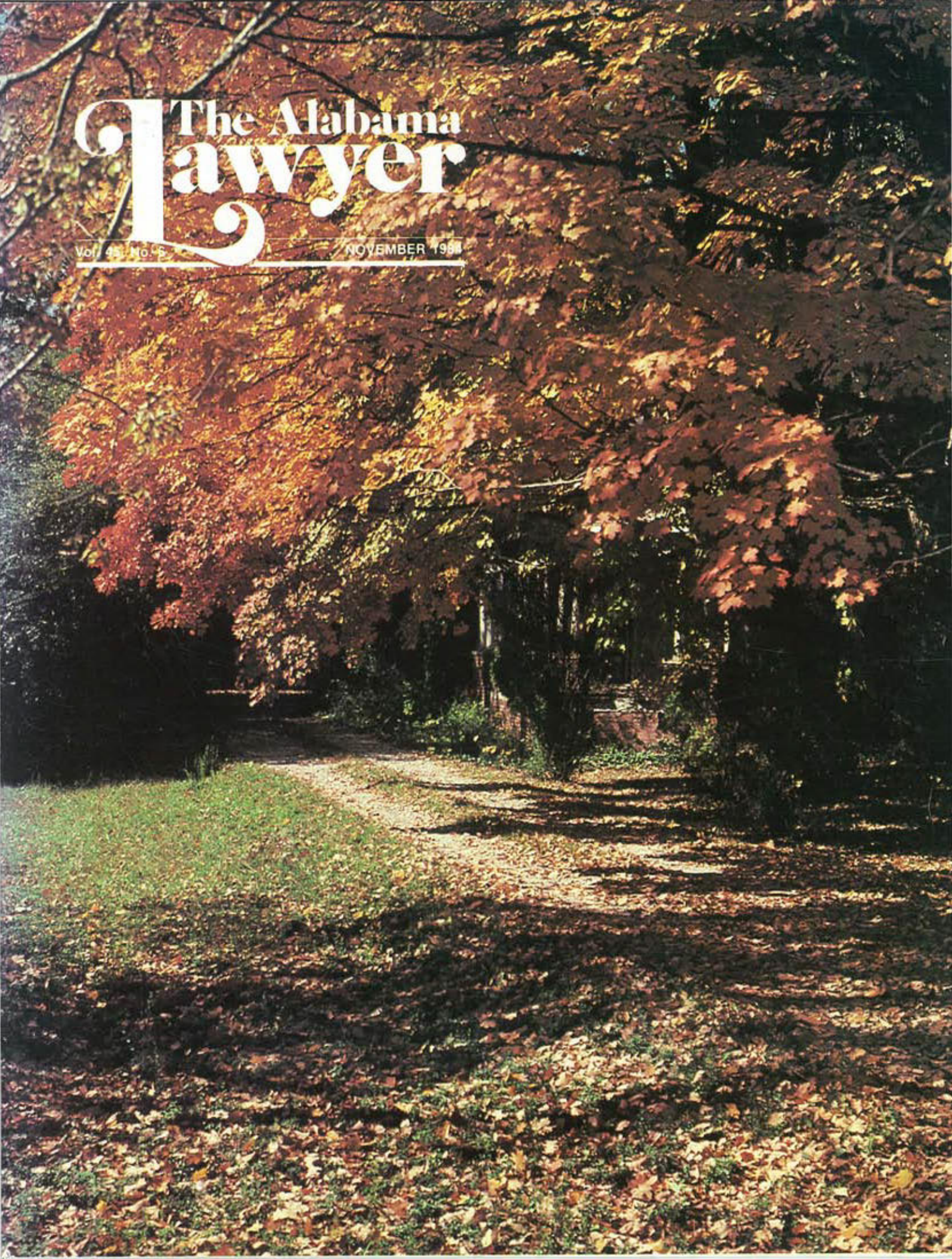
The Alabama
Lawyer
Vol. 45, No. 6
NOVEMBER 1984

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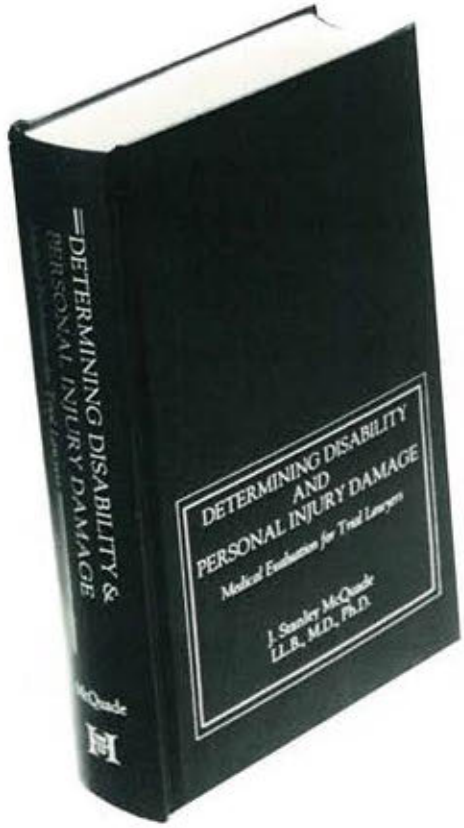

Determining Disability and Personal Injury Damage — Medical Evaluation for Trial Lawyers

by J. Stanley McQuade
LL.B., M.D., Ph.D.

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Robert A. Huffaker
Editor

Carol Ann Smith
Associate Editor

Jen Nowell
Managing Editor

GENERAL INFORMATION

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THE NOVEMBER

On the Cover

Pictured on the cover is a fall scene in Scottsboro, Alabama. The photo was taken by Scottsboro attorney John Proctor, a partner in the law firm of Thomas and Proctor and the bar commissioner representing the 38th Judicial Circuit.

Protection Against Intentional Breach of Contract

— pg. 320

In our complex society, unsatisfactory contractual relations frequently lead to litigation. The traditional breach of contract claim may now be supplemented with tort theories.

Legal Assistants Increase Productivity

— pg. 334

Does your office need a paralegal? Paralegals can ease the lawyer's burden of work while maximizing profits.

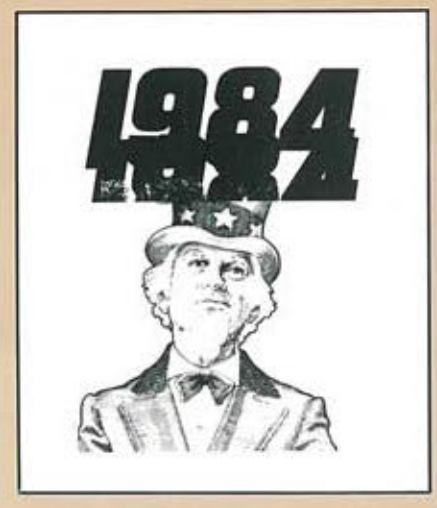
1984 ISSUE IN BRIEF

Annabelle's Dilemma — pg. 336

Judge Robert L. Hodges' short story, "Annabelle's Dilemma — A Christmas Story," is published inside. This story was runner-up in The Alabama Lawyer Short Story Contest.

Making Traditions at the Law School — pg. 351

Many Alabama lawyers have fond remembrances of Mrs. Anna S. Fitts who, as registrar for the University of Alabama School of Law, provided a base of support for them during their years at law school.



The Tax Reform Act of 1984 — pg. 357

Even lawyers who do not specialize in the tax field are frequently called upon to counsel with clients on tax related matters. Knowledge of the change included in the Tax Reform Act is imperative if competent legal advice is to be rendered.

Special Thanks

A special thanks for contributions to this issue: Robert F. Adams, James W. Cameron, James J. Carter, Leslie McCafferty, and Charles N. Parnell III.

Upcoming

March 1-2, 1985
Alabama State Bar
Midyear Meeting
Montgomery

July 25-27, 1985
Alabama State Bar
Annual Meeting
Huntsville

Regular Features

BYARS

President's Page

The primary role of the Alabama State Bar is to improve our profession and our system of justice. The viable active state bar organization is moving forward at a rapid pace with the identification of our problems and a search for solutions and innovative approaches to the needs of our profession, of our legal system and of our society.

Within a little more than two months, thirty-seven committees and task forces have met, organized, activated their programs and are in the process of seeking solutions. This is in addition to the initial meeting at the committee breakfast at the annual meeting in Mobile. Your Bar is active.

During the first week of August, your president and president-elect both attended the American Bar Association annual meeting in Chicago. We were accompanied by former President Bill Hairston, Executive Director Reggie Hamner and Mary Lyn Pike, who heads our Mandatory CLE program. In conjunction with that meeting, we attended meetings of the Southern Conference of Bar Presidents and National Conference of Bar Presidents.

Jim North and I also attended the annual meeting of the Southern Conference of Bar Presidents held in Houston from October 11 through 14, 1984. My experience with the Southern Conference is that it is the most aggressive regional organization within the organized bar. It was the Southern Conference which first took a stand against the regulation of lawyers by the Federal Trade Commission. Its organization has been held out as a model to those of the other areas of the country.

The similarity of problems facing lawyers, the legal systems and the bar associations in our sister states is amazing. The exchange of ideas concerning the problems and especially the solutions that have been tried and found to be effective is invaluable in Alabama.

"Why is it that we can be good persuaders before the court for our clients and not be able to persuade the larger jury, the public, that the lawyers are in fact their friends and protectors?"

President-Elect Jim North represented the Alabama State Bar at the Appellate Judges' Seminar held in Pensacola on September 20-21, 1984. While I was involved in trial, Jim North did an outstanding job as attested by those judges in attendance. Additionally, both Jim and I attended a meeting of the Supreme Court Liaison Committee. Your Bar has had these two opportunities to exchange ideas with the appellate judges, again concerning our mutual problems and suggested solutions.

On October 1, as your president, I participated in the opening of courts ceremony, including the Red Mass conducted at St. Peter's Catholic Church in Montgomery.

In addition to these meetings, we are dedicated to the idea of taking our program to the grass roots. I have attended the meeting of the Houston County Bar and of the Mobile Bar and a joint meeting of the Coffee, Dale, Geneva and Pike County Bar Associations. As your president, I appreciate the invitations and the opportunity to appear at local bar meetings. The state bar program cannot be successful without the understanding and participation of our lawyers on the local level. One of our most important new programs is the "buddy program" or "big brother-big sister" program, which can only be implemented at the local level. This program enlists the aid and counsel of experienced lawyers to serve as a partner or buddy for a newly admitted lawyer. The goal is professional and ethical counseling and assistance to enable our new admittees to provide better service for their clients.

I call on each of you in the "grass roots," individually and collectively, to share with the public the role of the lawyers and of our system of justice. Most clients believe and trust their own lawyers. You sit across the table from your clients. You champion their causes at the courthouse. You can best explain our profession and our system.

(Continued on page 318)

Executive Director's Report

HAMNER

Pictured below are the membership cards issued by the Alabama State Bar. Do you have your 1984-1985 membership card?

Attorneys admitted to the Alabama State Bar prior to October 1, 1982, who are engaged in the practice of law should have purchased a professional license between October 1 and 31, 1984. This includes attorneys admitted in the fall of 1982. This license should have been purchased from the probate judge or license commissioner in the county in which each one practices. Licenses purchased between October 1 and October 31 cost $100 plus an issuance fee for a total of $100.50. Others are subject to penalties for late payment, and these increase over time. The license gives attorneys the right to practice law in the state of Alabama through September 30, 1985. In addition to the state license, each person should check with the particular municipalities to be sure that the licensing requirements of the city or town have been met.

The annual license that is issued is too large to carry as a means of identification and should be available in the attorney's office for inspection by officers of the State Department of Revenue. We will send a small replica of the license to be used for identification purposes to each person who forwards a photocopy of the 1984-1985 license to state bar headquarters (License 1984-1985, P.O. Box 671, Montgomery, Alabama 36101).

Special Members pay dues directly to the state bar association. These memberships are for one year and are due between October 1 and October 31. Membership cards are issued upon receipt of the dues.

Special Membership status is extended pursuant to Sections 34-3-17 and 34-3-18, *Code of Alabama* (1975). Federal and state judges, district attorneys, U.S. attorneys, and other government attorneys who are prohibited from practicing privately by virtue of their positions are eligible for this membership status. Likewise, persons admitted to the bar of Alabama who are not engaged in the practice of law, or employees in a legal position not otherwise requiring a license are eligible to be Special Members. Attorneys admitted to the bar of Alabama who reside outside the state of Alabama who do not practice in the state of Alabama are also eligible for this status. With the exception of state attorneys and district attorneys, Special Members are exempt from mandatory continuing legal education requirements.

Questions regarding membership status and the proper category of membership should be directed to Ms. Ruth Strickland, Membership Department, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101. □

— Reginald T. Hamner

THE ALABAMA STATE BAR
SPECIAL MEMBERSHIP CARD
1984-1985

Nº 1850

THIS IS TO CERTIFY THAT

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IS A MEMBER IN GOOD STANDING OF THE ALABAMA STATE BAR.

SECRETARY

UNLESS RENEWED THIS MEMBERSHIP EXPIRES SEPTEMBER 30, 1985

State of Alabama

This is to certify issuance of license to:

SAMPLE

License Year
1984-1985

Expires Sept. 30, 1985

Section		License Amount	Fee	Total
49	Attorney	100 00	50	100 50
			Total	100 50

This is to certify that this membership card is issued upon proof made to me that the above named attorney is licensed to practice law in the State of Alabama and that the attorney is a member in good standing of the Alabama State Bar for the license period noted above.

Reginald T. Hamner, Secretary
Alabama State Bar

(Continued from page 316)

You can dispel the horror stories. You can explain, and even correct, the media's views of what's going on in the legal community. Your clients will not substitute statistical data, or tales of horror, for your observation as long as you are realistic and objective.

You must get across the message that our legal system is working. Yes, we have our problems. But as stated by Morris Harrell, past president of the ABA in his "State of the Legal Profession" report to the National Conference of Bar Presidents, "Our system is not perfect, but it is far the best in today's world." Convey that message effectively to those around you, and especially to those who have placed their trust in you and your ability as a lawyer.

Convince *your* public that *you* as a lawyer are committed, and your State Bar is committed, to improving the operation of the judicial system; to the elimination of unnecessary cost and delay; and to the ultimate goal of justice for all. Tell them of the strengths of our system; that the lawyers of this state and of this country are constantly making efforts to improve the system.

As posed by Edward Morgan, formerly president of the Tuscaloosa County Bar: "Why is it that we can be good persuaders before the court for our clients and not be able to persuade the larger jury, the public, that the lawyers are in fact their friends and protectors?"

In response to critics of our profession and legal system, former ABA President Morris Harrell quoted from Chief Justice Pope of the Texas Supreme Court:

> "Lawyers advise and represent schools, banks, corporate business, small business, newspapers, radio and T.V. stations, trust and private charities.
>
> "Lawyers represent a growing number of governmental agencies who serve a growing number of people with a growing number of conflicts.
>
> "Lawyers represent presidents, governors, cabinet members, administrators, congressional and legislative committees.
>
> "Lawyers represent families and neighborhoods, the poor, the dispossessed, the disadvantaged, the injured, the elderly.
>
> "Lawyers represent the despised, the unpopular, and the hated. They accept appointments to advise the worst of people. They absorb the hostility of the community so that our guarantee of rights may be safe for the rest of us.
>
> "This is our commitment to a government of law, the rule, reign and supremacy of the law.
>
> "This is our unapologetic contribution to the ideas of freedom."

As lawyers, we have no reason to apologize for our profession and for our legal system. We do, however, need to make certain that our act is professional, ethical, and in the best interest of our profession, of our system of laws and of our clients.

We must get our message across. The ball is in your court. Speak out with your actions and your words. □

— Walter R. Byars

Protection Against Intentional Breach of Contract Remedies in Tort

by Robert W. Bradford, Jr.

The primary purpose for entering into a written contract is to ensure that the party with whom one is contracting will perform as promised. The most tightly drawn contract, however, offers scant protection if a contracting party decides it is in his interest to breach the agreement. What then is the best protection against the intentional breach of a contract whether written or oral?[1] The potential of the victim of the breach pursuing remedies in tort.

Tort remedies are superior to a breach of contract action for preventing intentional breaches primarily for two reasons. First, damages in a contract action are limited to the amount of money which will put the plaintiff in the same position financially in which he would have been had the breach not occurred. Therefore, if only faced with a breach of contract claim, a businessman can determine with a fair amount of specificity the ballpark limits of exposure in the event of an intentional breach. Armed with that information, he can decide if the benefits of the breach are worth the potential exposure.

If, on the other hand, a claim for breach of contract is joined with a meritorious tort count, the certainty of the limits of exposure is removed as punitive damages may be recovered. There is no way to judge or logically determine with any precision the amount a jury will award in punitive damages. Verdicts depend not only on the facts presented, but to a large degree on the philosophical and emotional makeup of the jury. Thus, the element of risk may become unacceptable and an intentional breach avoided by the potential of an angry jury meting out financial punishment to the perpetrator of the breach.

Second, breach of contract claims normally are perceived merely as business disputes among businessmen. Evidence generally is limited to proof of the breach and damages arising therefrom. It is difficult to generate "heat" in such a situation. Allegations arising out of a breach of contract which sound in tort, however, allow one to offer evidence of bad motives for the breach. For purposes of jury appeal, a case is thereby transformed from a humdrum business dispute into a confrontation between the "good guys" and the "bad guys." Such evidence not only fuels the fire of punitive damages but, by enabling the jury to identify with the plaintiff, it tends to ensure a finding of liability.

Fraud

The most likely tort remedy available for the intentional breach of contract is legal fraud. In contract cases, fraud may be divided roughly into two categories. First, a party may have been fraudulently induced to enter into the contract, i.e., the intent to breach occurred prior to the execution of the contract. Proof of fraud in the inducement permits one to affirm or rescind the contract and to receive compensatory as well as punitive damages.

Robert W. Bradford, Jr., a member of the Montgomery law firm of Hill, Hill, Carter, Franco, Cole & Black, received a B.A. from David Lipscomb College and a J.D. degree from Vanderbilt University where he served as associate editor of the Vanderbilt Law Review.

Of course, most contracts are entered into with both parties intending to perform. Following the execution thereof, however, it may become beneficial for one party to breach the contract. Failure to inform the innocent party of this postexecution intent to breach is fraudulent if (1) the breaching party is under a duty to inform the other of his intent due to his relationship with the other party, (2) because of the innocent party's inquiries as to performance, or (3) because of promises made by the breaching party regarding performance.

Legal fraud is defined in §§6-5-100 through -104 of the *Alabama Code* (1975). "Innocent" misrepresentation is not discussed here as only intentional breaches are considered. Fraud involves (1) misrepresentation of a material fact or suppression of a material fact, (2) made with the intent to deceive, (3) which was relied on or acted on by the defrauded party, (4) to his damage. These elements will be addressed individually.

Misrepresentation of a Material Fact. A material fact is a fact of sufficient significance to cause another to act, i.e., a fact "of such a nature so as to have induced action" on the part of the complaining party. *Cooper v. Rowe*, 208 Ala. 494, 495, 94 So. 725 (1922); *Crigler v. Salac*, 438 So.2d 1375 (Ala. 1983). Promises and opinions rise to the level of "material fact" if (1) there was no intention to do the act promised, or (2) the opinion was given with the intent to deceive.[2] *Clanton v. Bains Oil Co.*, 417 So.2d 149 (Ala. 1982). For instance, in *First Virginia BankShares v. Benson*, 559 F.2d 1307 (5th Cir. 1977), the Fifth Circuit held that statements made in the form of an "opinion" which contain misrepresentations of financial matters of which the fraudulent party was aware may be utilized to demonstrate fraudulent intent. See, e.g., *Ringer v. First National Bank*, 291 Ala. 364, 281 So.2d 261 (1973).

Suppression of a Material Fact. One may be guilty of fraud in the absence of an overt misrepresentation of material fact if a material fact is suppressed or not communicated by a party who is under obligation to communicate it. The obligation to communicate may arise from the confidential relationship of the parties or from the particular circumstances of the case. §6-5-102, *Ala. Code* (1975).

Where a relationship of trust and confidence exists between the parties, it is the duty of the party in whom the confidence is reposed to make a full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of material facts by him constitutes fraud.[3] *Hall Motor Co. v. Furman*, 285 Ala. 499, 234 So.2d 37 (Ala. 1970); *Brasher v. First National Bank of Birmingham*, 232 Ala. 340, 168 So. 42 (1936). In *Brasher*, for example, plaintiff appealed to defendant as a business advisor seeking assistance in finding a safe and profitable place for his money. Defendant advised plaintiff to invest in a company in which defendant had an interest without disclosing to plaintiff his knowledge of the company's failing condition. In reliance upon defendant's recommendation, plaintiff invested to his subsequent damage. Plaintiff recovered against defendant.

The Alabama Supreme Court, in *Crigler v. Salac*, 438 So.2d 1375 (Ala. 1983), holding that a confidential relationship existed, stated that a bailor/bailee relationship gives rise to a duty to disclose material facts relating to the contract of bailment. There is no limit to the type of property which can be so entrusted.

In the absence of a confidential relationship, when, with intent to deceive, a party to a contract conceals material facts which good faith requires him to disclose, he is guilty of a false misrepresentation and fraudulent concealment. *Southern Land Development Co. v. Mayer*, 230 Ala. 40, 159 So.2d 245 (1935). For example, in the purchaser/seller situation there is normally no duty to disclose facts regarding the condition of the product. However, if the purchaser inquires about the condition of the product, the seller is under a duty to divulge all material facts pertinent to the inquiry. *Huntsville Dodge, Inc. v. Furnas*, 361 So.2d 585 (Ala.Civ.App. 1978).

In the context of an intentional breach, one may allege a fraudulent suppression of the intent to breach

(Continued on page 322)

(Continued from page 321)
even in the absence of a confidential relationship. For example, in many instances, the defendant gives assurances of performance after the intent to breach was formulated. Moreover, one legitimately can assert that the promise by a party to perform at the time of contracting gives rise to a duty to inform the other party of a present or subsequent intent to breach in the absence of which the former party is guilty of a fraudulent suppression, i.e., legal fraud.

In the face of such allegations, the breaching party will undoubtedly rely on cases which provide that if parties to a contract are intelligent and operating at arm's length with no confidential relationship, there is no duty to disclose facts when information is not requested; that mere silence in such a situation is not fraudulent. *Collier v. Brown,* 285 Ala. 40, 228 So.2d 800 (1969); *Ray v. Montgomery,* 399 So.2d 230 (Ala. 1980); *Harrell v. Dodson,* 398 So.2d 272 (Ala. 1981). However, the same cases indicate that "active" concealment or misrepresentation lays a predicate for legal fraud. In the situation of an *intentional* breach, one should contend that suppression of the intent to breach is "active" concealment. This is especially appropriate in situations in which performance of the contract is a continuing one over a period of time. The plaintiff can assert that continued performance after defendant decided to breach is a promise to perform fully coupled with the necessary intent to defraud.
a period of time. The plaintiff can assert that continued performance after defendant decided to breach is a promise to perform fully coupled with the necessary intent to defraud.

Made With Intent to Deceive. It is imperative to realize that the mere breach of a contract *is not* tantamount to fraud. There must be proof of an actual intent to deceive. *Lyxell v. Vautrin,* 604 F.2d 18 (5th Cir. 1979); *Old Southern Life Ins. Co. v. Woodall,* 295 Ala. 235, 326 So.2d 726 (1976).

Fortunately, great latitude is allowed in admitting evidence on the issue of alleged fraud. This is necessary as most often the perpetrator of the fraud is the sole possessor of actual knowledge of the presence or absence of an intent to defraud. Alabama law provides that undue restrictions should not be placed on the introduction of evidence which has probative value, however slight, on this issue. The weight to be given the evidence is to be determined by the jury. *National States Ins. Co. v. Jones,* 393 So.2d 1361 (Ala. 1980); *Mid-State Homes v. Johnson,* 294 Ala. 59, 311 So.2d 312 (1975); *National Surety Co. v. Julian,* 227 Ala. 472, 150 So. 474 (1933); McElroy's *Alabama Evidence,* §21.01(1) (3rd Ed. 1977). Evidence of the intent and state of mind of the alleged perpetrator is particularly relevant in a case of fraud in the inducement. *Id.*

When the claim for fraud relates to promises or representations regarding a future event, which it always does when one alleges fraudulent inducement, the evidence must establish proof of fraudulent intent at the time the representations or promises were made or the contract was executed. Mere failure to perform a contractual promise *is not* evidence of intent not to perform at the time the promise was made. *Purcell Company v. Spriggs Enterprises,* 431 So.2d 515 (Ala. 1983); *Shiloh Constr. Co. v. Mercury Constr. Corp.,* 392 So.2d 809 (Ala. 1980); *Robinson v. Allstate Ins. Co.,* 399 So.2d 288 (Ala. 1981); *Southeastern Properties v. Lee,* 368 So.2d 288, *on remand,* 368 So.2d 289 (Ala. 1979).

Any finding of intent to deceive must be based on reasonable inferences from the evidence and the intent to defraud must be clearly proven by a preponderance of the evidence. *Universal Brokers v. Higdon,* 56 Ala. App. 184, 320 So.2d 690 (1975); *Boulevard Chrysler v. Richardson,* 374 So.2d 857 (Ala. 1979). The issue of intent is a question for the trier of fact. *Walker v. Woodall,* 288 Ala. 510, 262 So.2d 756 (1972).

Every possible avenue of discovery should be thoroughly exhausted to establish evidence of fraudulent intent. Such evidence is not only essential to proving the cause of action, it is proof of the intent to deceive which stirs juries to award punitive damages. Personal business diaries, minutes of shareholders' and directors' meetings, correspondence, financial data indicating no intent to fund the contract or inability to fund, and other such information must be reviewed in detail.

The information which may be introduced into evidence is limited only by the attorney's imagination and the facts at his disposal. One of the best examples of such initiative is found in *National States Ins. Co. v. Jones,* 393 So.2d 1361 (Ala. 1980). There, plaintiff alleged defendant insurance company fraudulently induced her to enter into a contract of insurance with no intent to pay the benefits. In support of her allegation, plaintiff introduced evidence of the company's extraordinary low loss ratio. The admission of the evidence was upheld by the supreme court. Additionally, the supreme court sustained the admission into evidence in support of fraudulent intent a tape recording of a sales meeting which occurred after the subject policy was sold. The tape recording was admitted following the laying of a predicate that similar or identical presentations were made to sales trainees prior to selling the subject property. But see, *Davey Tree Expert Co. v. Willis,* 383 So.2d 529 (Ala. 1980).

Alabama courts generally agree that evidence of other similar fraudulent transactions by defendants which appear to be in keeping with a common plan or scheme to defraud is admissible to show intent.[1] *Roan v. Smith,* 272 Ala. 538, 133 So.2d 224 (1961); *Jackson v. Lowe,* 48 Ala. App. 633, 266 So.2d 891 (1972); McElroy's *Alabama Evidence,* §70.03 (3rd Ed. 1977).

It is noteworthy that the language of a contract may preclude a finding of fraudulent intent by defendant and/or reliance thereon by plaintiff. For example, in *Landale Enterprises v. Berry,* 676 F.2d 506 (11th Cir. 1982), buyers of a marina brought an action against the seller to recover for fraud in the inducement. The summary judgment granted by the trial court was affirmed by the Eleventh Circuit based on the following provision in the sales contract:

> It is agreed that the buyer has thoroughly examined the property to be conveyed and relies solely on his own judgment in making this agreement to purchase, and that there are no agreements, understandings, or representations made either by seller, broker, or broker's representative that are not set forth herein.

Id. at 507.

A standard merger clause contained in the agreement, however, does not prevent an action for fraud in the inducement. See, e.g., *Nelson Realty Co. v.*

Darling Shop Co., 267 Ala. 301, 101 So.2d 78 (1957); *Waters v. W.O. Wood Realty Co.*, 260 Ala. 527, 71 So.2d 1 (1954). Indeed, the Fifth Circuit in *Advanced Studios of Alabama v. Advanced Hairpiece*, 607 F.2d 1138 (5th Cir. 1979) specifically held that an action would lie for fraud in the inducement despite the following merger clause in the subject contract:

> The foregoing constitutes the entire agreement between the parties and the provisions hereof shall be binding upon the parties, their executors, administrators, successors, assigns or assignees. This agreement may not be modified or amended except in writing . . .

Id. at 1139.

Misrepresentation Relied Upon by the Defrauded Party. Despite proof of a misrepresentation or suppression of information and an accompanying fraudulent intent, there can be no recovery without proof that plaintiff relied thereupon. *Ames v. Pardue*, 389 So.2d 927, (Ala. 1980); *Cole v. Hartford Accident & Indemnity Co.*, 379 F. Supp. 1265 (Ala. 1974). Of course, proof of reliance fails if defendant is able to establish plaintiff knew or should have known of the fraudulent conduct of defendant based on information available to plaintiff. *Cook v. Brown*, 393 So.2d 1016, *App. after remand*, 408 So.2d 143 (Ala. 1981); *Bedwell Lumber Co. v. T&T Corp.*, 386 So.2d 413 (Ala. 1980).

Some claims are based on allegations that plaintiff relied upon defendant's misrepresentations of the contents of a contract. Such a claim is not permitted if plaintiff read the contract. *Advanced Studios, supra.* However, the failure of a party to read a contract prior to signing it, despite his opportunity and ability to do so, in reliance on defendant's representations as to the contents of the contract, is evidence of reliance on a misrepresentation. *Advanced Studios, supra; Standard Oil Co. v. Myers*, 232 Ala. 662, 169 So. 312 (1936).

Damages. To recover for fraud, one must show actual damage to plaintiff resulting from the fraudulent act. *Purcell Company v. Spriggs Enterprises*, 431 So.2d 515 (1983); *Amason v. First State Bank*, 369 So.2d 547 (Ala. 1979); *McLendon Pools v. Bush*, 414 So.2d 92 (Ala.Civ.App. 1982). However, as noted *supra*, the primary reason for seeking relief in tort is that punitive damages are not recoverable in an action for breach of contract. *Geohagan v. General Motors Corp.*, 291 Ala. 167, 279 So.2d 436 (Ala. 1973); *McLendon Pools v. Bush, supra.* In Alabama, punitive damages may be recovered in a fraud action if the fraudulent misrepresentation was malicious, oppressive or gross, made with knowledge of its falsity, or so recklessly made as to amount to the same thing and made with the purpose of injuring plaintiff. *P&S Business Machines v. Olympia U.S.*, 707 F.2d 1321 (11th Cir. 1983); *Fountain-Lowery Enterprises v. Williams*, 424 So.2d 581 (Ala. 1982). While intent to deceive or defraud is an essential element for the recovery of punitive damages, *Courtesy Ford Sales v. Clark*, 425 So.2d 1075 (Ala. 1983), evidence of intent to deceive supplies proof that the fraud was committed grossly. *Winn-Dixie of Montgomery v. Henderson*, 395 So.2d 475 (Ala. 1981); *Randell v. Banzhoff*, 375 So.2d 445 (Ala. 1979).

The victim of fraudulent inducement — *i.e.*, the victim of one who never intended to perform, may rescind the contract and sue for his money back or he may elect to affirm the contract and sue for damages for the fraud practiced upon him. *Spanish Fort Mobile Homes v. Sebrite Corp.*, 369 So.2d 777 (Ala. 1979); *Kyser v. Southern Bldg. & Loan Association*, 224 Ala. 673, 141 So. 648 (1932). Moreover, in *Mutual Savings Life Ins. Co. v. Osborne*, 245 Ala. 15, 15 So.2d 713 (1943), the Alabama Supreme Court held that if the election is to affirm, suit for fraud may be brought without returning or offering to return the consideration for the contract.

Additionally, in *Mid-State Homes v. Johnson*, 294 Ala. 59, 311 So.2d 312 (1975), the supreme court, noting punitive damages are awarded for punishment and prevention, held that punitive damages may be awarded in a fraudulent inducement suit whether the plaintiff elects to rescind the contract or to affirm it. Correctly noting there must be proof of nominal compensatory damages before punitive damages may be awarded, the court stated that in the case of an election to rescind the contract, the restitution of payment made by plaintiff is compensatory damages in the legal contemplation which form a sufficient predicate for the award of punitive damages.

Finally, in an obvious attempt to ward off legal scrambling by defendants once the fraudulent intent to breach a contract is discovered, the supreme court held satisfaction of the terms of a contract after a right of action has accrued is not a defense to fraud. *National States Ins. Co. v. Jones*, 393 So.2d 1361 (Ala. 1980); *Old Southern Life Ins. Co. v. Woodall*, 348 So.2d 1377 (Ala. 1977).

Tort of Bad Faith

Any intentional breach of contract immediately brings to mind the tort of bad faith. Since its recognition by the Alabama Supreme Court in 1981, its application has been limited to first party insurance claims. *Chavers v. National Security Fire & Casualty Co.*, 405 So.2d 1 (Ala. 1981); *Sprowl v. Ward*, 441 So.2d 898 (Ala. 1983); *Kennedy Electric Co. v. Moore-Handley*, 437 So.2d 76 (Ala. 1983); *Brown-Marx Assoc. v. Immigrants Savings Bank*, 527 F.Supp. 277 (N.D. Ala. 1981). Since its appearance, the parameters of this cause of action have been severely and, in the opinion of the author, properly curtailed. Its present parameters will now be addressed.

In *National Security Fire & Casualty Co. v. Bowen*, 417 So.2d 179 (Ala. 1982), the court set forth five elements which a plaintiff must prove to establish the tort of bad faith:

1. An insurance contract between the parties and the breach of it by defendants;
2. An intentional refusal to pay plaintiff's claim;
3. The absence of any reasonably legitimate or debatable reason for the refusal;[5]
4. Actual knowledge by the insurer of the absence of a legitimate or debatable reason for denying the claim; and,
5. If the intentional failure to determine the existence of a lawful basis for the denial is relied upon, plaintiff must establish the intentional failure by the insured to determine if there is legitimate or debatable reason for the refusal to pay the claim.

In *National Savings Life Ins. Co. v. Dutton*, 419 So.2d 1357 (Ala. 1982), the

(Continued on page 324)

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supreme court reaffirmed the elements of proof set out in *Bowen*. It further provided that to make a prima facie case of bad faith refusal to pay, plaintiff must offer proof which is sufficient to entitle him to a directed verdict on the contract claim as a matter of law. If there remains an issue of fact with regard to the contract claim, the claim for bad faith is not to be submitted to the jury. *Id.*

The supreme court further defined the bad faith tort in *Sexton v. Liberty National Life Ins. Co.*, 405 So.2d 18 (Ala. 1981). The court opined that partial payment of the disputed claim by the insurer was evidence of good faith on its part and affirmed the summary judgment granted by the trial court on all claims except breach of a written contract. Obviously, the claim of bad faith is now limited to blatant cases of the intentional and knowing breach of an insurance contract by the insurer and is of limited use.

Other Remedies

In addition to allegations of fraud and bad faith, the tort remedies available in an intentional breach situation vary widely. The remedies are limited only by the facts unique to each breach and the initiative and imagination of the attorney analyzing the case.

Trade Secrets. For instance, breach of an employee's covenant not to compete may involve the employee taking customer lists, price lists, knowledge of manufacturing processes, or other such trade secrets and proprietary information of the employer. The inclusion of an unlawful taking of trade secrets count changes the entire complexion of such a case. The perception of a cold hearted employer attempting to prevent an employee from bettering himself is transformed into a story of an ungrateful employee stealing the fruits of the investments and labor of a trusting employer. The significance of such a difference is obvious. For a discussion of the elements necessary to establish a trade secret case, see *Drill Parts & Service Co. v. Joy Mfg. Co.*, 439 So.2d 43 (Ala. 1983).

Conversion. Other remedies abound. Many contracts involve the entrusting of the possession of property to another. Such contracts run the gamut from the delivery of grain to a grain elevator to the delivery of information to a computer service. An intentional breach may involve the failure to return the property or, in case of information, wrongfully making copies of it. Both permit an allegation of conversion.

No attempt will be made here to treat the law of conversion in depth. Generally, under Alabama law, however, conversion is the wrongful taking of, the wrongful detention of, the interference with, the illegal assumption of ownership of, or the unlawful use of the property of another. *U.S. Fidelity & Guaranty Co. v. Bass*, 619 F.2d 1057 (5th Cir. 1980); *Ott v. Fox*, 362 So.2d 836 (Ala. 1978); *Kemp's Wrecker Service v. Grassland Side Co.*, 404 So.2d 348 (Ala. Civ.App. 1981). To recover under the theory of conversion, a plaintiff must have either general or specific title to the subject property or an immediate right to the possession thereof. *Whitman v. Mashburn*, 286 Ala. 209, 238 So.2d 709 (1970); *Kemp's Wrecker Service, supra.*[6]

International Interference With Business. In any intentional breach situation, there is the possibility of alleging the breach was an integral part of defendant's malicious and intentional interference with plaintiff's business. To state a cause of action for intentional interference with business, one must establish (a) an intentional act of interference, and (b) some consequential harm to plaintiff's business. *Marion v. Hall*, 429 So.2d 937 (Ala. 1983); *Thompson v. Allstate Ins. Co.*, 476 F.2d 746 (5th Cir. 1973); *Byars v. Baptist Medical Center*, 361 So.2d 350 (Ala. 1978); and *Wadsworth v. Nalco Chemical Co.*, 523 F.Supp. 997 (N.D. Ala. 1981). In considering whether an allegation of intentional interference with business should be brought, remember that mere negligent conduct by the defendant is not a sufficient foundation upon which to predicate this tort. An intentional act must be proved. *Dick Mayers Towing Service v. United States*, 577 F.2d 1023 (5th Cir. 1978); *Wadsworth v. Nalco Chemical Co., supra.*

Conclusion

Each breach of or anticipated breach of contract must be analyzed in light of the tort remedies discussed above and the other numerous remedies in tort which are available for the intentional breach of a contract. The availability of these remedies is the best protection against an intentional breach of contract. The application of the remedies after breach is the best assurance of the successful prosecution of a damage suit against the breaching party.□

FOOTNOTES

[1]For purposes of this discussion, an "intentional breach" does not include mere negligent failure to perform or a breach caused by the actions of parties not privy to the contract. Rather, an "intentional breach" is one predicated upon a conscious decision to breach which is designed to place the breaching party in a better financial position.

[2]Mere "sales puff" is a form of opinion which is not ordinarily actionable. *Harrell v. Dodson*, 398 So.2d 272 (Ala. 1981). For example, the statement that defendant's product was "as good or better" than a competitor's was held not to be a basis for a finding of fraud. *Lucky Mfg. Co. v. Activation, Inc.*, 406 So.2d 900 (Ala. 1981).

[3]Of course, one can only be held liable for the fraudulent concealment of facts of which he has knowledge. *Harrell v. Dodson, supra.* Interestingly, it is only in a relationship of trust and confidence that a misrepresentation of a matter of law will form the basis for fraud. *Advanced Studios of Alabama v. Advanced Hairpiece*, 607 F.2d 1138 (5th Cir. 1979); *Bank of Loretto v. Bobo*, 37 Ala. App. 139, 67 So.2d 77, *cert. den.*, 259 Ala. 374, 67 So.2d 90 (1953).

Moreover, similar acts by different agents, both of whom act for the defendant, are admissible to demonstrate fraud, scheme, motive or intent. *Winn-Dixie of Montgomery v. Henderson*, 395 So.2d 475 (Ala. 1981).

[5]Plaintiff must prove the insurance company had no legal or factual defense to the claim. A "debatable" reason means one open to dispute or question.

[6]Interestingly, faced with society's entry into the computer age, the Alabama Supreme Court held the compilation of information constitutes property subject to conversion. Moreover, computer programs may constitute property subject to being converted. *National Surety Corp. v. Applied Systems*, 418 So.2d 847 (Ala. 1982).

Butler County Bar Association

On August 23, 1984 the Butler County Bar Association elected new officers. They are:

President:	Edward H. McFerrin
Vice President:	Lewis S. Hamilton
Secretary/Treasurer:	J. Thomas Leverette

Several items of business were discussed at the August meeting, including the possibility of a public defender and a county law library. A committee was appointed to study the matter of the library.

Coffee, Dale, Geneva and Pike County Bar Associations

On the evening of September 26, 1984, a joint meeting of the Coffee, Dale, Geneva and Pike County Bar Associations was held at the Ft. Rucker Lake Lodge. The meeting was arranged by Dale County President Dale Marsh and the dinner plans coordinated by Major Mike Schneider at Ft. Rucker. A cocktail hour preceded the dinner and State Bar President Walter R. Byars of Montgomery was the featured speaker for the occasion. It was a most enjoyable evening and at its conclusion President Byars was presented a sack of peanuts in commemoration of his visit to the land where "peanuts are king."

At the September 26th joint meeting of the Coffee, Dale, Geneva and Pike County Bar Associations, local bar presidents (2nd left to right) Allen Jones (Pike County), Dale Marsh (Coffee County), Bob Brogden (Dale County), and Buddy Lee (Geneva County) present Walter Byars (far left) with a sack of peanuts to commemorate his visit.

Geneva County Bar Association

With the recent addition of two new members to the Geneva County Bar, the membership now stands at twelve. The most recent project of the association is to expand the county law library. With the help of the county, the association hopes plans will become a reality and the county law library will be housed in an entirely new and more adequate facility.

The Geneva County Bar meets at 12:00 noon on the first Monday of each month at the Chicken Box Restaurant on Highway No. 52 in Geneva. All fellow state bar members are cordially invited to attend if you are ever in the area on the first Monday.

Houston County Bar Association

At its annual banquet on August 28, 1984, the Houston County Bar Association presented a plaque to the following members in honor of their having been members of the Alabama Bar Association for more than fifty years:

Eleanor Oakley Gordy	—	admitted 1931
J. Theodore Jackson	—	admitted 1932
W.G. Hardwick	—	admitted 1933
G.M. Harrison, Sr.	—	admitted 1934

The following members were also installed as the new officers of the association:

President:	Joel W. Ramsey
Vice President:	J. Huntley Johnson
Secretary:	D. Taylor Flowers
Treasurer:	Malcolm Newman

At the September 26, 1984, meeting of the Houston County Bar Association, State Bar President Walter R. Byars was the featured speaker. Byars praised the active work of the state bar committees and the participation of lawyers from the "grassroots." He spoke of problems or concerns facing the bar, such as lawyer incompetence, judicial evaluation and selection, and the overwhelming disciplinary matters. He further told of steps the bar and its committees are taking to resolve these problems.

Pictured with Alabama State Bar President Walter Byars (2nd left) are the new officers of the Houston County Bar Association. They are (L to R) Malcolm Newman, treasurer; Joel W. Ramsey, president; and J. Huntley Johnson, vice president. D. Taylor Flowers, secretary, is not pictured.

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Lauderdale County Bar Association

At the September meeting of the Lauderdale County Bar Association, N. Mike Suttle, the new judge appointee for Lauderdale County, was introduced to the members of the association.

The Lauderdale County Bar Association is privileged to now have three circuit judges. The association welcomes Judge N. Mike Suttle to his new judgeship and extends congratulations to him on his appointment to this new position.

Montgomery County Bar Association

Members of the Montgomery County Bar Association enjoy the Annual MCBA Barbecue held on September 15.

U.S. Senator Howell Heflin (center) spoke at an August 22nd joint meeting of the Montgomery County Bar Association, the Montgomery County Trial Lawyers Association, and the Montgomery Chapter of the Federal Bar Association. Pictured with Senator Heflin are (L to R) Jimmy Pool (President of Montgomery County Trial Lawyers), Susan Bevill (President of Montgomery Chapter of the Federal Bar), Jere Beasley (Program Chairman of MCTL), and Henry Chappell (President of MCBA).

Tuscaloosa County Bar Association

The members of the Tuscaloosa County Bar Association have elected the following officers and board members for the 1984-85 year:

President:	Ralph Burroughs
Vice President:	Paul E. Skidmore
Secretary/Treasurer:	W. Cameron Parsons

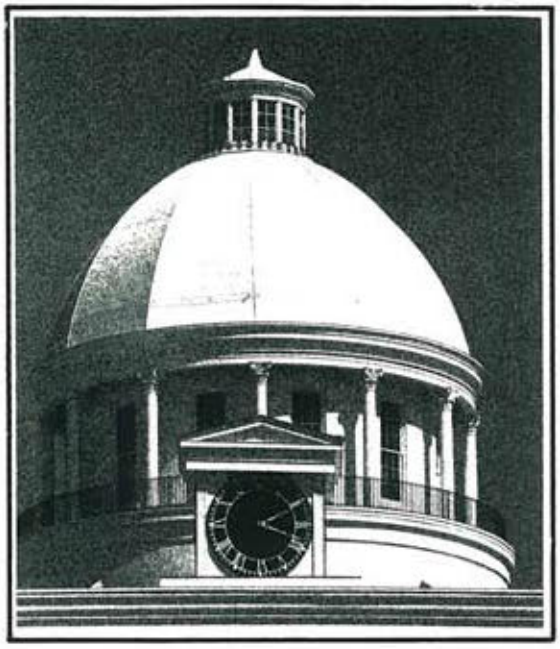
Members of the Executive Committee are Claude M. Burns, Daniel C. Lemley, A. Colin Barrett, Wilbur J. Hust, Jr., Joseph G. Pierce, and Robert V. Wooldridge III. □

Veterans Disability Fee Limit Reinstated

The U.S. District Court for the N.D. of California decision in Case No. C-83-1861-MHP entered on June 12, 1984 and modified on July 20, 1984 has been stayed pending the timely docketing of an appeal.

U.S. Supreme Court Justice William H. Rehnquist, in his capacity as Circuit Justice for the Ninth U.S. Circuit Court of Appeals, stayed the earlier decision of the U.S. District Court which freed attorneys from the $10.00 fee limit in veterans disability cases.

The U.S. Attorney for the N.D. of California has asked that the members of the state bars be advised that the penal provisions of 38 U.S.C. Section 3405 which prohibit attorney's fees in excess of $10.00 are again in effect and will be enforced. The state bar will continue to advise you with respect to this litigation, *National Assn. of Radiation Survivors, et al v. Henry N. Walters, Admin. of Veterans Affairs.*



LEGISLATIVE WRAP-UP

by Robert L. McCurley, Jr.

Legislative Review of Administrative Rules

In 1981 when the Legislature passed the Administrative Procedure Act, Alabama became the fiftieth state to require state agencies to file their rules at a central place. Most states require agency rules to be filed with the Secretary of State, but Alabama selected the Legislative Reference Service. There are seventy agencies in Alabama who have rule making power. The agencies have filed over two thousand rules which required thirteen loose leaf volumes to hold the promulgated rules, plus several more volumes of federally referenced rules.

In addition to filing rules, a uniform procedure for rule adoption was established. This procedure further requires the filing of the rules with the "Joint Committee on Administrative Regulation Review." See Ala. Code § 41-22-22 (Rpl. Vol. 1983). Forty-one states have a legislative review procedure.

Composition of Committee. The review committee is composed of twenty-two legislators who are the members of the legislative council. The legislative council is composed of the Lt. Governor and President Pro Tempore of the Senate, four members of the Senate elected by the Senate, the Speaker and Speaker Pro Tempore of the House of Representatives and six members of the House elected by the House of Representatives, the chairman of the Senate committees on Finance and Taxation, Judiciary, Rules and Governmental Affairs, and House committees on Ways and Means, Judiciary Rules and local government.

Review Procedure. An agency wishing to amend its rules must file copies of the proposed rules with the legislative committee. The committee must then function to review the proposed rules within sixty days or the rules are deemed to have been approved. At the same time, a statement describing the proposed rule change is published in the *Administrative Monthly.*

Function. The committee is charged with: 1) reviewing agencies' authority to promulgate rules; 2) reviewing agency rules; 3) reviewing proposed rules; 4) holding public hearings on proposed rules; 5) at its discretion suspending operation of a rule; 6) recommending amendments to rules; and 7) reporting annually to the legislature. See Ala. Code § 41-22-22 and 23 (Rep. Vol. 1983).

Disapproval. The Legislative Committee may disapprove a rule and suspend its operation. For the rule to be voided, the legislature at its next Regular Session must vote by joint resolution to disapprove the rule and the governor sign the resolution. Should the legislature fail to permanently revoke the rule, it could become effective upon the adjournment of the session.

Current Committee Action. All existing rules adopted prior to the passage of the Administrative Procedure Act must have been filed with the Legislative Reference Service by October 1, 1983, to be effective. Since October 1, 1983, all rules and amendments must be submitted to the review committee. The review committee has suspended an Alcohol Beverage Control proposed rule to prohibit sidewalk or walk-up liquor service and drive through liquor sales.

The ABC Board also submitted rules to regulate the items that could be sold at package stores, set a minimum of seven hundred square feet floor space in a package store and prohibit the sale of liquor in stores within two hundred feet of a gasoline pump. In the face of opposition by the review committee these proposed rules were withdrawn. The Department of Conservation proposed a rule that all boat drivers be at least sixteen years of age. This rule, too, was withdrawn.

The review committee initially suspended an ABC Board rule prohibiting bottomless dancers, lewd dancing, and the touching of performers. This suspension was later lifted by the committee and allowed to go into effect.

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The Lighter Side of Law:

Oh, Canada

by Gary P. Smith

No, don't you think that I'm off my base. You'll sing a different tune.
If only you'll let me spin my yarn, Come over to this saloon;
Wet my throat—it's as dry as chalk, and seeing as how it's you,
I'll tell the tale of a Northern trail, and so help me God, it's true.

Robert Service

All of us belong to that school of lawyers which holds that there are two kinds of cases. There are those cases with unique facts, complicated issues of law and which make fascinating stories. Then there are those cases on which some other lawyer is working. This case, unhappily, fits neither of those categories. It is a rather pedestrian matter, notable only because of the amount of frustration it has caused me, and this is the first opportunity I've had to vent my feelings in print, which is really the only excuse for this article.

The story begins back in the summer of 1979. My client, a metals broker, sold some aluminum fines, whatever the hell they are, to an outfit up in Toronto, Canada, which bought them on the basis of having inspected some samples. However, when the fines arrived at their destination the buyer refused to accept them, claiming they didn't conform to samples, which means my client eats the cost plus loses his commission. O.K., we'll sue their butts.

I don't know whether the long arm statute is long enough to reach these birds, but I figure I'll take a pop here in circuit court and if I wind up having to sue in Canada, then that's the breaks. I file my complaint and receive in the mail several weeks later a pleading from a Toronto lawyer entitled "Statement of Defence." Much to my surprise the pleading nowhere challenges the jurisdiction of the Alabama court, but instead goes to the merits. Hey, that constitutes what we call a general appearance doesn't it? Damn straight it does. So far, so good. In due course, meaning a couple of years later, the case comes up for trial and my client and I show up at the courthouse bright and early, ready to go. Only the defendant doesn't show. Well it's not like I'm going to pick up the phone and call across town and say "Charlie, our case is set for trial, get yourself on over here." After all, he didn't hire an Alabama lawyer, he filed his pleading and he's a big boy, right? So after checking with the clerk's office to make sure he'd been notified of the trial date, I go ahead and strike my jury demand, prove my damages and take a default. The time passes, no motion to set aside appears, and it looks like we're in good shape. Further, the Canada digest section in *Martindale* tells me that Canada gives foreign judgments full faith and credit, just like any other state in the good old U.S. of A. Swell. No problem, you think? Read on.

Now it's time to find a Canadian law firm to collect my judgment. Mind you now, I know little or nothing about Canada. Some years ago I was forced to fly from Washington, D.C. to Seattle during an airline strike which resulted in my being routed through Toronto, Calgary and Vancouver, but other than an occasional Moosehead beer, that constituted my sole contact with our northern neighbor. Still, no sweat. I call one of our so-called commercial lawyers here in town and ask him to look in one of those law lists and give me the name of one of his counterparts in Toronto. I write the Toronto firm, and yes, they'll be happy to handle the matter, please send $400 U.S. On September 10, 1982, I receive a letter from a gentleman with the rather un-Canadian sounding name of something like Haj Rabib, but what was I expecting? I dunno, Sgt. Preston maybe. Anyway, Mr. Rabib (not his real name) advises me that a Specially Endorsed Writ is in the hands of his process server. On October 13, 1982 he tells me that the defendant's solicitor has brought a motion which he regards as a delaying tactic but that the motion would be heard on November 1.

On October 27 I send copies of all the pertinent documents in the Alabama court file showing service of process, notice of trial, the whole ball of wax.

Having heard nothing by December 14, at my client's insistence, I write and ask what's happening. (At this point I should mention that my client, one of the sweetest guys around, by this time, is semi-retired so he calls me at least once a week. You all know the type, nothing better to do? Call the stockbroker, call the lawyer, see what those lazy bums are up to — "Heard anything?" "No, Harry, no-

thing new. When I hear something you'll be the first to know, believe me.")

January 24, 1983. I am advised that the defendant's solicitor has brought two interlocutory motions attempting to have our Specially Endorsed Writ struck out, necessitating an amendment to the writ providing further particulars. It is now apparently necessary, my man tells me, that when issuing a Specially Endorsed Writ, at least in Ontario, to set out very carefully the conversion rate from the foreign currency, where the conversion rate was obtained, and each calculation of principal and interest in both currencies. What kind of nonsense is this?

April 8, 1983. The defendant files an "Affidavit of Merits" which, says my solicitor, contains nothing which would raise a triable issue on the jurisdiction of the courts of Alabama and, therefore . . . "there is no defence to the action." Nevertheless, it is now necessary to cross-examine the defendant on the Affidavit before proceeding to move for judgment since the record will have to include the defendant's admissions that a Statement of Defence was filed (in Alabama). This cross-examination is scheduled for May 9. Please send another $325.

April 22, 1983. I send the $325 and ask at what point their fees cease to become noncontingent and become contingent upon amounts collected. In other words, since there is no "defence" to the action, how much longer can these guys jack us around?

April 29, 1983. I am informed that under "Ontario law, . . . contingent fees in these proceedings are not permissible." If we are able to establish that there is no defence in law on the basis of the Affidavit of Merits and cross-examination we will then be at liberty to move for judgment right away. But if even an arguable defence is shown, then the matter must proceed by what is called their "generally endorsed" procedure which is considerably more time consuming and expensive. You've got to be kidding!

May 9, 1983. The defendant doesn't show for cross-examination. Rescheduled for June 27, 1983.

June 29, 1983. My solicitor is informed on Friday, June 24 that the defendant's representative was out of town and would be unable to attend the cross-examination scheduled for June 27.

July 26, 1983. I write and ask if they've ever thought about the possibility of putting the guy under subpoena.

About this time Mr. Rabib leaves the firm and my case is assigned to someone else. Good. Maybe some new blood will get things moving.

November 14, 1983. My new man brings me up to date. They served an "appointment" (which, he tells me, under their system is all that can be served for a cross-examination) requiring the deponent to attend on August 17. On that morning the solicitor for the defendant calls and says his client cannot attend on that day. My man there files a motion to either strike the Affidavit of Merits or to compel the defendant to attend on a date to be fixed by the court. "To my disbelief," he says, "the court ordered, that since the defendant's solicitor had phoned on both occasions and told us why he could not attend he had never 'failed to attend.' " The judge then dismisses the motion and tells them to set another date. He says he debated whether to appeal the decision but determined that the less costly route was to proceed with another appointment, which he set for November 11, and guess what? You're right, no show again. By now even my Canadian friend is becoming somewhat perplexed for he concludes his letter by saying "I am sure you are by now fully amazed at the workings of our court system and I do not think I can add anything that would reduce that amazement." You got that right, friend.

About this time I'm reading in the papers where a Canadian citizen who is under indictment for stock fraud in Florida jumps bail and heads home to Toronto. Two bondsmen find him there, unceremoniously collar him and haul him back to Florida. This perceived insult to Canadian sovereignty has their authorities and press much upset. Could it be that they're taking it out on me? Am I getting paranoid? You bet your sweet bippy I am. I am also recalling the old saw about there being a fine line between sanity and insanity and right now I'm thinking it's the 49th parallel.

December 21, 1983. Surprise! Defendant's solicitor and client do show on December 6, and submit to cross-examination. We will be able to move for judgment, says our boy: "The motion will certainly be contested but I believe we will likely succeed as I do not think there is any defence to this action." Where have I heard that before? Oh yes, this is go-

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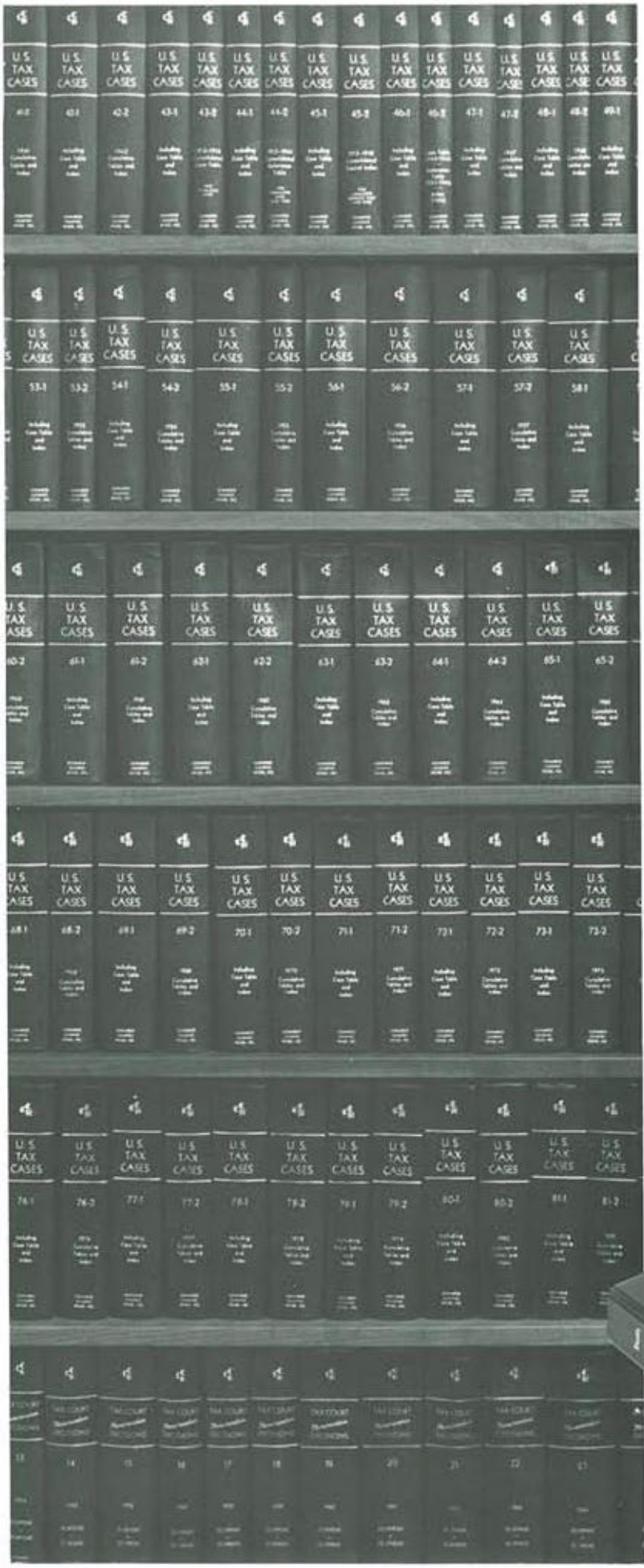

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AMSOUTH

Fee Declarations In Indigent Criminal Cases

The following guidelines were promulgated by the Indigent Defense Committee of the Alabama Bar Association, and adopted by the Board of Bar Commissioners of the Alabama State Bar Association, to assist and guide lawyers throughout the State with respect to billing procedures in cases in which they are appointed by the court to represent persons accused of crimes who have also been determined to be indigent. It is the hope of the Alabama State Bar that these guidelines will provide guidance to lawyers and serve as a standard by which questionable conduct can be judged.

Those lawyers who follow the letter and spirit of these guidelines will be protected from charges of impropriety; those who do not will have no added protection from charges to the contrary. In short, these guidelines, though designed chiefly to aid and assist members of the bar, also stand as this Bar Association's self-policing mechanism for questionable fee practices.

The Alabama State Bar expresses its sincere appreciation to those who dedicate themselves to the representation of those who do not have the means to hire a lawyer. At the same time, it cautions anyone who attempts to take advantage, either of their clients or the State of Alabama, by practices such as double-billing, that abuses of this honorable system will not be tolerated.

1. Activities are to be Separately Listed

All activities for which compensation is claimed shall be separately listed on contemporaneous time records. In order to receive payment, activities must be listed in the appropriate spaces on the Fee Declaration Form or, if contemporaneous time records are kept in a manner that conforms to the Fee Declaration Form, the contemporaneous records may themselves be submitted without the necessity for transferring them to the Fee Declaration Form.

2. Standard Time Reporting

All time shall be declared in increments of .1 hour (six minutes). Counsel may bill for time spent under six minutes at a minimum rate of .1.

3. Phone Calls

The purpose, *not substance,* of phone calls should be briefly specified. For example: "phone call to defendant's brother re: raising bail" or "phone call to defendant re: trial date."

Each call should be separately listed (on the contemporaneous time records, not on the fee declaration form).

4. Mileage

The rate for mileage shall conform to Alabama Code (1975) §36-7-22 (as of September 1, 1984, this rate is twenty-two cents ($0.22) per mile).

5. Expenses

Certain expenses must be approved prior to the time they are incurred. Alabama Code (1975) §15-12-21(d). A general definition of expenses is impractical. Therefore, a definition is given by way of what is and what is not an expense which requires approval prior to being incurred. Counsel should file the appropriate motion in cases of uncertainty. In cases where court approval is required, counsel *shall* file a copy of the court's pretrial order along with the Fee Declaration Form in order to obtain reimbursement.

The following are examples of expenses which do require approval prior to being incurred:

A. Private investigators
B. Expert witnesses
C. Transcripts of trials or hearings not otherwise available
D. Interpreters
E. Scientific tests

The following are examples of expenses which do not require approval prior to being incurred:

A. Copying (limited to twenty-five cents ($0.25) per copy, except in extraordinary circumstances)
B. Long distance phone calls
C. Travel

6. Opening and Closing Case Files

Counsel may bill for this activity, but the maximum time which may be billed (for opening and closing combined) is .5 hour.

7. Travel Time To and From Court

Travel time to and from a court appearance should be billed as out-of-court time, except under the following circumstances, where it may not be claimed:

A. Travel time to arraignment when counsel is not assigned a defendant prior to arraignment; and,
B. Travel time to arraignment when counsel is assigned a client prior to arraignment, but counsel fails to file a waiver of arraignment [where "waiver" is provided by local law or otherwise] without

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(Continued from page 331)

just reason. Some examples of just reasons for failing to file a waiver include that the client refused to waive arraignment, or that counsel could not locate client prior to arraignment, etc.

If travel time involves more than one case, it should be divided equally among the cases; e.g., if two cases are involved, one-half of travel time should be billed to each case.

8. Arraignment

Only the actual time spent arraigning a defendant is compensable unless counsel is assigned a client prior to arraignment and counsel is required to wait due to circumstances beyond his control. Such waiting time may be billed as in-court time and should be noted as such on the fee declaration form.

9. Hearings and Trials of Co-Defendants or Directly-Related Cases

Attendance at the hearings and trials of co-defendants or cases directly related to your clients should be billed as out-of-court time and your attendance should be justified by an attachment to the declaration. However, in cases where a co-defendant's case has been consolidated with your case, in-court activities may be billed as in-court hours.

10. Preliminary Hearings

An appearance at your client's preliminary hearing should be billed as in-court time even in the event you are proffered the state's witnesses for interview and the preliminary is thereafter waived. However, interviewing witnesses after your client's preliminary hearing is concluded should be billed as out-of-court time. Waiting time required by circumstances beyond counsel's control may be billed as in-court time and should be noted as such on the fee declaration form.

11. Law Clerks, Paralegals And Associates

Time spent by qualified law clerks and paralegals working at your direction should be billed at one-half the hourly out-of-court rate, and the name of the law clerk or paralegal should be noted on the declaration. Time spent by qualified associates working at your direction should be billed at the statutory rate, provided that (a) the associate's assistance was required by circumstances beyond your control and (b) the name of the associate is noted on the declaration. An associate will not be permitted to serve as lead counsel without prior approval from the court.

12. Actual Time Records

Actual time records, notations or memoranda shall be maintained contemporaneously.

13. Total Billing is Required

A declaration should not be filed until the case has reached conclusion, e.g., it is not permissible to file a declaration after preliminary hearing where the defendant has been bound over and been indicted.

When, however, a clerk fails to appear or absconds, a declaration may be filed sixty (60) days thereafter. Similarly, if new counsel is appointed or retained, a declaration may be filed immediately. However, the continuity of counsel provided by statute is to be strictly adhered to and should be departed from only in those cases in which it is absolutely necessary to have new counsel.

14. Separate Declarations are Required in Multiple Charge Cases

In the past, it has been the normal practice to file a separate fee declaration form for each separate case number, in cases involving multiple counts, defendants, and/or indictments. That was prior to joinder and consolidation under the new temporary rules of criminal procedure. These cases should no longer be treated separately, but rather should be billed in the following manner.

All cases arising out of the same transaction shall be billed as one case. For example, if a client is charged with breaking and entering and burglary of

the same dwelling, and the cases are joined, they shall be treated as one case. If, at the initiation of the proceedings, the cases were listed separately, simply list the additional case number on the Fee Declaration Form with an explanation that the cases were consolidated.

In contrast, if cases arise out of separate transactions, they may be billed individually, even if they have been consolidated. For example, if a client commits three separate and distinct burglaries at three separate locations, and the cases are consolidated, they may be billed separately.

Double-billing will not be tolerated under any circumstances. Therefore, if you are billing for more than one case, be careful not to charge for the same work more than once.

Finally, though payment will be permitted for new trial motions and like proceedings, including sentencing, all such billing shall be treated as trial, rather than post-conviction billing.

15. "In-Court" Versus "Out-of-Court" Time

Consistent with sections 8 and 10, *supra,* all waiting time at the courthouse for a scheduled court appearance, caused by circumstances beyond counsel's control, may be billed as in-court time and should be noted as such on the fee declaration form; i.e., that portion of the total in-court hours which reflects necessary waiting time should be specifically noted as "waiting time" on the declaration form.

16. Fees Collected from the Client

Any fees or expense money collected from the client (or from anyone on the client's behalf) before, during or after working the case for which counsel has been appointed, *shall* be reported. All amounts received shall be deducted from the amount finally paid to the lawyer.

In the event of changed circumstances (i.e., the client becomes able to retain counsel or secures outside assistance to retain counsel), counsel shall immediately notify the court that he/she has been retained, and the appointment shall be withdrawn. Retained counsel will not be required to file a fee declaration form, because no state funds will be paid.

Following the recommendations of this committee a special ad-hoc committee on indigent defense services, appointed by Chief Justice Torbert and chaired by Judge William R. Gordon, also approved the guidelines. The State Comptroller, as a member of this ad-hoc committee, has reviewed these guidelines and has indicated that they will aid his office in the processing of claims to be paid from the Fair Trial Tax Fund. □

Oh, Canada

(Contined from page 329)

ing to take another 10 hours so please send another $800. "Geez" says my client. "At the beginning I should have taken this money and gone to Vegas. At least I would have gotten some decent odds."

February 22, 1984. The defendant has retained a new solicitor as a result of which my solicitor was obliged to adjourn his motion for judgment. The new guy has also decided to seek security for costs. "We've got to cough up another $200, Harry. No, Harry, I'm still on your side, believe me."

March 20, 1984. We lose the motion for judgment. You heard me. The motion was argued for two hours at the end of which some county court judge finds that the triable issue that should be determined is ". . . what Rule 55(a) of the Alabama Rules of Civil Procedure is (!!!) and whether in fact the Rules of Civil Procedure of Alabama were followed in granting judgment to my client. Undamnbelievable.

Undaunted, my man says ". . . though I predicted success in the original motion, I am still prepared to predict success on the appeal." Send another $600 security for costs. "Harry, are you listening to me, Harry? Harry, crying won't help!"

July 19, 1984. The Supreme Court of Ontario (which I gather is similar to our circuit court here but at this point I can't be too sure about anything) awards judgment in our favor and overturns the judgment of the county court judge. However, the judge refuses to award pre-judgment interest. Naturally, this puts a premium on the delaying tactics employed by the defendant, but at this point I'm looking to get out without paying the damn judgment myself.

Naturally, the defendant appeals, and we cross-appeal on the interest. It's now in the court of appeals, wherever that may be. And that's where matters stand, five years after my client comes into my office with a simple collection matter.

In a classic understatement the solicitor says, "I am sure that you and your client marvel at the way this matter has proceeded." Yes, you might say we have.

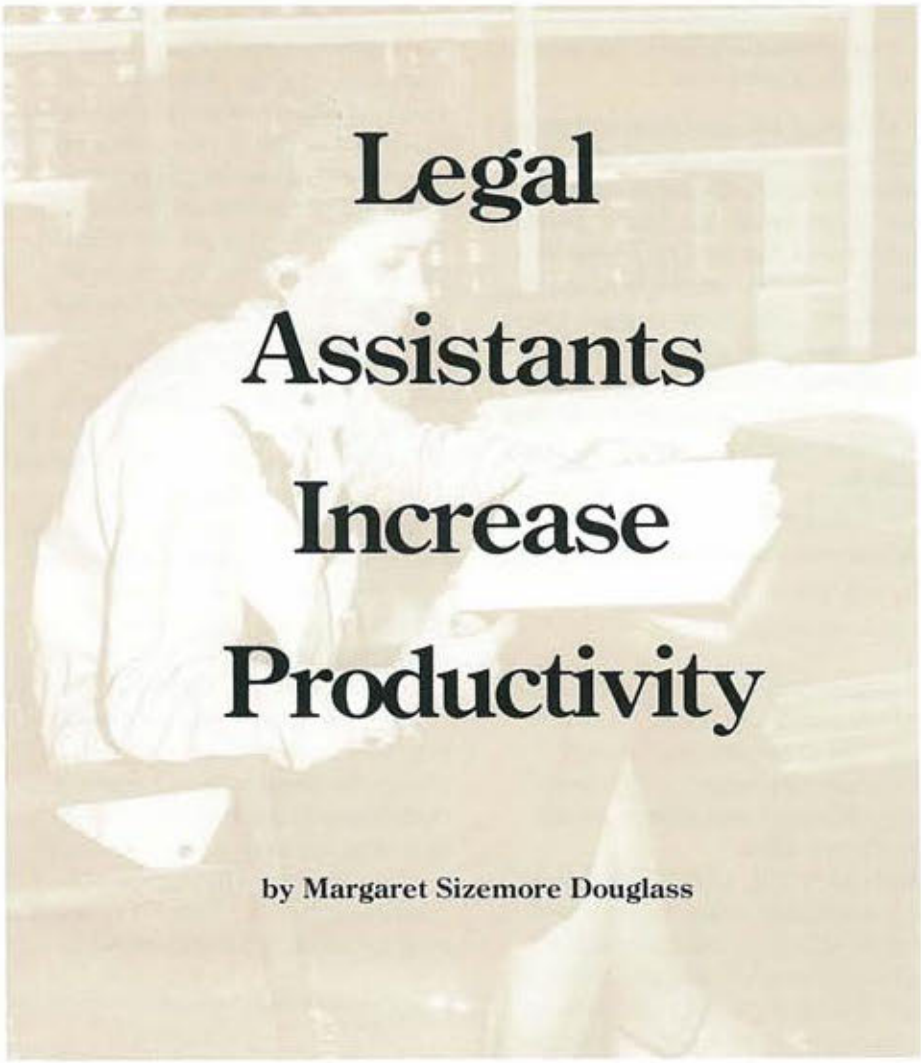
The other night I turned on the TV to see if the Braves can figure out a new way to blow one to the Expos. Before the game both U.S. and Canadian National Anthems are played and sung. Canada's, I notice, closes with the words, "Oh Canada, we stand on guard for Thee." I'm beginning to realize what they mean.□

Gary P. Smith is a 1954 graduate of the University of Missouri and graduated from the University of Alabama School of Law in 1960. Mr. Smith regularly authors "Around, Over & Under the Bar," the humor column in the Birmingham Bar Association Bulletin. *He has been in the private practice of law in Birmingham since 1966.*

How's That Again?

Those who argue for simplification of the Internal Revenue Code might find encouragement in the following paragraph from code section 509:

> For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in section 501(c)(4), (5) or (6) which would be described in paragraph (2) if it were an organization described in section 501(c)(3).



Legal Assistants Increase Productivity

by Margaret Sizemore Douglass

"The best kept secret in Alabama," commented a local attorney about the boon provided to lawyers by a comparatively new professional group — the paralegals. "The hottest new career on the horizon," states a leading periodical.

Attorneys are slowly, but surely recognizing that paralegals improve profits, service and efficiency of a law firm. The November 1982 issue of *The American Lawyer* stated that "paralegals are by far the most profitable law firm employees," and that during the 1980s the "smart firms" will increase the ratio of one paralegal for every three lawyers. This is unquestionably one of the fastest growing fields of this decade and its full potential is yet to be reached. The Bureau of Labor Statistics of the United States Department of Labor projects that in the next six years the profession will increase by 133% to 1990% placing it second only to computer mechanics in growth. With the strengthening and broadening of college training programs, preferably with the approval of the American Bar Association, the graduate legal assistant is performing many tasks heretofore performed by attorneys themselves, thus freeing the attorneys for increasing the number of clientele.

What is a legal assistant and what does he or she do? A legal assistant, or paralegal, is a nonlawyer who works under the direct supervision of an attorney and who provides a variety of services which are not an engagement in the practice of law. Some paralegals are generalists and work in various areas of the law. Others work in special areas such as litigation, estates and trusts, real estate law, business associations, labor law and family law.

Well-trained legal assistants work in cooperation with secretaries and attorneys. They may draft, organize and summarize documents, interview clients and witnesses, do factual and legal research, analyze and summarize evidence, prepare correspondence and memoranda and perform other tasks required in various areas.

The National Association of Legal Assistants offers the following definition:

> Under the supervision of a lawyer, the legal assistant shall apply knowledge of law and legal procedures in rendering direct assistance to lawyers, clients and courts; design, develop and modify procedures, techniques, services and processes; prepare and interpret legal documents; detail procedures for practicing in certain fields of law; research, select, assess, compile and use information from the law library and other references; and, analyze and handle procedural problems that involve independent decisions.

NALA further explains with four "shall nots": With the exception of not accepting cases, not setting fees, not representing the client in court, nor giving legal advice to the client, the legal assistant may perform any task delegated and supervised by a lawyer. The lawyer, of course, is and must be responsible to the client for the final work.

There is some confusion about the work paralegals can do, partly because of the many titles for the position: legal assistant, legal clerk, legal technician, paraprofessional and many others. Just as there is a diversity of title, so also is there diversity in duties. The National Paralegal Association of Doylestown, Pennsylvania lists some of these: conduct interviews with clients to gather background information; conduct case and statute research at the law library; write, analyze, and synopsize the same for attorneys or corporate executives; draft interrogatories and prepare witnesses for depositions, cross examinations and other court appearances; organize and manage the flow of work and direct the administration of others within a law firm; conduct business with the police, other attorneys, government officials and agencies, and all levels of the courts; organize, manage and direct word processing systems, computer systems and utilize computer systems such as Westlaw for legal

research; prepare drafts of trial motions, complaints, wills, leases, corporation formations, fictitious name papers, partnership agreements, contracts, appellate briefs, etc.; provide title and public record searches, keep meeting minutes, work closely with attorneys during trial by keeping material organized and making notes during examination and cross examination of witnesses; represent clients in certain administrative proceedings such as social security, unemployment compensation hearings and district justice or justice of the peace hearings; review, organize and digest deposition and trial transcripts; prepare and place advertising for staff personnel; interview, screen and recommend applicants for entry positions; and in law libraries, assist attorneys and the public in locating reference material on a desired topic of interest.

Of course, *all* paralegals cannot do *all* these things. There are areas of specialization and there are various types of programs. For example, at Samford University there are two options or goals, both approved by the American Bar Association. The four-year course of study terminates in a Bachelor of Science Degree in Paralegal Studies and includes basic core education plus four courses in Business and thirteen courses in Law. In addition, there are options for specializing in government areas, sociology and law enforcement or business — one hundred and twenty-eight semester hours in all. Or, one may enter a two-year program (designed principally for college graduates) and receive an associate or professional degree. This calls for the basic courses without specialization.

Donald C. Rikli in *Working with Legal Assistants* (1981) suggests a "rule of three," to wit: a legal assistant gross billing should be three times net income. In other words, a paralegal receiving $18,000 should be allowed overhead expense of that same amount and produce a profit of another $18,000. According to a survey performed for the *ABA Journal,* the average starting salary is now $14,700 and the average top pay is $21,000. These are said to be increasing by three percent a year. If a legal assistant receives $18,000 per year and incurs a like amount for overhead and expenses, the firm could expect a $6,000 profit of the paralegal billed 1,400 hours at $30 per hour. The lawyer, having been relieved of many routine tasks, can handle more matters in less time and bill at a higher rate. If the lawyer requires ten hours at $50 to do a job and a paralegal can do it in the same time (with assistance from the lawyer) at $30, the client's bill is lessened and the lawyer's time is freed for expansion of services.

What are some intangible values of the paralegal to the law firm? One opinion is that "some clients are simply more comfortable speaking with a non-lawyer. Because of their unique position in the legal world, paralegals have the advantage of understanding both the perspective of the legal world and that of the average citizen and bridging the gap between the two." An eight-year veteran adds:

> In many cases such as personal injury litigation, you are dealing with average middle-class citizens, not sophisticated professionals, but everyday people. They often feel more comfortable in dealing with someone whom they don't perceive as intimidating and who is able to spend the time. Because lawyers' days are so busy, they don't always have the time to talk to clients. The client's biggest concern is with the status of the case. For example, in will contests, you may spend a lot of time with the clients. They appreciate the contact. You see the daily progress of the case and what's being done. They feel more comfortable asking about the status. Because the only answer I can give them is not a legal opinion but more of a status report, the lawyers in our firm have had no problems with my being involved with the clients.

Paralegals are usually more accessible than lawyers — less likely to be out of the office. Paralegals can listen and relay questions to the attorney at a more convenient time and then relay the response back to the client. Paralegals hold a more client-oriented point of view. E. Moon writing in *The Paralegal* (Summer 1984) quotes a paralegal administrator ". . . lawyers sometimes get so wrapped up in the legal issues involved in a case that they forget how other people might think and how injuries might perceive things . . ." Ms. Moon also believes that we might learn a lesson in business efficiency from Japan where much of the work is carried on by nonlawyers who handle administrative matters and ordinary tax and real estate problems and who promote mediation rather than confrontation. Ms. Moon refers to a report in *Time* magazine of comic Russell Baker's suggestion for curing the balance of trade problem by "exporting one lawyer to Japan for every car that Japan exports to the United States."

In summary, the paralegal profession is growing by leaps and bounds. The progressive law firm or even the single lawyer office is recognizing that this is the "wave of the future" and that the attorney-paralegal team approach will attract and please clients, deliver more efficient legal services, and provide these services at a lower cost which in turn will benefit the public through increased availability of these services. Yes, the paralegal is here to stay, and the lawyer who uses his or her services wisely will find improved relationships with clients, more efficient operation of the office, fewer problems to take home, a larger clientele and increased profits. □

Margaret Sizemore Douglass, M.A., D.N., LL.D., is assistant to the president and director of the Division of Paralegal Studies at Samford University in Birmingham. The program, which is the only one in Alabama approved by the American Bar Association, is in its ninth year and has graduated 137 students in the field.

Annabelle's Dilemma — A Christmas Story

by
Judge Robert L. Hodges

When she thought about it, trying to begin at the beginning of her dilemma, she knew it was the precise moment in time when the fly lit on the pew Bible. That was what started the whole eroding of her faith, Annabelle felt sure. Not that the incident was anything monumental in itself, she thought, but the coincidence of the timing of it, that it came during the pastoral prayer, that it was the first day of Advent, and that the fly lit there just when Annabelle's thoughts were wandering from the prayer, lingering on the dinner conversation with her sister the night before. The lighting of the fly there, just under her nose, while she was tightly clasping the pew Bible and warring in her will between the dinner conversation and the pastor's prayer, and when she was focusing intently on the Bible as if she could, by mentally imposing its image in her thoughts, ward off the evil intrusion into the prayer of the evening before. She knew, until that moment, that God was listening to her; she never doubted it until then, never had a moment's question about it. Never in her seventy years of giving herself to the church, had she ever doubted that her meditations ever went anywhere but directly to Him, and certainly the question of whether He was there to listen had never entered her mind. That is, until the fly lit.

As the eldest child, Annabelle had early assumed the position of parent to her younger sisters and brothers, when Father died. She was only eighteen then, so long ago, but she took over the household and the younger children almost without a hitch in her stride, and it had been that way ever since. It was almost as if she had stepped into Father's shoes, she took her role so somberly. As the eldest child of a Methodist minister, she saw herself in no other capacity. She fed and clothed the younger children with her wages as secretary to the bank; she had the blessings devotedly in the same language Father had done them; she faithfully herded the children off to church every Sunday and Wednesday night; she never took a husband in all these years, even long after brother and sisters had married and moved away and had their own families. She had even, in her elder years, she proudly recalled, been compared by some of her friends in the Methodist Women, to the image of her father in dress and posture and gait. After that circle meeting, she remembered, she came home and stared admirably into the mirror for, she guessed, an hour, turning at different angles and posing in different postures, noting how she resembled her father. The black and white starkness of her customary jacket, skirt and coat, and the high, white collar tied at the neck, reminded her fondly of her father's faithfulness. Faithfulness was that way to Annabelle, stark, clear-cut, and uncompromising. She even held Father's watch and chain to her side, looking in the mirror, where his watch-pocket would have been, and noted the resemblance.

"You would have been proud of me, Father," she said to the mirror that night. "I have kept the faith." Keeping the faith, to Annabelle, was the joy of sacrifice, of days and unending days of working to support her brother and sisters, cleaning house, going to prayer meeting, teaching Sunday School, baking for the Methodist Women meetings, and retiring every single evening, since Father had died, over fifty years ago, to the reading of at least one chapter of scripture. Of course, she acknowledged to herself, there had been times of temptation; there, of course, to test her sacrificial dedication, to make her a stronger person, but she had resisted, and having overcome, felt renewed joy of sacrifice always the next morning, at having won. She knew, somewhere up there, Father was nodding approval. Yes, there were times of temptation, like the time, oh, it must have been fifteen years ago now, that Henry Argile had hugged her at the bank Christmas party, as she was leaving before the drinks were brought out, and murmured into her ear that he would like to come by her house after the party for a nightcap.

"The very idea!" she had said to him, pulling quickly away from his embrace and glancing furtively around to be sure no one saw.

"Have you been into the apple jack, already?" she had asked him. "You know I don't approve of drinking, and, besides, you are a widower — the very idea."

Henry was persistent, she remembered; most folks weren't with her. He had been angered. He had pushed her into the cloakroom.

"Annabelle, I am going to say some pretty straight things to you; things somebody should have said twenty years ago, and you probably ain't gonna like 'em."

"Then, don't say them. I've got to go home."

"Oh, I'll let you go home — to your housekeeping and your plants and your Bible-reading. I haven't been in the apple jack, Annabelle, mainly because I don't think I would drink it if any was here. But there is some whiskey and gin and vodka here, and some . . ."

"Stop it! You won't talk to me like this."

"Stop covering up your ears, Annabelle. And stop telling me I'm a widower; my wife's been dead ten years. That don't mean I've got cataracts in my eyes and don't recognize a fine looking woman, wasting, when I see one."

"Henry, this is scandalous! I'm leaving,

and if you don't get out of my way, I'll call the president."

"Annabelle, you can cover up your ears, and you can call the president if you want to, but there will still be me here when you leave, and me here when you come to work next Monday, and you back and forth between your plants and me, and there ain't nothing wrong with a man and a woman expressing affection for one another. Don't you ever *enjoy* yourself? Don't you ever, Annabelle, just once in a while, come out of them nun's robes you wear everywhere and go somewhere that ain't a bake sale?"

She remembered every word of the conversation, and she remembered her tears flowing uncontrollably before Henry there in the cloakroom of the bank, and finding no words to say, and rushing past him blindly into the parking lot into the snow and running down the sidewalk the few blocks to home. She had gotten into bed that night with her glass of milk and her Bible and remembered Henry and the strange warming feeling she had when he whispered in her ear, and the urge she had had through her tears to embrace him and tell him what she had known, way back in her head somewhere, ever since she had worked at the bank with him — that he really was a fine-looking figure of a man, that it might be nice to hold his hand in hers, that it might be nice to spend some time with him, had she not the proper faith. She had prayed that night, in bed, prayed in thanksgiving that she had not let her feelings for Henry out to him, that she had not succumbed to this temptation, that she had, in her faithfulness, circumnavigated one more stone in her path without stumbling. The next morning, she remembered, she had awakened with the joy of having sacrificed and renewed her strength. Henry was gone now. For the few years he lived after that she never let herself be alone with him again at work or anywhere else. At his funeral, she had said a silent prayer, there just outside the funeral tent, a prayer of forgiveness for Henry, that he be forgiven for his self-indulgence; a prayer of sorrow for Henry's never having learned in his life the joy of sacrifice.

She had invited her sisters and brother, the Saturday night before the fly lit on the pew Bible, to dinner, as was her custom on the eve of Advent. It had been a special time for Father, and she had preserved it through all these years, and, on the years when a sister or her brother or all of them could not come, she would prepare the same elaborate meal, the same as if they had all been there, and would set all the places for them, with her best china and silverware. On this particular eve of Advent, her sister, Marion, alone, came. Marion and Annabelle sat at opposite ends of the table. White candles burned between them on the starched white tablecloth, and round the huge dining room table, between them on either side, were places set before empty chairs. Annabelle sat in Father's place and, as was her custom, bowed her head to say grace.

"Our Father, at the beginning of this Advent season, when we celebrate with our sacrifices the coming of your Son into the world, where He paid the ultimate sacrifice for us . . ."

"Stop it!" Marion screamed.

Shocked, Annabelle jerked backward and looked up, sure she would find an intruder. Marion alone sat at the opposite end of the table, staring intently at Annabelle.

"I said stop it!" This time evenly and firmly spoken.

"Why, Marion, what on earth . . . I've never known you to . . . I mean, what irreverence . . . I mean . . . do *you* want to say the blessing?"

"I want *someone* to say it. Someone to bless happiness in this house, someone to *say* celebrate, someone to *mean* celebrate, someone to *laugh* here, someone to *sing* here . . ."

"Marion, I don't understand. You and the others have been coming here since you moved away, years and years, and we always celebrate the beginning of Advent the same as Father did, and no one has complained. What on earth has gotten into you?"

"Annabelle, don't you realize why there are all these *empty* places at this table? Don't you realize why Buddy and his family stopped coming years ago, and then Emily, and then all the nieces and nephews? Don't you see the hollowness of it, Annabelle? There is no *joy* in this house, no *laughter* here, no *color* here. Look at you — look at your closet — black and white, black and white —oh, you do have some *gray* slippers —they must have been out of black and white that day! Annabelle, we all love you, we *all* do, even the nieces and nephews who can't know what it was like to have you look after us and raise us —all of us, Annabelle, but you've smothered us in *sacrifice*, Annabelle. Smothered us with years and years of waiting on us hand and foot when we come here, of giving us gifts and not accepting ours, of, . . . of, . . . Oh, Annabelle! . . ."

She left her chair and ran around the table to Annabelle, kneeling at Annabelle's chair, tears in her eyes, grasping Annabelle's hands. Annabelle sat, staring straight ahead across the white starched tablecloth, across the white candles, across the darkness at the end of the table.

"Don't you see?" Marion pleaded. "Don't you see, Annabelle, that we love you, but that we don't want to be robed in mourning clothes every time we come here, to be scriptured to death, Annabelle, to be consigned to the hereafter always . . . to . . . to attending Father's funeral every holiday? Christmas, Easter, Thanksgiving, even July the 4th, Annabelle, we come here and consign our-

(Continued on page 338)

Robert L. Hodges is a 1963 graduate of the University of Alabama School of Law. He was a trial lawyer with the Huntsville firm of Ford, Caldwell, Ford & Payne for fifteen years, then returned to his hometown of Scottsboro where he was a partner in the firm Campbell & Hodges. He was elected circuit judge of the Thirty-eighth Judicial Circuit in 1982. Judge Hodges studied creative writing under Professor H.E. Francis at the University at Alabama in Huntsville, and has previously published a collection of poems and a short story. "Annabelle's Dilemma" was written originally as a Christmas gift to some close friends. The story placed second in The Alabama Lawyer Short Story Contest.

(Continued from page 337)

selves to the *dead*. To Father, to our own hereafter. Nothing for our present, Annabelle, not a thought to the *now* of things. And the worst of it is *you*, Annabelle. Look at you. You are seventy years old, and you've spun the better part of sixty of them out giving and not taking, and you've given it all *away*, Annabelle, you've given away all of your laughs, all of your songs, all of your body, all of your dreams. You've neatly packaged them up and postmarked them for the hereafter. Don't you see that?"

"I love all of you dearly," Annabelle said. "All of you. You *are* my life. Father's memory is my life. God is my life. Every day, every minute, I keep the faith. The *faith*, Marion. The faith that we are put here to serve others and not ourselves. That faith that God will reward us for that, the faith that . . ."

"Annabelle, Annabelle! Not a one of us has a doubt you keep the faith. But your faith is not ours, not anybody's I know. You've carved it out as you, or maybe you and Father, would have it, and you've left out the vital organs, Annabelle. You've left out the heart of it, the happiness of it, the *humanness* of it . . ."

"Humanness is imperfection. Humanness has to be fought and cast out day after day after day. That is my burden. That is your burden." She was still speaking across the table into the darkness, her hands in Marion's hands. Marion rose, let Annabelle's hands fall into her lap, got her coat, and slipped down the hall and out the door, leaving Annabelle sitting at the table in the candlelight.

Annabelle sat, stunned, at the table for hours that night. As the wax from the candles melted down and onto the table, she talked quietly to herself.

"Father loved them, and they loved him back. Why can't they love me? Father didn't laugh. I don't laugh. There is no place for laughter in God's temple. No place for drunkenness, no place for dancing, no place for the despoilation of our bodies, no place for . . . no place for . . . the *self*."

And Annabelle sat there long into the darkness after the candles had burned out, thinking about the faith she had kept. She sat and pondered the empty chairs and her black and white clothes, and her silent plants and darkness in her house and the wind outside. Then she prayed.

"God, I never have asked for proof. Father was enough for me. But I need to know you are there, God. I need to know that I haven't spun out my life as a sacrifice for some nothingness that is coming soon. I need a sign, God. Give me a sign."

She went to bed and lay all night, until dawn, with her eyes open for a revelation. Then she went to church. It was the first Sunday in Advent. She sat in her regular pew.

For the first time in her life, Annabelle felt that time was getting short for her, and for the first time she cared how much time was left. For if, she reasoned, if she didn't get a *sign*, if she didn't get some *symbol*, some *clue* to whether she was sacrificing for nothing, she had resolved to quietly end her days. It really wasn't an emotional decision for her; it seemed quite rational and calm for her to conclude that she simply didn't want to live any more if it had all been for nothing. It was a rather clear-cut theorem, as Father would say, that one either sacrificed for others, as the faith would have it, or one was free to do what he wished with one's life, fearing no consequences, and receiving no reward, other than one's own self-pleasure. There were no other options for Annabelle that Sunday morning when she went to church. Adherence to God's teachings meant a life of sacrifice to the exclusion of all human self-pleasure, or it meant nothing, because there was no God and there was no hereafter. It was, for Annabelle, the one or the other, and there was no other possibility. To admit of another possibility, for Annabelle, was to admit that there were gray zones in life, and she knew there weren't any. And so, Annabelle needed a sign, she had resolved.

All through the service she watched and listened intently to what was being sung, what was being said from the pulpit in the sermon, even who was sitting where, and how the light shone through the stained-glass windows. It occurred to Annabelle during the sermon that God might give her her sign by shining a ray of sunlight just so on the stained-glass windows, such that one particular symbol on the window might be illuminated for her, and that would be her sign. But this strategy didn't work for her.

As the clouds outside shifted, the rays of sunlight shifted alternately from the cross to the lamb to the crown of thorns to the dove with the olive branch, so Annabelle could make no clear sense of it. She tried hard for the first few minutes of this to focus on the crown of thorns, thinking that would be a fine sign for God to give her, but it didn't happen.

The pastor resolved to have a long prayer, suiting to Advent, in the form of a benediction, at the end of the service. Annabelle felt that time was running out, and her mind began wandering during the prayer to Marion's remarks, and she tried hard to clasp the Bible from the pew box before her to drive away Marion's words from her mind. And, then, in the middle of the prayer, when the minister was intoning something about imploring God to appear in the hearts and minds of those souls among them who had secret trials and oppressions, just then, the fly lit on Annabelle's Bible. He lit there, raised up on his hind legs as if to look directly into her eyes, and rubbed his front legs together and ran his tongue out at her. She was destroyed. There was her sign, she was sure of it. There was no mistaking the impertinence of the fly. It definitely reared up at her, rubbed its forelegs, and stuck its tongue out at her. There was no mistaking it. She was destroyed. She rose, during the prayer, pushed past people sitting in the pew, ran up the royal blue carpeted aisle and out the door of the church, down the sidewalk, still clutching the pew Bible, and into her house. If God had let a common ordinary housefly intrude on her prayerfulness, in such a holy place, on such a holy book, at the very time she was seeking to commune with Him, then, . . . then . . . there was no God to sacrifice to. She pulled down the shades to all the windows, turned off all the lights, and sat, in her coat, her hat with the veil still perched on her head, grasping the reality of her discovery. What fun they must have been having of me, she was thinking, for all of these years. What fun they must have been having.

True to her design, Annabelle set about to end her days. On Monday morning, she called and left word at the bank she was ill and would not be back for some time. She called the utility company and had the power and water cut off. She called the post office and left word for no mail to be forwarded to her house. Then she called the telephone

company and requested they come and take her phone. All this done, Annabelle bolted shut the doors, nailed the windows shut with her father's hammer, wrapped herself in her father's World War I army blanket, and lay down on her sofa, looking up at the ceiling, waiting for her days to end.

She had considered violent means as a solution to her dilemma, but had discarded it in favor of the logic she had pursued to that point — that this would, in itself, be a form of sacrifice, and she was having no more of it. There were enough canned goods in her pantry to last for months, and she was resolved to eat as her body demanded, and to let the end come as it may. It seemed to Annabelle that the nothingness of her seventy years would be well served by an end where she did nothing to further her life — and nothing to end it.

When she was missed at the bank for a week, the president, to whom she had been secretary for so many years, came to the front porch and knocked. She peeked at him from under the shade, but said nothing, and soon he left. When she missed the second Sunday of Advent, and then the third, the pastor came and knocked, and then some of the ladies from the Methodist Women, but still she peeked and did not answer. They all went away.

During her confinement, she passed the hours by just sitting or lying on the sofa and thinking, and by sleeping. She slept more and more, and she could tell she was getting weaker. She piled all of her clothes and her Bible and her family pictures in a back room and bolted the door. She let her plants die. She had some thoughts for a time about making a will, but discarded them. Somehow it might appear to her relatives that she had sacrificed her life to leave them property. That might not be logical, she thought, but it was certainly a construction which could be put on the act, and so she discarded the notion of making a will.

And now, on the afternoon of the twenty-fourth of December, the twenty-fifth day of her isolation, she lay on the sofa in her living room in half-stupor pondering the beginning of her dilemma. For three days she had been too weak to get off the sofa, and, at times, she had delusions. Once, it seemed to her, her father came in and stood before her in his black three-piece suit. He simply looked at her, and looked at his pocket watch, and looked at her and back at his watch.

"It's time I was going," he said and disappeared before her eyes.

Once she thought she heard music, piano music, and maybe a banjo. She raised her head and stared hard into the darkness and saw, through the archway into the dining room, Marion and several other people sitting around the dining room table. The table was all set with her finest china and the candles were there, and the people were laughing and clapping their hands to the music. The chair where she sat was empty, but no one seemed to notice.

Marion was dressed in a bright red velvet dress with a beautiful white corsage and a green belt and she could see green and gold and silver and blue and red colors around the table. The colors were so bright she could hardly see the figures. Marion, still laughing and clapping, got up from the table and took the hand of a man seated at the table and he rose and they began to dance to the music while the others clapped. Annabelle could see that the man dancing had bright green trousers and a red blazer and a red and white bow tie, and his head was thrown back while he was dancing, and he kicked his heels high, and when they danced under the light, Annabelle saw that it was Henry Argile.

"Don't!" She cried out, raising her head up from the pillow. "Don't! That's my sister — you shouldn't do that with my sister . . ."

It seemed to Annabelle that when she shouted, the music stopped and the figures vanished and the candles went out, and only Marion was left in the dining room, looking at her with tears, her arms outstretched to Annabelle.

"Bring back the music, Annabelle," she cried, "Bring back the music — it's nothing to you . . ."

Annabelle covered her eyes with both her hands, and when she removed them, Marion was gone. There were other delusions, but these she remembered, and she was getting so weak she could not focus her mind on the others.

A truck passed outside with bells playing on a loudspeaker.

"Merry Christmas. Merry Christmas. Merry Christmas . . ." It rumbled on

(Continued on page 340)

(Continued from page 339)

down the block and Annabelle tried to raise her head and peek at it under the shade, but could no longer get her head up that high. She closed her eyes, and soon she was running down the street after the loudspeaker truck; she could see herself running in her gown down the street after the truck, but never catching it, and she could hear the Merry Christmas, Merry Christmas, but could never touch it or feel it. She thought she felt the cold of the snow on her forehead while she was running after the truck, and opened her eyes. There was a wet cloth on her forehead. She was still lying in her living room, still on her sofa, still in the dark, but there was a hand attached to the cloth, and an arm to that, and that to a little girl. Annabelle started, but couldn't get up.

"Who are you! What are you doing here! Here in my house — how did you get in here?"

Her eyes focused now on the face of the little girl. Blue eyes looked out at her from under brown bangs. The girl was still holding the cloth to Annabelle's head, and Annabelle could see that she was dressed in a bright red dress, and green stockings.

"I saw your sign, and I came up to the porch, and I came in."

"You saw my *what?* What sign? And how did you get in the door. It was bolted and locked."

"The sign in the front yard you had. I was going to our Sunday School party, and they told us the Christmas party would be on this street and there would be a sign in the yard where it was. The sign was out there. It's still out there. It has a big red ball and a Christmas tree painted on it, and says 'Christmas Party.' I'm the first kid here, and I found you like this, and I thought you were sick, and I wanted you to enjoy the party, and so I got the cloth and I started you some soup on the stove, and . . ."

"Wait a minute, young lady. What party? How did you get in my door? It's been bolted shut for weeks."

"No'm. The door was open when I came. I just followed the sign, and the other kids will, too. If you don't feel like the party, I better take the sign down, so the other kids won't come."

Annabelle removed the cloth from her head. She struggled, with the little girl's help, to look out the window. There was, indeed, a sign. It was driven into her front yard on a stake and faced the street and she could not see the front of it.

"A sign," she thought. "Somebody put a sign at my house. A sign saying a party is here. A Christmas party."

"We are all bringing something to eat for the party," the little girl said. "Where are we having it?"

"Get me my Bible," she said. "Hurry, child, get me my Bible. It's in the back room. That door was bolted, too, but, unless I miss my guess, it's open. Hurry and see." She raised up on her elbow. The little girl ran out of the room and returned, Bible in hand, and sat on the floor at the foot of the sofa.

"Now," Annabelle said, "I'm too weak to read. Can you read?"

"Yes."

"Find me Luke, can you find Luke?"

"Yes, I found it."

"Turn to the front of Luke, turn to the first or second chapter, child. Hurry."

"I found it, but where do you want me to read?"

"Hold it up here — hold it up to the window and let the shade up so I can see. There. Let me see — about there — do you read something about the shepherds . . . you know it . . . do you see it?"

"Yes. Here it is."

"Read child, read where it talks about a sign. Read the sign part."

"I have good news for you: There is great joy coming to the whole people. Today in the city of David a de - a de - . . ."

"A deliverer."

"A deliverer has been born to you — the Mu - Mu - . . ."

"Messiah. The Messiah."

"The Messiah, the Lord. And this is your sign: You will find a baby lying wrapped in his swaddling clothes, in a manger."

"Well, you sure aren't in swaddling clothes, child, but I guess I've about made this a manger."

"Ma'm?"

"Nothing. Just an old woman mumbling. But you'll never know how glad I am to see you. Get me some soup, and help me get dressed."

Annabelle, with the help of the little girl in the red dress with the green stockings, ate a bowl of soup and struggled into an old dress and was fixing her hair when

the other kids began arriving. The little girl had set about setting places at the table, and lighting candles Annabelle dug out of her cedar chest.

One by one, the children came into Annabelle's house, bearing with them, cookies, candy, and one brought a tiny Christmas tree. There were at least a dozen, Annabelle stopped counting after ten, and her house was filled with the shouts and giggles of eight and nine-year-olds. She helped them put tiny decorations on the tiny Christmas tree, placing it in the center of the huge dining room table. She sat in the chair and watched her dining room reverberate with children. When they had eaten all they had brought, and shared with her, they sang Christmas carols. One of the children placed a green Christmas wreath with brightly colored balls on her head as she sat in her chair at the head of the table. Sing, she was commanded, sing. And she sang. She sang Little Town of Bethlehem and Silent Night and Deck the Halls, and was off-key most of the time, but unnoticed by the children.

Cars driven by parents began driving up in front of the house and honking, and the children ran out as they were honked for. The little girl in red ran to Annabelle, hugged her underneath the Christmas wreath, still on Annabelle's head, and placed a half-eaten cookie in Annabelle's hand before she darted out the door.

When they were all gone, Annabelle sat on the table alone, looking at the tiny green Christmas tree in the middle of the huge table. She got up, walked to the door, and looked out at the front yard. The sign was gone. Snow was beginning to fall lightly in the street outside. Annabelle stood for a moment at the door, and then struggled into her coat, got her purse, and stepped outside for the first time in weeks. She no longer felt weak. Feebly, she tested her steps in the fresh-falling snow and made her way cautiously down the street, and walked faster and faster till she reached the department store downtown. The shopping crowds were jostling each other in a last-minute rush, and she almost fell several times as she pushed her way to the ladies' clothing section and to the counter. A bedraggled clerk eked out an offer of assistance to her.

"I want a dress," Annabelle said, "A bright red and green dress. And a muffler, a white muffler with bells on it. I'll find the size. Just show me to the rack."

Annabelle found just what she wanted, and, as the clerk was wrapping it in a glittering package, said to the clerk:

"Do you think it's bright enough — with enough colors? I want lots of colors. The more the merrier."

"Depends on what you're wearing it to. You must be going to a party. It's probably just the thing for a party."

"Yes, it is just the thing, I think," said Annabelle.

"Whose party is it?" the clerk asked, handing over the package to Annabelle.

"It's a birthday party," Annabelle said. "A birthday party tomorrow for a little child. I've known him for years, but I've never really been to his birthday party before, not really."

Annabelle fought her way outside the department store, clutching the package with her new red dress and muffler with the bells on it, and noticed the snow was now falling heavier. The flakes were cascading down in the Christmas lights of the store, and it seemed to Annabelle that the flakes were not just white, but all colors of Christmas. She held out her hand and caught some of the snow flakes and watched them melt in her hand in the red and green light of the store windows.

"There are millions of beautiful designs in these snowflakes," she thought. "And none of them are alike."

She could not see the designs in the flakes, of course, with her seventy-year-old eyes; but, for the first time in her life, without seeing them, she knew they were there. She *knew* they were.

THE END

cle opportunities

november

8 thursday

PROFESSIONAL ASSOCIATIONS AND PROFESSIONAL CORPORATIONS
County Courthouse, Montgomery
Sponsored by: Montgomery County Bar Association
Credits: 1.0 Cost: None/members $15/nonmembers
For Information: (205) 265-4793

LEGISLATIVE AND CASE LAW UPDATE
Quality Inn, Mobile
Sponsored by: Alabama Bar Institute for CLE
Credits: 6.3 Cost: $75
For Information: (205) 348-6230

9 friday

LEGISLATIVE AND CASE LAW UPDATE
Civic Center, Montgomery
Sponsored by: Alabama Bar Institute for CLE
Credits: 6.3 Cost: $75
For Information: (205) 348-6230

REAL ESTATE SYNDICATIONS
Cumberland School of Law, Birmingham
Sponsored by: Cumberland Institute for CLE
Cost: $75
For Information: (205) 870-2865

14-15

CONSTRUCTION DELAY CLAIMS
Hyatt Regency Grand Cypress, Orlando
Sponsored by: Suemik Company, Ltd.
Credits: 11.0 Cost: $395
For Information: (913) 642-5111

15 thursday

LEGISLATIVE AND CASE LAW UPDATE
VonBraun Civic Center, Huntsville
Sponsored by: Alabama Bar Institute for CLE
Credits: 6.3 Cost: $75
For Information: (205) 348-6230

15-16

FEDERAL TAX CLINIC
Ferguson Center, University of Alabama
Sponsored by: The University of Alabama, Alabama Society of Certified Public Accountants, Alabama State Bar
Credits: 15.0
For Information: (205) 348-6222, ext. 46

PREVENTING CONSTRUCTION CLAIMS
Orlando
Sponsored by: Northwest Center for Professional Education
Credits: 12.0 Cost: $295
For Information: (206) 746-4173

TITLE INSURANCE IN 1984
The Ritz-Carlton, Atlanta
Sponsored by: Practising Law Institute
Credits: 14.4 Cost: $360
For Information: (212) 765-5700

REHABILITATING HISTORIC PROPERTIES: PRACTICING PRESERVATION LAW
The Westbury Hotel, New York City
Sponsored by: Practising Law Institute
Credits: 13.2 Cost: $360
For Information: (212) 765-5700

16 friday

PRACTICE BEFORE MUNICIPAL COURTS AND AGENCIES
First Alabama Bank, Birmingham
Sponsored by: Birmingham Bar Association
Credits: 1.0 Cost: $10
For Information: (205) 251-8006

COMPUTER LAW
Cumberland School of Law, Birmingham
Sponsored by: Cumberland Institute for CLE
Cost: $75
For Information: (205) 870-2865

LEGISLATIVE AND CASE LAW UPDATE
Civic Center, Birmingham
Sponsored by: Alabama Bar Institute for CLE
Credits: 6.3 Cost: $75
(205) 348-6230

29 thursday

TRIAL PRACTICE: CRIMINAL AND CIVIL
County Courthouse, Montgomery
Sponsored by: Montgomery County Bar Association
Credits: 2.0 Cost: None/members; $15/nonmembers
For Information: (205) 265-4793

30 friday

END OF YEAR TAX PLANNING
Cumberland School of Law, Birmingham
Sponsored by: Cumberland Institute for CLE
Cost: $75
For Information: (205) 870-2865

PREPARING A CASE FOR THE APPELLATE COURTS
First Alabama Bank, Birmingham
Sponsored by: Birmingham Bar Association
Credits: 3.2 Cost: $20/members; $25/nonmembers
For Information: (205) 251-8006

december

4 tuesday

LITIGATION RISK ANALYSIS™
Hyatt Regency O'Hare, Chicago
Sponsored by: Center for Litigation Risk Analysis
Credits: 8.0 Cost: $600
For Information: (415) 854-1104

5 wednesday

ALABAMA MORTGAGE FORECLOSURES
Montgomery
Sponsored by: Professional Education Systems, Inc.
Credits: 6.6 Cost: $85
For Information Call: 1-800-826-7155

6 thursday

ALABAMA MORTGAGE FORECLOSURES
Birmingham
Sponsored by: Professional Education Systems, Inc.
Credits: 6.6 Cost: $85
For Information Call: 1-800-826-7155

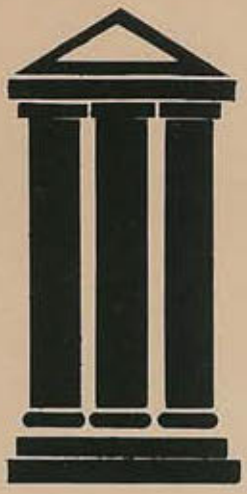
7 friday

TAX REFORM ACT OF 1984
First Alabama Bank, Birmingham
Sponsored by: Birmingham Bar Association
Credits: 1.0 Cost: $10
For Information: (205) 251-8006

ESTATE PLANNING
Birmingham-Jefferson Civic Center
Sponsored by: Alabama Bar Institute for CLE
Credits: 7.0 Cost: $75
For Information: (205) 348-6230

CRIMINAL LAW
Cumberland School of Law, Birmingham
Sponsored by: Cumberland Institute for CLE
For Information: (205) 870-2865

DEVELOPMENTS AND TRENDS IN SECURITIES LAW
Atlanta
Sponsored by: ICLE of Georgia
Credits: 7-2
For Information: (404) 542-2522



12 wednesday

EVALUATION, NEGOTIATION AND SETTLEMENT OF A CASE
Atlanta
Sponsored by: ICLE of Georgia
Credits: 3.6
For Information: (404) 542-2522

13 thursday

CRIMINAL LAW
County Courthouse, Montgomery
Sponsored by: Montgomery County Bar Association
Cost: None/members; $15/nonmembers
For Information: (205) 265-4793

JURY SELECTION
Birmingham-Jefferson Civic Center
Sponsored by: Alabama Bar Institute for CLE
Cost: $75
For Information: (205) 348-6230

14 friday

JURY SELECTION
Civic Center, Montgomery
Sponsored by: Alabama Bar Institute for CLE
Cost: $75
For Information: (205) 348-6230

PENSIONS AND PROFIT SHARING PLANS
Cumberland School of Law, Birmingham
Sponsored by: Cumberland Institute for CLE
Cost: $75
For Information: (205) 870-2865

21 friday

NEGOTIATING THE PURCHASE AND SALE OF A BUSINESS
First Alabama Bank, Birmingham
Sponsored by: Birmingham Bar Association
Credits: 3.2 Cost: $20/members $25/nonmembers
For Information: (205) 251-8006

CONFLICTS, MALPRACTICE AND ETHICS
Atlanta
Sponsored by: ICLE of Georgia
Credits: 7.2
For Information: (404) 542-2522

CLE News

by Mary Lyn Pike
Staff Director, MCLE Commission

Annual reports of compliance due December 31

Every member of the Alabama State Bar, resident and nonresident alike, must submit a CLE reporting form by December 31, 1984. However, only those who purchased a 1983-84 privilege license, 1982 and 1983 admittees, assistant attorneys general, district attorneys and assistant district attorneys must report attendance of CLE activities. Others should claim the appropriate exemption and may report attendance.

CLE reporting forms were mailed to all members of the bar in September. For the convenience of those who may have misplaced the form, a sample is printed here. Those who choose to submit a photocopy of the sample should call the MCLE Commission office to ascertain how many, if any, credits were brought forward from 1983. There is no need to send a cover letter with the form.

Information for individuals subject to the requirement

Carryover credits from 1983 were posted on the forms prior to mailing. Some were posted incorrectly and those who received incorrect figures have been notified by the Executive Director of the Alabama State Bar.

If twelve or more extra credits were brought forward from 1983 and none have been earned in 1984, the form should be signed and returned. Note that extra credits brought forward from 1983 cannot be used beyond 1984. However, credits earned but not needed in 1984 may be used to meet the 1985 requirement if they are reported in 1984.

Only accredited courses may be reported. These are courses offered by approved sponsors listed in the September issue of this journal (page 311) and courses that have been specially submitted to the MCLE Commission by the sponsoring organizations.

Anyone who attended a course that has not been accredited should not report it. Instead, the MCLE Commission should be requested to send an application to the sponsoring organization so that the course can be submitted for accreditation. If the course is accredited after December 31, 1984, the interested attorney may, by letter, request that the previously filed compliance report be amended to include it. Activities attended prior to 1984 cannot be considered for accreditation.

Teaching in accredited CLE courses earns CLE credit. Speakers who provide substantial handouts earn six credits per hour of presentation. Speakers who provide only brief outlines or fail to prepare written materials earn three credits per hour of presentation. Repeat presentations qualify for one half the credits available for the original presentation.

Teaching in ABA and AALS accredited law schools also earns CLE credit. Six CLE credits may be claimed for each hour of academic credit awarded by a school for a course. For example, a two-hour course provides twelve CLE credits and a three-hour course provides eighteen CLE credits. Guest lecturers earn credit according to the formula for CLE courses.

Information regarding exemptions

Exemptions are provided under Rule 2 of the Rules for Mandatory Continuing Legal Education and should be claimed only if clearly provided. Questions should be referred to the MCLE Commission's staff.

Lawyers admitted to the Alabama State Bar during 1984 were not required to attend CLE activities during 1984 but must file the form. Credits earned after the date of admission may be used to satisfy the 1985 requirement if they are reported in 1984. The date of admission appears on the license received from the Supreme Court of Alabama.

Individuals who reached the age of sixty-five during or before 1984 are exempt from the requirement. Those who have claimed the exemption before do not need to submit a form this year or any year hereafter. Those claiming the exemption for the first time this year will not be required to file a form in subsequent years but should submit the 1984 form in order to notify the MCLE Commission of their eligibility for the exemption.

Exemptions are also provided for full-time judges, members of the U.S. House, Senate and armed forces, and members of the Alabama House and Senate. Additionally, certain individuals who are prohibited from private practice by Constitution, law, or regulation are exempt. However, these exemptions are available only upon a ruling by the MCLE Commission. If a ruling has been made, the exemption may be claimed. Otherwise, documentation of the particular prohibition must be submitted and a ruling obtained prior to submitting the compliance form.

"Special members" are those who did not practice law in Alabama during 1984, but rather paid a fifty-dollar nonpracticing membership fee directly to the Alabama State Bar. With the ex-

(Continued on page 347)

MANDATORY CONTINUING LEGAL EDUCATION COMMISSION

ALABAMA STATE BAR

1984 MCLE FORM 1

ANNUAL REPORT OF COMPLIANCE

Submit this form by December 31, 1984

M MCLE Commission
A Alabama State Bar
I P.O. Box 671
L Montgomery, AL 36101

T Telephone:
O (205) 269-1515

Name and address as shown on Bar records:

If address shown is incorrect, please correct above.

REQUEST FOR EXEMPTION

- ☐ A. I became a member of the Alabama State Bar during 1984.
- ☐ B. I reached the age of 65 during or before 1984.
- ☐ C. I am
  - ____ a full-time judge.
  - ____ a member of the U.S. House or Senate.
  - ____ a member of the U.S. Armed Forces.
  - ____ a member of the Alabama Legislature.
  - ____ prohibited from the private practice of law by Constitution, law or regulation. Position: _____
- ☐ D. I held a special membership during 1984.
- ☐ E. I have received approval of a permanent substitute program.
- ☐ F. I have received a waiver from the MCLE Commission.

Office Telephone Number:

Birthdate: ____ ____ ____
MO DAY YR

1984 CREDIT SUMMARY

Extra credits earned in 1983 ..... _____

Credits earned for attendance in 1984 ..... _____

Teaching credits earned in 1984 ..... _____

TOTAL ..... _____

Extra credits **earned in 1984** to be carried forward for credit in 1985 ..... _____

1984 CREDIT REPORT

List only 1984 courses
(attach additional sheets as necessary)

A. Attendance

	Sponsor	Course or Seminar Title	Date(s)	City	Credits Earned
(1)			/ /		
(2)			/ /		
(3)			/ /		
(4)			/ /		
(5)			/ /		
(6)			/ /		
				TOTAL:	

B. Teaching

	Sponsor	Subject(s) Taught	Date(s)	City	Hours Taught	Credits Claimed*
(1)			/ /			
(2)			/ /			
(3)			/ /			
(4)			/ /			
					TOTAL:	

I affirm that the information given above is, to the best of my knowledge, accurate and complete.

Signature _____

Date _____

* TEACHING CREDITS

Speakers who prepare thorough, high quality, readable written materials earn six credits per hour of class presentation.

Speakers who do not do so earn three credits per hour of class presentation.

Repeat presentations qualify for one half the credits available for the initial presentation.

About Members Among Firms

About Members

Guy M. Hicks is pleased to announce that he will be the Supervising Attorney for the Alabama Developmental Disabilities Advocacy Program as of September 13, 1984. Offices are located on the campus of The University of Alabama at 918 4th Avenue, Tuscaloosa, Alabama 35401. Phone 348-4928.

Paul G. Smith, a member of the Birmingham law firm of Smith and Taylor, has recently been elected to the International Society of Barristers.

Shelby County District Attorney **Billy Hill** was elected president of the Alabama District Attorneys' Association at the mid-summer meeting at Gulf Shores.

Walter G. Browning has been promoted to the position of vice president — legal for Rust International Corporation. He has been associated with Rust since 1976, first as associate counsel and most recently as general counsel for the company.

N. Lee Cooper, state delegate in the ABA House of Delegates and chairman of its steering committee on state delegates, has been elected to the ten member American Bar Endowment Board. Cooper is a member of the Birmingham law firm of Maynard, Cooper, Frierson & Gale.

James B. Noel of Darien, Connecticut has been named assistant counsel to the commissioner of the National Football League. He was formerly director of Legal Affairs for NFL Properties, the League's subsidiary for marketing and promotion. Noel is a 1979 graduate of the University of Alabama School of Law.

Tuskegee attorney **Fred Gray** will in 1985 lead the nation's oldest and largest group of black lawyers. Gray has been chosen president-elect of the National Bar Association which was founded in 1925 and now has 8,500 members. Gray is presently on the Board of Commissioners of the Alabama State Bar, representing the 5th Judicial Circuit.

Among Firms

Claiborne P. Seier, A. Eric Johnston, and **R. Dale Wallace, Jr.,** announce the relocation of their law offices to 2100 Southbridge Parkway, Southbridge Building, Suite 376, Birmingham, Alabama 35209. Phone 879-9100.

The firm of **Duffey & Wallace** wish to announce the relocation of their offices to 25 Washington Avenue, Suite 500, Montgomery, Alabama 36104. Phone 834-4100.

Albrittons & Givhan, 109 Opp Avenue, Andalusia, Alabama, takes pleasure in announcing that **James R. Clifton,** formerly a partner in Stone, Patton, Kierce & Clifton, Bessemer, Alabama, has become associated with the firm.

J.M. Boozer, Gus Colvin, Jr., and **H. Wayne Love** are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Boozer, Colvin & Love.** Offices are located at 916 South Leighton Avenue, Anniston, Alabama 36201. Phone 237-2452.

Sadler, Sullivan, Sharp & Stutts, P.C., is pleased to announce that **W. Lee Thuston** has become a member of the firm and that **Turner Butler Williams** has become associated with the firm. Offices are at 1100 First National-Southern Natural Building, Birmingham, Alabama 35203. Phone 326-4166.

The members of the firm of **Miller, Hamilton, Snider & Odom** are pleased to announce that **Richard P. Woods, M. Kathryn Knight,** and **Carroll E. Blow, Jr.,** have become associated with the firm. Offices are at 254-256 State Street, Mobile, Alabama 36603.

Robert C. Tanner and **Jay F. Guin,** formerly partners in the firm of Hubbard, Waldrop & Tanner, are pleased to announce the formation of a professional corporation for the practice of law under the name **Tanner & Guin, P.C.** They also announce that **Kim Ingram Lary** and **Howard W. Neiswender** have become associated with the firm. Offices are located at 812 22nd Avenue, P.O. Box 2487, Tuscaloosa, Alabama 35403. Phone 349-4300.

Charles H. Volz, Jr., and **Charles H. Volz III,** formerly with Volz, Capouano, Wampold & Sansone, P.A., are pleased to announce the formation of a partnership for the practice of

law under the firm name of **Volz and Volz.** Offices are located at 216 Noble Avenue, P.O. Box 950, Montgomery, Alabama 36101-0950. Phone 832-4080.

Richard J. Ebbinghouse, formerly with Legal Services Corporation of Alabama, takes pleasure in announcing the opening of his office for the general practice of law located at 2107 5th Avenue, North, Suite 300, Birmingham, Alabama 35203. Phone 328-1300.

Gary L. Blume, formerly senior attorney for Sonat Inc. and Southern Natural Gas Company (1980-84) and assistant university counsel, University of Alabama (1978-80), announces the opening of his office for the general practice of law at 2429 University Blvd. East, Tuscaloosa, Alabama 35404. Phone 556-6712.

The law firm of **Melton & Espy, P.C.,** is pleased to announce that **Armstead L. Hayes III,** has become associated with the firm in the practice of law. Offices are located at 339 Washington Avenue, P.O. Box 1267, Montgomery, Alabama 36102.

The law firm of **David B. Carnes** is pleased to announce that **Walter J. Waid** has become associated with the firm. Offices are located at 140 South 9th Street, P.O. Box 1218, Gadsden, Alabama 35902-1218. Phone 547-1641.

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor First National Bank Building, Mobile, Alabama, takes pleasure in announcing that **Blane H. Crutchfield** and **David R. Quittmeyer,** have become associated with the firm.

After fifty-eight years of private practice, **Jack Crenshaw** announces his retirement. He will remain Of Counsel to the firm of **Azar, Campbell and Azar,** 250-260 Washington Avenue, Montgomery, Alabama 36104.

(Continued from page 344)

ception of assistant attorneys general, district attorneys, and assistant district attorneys, most special members are exempt from the requirement. However, attorneys who change their membership status from "active" to "special" between September and December 1984 are subject to the CLE requirement for 1984. Additionally, attorneys who change from "special" status and "inactive" status to regular memberships by purchasing a license during that period are subject to the requirement.

Amendment of 1984 reports

Attorneys who have attended approved CLE activities since submitting the form may use the sample form to report additional credits earned. Simply add the word "amendment" at the top right hand corner of the form. Amendments will be accepted through February 28, 1985, but cannot be accepted thereafter.

Enforcement of the requirement

In 1983, fifty-six attorneys failed to submit their CLE reports or to respond to reminders from the MCLE Commission. As required under Rule 6, those attorneys were certified to the Disciplinary Commission for possible suspension. All but five of them eventually complied. The remaining five were suspended pending compliance.

Please take some time today to ensure that you have met or will meet the requirement by December 31 and, just as importantly, that your report has been or will be mailed to the MCLE Commission by December 31. It is important to earn sufficient credits, but, until the Commission receives the report, you are not in compliance and disciplinary sanctions remain a possibility. □

Did You Purchase Your 1984-85 License?

Delinquent After Oct 31, 1984

Committees Pursuing Excellence

by Mary Lyn Pike

"Volunteer organizations are great — they have little money, less authority and lots of enthusiasm." Without knowing it, management consultant Ron Fortier aptly described the committees of the Alabama State Bar. What he had no way of knowing was the extent of the enthusiasm of those persons who have committed themselves to working for our bar. More than two hundred lawyers contributed most of a day's billable time plus travel expenses to work for our bar during August and September.

Carrying out President Byars' theme of "the pursuit of excellence," most of the committees and task forces have begun to study problems, evaluate solutions, and develop recommendations for the Board of Bar Commissioners. The Board hears some committee reports at each of its bimonthly meetings. All committees and task forces will make progress reports to the Board and members of the bar on Saturday, March 2, 1984, at the Midyear Meeting of the Alabama State Bar.

Public Service

In June 1984, the Alabama Legislature enacted a bill increasing the compensation of attorneys who accept appointment to indigent defense cases and authorizing the state comptroller to withdraw money from the Fair Trial Tax Fund to administer it. This bill was drafted by the **Indigent Defense Committee,** in consultation with State Comptroller Tom Brassell, and sponsored by Senator Ryan deGraffenried of Tuscaloosa. This fall, chairman Dennis Balske and the committee turned their attention to the recruitment of lawyers to handle post-conviction matters in death penalty cases and to insuring that courts appoint lawyers in all paternity, nonsupport, and DUI cases. The Board of Bar Commissioners heard the initial presentation on these matters at its October meeting.

President Byars has created a **Task Force on Alternate Methods of Dispute Resolution,** charging its members with studying and evaluating the concepts of mediation and arbitration. The arbitration subcommittee is reviewing a proposed "Alabama Arbitration Code," the experience of other states with similar codes, the desirability of adopting one for Alabama, and the effects of such a statute on the public and the bench and bar. The mediation subcommittee is considering ways in which mediation, conciliation, and similar non-binding third-party dispute resolution techniques may be useful and desirable in Alabama. The subcommittee on court rules is investigating ways in which the Alabama Rules of Civil Procedure and other statutes and rules applicable to the court system might be modified in order to accomplish the general purposes assigned to the committee. A.H. Gaede of Birmingham serves as chairman and Harold See of Tuscaloosa is vice chairman.

Focus on the Profession

"Policing our ranks" is the concern of the **Permanent Code Commission.** Under the leadership of Hugh Nash of Oneonta, the Commission is reviewing the Code of Professional Responsibility and the Rules of Disciplinary Procedure to determine if they meet the current needs of the legal profession and, if not, to recommend changes to the Board of Bar Commissioners. Among the subjects being addressed are the ABA's Model Rules of Professional Conduct. Additionally, the Commission has voted to recommend that the required period of time between disbarment and an initial petition for reinstatement be increased. It has also voted to recommend that DR5-104 be amended to provide that neither a lawyer nor his firm may prepare a will or trust in which a client desires to name the lawyer as a devisee or beneficiary, unless the lawyer is the spouse of the client or otherwise closely related. Bifurcated disciplinary hearings are being studied as well as an "habitual offender" rule to automatically enhance discipline of lawyers who accumulate private informal admonitions and private reprimands. Finally, the Commission is studying the possibility of prohibiting the direct or indirect purchase of property at probate, foreclosure, or judicial sale by an attorney who has represented one or more of the parties.

Chairman Gordon Tanner and members of the **Committee on Legal Education and Admission to the Bar** have formed subcommittees on evaluation of law schools, internships for graduates, bar admission rules, and nonaccredited law schools. It has heard a report on Alabama Christian College's efforts to obtain ABA accreditation of Jones Law School. Dr. Ernest Clevenger, president of ACC, reported that the college hopes to obtain provisional accreditation during the summer of 1985. In the near future, a random sample of Alabama State Bar members will receive a survey on law school curricula. The results will be disseminated to the law schools and the bar.

Last year, the **Committee on the**

Future of the Profession recommended, and the Board of Bar Commissioners adopted, a proposal that a

Harold L. Speake chairs the Committee on Programs, Priorities and Long-Range Planning.

demographic survey of the bar be conducted as soon as possible and every five years thereafter. The bar's financial difficulties have precluded funding of the survey. However, the committee is preparing for improvement in the financial situation, possibly during the spring session of the Alabama Legislature. Under the leadership of Jim Kierce of Bessemer, subcommittees are working on the content of the survey and possible costs.

Under the leadership of David Cauthen and James Baker, the **Legislative Liaison Committee** has outlined three areas of study for 1984-85.

David B. Cauthen chairs the Legislative Liaison Committee.

One subcommittee will study the bar's relationship with the Alabama Legislature, including the mechanics of the relationship and evaluation of legislation affecting lawyers and the legal system. Another will consider whether the Supreme Court of Alabama or the Legislature is the proper body to govern the bar. A third subcommittee will consider the problem of the decreasing number of lawyer-legislators. Comments on any of these matters may be directed to the committee at P.O. Box 671, Montgomery, Alabama 36101 or to the chairman at P.O. Box 1702, Decatur, Alabama 35602.

Under the leadership of Dorothy Norwood of Montgomery and Brenda Smith Stedham of Anniston, the **Desk Book Committee** has set a goal of placing such a book in each bar member's hands by July 1985. This book will be an update and revision of the last one, which was published in 1974.

Among the many ideas being considered by the **Energy Law Committee** is the publication of an energy law handbook. Alex Lacy and James Sledge are chairman and vice chairman, respectively.

Bench - Bar Relations

The **Committee on Meeting Criticism of the Bench and Courts,** responding to the consensus of the state's judges, is proceeding to develop procedures and mechanisms for dealing with the problem. Chairman Patrick Richardson, vice chairman Kent Henslee, and members of the committee are studying ways to deal with particular occurrences of unjust criticism and ways to prevent it. Possible preventive actions include media and the law workshops, education of the public on the legal system, and enhancement of judges' ability to handle inquiries from representatives of the media. □

WE WANT *YOU* TO JOIN OUR SPEAKERS BUREAU!

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

SPEAKER'S BUREAU APPLICATION

Name _____

Firm Name (if applicable) _____

Address _____

City _____ **State** _____ **Zip** _____

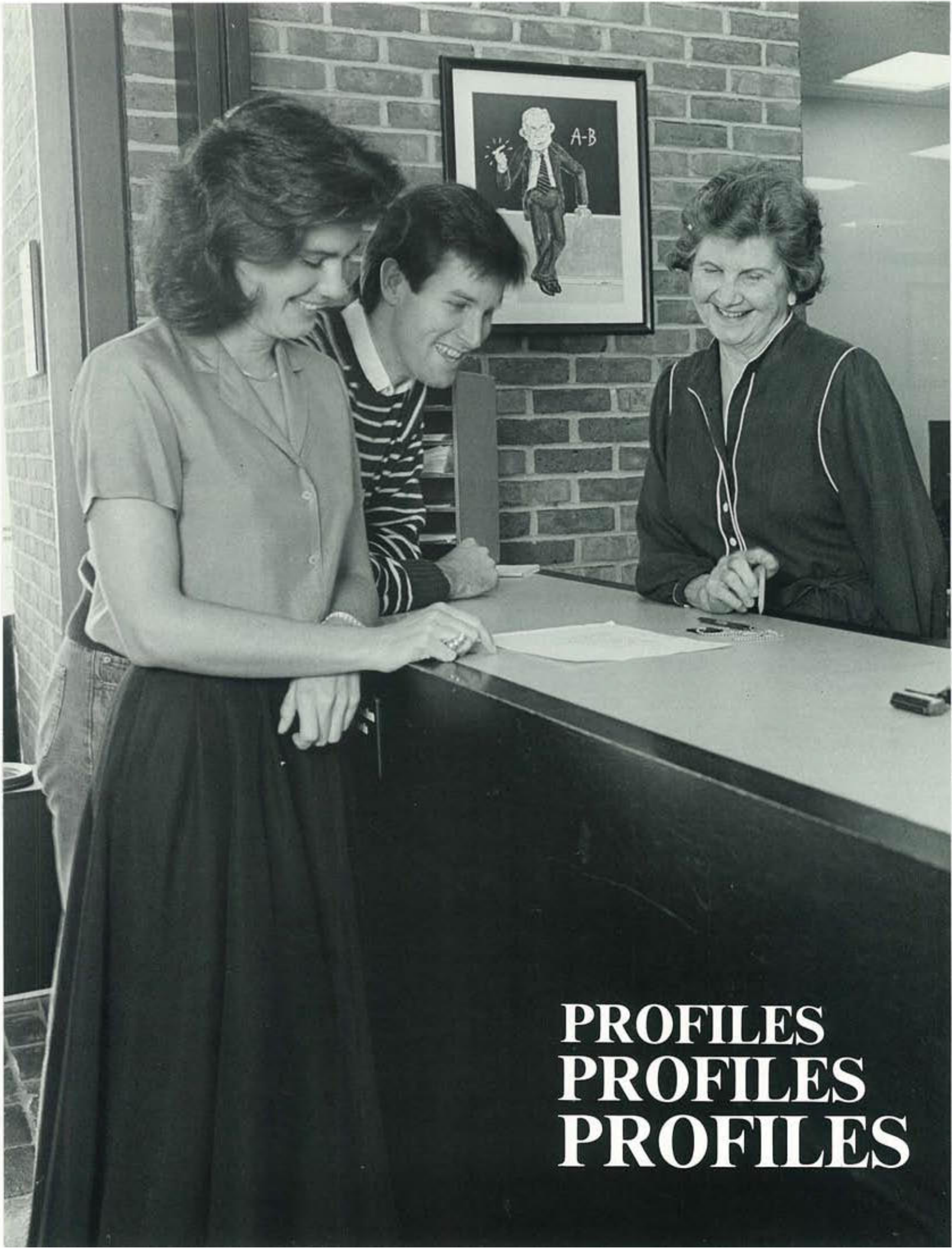
Telephone _____

Please list subjects on which you are willing to speak:

1) _____

2) _____

3) _____



PROFILES
PROFILES
PROFILES

Anna S. Fitts — Registrar, Counselor, and Friend

by Penny J. Parker

Mrs. Anna S. Fitts, registrar for the University of Alabama Law School, retired this summer after serving the school since 1965. Many law students over the years have graduated with fond remembrances of Mrs. Fitts, a professional who not only helped students by keeping accurate records of their progress and by helping them through registration for classes in that first frightening year, but who also provided an emotional base of support for many.

Before student counselors were in "vogue," Mrs. Fitts listened to students who needed to talk about their personal, as well as academic, concerns. Mrs. Fitts knew who got married, who had a new baby, who got a job almost before anyone else.

Reginald T. Hamner, executive director of the Alabama State Bar, said that he has received numbers of phone calls and letters from attorneys who heard of Mrs. Fitts' retirement and who wanted to show her their appreciation. Because of this widespread gratitude, the Board of Bar Commissioners presented Mrs. Anna Fitts with a special award at the State Bar Meeting on July 13th.

Mrs. Fitts, who reluctantly agreed to an interview, insists that she doesn't know what all the fuss is about. She reminisced about the days when she was first hired into the steno pool by Professor Jack Payne, during Dean Meador's time. In a short period she was secretary in Assistant Dean Huthnance's office. At that time Colonel Huthnance's office handled student records, registration and placement. When Huthnance became director of Continuing Legal Education, Assistant Dean Camille Cook hired a secretary who took over the placement function, and Mrs. Fitts was charged with the responsibility of registering 252 students that year. That was 1971 and Anna Fitts has been registrar, friend and counselor to approximately 2,400 Alabama graduates since, many of whom are practicing law in our state.

Mrs. Fitts began and continued a number of activities which now have become "traditions" at the law school at Alabama. She recalls one summer over at Old Farrah Hall when a lot of the students were clerking in Montgomery and they began sending her newspaper clippings on members of their class. That clipping board became a "tradition" which Mrs. Fitts continued. She helped personalize the law school experience by keeping the students aware of special events happening in other areas of their lives, outside of attending law school.

Another "tradition" that she believes is very special is that of the practice of Alabama students calling her when they receive word of passing the bar exam. Since no list is published for a few days, Mrs. Fitts writes the names of the Alabama students on a large blackboard. She says, "It's like Christmas, it's one of the most exciting days for the students."

In conjunction with the Bar results, since Dean Christopher's administration, she has attended the Bar Induction Ceremony in Montgomery. She relates, "It's marvelous after working with the students for three years to see them inducted. I have been so thrilled to attend the ceremonies." Students, too, recount the pride they feel when Mrs. Fitts attends their official transition from law student to lawyer.

Because the students as a group wanted to show Mrs. Fitts their respect, they voted her the special honor of requesting that she help in the hooding process at graduation.

To this day, Anna Fitts remembers events and occasions at the Law School, not by the year in which the event happened, but rather by which students were present at the time. Her emphasis always has been on the students. She fondly refers to law students as a special group — "I have had so many, that I have loved them all."

She is emphatic about her love not only for the law students, but for the many professors who have composed the Alabama Law School faculty over the years. "Between the students and the faculty, I have loved every minute of it. For a woman whose father was a Mississippi lawyer, and in a time when women were not strongly encouraged to become lawyers, Anna Fitts believes that even though she did not get to attend law school, her rewards have been great because of the role she has played in the profession which she has so loved and admired.

The University of Alabama School of Law, out of respect and gratitude to Anna S. Fitts, has established the Anna S. Fitts Scholarship Fund in honor of Mrs. Anna S. Fitts. Donations to the scholarship fund may be sent to the University of Alabama School of Law. □

Anna Fitts counsels second year law school students Selma Doyle and Bill Alverson at the registrar's office at the University of Alabama School of Law. (Photo by Larry Schaffield with the University Relations Office at the University of Alabama.)

Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

Spectators' conversations with jurors . . . a no-no

Phillips v. State, 6th Div. 96 (August, 14, 1984). During the course of Phillips' trial, it appears that members of the victim's family or friends engaged in a continuing effort to influence witnesses and members of the venire. An attorney from another jurisdiction observed the contact and brought it to the attention of the trial court, whereupon, the trial judge gave a curative instruction. The defendant alleged that despite the instruction, friends of the victim continued to verbally and non-verbally seek to influence the jury.

The Alabama Court of Criminal Appeals, through Chief Judge Bowen, remanded the case for an evidentiary hearing on whether "the communication might have affected the jury's verdict." See, also, *Bascom v. State,* 344 So.2d 218.

Constructive possession . . . a primer

Grubbs v. State, 6th Div. 951 (August 28, 1984). Grubbs was indicted and convicted for the unlawful possession of various controlled substances in violation of the Alabama Uniform Substances Act. His sentence was set at three years' imprisonment, suspended, with four years' probation.

In February 1980, the Jefferson County Sheriff's Department began surveillance of James Bunton's residence where Grubbs was a frequent visitor. On April 30, 1980, a search warrant was obtained based on surveillance and information from an informant. The warrant was executed on May 1, 1980. When the officers entered the front door, the defendant, Grubbs, was standing in the doorway between the living room and kitchen, facing away from the kitchen. In the living room, the officers found two more visitors seated on the couch. During the course of the search, contraband was located in the bedroom, except for a four pound brick of marijuana found in a plastic bag on the kitchen table.

On appeal, the defendant asserted that his motion for judgment of acquittal should have been granted because the state's evidence was insufficient to prove constructive possession.

A unanimous Court of Criminal Appeals reversed in an excellent opinion which surveys the law of constructive possession. Judge Harris noted:

> "Clearly the appellant was not in actual possession of the drugs or marijuana. There was no evidence of any controlled substance found on his person. Possession may be proven by showing (1) actual or potential physical control, (2) intention to exercise dominion, and (3) external manifestations of intent and control. (Citing cases) Constructive possession arises only where the illegal substance is found on premises owned or controlled by the accused." *Williams v. State,* 340 So.2d 1144 (Ala. Crim.App. 1976), cert. denied, 340 So.2d 1149 (Ala. 1977).

The court of appeals further reasoned that "while non-exclusive possession may raise a suspicion that all the occupants had knowledge of the contraband found, a mere suspicion is not enough. Some evidence that connects a defendant with the contraband is required. Generally, the circumstances that provided that connection, include:

> (1) evidence that excludes all other possible possessors; (2) evidence of actual possession; (3) evidence that the defendant had substantial control over the particular place where the contraband was found; (4) admissions of the defendant that provide the necessary connection, which includes both verbal admissions and conduct that evidences a consciousness of guilt when the defendant is confronted with the possibility that an illicit drug will be found; (5) evidence that debris of the contraband was found on defendant's person or with his personal effects; (6) evidence which shows that the defendant, at the time of the arrest, had either used the contraband very shortly before, or was under its influence."

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . abatement and survival

Price v. Southern Railway Co., 18 ABR 3814 (September 7, 1984). Mr. Price was injuried in a collision with a Southern Railway train, and Mr. and Mrs. Price filed suit to recover for his personal injuries and her loss of consortium. The day after suit was filed, Mr. Price died from his injuries. Mrs. Price amended the suit by substituting herself as administratrix and added a claim for his wrongful death. Although the proceedings were quite complicated, the Supreme Court was basically asked to consider whether Mrs. Price could amend her husband's personal injury action after his death and sue as administratrix of the estate; and, whether Mrs. Price's loss of consortium claim survived the death of her husband.

The Supreme Court answered both questions in the negative.

The Supreme Court first noted that all *tort claims* for personal injury are extinguished by the death of the claimant when he dies as a result of those injuries. Therefore, Rule 25, Ala.R. Civ.P. which governs substitution of parties, cannot apply because the claim was already extinguished when Mrs. Price amended to sue as administratrix. Concerning the second issue, the Supreme Court noted that since the wife's loss of consortium claim is "derivative," i.e., dependent on the husband's right of action, her right of action terminated when his personal injury action was extinguished. The death of the injured spouse operates as a bar to the surviving spouse's claim for loss of consortium and the right of action under the wrongful death statute remains as the exclusive tort remedy where an injured party dies from the injuries.

Civil procedure . . . court may not correct illegal verdict by striking portions as "surplusage"

Vanguard Industrial Corp. v. Alabama Power Co., 18 ABR 3404 (July 27, 1984). Stating that the exact issue previously had not been decided in Alabama, the Supreme Court held that the trial court could not accept an illegal verdict which apportioned damages between joint tortfeasors and attempt to correct that verdict by striking the apportionment language as surplusage. In this case, the jury returned a verdict against two defendants in the amount of $35,000 and then found against one defendant in the amount of $25,000 and the other defendant in the amount of $10,000. The trial court simply struck the apportionment language from the verdict leaving the verdict against both the defendants in the amount of $35,000.

The Supreme Court stated that a jury verdict that assesses separate amounts (whether equal or unequal) against joint tortfeasors is an illegal verdict and the trial court's striking the apportionment provision effected a substantive, and thus prohibited, revision of the jury verdict. The court should have refused the verdict and instructed the jury to continue deliberation with appropriate instructions to return a proper verdict.

Commercial code . . . section 7-2-708(2) applied to middleman-seller

Comeq, Inc. v. Mitternight Boiler Works, 18 ABR 3426 (July 27, 1984). In a case of first impression in Alabama, the Supreme Court applied Section 7-2-708(2), *Ala. Code* 1975, to award the middleman-seller damages for his buyer's breach of contract to purchase, even where the middleman-seller resold the machine to a third party. In this case, the middleman-seller was in a business of reselling standard-priced machines and had contracted to purchase a machine for resale to the defendant-buyer. The defendant-buyer breached that contract and the middleman-seller sold the machine to a third party. The defendant-buyer claimed that Section 7-2-708(1), *Ala. Code*, 1975, entitles it to a setoff for all profits received by the middleman-seller as a result of the sale of the machine to the third party. The trial court agreed and this appeal ensued.

The middleman-seller maintained that Section 7-2-708(2), *supra*, controls and no setoff is permitted because the sale to the third party would have been made regardless of the defendant-buyer's breach. The Supreme Court agreed, noting that other jurisdictions which have considered the question have consistently awarded damages for the breach because, but for the breach, the middleman-seller would have received the benefit of both sales, not just one.

Commercial code . . . a hospital supplying needles subject to section 7-2-315

Skelton v. Druid City Hospital Board, 18 ABR 3295 (September 7, 1984). Skelton underwent surgery at Druid City Hospital during which time a surgical needle supplied by the hospital broke. The hospital purchased the needle for use by its staff physicians.

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The needle, however, was not sold to Skelton because it was designed to be reusable and each needle is used in six or eight operations. The hospital maintained that it merely provided a *service* to its patients and was not a "seller" of goods and consequently not subject to Section 7-2-315, *Ala. Code,* 1975. Skelton, however, maintained that a direct sale was not necessary and the Supreme Court agreed.

The Supreme Court noted that the instant transaction is more akin to a *lease* or *rental* of equipment and also noted that the Uniform Commercial Code uses the term "transaction" rather than "sale," which term has been interpreted broadly to include transactions where there is no actual transfer of title, such as rental and lease transactions. The Supreme Court consequently concluded that the transactions involved both a service *and* a "transaction in goods," i.e., a "mixed" or "hybrid" transaction.

In a special concurring opinion, Justices Torbert, Maddox, and Shores indicated that not all mixed or hybrid transactions give rise to an implied warranty. Justice Torbert opined that whether a transaction gives rise to an implied warranty can only be resolved by first determining whether the transaction was predominantly an agreement for services, in which case the Uniform Commercial Code would not be applicable, or for a transaction in goods, in which case the Uniform Commercial Code would be applicable.

Domestic relations . . . attorney's fees allowed in custody dispute where father not a party

Ex parte: Brenda Handley (Bobby L. Handley v. Brenda Handley), 18 ABR 3292 (July 20, 1984). In a case of first impression in Alabama, the Supreme Court extended the authority of trial courts to award attorney's fees to cases involving parties who are strangers to the marital relationship. In this case, the custody dispute was between the custodial mother and the grandparents, the latter seeking custody or at least visitation rights. The mother counterclaimed for a reasonable attorney's fee, which the court granted.

The Supreme Court noted that the court of appeals had correctly determined that prior cases which have allowed attorney's fees in custody cases involved parties who were married or were divorced from each other, i.e., cases where a marital relationship was involved. The Supreme Court, however, also noted that the principles of law permitting allowance of attorney's fees in those prior cases did not turn so much on the relationship of the parties as it did on the fact that the mother found it necessary to hire counsel and resort to judicial proceedings to obtain relief. Since equity jurisdiction was involved in both situations and the best interest of the child was of paramount importance, the fact that a marital relationship was not involved should not prohibit a court from awarding a reasonable attorney's fee.

Statutory interpleader . . . jury trial permitted

Poss v. Franklin Federal Savings & Loan Association of Russellville, 18 ABR 3461 (July 27, 1984). Franklin Federal filed a statutory interpleader action pursuant to Rule 22, Ala.R.Civ.P., to determine ownership of a certificate of deposit. On motion of one of the claimants, the trial struck the jury demand and an appeal was taken. In a case of first impression in Alabama since the adoption of the Alabama Rules of Civil Procedure, the Supreme Court acknowledged that Rule 22 does not mention the right to trial by jury. The Supreme Court, however, noted that the Alabama Rule is patterned after Federal Rule 22 and that the federal courts have consistently construed the rule to include trial by jury. The Supreme Court cited Pennsylvania authority which stated that a claimant should not be deprived of a jury trial in an interpleader action since the same issues would be tried to a jury had the claimant asserted his rights against the stakeholder in an ordinary civil proceeding.

Tort . . . negligent sale of alcohol actionable in tort

Buchanan v. Merger Enterprises, Inc., 18 ABR 3483 (August 24, 1984). In this case, the Supreme Court overruled *King v. Henkie,* 80 Ala. 505 (1876), and recognized a cause of action for the

negligent sale of alcohol by a licensee for on-premises consumption to one who is visibly intoxicated. The Supreme Court stated that the law and our society had changed dramatically since *King*. During *King's* day, drunken driving was not a problem. Today, however, it is a problem since most lounge patrons travel by motor vehicle, and it is reasonably foreseeable that the sale of alcohol to a visibly intoxicated person may cause injury to some third party. The Supreme Court drew an analogy to the sale of a firearm to a known incompetent.

The Supreme Court expressly limited its holding to the negligent sale of alcohol by a licensee for on-premises consumption. Although the Supreme Court declined to decide whether an action would lie against a social host, the court left that possibility open for future litigation.

Workmen's compensation . . . an adopted child is a "dependent child" and may sue under section 25-5-11

Ragsdale v. Altec Industries, Inc., 18 ABR 3705 (September 7, 1984). The issue raised was whether a minor child, who is adopted prior to her natural father's death, and who is receiving no support from the father at the time of the fatal injury, had standing to sue as a "dependent child" for wrongful death under Section 25-5-11, *Ala. Code*, 1975. While the precise question had not been decided in Alabama, the Supreme Court noted that the court had held that an adopted child is entitled to death benefits pursuant to Section 25-5-6, *Ala. Code*, 1975, and therefore, it would be inconsistent to find that an adopted child is a "dependent" under one article of the Workmen's Compensation Act and not a dependent under another article of the Act. The Supreme Court recognized that other jurisdictions hold that the statutory right of a child to recover for the wrongful death of a natural parent is divested once the child is adopted. The Supreme Court, however, did not find those cases persuasive and held that an adopted child is entitled to inherit from its natural parent and is, therefore, a dependent child entitled to sue for that parent's wrongful death under Section 25-5-11.

Recent Decisions of the Supreme Court of Alabama—Criminal

The "slam dunk" by the prosecutor

Ex parte Mitchell Rutledge, No. 83-17 (September 7, 1984). This is a death penalty case which was remanded for resentencing. During the closing argument, at the sentencing phase, the prosecutor first argued that the defendant was due no mercy because the crime had been committed while he was on parole. The prosecutor argued that the defendant had his chance. Counsel for the accused replied to this argument by stating that life without parole would not be "another chance" and that this was a more appropriate sentence than death.

In rebuttal, the state argued that as long as there were federal judges, parole commissions, and bleeding hearts, there was a possibility that the defendant might get out on parole and, therefore, the jury should adjudge death in order to eliminate the possibility. The defendant's counsel moved for mistrial. The trial judge overruled; the Court of Criminal Appeals affirmed.

On certiorari, the Supreme Court of Alabama reversed finding that the state's argument was not "reply in kind" but, in fact, a gross distortion of law and fact constituting illegal argument.

Improper comment on the accused failure to testify

Ex parte Danny Ray Williams, 18 ABR 3913 (September 14, 1984). Danny Ray Williams was convicted in Jefferson County Circuit Court of the capital charge of murder in the first degree. After the jury found the defendant guilty, the trial court held a sentencing determination at which time the jury recommended the punishment of death. The trial judge agreed with the jury's recommendation and set the defendant's punishment at death. The Court of Criminal Appeals reviewed the issues raised by the defendant and found no error. The Supreme Court of Alabama, in a *per curiam* opinion, reversed and held that because the prosecutor made an impermissible comment on the defendant's failure to testify, the defendant was entitled to a new trial.

During his closing argument, the deputy district attorney made the following statement to the jury:

> "... But there's no testimony that he was coerced into making a statement about something he didn't do. You think about that. That's very important when you think about that. There's no evidence presented on the stand that Danny Ray Williams made a statement for something he didn't do."

The defendant contended that this statement was a comment by the prosecutor on his failure to testify and, thus, required the supreme court to reverse.

A unanimous supreme court reasoned that a prosecutor had the latitude to comment on the fact that the state's evidence is uncontradicted or has not been denied. *Beecher v. State*, 294 Ala. 674, 682, 320 So.2d 727, 734 (1975). However, a prosecutor may not make comments that step over the line drawn by the right of a defendant not to testify at trial. Comments made by the prosecutor on a defendant's failure to testify are of a highly prejudicial and harmful nature and the supreme court will carefully guard against the violation of the defendant's constitutional right not to testify.

Death of a police officer . . . knowledge of status

Ex parte Paul Edward Murry, 18 ABR 3194 (July 13, 1984). Murry was indicted on February 5, 1982 by the Montgomery County grand jury charging that he:

> "did intentionally cause the death of Mary Pearl McCord by shooting the said Mary Pearl McCord with a pistol while the said Mary Pearl McCord was on duty as a police officer for the City of Montgomery, Alabama . . ."

On May 19, 1982, the jury found Murry guilty of capital murder and reconvened immediately to deliberate

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on sentence. The jury voted 11 to 1 to recommend life without parole. The trial judge conducted a presentence hearing on June 11 and entered a detailed sentence order on June 22, 1982, ordering that Murry be sentenced to death. The Court of Criminal Appeals affirmed the conviction and sentence.

On certiorari to the Supreme Court of Alabama, Murry framed the issue on appeal as follows:

> "Whether the offense of the murder of a police officer who is in the performance of his duty requires proof of knowledge that the victim is, in fact, a police officer before the offense may be elevated to a capital one."

Parenthetically, Murry had made statements immediately after the incident and at trial that he did not know the people he shot were police officers, but thought they were trying to rob him. The trial judge refused to charge the jury that the offense of capital murder of a police officer required the defendant to know that the victim was a police officer on duty.

A divided supreme court reversed and remanded.

> "We hold that the trial court erred in failing to instruct the jury in accordance with Murry's requested instructions that, in the event the jury found him guilty of murder, the murder could be raised to a capital offense only if Murry knew that the victim was a peace officer on duty ...
>
> Without any such instruction, however, Murry has been convicted of a capital offense without proof of a "consciousness materially more 'depraved' that that of any person guilty of murder." *Enmond v. Florida, supra.* We cannot hold that the legislature intended to impose such a strict liability offense merely by implication."

Recent Decisions of the Supreme Court of the United States

Procedural tactics . . . a nightmare

Ohio v. Johnson, 81 L.Ed.2d 425 (June 11, 1984). As a result of a killing and a theft of property, the defendant was indicted on one count each of murder, involuntary manslaughter, aggravated robbery, and grand theft. At arraignment, the defendant, through counsel, offered to plead guilty to charges of involuntary manslaughter and grand theft, but pled not guilty to charges of murder and aggravated robbery. The trial court, over the state's objection, accepted the defendant's guilty pleas to involuntary manslaughter and grand theft and then granted the defendant's motion to dismiss the remaining charges to which he had pled not guilty on the ground that the further prosecution was barred by the double jeopardy provisions of the Fifth and Fourteenth Amendments. The Ohio Court of Appeals and the Ohio Supreme Court affirmed.

Justice Rehnquist, writing for the majority, held that the double jeopardy clause does not prevent the state of Ohio from continuing its prosecution of the defendant on the murder and aggravated robbery charges. The Supreme Court noted that the double jeopardy clause affords a defendant three basic protections:

> "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." See, also, *Brown v. Ohio,* 432 U.S. 161, 165, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977).

Given those basic protections, the Supreme Court reasoned that this case did not concern the double jeopardy protection against multiple punishments for the same offense. That protection is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Here, the trial court's dismissal of the more serious charge did more than simply prevent the imposition of cumulative punishments, it halted completely the proceedings that ultimately would have led to a verdict of guilt or innocence on these charges. The double jeopardy clause does not prohibit the state from prosecuting the defendant for such multiple offenses in a single prosecution.

In this case, the defendant only offered to resolve part of the charges brought against him, while the state objected to disposing of any of the counts against the respondent without a trial. Accordingly, the defendant *has not* been exposed to conviction on these counts nor has the state had the opportunity to marshall its evidence and resources more than once or to hone its presentation of its case through a trial. Moreover, the acceptance of a guilty plea on the lesser included offenses, while the charges on the greater offenses remained pending, has none of the implications of an "implied acquittal" that results from a guilty verdict on lesser included charges rendered by a jury charged to consider both greater and lesser offenses.

Finally, the Supreme Court held that, notwithstanding the trial court's acceptance of the defendant's guilty pleas, the accused should not be entitled to use the double jeopardy clause as a sword to prevent the state from completing its prosecution on the remaining charges.

Another facet of "good faith" . . . the inevitable discovery rule

Nix v. Williams, 104 S.Ct. 2501 (July 1984). The defendant was arrested on a murder charge and gave the police information regarding the location of the body after a detective appealed to Williams' decent human instincts. These statements were later found to be in violation of his sixth amendments rights even though a search party was actually in the general area, and would have found the body of the victim if the search had not been called off. After conviction for a second time, without the use of the incriminating statement, the defendant sought federal habeas corpus relief. The Court of Appeals granted the relief based on the inevitable discovery rule, finding that the police acted in bad faith. The Supreme Court of the United States, through Chief Justice Burger, reversed.

The doctrine requiring courts to suppress evidence as the tainted "fruit" of unlawful government conduct had its genesis in *Silverthorne Lumber Company v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

In reversing, the chief justice held that:

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The Tax Reform Act of 1984

Significant Changes Made by New Tax Law

by Richard P. Woods

The Tax Reform Act of 1984 (P.L. 98-369) (the "Act") makes significant changes in many areas of tax law. While many of these changes are in specialized areas such as taxation of life insurance, the treatment of industrial development bonds, and the private foundation rules, many provisions in the bill deal with less technical areas of tax law. This article proposes to discuss selected provisions that might be of interest to attorneys both in their practices and in their own affairs. The discussion does not explain every provision in detail, but it is intended to provide general information on provisions affecting some areas that frequently confront attorneys.

Estate and Gift Tax

Under the provisions of the Economic Recovery Tax Act of 1981 (P.L. 97-34), the maximum estate and gift tax rates were to be phased down from 70 percent to 50 percent. The present rate is 55 percent (for gifts made in 1984 or for the estates of individuals dying in 1984) and the 50 percent ceiling was to have been reached on January 1, 1985.

The Act provides that the 55 percent maximum rate will be maintained through 1987. The ceiling will be 50 percent for gifts made or individuals dying after December 31, 1987.

Domestic Relations

A. **Alimony**

The Act makes many changes in the area of tax treatment of domestic relations issues. The most significant changes deal with alimony. Under present law, to deduct alimony, payments must be periodic and must be paid pursuant to a court order or decree divorcing or legally separating the husband and wife or a written instrument incident to the divorce status or legal separation status. The payments may not be in discharge of a principal sum, unless the payments are for a term that exceeds ten years. Payments for a period of ten years or less are not treated as alimony but are treated as part of a property settlement. Alimony is deductible to the payor and includible in the income of the payee.

The Act repeals the present alimony provisions. In order for payments to qualify as alimony under new law, the following conditions must be met:

(1) The payment must be received by a spouse under a divorce or separation instrument;
(2) The divorce or separation instrument must not designate such payment as a payment which is not alimony;
(3) The payments must be in cash;
(4) The payee spouse and the payor spouse may not be members of the same household; and,
(5) The divorce or separation instrument must state that there is no liability to make any payments after the death of the payee spouse or to make any payment as substitute for such payments after the death of the payee spouse.

Special rules will apply when the total alimony or separate maintenance payments exceed $10,000 during any calendar year. Any payment in excess of $10,000 will be deductible only if the instrument provides that the payor spouse is required to make alimony payments for at least six consecutive calendar years beginning with the first year in which a payment is made. This

Richard P. Woods, a member of the Mobile law firm of Miller, Hamilton, Snider & Odom, received his B.A. degree from Wesleyan University. He earned his J.D. from the University of Alabama in 1978 and an LL.M. in Taxation from George Washington University in 1983. He is admitted to practice law in Alabama and the District of Columbia.

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provision has exceptions in the case of the death of either spouse or the remarriage of the payee.

Additionally, if there is a decrease of $10,000 or more in annual payments from a year to a subsequent year, the amount of the decrease that is in excess of $10,000 will be recaptured. The recapture will cause such amount to be includible in the income of the payor and to be deductible by the payee. These rules are illustrated by the following example:

	Alimony Payment
Year 1	$40,000
Year 2	$25,000
Year 3	$14,000

The recapture will be determined as follows:

Year 2	
Year 1 Payments	$40,000
Minus 2 Year Payments	25,000
	15,000
Minus Exemption	10,000
*Recapture	$5,000
Year 3	
Year 1 Payments	$40,000
Minus: Recapture in Previous Year	5,000
	35,000
Minus Year 3 Payments	14,000
	21,000
Minus Exemption	10,000
*Recapture (from Year 1)	11,000
Year 2 Payments	$25,000
Minus Year 3 Payments	14,000
	11,000
Minus Exemption	10,000
*Recapture (from Year 2)	$1,000

Next, the Act provides that a payment may not be treated as alimony or separate maintenance if the two parties file a joint tax return for the year in question. This could be a problem in years in which a divorce occurs. The parties will not be able to get the dual benefits of filing a joint return and treating payments as alimony.

Payments which fluctuate as a result of a continuing liability to pay a fixed portion of income from the earnings of a business, property or services will not qualify as alimony.

As under previous law, amounts that do qualify as alimony are includible in the gross income of the payee and are deductible to the payor.

The effective date of alimony provisions is December 31, 1984. The new provisions will also apply to a divorce or separation agreement that is executed before January 1, 1985 but is modified on or after such date, if the modification expressly states that the new provisions will apply to the modification.

B. Marital Claims

Another aspect of the Act deals with the tax treatment of transfers of property in exchange for the release of marital claims. Under present law, gain must generally be recognized on such transfers. *United States v. Davis*, 370 U.S. 65 (1962). The Act provides that no gain or loss will generally be recognized on transfers of property between spouses or that are incident to divorce. A transfer is "incident to divorce" if such transfer occurs within one year of the divorce or is "related to the cessation of the marriage." Neither the statute nor the conference report offers advice on determining whether a transfer is related to the cessation of a marriage. Additionally, the basis of the property transferred will be the same for the transferee as it had been for the transferor. The effective date of this provision is the date of enactment of the Act, although transitional rules are provided.

C. Dependency Exemption

The $1,000 personal exemption is allowed to a taxpayer for each dependent child under present law. A child is a dependent if the taxpayer provides over one half of the child's support. In the case of divorce, legal separation or written separation agreements, special rules apply. The dependency exemption is allowed to the custodial parent unless one of two conditions is met. If the divorce decree or separation agreement provides that the noncustodial parent is entitled to a deduction and that parent provides at least $600 of the child's support, the noncustodial parent is treated as providing one half of the support. Second, if a noncustodial parent provides at least $1,200 of the child's support, that parent is presumed to furnish over one half the support unless the custodial parent clearly establishes to the contrary.

The above rules may be waived. To do this the custodial parent must sign a declaration that he or she will not claim the exemption for the taxable year, and the noncustodial parent must attach the declaration to his or her return.

The Act will extend these dependency special rules to parents living apart at all times during the last six months of the calendar year. This provision is effective for taxable years beginning after December 31, 1984.

D. Child Support

One important change is made in the tax treatment of certain child support payments. Prior to the passage of this legislation, if a divorce or separation agreement did not state a specific amount that was payable as child support, no portion could be treated as child support for tax purposes. *Commissioner v. Lester*, 366 U.S. 299 (1961). This rule applied even if the agreement specified that the payments to the spouse would be reduced by a certain amount on the occurrence of a certain event relating to the child or children (e.g. graduation or marriage).

The *Lester* case is overruled by the new bill, as it provides that if the agreement specifies that a payment will be reduced by a certain amount on the happening of a contingency relating to a child, the amount of the reduction will be treated as child support. If, for example, payments are to be reduced from $500 per month to $400 per month when a child reaches the age of eighteen, $100 of each monthly payment will be treated as child support and $400 will be treated as alimony. This provision will be effective with respect to divorce or separation instruments executed after December 31, 1984.

E. Innocent Spouse Liability

Under previous law, a spouse could be relieved of a liability on a joint return only if:

(1) There was an omission equal to 25% or more of the gross income attributable to the other spouse;
(2) The spouse established that he or she had no knowledge, or reason to know, of the unreported income; and,
(3) It would have been inequitable to hold the spouse liable, taking into account whether the spouse significantly benefitted from the omission.

Under the provisions of the Act, the spouse will be relieved from liability only if:

(1) On the joint return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse;
(2) The other spouse establishes that in signing their return he or she did not know and had no reason to know that it was such a substantial understatement; and,
(3) Taking into account all the facts and circumstances, it would be inequitable to hold the other spouse liable for the tax deficiency.

A substantial understatement is any understatement which exceeds $500. In a case in which the adjusted gross income for the year is $20,000 or less, these provisions shall only apply if the liability is greater than 10 percent of the adjusted gross income. If the adjusted gross income exceeds $20,000, the provisions will apply only if the liability is greater than 25 percent of the adjusted gross income. These provisions are generally effective for all tax years, retroactively as well as prospectively.

F. **Transfer of property to spouse incident to divorce.**

Previous law provided that there was no gift tax liability for transfers of property to a spouse in settlement of marital property rights pursuant to a written agreement if the divorce occurred within two years of such an agreement. The Act provides an estate tax deduction for transfers pursuant to such written agreements.

Also, the two year time period is changed. The new law provides that the divorce must occur within a three year period beginning one year prior to the date on which the parties entered into the written agreement. The effect of this provision is to allow the written agreement to be entered into within one year after the divorce. This provision is effective on the day of enactment of the tax bill.

Depreciation for Real Property

The Act provides that the minimum recovery period for depreciation of real property will be eighteen years, as opposed to fifteen years under present law. Taxpayers may still use the present acceleration method (175 percent of the declining balance with a change to the straight line method).

This provision is effective for property placed in service by the taxpayer after March 15, 1984. However, the provision does not apply to property if the construction was begun by the taxpayer on or before March 15, 1984. Nor does the provision apply to property that the taxpayer was under a binding contract to construct or acquire, provided the contract was entered into before March 16, 1984.

Business Use for Automobiles

Business automobiles generally are eligible for the investment tax credit of 6 percent and for accelerated costs recovery system (ACRS) depreciation over three years, or, alternatively, for expensing. The Act provides that at least 50 percent of the use of an automobile by a business is treated as personal unless the taxpayer establishes otherwise. The maximum investment tax credit that can be claimed with respect to any passenger automobile will be $1,000, under the bill's provisions. The maximum allowance for depreciation will be $4,000 in the year that the automobile is placed in service and $6,000 in subsequent years. As an example, a $30,000 automobile may be depreciated over six years ($4,000 the first year, $6,000 in the subsequent four years, and $2,000 in the sixth year).

Additionally, in order to qualify for use of the investment tax credit and the accelerated percentages under ACRS, at least 50 percent of the use of an automobile must be in a trade or business. The use of the automobile for production of income will not be considered for these purposes. If the 50 percent test is met, the tax credit and depreciation limits will be allowed to the extent that the overall use is for business. If the 50 percent business use test is not met, the investment tax credit may not be used and depreciation will be on a straight line over five years. The records to establish business use must have been created contemporaneously with the use.

Finally, the Act specifies that business use does not include use of a car that is provided as compensation for the performance of services by a 5 percent owner of the business or by a person who is related to such person.

Income Averaging

The Act makes several significant changes to the rules governing the averaging of income:

(1) The period that is used for determining base income is reduced from four years to three years;
(2) In order to qualify for averaging, current year income must be 140 percent of base period income (as compared to 120 percent under previous law); and
(3) Tax will be computed on averageable income as if spread over a four year period (as compared to five years under previous law).

These provisions will be effective for taxable years after December 31, 1983.

Charitable Contributions

The Act provides that individual donors must obtain an independent appraisal if the claimed value of donated property exceeds $5,000. Similar items that are donated, whether to the same donee or to other donees, must be included for purposes of this test. The appraisal threshold is raised to $10,000 if the property is nonpublicly traded securities.

Fringe Benefits

The proper tax treatment of fringe benefits, an issue for a number of years, resulted in the Congressional enactment of a moratorium in 1978 to prohibit the Treasury from issuing regulations relating to the income tax treatment of nonstatutory fringe benefits.

The Act provides that certain employer provided fringe benefits will not be includible in the recipient employee's gross income for federal income tax purposes and for other federal tax purposes. Any fringe benefit that does not qualify for exclusion under these rules and that is not excluded under another statutory fringe benefit provision of the Internal Revenue Code will be includible in gross income for income tax purposes. The list of exclusions is as follows:

(1) No-additional-cost services (benefits

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that do not add any substantial cost to the employer who provides the service);

(2) Qualified employee discounts (a discount that does not exceed 20% of the selling price of the services or goods);

(3) Working condition fringes (property or services provided to an employee that would be deductible as ordinary and necessary business expenses if the employee had paid for them);

(4) De Minimis fringes (benefits whose value in the aggregate is so small as to make accounting for the benefits unreasonable or administratively impractical, such as holiday gifts with low market value and occasional company parties or picnics for employees); and

(5) Athletic facilities that are provided and operated by an employer for use of his employees.

Interest Free Loans

An area of considerable controversy in recent years has been the treatment of interest-free or below-market interest rate loans. The Supreme Court recently held that the value of the use of money in an interest-free demand loan without consideration will be treated as a gift from the lender to the borrower for Federal gift tax purposes. *Dickman v. Commissioner,* 465 U.S. ___ (1984). Additionally, the Internal Revenue Service has consistently contended that the benefit received by the borrower from such a loan should also be treated as income.

The Act resolves this dispute by providing, in general, that an interest-free or below-market interest rate loan will be recharacterized as an arms length transaction in which the lender made a loan to the borrower in exchange for a note requiring the payment of interest at a statutory rate and made a payment to the borrower.

In the case of a demand loan, the amount of foregone interest is treated as a gift, dividend, contribution to capital, payment of compensation or other payment, depending on the substance of the transaction. This amount is includible in the income of the borrower, is includible in the income of the lender, and is deductible by the borrower (to the same extent as if the interest had actually been paid to the lender).

In the case of a compensation-related loan that is not excess compensation, the effect of these rules on the lender will normally be a "wash." The lender will be able to deduct the foregone interest as wages while receiving income in the same amount. The borrower will be entitled to deduct the same amount that must be included in income.

If the loan is a term loan and is not a gift loan, the amount of transfer from lender to borrower is the excess of the amount loaned over the present value of all payments that are required to be made under the terms of the loan. This excess is treated as received and includible in income on the day the loan is made. The lender is treated as receiving interest income at a constant interest rate over the life of the loan while the borrower is treated as paying the same amount in the same manner. Such amount is deductible to the borrower to the same extent as interest actually due on the loan from the buyer.

The applicable federal statutory rate will be determined with reference to federal short-term rates, federal mid-term rates and federal long-term rates, depending on the term of the loan. The initial rate will be 10 percent.

There is also a de minimis exception for below market loans if the aggregate outstanding amount of loans does not exceed $10,000 for any day during the tax year. This exception will not apply if the proceeds of a gift loan are used for business or investment purposes, or if tax avoidance is one of the principal purposes of a compensation or dividend related loan.

In addition to the de minimis exception, gift loans will also be subject to the normal $10,000 annual exclusion from the gift tax. So, as long as the foregone interest does not exceed $10,000, no gift tax will be due.

These provisions will be applicable to loans made after June 6, 1984. They will also apply to outstanding demand loans after such date unless such loans are repaid prior to sixty days after the date of enactment of the bill. Term loans that were made prior to June 6, 1984, will not be covered by these provisions.

Partnership Provisions

The complexity of the changes in the tax treatment of partnerships makes the subject a suitable topic for several full articles. Though one of the new partnership provisions will be briefly discussed below, practitioners should also be aware that many other far-reaching changes have been made in the partnership area.

One of the most significant of the changes in the partnership area deals with the allocation of liabilities to partners. In the case of *Raphan v. United States* (83-2 USTC 9613 (Cl. Ct., 1983), it was held that a general partner who guaranteed repayment of what was otherwise a nonrecourse debt of the partnership would not be treated as personally liable for such debt. This decision allowed limited partners to take into account a portion of such debt in computing the basis of the partnership interest, even though the debt retained its nonrecourse status.

The Act provides a result that is contrary to the holding in *Raphan,* as the Treasury is directed to prescribe regulations concerning the inclusion of partnership liabilities in the basis of the partners' partnership interest, and to take into account, where possible, the manner in which the partners share the economic risk of loss with respect to the borrowed amounts. The conference report states that the regulations will specify that partnership debt for which a partner is primarily or secondarily personally liable, whether in his capacity as a partner or otherwise, is not a nonrecourse debt, and thus generally does not provide limited partners with additional basis for their partnership interests. When a limited partner guarantees what is otherwise a nonrecourse debt of the partnership, the regulations will not shift the basis attributable to that debt away from the limited partner as a result of the guarantee. This provision will take effect on enactment of the bill.

Capital Gains and Losses

Under prior law, capital assets had to be held for a full year in order to qualify for long term (as opposed to short term) capital gains treatment. For assets acquired after June 22, 1984, the holding period will be reduced to six months. This provision will be effective until 1988, at which time the holding period will revert to one year.□

Young Lawyers' Section

by Robert T. Meadows III
YLS President

On September 28, 1984, at the State Bar Headquarters in Montgomery, the Executive Committee of the Young Lawyers' Section held its first meeting of the 1984-85 year. The purposes of that meeting were to acquaint the new members of the Executive Committee with those members who served last year, to organize the Executive Committee, to receive preliminary reports from the various subcommittees regarding their plans for the upcoming year, to solicit input from the Executive Committee members on various projects, and to generally set the course and tone for the upcoming year.

For those of you who are not aware, the Young Lawyers are blessed with enthusiastic people on the Executive Committee. The young lawyers serving you and the various subcommittees which they chair are as follows: James Anderson, Youth Legislature Judicial Program Committee; Charles R. Mixon, Jr., Finance Committee; D. Patrick Harris, Administration Committee; Pam Gooden, Domestic Abuse Committee; Ronald L. Davis, Public Information Committee and Subcommittee on Publications; Lynn McCain, Community Law Week; John W. Donald, Jr., Disaster Emergency Legal Assistance Committee; Myra Baker, Bar Admissions Committee; Steve Heninger, Local Bar Coordinating Committee Jefferson County and North; Randolph P. Reaves, Legislative Committee and Conference for the Professions; Schuyler H. Richardson III, Leadership on Issues/Grants Committee; Carleta Ann Roberts, Alabama Bar Information Subcommittee and Newspaper, Television and Radio Subcommittee; James Miller, Continuing Legal Education Committee; William H. Traeger III, Law Student Liaison Committee; Claire Black, Meeting Arrangements Committee; J. Bernard Brannan, Jr., Long Range Planning Committee; Charles R. Mixon, Jr., Annual Seminar Committee (Sandestin; speaker and program arrangements); Caine O'Rear III, Annual Seminar Subcommittee and all arrangements except speaker and program; J. Bentley Owens III, Local Bar Coordinating Committee South of Jefferson County; Edmon H. McKinley, ABA/YLD Liaison Committee; J. Hobson Presley, Jr., ABA/YLD Liaison Committee; and Julie Smeds Stewart, Bylaws Committee. These people deserve your wholehearted support, encouragement and assistance wherever possible.

The Bar Admissions Ceremony for the Fall was held on October 29, 1984, in the Civic Center in Montgomery. As a result of that ceremony we now have approximately 310 new "young lawyers." Former Governor Albert P. Brewer gave the luncheon address to the new admittees. Myra Baker, who is in charge of the Bar Admissions Ceremony Subcommittee, worked extremely hard and long to make the ceremony a success. She is to be com-

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Members of the YLS Executive Committee meet to discuss plans for the year.

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mended for her efforts.

The Continuing Legal Education Subcommittee is being chaired this year by Jim Miller. This job is one of the most time-consuming and most visible of those which the Young Lawyers' Section performs for the State Bar as a whole. At this writing we anticipate having a basic legal skills seminar this year together with our Annual Sandestin Seminar. Jim is working long and hard to arrange good programs for these particular seminars. If any of you have any questions in this regard, I am sure that he would be happy to receive your input.

In my last article I inadvertently failed to mention that not only are the Young Lawyers of Alabama represented by Edmon McKinley and Hobby Presley in the Young Lawyers' Division of the American Bar Association, but, also, they are represented by Bob Eckinger. Bob has recently been named chairman of the Town Hall Meetings Committee. Our congratulations are extended to Bob for this honor.

I am pleased to announce that another local Young Lawyers' Section has begun its existence in Colbert, Franklin and Lauderdale Counties. The Young Lawyers there have named their chapter the John T. McKinley Young Lawyers' Section of Colbert, Franklin and Lauderdale County Bar Associations, commonly referred to as McKinley Young Lawyers' Section or MYLS. This Young Lawyers' group recently elected officers and those officers are as follows: President, Roy Hasseltine; Vice President, Frank B. Potts; Secretary, Robert M. Baker; Treasurer, Evelyn V. Mauldin; Delegate-Colbert, H. Thomas Heflin, Jr.; Delegate-Franklin, Paula Bohannon; and Delegate-Lauderdale, Laura Bess Cox. If any other young lawyers throughout the state desire to form their own Young Lawyers' Section, the State Young Lawyers' Section would be more than happy to assist you in this endeavor.

In an effort to expose as many Alabama young lawyers as possible to the activities and personnel of the Young Lawyers' Division of the American Bar Association, the Alabama Young Lawyers' Section plans to send representatives to the various Affiliate Outreach Project Meetings to be held throughout the country during the coming year by the Young Lawyers' Division of the American Bar Association. The first of these Affiliate Outreach Project Meetings was held in Vancouver, British Columbia, on October 26 and 27. The winter meeting will be held in Detroit and the spring meeting in St. Petersburg. Each of these meetings promises to be very interesting and informative and of great benefit to the leaders of the Young Lawyers' Section of Alabama.

In closing, let me say that the Executive Committee of your Young Lawyers' Section is working enthusiastically on the various projects for the upcoming year. If any of you would like to participate with us, please do not hesitate to contact me.

Please remember that the Young Lawyers' will cosponsor with the University of Alabama School of Law and the Cumberland University School of Law the First Annual Interviewing Conference to be held at the Midyear Meeting of the Alabama State Bar in Montgomery. Also, if any of you are interested in participating in the "Buddy Program" please fill out the application on this page and return it to bar headquarters or contact me. ☐

BE A BUDDY

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

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

Local Bar Activities and Services Buddy Program Application

Name _____

Firm Name (if applicable) _____

Address _____

City _____ **State** _____ **Zip** _____

Telephone _____

☐ **New Lawyer** ☐ **Experienced Lawyer**

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

Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

"When an attorney represents one party in a divorce or domestic relations proceeding, whether or not contested, or matters involving custody of children, alimony or child support and the other party thereto is not represented by counsel, but the attorney carefully complies with Disciplinary Rule 5-105(C)(1), may the attorney thereafter represent his/her original client in a post decretal proceeding to collect arrearages in child support, alimony or for modification of decree, etc?"

ANSWER:

When an attorney represents one party in a divorce or domestic relations proceeding, whether or not contested, or matters involving custody of children, alimony or child support and the other party thereto is not represented by counsel, but the attorney carefully complies with Disciplinary Rule 5-105(C)(1), the attorney may thereafter ethically represent his/her original client in a post decretal proceeding to collect arrearages in child support, alimony or for modification of decree, etc.

DISCUSSION:

Disciplinary Rule 5-101(C) provides:

> "A lawyer shall not represent a party to a cause or his successor after having previously represented an adverse party or interest in connection therewith."

Disciplinary Rule 5-105(A)(B) and (C) provides:

(A) "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if he reasonably determines that he can adequately represent the interest of each and if each consents to representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each:

(1) Except that in no event shall a lawyer represent both parties in divorce or domestic relations proceedings, whether or not contested, or matters involving custody of children, alimony or child support. (A lawyer shall be deemed to have complied with this paragraph by obtaining and filing the same in the proceeding a writing from the non represented party in which the non represented party acknowledges:

(a) That the attorney does not and cannot appear or serve as the attorney for the non represented party.

(b) That the attorney represents only his or her client and will use his or her best efforts to protect his or her client's best interests.

(c) That the non represented party has the right to employ counsel of his or her own choosing and has been advised that it may be in his or her best interest to do so.

(d) That having been advised of the foregoing, the non represented party has requested the lawyer to prepare an answer and waiver under which the cause may be submitted without notice and such other pleadings and agreements as may be appropriate.)"

The Code of Professional Responsibility of the American Bar Association does not have a Rule identical or substantially the same as Rule 5-101(C), Code of Professional Responsibility of the Alabama State Bar. This Disciplinary Rule of the Code of Professional Responsibility of the Alabama State Bar addresses itself specifically to the "former client" problem. The key words in this Disciplinary Rule are the words "adverse" and "in connection therewith." Although current Disciplinary Rule 5-105, Code of Professional Responsibility of the American Bar Association does not specifically refer to current or former clients, judicial opinions have expressly or impliedly found that the drafters of the Code intended to include the former client problem within the Disciplinary Rule. *E.F. Hutton and Company v. Brown,* 305 F. Supp. 371 (S.D. Tex. 1969); *Estate Theatres, Inc. v. Columbia Pictures Industries, Inc.,* 345 F. Supp. 93 (S.D.N.Y. 1972); *Robert H. Aronson, Conflict of Interest,* 52 Wash. L. Rev. 807.

The Disciplinary Commission has consistently held that in order to preclude an attorney from suing a former client it is not necessary that the attorney actually obtain "confidences" or "secrets" which he can now use favorably to a new client and adversely to a former client. It is sufficient

(Continued on page 364)

(Continued from page 363)

that there is a "substantial relationship" between the two representations such that the attorney could have acquired such "confidences" or "secrets." One commentator has stated, "It is sufficient that there be a substantial relationship between the attorney's former and his present representation, so that he may or could have obtained confidential information from his former client useful to his present client. It need not be shown that he did in fact receive such information." *Robert H. Aronson, Conflict of Interest,* supra; *Estate Theatres, Inc. v. Columbia Pictures Industries, Inc.,* supra; *Jeffry v. Pounds,* 136 Cal. Rptr. 373 (1977). In the recent case of *Ex Parte Taylor Coal Company, Inc.,* 401 So.2d 1 (Ala. 1981), the Supreme Court of Alabama adopted the substantial relationship test in contrast to the test which would require a showing of the receipt of actual "confidences" or "secrets."

Disciplinary Rule 7-104(A)(2) provides:

> "During the course of his representation of a client a lawyer shall not:
>
> . . .
>
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

Over the years the old Grievance Committee of the Alabama State Bar, the office of General Counsel and local grievance committees experienced considerable difficulty when parties were led to believe, intentionally or otherwise, that an attorney in an uncontested divorce was, in fact, representing both parties. In a later proceeding to collect arrearages in child support, alimony or to modify the original decree, the party against whom the action was taken would frequently complain that his/her attorney was now filing the proceeding against him/her. This prompted the Grievance Committee of the Alabama State Bar to render an opinion on December 1, 1976, which was published in the January 1977 issue of *The Alabama Lawyer.* In this opinion the Grievance Committee stated:

> "It is customary in Alabama for an attorney to file suit for a plaintiff in an uncontested divorce case and submit to the defendant not represented by other counsel an acceptance of service, answer and waiver. The typical acceptance of service, answer and waiver submits the party to the jurisdiction of the court, denies the material allegations of the complaint as to the grounds of divorce, waives all further notice, and agrees that the case may be submitted to the court on affidavit or deposition. The present practice in Alabama is not unethical if the following precautions are taken:
>
> (1) Since the attorney cannot appear as attorney of record for both the plaintiff and defendant, he cannot represent both the plaintiff and defendant and must advise both parties that he cannot do so.
>
> (2) The attorney must advise both parties that as attorney of record for the plaintiff he must use his best efforts to protect the plaintiff's interest.
>
> (3) The attorney must advise the defendant of his/her right to employ individual counsel.
>
> (4) The acceptance of service, answer and waiver must be on the form customarily used in uncontested divorces in Alabama and the attorney must not submit to the defendant any 'responsive pleadings' other than the typical acceptance of service, answer and waiver which is now used in Alabama as hereinabove described.
>
> There is no impropriety in the attorney preparing a property settlement agreement if in doing so he adheres to the precautions set forth above."

Complaints continued to be received from parties to uncontested divorces where, rightly or wrongly, the party complaining felt that his or her attorney in the original proceeding was now taking an adverse position in post decretal proceedings. This prompted the Board of Commissioners to propound and the Supreme Court of Alabama to adopt on November 10, 1981, Disciplinary Rule 5-105(C)(1), which substantially codified the opinion of the Grievance Committee of the Alabama State Bar of December 1, 1977.

Although the answer to the question posed herein does not appear to present any great difficulties, since the adoption of the amendment, numerous attorneys, in an abundance of caution, have been reluctant to file a proceeding on behalf of their original clients against the nonrepresented parties in the original proceedings although there has been strict compliance with Disciplinary Rule 5-105(C)(1). Two formal opinions have been requested and numerous informal inquiries have been received by telephone. The office of General Counsel and the Disciplinary Commission have therefore been requested to issue this opinion.

Despite the explicit language of the foregoing Rules and

despite strict compliance with Disciplinary Rule 5-105(C)(1), great care should be exercised in dealing with the nonrepresented party. We call your attention to Ethical Consideration 5-20 which provides:

> "A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

One of the results sought to be accomplished by the December 1, 1976, opinion of the Grievance Committee of the Alabama State Bar and the addition of Disciplinary Rule 5-105(C)(1) on November 10, 1981, was to insure that the nonrepresented party was never "represented" by the attorney involved within the contemplation of Disciplinary Rule 5-101(C), or received the impression that there had been such representation. □

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
OCTOBER 1, 1984

The Honorable William H. Morrow, General Counsel for the Alabama State Bar, has presented to the Supreme Court a request for an interpretation of Disciplinary Rule 2-111(A)(2) of the Code of Professional Responsibility of the Alabama State Bar as to whether on termination of an attorney-client relationship, a court-appointed attorney should upon request by an indigent criminal defendant, return to that defendant the copy of the transcript furnished at the expense of the State pursuant to Section 12-22-197, Code 1975.

IT IS CONSIDERED AND DETERMINED by the Court that it is appropriate for an attorney in this situation to return the transcript to the defendant.

Torbert, C.J., Maddox, Faulkner, Jones, Shores, and Adams, JJ., concur. Almon, Embry, and Beatty, JJ., not sitting.

Legislative Wrap-Up

(Continued from page 327)

Administrative Monthly. If one wishes to be informed of proposed agency rule changes and apprised of newly adopted rules, one may now subscribe to the *Alabama Administrative Monthly*, which is published the last business day of each month. A year's subscription is $50 and may be obtained by writing Ms. Edna Brooks, Administrative Procedures Division of The Legislative Reference Service, 750 Washington St., Suite 100, Montgomery, Alabama 36130.

Alabama Administrative Code. Mr. Lou Greene, director of the Legislative Reference Service, is presently having printed the first Alabama Administrative Code. This thirteen-volume loose leaf service may be subscribed to by writing the Administrative Procedures Office and should be available in November 1984. □

Disciplinary Report

On Friday, October, 5, 1984, the following disciplinary proceedings took place before the Board of Commissioners of the Alabama State Bar:

Public Censures

• Birmingham lawyer **Robert C. Sutton** was publicly censured for having misappropriated the funds of a client by failing promptly to pay over money collected by him for the client, in violation of DR 9-102(B)(4). Mr. Sutton collected $1,116 on behalf of the client in the fall of 1981 and forwarded the client a check for that amount in January 1982, but the check was returned unpaid due to insufficient funds in Mr. Sutton's client trust account. Despite giving repeated assurances that he would promptly forward the money to his client, Mr. Sutton did not pay the client the full amount owed until July 1983.

• Lawyer **Cecil M. Matthews** of Piedmont and Albertville was publicly censured for having willfully neglected a legal matter entrusted to him and having intentionally failed to carry out a contract of employment entered into with a client, by having undertaken to secure a divorce for his client, having accepted his fee from the client, and then having failed to pursue the matter to conclusion.

Private Reprimands

• A lawyer was privately reprimanded for violation of Disciplinary Rules 1-102(A)(4) and 1-102(A)(6). The lawyer failed to pay one of his employees at a business owned by the lawyer, after repeatedly assuring the employee of his intentions to pay. The employee ultimately sued the lawyer and obtained a judgment against the lawyer for back wages. The Disciplinary Commission determined that the attorney's conduct adversely reflected on his fitness to practice law and further that the attorney had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

• A lawyer was privately reprimanded for violation of Disciplinary Rules 6-101(A) and 7-101(A)(1) of the Code of Professional Responsibility for failing to timely file an appellate brief with the Court of Criminal Appeals. The attorney, who was employed to handle the appeal, received one extension from the Court, but was denied a further extension. Subsequently, the attorney did file a brief on his client's behalf, over one month after the due date, but the Court refused to grant the attorney's motion to suspend the rules and accept the appellant's brief as having been timely filed. It was determined that the attorney's conduct constituted willful neglect of a legal matter entrusted to him and also constituted a failure to seek the lawful objectives of his client through reasonably available means.

• A lawyer was privately reprimanded for violation of Disciplinary Rule 6-101(A) regarding the willful neglect of a legal matter entrusted to him by a client. It was determined that the lawyer had accepted a legal fee to file a consent divorce for his client, and that over a period of approximately one year the attorney did absolutely nothing toward completion of the legal matter entrusted to him. Approximately one year after receiving from his client payment in full for a legal fee, plus all court costs, the attorney made a refund of all monies paid to him and returned to the client all of her files and papers. It was determined that the attorney's conduct was in violation of Disciplinary Rule 6-101(A).

• A lawyer was privately reprimanded for having violated DR 4-101(B)(3) and DR 5-101(C) by first having undertaken to represent the mother of a man who had been killed in an accident, in her effort to be appointed administratrix of his estate in order to initiate civil litigation in connection with his death, and then, after having been discharged by the mother, having undertaken to represent a half-brother of the dead man in the half-brother's effort to be appointed administrator of the estate.

• A lawyer was privately reprimanded for having been guilty of willful neglect, in violation of DR 6-101(A), by having appealed a criminal case to the Court of Criminal Appeals, and then failing to either file a brief, or a request for extension of time, or a no merit letter, or a motion to withdraw.

• A lawyer was privately reprimanded for willful neglect of a legal matter entrusted to him, in violation of DR 6-101(A), in that he filed notice of appeal of a criminal case to the Alabama Court of Criminal Appeals, and then abandoned the appeal, filing neither a brief nor a motion to withdraw, nor any other explanation with the appellate court.

• A lawyer was privately reprimanded for having violated DR 6-101(A) and DR 7-106(B)(3) by having failed to file an appellate brief with the U.S. Eleventh Circuit Court of Appeals on behalf of a criminal appellant whom he had been appointed to represent on appeal, even after two overdue notices from the clerk, and, further, for having failed to respond to the Eleventh Circuit's order that he show cause why disciplinary action should not be taken against him for his lack of responsibility in complying with rules of the Court, resulting in a delay of the processing of the criminal appeal.

• A lawyer was privately reprimanded for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A), by having failed to obtain the transfer of certain corporate stock into the name of his client for over nine months, without justification, and until the client had filed a complaint with the State Bar.

• A lawyer was privately reprimanded for having willfully neglected a legal matter entrusted to him, in violation of DR 6-101(A), by having undertaken to represent the defendant debtor in a Small Claims Court action, and then having received from his client funds to forward to the creditor, but then, both, having failed to forward the funds to the creditor, and having failed to file an answer on behalf of his client, resulting in a judgment and a garnishment against his client.

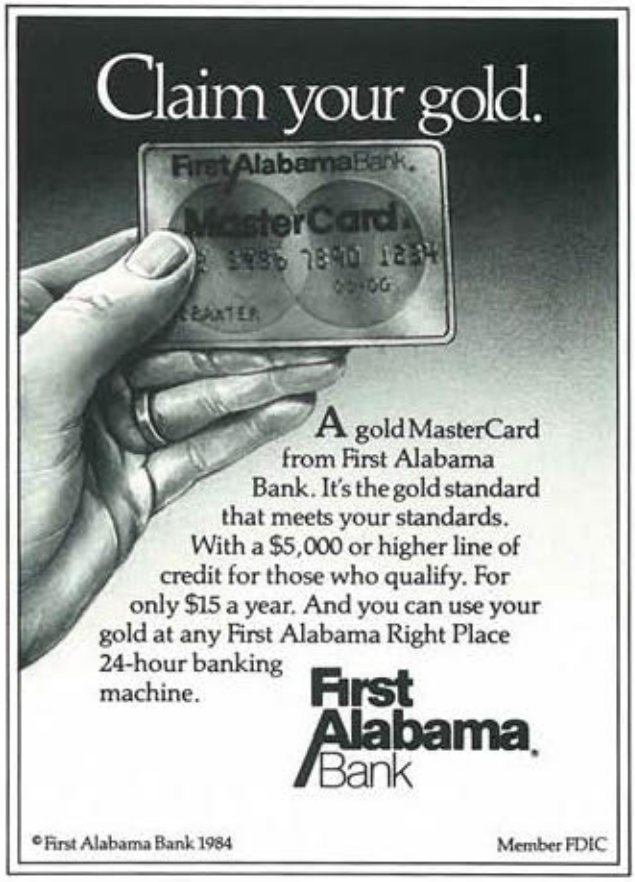
• An attorney was privately reprimanded for violations of Disciplinary Rules 6-101(A), 7-101(A)(1), 7-101(A)(2), and 7-101(A)(3). The attorney was found to have willfully neglected a legal matter entrusted to him, and was further found to have failed to seek the lawful objectives of his client through reasonably available means, to have failed to carry out a contract of employment entered into with a client for professional services, and to have prejudiced or damaged his clients during the course of the professional relationship, by virtue of having accepted employment to assist his clients in obtaining new financing for the clients' business and in communicating with creditors of the clients' business to obtain extensions on the business' indebtedness. It was determined that the attorney did not provide the services that he was hired to provide, and that the clients were eventually forced to declare bankruptcy.

• An Alabama attorney was privately reprimanded for failing to file an appellate brief in a case in which he had been appointed to represent an indigent defendant and further for failing to furnish to his client information and materials requested by the client and which the client had a right to obtain. The Disciplinary Commission determined this action to be violative of Disciplinary Rules 7-101 (A)(1)-(3) of the Code of Professional Responsibility.

• An Alabama lawyer was reprimanded for conveying to himself certain valuable mineral rights under a power of attorney previously given to him by his client, after having indicated to the client that no such conveyance would be made without the client's approval, and preferably with the client's own signature on a deed of conveyance. It was also determined that the attorney advanced in excess of $21,000 on the client's behalf, but without the client's prior knowledge or permission, and that the attorney thereby acquired a proprietary interest in the cause of action he was conducting for the client. The attorney's actions were deemed to violate Disciplinary Rules 5-103(A)(1)-(3) and 5-104(A) of the Code of Professional Responsibility.

Surrender of License

• On July 23, 1984, the Supreme Court of the State of Alabama accepted the Surrender of License tendered by **Willis W. Holloway, Jr.** of Mobile County, Alabama. The Supreme Court cancelled and annulled Mr. Holloway's license and privilege to practice law, effective at 12:01 a.m. June 13, 1984. Mr. Holloway had previously been convicted of a felonious violation of the United States Code in the United States District Court for the Southern District of Alabama.



In Memoriam

Thomas B. Hill, Jr.

President 1952-1953

Thomas Bowen Hill, Jr., a past president of the Alabama State Bar, died at Montgomery on August 24, 1984. A native of Montgomery, he had practiced law sixty years and was senior partner in the law firm Hill, Hill, Carter, Franco, Cole & Black.

He was born on November 11, 1903, the son of Dr. and Mrs. Thomas Bowen Hill. T.B. received his preparatory education at the Barnes School in Montgomery and then attended the University of Alabama, where he was Phi Beta Kappa, and where he received the A.B. degree in 1922 and the LL.B. in 1924.

An accomplished and dedicated lawyer, he was recognized as outstanding in the legal profession. He was a Fellow of the American College of Trial Lawyers, a Fellow of the American Bar Foundation, a Fellow of the International Academy of Trial Lawyers, and a charter member of the Farrah Law Society. In 1972, he received the Dean's Award of the University Law School and was honored as Outstanding Law School Alumnus of the University of Alabama School of Law in 1975. In 1978, the Honorary Doctor of Laws Degree was conferred upon him by the University of Alabama. He had served as a special judge of the Montgomery County Circuit Court and, in 1968, served as special chief justice of the Supreme Court of Alabama. He was active in the world of business and finance. He was a director and chairman of the Board of Union Bank & Trust Company and was chairman emeritus of the bank's board at the time of his death.

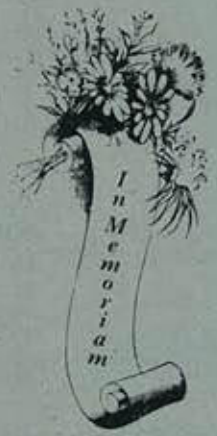
Throughout his long and distinguished career, he was active in civic and public affairs. T.B. served his church, the Episcopal Church, as a vestryman and senior warden.

T.B. was president of the Montgomery Bar Association in 1933, was president of the Alabama State Bar during the 1952-1953 year, served for twenty-seven years as a member of the Board of Commissioners of the Alabama State Bar, and for more than twenty years was a member of the House of Delegates of the American Bar Association. He was elected to membership and inducted into the Alabama Academy of Honor in 1977.

There was more than the bare record and statistics of his honors and achievements. There was, even more important, the man himself — his character, his arresting personality, his ability, his heart, and the intense humanity of his nature. He loved his profession with a devotion unbounded, and his labors and concerns for its welfare and improvement were many.

T.B. was not only a fine and accomplished lawyer, but, also, he was a delightful companion; a friendly, considerate, outgoing person — gentle of manner, articulate of speech and charmingly eloquent when an occasion called for eloquence. We shall miss the music of his silenced voice and the friendly touch of his vanished hand. The bar he loved and so faithfully served misses him now. We will miss him more and more.

T.B. is survived by his wife, Mildred A. Hill, and his children, T. Bowen Hill III, Mildred H. Hickson, William I. Hill, II, and Luther A. Hill. Two of the sons, Bowen and Billy, are respected lawyers who practiced in the firm with their distinguished father.



Carter, Hugh Powell — Birmingham
Admitted: 1946 Died: September 13, 1984

Daughtry, Ralph Manard — Fairhope
Admitted: 1952 Died: March 3, 1984

Hill, Thomas Bowen, Jr. — Montgomery
Admitted: 1924 Died: August 24, 1984

Hopper, Leon James — Montgomery
Admitted: 1953 Died: August 25, 1984

Kearley, Arthur James — Mobile
Admitted: 1923 Died: September 6, 1984

L.J. Hopper

Bankruptcy Judge Leon James Hopper, chief judge of the United States Bankruptcy Court for the Middle District of Alabama, died on August 25, 1984, at the age of fifty-nine. With his death the Bar lost an outstanding jurist who was an academician of the law and a legal scholar in the field of bankruptcy.

Judge Hopper was a compassionate man who tempered compassion and understanding with his application of the law. He was a bankruptcy judge who, above all else, always tried to be fair, to be understanding and to be meticulous in his rulings and orders. He was an intensely organized man who conducted his court with dignity, precision, decorum and confidence during the twenty-eight years he served us as bankruptcy judge.

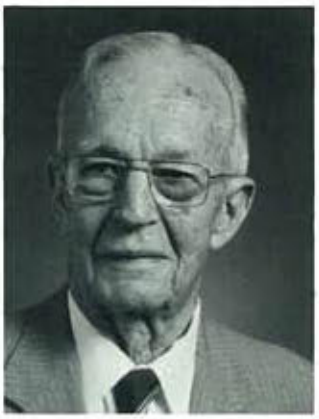
Judge Hopper was born on June 15, 1925, in Etowah County, Alabama. He was a veteran of the United States Navy and served during World War II and the Korean conflict. He received his A.B. degree from the University of Alabama in 1948 and later graduated from the University of Alabama School of Law in 1953. He engaged in the private practice of law for a short time in Gadsden after his graduation.

In 1953 he began to work with his lifelong friend, Judge Frank M. Johnson, Jr., now circuit judge of the Eleventh Circuit Court of Appeals, when he was appointed as assistant U.S. attorney for the Northern District of Alabama. Judge Johnson later was appointed United States district judge for the Middle District of Alabama and he thereafter called on his former assistant and friend to become referee of the Bankruptcy Court for the Middle District of Alabama. Judge Hopper's title was later to become bankruptcy judge, and he served in that position from his appointment in 1956 until his untimely death.

Judge Hopper constantly grew in stature and reputation as a bankruptcy judge. Among his fellow judges and peers, he was recognized for his incisive mind, his thorough knowledge of bankruptcy law and his uncanny ability to foresee and predict trends and developments in bankruptcy law. In recent years he was appointed to the faculty for the Seminar for Newly Appointed Bankruptcy Judges in Washington, D.C. He frequently was a member of the faculty for bankruptcy judges seminars at their meetings all across the nation. He was a panelist or faculty member on numerous seminars and programs conducted by bar associations and other bar groups such as the Alabama Bar Institute for Continuing Legal Education and the Montgomery County Bar Association.

To those of us who really knew Judge Leon Hopper other than just as a bankruptcy judge, we recognized him as a man who loved the simple, everyday things of life. The great loves of his life were, in order, his lovely and devoted wife, Dixie, with whom he shared so much; his four children, Perry, Leah, Julie and Susan, to whom he was devoted and from whom he obtained so much joy; the law; fishing with his companion Judge Frank Johnson, Jr., and creating tales of their adventures. He was devoted to his family and was anxiously and proudly awaiting the birth of his first grandchild in a few months.

Those of us who either frequently or infrequently practiced in his court will miss him terribly, for gone with him is his intense dedication to his job, his thorough knowledge of the intricacies of bankruptcy law, his personal wit and his guidance that helped all of us so many times. More than anything we will miss his open door policy, friendliness and warmth extended freely to any and all who asked for his help or assistance. We extend our deepest sympathy to his family and his many dear friends.



A.J. Kearley

Arthur James Kearley died in Mobile on September 6, 1984. He was eighty-four years old and had practiced law in Mobile for over sixty-one years.

He was educated in the public schools of Mobile and in 1923 earned his LL.B. degree from the University of Alabama School of Law, where he was a member of Phi Delta Phi Fraternity. A distinguished attorney and Christian gentleman, he was also a good citizen recognized for his leadership ability, as is evidenced by the fact he served as president of both the Mobile Lions Club and the Mobile Bar Association.

Judge Kearley, as he was affectionately and respectfully known, was meticulous in his attention to details in his practice of the law, and none of his fellow lawyers or judges can recall any instance in which he appeared in court without being carefully and fully prepared.

He served for a short time as judge of Juvenile Court of Mobile, but spent most of his life in the active practice of law as a private practitioner. For many years he and the late Alvin McConnell, who was also a highly-respected Mobile attorney, were associated in the practice, but had no formal partnership agreement. During the last few years of his life Judge Kearley was actively "of counsel" to Lyons, Pipes & Cook. He was married to Mrs. Dorothy Lucille Williams Kearley.

Arthur loved the practice of law, and he loved people — particularly his fellow lawyers. People loved Arthur and this is particularly true of his fellow lawyers.

Classified Notices

books for sale

FOR SALE: 1975 Code of Alabama with 1983 pocket parts; 1958 Code of Alabama; 1923 Code of Alabama. Contact: Arthur F. Fite, Jr., P.O. Box 1153, Anniston, Alabama 36202 or call 236-0789.

FOR SALE: ALR Federal, updated; Southeast Litigation Guide, updated; Weinstein's Evidence, updated; Southeast Transaction Guide, updated; Goldstein Trial Techniques, updated; and Criminal Law Library, eleven volumes updated. Contact Ernest H. Hornsby or Dow T. Huskey, P.O. Box 1193, Dothan, Alabama 36302 or call 793-3377.

FOR SALE: So.2nd Reporter, complete set, valued at $10,000, discounted forty to sixty percent of value; will sell for $6,000. Corpus Juris Secundum (101 volumes), valued at $3,022.50, needs pocket parts ($1,280), resultant value $1,742.50, discounted to sixty percent of value; will sell for $1,045.50. Set of Proving Medical Diagnosis and Prognosis (by Matthew Bender) all eleven volumes $20 each, price $220. I'll help box them; you transport them. In Alabama call 534-1443 or 536-0911.

FOR SALE: Federal Practice Digest 2d, Vol. 1-92, $1,050; Southern Reporter, Vol. 1-200, $2,500; Southern Reporter, 2nd Series, Vol. 1-436, $5,700; Federal Reporter, 2nd Series, Vol. 100-704, $6,000; Supreme Court Reporter, Vol. 1-101A, $1,450; and United States Supreme Court Reporter, Vol. 1-4 thru 102-105, $650. Interested persons contact Rita Durr, Suite 1600, 2121 Eighth Avenue North, Birmingham, Alabama 35203, telephone (205) 324-4445.

FOR SALE: Law library (close-out sale): Southern Reporter Vol. 1-200; Southern Reporter 2d Series Vol. 1-334; Alabama Reporter Vol. 334-398; Code of Alabama 1975; Am Jur 2d Vol. 1-82 with Index; ALR 3d Vol. 1-100; ALR 4th Vol. 1-23; ALR 2d Later Case Service; Quick Index for ALR 1st through 4th; Am Jur Proof of Facts 1st and 2d with Quick Index; Am Jur Pleading and Practice Forms Vol. 1-25 with Index; Am Jur Trials Vols. 1-28 with Index; Am Jur Legal Forms 2d Vols. 1-20 with Index; Nichols Cyclopedia of Legal Forms Vol. 1-10; American Law of Products Liability 2d Vol. 1-6; Lawyers Coop Bankruptcy Service Lawyers' Edition Vol. 1-10. Contact J.W. Hinton, P.O. Box 681, Gadsden, Alabama 35902.

FOR SALE: Complete set of 1975 Ala. Code current through 1984, $400. Route One, Box 39, Ashville or phone 594-7607 after 5 PM.

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(Continued on page 372)

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, however are limited to two announcements per year. 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.

RATES:

Members: No charge
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DEADLINES:

Classified copy and payment must be received no later than the first day of the month prior to publication date, no exceptions.

MAILING:

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

Alabama Lawyer Classifieds
c/o Jen Nowell
P.O. Box 4156
Montgomery, AL 36101

(Continued from page 371)

TRANSPORTATION ACCIDENT reconstruction: Land-Air-Sea-Rail; Reconstruction Investigations conducted throughout the United States to provide accurate causation and analysis to the Judicial system and Insurance Industry. Registered Engineer — Former State Trooper, Over 18 years experience: Court Consultant — Qualified Court Testimony — Causation Analysis — Claims Consultant — Expert Witness — Wrongful Charge — Proper Party Liability — Civil Liability Consultant — Products Liability Consultant. MEMBER: National Society of Professional Engineers — Institute of Transportation Engineers — (ITE Accident Investigation Committee member) — American Society of Safety Engineers — AOPA Air Safety Foundation. Philip W. Stuart, P.E., President, Interstate Investigations and Consultants, Inc., 716 Ingleside Avenue, Tallahassee, Florida 32303. (904) 222-7101.

miscellaneous

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LAW BOOK DONATIONS needed! Jones Law School at Alabama Christian College in Montgomery needs legal books, journals, etc. Pick up 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.

positions offered

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MEDIUM SIZE LAW firm with large tax practice seeks tax lawyer with one to five years experience. LL.M. in taxation preferred. Strong academic record required. Excellent salary and benefits. Reply to Hiring Partner, P.O. Box 55727, Birmingham, Alabama 35255.

(Continued from page 356)

> "When, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible."

In reaching that result, the Supreme Court reasoned that in these circumstances, the societal cost of the exclusionary rule far outweighs any possible benefit to deterrence that a good faith requirement might produce.

Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The sixth amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination.

Miranda's public safety exception

New York v. Quarles, 104 S.Ct. 2626 (July 1984). The defendant was apprehended in a store after a female approached a police officer and advised that she had been attacked by a six foot tall black male wearing a jacket with "Big Ben" on it. She also told the officer that her assailant was armed. The defendant fit the description and after he was arrested and handcuffed, the police officer asked him where the gun was. The defendant, before receiving his *Miranda* warnings, answered "The gun is over there" and pointed to the place where it was ultimately discovered. The defendant was then read his *Miranda* rights. At trial, the gun and the statements were excluded from evidence. The Supreme Court of the United States reversed:

Justice Rehnquist, writing for the majority, held that:

> "We believe that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda.*"

Justice Rehnquist explained the essence of the rule adopted by the Court as follows:

> "We hold that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception *does not* depend upon the motivation of the individual officers involved." (Emphasis ours.) □

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