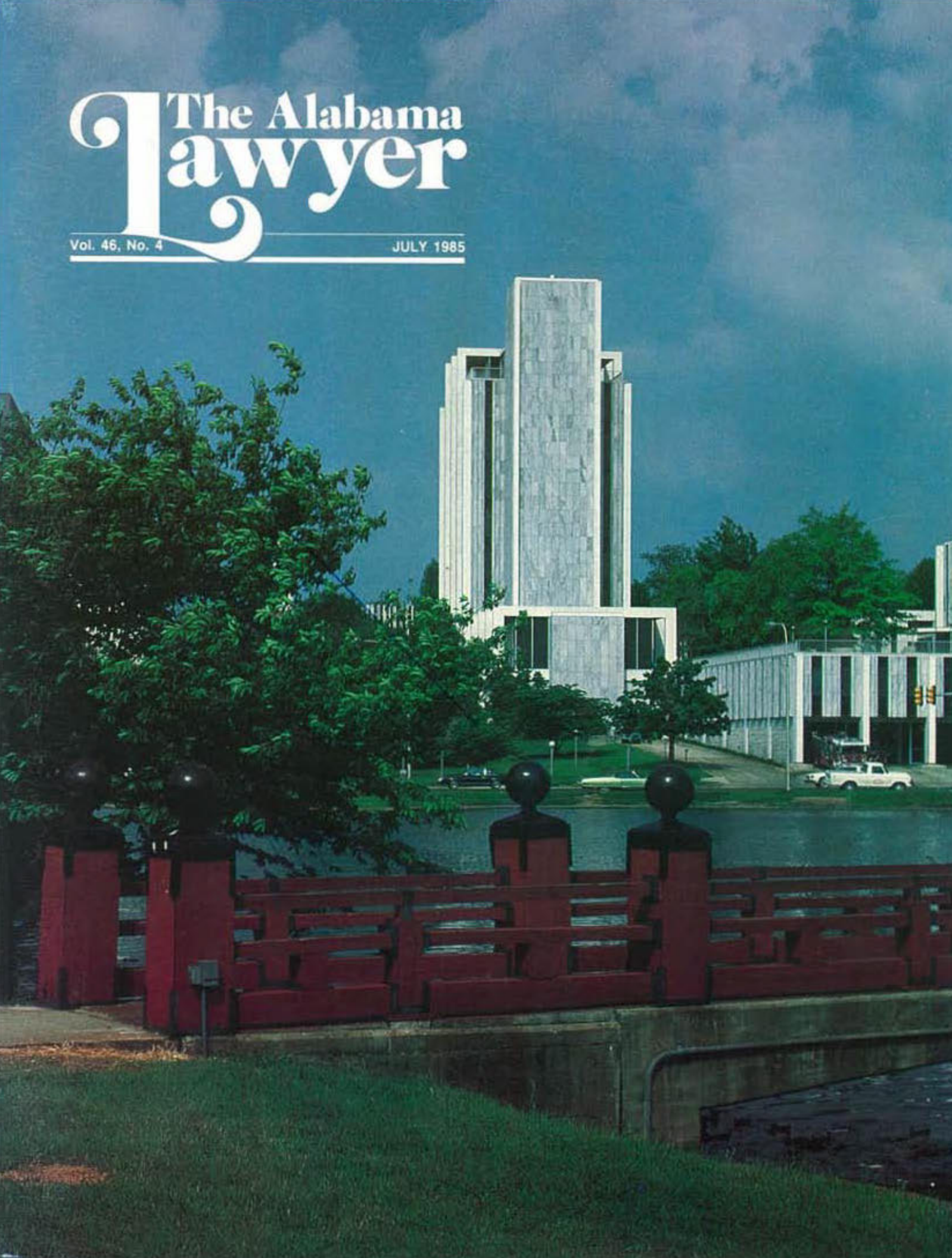
The Alabama Lawyer

Vol. 46, No. 4 JULY 1985



Tools of the trade for the Alabama attorney . . .

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——Analyzing Medical Records — A Method for Trial Lawyers, *McQuade* $79.00
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——Federal Tax Planning for Vacation Homes & Condominiums, 2d Ed., *Bristow & Dalton* $39.95
——Wills, The Truth About Probate, *McConaughey* . . .
Softbound . . . $14.95 Hardbound . . . $19.95

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GENERAL INFORMATION

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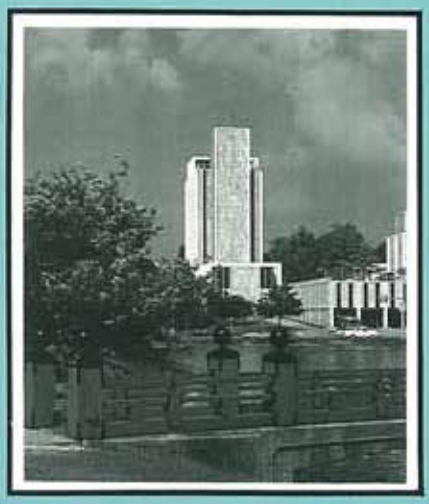
THE JULY 1985



On the Cover

This is just one of the lovely sites of downtown Huntsville awaiting you when you attend this year's annual convention. This photograph was contributed by Montgomery attorney Tom McGregor.

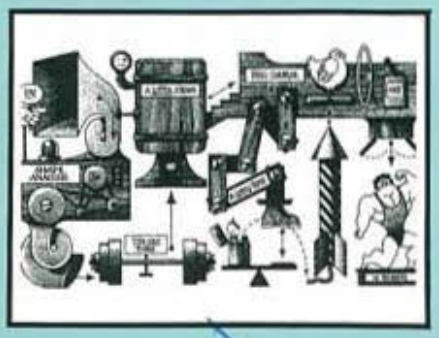
Huntsville! 1985 Site of the Alabama State Bar Annual Convention
— pg. 174

Are you ready to "fly high" in the Rocket City? Look inside to find out exactly what's in store to entertain and educate you July 25-27.

Advising Your Corporate Client on Avoiding Charges of Sexual Harassment
— pg. 176

A lawyer's role often involves rendering advice to clients in order to prevent violations of law. "Preventive" advice is particularly important in the area of sexual discrimination.

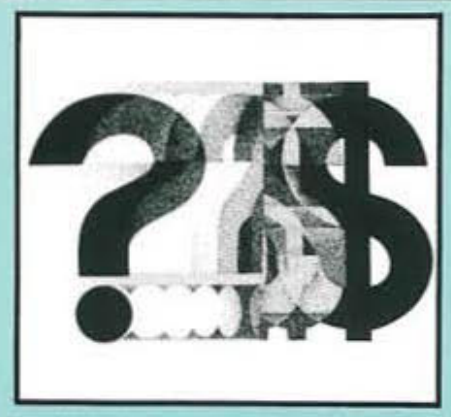
ISSUE IN BRIEF



A General Practitioner's Introduction to Patent and Trade Secret Law: A Primer on Intellectual Property

— pg. 188

In the first of a three-part series, Professor Harold See of the University of Alabama Law School provides practical insights into the field of patent and trade secret law.



A Judicial Perspective: Reimbursement of Appointed Counsel and Effective Assistance of Counsel

— pg. 202

Does the criminal justice system allow for adequate compensation to appointed counsel while simultaneously providing the indigent defendant with effective assistance of counsel? Judge William Bowen of the Alabama Court of Criminal Appeals shares his thoughts on this double-edged problem.

Recognition of Pro Tanto Judgments

— pg. 197

Pro tanto settlements frequently have proven to be a trap for the unwary. The legislature now has provided a mechanism allowing entry of a pro tanto judgment.

Inside This Issue

President's Page

BYARS

Take the Good with the Bad

This is my final report to you as president of the Alabama State Bar. Again I acknowledge with humility that you bestowed upon me your highest honor and my greatest honor by choosing me to serve as your president. Your Alabama State Bar has had an excellent year, much has been accomplished, but much remains to be accomplished. As I reach the end of my term, I face the reality that time has run out before the job has been completed.

Whatever our accomplishments during the past year, I acknowledge with gratitude the support of the state bar staff, the board of bar commissioners and the committees and task forces. Without their collective efforts, little if anything would have been accomplished. Without exception, the members of the bar staff have labored long and hard, cooperated fully and kept our association on the right track. Likewise, the bar commissioners have been actively considering and approving the long-range and current programs and policies of your bar. Every president must rely upon this staff and the bar commissioners to provide continuity of and support for programs which could not be accomplished by any president during a one-year administration. Both are commended for their excellent guidance and hard work.

Passing in review, the 1984-85 year has been a success. Conferences with local bar leaders were held in conjunction with both the annual and midyear meetings, with an excellent exchange of ideas. Additionally, your president has met with the local bars in Birmingham, Calhoun-Talladega, Coffee-Dale-Pike, Etowah, Houston-Henry, Madison, Mobile and Montgomery counties. Each conference and visit provided the state bar representatives with an opportunity to share and exchange ideas and to have input from the grass roots. As your president, I was especially honored by the opportunity to participate in the celebration of the 100th anniversary of the Birmingham Bar Association.

Of special significance to the bar is the acquisition from the State of Alabama of an addition to our headquarters lot on Dexter Avenue. Your bar has outgrown its existing space, and current and future expansion are essential to a well-run service organization. The bar is indebted to Governor George C. Wallace for his foresight and cooperation in making our needed expansion possible. This gift from the state will permit the consolidation of the headquarters office and the Center for Professional Responsibility, and permit future expansion better to serve the bar. We all owe a debt of gratitude to the task force composed of three former state bar presidents, Oakley Melton, Jr.; Robert E. Steiner, III; and James J. Carter; to Montgomery lawyers John B. Scott, Jr., and Jesse Williams, III; and to Chief Justice Torbert for his cooperation.

To finance the expanded services of the bar (without deficit), your legislative counsel, Wendell Mitchell and John Casey, guided the legislation increasing license fees to $150 per year and dues for non-practicing lawyers to $75 annually, and reducing the exemption from two years to October 1 following admission. During 1984-85, the deficit to provide the current programs was projected at approximately $46,000. This legislation, enacted during the special session 1985, assures the deficit-free operations, certainly in the near future.

We cannot overlook the multitude of good work done by the committees and task forces. The reports given at the midyear meeting, which have been collected and published by the bar, speak for themselves. Much additional work and many accomplishments have taken place since those reports. Without intending to overlook or belittle the work of any committee or task force, this report undertakes to review a few of the many outstanding programs.

By the annual meeting, each of you should have received the excellent desk book providing telephone directories and useful information for the bench and bar of this state. The Desk Book Committee, co-chaired by Dorothy F. Norwood, deputy clerk of the Alabama Supreme Court, and Brenda Smith Stedham of Anniston, is to be commended for a job well done. This is the first edition of a desk book in more than 10 years, but is to be replaced with an annual edition furnished without cost to bar members. As a by-product of the preparation of the desk book, for the

(Continued on page 206)

Executive Director's Report

HAMNER

It's Going to Get Worse . . . Before it Gets Better

The unusually large number of inquiries I have received regarding lawyers' professional liability coverage, plus the many long hours your Insurance Programs Committee has spent on our current problem, dictates this attempted explanation of a serious problem faced by all lawyers.

Starting in 1972-73, lawyers experienced the first instability in our professional liability insurance market . . . carriers withdrew, policies were restricted and rates soared. This phenomenon has been occurring about every seven years; six years ago was our last experience (until the recent problem) of the tight market and high premiums.

Our Insurance Programs Committee became very active in 1973 and really has not had a chance to relax since. We had two carriers writing in 1974; the market gradually eased as carriers re-entered the market and again began offering "great policies" at reasonable, competitive rates. As in earlier years, these carriers have skimmed the cream and once again are withdrawing. This is not peculiar to Alabama — it is nationwide. Our former endorsed carrier, ICA of Houston, has stopped writing lawyers' professional liability insurance. Their last year's experience in Alabama was catastrophic. We examined the figures and validated our loss ratio at 277 percent under the terms of our contract with ICA.

Our current endorsed administrator, Professional Liability Insurance, Inc. of Wilmington, Delaware, had hoped to (and in fact did contract to) limit to 20 percent any increase in rates for this year. This is not even a possibility in the current market. Our 1985-86 rates are at least 130 percent over our 1984-85 rates. You ask, "What about your contract?" Candidly, in today's insurance market, a guaranteed rate does not exist. The contract is not worth the paper it is written on, with respect to rates. If you do not pay the rate, the carrier merely withdraws from the market and refuses to write the coverage.

Our reinsurance through the Lloyds of London syndicate simply will not be available at the lower contracted rate. The London market is very shaky with the volume of lawyers' professional liability coverage it holds in America. It has stopped accepting new coverage in this area. Many U.S. carriers have withdrawn again, or those remaining in the market are requiring a new application even for those who have been insured previously over an extended period of time. Surcharges also are being added in certain areas of practice, particularly in the areas of torts and real estate.

All is not bad — it could be worse. The Florida Bar recently advised its members the insurance may not be available in that state at any price. Other states are experiencing 300 to 400 percent rate increases. I know of no state that is not concerned about the current state of the market.

Our committee is continuing to investigate the possibility of forming a captive; however, our most recent known experience indicates the cost of such a venture will not be advantageous. One of our carriers paid 27 claims last year. These claims arose primarily in the areas of torts and real estate law.

I fully anticipate one more year of a restricted market. Until better times, I suggest the following: (1) Act promptly when a renewal notice is received. You very well may be required to fill out a new application and have a totally new policy underwritten; (2) Have your agent survey the available market. We think we are "on top" of the market, but with its frequency of change you may find a good buy elsewhere. Do not forget your agent can write the policy for the currently endorsed carrier of the state bar. I personally am convinced of the excellent quality of the policy, and I believe its rates are the most favorable in the country for such quality coverage. Over the past few years, the bar's endorsed programs have suffered a 230 percent loss ratio, and even with the new rate increase, the cost of our program is significantly less than the costs of the other two

(Continued on page 209)

Riding the Circuits

Baldwin County Bar Association

The Baldwin County Bar Association held its annual business meeting Friday, May 3 in Gulf Shores. The newly-elected officers for the upcoming year are:

President:	Allan R. Chason
Vice President:	Marion E. Wynne, Jr.
Secretary/Treasurer:	Robert S. MacLeod

Dallas County Bar Association

Kelley, (President of the Dallas County bar) Russell, Hobbs

Law Day was observed by members of the Dallas County Bar Association at a luncheon held May 1. Judge Truman M. Hobbs, chief judge of the United States District Court for the middle district of Alabama, was guest speaker at the luncheon. Following the luncheon Judge Edgar P. Russell, Jr., who served as judge of the circuit court of the Fourth Judicial Circuit of Alabama from 1969 until his retirement in 1984, was honored for his years of service by presentation of a portrait to be placed in the courtroom over which he presided in the Dallas County Courthouse.

Etowah County Bar Association

The Etowah County Law Library and Bar Library Fund sponsored a CLE Spring Seminar April 19. The seminar on damage cases raised substantial financial support for the law library; this was the first full-day seminar held in Gadsden.

The Etowah County Bar Association recommended to the judges of the 16th Judicial Circuit it generally favored the creation of a family court exclusively for those cases.

Jackson County Bar Association

April 3, at a regular meeting of the Jackson County Bar Association, new officers were elected to take office May 1, 1985. They were as follows:

President:	Charles Dawson
Vice President:	Wallace Haralson
Secretary/Treasurer:	Ralph Grider

In the early spring, in a benefit basketball game held to raise funds for the Big Brother-Big Sister Program, the Lawyers soundly defeated the Doctors in Carter Gymnasium in Scottsboro. The event was a big success and raised a substantial amount of money for the program.

Law Day was observed May 1 with a dinner at the home of Tommy Armstrong after several mock trial presentations at various schools and places throughout the county.

Lee County Bar Association

The Lee County Bar Association was reorganized in February of this year after a period of inactivity. John V. Den-

son was named president; James K. Haygood, vice president; and Andrew J. Gentry, Jr., secretary-treasurer. President Denson appointed the following committees to serve during 1985:

Program Committee:	Jim Haygood, chairman
	Whit Whittelsey
	Yetta Samford
Library Committee:	Bob Harper, chairman
	Hoyt Hill
	Guy Gunter
Law Day Committee:	Jacob Walker, chairman
	Larry Ray
	Jimmy Sprayberry
Social Committee:	Crawford Melton, chairman
	Tutt Barrett
	Randy Spear
Organization Committee:	Thomas Samford, chairman
	Mike Benson
	Bob Pettey

A series of programs has been set up, beginning with Circuit Judges G.H. Wright, Jr., and James T. Gullage speaking in March on the state of the judiciary in Lee County. In April, District Attorney Ronald L. Myers gave an overview of his office and spoke on recent developments in criminal law and trends for the future.

For Law Day, Dean Charles W. Gamble of the University of Alabama School of Law met with University of Alabama graduates at a luncheon prior to conducting an afternoon seminar on evidence at the new Lee County Justice Center. Fifty members of the Lee County Bar Association attended the seminar and received CLE credit.

In the evening, Jacob and Jane Walker hosted the bar association members and their spouses at a cocktail buffet at their home in Opelika.

Huntsville-Madison County Bar Association

May 1 the doors of the Children's Advocacy Center officially were opened. This center is the result of years of dedicated effort of Robert E. (Bud) Cramer, Jr., Madison County's district attorney. The center is the "house" in which children who have been sexually or physically abused will be brought to be interviewed. A detailed discussion of how this center works is contained in volume 46, number 1, of the January 1985 edition of *The Alabama Lawyer* in an article by Mr. Cramer. Through national recognition of this effort, centers of this kind soon may be established across the country.

Montgomery County Bar Association

Twenty Montgomery judges and lawyers volunteered their time to serve as "judges" at a "Jail and Bail" fundraiser for the March of Dimes. Thanks to these generous men and women, the arrestees and the Montgomery County Sheriff's Department, the project raised approximately $17,000. Many Montgomery dignitaries were arrested, including Walter

"Prisoner" Byars

Byars, the Alabama State Bar president, and Judge H. Mark Kennedy.

April 24 the monthly luncheon meeting was devoted to the theme of Law Day, "Liberty and Justice For All."

The highlight of this meeting was the presentation of the Liberty Bell Award to Mr. Earl Nix, businessman, community server and church leader.

Also at the April luncheon meeting a presentation of a $1,000 scholarship (sponsored by Union Bank & Trust Company and MCBA) was made to Scott Gosnell, a senior at Jefferson Davis High School, for his oratorical essay on "Liberty and Justice For All." The Montgomery County Bar Association has in the past and continues to emphasize the education of our youth, and again this year furnished young lawyers to speak at each public junior high school in the county during Law Week.

The MCBA Annual Barbecue held on June 1 was at Lagoon Park. This year the bar had a tennis and golf tournament in conjunction with the barbecue.

Talladega County Bar Association

The Talladega County Bar Association recently elected new officers during its April meeting. These include:

President:	B. Greg Wood
Vice President:	James M. Sizemore, Jr.
Secretary/Treasurer:	Tommy R. Dobson

In addition to the election of officers, the bar association discussed the support of pending legislation which will establish an additional circuit court judgeship for the 29th judicial circuit. □

About Members, Among Firms

About Members

Margaret McRae Edwards of Birmingham was selected by the American Bar Association to attend the first national Conference on Legal Awareness of Older Americans held in Washington, DC, May 28-29.

Edwards currently is serving on the Alabama State Bar's committee on the elderly. Edwards is a *cum laude* graduate of both Agnes Scott College and Cumberland Law School.

An article by Birmingham attorney **Henry T. Henzel** will be reprinted in the *Alabama Appellate Handbook*. "Complying with Rule 39(k), A.R.A.P. (How to Succeed on 'Cert')" also appeared in the September 1984 issue of *The Alabama Lawyer*.

Marilyn S. Kavanaugh, attorney at law, formerly an attorney with the National Aeronautics and Space Administration, is pleased to announce the opening of her office at 1506 McCullough Avenue Northeast, Huntsville, Alabama 35801. Phone 539-6029.

Joseph W. Hudson, attorney, has relocated his office to the Blanton Building, 1810 3rd Avenue, P.O. Box 3172, Jasper, Alabama 35502-3172.

Montgomery attorney **Vanzetta Penn Durant** presented a workshop on "Evidentiary Defenses in Paternity Cases" at the American Bar Association's National Conference on Child Support Practice April 12-13.

Durant is a member of the Advisory Council to the ABA's Child Support Project and is chairman-elect of the Alabama State Bar's family law section.

Allen C. Jones is pleased to announce the relocation of his office to 202 West Walnut Street, Troy, Alabama 36081.

Richard K. Mauk, an associate with **Gordon, Silberman, Loeb, Cleveland & Gordon,** has been appointed general counsel to the Young Democrats of America. Mauk is a former president of the Alabama Young Democrats and of the Jefferson County Chapter, and is a graduate of Cumberland School of Law, Samford University.

Colonel H. Jere Armstrong retired from the United States Army's Judge Advocate General's Corps September 1, 1984, after 20 years of active duty. He was awarded the Legion of Merit in ceremonies at the Pentagon upon the occasion of his retirement. His last assignment in the Army was as executive officer of the Army's Civil Litigation Division in Washington.

Now living in Annandale, Virginia, and a member of the Alabama, District of Columbia and Virginia bars, Armstrong was appointed in August 1984 as counsel to the chief immigration judge in Falls Church, Virginia.

Irene Grubbs is pleased to announce the establishment of her Research & Writing Service at 6637 Remington Drive, Helena, Alabama 35080. Phone 988-8521.

Sarah Kathryn Farnell announces the relocation of her legal research practice to 112 Moore Building, Montgomery, Alabama 36101, phone 284-4958. She also will be affiliated with Jones Law School in Montgomery.

Among Firms

The law firm of **Martinson & Beason** announces the association of **Amy A. Slayden** for the practice of law. Offices are located at 115 North Side Square, Huntsville, Alabama 35801. Phone 533-1666.

The law firm of **Thomas, Taliaferro, Forman, Burr & Murray,** 1600 Bank for Savings Building, Birmingham, Alabama 35203, is pleased to announce **George M. Taylor, III,** has become a partner in the firm.

Jennings, Carter & Thompson is pleased to announce the relocation of their offices to Suite 1150, Bank for Savings Building, Birmingham, Alabama 35203, and that **Robert J. Veal** has become a member of the firm which will practice under the name of **Jennings, Carter, Thompson & Veal.** Phone 324-1524.

The law firm of **Hubbard, Waldrop, Reynolds, Davis & McIlwain** is pleased to announce **H. Edward Persons** has become associated with the firm. Offices are located at 808 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama 35403. Phone 345-6789.

The law firm of **O'Bannon & O'Bannon** is pleased to announce the relocation of its offices to 402 South Pine Street, P.O. Box 1428, Florence, Alabama 35631. Phone 767-6731.

J. Doyle Fuller takes pleasure in announcing **Candy Yarbray Englebert** has become associated with him in the practice of law and also takes pleasure in announcing the relocation of his offices to 22 Scott Street, P.O. Box 62, Montgomery, Alabama 36101.

The law firm of **Brown, Hudgens, Richardson, P.C.,** is pleased to announce **Edward L. Lasseter, Jr.,** and **Vincent A. Noletto, Jr.,** have become members of the firm, and **C. Paul Cavender** and **J. Langford Floyd** have become associated with the firm. Offices are located at 1495 University Boulevard, Mobile, Alabama 36609. Phone 344-7744.

McFadden, Riley & Parker takes pleasure in announcing **Beth McFadden Rouse** has become a member of the firm and **Douglas L. Anderson** has become associated with the firm. Offices are located at 718 Downtowner Boulevard, Mobile, Alabama 36609. Phone 342-9172.

The law firm of **John C. Coggin, III, P.A.,** takes pleasure in announcing **Timothy J. Tracy** has become an associate of the firm. The offices are located at 500 Bank for Savings Building, Birmingham, Alabama 35203. Phone 328-2200.

Wininger and Lee, P.A., is proud to announce **David L. Manz** is now associated with the firm for the general practice of law. Offices are located at 517 North 21st Street, Birmingham, Alabama 35203. Phone 322-3663.

Buntin & Cobb, P.A., announces the removal of its offices to 206 North Lena Street in Dothan, Alabama. Phone 794-8526.

The law firm of **Hardin & Hollis,** P.O. Box 11328, Birmingham, Alabama 35202, is pleased to announce the association of **Stuart F. Vargo.**

Thomas M. Goggans, Horace N. Lynn and **C. Michael McInnish** are pleased to announce the formation of their firm for the general practice of law under the name of **Goggans, Lynn & McInnish.** Offices are located at 770 South McDonough Street, Montgomery, Alabama 36104. Phone 263-0003.

The law firm of **Cabaniss, Johnston, Gardner, Dumas & O'Neal** is pleased to announce **Paul D. Myrick** has become associated with the firm in its Mobile office. Offices are located at 2210 First National Bank Building, Mobile, Alabama 36602. Phone 433-6961.

The law firm of **Donovan & Hoffman, P.C.,** takes pleasure in announcing **Samuel R. McCord** has become a member of the firm, and the firm name has been changed to **Donovan, McCord & Hoffman, P.C.** Offices are located at Suite 100, 1608 13th Avenue South, Birmingham, Alabama 35205. Phone 933-2800.

The law firm of **North, Haskell, Slaughter, Young & Lewis, P.A.,** takes pleasure in announcing **Jonathan H. Waller** has rejoined the firm and **James L. Richey** and **C. Drew Demaray** have become associated with the firm. The firm's name has been changed to **Haskell, Slaughter, Young & Lewis, P.A.,** with offices located at 800 First National-Southern Natural Building, Birmingham, Alabama 35203. Phone 251-1000.

Robert M. Harper and **Robert T. Meadows, III,** of the firm of **Harper & Meadows,** Auburn, Alabama, are pleased to announce **Will O. Walton, III,** formerly of the Montgomery County District Attorney's Office, has become associated with them effective May 15. The firm maintains its offices at 233 East Magnolia Avenue in Auburn.

Jim L. Wilson, P.C., and **George C. Day, Jr.,** are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Wilson & Day,** with offices at The Courtyard off Ninth, 924 Third Avenue, Gadsden, Alabama 35901. Phone 546-6334.

The Alabama State Bar 1985

Registration Information

By now, you already have received materials for registering for the 1985 Annual Meeting of the Alabama State Bar. This year's meeting will be held in Huntsville, with the Huntsville Hilton as the headquarters hotel and the convention activities being held in the Von Braun Civic Center.

Not only will you save money by pre-registering, but time, also. Your tickets for the social and luncheon functions you choose to attend will be in a packet ready for you to pick up upon arrival in Huntsville. This will help us better plan for your convention. Cancellations with a full refund may be made through July 22, 1985.

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

Fun Run

The return to Huntsville will see the return of the state bar Fun Run. This year's Fun Run will be held Saturday morning, July 27. There will be a nominal registration fee for the Fun Run, and T-shirts will be available for all participants who register in advance and finish the race.

Breakfasts

A breakfast for the general membership will be held Saturday morning after the Fun Run. Other breakfasts, which will be held Friday morning, include: 1985-86 Committee Breakfast, Farrah Order of Jurisprudence Breakfast and Cumberland Law Review Breakfast.

Alumni Luncheons

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

General Business Meeting

The Saturday morning general business meeting will be held during the grand convocation. At the business meeting, Walter R. Byars will pass the gavel to his successor, James L. North of Birmingham, who will assume the presidency of the state bar for the 1985-86 administrative year.

Also, the bar will elect its president-elect to succeed Mr. North at the conclusion of his term of office.

At press time, the final commitment of the grand convocation speaker had not been confirmed; however, a nationally known figure has been invited to address the lawyers of Alabama on Saturday morning.

Hotel Reservations

The convention headquarters in Huntsville will be the newly remodeled Huntsville Hilton. You will have an opportunity to make your hotel reservations through the state bar at the time you register for the annual meeting. The state bar again will handle the hotel reservations, and under our agreement with the Hilton, they will not accept reservations directly from the members.

In recent years, we have had difficulties with large blocks of rooms being reserved in the name of one person or law firm and then not being utilized, with members who desired rooms in the hotel turned away.

Membership Reception

The popularity of Huntsville's Space and Rocket Center as the site of the 1982 Membership Reception has prompted a return to the center for this year's membership reception Thursday evening, July 25.

Not only is the Space and Rocket Center Museum an interesting place to tour, but the museum and the hands-on exhibit, as well as the space "playground" outside the museum, will make for a most enjoyable evening among the stars. An added feature at this year's membership reception will be an opportunity to view the new movie in the museum's outstanding space theatre. The reception will be held between the hours of 7:30 and 10 p.m. Shuttle buses between the Hilton and the Space and Rocket Center will be available.

As always, this is a ticketed event, and to assist in our planning and insure adequate food and beverages, we ask that you pre-register and have your tickets picked up at the registration desk prior to the reception.

Annual Convention — Huntsville!

Continuing Legal Education and Section Meetings

CLE, in the form of an all-day seminar on Thursday and section meetings on Friday, will provide up to nine CLE credits, depending on the section meetings chosen. Additionally, the supreme court has mandated that 2.0 CLE credits be awarded for attendance of Saturday's business meeting.

"Update '85," presented Thursday, July 25 by the Young Lawyers' Section, will provide 6.0 credits and focus on recent developments in the law. Workers' compensation (including co-employee legislation); attorney-client privilege and the work product doctrine; commercial and contract law; estate planning; criminal law; and domestic relations are the planned topics.

Section meeting topics include: attorneys' fees in bankruptcy and commercial cases; attorneys' fees in divorces; basics of representation of oil, gas and mineral lessors; recent developments in practice and procedure; proposed changes in laws affecting real estate practice; and recent developments in Alabama tax laws.

General Assembly — Thursday

The 1985 Annual Meeting of the Alabama State Bar begins this year Thursday morning, July 25 with a seminar entitled "Update '85," covering recent developments in the law. Those who regularly attend the annual meeting will want to note this event at which substantial CLE credit will be given. An outstanding program has been planned with numerous areas of interest for every member of the bar.

Dessert Party and Dance

The success and the popularity (it was a sold-out event) of last year's dessert party will be repeated this year in Huntsville. The dessert party will be held at the Von Braun Civic Center Exhibition Hall and feature a wide variety of desserts, as well as a "make your own sundae" ice cream bar.

Bo Thorpe and His Orchestra have been engaged to play for your dancing pleasure that evening. This orchestra is billed as "a band that has a generation of Americans dancing again." Bo Thorpe, a native North Carolinian, and his orchestra have ushered in the return of the big band era; not only will you have an opportunity to dance to a wide range of music, but his orchestra features outstanding vocalists for your listening entertainment, too. The Bo Thorpe Orchestra has played each year on the anniversary of President Reagan's inauguration when he hosts an inaugural anniversary ball at the White House. The orchestra also played at the inaugural balls of both inaugurations of President Reagan. Dinner will be on your own, but you will have an opportunity to end the evening on a high note of after-dinner drinks, desserts and fine music for your dancing pleasure.

Bench and Bar Luncheon

The Bench and Bar Luncheon will be held Thursday and will feature as guest speaker Leonard Passmore of Austin, Texas. Mr. Passmore is a former assistant attorney general of the state of Texas and retired general counsel of the Texas Bankers Association. Prior to the Bench and Bar Luncheon there will be a Bloody Mary party in the pre-luncheon meeting area at the Huntsville Hilton.

General Assembly — Friday

Friday morning's general assembly will be a professional showcase, highlighting the work of two of the bar's committees and task forces.

Stafford F. McNamee, Jr., of the Nashville firm of Bass, Berry and Sims, and the committee on Lawyer Alcohol and Drug Abuse will present an informative program on the problems facing lawyers, judges and their families.

Patrick Emmanuel, president of The Florida Bar, will brief bar members on the IOLTA (Interest on Lawyers' Trust Accounts) program in Florida. The Alabama State Bar is considering developing such a program; the funds would be used for charitable and educational purposes.

Both programs will contribute greatly to your professional development and will be of interest to spouses and guests.

Advising Your Corporate Client on Avoiding Charges of Sexual Harassment

by
Fred W. Suggs, Jr.

Office romances and industrial sex frequently lead to practical and legal problems in the workplace. Although workplace romances are commonplace, practical problems related to these liaisons include reduced productivity, slower decision-making, poor quality, accusations of favoritism and open hostility. Moreover, an employer may be faced with litigation because a consensual affair of the heart between a supervisor and a subordinate turns sour, because a supervisor uses his or her position of authority over a subordinate to coerce sexual favors or because of the actions of employees or even nonemployees.

If an employer's organizational climate cannot tolerate even consensual romantic entanglements, management must establish and consistently enforce a policy against these affairs. In many companies, a policy that no romantic involvement interfere with work is more realistic. Lawyers should advise management it has the right to expect and require that personal relationships not interfere with performance.

More important, however, is what an employer does to prevent workplace sexual activities tinged with actual or potential coercion. An employer is entitled to forbid its supervisors from engaging in sexual relationships with subordinates and to require its supervisors to ensure the work areas over which they have authority are free from sexual harassment by employees and nonemployees. For the reasons discussed hereafter, all employers should be advised to implement, maintain and strictly enforce a company policy against sexual harassment.

An analysis of the Equal Employment Opportunity Commission's Guidelines On Discrimination Because Of Sex and the judicial decisions interpreting these guidelines are a good starting point for the lawyer who must advise a client interested in dealing effectively with the subject of sexual harassment.

Although sexual harassment was judicially recognized first in 1976, the courts were reluctant initially to treat sexual harassment as a violation of Title VII, even though several studies showed a high incidence of workplace conduct which working women viewed as harassing. Until the guidelines appeared, various district courts dismissed Title VII claims on the grounds sexual harassment did not constitute sex discrimination. The most common theory was that acts of sexual harassment were personal in nature and not solely gender-based since males as well as females could be harassed. More recent court decisions have recognized an allegation of sex harassment states a valid claim under Title VII. *Henson v. City of Dundee,* 682 F.2d 897, 29 FEP Cases 787 (11th Cir. 1982)

What Type Conduct Constitutes Sexual Harassment?

The EEOC Guidelines provide as follows:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Under the guidelines, there are two types of sexual harassment — "Force" and "Annoyance." Force is best described as quid pro quo harassment —

a supervisor using his or her position to coerce sexual favors. Quid pro quo sexual harassment forces an employee to choose between yielding to a workplace superior's sexual demands or suffering such adverse consequences as loss of employment benefits, demotion or discharge. Annoyance or an offensive working environment situation occurs when unwelcome sexually oriented conduct interferes with an employee's working conditions. Both types of sexual harassment are analyzed under the disparate treatment theory. See, e.g., *Henson v. City of Dundee, supra* (citing *McDonnell Douglas v. Green,* 411 U.S. 792, 5 FEP Cases 965 [1973] and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 25 FEP Cases 113 (1981)].

The guidelines contain such broad and highly subjective terms that they reach virtually any personal encounter one party deems "unwelcome," "hostile" or "offensive." Sexual harassment can be as violent as rape or as subtle as innuendo. An unwelcome sexual advance may be patting, fondling or caressing. A request for sexual favors needs no further definition. Other verbal or physical conduct of a sexual nature may include foul language, dirty jokes, suggestive slogans on apparel, pinups, leering and indecent exposure. It should be noted, however, sexual harassment, like beauty, often is in the eye of the beholder. What one person considers a joke may seriously offend another. Indeed, what may be considered funny at the first part of the week may serve as the basis for a sex harassment charge at week's end.

The classic example of quid pro quo sex harassment is the starlet who must submit to the movie producer to obtain a job as an actress. Sexual harassment also can occur where a job interviewer, by means of a suggestive glance or gesture, implies a job is available in return for sexual favors. Once an employee is hired, if the granting or refusal to grant sexual favors is used as a basis for employment decisions, then the decision is based on sex and is by definition sexual harassment. A common example is that of employees being denied promotion while others "sleep their way to the top."

Under the guidelines, however, any conduct of a sexual nature interfering with employee job performance and creating a hostile working environment can be sex harassment. Although the offensive working environment theory was rejected at first by the courts because of their unwillingness to find a claim actionable unless the granting of sexual favors was made a condition of employment, the theory received judicial acceptance in *Bundy v. Jackson,* 641 Fed. 934 (D.C. Cir. 1981). There, the court allowed the plaintiff to sue for an injunction even though the harassment had not caused the employee to lose tangible job benefits. The plaintiff's supervisors requested sexual favors, but the plaintiff was not discharged for refusing their advances and did not quit in response to their requests. The plaintiff complained of her supervisors' actions to her supervisors' superior, whose only response was, "Any man in his right mind would want to rape you." The court expressed concern that:

> [U]nless we extend [prior cases'] holding[s], an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance, thereby creating the impression . . . that the employer did not take the ritual of harassment and resistance seriously.
>
> [I]t may even be pointless to require the employee to prove that she "resisted" the harassment at all. So long as the employer never literally forces sexual relations on the employee, "resistance" may be a meaningless alternative for her. If the employer demands no response to his verbal or physical gestures other than good-natured tolerance, the woman has no means of communicating her rejection. She neither accepts nor rejects the advances; she simply endures them. She might be able to contrive proof of rejection by objecting to the employer's advances in some very visible and dramatic way, but she would do so only at the risk of making her life on the job even more miserable. . . . It hardly helps that the remote prospect of legal relief under [present law] remains available if she objects so powerfully that she provokes the employer into firing her. The employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a "condition" of her employment. The woman then faces a "cruel trilemma." She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew.

The "cruel trilemma" discussed in *Bundy* — in which a victim must choose among acquiescence to harassment, opposition to it or resignation from her job — recently has been taken a step further in *Vinson v. Taylor,* 36 FEP Cases 1423 (D.C. Cir. 1985). In *Vinson,* the court considered a fourth option — to yield and thereby lose all hope of legal redress for being put into the intolerable position in the first place if the court were to hold that a plaintiff's capitulation to on-the-job sexual advances worked a forfeiture of her opportunity for redress. In considering this "quadrilemma," the D.C. Circuit Court held that "[a] victim's 'voluntary' submission to unlawful [sexual harassment] can have no bearing on the pertinent inquiry: whether . . . toleration of sexual harassment [was made] a condition of . . . employment."

Although the foregoing discussion demonstrates the breadth of the guidelines' reach, there are some limitations under the guidelines. Sexual harassment must be "unwelcomed" in the sense the aggrieved employee did not solicit or incite it and regarded the conduct as undesirable and offensive. The conduct also must affect a "term or condition of employment" or be a "basis" for employment decisions. Conduct which does not affect employment is outside the definition of sexual harassment.

Moreover, courts recognize not all conduct which has sexual overtones is sexual harassment. Often, the decision of what is sex harassment is made on the totality of circumstances, which includes assessing the frequency and seriousness of the conduct. "A cause of action does not arise from an isolated incident or mere flirtation." Rather, courts look at such factors as: "(1) the extent to which the conduct affected the employee's terms and conditions of

employment; (2) whether the conduct was repeated or isolated; (3) whether the conduct was intended or perceived seriously or in jest; and (4) the degree to which the conduct is contrary to community standards." For example, in *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981), the court found no sexual harassment even if the plaintiff's allegations were true that her superior made one inebriated attempt to engage in sexual relations with her, touched her in the breast area and patted her bottom. The court based its decision on the fact the incidents occurred over a long period of time, and the plaintiff admitted there was no interference with her work and that she was not intimidated by her supervisor's conduct.

Notwithstanding the decisions that have found conduct not to constitute sex harassment, the broadness of the guidelines puts an employer at considerable risk that conduct which an employee claims was "intimidating, hostile or offensive" is sex harassment and will serve as a basis for a legal claim against the employer. In advising an employer in this area, lawyers must approach the problem in a practical fashion. No act of congress ever will eliminate from the workplace the topic of sex, off-color jokes or sexual overtures. It is implicit in the 10th Commandment that these problems have been with us for a long time and are not likely soon to be eradicated. However, where common sense shows that employees are likely to view conduct as being "unwelcomed" and "offensive" or where an employee complains of the conduct, the employer must be advised to take prompt action sufficient to stop the offending conduct.

For Whose Conduct May an Employer be Liable?

Supervisors

The EEOC's Guidelines impose strict liability on employers for supervisors who engage in sexual harassment whether the sexual harassment is quid pro quo harassment or sexual annoyance:

> Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

The courts generally agree with the EEOC in the area of quid pro quo sexual harassment and impose strict liability for supervisors who engage in sexual coercion. *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) is illustrative. There, a woman was fired because she would not submit to her supervisor's demands for sexual favors. The court stated:

> There is nothing in [Title VII] which even hints at a congressional intention that the employer is not to be liable if one of its employees, acting in the course of his employment, commits the tort. Such a rule would create an enormous loophole in the statutes. . . . The usual role, that an employer is liable for the torts of its employees, acting in the course of their employment, seems to us to be just as appropriate here as in other cases, at least where, as here, the actor is the supervisor of the wronged employee.

* * *

> We conclude that *respondeat superior* does not apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.

Miller and subsequent cases rely on the fact that the supervisor had power to adversely affect the employee's job. As a consequence, under the present status of the law, if a supervisor uses his or her power to adversely affect an employee's job in retaliation against the employee for spurning a request for sexual favors, the courts will hold the employer liable for the acts of the supervisor regardless of the employer's knowledge of the supervisor's actions.

Although the guidelines impose strict liability on an employer for offensive work environment situations, courts frequently have refused to find liability unless the employer knew or should have known of the situation and failed to take remedial action. Nevertheless, language in *Bundy v. Jackson* and in *Vinson v. Taylor* indicates some courts may follow the guidelines and impose strict liability on employers where there has been no sexual harassment beyond sexual annoyance by supervisors. In any event, it is clear courts impose liability on employers for the acts of supervisors which create an offensive working environment if the employer had notice of the sexual harassment and did nothing to rectify the situation. For example, in *Brown v. City of Guthrie*, 22 FEP Cases 1627 (W.D. Okla. 1980), the court held the police department liable for the sexual harassment of a female employee by a police lieutenant (lewd suggestions, remarks and gestures) where the plaintiff reported the lieutenant's actions to the chief of police, but he took no action to correct the situation.

In summary, lawyers should advise their clients they may be held strictly liable for sexual harassment by supervisors. Strict liability almost certainly will be imposed if an employee suffers adverse employment consequences at the hands of a rejected supervisor. If the employer knew or should have known of the sexual annoyance by a supervisor, liability also is likely to be imposed, and if courts follow the EEOC Guidelines, liability will be imposed absent actual or constructive knowledge.

In view of the high standard to which employers are held for the conduct of supervisors, attorneys should advise their corporate clients that supervisors should be chosen carefully, trained thoroughly and any hint of supervisory sexual harassment promptly investigated.

Co-Employees

In the case of co-employees, both the courts and the EEOC agree the employer must have actual or constructive notice of harassment by a nonsupervisory employee before the employer will be held responsible for the nonsupervisory employee's misconduct:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

In *Continental Can Co. v. Minnesota*, 297 N.W.2d 241, 22 FEP Cases 1808 (Minn. Sup. Ct. 1980), the plaintiff was subjected to sexually derogatory statements, verbal sexual advances and offensive touching of a sexual nature. The plaintiff reported the conduct to her supervisor, but the supervisor took no action until after there was a violent confrontation. The court held the employer liable, finding that the employer's responses were not timely.

In *Kyriazi v. Western Elec. Co.*, 476 F. Supp. 335, 26 FEP Cases 413 (D.N.J. 1979), Western Electric Company was found guilty of discriminating against Kyriazi because her co-workers sexually harassed her, and two of her supervisors knew of the co-workers' conduct but failed to stop it. The court described the conduct as follows: The co-employees "shot rubberbands at her. They engaged in boisterous speculations about her virginity. They circulated an obscene cartoon depiction of her." The court awarded Kyriazi, an engineer, $100,000 in back pay and directed that she be reinstated. The court also required each of Kyriazi's fellow workers who had harassed her to pay Kyriazi $1,500 each and prohibited the company from contributing to the $1,500 payment.

In discussing the issue of sexual harassment with clients, lawyers should emphasize the possibility of liability for harassment by rank and file employees and should stress the employer's duty to eliminate workplace sexual misconduct by employees. When training supervisory personnel, lawyers should underscore the potential for personal liability of supervisors who acquiesce in sexual harassment by employees.

Nonemployees

Many employers are surprised when their counsel informs them they may be liable for sex harassment by a nonemployee. The guidelines provide:

> An employer may also be responsible for the acts of nonemployees, with respect to sex harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such nonemployees.

Courts have agreed with the EEOC Guidelines. In *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 24 FEP Cases 1521 (S.D.N.Y. 1981), a female lobby attendant in a Manhattan office building claimed that her employer had violated Title VII by forcing her to wear what the employer called its "Bicentennial uniform" while performing her duties as a lobby attendant. The uniform, which the court found to be "short, revealing and sexually provocative," solicited unwelcomed sexual comments and gestures from passersby. After wearing the uniform for two days, the plaintiff refused to wear it further. The employer gave the plaintiff a choice of wearing the uniform or being terminated. Instead, the plaintiff quit. The court held that the employer

knew of the sexual harassment and did nothing to prevent it, and thus made the plaintiff "remain, as a condition of her employment, in a position where she would be subjected to sexual harassment on the job."

It takes little effort to imagine situations giving rise to employer liability for the sexual harassment of employees by nonemployees. Such nonemployees as vendors, consultants or contractors whom the employer permits to enter its workplace can be sexual harassers for whom the employer will be liable. Further, if waiters or waitresses in a restaurant are subjected to sexual harassment by patrons, the employer, under the guidelines, would have a duty to stop it. A salesperson who must call on a customer of the opposite sex and who may be subjected to sexual demands in return for orders, would be a victim of sexual harassment and the employer could be liable for that sex harassment if the employer knew of it or should have known of it and did nothing about it.

"Reverse" Harassment

If a female obtains promotions by granting sexual favors, do those whom she passes by have a claim for sex discrimination? The EEOC Guidelines answer this question affirmatively:

> Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

The courts agree. In *Toscano v. Nimmo*, 570 F. Supp. 1197, 32 FEP Cases 1401 (D. Del. 1983), the court found in favor of a female employee who was not awarded a promotion because the promotion was given instead to a co-worker who was willing to grant sexual favors to the supervisor having power to promote.

Lawyers must advise their corporate clients that an apparently consensual sexual affair between a supervisor and a subordinate may result in legal problems. Even if the subordinate never raises the issue of sexual harassment, co-workers may.

Prevention

The EEOC Guidelines provide as follows with respect to prevention:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

The guidelines do not imply, much less guarantee, the adoption of affirmative steps will immunize an employer from liability. Rather, an employer who knew or should have known about ongoing instances of sexual harassment can escape liability only by proving it took effective action to correct the situation. Thus, an employer can minimize exposure to liability by instituting a formal policy against sex harassment, providing a grievance mechanism and taking prompt disciplinary action against offenders.

If a complaint of sex harassment is made, both parties should be interviewed and appropriate action taken — that is, prompt remedial action reasonably calculated to end the harassment. Investigation may be difficult because charges of sex harassment by one employee seldom will be admitted by another. Further, improper requests for sexual favors are not likely to occur in a group, so witnesses will not be available often to corroborate either party's contentions.

Because of the difficulty of determining the truth, lawyers may have to advise innovative procedural solutions to sexual harassment problems. These solutions may include transfers, close management supervision after sexual harassment complaints are filed or counseling rather than immediately resorting to disciplinary procedures. However, where the facts support a claim of sex harassment, management should not hesitate to use disciplinary procedures to effect an appropriate remedy up to and including discharge.

Damage awards for sexual harassment have been staggering in the past and will continue to be. In *Clark v. World Airways, Inc.*, 24 FEP Cases 305 (D.D.C. 1980), the plaintiff resigned because of off-color remarks, offensive touching and propositions by the company president. The court found no Title VII violations, but did affirm the jury's verdict of $52,500 against the employer, World Airways, for sexual assault.

These cases also often receive headline media coverage. Just the filing of a sexual harassment case can be devastating to the employer's public relations and equally devastating to the reputation of the individual who is accused of harassment.

If the potential monetary liability and adverse publicity involved in sexual harassment suits are not sufficient to prod lawyers into advising their clients about the potential dangers of sexual harassment claims, the fact that sex harassment can be a major cause of unionization among women may do so. One union organizer has stated sexual harassment is "the single thing in the workplace which radicalizes women more than pay."

Since the definition of sexual harassment is determined initially by the

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person being harassed, the potential for abuse is constant. Sexual harassment claims are an obvious way for a disgruntled employee to retaliate. Simply put, permitting passes to be made in the workplace invites a lawsuit.

The potential for expensive litigation, bad publicity and lowered morale and productivity due to distractions caused by sexual harassment gives attorneys adequate reason to advise their corporate clients to take a hard line on sexual harassment. Attorneys should advise their clients to take at least the following action:

1. Adopt a strong policy against sex harassment (a lawyer should not recommend exactly the same sex harassment policy for each client, but should adapt the policy to the client's particular needs, taking into consideration the size and composition of the workplace and the general working conditions [e.g., office vs. factory]);
2. Top management should be briefed on the cost of sex harassment;
3. The employer should be advised to require all members of management to report known incidents of sex harassment to one central source (e.g., the EEO officer);
4. All supervisors should be trained. In the training, sex harassment should be defined and the employer's liability for the acts of supervisors, co-employees, non-employees and reverse harassment should be emphasized;
5. Employees should be told of the company's sex harassment policy; and
6. The sex harassment policy must give employees the opportunity to register complaints of sexual harassment, ensure that all complaints are investigated and provide for corrective action when appropriate.

In conclusion, employers should be advised that their employees' freedom from sex harassment is another "civil right" guaranteed by federal law. Employers have no choice but to protect this employee right. Attorneys should advise employers that "fun and games" on the job are a legally risky proposition that should be stopped. It is not only the legal thing to do, it is the right thing to do. □

Litigation Section Organization to be Considered

As was reported in the last issue of *The Alabama Lawyer,* Tennent Lee, chairman of the Task Force to Organize a Litigation Section, announced plans for a meeting open to all interested attorneys to be conducted during the bar's annual meeting in Huntsville, July 25-27.

Litigators interested in attending the meeting should write to Mr. Lee at P.O. Box 68, Huntsville, Alabama 35804. Those interested, but unable to attend, should let him know of their interest so their names can be added to the list of potential section members.

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** _____

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☐ New Lawyer ☐ Experienced Lawyer

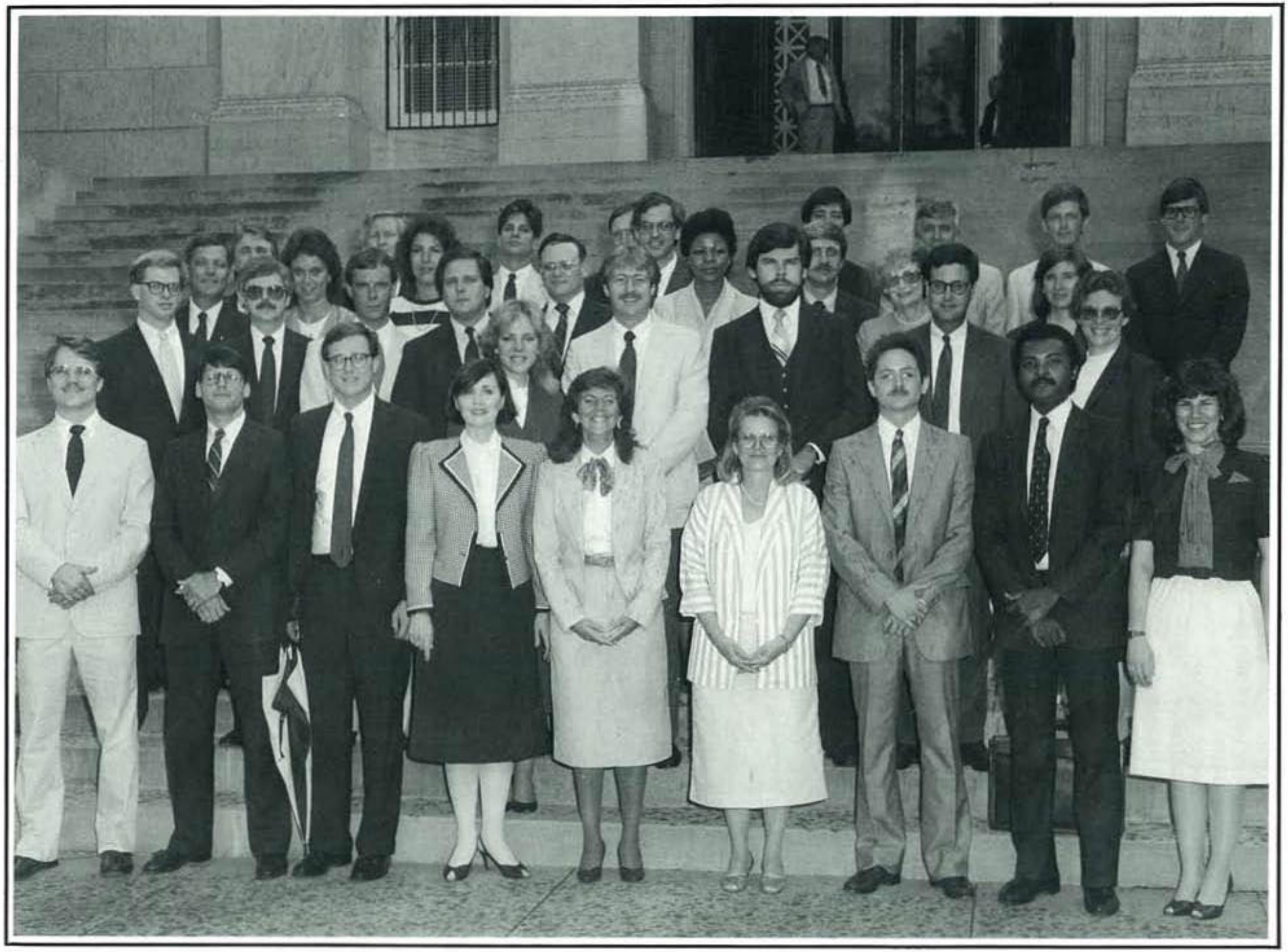
Please return to: Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101.

Young Lawyers' Section *(From page 207)*

nual affair in the host city of the bar convention.

In closing, as our former Alabama State Bar President Bill Hairston of Birmingham stated so eloquently on many occasions, "The greatness of our association lies in the unselfish manner in which its membership devotes their time and energies in carrying out its activities." I am acutely aware of the unselfish manner in which our membership devoted their time and energies during my tenure as president of the Young Lawyers' Section. For this you are commended! I again thank you for the privilege and honor of being able to serve you. □

SPRING 1985 ADMITTEES



Attorneys Admitted to Bar, Spring 1985

Vance Nicholas Abbett ..... *Opelika, Alabama*
Ottie Clay Akers ..... *Birmingham, Alabama*
Florence Charlotte Asnes ..... *Jackson, Alabama*
Susan Leslie Ramsey Barineau ..... *Birmingham, Alabama*
David Eugene Belser ..... *Montgomery, Alabama*
Joseph Thomas Booth, IV ..... *Montgomery, Alabama*
Ronnie Dean Booth ..... *Birmingham, Alabama*
James Robert Brewster ..... *Tallahassee, Florida*
Jerry Wayne Burchfield ..... *Hueytown, Alabama*
William John Collins ..... *Springfield, Virginia*
Patricia Allen Conover ..... *Auburn, Alabama*
Neva Claire Conway ..... *Hayneville, Alabama*
Robert James Cox ..... *Birmingham, Alabama*
Lloyd Vernon Crawford ..... *Montgomery, Alabama*
Jack Daniel ..... *Huntsville, Alabama*
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Mary Anne Gibbons ..... *Birmingham, Alabama*
Blake Alan Green ..... *Wetumpka, Alabama*
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Samuel Andrea Masdon ..... *Haleyville, Alabama*
James Joseph McAlpin, Jr. ..... *Smyrna, Georgia*
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Thomas Dwight Reid, Jr. ..... *Mobile, Alabama*
Anne Marguerite Reilly ..... *New York, New York*
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Mark Judson Upton ..... *Mobile, Alabama*
Stuart Forbes Vargo ..... *Birmingham, Alabama*
Deborah Serna Byrd Walker ..... *Pelham, Alabama*
Salley Plaxco Walker ..... *Nashville, Tennessee*
Robert Marc Weinberg ..... *Tuscaloosa, Alabama*
Michael Bryant Wingo ..... *Birmingham, Alabama*
Candace Elizabeth Winter ..... *Opelika, Alabama*

Lawyers in the Family

Scott Austin Spear (1985) and Mark Edward Spear (1979) (admittee/brother)

Ronnie Dean Booth (1985) and Pamela Chandler Booth (1984) (admittee/wife)

Blake Alan Green (1985) and Howard Albert Green (1979) (admittee/father)

Cathy Ann McCloud (1985) and Thomas Julian Motes (1984) (admittee/fiance)

John Lauthlin Moore, IV (1985) and Judge John Lauthlin Moore, III (1942) (admittee/father)

Mary Anne Gibbons (1985) and John Burdette Bates (1961) (admittee/brother)

Ralph Dewar Gaines, III (1985); Ralph Dewar Gaines, Jr. (1949); Charles Pafford Gaines (1981); and Jack Gideon Paden (1949) (admittee/father/brother/father-in-law)

Joseph Thomas Booth, IV (1985) and Joseph Thomas Booth, III (1954) (admittee/father)

Spring 1985

Bar Exam Statistics of Interest

Number Sitting for Exam	184
Number Certified to Supreme Court	77
Certification Rate	42%
Certification Percentages:	
University of Alabama	49%
Cumberland	61%
Alabama Nonaccredited Law Schools	22%

Francis William Speaks, Jr. (1985); Francis William Speaks, Sr. (1950); and John Manning Higgins (1967) (admittee/father/uncle)

David Eugene Belser (1985); Judge David Eugene Loe (1926); and Richard Collins Belser (1952) (admittee/grandfather/father)

The Lawyer "Explosion:" Employment, Satisfaction, Salaries and Related Data

by
Nancy Campbell-Goymer

Introduction

During 1984 the Alabama State Bar's Task Force to Evaluate the Lawyer Explosion reported many Alabama attorneys believe there has been an explosion of lawyers, and that supply exceeds demand. It further reported a similar perception in the eyes of the public.

The task force recommended, among other things, that the Alabama State Bar survey bar examinees so this information could be made available to law schools, members of the bar and interested committees. Topics recommended were prospective employment, nature of employment, desirability of employment obtained, compensation and other pertinent factors.

With the approval of the board of bar commissioners, those sitting for the July 1984 bar examination were surveyed on a voluntary basis. Ninety-eight percent of the 403 examinees completed in usable form at least part of the questionnaire.

Summary

Most examinees (about 70 percent) were employed in some capacity. Another 6 percent were either pursuing advanced study or not seeking employment. Twenty-three percent still were seeking employment.

About two-thirds of the examinees were employed full time, and 88 percent of those were satisfied with their jobs. Seventy-three percent of employed examinees considered their salaries "about right."

Somewhat discouraging is the fact that those working full time in legal positions tended to concentrate in Alabama's five largest cities (as have those admitted to the bar before them): Birmingham, Mobile, Montgomery, Huntsville and Tuscaloosa.

A question of particular importance left unanswered is whether, and to what degree, the unemployed and underemployed examinees had tried to secure employment prior to taking the bar examination. This matter will be addressed in future surveys.

Demographic data

Table 1 summarizes the demographic data on examinees. Most were between 21 and 30 years old, male, Caucasian, graduates of accredited law schools and ranked in the upper 25 percent of their classes. (Approximately three-fourths of

Table 1. Demographic Data and Employment of Bar Examinees
(Average number in each category = 386)

AGE		SEX		RACE	
21-30	76 percent	Male	67 percent	Caucasian	91 percent
31-40	18	Female	33	Black	7
41-50	4			Asian	<1
51-60	1			Other	1
61 and older	1				

TYPE LAW SCHOOL ATTENDED		CLASS RANK	
Accredited, Alabama	66 percent	Lower 25 percent	7 percent
Nonaccredited, Alabama	17	26-49th percentile	16
Alabama, unknown	8	50th percentile	1
Accredited, out-of-state	9	51-75th percentile	37
		Upper 25 percent	38

EMPLOYMENT STATUS

Employed		Not Employed	
Legal, full time	53 percent	Still seeking employment	23 percent
Nonlegal, full time	12	Advanced study, law	3
Legal, part time/temporary	4	Advanced study, non-law	<1
Nonlegal, part time/temporary	1	Not seeking employment	2
	70		
		Chose more than one category	1
			30

Nancy Campbell-Goymer is an associate professor of psychology at Birmingham Southern College. She received her bachelor's degree from Florida State University and her master's and doctorate from the University of Alabama.

She was assisted in the analysis of the data for this article by colleague Dr. Rick McCallum, an assistant professor of psychology, and BSC student Paul Davis.

the examinees reported they were ranked in the upper half of their graduating classes — which is possible but unlikely; the data are probably biased.)

Only 74 examinees reported which school they attended. Of these, 48 went to either the University of Alabama or Cumberland; nine went to unaccredited schools in Alabama, most to the Birmingham School of Law; 17 went to out-of-state schools, mostly in the southeast.

There were 241 Caucasian males, 108 Caucasian females, 15 black females, 11 black males and six from other racial groups (four males, two females). Fifteen examinees did not report their sex or race.

Employment, job location and job preference

Approximately 70 percent were employed in some capacity, about 57 percent in a legal capacity. (See Table 1.) Two-thirds were employed full time, 53 percent in legal, 12 percent in nonlegal positions. An additional 5 percent were employed in part time or temporary positions, 4 percent in legal and 1 percent in nonlegal positions.

Twenty-three percent (91) reported they were still seeking employment; the rest were either pursuing advanced study (10 in tax, one in comparative law), or not seeking employment. Those still seeking employment were not asked whether they had attempted to secure employment, so it is not known whether they were having difficulty obtaining a position.

Thirty-eight percent of those with full-time legal positions were working in Birmingham, 15 percent in Mobile, 14 percent in Montgomery, 6 percent in Tuscaloosa and 2 percent in Huntsville. Two or more examinees (1 percent) had settled in each of the following counties: Calhoun, Colbert, Dale, Dallas, Houston, Lauderdale, Morgan and Walker. Nine (4 percent) were working out of state, with Georgia and Washington, D.C., drawing more than one employee each.

Of the unemployed examinees who stated a preference (some stated more than one), 53 percent wanted to locate in Birmingham, where 30 percent of the bar's members already are located. Fifteen percent preferred Mobile, 12 percent Montgomery, 7 percent Huntsville and 6 percent Tuscaloosa. Fourteen percent preferred to locate outside those areas, with Jackson and Morgan Counties being cited most frequently. Twenty-one percent wanted to go out-of-state; Florida, Georgia and Washington, D.C., were cited by three or more unemployed examinees each.

Employers

Table 2 shows employers of examinees. Half of all employed examinees (134) were working in law firms. Sixty percent of those (77) were in firms of two to ten lawyers; another 20 percent (27) were in 11- to 25-member law firms. Only eight of that 134 chose solo practice.

Another fourth of the examinees (71) held government positions; over half of those (44) chose judicial clerkships at the state and federal levels.

Businesses were a distant third among employers. Sixteen percent were employed there, half by corporations.

Two percent entered the military, three percent went into academic settings and less than one percent were self-employed in nonlegal work.

Satisfaction and Salary

Table 3 presents employed examinees' degree of satisfaction with their positions and their salary ranges.

Most (88 percent) reported being sat-

Table 2. Employers

TYPE OF EMPLOYER	ALL EMPLOYED EXAMINEES (270)
Private Practice	**50 percent**
Self-employed	3
Very small firm (2-10)	29
Small firm (11-25)	10
Medium firm (26-50)	4
Large firm (51-100)	3
Very large firm (over 100)	<1
Government	**26**
Public defender	1
Prosecutorial position	2
Federal court clerk	6
State court clerk (appellate)	6
State court clerk (circuit, district)	4
Other federal position	4
Other state position	3
Other local position	<1
Public Sector	**3**
Legal services	2
Public interest program	1
Other	<1
Business	**17**
Corporation	8
Accounting firm	2
Insurance firm	1
Financial institution	2
Other	4
Military (JAGC)	**2**
Academic	**3**
Law school faculty	<1
Other higher education	2
Other academic setting	1
Self-employed, nonlegal	**<1**
More Than One Employer	**1**

isfied with their positions; over half (57 percent) were highly satisfied with them. Those in full-time legal positions were even more positive; 97 percent were satisfied with their employment, 69 percent highly satisfied and 28 percent moderately satisfied. Least satisfied were those in nonlegal positions, particularly those few in part-time or temporary positions.

Half of those who were dissatisfied cited salary as the reason. Nearly half cited type of work and one fourth, type of employer. Other complaints included job location and personality conflicts with colleagues.

One-third of all examinees reported annual starting salaries in the $20,001 to $26,000 range. However, 43 percent reported making less than $20,001 a year, including 19 percent making $16,000 or less. About 23 percent reported making more than $26,000 annually. Looking separately at those in full-time legal positions, the data are similar.

Most examinees were satisfied with their salaries; 73 percent of those answering the question said their salaries were "about right."

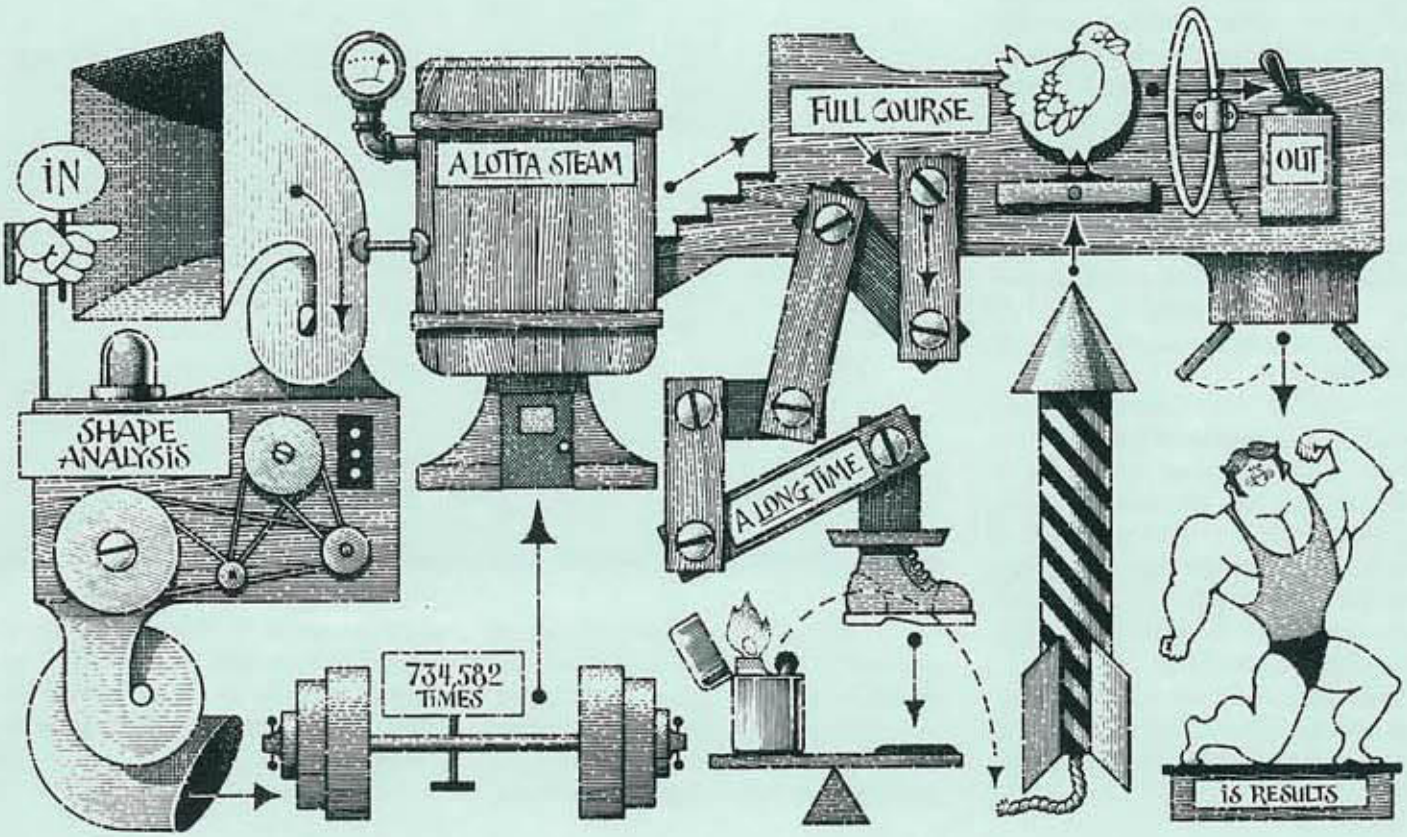
Table 3. Job Satisfaction and Salary

	ALL EMPLOYED EXAMINEES	EXAMINEES IN FULL-TIME LEGAL POSITIONS
JOB SATISFACTION		
Very unsatisfied	2 percent	<1 percent
Moderately unsatisfied	10	3
Moderately satisfied	31	28
Very satisfied	57	69
SALARY		
$8,000-16,000	19	17
16,001-20,000	24	25
20,001-26,000	34	37
26,001-34,000	18	17
over 34,000	5	3

Analysis: important variables

Data obtained from the survey did not distinguish very well employed from unemployed and underemployed examinees, but two variables were particularly associated with job satisfaction: employment status and salary. Rather predictably, a proportionately higher number of those in full-time legal positions were very satisfied with their jobs. Also, those with higher salaries were more likely than those with lower salaries to be satisfied with their positions.

The five variables particularly associated with salary, in order of importance, were: class rank, race, general job category, type school attended and full-time/part-time employment status. As might be expected, the majority of part-time employees reported salaries in the two lowest salary ranges, whereas the majority of full-time employees reported higher salaries. Examinees in the lower 50 percent of their classes (with a few notable exceptions) appeared disproportionately often in the lowest salary ranges, as did non-whites and graduates of nonaccredited schools. Salaries reported by blacks tended to cluster at the low and relatively high extremes of the salary ranges, in contrast to the salaries of Caucasians, which clustered mid-range. The majority of out-of-state school graduates appeared in the highest salary ranges. Finally, regarding general job category, those in the public sector or in academic positions (with a few notable exceptions) were among the lowest-paid examinees; those in business or in the military tended to be the highest paid. □



A General Practitioner's Introduction to Patent and Trade Secret Law: A Primer on Intellectual Property

by
Harold See

Patent law is a specialized area of practice. The non-specialist attorney should not attempt to obtain a patent for a client, but there are things about patent law the attorney should know. It is helpful to begin by distinguishing the major forms of "intellectual property."

Definitions

The three major categories of intellectual property are patents, copyrights and trademarks. Rough definitions of these three follow:

A. **PATENT** A patent is a federal statutorily granted monopoly to *make, use* or *sell* a machine; a manufacture; a composition of matter; or a process.

B. **COPYRIGHT** A copyright is a federal statutorily granted monopoly of the exclusive right to reproduce, distribute, perform or display certain original works of authorship. Basically, protection is against copying and extends only to the form of expression.

C. **TRADEMARK** A trademark (or trade name) is a state law granted monopoly in the right to use a mark on goods to designate them as coming from a particular source (or on a business to identify the business). There are federal and state registration schemes.

Source of federal authority

The United States Constitution, Article I, Section 8, provides:

> "The Congress shall have Power . . .
> (3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .
> (8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

Clause (8) is the source of federal power over patents and copyrights. By application of the supremacy clause conflicting state law must yield. Clause (3) is the source of federal authority for a trademark registration system. Therefore, although trademark registration is limited to interstate commerce, patents and copyrights are not.

Patent law (35 U.S.C.A. §§1-376)

A. Who may practice patent law?

1. Practice before the Patent and Trademark Office (PTO)

Practice before the Patent and Trademark Office (PTO) requires registration. Registration may be as an "attorney" or as an "agent." To be a patent attorney one must be an attorney in good standing admitted to practice before any United States court or the highest court of any state or territory of the United States.

In addition he or she shall have submitted a completed application, established good moral character and competence, and demonstrated the requisite legal, scientific and technical qualifications, and, of course, paid the prescribed fee. To establish the legal, scientific and technical qualifications, the applicant must take and pass an examination. The examination is scheduled in March and September of each year and is given where civil service examinations are given. There are special patent bar review courses designed to prepare the applicant for the legal, regulatory and technical aspects of the examination. To be admitted to the examination the applicant must have "a degree or the equivalent thereof, from a college or school of recognized standing in one of the following subjects: Applied Physical Science, Electronics, Engineering (Aeronautical, Agricultural, Ceramic, Chemical — including Electrochemical, Civil, Electrical, Engineering Physics, Geological, Industrial, Mechanical, Metallurgical, Mining, Nuclear, Petroleum), General Chemistry, Marine Technology, Organic Chemistry, Physics or Textile Technology.

> "A degree in another subject may also qualify a person to be admitted to take the examination where he has completed 30 semester hours in chemistry or 24 semester hours in physics or a combined total of 40 semester hours in chemistry, physics and engineering."

Certain biographical science and genetics courses may count, as may extended practical engineering or scientific experience.

What should be clear is that the general practitioner *cannot* obtain a patent for a client, but must refer it, or any other patent matter before the PTO, to a patent attorney or agent.

2. Practice before a federal district court

The above restrictions do not apply to infringement suits in federal court, but one should consider Disciplinary Rule 6-101(A) of the American Bar Association *Code of Professional Responsibility:*

> "A lawyer shall not:
> (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it."

This section of the *Code* was deleted from the *Code* as adopted in Alabama. Although negative implication might suggest it is ethical in Alabama to handle a matter one is not competent to handle, remember Alabama did adopt Disciplinary Rule 6-102(A):

> "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice."

Patent suits generally are handled by patent specialists because such suits are almost always highly complex and technical.

B. What should the general practitioner know?

1. What is patentable

To be patentable an invention must be:

(a) NOVEL That which already is generally known, or is a law of nature, cannot be patented;

(b) NON-OBVIOUS Even though an invention is novel, it cannot be patented if it is merely a trivial advance that would have been obvious to one "ordinarily skilled in the art;"

(c) USEFUL The invention must be useful, though it need not be better than what is available. Utility is seldom a problem, except in the area of chemical process patents.

2. Who may obtain a patent

Only the *inventor* (or inventors if they worked together) may obtain a patent. No one may obtain a patent on anything unless he or she in fact invented it. If more than one person independently invents the same thing, the patent goes to the first to invent. This priority is *not* determined by priority of filing, or even by priority of completing the invention, but by priority of "conception." Conception requires

the idea of a useful result together with a specific means for achieving that result. Whether the specific means work is not known until the invention is later "reduced to practice;" therefore, the date of conception must be reconstructed later. It is for that reason important for the inventor to keep thorough records.

3. What the client should be advised

(a) If there is any question, see a patent lawyer. Although novelty and nonobviousness are required, remember that patents have been issued on: the electric flyswatter (a flashlight-type handle with a lever and swatter attached so when the switch is flipped the lever causes the swatter to swat), the automatic dip stick cleaner (a small piece of material hinged on the dip stick receptacle; it can be put in contact with an automobile dip stick so it strips the oil from the dip stick when the dip stick is withdrawn), and the massage sandal (a plastic sandal with protruding knobs that "lightly massage your feet as you wear them").

(b) Move promptly to file a patent application. Lack of novelty can prevent an inventor from obtaining a patent even though the inventor himself was the only one to disclose the invention or offer it for sale. There is a one-year grace period, but it may be difficult to know when that period started to run.

(c) Keep a notebook. To demonstrate that he or she is the inventor, and is the *first* inventor, it is important to keep a thorough notebook. It is also helpful to have someone (for example, a co-worker), who is sworn to confidence, witness the notebook from time to time, signing each page and dating it. All blank sections should be crossed out, and it is preferable if the witness understands the material in the notebook. (Inventors frequently are quite secretive. The risk of an idea's being stolen must be balanced against the possible need to authenticate a date of invention.)

4. How to find a patent attorney

The Patent and Trademark Office of the U.S. Department of Commerce publishes a list of *Attorneys and Agents Registered to Practice Before the U.S. Patent and Trademark Office.* There are patent attorneys listed in Birmingham, Tuscaloosa, Florence, Huntsville, Perdido Beach and Phenix City. The advantage of a local attorney is the proximity of that attorney to you. The advantage of an Arlington, Virginia, or Washington, D.C., attorney is the proximity to the patent office. The advantages of a sole practitioner or small firm as compared with a large patent law firm is the same in this as in other technical areas. A large patent firm probably can handle many more problems as routine; on the other hand, a patent application is much more likely to be handled in a routine manner.

5. The cost of a patent

(a) An initial determination of patentability, including a patent search, ordinarily should cost no more than a few hundred dollars. Chemical inventions probably will be more costly than mechanical inventions. More complex technology and unexpected problems can run the figures considerably higher.

(b) A patent on a simple invention, if there are no problems, should run no more than a few thousand dollars. There usually are some problems, and, of course, major difficulties in the patent office — for example, a priority fight — can run up the cost considerably.

6. How long will it take?

Initial action by the PTO will take from four months to three years and issuance from one year to four, with two years being typical. Efforts are under way to speed up the procedure.

7. Patent infringement

In general, the making, using or selling of a patented invention without the authority of the patent owner is an infringement. Whether the allegedly infringing device is the same is determined by whether it accomplishes essentially the same result by essentially the same means as that stated in the patent claims.

One should distinguish between the patent and the device in which the invention is embodied. Once the device is sold (e.g., a customer buys a patented electric shaver) the patent owner has parted with control of that device, and the purchaser may use it, sell it, etc., as he or she sees fit. What the purchaser may *not* do is make, use or sell another shaver like the patented one. In addition, one infringes if he or she actively induces another to infringe.

C. The trade secret alternative

There is an alternative to patenting. It is the state law doctrine of trade secrets. Comment "b" to the *Restatement of Torts* gives the following definition:

> *"Definition of trade secret* A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see §759) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management."

Trade secret protection applies only to the improper taking of a trade secret and not to the secret itself:

> "§757. LIABILITY FOR DISCLOSURE OR USE OF ANOTHER'S TRADE SECRET — GENERAL PRINCIPLE
>
> One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if
>
> (a) he discovered the secret by improper means, or
>
> (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
>
> (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or
>
> (d) he learned the secret with notice

of the facts that it was a secret and that its disclosure was made to him by mistake."

What is required for trade secret protection is, first, a trade secret. A trade secret must be *secret* and it must be *used in one's trade or business*, thereby giving one an "opportunity to obtain an advantage over competitors." The secrecy requirement means steps must be taken to preserve its secrecy. These steps usually take the form of precautions against third parties discovering the secret and establishment of a confidential relationship with anyone (employees, joint venturers) to whom the secret must be disclosed.

Misappropriation of a trade secret requires the trade secret be disclosed or used in a breach of confidence, or that the trade secret be discovered by improper means (the use of criminal or tortious means, or means that are otherwise objectionable). Discovery or use of the trade secret absent a breach of confidence or the use of improper means does not constitute trade secret misappropriation. Thus, independent research or reverse engineering which discloses the invention is permissible, and the original trade secret owner is without remedy.

Protection lasts only as long as the secret remains secret, or would have remained secret absent misappropriation. Thus, while as a general proposition injunctive relieve and damages are available, they generally are measured by the life of the trade secret.

Trade secret law is recognized in Alabama: *Drill Parts & Service Company v. Joy Manufacturing*, 439 So. 2d 43 (Ala. 1983). □

Harold F. See received his bachelor's degree from Emporia State University (Kansas), his master's from Iowa State University and his law degree from the University of Iowa. He practiced law with the firm of Sidley & Austin in Chicago and has been a professor at the University of Alabama School of Law since 1976. See is a member of the bars of Alabama and Illinois.

ATTENTION! TWO CONTESTS TO ENTER. . .

ATTENTION ALL POETS

Once again, *The Alabama Lawyer* is sponsoring a writing contest exclusively for members of the Alabama State Bar and law students. This time, however, instead of submitting your short stories, we want your best and most memorable poetry. We want you to enter!

Specifications: Those entering either must be members in good standing of the Alabama State Bar or students attending a law school within Alabama.

Subject matter is completely to participant's choosing. Poems *must be* on 8½" x 11" paper, typed and double-spaced.

The deadline for receiving entries is September 30, 1985. The winning poem, and possibly others, will appear in the November 1985 issue of *The Alabama Lawyer*. Individuals are limited to one (1) poetic entry, but also may participate in *The Alabama Lawyer's* photography contest.

Participants are urged to submit entries early, rather than wait until the closing date.

Send two copies to:

The Alabama Lawyer
P.O. Box 4156
Montgomery, AL 36101

*Please include your name and a telephone number where you may be reached during the day.

ATTENTION ALL AMATEUR PHOTOGRAPHERS

In addition to our writing contest *The Alabama Lawyer* also is sponsoring a photography contest. These color slides, transparencies or prints possibly will be used as cover shots for the journal. The winning photograph will appear on the cover of the January issue of *The Alabama Lawyer*.

Specifications: Photographs must be shot vertically, for enlargement purposes. *The Alabama Lawyer* is interested in outdoor Alabama seasonal scenes, law-related subjects (such as courthouses, etc.) and anything else you feel would make an "eye-catching" cover.

The Alabama Lawyer will attempt to return all photographs not used for covers, if requested, but will not be held responsible for those misplaced. Be sure to send an index card with your address and subject matter of enclosed photograph to:

The Alabama Lawyer
P.O. Box 4156
Montgomery, AL 36101

*Please include your name and a telephone number where you may be reached during the day.

July is the Month of Transition for Committees

Looking back

As the 1984-85 program year draws to a close, a look at the work of the bar's 37 committees and 15 task forces reveals their commitment to the pursuit of excellence.

Since August 1984, 112 meetings have been conducted, with an average of 10 per month, or one every two working days. Most have necessitated traveling and giving up a day at the office — 74 percent were conducted in Montgomery and 22 percent in Birmingham. Friday was the typical meeting day (75 percent) and 10 a.m. the typical meeting time. Thursday was a distant second choice for meeting day (10 percent).

These volunteers made good use of our bar's facilities: 63 of the 85 Montgomery meetings were conducted at bar headquarters or the Center for Professional Responsibility. Law firms in Montgomery and Birmingham hosted 47 meetings. Taking their charge very seriously, the **Committee on Correctional Institutions and Procedures** chose appropriate meeting sites: Holman Prison and the State Cattle Ranch.

None of these 400 volunteers has been reimbursed for expenses associated with meetings. Additionally, they have donated paper, postage, secretarial support and long-distance telephone calls for the good of the bar and the public.

Current events

As announced in the May issue of this journal, the official *Alabama Bar Directory* will be published this month. It will contain alphabetical and geographical listings of attorneys with addresses and telephone numbers, plus valuable information of daily use by attorneys. One copy will be furnished without cost to each member of the bar. Additional subscriptions for staff are available for $7.50 before publication. The cost will rise to $10 afterward. This directory is the product of the **Desk Book Committee,** co-chaired by Dorothy F. Norwood, Montgomery, and Brenda Smith Stedham, Anniston.

The **Committee on Lawyer Alcohol and Drug Abuse,** as authorized by the board, has formed the Concerned Lawyers Foundation, Inc., a non-profit corporation. Broadly stated, its purposes are to educate the legal community about the disease of chemical dependency; establish a continuing education program for lawyers, judges and their families; assist them in securing treatment; and publish and distribute information on the nature of the problem and the availability of help. Named as initial trustees were Judge John M. Patterson, Judge Val L. McGee, J. Michael Conaway, Walter J. Price, Jr., and Alabama State Bar president-elect James L. North.

The committee will host an alcohol-free hospitality suite during the bar's annual meeting in Huntsville and invites interested attorneys, spouses and guests to visit with them.

As recommended by the **Permanent Code Commission,** the board has approved and sent to the supreme

court for approval a modification of Rule 8(c) of the Rules of Disciplinary Enforcement. This modification specifically provides that the Disciplinary Board consider prior disciplinary offenses in setting subsequent disciplinary sanctions.

Upon approval by the board of bar commissioners, President Byars has forwarded the recommendations of the **Federal Judiciary Liaison Committee** to the presiding judges in Alabama's federal districts. The committee drafted and requested adoption of a uniform admission to practice rule, uniform rule on appointment of counsel in civil rights cases and uniform procedure on discovery scheduling. Further recommendations were that: (1) a pilot project be established in which lawyers would have an opportunity to ask a limited number of questions during jury selection voir dire; (2) jury selection more than one week in advance of trial poses a significant and serious problem for all parties involved in the litigation and should not be required; (3) the new criminal justice act hourly rates and case compensation maximums be followed in the three districts, and compensation in indigent cases be authorized at the maximum rate.

The **Professional Economics Committee** has been authorized to investigate and recommend to the board law office management consultants to be endorsed by the bar. Such consultants would provide services to Alabama State Bar members at reduced rates. Areas of consultation would range from equipment to personnel to billing to docket control to fire safety, depending on the attorney's request.

Additionally, the committee has been authorized to pursue formation of a legal economics section for members of the bar. Potential members should write to Chairman David Arendall, 2107 5th Avenue North, Suite 501, Birmingham, Alabama 35203.

As requested by the **Task Force on Alternative Methods of Dispute Resolution,** the board has approved the concept of local mediation centers and authorized the task force to assist interested communities in developing such centers. It is anticipated the services of such programs will be available on a voluntary basis to any private citizen who has a grievance against another citizen in such matters as simple assault, nuisance and harassment, breach of peace, menacing threats, animal control, trespass, landlord-tenant disputes and merchant-consumer disputes.

The **Committee on Programs, Priorities and Long-range Planning** recently devoted a Saturday to hearing presentations on the bar's automation needs. Additional presentations will be heard, and it is likely a preliminary report will be made to the board during the bar's annual meeting.

Evaluating two years' work, the board recently adopted the following resolution:

> Be it resolved by the Board of Commissioners of the Alabama State Bar that it does formally commend the state bar's **Committee on a Client Security Fund** for the dedicated work performed by it.

The board continues to study the concept and proposed rules and procedures.

Looking ahead

President-elect James L. North recently made appointments to 47 committees and task forces for the 1985-86 program year. Resources available to him in this effort included members' responses to the committee preference questionnaire and evaluations submitted by committee and task force leaders.

All those appointed are invited to the third annual committee breakfast Friday, July 26, during the bar's annual meeting in Huntsville. Each committee and task force will conduct its first meeting of the year at that time and will receive words of challenge and encouragement from the bar's outgoing and incoming leaders. □

MLP

WE WANT *YOU* TO JOIN OUR SPEAKERS BUREAU!

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Please list subjects on which you are willing to speak:

1) _____

2) _____

3) _____

cle opportunities

july

14-19

ANNUAL CONFERENCE
Grand Hotel, Point Clear
Sponsored by: National College of Juvenile Justice and National Council of Juvenile and Family Court Judges
For Information: (702) 784-6012

17 wednesday

FEDERAL COMPREHENSIVE CRIME CONTROL ACT OF OCTOBER 1984
Capital City Club, Montgomery
Sponsored by: Montgomery County Bar Association
Credits: 1.0 Cost: $7.50/members; $22.50/nonmembers
For Information: (205) 265-4793

18-19

SUMMER CONFERENCE
Gulf State Park, Gulf Shores
Sponsored by: Alabama District Attorneys Association
Credits: 8.0 Cost: $80
For Information: (205) 261-4191

19 friday

COASTAL ZONE REGULATION IN ALABAMA
Mobile
Sponsored by: Marine Environmental Sciences Consortium
Credits: 4.4 Cost: $65
For Information: (205) 861-2141

25 thursday

UPDATE '85: RECENT DEVELOPMENTS IN THE LAW
Von Braun Civic Center, Huntsville
Sponsored by: Alabama State Bar Young Lawyers' Section
Credits: 6.0 Cost: Included in convention registration fee
For Information: (205) 269-1515

26 friday

SECTION MEETINGS
Von Braun Civic Center and Hilton Hotel, Huntsville
Sponsored by: Alabama State Bar Sections

Administrative Law	1.6
Attorney's Fees in Bankruptcy and Commercial Cases	2.7
Attorney's Fees in a Divorce and How to Prove Them	1.4
Representation of Oil, Gas & Mineral Lessors — the Basics	2.2
Practice and Procedure: Recent Developments	1.5
Proposed Changes in Laws Affecting Real Estate Practice	1.6
Recent Developments in Alabama Tax Laws	1.2
What Every Civil Lawyer Should Know About Criminal Environmental Laws	1.2

Cost: Included in convention registration fee
For Information: (205) 269-1515

26 friday

ENVIRONMENTAL LAW AND REGULATION
Montgomery
Sponsored by: Jones School of Law
Credits: 5.4
For Information: (205) 272-5820

july 29-august 2

SHORT COURSE ON ESTATE PLANNING
Hilton, Dallas
Sponsored by: Southwestern Legal Foundation
For Information: (214) 690-2377

august

5-6

INTRODUCTION TO FINANCIAL ACCOUNTING FOR LAWYERS
Sheraton City Squire, New York City
Sponsored by: Practising Law Institute
Credits: 10.8 Cost: $325
For Information: (212) 765-5700

AGE DISCRIMINATION WORKSHOP
Four Seasons-Clift Hotel, San Francisco
Sponsored by: Practising Law Institute
Credits: 13.8 Cost: $390
For Information: (212) 765-5700

5-9

THE BANKRUPTCY CODE RE-EXAMINED AND UPDATED
Pepperdine University School of Law, Malibu
Sponsored by: American Law Institute-American Bar Association (ALI-ABA)
Cost: $550
For Information: (215) 243-1600

8-9

PROFESSIONAL LIABILITY
The Fairmont, San Francisco
Sponsored by: Defense Research Institute
For Information: (312) 944-0575

13-16

LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN AND COMPENSATION
University of Colorado, Boulder
Sponsored by: American Law Institute-American Bar Association (ALI-ABA)
Credits: 22.5 Cost: $395
For Information: (215) 243-1600

14-18

ANNUAL MEETING
Minneapolis
Sponsored by: National Association of Criminal Defense Lawyers
Credits: 10.2 Cost: $350/members; $375/nonmembers
For Information: (202) 872-8688

16 friday

HAZARDOUS WASTE LAW
Montgomery
Sponsored by: Jones School of Law
Credits: 4.2
For Information: (205) 272-5820

18-21

NATIONAL INSTITUTE ON CHILD SEXUAL ABUSE
Kansas City, Missouri
Sponsored by: National College of Juvenile Justice
For Information: (702) 784-6012

19 monday

PROFESSIONAL AND SERVICE CORPORATIONS
Mobile
Sponsored by: Alabama Society of CPAs
Credits: 8.0 Cost: $105
For Information: (205) 834-7650

20 tuesday

TAX PLANNING IN CORPORATE LIQUIDATIONS
Mobile
Sponsored by: Alabama Society of CPAs
Credits: 8.0 Cost: $105
For Information: (205) 834-7650

22 thursday

TIPS ON FEDERAL TORT CLAIM LITIGATION
County Courthouse, Montgomery
Sponsored by: Montgomery County Bar Association
Credits: 1.0 Cost: free/members; $15/nonmembers
For Information: (205) 265-4793

DAMAGES
Montgomery
Sponsored by: National Business Institute
Credits: 6.8 Cost: $96
For Information: (715) 835-8525

22-23

ANATOMY OF AN AUTOMOBILE ACCIDENT TRIAL
The Ambassador West, Chicago
Sponsored by: Practising Law Institute
Credits: 10.5 Cost: $250
For Information: (212) 765-5700

22-24

TRIAL EVIDENCE, CIVIL PRACTICE AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS
Mark Hopkins Intercontinental, San Francisco
Sponsored by: ALI-ABA
Credits: 22.8 Cost: $425
For Information: (215) 243-1600

23 friday

S CORPORATIONS
Florence
Sponsored by: Alabama Society of CPAs
Credits: 8.0 Cost: $95
For Information: (205) 834-7650

DAMAGES
Birmingham
Sponsored by: National Business Institute
Credits: 6.8 Cost: $96
For Information: (715) 835-8525

PRODUCTS LIABILITY
Coliseum Ramada Inn, Jackson
Sponsored by: The University of Mississippi Center for Continuing Legal Education
Credits: 6.0 Cost: $75
For Information: (601) 982-6590

TAX PROBLEMS OF INDIVIDUALS
Tuscaloosa
Sponsored by: Alabama Society of CPAs
Credits: 8.0 Cost: $120
For Information: (205) 834-7650

27-28

ESTATE AND GIFT TAXATION
Tuscaloosa
Sponsored by: Alabama Society of CPAs
Credits: 16.0 Cost: $180
For Information: (205) 834-7650

september

6 friday

BASIC HOUSING LAW INSTITUTE
AUM Library Tower, Montgomery
Sponsored by: Alabama Consortium of Legal Services Programs
Credits: 7.2
For Information: (205) 264-1471

13 friday

USE OF MICROCOMPUTERS IN LAW FIRMS IN 1980s
Birmingham
Sponsored by: Alabama Bar Institute for Continuing Legal Education
For Information: (205) 348-6230

BASIC HEALTH LAW INSTITUTE
AUM Library Tower, Montgomery
Sponsored by: Alabama Consortium of Legal Services Programs
Credits: 6.0
For Information: (205) 264-1471

19 thursday

PRACTICAL ASPECTS OF REAL ESTATE FORECLOSURE
County Courthouse, Montgomery
Sponsored by: Montgomery County Bar Association
Credits: 2.0 Cost: free/members; $15/nonmembers
For Information: (205) 265-4793

REAL ESTATE
Huntsville
Sponsored by: Alabama Bar Institute for Continuing Legal Education
For Information: (205) 348-6230

20 friday

REAL ESTATE
Birmingham
Sponsored by: Alabama Bar Institute for Continuing Legal Education
For Information: (205) 348-6230

26 thursday

REAL ESTATE
Montgomery
Sponsored by: Alabama Bar Institute for Continuing Legal Education
For Information: (205) 348-6230

26-27

GOVERNMENT LIABILITY
The Knickerbocker, Chicago
Sponsored by: Defense Research Institute, Inc.
For Information: (312) 944-0575

27 friday

REAL ESTATE
Mobile
Sponsored by: Alabama Bar Institute for Continuing Legal Education
For Information: (205) 348-6230

BASIC CONSUMER LAW INSTITUTE
Wallace State Community College, Hanceville
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Credits: 7.5
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Recognition of Pro Tanto Judgments

by
Judge Marvin Cherner

By amendment to § 12-21-109, *Alabama Code* 1975, the Alabama Legislature made it clear that judgments entered pursuant to pro tanto settlements shall be given effect according to their terms and the intentions of the parties thereto.[1] Before the passage of the amendment, such judgments were not valid.

The Supreme Court of Alabama has been following the common law rule that satisfaction of a judgment against one joint tortfeasor operated to discharge or relieve all other joint tortfeasors of liability, even though the judgment recited that it was only for part of the plaintiff's damages and expressly reserved the plaintiff's rights against the other joint tortfeasors.[2]

In *Maddox v. Druid City Hospital Board*, Charles Maddox, a minor, claimed that he sustained injuries while hospitalized when he was given an overdose of a certain drug by his nurse. He made claim against Druid City Hospital Board as the employer of the nurse and also against the drug manufacturer, Parke-Davis, alleging it had improperly labeled the drug. After suit was filed, Druid City Hospital Board made a settlement proposal. After taking evidence, the trial judge entered judgment pursuant to a pro tanto settlement in favor of Maddox against Druid City. The judgment provided that issues as to Parke-Davis, the other defendant, were to be preserved.

However, after Druid City had paid the amount of the judgment into court and the judgment had been satisfied by Maddox, Parke-Davis moved for summary judgment on the ground that the satisfaction of that judgment extinguished any claims against it. Upholding the trial court's action in granting the summary judgment, the Supreme Court of Alabama again followed the precedents established by earlier decisions in holding that the satisfaction of the judgment against one tortfeasor operated as a discharge of all other joint tortfeasors.

In *Butler v. GAB Business Services*, plaintiff Butler sued a number of defendants, charging them with having committed various forms of tortious conduct in connection with a fire loss on his house. Butler then reached agreement with one of the defendants under which the trial court entered an order which it entitled, "Consent Pro Tanto Judgment." The order recited it was a pro tanto judgment for $8,175 against Pennsylvania General Insurance Company, it operated as a release of that company from all liability and Butler retained the right to proceed against the other defendants.

In that case, Pennsylvania General apparently paid the amount of the judgment directly to Butler or his attorney, but no formal entry of satisfaction was entered on the record in the clerk's office. The supreme court again affirmed the action of the trial court in granting summary judgment in favor of the other defendants concluding that the payment of the judgment by Pennsylvania operated as a satisfaction discharging all other defendants from liability to Butler.

Under the original common law rule, the satisfaction of a judgment against one tortfeasor or the release of one joint tortfeasor had the legal effect of discharging all other joint tortfeasors from liability, even though there was an express reservation of the claimant's rights against the joint tortfeasors who were not parties to the release or the judgment. The rule was based on the concept there could be but one cause of action for a single injury, even though committed by several persons jointly, and that the claimant was entitled to only one satisfaction of his claim for that injury. Legal writers have concluded this concept was borrowed from the law applied to joint estates in property and erroneously applied to the law of obligations independent of property.[3]

The results of the rule were incongruous and often achieved unjust and unintended results. It was not possible for the claimant to settle with one tortfeasor for less than the full amount of his damages because a release of that person would discharge all others. Many injured persons, not knowing the effect of such a release, would accept less than the full amount of the damages from one tortfeasor, only to find later they had walked into a trap. The effect of the rule also was to give the nonsettling tortfeasors an advantage wholly inconsistent with the nature of their liability.[4] One legal writer has referred to the rule, as it applied to releases, as "a surviving relic of the Cokian period of metaphysics."[5]

Pro tanto settlements evidenced by releases have been given effect in Alabama based on the provisions of the statute now found as § 12-21-109, *Alabama Code* 1975.[6] This statute merely provides that any release is to have effect according to the intention of the parties. Relying on this statute, the

Judge Marvin Cherner, of the 10th judicial circuit of Alabama, is a 1947 graduate of Northwestern University and a 1951 graduate of Harvard Law School. Before election in 1976 to his present position, Cherner was in private practice in Birmingham.

supreme court held a plaintiff could release one or more joint tortfeasors for a payment of part of the damages claimed and reserve the right to proceed against the remaining ones.[7]

Unfortunately, the statute was not considered a sufficient basis for recognizing the validity of judgments purporting to reserve the claimant's right to proceed against nonsettling joint tortfeasors.[8]

There was no logical reason for making a distinction between a pro tanto settlement effected by a release and a pro tanto settlement expressed by judgment. In either case, it should have been possible to reserve expressly the right of the claimant to proceed against the nonsettling joint tortfeasors.

This is the position adopted by the American Law Institute in Restatement (Second) of Judgments § 50. Section 50 provides:

> When a judgment has been rendered against one of several persons each of whom is liable for a loss claimed in the action on which the judgment is based:
>
> (1) A satisfaction or release of the judgment, or covenant not to execute upon it, or other agreement terminating in whole or in part the judgment debtor's obligation, does not discharge the liability of any of the other persons liable for the loss, except:
>
> (a) To the extent that the agreement may so provide; and
>
> (b) To the extent required by the law of suretyship.
>
> (2) Any consideration received by the judgment creditor in payment of the judgment debtor's obligation discharges, to the extent of the amount of value received, the liability to the judgment creditor of all other persons liable for the loss.

The comment to Section 50 indicates it was intended to give the same recognition to judgments as has been given to releases affecting a pro tanto settlement. The comment states:

> a. *Rationale* The traditional rule regarding satisfaction or discharge of a judgment against one of several co-obligors was that it discharged all other persons liable for the loss in question. Accordingly, a satisfaction or discharge of a judgment debtor also discharged others liable under the same judgment, liable for the same harm under separate judgments, or against whom a claim of liability might be asserted in a subsequent action. The rule applicable to judgments was a counterpart of the rules applicable to co-obligors whose obligations had not been reduced to judgment. The latter rules were that a release of one tortfeasor released all others liable for the same harm, and that a release of one "joint" or "joint and several" promisor released other such promisors.
>
> The traditional rules regarding discharge of co-obligors have now been superseded by the rule that an agreement terminating the obligation of one such co-obligor has no effect on the liability of another one of them unless the agreement has provisions to that effect. Restatement, Second, Torts § 885(1); Restatement, Second, Contracts § 294, 295. *An obligation represented by a judgment is simply a formalized counterpart of the claim on which it is based. The effect of discharging a judgment should therefore be the same as the effect of discharging less formal obligations. The modern authorities so hold.* (emphasis added)

Because pro tanto settlements effected by a release were recognized in Alabama over 100 years ago, it has been possible for a claimant during trial to accomplish a partial or pro tanto settlement with one or more joint tortfeasors by executing a release discharging the settling tortfeasors from liability and dismissing the complaint as to them while expressly reserving the right in the release to proceed against the nonsettling tortfeasors for the remaining damages claimed by him.

However, a pro tanto release could not have been given legal effect if executed by a plaintiff who was a minor child or an incompetent. It would have been necessary that a guardian first have been appointed to represent the estate of the minor child or incompetent. The guardian then would have to petition the probate court for authority to agree to a compromise of the claim and execute the pro tanto release. After the appointment of a guardian ad litem to represent the ward, it would be necessary for the probate court to hear evidence concerning the proposed pro tanto settlement. If satisfied that the settlement would be of advantage to the ward, the probate court then would enter an order authorizing the guardian to execute the pro tanto release and also to file a motion to dismiss the complaint as to the settling joint tortfeasors.[9]

This procedure, however, contemplates a hearing before the probate court after at least five days notice and an order by the probate court authorizing the compromise. If the pro tanto settlement is negotiated immediately before or during trial, it is readily apparent that it would be difficult, if not impossible, from a practical standpoint to suspend the trial for the time needed to obtain authorization for the execution by a guardian of a pro tanto release.

The settlement of a claim against *all* defendants negotiated on behalf of a plaintiff who is a minor child or an incompetent can be given binding legal effect by a judgment based on the trial court's determination from the evidence presented at a hearing that the proposed settlement is just and fair and in the best interest of the plaintiff.[10]

Now that a pro tanto judgment can be given legal effect, the trial court itself has the authority to decide after hearing evidence whether it should approve a proposed pro tanto settlement of a plaintiff who is a minor child. If the trial court approves the settlement, it then may enter judgment for the agreed amount against the settling defendants while reserving the plaintiff's right to proceed against those remaining.

The amendment giving legal effect to pro tanto judgments thus achieves the salutary object of permitting court approval of pro tanto settlements involving minors and incompetent persons immediately before and during trial. Nothing by way of policy or common sense supported the former Alabama rule that the satisfaction of a judgment against one joint tortfeasor discharged all others from liability. □

FOOTNOTES

[1]The amendment to § 12-21-109, *Alabama Code* 1975, was accomplished by Act No. 85-517, General Acts of Alabama, and became effective immediately on its enactment on May 8, 1985.

[2]*Steenhuis v. Holland*, 217 Ala. 105, 115 So. 2 (1927); *Huey v. Dykes*, 203 Ala. 231, 82 So. 481 (1919); *Williams v. Colquett*, 272 Ala. 577, 133 So. 2d 364 (1961); *Maddox v. Druid City Hospital Board*, 357 So. 2d 974 (Ala. 1978); *Butler v. GAB Business Services, Inc.*, 416 So. 2d 984 (Ala. 1982).

[3]*McKenna v. Austin*, 134 F.2d 659, 663 (D.C. Cir. 1943); Habighurst, *The Effect of a Settlement With One Co-Obligor Upon the Obligations of the Others*, 45 Cornell L.Q. 1 (1959); Prosser, *Law of Torts*, ¶ 46 and 47 (2d Ed. 1955); 1 Pollock and Maitland, *History of English Law* (2d Ed. 1923) 407; 3 Holdsworth, *History of Eng-*

lish Law (1934) 457, 460, 463.

[4]*McKenna v. Austin*, 134 F.2d 659 at 662 (D.C. Cir. 1943).

[5]Wigmore, *Release to One Joint Feasor*, 17 Ill. L. Rev. 563 (1923).

Wigmore stated in part:

> Our obnoxious old friend, that constant companion of personal injury cases, viz., the rule that a release to one of several joint tortfeasors is a discharge to all, is receiving numerous hard knocks lately. He is already aged and infirm, being quite anachronistic; and it looks as though he would soon have to retire from active meddling in the affairs of men. The legislatures have begun to deliver blows at him (e.g., the Code of West Virginia, ¶ 5028, c. 136, ¶ 7), and these legislative remedial statutes sometimes become fashionable and spread rapidly.
>
> We shall not be sorry to end acquaintance with this old party, for he is merely a surviving relic of the Cokian period of metaphysics . . .

Wigmore is quoted with approval in *Friday v. United States*, 239 F.2d 701, 705 (9th Cir. 1957).

[6]This identical section first appeared as section 2282 of the *Alabama Code* of 1852.

[7]*Smith v. Gayle*, 58 Ala. 600, 606 (1877); *Home Telephone Co. v. Fields*, 150 Ala. 306, 43 So. 711 (1907); *Steagall v. Wright*, 143 Ala. 204, 38 So. 844 (1904); *Thompson v. N.C. & St. L. Railway*, 160 Ala. 590, 49 So. 340 (1909).

[8]In *Battle v. Morris*, 265 Ala. 581, 93 So. 2d 428 (1957), the supreme court stated in its opinion:

> . . . The recovery of a judgment against one and its satisfaction is a satisfaction of the entire claim, and the judgment cannot be so expressed as to have a different meaning. *McCoy v. Louisville & N.R. Co.*, 146 Ala. 333, 40 So. 106; *Steenhuis v. Holland*, 217 Ala. 105, 115 So. 2. What we have said must not be confused with the right of Radford Morris to give a pro tanto release to Enoch Battle with a retention of the right to sue and hold Louis Thomas liable for a proportionate part of the total amount of the damages sustained without a judgment against him. *Steenhuis v. Holland*, supra; *Home Telephone Co. v. Fields*, 150 Ala. 306, 43 So. 711. By statute, all releases must be given effect according to the intention of the parties. *Steenhuis v. Holland*, supra; § 381, Title 7, Code of 1940. The effect given by statute to a release has nothing to do with the apportionment of damages by judgment, when there are joint tortfeasors.

[9]Under § 26-4-80, *et. seq.*, *Alabama Code* 1975, the probate court may authorize a guardian to compromise a ward's "doubtful" claim, following the appointment of a guardian ad litem and full hearing on the merits of the compromise.

In *Bishop v. Big Sandy Lumber Co.*, 199 Ala. 463, 74 So. 931 (1917), the supreme court held that the word "claim" as used in § 26-4-80, *et. seq.*, included claims arising out of tort, as well as out of contracts.

[10]*Tennessee Coal, Iron & Railroad Company v. Hayes*, 97 Ala. 201, 12 So. 98 (1892); *Abernathy v. Colbert County Hospital Board*, 388 So. 2d 1207 (Ala. 1980).

CLE News

by
Mary Lyn Pike
Assistant Executive Director

At its March 2 meeting in Montgomery, the Mandatory Continuing Legal Education Commission:

1. Granted a waiver of the CLE requirement to a retired lawyer;
2. Denied credit for videotaped presentations by an approved sponsor, based on the absence of a discussion leader and written materials;
3. Approved Alabama Trial Lawyers' "1985 Austria CLE Seminar."

April 19 in Montgomery the MCLE Commission:

1. Heard a status report on 1984 individual compliance;
2. Reviewed the first quarter report on programs approved and programs denied approval;
3. Denied a request for credit for judging a mock trial competition at a law school;
4. Tabled further discussion of a decision not to approve in-house seminars;
5. Considered an attorney's objection to the requirement that approved courses be designed primarily for attorneys;
6. Declined to implement reciprocal approval of courses approved by other states' CLE commissions;
7. Denied a request to accept for credit unaccredited courses reported by attorneys not subject to the CLE requirement;
8. Tabled a request for reconsideration of a program denied approval;
9. Affirmed a decision not to approve an October 1984 course submitted for approval in March 1985;
10. Voted to certify to the Disciplinary Commission three additional attorneys for failure to meet the 1984 CLE requirement;
11. Approved two courses on the condition the sponsor offer them primarily to attorneys and accountants;
12. Denied approval of a finance and accounting course not designed primarily for attorneys;
13. Denied approval of three courses designed "to hone the legislative skills" of anyone desiring such training;
14. Granted half credit for a workshop on law office partnerships;
15. Approved two continuing legal education seminars offered by an unaccredited law school. □

Bar Briefs

Birmingham bar reaches the 100-year mark

109 North 20th Street, home for the Birmingham Bar

April 15, the Birmingham Bar celebrated its 100th anniversary with a Founders' Day Luncheon and open house.

Birmingham became the county seat of Jefferson County in 1873 and 12 years later 19 attorneys met at the courthouse to adopt a constitution for the bar, as well as elect officers.

The Birmingham Bar has almost 2,000 members and operates on a yearly budget of over $180,000.

Speakers at the luncheon included Richard Arrington, Jr., mayor of the city of Birmingham; C.C. Torbert, Jr., chief justice of the Alabama Supreme Court; Walter R. Byars, president of the Alabama State Bar; and J. Mason Davis, president of the Birmingham bar.

Two new judges appointed

In April of this year, Gov. George C. Wallace appointed two new judges in Alabama: Thomas

WILSON

S. Wilson as circuit judge of Tuscaloosa County and Barbara W. Mountain as district judge of Tuscaloosa County, filling Wilson's unexpired term.

Wilson, a 1979 graduate of the Birmingham School of Law, also received a graduate degree in rehabilitation counseling.

Before his appointment to district judge in January 1983, he was in private practice in Birmingham and Tuscaloosa.

MOUNTAIN

Mountain is a native of Tuscaloosa and graduated from Tulane University in 1977. She is a 1984 graduate of the University of Alabama School of Law and worked in the Tuscaloosa County Public Defender's Office from September 1984 until she joined her husband's practice in January 1985.

Alabama State Bar President-elect Jim North (center) attended the 1985 American Bar Association Leadership Conference, held annually in Chicago for incoming bar presidents.

North is shown above with John C. Shepherd (left), president of the ABA, and William Falsgraf, president-elect of the ABA.

Byars honored at law review's annual banquet

The *American Journal of Trial Advocacy,* Cumberland School of Law, honored Walter R. Byars at its annual banquet April 13. The dinner, held at the Relay House in Birmingham, was attended by Alabama Supreme Court Justices Jones and Adams and retired Circuit Judge James Haley of Birmingham, in addition to many others. Mr. Byars addressed the members of the law review with a look at professionalism in the legal world. He spoke out against attorney advertising and cautioned young lawyers about losing sight via the media and commercialism of the American society of the idealism, goals and objectives which brought them into the field.

The *American Journal of Trial Advocacy* is a law review devoted to trial practice and was established at Cumberland in 1977.

BRASWELL

Newest bar examiner appointed

Nicholas T. Braswell, III, was appointed recently to begin serving a four-year term as a member of the Alabama State Bar Board of Bar Examiners. His term officially begins this month.

Braswell is a native of Demopolis and attended Marion Military Institute. After serving in the United States Army for two years, he received undergraduate and law degrees from the University of Alabama. Since 1966, he has been a member of the Montgomery firm of Rushton, Stakely, Johnston & Garrett.

He has served on the bar's Grievance Committee and as chairman of the Character and Fitness Committee.

BYARS

Another leader in the Byars family

As Alabama State Bar President Walter Byars prepares to "turn over the reins" to President-elect Jim North, another member of the Byars family is just getting settled in her new term of office.

Mickey Byars (Mrs. Walter R.) was installed April 19 as state regent of the Alabama Society, Daughters of the American Revolution. The ceremony was held at the 94th Congress of the Society in Washington, D.C.

The DAR, founded in October 1890, was chartered in 1896 by an act of Congress. The society's objectives are the same today as then: historic, educational and patriotic.

Mrs. Byars has been active in DAR for many years, serving as chapter regent of Anne Phillips Chapter and as registrar and first vice regent of the Alabama Society. She is also an active member of Colonial Dames XVII Century, Daughters of the American Colonists, Alabama Genealogical Society and numerous other patriotic and civic organizations.

The Byars have four children and reside in Montgomery.

In memory of J.O. Sentell, Jr.

As a tribute to the late J.O. Sentell, United States Senator Howell Heflin entered a statement in memory of him in a recent issue of the *Congressional Record.*

Sentell, who died January 19, served for many years as clerk of the Supreme Court of Alabama, in addition to his duties as editor of *The Alabama Lawyer* (from 1967-82).

"I'LL BE AT A C.L.E. COURSE FOR THE REST OF THE DAY."

A Judicial Perspective: Reimbursement of Appointed Counsel and Effective Assistance of Counsel

by
Hon. William M. Bowen, Jr.

The appointed criminal defense attorney serves an invaluable function without which our criminal judicial system could not operate. However, it often appears that appointed counsel is frustrated by the system served and the indigent defended. On the one hand, counsel is underpaid for his services which often involve defending the most heinous crimes committed by society's outcasts and renegades. On the other hand, counsel often is charged with being ineffective and incompetent by the client. This article, in summary fashion, highlights recent developments in both of those areas.

Part I

June 13, 1984, significant changes became effective concerning reimbursement for appointed counsel. Counsel appointed to defend any indigent defendant for the appeal from a decision in any criminal conviction or juvenile proceeding is entitled to reimbursement for services rendered at the rate of $40 per hour "for time reasonably expended in the prosecution of such appeal, and any subsequent petition for writ of certiorari." *Alabama Code* 1975, § 15-12-22(d) (1984). This $40 per hour includes both "in-court" and "out-of-court" time.

There is no longer a $500 maximum limit on expenses incurred in handling an appeal from a conviction or juvenile proceedings. Section 15-12-22(d), as amended, provides that "counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in preparing and handling such appeal, to be approved in advance by the appellate court." This amended section does not limit expenses to a maximum of "one-half of the allowable attorney fees" as did its predecessor. Reasonably incurred expenses include such items as postage fees for the mailing of briefs, copying and typing fees, and mileage (at the present rate of $.22 a mile § 36-7-22).

The total fees awarded counsel shall not exceed $1,000 plus expenses for any appeal and subsequent petition for writ of certiorari, § 15-12-22(d), with two exceptions: (1) If the state takes a pretrial appeal, defense counsel also may be reimbursed up to $1,000 plus expenses for handling just that pretrial appeal; (2) If the Alabama Supreme Court grants a petition for writ of certiorari, which is automatic in death penalty cases, "counsel shall be entitled to bill separately for all services rendered after the granting of the certiorari petition, up to a separate limit of $1,000.00 [plus expenses] over and above any funds received for services rendered in the court of criminal appeals." § 15-12-22(d)

Indigent fees in appeals from the denial of petitions for writs of habeas corpus and error coram nobis or other post-conviction remedies are governed by § 15-12-23(d). That section does *not* authorize reimbursement for expenses because it only provides that the "fee shall be based on the number of hours spent by counsel in working on such proceedings." An attorney's total fee is limited to a maximum of $600 at the rate of $40 per hour for time expended in court and $20 per hour for out-of-court time. Section 15-12-23 does not provide any additional amount of reimbursement in the event certiorari is granted by the supreme court. Although not specifically provided for, an appeal from a revocation of probation is governed by § 15-12-23.

Part II

A criminal defendant on his first appeal as of right has a constitutional right to the effective assistance of counsel. *Evitts v. Lucey*, ___ U.S. ___, 105 S.Ct. 830 (1985). The test of effec-

William M. Bowen, Jr., the presiding judge of the Alabama Court of Criminal Appeals, is a native of Birmingham. He received his bachelor's degree from Samford University and his law degree from Cumberland School of Law. Before assuming office in 1977, Judge Bowen served as an assistant attorney general.

tive assistance presently applied is the standard of "reasonably effective representation." *Smith v. Wainwright,* 741 F.2d 1248, 1259 (11th Cir. 1984), cert. den., ___ U.S. ___, 105 S.Ct. 1853 and 1855 (1985). Counsel need not provide perfect assistance and need not brief issues reasonably considered to be without merit, *Smith,* supra, or "raise issues that he reasonably concludes will not be considered on the merits by the appeals court." *Francois v. Wainwright,* 741 F.2d 1275, 1285 (11th Cir. 1984). Appellate counsel has no constitutional duty to raise every nonfrivolous issue requested by the defendant. *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)

Although, generally, counsel's failure on appeal to advance errors which only have subsequently gained "judicial recognition" does not constitute ineffective assistance, *Sullivan v. Wainwright,* 695 F.2d 1306, 1309 (11th Cir.), cert. den., ___ U.S. ___, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), see also *Reed v. Ross,* ___ U.S. ___, 104 S.Ct. 2901 (1984), "there may be some cases in which trial counsel's failure to preserve error will not excuse appellate counsel's failure to raise the error." *Francois,* 741 F.2d at 1286. However, an appellate court should not "second guess reasonable professional judgments" by appellate counsel as to what are the most promising issues for appellate review. *Jones v. Barnes,* 103 S.Ct. at 3314. Counsel should raise "all arguably meritorious issues which might lead to the convict's securing of relief unless counsel has a reasonable basis designed to effectuate his client's interests for refraining from making the contention." Annot. 15 A.L.R.4th 582, 602 (1982)

In almost every case, counsel's failure to file a brief on appeal constitutes ineffective assistance. *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). "[T]he failure to file a brief in a nonfrivolous appeal falls below the standard of competency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance" of counsel. *Mylar v. Alabama,* 671 F.2d 1299, 1302 (11th Cir. 1982), cert. den., ___ U.S. ___, 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983). As an active advocate, appellate counsel is duty bound to "inform the court of errors committed at trial" and "provide legal citations and reasoning to support any claim for relief." *Mylar,* 671 F.2d at 1301; *Passmore v. Estelle,* 594 F.2d 115 (5th Cir.), modified, 607 F.2d 662 (5th Cir. 1979), cert. denied, 446 U.S. 937 (1980)

"If counsel finds his case to be wholly frivolous, . . . he should so advise the court and request permission to withdraw." *Anders,* 386 U.S. at 744. The request to withdraw should be accompanied by a brief referring to anything that arguably might support the appeal. At a minimum, this brief should include a list of adverse rulings in the trial court. Counsel should furnish the indigent with a copy of the brief and request time for the indigent to be allowed to raise any issue he chooses.

When appellate counsel fails to file a brief, it is the policy of the court of criminal appeals to send that attorney a letter informing him of the holding in *Mylar.* This court does not file a complaint with the Alabama State Bar against appellate counsel. However, the bar has requested that it receive a copy of every *Mylar* letter. This letter serves three purposes. It effectuates the responsibility of this court to ensure the defendant receives the constitutionally required assistance of counsel. It avoids the delay associated with an out-of-time appeal which must be granted where the defendant has been denied the effective assistance of appellate counsel or his right of appeal. *Ex parte Longmire,* 443 So.2d 1265 (Ala. 1982). Finally, the letter serves as a reminder to those attorneys who have negligently or inadvertently failed to file a brief.

Appellate counsel who represent their clients in the best traditions of the profession should claim the full reimbursement to which they are authorized and entitled. Those few who fail in their duties as active advocates should realize the almost certain risk they encounter of being criticized before the bench and bar. □

Law Day USA

"Remember with pride liberty, justice and equality under law." These words, spoken by former United States President Dwight D. Eisenhower when he proclaimed the first Law Day, appear to be as true today as they were almost 30 years ago.

Law Day U.S.A. was established in 1958 by a U.S. Presidential Proclamation and reaffirmed three years later by a joint resolution of congress. Celebrated annually on May 1, Law Day's purpose is to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under the laws."

"Liberty and Justice for All," this year's theme, encouraged Law Day programs and events to center on what America enjoys because of our legal system's goal of liberty and justice for everyone.

The following brief summaries reflect how some city and county bar associations in Alabama celebrated this commitment to improving and preserving the American legal system.

Baldwin County

Throughout the county, numerous speakers and guided tours took place May 1, with the majority of the tours planned especially for elementary school students.

An essay contest for junior high students was won by Robertsdale contestants. Baldwin County senior economic and government classes heard lectures by District Attorney David Whetstone and Assistant District Attorney Greer Minic.

In addition, several mayors around the county signed their own Law Day proclamations; libraries emphasized the legal motif in displays and various churches observed the day in different ways.

Butler County

Seniors from all county schools were treated to a panel discussion and a question and answer period with panel members representing the four levels of Alabama's judicial system.

Justice Hugh Maddox (supreme court); Judge Sam Taylor (appeals court); Judge Arthur E. Gamble, Jr., (circuit courts);

Judge Joseph N. Poole, III, (district courts); and Butler county and municipal officials participated in the day's events.

Also included was a short presentation by the local juvenile probation officer on local judicial history.

Cullman County

The county bar association held a Law Day luncheon with attorney James J. Thompson as guest speaker. Other activities included a taped discussion by local attorneys James J. Knight, Steven J. Pettit and Assistant District Attorney Charles Neizer regarding Law Day's foundation, recent developments in legislation, etc. This discussion was aired on a local radio station.

Escambia County

An "actual" criminal case, in which an advisory jury of high school students was selected to hear and decide the case, was sponsored by the county bar. (The defendant was charged with possession of marijuana and found guilty of the offense.) The 12-member jury and two alternates represented the four county high schools.

Concluding Law Week activities was a lake party and cookout for bar members and spouses.

Huntsville-Madison County

Monday and Tuesday, April 29 and 30 attorneys went to local high schools and talked to students on topics ranging from the development of law in society to how students can prepare themselves for a career in law.

Law Day was celebrated with a church service at the First Presbyterian Church, with the Honorable Seybourn Lynne, Edwin Breland and John David Snodgrass heading the noon presentation. Following the service, more than 160 bar members met for lunch and a monthly meeting.

Later that same day, the courtroom of the Madison County courthouse was dedicated to the honor and memory of Judge Schuyler H. Richardson.

May 2, the bar, in conjunction with the local federal bar, held its annual Law Day banquet at the Redstone Arsenal Officers' Club, with featured speaker Robert L. Steed, Atlanta attorney and humorist.

All law offices closed at noon Friday in the observance of Law Day.

Jackson County

Mock trials and informative speakers involved students throughout the county. The mock trial eventually was seen by almost 800 students and was held in local courtrooms.

Law Week culminated in the bar's annual banquet, held at the home of H. Thomas Armstrong, county bar president. Public service announcements in local newspapers and on a local radio station helped ensure the success of Law Week.

Lauderdale County

Numerous events for Law Week were scheduled throughout the county. Among these were the proclamation by the Florence City Commission of Law Week for the week of April 28-May 4; a speakers bureau from the local bar going to senior high, junior high and elementary schools; and an essay for senior high students using the Law Day theme.

A poster contest, continuing legal education seminar, mock trial, Law Day brunch (sponsored by the Legal Secretaries Association for local bar members), senior citizens' program and courthouse tours for school groups also filled Law Week in Lauderdale County.

The McKinley Young Lawyers presented the William Rotch award to Barbara Collum of the county probate judge's office for having gone "above and beyond" the call of duty in assisting lawyers, and the Colbert-Lauderdale Bar Auxiliary ended Law Week with a picnic and live entertainment.

Marshall County

The bar association, in conjunction with the bar auxiliary, held a picnic-barbecue for members of the bar and legal assistants. In another joint effort, bar members and legal assistants provided books for the county law library.

Members of the bar visited each high school in the county, discussing topics relating to law and the legal community. One final cooperative effort (between the bar and bar auxiliary) provided law-related books for libraries throughout the county.

Mobile

An information booth at Bel Air Mall, exhibiting winning entries in the bar auxiliary's poster contest, and senior citizens' seminars were just two of the events coordinated by the Mobile bar. In addition, several members of the bar spoke to students at area high schools.

The week concluded with the traditional naturalization ceremony in the Honorable W. Brevard Hand's courtroom. Almost 60 persons, from 29 countries, became America's newest citizens.

Participating in the program were Theodore High School's choir, the U.S. Marine Corps Color Guard, the Mobile Exchange Club and the Daughters of the American Revolution. All judges of the 13th circuit and the southern district of Alabama were present; a certificate of appreciation was presented to Judge Hand for his assistance.

Montgomery County

A "Day in Court," including a tour for 50 eighth-graders of various state and federal courts, was sponsored by the bar. The United States Air Force donated two buses for transportation, as well as served as tour guides and chaperones.

The day included a naturalization ceremony at the federal courthouse; tour of the Alabama Supreme Court and an address by one of the justices; bus tour of Maxwell AFB and lunch at the Officers' Dining Hall; tour of the Air Force JAG School, with an address by the commandant and video-taped mock trial court-martial; and tour of the county courthouse, with a talk by Judge Joe Phelps and a look at the county jail facility.

The next day, the bar sponsored a Law Day reception and cocktail hour at the Capital City Club.

Morgan County

With the assistance of the Young Lawyers' Section, the county bar sponsored a luncheon recognizing the efforts of PACT (Parents and Children Together), a child abuse prevention association. PACT received a $250 donation from the bar.

In addition, the YLS, in conjunction with the Decatur City Police Department, the Hartselle Police Department and the Morgan County Sheriff's Department, staffed the fingerprinting of many area children.

President's Page

(From page 168)

first time the membership rolls of the Alabama State Bar are computerized. We owe a debt of gratitude to the Administrative Office of the Courts for providing the bar with access to its computer. This not only will lead to the computerization of the membership list, but also the admission data relating to law students and prospective lawyers and disciplinary matters relating to members of our bar.

A priority area has been the study of the organization and governance of your bar, including the election of its officers. The Governance Committee, chaired by Gary Huckaby of Huntsville and aided by Vice Chairman John Proctor of Scottsboro, and each of its members, has conducted extensive study into the existing structure of the bar, held a public hearing during the mid-year meeting and proposed to the bar commissioners a comprehensive reorganization of the bar. The bar commissioners have under consideration the committee report and minority views. I feel confident the bar will be reorganized to provide increased representation for the larger judicial circuits, but retain representation for each of the 39 judicial circuits. The Governance Committee is due a special commendation for tackling a difficult task and responding in a responsible manner to the bar commissioners.

The Task Force on Judicial Evaluation, Election and Selection recommended, and the bar commissioners approved, proposed legislation to provide for non-partisan judicial election for all state courts and a judicial nominating commission for state appellate judges. Both of these bills were introduced without success in the 1985 regular session, but we have our foot in the door. Our able legislative counsel have made progress with members of the legislature in the pursuit of these ideals.

The Programs, Priorities and Long-range Planning Committee, chaired by Harold Speake of Moulton and co-chaired by Thad Long of Birmingham, has undertaken extensive studies and made excellent long-range recommendations for the operation of your bar as your service arm. This committee provided an invaluable service to all lawyers in this state, including a comprehensive study of the electronic mechanization of the headquarters functions. This committee's labor and foresight will accrue to the benefit of us all and of the future of our profession.

The special Task Force on Alcohol and Drug Abuse has formed a non-profit corporation for the purpose of establishing a program to help our fellow lawyers. The initial board of Concerned Lawyers Foundation, Inc., is composed of the Task Force Chairman, Judge Val L. McGee of Ozark; Judge John Patterson; incoming President Jim North and attorneys Mike Conaway and Walter Price, Jr. The program of the Alabama State Bar at its annual meeting in Huntsville reflects the substantial need in this area and as well the continued hard work of this task force.

After almost two years' study, the board of bar commissioners has adopted proposed rules for an Alabama State Bar Client Security Fund. These rules have been transmitted to the Supreme Court of Alabama with a request for their adoption. The board has formally commended the Client Security Fund Committee for its work. Birmingham attorney Jim Ward and his committee have done the bar and the public a great service with their dedicated efforts.

During the 1984-85 bar year, two new sections were created — bankruptcy and family law. In addition, a litigation section is to hold its organizational meeting at the annual meeting. Sections within the bar permit the uniting of legal practitioners who specialize in certain areas of the law, all for the improvement of the services offered to the public.

There is bad news on the federal front affecting Alabama citizens and both plaintiff and defense lawyers involved in personal injury litigation. After approximately 30 years, the Internal Revenue Service arbitrarily changed its regulations to impose federal income tax on awards and settlements of wrongful death cases, singling out Alabama's punitive damages wrongful death statute in the regulation. The bar commissioners elected to oppose this discriminatory move. Your president wrote requesting the aid and assistance of our senators and congressman. After receiving negative responses from the IRS, Tom Carruthers and Robert Couch of Birmingham were requested to draft an amendment to the Internal Revenue Code to exempt from taxation punitive damages received in wrongful death cases. After devoting substantial research and consideration, these lawyers cooperated with David Wooldridge, who was employed by the Alabama Trial Lawyers, and proposed corrective legislation has been forwarded to our congressmen for action. I hope we will be successful in our legislative endeavors during this year of proposed tax reform.

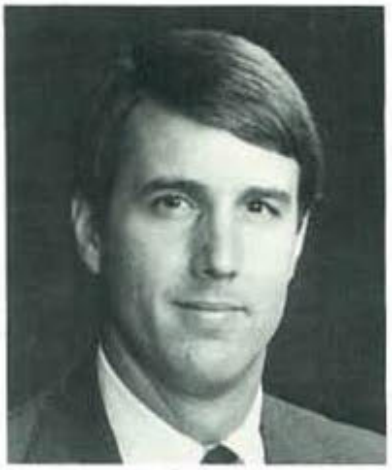
There also is good news on the national scene. A major problem confronting the organized bar in this country was the attempt by the Federal Trade Commission to include within its reauthorization legislation the preemption of traditional state regulation of the legal profession. This attempt recently has been defeated in congress, meaning the courts will continue to determine what, if any, jurisdiction the FTC may have over the profession under the 1914 FTC Act, as limited by the state action doctrine of *Parker v. Brown*. The successful fight against this adverse legislation was initiated and led by the Southern Conference of Bar Presidents, which includes in its membership the president and president-elect of the Alabama State Bar, with the joint efforts of the National Conference of Bar Presidents and American Bar Association.

These accomplishments point to the continued success of the Alabama State Bar in its representation of Alabama lawyers. Yet, I, more than anyone, realize the magnitude of the job left for future administrations. I leave with the realization, though, that incoming President Jim North will provide able leadership, and he will receive the full cooperation and assistance of your bar commissioners and state bar staff. While all may not be well within the profession, each of you can expect an outstanding administration in 1985-86.

In closing the 1984-85 year, I thank each of you for the opportunity to serve and for your work and support in helping me carry out your program. □

— Walter R. Byars

Young Lawyers' Section



by
Robert T. Meadows, III
YLS President

A reminder from my secretary that the article for the Young Lawyers' Section of the July issue of *The Alabama Lawyer* is late again makes me realize time has flown during the past year. It has been a busy — at times too busy — year, but a very satisfying one from the standpoint of having served the bar. Unfortunately, it seems just as one gets a good grasp on the system and its people, the time has come to relinquish the gavel to another individual. Suffice it to say I thoroughly have enjoyed my opportunity to serve the young lawyers of this state, and I hope that by my having done so I have contributed in some small way to the betterment of our profession.

I thank all of the fine attorneys with whom I have served on the YLS Executive Committee, particularly those officers who have been so helpful to me during this year. Without their steadfast aid and support, the Young Lawyers' Section would not have been nearly as successful this year in its activities. Thanks also go to particular members of the executive committee who have gone above and beyond the call of duty in their efforts on behalf of the Young Lawyers' Section. James Anderson of Montgomery, Ron Davis of Tuscaloosa, Bernie Brannan of Montgomery, James Miller of Birmingham, Randy Reaves of Montgomery, Charles Mixon and Caine O'Rear of Mobile, Dick Richardson of Huntsville, Lynn McCain of Gadsden, Pat Harris and Myra Sabel of Montgomery, Claire Black of Tuscaloosa and others too numerous to mention continually have been willing to give of themselves and their time.

I would be remiss if I did not also extend my gratitude to Walter Byars, president of the state bar. Walter is a very enthusiastic individual when it comes to promoting his profession, and I believe some of his enthusiasm has spilled over to the young lawyers in our efforts to better our profession. Walter particularly has been helpful in times of crisis when decisions had to be made that were of long-range effect on the young lawyers, and the state bar as a whole. Of course, it goes without saying Reginald Hamner and his staff at the Alabama State Bar Headquarters in Montgomery have done their usual fine job. Without Reggie, Mary Lyn Pike, Margaret Dubberley, Diane Weldon and the other members of the staff, the Young Lawyers' Section would have fallen short on several occasions during the year.

By the time this article appears in the hands of the lawyers throughout the state, my term will have ended and Bernie Brannan of Montgomery will have taken over. Between the time of writing this article and its appearance in *The Alabama Lawyer*, several projects remain to be completed in this year's activities of the Young Lawyers' Section. May 17 and 18, the annual Sandestin seminar was held in Sandestin. Approximately 200 young and "old" lawyers attended this particular seminar with 180 of those pre-registering. The seminar programs, together with the golf and tennis tournaments, were well received by all in attendance. One would do well to make plans to attend the May 1986 annual Sandestin seminar.

In Montgomery on Wednesday, May 22 the second bar admissions ceremony of the year was held. Approximately 80 new admittees to the bar were honored. At the bar luncheon held that day, the Hon. Fred Gray of the law firm of Gray, Langford, Sapp, Davis & McGowan of Tuskegee spoke to the new admittees. Mr. Gray, in addition to having handled a number of very significant cases throughout his years as a practicing lawyer, recently has been named president of the National Bar Association. It is significant that Mr. Gray, who graduated from Case Western Reserve Law School, will be assuming the presidency of the NBA at approximately the same time another graduate of Case Western Reserve Law School is assuming the presidency of the American Bar Association.

For the annual bar convention held in Huntsville in July, Dick Richardson and his Huntsville young lawyers arranged a party for the young lawyers of the state who will attend the convention. Dick and his comrades from the Huntsville Young Lawyers' Section are to be commended. I hope this type of party will continue as an an-

(Continued on page 181)

LEGISLATIVE WRAP-UP

by
Robert L. McCurley, Jr.

The Alabama Legislature unanimously approved and the governor signed into law the Eminent Domain Code. This act was one of only a relatively few major bills approved during the 1985 regular session. Also approved was a bill authorizing pro-tanto settlements (see "Pro Tanto Settlements" by Judge Marvin Cherner, page 197).

This was the first year the legislature operated under "budget isolation," a constitutional amendment approved by the voters requiring no legislation could be passed until the two budgets were passed and submitted to the governor.

The budget isolation amendment did provide an exception which permitted other legislation to be considered if a resolution was approved first by a majority of the respective house. This provision apparently caused the house no problem. The house bills, with their companion resolution, were considered as usual. The senate required every budget isolation resolution to be referred to the Senate Rules Committee. Consequently every bill once approved by one of the 20 senate committees still required the approval of a resolution from the rules committee before it could be considered by the senate.

Only 89 senate bills (12.34 percent) were enacted into law. Of these 40 were local bills applying to only one county. The house of representatives enacted only 251 of which 183 were local bills.

Only 105 statewide bills were enacted during the regular session. Most were of limited scope, applying to only one state agency or were pay raises or expense bills for state and county officials.

The following chart is an indication of 1985 legislative enactments to prior years.

Percentage of Legislative Enactments to Bills Introduced

	Years			
	1985	**1982**	**1980**	**1975**
House Bills Introduced	1080	787	1145	2598
% of House Bills Passed	23.24	11.82	12.05	31.7
Senate Bills Introduced	721	531	605	1601
% of Senate Bills Passed	12.34	22.22	17.36	23.2
House Joint Resolutions Introduced	217	307	175	688
% of House Joint Resolutions Passed	89.86	84.03	78.86	60
Senate Joint Resolutions Introduced	112	169	239	340
% of Senate Joint Resolutions Passed	87.5	84.61	43.93	49.7
Local Acts	223	295	324	
TOTAL ACTS	340(a)	628(b)	810(c)	1822(d)

(a) Regular session only
(b) Includes regular session and 3 special sessions
(c) Regular session only
(d) Includes organizational session, regular session and 4 special sessions. Prior to *Peddycoart v. City of Birmingham* (which declared general bills of local application to be unconstitutional) 354 So.2d 808 (Ala. 1978)

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.

Eminent Domain

The Eminent Domain Act (Act No. 85-548), sponsored by Senator Frank Ellis and Representative Jim Campbell, passed the legislature and will be effective January 1, 1986. The revision was the work of a committee chaired by the late Maurice Bishop of Birmingham. This bill provides a procedure for handling eminent domain cases from the commencement of the action through judgment and post judgment. It does not change the requirements for the right to condemn. The present Title 18, although slightly modified, is included in this new code.

Pro Tanto Settlements

Section 12-21-109, *Code of Alabama* 1975, was amended to include "all judgments entered pursuant to pro tanto settlements." This amendment (act no. 85-517) was effective May 8, 1985. The bill was sponsored by Representatives Mike Box and Beth Marietta and Senator Jim Smith.

Child Abuse

The legislature also passed eight "child abuse" protection bills. Among other requirements these bills require criminal background investigations for foster parents and others who work with children. The testimony of children in child abuse cases may be videotaped and the taped testimony used at trial.

Taxation

The legislature passed a corporate income tax bill which conforms Alabama's corporate income tax law provisions with the federal law. It further makes available Subchapter S treatment for foreign and domestic corporations by deleting the ten million dollar gross sales limit. It further requires a carry-over basis for gifts and transfers in trust taking place after March 14, 1985. Alabama income tax procedure rules also were conformed to their federal counterparts by adopting the federal "timely mailing is timely filing" rule. The bill also phases out the $600,000 per year corporate net operating loss rule and now allows a 15-year net operating loss carry-over. This corporate income tax bill was signed into law May 8 as Act No. 85-515.

The Federal Tax Reform Act of 1984 (P.L. 98-369) became effective January 1 and relates to tax treatments of alimony, separate maintenance, property settlements and child support. Alabama has not conformed its law, but still treats such payments under the federal law in effect January 1, 1982. The bill conforming Alabama's law with the federal law was caught in the last day "log jam," but will be re-introduced in an expected special session.

Other Legislation

The legal drinking age was raised to 21 years of age. This bill did "grandfather in" all those 19 years of age by October 1, 1985, and certain others in the military. This law will become effective October 1, 1986.

The primary election date was moved from September to June. The 1986 elections will hold an initial primary June 3, 1986, with a run-off June 24, 1986. □

Executive Director's Report

(From page 169)

programs being offered in Alabama; (3) Carefully evaluate the provisions of any policy for prior acts coverage. Sometimes you find a more favorable basic rate; however, in purchasing your "tail" coverage, you very well may pay more for this coverage than the overall increase in the policy costs under which you currently are insured; (4) Watch for new restrictions in prior policy provisions. Many insurers are seeking to reduce exposure through this means and remain in the market at, I hope, a competitive rate.

The American Bar Association Standing Committee on Lawyers' Professional Liability and our own Insurance Programs Committee of the Alabama State Bar are frustrated by the lack of consistency in this market. It is hard to realize that 15 years ago this problem was not worthy of a committee's time in either association, much less the necessity for full-time staffing of a position within the American Bar Association.

One thing is readily apparent. Lawyers are getting sued for malpractice; judgements and/or settlements are being obtained. Be assured we in Alabama are not paying for the mistakes in other jurisdictions; we are paying for our own mistakes as this problem is a pervasive one throughout our profession within these United States.

It will get better if history can be relied upon. I predict an easing in late 1986, but I fully anticipate to find us in the same predicament we are in today no later than 1993. No one has explained satisfactorily to me the cyclical effect that occurs with seeming regularity every seven years. Come to think of it, there very well may be a "seven-year itch." □

— Reginald T. Hamner

MEMORANDUM

TO: Bench and Bar of Alabama

FROM: Robert G. Esdale, clerk
Supreme Court of Alabama

In the case of **Green v. Harbin,** presently pending in the United States District Court for the Northern District of Alabama, a decree was entered on May 21, 1985, concerning writs of garnishment. That decree requires: (1) judgment debtors be given express notice of rights of exemption, and (2) the development of a new timetable in which to make a contest of a claim of exemption, along with a procedure for mandatory dismissal of process if no contest of exemption is timely made and a prompt hearing if a contest is made.

The order further provides the state will be enjoined from the issuance of any writ of garnishment (except to collect child or spousal support) after June 20, 1985, unless the above requirements are met either by legislative act, local judicial order or a rule of the supreme court.

Pending legislative action on this matter, the court has asked the Standing Committee on the Alabama Rules of Civil Procedure to study this matter and recommend a rule or rules putting the state in compliance with the court order. Unfortunately, this cannot be done in time to publish such a rule or rules in the July issue of **The Alabama Lawyer.** Publication will be made in the September issue.

These rules probably will be in the form of Emergency Garnishment Rule A (replacing § 6-6-394, **Code of Alabama** [1975]) and the Emergency Garnishment Rule B (replacing § 6-10-37, **Code of Alabama** [1975]).

If you have not done so already please obtain a copy of these rules from your circuit or district clerk's office.

Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

Arson expert cannot testify as to the ultimate fact

Huffman v. State, 3rd Div. 975 (April 23, 1985) — The Alabama Court of Criminal Appeals reversed the defendant's arson conviction based upon the error which occurred during the examination of John Robinson, assistant fire marshall for the State of Alabama.

Mr. Robinson, after giving his qualifications, stated he made an investigation of the fire to determine if the cause of the fire was from natural causes or had been set intentionally. During the course of the direct examination, the prosecutor asked the following questions:

Q. Okay. Now, I am going to ask you if you have an opinion as to the cause of the fire, I mean exactly what materials were used, if any, to start the fire.

A. Based on the elimination of acts of God and accidental causes, I would have to feel that this fire was intentionally caused.

MR. YATES: Your Honor, I object.

THE COURT: Overruled.

MR. YATES: Your Honor, that asks — that's an ultimate fact of issue here. That is not expert testimony.

THE COURT: Overruled. . . .

Q. So, it is your determination that it was a deliberate or intentional fire?

MR. YATES: Object to that. It asks for an ultimate fact in issue, and it is not subject to an expert witness's testimony.

THE COURT: It's his opinion. Ask him that again."

Judge Tyson, writing for a unanimous court of criminal appeals, affirmed the doctrine enunciated in *Hughes v. State*, 412 So.2d 296 (Ala.Crim.App. 1982). In *Hughes*, the court of appeals held:

> "It is clear that, over proper objection, the admission of testimony that a fire was 'intentional' or 'of incendiary origin' is reversible error. See *Colvin v. State*, 247 Ala. 55, 22 So.2d 548 (1945); *Moreland v. State*, Ala.Cr.App. 373 So.2d 1259 (1979). Even an expert may not give an opinion on the issue since the cause of a fire is the ultimate fact in an arson case."

Judge Tyson critically noted: "It is clear from the record . . . that Mr. Robinson was improperly permitted to give his opinion as to the ultimate fact at issue in this arson case. Thus reversible error occurred."

Recent Decisions of the Supreme Court of Alabama—Civil

Administration of estates . . . section 26-12-7 invalidated for purposes of inheritance

Abrams v. Wheeler, 19 ABR 1451 (March 29, 1985) — The issue presented was whether the two-year statute of limitations on paternity proceedings set out in §26-12-7, *Ala. Code* 1975, bars the child from *inheriting* from the decedent's estate by intestate succession. The supreme court answered the question in the negative. The decedent died intestate leaving an illegitimate child. The trial court found since the child was illegitimate, she was not entitled to inherit as the judicial determination of paternity was not made within two years of the child's birth as required by statute and *Everage v. Gibson*, 372 So.2d 829 (Ala. 1979).

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.

The supreme court stated the rule in *Everage* is modified because the United States Supreme Court recently has struck down Tennessee's two-year statute of limitations as being in violation of the equal protection clause. The rationale is that the limitation failed to afford illegitimate children an adequate opportunity to obtain child support while failing to be related substantially to the state interest of preventing the litigation of stale or fraudulent claims. The supreme court also noted the Alabama Court of Civil Appeals in *State v. Martin*, 437 So.2d 1311 (1983), recently invalidated §26-12-7, *supra*, for purposes of support. The supreme court reasoned that since a judgment of paternity serves the same state purpose, regardless of whether it pertains to *support* or *intestate succession*, it follows that the statute of limitations likewise discriminates for purposes of establishing the right to inherit from a putative father's intestate estate.

Administration of estates . . . section 43-2-24 applies only to testate estates

Ex parte: Holladay (In Re: The Estate of Calvin Jerome Holladay, Deceased), 19 ABR 1255 (March 22, 1985) — In a case of first impression in Alabama, the supreme court was asked to decide whether §43-2-24, *Ala. Code* 1975, permits the probate court to issue letters of administration to a widow, who at the time of her husband's death was disqualified under §43-2-22, *Ala. Code* 1975, for minority. Teresa Holladay was only 16 at the time of her husband's death and thus disqualified because of minority. Her father-in-law was appointed sole administrator. Teresa subsequently remarried and when her disability of non-age was removed, she filed a petition to have her father-in-law removed or in the alternative to be appointed co-administrator. Relying on §43-2-24 the trial court issued supplemental letters of administration naming the widow as co-administrator. Both parties filed petitions for writ of mandamus.

The supreme court stated there is no authority in Alabama by which a probate court can issue supplemental letters of *administration*, and there is no authority by which a probate court can appoint a co-administrator. Section 43-2-24 expressly provides for supplemental letters *testamentary* "if the disability of a person under age or of a married woman *named as executor in a will* is removed." The supreme court reasoned that by mentioning only those *"named as executor in a will,"* the legislature expressed its intent this section should apply only to testate estates. Since supplemental letters of administration are not mentioned in §43-2-24 nor in any other statute, the supreme court presumed the legislature never intended to allow for the issuance of such letters. In a footnote, however, the supreme court stated it could not understand why the 1975 *Code* committee failed to include administrators in §43-2-22.

Attorney and client . . . non-licensed attorney cannot enforce lien for fees in Alabama

Sawyer v. McRae, 19 ABR 1680 (April 12, 1985) — Sawyer, an Alabama resident, was injured in Alabama. McRae, a Mississippi attorney licensed to practice law in Mississippi but not licensed in Alabama, associated an Alabama attorney and filed suit in Alabama. Subsequently, Sawyer discharged McRae, and McRae filed a motion to fix attorney's liens. The trial court granted a lien of $10,000, and this ruling was certified under Rule 54(b), ARCP. The issue was whether an attorney who is not licensed to practice law in Alabama is estopped from pursuing a claim for recovery of compensation on a contract with a client. In a case of first impression in Alabama, the supreme court ruled that an attorney who is unlicensed in Alabama cannot enforce a contract entered into to provide legal services in Alabama. The supreme court noted it consistently has held that members of other unlicensed occupations cannot enforce their contracts in regard to rendered services if they have not complied with Alabama licensing requirements. The supreme court could see no reason to treat the legal profession differently from other licensed occupations in Alabama.

Civil procedure . . . rule 9(h), ARCP, requires the plaintiff to proceed in a reasonably diligent manner to determine the true identity of the defendant

Kinard v. C.A. Kelly and Company, Inc., 19 ABR 1385 (March 29, 1985) — Kinard, a tenant, fell in a parking lot and sued the lessor, Kelly and Company, Inc., August 8, 1980. Kinard's attorney listed fictitious parties described as owners of the premises. Although Kinard's attorney maintained he commenced "informal discovery" soon after the complaint was filed, the surpreme court could find no evidence of any attempts to discover the true identities of the fictitious parties until January 1983 when Kinard propounded interrogatories to Kelly and Company. In response to the interrogatories, the identities of the owners were revealed, and Kinard's attorney immediately amended her complaint to substitute the named individuals. The defendants filed motions for summary judgment based upon the statute of limitations, and their motions were granted.

The supreme court stated a plaintiff is required to proceed in a reasonably diligent manner in determining the true identity of the defendant. The court noted that although the rule does not expressly require due diligence, the same policy considerations requiring a plaintiff to amend his complaint within a reasonable time after learning of the defendant's true identity also require the plaintiff to proceed in a reasonably diligent manner in determining the true identity of the defendant. The recalcitrant plaintiff cannot use Rule 9(h), ARCP, to gain what otherwise might amount to an open-ended statute of limitations.

Civil procedure . . . rule 15, ARCP, modifies *Parker v. Fies and Sons*

Price v. Southern Railway Company, 19 ABR 1303 (March 22, 1985) — On application for rehearing, the supreme court withdrew its opinion of September 7, 1984, and took this opportunity to address two issues not addressed directly by the court since adoption of the Alabama Rules of Civil Procedure.

First, the court considered whether a personal injury claim filed by a person prior to his death may be amended by his personal representative to add a claim for wrongful death. The supreme court answered this question in the affirmative, *if* the personal injury action survives. In other words, if the plaintiff had a breach of warranty action (ex contractu) seeking personal injuries and died from those injuries, the personal representative may amend pursuant to Rule 15(d) and add a wrongful death action. The supreme court recognized this result runs contrary to *Parker v. Fies and Sons,* 243 Ala. 348, 10 So.2d 13 (1942), and stated *Parker* construed Title VII, §239, *Ala. Code* 1940, which has been superseded by Rule 15. Rule 15 allows a party to amend, alleging "transactions or occurrences or events" which have happened subsequent to the date of the original complaint.

The supreme court also considered whether the wife's claim for loss of consortium survived the death of her husband, when he died as a result of the injuries sustained. The court also answered this question in the affirmative stating the cause of action belongs to her, and the loss is hers, not his. The supreme court reasoned that since the consortium action would have vested in the spouse prior to the death, the action would not have belonged to the decedent if he had survived and is not affected by the survivorship statute.

Torts . . . doctrine of economic duress explained

International Paper Company v. Whilden, 19 ABR 1531 (April 5, 1985) — International Paper Company (I.P.) contracted with a landowner to purchase certain marked trees. I.P. also contracted with Whilden to cut those marked trees. Whilden entered into another contract with I.P. to purchase some logs and secured a loan to cover the purchase price. A dispute between I.P. and the landowner arose because numerous unmarked trees were cut. At the conclusion of the timber cutting, I.P. owed Whilden $7,000. Because of the dispute over the unmarked trees, I.P. refused to pay Whilden unless Whilden executed a blanket indemnity agreement holding I.P. harmless from liability to the landowner. Whilden signed the agreement because he needed the money to pay off the bank loan and because I.P. told him only a few unmarked trees had been cut. The trial court entered judgment against I.P. for the value of the unmarked trees, but invalidated the indemnity agreement finding it executed under duress.

The supreme court affirmed noting the doctrine of economic duress now has gained acceptance in many states, including Alabama. There are three essential elements to a prima facie case: (1) wrongful acts or threats; (2) financial distress caused by wrongful acts or threats; (3) the absence of any reasonable alternative to the terms presented by the wrongdoer. The *Restatement (Second) of Contracts,* §175 (1979), also defines "economic distress" as follows:

"WHEN DURESS BY THREAT MAKES A CONTRACT VOIDABLE

> (1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."

The supreme court reasoned the trial court could have found Whilden had no choice but to accept the terms of the indemnity agreement, especially when considered inlight of the superior bargaining power of I.P.

Recent Decisions of the Supreme Court of Alabama—Criminal

Impeachment by prior inconsistent statement . . . a primer

Ex Parte: Sharon Dianne Watts v. State, 19 ABR 1528 (April 5, 1985) — During the cross-examination of defendant Watts, the state began to question her about a statement she allegedly made on the night of the shooting. Before the substance of the statement was brought out, Watts objected on the ground that the statement was involuntary and the state abandoned the line of questioning. In rebuttal, the state put a police officer on the stand and attempted to introduce the statement made by Watts for the purpose of impeachment. Watts' trial testimony was to the effect the victim and her husband had provoked her. The state wanted to show that in her statement given to the detectives on the night of the shooting, she did not mention that she had been provoked.

The supreme court reversed the court of criminal appeals and held that a witness first must be confronted with an inconsistent statement and deny making it before that witness can be impeached by another witness as to the substance of that statement.

The court noted that the law is clear that a statement, not admissible in the prosecution's case-in-chief to prove the crime charged because it was obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), can nevertheless be used to impeach the accused's trial testimony. See *Oregon v. Haas,* 420 U.S. 714 (1975). However, such statements can be used only if the state affirmatively shows the statement to have been voluntary.

The reason for the prior confrontation rule is stated as follows:

> "The basic reason for the requirement that the predicate question specify time, place, content of the supposed statement, and the person to whom made, is to enable the faculties of the mind of the witness to be put in motion and his memory aided by the train of ideas which such circumstances would be likely to suggest with reference to the subject matter under inquiry and thereby be aided in recalling to memory whether he made the statement; and, if he recalls making it, to give his explanation of the apparent conflict between his testimony and such prior statement."

Post conviction hearing cannot be used to determine voluntariness aspect of a confession

Shula v. State of Alabama, 19 ABR 648 (March 1985) — Shula was convicted of first degree rape. During the trial, a confession was introduced into evidence in which Shula admitted his guilt. The issue decided by the court of criminal appeals was whether the state met its burden of proving Shula made a voluntary, intelligent and knowing waiver of his constitutional rights, such proof being a prerequisite to the admissibility of the confession.

The court of criminal appeals found the state had not met its burden of proof and the confession was, therefore, not properly admissible into evidence. The court's solution was to leave the conviction intact and remand the case for a post conviction evidentiary hearing to determine whether Shula, in fact, made a valid waiver of his rights.

The supreme court granted certiorari to review the court of appeals' disposition of the case. The defendant argued that the proper remedy is a new trial, not an after-the-fact hearing on the admissibility of evidence already entertained by the jury convicting him. The supreme court agreed.

A confession is not properly admissible into evidence in a trial without a showing by the state that the defendant knowingly, intelligently and voluntarily waived his or her constitutional rights before making the statement. *Miranda v. Arizona,* 384 U.S. 436 (1966). Confessions are presumed to be involuntary, placing the burden on the state to prove a valid waiver. *North Carolina v. Butler,* 441 U.S. 369 (1979); *Duncan v. State,* 176 So.2d 840 (Ala. 1965).

In *Jackson v. Denno,* 378 U.S. 368 (1964), the United States Supreme Court declared unconstitutional the "New York rule" governing this determination of voluntariness. The supreme court held that it was a violation of the due process clause of the 14th Amendment to allow the convicting jury to determine both the voluntariness and the credibility of a confession. Under *Jackson v. Denno, supra,* then, separate triers of fact must determine the voluntariness of a confession for purposes of admissibility on the one hand and the credibility of a confession on the other hand, with voluntariness being a factor permissibly considered as being on credibility.

Alabama follows the "Wigmore" or "orthodox" rule in which the judge hears all the evidence and then rules on voluntariness for the purpose of admissibility as affecting weight or credibility of the confession.

Justice Adams reasoned that under the Alabama rule the jury considers voluntariness as being on credibility. Accordingly, the jurors must hear evidence concerning voluntariness/credibility just as the trial court hears evidence concerning voluntariness/admissibility. Therefore, since the jury which convicted Shula was entitled to hear evidence concerning the circumstances in which the confession was obtained as bearing on voluntariness, which could then be used to weigh the credibility of the confession, a post conviction evidentiary hearing is inadequate. The proper remedy is a new trial in which the jury hears the evidence as to the voluntariness of the confession.

There is no shortcut to allegations of ineffective assistance of counsel

Boatwright v. State of Alabama, 19 ABR 1587 (April 5, 1985) — Boatwright was convicted of trafficking in marijuana and sentenced to nine years in prison. The court of criminal appeals affirmed his conviction without opinion; the supreme court denied certiorari.

Boatwright later petitioned the trial court for a writ of *error coram nobis,* alleging three separate grounds for relief and alleging he was denied the effective assistance of counsel in violation of Article I of the Alabama Constitution and the Sixth and 14th Amendments of the United States Constitution.

In support of his petition, Boatwright alleged that his trial counsel failed to appear at certain hearings, leaving the petitioner without counsel well versed in the case. He also averred that his trial defense counsel was representing another defendant on a drug charge at the same time, and as a result of that representation, there was a conflict of interest. Petitioner further alleged his lawyer was guilty of improper conduct in waiving a jury trial and stipulating the admission of the marijuana into evidence.

The trial court dismissed the petition without a hearing. Thereafter, Boatwright appealed the dismissal of his writ to the court of criminal appeals which affirmed. The court of criminal appeals, in a blistering opinion, noted:

> "Boatwright cannot blame his conviction on the alleged incompetence of his attorneys. His own statements convicted him. . . ."

The Supreme Court of Alabama reversed and remanded the case to the trial court with the instructions to hold an evidentiary hearing on the matters contained in Boatwright's petition.

The decisions of the court of criminal appeals, as well as the supreme court, recognize that an evidentiary hearing must be held on a *coram nobis* petition which is meritorious on its fact, *i.e.*, one which contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief. Justice Beatty, writing for the majority, noted that allegations of ineffective assistance of counsel, if true, entitle the petitioner to relief; thus, the petition was meritorious on its face and a hearing thereon was required.

It is important to read Justice Maddox's special concurring opinion. Justice Maddox agreed Boatwright was entitled to a hearing on his allegation, but is deeply troubled by the "virtual flood of post-conviction claims made by prisoners in both state and federal proceedings that their constitutional rights were violated because of ineffective assistance of counsel." Justice Maddox noted that ineffective assistance of counsel has become a sort of "canned claim" which appears in practically every post conviction petition filed in the appellate courts.

Justice Maddox has advanced the suggestion that the Advisory Committee on Proposed Rules of Criminal Procedure address this problem by requiring an accused to raise, at the trial court level, on motion for new trial, any facts known to him upon which he could base a claim of ineffective assistance of counsel. "If an accused were required to state at the trial level facts within his knowledge that would justify a new trial because his counsel was ineffective, it would materially aid all concerned in the speedy, inexpensive and just determination of the claim."

Loss of jurisdiction to amend sentence

Myra Jean Pickron v. State of Alabama, 19 ABR 1163 (March 15, 1985) — The Supreme Court of Alabama granted certiorari to determine the sole issue of whether a trial court loses jurisdiction to consider a motion to amend a sentence, which is filed within 30 days after the imposition of the sentence, but which is not presented to the trial judge within the 30-day period.

The Supreme Court of Alabama held that a motion to amend a sentence is one made after the trial and should be treated as one that need not be presented to the trial judge within 30 days. The court noted it was the intent of Temporary Rule 13, *Alabama Rules of Criminal Procedure,* to abrogate the necessity of presenting to the judge

post-judgment motions in criminal cases and entering orders continuing the motions in order to keep them alive. In this regard, Temporary Rule 13 corresponds with Rule 59, *Alabama Rules of Civil Procedure,* and accomplishes the same result as that rule.

Recent Decisions of the Supreme Court of the United States

Effective assistance of appellate counsel on first appeal is guaranteed by the due process clause of the 14th Amendment

Evitts v. Lucey, 469 U.S. ___, 83 L.Ed.2d 821 (January 21, 1985) — Lucey was convicted of a drug offense in a Kentucky state court, and his retained counsel filed a timely notice of appeal to the Kentucky Court of Appeals. However, his appellate counsel failed to file the statement of appeal required by the Kentucky Rules of Appellate Procedure when he filed his brief. The Kentucky Court of Appeals dismissed the appeal and later denied a motion for reconsideration. The Kentucky Supreme Court affirmed. The defendant then sought *habeas corpus* relief in the federal district court challenging the dismissal of his appeal on the ground that it deprived him of the right to effective assistance of counsel.

The federal district court granted a conditional writ of *habeas corpus,* ordering the defendant's release unless the Commonwealth either reinstated his appeal or retried him. The United States Court of Appeals affirmed.

Mr. Justice Brennan delivered the opinion of the court which held that the due process clause of the 14th Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as a matter of right.

Justice Brennan reasoned that:

> "Nominal representation on an appeal as a right — like nominal representation at trial — does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."

Therefore, the first appeal granted as a matter of right is not "adjudicated" in accordance with the due process clause if the defendant does not have the effective assistance of an attorney. The promise of *Douglas v. California,* 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, that a criminal defendant has a right to counsel on his first appeal as a right — like the promise of *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, that a criminal defendant has a right to counsel at trial — would be a futile gesture unless it comprehended the right to effective assistance of counsel.

Deadly force cannot be used to stop a nondangerous fleeing felon

Tennessee v. Garner, 53 U.S.L.W. 4410 (March 27, 1985) — The United States Supreme Court, in a six to three decision, ruled the Tennessee statute allowing police officers to employ deadly force to prevent fleeing felons from escaping is unconstitutional insofar as it authorizes the use of such force to stop an apparently unarmed and nondangerous suspect. However, the supreme court stopped short of striking down the entire Tennessee statute. The court reasoned that deadly force may be properly used against a fleeing felon where it is "necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."

Mr. Justice White, writing for the majority, points out that apprehension by the use of deadly force is a "seizure" subject to the Fourth Amendment's reasonableness requirement. After weighing the suspect's fundamental interest in his own life, as well as society's interest in judicial determination of guilt and punishment against the governmental interest in effective law enforcement, Justice White concluded the use of deadly force is not a sufficiently productive means of accomplishing law enforcement goals to justify the killing of a *non-violent suspect.*

The 'Carroll Doctrine' extended to the warrantless search of a motor home

California v. Carney, U.S. 53 L.W. 4521 (May 13, 1985) — Federal narcotics agents did not violate the Fourth Amendment when they conducted a warrantless search, based on probable cause, of a fully mobile motor home located in a public parking lot. Chief Justice Burger, writing for the majority, concluded that the motor home, although outfitted to function as a residence, fell within the "automobile exception" to the warrant requirement.

A DEA agent, who had information the defendant's mobile home was being used to exchange marijuana for sex, watched the defendant approach a youth who accompanied him to the motor home, which was parked in a lot in downtown San Diego. The agent kept the vehicles under surveillance and stopped the youth after he left the motor home. The youth explained he had received marijuana in return for allowing the respondent sexual contact. At the agent's request, the youth returned to the motor home and knocked on the door. The defendant stepped out. Without a warrant or consent, one agent entered the motor home and observed marijuana.

The supreme court, in a six to three decision, held that the warrantless search of the defendant's motor home did not violate the Fourth Amendment when a vehicle is being used on the highway or is capable of such use and is found stationary in a place not used regularly for residential purposes. The two justifications for the vehicle exception come into play. First, the vehicle is readily mobile and second, there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of traveling on the highway. The majority concluded that while the defendant's vehicle possessed some of the attributes of a home, it clearly fit within the vehicle exception. □

Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

"May an attorney ethically permit a reputable law list or legal directory to indicate that the attorney handles certain matters as a 'specialty' or 'specialties' or that the attorney does 'specialize' or 'specializes' in certain areas?"

ANSWER:

There would be no ethical impropriety in a lawyer permitting a reputable law list or legal directory to publish data including "... one or more fields of law in which the lawyer or law firm concentrates ..." and "... a statement that practice is limited to one or more fields of law...." However, since the Alabama State Bar does not have any procedures whereby through the continuing legal education program or otherwise lawyers are certified as specialists, data published in a reputable law list or legal directory should not give the false impression the lawyer listing his name therein has been certified as a specialist by the Alabama State Bar or other duly authorized certification authority, and the words "specialty," "specialties," "specialize" or "specializes" should not be used.

DISCUSSION:

It has come to the attention of the Office of General Counsel and the Disciplinary Commission that Martindale-Hubbell Law Directory has indicated attorneys may indicate therein three areas of specialty. This has prompted a number of inquiries from attorneys concerning the propriety of permitting such listing.

Ethical Consideration 2-14 provides:

> "In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a *specialist* or as having special training or ability, than in the historically excepted fields of admiralty, trademark, and patent law." (emphasis added)

Disciplinary Rule 2-102(A) provides:

> "A lawyer shall not prepare, cause to be prepared, use, or participate in the use of any form of public communication that contains false, fraudulent, misleading, deceptive or professionally self-laudatory statements."

Disciplinary Rule 2-102(A) (6) provides:

> "A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings,

law lists, legal directory listings, similar professional notices or devices or newspapers, that the following may be used if they are in dignified form:

* * * * *

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; *one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law;* date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorities; legal teaching positions; memberships, offices, committee assignments, and section membership in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional association and societies; foreign language ability; names and addresses of references, and, with their consent, names of client regularly represented." (emphasis added)

Disciplinary Rule 2-106(A) (1) provides:

> "A lawyer shall not hold himself out publicly as a *specialist or as limiting his practice,* except as permitted under DR 2-102(A) (6) or as follows:
>
> (1) A lawyer admitted to practice before the United States Patent Office may use the designation Patent Attorney, Patent Lawyer, Trademark Attorney, or Trademark Lawyer, or any combination of those terms on his letterhead and office sign, and a lawyer actively engaged in the admiralty of practice may use the designation Admiralty or Admiralty Lawyer on his letterhead and office sign." (emphasis added)

Certain of the Ethical Considerations and Disciplinary Rules appear to be somewhat inconsistent. Disciplinary Rule 2-102(A) (6) does not contain the words "specialty," "specialties," "specialize" or "specializes." Disciplinary Rules limit the information permitted upon certain documents to the historically excepted fields of admiralty, trademark and patent law. Disciplinary Rule 2-102(A)(1) (professional cards); Disciplinary Rule 2-102(A) (2) (professional announcement cards); Disciplinary Rule 2-102(A) (3) (sign on or near the door of the office); Disciplinary Rule 2-102(A) (4) (letterhead); Disciplinary Rule 2-102(A) (5) (classified sections of telephone directory).

We are of the opinion that reading all of the provisions of the Code of Professional Responsibility in *pari materia* the words "specialty," "specialties," "specialize" or "specializes" should be avoided. □

Disciplinary Report

The following reprimands and censures took place April 19, 1985.

Private Reprimands

• An Alabama lawyer was reprimanded privately for violation of Disciplinary Rules 1-102(A) (4), 1-102(A) (5), 6-101(A), 7-102(A) (5) and 7-104(A) (2) of the *Code of Professional Responsibility*. The Disciplinary Commission found the attorney, while representing clients in a bankruptcy matter, sent a letter to his clients' creditors in January 1984 advising those creditors a bankruptcy petition had been filed and further demanding the creditors cease and desist collection efforts against the clients. The commission found in fact no bankruptcy petition had been filed at that time and no such petition was filed until November 1984, over 10 months after the attorney's letter to the clients' creditors. The commission found the attorney's conduct violated the above-stated Rules, and this conduct warranted a private reprimand. [ASB No. 84-564]

• An Alabama lawyer was reprimanded privately for making false accusations about a circuit judge, knowing the statements were false and further knowing the statements would be published in a newspaper. The commission found the attorney's conduct to be in violation of Disciplinary Rules 8-101(B) and 1-102(A) (6).

• An Alabama attorney received a private reprimand for violation of Disciplinary Rules 9-102(A) (2) and 9-102(B) (4). A panel of the Disciplinary Board determined the attorney removed funds belonging to his client from his trust account and applied them to a fee owed to the attorney by the client, without the prior approval of the client, in violation of the above-stated rules. The board further determined a private reprimand should be administered in this case.

• A lawyer was reprimanded privately for willfully having neglected a legal matter entrusted to him, in violation of DR 6-101(A) and intentionally failed to carry out a contract of employment entered into with a client for professional services, in violation of DR 7-101(A) (2). The attorney accepted a fee of $750 from the mother of a prison inmate to take such actions as was possible to have the inmate placed on either the work release program or the supervised intensive restitution program; the attorney then took no action on behalf of the client, other than making one telephone call to the district attorney who had prosecuted the inmate and one telephone call to an employee of the State Board of Pardons and Paroles. The attorney then failed to make any response to numerous efforts by the inmate's mother to contact the lawyer by telephone, letter and personal visit to his law office.

Public Censures

• Clanton lawyer **William P. Boggs** was censured publicly for having engaged in willful misconduct prejudicial to the administration of justice and adversely reflecting on his fitness to practice law, in violation of Disciplinary Rule 1-102(A), *Code of Professional Responsibility* of the Alabama State Bar. The attorney collected a $5,000 legal fee from a client he represented in a workman's compensation case, though he was entitled to only a $3,000 fee under Alabama law and under the order of the Chilton County Circuit Court.

• Mobile lawyer **Major E. Madison, Jr.,** was censured publicly for willfully having neglected a legal matter entrusted to him and for intentionally having failed to seek the lawful objectives of a client through reasonably available means, in violation of DR 6-101(A) and DR 7-101(A)(1), of the *Code of Professional Responsibility* of the Alabama State Bar. Madison undertook to represent a client in connection with a motor vehicle accident and then failed either to negotiate a settlement on the client's behalf or file suit on the client's behalf prior to the expiration of the statutory period of limitations for such suit.

• Muscle Shoals' lawyer **James H. Stansell** was censured publicly for purposely having caused another to communicate with persons he knew to be members of the venire from which the jury was to be selected for the trial of a criminal case in which he represented the defendant, in violation of DR 7-108(A), *Code of Professional Responsibility* of the Alabama State Bar.

• Phenix City attorney **James Curtis Bernard** was censured publicly for violation of Disciplinary Rules 9-102(A) and 9-102(B) (3) of the *Code of Professional Responsibility.* Bernard received funds on behalf of a client in a worker's compensation case and failed to keep adequate records of the funds received and disbursed on behalf of the client; furthermore, he failed to use an identifiable bank account as required by DR 9-102(A).

Disbarments

• Mobile lawyer **Walter L. Davis** was disbarred, effective April 10, 1985, for having misappropriated $2,374.94, delivered to him in connection with the settlement of a civil suit, funds he was supposed to have paid to the attorney for an insurance company that was a party to the suit.

Birmingham lawyer **Ronald Edward Jackson** was disbarred, effective May 6, for having willfully neglected a civil suit in which he represented the plaintiff. Mr. Jackson previously had been suspended from the practice of law for a period of three years, effective March 15, 1985, for various other, unrelated violations of the *Code of Professional Responsibility of the Alabama State Bar.* [83-333]

In Memoriam

Maurice A. Downing

April 10, 1985, Maurice A. "Casey" Downing, a member of the Mobile and American Bar Associations, died at age 69.

Mr. Downing was educated at the Catholic Boys' Home and McGill Institute and graduated from the University of Alabama School of Law, class of 1950. He immediately commenced the practice of law in Mobile and practiced actively until the time of his death.

He saw active combat service in the Pacific in the United States Army in World War II and prior to that time served in the U.S. Border Patrol and as a Mobile police officer.

During his service in the state legislature, he sponsored bill after bill to authorize greyhound racing in Mobile. As a result, he was successful in seeing the establishment of the Mobile Greyhound Park. (The mechanical rabbit at the park has been named "Casey" in recognition of Mr. Downing's efforts.)

In addition to his effective support of greyhound racing, he consistently advocated the establishment of, and later the continuing support of, the University of South Alabama.

His commitment has been not only to the legal profession, but also to the Mobile community as a whole, as evidenced by his participation as a member of the Knights of Columbus, the Friendly Sons of St. Patrick, the bar association and a major mystic society. He also was a leader in the efforts to revitalize downtown Mobile.

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

Cusick, George Colgan, Jr.
Leeds — Admitted: 1984
Died: April 20, 1985

Downing, Maurice Albert
Mobile — Admitted: 1950
Died: April 10, 1985

Driver, George Taylor
Tuscaloosa — Admitted: 1956
Died: March 31, 1985

Howard, Fontaine Maury, Jr.
Montgomery — Admitted: 1935
Died: March 20, 1985

Huey, Charles Harold
Birmingham — Admitted: 1967
Died: March 24, 1985

Lightfoot, Benjamin Henry, Sr.
Luverne — Admitted: 1933
Died: April 21, 1985

Lott, William Blacksher
Daphne — Admitted: 1933
Died: April 5, 1985

McBee, Earl
Birmingham — Admitted: 1924
Died: February 12, 1985

Patton, James William, Jr.
Bessemer — Admitted: 1937
Died: January 8, 1985

Tally, John Benton, Sr.
Scottsboro — Admitted: 1937
Died: March 27, 1985

Mr. Downing leaves surviving him his wife, Helen R. Downing; his daughters, Helen Patricia Yemm, Cecilia D. Luker and Mary Margaret Downing; and his sons, Maurice A. Downing, Jr., and John A. Downing.

The life of Casey Downing is recognized as one of dedication to the bar and devotion to his community and his church, and his death represents a great loss to each.

The Mobile Bar Association extends its deepest sympathy to the family of Mr. Downing.

Ben H. Lightfoot

Mark Twain, the American humorist, once advised us to "so live that when we come to die even the undertaker will be sorry." That bittersweet commentary could apply to no one more certainly than it did to Ben Lightfoot of Luverne, who died April 21 after an illness of several months.

"Mr. Ben," as he was known respectfully and fondly to friends and adversaries alike, truly was without peers in his chosen profession as an attorney. In a very real sense he was a good man first and a good lawyer second. There was no matter too trivial or too insignificant for his efforts if it meant that, with some work, things could be righted or made better for a fellow human being. No case was too tedious, no matter too unimportant if it was of moment to those affected by it. At the same time, no matter was too complex or "too big to handle" if it was within his professional capabilities. In point of fact, "Mr. Ben" was a lawyer well-suited for his trade in that practically all matters held an interest for him so long as he was learning and expanding his horizons.

The only areas which held more importance to him than his practice of law were his church and his family. Ben served as chairman of the administrative board of the Luverne United Methodist Church for several terms and taught an adult Sunday school class in the church for approximately 45 years. In immediate order behind his church was his untiring devotion to his family. Never was anyone more dedicated to a marriage partner than was Ben to his wife, Hermione. In fact, in later years a regular fixture in Luverne was Ben and Hermione, out for an early morning walk or a late afternoon stroll in the beautiful gardens adjoining their home on First Street.

Ben was, in many respects, a "renaissance man." He loved to travel; he was an avid and regular member of the Thursday afternoon golf team at the country club; his love for literature was unending and he had a thirst for knowledge on any topic he had not conquered. He fully involved himself in local civic affairs and was a respected city father of Luverne.

For younger, aspiring lawyers, he was a model and an inspiration, all rolled into one. From his days as district attorney for Crenshaw County (when pleadings were written in longhand and typewritten with five carbon copies — and one was lucky not to get the fifth copy) and the era of "common law pleadings," Ben grew in his stature in the community and his reputation in his profession. Without ceasing, he encouraged young people and seemed to get a particular thrill from the successes of those who were coming after him. He was, in every respect, a bridge to both the past and the future, and he relished every moment of it.

"Mr. Ben" died at the age of 74. In another life, this might have meant a long endurance test, a survival of time, but in his case, it meant the swift passage of a life well-lived and a loss to all who knew him. Beyond this, though, the life of Ben Lightfoot serves to urge us all toward more and better things. He would approve if we quoted this passage from Oliver Wendell Holmes: "I find the great thing in this world is not so much where we stand as in what direction we are moving: To reach the port of Heaven, we must sail sometimes with the wind and sometimes against it — but we must sail, and not drift, nor lie at anchor."

Earl McBee

Earl McBee died in Birmingham February 12, 1985. He was 83.

Mr. McBee attended Birmingham public schools and graduated, *cum laude*, from Birmingham Southern College. In 1929, he finished at the Birmingham School of Law.

Mr. McBee was associated first with Judges Leck and Creel and then with D.G. Ewing.

After a long and successful career in the private practice of law, he was appointed assistant city attorney for Birmingham in 1960 and continued to serve in that capacity until his retirement in May 1972. He was recognized as an authority on equity pleading and practice in Alabama and wrote a number of articles on this subject; Mr. McBee also taught equity pleading and procedure for many years at the Birmingham School of Law.

Mr. McBee was an active member of Ensley First United Methodist Church, at one time or another holding every lay office in the church. He was very active in working with young people and was one of the organizers and original trustees of Sumatanga Methodist Church camp. In recognition of his work with Sumatanga, one of the buildings is named in honor of him.

Hear the words of a poet:

> When Earth's last picture is painted
> and the tubes are twisted and dried,
> When the oldest colors have faded,
> and the youngest critic has died,
> We shall rest, and faith, we shall
> need it —
> Lie down for an aeon or two,
> Til the Master of All Good Workmen
> shall put us to work anew.

Mr. McBee left surviving him a brother and sister, both of Ensley.

Classified Notices

books for sale

FOR SALE: *Standard Federal Tax Reporter, Estate and Gift Tax Reporter, Business Franchise Guide* completely updated. Call (205) 326-6111 or contact Deborah Braden at 1405 First Alabama Bank Building, Birmingham, Alabama 35203.

FOR SALE: AmJur Trials, completely updated, $600; AmJur Pleading & Practice Forms, completely updated, $600. Both sets in new condition. Will deliver. Contact David Howland, P.O. Box 10406, Birmingham, Alabama 35202, phone (205) 254-7090.

FOR SALE: Alabama Digest: Southern Reporter 1 & 2; Federal Reporter 1 & 2; Federal Supplement; F.R.D.; U.S. Led 1 & 2; Am Jur 2d, Am Jur Legal Forms 2d; ALR 2, 3, 4 & Federal; Williston on Contracts, 3d, complete tax library. For all your law book needs: The Lawbook Exchange, Ltd., buys & sells, 135 W. 29th Street, New York, New York 10001, (212) 594-4341.

services

EXAMINATION OF QUESTIONED Documents: Handwriting, typewriting and related examinations. Internationally court-qualified expert witness. Diplomate, American Board of Forensic Document Examiners. Member: American Society of Questioned Document Examiners, the International Association for Identification, the British Forensic Science Society and the National Association of Criminal Defense Lawyers. Retired Chief Document Examiner, USA CI Laboratories. Hans Mayer Gidion, 218 Merrymont Drive, Augusta, Georgia 30907. (404) 860-4267.

INDUSTRIAL SAFETY Consultant, pertaining to industrial accidents and accident prevention. Fifty years' experience. Specializing in consultations, professional testimony, investigations and safety training. Contact Fred Melof, 4 Pamona Avenue, Homewood, Birmingham, Alabama 35209. (205) 879-5159.

LEGAL RESEARCH HELP Attorney with seven years' experience in legal research/writing. Access to University of Alabama and Cumberland libraries, Westlaw available. Prompt deadline service. $35/hour. Sarah Kathryn Farnell, 112 Moore Building, Montgomery, Alabama 36101. Phone 284-4958. *No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.*

LEGAL RESEARCH AND writing services: Licensed attorney, B.A. in English, *Law Review* associate editor, former federal district court clerk, former Alabama Supreme Court clerk. Four years' experience. Access to Cumberland library. Rate $35/hour. Irene Grubbs, 205-988-8521 (local call for greater Birmingham.) *No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services.*

THE ALABAMA LAWYER CLASSIFIEDS

All requests for classified ad placement must be submitted typewritten and are subject to approval. Alabama State Bar members are not charged for classified notices up to two insertions per calendar year, except for "position wanted" or "position offered" listings, which are at the regular rate. Nonmember advertisers must pay in advance and will receive a complimentary copy of *The Alabama Lawyer* in which their advertisement is published. Additional copies are $3.00 plus postage.

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Send classified advertising copy and your check, made out to *The Alabama Lawyer*, to:

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c/o Margaret Dubberley
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positions offered

TAX LAWYER WANTED Major Montgomery law firm seeks tax lawyer, experience preferred. Please send resume to P.O. Box 429, Montgomery, Alabama 36195.

MEDIUM-SIZED FIRM with litigation practice seeks lawyer with two to five years' experience in litigation. All inquiries kept confidential. Reply to Hiring Partner, P.O. Box 16818, Mobile, Alabama 36616.

AGGRESSIVE CORPORATION near Mobile, Alabama, is seeking experienced real estate, litigation and regulatory attorney to handle in-house legal matters. An equal opportunity employer. Reply to 3510 Borroughs, Pascagoula, Mississippi 39567.

miscellaneous

ATTORNEY JOBS: National and Federal Legal Employment Report: A monthly detailed listing of hundreds of attorney and law-related jobs with the U.S. Government and other public/private employers in Washington, D.C., throughout the U.S. and abroad. $30 — 3 months; $50 — 6 months; $90 — 12 months. Send check to Federal Reports, P.O. Box 3709, Georgetown Station, Washington, D.C. 20007, Attn: Al. (202) 393-3311. Visa/MC.

FOR SALE: Two IBM Mag Card II machines — under contract with IBM — make offer. Call 943-1579 between the hours of 8-5.

LAW BOOK DONATIONS needed! Jones Law School at Alabama Christian College in Montgomery needs legal books, journals, etc. Pickup can be arranged. Contact Kay Newman, 5345 Atlanta Highway, Montgomery, Alabama 36193-4601 or call (205) 272-5820, ext. 147 (1-800-824-4527 in Alabama). Acknowledgment will be made for tax purposes.

FOR RENT: Gulf Shores — house directly on the Gulf, sleeps 10, fully equipped. Call 836-0922, 833-2245 or write for brochure to Steve Harris, 7211 — 1st Avenue North, Birmingham, Alabama 35206.

ORDER

WHEREAS, the Board of Bar Commissioners of the Alabama State Bar has made recommendations to this court regarding revisions of the **Code of Professional Responsibility of the Alabama State Bar** and the Rules of Disciplinary Enforcement of the Alabama State Bar; and

WHEREAS, the court is interested in receiving suggestions and comments regarding the proposed rules from interested parties and attorneys,

IT IS, THEREFORE, ORDERED that the attached proposed rules be published in the **Southern Reporter,** Second Series, Advance Sheets, and that any comments and suggestions be filed with the Clerk of the Supreme Court, P.O. Box 157, Montgomery, AL 36101, by July 31, 1985.

The Supreme Court of Alabama

Proposed Amendments to the **Code of Professional Responsibility** and Rules of Disciplinary Enforcement of the Alabama State Bar

Whereas the Board of Commissioners of the Alabama State Bar has proposed the following amendments to the **Code of Professional Responsibility** and the Rules of Disciplinary Enforcement of the Alabama State Bar, and

Whereas, jurisdiction is vested in the Supreme Court of Alabama to adopt amendments to the said **Code of Professional Responsibility** and Rules of Disciplinary Enforcement, the Board of Commissioners of the Alabama State Bar proposes the following amendments, to-wit:

1. It is recommended that Appendix "A" to the Alabama Rules of Disciplinary Enforcement be amended to add after "law" in the first sentence thereof, the following, to-wit:

", or who voluntarily resigned or surrendered his license,"

2. It is recommended that Rule 8(c) of the Rules of Disciplinary Enforcement be amended to include, between the present penultimate and last paragraph thereto a new paragraph, as follows, to-wit:

"In those cases where the respondent is found to have violated the **Code of Professional Responsibility,** the Disciplinary Board shall allow the state bar and the respondent to be heard further on the question of appropriate discipline in the matter and the Disciplinary Board shall consider, in setting discipline, any prior violations of the **Code of Professional Responsibility** by the respondent."

3. It is recommended that Rule 8(b) (2) of the Rules of Disciplinary Enforcement be amended by adding after the first sentence and before the second sentence the following, to-wit:

"The General Counsel shall maintain a file for at least six years as to all charges filed with it and investigated by it and shall make the same available to each grievance committee upon fourteen (14) days' receipt of written request by each grievance committee, provided, however, that Rule 22 shall be observed by said grievance committee."

4. It is recommended that Rule 1(a) of the Rules of Disciplinary Enforcement be amended to read as follows, to-wit:

"Any attorney admitted to practice law in this state, **including district attorneys, assistant district attorneys, United States attorneys, assistant United States attorneys, the attorney general, assistant attorneys general,** and any attorney specially admitted by any court in this state for a particular proceeding is subject to the exclusive disciplinary jurisdiction of the Supreme Court of Alabama and the Disciplinary Board of the Alabama State Bar, hereafter established."

5. It is recommended that Rule 8 of the Rules of Disciplinary Enforcement be amended to include new paragraph "f" which would read as follows, to-wit:

"(f) **Expungement of records** A grievance committee of a circuit, county or city bar association, approved by the Alabama State Bar, or its board of commissioners, and the general counsel of the Alabama State Bar shall expunge any records or files relating to

or involving any complaint or grievance which has been dismissed without discipline by an order of the Disciplinary Commission or by a panel of the Disciplinary Board of the Alabama State Bar, and wherein a period of time of at least seven (7) years has elapsed since the date of the order dismissing said complaint or grievance."

6. It is recommended that DR 2-102(A) (4) of the **Code of Professional Responsibility** be amended to insert after the word "firm" in the first sentence thereof the following, to-wit:

", places of admissions to the bars of state and federal courts,"

7. It is recommended that DR 3-103(B) of the **Code of Professional Responsibility** be amended to read as follows, to-wit:

"A lawyer shall not be associated, as a partner or otherwise, in the practice of law with another person who is not then licensed in Alabama to practice law, or who is then suspended or disbarred from the practice of law, or who has voluntarily resigned or surrendered his or her license to practice law, nor shall a lawyer employ such a person in any capacity in connection with the lawyer's practice of law, whether as secretary, paralegal, research assistant, or otherwise, provided that this rule shall not apply to association as a partner or otherwise, with an attorney of a state other than Alabama who is authorized to practice and is practicing in such other state."

NOTICE

IRS Ruling on Reporting Requirements for Split Fees

Facts

Situation 1 An attorney obtains the assistance of a second attorney in serving a client. In return for the assistance the first attorney agrees to split the fee received for the services rendered. The amount of the split fee paid by the first attorney to the second attorney is $600. The second attorney is an individual and is not a corporation.

Law and Analysis

Section 6041(a) of the **Code** provides that all persons engaged in a trade or business and making payment, in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits and income of $600 or more in any taxable year must render a true and accurate return setting forth the amount of such gains, profits and income, and the name and address of the recipient of the payment.

Section 1.6041-1(a) of the Income Tax Regulations provides that returns required by section 6041 of the **Code** are to be made each calendar year and, with certain exceptions, are to be made on Forms 1096 and 1099.

Section 1.6041-1(d) (2) of the regulations requires the reporting of fees for professional services paid to attorneys, physicians and members of other professions if paid by persons engaged in a trade or business and paid in the course of that trade or business.

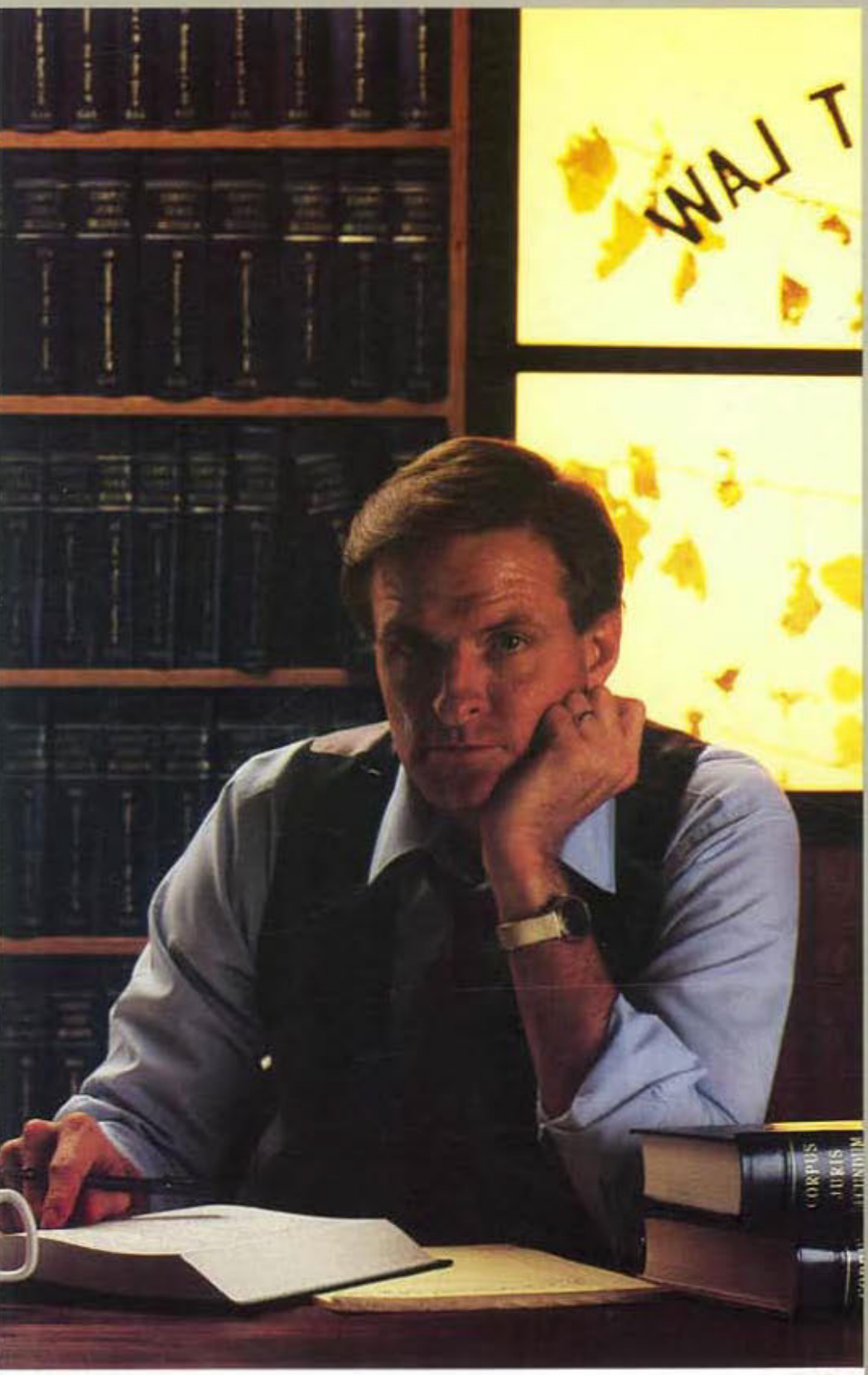
Under section 1.6041-3(c) of the regulations, returns of information are not required with respect to payments to a corporation, except to a corporation engaged in providing medical and health care services or engaged in the billing and collecting of payments for such services, other than payments to certain hospitals and extended care facilities.

The payments made by the attorney in Situation 1 are payments in the course of his trade or business and are of $600 or more. The exception for payments to corporations does not apply because, under the facts, the recipient attorney is not incorporated.

Holding

In Situation 1, the attorney making payment of a split-fee of $600 to an unincorporated attorney is required to make an information return under section 6041 of the **Code.**

The Master's Tools



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