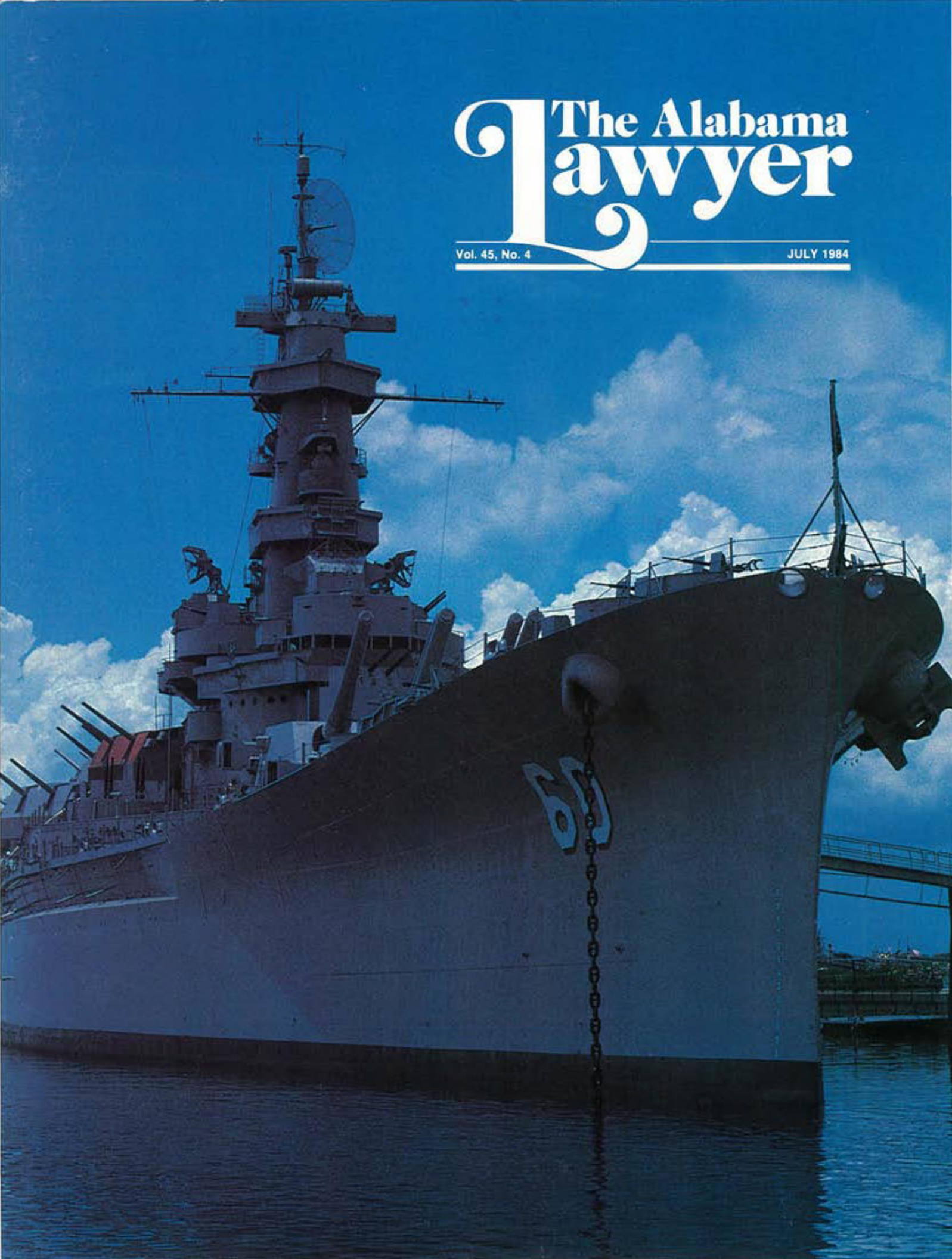


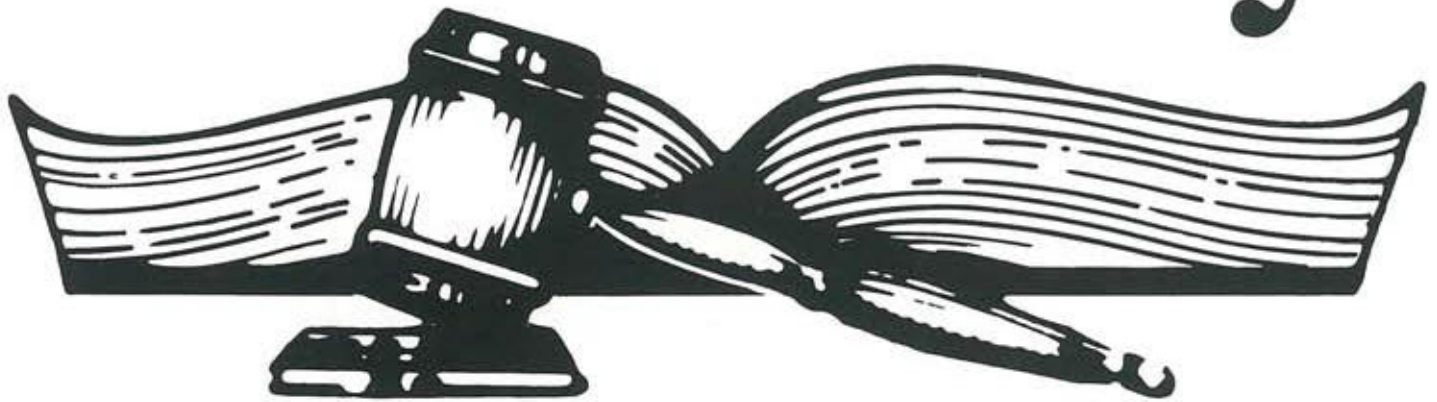
The Alabama Lawyer

Vol. 45, No. 4

JULY 1984



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by *J. Stanley McQuade*
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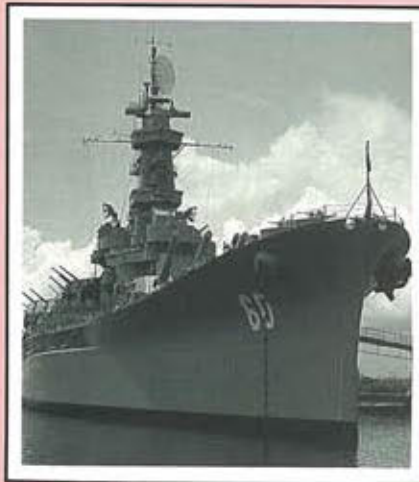
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THE JULY 1984



On the Cover

Familiar to Mobile is the battleship *USS Alabama*. This photograph was taken by Montgomery attorney Tom McGregor with the law firm of Webb, Crumpton & McGregor.



The Settlement Concept of the Eighties and Beyond

— pg. 190

Structured settlements in civil litigation have become commonplace. Settlements of this nature offer distinct benefits to the litigants and their attorneys.



'State of the Art' Evidence in Alabama

— pg. 202

Product liability suits are frequently brought many years after manufacture of the product claimed to be defective. Can the manufacturer escape liability by demonstrating that its product was manufactured in compliance with the "state of the art" existing at the time of manufacture?

ISSUE IN BRIEF



More New Lawyers

— pg. 215

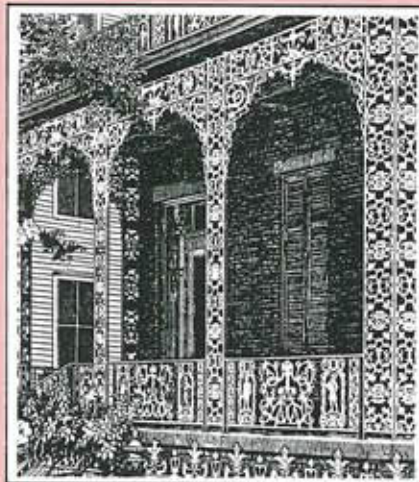
The roll of attorneys in Alabama continues to grow as more than one hundred new lawyers are admitted. Names, pictures, and exam statistics inside.



She's Quite a Lady

— pg. 218

Meet Olive Bamford Greene who is law office manager for the Birmingham law firm of London, Yancey, Clark & Allen. She's not your average employee — she's been with the firm seventy-five years!



Tips From One Who's Been There

— pg. 227

More and more attorneys are housing their law practice in renovated buildings. A practitioner recently experiencing a move to new quarters offers some tips for the unwary.

Upcoming

July 12-14
Alabama State Bar
Annual Meeting
Mobile

August 24-25
Alabama Criminal Defense
Lawyers' Annual Meeting
Birmingham

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

Regular Features

President's Page	184
Executive Director's Report	186
Letters to the Editor	188
Riding the Circuits	195
Bar Briefs	198
Book Review	189
About Members, Among Firms	200
Committee Report	208
CLE Opportunities	210
CLE News	212
Young Lawyer's Section	213
Recent Decisions	220
Legislative Wrap-Up	225
General Counsel Opinions	235
The Final Judgment	238
Classifieds	239



HAIRSTON

President's Page

Strong Steps in New Directions

Notice that the copy for the July President's Page is late again reminds me that a motion for adjournment is in order. This has been a busy, enlightening and satisfying year for me. Unfortunately, it seems that just about the time that you get into the swing of things, the sands have run and it is time to turn the glass. I relinquish this office with mixed emotions — gratitude, as I realize how far beyond reality dreams have carried us; but also with a feeling of a wistful awareness of how much is still undone.

I am deeply grateful for the hard work and support of the members of the Bar headquarters staff, the members of the Board of Bar Commissioners, and the chairmen, co-chairmen and members of all the committees and task forces. We have depended upon a great many dedicated people during this past year — so many that any attempt to name them would risk inadvertent offense to a few that might be omitted. I want to thank Reginald Hamner and those who are so closely associated with him in maintaining our Bar headquarters. I want to expressly acknowledge the value of that

headquarters staff in maintaining a continuity of direction from one yearly administration to the next. While the Board of Bar Commissioners slowly changes and the officers come and go, it is comforting to know that the execu-

The greatness of our association lies in the unselfish manner in which its membership devotes their time and energies in carrying out its activities.

utive secretary's office is the cohesive force that provides a springboard of the past from which we can dive into the future.

I hope that you share my pride in what I consider to be substantial achievements by the Alabama State Bar and some strong steps in new directions. Testimonies of these efforts have been cataloged for you in the re-

ports of the committees and the task forces that have appeared on the pages of this publication over the past year. The committee and task force activity is the true measure of the progress of this Bar. The greatness of our association lies in the unselfish manner in which its membership devotes their time and energies in carrying out its activities. It is very seldom that one of you is called upon to perform or function, that he or she doesn't do it gladly, enthusiastically to perfection. This is especially noteworthy when you consider that a lawyer probably doesn't have more than 1,300 hours of billable time available each year. When called upon to do something extra for the Bar Association it means the lawyer is cutting into his or her bread. Rather than dwell upon what we have done, I direct you toward the future.

At the top of the list is the matter of self discipline. Our available resources have not been able to stem the tide of the shortcomings of our membership. As we grow in number so do the number of complaints that need to be investigated. While this is a problem, it is not our main problem. Our main problem lies with the dramatic rise of

complaints that must result in sanctions. We are missing the boat somewhere. We don't seem to be able to instill a pride in our individual membership that makes it want to follow an ethical course of conduct because it is the right thing to do. The only alternative seems to be to increase the severity of the sanctions so that they serve as an outward deterrent. They say you cannot legislate morals but what other course is open to us? The disciplinary staff is overworked. The members of the Board of Bar Commissioners who hear these matters are overworked. This is probably the most pressing area for our concentrated concern.

In the same vein and because of the special responsibility of the Bar Association in the field of protecting the client, we need to adopt a client security fund. The groundwork has been laid down. It is now up to us to make the work of this committee a reality in our course of conduct.

The legal profession is faced with the burning question as to whether or not our courts, civil and criminal, are capable of providing equal justice because of case load demands. Our state is twice blessed. On the one hand we are fortunate in having a group of excellent and capable jurists. I am amazed when I look at the magnitude of the individuals who sit in our courts. On the other hand, we are blessed with the finest group of lawyers that the world has ever known. I cannot, by any stretch of the few words available to me, convey to you the importance, the depth and the ability of the men and women who practice at this Bar. And while we are grateful for this blessing, we cannot ignore the problems that are rapidly growing out of changes in the makeup of our population, our accelerating social and technological change, our flight to the suburbs, our changing civil and criminal law procedure, our increasing crime and our government by crisis.

We must ask and ask: Is this system of justice the very best that we can offer to the people of our state? Will it be the very best in the year 2000 in light of the changed conditions that we know are now taking place? If our system is not the very best that there is, then we want to know exactly wherein

it isn't and do something about it. However, on the other hand, if our system is the best, then we want to know wherein it is the best and say something about it. To that end a special task force has been appointed to study the makeup and the procedures available to our appellate courts. This is not a simple task. We would not look for an immediate report or solutions. They must look beneath the surface to measure the problems and to measure the facilities available to solve these problems. And once the task force has determined the scope of its charge, it will go to the Board of Bar Commissioners, to the Supreme Court and to the Legislature for additional assis-

If our system of justice is not the very best that there is, then we want to know exactly wherein it isn't and do something about it... on the other hand, if our system is the best, then we want to know wherein it is the best and say something about it.

tance to meet the needs which they find. The task force cannot adequately perform this special and difficult task without your comments and suggestions. This is your destiny, your work and your responsibility.

Our State Judicial Building is a disgrace. I understand that when Bear Bryant made his appearance on the University of Alabama campus, he told his players that from that time on they would eat the best, dress the best and play the best. We certainly need to look at the dress in which we clothe our judicial system.

Notice pleading is a problem that we talk about but we don't do anything about. While it is the primary problem of the Supreme Court's Committee on the Rules, it is an everyday problem of every lawyer in this state. It seems that it would not be an undue burden to require that a complaint set out a

remedy and the elements of that remedy before the case embarks on a sea of expensive discovery. This is a very serious problem. Lawsuits are too expensive. The question is whether we, as a profession, will bring the expenses in line or the marketplace will insist on a different procedure for settlement of disputes.

I look back at the past creativeness and the progressiveness of the Bench and the Bar of this state, and at the willingness of this same Bench and Bar not to stagnate, but to experiment, to probe and to try and lay aside ancient methods when they have outworn their usefulness, to simplify and cut through the chaff of technicalities. I cannot help but believe that the system of justice in Alabama will continue to improve as it has in the past, so long as we continue to look for procedures which would speed the dispatch and better consideration of our cases.

We are caught in a cross fire when it comes to administering the needs of our profession. We go to the Supreme Court for the rules to guide us in admissions, conduct, discipline and the like. When it comes to the problem of a client security fund or in establishing dues that will furnish us with the money necessary to carry on the activities of our association, then we must turn to the Legislature. In Washington the Federal Trade Commission is trying to get into the act by giving that commission power to regulate the legal profession. Our Committee on Governance has a demanding responsibility. It is not enough that it look into the size and makeup of our Board of Bar Commissioners or the way we select our president — it must also look to the sources of our authority. I suggest that a great measure of home rule is in order if the Bar Association is to fully utilize the rightful place of lawyers in our system of justice.

A special task force has laid the foundations for the development of an alcohol abuse program. We have not been able to take advantage of that program for lack of money. That we have to go elsewhere to obtain the right to tax ourselves to secure the income necessary to meet the needs of our

(Continued on page 188)

Executive Director's Report



HAMNER

Stars Fell on Alabama

This month's column is written from an admittedly personal bias. I have been a commissioned officer assigned to the Judge Advocate General Department of the United States Air Force since 1965. During this time, I have always been proud of the members of the Alabama State Bar who have served on active duty and in the Reserves and the National Guard legal offices around the world. The achievements of many of our members and the responsible positions they currently hold or have held

reflect great credit on our bar.

Two members of our bar presently occupy the position of The Judge Advocate General, United States Army and the Deputy Judge Advocate General, United States Air Force. They are respectively Major General Hugh J. Clausen, USA, and Major General Robert W. Norris, USAF.

General Clausen is a native of Mobile while General Norris was born in Birmingham. Both are graduates of the University of Alabama School of Law and have had distinguished military legal careers.

General Clausen was graduated from the United States Army Command and General Staff College and the United States Army War College. He also completed the Advanced Management program at the Graduate School of Business at Harvard University. In addition to his having earned a Masters Degree in tax from George Washington University, General Norris has completed Air Command and Staff College, Air War College and the National War College.

General Clausen was nominated to his present position in July 1981. General Norris assumed his present duties in November 1983.

The Alabama State Bar can be justly proud of these native sons. In addition to these active duty lawyers, Ira De-

Ment of Montgomery holds the rank of Brigadier General, USAF Reserves and is Mobilization Augmentee to General Norris at Headquarters USAF. Tom Elliott of the Birmingham Bar was recently nominated to the rank of Brigadier General in the Air National Guard and will be assigned as Air National Guard Assistant to Major General Thomas Bruton, The Judge Advocate General of the Air Force.

Stars have indeed fallen on Alabama — and her lawyers. □

— Reginald T. Hamner



GENERAL CLAUSEN



GENERAL NORRIS



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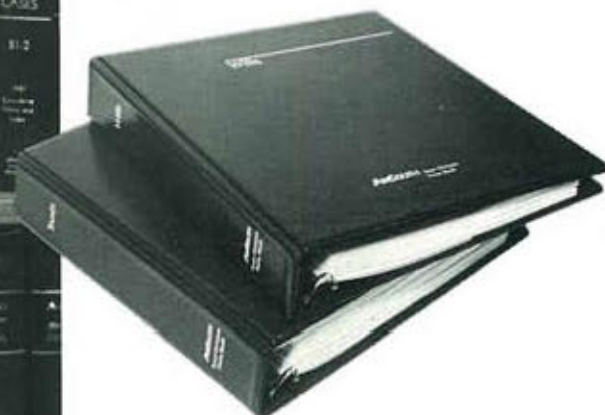
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AM SOUTH

(from page 185)

Letters to the Editor



Opinions Differ

In the May 1984 issue of this publication, the General Counsel issued the following ethics opinion:

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

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

I wholeheartedly disagree with this opinion. The rule is too broad, as there are situations that require the memorializing of conversations with others where no right of privacy is provided by law, i.e., telephone calls and office conversations. Such a procedure is wise for all parties to the conversation — it preserves the truth and requires honesty, not dishonesty. What difference does it make whether a person takes down a conversation by recording, shorthand, speed-writing or memory? The recorder takes down every word and should be the highest and best evidence. Surely, the General Counsel is not saying that an attorney cannot make notes nor remember a conversation without

asking for permission from the other party to that conversation. If this opinion is allowed to stand, it will only serve those who have something to conceal or hide. Hopefully the constitution will provide the attorneys of this state some protection against enforcement of this unfair opinion.

*Name Withheld
by Request*

LETTERS TO THE EDITOR

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

membership is an example of one of our problems of administration.

I would like to leave this office by reporting to you that everything is coming up roses. It isn't. But this association, our committees and our task forces recognize the problems with which we are faced. They are diligently working on those problems. I can report to you that we have the mental power with which to overcome our problems.

I come to the conclusion of what has been a most exciting and satisfying year in my life. It has not been a short year, but it has been an invigorating one. I have had the special opportunity of measuring the breadth and depth of the men and women who make up this bar association. To walk through a professional life with you is most gratifying. Only now can I realize the honor you bestowed upon me a year ago. To have served as president of the Alabama State Bar is an honor far beyond my expectations. I have tried to fill the office in a manner that would insure the progress of this association. There have been many accomplishments; there have been some failures. There is certainly the realization that the goal is not here or now, but tomorrow. I appreciate the privilege of having been a part of this movement into the future.

When I turn the gavel over to Walter Byars on July 14th, I am going to turn over the administration of one of the finest organizations that this country could possibly know. But then I am going to turn the administration over to one of the association's finest members. I believe that with Walter Byars we stand on the threshold of the association's finest hour.

In closing this "Presidential Page" for the year 1983-84, let me say to each and everyone: Thank you and God bless you for giving me this opportunity and for helping me carry it out. □

— William B. Hairston, Jr.

Book Review

by Robert L. Potts

Everyone who has engaged in the general practice of law probably remembers his or her first divorce case. Fresh out of law school, a new diploma on the wall and the bar examination a fading memory, the "new" lawyer typically waited anxiously in his office as Mrs. Jones arrived for her "appointment." "I have been doing some thinking," she says, "and I have decided I've got to divorce that no good John." Panic. All the young lawyer could remember on that auspicious occasion was that one who comes into equity must appear with "clean hands," alimony is not always awarded, custody issues are

awful, and Judge So-And-So favors the husband. Fortunately for the public, in days gone by, most young lawyers survived by borrowing a partner's file in a similar case, or by doing some fast empirical research in the register or clerk's office at the county courthouse.

Law schools have never placed much emphasis on domestic relations law, evidently assuming that it is a relatively simple area of the law, which can readily be learned in practice. That may have been true several years ago, but it is certainly not the case in Alabama today.

In 1971, Alabama liberalized its divorce

laws by adding "no fault" grounds for divorce, namely "incompatibility" and "irretrievable breakdown." Many of the old, old doctrines and concepts in Alabama divorce law thereupon became as obsolete as a divorce by the legislature. In 1978, a law was enacted in Alabama providing for termination of periodic alimony upon proof of remarriage or open cohabitation with a member of the opposite sex. In 1979, the United States Supreme Court in *Orr v. Orr* held Alabama's alimony statute unconstitutional. The Alabama Legislature thereafter amended the alimony statute to make it applicable to either spouse. In 1980, the Alabama Legislature enacted the Alabama Uniform Child Custody Jurisdiction Act. A year later, the Alabama Supreme Court in *Ex Parte Devine* struck down the "tender years" presumption favoring the mother in child custody cases. Moreover, tax issues now permeate all aspects of property settlement, child support and alimony questions.

Fortunately, three Alabama lawyers have recently published materials on family law which should prove to be of great benefit to practitioners in the domestic relations area.

Alabama Divorce Systems Manual

by
Patrick H. Graves, Jr.
Alabama Bar Institute for
Continuing Legal Education
University, Alabama
1984, pp. 507

A new book by Patrick H. Graves, Jr., of the Huntsville Bar, contains a refreshingly new approach to this area of the law. This work, titled *Alabama Divorce Systems Manual*, is published by the Alabama Bar Institute for Continuing Legal Education. It has an editorial board of nineteen prominent Alabama attorneys. The volume is more than a form book. It has sections on Client Interview, Uncontested Divorce, Separation Agreement, Complaint, Discovery, Trial, Orders and Decrees, Post Divorce Action, Appeals, Letters, and Tax Notes. The book offers suggestions as to when paralegals should be used, contains checklists, and extensive practice notes and examples. Unfortunately, the initial printings of this manual were placed in loose leaf binders that are too small, and the pages do not have reinforcing, making it difficult to use. However, the Alabama Bar Institute for Continuing Legal Education is taking steps to correct this problem and the book should soon be available in a manageable format. Although the forms contained in the manual may in some respects differ from those in use in some local jurisdictions, overall the work is a practice manual of the first order.

With the acquisition of these two books, the practitioner of domestic relations law in Alabama will be well-equipped to represent clients in a first-rate manner.

Alabama Divorce, Alimony and Child Custody

by
Robert L. McCurley, Jr., and Penny A. Davis
The Harrison Company
Norcross, Georgia
1982, pp. 358

In 1982, Robert L. McCurley, Jr., and Penny A. Davis of the Alabama Law Institute published the first comprehensive text on domestic relations law in Alabama, titled *Alabama Divorce, Alimony and Child Custody*. Also, they are keeping the book current with periodic pocket parts. They have divided their book into twenty-seven chapters organized into five parts: Annulment and Separation, Divorce, Alimony and Support, Custody, Taxation, and Forms. One of the helpful features of the book is that each section is annotated through footnotes which list the leading cases and statutes for the legal principles discussed in the text. Especially interesting to the general practitioner are the chapters on foreign judgments, juvenile courts, and the Uniform Child Custody Jurisdiction Act. A new chapter added by the 1983 pocket part discusses antenuptial agreements. The book does not, however, discuss the policy underlying the Alabama rules, nor criticize or comment judgmentally on areas of domestic relations law which need reform.



Robert L. Potts is the General Counsel for The University of Alabama System. He also serves as Chairman of the Alabama State Board of Bar Examiners. He is a frequent contributor to The Alabama Lawyer.

The Settlement Concept of the Eighties and Beyond

by
Bud Fleming

No doubt, most of you have read articles regarding the concept and use of structured settlements. Many have been published from all perspectives — that of the insurance company, the plaintiff's attorney and the defense attorney. In this article, I will discuss the advantages and disadvantages from the perspectives of all parties involved in the settlement of claims. If I sound a little prejudiced, please note that my career has been in the insurance industry and I have been involved in the use of the structure concept in negotiating settlements for the past five years. These years were spent arguing the side of the defense, unless I happened to be a plaintiff in a subrogation action.

The advent of the structure concept was brought on primarily by the recent trend of devastatingly large jury verdicts in many jurisdictions. In the past, when both jury verdicts and insurance policy limits were lower, lump-sum cash settlements were an appropriate way to dispose of litigation. Today, million dollars verdicts have become everyday affairs. Volatile jurisdictions across the country are handing down headline grabbing awards. The air of consumerism, sharpened by economic difficulties and fueled by substantial adverse publicity, has influenced jurors' damage calculations. As jury verdicts increased dramatically, claims settlements grew larger and larger. There arose a hesitancy on the part of some claim managers and supervisors to "roll the dice" no matter how good their defense.

Vast sums of money were passed into the hands of individuals, many of whom were unskilled in investment

practices and they were simply unable to manage such funds. Often those cash settlements were misused. The result was that the plaintiff, initially the winner, ended up the loser.

An article in the April 28, 1980, issue of *Business Insurance* stated that ninety percent of all major windfalls, be they in the form of sweepstakes, lotteries or court settlements, had been squandered within five years. The structure concept provides security for the financial future of plaintiffs who are awarded large sums of money or receive them in voluntary settlement prior to trial.

What is a Structured Settlement?

I am often amazed at the number of persons with whom I discuss the concept that really do not understand it. Some of them are attorneys. A structured settlement is simply one in which the benefits are individually tailored to address specific needs of a plaintiff. Payment of special damages, i.e. lost wages, medical expenses, any outstanding liens and attorney fees, is made "up-front." In addition, "up-front" cash

is normally paid to the plaintiff. Additionally, cash may be left in to increase the payout of the funding vehicle if desired, depending upon individual circumstances. (Plaintiff's attorney's fees can be structured if desired.) It is then customary to provide guaranteed monthly or yearly income, payable for the lifetime of the plaintiff, to meet day to day living expenses. The word "customary" is used because the structure is so very flexible it can be designed in practically any manner.

From What Source are Funds for Structured Settlements Generated?

An annuity is the most popular method of funding a structured settlement. However, the concept encompasses much more than the simple purchase of an annuity. The annuity is merely a funding vehicle and is only a small element in the proper application of the concept. The approach involves total financial planning to fulfill the needs of the plaintiff and the plaintiff's attorney within the parameters of the



Bud Fleming is assistant vice president of the Galaher Settlements company, Structured Settlements Specialists, in their Chicago office. Prior to entering the field of structured settlements, he was assistant regional claims manager for a large international insurance carrier. Experience in the claims field includes twenty years in all levels in the southeastern and midwestern U.S., including thirteen years in Alabama, Georgia, and Tennessee.

settlement value established by the insurance carrier, the self-insured entity or the defense attorney.

What is an Annuity?

Webster's defines *annuity* as "a sum of money payable yearly or at other regular intervals." It is most usually defined in the industry as "an agreement by an insurer to make periodic payments that continue during the survival of the annuitant(s) or for a specified period." There are basically four types of annuities which can be used to provide funding for a structured settlement. They are:

- 1) **The level annuity** in which benefits are paid at a stipulated amount, either monthly or annually for the lifetime of the annuitant. The amount of each payment never varies and it ceases at the death of the annuitant;
- 2) **The increasing annuity** in which the benefits increase by a compound percentage, usually to combat the arguments that inflationary trends dissipate level amounts of income. This form, quite naturally, is more costly than the level annuity;
- 3) **The period certain annuity** in which payments are simply made for a certain period of time. This might be used to fund a home mortgage, provide college funds or rehabilitation costs;
- 4) **The deferred annuity** in which payments are not begun immediately but are begun at a present date in the future. This type of annuity also is quite useful as a funding vehicle for college tuition, for minors who have not yet reached the college age, or retirement benefits. Deferred annuities are capable of producing substantial levels of income at relatively low cost.

A recent example of the use of a deferred lump sum annuity involved a young child with injuries to an eye. A deferred lump sum annuity was provided to afford funds for contemplated surgery in eight years. This was only a small portion of a complicated package put together in this instance which provided benefits of \$554,100 over the life of the child at a cost of \$34,981.

What Benefits are Provided and to Whom?

It is generally accepted that structured settlements provide advantages

to all parties. Some of those advantages are as follows:

A) Benefits to the Casualty Company or Self-Insured Entity:

- 1) Cash reserves are protected.
- 2) Claim costs are reduced.
- 3) Lengthy court sessions are eliminated due to early settlement, thereby reducing legal costs.
- 4) Flexibility during the negotiation process is dramatically improved.
- 5) Alternate method of lump-sum settlement.
- 6) Protects assets of assured by avoiding excess exposure.
- 7) Improves insurance image and creates goodwill.
- 8) Maintains control of negotiations.
- 9) Reduces risk of runaway verdict.

B) Benefits to the Plaintiff:

- 1) Guaranteed income and financial security.
- 2) A customized payment plan to meet individual needs.
- 3) No investment or management worries.
- 4) Tax exempt status of settlement income.
- 5) Generates greater sums than lump sum.
- 6) More timely settlement.
- 7) Avoids risk of trial.

C) Benefits to Both Plaintiff's and Defense Attorneys:

- 1) Tax advantages from deferral fee (optional).
- 2) Minimizes income fluctuation.
- 3) Allows possible income average.
- 4) Quickly disposes of cases.
- 5) Professional satisfaction/Good for their client.
- 6) Easier to sell client on settlement.
- 7) Avoids risk of trial.

D) Benefits to the General Public:

- 1) Prevents claimant from squandering lump-sum payment and possibly becoming a ward of the state.
- 2) Savings to the insurance industry resulting in smaller premium increases.
- 3) Expedites justice while alleviating congested court system.

To expand on some of those items listed above, I would state that a significant advantage of the annuity funding vehicle is its continuous and certain payments — the guarantee of financial security. It can assure funds for college tuition, as previously mentioned; it provides financial security and guaranteed income regardless of the ill

health of the injured party; and, it can provide a rehabilitation program consisting of physical, psychological and occupational therapy. Another key advantage of the annuity type settlement is the tax exempt status of the benefits. Guaranteed benefits flow tax free to the injured party. We all know that lump-sum settlements for personal injury are also tax free; however, any income generated from the investment of those lump sums is taxable income, in practically all instances. If properly handled, periodic payments avoid the tax exposure on investment income by shielding the plaintiff from actual or "constructive" receipt of the lump sum that the defendant invests on the plaintiff's behalf. The IRS has addressed these matters specifically. Their rulings can be found in Revenue Ruling 79-313 and Revenue Ruling 79-220. See also, 26 USC § 104, et. seq.

In addition, benefits of a structured settlement are not subject to the unpredictability of economic change and are guaranteed in practically all instances. The income generated is not only nontaxable, but also requires no management or administrative fees. The injured party receives the intangible benefits of freedom from economic concern at the time when his or her own health and the well-being of the family are of utmost importance. In addition, the concept has been looked upon with great favor by the courts and is a useful tool in finalizing cases early in the development stages, once the investigation has been completed and liability is determined. The insurance company or self-insured entity can respond quickly and flexibly to the plaintiff's demand, can provide more ultimate benefits and can do so at less cost than the lump-sum settlement value.

What Type of Cases are Candidates for Structured Settlements?

It was, at one time, generally believed that the only appropriate cases for structured settlements were catastrophic ones. This simply is no longer the case. No monetary threshold should be established for the use of a structured settlement. Flexibility of the con-

cept lends its use to virtually any situation and a savings can be generated through its use. Either the defense attorney's or the plaintiff's attorney's thorough understanding of the circumstances, needs and wants of a particular client can lead to a realization that a structured settlement best meets the needs of the client, be they plaintiff or defendant.

Previously, I mentioned that the courts look favorably upon structured settlements. This is true even in the Workers' Compensation claim field. Practically all jurisdictions, especially in Workers' Compensation, apply different laws. Weekly temporary total disability rates fluctuate greatly from one jurisdiction to the other. Some states allow lump-sum settlements of permanent partial disability awards, others provide nothing for permanent partial disability. Some provide lifetime temporary total disability and medical benefits. By using the structure concept, insurance companies and self-insured entities are able to buy out of these cases and close their file with the provider of the annuity funding vehicle taking over the check writing services and paying the benefits. This reduces to zero the future claims handling expense or regular weekly or monthly file activities.

Will I Experience Opposition to the Use of the Structure Approach?

Some attorneys, both defense and plaintiff, have preconceived concerns about the use of structured settlement. We now find that the majority of plaintiff's attorneys realize the benefits and protection of their clients that the concept provides and quite often are insistent that cases be settled on a structure basis. There is always a fear of the new or unknown, and the attorneys' training and experience has taught them to evaluate cases in lump-sum figures and to base their fees (plaintiff's) on a percentage basis. Plaintiff's attorneys have an inherent caution in the adversary system and have ethical considerations regarding determination of their fees. Regardless of how determined, plaintiff's attorney's fees remain essentially the same whether or

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not the structure concept is used in the loss settlement.

It has been said by plaintiff's attorneys that they have an obligation to exercise their judgment about the use of structured settlements in determining if a structured settlement would be of benefit to their clients. Some are simply unwilling to do so and it is difficult to understand why. They may still receive their fees "up-front," if this is of major consideration to them. Plaintiff's counsel may have a moral as well as an ethical obligation to investigate alternative forms of settlement which will insure that the client continues to enjoy the funds of the settlement long after it has been concluded.

What About Attorney Fees?

While the fees may be of minor importance when compared to the interests of the claimant, they should be discussed early in the settlement negotiations. It may even be necessary to conduct separate negotiations over fees. We very rarely encounter difficulties in this phase of the settlement. It is most often felt that if a contingency fee arrangement is contracted, the percentage should be based on the present date value of the benefits provided. This can be determined through the use of claimant oriented settlement specialists or economists if the attorney has no fear of the possibility of the

loss of the tax free status of the funds. This determination of the value of future payments should reflect consideration of interest rates, the fact that no management fees are being incurred, tax free status of the funds and the cost of the annuity. This cost varies from one company to the next making use of a "Structured Settlement Specialist" more important so as to obtain the most competitive rates.

It is not as difficult as it may seem to arrive at a fee for the plaintiff's attorney. Often it is based on an estimate of the low end of a jury verdict. At my previous employer, we frequently arrived at a value of the case and based our offer of plaintiff's attorney fees on a percentage of that value. It normally did not create a problem. Difficulty incurred depends on the attorney involved, the jurisdiction and the type of case. Some jurisdictions establish fees for attorneys, especially in certain types of settlements such as Workers' Compensation cases.

Why Must Costs not be Divulged?

Discussions have always arisen regarding the cost of the settlement using the structure concept. Plaintiff's attorneys feel that they have a right to know the costs and perhaps they do. The general thought, however, is that knowing the costs of the proposals constitutes "constructive receipt." Most defense attorneys, and settlement specialists who assist them, cannot and do not attempt to prevent the plaintiff from obtaining cost information, but, as a rule, do not divulge it simply to avoid even a hint of conflict. That information can be released under certain circumstances in certain states; however, stipulations must be made in writing to assure that no liability would be imposed upon the defendant or the settlement specialist should the tax free status of the funds be disturbed.

Plaintiff's attorneys, and often their clients, quite often object to insurance companies keeping the structured settlement "in-house." This merely means that the annuity is placed with a life insurance company which is owned by or affiliated with the casualty insurer. Plaintiff's attorneys generally view an

insurer's insistence that the structure be kept "in-house" with suspicion. They feel that the possibility exists that an inadequate return would be generated on the funds. It is the general feeling in the industry that the most dangerous aspect to the insurance company of keeping the annuities "in-house" is in creating a conflict of interest between the carrier, their reinsurers, and the stockholders. One senior claims executive has stated that the use of "in-house" affiliated carriers borders on being illegal. Paying a higher cost to keep the premium "in-house" creates greater expenditure in claim payment thus costing the reinsurer additional funds and affecting profits.

How do You Avoid this Type of Conflict of Interest?

In a previous paragraph the term "Structured Settlement Specialist" was used. This is an individual or firm which specializes in the settlement of claims through the structure concept. Some of these have many markets and will shop for the best rates in order to provide lower costs for purchase of the funding vehicle. Using a "Structured Settlement Specialist" assures that the costs are developed using the most competitive rates. Our specialists are available to assist in development of proposals at no cost to the insurance companies, self-insured entity or the attorney. Their income is generated from the commission on the funding annuity. Most will quote rates and costs only to defense counsel. Some do, however, specialize for plaintiffs only and others will do either defense or plaintiff. Any plaintiff requiring that a specialist assist them could simply request that the defense attorney engage them to assist them in concluding the claim if that particular firm was a "defense only" firm. We have found it necessary, in many instances, to refuse to quote costs to a "friendly" defense firm who might be representing a plaintiff.

In most instances, these specialists attend negotiation conferences, again at no cost to the insurance company or the defense counsel. In such instances, they are not an adversary to the plaintiff and can work with all parties con-

cerned to reach an amicable settlement. By attending these conferences, they are available to answer any questions regarding the structure itself, the tax ramifications and to provide possible wording for settlement agreements. Specialists are also available to testify, if needed, in court regarding the structure itself. *Most* are not economists and cannot testify regarding actuarial matters.

Do the Specialists Negotiate the Loss?

Many attorneys, claims adjusters, supervisors and managers resent having any person negotiate their losses. This is not the function or intent of the "Structured Settlement Specialist." He or she is there to assist, to provide information and to answer questions about the structure or the funding vehicle. They can quickly respond, on the spot, if alternative proposals are needed. In practically all instances, the first offer is not acceptable, creating the need for different proposals. Practically all plaintiffs and their attorneys face individual problems that require specific proposals. Only by being there to assist can the specialist respond quickly and completely. They are at your disposal.

With the backgrounds and many years of claim experience that most of these individuals possess, they can and will conduct the negotiations for you if you so desire. Most prefer not to do so. They then face the probability of becoming an adversary to the plaintiff or of a co-defendant and lose some of their effectiveness.

How may Structured Settlements be Negotiated?

During the past five years, I have enjoyed the opportunity of negotiating structured settlements from the insurance company standpoint. Our use of the concept, at my previous employer, was in such a way as to offer no alternative, at least initially, to the plaintiff or the attorney. Often the plaintiff's attorney would ask for an option or the amount of cash we were willing to offer. Obviously, that is not to say that we refused to settle for cash, but dur-

ing preliminary and sometimes even through final negotiations, it simply was not an option. Some plaintiff's attorneys feel that the response from a plaintiff's attorney to a structured settlement offer that he or she finds unacceptable is to make a structured settlement proposal of his or her own. Attendance by "Structured Settlement Specialists" would be necessary at settlement conferences under circumstances such as this so as to be able to immediately determine the costs of the alternative proposal submitted by the plaintiff's attorney.

Is the Concept Available Only in Cases of Clear Liability?

The structure concept is useful in questionable liability cases as well as those wherein liability is not an issue. Very few cases are ones of absolute liability. The concept removes the risk of nonrecovery by the plaintiff while still providing a favorable settlement. It provides the settlement at less cost to the defendant.

Who Determines Ownership of the Annuity?

The annuity policy is issued in the name of the plaintiff who appears in the contract as the annuitant. Ownership of the policy is placed in the name of any person or corporation agreeable to the parties to the settlement. It does not have to be the insurance carrier who is purchasing the annuity and often times the life insurance broker is designated as the policy owner. The reasons for such an arrangement are twofold: First, an annuitant who is not the owner of the policy cannot change the beneficiaries or assign the policy to anyone else. Such changes would defeat the purpose of the structured settlement program. Second, income tax laws and regulations are such that without an intermediary between the insurance company and the plaintiff, the periodic payments would be payable as income from the investment of funds over which the recipient had "unfettered control." The owner of the annuity contract has no particular duties other than to retain control over the policy. The life insurance company

issues checks payable to the plaintiffs and they are either sent directly to the plaintiffs or to their bank account for distribution to the plaintiff depending upon the terms of the agreement.

How Safe are the Funds?

Questions have arisen regarding responsibility for payments in the unlikely event of insolvency of the life company writing the annuity. First it should be pointed out that only life companies with an "A plus, excellent" rating should be used, and there has never been an A plus company that has failed to our knowledge. It is now possible, however, to assign that liability to the parent company of the life insurance company writing the annuity or to a third party.

In summation, I would like to quote again from the March 5, 1984, edition of *Business Insurance* wherein their editorial opinion states,

"Structured settlements should be a part of every risk management and defense strategy, whether a company

is insured or self-insured. . . . Even the plaintiff's attorneys who at first opposed structured settlements are finding that they, too, can benefit in tax savings from accepting their fees over a period of time. . . . While we heartily endorse the growing use of structured settlements, we do want to emphasize that companies should be very careful when buying annuities to cover the settlement costs. The insurer of the annuity must be around to pay in the coming years, or the defendant will be stuck paying the promised money. . . . Otherwise, there are not risks . . . only benefits . . . to be reaped from structured settlements. *We can only conclude that settlements would be structured more often if defendants showed more initiative and imagination.*"

It is appropriate to state that the structured settlement concept is a common sense approach to settling claims in this day and age. Not only does it provide financial security for plaintiffs, bring a hasty conclusion to a claim, and provide additional benefits to the plaintiff, but it also reduces legal expenses and the bottom line ratio for insurance companies. □

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Riding the Circuits



“Law Makes Freedom Work”

For over a quarter of a century May 1 has been set aside as Law Day U.S.A. — a day to celebrate our heritage as a nation dedicated to freedom under the rule of law. This year the theme of Law Day, “Law Makes Freedom Work,” embodied that which our founding fathers knew was essential to form and preserve our unique society — that law and freedom must be indivisible to have a truly liberated republic.

On this 27th annual observance of Law Day U.S.A., local and state bar associations held programs nationwide. Alabama certainly made its contribution to this Law Day celebration. While “riding the circuits” we will look at these special Law Day activities as well as other happenings in our local bars.

Birmingham Bar Association

The Birmingham Bar Association sponsored a series of successful programs for their Law Week activities. These programs were all coordinated by the Birmingham Bar’s Law Day Committee, with H. Thomas Wells, Jr., serving as chairman and Steve Casey as co-chairman.

On April 27 the Law Day Committee sponsored a Naturalization Ceremony in the United States District Court with the Honorable James Hancock presiding. At this moving ceremony, 138 adults and 13 children from nations around the world took the Oath of Allegiance and became United States citizens.

Two “Day-in-Court” programs for high school students were held during Law Week. Students were given the opportunity to have an inside look at the court system and to talk with lawyers and judges at the courthouse. Also, the Birmingham Bar sponsored a series of seminars for the



Former President Jimmy Carter speaks at a Law Day program jointly sponsored by the Birmingham Bar Association and the Cumberland School of Law.

elderly at which informative presentations were made on such vital topics as Consumer Protection for the Elderly; Wills, Estates and Trusts; Dealing with Insurance Claims; and explanations of Medicare and Social Security.

The highlight of the Law Week celebration occurred on May 1 when former President Jimmy Carter spoke at the Leslie Wright Fine Arts Center on the campus of Samford University. The theme of his speech for this Law Day was conflict resolution, stressing that this was one of the primary duties and responsibilities of the practicing Bar. This event, which received widespread publicity, was co-sponsored by the Birmingham Bar Association and the Cumberland School of Law.

The announcement of the Birmingham Bar Association’s Lawyer of the Year was made just prior to President Carter’s address. On May 2, the following evening, a cocktail

reception, held at The Club and attended by over 350 persons, honored Lawyer-of-the-Year Herbert Peterson. Another award given during Law Week was the Liberty Bell Award, presented to a nonlawyer who has fostered an understanding and appreciation of our system of justice and the law. The recipient of the award was Ms. Emily Tynes who works tirelessly and voluntarily on behalf of children and for children's rights within the family court system of Jefferson County. Ms. Tynes is associated with Big Brothers/Big Sisters of Jefferson County.

On May 2, a nondenominational religious service was held at the Cathedral Church of the Advent. The Honorable Bibb Allen mesmerized everyone with his "sermon," which was an analysis of the role of the scribe (as lawyer) in Jewish history.

On the lighter side, during Law Week the Birmingham Bar also sponsored its second annual "Race to the Courthouse," a five kilometer run beginning and ending at the Jefferson County Courthouse.

Dallas County Bar Association

The Dallas County Bar Association held its annual Law Day observance on Monday, April 30. At the luncheon held at the Holiday Inn in Selma, Judge Sam Taylor of the Alabama Court of Criminal Appeals spoke to the association on "Our Judicial System: How to Maintain It." At the association's quarterly luncheon earlier in the month, Congressman Richard Shelby spoke on legislative matters in the United States Congress which affect the legal profession and lawyers.

Huntsville-Madison County Bar Association

The Huntsville-Madison County Bar Association had a very successful Law Week. On the evening of April 27, the Huntsville-Madison County Bar Association and the Federal Bar Association of Madison County held their annual combined Law Day Banquet. CBS legal correspondent Fred Graham, who reports on activities of the Supreme Court, the Justice Department and the FBI, was the featured speaker. He was introduced by former Vanderbilt Law School classmate William T. Galloway, Jr., a past president of the Huntsville Bar Association.

On May 1, a Law Day observance was held at the First United Methodist Church in Huntsville. Alabama Supreme Court Chief Justice C.C. "Bo" Torbert spoke at the observance attended by more than two hundred members of the bar, the judiciary, and the public.

Madison County Circuit Court Clerk Billy Harbin was presented the association's Liberty Bell Award during Law Week. The presentation is made to a nonlawyer whose community service has made people aware of government, citizens' rights and the legal system.

Aside from Law Day activities, the Huntsville-Madison County Bar announces their 1984 officers:

President: Harvey B. Morris
Vice President: William H. Griffith
Secretary: George W. Royer, Jr.
Treasurer: Laura Jo Wilbourn

Jackson County Bar Association

On Law Day the Jackson County Bar Association met for a dinner at the home of Wally and Ann Haralson. Wally's mother, the widow of the late Judge W. J. Haralson, was guest of honor.

New officers of the Jackson County Bar Association, elected on April 27, are:

President: Tommy Armstrong
Vice President: Charles Dawson
Secretary/Treasurer: Ralph Grider

Mobile Bar Association



Charles S. Price holds certificate given him for his participation in the promotion of Law Day ceremonies in Mobile for more than twenty-five years.

Sixty-four persons became naturalized citizens of the United States during a Law Day ceremony that culminated the week long Law Day activities of the active Mobile Bar Association. MBA President-elect Ben Kilborn was the principal speaker for the Immigration and Naturalization ceremony held in U.S. District Court. At the program local attorney Charles S. Price was honored by the MBA for his participation in the promotion of Law Day ceremonies in Mobile for more than twenty-five years.

Elsewhere in Mobile during Law Week, more than twenty-

five attorneys and judges spoke to hundreds of local elementary and high school students as well as senior citizen groups and civic clubs. Additionally, local attorneys Joey Jones and Edgar Walsh were featured on a local T.V. program and an information booth with brochures, Law Day buttons and balloons was set up in Mobile's largest shopping mall.

"Election Eighty-Four" should have been the title of the monthly meeting of the MBA in May held at the Riverview Plaza. Five of the six candidates seeking the First District Congressional seat spoke briefly and were given the opportunity to answer questions from the audience. Five of the six Congressional candidates are attorneys. Lionel Layden, of the Programs Committee, arranged this informative and timely meeting.

Morgan County Bar Association

The Young Lawyers Section of the Morgan County Bar Association conducted two seminars during Law Week for retailers and small businesses. The topics of the seminars were how to use the Small Claims Court and the procedure for obtaining warrants for worthless checks. Speaking at the seminars were Morgan County District Judge David Breland, Ms. Willodene Lovett of the Morgan County District Court Clerk's office, and Captain Brad Cook of the Morgan County Sheriff's Department. The seminar was presented in Decatur on Tuesday, May 1, in conjunction with the Decatur Chamber of Commerce, and in Hartselle on Thursday, May 3, with the Hartselle Chamber of Commerce. Over thirty persons attended each session. Glenn E. Thompson of Hartselle organized the seminars.

The Young Lawyers Section of the Morgan County Bar Association has elected its officers for 1984. They are:

President: Mark Daniel Maloney
 Vice President: Glenn E. Thompson
 Secretary/Treasurer: Mona Lee M. Furst

On March 28 the "Big Bar" of the Morgan County Bar Association elected new officers. They are:

President: Harvey Elrod
 Vice President: Travis W. Hardwick
 Secretary/Treasurer: Barney Lovelace

Montgomery County Bar Association



James D. Hawthorne, senior vice president, Trust Department, Union Bank and Trust, presents Liberty Bell Scholarship Awards to Robert E. Lee students Dan Seidel and Joan Martitch.

The Montgomery County Bar Association sponsored its annual Law Week celebration under the capable leadership of Tom DeBray. At the annual Law Day Luncheon the MCBA presented the Liberty Bell Award to Charles Whitehurst of Montgomery. Mr. Whitehurst has been active in civic and community affairs since he moved to Montgomery some five years ago. Most recently he served as chairman of the successful 1983 United Way campaign. He is station manager of WSFA-TV.

Also, two area high school students were presented Liberty Bell Scholarship Awards. Dan Seidel and Joan Martitch were each awarded \$500 scholarships from the MCBA and Union Bank and Trust of Montgomery.

The Law Day Reception honoring the Judiciary was held May 2, 1984, at the Sheraton Riverfront Station. The reception was successful with well over 150 members of the bench and bar in attendance. □

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Bar examiner elected

Cleophus Thomas, Jr., of Anniston, has been elected to the Board of Bar Examiners, replacing Milton C. Davis whose term has expired. Thomas will serve a four-year term, examining in the area of business organizations.

Alabama Acts available, etc.

The Secretary of State's Office has announced that hard-bound volumes of the Alabama Acts, plus corresponding House and Senate Journals for 1983, are available at a cost of \$50 for the entire set of some eleven volumes. At no additional charge, replacement volumes for previous years of the Acts or House and Senate Journals may be requested and will be available only until the supply is depleted. Checks should be made payable to the Department of the Secretary of State and mailed to:

**Secretary of State's Office
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Montgomery, Alabama 36130**

Additionally, through an arrangement with the company which prints the hard-bound volumes of the *Alabama Acts*, law-

yers may subscribe for pamphlet acts to be made available at a cost of \$70 per calendar year. Pamphlet acts may be purchased by writing:

**Darby Printing Company
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Heflin receives award

U.S. Senator Howell T. Heflin (D-Ala.) is one of eight recipients of the National Center for State Courts' 1984 Distinguished Service Awards, which recognize outstanding contributions both to court administration and to the National Center.

Sen. Heflin is a former chief justice of the Supreme Court of Alabama and a former chairman of the Conference of Chief Justices. A strong proponent of federal legislation to aid the state courts, he serves as chairman of the Senate Ethics Committee and is a member of the Senate Judiciary Committee. During his tenure as chief justice of Alabama, he was a member of the National Center's board of directors and served as its vice president.

Chief Justice Warren E. Burger, of the U.S. Supreme Court, is also among those receiving the honor.

Johnstone new district judge

On Monday, May 21, 1984, Governor George C. Wallace appointed Mobile attorney Douglas Inge Johnstone to complete the unexpired term of Mobile District Judge James Sullivan.

The swearing in ceremony for the new judge was on Friday, June 1.

Johnstone attended undergraduate school at Rice University and is a 1966 graduate of the Tulane School of Law. Prior to his appointment, Johnstone was in private practice in Mobile.

Two sections formed

The Alabama State Bar has two new sections. On May 18, the Board of Bar Commissioners granted section status to a Family Law Section and a Bankruptcy and Commercial Law Section. If you wish to become a charter member of either section, contact the section chairman before July 31, 1984. Initial dues are \$15, payable to the section.

Family Law Section: Sam Rumore, Jr., P.O. Box 2141, Birmingham, Alabama 35201-2141.

Bankruptcy and Commercial Law Section: Robert P. Reynolds, P.O. Box 2427, Tuscaloosa, Alabama 35403.

We mean business

Avis Rent a Car System, Inc., is offering Alabama State Bar members a greater discount on Avis daily "We Mean Business" rates. The new discount is 25%, with unlimited free mileage included. Bar members also receive a 10% discount on Avis special weekly rates.

Eleventh circuit meets in Mobile

The Third Annual Judicial Conference of the Eleventh Judicial Circuit was held at the Riverview Plaza Hotel in Mobile on May 6-9, 1984. Members of the Mobile Bar Association served as hosts for the conference. The Judicial Conference, convened pursuant to statutory mandate, seeks to improve the administration of justice by affording an opportunity for lawyers and judges to have informal exchanges of ideas and experiences that bring formal information into practical focus.

Chief Judge John C. Godbold presented the annual "State of the Eleventh Circuit" address and noted that great strides had been made in processing civil and criminal cases to final adjudication notwithstanding an ever increasing case load at both the district court and appellate level.

The attendees at the conference were addressed by both Senator Howell Heflin and Senator Jeremiah Denton of Alabama who reported on the current status of legislation pending in congress relating to the federal judiciary. Supreme Court Justice Lewis Powell, who serves as the circuit justice for the Eleventh Circuit, summarized recent rulings by the United States Supreme Court. Educational topics presented through the avenue of panel discussions focused upon discovery use and abuse and upon the assessment of attorney's fees.

On the concluding day of the conference, lawyer members from each state met with the circuit, district and bankruptcy judges, and magistrates from their state. In the state meeting for Alabama, the attendees exchanged ideas on matters of concern to the bench and bar in Alabama and discussed means of expediting disposition of civil and criminal cases.



GAMBLE

Gamble named dean

Charles W. Gamble has been named dean of the University of Alabama School of Law. The announcement was made by University of Alabama President Joab Thomas on April 19.

Gamble, who has served as acting dean of the University of Alabama School of Law for the past two years, was previously on the faculty of Samford University's Cumberland School of Law.

A graduate of Jacksonville State University, Gamble earned his law degree at the University of Alabama School of Law in 1968.

Legislation creates needed judgeships

Governor George C. Wallace will appoint ten state court judges under legislation creating new judgeships in several counties.

Wallace signed a bill that creates nine circuit court judgeships and one district judgeship on October 1.

The new judges will serve an initial term beginning on or after October 1, and will serve until the next general election in 1986.

The bill created circuit court positions in Mobile, Baldwin, Lauderdale, Pike and Montgomery counties.

Jefferson County was funded for four new circuit judgeships — one in domestic relations and three in the civil division.

Russell County will get a new district judge.



Pictured are (left to right) Chief Judge John C. Godbold; Mobile attorney Charles B. Arendall, Jr., who served as chairman of the Host Committee; and circuit executive Norman E. Zoller at the Eleventh Circuit Judicial Conference held in Mobile in May.

About Members Among Firms

About Members

Frank H. McFadden, senior vice president and general counsel of Blount, Inc., has been elected to the Board of Directors of the American Corporate Counsel Association.

Among Firms

The law firm of **Huie, Fernambucq & Stewart** announces with pleasure that **John S. Civils, Jr.**, and **Frank E. Lankford, Jr.**, have become members of the firm and **Rebecca L. Shows** and **Charles H. Clark, Jr.**, have become associates of the firm. Offices are located at Suite 825, First Alabama Bank Building, Birmingham, Alabama 35203.

The law firm of **Johnstone, Adams, May, Howard and Hill** announces that J. Jephtha Hill has withdrawn from the firm and **Joseph M. Allen, Jr.**, and **I. David Cherniak** have joined the firm as partners. **Gregory C. Buffalow** has joined the firm as an associate. The Mobile law firm's name has been changed to **Johnstone, Adams, Howard, Bailey and Gordon**.

The law firm of **Mandell & Boyd** is pleased to announce that **John L. Carroll**, formerly legal director of the Southern Poverty Law Center, has joined the firm. Offices are located at 25 South Court Street, P.O. Box 4248, Montgomery, Alabama 36103. Phone 262-1666.

The law firm of **Blackburn and Maloney** is pleased to announce that **Gay Blackburn Maloney** has become of counsel to the firm and that **Lynn Belt Schuppert** has become associated with the firm. Offices are located at 802 Bank Street, P.O. Box 1469, Decatur, Alabama 35602.

Powell and Powell takes pleasure in announcing that **M. Ashley McKathan** has become a member of the firm. The name of the firm is now **Powell, Powell, Pearson and McKathan**. Offices are at 102 North Cotton, P.O. Drawer 969, Andalusia, Alabama 36420.

The members of the firm of **Miller, Hamilton, Snider & Odom** are pleased to announce that **Clifford Foster III** has become a partner of the firm and that **Daniel B. Graves** has become associated with the firm.

Offices are located at 254-256 State Street, Mobile, Alabama 36603.

Joseph E. Walden is pleased to announce the relocation of his offices for the practice of law to 127 1st Street North, P.O. Box 1610, Alabaster, Alabama 35007. Phone 663-0915.

The law firm of **Najjar, Najjar, Boyd & Pate** announces **Douglas L. McWhorter** has become a partner in the firm and the firm name has been changed to **Najjar, Najjar, Boyd, Pate & McWhorter**. Offices are at 2127 Morris Avenue, Birmingham, Alabama 35203.

The firm of **Butler & Royer** is pleased to announce that **Peter Sheffey Joffrion** has become associated with the firm. Offices are located at 108 N. Jefferson Street, P.O. Box 193, Huntsville, Alabama 35804.

The law firm of **Beddow, Fullan & Vowell** is pleased to announce that **Gregory J. McKay** has become associated with the firm. Prior to this association, he was in private practice in Birmingham. Offices are lo-

cated at Ninth Floor, Massey Building, 2025 3rd Avenue North, Birmingham, Alabama 35203.

The firm of **Wood, Minor & Parnell, P.A.**, announces its relocation to 641 South Lawrence Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 4189, Montgomery, Alabama 36103. Phone: 832-4202.

Melton L. (Mel) Alexander is pleased to announce the relocation of his office to Suite 1044, Park Place Tower, 2001 Park Place, Birmingham, Alabama 35203. Phone: 328-7400.

The Birmingham law firm of **Maynard, Cooper, Frierson & Gale, P.C.**, is pleased to announce that **Kathleen A. Collier, James L. Goyer III, A. Inge Selden III, Lee E. Bains, Jr., Tony G. Miller, Deborah J. Long, Frank D. McPhillips, Maibeth J. Porter, William S. Dodson, Jr., Laura A. Woodruff, Walker Percy Badham III, David M. Smith, Jarred O. Taylor II, J. Michael Savage, and Arthur J. Sharbel III** have become associated with the firm.

Robert R. Kracke, Jack R. Thompson, Jr., and Tom E. Ellis are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Kracke, Thompson & Ellis**. Offices are located at 2220 Highland Avenue, South, Birmingham, Alabama 35205-2902. Phone 933-2756.

Charles M. Thompson and **R. Stephen Griffis**, Attorneys at Law, join with **Timothy P. Brunson**, formerly associated with L. Paul Kassouf & Company, P.C., in announcing the formation of **Thompson, Griffis & Brunson, P.C.**, engaged in the practice of law. Offices are located at 1609 21st Street South,

Cambridge Row, Birmingham, Alabama 35205-4901. Phone 933-1000.

G. Douglas Jones, formerly assistant U.S. attorney, Northern District of Alabama, takes pleasure in announcing the opening of his office for the general practice of law located at 2200 City Federal Building, Birmingham, Alabama 35203. Phone 328-9000.

Eugene W. Reese and **William F. Addison** are pleased to announce the formation of a partnership for the general practice of law under the name **Reese and Addison**. Offices are located at 132 South Perry Street, Montgomery, Alabama. Phone 263-0900.

Jack Caddell announces the relocation of his law office to 116 Lee Street, N.E., (P.O. Box 2004), Decatur, Alabama 35602. Phone 353-1212.

Butler & Sullivan and **Hamilton, Butler, Riddick, Tarlton & Allen, P.A.**, announce the merger of their firms and the continued practice of law as **Hamilton, Butler, Riddick, Tarlton & Sullivan, P.A.** Offices are located at 130 Saint Joseph Street, P.O. Box 1743, Mobile, Alabama 36633. Phone 432-7517.

Announcements for this column must be received by the first day of the month prior to publication date.

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



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Can 'State of the Art' Evidence Be Used as a Defense Under Alabama Extended Manufacturer's Liability Doctrine?

by Craig Olmstead

Ten year old Jim was driving his "Rider Go-Kart" in his backyard when he caught his left arm in the left rear wheel of the go-cart. His arm was stretched so as to tear the muscles, ligaments, soft tissue, and vessels in his shoulder causing severe and permanent damage. The only thing that can be done medically for Jim is to amputate his left arm from the shoulder down.

Suit was filed against Rider Company under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) alleging that the go-cart was defective and that the defect was the proximate cause of Jim's injuries.

Rider Company may be able to broaden the defect allegation by proving that at the time the go-cart was designed, it was as safe as technology

would permit. This argument, known as the 'State of the Art' defense, has the presumption that if the product, here the go-cart, is designed within the 'State of the Art', the manufacturer should be absolved of liability.

It is the focus of this paper to determine whether Rider Company can introduce 'State of the Art' evidence to act as a complete defense to Jim's product liability suit or whether this evidence would be just another factor for the jury to consider in assessing liability.

'State of the Art' Evidence

A brief survey of jurisdictions which admit 'State of the Art' evidence indicate that there is no uniform definition for 'State of the Art'.¹ The evidence receives confusing and inconsistent

treatment in that the defendant manufacturer will attempt to introduce whatever standards he can present to prove what the 'State of the Art' is for his case. The major examples are industry standards,² current custom,³ feasibility,⁴ government standards,⁵ and technological capabilities.⁶

Because of the confusion, some legal writers have suggested that a more precise meaning be adopted that is readily understandable to lawyers, judges and lay people alike. The suggested meaning of 'State of the Art' evidence is "the level of pertinent scientific and technical knowledge existing at the time the product was designed and manufactured."⁷

The idea behind this definition is that if the manufacturer presents evidence which would show that at the time he designed the product, he incorporated the known existing technology and the latest in safety innovations, he should not be held accountable for an injury which could not be prevented by design. The thrust of admitting the evidence is not to show that due care was used in the design but as proof that the product was simply not defective within the existing knowledge.

The key element of the suggested definition is the existing knowledge at the time of design. If Jim's lawyer cannot provide a known alternative to the go-cart design which Rider could have used instead of the one it chose, then Rider could prevail. On the other hand, if the lawyer provided an alternative design that was not part of the generally understood technical knowledge when Rider designed the go-cart, it would be unfair to hold Rider responsible for not using the technology since it would require Rider to use knowledge not yet in existence.

This rather awkward result was reached in *Boatland of Houston v. Bailey*.⁸ In *Boatland* the Texas Supreme Court held the defendant manufacturer of a boat liable for the wrongful death of the driver who had fallen out of the boat and was killed by the propeller when it struck his head. The court was persuaded by the plaintiff that a simple kill switch would have prevented the accident even though the defendant argued that at the time the boat was manufactured kill switches were not



Craig D. Olmstead, a third-year student at the Cumberland School of Law, is a winner of The Alabama Lawyer 1984 Legal Writing Contest. He is a member of the American Journal of Trial Advocacy and a law clerk for the Birmingham law firm of Bouloukos & Oglesby.

The Alabama Lawyer Legal Writing Contest for Law Students

1984
Winners

Mr. Craig D. Olmstead

Cumberland School of Law
for

"Can 'State of the Art' Evidence
Be Used as a Defense Under
Alabama Extended Manufacturer's
Liability Doctrine?"

and

Mr. Walter G. Ward

University of Alabama School of Law
for

"Alabama Fictitious Defendant Practice:
An Overview"

made or sold for boats. The court did not accept the 'State of the Art' evidence as a defense since Texas is a strict liability jurisdiction and the evidence went to the argument of the manufacturer's due care, which is irrelevant in strict liability. By its holding, the Texas Supreme Court requires manufacturers to be one step ahead of existing knowledge. What this reasoning translates into is that in Texas strict liability is absolute liability and a manufacturer becomes an insurer of his product.

The Alabama Supreme Court, in its judicial legislation of products liability law, has stopped cold the Texas interpretation of strict liability for Alabama manufacturers.

Alabama Extended Manufacturer's Liability Doctrine

Prior to 1976, the law in Alabama for defective products followed *MacPherson v. Buick Motor Co.*⁹ In *MacPherson* the "manufacturers liability doctrine" placed liability on either "the negligent manufacture of the article or negligence on selling it."¹⁰ In 1976 the Alabama Supreme Court in *Casrell v. Altec Ind., Inc.*¹¹ and *Atkins v. American Motors Co.*,¹² extended the doctrine to include "not only the manufacturer, but also the supplier and the seller."¹³ The new doctrine was relabeled the Ala-

bama Extended Manufacturers Liability Doctrine.¹¹ In this new doctrine, Alabama adopts Section 402(A) of the *Restatement 2d of Torts* but retains the element of fault.¹⁵ The result of this hybrid doctrine is something like *Res ipsa loquiter* with shifting burdens of proof.

The plaintiff no longer has the initial burden of proving the manufacturer failed to use due care in the design and manufacture of a product. If the plaintiff establishes that "(1) he suffered injury or damages . . . by one who sells a product in a defective condition . . . and (a) the seller is engaged in the business of selling such a product and (b) the product reaches the consumer without substantial change in the condition in which it was sold,"¹⁶ then the plaintiff has proven a prima facie case.¹⁷ The

court made it clear that the approval of Section 402(A) language "is not the equivalent of adoption in toto of the Restatement concept of strict liability in products liability cases."¹⁸ By expressly reserving the element of fault which is alien to strict liability, the court prevents the AEMLD from becoming absolute liability.

Under the old "manufacturers liability doctrine," the burden of proof originated with the plaintiff who had to show that the manufacturer did not use due care in its product design. Deciding that this burden was too difficult, the court shifts the burden to the manufacturer by using the Section 402(A) language, but instead of focusing on the manufacturer's performance, the emphasis is on the product's performance.¹⁹ If the focus then is on the

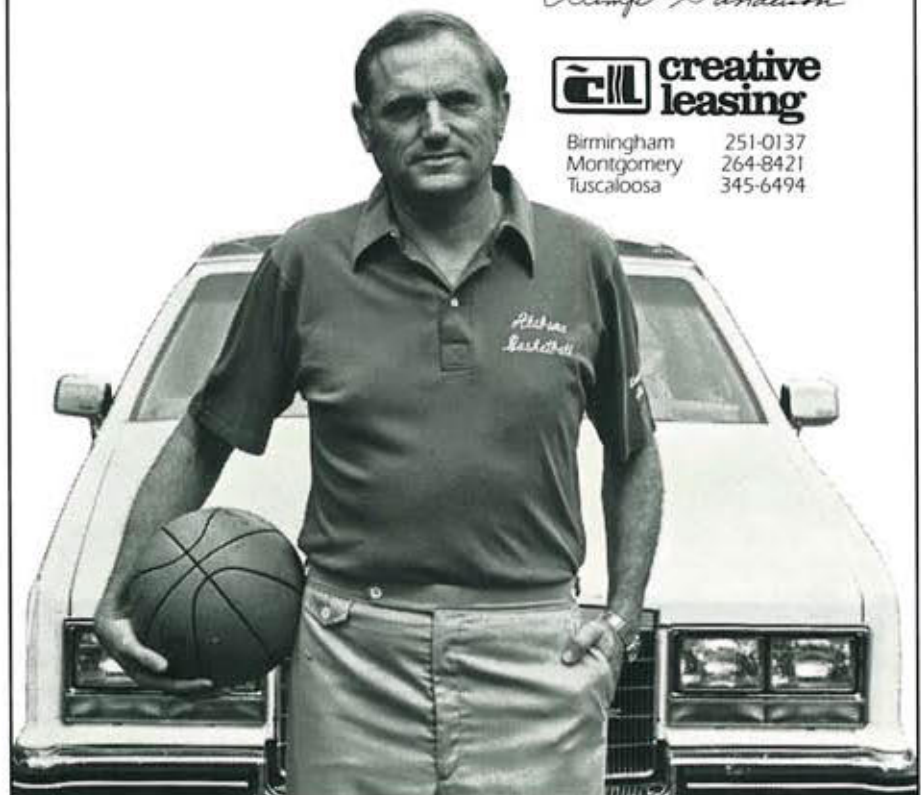
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product's performance, the 'State of the Art' evidence would appear to be an appropriate defense if the design of the product were as safe as technology would permit.

'State of the Art' Evidence as a Defense Under AEMLD

To determine if 'State of the Art' evidence would be a workable defense under the AEMLD we need to examine what a defective design is. In Jim's suit, meeting the requirements to establish a prima facie case does not entirely remove his burden of proof. Jim will need to be prepared to prove that the go-cart was defectively designed. Under the AEMLD, a "defect is that which renders a product unreasonably dangerous, i.e., not fit for its intended purpose."²⁰

Jim could logically point out that Rider Company knew the go-cart was intended not for adults but for children to ride in; that the go-cart would be ridden off the road subject to bumps and objects not found on smooth surfaces, that because of these bumps a child's arm could be knocked back so as to be caught in the wheels of the go-cart, and because the possibility of this type accident exists, Rider Company should have designed the go-cart in such a way so as to protect children from this injury.

If 'State of the Art' evidence is based on industry standards, Jim could prevail if he finds another go-cart manufacturer who was aware of this danger and designed his go-cart with safety features. Just such evidence has been allowed in several Alabama cases.²¹

In *Caterpillar Tractor Co. v. Ford*,²² the Alabama Supreme Court concluded that a "manufacturer of unreasonably dangerous and defective products cannot escape liability for injury resulting therefrom if standards in the industry dictated the inclusion of some protection against injuries likely to occur while using products for their intended purpose."²³ With *Caterpillar* as well as the other cases, the court relied on industry standards since at the time of the caterpillar tractor design there existed devices that could have prevented the injury in the case.²⁴ But suppose at the time the tractor, or in our case the go-cart, was designed there was no other manufacturer of similar products

that included safety features that would prevent these injuries. If industry standards were the basis of 'State of the Art' evidence, then the manufacturer could be absolved of liability. This would not be a satisfactory conclusion, especially if there is technology that existed at the time of design that would have included the necessary safety features.

Jim would be in a better position if he could maintain that the 'State of the Art' is based on technology although this argument could fail if the technology is untested.²⁵ On the defense side, the technology-based definition of 'State of the Art' may be more advantageous as well. If Rider Company can prove that at the time it designed the go-cart there did not exist any knowledge of technology that would provide protection for preventing a child's arm from

getting caught in the wheels of the go-cart, it would lessen the element of fault. If this is true, then with AEMLD the products performance is as good as it can be with its design.

Rider Company could also take another tact using the 'State of the Art' evidence based on technology to win the suit. It can be argued that Jim's injury was not due to a design defect per se but that a go-cart is so inherently dangerous that it is unavoidably unsafe. In Comment J of Section 402(A) it is expressed that the manufacturer would have a duty to warn a user of its product if the manufacturer has knowledge, or by "application of reasonably developed human skill and foresight should have knowledge . . ." of the inherent dangers. If technology based 'State of the Art' evidence is the standard, then Rider Company could point



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out that even with the knowledge and technology available to them, they cannot make the go-cart safe enough to prevent injuries. Since Comment J is persuasive to Section 402(A), the 'State of the Art' evidence could be available under AEMLD assuming Rider did make the necessary warnings.

Use of 'State of the Art' Evidence in Alabama

It can only be guessed at as to whether Alabama will accept 'State of the Art' evidence as a defense or merely another form of evidence to be used by the jury. The Alabama Supreme Court did catalogue three affirmative defenses available to a defendant manufacturer.²⁷ 'State of the Art' was not one of them,

but there is nothing in the cases which indicates that these three defenses are exclusive.

There is some indication that the 'State of the Art' defense could be permitted in the *Casrell*²⁸ case. There the court remarked that "the defendant may affirmatively show that it did not contribute to the defective condition,"²⁹ but it was not established that this would operate as a complete defense. It is more likely that Alabama would follow other jurisdictions which hold 'State of the Art' evidence is not conclusive and is simply another factor for the jury's consideration.³⁰ □

²⁷1984, *The American Journal of Trial Advocacy*, Cumberland School of Law of Samford University, Birmingham, Alabama 35229. All rights reserved.

FOOTNOTES

¹Even the *Model Uniform Products Liability Act*, Section 107 (1979) suggests that the State of the Art could be either "industry custom or the most scientifically advanced developments in the field."

²*Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 887 (Alaska 1979) (defining State of the Art as what other manufacturers of construction equipment were doing at the time); *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494, 135 N.E. 2d 231 (1956) (the design having been found safe in the industry).

³*Strum, Rugar & Co. v. Day*, 594 P. 2d 38 (Alaska 1979) (State of the Art refers to customary practice in the industry); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A. 2d 140 (1979) (State of the Art refers to common practice).

⁴*Model Uniform Products Liability Act*, Section 107 (1979).

⁵*Rucker v. Norfolk & W. Ry.*, 64 Ill. App. 3d 770, 381 N.E. 2d 715 (1978) (Federally mandated design specifications).

⁶*Bruce v. Martin-Marietta Corp.*, 544 F. 2d 442 (10th Cir. 1976); *Wiska v. St. Stanislaus Social Club, Inc.*, 390 N.E. 2d 113 (Mass. App. 1979); *Toyota Motor Sales Co., Ltd. v. Moll*, 438 S. 2d 192 (Fla. Dist. Ct. App. 1983).

⁷L.L. Frumer & M. Friedman, *Products Liability*, Section 6.05 (15) (1978).

⁸585 S.W. 2d 805 (Tex. App. 1979), Rev'd, 609 S.W. 2d 743 (Tex. 1980).

⁹271 N.Y. 382, 111 N.E. 1050 (1916).

¹⁰*Norton Co. v. Harrelson*, 176 So. 2d 18, 21 (Ala. 1965). See also *Jones v. Gulf States Steel Co.*, 205 Ala. 291, 88 So. 21 (1921); *Sterchi Bros. Stores v. Castleberry*, 236 Ala. 349, 182 So. 474 (1938); *Allorfer Bros. Co. v. Green*, 236 Ala. 427, 183 So. 415 (1983); *Miles v. Chrysler Corp.*, 238 Ala. 359, 191 So. 245 (1939); *Jefferson Standard Life Ins. Co. v. Watson*, 242 Ala. 181, 5 So.2d 639 (1942); *Crane Co. v. Davis*, 242 Ala. 570, 8 So. 2d 196 (1942); *Defore v. Bourjois, Inc.*, 268 Ala. 228, 105 So. 2d 846 (1958); *Greyhound Corp. v. Brown*, 269 Ala. 250, 113 So. 2d 916 (1959); *Sears, Roebuck &*

Co. v. Morris, 273 Ala. 218, 136 So. 2d 883 (1962); *Saunders System Birmingham Co. v. Adams*, 217 Ala. 621, 117 So. 2d 72 (1928).

¹¹335 So. 2d 128 (Ala. 1976).

¹²335 So. 2d 134 (Ala. 1976).

¹³*Casrell v. Altec Ind. Inc.*, 335 So. 2d 128, 132 (Ala. 1976).

¹⁴*Id.* at 133 N. 1.

¹⁵*Atkins v. American Motors Co.*, 335 So. 2d 134, 139 (Ala. 1976).

¹⁶*Casrell v. Altec Ind., Inc.*, 335 So. 2d 128, 133 (Ala. 1976).

¹⁷*Id.* at 137.

¹⁸*Atkins v. American Motors Co.*, 335 So. 2d 134, 137 (Ala. 1976).

¹⁹*Id.* at 140.

²⁰*Casrell v. Altec Ind., Inc.*, 335 So. 2d 128, 133 (Ala. 1976); *Sears, Roebuck v. Haven Hill Farm, Inc.*, 395 So. 2d 991, 994 (Ala. 1981).

²¹*Bon Lee v. Louisville Varnish Co.*, 641 F. 2d 397 (5th Cir. 1981); *Beloit Corp. v. Harrell*, 339 So. 2d 992 (Ala. 1976); *Joe Sartan Ford v. American Indemnity*, 399 So. 2d 281 (Ala. 1981); *Caterpillar Tractor Co. v. Ford*, 406 So. 2d 854 (Ala. 1981); *Banner Welders v. Knighton*, 425 So. 2d 44 (Ala. 1982).

²²406 So. 2d 854 (Ala. 1981).

²³*Id.* at 859.

²⁴In *Caterpillar*, a tractor driven by the plaintiff's husband rolled over and crushed him. The plaintiff argued that if strong rollover bars were in place, the husband would have survived.

²⁵*Medley v. U.S.*, 480 F. Supp. 1005 (M.D.S.D. Ala. 1979).

²⁶*Restatement Second of Torts*, Section 402(A), Comment J.

²⁷Assumption of the Risk, Contributory Negligence and Casual Relation.

²⁸335 So. 2d 128 (Ala. 1976).

²⁹*Id.* at 134.

³⁰*Dean v. General Motors Corp.*, 301 F. Supp. 187 (E.D. La. 1969); *Gelsumino v. E.W. Bliss Co.*, 10 Ill. App. 3d 604, 295 N.E. 2d 110 (1973); *Olsen v. A.W. Chewsterson Co.*, 256 N.W. 2d 530 (N.D. 1977); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W. 2d 25 (1979).

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Meet Our New Commissioners



ROGER H. BEDFORD, SR., commissioner for the 34th Judicial Circuit, was born on February 17, 1933, in Franklin County, Alabama. Commissioner Bedford received a B.A. from the University of Alabama and LL.B. from the University of Alabama School of

Law in 1963. He is senior partner in the Russellville law firm of Bedford, Bedford & Rogers, P.C. Commissioner Bedford served six years as judge of the Intermediate Court of Franklin County and is, also, a past president of the Franklin County Bar Association.



RJ. COLEMAN, commissioner for the 8th Judicial Circuit, was born in Huntsville, Alabama on January 22, 1928. He is a graduate of Auburn University, received his LL.B. from the University of Alabama School of Law in 1953 and was admitted to the Alabama State Bar that same

year. He has practiced privately in Decatur since his admission to the bar, serving as president of the Morgan County Bar Association in 1959. Commissioner Coleman is married to the former Shirley Braswell of Decatur and they have two children — Brian and Melissa.



EDWARD W. BOSWELL, commissioner for the 33rd Judicial Circuit, was born on November 2, 1921, in Hartford, Alabama. He attended college and law school at the University of Alabama and was admitted to the Alabama Bar in 1947. A resident of Geneva, Commissioner

Boswell is a past president of the Geneva County Bar Association and has previously represented the 33rd Judicial Circuit on the Board of Bar Commissioners (1960-1963 and 1975-1981). He has served thirty-six years as district attorney. Commissioner Boswell is married to the former Gretchen McEachern of Geneva County, and they have four children — Edward W. Boswell, Jr., Anita, Daniel, and Alice Ann.



ROBERT M. HILL, JR., commissioner for the 11th Judicial Circuit, was born in Florence, Alabama on April 16, 1932. He is a graduate of the University of Alabama and received his LL.B. from the University of Alabama School of Law in 1959. Commissioner Hill served

in the Alabama House of Representatives from 1966-1978, and received the Alabama State Bar Award of Merit in 1975. He is a partner in the Florence law firm of Hill and Young and is serving as the 1983-84 president of the Lauderdale County Bar Association. Commissioner Hill is married to the former Patsy Graydon of Montgomery and they have one daughter, Alicia Michelle.

Commissioners reelected to the Alabama State Bar Board of Commissioners to serve additional three-year terms include: **Harold Albritton** of Andalusia, representing the 22nd Circuit; **Broox G. Garrett** of Brewton, representing the 21st Circuit; **Ben H. Harris, Jr.**, of Mobile, representing the 13th Circuit; **Oliver P. Head** of Columbiana, representing the 18th Circuit; **Gary C. Huckaby** of Huntsville, representing the 23rd Circuit; and **Gorman R. Jones** of Sheffield, representing the 31st Circuit.



JOHN HOLLIS JACKSON, JR., commissioner for the 19th Judicial Circuit, was born in Montgomery, Alabama, on August 21, 1941. Commissioner Jackson is a 1963 graduate of the University of Alabama and a 1966 graduate of the University of Alabama School of Law. He was admitted to

the Alabama State Bar in 1966. Upon discharge from the United States Army he began the private practice of law in Clanton and has practiced there since. He is married to the former Rebecca Mullins of Clanton and they have one son, John Hollis Jackson III.



WINDELL C. OWENS, commissioner for the 35th Judicial Circuit, was born in Repton, Alabama on November 9, 1922. Commissioner Owens received his LL.B. from the University of Alabama School of Law in 1948 and was admitted to the Alabama State

Bar in 1948. He has practiced law in Monroeville, Alabama continuously since that time. Commissioner Owens is a former mayor of Monroeville, is chairman of the Board of Directors of United Bank of Frisco City, and is the county attorney for Monroe County. He is married to the former Ramona Westbrook of Collins, Mississippi, and they have two children — George Marion and Lynn.



D.L. MARTIN, commissioner for the 36th Judicial Circuit, was born in Courtland, Alabama on January 2, 1951. Commissioner Martin is a 1973 honor graduate of the University of the South at Sewanee, Tennessee. He received his J.D. from the University of Alabama School

of Law in 1977. Upon his admission to the Alabama Bar in the same year, he began a general practice in Moulton, Alabama that has continued to the present. Commissioner Martin is a past president of the Lawrence County Bar Association.



BJ. MCPHERSON, commissioner for the 30th Judicial Circuit, was born on August 18, 1935 in Oneonta, Alabama. He is a graduate of Lincoln Memorial University and received his J.D. from the Cumberland School of Law in 1968. He has been a sole practitioner and engaged in

the general practice of law since his admittance to the Bar in 1969. Commissioner McPherson is a past president of the Blount County Bar Association. He is married to the former Jane Landers of Alexander City, and they have three children — Melinda, Jana and Scott.

Committee Volunteerism Overwhelming

by
Mary Lyn Pike

Annual Meeting Highlights

Response to the 1984-85 committee preference questionnaire shows that interest in the work of our bar remains at a high level. To sustain the momentum, President-elect Byars has invited all 1984-85 committee appointees to a "kickoff" breakfast on Friday, July 13, during the bar's annual meeting in Mobile. There, each committee will have the opportunity to begin organizing its work for the year. Additionally, President-elect Byars and the **Committee on Local Bar Activities and Services** have invited the presidents and presidents-elect of Alabama's local bars to a special meeting so that they can be recognized and the State Bar can begin to work more closely with them.

On the same day, the **Prepaid Legal Services Committee** will sponsor a workshop featuring Alec M. Schwartz, executive director of the American Prepaid Legal Services Institute. He will provide basic technical information to lawyers on the establishment of prepaid legal services plans. New legislation allowing the marketing of such plans makes it important for Alabama's attorneys to take advantage of the opportunity to hear an expert. The workshop is free to those who register for the Annual Meeting and participants may earn up to 3.0 CLE credits. A prepaid legal services manual will be available at a cost of \$10.

Also on Friday the 13th, the new

Bankruptcy and Commercial Law Section, founded by members of the **Bankruptcy Law and Federal Bankruptcy Courts Liaison Committees**, will present a program entitled "Staying Alive in Bankruptcy Court — Practical Bankruptcy Issues." Topics will include: bankruptcy litigation, Alfred S. Lurey, Atlanta; keeping the business going in Chapter 11, Joel P. Kay, Houston; making the choice between Chapter 13 and Chapter 7, Judge L. Chandler Watson, U.S. Bankruptcy Court, N.D. of Alabama; and a legislative update, Lawrence B. Voit, Mobile. CLE credits: 2.2.

Bar members are invited to the first meeting of the new Family Law Section, on Friday, July 13 in Mobile. A presentation entitled "Current Hot Spots in Domestic Relations Law in



Jere Beasley makes report for the Task Force to Study Lawyer Political Action Committees at the May meeting of the Board of Commissioners.

Alabama — Child Custody, Children's Rights, Attorneys' Fees," will be made by Judge Richard L. Holmes, Alabama Court of Civil Appeals; Judge W.C. Zanaty, Tenth Judicial Circuit; Al J. Seale, Mobile; and Stephen R. Arnold, Birmingham. CLE credits: 1.5.

Focus on the Profession

President Hairston recently appointed the **Committee on Governance of the Alabama State Bar**. Under the leadership of chairman Gary C. Huckaby of Huntsville and vice chairman John F. Proctor of Scottsboro, the committee is charged with beginning an immediate study of the size and makeup of the Board of Bar Commissioners, possible reapportionment of the Board, nomination of lawyers to stand for election as president-elect, and the procedure used to elect the president-elect. The committee will consider the work of its predecessor in 1976 and the experiences of other unified bars in the area of self-government.

On the recommendation of the **Committee on Legal Education and Admission to the Bar**, the Board of Bar Commissioners recently authorized a survey on law school curricula and other matters related to the quality of legal education in Alabama. A representative sample of bar members will be surveyed in the near future.

The Board of Bar Commissioners recently approved three recommendations made by the **Task Force to Evaluate the Lawyer Explosion**:

- (1) That the bar shall be surveyed at least as often as every five years, in the same fashion as the 1978 "Demographic Survey of Alabama Lawyers," and the results of this survey shall be disseminated to the law schools, undergraduate colleges in Alabama, guidance and career counselors in the colleges and high schools, other interested individuals, and the news media;
- (2) That the bar shall survey examinees at the time of their bar examination as to their prospective employment, nature of employment, desirability of employment obtained to that sought, compensation, and other pertinent factors that may be determined desirable in this area, and the results shall be provided to the law schools

and interested committees or members of the bar; and

- (3) That all members of the bar shall be informed concerning the "lawyer explosion" and encouraged to discuss the subject with prospective law students, either individually or in groups, as well as with their parents and others interested in their education.

Recommendations as to a lateral placement bureau for experienced attorneys and assistance to members who have inadequate incomes were referred to the Finance Committee.

The Committee on Local Bar Activities and Services is preparing to implement a lawyer-to-lawyer program statewide. New lawyers will be able to call on more experienced lawyers for help with ethical and other practical problems. The target date for implementation of the program is October 1. Interested persons should complete and return the form accompanying this article.

The Task Force to Study Lawyer Political Action Committees made its report to the Board of Bar Commissioners on May 18 in Montgomery. It reported that it had studied the experiences of other state bars that had implemented such committees. The task force formed the opinion that the energies, time and money associated with a law PAC would be better utilized in areas such as public relations and prevention of the unauthorized practice of law. The Board accepted the report and discharged the task force. President Hairston expressed his appreciation to chairman Richard H. Gill and members of the task force.

The Committee on Lawyer Public Relations, Information and Media Relations presented the following resolution to the Board of Bar Commissioners on May 18:

RESOLVED, that public notices of disbarment, censure, etc., published in the newspapers of this state, have a negative effect on the public relations and public image of the Bar as a whole. Alternatives should be explored such as publication only in *The Alabama Lawyer*.

After some discussion, the Board referred the resolution to the Permanent Code Commission, the group charged

with studying proposed changes in the Code of Professional Responsibility and Rules of Disciplinary Enforcement. Comments on the resolution may be addressed to the chairman of the Commission, Hugh A. Nash, P.O. Box 580, Oneonta, Alabama 35121.

Persons interested in improving the image of Alabama's lawyers have an important opportunity to do so. Volunteers for the newly established "Speakers Bureau" can make a difference by appearing before civic organizations, schools, churches, and other interested groups. You may offer yourself as a volunteer by completing the Speaker's Bureau application found in this issue of *The Alabama Lawyer*.

Public Service

The Task Force on Legal Services to the Poor recently made several recommendations to the Board of Bar Commissioners regarding increased

communication and consultation between members of the private bar and the Legal Services Corporation of Alabama. It also reported making application for an American Bar Association grant to increase private bar involvement in the delivery of legal services to the poor. The Board accepted the report and the results of these efforts will be reported at a later date.

As a public service, the **Committee on Legal Services to the Elderly** recently prepared six press releases on legal concerns of older citizens. The articles were written by committee members Anne Mitchell and Clayton Davis and dealt with Social Security and S.S.I. eligibility, Medicare and health insurance benefits, retirement plan options, preparation of wills, property ownership, and powers of attorney. They were distributed to one hundred and fifty newspapers statewide for publication during "Older Americans' Month" in May. □

BE A BUDDY

With the number of new attorneys increasing and the number of jobs decreasing, more and more attorneys are going into practice on their own and miss the benefit of the counseling of more experienced practitioners. The Alabama State Bar Committee on Local Bar Activities and Services is sponsoring a "Buddy Program" to provide newer bar members a fellow-lawyer they may consult if they confront a problem, need to ask a question, or simply want directions to the courthouse.

If you are a lawyer who has recently begun a practice and would like to meet a lawyer in your area to call on occasionally for a hand, or if you are the more experienced practitioner with valuable information and advice you're willing to share, please complete and return the form below. Your participation in this program will certainly benefit the bar as a whole.



Local Bar Activities and Services Buddy Program Application

Name _____

Firm Name (if applicable) _____

Address _____

City _____ State _____ Zip _____

Telephone _____

New Lawyer

Experienced Lawyer

Please return to: Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101.

cle opportunities

july

12 thursday

UPDATE '84: A GENERAL PRACTICE SEMINAR

Riverview Plaza, Mobile

Sponsored by: Young Lawyers Section,
Alabama State Bar

Credits: 6.9 Cost: Included in convention
registration fee

For Information: (205) 269-1515

13 friday

ALABAMA PRACTICE AND PROCEDURE: ANNUAL UPDATE

Riverview Plaza, Mobile

Sponsored by: Practice and Procedure
Section, Alabama State Bar

Credits: 1.8

For Information: (205) 269-1515

CURRENT "HOT SPOTS" IN DOMESTIC RELATIONS LAW IN ALABAMA

Riverview Plaza, Mobile

Sponsored by: Family Law Section,
Alabama State Bar

Credits: 1.5

For Information: (205) 269-1515

CURRENT ISSUES IN BANKING: THE FDIC, FEDERAL RESERVE, AND COMPTROLLER OF THE CURRENCY

Riverview Plaza, Mobile

Sponsored by: Corporation, Banking and
Business Law Section,
Alabama State Bar

Credits: 1.4

For Information: (205) 269-1515

GAS MARKET PROBLEMS: RECENT ALABAMA OIL AND GAS DECISIONS

Riverview Plaza, Mobile

Sponsored by: Oil, Gas and Mineral Law
Section, Alabama State Bar

Credits: 1.4

For Information: (205) 269-1515

HAZARDOUS WASTE LITIGATION

Riverview Plaza, Mobile

Sponsored by: Environmental Law Section,
Alabama State Bar

Credits: 1.6

For Information: (205) 269-1515

NLRB v. BILDISCO: THE EMPLOYER'S RIGHT TO REJECT UNION CONTRACTS UNDER THE FEDERAL BANKRUPTCY CODE

Riverview Plaza, Mobile

Sponsored by: Labor Law Section,
Alabama State Bar

Credits: 1.2

For Information: (205) 269-1515

PRACTICE UNDER THE NEW ALABAMA PROBATE CODE

Riverview Plaza, Mobile

Sponsored by: Labor Law Section,
Alabama State Bar

Credits: 1.2

For Information: (205) 269-1515

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Riverview Plaza, Mobile

Sponsored by: Administrative Law Section,
Alabama State Bar

Credits: 1.5

For Information: (205) 269-1515

STAYING ALIVE IN BANKRUPTCY COURT

Riverview Plaza, Mobile

Sponsored by: Bankruptcy and Commercial
Law Section, Alabama
State Bar

Credits: 2.2

For Information: (205) 269-1515

19 thursday

INCOME TAX SHIFTING TECHNIQUES

County Courthouse, Montgomery

Sponsored by: Montgomery County Bar
Association

Credits: 1.0 Cost: none

For Information: (205) 265-4793

27 friday

EMPLOYMENT TERMINATION LITIGATION

First Alabama Bank, Birmingham

Sponsored by: Birmingham Bar Association

Credits: 3.2 Cost: \$20/members;
\$30/nonmembers

For Information: (205) 251-8006

27-august 4

ANNUAL MEETING

Fairmont Hotel, New Orleans

Sponsored by: National Bar Association

Credits: 12.0 Cost: \$150/members;
\$200/nonmembers

For Information: (202) 797-9002



august

3 friday

COASTAL ZONE REGULATION IN ALABAMA

Dauphin Island Sea Lab

Sponsored by: Marine Environmental
Sciences Consortium

Credits: 4.4 Cost: \$65

For Information: (205) 556-1451

3-4

RECENT DEVELOPMENTS IN THE LAW

Museum of Natural History, Anniston

Sponsored by: ABICLE

Credits: 7.3 Cost: \$65

For Information: (205) 348-6230

9-10

TRIAL ADVOCACY

UA Law Center, Tuscaloosa

Sponsored by: ABICLE

For Information: (205) 348-6230

16 thursday

DOMESTIC RELATIONS

County Courthouse, Montgomery

Sponsored by: Montgomery County Bar
Association

Credits: 2.0 Cost: none

For Information: (205) 265-4793

17 friday

ESTATE PLANNING

Riverview Plaza, Mobile

Sponsored by: Mobile Bar Association

Credits: 7.0

For Information: (205) 433-9790

17-18

SUMMER SEMINAR

Sandestin
Sponsored by: Alabama Trial Lawyers
Association
For Information: (205) 262-4974

24-25

ALABAMA CRIMINAL DEFENSE SEMINAR

Mountainbrook Sheraton, Birmingham
Sponsored by: Alabama Criminal Defense
Lawyers Association
Credits: 10.0 Cost: \$75/members;
\$100/nonmembers
For Information: (205) 264-0286

27 monday

BASICS OF TAX SHELTERING

Birmingham Hilton
Sponsored by: Alabama Society of Certified
Public Accountants
Credits: 8.0 Cost: \$100
For Information: 1-800-227-1711

27-28

MEDICAL EVIDENCE FOR LAWYERS

New York Hilton, New York City
Sponsored by: Practising Law Institute
Cost: \$250
For Information: (212) 765-5700

30-31

ESTATE AND GIFT TAXATION

Quality Inn, Mobile
Sponsored by: Alabama Society of Certified
Public Accountants
Credits: 16.0 Cost: \$170
For Information: 1-800-227-1711

september

5 wednesday

PROCEDURE AND PRACTICE BEFORE THE IRS

Governor's House, Montgomery
Sponsored by: Alabama Society of Certified
Public Accountants
Credits: 8.0 Cost: \$90
For Information: 1-800-227-1711

6 thursday

LEMON LAW LITIGATION

County Courthouse, Montgomery
Sponsored by: Montgomery County Bar
Association
Credits: 1.0 Cost: none
For Information: (205) 265-4793

INSURANCE

Mobile
Sponsored by: ABICLE
Credits: 6.9 Cost: \$65
For Information: (205) 348-6230



7 friday

BASIC CONCEPTS IN ESTATE PLANNING

Joe Wheeler State Park, Florence
Sponsored by: Alabama Society of Certified
Public Accountants
Credits: 8.0 Cost: \$90
For Information: 1-800-227-1711

INSURANCE

Montgomery
Sponsored by: ABICLE
Credits: 6.9 Cost: \$65
For Information: (205) 348-6230

12-14

TULANE TAX INSTITUTE

Hilton Hotel, New Orleans
Sponsored by: Tulane University School
of Law
Cost: \$275
For Information: (504) 865-5939

13 thursday

INSURANCE

Huntsville
Sponsored by: ABICLE
Credits: 6.9 Cost: \$65
For Information: (205) 348-6230

13-14

ADVANCED ESTATE AND GIFT TAXATION

Quality Inn, Mobile
Sponsored by: Alabama Society of Certified
Public Accountants
Credits: 16.0 Cost: \$170
For Information: 1-800-227-1711

14 friday

INSURANCE

Birmingham-Jefferson Civic Center
Sponsored by: ABICLE
Credits: 6.9 Cost: \$65
For Information: (205) 348-6230

19-21

PLANNING, ZONING AND EMINENT DOMAIN

Doubletree Inn, Dallas
Sponsored by: Southwestern Legal
Foundation
For Information: (214) 690-2377

21 friday

PURCHASE, SALE OR LIQUIDATION OF A CORPORATE BUSINESS

Huntsville Hilton
Sponsored by: Alabama Society of Certified
Public Accountants
Credits: 8.0 Cost: \$90
For Information: 1-800-227-1711

COLLECTIONS

Birmingham-Jefferson Civic Center
Sponsored by: ABICLE
Credits: 6.3 Cost: \$65
For Information: (205) 348-6230

26 wednesday

TAX PROBLEMS OF INDIVIDUALS

Auburn Motor Lodge
Sponsored by: Alabama Society of Certified
Public Accountants
Credits: 8.0 Cost: \$110
For Information: 1-800-227-1711

27-28

USING TRUSTS IN INCOME AND ESTATE PLANNING

Governor's House, Montgomery
Sponsored by: Alabama Society of Certified
Public Accountants
Credits: 16.0 Cost: \$160
For Information: 1-800-227-1711

CLE News



by Mary Lyn Pike
Staff Director, MCLE Commission

CLE Compliance: 1983 . . .

As reported in the May issue of this journal, mandatory continuing legal education was endorsed by seventy-six percent of those responding to the recent survey ordered by the Supreme Court of Alabama. Bar members not only voted — more than ninety-nine percent of them voluntarily complied with the continuing education requirement in 1983. Only fifty-five individuals were certified to the Disciplinary Commission for noncompliance. Twenty-five of those reported compliance upon receiving notice of the certification.

. . . And 1984

Now is the time to make sure that continuing education credits will be earned and reported by December 31, 1984. The calendar of CLE opportuni-

ties included in this issue lists thirty-two programs being conducted in *Alabama* during July, August, and September. The MCLE Commission is notified of additional seminars on a daily basis, and its staff is pleased to share this information with bar members. Call (205) 269-1515 for assistance.

The six primary compliance problems encountered over the last two years are as follows:

- (1) Failure to report on time (by December 31);
- (2) Reporting of unaccredited activities;
- (3) Failure to identify programs completely;
- (4) Claiming too many credits for an activity;
- (5) Mathematical errors; and
- (6) Illegibility.

Most of these problems could be avoided by careful attention to the Rules for Mandatory Continuing Legal Education, diligent record-keeping, and by following a rule of thumb: when in doubt, call the MCLE Commission office.

Obtaining accreditation of courses that are not presumptively approved is not difficult. Simply call or write to the MCLE Commission staff at least one month in advance of the program. An application will be forwarded to the sponsoring organization and you will receive copies of all correspondence between the staff and the organization. When the organization has submitted the required information, a decision as to accreditation will be made and you will receive notice of it for your records.

Let Your Secretary Assist You

On a recent visit with the Alabama Association of Legal Secretaries, this writer found its members most eager for information on mandatory continuing legal education. A handbook prepared for the meeting is available without charge and upon request by writing:

MCLE Commission
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101

We'd be pleased to supply one for each secretary in your office.

Scruggs Resigns, Hartley and Adams Elected

Bar Commissioner William D. Scruggs, Jr., of Fort Payne recently resigned as chairman of the MCLE Commission. After six years of CLE service, he is shifting his focus to service on the Court of the Judiciary and is continuing as chairman of the Supreme Court Liaison Committee. At its meeting on May 18, 1984, the Board of Bar Commissioners approved the elevation of vice chairman P. Richard Hartley of Greenville to the chairmanship of the MCLE Commission. Additionally, the Board elected Commissioner Phillip E. Adams, Jr., of Opelika to fill the vacancy created by the resignation. Bar members in the Thirty-Seventh and surrounding judicial circuits should feel free to call on Commissioner Adams for advice and assistance in meeting continuing education requirements. □

Young Lawyer's Section



Edmon H. McKinley
President

The 1983-84 Bar year is rapidly drawing to an end; however, this part of the year is one of the busiest times for the Young Lawyers Section of the Alabama State Bar. Many projects culminate at this time of the year after having been worked on all of the rest of the year. I think that it would be appropriate to bring you up to date and give a final report on several projects.

These projects involve three major seminars sponsored, coordinated, and presented by the YLS. First, the Basic Legal Skills — Bridge the Gap Seminar was held on March 30, 1984. Carol Smith's YLS Continuing Legal Education Committee put on this seminar, and over 105 lawyers attended. As previously discussed in this space, the topics covered a broad range of areas essential to the young lawyers. Eighty of those attending who completed evaluations of the seminar responded that the seminar was of either "considerable" or "great" assistance to them. This is exactly the kind of seminar that the YLS wants to present.

Second, the Conference of Professions directed by Randy Reaves was held April 6 and 7 at the Holiday Inn in Gulf Shores. This seminar, too, was well attended and had representatives from nine of the regulated professions here in Alabama. The responses to evaluations of this seminar also reflected

that it was an excellent presentation of the topics. This year's focus of the seminar was on the investigative aspects of administrative law. It is noteworthy to mention that investigators, attorneys, and professional staff persons from these regulated professions attended this conference.

Third, the annual seminar on the Gulf was held in Sandestin on May 17-19. This year's seminar was the largest ever held with over 182 registered attendees. This substantive seminar was well attended and enthusiastically received. The Seafood Buffet was served to over 380 persons, and a large number stayed to dance to the "beach music" that was presented afterwards. The success of this seminar was due to the efforts of Charlie Mixon and Caine O'Rear. They did an excellent job.

Finally, the second Bar Admissions Ceremony sponsored by the YLS was conducted on May 22. Over one hundred new lawyers were admitted to the Alabama Bar Association. The highlight of the ceremony was the luncheon address given by the Honorable Richard L. Jones, associate justice of the Alabama Supreme Court. Justice Jones related many lawyer-related jokes, stories, and illustrations directed to showing that lawyers are better professionals if they can laugh at themselves and at the amusing things that happen in

the judicial system. Lynda Flynt, who is the chairman of the Bar Admissions Ceremony, did another excellent job and is to be applauded for her efforts.

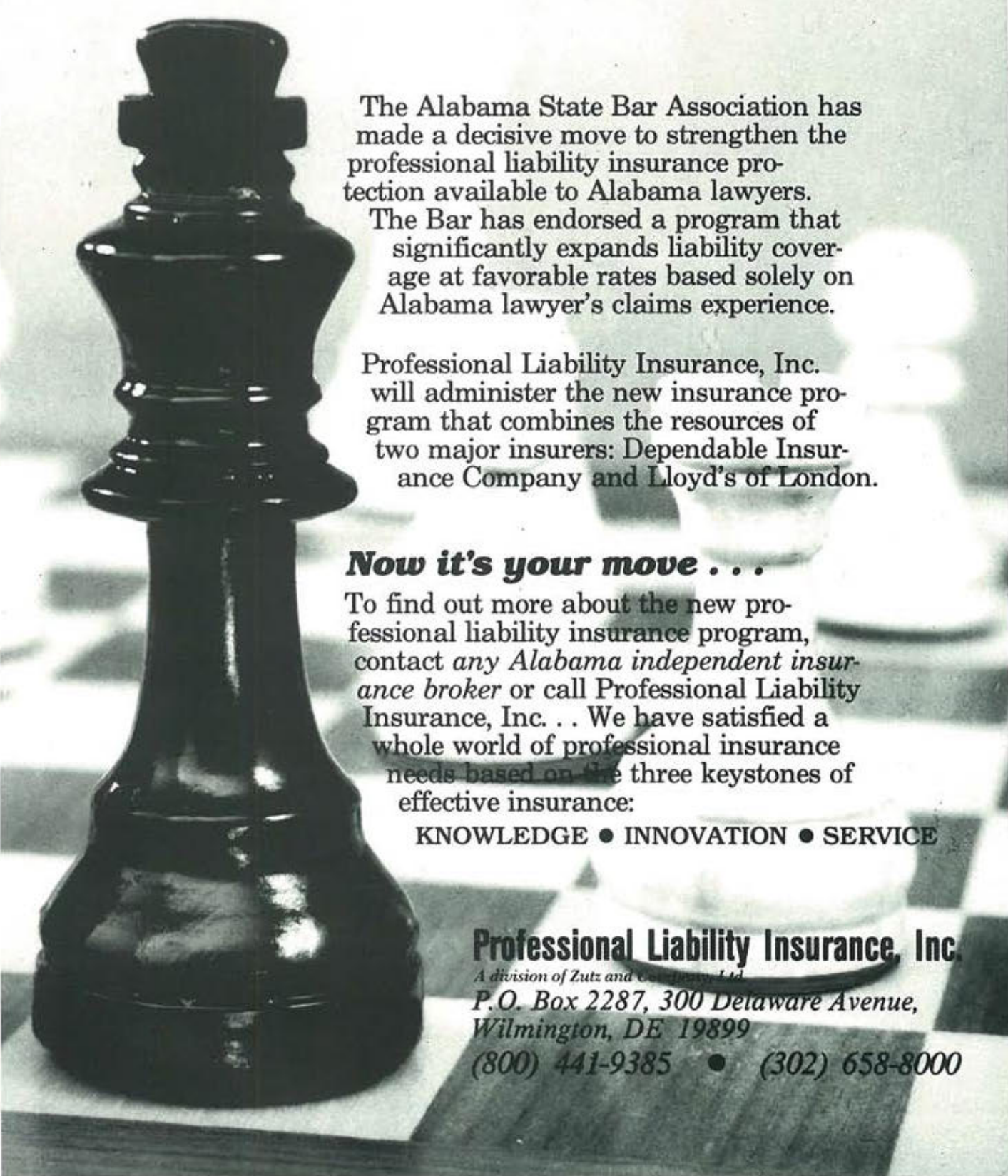
The final YLS seminar for the year will be presented at the Alabama State Bar Convention to be held in Mobile at the Riverview Plaza on Thursday, July 12, 1984. The title of this year's seminar is "Update '84: A General Practice Seminar." This is going to be a "meat and potatoes" seminar of general interest to as many segments of the Bar as possible.

Let me encourage each of you to attend the annual convention in Mobile. Of special interest to the young lawyers attending will be the party held on the fantail of the *USS Alabama* sponsored by the Young Lawyers Section of the Alabama State Bar and the Mobile Young Lawyers. A lot of time and effort has been put into this social occasion and everyone is anticipating an enjoyable time dancing to live music floating across Mobile Bay.

This is the last YLS article of *The Alabama Lawyer* for this Bar year and in organizing this article I have thought a good bit about having served as president of the YLS for the past year. The work of this Section has been carried on by the Executive Committee which is composed of a group of the

(Continued on page 240)

They've made their move...



The Alabama State Bar Association has made a decisive move to strengthen the professional liability insurance protection available to Alabama lawyers.

The Bar has endorsed a program that significantly expands liability coverage at favorable rates based solely on Alabama lawyer's claims experience.

Professional Liability Insurance, Inc. will administer the new insurance program that combines the resources of two major insurers: Dependable Insurance Company and Lloyd's of London.

Now it's your move . . .

To find out more about the new professional liability insurance program, contact *any Alabama independent insurance broker* or call Professional Liability Insurance, Inc. . . We have satisfied a whole world of professional insurance needs based on the three keystones of effective insurance:

KNOWLEDGE • INNOVATION • SERVICE

Professional Liability Insurance, Inc.

A division of Zutz and Company, Ltd.

*P.O. Box 2287, 300 Delaware Avenue,
Wilmington, DE 19899*

(800) 441-9385 • (302) 658-8000

Attorneys Admitted to Bar

Spring 1984

Garry Wayne Abbott	Bessemer, Alabama	Edward Collins Miller	Birmingham, Alabama
Courtney Burge Adams	Birmingham, Alabama	Theodore Albert Mills	Birmingham, Alabama
Robert Alan Alexander	Montgomery, Alabama	Terry Lynnann Mock	Florence, Alabama
Donna Smith Ames	Mobile, Alabama	Thomas Daniel Motley	Geneva, Alabama
Denise Boone Azar	Montgomery, Alabama	Amy Kirkland Myers	Birmingham, Alabama
Mary Anne Coley Ball	Mobile, Alabama	William David Newton	Montgomery, Alabama
Robert John Becher	Huntsville, Alabama	Robert William Norman, Jr.	Birmingham, Alabama
Paul Vaughn Blalock, Jr.	Birmingham, Alabama	Rhonda Nunn	Birmingham, Alabama
Gary Joseph Bone	Gadsden, Alabama	Anne Laura Ragsdale Parker	Ozark, Alabama
Elizabeth Coen Bookwalter	Montgomery, Alabama	Connie Walter Parson	Birmingham, Alabama
Kathryn Lynne Bowden	Eufaula, Alabama	Joe Hill Pickens	Tuscaloosa, Alabama
Bernice Cecilia Bradley	Tallahassee, Florida	Gary Ray Powell	Montgomery, Alabama
Tommy Elias Bryan	Montgomery, Alabama	Robert Francis Powers	Montgomery, Alabama
Jasper Newton Buckner, Jr.	Prattville, Alabama	Gail Marie Pugh	Birmingham, Alabama
Mary Ann Waddell Burge	Birmingham, Alabama	Lynn Ellen Quinley	Bay Minette, Alabama
Albert Sim Butler	Montgomery, Alabama	John Lee Quinn	Birmingham, Alabama
Carol Gray Caldwell	Birmingham, Alabama	Ellen Gail Ray	Birmingham, Alabama
John Oliver Cameron	Montgomery, Alabama	James Christopher Reilly	Birmingham, Alabama
Mary Joanne Camp	Opelika, Alabama	Robert Bruce Rinehart	Montgomery, Alabama
Stephanie Katherine Cardos	Tuscaloosa, Alabama	Jeffrey Lee Roth	Huntsville, Alabama
Carolyn Pounds Casey	Heflin, Alabama	Jay Daniel St. Clair	Birmingham, Alabama
Edward Minor Coke	Birmingham, Alabama	Deborah Sue Sanders	Montgomery, Alabama
Homer Crawford Coke	Birmingham, Alabama	Wayne Ray Satterwhite	Birmingham, Alabama
Joe Wayne Cotney	Elmore, Alabama	Richard Singleton Sawyer	Mobile, Alabama
Henry Bruce Cyr	Wetumpka, Alabama	Stephen David Scorey	Birmingham, Alabama
Harry Leon Dadds II	Anniston, Alabama	Stuart Jay Shapiro	Tuscaloosa, Alabama
James Lindbergh Davis, Jr.	Dothan, Alabama	Robert Harris Shaw, Jr.	Tuscaloosa, Alabama
Joseph Spratley Dice	Tuscaloosa, Alabama	William Earl Siniard, Jr.	Birmingham, Alabama
Richard Dale Durden	Birmingham, Alabama	Bruce Martin Slomka	Birmingham, Alabama
Dewey Russell Eason	Birmingham, Alabama	David Arthur Snipes	Columbus, Georgia
Ronald Wesley Farley	Fairhope, Alabama	Margaret Lynn Sturges	Tuscaloosa, Alabama
Sharon Elaine Ficquette	Wetumpka, Alabama	Barry Gordon Terranova	Mobile, Alabama
Shara Ann Flacy	Ardmore, Tennessee	James Harvey Tipler	Andalusia, Alabama
Roland Colquette Gamble	Birmingham, Alabama	Mary Dixon Torbert	Opelika, Alabama
Charles Austin Ganus	Tuscaloosa, Alabama	Charles Rogers Trotman	Montgomery, Alabama
Debra Holly Goldstein	Birmingham, Alabama	Billy Andrew Wallace	Adamsville, Alabama
Garland Clifton Hall III	Decatur, Alabama	Michael Evans Wallace	Birmingham, Alabama
William Michael Hanlin	Birmingham, Alabama	William Ora Walton III	LaFayette, Alabama
Armstead Lester Hayes III	Montgomery, Alabama	Sam Burke Wear	Birmingham, Alabama
Glen Steven Henry	Tuscaloosa, Alabama	Kimberly Redman West	Huntsville, Alabama
Leila Aki Hirayama	Birmingham, Alabama	Wallace Patrick Whaley	Roanoke, Alabama
Jack Wayne Hughes	Montevallo, Alabama	Wilfrid Matthew Whitney	Birmingham, Alabama
Peyton Bush Hyslop	Bartow, Florida	Jack William Willis	Montgomery, Alabama
Judge Malcolm Jackson III	Mobile, Alabama	John Gregory Wolinski	Columbus, Georgia
Randall Baxter James	Montgomery, Alabama	Kathleen Nelson Woodham	ChIPLEY, Florida
Marcus Andrew Jones III	Birmingham, Alabama	Dennis McClendon Wright	Montgomery, Alabama
Thomas ap Roger Jones	Selma, Alabama		
Joyce Iris Kahn	Birmingham, Alabama		
Linda Henley Keown	Montgomery, Alabama		
Mary Kay Laumer	Opelika, Alabama		
Jennifer Hooks Lawrence	Chattanooga, Tennessee		
Ronald Melvin Leaf	Birmingham, Alabama		
Charles Scott Linton	Birmingham, Alabama		
John Peyton Mabry	Tuscaloosa, Alabama		
Donald Gordon Madison	Montgomery, Alabama		
Kathryn Eileen Robinson Malcom	Gadsden, Alabama		
Richard Glenn Manville	Birmingham, Alabama		
Mary Lynn Marmann	Montgomery, Alabama		
James Guy Martin, Jr.	Montgomery, Alabama		
Steven Anthony Martino	Birmingham, Alabama		
Valentino Don Bosco Mazzia	Beverly Hills, California		
Jesse Derrell McBrayer	Birmingham, Alabama		
Michael Norman McIntyre	Birmingham, Alabama		

February 1984

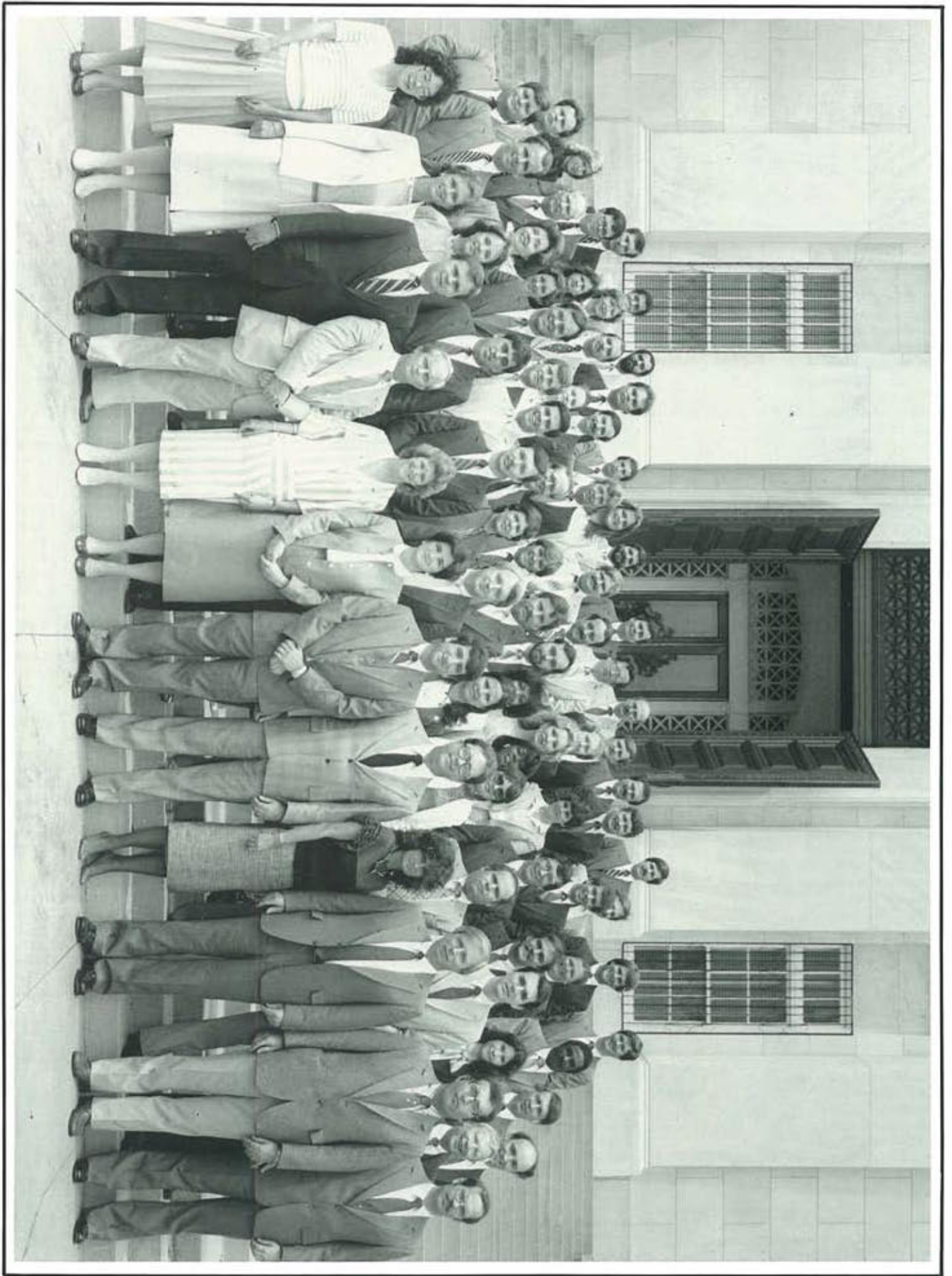
Bar Exam Statistics of Interest

Number Sitting for Exam	198
Number Certified to Supreme Court	108
Certification Rate	55%

Certification Rate From:

University of Alabama	81%
Cumberland	77%
Alabama Nonaccredited Law Schools	38%

SPRING 1984 ADMITTEES



Lawyers in the Family



Will O. Walton III (1984), William O. Walton, Jr., (1952), Marianne Walton Terry (1980) and Russell S. Terry (1980) (Admittee/Father/Sister/Brother-in-law)



Donna Smith Ames (1984) and Orrin K. Ames III (1969) (Admittee/Husband)



Mary Anne Coley Ball (1984) and David R. Coley III (1954) (Admittee/Father)



Albert S. Butler (1984) and Phillip H. Butler (1971) (Admittee/Brother)



John Oliver Cameron (1984), George W. Cameron (1950) and James W. Cameron (1955) (Admittee/Father/Uncle)



Carolyn Pounds Casey (1984) and John S. Casey (1957) (Admittee/Husband)



Homer C. Coke (1984) and Edward M. Coke (1984) (Brother admittees)



Les Hayes (1984) and Oakley W. Melton (1951) (Admittee/Father-in-law)



Marcus Andrew Jones III (1984) and Cathy Jones Eades (1982) (Admittee/Sister)



Amy Kirkland Myers (1984) and Rebecca Kirkland Stephenson (1981) (Admittee/Sister)



Anne Laura R. Parker (1984), Virginia Parker Cook (1975) and Wilmer Parker III (1978) (Admittee/Daughter/Son)



Robert Bruce Rinehart (1984) and Edmon Loftin Rinehart (1955) (Admittee/Father)



James Harvey Tipler (1984) and Frank J. Tipler, Jr. (1939) (Admittee/Father)



Mary Dixon Torbert (1984) and Chief Justice C.C. "Bo" Torbert (1954) (Admittee/Father)



Dennis McClendon Wright (1984) and Judge L. Charles Wright (1948) (Admittee/Father)

Those wishing to order the family or group picture may contact Scott Photographic Services, P.O. Box 1361, Montgomery, Alabama 36102. Phone 262-8761.



PROFILES PROFILES PROFILES

A Remarkable Lady — Olive Greene Still on the Job After 75 Years

Several months ago following an inquiry regarding who the oldest practicing lawyer in Alabama was, The Alabama Lawyer, shortly thereafter, heard of quite a remarkable lady whose years of dedicated service as a legal secretary surely surpassed any number of years of lawyering we could have dreamed of learning about. In this first feature in a regular series on interesting Alabama attorneys, we want to introduce you to Mrs. Olive Bamford Greene.

Olive Bamford Greene is not your average office worker, although she does work the usual forty hours a week for the Birmingham law firm of London, Yancey, Clark & Allen. As a matter of fact, she's quite extraordi-

nary in several respects. For one, Mrs. Greene is ninety-six years old. For another, how many people do you know, or have heard of, who have worked seventy-five years with the same employer? That's dedication!

Olive Patricia Bamford was born on March 16, 1888 in Minneapolis, Minnesota on a night when temperatures were forty degrees below zero — to this she attributes her good health and hardiness. She attended high school in Chicago, followed by a three-month stenographic course. While working at the Chicago YMCA she met, and later married, Gilbert H. Greene, of Selma, who was working at the YMCA as a physical aid instructor.

In 1905 she and her husband moved to Selma and she got a job working for a law office there. In 1907, they moved to Birmingham, and on February 9, 1909,

Mrs. Greene joined the London & London firm, which had been organized by John and Alex London in 1871 in Elyton. Alex London had died the previous year, so John London was the senior partner when Mrs. Greene began her employment with the firm — she has been there ever since. Mr. George Yancey joined the firm in 1910, the following year.

Red Clark, presently a senior partner in the firm says, "During the tenure of Mrs. Greene, she has trained, just as she did Bibb Allen and me, such outstanding attorneys as Walter Brower, Judge J. Russell McElroy, Frank Bainbridge, Sr., Judge Whit Windham, Kirkman Jackson and Al Rives, who have gone on to other successful firms." Mr. Clark adds, "When we take on a young lawyer here, our advice to him is always the same: 'Don't worry about making good with the partners; just make good with Mrs. Greene. That's what we did!'"

It has been said that Mrs. Greene was president of the Alabama State Bar on three different occasions. Actually the London firm claims three presidents during Mrs. Greene's years there — John London in 1910, Red Clark in 1968, and Bibb Allen in 1978 — so she has been closely involved with the workings of the association over the years. Mr. Clark, who frequently reminisces with Mrs. Greene, claims their firm to be unique in that they have their own historian — "who is pretty accurate!"

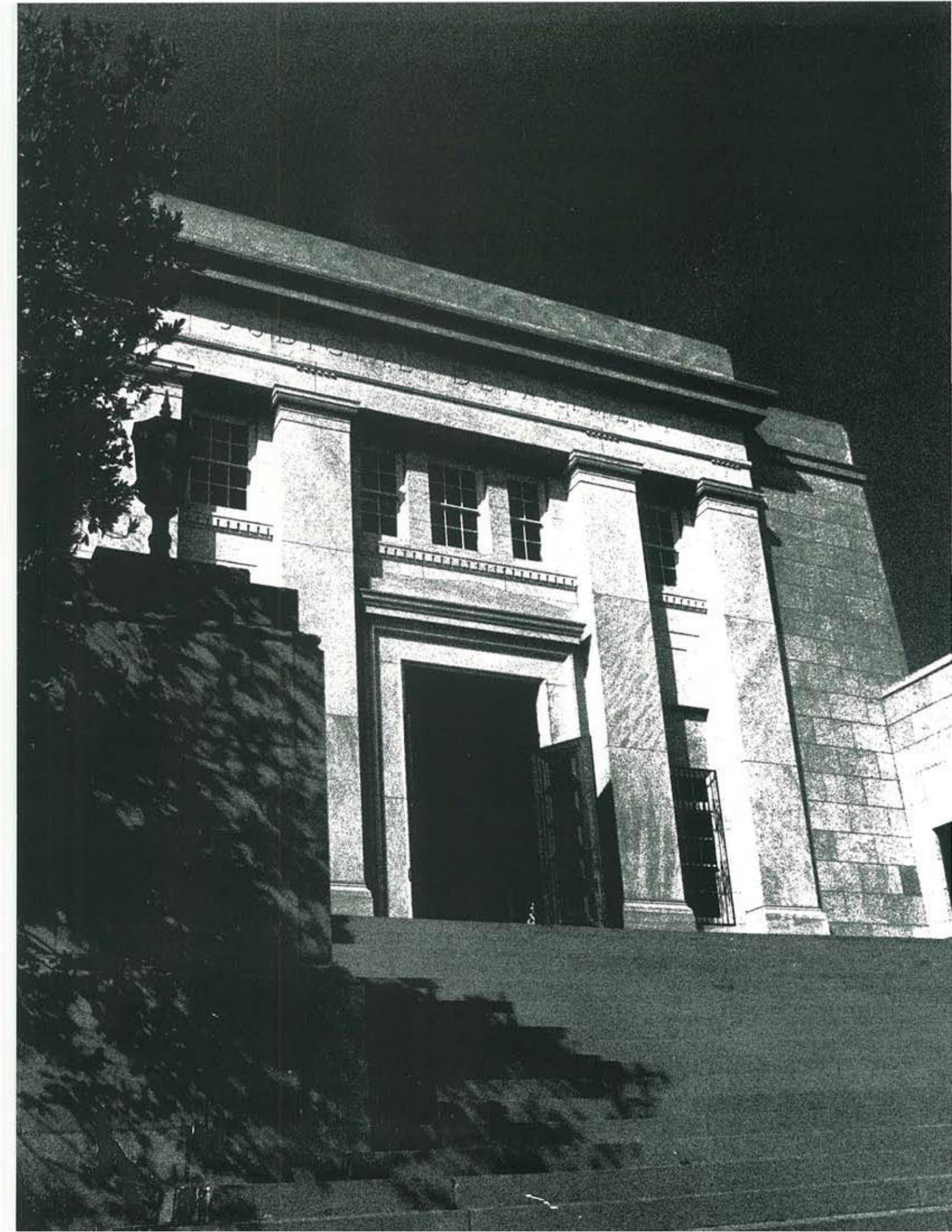
Mrs. Greene recalls the time when there weren't so many lawyers. The apparent oversupply of lawyers and more coming out of law school every year concerns her. "There are more of them and not enough places for them to go," she says. "But some young people are determined to be lawyers anyway. If a young person is a good lawyer, he can make a good living anyway."

Mrs. Greene says her duties as law office manager include being in charge of check writing and other detail work. Mr. Bibb Allen, a senior partner in the firm, says she still runs the law firm as if she were twenty years old.

"Ours is a rich heritage," says Mr. Clark, "and it is Mrs. Greene who has been the glue which has held us together. She is the most humane, outstanding individual I have ever known and we all love her so very much, and, would you believe it? — she loves us."



Senior partners Bibb Allen and Red Clark pose with Mrs. Olive Greene for a picture in the law office of London, Yancey, Clark & Allen overlooking Birmingham.



Recent Decisions

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

Recent Decisions of the Alabama Court of Civil Appeals

Domestic relations . . . professional degree not marital property

Jones v. Jones, Civil Appeals No. 4099 (April 25, 1984). In a case of first impression, the court of appeals declined to hold as a matter of law that a law (professional) degree earned by one after marriage, with the encouragement (even sacrifice) and financial assistance of the marriage partner, must be assessed at value and a portion of such value ordered paid to the assisting partner at the time of divorce. The court of appeals noted that there is a split of authority among the jurisdictions which have considered this issue.

Truth-in-lending . . . debtor represented by legal aid attorney entitled to an attorney's fee

Ingram v. Cedar Springs Federal Credit Union, Civil Appeals No. 4096 (May 16, 1984). The plaintiff sued to recover on a promissory note, and the defendant/debtor counterclaimed alleging that the plaintiff violated the Truth-in-Lending Act (TILA). The court found in favor of the defendant on the counterclaim, and the defendant moved for attorney's fees. The plaintiff con-

tended that since the defendant was represented by a legal aid attorney and was under no obligation to pay the attorney, the attorney was not entitled to an attorney's fee. The court of appeals disagreed, noting that a debtor cannot be denied an attorney's fee because his attorney is employed by a legal aid society, and an award of attorney's fees under the TILA is not contingent upon the party's obligation to pay an attorney nor effected by the fact that no fee was charged. Moreover, a denial of attorney's fees could have a chilling effect on the desire of legal aid societies to represent debtors in TILA cases.

Recent Decisions of the Alabama Court of Criminal Appeals

Hearsay cannot be the sole basis to revoke probation

Watkins v. State, 4th Div. 261 (April 10, 1984). The defendant appealed from the revocation of his probation. The Alabama Court of Criminal Appeals reversed and remanded the case noting:

"The record is totally devoid of any evidence other than hearsay concerning Watkins Georgia conviction. While the formal rules of evidence do not have to be strictly adhered to in a probation revocation hearing, *Armstrong v. State*, 294 Ala. 100, 312 So.2d 620 (1975); *Bullock v. State*, 392 So.2d 848 (Ala. Crim. App. 1980), 'Hearsay information may not be

used to furnish the sole basis of the revocation'."

Credit for pretrial confinement mandatory

Blake v. State, 3rd Div. 903 (April 10, 1984). The defendant entered a plea of guilty to the reduced charge of robbery in the second degree. The court sentenced the defendant under a split sentence to one year in prison and one year on probation. The court did not order the defendant credited with the time already served in jail awaiting disposition of his case.

The Alabama Court of Criminal Appeals, through Judge Sam Taylor, focused the issue as follows:

"The sole issue presented by appellant is whether the Court should have ordered that he be given credit for the time he was incarcerated before sentence. This question must be answered in the affirmative."

The Court of Appeals found the language in § 15-18-5, *Ala. Code* mandatory. The statute provides that:

"Upon conviction and imprisonment for any felony or misdemeanor, the sentencing court shall order that the convicted person be credited with all of his actual time spent incarcerated pending . . . trial for such offense." (emphasis ours)

Timely filing of the notice of appeal — a jurisdictional prerequisite

Yearby v. State, 6th Div. 469 (April 24, 1984). The defendant was indicted and convicted for child abuse. He was sentenced to nine years imprisonment. The judgment entry was dated January 28, 1984. A motion to reduce sentence was filed February 9th and denied February 24th. Notice of appeal was given March 15th, forty-seven (47) days after the judgment entry.

The court of appeals dismissed the defendant's appeal. The court specifically held that a "motion to reduce sentence" is not a "motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal" and does not expand the time limit for filing a notice of appeal. (emphasis ours)

Accordingly, defendant's appeal was

dismissed because the notice of appeal was not timely filed so as to invoke the jurisdiction of the appellate court.

A single act causing injury to multiple victims constitutes one criminal offense

Hampton v. State, 8th Div. 987 (May 22, 1984). The defendant, Pearl Hampton, was indicted for the first degree assault of police officer Compton Owens. A jury convicted him of assault in the second degree; the court sentenced the defendant to a ten-year split sentence. On appeal, Hampton argued that this conviction was barred under the principles of former jeopardy by a prior conviction involving a different victim because both victims were injured by the same shotgun blast.

At trial, the facts were without dispute that both officers Hancock and Owens were wounded by a single shotgun blast which went through the storm door of the residence. Hampton raised the issue of former jeopardy by a motion filed before arraignment. The trial court denied the motion.

The court of appeals reversed and held:

"In Alabama the courts have traditionally and consistently held that a single act resulting in death or injury to multiple victims constitutes a single criminal offense." See *Kilpatrick v. State*, 257 Ala. 316, 318, 59 So.2d 61 (1952).

Accordingly, even though three people were wounded by the single shotgun blast, that act constitutes but a single offense under Alabama law. Hampton could only be legally prosecuted for one offense.

Recent Decisions of the Supreme Court of Alabama—Civil

Domestic relations/custody dispute . . .

***in camera* interview of a minor without a court reporter is error**

Ex parte: John Roger Wilson, Jr. (Wilson v. Wilson), 18 ABR 153 (April 6, 1984). During a divorce proceeding and

a custody dispute, the court held an *in camera* off-the-record interview with minor children. The father alleged that the court erred when it failed to comply with his request that a court reporter be present during the interview. The supreme court agreed with the father, noting that under *Ex parte: Berryhill*, 410 So.2d 416 (Ala. 1982), a trial court cannot conduct a private *in camera* interview with minor children in a custody dispute without the consent of the parties, and under Section 12-17-275, *Ala. Code* 1975, a party requesting a record is entitled to have the court reporter present. Therefore, it follows that a party giving consent for a private *in camera* interview attended by a court reporter has the right to have a record of the interview. The supreme court reasoned that if no record is made of the child's testimony in chambers, an appellate court would be unable to determine to what extent, if any, the trial court considered that testimony.

Section 6-5-440, Alabama Code 1975, abatement . . . federal suit abates state action

Draper & Son, Inc. v. Wheelabrator-Frye, Inc., 18 ABR 1605 (April 27, 1984). The plaintiff first filed suit in federal court asserting a federal claim and a pendant state unfair competition claim. The federal court dismissed the pendant state claim, and approximately twenty-seven (27) days later the plaintiff filed the unfair competition claim in state court. The defendant moved to dismiss the state court action on the grounds that the same action was pending in federal court, citing Section 6-5-440, *Ala. Code* 1975. The plaintiff attempted to circumvent Section 6-5-440 arguing that the state court action was filed *before* the federal appeal was filed. The supreme court did not find the plaintiff's argument persuasive, and noted that an action is deemed pending in federal court so long as a party's right to appeal has not yet been exhausted *or expired*. Here, the plaintiff filed the state court action *before* the thirty (30) days for appeal had expired, and, therefore, the state court suit was filed while the federal court action was still pending.

Civil procedure . . .

statute of limitations-rule 6(a), ARCP, has limited application

Jackson v. Daily, 18 ABR 1417 (March 30, 1984). The plaintiff was injured on March 21, 1982, but did not file suit until March 22, 1983. The plaintiff maintained that suit was timely filed because Rule 6(a), ARCP, provides that "the day of the act, event or default from which the designated period of time begins to run shall not be included;" therefore, the plaintiff says that the statute of limitations did not begin to run until March 22, 1982.

The supreme court disagreed as a matter of law, stating that in tort actions, such as this one, the statute of limitations begins to run from the *time of the injury*, i.e., March 21, 1982. The application of Rule 6(a) is limited to situations where the statute of limitations runs on a weekend or legal holiday. In such cases, Rule 6(a) would permit filing of suit on the next day which was not a weekend or a legal holiday. The rule does not postpone the time when the cause of action accrues.

Section 1983 action . . .

motion for attorneys fees does not render judgment on the merits interlocutory

City of Huntsville v. Certain, 18 ABR 1592 (April 20, 1984). The plaintiff, a former city employee, brought a civil rights claim under 42 U.S.C. Section 1983 against the city and the jury returned a verdict in the favor of the plaintiff. Following entry of the judgment on the merits, the plaintiff filed a motion for attorneys fees pursuant to 42 U.S.C. Section 1988, which allows the prevailing plaintiff to recover his "attorneys fees as part of the costs." This motion was outstanding when the city filed its notice of appeal, but an award of attorneys fees had not been made until six (6) days after the appeal was taken. The plaintiff moved to dismiss the appeal, arguing that the appeal was not from a final judgment since *all* matters had not been adjudicated when the appeal was taken.

The supreme court disagreed, stating that recent federal authorities hold

that a request for attorneys fees is simply a motion for costs and noting that it is well settled that costs may be taxed after a notice of appeal has been filed. Therefore, an outstanding motion for attorneys fees did not destroy the finality of the judgment on the merits.

Physician/patient relationship... patient may waive his right to insist on confidentiality

Mull v. String, 18 ABR 1346 (March 16, 1984). In a case of first impression, the supreme court recognized an exception to the physician's duty of nondisclosure of information obtained by the physician from the patient during the course of the physician/patient relationship. The supreme court held that when a patient sues a defendant, other than the physician, the patient waives the right to insist on the nondisclosure of legally discoverable information by the defendant in that litigation. In this case, the plaintiff sued a hospital for malpractice, and Dr. String, the treating physician, sent a copy of his letter report to the hospital and its attorney.

The plaintiff contended that the doctor breached a fiduciary duty by making this unauthorized disclosure. The supreme court noted that the absence of a statutory physician/patient testimonial privilege evidenced a legislative intent to uphold the public's interest in full disclosure to obtain a just disposition of the case. The court reasoned that when the plaintiff filed suit, he effectively relegated his own privacy interest in nondisclosure in favor of the public's interest in full disclosure.

Recent Decisions of the Supreme Court of the United States

Scope of 18 U.S.C. 1001 expanded

United States v. Rodgers, 52 USLW 4510 (April 30, 1984). The defendant was charged in a two count indictment with making "false, fictitious or fraudulent statements" to the Federal Bureau of Investigation (FBI) and the United States Secret Service in violation of 18 U.S.C. §1001. The defendant

allegedly lied in telling the FBI that his wife had been kidnapped and in telling the Secret Service that his wife was involved in a plot to kill the President.

At trial, the defendant moved to dismiss the indictment for failure to state an offense on the grounds that the investigation of kidnappings and the protection of the President are not matters "within the jurisdiction" of the respective agencies as that phrase is used in §1001. The district court granted the motion and the United States Court of Appeals for the Eighth Circuit affirmed. The Supreme Court, through Justice Rehnquist, reversed and expanded the scope of 18 U.S.C. §1001.

The Court held that the language of §1001 clearly encompassed criminal investigations conducted by the FBI and Secret Service. Justice Rehnquist noted that nothing in the legislative history indicated that Congress intended a more restrictive reach for the statute. The Court noted that a criminal investigation surely falls within the meaning of "any matter" and that the FBI and Secret Service qualify as "departments or agencies of the United States." The most natural, nontechnical meaning of "jurisdiction" within the meaning of §1001 is that it covers all matters confided to the authority of an agency or department. Understood in this way, the statutory phrase "within the jurisdiction" merely differentiates the official, authorized function of an agency or department from matters peripheral to business.

Sixth amendment right to public trial extends to pretrial suppression hearings

Waller v. Georgia, 52 USLW 4618 (May 21, 1984). After court authorized wire taps of telephones by Georgia police revealed a large lottery operation, police officers executed search warrants at numerous locations, including the defendants' homes. The defendant, Waller, and others were indicted for violating the Georgia Racketeer Influenced and Corrupt Organization (RICO) Act and other state gambling statutes. Prior to trial, the defendants moved to suppress the wiretaps and evidence seized during the searches. The state

moved to close the suppression hearing to the public, alleging that unnecessary "publication" of information obtained under the wiretaps would render the information inadmissible as evidence, and that the wiretap evidence would "involve" the privacy interests of some of the persons who were indicted but were not then on trial. The trial court agreed and closed the suppression hearing. The Georgia Supreme Court affirmed. On certiorari the Supreme Court of the United States reversed and remanded.

The Supreme Court held that under the Sixth Amendment any closure of a suppression hearing over the objection of counsel must meet the following tests: the party seeking to close the hearing must advance an *overriding* interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the hearing; and it must make findings adequate to support the closure.

In this case the closure of the entire suppression hearing was plainly unjustified. The state's proffer was not specific as to whose privacy interests might be infringed if the hearings were open to the public or what portions of the wiretaps might infringe those interests. As a result, the Supreme Court found that the trial court's findings were overbroad and did not purport to justify closure of the entire hearing.

The Supreme Court remanded the case to the state court to decide what portions, if any, of a new suppression hearing may be closed to the public in light of conditions at the time of that hearing. The Supreme Court noted that a new trial need be held only if a new public suppression hearing results in the suppression of material evidence not suppressed at the first trial or in some other material change in the position of the parties.

Sixth amendment right to counsel — the *Burger* standard revised?

United States v. Cronin, 52 USLW 4560 (May 14, 1984) and *Strickland v. Washington*, 52 USLW 4565 (May 14,

1984). The Supreme Court of the United States in two cases, *Cronic* and *Washington*, redefined what is "effective assistance of counsel" within the meaning of the Sixth Amendment. In reading these cases, it is difficult to "square" Chief Justice Burger's comments regarding the competency of American trial lawyers with the standard set herein for effectiveness of counsel within the meaning of the Sixth Amendment.

The Supreme Court in *Cronic* held:

"[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel' acting in the role of an advocate," *Anders v. California*, 386 U.S. 738, 743 (1967). "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors — the kind of testing envisioned by the Sixth Amendment has occurred.

...

Similarly, if counsel fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of the Sixth Amendment rights that makes the adversary process itself presumptively unreliable."

In the *Washington* case, the Supreme Court further defined the Sixth Amendment right to counsel by holding that the bench mark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

What is troublesome about the *Washington* standard is the burden placed upon the defendant to make the required showing of prejudice. The Court, speaking through Justice O'Connor, held that with regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

It is this writer's opinion that these cases erode the standard for prejudice enunciated in *Davis v. Alaska*, 415 U.S. 308 (1974).

Open fields doctrine reaffirmed

Oliver v. United States, 52 USLW 4425 (April 17, 1984). Acting on reports that marijuana was being raised on the defendant's farm, Kentucky narcotics agents went to the farm to investigate. When they arrived at the farm, the agents drove past the defendant's house to a locked gate with a "No Trespassing" sign, but with a footpath around one side. The agents then walked around the gate and along the road. They found a field of marijuana over a mile from the defendant's house. The defendant was arrested and indicted for manufacturing a controlled substance in violation of the federal statute. After a pretrial hearing, the district court suppressed the evidence applying *Katz v. United States*, 389 U.S. 347, thereby holding that the defendant had a reasonable expectation that the fields would remain private and that these were not "open fields" that invited casual intrusion.

The Court, speaking through Justice Powell, held that the "open fields" doctrine was founded upon the explicit language of the Fourth Amendment, whose special protection accorded to "persons, houses, papers and effects" did not extend to open fields. Specifically, open fields were not deemed to be "effects" within the meaning of the Fourth Amendment; the term "effects" being less inclusive than "property" did not encompass open fields. Hence the Kentucky state police's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Fourth Amendment. Interestingly, the Court noted that the steps taken to protect privacies, such as planting the

marijuana on secluded land and erecting fences and no trespassing signs around the property, did not establish the expectation of privacy in an open field in the sense required by the Fourth Amendment.

Fruits of a private search . . . a different kind of silver platter

United States v. Jacobsen, 52 USLW 4414 (April 2, 1984). The Supreme Court held in this decision that there was no violation of the Fourth Amendment when a federal agent, acting without a warrant, tested the contents of a package containing narcotics that previously had been opened by employees of a private freight carrier. The package was opened for insurance purposes by employees of the Federal Express Company after it had been damaged in transit. It contained a white powder, and the employees called an agent of the Drug Enforcement Administration who tested the contents and determined the powder to be cocaine. The package was resealed and other agents obtained a warrant to search the premises to which it was addressed.

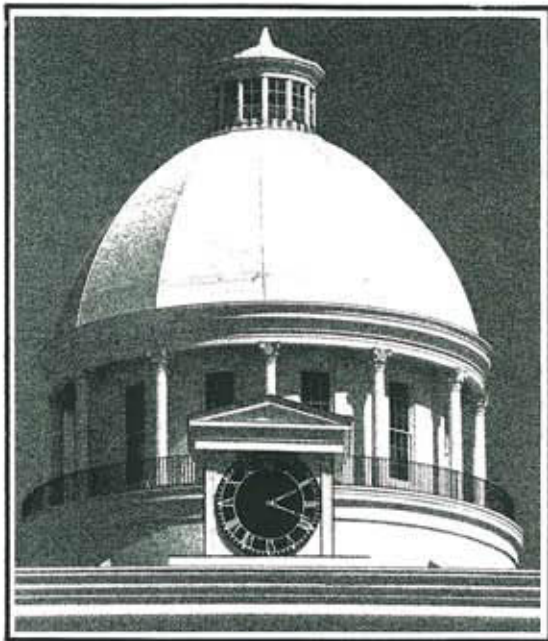
Speaking through Justice Stevens, the Supreme Court reversed and held that the Fourth Amendment protection applies only to searches and seizures by the government and not by private individuals, whether reasonable or not. Justice Stevens further reasoned that "once the original expectation or privacy has been frustrated by private individuals, the Fourth Amendment does not prevent the government from using the 'now nonprivate information' in a subsequent prosecution." □



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



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



LEGISLATIVE WRAP-UP

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

Legislature Adopts Institute Bills

The Alabama Legislature unanimously approved and the governor signed into law the Nonprofit Corporation Act and amendments to the Probate law. The Nonprofit Corporation Act will become effective January 1, 1985, while the Probate amendments became effective May 7, 1984.

Nonprofit Corporation Act

The Nonprofit Corporation Act (Act No. 84-290) sponsored by Senator Ryan deGraffenried and Representatives Michael Onderdonk, Jim Campbell and Beth Marietta passed the Legislature without amendment. The revision was the work of a committee chaired by Mr. Yetta Samford of Opelika and Mr. L.B. Feld of Birmingham served as draftsman. Foreign as well as domestic nonprofit corporations are included under this Act. The formation and conduct of nonprofit corporations now will parallel that of business corporations whenever possible.

Amendments to Probate Law

Amendments to Chapter 2 of Title 43 of the Probate Law (Act 84-258) sponsored by Senator Jim Smith and Representatives John Tanner, Jim Campbell, Bill Fuller, Phil Poole, Beth Marietta, Michael Onderdonk and Michael Box passed both Houses without amendment. The amendments were necessary to conform probate practice and procedure with the new "Probate Code." The amendments are to Sections 43-2-230, 43-2-231, 43-2-312, 43-2-313, 43-2-315, 43-2-316, 42-2-336, 43-2-412, 43-2-441, 43-2-442, 43-2-450, 43-2-510, 43-8-114, 43-8-132 and repeals Sections 43-2-314, 43-2-317, 43-2-449 and 43-2-466. Several of the amendments were to alleviate questions raised due to the removal of the distinction between real and personal property. Another was to remove reference to dower now that dower has been abolished.

These amendments were the recommendation of the Probate Revision Committee of the Alabama Law Institute which is chaired by Mr. E.T. Brown of Birmingham. Professor Tom Jones of the Alabama School of Law was the draftsman.

Bar Bills Die With Early Adjournment

The Regular Session of the 1983 Alabama Legislature came to an unusual conclusion on May 21, 1984. At 5:45 p.m., the Senate voted 17-12 to adjourn sine die. Most observers could not remember a session that didn't last until midnight of the final day. This year the thirtieth day ended before dark.

When the Senate adjourned it ended hopes for H.B. 146 by Representatives Jim Campbell of Anniston and Beth Marietta of Mobile. The bill, if it had passed, would have raised license fees and removed the two year exemption presently existing. The bar now faces the prospect of at least a year of deficit funding. The bill was handled in the Senate by Montgomery lawyer Charles Langford.

Other Legislative Actions

Minimum Limits Sparks Most Controversy

The bill that caused the most controversy for lawyers during this session was sponsored by the Alabama Trial Lawyers and was commonly referred to as the "minimum limits" bill. A compromise version ultimately passed and bears Act No. 84-301. The final version amends *Code of Alabama*, 1975, § 34-7-6 to require minimum limits of liability coverage, under the Motor Vehicle Safety-Responsibility Act, of \$20,000 for one injury, \$40,000 for two or more

injuries, and property limits of \$10,000. This does not mandate insurance coverage prior to the issuance of a license or tag, rather the act relates to suspension if coverage does not exist and an accident occurs.

Family Practice Bills

Two measures passed this session that may have significant effect on matters before our juvenile and domestic courts. Act No. 84-261, the 1984 Child Protection Law establishes standards by which juvenile court judges may determine whether parental rights of irresponsible parents may be terminated. It provides for the procedures to be followed in such cases and for periodic review. The act was sponsored by lawyer/Senator Jim Smith of Huntsville.

Also of significant importance is S.B. 86 which provides for court ordered continuing income withholding by employers as a means of child support enforcement. The bill provides that such an order may be entered on post judgment proceedings. It also provides that such orders shall have priority over any notice of garnishment served upon any employer of the obligor. Employers who willfully fail or refuse to withhold or pay amounts withheld may be held in contempt and may be held personally liable to the obligee for failure to withhold. The Senate sponsor of this bill was Cullman attorney Steve Cooley. As of this writing it had yet to be assigned an Act number.

New Trade Secrets Theft Act

An interesting criminal statute passed this session. Act No. 84-278 makes it a Class C felony to steal a trade secret, to make a copy of an article representing a trade secret, communicate or transmit a trade secret, make a copy or reproduction of a trademark for any commercial purpose, or sell an article on which a trademark is reproduced knowing the trademark was used without the owner's consent.

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



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



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The Pros and Cons of Rehabilitation

Some Guidelines from Personal Experience

by Robert R. Kracke

For all of the headaches that encompass a renovation project, from the planning stages to occupancy and beyond, April 15th of each year makes it all worthwhile. The IRS has allowed and is still extending for your benefit deductions and credits rendering rehabilitation of old structures extremely attractive.

Preparation

First, get out your office lease and examine your expiration date and notice requirements. Then try to coordinate your estimated time of construction with the expiration of your lease

and, whatever a contractor tells you about the length of time of construction, add three months to it.

Location

Many considerations enter into location of an office for the practice of law. As the realtors and bankers say, there are only three requirements to starting a successful business: location, location and location. The address of your location should be an easily recognizable one so that you might direct clients to a street address or avenue with which most residents of your locale are familiar. A location at or near a well-

traveled thoroughfare is a simple solution, and there are some lawyers who not only display their patriotism but identify their location with a flagpole and a large American flag (or other distinctive features) so as to direct clients easily to them. Also, secure the services of a good real estate agent who is familiar with property values and take into consideration the crime factor for the sake of the safety of your personnel who must leave the office in the dark winter hours. Then begin your time and motion studies to the Courthouse to ascertain how much of your valuable time will be utilized in



getting there and back. Parking requirements at your proposed office site are an absolute must and, if you cannot make space on the property you have selected for adequate parking, there must be sufficient "on street" parking to meet your requirements (Some city codes require a minimum number of spaces for off-street parking in relation to the number of square footage proposed). So far as real estate clients are concerned lawyers are "a dime a dozen," and agents are interested in convenience and accessibility for their closings. Also, consider whether or not your proposed property site is a coming location or a deteriorating one, and consult an appraiser, if necessary; then find an architect for a site study.

Architect

Choose an architect who is familiar with the federal guidelines so that you won't lose accelerated depreciation advantages by the changing of the exterior facade to a degree that is not acceptable by the Internal Revenue Ser-



Robert R. Kracke, a partner in the law firm of Kracke, Thompson & Ellis, is a graduate of Samford University and the Cumberland School of Law. He is editor of the Birmingham Bar Bulletin and serves on the Board of Editors of The Alabama Lawyer.

vice. Also choose an architect whose attitude of style is compatible with your own tastes in building design. Ask to examine other structures he has designed. Then ask him to do a rendering of the possibilities of rehabilitation or renovation and a preliminary study of floor plan changes that will be necessary to meet Building Code requirements for number of bathrooms, etc. This writer rejected two different architectural styles before a cost-effective one was achieved. A pure Georgian style was first rejected, a pure Italian Renaissance style was next rejected and finally replaced with a modified Italian Renaissance style that was more cost-effective as to exterior

“Hire an interior decorator immediately and avoid fist fights with your partners . . . and most importantly, do not get spouses involved in the decision making process.”

construction. Remind your architect from time to time that one of your primary objectives is to save money on construction costs and keep the price per square foot as low as possible, otherwise you'd just as well build a new building with a commercial architect. Remember, most architects are compensated by cost of construction. Another alternative is to agree on a fixed fee in advance.

Engineer

Obtain the services of a qualified structural engineer, pay him a fee and ask him to inspect the foundation and give you an opinion as to the soundness of the structure and make recommendations to you as to where support should be shored up after you have decided where your law library will be placed and where the abundance of file cabinets will be located, both of which will present weight/

stress problems for your structure. Then follow his recommendations; otherwise, you have not taken advantage of his malpractice coverage if a catastrophe occurs.

Zoning

Next check all zoning and variance requirements. This writer discovered that his proposed project was in a conflagration district and required a variance even though the property was already zoned for business. The variance hearing and its certification required a wasted thirty days since a building permit cannot be issued until the architect's plans and the variance requirements have been satisfied and approved by the Building Inspection Department.

Historical District

Check and ascertain whether or not your proposed site is located in an historical district and explore the possibility of declaring the location of your site an historical district by contacting the Department of Interior for placement on the National Register of Historical Sites.

Fire Marshal

The Fire Marshal will have a say-so in the construction requirements of your building. He can require that the stairway have fire doors and that fire extinguishers be placed throughout your building. More on this subject later.

Design for Tenants

Keep in mind that part of your building might need to be rented to tenants who are not in the legal profession who might need security separate and apart from your law practice. There are ethical considerations in keeping your files confidential which you should check into before accepting a nonlawyer tenant in the same building in which you are located. It is a simple matter for a locksmith to make a master key for the building which will only be in the possession of the owner of the building (the lawyer) and a separate system of locks for the tenants of the building. The tenants will then be given keys which are not accessible to the lawyer's office.



Contractor

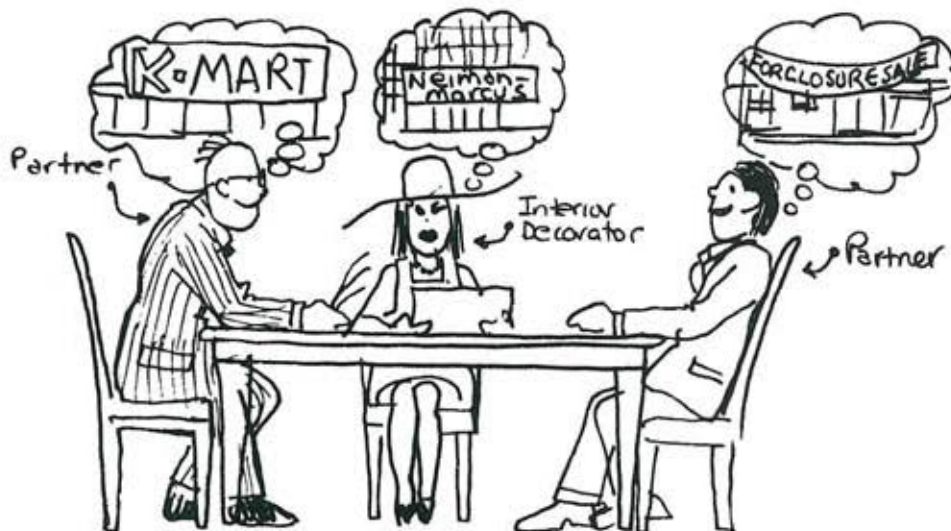
Decide at the outset whether or not you want to be owner/contractor or whether you wish to hire a contractor who will of necessity have bonding requirements with the state of Alabama. If you are the owner/contractor, there will be no bonding requirements and you can subcontract the premises yourself for electrical, plumbing, carpentry, roofing, etc. As owner/contractor, be prepared to be on the site at 6:30 every morning or hire a straw boss to take care of these details for you.

Photographs

Take photographs in both black and white and color of the purchased structure in its original state. This will benefit you not only in establishing the appearance of the structure for accelerated depreciation requirements, but will also provide dramatic before and after proof of the improvements you have made for the benefit of visitors to your building after completion. Then have the photographs enlarged and display them prominently in your finished building.

Building Inspection

From time to time, a general building inspection will be done by the Building Inspection Department of the city in which you are located as well as a plumbing and electrical and final inspection. This is mentioned because permanent electrical power cannot usually be obtained for a building without a final inspection by the Inspection



Illustrations by Dennis R. Bailey

Department of your city and the issuance by them of a Certificate of Occupancy.

Construction

Prepare yourself for a few surprises as you proceed through the construction process. This writer experienced the loss of a sewer line in the parking lot while bulldozing was being done prior to asphalt topping. The bulldozer operator inadvertently dug up the sewer line; the location of the sewer line was lost as to where it entered the property; the records of the city were not in existence when the structure was built; and a plumber was hired at a cost of \$750 to locate the sewer line entry to the property from the trunkline. Additionally, the architect made no plans for a fire escape on the rear of the building and a \$6,000 surprise resulted in the required construction of a metal fire escape (See **Fire Marshal** above).

Interior Decoration

Hire an interior decorator immediately and avoid fist fights with your partners. Finally and most importantly, do not get spouses involved in the decision making process. The interior decorator's services, if obtained through a carpeting or wallpaper concern, are usually free in that he or she is paid a commission on the sale of the carpeting, wallpaper, paint, etc. Therefore, the interior decorator will be no expense to you, will save you time, trouble, energy, and contention, and will make a preliminary presentation to

you (usually) of color-coordinated items for the entire building. Follow his or her recommendations. This writer detested a suggested pattern of carpeting for the hallways which was busy, busy. The recommended carpet choice by the interior decorator, however, in the final analysis was correct. The carpet after eight years of heavy use shows virtually no dirt or wear and tear. The added expense of vinyl wallpaper in public areas and hallways is highly recommended. It is longer lasting and requires virtually no maintenance. Also, consider placing your law library in the hallways or waiting room of your building as a space-saving device. It also impresses upon the client the investment you have made when he evaluates the costs of the services you are rendering him.

Recognition

Recognition for the cost and uncertainty experienced in the rehabilitation or renovation of a building does not automatically become bestowed upon you. You must usually seek it out. If you don't file an application for a beautification award with the Birmingham Beautification Board, you will not receive one. If you do not file an application with the Jefferson County Historical Society for recognition of your building as an historical one, you will not get it. If you do not file an application with the Department of Interior for recognition of your structure as an historical structure, you will not get it.

Conclusion

After all the heartaches, disappointments, wrangling, and expense, when you walk into that finished building, believe me, you'll be as proud as a plaintiff's lawyer with a million dollar verdict. The public recognition that comes your way is unbounded. You are considered a public-spirited citizen for preserving an historical structure worthy of preservation. And finally, and most importantly, your investment will appreciate in value as time goes on and, as opposed to the tenant in the downtown building after ten years, you'll have something to show for the "rent" you are paying to the mortgage company. The tax advantages have already been alluded to; however, it should be mentioned that a new concept and yet another tax advantage has come to the forefront. This writer has been informed that in the Charleston and Savannah areas, the dedication of the facade of your building (usually only the front) by deed to the federal government will give you yet another tax writeoff. You must agree that the facade will not be changed or there will be a recapture of the deduction. Certain problems are attendant to this dedication and transfer such as title and surveying questions. However, this writer has been told that it's worth your investigation.

All in all, the rehabilitation/renovation project is one worthy of pursuit. The rewards in property value appreciation, tax savings and aesthetic advantages to your law practice are worth the expense and uncertainty. Try it — you'll like it! □

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Renovations Running Rampant

by Jen Nowell

In the May issue of *The Alabama Lawyer* several law office "rehabilitations" across the state were featured as part of a two-part article on the preservation of old buildings. We left you on the corner of Adams Avenue and Perry Street in the heart of beautiful downtown Montgomery, so we'll pick you up there, and then visit the city that can certainly claim the crown in historic preservation — Mobile.

In early 1979, the Montgomery Historic Development Commission presented a seminar at the Montgomery Civic Center entitled "The Past can be Profitable." As you might have guessed, most attending were interested in and committed to historic preservation in the city. In addition to the public at large, representatives from various professions who would benefit from the information of their associates — lawyers, accountants, architects, bankers, investors, realtors and other design and construction professionals — all turned out to hear about and discuss the pitfalls and the windfalls of the preservation effort.

Upon leaving the Civic Center those who attended the seminar came face to face with probably the most noted area of rehabilitation in recent years in Montgomery — the Commerce Street Historic District. At that time in 1979,



Robert Edington

restoration of those structures along lower Commerce Street had just begun.

Directly across from the Civic Center, reconstruction was under way for what would soon be the law offices of **Rushton, Stakely, Johnston & Garrett**. Built in 1891, this structure, known as the Steiner & Lobman Building, like many of the other buildings along Commerce Street, was used as a warehouse — this one in particular, for the storage and wholesaling of dry goods. Unique to the Steiner & Lobman Building is its exterior facade ornamentation — atop the building is a



Rushton, Stakely, Johnston & Garrett casket and, also, a statue which was replaced during the building's rehabilitation, after being missing for several years.

Although this law firm was the first to make the Commerce Street move, others, more recently, have restored beautiful old buildings, which has helped to revitalize this portion of the city. Those attending the State Bar's Midyear Meeting had the opportunity to visit these other firms — **Robison & Belser; Webb, Crumpton & McGregor**; and, at the end of Commerce Street, overlooking the Alabama River, the law firm of **Jones, Murray, Stewart & Yarbrough**.

In another effort to make ties with the past, the city of Montgomery, which



Donald M. Briskman

claims the first city-wide system of electric-powered trolley cars in the nation, plans on bringing these rail cars back by 1986, the 100th anniversary of Montgomery's trolley-car system. The proposed route could take members of these law firms from their front door to the Judicial Building, State Bar Headquarters, or even to the Capitol and back.

When you speak of renovation, restoration, rehabilitation, and other terms frequently associated with the adaptive reuse of older structures, many Mobilians may think of attorney **Robert Edington** and his wife, Pat, who have been in the forefront of the "preservationist movement" in the city. In 1977 they restored, and are presently living in, the Bishop Portier House in the Oakleigh Garden District. In 1980 when they decided they needed offices, he for his law office and she in her capacity as an appraiser of antiques and silver, they went shopping in the Church Street East District, an older section near downtown Mobile that has become very popular in recent years.

The structure they selected, located at 551 Church Street, was built in 1848 for sea captain Joseph Clemmons who came to Mobile from New England to be captain of the Port and to head the Association of Harbor and Bar Pilots. In renovating the building, the Edingtons were careful to preserve as much of the original character of the house as possible — and this care extends to the interior as well.



Beth Marietta

Another Church Street law office which has been "rehabilitated" is that

structure built in 1905 is a late example of the type of workman's cottage which sprang up all over the city of Mobile immediately following the Civil War and the invention of the jigsaw, sometimes known as a scroll saw. These two events were significant because former slaves became free men capable of having independent housing and because many of them were carpenters, thus they could combine their skills with the new jigsaw to create small adorned shotguns and cottages. Wood was used instead of brick because it was cheaper. Although this particular house was not built by free blacks, it is architecturally indicative



Wilkins and Druhan

of **Donald M. Briskman**. "Rehabilitation" here takes on a second meaning since this structure was purchased by Mr. Briskman in November of 1979, two months after Hurricane Frederic struck the port city, during which the building sustained significant damage to the roof and interior walls and floors. Prior to its acquisition by Mr. Briskman, the building had been used as a boarding house since World War II. Originally the building was constructed in 1844 as the residence of Daniel Chandler, who was a law partner to John Campbell who later became a United States Supreme Court Justice.

Nearby, at 204 South Cedar Street, is the law office of attorney and state representative **Beth Marietta**. This

of the stylistic and social process that resulted in the development of the decorated shotgun.

An early preservation effort in Mobile was made in 1965, when the Hannah Houses were restored for the law firm of **Wilkins and Druhan**. The Hannah Houses, built in 1833, derived their name from Mobile businessman James R. Roberts and his wife, Hannah. Under the supervision of the Mobile Historic Development Commission, the Hannah Houses were the first homes restored in the DeTonti Square area in downtown Mobile. Although they are now joined by a connecting wall, the architecture exemplifies the Gulf Coast version of the detached townhouses. The three-story houses



Stout & Roebuck

are Mobile's only remaining, Federal Period, mirror image houses. The enhanced craftsmanship of bygone times and the elaborateness lavished on both interior and exterior detail, give the houses quite a distinct character.

At Number One South Royal Street is a four story commercial building built in 1891. In October 1983, the law firm of **Stout & Roebuck** moved into the top two floors of The Pincus Building. This structure is one of Mobile's most notable commercial buildings dating from the late Victorian period. Its design includes a great variety of decorative elements drawn from classical and medieval sources. Originally, atop the center corner of the building, on Dauphin and Royal streets, was a round tower with a conical roof which was later removed leaving the truncated appearance. This building was recently placed on the National Register of Historic Places.

Another Royal Street law office — 62 North Royal Street to be exact — is that of **Diamond & Flynn**. The rehabilitation of this one hundred plus year old structure was started in May



Diamond & Flynn



Street upon arriving in Mobile via Bankhead Tunnel. The Mobile landmark, known locally for many years as The LaClede Hotel, is actually three separate Federal style buildings constructed over a ten-year span commencing in 1856. The LaClede Building at 150 Government Street now houses, on the second and part of the third floor, the law offices for the law firm of **Coale, Helmsing, Lyons & Sims**.



Drinkard and Sherling



THE LA CLEDE BUILDING

LeVert Office was erected during the period 1856-1859 as a medical office for Dr. Henry Strachey LeVert. It boasts some of the finest old brick work remaining in Mobile.

The law firm of **Drinkard and Sherling** at 1070 Government Boulevard, is in the former home of Mr. Henry Piser which was built in 1903. The Mobile Commercial Register, dated September 1, 1903, refers to this structure as "a modern mansion having every latter-day requisite for the comfort and convenience of its occupants . . . the home of Mr. Piser is one of the most substantially constructed in the city and stands out prominently among the many fine residences adorning the west of Government Street." Mobile attorney Vaughn Drinkard, Jr., acquired the property in 1976 from his grandfather, Cliff Harris, who had purchased the residence in 1942 from Mr. Piser, the original owner. Major renovations took place in the summer of 1983.

Another Government Street law office is that of **Lawrence J. Hallett, Jr.** The property where this present structure is located was purchased in



Lawrence J. Hallett, Jr.

1983 and completed in November of the same year. Although the history of the building is fairly vague, it for many years housed the Western Union office and, for a short time, was used by the Legal Aid Office which was at the time operated by the Mobile County Bar Association. The building originally had a third story, but no one recalls why or

Nearby, at 204 South Cedar Street, when it was removed.

The law office of **E. Graham Gibbons** at 1006 Dauphin Street is another rehabilitation effort near downtown Mobile. Upon completion of renovation of this structure, built in 1858, the house received the Mobile Historical Commission shield and plaque. Being located within the Old Dauphinway Historical District, the house also received the beautification award.

Visitors to Mobile may recall a wrought iron balcony encircling the second floor of a three story building on the right-hand side of Government



E. Graham Gibbons

The renovation of the LaClede was faithful to the original design, and adaptation from use as a hotel to a law office was a remarkably easy transition. Left intact is the 260 foot expanse of iron lace supported by cast iron posts and adorning a gallery punctuated by copper lanterns. A central



Mobile Bar Association

courtyard, visible only from the interior of the building, completes the suggestion of the flavor of the French Quarter. Many of Mobile's Mardi Gras parades pass under the balcony on Government Street, just as they have done for decades.

Across the street from the LaClede Building is another very important historical structure in Mobile. The LeVert Office, located at 153 Government Street, has been a hall of service to Mobile, first as a medical office and, since March 1982, as the headquarters of the **Mobile Bar Association**. The

1821 by Larry Hallett's great, great, great, great grandfather, William Hallett. At the time there was a wood frame structure on the property. In 1858 the present structure at 503 Government Street was built and given to grandson William as a wedding gift.

The house is built in the Federal style and there is a courtyard in the back with a fountain as well as a carriage house. Some of the original furnishings are still in the house including the six foot by three foot brass chandeliers and two fourteen foot mirrors.

The Hallett House, which has served as a home for the Halletts through the



Miller, Hamilton, Snider & Odom

years, and now is Larry Hallett's law office, was one of the first Mobile homes to be placed on the National Register of Historic Places.

A fascinating Mobile law office rehabilitation project, that has received much notoriety since its completion in early 1983, is the structure that houses the law offices of **Miller, Hamilton, Snider & Odom**. The Frazer House, a balconied two-story dwelling built in 1856, is located at 256 State Street. The structure lived a rather placid existence for 123 years, until it had a bout in 1979 with Hurricane Frederic. The hurricane uprooted a front yard oak tree which hit the front chimney and crashed through the front gallery. The house, which was for sale at the time, was purchased by the present owners that same year, and the revitalization started in May of 1982.

The Frazer House was built by C.W. Butt, a commission merchant and the son of a noted Mobile architect. Dr.

T.L. Frazer, a newcomer to Mobile, bought the home in 1897 in the middle of the city's last yellow fever epidemic, ignoring advice of friends who warned Mobile would never be a healthy place to settle. His daughter, Miss Alice Frazer, owned the structure at the time it was acquired by Miller, Hamilton, Snider & Odom.

During the restoration, a new wing was added in the back, creating a courtyard capable of hosting hundreds. As required by historical preservation tax laws, the same building techniques as on the old parts of the home were used on the addition of the building.

Restorations are running rampant, and it's great to see that lawyers are the leaders in rehabilitating these old, historic structures for "adaptive reuse." For all the endless hours of time and

effort put into preservation of a building, would most lawyers do it again? You bet they would. In fact, now that Miller, Hamilton, Snider & Odom have completed renovation of the Frazer House, they have bought the house next door to begin working on. Some folks just can't get enough. □



Jen Nowell, a graduate of Auburn University at Montgomery, is publications director of the Alabama State Bar and serves as managing editor of *The Alabama Lawyer*.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

ORDER

It is ORDERED that the local rules of the United States District Court for the Middle District of Alabama be amended to include:

Rule 15 Non-Filing of Civil Discovery

Unless the Court directs otherwise, in all civil actions other than inmate complaints challenging the conditions of confinement:

- A. Interrogatories, requests for production, requests for admissions and responses thereto, and notices of depositions shall be served in accordance with Rule 5(b), FED.R.CIV.P., but shall not be filed with the Clerk except upon order of the Court or for use at trial or in connection with motions. The party responsible for service of the discovery material shall retain the original and become custodian.
- B. No depositions shall be filed with the Clerk unless the Court directs otherwise, or unless in support of or in opposition to a motion. Counsel who notices a deposition shall be the custodian of the deposition and shall maintain the original for filing if the Court so directs.
- C. If discovery materials are germane to any motion or response, only the relevant material need be filed with the motion or response.
- D. During the pendency of any case the custodian of any discovery material shall provide to counsel for all other parties reasonable access to the material and an opportunity to duplicate the material at the expense of the copying party, and any other person may, with leave of Court, obtain a copy of any discovery material from its custodian upon payment of the expense of the copy.
- E. When documentation of discovery not previously in the record is needed for appeal purposes, upon an application and order of the Court, or by stipulation of counsel, the necessary discovery papers shall be filed with the Clerk.
- F. Any discovery material, depositions and trial exhibits filed with the Clerk will be disposed of by the Clerk sixty days following the final disposition of the action, unless earlier withdrawn.

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Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

(1) "May an attorney accept a check for deposit in the attorney's trust account, other than a certified check or a cashier's check, and, before it has been paid by the drawee bank, disburse the funds by check drawn on the attorney's trust account?"

QUESTION:

(2) "May an attorney accept a check representing trust funds for deposit in the attorney's personal account, other than a certified check or a cashier's check, and before it has been paid by the drawee bank, disburse the funds by a check drawn on the attorney's personal account?"

ANSWER QUESTION 1:

For an attorney to accept a check for deposit in the attorney's trust account, other than a certified check or a cashier's check, and, before it has been paid by the drawee bank, disburse the funds by check drawn on the attorney's trust account would constitute a misappropriation of the funds of some other client or clients in violation of DR 9-102(B) (4).

ANSWER QUESTION 2:

For an attorney to accept a check representing trust funds for deposit in the attorney's personal account would constitute a comingling of funds in violation of DR 9-102, and for an attorney to accept a check for deposit in a trust account or in a personal account, other than a certified check or a cashier's check, and before it has been paid by the drawee bank, disburse the funds by a check drawn on the attorney's personal account would cause the attorney to acquire a proprietary interest in the subject matter of potential litigation in violation of DR 5-103(A).

DISCUSSION:

Disciplinary Rule 9-102(A) provides:

"All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved."

Disciplinary Rule 9-102(B) (4) provides:

"A lawyer shall:

(4) Not misappropriate the funds of his client, either by failing promptly to pay over money collected by him for his client or by appropriating to his own use funds entrusted to his keeping."

Disciplinary Rule 5-103(A) in pertinent part provides:

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

A Disciplinary Rule of the Florida State Bar is more specific than the above-quoted Disciplinary Rules of the Code of Professional Responsibility of the Alabama State Bar. This Rule provides:

11.02 (4) "Trust funds and fees.

Money or other property entrusted to an attorney for a specific purpose, including advances

for costs and expenses, is held in trust and must be applied only to that purpose."

This Rule has been interpreted by many of the attorneys in Florida to mean that until checks have cleared, if a disbursement is made, the disbursement is made on funds of other clients.

In the case of *Matter of Makowski*, 73 N.J. 265, 374 A.2d 458 (1977), the Supreme Court of New Jersey held that an attorney had violated Disciplinary Rule 9-102 for, among other reasons, the attorney's habit of drawing checks on his

trust account to cover a client's expenses before the client had made the corresponding payment. In the opinion the court stated:

"... respondent was in the habit of drawing checks on the trust account to cover a client's expenses before the client had made the corresponding payment.

... the irregularities were due to respondent's imperfect understanding of the nature of an attorney's trust account and his obligations with respect thereto."

Disciplinary Report

On Friday, May 18, 1984, the following disciplinary proceedings took place before the Board of Commissioners of the Alabama State Bar:

Private Reprimand

A lawyer was privately reprimanded for having been guilty of willful neglect, in violation of DR 6-101(A), by having failed to file suit prior to the expiration of the statutory period of limitation after he was unable to negotiate a settlement on behalf of two clients who suffered damages in a motor vehicle accident. The same lawyer was also privately reprimanded for attempting to exonerate himself from his liability to his clients for personal malpractice, in violation of DR 6-102(A), by offering to reimburse his clients for their out-of-pocket losses in the matter in exchange for their releasing him from liability for malpractice.

A lawyer was privately reprimanded for violation of Disciplinary Rule 1-102(A) (6) for making sexually suggestive comments to two perspective female clients while conducting an interview in the attorney's office.

Public Censures

Birmingham lawyer **Timothy A. Massey** was publicly censured for having filed claims with the State Comptroller that misrepresented the time that he had spent on indigent criminal defense work in cases to which he had been appointed by the court, which claims

resulted in Mr. Massey receiving an overpayment of \$3,978.40 (which he subsequently returned to the State), in violation of DR 1-102(A) (4).

Talladega attorney **Rufus Dempsey Pitts** was publicly censured for violation of Disciplinary Rules 1-102(A) (4) and 1-102(A) (5) arising from several instances of inaccurate billings submitted by Mr. Pitts to the State Comptroller requesting payment for work performed for indigent defendants. Mr. Pitts was found to have submitted several billings with erroneous dates and times together with some instances of double billing. Prior to administration of the public censure, Mr. Pitts repaid the State Comptroller all money received from the questioned billings.

Surrender of License

Cecil W. Elledge, of Birmingham, surrendered his license to practice law in Alabama, effective April 9, 1984, as a result of a felony conviction in Federal Court.

Transferred to Disability Inactive

Burl Van Gamble, of Birmingham, was transferred to disability inactive status by an April 6, 1984, order of the Disciplinary Board based upon Gamble's petition to the Board in which he asserted that he suffered "a mental infirmity or illness which renders him incapacitated from the practice of law."

In Informal Opinion 1170 (1970) the American Bar Association Committee on Ethics and Professional Responsibility held that there is nothing improper in an attorney representing both buyer and seller in a real estate transaction with the full knowledge and consent of both. However, the committee held that for an attorney to advance his own funds to cover the purchase price until a check tendered to the attorney clears would constitute a violation of Disciplinary Rule 5-103(B). In the opinion the committee stated:

"Informal Opinion 923 held that there is nothing improper in an attorney representing both buyer and seller in a real estate transaction with the full knowledge and consent of both. DR 5-105(C) appears to be in accord with this. If the lawyer may accept the employment after full disclosure, it would appear that he could also with the full disclosure to and consent of all parties deliver the deed against future availability of funds, where this will expedite the closing. The risk is the client's which he may wish to knowingly take if he is fully advised of the possible consequences.

But for the lawyer to advance his own funds presents an entirely different situation. By doing so he is in effect making a loan to his client. In litigated matters, this is specifically prohibited by Canons 10 and 42 and DR 5-103(B). See Formal Opinion 288. In principle there appears to be no difference between litigated and non-litigated matters in this respect. Potential litigation is involved, in the event the out of state check does not clear. And, as was said in Formal Opinion 176: 'It is true that litigation may never ensue, and that it is not in course of conduct at the time the purchase is made, but, in the opinion of the Committee this does not alter the unprofessional nature of the transaction.'

We therefore hold such advance of funds by an attorney to be improper."

We recognize that it is a widespread practice among attorneys in Alabama to accept in a trust account a check (not certified or a cashier's check) and disburse the money before it has been paid by the correspondent bank.

Interestingly, the above-quoted Florida Disciplinary Rule created so much controversy among Florida attorneys and lending institutions that the Florida Bar has now petitioned the Supreme Court of Florida to change the Rule. The proposed amended Rule would read as follows:

"Except as hereinafter provided, the lawyer will not disburse funds held for a client to or on behalf of that client unless the funds held for that client are collected funds. The exceptions are as follows:

(a) The deposit is made by certified or cashier's check issued by a bank authorized to transact business in the State of Florida; or

(b) The deposit is made by a check representing loan proceeds issued by a bank, savings

bank, savings and loan association or other institutional lender; or

(c) The deposit is made by a bank check, official check, treasurer's check, or money order or other such instrument issued by a bank or savings and loan association within the State of Florida when the attorney has reasonable and prudent grounds to believe the instrument will clear and represent collected funds in the attorney's trust account within a reasonable period of time; or

(d) The deposit is made by a check drawn on the trust account of an attorney licensed to practice in the State of Florida or on the escrow or trust account of a real estate broker licensed under Chapter 475 of the Florida Statutes when the attorney has a reasonable and prudent belief that the deposit will clear and represent collected funds in his trust account in a reasonable period of time.

The above exceptions are at the risk of the attorney. If any of the deposits fail, the attorney shall within two (2) working days after notice replace the funds in the attorney's trust account. Violation of any part of this section is an offense punishable by disciplinary proceedings."

We feel that our interpretation of the Code of Professional Responsibility should be made known to the attorneys in Alabama generally so that all attorneys will abide by the letter of the rules and those who do so will not be unjustly criticized. □

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The Final Judgment

W. W. Flowers, Jr.



It is with great sadness and great pride that I write in memory of Walter Flowers. Sadness because of his untimely death. Pride because he was my very dear friend.

Walter died April 12, on his 51st birthday, at his home in McLean, Virginia. A native of Greenville, Alabama, he had lived most of his life in Tuscaloosa. He graduated from the University of Alabama in 1955. While at the University he was president of the

Student Government Association and was elected to Phi Beta Kappa. He received his law degree from the University, and was admitted to the Alabama Bar in 1957. Walter and I practiced law together prior to his election to the U.S. House of Representatives in 1968.

Walter was a highly respected, valuable member of the House for five consecutive terms. He is remembered most vividly for his pivotal and courageous role during the impeachment proceedings by the House Judiciary Committee in 1974. That was surely his finest hour, the climax of his career as a statesman. He will also be remembered as chairman of the Judiciary Subcommittee on Administrative Law and Governmental Relations and for his effective leadership on the Science and Technology Committee and the Fossil and Nuclear Energy Research, Development and Demonstration Subcommittee which he chaired.

While Walter served the Seventh

District for those ten years, I watched him as he faced controversial decisions head on. He anguished over many of them privately, and he occasionally drew public criticism for them, but I cannot remember a single decision that he would have changed had he had the opportunity. He was a man of strong principles — principles that guided him through the difficult times and that were an inspiration to those of us around him.

Those who knew him were impressed by Walter's superior intelligence. And yet he was one of the most unpretentious people I know. He was everybody's "buddy," and he was as strong an advocate for his meekest constituent as he was for the most influential one.

Walter gave up his House seat to run for the Senate in 1978. It was one of his rare endeavors that was not successful, but he turned even defeat into advantage. He began making a name for himself in the Washington business community, first as a valuable member of a respected law firm there, then as vice president of Signal Companies, Inc., a successful engineering and energy conglomerate, organizing and serving as first chairman of the National Council on Synthetic Fuels.

My heartfelt sympathy goes out to the family he left behind — to his wife, Beverly; to the children, Vivian Flowers Porter of Birmingham, Walter W. Flowers and Victor Flowers of Tuscaloosa; to his father, Walter W. Flowers, Sr. of Northport; and to his brother, Dr. Robert Flowers of Honolulu, Hawaii.

Congressman Richard C. Shelby



Allen, Elbert Troy—Tuscaloosa
Admitted: 1956 Died: March 24, 1984

Barnes, Reid Boylston, Jr.—Birmingham
Admitted: 1926 Died: May 13, 1984

Buck, James Douglas—Tuscaloosa
Admitted: 1954 Died: June 4, 1984

Flowers, Walter Winkler, Jr.—McLean, Virginia
Admitted: 1957 Died: April 12, 1984

Hutchens, Raymond Paul—Birmingham
Admitted: 1971 Died: May 26, 1984

Johnson, William Warren, Jr.—Birmingham
Admitted: 1967 Died: May 5, 1984

Long, Knox Stedman—Gulf Shores
Admitted: 1956 Died: March 21, 1984

Parrish, Hollis Bowden, Jr.—Irvington
Admitted: 1934 Died: March 8, 1984

Shannon, Sam Ray, Jr.—Birmingham
Admitted: 1955 Died: April 5, 1984

Thornton, John Richard, Jr.—Abbeville
Admitted: 1925 Died: March 24, 1984

Classified Notices

books for sale

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FOR SALE: Two sets of Alabama Code with pocket parts updated through 1983. Contact Chenault, Hammond and Buck, 117 Second Avenue, N.E., P.O. Box 1906, Decatur, Alabama 35602. Phone: 353-7031.

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Young Lawyer's Section

(from page 213)

finest young lawyers that could be found anywhere. As I see and hear about some of the problems facing the Bar today and in the future, I am continually assured that the Bar will overcome those issues because there is a core of older lawyers and younger lawyers who have the best interest of the Bar dear to their hearts, and they will work to overcome the tough issues. The young lawyers in Alabama are fighting the problems of economic recession, lawyer over-population, rapidly changing laws and court rulings, and dividing their time between their practice and their social responsibilities. I think our young lawyers are recognizing these problems and adapting themselves so that they can overcome them.

They are successfully meeting these challenges. The future of this Section is bright and the Section remains strong. The incoming president of the YLS, Bob Meadows, is a fine young lawyer from Opelika who is already working to develop the coming year.

If I may be excused for taking a personal privilege, I would like to thank all of those Alabama young lawyers who have been most helpful this year. This group includes not only the Executive Committee but those liaison persons and the various subcommittee members. Your work and determination have been evidenced all year long. I have enjoyed serving as president of the Young Lawyers Section and have been rewarded in being exposed to the broad sweep of not only the Young Lawyers Section but also the Alabama

State Bar. The Young Lawyers Section is something that each of you should become actively involved in, and my eight-plus years involvement with the Section continues to reinforce my conviction that a lawyer becomes closer to being that ideal lawyer the more he participates in the organized Bar and understands its problems and endeavors to solve or overcome them. This year has made me more enthusiastic about the practice of law as well as helping me to realize more fully that this is an honored profession and that all of us should strive to keep it that way. I am proud to have chosen this profession and to be a Young Lawyers member of the Alabama State Bar Association. Again, I thank you all and wish the very best to each of you for the years to come. □



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