee), and State Sen. Hinton Mitchem (Chairman of the Finance and Taxation Committee), who can be reached by writing to: The Capitol, Montgomery, 36130. I would appreciate receiving a copy of any written communications.

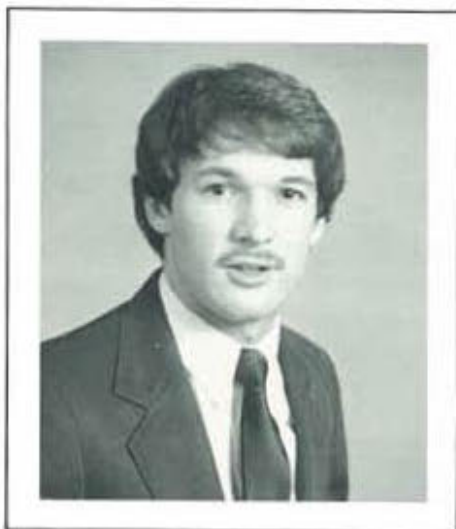
Your immediate attention to this critical matter will, hopefully, have an impact.

Don Siegelman
Secretary of State

LETTERS TO THE EDITOR

The purpose of the Letters to the Editor column is to provide a forum for the expression of the readers' views. Readers of *The Alabama Lawyer* are invited to submit short letters, not exceeding 250 words, expressing their opinions or giving information as to any matter appearing in the publication or otherwise. The editor reserves the right to select the excerpts therefrom to publish. Unless otherwise expressed by the author, all letters specifically addressed as Letters to the Editor will be candidates for publication in *The Alabama Lawyer*. The publication of a letter does not, however, constitute an endorsement of the views expressed. Letters to the Editor should be sent to:

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Time Share Ownership of Condominiums

Richard E. Davis

Richard E. Davis, a student at the University of Alabama School of Law, is the winner of the 1983 Alabama Lawyer Writing Contest. Davis is a graduate of the University of South Alabama in Mobile, with a B.A. in Political Science. He has worked with the Mobile firms McDermott, Slepian, Windom & Reed; Johnstone, Adams, May, Howard & Hill; and Coale, Helmsing, Lyons & Sims during the summer months since beginning law school.

Time share ownership of condominiums is an idea whose newness and novelty has worn away and whose popularity requires lawyers to familiarize themselves with time share's principles, features, and problems. The idea involves the division of a condominium's life into equal and fixed time periods which are "sold" to purchasers each of whom acquire, at the least, the right to exclusive use and occupancy of the condominium during his time period. Time sharing may be implemented through any one of a surprisingly high number of "ownership" forms; thus, depending upon the form offered to the purchaser, he may acquire any one of several different real property estates or he may acquire only one of several right-to-use forms. The differences between the estate forms group and the right-to-use group together with the differences within each group necessitate the caveat that few propositions or questions concerning time sharing should be presented without identifying the particular form to which the proposition or question applies.

The time share concept, borrowed from the Europeans in the early 1970's, is a creative but simple response to the demands of the American vacation industry.¹ The "good life" of resort con-

dominium ownership appealed to many, but the economic realities precluded most from even seriously considering such a purchase. The developers recognized that with rising construction and financing costs, few Americans could afford a second home especially one they would occupy for only a week or so. Thus the developers began to market the condominiums as investments emphasizing the potential rental income, the deductibility of expenses, and the depreciation allowance. But this marketing technique risked invoking security laws and failed to satisfy those consumers who wanted only an annual vacation without the worries and responsibilities of year-round ownership.

The time share seemed to be a perfect solution. A consumer could pay for only that time he wanted, and he would be free from the worries of renting, maintaining, insuring, and paying taxes for the time he did not use the condominium. He would also have a hedge against inflation's effect on hotel costs while enjoying the hotel-like services that many resort condominiums offer. Additionally, the developer benefited from the enhanced marketability of the condominium, and he realized greater profits from selling the condominium incrementally. Finally, because the pur-

chaser is more interested in personal use than in investment, the developer undertook less risk that security registration would be required. The foregoing explains why the number of time share owners in this country jumped from 40,000 in 1976 to 300,000 in 1979.² Further, the time share industry has developed attractive optional items such as exchange programs through which a time share owner of a December week in Key West can swap with a time share owner of a week in Aspen.

Time sharing ownership of condominiums seems destined only for growing popularity, and this destiny challenges legislatures and the legal profession to understand the idea and to eliminate and avoid creating any problems to the benefit of lenders, developers, and consumers. This article was written in humble hope that it would help legislators and lawyers prepare to meet this challenge.

Forms of Ownership

As mentioned above, each of the many forms of time share ownership can be classified as either a proprietary interest

in real estate or a non-proprietary interest with only an exclusive right to use, such as a license or a lease. Which of the two major classifications a developer will offer and a purchaser will choose depends upon their respective needs, abilities, and goals. A developer who wants a quick return as well as a quick release from a project will market an estate form. On the other hand, a developer who desires to retain ownership and control so as to ensure income from providing collateral services and to take advantage of the depreciation allowance and the probable capital appreciation will offer only the right to use.

A purchaser may consider ownership to be a liability or an asset. Certainly, real estate ownership permits an owner to deduct his interest payments and property taxes. The owner acquires a hedge against inflation while building equity. Also, his estate interest is more likely to qualify as security for financing which benefits him upon initial purchase and upon resale thus enhancing alienability. He may even receive capital gains treatment if he resells. Finally, the purchaser may be one who does not consider the great American dream to be fulfilled until he owns his very own second home in a resort area.

Notwithstanding the foregoing, over half of the time shares sold in this country have been of the right-to-use type.³ The lower costs of the rights to use and the responsibilities of ownership together with the less chance of regulation of the right-to-use programs as well as the peculiar nature of the estate forms explain the higher percentage of the lesser interest schemes.

Estates in Land

Generally, but not always, a time-sharer owns an estate in land through one of the three following forms: (1) time span estate, which is a tenancy in common subject to a real covenant limiting possession; (2) interval ownership which entails recurring estates for years together with a tenancy in common in the "remainder;" and (3) recurring fee simple estates.

Tenancy in Common or Time Span Estate. The tenancy in common form, sometimes called the time span estate, is the easiest to understand. As the name connotes, a time sharer owns a 1/52 un-

divided interest (assuming the developer chose to market in increments of one week) in the private elements of the condominium together with a proportionate undivided interest in the common elements. The time sharer is bound to the condominium declaration which limits his right to exclusive possession to one week annually.

With several hundred years of common law's development and application of tenancy in common principles (especially those concerning duties, liabilities, and rights of the cotenants) courts and counsel should have little difficulty ascertaining the appropriate law and recognizing potential problem areas. However, several items should be mentioned. First, traditional property law defines a tenancy in common as including the "unity of possession." But the time sharer has covenanted away the possessory right; thus, absent statutory provision, a court may refuse to consider the estate a tenancy in common⁴ and proceed to apply and perhaps create a different body of principles.

Second, judicial partition always threatens a tenancy in common estate. Therefore, most developers include in the declaration a bar to partition. Generally, the original time shares of a condominium contract away the partition right; however, the time share program's success depends upon the enforceability of the covenants (especially those eliminating unity of possession and the right of partition) against grantees of the covenantors. Some states ensure enforceability of condominium covenants by statutorily recognizing that recordation of the covenant acts as an equitable servitude which runs with the land. However, if the condominium statute does not explicitly authorize time sharing (and only the statutes of six states do), such statutory recognition may be of no help. Of course, even without a statute, recordation should work an equitable servitude at common law. Though most condominium enabling acts authorize bars to partition of the common elements, without statutory authority, a bar to partition of a time share program's private elements will be subject to a reasonable time period limitation.

Finally, even without the threat of judicial partition at the insistence of a

tenant, a tenant may fear a federal tax lien foreclosure on the whole condominium upon the default of a cotenant. Fortunately for the time share industry, the Internal Revenue Service has alleviated this fear by recognizing the time sharer's time span interest as separate and distinct and, therefore, capable of being sold without selling the entire condominium.⁵

Interval Ownership. Also available to a time share purchaser is the interval ownership form. This form gives the purchaser an estate for years consisting of only a week which estate recurs annually for a fixed number of years.⁶ Also, the purchaser receives a remainder interest which he holds as a tenant in common with the owners of the other estates for years. The "remainder" interest following an estate for years, a non-freehold estate, differs from the remainder interest following a freehold estate; thus, the interval ownership can be better understood as tenancy in common ownership of a condominium subject to the cotenants' recurring estates for years.⁷

The threat of partition in interval ownership is not as serious as it is in straight tenancy in common ownership primarily because even judicial sale for partition could not defeat the estates for years to which the tenancy in common remainder is subject. Also, "because each interval estate owner has a defeasible fee . . . during his period of possession, exclusive of all rights and liabilities of persons in whom title may later vest in the cycle," liability of a co-owner for the injury to a third person caused by another owner's negligence is unlikely.⁸ Finally, there appears no reason why a federal tax lien may not be enforced against interval ownership in the same favorable way it would be enforced with the time span estate.

Fee Simple. The most creative form of time sharing is the recurring fee simple, otherwise known as the chronometric fee and authorized by the Uniform Real Estate Time-Sharing Act⁹. This ownership form, not before recognized in property law, entails the creation of recurring fee simple estates by making time a property dimension in the same way that height, breadth, and width are.¹⁰ The novelty of this notion has, no doubt, led many to call it "risky," and the treatment of the notion in this article is

proportional to the industry's employment of it.

Rights to Use

The second major group of time share ownership forms confers only an annually recurring right to use a condominium.¹¹ The right-to-use forms vary more than do the estate in land forms. For example, a time sharer may purchase a right to use a specified condominium for a specified time period, or a right to use an unspecified condominium for an unspecified period. The Uniform Real Estate Time-Share Act classifies such rights as licenses, but developers have called them either vacation licenses or club memberships. Certainly, the nature of the interest will depend not upon the terminology of the developer, but upon the contract creating the interest. For example, in *Cal-Am Corp. v. Department of Real Estate*,¹² a time share developer marketed a "membership interest," but the California Court of Appeal disagreed with his characterization. Notwithstanding that the "club" retained the right to select annually the condominium the "member" would occupy, the court concluded that the member's rights constituted an interest in real estate in the nature of a lease. The Supreme Court of Nevada in *State v. Carriage House Associates*,¹³ reclassified a "vacation license" similar to the "membership interest" in *Cal-Am Corp.* as merely a contract right constituting neither a license, since the interest was irrevocable, nor a lease, since the particular condominium the "licensee" would occupy was not fixed.

Seemingly, if a court determines that a right-to-use program establishes a lease, that jurisdiction's landlord and tenant law will direct the rights, duties, and liabilities. Likewise, if the court finds that the developer is offering a license, the state's law governing licensees and licensors will control. The court may draw also from other common law notions or rely totally upon the contract to construe the relationships as the Internal Revenue Service recently did. In a Private Ruling,¹⁴ the Service, relying in part on the fact that the vacation license in question did not guarantee exclusive possession of a specific suite, resolved that the purchaser had only a contract right to future, hotel-like services.

If the Internal Revenue Service's position is indicative of the attitude toward such interests, financing the purchase of a right to use may be extremely difficult. This difficulty would cause problems not only for the initial time sharer's purchase, but would also make easy resale unlikely.

State and Federal Regulation

Securities Registration

A prospective time share promoter and a defrauded purchaser should determine if the scheme invokes federal and state securities requirement. Generally, offerors of non-exempt securities must register with the federal and state commissions.¹⁵ Since an "investment contract" is a security, the offeror of such falls within the reach of securities laws. Construing "investment contract," the Supreme Court in *S.E.C. v. W.J. Howey Co.*¹⁶ established the applicable standard: "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."¹⁷ Subsequent courts have explained that "profits" include not only "a participation in earnings resulting from the use of investors' funds" but also the "capital appreciation resulting from the development of the initial investment."¹⁸ Further, courts have relaxed the *Howey* rule by explaining that the third person's efforts need not be the sole efforts, but need to be only "the undeniably significant ones."¹⁹

Thus if a developer offers to rent the time sharer's interest, or pitches the program by promising that the developer's managerial efforts and marketing skills will lead to a high resale, the security laws could apply. If, however, the time sharer is motivated by a desire to personally occupy the condominium, and if the developer avoids certain marketing techniques, or requires that resale be only to offeror and at no profit, a common practice in the right-to-use programs, the scheme will probably not invoke security laws.²⁰ Unfortunately, the S.E.C. has determined that because of the many different types of time share plans, it will no longer issue no-action opinions.²¹

Real Estate Laws

The marketing of any of the estate in land forms probably requires registration under the Federal Interstate Land Sales Act²² and the procurement of state real estate licenses.²³ Doubtful is that the right-to-use schemes fall within these real estate laws unless the scheme constitutes a lease arrangement.²⁴

Time Share Legislation in Alabama

Alabama does not have special time share legislation; however, two time share bills will probably be offered to the legislature this summer. The Alabama Real Estate Commission is drafting a comprehensive time share proposal,²⁵ and a state representative plans to introduce a bill authorizing Baldwin County and its political subdivisions to regulate, *inter alia*, the development of time sharing.²⁶ Without the benefit of such specialized legislation, Alabama courts and lawyers must look elsewhere for authority and guidance.

Alabama Condominium Ownership Act

Perhaps, the Alabama Condominium Ownership Act, (hereafter, the act)²⁷ passed in 1973, provides the authority and guidance needed in the time share industry. Section 35-8-3 of the Alabama Code limits the act's applicability to property whose owner or owners have executed and recorded a declaration pursuant to section 35-8-7. Section 35-8-22 states the act's purpose to be that of encouraging development and construction of condominium property under the act's provisions, and the act seeks to effectuate this purpose by ensuring protection of lenders, developers, and purchasers. Thus arises the question whether a developer may lawfully offer a time share plan yet remain under the act's protection. The importance of the answer to this question lies in the possibility that a court may find a time share condominium project totally outside the act's protection and thus be forced to apply common law property concepts that were not developed within the time share or condominium ownership context.

The act does not expressly mention time sharing, and apparently the concept was not considered when the legislature adopted the act. Thus resort must be had to interpretation of the law with the construer keeping in mind that section 35-8-22 requires liberal construction to effectuate the act's purpose.

Applicability to Estate Forms. The Alabama Condominium Ownership Act provides that a unit includes the right of ownership of the private elements and the right to exclusive use and possession of such private elements together with an undivided interest in the common elements. Further, a unit is deemed to be real property and may be held and owned through any real property estate recognized by Alabama law including a lease. Apparently, therefore, a unit may be owned collectively by the fifty-two owners of time-span estates or of interval estates but not by chronometric fee owners. However, the mere qualification for treatment under the act does not guarantee full protection. For example, since the fifty-two time sharers own collectively only one unit, (unless the court strains to construe "unit" to be that which one time sharer owns) the act's prohibiting imposition of liability upon a unit owner for the tortious acts of another unit owner will not extend to similarly protect a time share owner of one unit against liability for the tortious conduct of another time share owner of the same unit. Further, the act's providing for tax assessment against units and for limiting liens to creation only against units will not help the time share owners of a certain unit except as against time share owners of another unit. Consequently, if a time sharer failed to pay his share of the property tax, consistent with the act, the state could foreclose against the unit. The foregoing observations are far from exhaustive, but they reflect the type of legal analysis required for each time share scheme.

Applicability to Right-to-Use Forms. Whether the right-to-use time share programs may be covered by the Condominium Ownership Act presents a more preliminary question: whether a right-to-use form even involves condominiums. Generally, "condominium" connotes a fee simple ownership (either by an individual solely or by a group collectively) of a unit's private elements

together with an undivided interest in the common elements. Seemingly, a developer who retains the fee in a project and leases or conveys only licenses or contracts to provide hotel-like services has not created condominium ownership. Thus such a project would not fall within the act's purview.²⁸ If, however, the developer leased "units," that is, gave to a lessee for a limited time the right to exclusive possession of private elements together with the right to use common elements as if he were a cotenant owner of such common elements, perhaps, the project would qualify under the section that authorizes ownership by lease.²⁹ Again, the interpretation of the nature of the time sharer's interest is determinative.

Even if a time share program cannot be brought under the Condominium Ownership Act, the act can be of valuable assistance to counsel for lenders, developers, and consumers. For instance, section 35-8-9 requires formation of an owners association which is charged with maintaining, repairing, and cleaning the complex, assessing and collecting the owners' proportionate share of expenses, promulgating and enforcing complex rules, enforcing restrictive covenants, and procuring casualty and liability insurance. Counsel should ensure that these vital tasks will be properly carried out and that since a time sharer will likely be unwilling and unable to attend association meetings, counsel should insist that the owner have the right to vote by mail. Other of the act's provisions, such as the "Termination of Condominium" section, 35-8-20, can help counsel understand the potential problems that can and should be eliminated in advance.

Time sharing, in any one of its forms, can provide an affordable luxury for many Americans, and it can blossom into a lucrative industry for developers. However, the various forms of time share ownership and the confusing implications of each accompanied by a lack of adequate protection for lenders, developers, and consumers could cause serious problems, skepticism, and crackdown by various federal and state offices. Time share legislation, as flexible, thoughtful, and sophisticated as the Condominium Ownership Act, is needed in Alabama, and as mentioned

above, legislation could be passed as early as this summer. In the meantime, counsel for lenders, developers, and consumers must anticipate problems and advise and draft accordingly. □

Footnotes

¹See generally, Comment *Time-Share Condominiums: Property's Fourth Dimension*, 32 *Mo. L. Rev.* 181, 181-83 (1980).

²See Burek, *Uniform Real Estate Time-Share Act*, 14 *Real Prop. Prob. & Tr. J.* 683, 683 (1979).

³See *id.*

⁴See, Comment, *Legal Challenges to Time Sharing Ownership*, 45 *Mo. L. Rev.* 423, 438 (1980).

⁵See Rev. Rul. 79-55, 1979-1 C.B. 400.

⁶See generally, Comment, *supra* note 1, at 201-10.

⁷See *id.* at 204-10 (thoughtfully discusses underlying property theories and their implications).

⁸See Comment, *supra* note 4, at 437.

⁹See Burek, *supra* note 2, at 684.

¹⁰See generally, Comment, *supra* note 1 at 211-16.

¹¹"Condominium" is technically inappropriate in a discussion of the right-to-use programs. See *infra* part II. D. 2. As used herein, the right to use a condominium is the right to use private elements exclusively, and the right to use common elements as if the right holder were a cotenant in the common elements.

¹²104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (Ct. App. 1980). See also Annot., 6 A.L.R. 4th 1288 (1981).

¹³94 Nev. 707, 585 P.2d 1337 (1978).

¹⁴See Priv. Rul. 8252005, [1982 Priv. Ltr. Rul.] *Fed. Taxes* (P-H) ¶ 6431.

¹⁵Securities Act of 1933 § 2(1), 15 U.S.C. § 77c (c) (1976); *Ala. Code* § 8-6-4 (1975).

¹⁶328 U.S. 293 (1946), cited with approval in *Burke v. State*, 385 So. 2d 648 (Ala. 1980).

¹⁷*Id.* at 501.

¹⁸See, e.g., *United Hous. Found. Inc. v. Forman*, 421 U.S. 837 (1975).

¹⁹*S.E.C. v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973), cert. denied, 414 U.S. 821 (1973), quoted in *Burke v. State*, 385 So. 2d 648, 652 (Ala. 1980).

²⁰See *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852-54 (1975).

²¹The *Innisfree Corp.* [1974-1975 Transfer Binder] *Fed. Sec. L. Rep.* (CCH) ¶ 79,935 (June 12, 1974).

²²15 U.S.C. § 1701-1720 (1976 & Supp. III 1979).

²³See *Ala. Code* § 34-27-30 (1975).

²⁴See *id.*; "Time Sharing" Leases of Resort Motels, Op. Atty Gen. (Ala. Oct. 13, 1977).

²⁵Telephone interview with Mary Goodwin, Exec. Dir. of the Alabama Real Estate Commission (Feb. 25, 1983).

²⁶Letter from Alabama State Rep. Stephen A. McMillan, Dist. No. 95, to Richard E. Davis (Feb. 15, 1983).

²⁷*Ala. Code* § 35-8-1 to -22 (1975).

²⁸See Op. Atty Gen., *supra* note 24.

²⁹See *Ala. Code* § 35-8-4 (1975). But See Op. Atty Gen., *supra* note 24.

Is Your Calendar Marked For July 21-23?

*The Alabama State Bar
cordially invites you
to attend the
State Bar Annual Meeting
Thursday, the twenty-first day of July,
through
Saturday, the twenty-third of July,
nineteen hundred and eighty-three
Birmingham, Alabama*

R.S.V.P.

1983 Annual Meeting Outline

Thursday

- 8:00 a.m.-
5:00 p.m.— Recent Developments Seminar—
6.6 hours CLE credit
- 11:00 a.m.— Bloody Mary Party
- 12:00 noon— Bench and Bar Luncheon—Morris Harrell,
Esq., President of ABA, guest speaker
- 7:00 p.m.-
9:00 p.m.— Membership Reception
- 9:00 p.m.-
12:00 a.m.— Young Lawyers' Party

Friday

- 7:30 a.m.— Special Breakfasts
- 9:00 a.m.— General Assembly
- 9:15 a.m.— "Raid on Entebbe"—Colonel Joshua Shani
"Fitness & Productivity"—Glenn McWaters

- 12:00 noon— Alumni Luncheons
- 2:00 p.m.-
5:00 p.m.— "Policing the Bar; How the Grievance
Process Works" and Section Meetings
- 4:00 p.m.— Women Lawyers' Reception
- 7:00 p.m.— Annual Dinner and Dance

Saturday

- 6:30 a.m.— The Vulcan Too! Run
- 7:30 a.m.— Family Breakfast
- 9:00 a.m.-
10:30 a.m.— General Assembly—"Reflective
Roundtable" and Section Meetings
- 11:00 a.m.— Business Meeting—Election of Officers

PLEASE REGISTER EARLY

If you have not received your registration materials contact the state bar, toll free, at 1-800-392-5660 or 269-1515 in Montgomery.

Birmingham—Much More Than Hot Dogs!

Gary P. Smith

If you're planning on visiting a city and want to know what attractions it has to offer, the last person you should consult is an inhabitant of that city. After all, New Yorkers don't go to Radio City, Washingtonians don't go up in the Washington Monument, and San Franciscans don't take the ferry over to Alcatraz, that is, until Cousin Mildew and his wife Edentia come to town and demand to be taken there. And we here in Birmingham are pretty much the same way. We spend our eight per day in our brick or concrete and steel enclosed cubicles, interrupted only by a quick trip to a hot dog stand, and then rush to the martinis and crabgrass of suburbia.

Speaking of hot dogs, you might be surprised to learn that Birmingham lays claim to being the hot dog capital of the nation, boasting more hot dog stands—at last count more than sixty—in relation to population than any other city. This should tell you something about Birmingham, although what I'm not exactly sure.



Hot Dog Capital of the Nation

All this is by way of saying that I never realized there were so many things to do in Birmingham until I started to tell you about them, so much of this information—with certain exceptions which I'll leave you to figure out—is necessarily hearsay. But my sources are reliable and one of these days I'm going to get around to some of these places myself. You betcha. So, as the saying goes, it's nice to have you in Birmingham. Enjoy.

WHERE TO START? Depends on what interests you.

SPORTS

If you're a sports fan, be sure and take in the Alabama Sports Hall of Fame. The ASHOF Museum features a collection of memorabilia belonging to legendary Alabama sports personalities. Sound sensed displays and cleverly designed exhibits house such famous articles as Coach Paul "Bear" Bryant's checkered hat and Pat Sullivan's Heisman Trophy.



Alabama Sports Hall of Fame

Baseball. The Birmingham Barons, a Class AA Detroit farm club, host the Columbus Astros at Rickwood Field July 22-25.

The park (including parking area) is clean, well lit, and provides fun for the entire family.

Golf. Try Don Hawkins Golf Course, Oak Mountain State Park Golf Course (have to have reservations for the weekend), or Charlie Boswell Golf Course.

Tennis. Highland Racquet Club, excellent courts.

OUTDOORS

If nature and the great outdoors is your thing, then there are a variety of sites in and around Birmingham. Ruffner Mountain Nature Center, with a rich variety of plant or animal life, is located only minutes from downtown Birmingham.

Oak Mountain State Park with fishing, boating, swimming and camping facilities is located eighteen miles south of the city.

Tannehill Historical State Park, built around the ruins of antebellum Tannehill furnaces, is located off I-59 near Bessemer.

PARKS AND MUSEUMS

The Jimmy Morgan Zoo is one of the largest in the Southeast. It features, among other things, a white rhinoceros (I'm glad there's only one—I never could figure out the plural of that word), Siberian tigers, gorillas and orangutans along with a monkey island and childrens' petting zoo.

For the more contemplative types, across the road from the zoo are the Botanical Gardens covering



Birmingham Zoo

67.5 acres consisting of twelve sections including the Rose Garden and the Japanese Garden.

The Birmingham Museum of Art has over eight thousand works of art including an especially fine collection of Remington Bronzes. The Red Mountain Museum is a natural history museum with exhibits explaining the geological and paleontological history of the area.



Botanical Gardens

THIS 'N THAT

Arlington Historic House and Gardens is a restored mid-nineteenth century home. Sloss Furnace is an eighteen acre iron and steel facility containing the oldest blast furnace in Birmingham. And there's always the familiar Vulcan with his panoramic view of



Arlington House

Birmingham. Not so long ago there were a series of complaints from citizens of Homewood to whom Vulcan's backside is perpetually bared. A local singer and songwriter even wrote a song about Vulcan "mooning" Homewood. I view these protests as frivolous. Indeed, the present occupant of the White House can look to the southeast, to the rear of the Treasury Building and view an equestrian statue of General Sherman—a classic example, many Southern Democrats would hold, of one horse's behind beholding two others. But back to the myriad wonders of the Magic City.

ANTIQUES

To those of you whose interest in antiques goes beyond being married to one, the two-block radius of 29th Avenue South, leading from U.S. 31 to the curve in Homewood, is known as Antique Row and features at least a half dozen antique shops. Likewise, Cobb Lane, a few blocks to the north, just off 20th Street, has a number of shops.

FOOD, POTABLES AND NIGHT LIFE

Tuckered out from all that activity? Want to relax with a cool one and a thick steak or obscenely large lobster?

Here are some places you might try. First, let me file a disclaimer of responsibility. The following list of commercial establishments does not constitute a



Rockefeller's

personal endorsement, but, rather, represents a general consensus of opinion backed to some extent by personal observation. However, you know any place can occasionally have an off evening, so, if your steak comes out overdone or your lobster pinches you, don't blame me. It's just a matter of *de gustibus*.

- **Steaks**—Steer butt at Michael's
- **Seafood**—For lobster try GG in the Park; Leos. For something a little different try Harpoon Louies.
- **Lamb**—La Patee if you like it a little pink. Michael's if you prefer it a little more well done.
- **Barbecue**—Are you kidding? You can get that at home. All right, if you've got the craves and simply must have some, Carliles, Golden Rule and Old Plantation.

- **Prime Ribs**—Gold Nugget
- **Italian**—Rossi's, try the veal picante
- **French**—Christians, LeRelais
- **Chinese**—Pick 'em. If you like Chinese they're all good. Try the Cathay Inn and Kao's, both in Homewood, for both Mandarin and Szechwan.
- **Japanese**—Sumos, twirling knives, the whole bit. Before going check your socks for holes.
- **All around good food, atmosphere and genial host**—Gkika's Down the Street
- **All around down home family atmosphere**—Old favorite John's, hands down. Hot cornsticks and cole slaw with French Dressing.
- **Expense account/price is no object/trying to impress someone**—Hugo's Rotisserie. Great view, strolling violinists, the works. If she doesn't go for this, you'd better try something else besides food, like maybe a more direct approach.
- **Something on the unusual side**—Highlands Bar and Grill. Tiled floor in the bar reminiscent of Antoine's. Only place in town I know of that serves sweetbreads, if you like sweetbreads.

Now that your appetite is sated and you're considering some post-prandial peregrinations, where to? Depends on what you've got in mind!

Theatre. In the theatre category there's Summerfest at Boutwell Auditorium featuring "Annie" (the orphan, not the one who got her gun) and the Celebrity Dinner Theatre where you can dine and watch a stage comedy at the same time. And there's "Wit's Other End"—a consistently fine presentation of contemporary humor by some of the most talented young people around.

Music. There are not quite as many guitar pickers in Birmingham as there are in Nashville, but there are still gracious aplenty to the extent you won't be able to hear them all in one stay. They all sound pretty much alike to me so choose whatever strikes your fancy. One of the most popular spots in town right now is Rockefeller's, on the strip, featuring Johnny Click's band, a combination of country and western, rock and pop. And there's always Birmingham's perennial favorite, Bob Cain—and with good reason—an accomplished musician who can play anything from contemporary to golden oldies. Bob's holding forth at the Hilton nowadays.

If you're a jazz enthusiast then head for New Orleans or Mobile, there's very little of it here. On Friday night the Sheraton Mountainbrook has a combo that plays something resembling Dixieland, and Joe's at Five Points South has a live combo on Saturday nights that's well worth hearing especially if, like me, you're up to here with electric guitars and fiddles.

But in the last analysis with Birmingham, as with any other city, it's by and large the people you meet and not the places you see which determines whether you'll enjoy your visit. Like every other burg in the South, from Vicks to St. Peters, we like to think of ourselves as friendly, gracious and hospitable. We hope you find us so and that you'll, as another saying goes, have a ball. And by the way, bring lots of money. We can use it. □

1982-83 Section Reports

Administrative Law Section

Alvin T. Prestwood, chairman

Last fall, the Administrative Law Section laid out an enthusiastic and monumental program of goals which we hoped to achieve during the 1982-83 year. Those plans were published in the October 1982 issue of *The Alabama Lawyer*; this report may be considered a follow-up to that article.

General Report of Activities

Beginning with the presentation of a program during the first day's general session of the 1982 annual meeting of the Alabama State Bar in Huntsville, we have continued a pace of activities which included three seminars for lawyers (in Mobile, Montgomery and Birmingham) on the implementation of the Alabama Administrative Procedure Act (APA). These seminars were planned and conducted with the able assistance of the Alabama Bar Institute for Continuing Legal Education.

In November, we joined with Auburn University at Montgomery (AUM) in planning and presenting a seminar to train hearing officers who would be presiding over contested cases under the APA. That seminar proved a significant success, and the section and AUM ended up with a \$1,200 profit. This money was used to advertise an informational seminar aimed at educating members of the general public on how they might utilize the APA's provisions for their benefit. That general seminar was held on June 25, 1983 in the auditorium of the State Office Building in Montgomery.

Our members have also spent many hours working closely with Alabama Law Institute, the Legislative Reference Service, and all state agencies which are to be affected by the APA in an effort to insure a smooth entry into the initial implementation stages of the legislation.

The section is anticipating another important meeting at the annual meeting in Birmingham. We will meet on Friday afternoon, July 22, and Manning G. Warren III will speak to our group on the subject of recent developments in federal administrative law.

The Eugene W. Carter Medallion

Perhaps the most significant thing the section has done this year is to create the "Eugene W. Carter Medallion," an award to be bestowed upon selected former public officials who, during a lifetime of public service, have especially been renown

for honestly and fairly "weighing governmental interests against the rights of individuals." Qualifications required to certify persons as eligible to receive the medallion are extremely selective and, while it may be awarded annually, it is not anticipated that an honoree will be chosen that frequently.

As its name indicates, the idea for the award was inspired by the widely recognized and consistent fair enforcement of the law demonstrated during the life of public service of the beloved Eugene W. Carter, former presiding judge of the Fifteenth Judicial Circuit of Alabama.

Antitrust Section

Robert A. Huffaker, chairman

The principal activity of the Antitrust Section of the Alabama State Bar during the preceding year was its sponsorship of a seminar at the Cumberland School of Law on October 8, 1982. The seminar, entitled "Business Torts and Commercial Litigation," covered a wide spectrum of subject areas and was attended by well over a hundred participants. Speakers at the seminar included Samuel H. Franklin, Lewis W. Page, John R. Matthews, Frank B. McRight, Richard H. Gill, Michael L. Edwards, Judge Marvin Cherner, Eddie Leitman, U. S. Magistrate David Bagwell, and Richard Ogle.

There may be a misconception among many of the members of the bar as to the area of interest of the Antitrust Section. While the focus of the section is largely upon areas of law involving antitrust practice and procedure, the section is also concerned with areas of law involving business and commercial litigation, unfair competition, and deceptive trade practices. If bar members have an interest in these areas, we would welcome their membership in the Antitrust Section.

Corporation, Banking & Business Law Section

Robert Potts, chairman

The Section on Corporation, Banking and Business Law of the Alabama State Bar is alive and well. Within the last year, a newsletter has been published by the section, and an excellent annual meeting was held in July 1982 at Huntsville in connection with the State Bar Association Annual Meeting. At the meeting, Miss Carolyn Duncan, staff attorney with the Alabama Securities Commission, gave a splendid presentation on "Securities Problems Facing Banks and Other Financial Institutions." Also, Professor Howard Walthall of the Cumberland Law School discussed "New Regulation D: Limited Of-

fering Exemptions," based on material supplied by Professor Manning Warren.

At the annual meeting in July 1983 to be held in Birmingham Mr. R. Frank Ussery, director of the Alabama Securities Commission, will discuss "Securities Regulation-Alabama Style," and Professor Howard P. Walthall and some of his students will give an update on recent developments in corporate and commercial law.

If you are interested in joining the Corporation, Banking & Business Law Section, please contact Curtis W. Jones, P. O. Box 10246, Birmingham, Alabama 35202.

Criminal Law Section

David C. Johnson, chairman

The Criminal Law Section of the Alabama State Bar is planning a jury selection seminar for the fall or winter which will feature nationally prominent speakers and cover in depth voir dire and the art of jury selection. The program may be expanded to include civil as well as criminal trials.

During the past year we have monitored pending legislation in the Alabama Legislature and are working in conjunction with Mr. Donald Jones with the United States Attorney's Office in Birmingham, the American Bar Association representative who is monitoring the activities of the legislature on behalf of the American Bar's Criminal Justice Committee. We are identifying legislation in the criminal justice field with the idea of legislation which may be of interest to individual bar members.

Our committee has developed an impetus which we hope to carry forward in the coming years. High interest has been shown by the bar membership in the Criminal Law Section. We hope to nurture and intensify our assistance to our fellow lawyers.

Environmental Law Section

Thomas B. Leonard III, chairman

The major activity of the Environmental Law Section was the program entitled "The Role of Epidemiology in Proving Toxic Torts," which was presented at the 1982 State Bar Annual Meeting in Huntsville. The speakers were Dr. Jeffrey Roseman, associate professor, School of Public Health, UAB; and Ms. B. Suzi Ruhl, executive director, Legal Environmental Assistance Foundation.

Due to the vast number of toxic substances present in the environment and the dearth of statutory remedies for individual compensation, a new area of the law, Toxic Tort litigation, is emerging and is now providing a tool to make significant social changes through personal injury cases.

In proving a causal connection between the defendant's conduct in causing exposure to a toxic substance and the plaintiff's injury of a health impact resulting from that exposure, the incorporation of the epidemiologist into the legal team can ultimately provide the strongest evidence available.

At the 1983 Annual Meeting to be held in July in Birmingham, the Environmental Law Section will present a program entitled "Hazardous Waste in Alabama." Interested attorneys are invited to attend the Saturday morning program.

Labor Law Section

Harry L. Hopkins, chairman

At the 1982 Alabama State Bar Annual Meeting in Huntsville the Labor Law Section was addressed by the Honorable U. W. Clemon, judge, U. S. District Court for the Northern District of Alabama, who spoke on intentional discrimination under Title VII of the civil rights law with particular reference to seniority provisions and collective bargaining. The section meeting was attended by approximately one hundred members of the bar.

On October 1-2, 1982, the Labor Law Section held its annual seminar at Gulf Shores, Alabama. Giving lectures at that seminar were several Alabama tax attorneys, including James P. Alexander, John C. Bird, William F. Gardner, J. Fredric Ingram, Peyton Lacy, Jr., William E. Mitch and Terry Price of Birmingham; Walter F. Eigenbrod of Huntsville; and James U. Blacksher of Mobile.

Also, on March 17 and 18, 1983, the Alabama Labor Law Section joined with the labor law sections of Texas, Mississippi and Louisiana in New Orleans. The Alabama lawyers on the program were J. Fredric Ingram of the Birmingham firm Thomas, Taliaferro, Forman, Burr & Murray, and John Falkenberry of the firm Stewart, Falkenberry & Whatley who spoke on "Trial Strategy in an Age Discrimination Case."

Plans are now being made for the Labor Law program at the forthcoming state bar meeting as well as plans for the section seminar to be held at Gulf Shores in October or November.

Practice and Procedure Section

W. Stancil Starnes, chairman

The Practice and Procedure Section is planning an educational program to be held during the meeting of the Alabama Bar in Birmingham on July 22, 1983. The entire membership of the Alabama State Bar is invited to attend. The program is scheduled to begin at 2:00 p.m. on July 22. Three outstanding speakers have agreed to participate in the meeting.

Justice Janie Shores of the Alabama Supreme Court will share her thoughts regarding the future of substantive law in the state of Alabama. Many lawyers perceive that the last ten years have witnessed a great deal of change in the substantive law of this state. Is that perception right or wrong? What does the past portend for the future? Justice Shores' thoughts on these subjects should be of extraordinary interest to all of us.

Judge William A. Acker, Jr. of the United States District Court for the Northern District of Alabama will address "The Most Common Mistakes Made by Lawyers in the Litigation Process" from the perspective of a recently appointed United States district court judge. All who know him know that Judge Acker was an aggressive trial lawyer before ascending to the bench. His thoughts on the most common mistakes made by trial lawyers will undoubtedly be probative and educational.

Finally, as is traditional, Mr. Champ Lyons of the Mobile Bar Association will address recent developments in the Alabama Rules of Civil Procedure. Champ's comments on this subject are always timely and informative.

All in all, this promises to be one of the highlights of the annual meeting. Come early and get a good seat.

The Practice and Procedure Section of the Alabama Bar is the sole vehicle within this state which addresses the problems of the trial lawyer from a neutral viewpoint. The Practice and Procedure Section is neither a criminal lawyer's organization or a civil lawyer's organization. It is neither plaintiff oriented nor defendant oriented. Rather, it is a group of trial lawyers actively engaged in the litigation process who are committed to the strengthening of that process.

If you are not a member of the Alabama Practice and Procedure Section and you have occasion to go to the courthouse, you should join today.

Real Property, Probate & Trust Law Section

W. Roscoe Johnson III, chairman

Members of the Real Property, Probate and Trust Law Section of the Alabama State Bar have been active participants in a series of CLE seminars on the new Alabama Probate Code during the past year. Section members have also redrafted the bar brochure on wills and expect that document to reach lawyers throughout the state very soon.

Executive Director's Report

Continued from page 181

thousand lawyers responded to the committee preference survey. This is far more persons wanting to serve than there are committee positions available. Bill will announce his appointments before the July convention.

All committees are requested to hold their initial meeting at the inaugural Committee Breakfast to be held on Friday morning, July 22, 1983. There will be a table designated for each committee at the breakfast to be hosted by the state bar. This new innovation will hopefully launch the 1983-1984 committees on an active year. The appointment letters will contain breakfast details.

The response to the questionnaire evidenced a continued strong interest in our profession. It was exciting to see the new names wanting to be about the work of the bar.

SEE YOU IN BIRMINGHAM!

Reginald T. Hamner

Young Lawyers' Section

J. Thomas King, Jr., president

Over the past year the Young Lawyers' Section of the Alabama State Bar has been quite active. The president of the YLS has reported in *The Alabama Lawyer*, on an issue by issue basis, the activities of the section. Some of the significant events during the 1982-83 year were two bar admission ceremonies where a total of more than four hundred new attorneys were admitted to the bar; the General Practice Seminar held in Birmingham in cooperation with ABICLE; the Second Annual Conference of Professions held in Montgomery in March; the Youth Legislature Judicial Program in cooperation with the Montgomery YMCA; the Young Lawyers' Annual Seminar in Sandestin; and three Executive Committee Meetings where these events were planned.

In July at the State Bar Annual Meeting the YLS will sponsor the Recent Developments Seminar where bar members can earn 6.6 hours of CLE credit. Also, the State YLS and the Birmingham YLS will co-host a party following the Membership Reception on Thursday night of the annual meeting. □



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About Members Among Firms

About Members

Dewitt Reams, senior partner in the law firm of Reams, Wood & Vollmer, has been chosen Lawyer of the Year by the Mobile Legal Secretaries Association.

Charles D. Martin, Gadsden lawyer and deputy district attorney, has been chosen the 1983 Lawyer of the Year by the Gadsden Legal Secretaries Association.

Frank L. Butler III, of Macon, Georgia, has been appointed as assistant U.S. attorney for the Middle District of Georgia (Civil Division) with offices in the Old Post Office Building, 475 Mulberry Street, Macon, Georgia.

Dothan attorney **Huey D. McInish**, a partner in the firm of Lee and McInish, was awarded the Defense Research Institute's Exceptional Performance Citation at the Sixteenth National Conference of State and Local Defense Associations which was held in Point Clear in April.

James A. Main of Anniston has been awarded the 1983 President's Award by the American Society of Pharmacy Law. This award is presented annually to the person, chosen nationwide, who has most contributed to the development of pharmacy law. There is no requirement that the recipient of this award be either a pharmacist or an attorney, however, Main happens to be both.

W. Boyd Reeves of Mobile has been awarded a Certificate as a Civil Trial Specialist from the National Board of Trial Advocacy (NBTA), the only national certification program for the legal profession. Reeves, a member of the firm Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, joins nine other Alabama trial lawyers who are NBTA certified.

Danny L. Dupree, a member of the Alabama bar, who practices in Columbus, Georgia has, also, been awarded a National Certificate as a Civil Trial Specialist from the NBTA.

Rudolph O. Schwartz, president of the American College of Probate Counsel, has announced that **Vivian G. Johnston, Jr.**, of the Mobile law firm of Hand, Arendall, Bedsole, Greaves & Johnston has been elected as a Fellow of the College.

Walter G. Browning, of Birmingham, has been promoted to general counsel of Rust International Corporation. Browning will be responsible for the worldwide legal affairs of the Rust group of companies.

Birmingham attorney **Alex W. Newton** has received the first Samuel W. Pipes Distinguished Alumnus Award from the Farrah Society at the University of Alabama School of Law. Newton is a partner in the firm Hare, Wynn, Newell & Newton. Also, Newton has been elected to a six-year term on the Jefferson County Judicial Commission.

Among Firms

The Birmingham law firm of **McDaniel, Hall, Parsons, Conerly, Scott & Lusk, P.C.**, is pleased to announce that **Mark W. Lee** and **Jasper P. Juliano** have become members of the firm.

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor First National Bank Building, Mobile, Alabama, takes pleasure in announcing that **Preston Bolt, Jr.**, and **Sheryl Tatar Dacso** have become associated with the firm.

Roe & Associates announce the relocation of their offices to Suite 130, 1933 Montgomery Highway, Birmingham, Alabama 35209.

The Birmingham law firm of **Sirote, Permutt, Friend, Friedman, Held & Apolinsky, P.A.**, is pleased to announce that **Steven A. Brickman**, **John V. Lee**, **Richard I. Lehr**, and **Susan B. Mitchell** have become members of the firm; **Judith F. Todd**, **C. Paul Davis**, **Charles R. Driggers**, **Kaye K. Houser** and **Andrea L. Witcher** have become associates of the firm. The firm also announces that **Robert F. Fraley** in Orlando, Florida has become of counsel to the firm.

William L. Mathis, Jr., announces the relocation of his office to Suite 104, 2117 Magnolia Avenue, Birmingham, Alabama 35205. Phone 252-7422.

Harold D. Rice and Jack M. Glover are pleased to announce the opening of their offices, **Rice and Glover**, No. 4 18th Avenue N.W., Birmingham, Alabama 35215.

The law firm of **Pappanastos, Samford, Roberts & Blanchard, P.C.**, takes pleasure in announcing that **Laura A. Calloway** has become associated with the firm. Offices are located in Suite 311, One Court Square, Montgomery, Alabama 36104.

Joel Lee Williams announces the removal of his offices to 101 Church Street, Carroll Building, Troy, Alabama 36108. Phone 366-3464.

George J. Porter, Attorney-at-Law, Patent and Trademark Attorney, announces his relocation to 2007 Gallatin Street, Suite C, Huntsville, Alabama 35801. Phone 336-9716.

The law firm of **Brown, Hudgens, Richardson, Whitfield and Gillian, P.C.**, is pleased to announce that **Franklin G. Shuler, Jr.**, has become associated with the firm and that **George L. Williamson**, an associate of the firm, has become a patent attorney licensed to practice before the U.S. Patent and Trademark Office. Offices are at 601 Bel Air Boulevard, Mobile, Alabama 36606.

The law firm of **Melton & Espy, P.C.**, is pleased to announce that **James E. Williams**, former assistant district attorney for the Fifteenth Judicial Circuit, is now associated with the firm. Offices are at 339 Washington Avenue, P.O. Box 1267, Montgomery, Alabama 36102.

Simon & Wood, Attorneys at Law, take pleasure in announcing that **Joseph Randall Crane** has become a partner in the firm and that the firm name has been changed to **Simon, Wood & Crane**. Offices are at Suite 1010, Van Antwerp Building, Mobile, Alabama 36602.

The law firm of **Noojin & McNair** takes pleasure in announcing the relocation of their offices to the Landmark Hall, 1005 Government Street, Mobile, Alabama.

J. Donald Reynolds announces the relocation of his law office to 300 South Hull Street, Montgomery, Alabama.

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CLE News and Seminars



Mary Lyn Pike
Staff Director, MCLE Commission

MCLE NEWS

Compliance: 1982

Ninety-eight percent of Alabama's 6,900 attorneys met or exceeded the twelve hour requirement during the first year of mandatory continuing legal education. Compliance by the Alabama Bar compares favorably with compliance rates of ninety-two to ninety-nine percent in other mandatory CLE states.

This accomplishment was facilitated by a number of approved Alabama organizations that conducted more than 150 seminars during 1982. Each of Alabama's 6,000 resident attorneys had the opportunity to attend at least one seminar without driving more than fifty miles from home. Credits could be earned at rates of \$8 to \$11 per hour or \$96 to \$132 for the year. These fees are comparable with those in other Southern states.

Appreciation for providing these opportunities is expressed to the following Alabama organizations: Alabama Association of Corporate Counsel, Alabama

CONTINUING LEGAL EDUCATION OPPORTUNITIES

July—October, 1983

LIST OF SPONSORING ORGANIZATIONS

Sponsor Code	Sponsor Name	Telephone Number
ABICLE	Alabama Bar Institute for Continuing Legal Education	(205) 348-6230
ACDLA	Alabama Criminal Defense Lawyers Association	(205) 345-0966
ADAA	Alabama District Attorneys Association	(205) 832-6946
AJC	Alabama Judicial College	(205) 348-7566
ASBYLS	Alabama State Bar Young Lawyers Section	(205) 269-1515
ASCPA	Alabama Society of Certified Public Accountants	(205) 834-7650
BBA	Birmingham Bar Association	(205) 251-8006
CICLE	Cumberland Institute for Continuing Legal Education	(205) 870-2865
DRI	Defense Research Institute	(414) 272-5995
LPGC	Lawyers Post Graduate Clinic	(312) 346-0110
NCDA	National College of District Attorneys	(713) 749-1571
NDAA	National District Attorneys Association	(703) 549-9222
SFTI	Southern Federal Tax Institute, Inc.	(404) 524-5252
SLF	Southwestern Legal Foundation	(214) 690-2376
TULS	Tulane University Law School	(504) 865-5939

SCHEDULE OF SEMINARS

The following list of approved CLE activities was compiled on May 16, 1983. For more current information, contact the sponsoring organizations.

Dates	Names and Places
July 15, 1983	Birmingham— <i>International Law</i> . CICLE. Credits: 3.0 (estimate).
July 19, 1983	Birmingham— <i>Circuit and District Judges Annual Meeting</i> . AJC.
July 21, 1983	Birmingham— <i>Recent Developments in the Law</i> . ASBYLS. Credits: 6.6. Cost: Included in the Alabama State Bar convention registration fee.

July 22, 1983	Huntsville— <i>Basic Concepts in Estate Planning</i> . ASCPA. Credits: 8.0. Cost: \$90.
July 25-29, 1983	Chicago— <i>Trial Techniques Institute</i> . LPGC. Credits: 39.0. Cost: \$675.
July 29-30, 1983	Dallas— <i>Estate Planning</i> . SLF. Credits: 33.0. Cost: \$595 before July 18; \$620 after July 18.
August 8-9, 1983	Anniston— <i>Collections</i> (in conjunction with Alabama Shakespeare Festival). ABICLE. Cost: \$65.
August 11-18, 1983	Dothan— <i>Advanced Estate and Gift Taxation</i> . ASCPA. Credits: 16.0. Cost: \$160.
August 11, 1983	Nashville— <i>Summer Conference</i> . NDAA.
August 12, 1983	Birmingham— <i>Will Drafting After ERTA and TEFRA</i> . ABICLE. Credits: 6.3. Cost: \$65.
August 15-16, 1983	Montgomery— <i>Will Drafting After ERTA and TEFRA</i> . ABICLE. Credits: 6.3. Cost: \$65.
August 18-19, 1983	Gulf Shores— <i>Summer Conference</i> . ADAA.
August 18-20, 1983	Mobile— <i>Basic Oil and Gas Taxation</i> . ASCPA. Credits: 16.0. Cost: \$290.
August 19, 1983	Tuscaloosa— <i>Trial Advocacy</i> . ABICLE. Credits: 24.6. Cost: \$350.
August 26, 1983	Birmingham— <i>New Proposed Supreme Appeals Court</i> . BBA. Credits: 1.0. Cost: \$10.
August 26-27, 1983	Birmingham— <i>How to Win After You've Lost (Appellate Practice)</i> . BBA. Credits: 3.0. Cost: \$15/members; \$25/nonmembers.
September 12, 1983	Mobile— <i>Developments and Techniques in State Court Practice</i> . ACDLA. Credits: 9.0. Cost: \$75/members; \$100/nonmembers.
September 15-16, 1983	Auburn— <i>Problems of the Closely Held Corporation</i> . ASCPA. Credits: 8.0. Cost: \$90.
September 16, 1983	Las Vegas— <i>Products Liability</i> . DRI.
September 22, 1983	Mobile— <i>Estate Planning Workshop</i> . ASCPA. Credits: 16.0. Cost: \$160.
September 23, 1983	Birmingham— <i>The Lawyer's Role in State Government</i> . BBA. Credits: 1.0. Cost: \$10.
September 25-29, 1983	Mobile— <i>Tax Problems of Individuals</i> . ASCPA. Credits: 8.0. Cost: \$90.
September 25-30, 1983	Huntsville— <i>Criminal Procedure</i> . ABICLE. Cost: \$65.
September 29, 1983	Birmingham— <i>Age, Race and Sex Discrimination</i> . BBA. Credits: 3.0. Cost: \$15/members; \$25/nonmembers.
September 30, 1983	Birmingham— <i>Criminal Procedure</i> . ABICLE. Cost: \$65.
October 5-7, 1983	Huntsville— <i>Tax Planning in Corporate Liquidations</i> . ASCPA. Credits: 8.0. Cost: \$90.
October 6-7, 1983	New Orleans— <i>Prosecution of Violent Crime</i> . NCDA.
October 7, 1983	Atlanta— <i>Southern Federal Tax Institute</i> . SFTI. Credits: 36.2. Cost: \$325.
October 20, 1983	Mobile— <i>Criminal Procedure</i> . ABICLE. Cost: \$65.
October 21, 1983	Montgomery— <i>Criminal Procedure</i> . ABICLE. Cost: \$65.
October 27, 1983	New Orleans— <i>Tulane Tax Institute</i> . TULS. Cost: \$275.
October 28, 1983	New Orleans— <i>Medicine for Lawyers</i> . DRI.
	Dothan— <i>Criminal Procedure</i> . ABICLE. Cost: \$65.
	Mobile— <i>Real Estate</i> . ABICLE. Cost: \$65.
	Montgomery— <i>Real Estate</i> . ABICLE. Cost: \$65.
	Huntsville— <i>Real Estate</i> . ABICLE. Cost: \$65.
	Birmingham— <i>Real Estate</i> . ABICLE. Cost: \$65.

Bar Institute for Continuing Legal Education, Alabama Bar Sections, Alabama Consortium of Legal Services Programs, Alabama Criminal Defense Lawyers Association, Alabama Defense Lawyers Association, Alabama District Attorneys Association, Alabama Judicial College, Alabama Trial Lawyers Association, Birmingham Bar Association, Cumberland Institute for Continuing Legal Education, Huntsville-Madison County Bar Association, Mobile Bar Association and Montgomery County Bar Association.

Compliance Reports: 1983

Forms for reporting 1983 CLE compliance will be mailed in September to all members of the Alabama Bar except those who have already claimed the age exemption. Carryover credits from 1982 will be posted on the forms prior to mailing them. Attorneys should be prepared to report the dates, names, locations and sponsors of activities attended in 1983 as well as credits earned. An attorney who reported at least twelve carryover credits in 1981-82 does not need to earn any credits in 1983 and may return the 1983 reporting form without listing any courses. However, if credits have been earned in 1983 to be used in 1984, these *must* be recorded on the 1983 form. Exemptions may also be claimed on these forms.

The reports should be submitted by December 31, 1983. Last year, 2,000 reports were filed after the reporting deadline. Many of these could have been filed on time if the Bar's records had reflected current addresses. If your address has changed in the last year, please notify Bar headquarters at P. O. Box 671, Montgomery, Alabama 36101 to ensure that you receive your reporting form.

New Approved Sponsors

At its meeting on May 5, 1983, the MCLE Commission approved applications by the Alabama Lawyers Association and the Tuscaloosa County Bar Association for the status of approved sponsor. Continuing legal education activities conducted by these organizations are presumptively approved for 1983, provided the criteria for course approval are met. □

Bar Briefs

ABA to meet in London in 1985

For the fourth time in sixty years, the American Bar Association will meet jointly with British barristers, solicitors and judges in London in 1985.

"Planning is now well along for the London sessions of the 1985 Annual Meeting," according to David R. Brink, immediate past president of the ABA and chairman of its Special Committee on the London Sessions. The ABA held meetings in London in 1924, 1957, and 1971.

The 1985 Annual Meeting will be held in Washington, D.C., from July 4-10 and the London sessions will follow from July 14-20.

American Express Europe Limited has been appointed by the ABA as the official travel agent and conference and convention organizer for the London sessions. It has been requested to develop a full range of air and land packages, including a possible return trip from London on the *Queen Elizabeth II* and tour packages during and after the London sessions.

It is expected that complete tour packages will be ready by March 30, 1984, according to David J. A. Hayes, Jr., ABA assistant executive director, and that registration will open soon after that date. Registration will be on a first come—first served basis, he said, after space has been reserved for the governance groups of the ABA, which is standard procedure in connection with annual meetings.

Bright named district judge

In April, Governor George C. Wallace announced the appointment of Montgomery lawyer Lynn Clardy Bright as a Montgomery County district judge. The appointment filled the vacancy which occurred when Wallace appointed Judge Mark Kennedy to a circuit court judgeship.

Judge Bright received her Bachelor of Science degree in criminal justice at Auburn University at Montgomery in

1975 and is a 1979 graduate of Jones Law School.

Most recently Bright has been in private practice and has worked as a special assistant attorney general representing the Office of State Planning and Federal Programs.



Bright

Law school offers graduate tax program

The University of Alabama School of Law will offer its Graduate Tax Program in Birmingham beginning in August 1983. The program, which is ABA accredited, leads to the degree LL.M. (Taxation).

The program operates in a two-year cycle, offering two courses per semester for six semesters. Because the program is designed for practicing lawyers, classes will be held Wednesday evenings and Saturday mornings.

The Graduate Tax Program has operated for two complete cycles in Birmingham, during which fifty graduates have received their degrees. The program is now being conducted in Mobile. The Mobile cycle will be completed in the summer of 1983, when another eighteen students are expected to receive their degrees.

Courses in the program qualify for the CLE credit on an hour-for-hour basis, i.e., a two-credit-hour course (thirty hours of class time) would receive thirty hours CLE credit.

Charles W. Gamble, acting dean and professor of law at the law school, advises that the program is rigorous and demanding. Instruction is primarily by the problem method.

Much of the material is highly technical and some of the material is conceptually difficult.

Admission materials are being mailed to those who expressed an interest in the program in response to our August 23, 1982 letter. If you would like to apply for admission to the program and have not previously requested admission materials, you may obtain them from the Admissions Office, The University of Alabama, School of Law, Box 1435, University, Alabama 35486.

If you have any questions about the program, please call Professors Jim Bryce or L. B. Feld at 348-7371.

Postal service may aid to effect service of legal process

The Postal Service wishes to clarify the circumstances under which the street address of a post office boxholder will be furnished when needed to effect service of legal process. It has been the intent of the Postal Service to release such information to persons empowered by law to serve legal process, but only when a legal action has, in fact, been commenced, often by an appropriate filing with the clerk of court. The Postal Service's underlying purpose has been to protect the privacy of Postal Service customers who elect to use post office boxes, while not permitting such use to become a means of avoiding or evading the obligation to respond to legal process.

As presently written, however, the pertinent Postal Service regulation does not literally state that disclosure of a street address will be made only after an action has been commenced, and may conceivably be interpreted to mean that disclosure will be made in order to commence an action. The proposed amendment is designed to remedy this situation, and also provides that street address information may be disclosed, when the prerequisite conditions are met, to attorneys (whether or not authorized to serve process) who represent the parties on whose behalf service is to

take place, as well as to persons who are actually authorized to serve process.

For further information consult: Proposed Rule, 48 Fed. Reg. 19,038 (1983).

Election of bar examiner

At the Alabama State Bar Board of Commissioners Meeting held in May, Sarah L. Thompson of Gadsden was elected to a four-year term on the Board of Bar Examiners. Thompson fills the vacancy which existed as a result of the expiration of an examiner's term of service on the board. She will examine in the area of Equity Jurisprudence.

Bar president to speak out on judiciary criticisms

For some time there has been a concern in the bar about the unfair and unwarranted criticism of the judiciary by the news media.

The topic, which Alabama State Bar President Norborne Stone covered in his message to the bar members in the May issue of *The Alabama Lawyer*, was also discussed at the Board of Bar Commissioners Meeting on May 5.

Because of their position as judges, as set out in the Canons of Judicial Ethics, members of the judiciary and the court are not permitted a forum to respond to these criticisms. President Stone therefore advised the commission that the responsibility for speaking on behalf of the bar, pursuant to a board resolution, was vested in the president.

President Stone reviewed with the commission his correspondence with Chief Justice Torbert wherein the bar and Board of Commissioners were asked to participate in responding to the unwarranted criticisms. President Stone indicated his intent to continue to speak out against unfair criticisms and to utilize the Executive Committee and other members of the board for advice and consent.

Bealle retires

J. Rufus Bealle, secretary and general counsel of the University of Alabama Board of Trustees, retired on June 30 after over thirty years of service to the university.

Board President Pro Tempore Samuel Earle G. Hobbs of Selma

announced Bealle's plans to retire to the board at its February 3rd meeting in Birmingham.

Bealle, who completed thirty years with the university on April 1, stated, "This is a good time for me to officially step down, with the full understanding that I owe so much to the university and will always be available if needed for any special assignment."

Since Bealle offered to perform special tasks for the university, Hobbs added, "I'm afraid he'll never retire."

The general counsel is responsible for the legal services on the university system's three campuses, coordinating the work of ten attorneys within the system.

Through the years Bealle has been central to the operations of the Board of Trustees. He has been secretary to the board and performed a variety of other functions for trustees longer than any of the present fifteen trustees have served on the board.



Bealle

Bowen named presiding judge



Judge William Bowen (left) was named presiding judge of the Alabama Court of Criminal Appeals on April 18, 1985, in a unanimous decision by the court's four other judges. Judge John Tyson III (right), the court's senior judge, served as acting presiding judge when Judge John Paul DeCarlo retired from the court in March to become Jefferson County district attorney. A former assistant attorney general, Bowen has been on the appeals court for five years. He will preside during terms of court and perform court-related administrative duties.

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 J. Gregory Allen Montgomery, Alabama
 Nancye Scott Noel Alley Birmingham, Alabama
 Charles Newton Amos Enterprise, Alabama
 Lyndel K. Armstrong Lexington, Illinois
 Anne Hendrix Avera Brewton, Alabama
 Myra Jane Baker Montgomery, Alabama
 Susan L. Barber Montgomery, Alabama
 Jefferson Stuart Barganier Montgomery, Alabama
 Robert Benton Barnett, Jr. Mobile, Alabama
 Phillip Kent Baxley Sylacauga, Alabama
 Fred F. Bell, Sr. Montgomery, Alabama
 Ralph Preston Bolt, Jr. Mobile, Alabama
 Sarah Clark Bowers Sylacauga, Alabama
 Bobby Neal Bright Montgomery, Alabama
 William Stanley Brobston Bessemer, Alabama
 John Garland Butler, Jr. Huntsville, Alabama
 Michael E. Bybee Birmingham, Alabama
 Robert P. Bynon, Jr. Adamsville, Alabama
 Jerry L. Carpenter Montgomery, Alabama
 James Patrick Cheshire Selma, Alabama
 Linda L. Cole Birmingham, Alabama
 Garth Anthony Corbett Monroeville, Alabama
 Barbara Schneider Corner Huntsville, Alabama
 Sheryl Tatar Dacso Mobile, Alabama
 Sally McNeill Ebaugh Birmingham, Alabama

Edward Owen Falkowski Fayetteville, Tennessee
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 Randy Herschel Hurst Cropwell, Alabama
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 Charles Grady Reynolds, Jr. Alexander City, Alabama
 Madeliene Humphrey Robinson Birmingham, Alabama
 Benton Stephen Sansom Kinston, Alabama
 Camille Gaylor Scales Huntsville, Alabama
 Stephen Lawrence Sexton Birmingham, Alabama
 John Edward Shaw Montgomery, Alabama
 Franklin G. Shuler, Jr. Mobile, Alabama
 William Edward Simms Fayetteville, Tennessee
 Joan B. Singleton Bessemer, Alabama
 Jeffrey W. Smith Montgomery, Alabama
 Justice D. Smyth, Jr. Luverne, Alabama
 Mark Thornton Smyth Luverne, Alabama
 I. Scott Sokol Birmingham, Alabama
 Rebecca House Thompson Birmingham, Alabama

Susanne Thornton Birmingham, Alabama
 Frank Charles Vaughn, Jr. Huntsville, Alabama
 Richard W. Vickers Birmingham, Alabama
 Carol Bernhard Wallace Birmingham, Alabama
 Tereasa D. Horton Washington Huntsville, Alabama
 Jackie Sparks Wedell Birmingham, Alabama
 Patricia Shadoin Williamson Montgomery, Alabama
 Ann Louise Davidson Wilson Birmingham, Alabama

February 1983

Bar Exam Statistics of Interest

Number Sitting for Exam 173*
 Number Certified to Supreme Court 93
 Certification Rate 54%

Certification Rate From:

ABA Alabama Accredited Law Schools 68%
 Alabama Non-accredited Law Schools 43%

*Seventy-four of those sitting for the exam were repeat candidates.

Lawyers in the Family



James S. McGinty (1982), Pamela McGinty Parker (1983) and O. O. McGinty (1925) (Father, Admittee, Grandfather)



Frank Butler Potts (1983) and Frank V. Potts (1959) (Admittee/Father)



Sara Dominick Clark (1942), Sarah Clark Bowers (1983) and James E. "Red" Clark (1941) (Mother/Admittee/Father)



David Patrick Harris (1983), J. Douglas Harris, Sr. (1943) and James D. Harris, Jr. (1967) (Admittee/Father/Brother)



Robert Shannon Paden (1983), Robert E. Paden (1960) and Jack G. Paden (1949) (Admittee/Father/Uncle)



Michael D. Godwin (1983) and Lee M. Otts (1949) (Admittee/Father-in-law)



Robert D. Norman, Jr. (1983) and Robert D. Norman, Sr. (1950) (Admittee/Father)



Charles Grady Reynolds, Jr. (1983) and Charles Grady Reynolds, Sr. (1953) (Admittee/Father)



Linda L. Cole (1983) and John L. Cole (1959) (Admittee/Father)



James Paul Graham, Jr. (1983) and William J. Benton, Sr. (1960) (Admittee/Father-in-law)



Sarah Booth Mooneyham (1983) and William S. Mooneyham (1960) (Admittee/Husband)



Joseph Craig Fine (1983) and Joe Fine (1963) (Admittee/Father)



Bobby Neal Bright (1983), Judge Lynn Clarly Bright (1979) and Janice Clardy Williams (1978) (Admittee/Wife/Sister-in-law)



John G. Butler, Jr. (1983) and J. Thomas Conwell, Jr. (1976) (Admittee/Brother-in-law)



Mark T. Smyth (1983), J. D. Smyth, Jr. (1983) and J. D. Smyth III (1980) (Admittee/Admittee/Brother and Son)



Fred F. Bell, Sr. (1983) and Tyrone C. Means (1977) (Admittee/First Cousin)



David A. Garfinkel (1983) and Judy M. Garfinkel (1981) (Admittee/Wife)



Doyce Pierce Mitchell (1983) and Thomas E. Mitchell (1982) (Admittee/Brother)

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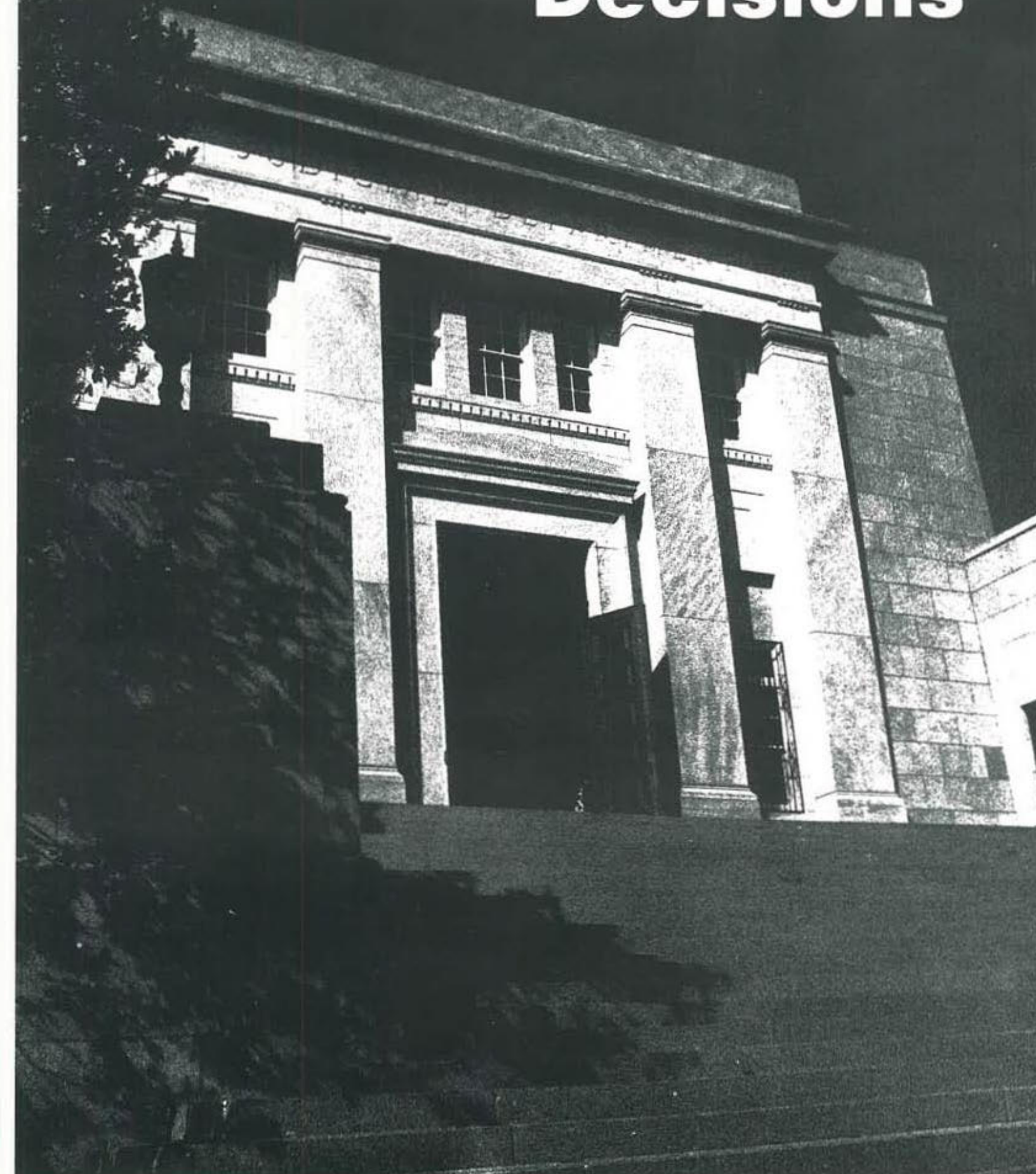
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Recent Decisions





John M. Milling, Jr., a member of the Montgomery law firm of Hill, Hill, Carter, Franco, Cole & Black, received his B.S. degree from Spring Hill College and J.D. from the University of Alabama.



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

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

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . denial of summary judgment not res judicata

Food Service Distributors, Inc. v. Barber, 17 ABR 1569 (April 1, 1983). In a case of first impression, the Supreme Court stated that there can be no res judicata effect on the denial of a summary judgment since, for res judicata to apply, there must have been a final judgment on the merits of the case. Denial of a motion for summary judgment is not a final judgment.

Shareholders derivative action . . . standing to bring action

Green v. Bradley Construction, Inc., 17 ABR 1942 (May 6, 1983). The Supreme Court held that in a suit filed under Rule 23.1, A.R.C.P. (Derivative Action by Shareholders), the plaintiff must be a shareholder when the alleged wrong oc-

curred and at the time suit was commenced. The court cited *Wefel v. Kramarsky*, 61 FRD 674 (1974), wherein the court noted:

"Rule 23.1, Federal Rules of Civil Procedure, does not expressly require that a derivative plaintiff be a stockholder at the time of said suit. Such a requirement is implied by the rule, however, since it deals with actions brought by one or more stockholders. The cases under the law clearly establish that one who does not own shares in a corporation at the time a suit is filed is not qualified to bring a derivative action on their behalf."

Executors and administrators . . . Section 6-6-540 interpreted

Beesley, Admr. of the Estate of Dr. Ralph S. Beesley v. Ebert, 17 ABR 1501 (April 1, 1983). In an administrator's action to quiet title pursuant to Section 6-6-540,

Ala. Code 1975, the Supreme Court held that the only circumstance under which an administrator may proceed with an action to quiet title to realty is where the administrator is permitted to intercept the title to realty otherwise passing to heirs, as when necessary to pay debts. Section 6-6-540, *supra*, provides that an action may be maintained by "any person . . . in peaceful possession . . . claiming to own same . . . as personal representatives. . . ." The Supreme Court reviewed the authorities which have interpreted statutes from which this section evolved and declined to interpret this statutory language broadly to permit an administrator of an estate to bring an action to quiet title.

Federal Arbitration Act . . . not applicable in state court

Ex parte: Alabama Oxygen Company, Inc. (In Re: Alabama Oxygen Company, Inc., et al. v. York International, York Division, Borg-Warner Corporation), 17 ABR 2032 (May 13, 1983). Granting a petition for writ of mandamus to require the trial court to vacate its stay of petitioner's civil action against York pending arbitration, the Supreme Court held that the Federal Arbitration Act (FAA) does not preempt state law regarding arbitration; therefore, Alabama law, rather than the FAA, controls in the state courts.

In this case, the parties had a contract which provided for the arbitration of disputes and provided that the law of New York would control. The Supreme Court reasoned that enforcement of the FAA in state court would violate longstanding Alabama public policy against the enforcement of agreements to arbitrate future disputes. The Supreme Court also stated that "our court would, if forced to apply the FAA, be compelled to violate . . . [Section 13] . . . of the Alabama Constitution and an act of our legislature." The court also stated that contractual agreements that a contract will be governed by the laws of a foreign state are enforceable *only* if there is no conflict between that law and the Alabama law or public policy. Conse-

quently, New York law which favors arbitration is not applicable in this case.

Insurance . . .

bad faith in re: uninsured motorists benefits

Quick v. State Farm Mutual Automobile Ins. Co., 17 ABR 1752 (April 15, 1983). In this case, the Supreme Court held that the tort of "bad faith" should not be extended to an uninsured motorist claim. Claimant was a passenger in a vehicle owned and operated by a State Farm insured. The State Farm policy contained provisions for uninsured motorists coverage. The Supreme Court noted an inherent difference in uninsured motorist coverage and first party insurance. The policy required State Farm to pay sums which the insured shall be *legally entitled* to recover as damages. The court stated that there can be no breach of an uninsured motorist contract, and therefore no bad faith, until the insured proves that he is legally entitled to recover.

Intestate succession— homestead law . . .

Ransom v. Ransom not retroactive

Stallworth v. Hicks, 17 ABR 2021 (May 13, 1983). Hicks, a widower, filed suit to have the court declare that he was entitled, under the homestead laws of Alabama, as construed by the Supreme Court in *Ransom v. Ransom*, 401 So.2d 746 (Ala. 1981), to fee simple ownership in property owned by his wife prior to her death. Under the laws of intestate succession in effect on the date of the wife's death, and prior to *Ransom*, *supra*, the widower had no rights under the homestead laws.

In *Ransom*, *supra*, the Supreme Court held that the homestead law was under-inclusive and extended its applicability to widowers. The Supreme Court in this case, however, refused to give that holding retroactive effect stating that there was no constitutional mandate to do so and that overwhelming public policy considerations compelled the opposite result.

Medical liability act . . .

savings clause judicially interpreted

Tucker v. Nichols, 17 ABR 1948 (May 6, 1983). In this medical malpractice action, plaintiff discovered the cause of action approximately one month before the two-year statute of limitations ran. However, suit was not filed until two years and four months after the allegedly negligent act occurred, but less than six months after the discovery of the cause of action. In addition to the two-year statute of limitations, Section 6-5-482(a), *Ala. Code* 1975, provides for a six months savings clause which states that if the cause of action is not discovered within such period, "then the action may be commenced within six months from the date of such discovery. . . ."

The trial court judicially construed this savings clause so as to allow the six month filing period to apply to the discovery of causes of action prior to the running of the two year statute of limitations. The court agreed with the trial court's interpretation, noting that the act, if literally interpreted, is unconstitutional under the rationale of *Lankford v. Sullivan, Long and Hagerty*, 416 So.2d 996, (Ala. 1982). By allowing the instant suit, *all* party claimants are given the same six month period after discovery within which to file their action, thus removing the fatal defect found by *Lankford*, *supra*.

Recent Decisions of the Supreme Court of Alabama—Criminal

Sentencing hearing . . . presence of counsel

Anderson v. State, 17 ABR 1731 (April 8, 1983). The Supreme Court granted certiorari to determine whether the defendant was represented by counsel at sentencing and whether the court permitted allocution prior to sentencing.

The record disclosed that following Anderson's conviction on May 5, 1981, but before sentencing, the defendant's appointed counsel of record was allowed to withdraw from the case. The petitioner was allowed to remain free on bond until the date set for sentencing, May 8, 1981. On the appointed day, the defendant did not appear and a *capias* issued. Subsequently, a sentencing hearing was held on April 19, 1982. At that hearing, the defendant was present and received a sentence of twelve years in the state penitentiary. The record failed to disclose either allocution or the presence of defense counsel, or the waiver of either.

Justice Beatty, writing for a unanimous court, held that the presence of counsel at sentencing is an absolute necessity. Furthermore, the Supreme Court noted that the record failed to disclose that the defendant had the opportunity to speak in his own behalf prior to the time the sentence of law was imposed. The court concluded that in a felony conviction, the sentencing court *must ask* the convicted person if he has anything to say as to why the sentence of law should not be imposed upon him. See *McGuff v. State*, 49 Ala. App. 88, 268 So.2d 868 (1972).

These errors rendered the sentence erroneous although the conviction was unaffected. The court remanded the cause to the trial court for the purpose of resentencing the defendant.

Reckless homicide . . .

extreme indifference to human life

McCormack v. State of Alabama, 17 ABR 1729 (April 8, 1983). The Supreme Court reversed and remanded the murder conviction of David McCormack for a violation of Section 13-16-2(a) (2) *Ala. Code* 1975 thereby adopting the rationale of the court of criminal appeals enunciated in *Northington v. State*, 413 So.2d 1169 (Ct. Crim. App. 1981).

A unanimous Supreme Court held that a charge of murder under Section 13-16-2(a) (2) (reckless homicide manifesting extreme indifference to human life) involves circumstances where a per-

son has no deliberate intent to kill or injure any particular individual. The element of "extreme indifference to human life," by definition, does not address itself to the life of the victim, but to human life generally.

In *McCormack*, the State presented no evidence that this defendant engaged in conduct "manifesting extreme indifference to human life generally." The only evidence was that the defendant had attempted to strike Charles Newsome with a yard rake which caused Newsome, who was riding a bicycle to swerve into the path of an oncoming car. Thus, it was error for the trial court to submit Count I to the jury.

Capital murder . . .

an alibi defense may preclude jury consideration of lesser included offenses

Cook v. State, 17 ABR 1312 (March 11, 1983). Cook was convicted of robbery during the course of which the victim was intentionally killed, a capital offense under Section 13-11-2(a) (2), *Ala. Code* 1975. He received a sentence of life imprisonment without parole.

Cook's only defense was alibi, and the only witness who testified for the defense was Cook himself. He claimed that he had been with his girlfriend at the time of the crime, but did not know where she was at the time of trial. There was no defense evidence offered which would have supported a lesser included offense.

The Supreme Court granted certiorari to consider whether the principles enunciated by the Supreme Court of the United States in *Beck v. Alabama*, 447 U.S. 625 (1980), were applicable to the facts of Cook's case. While the *Cook* case was pending before the state Supreme Court, the United States Supreme Court in *Hopper v. Evans*, ___ U.S. ___, 102 S. Ct. 2049 (1982), clarified its earlier opinion in *Beck*. *Beck* and its progeny stand for the proposition that a jury must be permitted to consider a verdict of guilt of a non-capital offense "in every case" in which the evidence would have supported such a verdict.

The Supreme Court, speaking through Justice Adams, established the

test which triggers the preclusion clause, as follows:

(1) Was there any evidence presented at trial upon which a conviction of a lesser included offense could have been based?

(2) If not, has the defendant suggested any plausible claim which he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial? If the answer to both of these questions is no, then a conviction at trial is due to be affirmed.

In the present case, when Cook took the stand and testified that he was in a distant location when the crime took place and could not thereby have committed it, he directly contradicted any evidence which could later be produced to show that he was guilty of a lesser included offense. Therefore, Cook's alibi defense precluded jury consideration of a lesser included offense.

Recent Decisions of the Alabama Court of Civil Appeals

Civil procedure . . . rule 62(dc) (5) jurisdictional

Hardeman, d/b/a Four-way Dairy Bar v. Mayfield, ___ So.2nd ___, Civil Appeals No. 3577 (April 6, 1983). In this case, the Alabama Court of Civil Appeals held that if an appellant in a civil case fails to file security for costs ("cost bond" or "bond for cost") in an appeal from the district court to the circuit court, a jurisdictional defect in the appeal is thereby created and the appeal is subject to dismissal by the circuit court.

The court recognized that Rule 2 (Alabama Rules of Appellate Procedure) mandates a different result in appeals

from the circuit court in that timely filing of the notice of appeal is the only jurisdictional requirement. However, Rule 62(dc) (5), A.R.C.P., expressly requires a security for costs and, since the rules of appellate procedure do not apply to civil appeals to the circuit court from the district court and the Rules of Civil Procedure have no savings provision as in Rule 2, *supra*, filing of the security for costs is jurisdictional.

Insurance . . . uninsured motorists coverage

Rohleder v. Family Shows, Inc., ___ So.2nd ___, Civil Appeals No. 3715 (May 4, 1983). In a case of first impression, the court of appeals held that the insurer cannot reduce uninsured motorists coverage by workmen's compensation benefits paid to an omnibus insured even though the statutory minimum is left intact. The court reasoned that since the limiting clause would be void where the named insured is concerned (*Preferred Risk Mutual Ins. Co. v. Holmes*, 251 So.2d 213), it is difficult to understand why the same clause should be applicable against an omnibus insured absent clear language indicating it applies only to the omnibus insured.

Wrongful death . . . constructive trust denied

Pogue v. Pogue, ___ So.2nd ___, Civil Appeals No. 3532 (April 6, 1983). In a case of first impression, the court of appeals held that the damages recovered for wrongful death (Section 6-5-410, *Ala. Code* 1975) must be distributed according to the Statute of Distribution. The mother of the deceased sought a constructive trust on the portion of the father's share on the grounds that the father never supported the deceased son. The court declined to alter the distribution mandated by Section 43-3-1, *Ala. Code* 1975 (father and mother share equally), noting that the great weight of authority holds that the courts, absent a statute, may not circumvent the statutory distribution scheme on the grounds that the recipient is "unworthy."

Zoning . . . group homes are not families

Civilians Care, Inc. and Huntsville Group Homes, Inc. v. Board of Adjustment of the City of Huntsville, — So.2d —, Civil Appeals No. 3450 (May 4, 1983). In this case, the trial court ruled that two group homes for mentally disabled adults were not permissible in an area zoned for "families," defined as "any number of individuals living together as a single housekeeping unit and doing their own cooking on the premises." The court of appeals affirmed, recognizing that there is a split of authority among the states as to the proper classification of "group homes" under zoning ordinances. The court also noted that although the zoning ordinance definition of "families" was very broad, it did not include situations where the operators of the home received compensation for their services to the residents.

Recent Decisions of the Alabama Court of Criminal Appeals

DUI . . . failure to state an offense

Smith v. State, 2 Div. 348 (March 29, 1983). The Alabama Court of Criminal Appeals reversed Smith's DUI conviction because the information was void. The information charged that the defendant (Smith) did "commit the offense of Driving Under the Influence in violation of Section 32-5A-191 of the Code of Alabama." The court of criminal appeals held that the information was fatally defective because it failed to specify whether the defendant was driving while under the influence of alcohol, Section 32-5A-191(a) (2); under the influence of a controlled substance, Section 32-5A-191(a) (3); or under the combined

influence of alcohol and a controlled substance, Section 32-5A-191(a) (4).

Prosecutorial misconduct . . . closing argument

Jetton v. State, 8 Div. 501 (March 29, 1983). Jetton was indicted by the Lawrence County Grand Jury for murder. At his arraignment, the defendant entered a plea of not guilty and not guilty by reason of insanity. Pursuant to a pre-trial motion for mental examination, the defendant was later certified as being competent to stand trial and was returned to Lawrence County.

The defendant had a long history of acute and chronic alcoholism. While hospitalized in an alcohol abuse center in Florence, the defendant had the "d.t.'s" and had hallucinated as well as heard voices. Dr. Harry Simpson, a Florence doctor specializing in internal medicine, treated alcoholics at the abuse center. He testified that during "d.t.'s" alcoholics would suffer an "alcoholic psychosis" and would lose touch with reality. The evidence was without dispute that at the time of the commission of the offense, the defendant was in a drunken stupor.

On appeal, the defendant asserted that the trial court committed reversible error in overruling his motion for mistrial based on certain remarks made by the prosecutor in closing argument. Specifically, the defendant contended that the prosecutor's remarks, which included the statement that it was probable the defendant would be released in three months if found not guilty by reason of insanity, constituted ineradicable error.

Judge Harris, writing for the appeals court, held that "considering the issues, the parties and the circumstances, the cumulative effects of the prosecutor's closing argument were so highly prejudicial that their utterance constituted reversible error." The prosecutor exceeded the bounds of legitimate argument when he commented "and there is no guarantee that he won't be out in three months . . . the probabilities are that he will be out in three months." These remarks cannot be considered as mere comments on the evidence, and the objections raised thereto should have been promptly sustained and proper instruction to the jury given.

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

Plain view . . . "an open window"

Texas v. Brown, 81-419, — U.S. —, (Apr. 19, 1983). In a plurality opinion, the U.S. Supreme Court softened the requirements of the "Plain View Doctrine." The opinion modified a 1971 holding that it must be "immediately apparent" to law enforcement officials that objects within their view are incriminating evidence for a warrantless seizure to be constitutional. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The Court's new position on "plain view" is that warrantless seizures must meet a standard of "reasonableness."

The facts of *Texas v. Brown*, *supra*, involved a Fort Worth, Texas police officer's discovery of an uninflated, knotted party balloon in an automobile which had been stopped on a routine driver's license check. The uninflated balloon contained a white powdery substance and was seized when the driver of the car was arrested for driving without a license. Laboratory tests determined that the powdery substance was heroin.

The Texas state trial court refused to suppress the balloon and the drug as illegally seized evidence. The Texas Court of Criminal Appeals reversed, holding that the arresting officer "had to know" that the incriminating evidence was before him for the seizure to be valid. The Texas appeals court cited the requirement of *Coolidge*, *supra*, that the nature of the evidence, *i.e.*, its criminality, be "immediately apparent to the officer."

Justice Rehnquist concluded that the phrase in *Coolidge* "immediately apparent," was very likely an unhappy choice of words, since it can be taken to imply that a high degree of certainty as to the incriminating character is necessary for an application of the plain view doctrine." Justice Rehnquist's opinion continues the "common sense approach" to Fourth Amendment problems by suggesting that the central requirement of the Fourth Amendment as it pertains to government seizures of evidence is "reasonableness."

Five other justices joined in two opinions concurring with the plurality that the Texas appellate court should be reversed but holding that such reversal should be based on the *Coolidge* standard. The minority view held that the appearance of a balloon, a commonly used piece of drug paraphernalia, met the "immediately apparent" test of *Coolidge*.

Significantly, Justice Powell, in an opinion joined by Justice Blackmun, argued that the plurality opinion went beyond the test established in *Coolidge* and apparently accords less significance to the warrant clause of the Fourth Amendment than is justified by the language and purpose of the amendment.

Refusal to take a blood test . . . not a testimonial act within the fifth amendment

South Dakota v. Neville, 459 U.S. —, 74 L. Ed.2d 748, 103 S. Ct. 916, 51 U.S.L.W. 4148 (February 22, 1983). In this case the Supreme Court held that there was no violation of the Fifth Amendment in a South Dakota statute that makes a refusal to take a blood alcohol test admissible as evidence in a trial for driving while intoxicated.

Neville was arrested by two South Dakota police officers for failure to stop at a stop sign. At the time of the arrest, Neville appeared to be intoxicated and refused to take a blood alcohol test. Later, at Neville's DWI trial, the trial court granted his motion to suppress all evidence of his refusal to take the blood alcohol test although a state statute specifically provided that refusal to submit to a test "may be admissible into evidence at the trial."

The South Dakota Supreme Court affirmed on the ground that the statute violated the federal and state privileges against self-incrimination. The Supreme Court reversed and remanded in an opinion authored by Justice O'Connor.

Justice O'Connor, employing the rationale of *Schmerber v. California*, 384 U.S. 757 (1966), found that South Dakota had stopped short of the California statute in *Schmerber*. The South Dakota statute permits a suspect to refuse to take the test at the risk of losing his driver's license.

Justice O'Connor held, in pertinent part:

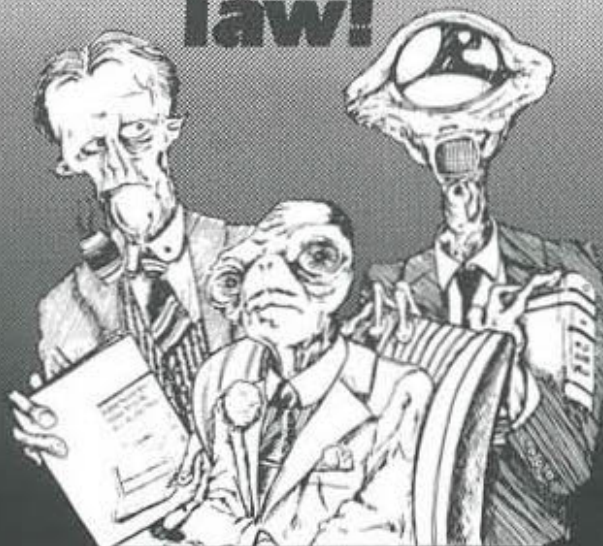
"Such a penalty . . . is unquestionably legitimate, assuming appropriate procedural protections . . ."

Since the state could compel the suspect to take the test, the Court said the offer of the test is legitimate, and it becomes

no less legitimate when the state affords the option of taking the test or refusing it with the attendant penalties. The opinion concludes that there is nothing fundamentally unfair "in using the suspect's refusal to take the test as evidence because his right to refuse is simply a matter of grace . . ." □



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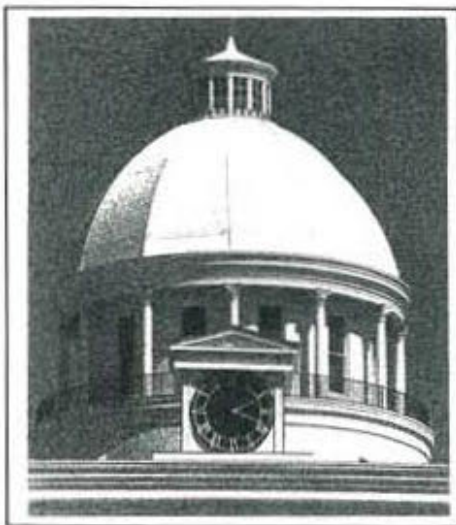


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LEGISLATIVE WRAP-UP

Robert L. McCurley, Jr.

Randolph P. Reaves

Archaic Laws No Longer The Case

The Alabama Legislature created the Alabama Law Institute to be its code revision agency in 1967. Two years later the Institute was funded and began its operation. Recently a college student called the Institute to inquire about Alabama's "archaic" laws. The student had been reading a 1970 magazine article about the Alabama Legislature's failure to stay current on its laws. She was told that such simply was no longer the case. In the last five years the legislature has enacted the following major revisions which were drafted by the Alabama Law Institute:

- Criminal Code**—first time in 160 years
- Business Corporation Act**—first review since 1958
- Probate Code**—first time in 160 years
- Banking Code**—first revision since 1915
- Rules of the Road**—first revision since 1926
- Administrative Procedure Act**—50th state to adopt code
- Revised the UCC**—first revision in 18 years

Furthermore, the entire court system was reorganized in 1975 and a new Code of Alabama was adopted in 1977. New rules of civil procedure were adopted in 1973. The Supreme Court is presently considering the adoption of the first comprehensive Rules of Criminal Procedure. Also, the legislature recently passed the first Alabama reapportionment plan that has been accepted by the courts.

The legislature this year has a revision of the Limited Partnership Laws and a revision of the Professional Corporation Act that the Institute drafted. The Alabama Legislature, although one of the lowest paid, functioning without individual or committee staffs and without adequate offices or meeting space, has made tremendous efforts in updating the laws. This progress is due, in part, to the law institute's handling of the major revisions and the Legislative Reference Service's drafting of the everyday legislation.

Revised Alabama Professional Corporation Act

The Alabama Law Institute has presented two major revisions of law to the legislature for the 1983 Regular Session. The Revised Limited Partnership Act was reviewed in the May issue of *The Alabama Lawyer*. This article reviews the Revised Alabama Professional Corporation Act.

The following is an excerpt from my forward and the preface and commentary of the Alabama Law Institute's Revised Alabama Professional Corporation draft ("the act") written by Professor James D. Bryce who served as reporter for the committee. The following persons served on the Professional Corporation Committee:

- | | |
|-------------------------------|-----------------------|
| Harold I. Apolinsky, Chairman | |
| Joseph S. Bluestein | Norman Harris, Jr. |
| Harwell E. Coale, Jr. | Robert Johnson |
| Steve Crawford | Thomas G. Mancuso |
| C. Fred Daniels | Robert H. Pettey, Jr. |
| Davis D. Dunkle | Stephen J. Pettit |
| Jay Guin | Don F. Siegal |

Professionals have been incorporating in Alabama under two statutes—the Professional Association Act of 1961 (Ala. Code §§ 10-10-1 through -16) and the Professional Corporation Act of 1971 (Ala. Code §§ 10-4-220 through -239). Although the statutes are similar, there is confusion due to some of the dissimilarities. Furthermore, both acts rely on the Business Corporation Act to govern the operation of P.C.'s and P.A.'s where their statutes are silent. In 1980 the legislature enacted the Alabama Law Institute's Revised Business Corporation Act to be effective January 1, 1981. This revision of the professional corporation and professional association laws brings these laws into conformity with the Business Corporation Act while at the same time combining them into one statute.

Professional corporations have become widely used by professionals to gain the advantages of corporate status with-

out breaching the special rules governing a professional's duty to his client or patient. Although the federal income tax benefits of incorporation have been largely eliminated, it is expected that the professional corporation will continue to be an important form of conducting a professional practice.

The underlying principle of this act is that the general provisions of corporate law (the Alabama Business Corporation Act or, in the case of not-for-profit corporations, the Alabama Nonprofit Corporation Act) will apply except where different or additional rules are necessary to protect the public or carry out the requirements of the professions.

This act is drafted to authorize and regulate not-for-profit corporations rendering professional services because the committee believes that it is important to provide professionals that additional alternative form of carrying on their professional activities. The fact that some provisions of the Business Corporation Act (or Nonprofit Corporations Act) are specifically referred to in this act is not intended to give them greater weight in construction of this act than other sections of the Business Corporation Act (or Nonprofit Corporations Act) not specifically referred to.

The act is based on the Professional Corporation Supplement to the Model Business Corporation Act as drafted by the ABA Committee on Corporate Laws in 1977. (The Professional Corporation Supplement is referred to herein as the "Model Act.") Although the Model Act served as the basis of the act, the Committee made substantial changes, both in structure and in substance, in the Model Act.

As a drafting technique, it was determined to separate, insofar as possible, the provisions concerning ethical restrictions imposed on professions from corporate law provisions. As a substantive matter, it was determined that, insofar as possible, violations of professional (ethical) rules by professional corporations or their shareholders should not have corporate law consequences. Any such violations would be subject to action by the appropriate licensing authority.

Although the effect of Professional Corporation and Professional Association statutes are generally the same, there are some differences. In addition, neither statute addresses the questions presented by foreign professional corporations or by not-for-profit professional corporations.

Since many small as well as large professional practices are conducted in more than one state by individuals licensed to practice in more than one state or by partnerships whose members are licensed to practice in various states, section 18(a) of the act provides for reciprocity in the determination of whether a foreign corporation will be issued a certificate of authority in Alabama. Also, the foreign corporation must comply with the provisions of the act relating to corporate purposes, and combinations of professional services or combinations of professional and business purposes. The foreign professional corporation must designate an Alabama-licensed individual through whom it will render professional services, thus assuring that the licensing authority will be able to impose professional sanctions on someone if the foreign professional corporation violates Alabama ethical standards. The foreign professional corporation's name must satisfy the same rules as a domestic professional corporation's name (see Section 8) except that if the corporate name in the foreign jurisdiction is not

"professional corporation," the corporation may add that term or the abbreviation of "P.C." to its name for Alabama purposes.

All the shareholders, at least one director, and the president must be licensed to practice the profession engaged in by the foreign professional corporation. The committee believes that compliance with this requirement of Alabama law is necessary to ensure Alabama residents the same protection in dealing with a foreign professional corporation as in dealing with an Alabama professional corporation. The committee does not believe, however, that there is any reason to require a foreign professional corporation to comply with other provisions of this act, *e.g.* the provisions concerning the mandatory buy-out of shares since those matters are primarily of concern to the jurisdiction in which it is organized.

A certificate of authority must be obtained as a condition to maintaining an office in Alabama for the rendering of professional services. A foreign professional corporation must qualify in Alabama as a professional corporation even if it does not intend to conduct a professional practice in Alabama but only to carry on a business.

The act will further allow the practicing lawyer to represent his professional clients with more certainty by allowing him to more closely align the professional corporation with the more extensively used and complete Business Corporation Act. This bill has been introduced in the House of Representatives by Representative Rick Manley as House Bill 151 and in the Senate by Senator Ryan deGraffenried as Senate Bill 119.

Additional Legislation

The Board of Bar Commissioners approved the introduction of two bills for the 1983 regular session of the Alabama Legislature. First is House Bill 81, which will, if passed, remove the exemption from license fees for first and second year lawyers. The bill is sponsored by Representative Jim Campbell of Anniston.

The costs of running the bar have naturally increased since license fees were raised in 1978. Rather than raise the cost for all other lawyers, removal of the two year exemption was chosen as the preferred course of action. This change may produce as much as \$100,000 in additional revenue. The bill has been reported from the House Judiciary Committee and is on the House calendar.

The other bill in the bar package is Senate Bill 204, which is sponsored by Huntsville Senator Bill Smith. This bill will, if passed, reduce the statute of limitations in actions against attorneys to two years. The statute is presently six years, far longer than statutes of limitations for other professionals.

The impetus for this bill comes from the Madison County Bar Association. Among the reasons for the change are the costs of maintaining claims-made insurance policies after leaving the practice of law and, more importantly, the extraordinary cost of maintaining client files for such a length of time. This bill is currently stalled in the Senate Judiciary Committee, which has devoted almost all of its attention to the Governor's Crime Package.

Among other bills of interest to the state's lawyers is Senate Bill 58, by Senator Ryan deGraffenried of Tuscaloosa, which

proposes a new Alabama Constitution. The bill is sixty-three pages long and contains some 216 sections. It has been reported from Committee and has the support of the Senate leadership.

Alabama's trial lawyers have been busy this year. Already reported from the Senate Judiciary Committee are bills to increase the statute of limitations in negligence and wrongful death actions (S. B. 136) and to remove contributory negligence as a bar to recovery, replacing it with comparative negligence (S. B. 139). The House Judiciary Committee considered companion bills and favorably reported the comparative negligence measure but killed the bill to increase the statute of limitations.

Also of interest is Senate Bill 278, by Senator Mac Parsons of Hueytown which relates to the continued operation of Birmingham, Miles and Jones schools of law. The bill instructs the Supreme Court to change its rules of admission to the bar and allow graduates of these institutions to sit for the bar examination.

Last, but certainly not least, are the myriad of bills in the Governor's Crime Package. These bills number at least sixty and range from reducing the limit of legal intoxication in DUI cases to the method of execution for convicted capital murder-

ers. The package has been the focus of attention in both the House and Senate Judiciary Committees and several of the bills have reached the House floor for debate.



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



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



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Congressman Ben Erdreich cuts ribbon as Vice President Ann Johnston (l to r), President Grantland Rice, II, and Manager Bea Fowlkes look on.



Riding the Circuits

Local Bar Meeting Schedules

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

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

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

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

Mobile Bar Association Women Attorneys: The regular monthly luncheon meeting is held the last Wednesday of each month at the International Trade Club. No reservation necessary.

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

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

Autauga County

In observance of Law and Court Week, the Autauga County Bar Association presented a sixteen page coloring book to the Prattville Primary School. Harold Howell of the firm Howell, Sarto & Howell (pictured) requested that each lawyer or law firm copy 1,000 copies of one page in the coloring book, therefore the book was produced at a minimum cost. This project was well received by the school officials and the children.



Harold Howell, of the Autauga County Bar Association, presents a "Play it Safe" coloring book to Amy Burdette at Prattville Elementary School. The bar provided one thousand of the coloring books to the school for Law and Court Observance Week.

Another worthwhile project which involved our association's lawyers was held recently. In March, the Medical Society of Prattville and the lawyers competed in a benefit basketball game to raise money for the Cancer Society. Even with the tremendous support of the Legal Secretaries as cheerleaders, the Health Hounds were able to overpower the Legal Beagles. Everyone enjoyed the event and money was raised for a worthy cause.

—submitted by George P. Walthall, Jr.

Mobile County

The Mobile Bar Association celebrated Law Day by sponsoring various activities over a week-long period. Colorful displays depicting the "Sharing in Justice" theme were evident throughout the city and television appearances by Broox Holmes and Edgar Walsh as well as radio announcements and newspaper coverage helped to make the public more aware of the meaning of Law Day.

The Women Attorneys sponsored a Symposium on Law-Related Careers for Women with guest speakers including a paralegal, court reporter, law librarian, policewoman, legal secretary, court clerk, Mobile County Youth Center counselor and an Army lawyer. The audience participated in a question and answer period and talked one-on-one with many of the speakers and women attorneys during the brief reception.

Tom Ollinger, vice-chairman of the Law Day Committee, organized and participated in two seminars for local senior citizen organizations. Topics of special interest to this particular audience included Social Security changes, wills, and senior aide programs now available.

One of the highlights of the week was a "question and answer" booth at Bel Air Mall. Local attorney Barre Dumas helped man the booth that was surrounded by a colorful array of Law Day posters submitted by local students. Law Day buttons were given away as well as a variety of literature on law-related topics.

To climax this year's Law Day activities, the Mobile Bar Association sponsored a naturalization ceremony with the Honorable W. B. Hand presiding. Fifty persons, natives of twenty-two nations, were congratulated and challenged by various speakers including Judges Virgil Pittman, Emmett R. Cox and Ferrill D. McRae, Broox G. Holmes, chairman-Law Day Committee, and James J. Duffy, Jr., president of the Mobile Bar Association. Mesdames Charles Fleming and Irwin W. Coleman represented the MBA Auxiliary and presented three area middle school students with cash prizes for their winning entries in the auxiliary-sponsored poster contest. In his speech, Mr. Duffy reminded not only the new citizens but also the more than two hundred guests that we are an "integral part of the government of the United States. It is the highest privilege and greatest responsibility of any citizenship in the world."

—submitted by Barbara Rhodes

Montgomery County

The Montgomery County Bar Association hosted a retirement ceremony and reception for Judge Perry O. Hooper on March 23, 1983, in his courtroom. President Euel Screws presented Judge Hooper with a plaque honoring him for his distinguished service on the bench. Immediately following the reception, MCBA hosted an Open House at the Montgomery County Law Library.

The Montgomery County Bar Association, in conjunction with the Federal Bar Association, observed the 26th Anniversary of Law Day with numerous activities highlighted by a reception honoring the judiciary held at the Sheraton Riverfront on May 2, 1983. It was well attended by the MCBA membership and the judiciary. In addition to the reception, MCBA held its regular monthly meeting at the Whitley Hotel on April 27, 1983, and along with the Trust Department of the Union Bank, presented the Liberty Bell Scholarship of \$1,000 to Ashanti Gresham, winner of the speech contest held among area high school students. Our sincere appreciation goes out to Judge Joseph D. Phelps for coordinating this annual contest. The Liberty Bell Award, given to recognize a non-legal, non-judicial citizen for outstanding leadership in our community, was presented to Dr. Ira L. Myers, state health officer, Alabama Department of Public Health.

On May 5, 1983, MCBA hosted an Investiture Ceremony and Reception for Honorable Sam Taylor, Honorable H. Mark Kennedy, Honorable Charles Price and Honorable Lynn Clardy Bright. The oath of office for the four judges was administered by Chief Justice C. C. (Bo) Torbert, Jr. The refreshments served at the reception were prepared by the members of the Montgomery Association of Legal Secretaries and MCBA extends its sincere appreciation for a job well done.

The Montgomery County Bar Association welcomes the following new members of our association: George N. Hardesty, Jr., Richard N. Meadows, L. Daniel Morris, Jr. and Judge Frank H. McFadden.

—submitted by Gloria Waites

Tuscaloosa County

On April 12, 1983, a luncheon for members of the Tuscaloosa County Bar Association was held at the Tuscaloosa Country Club. Paul Conger, newly elected circuit court domestic relations judge, was the speaker on the topic "Revamping of the Domestic Relations Division and Juvenile Court of Tuscaloosa County."

Indian Hills Country Club was the site of the Tuscaloosa County Bar Association Annual Spring Fling dinner-dance held on April 23, 1983. After a seated dinner, bar association members and guests danced to the music of the George Winter Combo.

Preceding the quarterly meeting held on April 27, 1983, the Tuscaloosa County Bar Association sponsored a CLE approved seminar on the use of video equipment recently

purchased through the county law library. Presiding over the hands-on demonstration was Frank Deaver, president of Media Consultants of Tuscaloosa.

Law Day 1983 was highlighted by several functions. A Law Fair was held at University Mall on April 29, 1983. As a public relations gesture, members of the local bar association offered advice on routine legal matters and awarded a door prize of an American flag which had flown over the state capitol. Jointly, the Alabama Law School and the Bar Auxiliary assisted in furnishing career and Law Day information as well as providing a hospitality booth. In addition, the Bar Auxiliary sponsored a blood drive on May 2, 1983, and was instrumental in providing much needed support and assistance to the local chapter of the American Red Cross. Finally, on May 6, 1983, the annual Law Day Luncheon was held at Tuscaloosa Country Club. At that time, the Liberty Bell Award was posthumously presented to Buford Boone, Pulitzer Prize winning journalist and publisher of *The Tuscaloosa News*.

—submitted by Claire A. Black



Important Announcement

The Alabama Lawyer needs a correspondent from each of the local bar associations who will keep us informed of your association's local bar events. Although several attempts have been made on our part to acquire some updated information on the local bar officers, and reminders have been sent about the reporting of association activities, we still have not gotten the participation we had hoped we would. We need news! We need pictures! We need your help!

Let the entire bar membership know what your association is doing. *The Alabama Lawyer* is the place to do it. Please call Jen Nowell at the Alabama State Bar, toll-free at 1-800-392-5660, with the names of your local bar officers and the name of a "contact" person for "Riding the Circuits" news.

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Young Lawyers' Section



J. Thomas King, Jr.
President

The Young Lawyers' Annual Seminar at Sandestin the weekend of May 13-14 was an abounding success. Some 180 lawyers benefited from the seminar, in addition to the golf tournament Friday afternoon and the seafood dinner at poolside that evening. It will be to your benefit to mark your calendar now for the seminar next year scheduled for May 18-19, 1984.

The Young Lawyers' Section (YLS) sponsored the Bar Admissions Ceremony at the Montgomery Civic Center on May 23, 1983. We were privileged to have as our luncheon speaker Senator Howell Heflin who, after being presented by Chief Justice Torbert, offered challenging remarks to some one hundred admittees. I am grateful to Tom Barber for his outstanding work in making that event such a success.

There continues to be interest expressed regarding the formation of local Young Lawyers' Sections in areas that heretofore either have had no active section, or where a Young Lawyers' Section, once active, has become dormant. Aside from the areas of the Quad-Cities and Dothan, I am pleased to report that Randy Woodrow of Anniston has contacted the State YLS concerning a YLS in that viable area. We are assisting in those efforts and continue to encourage interest in other areas.

One of the initial ideas offered by Norborne Stone, upon his assumption of the presidency of our State Bar last July, was an opportunity for all members of the State Bar to attend the Annual Meeting in Birmingham as well as to achieve six hours of CLE credit without additional charge. The Young Lawyers' Section was requested to organize the CLE program and we, of course, accepted enthusiastically. The YLS-CLE Committee, capably chaired by Julia Smeds, commenced planning last November. It is my belief that the program to be offered is among the premier CLE seminars that has been presented on any occasion. The topics and speakers are highlighted in the Bar Annual Meeting registration brochure.



New admittees to the bar were welcomed by the remarks of notable bar leaders. Those on the program included (L to R) Mary Lyn Pike, CLE director; Tom Barber, Administrative Office of Courts; Edmon McKinley, YLS president-elect; Tom King, YLS president; Norborne Stone, Alabama State Bar president; Reggie Hamner, executive director.

The State YLS and the Birmingham YLS will hold a joint party on the plaza at the Birmingham-Jefferson Civic Center at 9:00 p.m. on Thursday, July 21, 1983, immediately following the State Bar membership reception.

We have engaged the Visions/Track IV band to provide entertainment for the evening. The charge is a nominal \$5 per person which entitles each participant to a season of hospitality as well as entertainment. It is my hope that this first joint party will become a traditional event, a social gathering co-sponsored by the State YLS and the YLS in the host city of the bar meeting.

It has been an honor to serve as president of the Young Lawyers' Section during the past year. A busy year it has been; an exciting year it has been; most of all it has been a rewarding year.

I wish to thank especially the fine attorneys with whom I

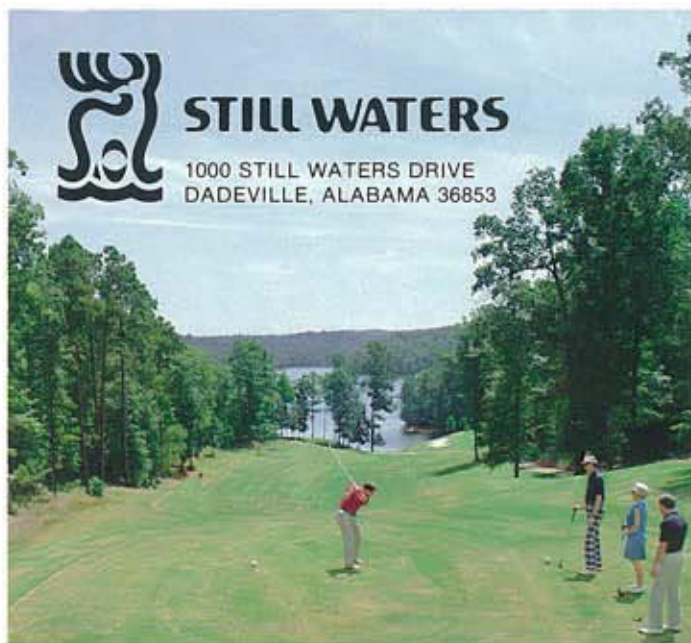


Visions/Track IV

have served on the YLS Executive Committee. Without their steadfast aid and support, we could not have had the year of progress that I do believe we have experienced.

I wish to express my gratitude also to Norborne Stone, our State Bar president; to Bill Hairston, president-elect; and to

our executive director, Reggie Hamner, along with the entire Board of Bar Commissioners, for their cooperation in all programs of the Young Lawyers' Section. Certainly I would be remiss if I did not thank all those mentioned above for the many courtesies extended to me personally. □



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AL-1A

From the Center for Professional Responsibility



Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

"Under what circumstances may an attorney ethically accept a domestic relations case upon a contingent fee basis?"

ANSWER:

The only opinions wherein the office of the General Counsel and the Disciplinary Commission have approved contingent fee contracts in domestic relations cases involve attempts on the part of attorneys to collect arrearages in alimony and/or child support payments provided for in a final decree of divorce already entered.

DISCUSSION:

The Code of Professional Responsibility of the Alabama State Bar alludes to contingent fee contracts in only three places.

Ethical Consideration 2-20 provides:

"Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with *any client* who, after being fully informed of all relevant factors, desires that arrangement. *Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified.* In administrative agency proceedings contingent fee contracts should be governed by the same considerations as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee." (emphasis added)

Disciplinary Rule 2-107(A) provides:

"A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

Disciplinary Rule 5-103(A) (2) provides:

"A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(2) Contract with a client for a reasonable contingent fee in a civil case, which contingent fee shall involve and relate only to the specific transaction, cause of action or subject matter of litigation he is conducting for a client."

It is significant that although Ethical Consideration 2-20 states that contingent fee arrangements in domestic relations cases are rarely justified "because of the human relationships involved and the unique character of the proceedings" there is no Disciplinary Rule comparable to Disciplinary Rule 2-107(A) relating to criminal cases which would clearly prohibit contingent fee contracts in domestic relations cases.

Once a final decree of divorce has been entered requiring the payment of child support and/or alimony, we are of the opinion that the reasons prompting the drafters of Ethical Consideration 2-20 to caution against contingent fee contracts in domestic relations cases are no longer applicable.

The enforceability of a contingent fee contract in a domestic relations case poses primarily a question of law rather than one of ethics. A fee contract contingent upon the amount of alimony an attorney obtains for a client upon the attorney's procuring a divorce is generally held void as against public policy. The major arguments in support of this position are that these agreements give the attorney an interest in avoiding reconciliation. See 15 *Ala. L. Rev.*, 208; 56 *Minn. L. Rev.*, 979; 7 *Vand. L. Rev.*, 120; *Brindley v. Brindley*, 121 Ala. 429, 25 So. 751 (1899); *Farrell v. Betts*, 16 Ala. App. 668, 81 So. 188 (1918).

There has been some relaxation of the strict rule of invalidity of contingent fee contracts in divorce cases stemming from a willingness of the courts to determine on the particular facts of the case whether the contingent fee arrangement does, in fact, promote divorce and therefore violate the public policy against destruction of marriages. *Coons v. Karey*, 263 Cal. App. 2d 650, 69 Cal. Rptr. 712 (1968); *Krieger v. Bulpitt*, 40 Cal. 2d 47, 251 P. 2d 673 (1953); *Salter v. St. Jean*, 170 So. 2d, 94 (Fla. App. 1964).

Once a final decree of divorce has been entered awarding alimony and/or child support, the collection of arrearages concerning the same would not discourage reconciliation, promote divorce and therefore violate the public policy against the destruction of marriages. Furthermore, the mechanics of reducing an order for child support and/or alimony to judgment and proceeding to collect the same would not appear to involve "the human relationship" or "the unique character of the proceedings" referred to in Ethical Consideration 2-20. The acceptance of employment to collect arrearages in child support and/or alimony is analogous to accepting employment to collect any type of debt, and, of course, collection matters are routinely accepted on a contingent fee basis.

QUESTION:

"If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, must the lawyer and his law firm immediately withdraw from representation, or may the lawyer and his law firm continue to represent the client in pre-trial proceedings if another lawyer or law firm handles the actual 'conduct of the trial'?"

Disciplinary Report

L. Wayne Collier, of Montgomery, was suspended from the practice of law for one year, effective July 1, 1983, for having violated DR 7-102(A) (7), DR 9-102(A) and DR 9-102(B) (4), by having retained approximately \$6,500 that he collected for a client, rather than depositing the funds to a trust account or delivering the funds to the client, and, further, by having agreed and undertaken to personally hold in cash certain client funds in order to secret the funds from the client's creditors.

Jackson William Stokes, of Elba, was heretofore suspended for a period of 91 days without automatic reinstatement by order of the Supreme Court effective November 19, 1982. Stokes was suspended from the practice of law for having failed to perform the legal services he had been retained to provide in three separate cases. Additionally, in two of the cases, Mr. Stokes misrepresented to his clients the status of the matter he had been retained to handle. Stokes filed a petition for reinstatement and has been reinstated effective April 8, 1983 by order of the Disciplinary Board and the Supreme Court of Alabama.

Chase R. Laurendine, of Mobile, was publicly censured on May 6, 1983, for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A), and for having failed to seek the lawful objectives of a client through reasonably available means, in violation of DR 7-101(A) (1).

Continued next page

Disciplinary Report

Warren Seymore Trammell, of Montgomery, was ordered disbarred by the Disciplinary Board on June 4, 1982, for having violated DR 1-102(A) (4), (5) & (6) and DR 9-101(C) by having accepted money from an undercover agent on the representation that he could secure a parole for a prison inmate by paying money to a member of the Alabama Board of Pardons and Paroles. The Supreme Court of Alabama affirmed Trammell's disbarment, and the Court overruled Trammell's application for rehearing on May 6, 1983.

There was one private reprimand given for violation of Disciplinary Rules 6-101(A), 9-102(B) (1) and 9-102(B) (4), in addition to the above mentioned public censure, administered at the May 6th meeting of the Board of Bar Commissioners.

On March 23, 1982, Baldwin County attorney Lloyd E. Taylor surrendered his license to practice law in the state of Alabama. Accordingly, on April 19, 1983, the Supreme Court entered an order removing Taylor's name from the roll of attorneys licensed to practice in the state of Alabama. Taylor had previously been convicted on ten felony counts relating to certain banking irregularities after trial in federal court in Mobile.

ANSWER:

A lawyer and his law firm must withdraw from the conduct of the trial of a case if it is obvious that the lawyer or a member of his firm ought to be called as a witness on behalf of the client, and the facts do not bring into play any of the exceptions as set forth in DR 5-101 (B) (1) through (4); however, the lawyer and his law firm may continue as counsel for the client in pre-trial proceedings such as preparation for trial, discovery, settlement negotiations, etc.

DISCUSSION:

Ethical Consideration 5-9 provides:

"Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or advocate. If a lawyer is both counsel and witness, (1) he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, (2) the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. (3) An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." (numbers and parentheses added)

Disciplinary Rule 5-101(B) provides:

"A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

- (1) If the testimony will relate solely to an uncontested matter.
- (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
- (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

Disciplinary Rule 5-102(A) provides:

"If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw *from the conduct of the trial* and his firm, if any, shall not continue representation *in the trial*, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) through (4)." (emphasis added)

We arrive at the conclusions set forth in the answer hereinabove for at least three reasons. First, there is no rule of law which renders an attorney incompetent as a witness merely because he also acts as trial counsel. The rationale behind the courts' refusal to hold an attorney incompetent as a witness in spite of an ethical violation is that the interest of the client should not be jeopardized in such manner in order to discipline an attorney. *State v. Blake*, 157 Conn. 99, A. 2d 232 (1968); *Attorney As Witness For Client In Federal Case*, 9 ALR Fed. 500. Second, since an attorney's preclusion from testifying and also acting as trial counsel is based entirely upon a provision of the Code of Professional Responsibility, and since DR 5-102(A) refers only to withdrawal "from the conduct of the trial" we are of the opinion that the rule should be literally applied and should not be extended to cover situations not clearly comprehended by the language of the rule. Third, a lawyer's continuing to act as counsel in pre-trial proceedings would not bring into play any of the reasons for the rule as set forth in EC 5-9, namely, that the attorney "becomes more easily impeacha-

ble for interest and thus may be a less effective witness," that "opposing counsel may be handicapped in challenging the credibility of the lawyer," and that the lawyer will become less effective in arguing his "own credibility."

Our research reveals very little authority touching upon the issue raised by the question posed herein. The case of *Norman Norrell, Inc. v. Federated Department Stores, Inc.*, 450 F. Supp. 127 (D.C.N.Y. 1978) held that an attorney who would be an essential witness on behalf of his client could not conduct the actual trial of the case but could, nevertheless, continue to act as counsel for his client in pre-trial proceedings. In the opinion the court observed:

"... Manning has suggested that if disqualification is required it be partial, that is, that the Manning firm be allowed to continue as pre-trial counsel and trial counsel... be obtained who can handle the actual trial, so as to avoid the problem of Manning being a witness and also arguing his own credibility before a jury."

Examination of the basis for the lawyer-witness prohibition and a closer look at Norrell's interest in being represented by the Manning firm reveal that the compromise suggested represents the best reconciliation among the competing interests of the plaintiffs, the defendant and the judicial system. In *International Electronics Corp. v. Flanzer*, supra, 527 F. 2d 1294, the court of appeals explained in the following manner the rationale for disqualification of counsel who is prospectively a material witness:

The ultimate justification for the disqualification rule... [is] that the public might think that the lawyer is distorting the truth for the sake of his client. Another argument for the disqualification is that the lawyer-witness will vouch for his own credibility in summing up to the jury—a powerful means of support for his own credibility... [T]he argument that [this opportunity] is unfair to the opponent has some merit. It is difficult, indeed, to cross-examine a witness who is also an adversary counsel concerning matters of fact, and, more particularly on matters impeaching his credibility, within the bounds of propriety and courtesy owed to professional colleagues.

The concerns there expressed are for the public perception of justice done and probity preserved and for neutralization of any possible unfair advantage *at trial*. By this standard there can be no cavil if Manning acts as counsel *prior* to trial but is barred from dual participation at the trial." (emphasis added by court)

We will not attempt to define the precise scope of pre-trial proceedings in which an attorney may participate when he learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client. We add one note of caution. A lawyer should not permit himself to be influenced, consciously or unconsciously, in settlement negotiations because he ought to be called as a witness on behalf of his client at the trial of the case. In the case of *Honeywell v. Bub*, 130 N.Y. Supp. 130, 325 A. 2d 832 (1974), the court refused to set aside a settlement agreement which had been negotiated by an attorney who would have been an essential witness for his client had the case gone to trial. In the opinion the court observed:

"It would seem that at least the appearance of a conflict of interest may be created if an attorney likely to be called as a trial witness plays an active role in the pre-trial settlement conferences. For example, in recommending approval of a particular settlement, he might be open to the charge that he was motivated to sacrifice his client's interest to avoid any question as to a later development in the case which might bring him in conflict with the disciplinary rule cited above; or to avoid giving potentially embarrassing testimony at trial, or to retain the benefits accruing from representing a client which might be lost if other trial counsel were required."

In summary, we hold that merely because a lawyer ought to be called as a witness on behalf of his client does not necessarily preclude him from participating in all pre-trial proceedings. □



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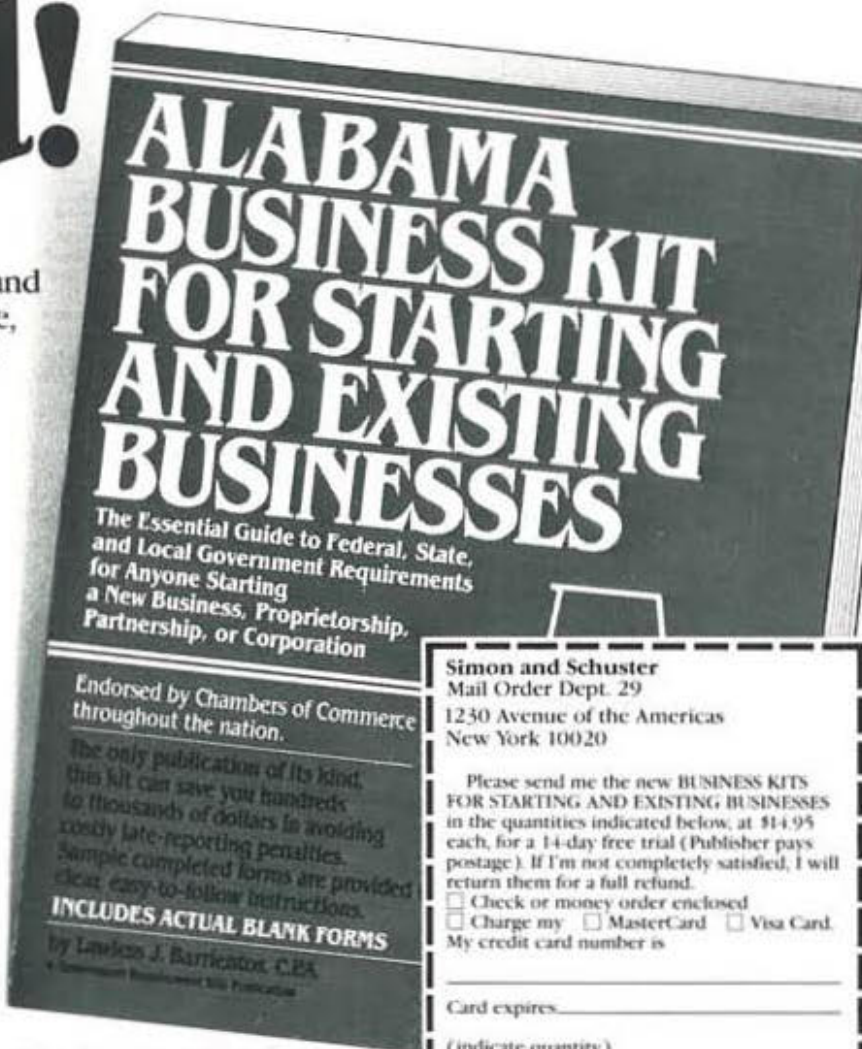
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THE CONTINUING RISK FROM FAULTY DOCKET CONTROL

Duke Nordlinger Stern*

A significant amount has been written about the importance of effective docket control in reducing legal malpractice exposure. This choice of subject matter is appropriate since in most jurisdictions the majority of professional liability claims results from administrative or law office management types of errors or omissions, and the major cause of loss within this category is missed statutes of limitations, procedural deadlines and other time commitments. While the need for effective docket control is logical, examples of claims in this area can serve to underscore why attorneys should take the time to review their own deadline monitoring systems.

1. Law Firm A utilizes a diary book type of docket control system with books on both the attorney's and secretary's desks. During a conversation with opposing counsel on a certain matter the attorney agrees to the scheduling of a hearing on a motion. The attorney notes the date in the diary book and intends to tell the secretary to make a similar entry in the backup diary, but another telephone call breaks the train of thought. On the morning of the hearing the lawyer has an appointment before going to the office and calls the secretary to see what matters are scheduled for that day. Since the hearing was never entered in the secretary's diary book the commitment is not reported and not attended.

2. Law Firm B uses a centralized perpetual calendar or tickler type of docket

control system with a designated legal secretary responsible for all entries. Attorneys and staff tell this secretary what deadline entries must be made. On a given day one of the attorneys is in this secretary's office reviewing the draft of a document. Another attorney calls to request the entry of a deadline into the system. The secretary makes a note and returns to the draft document. The note is subsequently misplaced and the entry is never made. As a result, the filing date for a worker's compensation claim is missed.

3. Law Firm C also utilizes a perpetual calendar docket control system, but in this example the attorneys and staff members create their own entry slips. One time each day the staff person responsible for the system collects these slips for filing in the system. Every Friday weekly work schedules for the subsequent week are prepared, and these schedules contain the deadlines for that week along with the appropriate urgency notations. Unfortunately, this otherwise effective system has no provision for a daily review to determine that there has been compliance with final notices. One of the attorneys misses a statute of limitations deadline because there was no backup to be certain the reminder was honored.

Effective docket control requires the use of a manual or computerized perpetual calendar or tickler system. There are certain rules which must be followed to be certain the system operates suc-

cessfully. First, each lawyer and staff person must understand and adhere to the system. Second, all important dates must be recorded immediately. Third, there must be procedures for enforcing the system. Fourth, the deadline entries must allow sufficient time for performance. Fifth, the person responsible for the docket control system must be certain that activities or actions are completed on time or properly rescheduled. Finally, the docket control system should be described in the firm's systems and procedures manual. □

*© 1983: Duke Nordlinger Stern, J.D., Ph.D. Mr. Stern serves as Risk Manager to the Alabama State Bar in the areas of claims analysis, loss prevention, claims repair and insurance counsel. The risk management program is funded by the Bar's endorsed professional liability insurance company, Insurance Corporation of America (ICA). Loss prevention and claims information is available without cost to any member of the Bar by calling Mr. Stern at (800) 237-8903. Information on the Bar's endorsed professional liability insurance program can be obtained by calling Insurance Corporation of America at (800) 231-2615. These materials may not be reproduced in any form without the express written permission of the author.

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The Florida Bar Journal • News

Flipping through the new **Florida Bar Journal Directory** makes me think how much lawyers could save on advertising if they would just practice with other lawyers whose names complement their own.

The possibilities are endless: If I were thumbing through the Yellow Pages looking for a firm to incorporate my fast food chain there would be *Grill Hamburger French Fry & Weiner*.

For my whiplash suit I would call *Fayne Payne & Suffern*; my more seri-

ous car accident litigation would go to *Rapp Carr Roundtree & Hurt*. If it had to be handled on a contingency basis I wouldn't waste time calling *Handlin Case Flatley Cash & Cary*.

When I wanted simple answers to direct questions I would go to *Black & White*. If I needed a cautious firm for my defense I'd first try *Fear & Leary*.

If I wanted to sue just to force an issue I'd call *Dicker Knott & Settle*. *Bellows Groner & Howell* would handle my civil rights suits.

If I really wanted to get tough I'd call *Pound Press Hammer Slaughter Slay & Butcher*.

If I were suing a Palm Beach heiress and needed a dapper attorney to look good on national television I would probably turn first to *White Tye Silver Haire & Spatz*; if I needed the opposite I'd call *Gummy Gross & Rude*.

For my drug bust defense I'd retain *Coker Grass & Gold* or, if I hoped to buy my way out, perhaps *Green Tilton Scales & Justiss*.

If I anticipated or desired protracted litigation, the first firm I'd call would be *Hough Puffer Furlong Weeks & Weeks*.

Under no circumstances would I call *Cheatham Conn Faiks Fleece & Steele* unless it would be to suggest they disband or change their names. □



**From local bar president
to state bar president . . .
Hairston will assume
position at annual
meeting in home town.**

At the 1970 Alabama State Bar Annual Meeting in Birmingham, Mr. and Mrs. William B. Hairston, Jr., speak with convention guest J. Pennington Straus, Esq., of Philadelphia. Bill Hairston was president of the Birmingham Bar Association at that meeting where, as traditional of hosting city bar presidents, he made opening remarks of welcome to bar members attending. During this year's annual meeting, thirteen years later, he will become president of the Alabama State Bar.

Some experiences in life are worth repeating.

ALABAMA STATE BAR
1983
~~1980~~ Annual Meeting • July 17-19 ²¹⁻²³

Birmingham, Alabama

Norborn E. Stone, Jr.
Oakley W. Melton, Jr.
President

(Ed. note: Just what does it take to pull off a dynamite convention? The following memoranda collected and compiled by Birmingham lawyer Mark White may be of interest to you if you have ever been responsible for the planning of an annual meeting . . . or you may think twice about it if you've ever asked to take on such a task!)

Memo

From: James C. Barton, President Birmingham Bar Association
To: J. Mark White, Smith, White and Hynds, Attorneys
Date: December 1979
Subject: State Bar Meeting

You are the local committee chairman for State Bar convention. You will:

1. Keep me advised but don't bother me.
2. Have a first class convention, but don't spend any money.
3. Have a program that appeals to young and old lawyers (also in between), all wives, Democrats, Republicans, Masons, FOP, Elks, Moose & Chickens.
4. Be provocative and innovative but don't offend anyone.
5. Coordinate—Reggie Hamner, Oakley Melton, E. T. Brown, Hyatt House, Civic Center, Mayor Arrington.

Memo

From: J. Mark White
To: James C. Barton
Subject: December 1979 Memo
Date: January 1980

- 1-2. Received your ransom demand.
3. Unclear as to what program should include other than whiskey (chickens?).
4. How about mud wrestling—Demetrius Newton v. Jerry Lorant?
5. Have contacted Ringling Brothers and Judge McFadden for advice—no response.

P.S. I have never attended one of these things—does that bother you?

Memo

From: James C. Barton
To: J. Mark White
Date: February 1980

What's the story on convention? E. T. tells me Reggie is staying and everything is go! Where are we going? What's our goal? What's our responsibility? Clarify our concerns re: coordination!

P.S. Your plea of inexperience is noted and overruled.

Memo

From: J. Mark White
To: James C. Barton
Date: February 1980

1. I spent all day yesterday at the State Bar debating if we would have fish or beef and now you expect me to explain the origin of earth and how it revolves around Montgomery in 25 words or less.
2. Phil Norwood working on ladies.
3. Q. Q. Brown is talking with Birmingham Symphony. (Will our people be willing to cross a picket line?)
4. We have some speakers who will come and some speakers who won't stay home.
5. I still have to line up program for banquet on Friday night and get with Leon Ashford re: band for the dance. (Any suggestions?)

P.S. Loretta Malandro is going to speak on "The Critical First Four Minutes."

Memo

From: J. Mark White
To: James C. Barton
Date: March 1980

Thanks for phone call. Hope the Valiums have helped you. Glad to confirm in writing the following:

1. Loretta Malandro is communications expert not sex therapist.
2. Musicians will not have a picket line (maybe).
3. Beef not fish (chicken?).
4. Norwood still practicing law.
5. Apologize for snide comment about Montgomery—they are top-notch.
6. I'll give your Lawrence Welk suggestion to Leon.
7. Enclosed is draft program—would appreciate your comments.

Memo

From: James C. Barton
To: J. Mark White
Date: April 1980

1. Program is looking good except I'm afraid Fred Ingram's talk on "The Age Discrimination in Employment Act" might keep people away from Racehorse Haynes talk. Should we reschedule?
2. Why does everything cost so much? Can't we cut back? Not sure young lawyers can afford prices.
3. Wit's Other End o.k. if they don't offend anyone or anything. What's alternative?
4. Heard rumor you were forming corporation to print and sell maps to hospitality rooms—not a good idea.

Memo

From: J. Mark White
To: James C. Barton
Date: May 1980

1. Talked with Fred Ingram—he will make talk dull and give Racehorse a break. I suggest we move Fred to next year's Law Day banquet if you are still concerned.
 2. Everything is designed to break even. No profit anywhere. High Cost Example: Civic Center rent for cocktail reception (space only, does not include booze or food)—\$1,200. Might go outside of Civic Center—\$400.
 3. Alternative to Wit's Other End is one of the following: Billy Carter, Chief Parsons, Clarence Small.
 4. Don't believe everything you hear.
- P.S. I need to know your room number.

Memo

From: James C. Barton
To: J. Mark White
Date: June 1980

1. Wit's Other End
2. Outside
3. Still hearing talk about maps—got call from National Law Journal re: this.
4. Ingram says you're a smart Alec.

Memo

From: J. Mark White
To: James C. Barton
Date: July 1980

D-Day Report:

1. 107° and rising—I think we need to go inside. I told Reggie to call you.
2. Program set—we have lined up escorts and host couples from local bar for all VIP's and guests. All will check in with you.
3. Wit's Other End does not want to compromise First Amendment Rights. I told them you were man to see.
4. Please give my secretary your room number—printer is waiting.

Memo

From: James C. Barton
To: J. Mark White
Date: July 1980

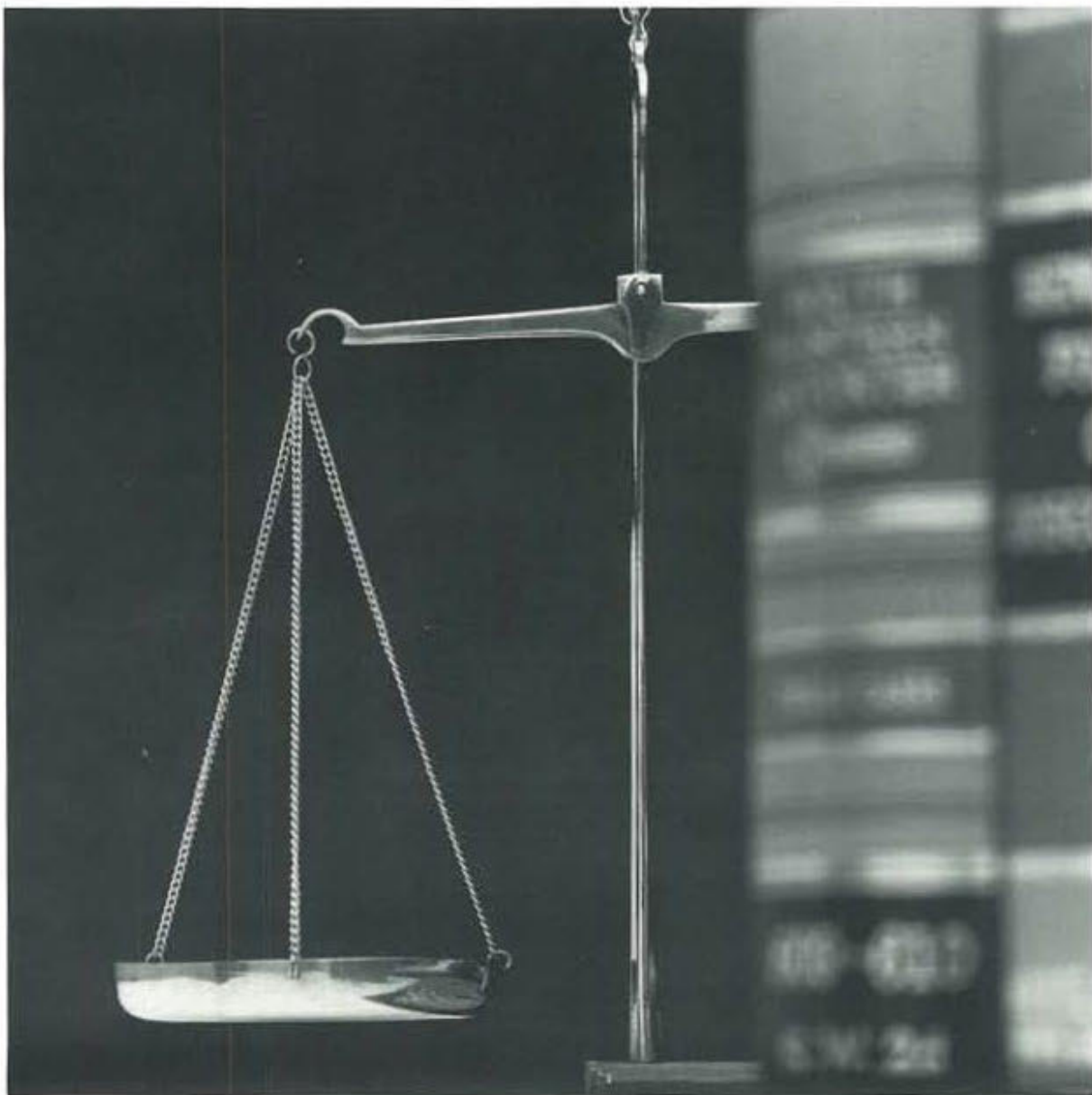
1. Who are all these people and why are they calling me?
2. 1031.

Memo

From: J. Mark White
To: James C. Barton
Date: August 1980

Post Convention Report:

1. Sorry about all those people in your room (the chickens too).
2. Great reviews from all who attended.
3. Great support from local bar.
4. Largest convention ever.
5. Best attendance by young lawyers. Need to constantly expand program every year.
6. Reggie is going to show cost breakdown in bar publication so everyone will know expense involved.
7. My firm has requested I return to practice of law—sorry if this inconveniences you.



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HELP! Okay buddies in the bar, please help the publications director get Reggie Hamner off her back! We have some lovely *Alabama Lawyer* binders ordered especially for you. I knew you would want to keep your magazines organized so I pre-ordered (a measly few hundred). RTH has placed a salt and pepper shaker on my desk and I will have to start eating binder burgers for breakfast, lunch, and dinner soon. Send \$6.50 to The Alabama Lawyer, P.O. Box 4156, Montgomery, AL 36101 to get me out of this "bind." Or ask me out to lunch! Thanks, Jen.

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

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The Final Judgment



J. M. Williams, Jr.

Jesse McKenney Williams, Jr., died at his home in Montgomery on March 24, 1983. He was seventy-nine years of age.

They were seventy-nine years well spent. Jesse Williams was that rare phenomenon—a contented man. He genuinely loved his profession, his family, his community and his friends. This affection was returned in equal measure by all those around him. One could hardly seek for more.

Jesse grew up in Montgomery and later attended the University of Alabama. After graduating from the University Law School, he did a stint with the Federal Land Bank in New Orleans and then returned home to enter private practice. In 1935, he joined the present firm of Rushton, Stakely, Johnston & Garrett and remained a partner there until his death. His son, Jesse Williams III, continues as a partner in the firm.

During his years as a member of the bar, Jesse conducted a varied practice and became one of the leading lawyers in the state. He was one of the old school who could “do it all.” Jesse was long identified closely with the Rural Electric Cooperatives in Alabama. For thirty-seven years he served as general counsel of Alabama Electric Cooperative, Inc., the Alabama Rural Electric Association and several local rural electric cooperatives. He was one of the most knowledgeable attorneys in the country on general utility law and especially with respect to the organization, operation and procedures of rural electric cooperatives and the extensive and complex rules and regulations of the Rural Electrification Administration of the United States Government. Attorneys from both within and without Alabama regularly sought his advice on matters

relating to rural electric cooperatives and the Rural Electrification Administration. Jesse was posthumously presented AREA’s highest award, the Eminent Service Award, at the Alabama Rural Electric Association’s annual meeting held March 30-31, 1983.

In addition to his professional accomplishments, Jesse was the “Compleat Angler.” He was not only a master fisherman but also crafted fine quality rods for himself and his fishing buddies. If Issac Walton were around today, he would probably have served his internship with Jesse Williams.

Jesse is survived by his wife, Dorothy B. Williams; a son, Jesse M. Williams III of Montgomery; two daughters, Gayle T. White of Jackson, Mississippi and Darnell T. Savage of Atlanta, Georgia; and nine grandchildren. We join them in bidding Jesse a fond farewell.



W. H. Albritton, Jr.

William Harold Albritton, Jr., senior partner of the Andalusia law firm Albrittons & Givhan, died on April 14, 1983. He was seventy-five.

Mr. Albritton, a native and lifelong resident of Andalusia, began practicing law in 1929 and was one of the first lawyers in Alabama to concentrate his practice in the area of taxation. He was known as one of the state's top experts in that specialized field.

Mr. Albritton helped organize the taxation section of the Alabama State Bar, he served for several years as a member of the State Board of Bar Examiners, and he was the Bar Commissioner from the twenty-second judicial circuit from 1939-1943. He, also, was one of the early chairmen of the Federal Tax Clinic for lawyers and accountants, which became an annual function at the University of Alabama.

Mr. Albritton was an active layman in the Presbyterian Church. For many years he served as an Elder and taught a Sunday school class at the First Presby-

terian Church in Andalusia. In 1981, Mr. Albritton was a delegate to the General Assembly of the Presbyterian Church and in 1982 was elected moderator of the Presbytery of John Knox.

As a resident of Andalusia, Mr. Albritton was one of the organizers and active members of the Andalusia Hospital, Andalusia Health Services, the Scherf Memorial Foundation, Friends of the Library, Covington Historical Society and many other local organizations.

He was a past member of the Andalusia Board of Education and a member and past president of the Andalusia Rotary Club. He also served as a director of the Commercial Bank for many years.

Survivors include his wife, Mrs. Anne Long Albritton; two sons, Robert B. Albritton II and Dr. William L. Albritton; and four grandchildren.



Foster, John Strickland—Birmingham
Admitted: 1930 Died: April 15, 1983

McLendon, Clyde Patterson—Montgomery
Admitted: 1951 Died: May 18, 1983

Morton, Wade Hampton—Birmingham
Admitted: 1939 Died: June 19, 1983

Nicol, Frederick Walter—Tuscaloosa
Admitted: 1934 Died: June 13, 1983

Parker, Thomas Francis—Montgomery
Admitted: 1947 Died: April 5, 1983

Ross, Carl Ira, Sr.—Bessemer
Admitted: 1918 Died: March 27, 1983

Stahmer, Harry Joseph, Jr.—Birmingham
Admitted: 1950 Died: April 7, 1983

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



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UPCOMING

1983

July 19

Circuit and District Judges Annual Meeting, Birmingham

July 20

Board of Commissioners Meeting, Birmingham

July 21-23

Alabama State Bar Annual Meeting, Birmingham

July 25-27

Bar Exam, Montgomery

July 28-August 4

ABA Annual Meeting, Atlanta

August 15-16

ADAA Summer Conference, Gulf Shores

August 26-27

Alabama Criminal Defense Lawyers Seminar, Mobile

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JULY

MON 4 Independence Day	FRI 15 International Law, Birmingham (CICLE) Alabama Lawyer Deadline	TUES 19 Circuit and District Judges Annual Meeting, Birmingham (AJC)
THURS 21 Alabama State Bar Annual Meeting, Birmingham Recent Developments in the Law, (ASBYLS)	FRI 22 Basic Concepts in Estate Planning, Huntsville (ASCPA) Alabama State Bar Annual Meeting, Birmingham	SAT 23 Alabama State Bar Annual Meeting, Birmingham
MON 25-27 Bar Exam, Montgomery	FRI 29-30 Collections, Anniston (ABICLE)	

AUGUST

MON 8-9 Advanced Estate and Gift Taxation, Dothan (ASCPA)	THURS 11 Will Drafting After ERTA and TEFRA, Birmingham (ABICLE)	FRI 12 Will Drafting After ERTA and TEFRA, Montgomery (ABICLE)
MON 15-16 Summer Conference, Gulf Shores (ADAA)	THURS 18 Basic Oil and Gas Taxation, Mobile (ASCPA) Trial Advocacy, Tuscaloosa (ABICLE)	FRI 19 Basic Oil and Gas Taxation, Mobile (ASCPA) Trial Advocacy, Tuscaloosa (ABICLE) New Proposed Supreme/Appeals Court, Birmingham (BBA)
SAT 20 Trial Advocacy, Tuscaloosa (ABICLE)	FRI 26 Appellate Practice, Birmingham (BBA) Developments and Techniques in State Court Practice, Mobile (ACDLA) Alabama Criminal Defense Lawyers Seminar, Mobile (ACPLA)	SAT 27 Alabama Criminal Defense Lawyers Seminar, Mobile (ACPLA) Developments and Techniques in State Court Practice, Mobile (ACDLA)

SEPTEMBER

MON 12 Problems of the Closely Held Corporation, Auburn (ACPA)	THURS 15 Estate Planning Workshop, Mobile (ASCPA)	FRI 16 Estate Planning Workshop, Mobile (ASCPA) The Lawyer's Role in State Government, Birmingham (BBA) Tax Problems of Individuals, Mobile (ASCPA)	THURS 22 Criminal Procedure, Huntsville (ABICLE) Age, Race and Sex Discrimination, Birmingham (BBA)	FRI 23 Criminal Procedure, Birmingham (ABICLE) Tax Planning in Corporate Liquidations, Huntsville (ASCPA)	THURS 29 Criminal Procedure, Mobile (ABICLE)	FRI 30 Criminal Procedure, Montgomery (ABICLE)
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