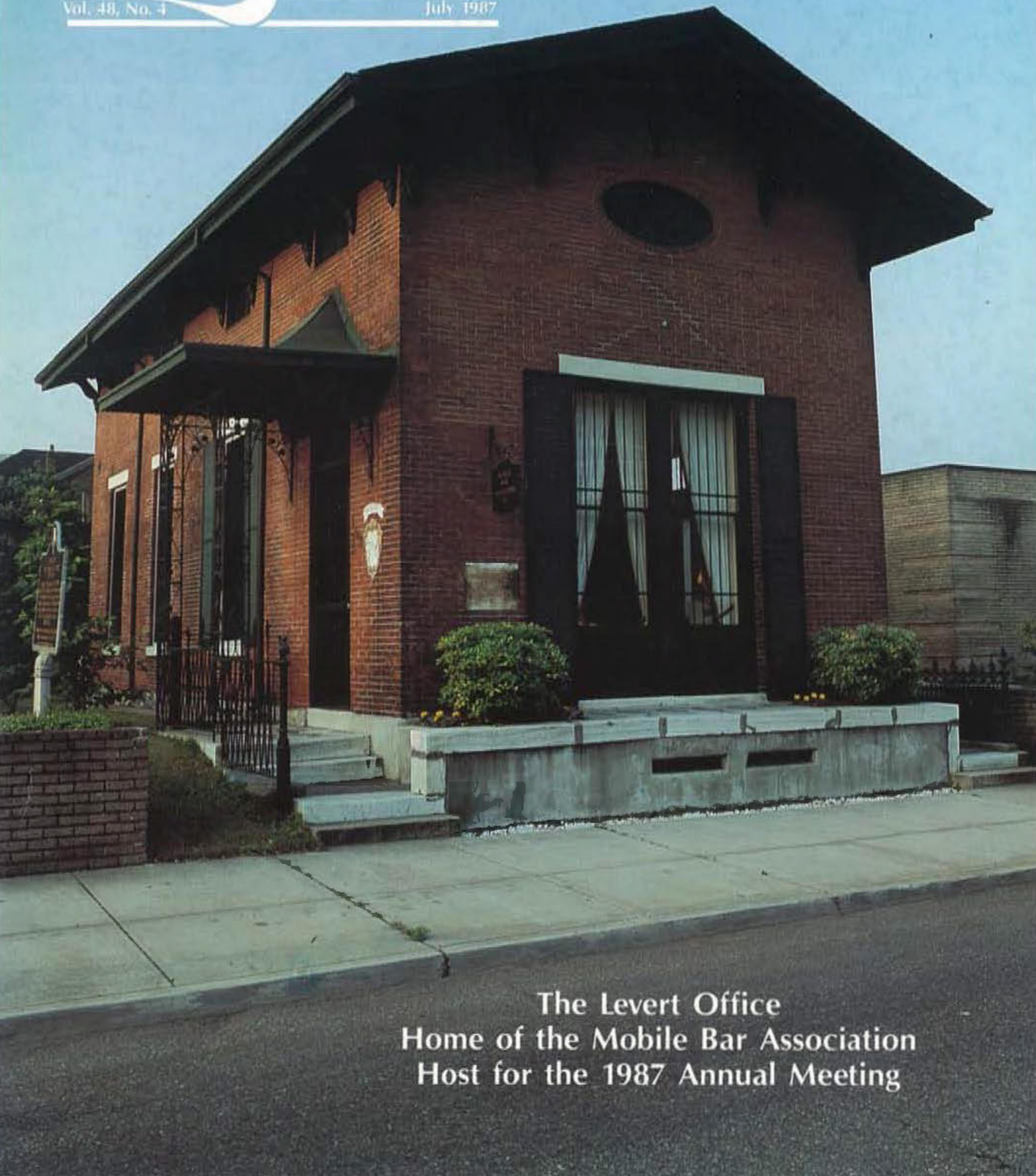
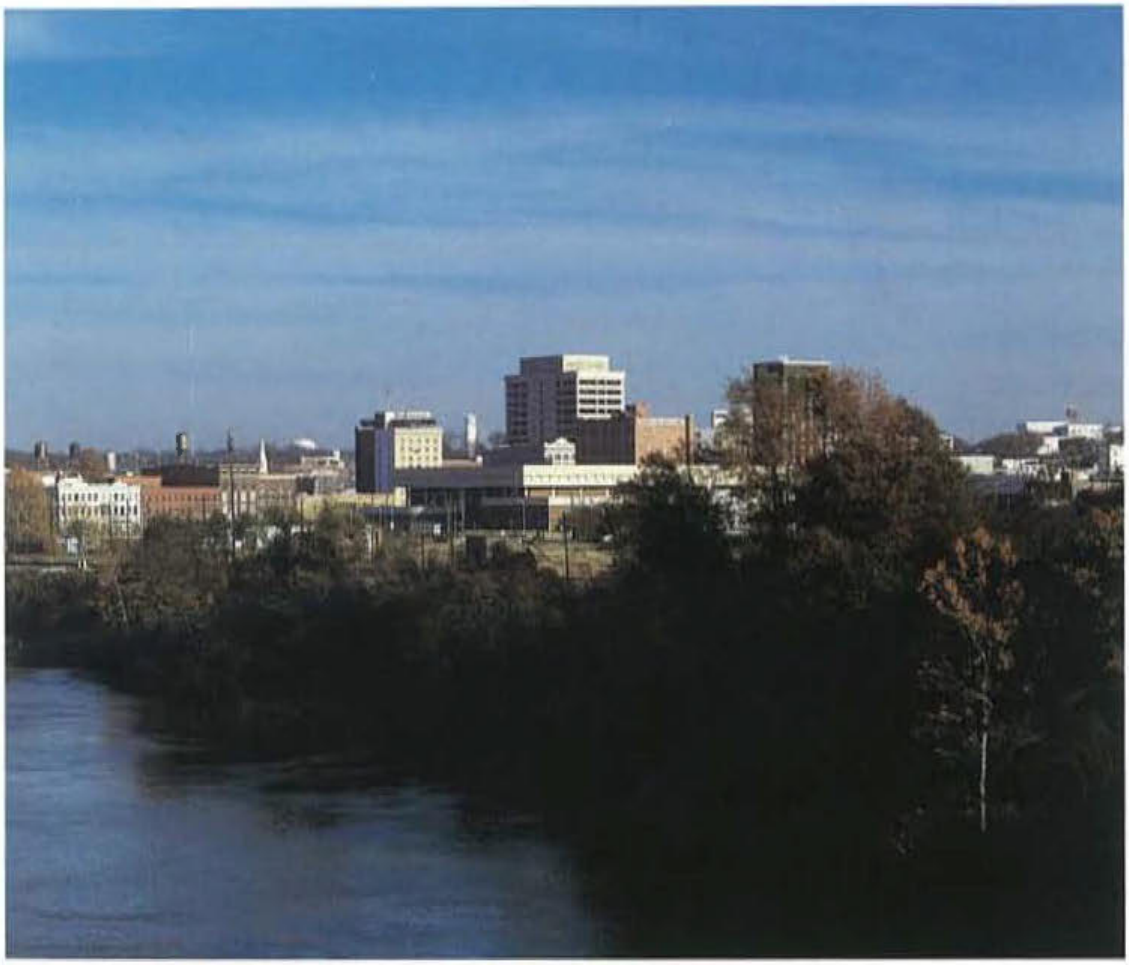
The Alabama Lawyer

Vol. 48, No. 4 July 1987



The Levert Office
Home of the Mobile Bar Association
Host for the 1987 Annual Meeting



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Schroeder, Hoffman and Thigpen on

ALABAMA EVIDENCE

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INTRODUCTORY PRICE $69.95 Regularly $74.95

by William A. Schroeder, Jerome A. Hoffman and Richard Thigpen

In this comprehensive examination of the rules of Alabama Evidence, the authors present an in-depth discussion of all areas of evidentiary procedures from the relatively simple ways to object to evidence through competence, privileges, relevance, impeachment, the best evidence rule and parol evidence. Many sections contain a discussion of Federal law and how it compares to its Alabama counterpart. Case law is thoroughly cited throughout the book. An excellent reference tool for both the inexperienced and veteran lawyer!

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Obtaining, Offering and Objecting to Evidence • Competence • Examination of Witnesses • Relevance and Limitations on the Admission of Relevant Evidence • Privileges • Impeachment • Expert Testimony • Hearsay • Authentication and Identification — Rules 901, 902, 903 • Special Rules Relating to Writings: The Best Evidence Rule and the Parol Evidence Rule • Real and Demonstrative Evidence • Judicial Notice • Presumptions • Burdens of Proof and Persuasion

About the Authors

William A. Schroeder received his B.A. and J.D. from the University of Illinois and his LL.M. from Harvard Law School. He is a member of the American Bar Association. He taught Evidence, Criminal Procedure and Trial Advocacy at the University of Alabama from 1980 to 1984. Since then he has been a Professor of Law at Southern Illinois University School of Law where he teaches Evidence and Criminal Procedure.

Jerome A. Hoffman received both his B.A. and J.D. from the University of Nebraska. He is a member of the Alabama State Bar Association and the State Bar Association of California. He has been a member of the Alabama Supreme Court's Advisory Committee on Civil Practice and Procedure since its creation in 1971. He is currently a Professor of Law at the University of Alabama School of Law where he teaches Evidence and Civil Procedure.

Richard Thigpen received his B.A. and M.A. from the University of Alabama and his J.D. from the University of Alabama School of Law. He has an LL.M. from Yale University and also an LL.D. (Honorary) from the University of Alabama. He is a member of the Alabama State Bar Association. He is currently a Professor of Law at the University of Alabama School of Law.

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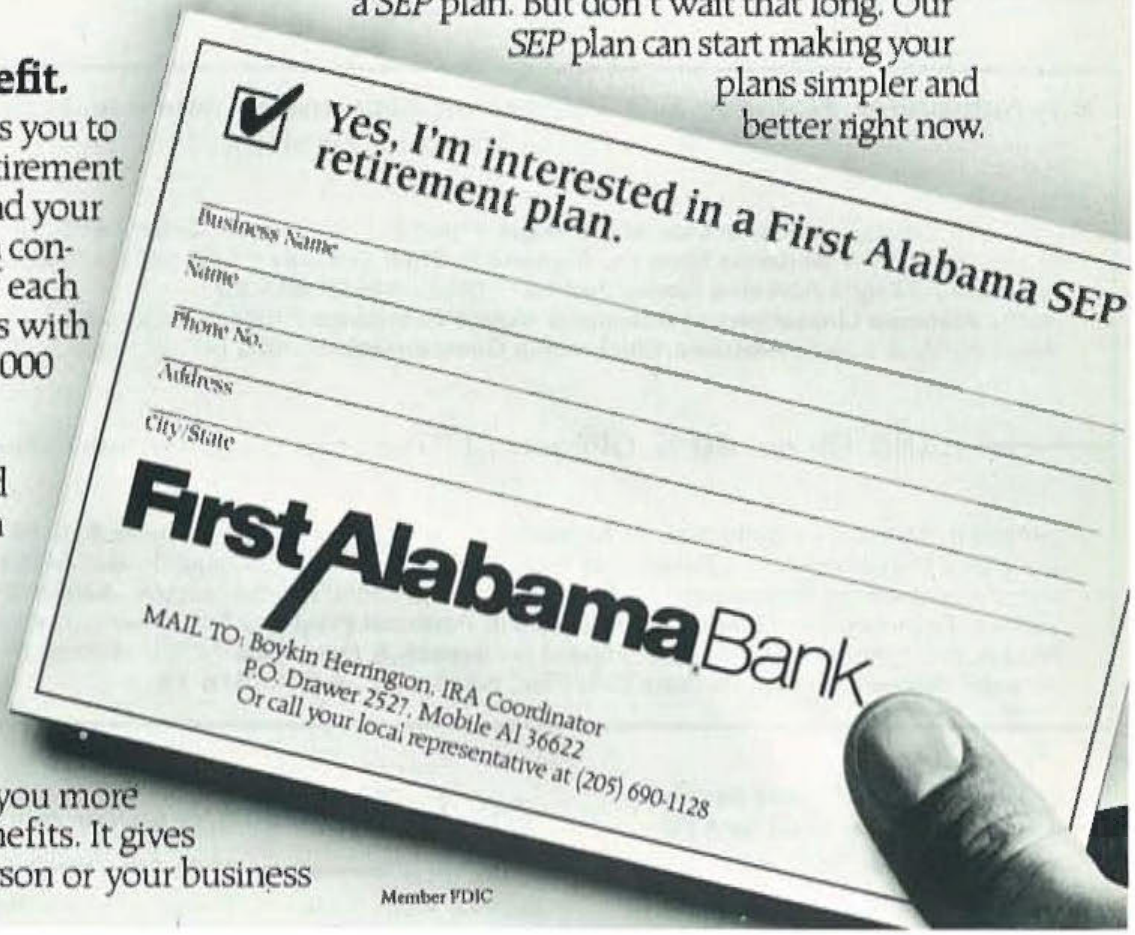

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The Alabama Lawyer

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In Brief

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Margaret Lacey—Managing Editor

GENERAL INFORMATION **The Alabama Lawyer, (ISSN 0002-4287),** the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, July, August (bar directory edition), September and November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive **The Alabama Lawyer** as part of their annual dues payment; $15 of this goes toward subscriptions for **The Alabama Lawyer.** Advertising rates will be furnished upon request. Advertising copy is carefully reviewed, but publication herein does not necessarily imply endorsement of any product or service offered.

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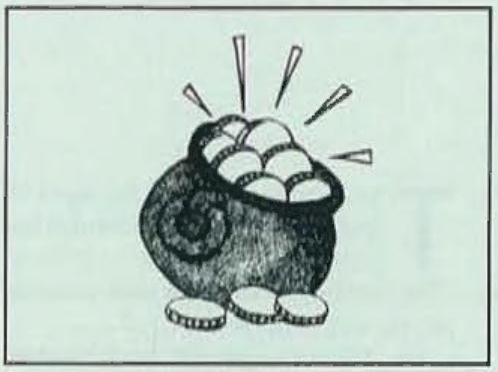
Postmaster: Send address changes to **The Alabama Lawyer,** P.O. Box 4156, Montgomery, AL 36101.

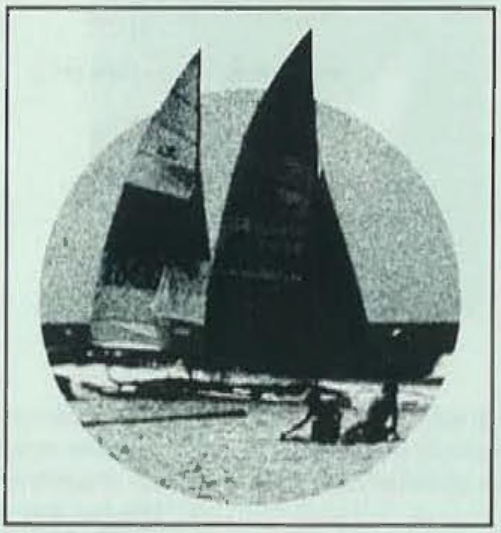
On the cover—

The Levert Office is home to the Mobile Bar Association and will be the site of a reception sponsored by the Mobile Women Lawyers' Association during the annual meeting.



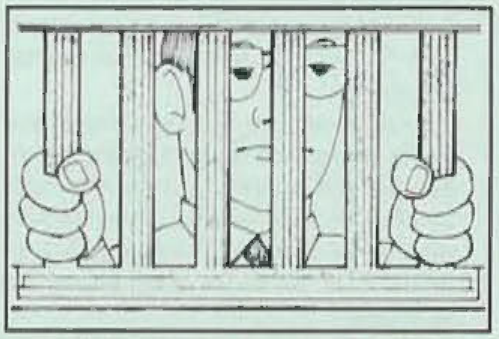
The Impact of the Tax Reform Act of 1986 on Small Businesses—by Sandra L. Randleman 206

The Tax Reform Act of 1986 now is being implemented. How does the act affect small businesses?



Mobile—as good as you remember!—by Judge Arthur B. Briskman 200

Once again Mobile is proud to host the bar's annual meeting. The Port City has many outstanding restaurants and other attractions that should not be missed.



Introduction to Lender Liability—by Gregory H. Hawley 214

A creditor generally is well-armed with statutory and contractual rights when seeking to remedy debtor delinquency. However, the creditor faces potential liability if unreasonable collection efforts are employed.

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SCRUGGS

The opening prayer of the April 15 special meeting of the board of bar commissioners began as follows: "The Lord save us from evil princes, priests and parliaments . . . ."

The Alabama State Bar rarely, if ever, takes a position concerning pending, controversial legislation. This is as it should be; lawyers can be found advocating all sides of all public issues. In the case of "tort reform," however, the proposed legislation was so far-reaching and basic in the administration of justice that the board of bar commissioners believed it should take a position and communicate that position to the Alabama State Legislature.

By a vote of 33-0, with no abstentions, the board adopted a general position regarding the various tort reform bills pending in the Alabama House of Representatives as of the date of the special meeting. The position of the bar on the principal issues of tort reform may be summarized as follows:

1. The bar supported the abolition of the scintilla rule in favor of the rule of substantial evidence as defined by the Eleventh Circuit;
2. The bar supported the *forum non conveniens* bill for causes of action arising in the state of Alabama;
3. The bar supported the *forum non conveniens* rule for cases arising outside the state of Alabama;
4. The bar supported abolishing the collateral source rule to allow the admissibility of third-party payments to the plaintiff by contract for hospital and medical expenses, provided the cost of obtaining the benefits also was admissible; the bar opposed the admissibility of any governmental payments and further opposed the admissibility of any tax consequences;
5. The bar supported raising the standard for punitive damages to clear and convincing proof, providing a neutral review by the trial and appellate courts making such facts as the efforts of the defendant, if any, to remedy the wrong prior to suit and the opportunity the plaintiff gave the defendant to correct the problem, and the net worth of the defendant admissible in a post-trial hearing before the court; the bar was opposed to caps or formulas for punitive damages;
6. The bar was in favor of giving the trial or appellate courts authority to tax fees, costs and penalties for frivolous claims, defenses or appeals;
7. The bar was in favor of abolishing the automatic 10 percent affirmance fee, provided the appellate courts had the authority to impose fees, costs and penalties for frivolous appeals;
8. The bar was opposed to the payment of any forms of damages to the state and further was opposed to any settling of a contingency fee arrangement by law;
9. The bar was opposed to the structured settlement bill for future damages on both philosophical and technical grounds;
10. Finally, the bar was opposed to the medical malpractice act because of its caps, formulas, required standard payments of future damages, witness rule and many technical deficiencies.

The Alabama State Bar makes no campaign contributions and neither endorses nor opposes candidates for political office. It is apolitical in the truest sense, and the bar's only commodity in the legislative process of tort reform has been its argument in favor of reason, balance and simple intellectual honesty. When one considers that the Alabama State Bar has no real political power, its apparent impact on tort reform has been significant. As this article is being written, some substantial changes and modifications have been made in the senate incorporating some, but certainly not even a majority, of the language

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Executive Director's Report

Voting Responsibility—Does Your Vote Count?

Each time there is an election, I am amazed at the pre-election guessing about the turnout and the many factors that will influence the exercise of this great freedom. It is unique in this great country of ours that turnout can be an issue, considering the ease and freedom to vote, not to mention the feelings we possess, either pro or con, about our elected leadership and public issues.

The election underway in the state bar is no less reflective of the attitude in other elections. Less than two weeks before the ballots are to be counted, having been in the mail two weeks, fewer than 50 percent of those eligible to vote have done so. Unlike most elections, the ballots were sent directly to the voters, who needed only to mark a ballot, place it in a secure envelope, then put both in a certification/return envelope and return same to the Elections Committee.

Fifty-four elected commissioners will serve on the board of commissioners as of July 1, 1987, plus three *ex officio* members. Twenty-nine of those places are on the current ballot. With the majority of the board up for election, more than 50 percent of the membership should cast a ballot. It is the commission which sets the course of action the bar will follow. You have a stake in this and should make your views known.

I will have completed 18 years of service as your executive director when you read this (I hope). I have watched with pride as our various boards dealt with increasingly complex professional issues under the concerned leadership of a long line of outstanding presidents. I have never been prouder of a board's action than that taken in formulating, and later President Scruggs' articulating, the bar's position in the tort reform debates. The bar had a responsibility to act in this legislative effort to change an entire body of law, and it was obvious the bar made a difference. The philosophical issues have not been resolved to everyone's satisfaction, but a higher than otherwise quality of legislation will be enacted. Your board met three times within 30 days to deal with this issue. Numerous smaller subgroups met in the interim.

The expanded board will be even more reflective of the total bar, and you have a role to play—you begin by continuing to insure strong leadership. The field of candidates is superb; they have offered their services—you should exercise your responsibility to choose those you think would best represent the profession.

The new balloting process has afforded the first truly secret ballot; voters no longer certify on the ballot itself their eligibility to cast a vote in the election. Now the ballot is sealed and certification is made on an outside envelope. As these are received, the voter's name is stricken from the polling list. The envelopes are opened, and the sealed ballot envelopes are deposited in the appropriate circuit ballot box for canvassing by the Election Committee after the polls close.

Certification of the return envelopes has been a less than perfect exercise in attention to detail; over 30 persons returned ballots with no certification. The biggest problem has been a failure to indicate the circuit in which the vote is intended to be cast. There was no election in the Eleventh Judicial Circuit, but many people declared their eligibility there, possibly confusing it with the Eleventh U.S. Circuit Court of Appeals. Others, I am sure, sealed the ballot (which had the state circuit number on it) and did not remember in which circuit they voted. Still others "certified" by U.S. mail with return receipts.

HAMNER

This first year, we returned defective certifications when possible. Some failed to print or type their names, signing their names instead and the signatures were illegible. The executive directors in Birmingham (Beth Carmichael), Mobile (Barbara Rhodes) and Montgomery (Dot Wilson) were most helpful in getting ballots back in the hands of their members to obtain proper certifications. In the smaller circuits, ballots were returned directly to the members, if identifiable.

A commercial mailing service was used in ballot preparation in the larger circuits. I am aware that a few errors occurred with missing ballots and return envelopes, but new materials were sent if we were notified.

As we celebrate the bicentennial of our Constitution, let us resolve to be better voters in all elections. They all are important as they set future directions that, it is hoped, will better the lot of all society. ■

—Reginald T. Hamner

President's Page

(continued from page 192)

suggested by the board of commissioners.

The single, most impressive argument to the legislature was our ability to tell the Senate Judiciary Committee that the bar's position had been approved by a unanimous vote, 33-0.

The ultimate form of tort reform presently is unknown, but whatever reason and sense is in the package that becomes law will have been influenced to some degree by the 33 members of the board of bar commissioners who had the wisdom and courage to take a position not necessarily identical with their private or professional views, but one entirely consistent with fairness and the administration of true justice. Special appreciation also is due Champ Lyons who translated the position of the commissioners to proposed amendments to the various bills. Although Champ had nothing to do with the formulation of the bar's position and he acted as a scrivener only, he did make his extensive talents available to the bar on short notice and without compensation. The Alabama State Bar is indebted to him for his tireless, generous service.

The bar's response to tort reform should not be viewed as a permanent entry into the political realm. It is a rare event entered into with great caution and unanimous approval; only under the most unusual of circumstances should the Alabama State Bar take such a position in the future. ■

Get in your orders now for *extra* copies of the 1987 Alabama Bar Directory, at $15.00 each (includes postage), to be published in August.

ALABAMA STATE BAR 1987 ANNUAL MEETING

July 16-18

Speaker:

Stephen Sachs—former attorney general, Maryland

and

Among the Programs:

The Practical Impact of Tort Reform
What Every Practitioner Should Know About Tax Reform
Recent Decisions of the Alabama Supreme Court
Insurance Practice Developments

and

Socials:

Bloody Mary Party—For members and spouses/guests, Riverview's Plantation Ballroom Foyer

Membership Receptions—Thursday's sponsored by Cabaniss, Johnston, Gardner, Dumas & O'Neal at Rousso's; Friday's sponsored by Mobile Women Lawyers' Association, at The Levert Office, Mobile Bar Association headquarters, and by Insurance Specialists, Inc., at the Riverview Plaza

Dessert Party—Chocolate smorgasbord, sundae bar, cordials and entertainment by "Three on a String"

Champagne Breakfast—Sponsored by Kirke-Van Orsdel Insurance Services, Inc., Riverview's Alabama Ballroom

Spouses' Brunch—"Charlotte & the Yankee Captain," Mobile Country Club, entertainment, brunch and transportation

. . . and much, much more!

About Members, Among Firms

ABOUT MEMBERS

Melissa A. Posey announces the opening of her office at 622 Azalea Road, Mobile, Alabama 36609. Phone (205) 666-6155.

■

Paul M. Harden announces the opening of his new office at Court Square, Suite 102, Evergreen, Alabama 36401. Phone (205) 578-4746.

■

Thomas L. Johnston announces the opening of his offices at Old Bank Building, Main Street, Rockford, Alabama. Phone (205) 377-4720.

■

Craig S. Pittman announces the opening of his office at 161 Conti Street, Mobile, Alabama 36602, P.O. Box 1321, Mobile, Alabama 36601. Phone (205) 432-0532.

■

Tommie Wilson, formerly of the Alabama Attorney General's Office, announces the opening of her offices at 2305 Cogswell Avenue, Pell City, Alabama 35125. Phone (205) 338-4422.

■

D.L. Martin announces the relocation of his office from 215 South Main Street to 210 South Main Street, Moulton, Alabama. His new office is across the street from his former location, and the mailing address, P.O. Box 456, Moulton, Alabama 35650 and telephone number, (205) 974-9200, have not changed.

■

Michael A. Anderson announces his admission to the Tennessee State Bar and his association with the firm of **Gearhiser, Peters & Horton,** 801 Chestnut Street, Chattanooga, Tennessee 37402. Phone (615) 756-5171. He previously was a member of the law firm of Skinner & Anderson, Birmingham, Alabama.

■

Stella Miles Anderson announces her admission to the Tennessee State Bar and her position as staff attorney with Blue Cross Blue Shield of Tennessee, 801 Pine Street, Chattanooga, Tennessee 37402. Phone (615) 755-5837.

■

The law office of **Thomas H. Jackson** has moved to 1810 Third Avenue, North, Bessemer, Alabama. Phone (205) 428-7318.

■

Richard J. Stockham, III, announces a change of address from 19 Glen Iris Park, Birmingham AL 35205, to 903 City Federal Building, Birmingham 35203. Phone (205) 322-0084.

■

Frederick B. Benson announces the opening of his office for the practice of law, at the Dr. J.G. Alston Professional Building, Highway 280 East at Highway 55 Junction, P.O. Box 63, Westover, Alabama 35185. Phone (205) 678-8273.

■

Joseph D. Whitehead, P.A. announces the relocation of its offices to 238 North Daleville Avenue, Daleville, Alabama 36322. Phone (205) 598-3486.

AMONG FIRMS

The members of the firm of **Miller, Hamilton, Snider & Odom** of Mobile and Washington, D.C., announce the opening of an office in Montgomery, Alabama, and that **Michael D. Waters** will be the resident partner. Offices are located at Suite 802, One Commerce Street, Montgomery, Alabama 36104. Phone (205) 834-5550.

■

Jones, Day, Reavis & Pogue announces that **David R. Baker** has become a member of the firm, and that the New York office is now located at 599 Lexington Avenue 10022. Phone (212) 326-3939.

■

The law firm of **Locke, Purnell, Boren, Laney & Neely** announces that **Gary R. Powell** has become associated with the firm. Powell served as law clerk to the Honorable A. Joe Fish, United States District Judge, Northern District of Texas at Dallas. Firm offices are located at 3600 RepublicBank Tower, Dallas, Texas 75201-3989. Phone (214) 754-7470.

■

Balch & Bingham of Birmingham and Montgomery, Alabama, announces that **Malcolm N. Carmichael, Richard L. Pearson, James A. Bradford, Dan H. McCrary, Edward B. Parker, II, William P. Cobb, II,** and **Alan T. Rogers** have become partners in the firm.

■

Barnett, Tingle, Noble & Sexton announce that **Roger L. Bates** has become a member of the firm, with offices at 1600 City Federal Building, 2026 Second Avenue, North, Birmingham, Alabama 35203.

■

Maynard, Cooper, Frierson & Gale, P.C. and **Markstein, Morris** and **Liles, P.C.** announce the combination of their practices under the name **Maynard, Cooper, Frierson & Gale, P.C.,** and that **Daniel H. Markstein, III, Curtis 0. Liles, III, Deborah J. Long, Frank D. McPhillips** and **Maibeth J. Porter** have become members of the firm and that **Anne Reilly Moses, Luther M. Dorr, Jr.,** and **Alfred F. Smith, Jr.,** have joined the firm as associates. Offices are located at Twelfth Floor, Watts Building, Birmingham, Alabama 35203. Phone (205) 252-2889.

■

Lloyd W. Gathings, II, formerly of Emond and Vines, and **Joe L. Tucker, Jr.,** formerly of Holliman & Tucker, announce the formation of a partnership under the name of **Gathings &**

Tucker, and that **Timothy C. Davis** has become associated with the firm. Offices are located at 600 Farley Building, 3rd Avenue North & 20th Street, Birmingham, Alabama 35203. Phone (205) 326-3553.

■

J. Louis Wilkinson and **Virginia A. Vinson** announce the formation of a partnership under the name of **Wilkinson & Vinson,** with offices located at 503 Frank Nelson Building, Birmingham, Alabama 35203. Phone (205) 252-4959.

■

The firm of **Thomas & Kennedy** announces that **Steven D. Kerr** has become associated with the firm, with offices at 100 Galleria Parkway, N.W., Suite 590, Atlanta, Georgia 30339. Phone (404) 951-0931.

■

John T. Kirk announces that **Janet E. Schroeder,** former assistant district attorney, has become associated with him in the general practice of law, with offices located at 138 Adams Avenue, P.O. Box 1412, Montgomery, Alabama 36102. Phone (205) 264-1498.

■

Stephen J. Flynn and **Michael G. Huey** announce the opening of their new office, at 158 South Jackson Street, P.O. Drawer 1806, Mobile, Alabama 36633. Phone (205) 433-6622.

■

The law firm of **Zisser, Robison, Spohrer & Wilner, P.A.,** announces that **John S. Mordecai** and **Michael J. Marees** have become members of the firm, and **Donald E. Brown, Robert M. Paine, Gregory H. Maxwell** and **Nancy N. Nowlis** have become associated with the firm.

■

The law firm of **Pilgrim & Gooden,** 600 South McDonough Street, Montgomery, Alabama 36104, announces that **Kenneth S. Nunnelley,** former law clerk to the Honorable Richard Dorrough, 15th Judicial Circuit, has become associated with the firm.

■

Phillip E. Stano, senior counsel for the **American Council of Life Insurance,** announces the council's new address: 1001 Pennsylvania Avenue, NW, Washington, D.C. 20004-2599. Phone (202) 624-2183.

■

The law firm of **Longshore, Evans and Longshore** announces **Thomas W. H. Buck** has joined the firm, with offices at 1900 City Federal Building, Birmingham, Alabama 35203. Phone (205) 252-7661.

■

The law offices of **John W. Parker** announce that **James Rebarchak,** formerly an assistant attorney general for the State of Alabama, has become associated with the firm, with offices at 4332 Boulevard Park South, Suite D, Mobile, Alabama 36609.

■

The firm of **Najjar, Denaburg, Meyerson, Zarzaur, Max, Boyd & Schwartz** announces that the following individuals have become members of the firm: **Gary S. Schiff, G.R. Fernambucq, Richard Briebart** and **Richard D. Greer.** Also, **Beth Gerwin** has become associated with the firm with its offices at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 328-5760.

■

Bradley, Arant, Rose & White, of Birmingham and Huntsville, announces the opening of an additional office at 2000 SouthTrust Tower, 420 North 20th Street, Birmingham, Alabama. The mailing address of the Birmingham offices of the firm continues to be 1400 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 252-4500.

■

The law firm of **Caddell, Shanks, Harris, Moores & Murphree** announces that the firm name has been changed to **Caddell & Shanks** and that **Barnes F. Lovelace, Jr.,** has become a member of the firm and **Robert R. Baugh** has become associated with the firm. Offices are still located at 230 East Moulton Street, Decatur, Alabama 35601.

■

Ryan deGraffenried, Jr., Ritchie Tipton and **Scott Donaldson** announce the formation of a firm under the name of **deGraffenried, Tipton** and **Donaldson,** with offices at 2620 6th Street, P.O. Box 2263, Tuscaloosa, Alabama 35403. Phone (205) 759-1226.

■

The law firm of **Mandell & Boyd** announces that **Celeste W. Sabel,** former law clerk to Alabama Supreme Court Justice Richard L. Jones, became associated with the firm April 13, 1987. Offices are located at 25 South Court Street, Montgomery, Alabama 36104. Phone (205) 262-1666.

■

Harry Pharr Long and **Frank Reinholdt, III,** announce a change of address from P.O. Box 519, Anniston, Alabama, to P.O. Box 1468, Anniston 36202. Phone (205) 237-3266

■

George M. Barnett and **Claude E. Hundley, III,** of the firm of **Barnett & Hundley,** announce that **Tameria S. Driskill** has become a partner of the firm. The firm name now is **Barnett, Hundley & Driskill,** at 431 Gunter Avenue, P.O. Box 93, Guntersville, Alabama 35976. Phone (205) 582-0133.

■

The law firm of **Bryant, House, Ulmer & de Juan** announces the change of the firm's name to **Bryant, Ulmer & de Juan** with offices at Suite 1107, Riverview Plaza Office Tower, 63 South Royal Street, Mobile, Alabama 36622; the mailing address is P.O. Drawer 1465, Mobile, Alabama 36633. Phone (205) 432-4671.

■

Smyer, White, Taylor & Putt announce that **F. Braxton Wagnon** has become an associate of the firm. Offices are located at 600 Title Building, Birmingham, Alabama 35203. Phone (205) 323-7195.

■

H. Young Dempsey announces that **W. Beatty Pearson** has become a member of the firm. The firm will now practice under the name of **Dempsey & Pearson,** with offices at

Highway 98, The Summit, P.O. Box 980, Spanish Fort, Alabama 36527. Phone (205) 626-2772.

■

The firm of **Gray, Langford, Sapp, Davis** and **McGowan** announces that **Edwin Lamar Davis** has left the firm to serve as Tuskegee Municipal Judge. The firm name has been changed to **Gray, Langford, Sapp** and **McGowan** with offices located at 108 Commodore Circle, Tuskegee, Alabama, and 352 Dexter Avenue, Montgomery, Alabama. Phone (205) 727-4830.

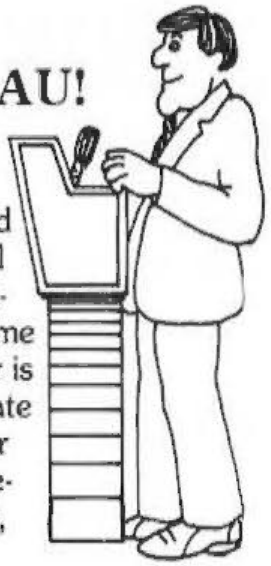
■

The law firm of **Nolen and Nolen** announces that **Laura Gunn Poston** has become associated with the firm. Offices are located at 309 First Avenue, NE, Fayette, Alabama 35555. Phone (205) 932-3281.

■

Lanier, Shaver & Herring, P.C., announces the association of **Ronald F. Suber** and **Y. Albert Moore,** with offices at 404 Madison Street, South, Huntsville, Alabama 35801. Phone (205) 533-5920.

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) _____

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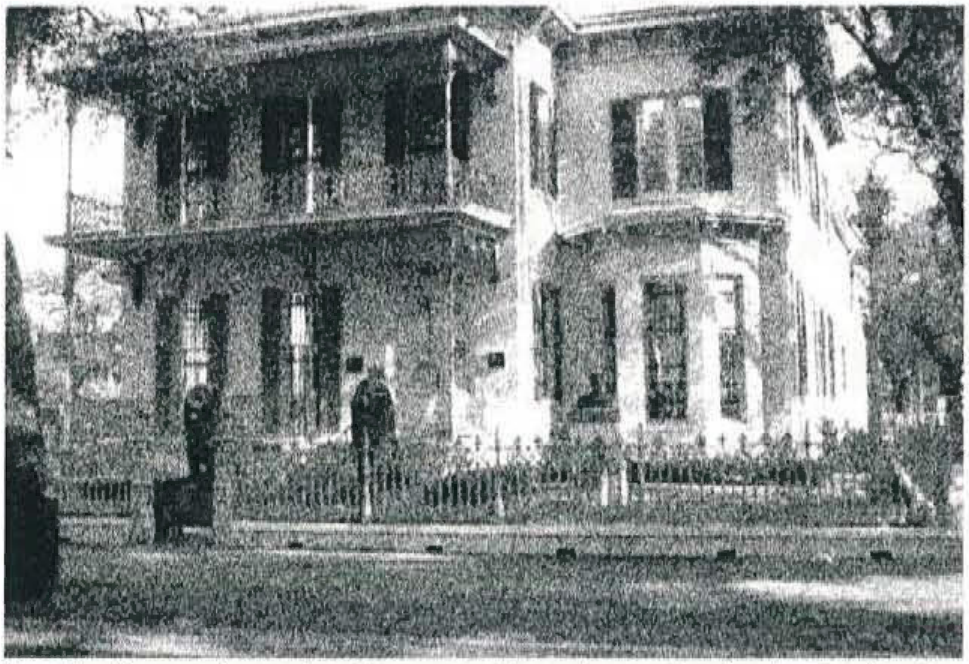


The City Museum, located on Government Street, is open Tuesday thru Sunday. One feature is the Hammel's collection of fine women's fashions.

The 1987 Alabama State Bar Annual Meeting is in the port city of Mobile. The following should convince you to attend, not only to be educated, but also to be entertained! Many thanks to Barbara Rhodes of the Mobile Bar for assistance with photographs.—The Editor

by Arthur B. Briskman

It seems like everyone has a colorful story about Mobile. Some reminisce about trekking down to our beaches for vacations; others relate tales of Mobile's "unique" political activities; and, of course, most remember partying at the most festive Mardi Gras ever.

The amazing part, however, is that everything you remember about Mobile still is true. Our seafood is still the tastiest and our beaches the most alluring. The exotic Bellingrath Gardens can be matched only by the beauty of the oaks and azaleas lining our historic streets. We also have every type of recreation available from golfing and tennis to fishing and sailing. So what better place for the 1987 annual meeting of the Alabama State Bar than Mobile, Alabama's most versatile and inviting spot?

Like any city, Mobile has changed dramatically in the past 20 years. Growing up in Mobile meant living downtown, shopping on Dauphin Street or Bienville Square and getting your best meals at Constantine's or waiting in long lines on Sundays at Palmer's Seafood House.

M

Today, Mobilians live on both sides of the bay. The new retail centers are in west Mobile, circling Airport Boulevard, and along the fashionable Eastern Shore in Fairhope, Daphne and Montrose.

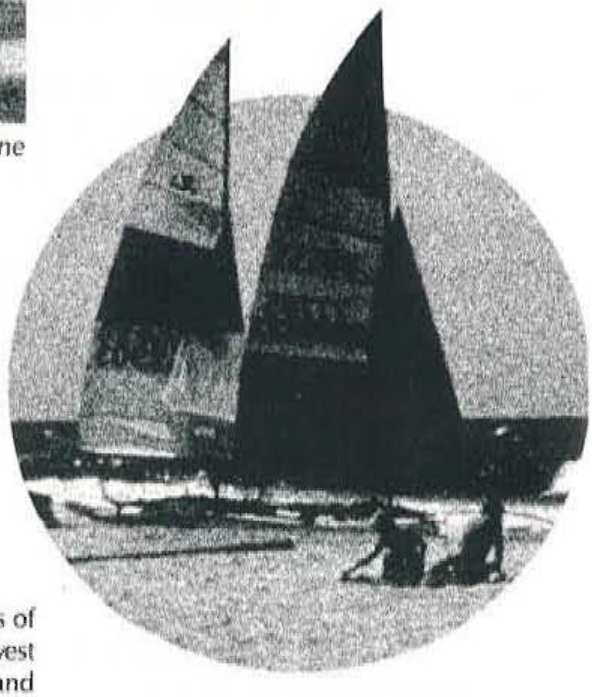
And, while we have moved out in all directions, historic preservation has revitalized parts of downtown. No trip to Mobile is complete without a ride through the Oakleigh Garden District and Church Street areas. They are truly a testament to the beauty of the old South.

The future of Mobile is an exciting one. Plans for a new convention center, as well as a waterfront commercial development project to complement the Riverview complex and newly-restored Admiral Semmes Hotel, will only enhance Mobile's reputation of being one of Alabama's most desirable places to live and visit.

But for today, there is plenty to see and do and, most importantly, to eat. When they come to Mobile, most people are looking for a good time and, believe me, a good time can be had by all. Mobile and the Eastern Shore have historic sites, natural beauty and activities for all members of the family, not to mention some of the best restaurants in Alabama.

MUSEUMS AND HISTORICAL SITES

Bellingrath Gardens and Home, 65 landscaped acres in the midst of 905 acres in a semi-tropical setting—The unsurpassed beauty of the gardens is world renowned. In July, the 2,500 rose bushes



will complement the summer foliage, while orchids and a wide variety of freshly budding plants bloom in the tropical conservatory. One of America's great natural assets. Open 7 a.m. until dusk. 973-2217, Theodore, Alabama.

Battleship Memorial Park, The USS Alabama and the Submarine USS Drum provide a unique experience for exploring one of the great vessels of the World War II Pacific Theatre, along with a variety of military exhibits, including the "Calamity Jane," a gigantic B-52 bomber. Its location on the Battleship Parkway provides an excellent opportunity to see this popular attraction and be close to some great seafood restaurants for lunch. Open 8 a.m. to sunset. Battleship Parkway.

Fine Arts Museum of the South (FAMOS)—Located in picturesque Langon Park. Significant early 20th century American, 19th century European, Oriental and southern contemporary pieces, as well as photography, will be on display in July. One of the best craft collections of southern artisans also is housed here. 343-2667. Open Tuesday through Sunday. 10 a.m. to 5 p.m. No admission charge.

Oakleigh Mansion—Mobile's historic sites and restored homes are one of its greatest assets. A stroll through the Church Street area, which has turned into a "lawyer's row," Washington Square area or the Oakleigh District is essential for a true sense of Mobile. Many of the late 19th and early 20th century homes have been restored to their original grandeur. The Oakleigh Mansion is a Greek revival with beautiful grounds. It exemplifies the 19th century Mobile era. Open daily. 432-1281, 350 Oakleigh Place.

The Exploreum—A children's hands-on museum set in a beautiful part of Springhill Avenue in the mid-town area. Open Tuesday through Sunday. 476-6873, 1906 Springhill Avenue.

Mobile is home of the original, and possibly the most festive, Mardi Gras activities in the country.

BILE

As good as you remember!

Fort Conde—Reconstruction of 18th century French fort, also serves as Mobile's official welcome center in downtown Mobile. Open daily 8 a.m. until 5 p.m. 438-7304, 150 South Royal.

City Museum—Civil War exhibits, antique carriages, Mardi Gras display and the Hammel's collection of fine women's fashions. Open Tuesday through Sunday. 438-7569, 66 Government Street.

Magnolia Cemetery—Established 1836. Part of the USS Alabama Historic Trail and designated a national cemetery in 1866. Contains the graves of the crew of the CSS Hunley, the world's first submarine, and Chappo Geronimo, son of the Apache leader, Geronimo, who was imprisoned for a time in Mount Vernon, Alabama. Ann and Virginia Streets.

EASTERN SHORE DAY TRIP

As the Eastern Shore has developed over the last decade, Fairhope has emerged as a wonderful shopping area with unique stores and merchandise. A stroll down Section Street and Fairhope Avenue can be the start of a fun day trip with lunch, shopping and cocktails. Some highlights:

FANTASY ISLAND Award-winning toy store. 335 Fairhope Avenue.

THE COLONY SHOP Women's ready-to-wear. 27 South Section

OBJECTS Gourmet coffee and other international treats. 25 South Section.

PAGE AND PALETTE Regional art and impressive selection of books and publications. 32 South Section.

THE SILVER MARKET Antique and contemporary silver collectibles and fine linens. 35 North Section.

STITCH IN TYME Handmade smocking. 26 South Section.

MARY ANN'S DELI 302 De La Mare Avenue, or **WINTZELL'S TUMBLE INN,** 312 Fairhope, for lunch.

THE GRAND HOTEL at Point Clear for lunch or cocktails.

Oakleigh Mansion, an excellent example of Greek revival architecture, exemplifying 19th century Mobile era

RESTAURANTS

Mobile is famous for its excellent food, especially its fresh seafood. Most of the hotels have good restaurants and are the best place for breakfast. The following is a sample of some of the famous and not-so-famous to give a good cross-section of some of our eating establishments.

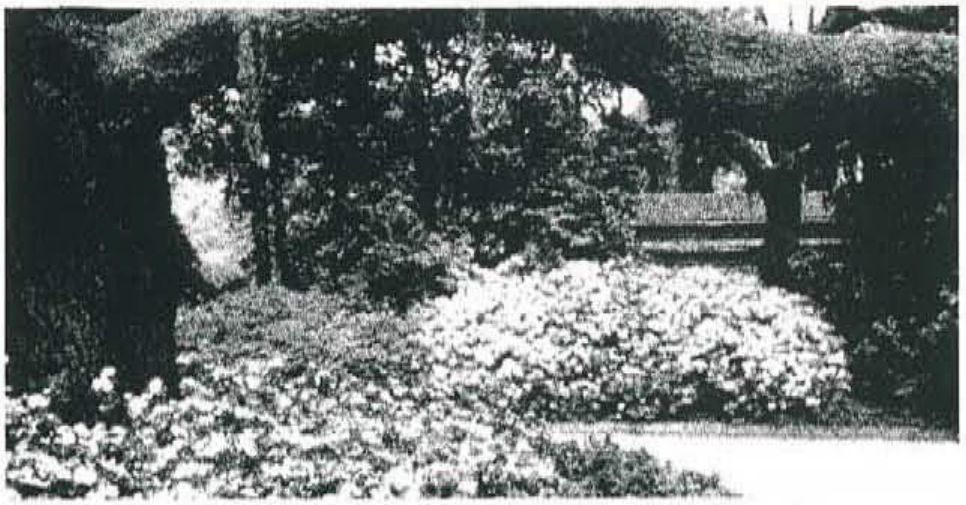
MOBILE'S FAVORITES

BLUE GILL—A causeway landmark for a quarter of a century. Gathering place for politicos of all Democratic persuasions. In fact, known Republicans should be accompanied by a personal food taster. The best fried seafood you will find anywhere. Best fried softshell crab in the world . . . served as a sandwich or part of a dinner. Start with fried crab claws as an appetizer with a pitcher of ice cold beer. Credit cards not accepted. Closed Mondays. 626-9852, Battleship Parkway.

ENTERTAINMENT

Mobile Greyhound Park—Greyhound racing with paramutual betting. Excellent clubhouse dining overlooking the track with convenient betting windows. Extensive menu with good seafood entrees. Post time 7:45 p.m. Monday through Saturday; Saturday matinee post time 1:45 p.m. For dinner reservations, 653-6040.

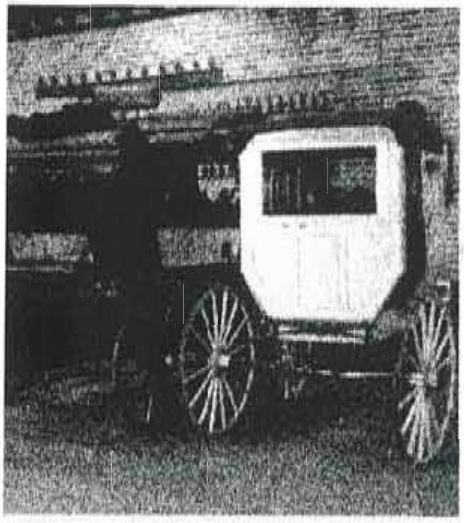
Entertainer Dinner Theatre—Enjoyable buffet dinner and live theatrical production. July 17-18, 1987, "The Seven-Year Itch." Dinner at 7 p.m.—Show 8:30 p.m. 473-8611, 421 Holcombe Avenue.



Bellingrath Gardens and Home, with over 900 acres of world-famous beauty—one of America's great natural assets

PILLARS—The finest in continental dining, highlights include excellent seafood, lamb and beef. The restaurant is housed in a beautifully restored turn-of-the-century Greek revival manslon. Beef Wellington, scamp en papillotte, sauteed shrimp with special sauce are a few examples of the "Epicurean dinners" that have made the Pillars a favorite. Proper attire and reservations suggested. 478-6341, 1757 Government Street.

Hon. Arthur B. Briskman is a United States Bankruptcy Judge for the Southern District of Alabama. He is a graduate of the University of Alabama and Cumberland School of Law.



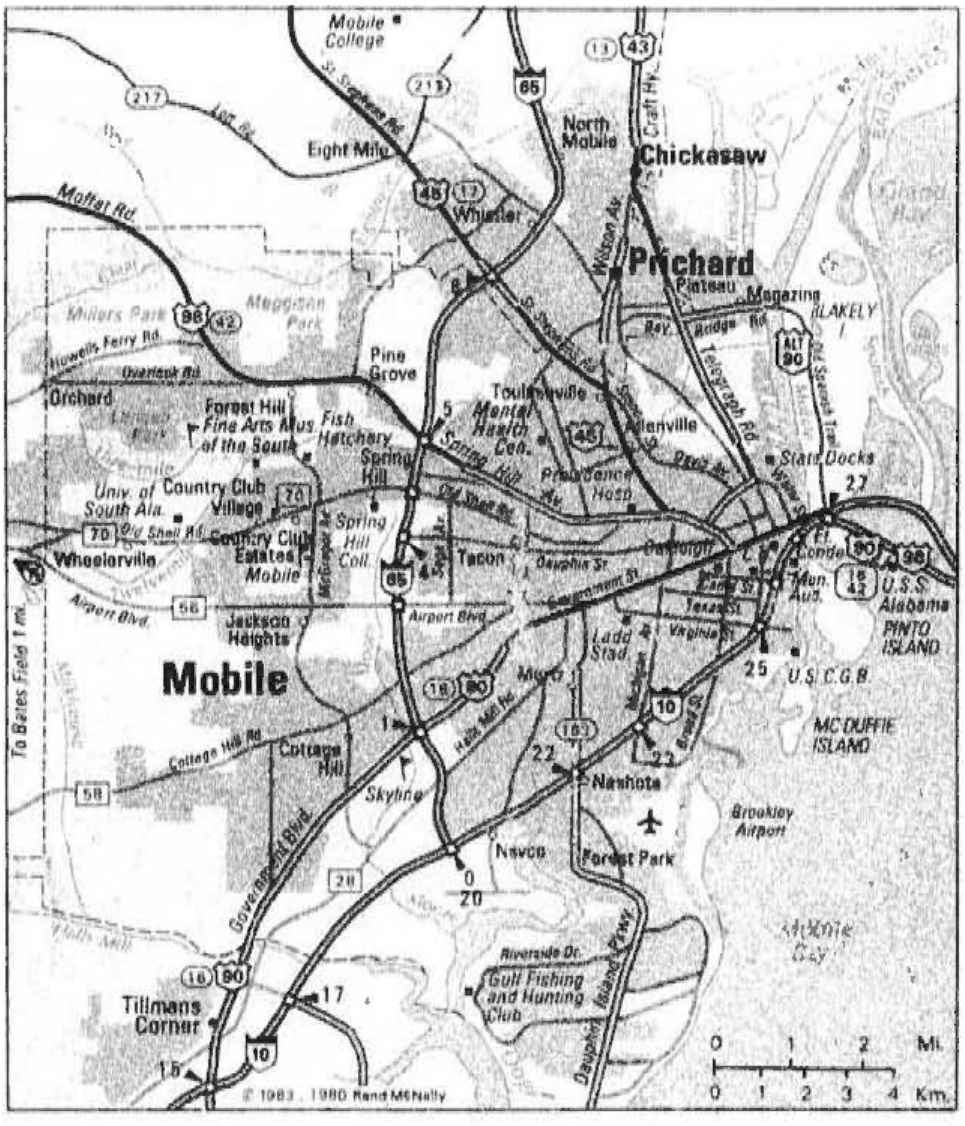
Antique carriages are just one feature of the City Museum on Government Street.

ROUSSOS—Established on the causeway, this favorite for seafood relocated in the Fort Conde area within walking distance from all downtown hotels. Wide variety of seafood, broiled or fried, Greek-style dishes and spaghetti and oysters are especially good. 433-3322, 166 South Royal Street.

WEICHMAN'S ALL SEASONS RESTAURANT—The only restaurant serving Constantine's original recipes. Famous for their scamp almondine, oysters bienville and their award-winning crabmeat specialties la Louisiana, a la Rector and shrimp and crabmeat au gratin, not to mention juicy prime rib. Live music for listening and dancing. Reservations accepted, 344-3961, 168 South Beltline Highway.

WINTZELL'S OYSTER HOUSE—A Mobile landmark and tradition since 1938. Famous for serving oysters "fried, stewed and nude." Walls are plastered with over 6,000 quotes and humorous sayings. Good selection of fried seafood, gumbo, oyster stew, shrimp loafs and great oysters on the half shell. If you want oysters on the half shell, sit at the oyster bar where they will open them for you. (If you order oysters on the half shell in the seated area, they are previously opened and iced, not opened to order.) Very casual. Open daily except Sunday. 433-1004. 605 Dauphin Street.

JOHN WORD'S—Favorite lunch and dinner establishment for downtown professionals. Scamp Kammeraad, sauteed crab and catch of the day are among its outstanding selection of seafood. Many consider the steaks to be the best in Mobile. Live jazz nightly. Great place to



go for dessert (try the hot pecan pie with a scoop of vanilla ice cream), coffee, drinks and jazz. 433-7955, 358 Dauphin Street.

AMERICAN

AZALEA GRILL—New Springhill neighborhood grill, specializing in light entrees of soups, salads, sandwiches, poultry and seafood. A great after-the-theatre place; unfortunately there is not too much great theatre in July. 342-0000, 4363 Old Shell Road.

J. PRESTON'S—Good selection of cajun cuisine with seafood pasta, veal Dianne, excellent blackened dishes and Sunday buffet. Located in the western part of Mobile. 344-2790, 6700 Airport Boulevard.

SEAFOOD

L & N SEAFOOD GRILL—Relatively new restaurant with unique selections of fresh fish from all over the country, such as dolphin, Norwegian salmon, halibut, swordfish, grouper, tuna and lobster. Good choice for those (former Yankees) who prefer broiled to fried. Fresh hot bread and good salad. Reservations suggested. 343-2524, 3662-A Airport Boulevard.

ORIGINAL OYSTER BAR—Very popular family restaurant with daily blackened and fried specialties, including a create-your-own platter of local favorites with good salad bar. Extremely busy at lunch. 626-2188, Battleship Parkway.

PIER 4—Wonderful seafood restaurant with beautiful view of Mobile Bay. Specializing in Gulf seafood of all varieties, Snapper Pontchatrain and shrimp and crabmeat au gratin. 626-6710, Battleship Parkway.

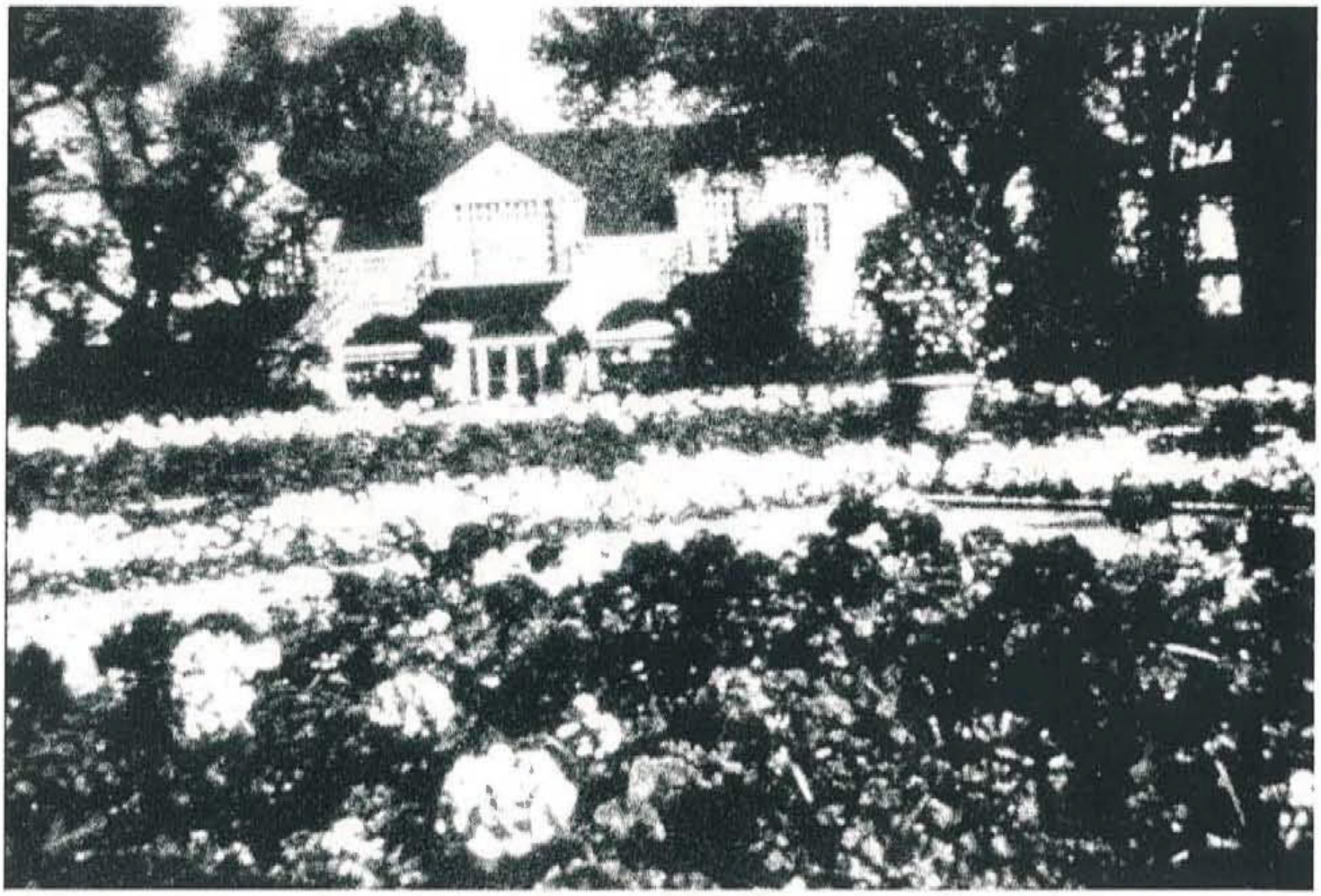
ITALIAN

DUSTY RHOADES—Northern Italian and continental cuisine with good seafood and veal dishes. Fresh grouper with seafood artichoke sauce and shrimp with raspberry beurre blanc sauce. Entertainment nightly, with Dusty at the piano. Well worth the trip to Fairhope. Reservations, as well as directions, suggested. 928-8637, Morphy Avenue at Greeno Road, Fairhope.

RICARDO'S—Small and quiet Italian restaurant with excellent veal and pasta dishes. Veal Vespucci with shrimp, crabmeat and mushrooms, and fettuccini Alfredo. Several specialty dishes each evening. Good wine and candlelight atmosphere, but service is inconsistent at best. Tuesday through Saturday. 343-0658, Bit & Spur at Old Shell Road.

ORIENTAL

IVORY CHOPSTICKS—Wonderful little Vietnamese restaurant. Favorite with the Garden District crowd. Excellent soups and appetizers and wide variety of main courses including poultry, seafood, pork and beef. No liquor license, so you will have to brown bag it. 476-7139, 2206 Government.



This month, numerous rose bushes, orchids and a wide variety of freshly budding plants vie for attention at Bellingrath Gardens.

PEKING SEAFOOD—Mobile's best Chinese restaurant with a wide variety of mild to spicy dishes specializing in seafood. Take-out available. 471-6511, 2662 Government Boulevard.

CHEAP EATS

DEW DROP INN—A Mobile tradition since 1920. Famous for hot dogs and onion rings, but also good seafood sandwiches and ice cold bottled beer. 473-7872, 1808 Old Shell Road.

FLETCHER'S—Mobile's best-known barbeque establishment for more than half a century. Excellent ribs and chicken. Big breakfast buffet and large children's menu. 666-1426, Highway 90 and Azalea Road.

MICHAEL'S MIDTOWN—One of the best restaurants you will ever find in a former gas station. Cajun, Jamaican and other ethnic specialties, including red beans and rice, crawfish etouffe and jambalaya. If the cuisine is not agreeable, T.P. Crockmiers (see BARS) is right across the street. 473-5908, 161 South Florida Street.

NEW CHINA INN—Inexpensive downtown Chinese restaurant open for lunch only. Outstanding won ton soup and inexpensive lunch specials. 432-2288, 555 Government.

ZITSOS CAFETERIA—Pete Zitsos and his family have been serving Mobile good homestyle food at reasonable prices for more than 40 years. Now located in the basement of the First National Bank Building, Zitsos offers breakfast and lunch to the downtown community. A wide variety of salads, soups, outstanding gumbo, entrees (with some of Pete's Greek specialties) and freshly baked breads, biscuits, pies and cakes. 438-8127, 31 North Royal Street.

BARS

THE ACAPULCO CLUB—Mobile's premiere nightclub . . . according to my secretary, and she should know. Enjoy delectable buffet and happy hour prices until 9 p.m. Monday through Friday. Fun place to meet with friends and dance to contemporary music and "the classics." Minimum age 21. Modest dress code. Located in West Mobile. 3679 Airport Boulevard.

T. P. CROCKMIERS—Mainstay hangout for Mobilians for more than a decade. Comfortable brass and glass bar with wide variety menu of sandwiches and light entrees. Very pleasant environment. 476-1890, 170 South Florida Street.

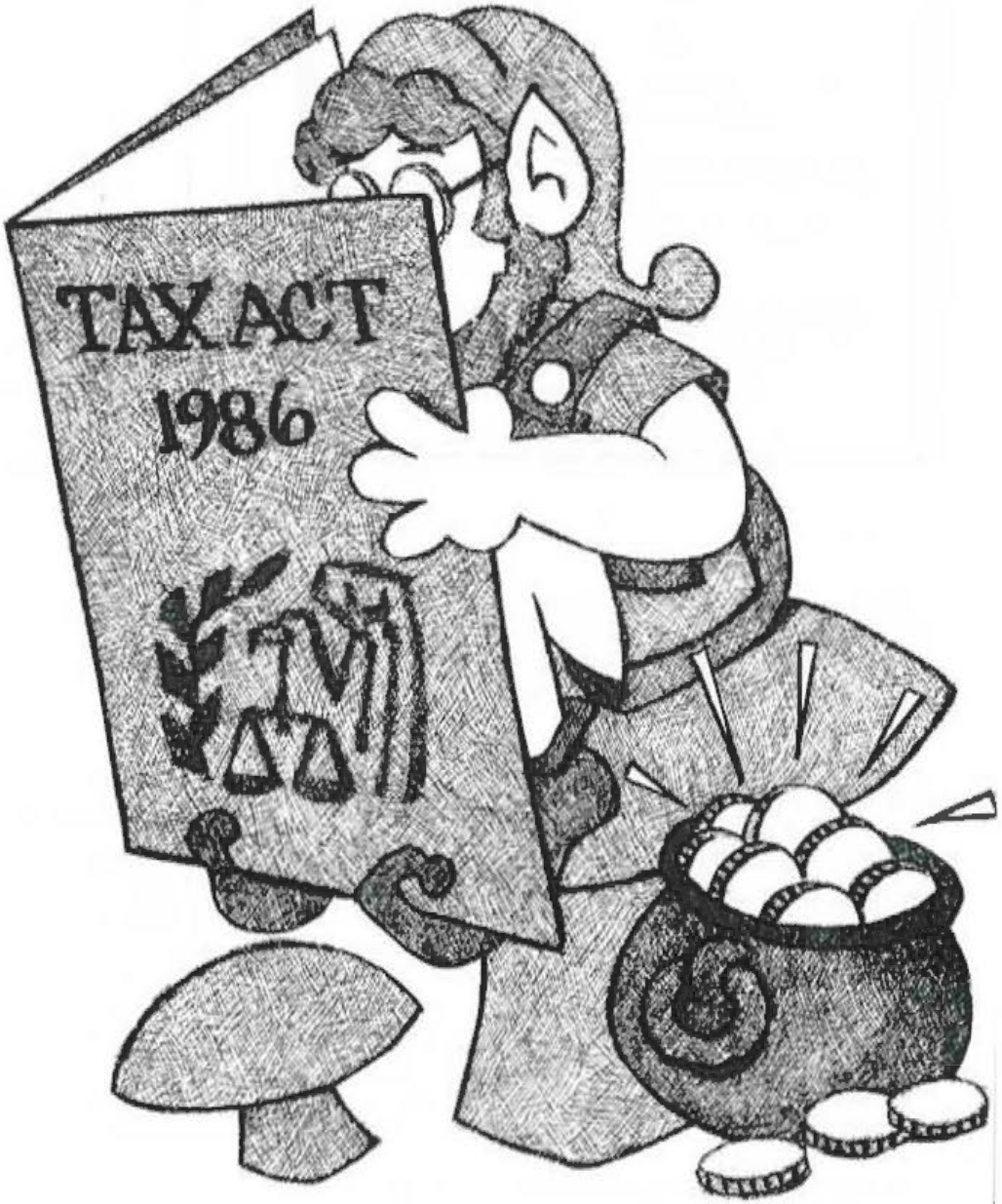
THE LUMBER YARD CAFE—Good neighborhood bar that is very popular with the Yuppie set. Make sure you get into the right BMW or Volvo station-wagon when leaving . . . there can be confusion on occasion. Good after-work crowd of professionals. Light menu of seafood, sandwiches and traditional bar munchees. 471-1241, 2617 Dauphin Street.

TRINITY'S—After-work tavern for downtown lawyers and hottest spot in Mobile later in the evening with live entertainment and dancing. Munchees and menu include Teriyaki chicken, seafood salad and local specialties. Good place for a late afternoon drink. 432-0000, 456 Auditorium Drive. ■

The Impact of the Tax on Small

by Sandra L. Randleman

The Tax Reform Act of 1986, Pub. L. 99-514, enacts numerous changes to tax laws affecting small businesses. Although the act lowers the tax rates imposed on both corporations and individuals, it also eliminates and limits a number of tax benefits that were used frequently by small businesses under prior law and adds some accounting requirements which small business owners may find burdensome. As a consequence of the changes enacted under the act, the relative tax consequences of operating a small business as a corporation[1], partnership or S corporation[2] are altered. Passage of the act may result in the operation of more businesses as partnerships or S corporations rather than as corporations. This article summarizes the provisions of the act having the most direct impact upon businesses.



Income tax rates

One of the most significant changes to the Internal Revenue Code[3] under the act is the reduction in income tax rates imposed on both corporate and individual taxable income. The maximum tax rate imposed on corporate income is reduced from 46 percent to 34 percent, while the maximum tax rate imposed on individual income is reduced from 50 percent to 28 percent. Both corporate and individual tax rates are relevant in evaluating the relative tax advantages of operating a business as a corporation, partnership or S corporation.

Prior law taxed corporate taxable income under a five-step graduated tax rate schedule, with a top rate of 48 percent imposed on taxable income over $100,000. An additional 5 percent was imposed on taxable income between $1,000,000 and $1,405,000.

For tax years beginning on or after July 1, 1987, a three-step graduated rate schedule is substituted for the five-step rate schedule. Section 11(b) of the Code The corporate tax rate schedule under the act is as follows:

Reform Act of 1986 Businesses

Taxable Income	Tax Rate
Not over $50,000	15 percent
Over $50,000 but not over $75,000	25 percent
Over $75,000	34 percent

A phase-out of the benefit of the two lower rates of tax occurs through the imposition of an additional 5 percent tax on taxable income between $100,000 and $335,000. Income in taxable years that begin before and include July 1, 1987, will be taxed at blended rates under the rules of Section 15 of the Code.

Prior law taxed individuals under as many as 15 tax brackets ranging from 11 percent to 50 percent. Under the act there is a two-bracket rate system: 15 percent and 28 percent. Section 1 of the Code Beginning in 1988, however, two 5 percent surtaxes are imposed on high-income taxpayers and, in effect, reduce the benefit of the 15 percent bracket. Section 1(g) of the Code As a result of the surtaxes, high-income taxpayers will pay an effective tax rate of 28 percent on all taxable income. For married individuals filing jointly, the first 5 percent surtax begins at taxable income in excess of $71,900 and ends at $149,250. The second 5 percent surtax phases out the tax benefit derived from personal and dependency exemptions, and for married individuals filing jointly, begins at taxable income in excess of $149,250. For any taxable year beginning in 1987, a five-bracket blended rate schedule will be used with a maximum tax rate of 38.5 percent.

In evaluating the relative tax advantages of operating as a corporation, partnership or S corporation, it is important to anticipate both the level of company earnings and the likelihood that company earnings will be distributed to the shareholders or partners. If the business operates as a corporation, then the earnings are subject to double taxation: first, to the corporation and then to the shareholders as a dividend. If the business operates as a partnership or S corporation, however, then the earnings will be taxed solely at the partner or shareholder level. A partner or S corporation shareholder generally is not taxed with respect to a cash distribution unless the amount of the distribution exceeds the partner's adjusted basis in his partnership interest or the shareholder's basis in his stock (provided the S corporation has no earnings and profits). Sections 731 and 1368 of the Code

Alternative minimum tax

The act repeals the corporate add-on minimum tax after 1986 and enacts an alternative minimum tax (AMT) for corporations. The alternative minimum tax for individuals is expanded.

The alternative minimum taxable income is composed of (1) regular taxable income, plus (2) tax preferences less (3) certain deductions. Section 55(b)(2) of the Code In calculating the corporate AMT, the alternative minimum taxable income then is reduced by the exemption amount, which is $40,000 less 25 percent of the excess of alternative minimum taxable income over $150,000. Section 55(d)(2) and (3) of the Code The tax rate under the AMT is increased to 20 percent of the excess of alternative minimum taxable income over the exemption amount, less the AMT foreign tax credit. Section 55(b) of the Code A corporation must pay AMT to the extent the tentative minimum tax exceeds the regular tax. Section 55(a) of the Code

The act adds certain tax preferences and requires certain adjustments under the corporate AMT which do not apply to S corporations and are not tax preferences under the AMT imposed on individuals. Sections 56(f) and (g) of the Code For taxable years beginning in 1987, 1988 or 1989, alternative minimum taxable income includes one-half of the excess of adjusted net book income over alternative minimum taxable income. Section 56(f) of the Code For taxable years beginning after 1989, alternative minimum taxable income is increased or decreased based on the corporation's earnings and profits. Section 56(g) of the Code

Sandra L. Randleman is an associate with the Birmingham firm of Lewis, Martin, Burnett & Dunkle, P.C. She received her undergraduate degree, with honors, and master's degree from Samford University, her law degree from Vanderbilt University and an advanced degree in taxation from New York University. She is a member of the Alabama, South Carolina and American bar associations.

The act modifies several provisions of the prior law treatment of the individual AMT. The tax rate is increased from 20 percent to 21 percent. Section 55(b)(10) of the Code In computing the alternative minimum taxable income of an individual, there is a limitation on itemized deductions and the deduction of passive activity losses is disallowed. Sections 56 and 58(b) of the Code There is an exemption amount of $40,000 for joint returns, $20,000 for trusts and married persons filing separately and $30,000 for single taxpayers. Section 55(d)(1) of the Code The exemption amount is reduced by 25 percent of the alternative minimum taxable income in excess of (1) $150,000 for joint returns, (2) $75,000 for trusts and married individuals filing separately; and (3) $112,500 for single taxpayers. Section 55(d)(3) of the Code

In selecting the form of business entity, the impact of the AMT on both corporations and individuals should be considered and compared. This comparison requires a prediction of the potential AMT liability which may be imposed on the corporation. In addition, the individual tax situations of potential partners and S corporation shareholders must be reviewed and the tax effect of receiving allocations of income, deductions and credits from the entity should be evaluated.

Passive loss rule

Under prior law, partners and shareholders in an S corporation could apply losses and credits from the partnership or corporate activity against income derived from other sources, such as salary, interest and dividends. Business owners, for example, could own the firm's buildings (either directly or through partnerships or S corporations) and then lease the property to the company. The business owners then would use the losses derived from the ownership of the real estate, such as depreciation deductions, to offset other income.

The act applies a passive loss rule to individuals, including partners in a partnership and shareholders in an S corporation, as well as closely held C corporations (generally, when five or fewer individuals own directly or indirectly more than 50 percent of the stock) and personal service corporations (unless the employee-owners own less than 10 percent of the stock). Section 469(a)(2) of the Code The passive loss rule provides that losses generated by a "passive activity" can offset only passive income. Section 469(a)(1) and (d) of the Code Disallowed losses and credits are carried forward and treated as deductions and credits from passive activities in the next taxable year. Section 469(b) of the Code Disallowed losses from a passive activity are allowed in full when the taxpayer disposes of his entire interest in the activity in a taxable transaction. Section 469(g) of the Code A closely held corporation (other than a personal service corporation), however, may use passive losses and credits to offset "net active income," defined as taxable income of the corporation other than passive income or loss or portfolio income or loss. Section 469(e)(2) of the Code A passive activity is any activity which involves the conduct of a trade or business in which the taxpayer does not materially participate. Section 469(d)(1) of the Code In addition, a rental activity is a passive activity. Section 369(c)(2) of the Code

A taxpayer is treated as materially participating in an activity only if the taxpayer is involved in the operations of the activity on a basis which is regular, continuous and substantial. Section 469(h)(1) of the Code Neither the act nor the committee reports, however, specifically define what constitutes "regular, continuous and substantial" involvement in an activity. Except as otherwise provided in regulations not yet promulgated, a taxpayer owning a limited partnership interest will not be treated as materially participating in the activity. A closely held C corporation or personal service corporation is treated as materially participating in an activity if one or more shareholders holding more than 50 percent (by value) of the outstanding stock materially participate in the activity. Section 469(h)(4) of the Code In addition, a closely held C corporation will meet the material participation if (1) during the prior 12-month period, the corporation had at least one full-time employee working full time in the active management of the activity; (2) during the prior 12-month period, the corporation had at least three full-time, nonowner employees working full time in services directly related to the activity and (3) business deductions (under Sections 162 and 404 of the Code) attributable to the activity exceed 15 percent of the gross income from such business. Section 469(h)(4)(B) of the Code

A limited exception to the disallowance of passive activity losses exists with respect to losses and credits incurred by individuals from rental real estate activities in which the taxpayer actively participated in the taxable year in which the loss or credit arose. Section 469(i)(1) of the Code Active participation requires an interest of at least 10 percent (by value) in the rental real estate activity. Section 469(i)(6)(A) of the Code There is, however, no active participation requirement with respect to the low-income housing and rehabilitation investment tax credits. Section 469(i)(6)(B) of the Code The losses and credits are allowed in an amount not to exceed the equivalent of $25,000 in losses, with a phase-out of the exemption for taxpayers with adjusted gross income in excess of $100,000 or $200,000 in the case of low-income housing and rehabilitation investment tax credits. Section 469(i)(2) and (3) of the Code

If it is possible that a business will generate losses in excess of income or credits in excess of tax payable on passive income, then the level of participation of each owner should be evaluated to determine whether it is likely that the participation will constitute material participation in the business or active participation in a rental real estate activity, whichever standard is relevant. Business owners who rent property to their businesses may choose to receive larger rental payments and thus reduce or eliminate a passive loss. Yet, even if a passive activity generates losses, an individual can deduct his share of the passive losses generated by the business against income generated by other passive activities. In addition, suspended passive losses may be deductible in future years against income from passive activities or upon termination of the taxpayer's in-

terest in the business in a taxable transaction. Therefore, despite the enactment of the passive loss rule, passive losses may still be of benefit to a partner or shareholder in an S corporation.

The passive loss rule generally applies to tax years beginning after December 31, 1986. There is a five-year phase-in rule for losses or credits from passive activities held on October 22, 1986, provided that the passive activity was conducted on that date, the construction of the property used in the activity began on or before August 16, 1986, or the property used in the activity is acquired pursuant to a written binding contract in effect on August 16, 1986, and at all times thereafter. Section 469(1)(3)(B)(iii) of the act

Repeal of investment tax credit

The act repeals the regular investment tax credit for property placed in service after December 31, 1985. Section 49(a) of the Code This provision will adversely affect small businesses that invested heavily in property eligible for the investment tax credit.

Modification of depreciation provisions

The act modifies the accelerated cost recovery system of prior law. Personal property is depreciated over a three, five, seven, ten, 15 or 20-year period, depending upon the type of property. The depreciation method for property in the three, five, seven and ten-year recovery periods is the 200 percent declining balance method, switching to the straight line method at a time to maximize the deduction. Section 168(b)(1) and (c) of the Code The depreciation method for property in the 15 and 20-year recovery periods is the 150 percent declining balance, switching to the straight line method at a time to maximize the deduction. Section 168(b)(2) and (c) of the Code Under prior law, personal property was recovered under the 150 percent declining balance method over a three, five, ten or 15-year period. The act, however, shifts some types of property to longer class lives than under prior law. Cars and light-duty trucks, for example, are shifted from the three-year class to the five-year class. Section 168(e)(3)(b) of the Code

Businesses will want to avoid placing in service during the last three months of the tax year personal property constituting more than 40 percent of the aggregate bases of all the personal property placed in service by the business during the year. The act provides that property assigned to the three, five, seven, ten, 15 or 20-year classes generally are depreciated under the half-year convention. Section 168(d)(1) of the Code Under the half-year convention, all property is treated as placed in service or disposed of in the middle of the year. Section 168(d)(4)(A) of the Code

If, however, the aggregate bases of all property (other than nonresidential and residential rental property) placed in service by the taxpayer during the last three months of the tax year exceed 40 percent of the aggregate bases of all the property (other than real property) placed in service during the year then the taxpayer must use the mid-quarter convention for all property (other than real property) rather than the half-year convention. Section 168(d)(3) of the Code The mid-quarter convention requires that property placed in service during a quarter be treated as placed in service on the mid-point of the quarter. Section 168(d)(4)(c) of the Code Businesses will need to maintain careful records of their purchases of personal property to avoid application of the mid-quarter convention to all property placed in service during their tax year.

Instead of depreciating property under the accelerated cost recovery system as modified by the act, taxpayers can elect to currently deduct all or part of the cost of certain personal property bought for use in the active conduct of a trade or business Section 179 of the Code For qualifying property placed in service after 1986, the expensing deduction is equal to $10,000, and in the case of a partnership, this limitation applies with respect to the partnership and each partner. Section 179(b)(1) and (d)(8) of the Code The expensed amount is deducted from the property's basis. The expensing deduction is subject to several limita-

tions. The amount expensed cannot exceed the taxable income of the taxpayer derived from the active conduct of a trade or business during the tax year. Section 179(b)(3) of the Code If the aggregate cost of qualifying property placed in service during the tax year exceeds $200,000, then the deduction is reduced by the cost of qualifying property in excess of $200,000. Section 179(b)(2) of the Code If the expensed property is not used predominately in a trade or business at any time before the end of the property's recovery period, the taxpayer must recognize recapture income. Section 179(d)(10) of the Code

The act has considerably slowed and lengthened the depreciation of real property. Under prior law, real property was recoverable over 19 years under the 175 percent declining balance method, switching to the straight-line method at a time to maximize the depreciation deductions. The act extends the recovery period of residential tal property to 27.5 years and of nonresidential real property to 31.5 years. Section 168(c) of the Code The depreciation method is the straight-line method with a mid-month convention. Section 168(b)(3) of the Code

The modifications to the depreciation system enacted by the act generally are effective for property placed in service after December 31, 1986. As a consequence of the changes in the depreciation rules, some business owners will have to depreciate their property under three methods of depreciation: (1) property placed in service before 1981 and property covered by the antichurning rules are depreciated under the useful life system; (2) property placed in service after 1980 and before 1987 and property covered by transition rules and antichurning rules are depreciated under the accelerated cost recovery system; and (3) property placed in service after 1987 and not covered by transition rules is depreciated under the modified accelerated cost recovery system pursuant to the act.

Business meals and entertainment deduction

Under prior law, the cost of food or beverages which constitutes ordinary and necessary business expenses was deductible if furnished under circumstances which are conducive to business discussion. Section 274(e)(1) of the Internal Revenue Code of 1954

Under the act, businesses will find that their business meals and entertainment deductions are subject to stricter standards and only a portion of such expenses may be deducted. A business meal is deductible only if it is directly related to or associated with the active conduct of a taxpayer's trade or business, and the taxpayer substantiates the deduction. Section 274 of the Code The cost of the meal is not deductible if it is lavish or extravagant, and the taxpayer (or an employee of the taxpayer) must be present at the meal. Section 274(k)(1) of the Code

The deduction for otherwise allowable business meals and entertainment is limited to 80 percent of the cost. Section 174(n) of the Code There are a number of exceptions to the 80 percent rule, including an exception for qualifying banquet meetings during 1987 and 1988. The act limits deductions for tickets to entertainment events to 80 percent of the face value of such tickets. Section 274(1)(1) of the act The act disallows a portion of the amount allowable as a deduction for skyboxes leased for more than one event for business entertainment purposes and phases in the disallowance over a period of three years. Section 274(1)(2) of the act

Liquidation of a corporation

The act has made substantial changes in the manner in which corporations and their shareholders are taxed upon the liquidation of the corporation. Under prior law, a corporation generally recognized no gain or loss (except for depreciation recapture and similar items) as a result of a distribution of assets in complete liquidation (Section 336 of the Internal Revenue Code of 1954) or, if certain conditions were met, on a liquidating sale of its assets (Section 337 of the Internal Revenue Code of 1954).

Under new section 336, a corporation must recognize gain or loss on the distribution of property in complete liquidation as if the property were sold to the distributee shareholder for its fair market value. If the property is distributed subject to a liability, or a liability is assumed in connection with the distribution, then the property is deemed to have a fair market value at least equal to the liability. Section 336(b) of the Code The act repeals Section 337 of the Internal Revenue Code of 1954 so that liquidating sales are treated no differently than other sales by the corporation.

The act provides several exceptions to the general rule that gain or loss is recognized by a corporation on a distribution of property in complete liquidation. Under one exception to the general rule gain or loss will not be recognized with respect to any distribution of property by a corporation to the extent that there is nonrecognition treatment to the recipient under the reorganization provisions of the Code. Section 336(c) of the Code

A second exception to the general rule provides that under regulations to be issued by the Internal Revenue Service no gain or loss will be recognized upon the sale, exchange or distribution of a controlled corporation's stock by the parent corporation if the parent corporation elects to treat such sale, exchange or distribution as a disposition of all of the assets of the controlled corporation. Section 336(e) of the Code A corporation is a controlled corporation if a parent owns 80 percent of the value and voting power of the corporation.

A third exception provides that no gain or loss is recognized by a liquidating subsidiary corporation on the distribution of property to an "80-percent distributee." Section 337(a) of the Code An "80-percent distributee" is defined as a corporation which meets the 80 percent stock ownership requirements of section 332(b) of the Code. Section 337(c) of the Code

A fourth exception to the general rule of gain or loss recognition contains two provisions designed to limit the ability of taxpayers to "create artificial losses at the corporate level or to duplicate shareholder losses in corporate solution through contribution of built-in loss property." Conf. Rep. No. 841, 99th Cong., 2d Sess. 200 (Sept. 18, 1986) The first provision states that no loss may be recognized on the distribution of any property to a related person (within the meaning of

section 267) if the distribution is not *pro rata* or the property is disqualified property. Section 336(d)(1)(A) of the Code "Disqualified Property" is defined as any property which is acquired by the liquidating corporation in a section 351 transaction or as a contribution to capital, during the five-year period ending on the date of distribution. Section 336(d)(1)(B) of the Code The second provision provides that if property is acquired by the liquidating corporation in a transaction to which section 351 applies or as a contribution to capital, and the acquisition was part of a plan in which a principal purpose was to recognize loss by the liquidating corporation in connection with the liquidation, then for purposes of determining loss on the sale, exchange or distribution of the property, the adjusted basis of the property must be reduced (but not below zero) by the excess of the adjusted basis over the fair market value of the property on the date of the contribution. Section 336(d)(2) of the Code Any property acquired during the two years prior to the adoption of the plan of complete liquidation in a Section 351 transaction or as a contribution to capital is presumed to have been contributed to the liquidating corporation with the prohibited purpose. Section 336(d)(2)(B)(ii) of the Code

The act contains a special provision dealing with the liquidation of certain S corporations. An S corporation that was formerly a C corporation generally must pay a corporate level tax at the highest rate specified in Section 11(b) of the Code on the lesser of the "recognized built-in gains" or the corporation's taxable income for the year if it were not an S corporation. Section 1374(a) and (b) of the Code "Recognized built-in gain" is built-in gain (the excess of fair market value of the assets over the aggregate adjusted bases of such assets) as of the time of conversion to S corporation status which is recognized during the ten-year period beginning on the first day of the first taxable year for which the corporation was an S corporation. Section 1374 (d)(2) of the Code Gain on the disposition of any asset within the ten-year period will be presumed to be built-in gain unless the S corporation can establish that the asset was acquired or the appreciation accrued after the corporation's conversion to S corporation status. Section 1374(d)(2) of the Code The rule is applicable to corporations electing S corporation status after December 31, 1986. Section 633(b) of the act

Although the act generally applies to liquidations completed after December 31, 1986, the act contains numerous transitional and grandfather provisions. A transitional rule allows small, closely held companies to apply prior law with respect to sale and distributions completed before January 1, 1989. Section 633(d) of the act The transitional rule does not apply, however, to ordinary income and short-term capital gain property and gain recognized on disposition of an installment obligation pursuant to Section 453B of the Code. Section 633(d) (2) of the act A corporation is eligible for the transitional rule if (1) on August 1, 1986, and at all times thereafter before the corporation is completely liquidated, more than 50 percent (by value) of the stock is held by ten or fewer individuals and (2) the value of the corporation does not exceed $10,000,000. Section 633(d) (5) of the act Relief is phased out for corporations with values between $5,000,000 and $10,000,000. Section 633(d)(3) of the act

In addition, the legislative history indicates that the stock must have been held for the lesser of the five-year period ending on the date of adoption of the plan of complete liquidation or the period during which the corporation (or any predecessor) was in existence. H. Con. Res. 395(74)

Capitalization rules for inventory, construction and development costs

Section 803 of the act adds section 263 A to the Code, which provides uniform capitalization rules for costs incurred in manufacturing property, constructing property or purchasing and holding property for resale. Prior law required all direct production costs and certain indirect production costs to be included in inventory cost and deducted as cost of goods sold as the inventory is sold. Other indirect costs were treated as period costs and deducted at the end of the accounting period. The act generally requires more indirect costs than under prior law to be included in inventory cost and deducted as the product is sold rather than deducted at the end of the accounting period. Section 263A(a)(2) of the Code Indirect costs affected by this law include costs (including general and administrative costs) attributable to purchasing, processing and storage of goods and a portion of pension and fringe benefit costs. Conf. Rep. No. 841, 99th Cong., 2d Sess. 303 (Sept. 18, 1986) Similar indirect costs incurred with respect to non-inventory items must be capitalized.

The uniform capitalization rules apply to real or tangible personal property produced by the taxpayer and property acquired for resale. Section 263A(b) of the Code Inventory acquired for resale that is personal property is excluded from the uniform capitalization rules if the property is acquired by a taxpayer having average annual gross receipts for the three prior taxable years of $10,000,000 or less. Section 263A(b)(2)(B) of the Code

The new uniform capitalization rules will require most businesses to maintain additional records and generally are effective for costs incurred after December 31, 1986. Section 803(d)(1) of the act Several exceptions and transitional rules apply, however. If a taxpayer is required to change its method of accounting for inventories to comply with the uniform capitalization rules, then the period for taking into account the adjustment will not exceed four years. Section 803(d)(2)(B) of the act.

Simplified dollar-value LIFO inventory method for small businesses

The act allows eligible small businesses to elect to use simplified rules for using the LIFO inventory method. Section 802 of the act, amending Section 474 of the Code Under prior law, a simplified LIFO method was available for businesses with average annual gross receipts of $2,000,000 or less. The act provides a new simplified dollar-value method of pricing inventories for purposes of the LIFO method to a business if its average annual gross receipts for the three preceding taxable years do not exceed $5,000,000. Section 474(a) and (c) of the Code The gross receipts of commonly controlled entities must be aggregated in applying this test. Section 474(d) of the Code

The LIFO method can be an advantageous method of accounting for inventories, particularly in inflationary periods, since the costs of the most recent additions to inventories are matched against sales. Many smaller businesses have not used the LIFO method because of the complex and costly accounting methods required by the LIFO method. The simplified dollar-value LIFO method will make the LIFO method economically feasible for more small businesses.

Tax year

The act limits a tax advantage of using the corporate form available under prior law. Under prior law, owners of a business would defer taxes on some of their business income by putting the business entity on a fiscal year and using a calendar year for their personal taxes. Income realized between the end of the fiscal year and the calendar year would not be included on an owner's tax return until the end of the calendar year.

The act provides that a professional service corporation and an S corporation generally must use the calendar year as its taxable year. Section 806(b) and (c)(1)(i) of the act In addition, the act strengthens the prior law requirement that a partnership must conform its taxable year to the taxable year of its owners. Section 806(a)(1) of the act An exception to the general rules exists if the entity can establish, to the satisfaction of the secretary of the treasury, a business purpose for having a different taxable year. Section 806(a)(1), (b)(2) and (c)(1) of the act Thus, the act narrows opportunities for tax deferral by owners of professional service corporations, S corporations and partnerships.

As a business converts to a calendar year in 1987, its present fiscal year will end in 1987 and an additional short tax year will end December 31, 1987. This process will require partners, S corporation shareholders and professional service corporations to include more than 12 months of income on their return for 1987. The act allows partners and S corporation shareholders to spread the income in excess of expenses from the short tax year over four years. Section 806(e)(2)(C) of the act Professional service corporations, however, will be required to recognize all of the additional income in 1987.

Limitation on use of cash method of accounting

Section 801 of the act adds Section 448 to the Code limiting the taxpayers who can use the cash method of accounting. Section 448(a) provides that the cash method may not be used by a C corporation, a partnership which has a C corporation as a partner or a tax shelter. There are exceptions to the general rule for farming businesses, qualified personal service corporations and a C corporation or partnership which has a C corporation as a partner if the average annual gross receipts of such entity for the preceding three tax years does not exceed $5,000,000. Section 448(b) of the Code The provisions of Section 448 generally are applicable to taxable years beginning after December 31, 1986. Section 801(d)(1) of the act A taxpayer may elect to apply the cash method to any loan or lease or any transaction with a related party entered into on or before September 25, 1985. Section 801(d)(2) of the act

Employee benefits under qualified plans

The act enacted numerous changes to the provisions of the Code dealing with qualified retirement plans and statutory employee benefit plans. Title XI of the act Although a decision of such modifications under the act is beyond the scope of this article, some of the changes which will have an impact on the plans of qualified small businesses include: new contribution and benefit limitations for defined contribution plans and defined benefit plans; reductions in the amount payable from a defined benefit plan; revised rules governing the integration of qualified plan benefits with social security benefits; new nondiscriminatory tests; minimum coverage requirements for qualified plans; accelerated vesting schedules; modified restrictions on deferrals under and withdrawals from cash or deferred arrangements; and uniform distribution rules for all qualified plans. Plan amendments are needed to comply with the provisions of the act and must be made no later than the last day of the first plan year beginning on or after January 1, 1989. Section 1140 of the act A qualified plan must comply in operation, however, with the new provisions of the act as of the effective date of each provision.

The act also modifies the rules for the simplified employee pension (SEP), which are designed to allow small employers to provide pension plans for their employees without the complexities and costs normally associated with qualified pension plans. Several changes to the SEP requirements decrease the administrative requirements applicable to an employer maintaining a SEP. The act adds an elective salary reduction arrangement to SEPs under which employees may elect to have the employer make pay-

ments to the SEP or to the employee in cash. Section 408(k)(6) of the Code Elective deferrals by an employee generally are limited to $7,000 of his annual salary. Section 402(g)(1) of the Code Contributions by an employer on behalf of an employee to a SEP currently are not taxable to the employee. Section 408(h) of the Code The elective salary reduction feature is available only if the employer has no more than 25 employees at any time during the preceding year and the election is made with respect to not less than 50 percent of the employees of the employer. Section 408(K)(6) of the Code

Conclusion

Prudent management requires every small business to review the possible impact the tax revisions enacted by the act will have on both the business and its owners and to evaluate methods of making the new provisions of the act work to their advantage. The review should include not only an analysis of the potential tax liability of the business and its owners if the business continues in its present form, but also the cost and consequences of converting the business to another entity. The cost of liquidating may be less for small corporations that qualify for a transitional rule that allows certain small closely held companies to enjoy beneficial provisions of prior law with respect to liquidations completed before January 1, 1989.

Under the act, the nature of a taxpayer's income and the manner of operating the activity that produces the income is significant for tax purposes. Taxpayers with passive losses and credits will want to seek means of generating passive income or of transforming a passive activity to a business activity through material participation in the activity. It may be beneficial for a taxpayer to meet the active participation standard with respect to rental real estate activities. Acquisition of personal property should be timed to avoid the mid-quarter convention which is applicable when more than 40 percent of the aggregate bases of all the personal property placed in service by the business during the year is placed in service during the last three months of the tax year.

Several provisions of the act were included specifically to assist small businesses. Small businesses may be eligible for the simplified rules for using the LIFO inventory method and may be excluded from the requirements of the uniform capitalization rules for personal property acquired for resale. Certain small businesses will not be required to use the cash method of accounting if the average annual gross receipts of such entity for the preceding three tax years do not exceed $5,000,000. The modifications to the rules for SEPs may make these pension plans more attractive to small employers. Thus, careful tax and business planning is required to lessen any potential adverse consequences of the act and to determine the provisions of the act which are advantageous to a small business and its owners. ■

FOOTNOTES

[1]The term "corporation" as used in this article refers to C corporations or corporations that are not S corporations.

[2]An "S corporation," named after the subchapter of the Internal Revenue Code (Sections 1361 through 1379) that creates S corporations, is a hybrid entity with elements of both a partnership and a corporation. The taxable income of an S corporation is taxed in a manner similar to that of a partnership: the items of income, deductions and credits of an S corporation are allocated to the shareholders in proportion to their ownership interest and then included on their personal income tax returns. An S corporation has other characteristics of a corporation such as limited liability. A corporation and its shareholders must elect S corporation status. To be eligible for S corporation status, a corporation must meet certain requirements, including no more than 35 shareholders, no corporate shareholders and only one class of stock.

[3]All references to the Code are to the Internal Revenue Code of 1986.

Introduction To Lender

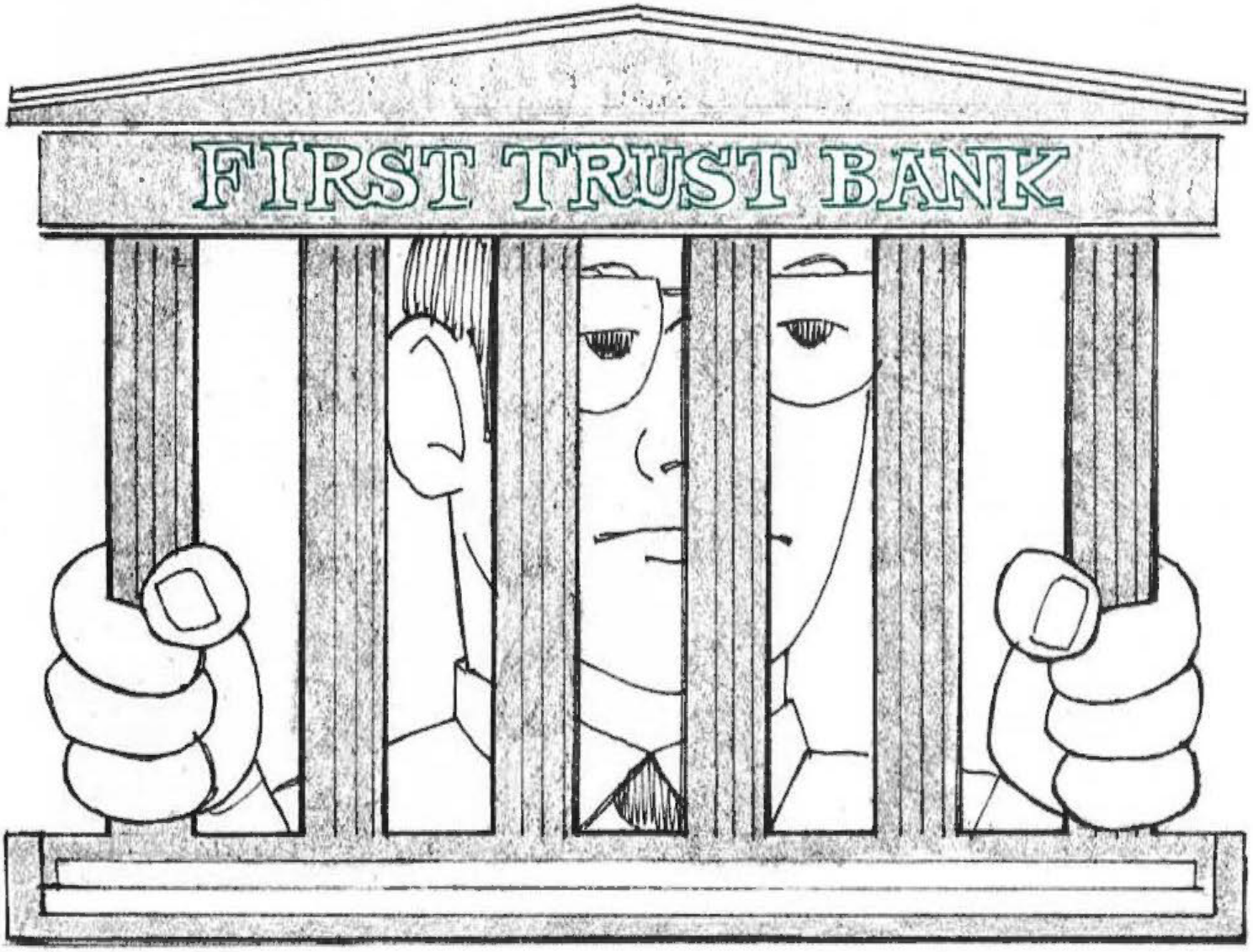
by Gregory H. Hawley

Introduction

For those who adhere to time-worn clichés about banks foreclosing mortgages on widows and orphans, there are now legal remedies to curb the power of creditors. Courts across the country have rendered judgments against banks under the broad rubric of "lender liability" to compensate debtors who prove that lenders have improperly meddled in the debtors' affairs. Thus far, however, the new theories of liability have not helped any widows or orphans, but have assisted corporations and corporate owners in recovering millions of dollars in business losses arising from concerned lenders who interfered with corporate governance or management to protect their loans. (For example, two cases filed in federal district court in Texas by William Herbert Hunt and Nelson Bunker Hunt against 23 lenders alleges $13.8 billion in damages).

Although the term "lender liability" may be new, the theories of liability are not. Most of the lender liability cases allege common law causes of action such as fraud, duress, breach of good faith, tortious interference with business relations, instrumentality, principal-agent and breach of fiduciary duty. Some cases also assert statutory claims under the Uniform Commercial Code, federal securities laws, the Racketeer Influenced and Corrupt Organizations (RICO) statute or the federal environmental superfund statute.

To date, the seminal lender liability cases have occurred in jurisdictions outside of Alabama, but they have traveled under theories recognized by Alabama courts. Consequently, it seems only a



Liability

matter of time before Alabama banks and other lending institutions encounter lender liability lawsuits in Alabama. This article will outline the most significant theories of lender liability, describe the leading cases in those areas and give an account of the present state of the law in Alabama.

Fraud

In the celebrated decision of *State National Bank v. Farah Manufacturing Co.*, 678 S.W. 2d 661 (Tex. App. 1984), the Texas Court of Appeals upheld the trial court's $18.9 million judgment against the creditors of Farah Manufacturing Co. (FMC). FMC instituted the action against four creditors based on the creditors' actions surrounding a management change clause in a $22 million loan agreement. The management change clause imposed default if any election to the office of president and chief executive officer was considered by any two of the four creditor banks to be adverse to the interests of the banks.

William Farah, a descendant of FMC's founder and a former CEO of FMC, indicated an interest in returning as CEO. Several of the banks, through their lawyers, vowed to members of the board of directors that they would "padlock the company's doors" and "bankrupt" the company if Farah were installed as CEO. To the contrary, however, the evidence showed that the banks had decided that they would not declare default if Farah called their bluff and were elected. The board heeded the threats and failed to elect Farah. Consequently, when FMC's financial condition became desperate, Farah successfully initiated a proxy fight for return as CEO and, after engineering a significant economic upturn, instituted a fraud action against the lending banks for their threat "to bankrupt" the company and for the damages resulting from the subsequent downward slide of FMC before Farah regained control as CEO. The Texas Court of Appeals enumerated the elements for misrepresentational fraud as follows:

(1) the making of material misrepresentations;

(2) which are false;

(3) with knowledge of the falsity;

(4) with the intention that the misrepresentation will be acted upon;

(5) actual reliance; and

(6) injury.

The *Farah* court held that where a promise regarding future action is made with the intent that it will not be performed, and is made to deceive a person, then it is actionable as a fradulent representation. The court found the creditors' threats constituted a misrepresentational fraud. (The court also stated a variety of alternate holdings which will be discussed infra.) As previously noted, the trial court assessed damages at $18.9 million (while on appeal to the Texas Supreme Court the parties settled the case, reportedly for $12-13 million).

Alabama law is in accordance with *Farah's* interpretation of fraud. The Alabama Supreme Court, in *Haddox v. First Alabama Bank*, 449 So. 2d 1226 (Ala. 1984), stated that "whether a representation is made willfully, recklessly, or mistakenly, the critical elements of fraud include: (1) a false representation, (2) concerning a material fact, (3) upon which the plaintiff has relied, and (4) has been damaged as a proximate result." 449 So. 2d at 1229

Further, an Alabama federal court, in language that could apply equally to the threats to "padlock the doors" in *Farah*, maintained that "[t]he only basis upon which [statements promissory or threatening future action] could support a finding of fraud would be a showing that at the time the promise of future action was made, the promissor did not have any intention of carrying out the promise as made and instead had an actual intent to deceive." *Smith v. Chase Manhattan Corp.*, 458 F. Supp. 740 (N.D. Ala. 1978) (citing *Shepherd v. Kendrick*, 236 Ala. 239, 181 So. 782 [1938]) Thus, *Farah's* holding on the fraud count clearly is in accordance with Alabama law.

Economic duress

In an alternative to its holding based on fraud, the *Farah* court also maintained that FMC had successfully proved damages under a theory of economic duress, and cited *Williston on Contracts:*

> "Economic duress (business coercion) may be evident by forcing a victim to choose between distasteful and costly situations, i.e. bow to duress or face bankruptcy, loss of credit rating or loss of profits from a venture"

13 *Williston on Contracts* § 1617 (3d ed. 1970)

The elements of duress stated by the *Farah* court were:

(1) the threat to do an act the threatening party has no right to do,

(2) of a nature to destroy the free agency at the party to whom it is directed,

(3) the restraint caused by the threat must be eminent, and

(4) the person to whom the threat is made must have no present means of protection.

Thus, the same facts used to prove fraud also supported FMC's theory that the creditors had committed economic duress in interfering with FMC's election of officers. 678 S.W. 2d at 684

Like the Texas Court of Appeals, the Alabama Supreme Court also has expanded the common law doctrine of duress into the doctrine of economic duress. *International Paper v. Whilden*, 469 So. 2d 560 (Ala. 1985); *Ralls v. First Federal Savings and Loan*, 422 So. 2d

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764 (Ala. 1982); *Ancora Corp. v. Miller Oil Purchasing Co.*, 396 So. 2d 672 (Ala. 1981); *McElrath v. Consolidated Pipe and Supply*, 351 So. 2d 560 (Ala. 1977)

In *International Paper v. Whilden, supra*, the Alabama Supreme Court adopted the Restatement (Second) of Contracts § 175 (1975) definition of economic duress:

> "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." 469 So. 2d at 562

Further, the court found the legal elements of the economic duress to be: "(1) wrongful acts or threats, (2) financial distress caused by the wrongful acts or threats, (3) the absence of any reasonable alternative to the terms presented by the wrongdoer." Id. at 562

The *Whilden* court invalidated an indemnity agreement between the plaintiff and the defendant because the plaintiff had been coerced into signing the agreement by defendant's refusing to pay plaintiff $7,000 for work already performed unless the indemnity agreement were executed, and defendant's misrepresenting (by minimizing) the potential liability under the indemnity agreement. Id. at 563 Under the circumstances of this case, the plaintiff had no option but to indemnify the defendant. Consequently, the court found duress.

The Alabama Supreme Court also has addressed economic duress in the context of bank loans, in *Ralls v. First Federal Savings and Loan Association*, 422 So. 2d 764 (Ala. 1982). In this case, the plaintiff was granted a construction loan guaranteed at a 10 percent interest rate. When the closing was postponed three months by construction delays, the defendant bank attempted to raise the interest rate to 12 percent. The Alabama Supreme Court reversed a directed verdict for the bank and remanded the case for jury consideration of plaintiff's claim that economic duress forced him to accede to the higher interest rate. 422 So. 2d at 766

Based on these cases, Alabama courts would be inclined to consider lender liability cases on the economic duress theory.

Tortious interference

In its third alternative holding, the *Farah* court found that FMC had proved damages under a cause of action for tortious interference with contractual relations. Such interference included the forcing out of Farah, the installation as CEO of persons affiliated with the banks, the interference with Farah's attempt to use the proxy system to regain control of FMC and the insistence that FMC hire a consultant. 678 S.W. 2d at 677 Further, it was proven that the bank's consultant was inexperienced in the mens' apparel business and that many of his "improvements" in FMC's operations were "too expensive, poorly priced and contrary to market demand." 678 S.W. 2d at 677 In addition, the banks insisted that their consultant be named CEO and, from this position, the consultant sold assets of FMC, the proceeds of which were used to make repayments on FMC's loan. 678 S.W. 2d at 678

The common law elements for a cause of action for tortious interference are: (1) existence of a contract; (2) the willful and intentional interference with the contract; (3) the intentional act as approximate cause of the damage; and (4) actual damage. The *Farah* court seems to have focused more on the bank's interference with corporate governance than on the interference with an actual contract. Nevertheless, their alternative holding in this regard was based on the cause of action for tortious interference of contract.

In 1986 the Alabama Supreme Court expanded the cause of action for interference with contractual relations to incorporate the tort of interference with business relations. *Gross v. Lowder Realty*, 494 So. 2d 590 (Ala. 1986) Breaking new ground in this area, the Alabama Supreme Court held that the requirements of the tort of intentional interference with business or contractual relations requires:

> (1) the existence of a contract or business relation;
>
> (2) defendant's knowledge of the contract or business relation;
>
> (3) intentional interference by the defendant with the contract or business relation;
>
> (4) absence of justification for the defendant's interference; and
>
> (5) damage to the plaintiff as a result of defendant's interference.
>
> 494 So. 2d at 597

This recent Alabama case clearly has formulated a cause of action sufficiently broad to incorporate fact situations such as those of *Farah* without relying on the more narrow tort of interference with contractual relations.

Breach of good faith

In most states, the common law implied a duty of good faith in contract. Later, this common law concept was incorporated in the Uniform Commercial Code § 1-203. Consequently, lender liability cases involving allegations of bad faith may involve both common law and statutory allegations.

The Sixth Circuit recently upheld a trial court's $7.5 million judgment against Irving Trust Co. in a case that focused primarily on common law bad faith. In *KMC Co. v. Irving Trust Co.*, 755 F. 2d 752 (Sixth Cir., 1985), KMC, a grocery wholesaler and retailer, entered into a financing agreement which provided KMC with a $3.5 million line of credit and gave Irving Trust a security interest in inventory and accounts receivable. KMC brought suit for breach of contract against Irving Trust when the bank refused without notice to advance $800,000 requested by KMC despite the fact that the request did not exceed the $3.5 million limit on the line of credit.

The Sixth Circuit approved the trial court's instruction to the jury that there is "in every contract an obligation of good faith." Id. at 759 (citing *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79, 87 N.E. 163) Further, the appellate court implied that the rapid turnover of inventory in the grocery wholesale business created a constant need for outside financing and asserted that "good faith would require a period of notice to KMC to allow it a reasonable opportunity to seek alternative financing, *absent valid business reasons precluding Irving from so.*" Id. at 759 (emphasis added)

The facts developed at trial clearly favored KMC. Irving Trust conceded that at the time of the termination of the loan, the bank was adequately secured. Further, an executive vice president and manager of secured lending activities for Irving Trust "acknowledged that Irving owed its clients a duty of good faith, that it was not a policy of Irving to terminate financing without notice and that if Sa-

rokin (the loan officer) believed that Irving was adequately secured he would not have been acting in accordance with that duty of good faith to have refused without notice to advance funds to KMC." Id. at 761 Without hesitation, the Sixth Circuit upheld the trial court's judgment.

Thus far, Alabama courts have been reluctant to find a cause of action for bad faith except in the field of insurance law. The Alabama Supreme Court, in *Kennedy Electric Co. v. Moore-Handley*, 437 So. 2d 76 (Ala. 1983), a breach of contract case, stated that "[a]lthough every contract does imply good faith and fair dealing (see § 7-1-203, Code 1975), it does not carry with it the duty imposed by law which we have found in the context of insurance cases. We are not prepared to extend the tort of bad faith beyond the area of insurance policy cases at this time." 437 So. 2d at 81 In 1984, the court reaffirmed the validity of *Kennedy Electric* in *Dickey v. Alabama Farm Bureau Insurance Co.*, 447 So. 2d 693 (Ala. 1984).

At the same time, however, the door seems to be opening in banking cases involving the common law and UCC breach of good faith. For example, in *Brown-Marx Associates, Ltd. v. Emigrant Savings Bank*, 527 F. Supp. 277 (N.D. Ala. 1981), aff'd. 703 F. 2d 1361 (Eleventh Circuit 1983), the court noted that the Alabama Supreme Court had not recognized an "implied duty in law, as distinguished from an implied covenant, of good faith except in an insurance contract context." 527 F. Supp. at 283 The court added, however, that "the long-standing legal principle in this state holds that every contract carries with it an implied law duty of good faith and fair dealing" Id. at 278 (citing *Chavers v. National Security Fire and Casualty Co.*, 405 So. 2d 1 (Ala. 1981) Further, the court noted "that this duty may be imposed by the law is evidenced by a line of cases in this state allowing an action in tort in insurance cases." Id. at 278 The opinion seems to invite further consideration by the Alabama Supreme Court of duties of good faith in the banking context. Most of the other cases that seem to urge reconsideration of Alabama law on this point, however, focus on the Uniform Commercial Code rather than on common law.

UCC good faith

In *First National Bank v. Twombley*, 689 P. 2d 1226 (Mont. 1984), the defendant had taken a promissory note of $3,500 and granted a security interest in restaurant kitchen equipment. When the defendant left the restaurant business, the loan officer at First National Bank agreed to restructure the loan with a $500 payoff and converted the $3,000 obligation to an installment loan. Unfortunately, the loan officer left town for several weeks and when the promissory note came due, the bank did not know of this agreement. When the bank sued to recover on the delinquent promissory note, the borrower counter-claimed for breach of good faith.

The Montana Supreme Court found that the bank had breached its duty of good faith imposed by law (under the

UCC), and not just its duty imposed by contract. Based on this distinction, the Montana Court remanded the case for further consideration of damages available in tort that were inapplicable under the contract claim. 689 P. 2d at 1230 Specifically, the court noted that punitive damages might be available if malice, oppression or fraud were shown. Id. at 1230

Alabama cases seem to be moving in the direction of finding a cause of action for breach of UCC good faith. In *Moseley v. Washington County State Bank*, 491 So. 2d 229 (Ala. 1986), the Alabama Supreme Court reversed the trial court's directed verdict and held that the plaintiff had offered sufficient evidence of a duty of due care to merit jury consideration. 491 So. 2d at 232

Moseley involved a suit by a bank depositor whose account was automatically debited monthly to pay the depositor's mortgage. The bank in turn issued a cashier's check to the mortgagee. On February 23, the depositer deposited sufficient funds to make the necessary payment, but the bank did not prepare and mail a cashier's check until March 1, which was received March 3. When the mortgagee instituted foreclosure proceedings, the depositor/mortgagor commenced action against the bank for negligence.

The Alabama Supreme Court relied on articles one and four of the UCC to remand the case for jury consideration. First, the court noted the commentary to § 7-4-103: "Under this article banks come under the general obligations of the use of good faith and the exercise of ordinary care." 491 So. 2d 231 Second, the court indicated that there also was sufficient evidence for the jury to find that the plaintiff and defendant had an "agreement" under the UCC through their "course of dealing" in making mortgage payments to the mortgagee. Id. at 232 See Ala. *Code* § 7-1-201 (3). Consequently, the court held that *Moseley* presented sufficient evidence to show that the Washington County State Bank owed a duty of ordinary care in preparing and delivering the cashier's checks and that this issue should go to the jury. Id. at 232

Based on the recent Alabama cases (both the *Moseley UCC* case and the Brown Marx common law case), it seems evident that the Alabama Supreme Court is prepared to use the UCC as a vehicle to extend liabilities for breach of good faith in the banking context.

Principal-agent

Frequently lender liability arises in the context of the lender's controlling the operations of the debtor to the extent that courts find that the debtor becomes the mere instrumentality or the agent of the lender.

The most extreme example of the principal-agent theory of lender liability is *A.C. Jensen Farms Co. v. Cargill, Inc.*, 309 N.W. 2d 285 (Minn. 1981). In this action a company representing a group of individual farmers brought action against Cargill, which had lent money to Warren Grain and Feed Co., a failing company which had outstanding obligations with the plaintiffs.

Initially, Warren had obtained open account financing from Cargill up to $175,000, but as Warren's financial condition grew worse, Cargill gradually took greater measures to protect its loan. Over time, Cargill required Warren to grant a right of access to examine Warren's books for audit and inspection, required that no capital improvements of over $5,000 would be made without Cargill's consent, required that no dividends would be declared and required that no stock would be sold or purchased without Cargill's consent.

The Minnesota Supreme Court concluded that Warren had become Cargill's agent for the purchase and sale of grain for market, for the purchase and sale of seed grain and for the storage of grain. 309 N.W. 2d at 290 Thus, the court held Cargill liable for the outstanding obligations of Warren toward the plaintiffs.

In addition, the court delineated the indicia of control that led to its principal-agent holding: (1) Cargill's constant recommendations to Warren; (2) Cargill's right of first refusal on grain; (3) Warren's inability to purchase stock or pay dividends; (4) Cargill's right of entry to check records and audit accounts; (5) Cargill's criticism of Warren's finances and salaries; (6) Cargill's determination that Warren needed "strong paternal guidance"; (7) Cargill's provision of forms on which its name was printed; (8) Cargill's financing of all of Warren's purchases; and (9) Cargill's power to discontinue the financing of the operation. Id. at 291

Alabama law also embodies theories based on such indicia of control. The most significant Alabama case involving principal-agent or instrumentality concepts is *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp.*, 483 F. 2d 1098 (Fifth Cir. 1973), a federal case involving Alabama law.

The Fifth Circuit noted that "'instrumentality' is perhaps the term most frequently employed to describe the relationship between a dominant corporation and its subservient corporation, and Alabama law follows this characterization." Id. at 1103 Further, the court delineated the instrumentality theory under Alabama law:

> "The notion of separate corporate existence will not be recognized where a corporation is so organized and controlled and its business is conducted in such a manner as to make it merely an instrumentality of another...," Id. at 1103 (quoting *Forest Hill Corp. v. Latter & Blum, Inc.*, 249 Ala. 23, 29 So. 2d 298, 302 [Ala. 1947])

Stressing that "facts are critical in cases under the 'instrumentality' rule" the court held that the trial court's "motion for a directed verdict in favor of defendants was properly granted." 483 F. 2d at 1107-1109

The court also enumerated the elements of instrumentality: "The control required for liability under the instrumentality rule amounts to total domination of the subservient corporation . . ." and "requires that fraud or injustice proximately result from a misuse of this control." 483 F. 2d at 1106

Breach of fiduciary relationship

Most of the recent lender liability cases do not involve allegations of breach of fiduciary relationships. Nevertheless, in Alabama this area may be fertile ground for lender liability cases. Alabama courts "have traditionally viewed the relationship between a bank and its customer as a creditor-debtor relationship which does not impose a fiduciary duty of disclosure on the bank. A fiduciary duty may arise when the customer reposes trust in a bank and relies on the bank for financial advice, or in *other special circumstances*." *Baylor v. Jordan*, 445 So. 2d 254, 256 (Ala. 1986) (emphasis added)

Alabama courts have not yet defined the "special circumstances" that may give

rise to a fiduciary relationship. Consequently, a bank's close involvement in the day-to-day operations of a loan workout or other similar financial advice may well impose upon the bank the obligations of a fiduciary. In those circumstances the creditor must disclose all material facts relating to the transaction and will be subject to intense scrutiny by Alabama courts. "Where confidential or fiduciary relations exists, which afford the power and means to one party to a transaction to take undue advantage of the other party, then if there is the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." *Baylor v. Jordan*, 445 So. 2d 256 (quoting *Brasher v. First National Bank of Birmingham*, 232 Ala. 340, 168 So. 42, 46 (1936)

Statutory liability issues

A more complete review of lender liability theories would include more extensive discussions of following federal statutes:

RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1961 et seq., generally prohibits "racketeering" and profiting from racketeering activity. As interpreted by the United States Supreme Court, racketeering activity also may include specific acts, such as counterfeiting, embezzlement, mail fraud, wire fraud and fraud in the sale of securities. Because of the broad interpretation of the RICO statute, bank regulators now frequently use RICO in bank failure cases, and federal prosecutors frequently add RICO counts to indictments in business cases. RICO also authorizes treble damages, plus costs and reasonable attorneys fees.

Federal securities liabilities

The Securities Act of 1933 and the Securities Exchange Act of 1934 include a provision on "aiding and abetting," whereby lenders sometimes are held liable for securities laws violations of a borrower. Under aider and abetter liability, a bank that merely recommends a security or an entity offering a security may be deemed an "abetter" if the security ultimately violates securities laws.

Superfund

Lenders also may incur significant risks of liability under federal environmental laws such as The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC § 4607 (superfund). If a lender obtains control over a borrower's property (through foreclosure or otherwise) and the property has an environmental problem, such as a chemical waste site, federal laws will impose on the lender the duty of cleanup and/or disposal.

Conclusion

While lender liability has come into the national spotlight over the past two years, it is a trend whose impact has not yet been felt by Alabama courts. Nevertheless, because lender liability theories generally follow common law concepts as they exist in Alabama and elsewhere, the development of lender liability law in Alabama is only a matter of time.■

cle opportunities

july

10 friday

TAX REFORM ACT OF 1986
Civic Center, Montgomery
National Business Institute
Credits: 7.2 Cost: $96
(715) 835-8525

13-17

LAW OFFICE MANAGEMENT
Inn on the Park, Toronto
ICLE of Michigan
Credits: 14.9
(313) 764-0533

14-15

CIRCUIT & DISTRICT JUDGES' ANNUAL CONFERENCE
E.H. Myers Civic Center, Gulf Shores
Alabama Judicial College
(205) 834-7990

16 thursday

ANNUAL SEMINARS
Riverview Plaza, Mobile
Alabama State Bar Sections
Credits: 1.0-3.0 each
Cost: included in convention registration fee
(205) 269-1515

17 friday

UPDATE '87: RECENT DEVELOPMENTS IN THE LAW
Riverview Plaza, Mobile
Alabama State Bar Young Lawyers' Section
Credits: 6.0
Cost: included in convention registration fee
(205) 269-1515

19-25

ANNUAL MEETING
Marriott Marquis, New York
National Bar Association
Credits: 14.4
(202) 797-9002

20 monday

BASIC UCC SKILLS—ARTICLES 2 AND 2A
Peat Marwick Professional Development Center, New York
Practising Law Institute
Credits: 7.2 Cost: $225
(212) 765-5700

20-27

TAX I AGAIN
Law Center, Tuscaloosa
University of Alabama School of Law
Credits: 31.2 Cost: $350
(205) 348-6230

21 tuesday

BASIC UCC SKILLS—ARTICLES 3 AND 4
Peat Marwick Professional Development Center, New York
Practising Law Institute
Credits: 6.6 Cost: $225
(212) 765-5700

22 wednesday

BASIC UCC SKILLS—ARTICLES 6 AND 8
Peat Marwick Professional Development Center, New York
Practising Law Institute
Credits: 6.6 Cost: $225
(212) 765-5700

23-24

BASIC UCC SKILLS—ARTICLES 5 AND 9
Peat Marwick Professional Development Center, New York
Practising Law Institute
Credits: 13.2 Cost: $390
(212) 765-5700

23-25

EDUCATION LAW
The Knickerbocker Hotel, Chicago
National Organization on Legal Problems of Education
Credits: 13.2 Cost: $60
(913) 273-3550

25-26

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

27-31

ESTATE PLANNING
Hilton Inn, Dallas
Southwestern Legal Foundation
Credits: 33.0 Cost: $825
(214) 690-2377

29-31

TRIAL EVIDENCE, CIVIL PRACTICE & EFFECTIVE LITIGATION
Eldorado Hotel, Santa Fe
American Law Institute-American Bar Association
Credits: 23.9 Cost: $495
(215) 243-1600

31 friday

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

august

6-7

INTRODUCTION TO QUALIFIED PENSION AND PROFIT SHARING PLANS
Ambassador West Hotel, Chicago
Practising Law Institute
Credits: 14.4 Cost: $390
(212) 765-5700

13-16

SUMMER SEMINAR
Perdido Beach Hilton, Gulf Shores
Alabama Trial Lawyers' Association
Cost: $95
(205) 262-4974

20 thursday

COLLECTIONS
Riverview Plaza, Mobile
Alabama Bar Institute for CLE
(205) 348-6230

20-21

ACCOUNTING FOR LAWYERS
The Halloran House, New York
Practising Law Institute
Credits: 13.2 Cost: $375
(212) 765-5700

CREATIVE REAL ESTATE FINANCING
The Mark Hopkins, San Francisco
Practising Law Institute
Credits: 13.2 Cost: $425
(212) 765-5700

21 friday

COLLECTIONS
Birmingham-Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 248-6230

INTRODUCTION TO TRA '86
Ramada Civic Center Plaza, Birmingham
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

CONSTRUCTION LAW
Ramada Renaissance, Jackson
Mississippi Continuing Legal Education
Credits: 7.2 Cost: $90
(601) 982-6590

23-28

PERSONAL INJURY LITIGATION
Marriott's Mark Resort, Vail
Association of Trial Lawyers of America
Cost: $550
800-424-2725

CRIMINAL LITIGATION
Marriott's Mark Resort, Vail
Association of Trial Lawyers of America
Cost: $550
800-424-2725

COMMERCIAL LITIGATION
Marriott's Mark Resort, Vail
Association of Trial Lawyers of America
Cost: $550
800-424-2725

24 monday

BASIC UCC SKILLS—ARTICLES 2 AND 2A
Hyatt Regency, San Francisco
Practising Law Institute
Credits: 7.2 Cost: $225
(212) 765-5700

24-26

PRODUCTS LIABILITY
Marriott's Mark Resort, Vail
Association of Trial Lawyers of America
Cost: $275
800-424-2725

PROOF OF DAMAGES
Marriott Mark Resort, Vail
Association of Trial Lawyers of America
Cost: $275
800-424-2725

25 tuesday

BASIC UCC SKILLS—ARTICLES 3 AND 4
Hyatt Regency, San Francisco
Credits: 6.6 Cost: $225
(212) 765-5700

cle opportunities

26 wednesday

INTRODUCTION TO TRA '86
Admiral Semmes, Mobile
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

BASIC UCC SKILLS—ARTICLES 6 AND 8
Hyatt Regency, San Francisco
Practising Law Institute
Credits: 6.6 Cost: $225
(212) 765-5700

26-28

COURTROOM DYNAMICS
Marriott's Mark Resort, Vail
Association of Trial Lawyers of America
Cost: $275
800-424-2725

MEDICAL NEGLIGENCE
Marriott's Mark Resort, Vail
Association of Trial Lawyers of America
Cost: $275
800-424-2725

27 thursday

WILL DRAFTING
Civic Center, Montgomery
Alabama Bar Institute for CLE
(205) 348-6230

27-28

BASIC UCC SKILLS—ARTICLES 5 AND 9
Hyatt Regency, San Francisco
Practising Law Institute
Credits: 13.2 Cost: $390
(212) 765-5700

28 friday

WILL DRAFTING
Birmingham-Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

september

3 thursday

REAL ESTATE
Civic Center, Montgomery
Alabama Bar Institute for CLE
(205) 348-6230

4 friday

REAL ESTATE
Mobile
Alabama Bar Institute for CLE
(205) 348-6230

10 thursday

REAL ESTATE
Decatur
Alabama Bar Institute for CLE
(205) 348-6230

11 friday

REAL ESTATE
Birmingham-Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

17 thursday

FAMILY LAW
Civic Center, Montgomery
Alabama Bar Institute for CLE
(205) 348-6230

18 friday

FAMILY LAW
Birmingham-Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

ESTATE PLANNING UNDER TRA '86
Ramada Civic Center Plaza, Birmingham
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

24 thursday

ESTATE PLANNING UNDER TRA '86
Civic Center, Montgomery
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

TORTS
Von Braun Civic Center, Huntsville
Alabama Bar Institute for CLE
(205) 348-6230

25 friday

ESTATE PLANNING UNDER TRA '86
Admiral Semmes, Mobile
Cumberland Institute for CLE
Cost: $90
(205) 870-2865

DRUG TESTING: THE LEGAL ISSUE
Wynfrey, Birmingham
Irwin Associates, Inc.
Credits: 7.8 Cost: $150
(919) 229-9184

TORTS
Birmingham-Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

Attorneys Admitted to Bar, Spring 1987

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Michael Evan Auffenorde ..... Birmingham, Alabama
Harry Bell Bailey, III ..... Mobile, Alabama
Sharon Spence Bailey ..... Birmingham, Alabama
Rebecca Turnipseed Bergquist ..... Huntsville, Alabama
Jerry Lee Biddix ..... Birmingham, Alabama
Rebecca Joyce Knowles Bigbee ..... Montgomery, Alabama
Beth Allison Blackburn ..... Decatur, Alabama
Susan Lynn Blake ..... Phenix City, Alabama
Thomas Delbert Bobitt, II ..... Tuscaloosa, Alabama
John Robert Bowers, Jr. ..... Montgomery, Alabama
Sherry Cameron Broyles ..... Huntsville, Alabama
Robert Earle Burney, II ..... Opelika, Alabama
Lindsay Clay Callaham, Jr. ..... Wetumpka, Alabama
Albert Harvey Casey, Jr. ..... Birmingham, Alabama
Patricia Lynn Clem ..... Birmingham, Alabama
Roger Edward Cole ..... Mobile, Alabama
Phillip Ted Colquett ..... Birmingham, Alabama
Neal Presley Conner ..... Decatur, Alabama
Billy Earl Cook, Jr. ..... Decatur, Alabama
Cynthia Slate Cook ..... Decatur, Alabama
Lynn Angle Crosson ..... Palisades Park, New Jersey
Duncan Reid Crow ..... Semmes, Alabama
Laura Ann McDonald Dahle ..... Fairhope, Alabama
Pamela Giorlando Daniel ..... Birmingham, Alabama
Elbert Allen Dodd, Jr. ..... Birmingham, Alabama
Rodney Dixon Dorand ..... Montgomery, Alabama
Holly Stewart Green Dunlap ..... Birmingham, Alabama
Charles Wyatt Edmondson ..... Montgomery, Alabama
Regina Boatright Edwards ..... Wetumpka, Alabama
Thomas Randolph Edwards ..... Wetumpka, Alabama
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Terry Glen Hutcheson ..... Mentone, Alabama
Timothy Clark Hutchinson ..... Birmingham, Alabama
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George Benjamin Jones ..... Boulder, Colorado
John Harvey Jones ..... Livingston, Alabama
Wayne Michael Jones ..... Birmingham, Alabama
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Alice Marie Kracke ..... Montgomery, Alabama
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Matthew Willis Sowell ..... Northport, Alabama
Stephen David Springer ..... Mobile, Alabama
Bryan Allen Stevenson ..... Atlanta, Georgia
Blewett William Thomas ..... Jackson, Mississippi
Herman Young Thomas ..... Mobile, Alabama
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Louie Harold Turner, Jr. ..... Anniston, Alabama
William Sidney Underwood, Jr. ..... Birmingham, Alabama
Elizabeth Claire Vickers ..... Enterprise, Alabama
Foy Braxton Wagnon, Jr. ..... Birmingham, Alabama
James Armor Wagoner, III ..... Mobile, Alabama
Paul Stephen Ware ..... Birmingham, Alabama
Brenda Dunn Watson ..... Auburn, Alabama
Frances Angelyn Wells ..... Birmingham, Alabama
Sharon Woods Woodruff ..... Birmingham, Alabama
Keith Richard Zinder ..... Birmingham, Alabama

SPRING 1987 ADMITTEES

Lawyers in the Family

Marla Yvette Newman (1987) and Malcolm R. Newman (1982) (admittee and husband)

B. Allison Blackburn (1987), J. Gilmer Blackburn (1954), Gay Blackburn Maloney (1980) and Mark Daniel Maloney (1979) (admittee, father, sister and brother-in-law)

Winter 1987 Bar Exam Statistics of Interest

Number sitting for exam 188

Number certified to Supreme Court 101

Certification rate 54%

Certification percentages:

- University of Alabama 69%
- Cumberland 76%
- Alabama nonaccredited law schools 36%

Laurie Newman Smith (1987), Thomas A. Smith, Jr. (1957) and Steven C. Smith (1986) (admittee, father-in-law and husband)

Norma Ruth Haas (1987) and Harry B. Bailey, III (1987) (wife and husband co-admittees)

Norris W. Green (1987) and B. Kincey Green, Jr. (1978) (admittee and brother)

Ralph Wendell Sheffield (1987), Lawrence B. Sheffield, III (1981) and Lawrence B. Sheffield, Jr. (1955) (admittee, brother and father)

Walter Hayden, III (1987) and Judge Walter C. Hayden, Jr. (1955) (admittee and father)

Charles H. Giorlando (1987) and Pamela Giorlando Daniel (1987) (father and daughter co-admittees)

Michael Lewis Odom (1987) and Lewis G. Odom, Jr. (1949) (admittee and father)

Amy Williamson Jones (1987) and J. Fletcher Jones (1953) (admittee and father-in-law)

Mary Hunter Reaves (1987) and Preston C. Clayton (1931) (admittee and grandfather)

Billy E. Cook, Jr. (1987), Billy Earl Cook (1977), Cynthia Slate Cook (1987), Ralph E. Slate (1949) and Beth Slate Poe (1983) (admittee, father/father-in-law, admittee, father-in-law/father and sister-in-law/sister)

Elizabeth Claire Vickers (1987) and David Windell Vickers (1985) (admittee and brother)

Wayne Michael Jones (1987) and Donald Hugh Jones (1968) (admittee and father)

Neal P. Conner (1987) and Julian Harris (1927) (admittee and father-in-law)

Timothy C. Hutchinson (1987) and Rick Hutchinson (1983) (admittee and brother)

Regina B. Edwards (1987) and Thomas R. Edwards (1987) (wife and husband co-admittees)

MCLE News

by Mary Lyn Pike
Assistant Executive Director

Commission meeting

At its April 3, 1987, meeting the Mandatory CLE Commission:

1. Received the administrator's report on 1986 compliance—118 attorneys certified to the Disciplinary Commission for noncompliance, 134 deficiency plans approved;
2. Received the administrator's report on 1986 courses accredited—1,590 total, 318 in-state, 1,272 out-of-state;
3. Voted to amend Regulation 5.1, as follows: On or before January 31 of each year, each attorney subject to the CLE requirement and each attorney exempt from the requirement who wishes to receive credit for courses attended will submit a report on a form as the Commission shall provide concerning such attorney's completion of ~~exemption from or approved substitute for~~ the minimum hours of instruction, including reference to hours earned during that year and hours to be carried forward to the next year.
4. Received Chairman Huckaby's report on his meeting with the bar's Ethics Education Committee, where possible mandatory ethics education was discussed;
5. Received Commissioner Harris's report on his attendance of the American Bar Association's conference on lawyer competence, where law office management as a competence issue was discussed;
6. Voted to amend Regulation 3.6, adopting a 60-minute instructional hour, as have the rest of the southeastern states, and eliminating the 50-minute hour, effective January 1, 1988;
7. Considered, but voted against, eliminating the evaluation requirement for out-of-state programs attended by few, if any, Alabama bar members;
8. Established a CLE recognition award to be given to attorneys attending 25 or more hours of approved instruction in one year. Beginning at the close of 1987, such attorneys will receive a certificate and their names will be published in this journal;
9. Voted to certify to the Disciplinary Commission an attorney who had an approved deficiency plan but earned his credits after the March 1 deadline;
10. Denied three requests by attorneys subject to the CLE requirement for waiver of the late filing fee;
11. Authorized a refund of a late filing fee paid by an attorney exempt from the CLE requirement;
12. Considered two complaints from attorneys whose proposed deficiency plans were mailed by the January 31 deadline but received on Monday, February 2, and thus not accepted; voted to interpret Rule 6A as requiring receipt of such plans by the first business day following January 31, if January 31 falls on a weekend or holiday;
13. Considered an inquiry on accreditation of a law firm's monthly review of cases decided; referred the firm to Regulation 4.1.14, approval of in-house seminars;
14. Considered a request that the commission examine closely and consider denying approval of "psychodrama/sociodrama in the courtroom" courses;
15. Authorized approval of a course designed for attorneys, municipal court officials and police officers (Administrative Office of Courts);
16. Denied approval of law student seminars for which no written materials were prepared or provided (Jones School of Law);
17. Authorized half-credit for half of 72 workshops scheduled as a law office management institute (ICLE of Michigan);
18. Approved two 1986 courses submitted after the March 1 deadline, so as not to penalize bar members for sponsors' dilatory handling of the applications (National Institute of Municipal Law Officers, Alabama Trial Lawyers).

coming events:

1987 Annual Meeting, Mobile—July 16-18

Board of Commissioners' Meeting—July 15

1987 Alabama Bar Directory published—August

Recent Decisions

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

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . juvenile court discovery methods established

Ex parte: Marshall County DPS (RE: Marshall County DPS v. Rives, 21 ABR 2115 (February 20, 1987)—In this case of initial impression, the supreme court granted certiorari to determine which methods of discovery are available in *all* juvenile courts under Rule 26(a), Ala.R.Civ.P.

The parties were involved in a child custody dispute and notified DPS they intended to take a DPS case worker's deposition. The case was being heard by a district court judge. DPS secured a protective order based on Rule 26(d). This rule leaves the availability of deposition discovery to the discretion of the court or by agreement of the parties, and also prohibits physical and mental examinations.

The district judge granted the protective order and the court of civil appeals reversed. The supreme court affirmed the court of civil appeals and held that: (1) the juvenile court, whether it is a circuit court or a district court, has authority to grant a motion to compel a discovery deposition and (2) physical and mental examinations also are available.

Discovery in the juvenile courts is not dealt with specifically in the Alabama Rules of Juvenile Procedure. The rules simply defer to the Rules of Civil Procedure. However, discovery for circuit and district courts is slightly different and, therefore, the supreme court had to resolve this apparent conflict.

In doing so, the supreme court noted that Rule 1, Ala.R.Juv.P., provides the same discovery shall be available for *all* juvenile proceedings, whether in circuit or district courts. Consequently, the underlying question was whether to restrict discovery or broaden discovery. The supreme court chose the latter and reasoned that since juvenile court cases involve child custody, and the welfare of the child is paramount, the state should have available to it every method by which it can fully discover the true facts and circumstances.

Defamation . . . discovery defamation-defendant's rights v. psychiatrist-patient's privilege

Ex parte: Dr. William H. Rudder (RE: Rudder v. Universal Communications Corp.), 21 ABR 1727 (February 30, 1987)—The supreme court was asked to decide whether a news media defendant in defense of an action for defamation brought by a psychiatrist (or other physician) has a right to

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David B. Byrne, Jr., is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Belser and covers the criminal portion of the decisions.

discover that doctor's privileged medical records pertaining to one of his patients. The supreme court answered the question in the negative.

Rudder, a psychiatrist, sued WALA-TV in Mobile for libel based on a broadcast of an investigative report of alleged abusive prescriptive practices involving Chris Galanos, the Mobile district attorney. WALA sought production of Rudder's records concerning treatment of Galanos. Galanos asserted his psychiatrist-patient privilege, Section 34-26-2, Ala. Code 1975. Rudder objected to producing the records. The trial court overruled Rudder's objection and held the psychiatrist-patient privilege must give way to WALA's First Amendment guarantee.

The supreme court recognized that there were three competing interests: (1) the public's interest in protecting the psychiatrist-patient privilege; (2) the defendant's discovery rights to prepare a defense of its case; and (3) the news media's right to free speech guaranteed by the First Amendment.

The supreme court stated that protection of a patient's and society's interest in preserving the confidentiality of a psychiatrist-patient's relationship is of sufficient importance to *generally* warrant exclusion from discovery. The supreme court also noted that while freedom of the press must be strongly defended, it does not include access to information not generally available to members of the public. Information recognized as privileged is not available to the public. The supreme court, however, recognized there may be instances where the psychiatrist-patient privilege will yield to a defendant's right to discovery or the media defendant's right to free speech, but those cases were not before the court.

Insurance . . .

***Strother v. Alabama Farm Bureau* overruled**

Howton v. State Farm Mutual Automobile, 21 ABR 2334 (March 13, 1987)—The plaintiffs appealed from a summary judgment granted in favor of State Farm. The plaintiffs' claimed that State Farm breached its agreement to pay for the cost of repairing their automobile which was damaged in an accident with State Farm's insured. In its order granting State Farm's motion for summary judgment, the trial court found that State Farm had agreed to have the plaintiffs' automobile repaired, the plaintiffs delivered the automobile to the agreed-upon repairman and after the repairs were made, State Farm breached its agreement.

The trial court, relying on *Strother v. Alabama Farm Bureau*, 474 So.2d 85 (Ala. 1985), held that an insurance carrier negotiating with a third party on behalf of its insured cannot be directly liable for torts or breaches of contract committed during the negotiations.

On appeal, the supreme court expressly overruled *Strother* and held that an insurance carrier may be directly liable to an injured third party where the insurer undertakes a new and independent obligation directly with a non-party to the insurance contract in its efforts to negotiate a settlement of the third party's claim. However, it is still well-established that an accident victim (a third party to a liability insurance contract) cannot maintain a direct action against the insurer *for the alleged liability of the insurer* where the legal liability of the insured has not been determined by judgment.

Insurance . . .

contractual duty to defend intentional wrongs not void as against public policy

Burnham Shoes, Inc. v. West American, 21 ABR 1862 (January 30, 1987)—In a case of first impression, the supreme court was asked to decide whether an insurance policy which obligates the insurer to defend the insured in a lawsuit based upon intentional wrongs is void as against public policy. The supreme court said "no" and declined to follow *St. Paul Ins. Cos. v. Talladega Nursing Home*, 505 F.2d 631 (5th Cir. 1979).

In this case, the insurance company covered Burnham's shoe business. Burnham was a defendant in an anti-trust suit and sued for conspiring to drive a competitor out of business. The supreme court stated that it found no authority concerning the public policy aspects of the insurer's duty to *merely provide its insured a defense* to such claims. It is well-established that the duty to defend is more extensive than the duty to pay. The supreme court failed to perceive how requiring an insurer to meet its contractual obligation to *provide a defense* to claims alleging intentional acts violates the public policy of Alabama. The insurance contract *expressly* provides for such coverage, and the insurer collected a premium therefor.

Recent Decisions of the Supreme Court of the United States

The Demise of *Enmund v. Florida*

Tison v. Arizona, 55 U.S. LW 4496 (April 21, 1987)—May persons who did not actually commit a murder and who never intended that a killing occur nevertheless be sentenced to death if they played a major part in a crime resulting in murder and displayed a reckless indifference for human life? The Supreme Court, five to four, said yes.

The defendants, two brothers, along with other members of their family, planned and effected the escape of their father from prison where he was serving a life sentence. They entered the prison with a chest filled with guns and armed their father and another convicted murderer. Later, the brothers helped to abduct, detain and rob a family of four, and watched their father and the other convict murder the members of that family. Although they both later stated they were surprised by the shooting, neither of the defendants made any effort to help the victims, but drove away in the victims' car.

After the Arizona Supreme Court affirmed their individual convictions for capital murder under the state's Felony-Murder and Accomplice-Liability statutes, the defendants collaterally attacked their death sentence in post-conviction proceedings alleging that *Enmund v. Florida*, 458 U.S. 782 (1982), required reversal. The Arizona Supreme Court determined that they should be executed, holding that *Enmund* requires a finding of "intent to kill" and interpreting that phrase to include situations in which the

defendant intended, contemplated or anticipated that lethal force would or might be used, or that life would or might be taken in accomplishing the underlying felony.

The Supreme Court, in an opinion delivered by Justice O'Connor, held that although the defendants neither intended to kill the victims nor inflicted the fatal wounds, the record supported a finding that they had the culpable mental state of reckless indifference to human life. The Eighth Amendment does not prohibit the death penalty in the case of a defendant whose participation is major in a felony that results in murder and whose mental state is one of reckless indifference.

Justice O'Connor, in a survey of state felony murder laws and judicial decisions after *Enmund*, noted that a societal consensus held that there were a combination of factors which might justify the death penalty even without a specific "intent to kill." Reckless disregard for human life also represents a highly culpable mental state that may support a capital sentencing judgment in combination with major participation in the felony resulting in death.

This ruling considerably dilutes the Supreme Court's earlier decision in *Enmund v. Florida*, 458 U.S. 782 (1982), which outlawed the death penalty for a "non-triggerman" who did not intend to take part in a killing, but whose crimes resulted in a death.

Bruton revisited

Richardson v. Marsh, No. 85-1433, 55 U.S. LW 4509 (April 21, 1987)—May prosecutors use a non-testifying co-defendant's confession if all references to the defendant are excised and jurors are told not to consider it when determining the defendant's guilt or innocence? The Supreme Court, six to three, said yes. Justice Scalia, further refining the decision in *Bruton v. United States*, 391 U.S. 123 (1968), said that such a confession may be admitted if it contains nothing to incriminate the defendant and jurors are told it should not be used against the defendant (a cautionary limiting instruction).

Richardson and Williams were charged with murder, robbery and assault. At their joint trial, Williams' confession was admitted over objection by Richardson's counsel. The confession had been modified to omit all reference to the defendant Richardson—and, indeed, the confession did not indicate that anyone other than Williams and a third accomplice participated in the crime.

At the time the confession was admitted, the jury was admonished by the trial judge not to use it in any way against the defendant Richardson. Williams did not testify, however, that Richardson's trial testimony indicated that she had been in the car with Williams and the third accomplice, but had not heard their conversation. She insisted that she had not intended to rob or kill anyone. Richardson was convicted of felony murder and assault to commit murder.

After exhausting the state appellate process, the defendant filed a writ of *habeas corpus* maintaining that she was entitled to a new trial under *Bruton v. United States*, 391 U.S. 123 (1968). The Supreme Court in *Bruton* had held that a defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment, when his non-testifying co-defendants' confession, naming him as a participant in the crime, is introduced at their joint trial, even if the jury is instructed to consider that confession only against the co-defendant.

Justice Scalia held that the confrontation clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction when, as here, the confession is abridged to eliminate not only the defendant's name, but any reference to her existence. Justice Scalia critically noted that the *Bruton* court recognized a very narrow exception to the almost invariable assumption of the law that jurors follow their instructions in the situation when the facially incriminating confession of a non-testifying co-defendant is introduced at a joint trial and the jury is instructed to consider the confession only against the co-defendant.

There are two important distinctions between *Richardson* and *Bruton* which cause it to fall outside the narrow exception *Bruton* created. First, in *Bruton*, the co-defendant's confession expressly implicated the defendant as his accomplice, whereas in *Richardson*, the confession was not incriminating on its face, but became so only when linked with other evidence introduced by the defendant at trial. The justices noted that where the necessity of such linkage is involved, there does not exist the overwhelming probability of the jury's being unable to disregard incriminating inferences that is the foundation of *Bruton*. Second, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce.

Fourth Amendment—within the curtilage "bright line" test

United States v. Dunn, 55 U.S. LW 4251 (March 3, 1987)—In 1980, DEA agents tracked Carpenter to Dunn's ranch by placing tracking beepers in some of his equipment. Aerial photographs of Dunn's ranch showed that Carpenter's truck was backed up to a barn behind the ranch house. The ranch was completely encircled by a perimeter fence and contained several interior barbed wire fences, including one around the house, approximately 50 yards from the barn, and a wooden fence enclosing the front of the bar with an open overhang and locked, waist-high gates.

Without a warrant, agents crossed the perimeter fence, several of the barbed wire fences and the wooden fence in front of the barn. They were led there by the smell of chemicals and, while there, could hear a motor running inside the barn. They did not enter the barn, but stopped at the locked gate and shined a flashlight inside observing what they believed to be a drug laboratory. Over the next 24 hours, the agents entered the immediate area next to the barn twice to confirm the laboratory's presence. The officers obtained a search warrant and executed it, arresting Dunn and seizing chemicals and equipment as well as bags of amphetamines.

The court of appeals reversed the trial court's decision holding that the barn was within the residence's curtilage and, therefore, within the Fourth Amendment's protective ambit. The Supreme

Court of the United States reversed in a seven-to-two decision.

Justice White delivered the opinion of the Court which held, first, that the area near the barn was not within the curtilage of the house for Fourth Amendment purposes, and, second, that the defendant had or possessed no expectation of privacy.

The Supreme Court's analysis of the curtilage question was resolved with reference to the following four factors:

(1) the proximity of the area to the home;

(2) whether the area is within an enclosure surrounding the home;

(3) the nature and uses to which the area is put; and

(4) the steps taken by the resident to protect the area from observation by passers-by.

Applying this four-prong test, Justice White concluded that the Dunn barn was not within the curtilage of the home and reversed the court of appeals. The Supreme Court's opinion, however, went further and found the defendant's contention that the barn was essential to his business, and, therefore, he had an expectation of privacy in it, was without merit, based upon the Court's prior decisions regarding the government's intrusion upon "open fields."

Burden of proof—self-defense

Martin v. Ohio, No. 85-6461, 55 U.S. LW 4232 (February 25, 1987)—The Supreme Court held that the Fourteenth Amendment's due process clause does not forbid the state from placing the burden of proving self-defense on the defendant charged with the crime of aggravated murder.

Martin was charged with aggravated murder, which was defined as "purposely, and with prior calculation and design, causing the death of another." She pled self-defense and testified that she had shot and killed her husband when he attacked her following an argument.

As to self-defense, the jury was instructed that it could acquit if it found by a preponderance of the evidence that the defendant had proved (1) that she had not precipitated the confrontation with her husband; (2) that she honestly believed that she was in imminent danger of death or great bodily harm, and that her only means of escape was to use force; and, (3) that she had satisfied any duty to retreat or avoid danger. The jury found her guilty and the Ohio appellate courts affirmed.

The Supreme Court of the United States in an opinion delivered by Justice White affirmed the conviction noting:

> "Neither Ohio law nor the above instructions violate the Due Process Clause of the Fourteenth Amendment by shifting to the defendant the State's burden of proving the elements of the crime. The instructions, when read as a whole, do not improperly suggest that self-defense evidence could not be considered in determining whether there was reasonable doubt about the sufficiency of the State's proof of the crime's elements."

More importantly, the Supreme Court held that it was not a violation of the due process clause for the state to place the burden of proving self-defense on a defendant charged with committing aggravated murder. The Court concluded that there was no merit to Martin's argument that it was necessary, under Ohio law, for the state to disprove self-defense since both unlawfulness and criminal intent are elements of serious offenses, while self-defense renders lawful that which otherwise would be a crime and negates a showing of criminal intent. Ultimately, the Supreme Court concluded that placing the burden of proof upon the defendant to go forward by a preponderance of the evidence in asserting self-defense does not shift the overall burden placed upon the state or prove each element of the charged offense beyond a reasonable doubt.

Other Important Federal Decisions

Assets marked for attorneys' fees held not subject to forfeiture

United States v. Harvey, 55 U.S. LW 1145 (4th Cir. March 6, 1987)—The controversy over the forfeitability of criminal defense attorney's fees under the 1984 Comprehensive Forfeiture Act finally has reached the federal appellate level. The United States Court of Appeals for the Fourth Circuit has decided that the new forfeiture provisions do, in fact, subject to forfeiture property to be used for legitimate attorneys' fees. As a result, the Fourth Circuit ruled that the provisions infringe on an accused's Sixth Amendment right to retain counsel of his own choice and cannot be upheld.

statutory encroachment upon a defendant's right to counsel is too great to be justified by any competing governmental interest. An accused's ability to employ a private attorney—a primary Sixth Amendment right—is severely inhibited by the freezing of his assets or even the threat of forfeiture. The court critically noted that while the alternative right to appointed counsel would remain, such fact did not cure the interference with a defendant's right to hire private counsel. ■

Deadline, *The Alabama Lawyer* articles, September edition —July 17

Young Lawyers' Section

Claire A. Black
YLS President

During the past year, the Young Lawyers' Section has successfully served the bar and the public, thanks to the leadership and efforts of its officers and executive committee members. These attorneys have been selfless in giving countless hours of work and truly have made possible the contributions made by the section. Officers and executive committee members include Charlie Mixon, Mobile, president-elect; N. Gunter Guy, Montgomery, secretary; James Anderson, Montgomery, treasurer; J. Bernard Brannan, Jr., Montgomery, immediate past president; Percy Badham, Birmingham, grants chair; Preston Bolt, Mobile, annual Seminar on the Gulf, arrangements chair; Laura Crum, Montgomery, bar admissions chair; Edward A. Dean, Mobile, disaster legal assistance chair; Ronald Forehand, Montgomery, senior bar administrative liaison chair; D. Patrick Harris, Montgomery, child advocacy chair; H. Thomas Heflin, Jr., Birmingham, issues affecting the legal profession chair; Sidney W. Jackson, III, Mobile, annual Seminar on the Gulf speaker and program chair; Frederick T. Kuykendall, III, Birmingham, ABA/YLS liaison chair; Lynn McCain, Gadsden, constitutional bicentennial chair; J. Terrell McElheny, Birmingham, publications chair; Keith Norman, Montgomery, Youth Legislature judicial program chair; John Plunk, Athens, bylaws chair; James P. Rea, Birmingham, alternate dispute resolution chair; Stephen A. Rowe, Birmingham, continuing legal education chair; Colleen M. Samples, Birmingham, domestic abuse chair; James T. Sasser, Montgomery, public relations chair; Stephen W. Shaw, Birmingham, Law Week chair; Rebecca L. Shows, Birmingham, legal services to the elderly chair; Amy Slayden, Huntsville, local bar liaison chair; William H. Traeger, III, Demopolis, law student liaison chair; and James H. Wettermark, Birmingham, meeting arrangements chair.

Without the collective efforts of this group and their commitment to the betterment of our bar, the progress enjoyed this year by the YLS would have been impossible.

Also in order are thanks to state bar President Bill Scruggs, who, in his term of office nevertheless found time to encourage the activities of the YLS, and to the board of bar commissioners and Alabama State Bar staff for their support.

HIGHLIGHTS OF 1986-87 YEAR

Continuing Legal Education—For the first time, the YLS co-sponsored with Cumberland School of Law and the Young Lawyers' Division of the ABA a bankruptcy seminar in October 1986, held in Birmingham. The annual Bridge the Gap seminar, co-sponsored by the YLS and the Alabama Bar Institute for Continuing Legal Education, was expanded to a two-day format for the March 1987 seminar and included a workshop in which a hypothetical fact situation was discussed by YLS Executive Committee members Tom Heflin and Keith Norman and the topic speaker, Drew Redden, of Birmingham.

The Conference of the Professions was held in April 1987 in Gulf Shores. YLS CLE Chairman Steve Rowe was assisted in the planning and implementation of this seminar by YLS past President Randy Reaves of Montgomery, who has been active in presenting this seminar since its inception.

Public Relations—Jim Sasser of Montgomery was responsible for disseminating information about YLS committee members and activities. His committee also is coordinating efforts for publicizing the various celebratory events of the bicentennial of the Constitution, culminating September 17, 1987. Additionally, Jim was appointed to the state bar Legislative Liaison Committee, where he was in contact with bar President Bill Scruggs and bar Executive Director Reggie Hamner.

Bar Admissions Ceremony—Each year, the YLS sponsors the two bar admissions ceremonies in Montgomery for new attorney admittees. Montgomery chair Laura Crum was responsible for coordinating all aspects

of both events, including addresses by guest speakers at the luncheon following the induction of the admittees into the bar. In October, Circuit Judge Inge P. Johnson spoke at the luncheon, while in May, N. Lee Cooper, delegate from Alabama to the ABA, served as speaker.

Constitution Bicentennial—Lynn McCain of Gadsden chaired this committee, which served as a clearinghouse for Constitution bicentennial activities, including production of a play about the First Amendment, "There's Trouble Right Here in River City." She was assisted in publicity efforts by publications chair Terry McElheny of Birmingham, who prepared all of the publicity for use by the media.

Annual Seminar on the Gulf—Co-chaired by speaker and program chair Sid Jackson and arrangements chair Preston Bolt, and assisted by President-elect Charlie Mixon, all of Mobile, the May seminar at the Sandestin Beach Resort was well-attended this year. This event was co-sponsored by the Alabama Bar Institute for Continuing Legal Education. In addition to two half-day seminars, there was a golf tournament and band party featuring "The Soul Practitioners," an all-lawyer band. Friday, the firm of Hare, Wynn, Newell and Newton sponsored a poolside cocktail party, and Saturday there was another cocktail party, sponsored by Emond and Vines.

Publications—In December, the YLS completed publication of "Law as a Career," a brochure designed to inform students interested in law careers. Chair Terry McElheny of Birmingham edited the publication and coordinated with Reggie Hamner to make distribution available through the state bar.

Youth Legislature Judicial Program—This year, thanks to the leadership of chair Keith Norman of Montgomery, there were a total of 825 lawyers, volunteer judges, adult sponsors and students participating in the program. More than 30 teams from ten Alabama cities took part in the mock trial competition culminating in April in Montgomery. By this fall, the committee will distribute a videotape on the program to be used in recruiting students and preparing for the mock trials. The Youth Legislature Judicial Program has been recommended to the ABA Young Lawyers' Division for its Affiliate Outreach Program to be held in October 1987, and received first place in the ABA Young Lawyers' Division Award of Achievement in the service-to-the-public category.

Grants—The ABA Young Lawyers' Division awarded its Affiliate Outreach Project Public Service subgrant to the YLS for the Youth Legislature Judicial Program, largely as a result of the combined efforts of grants chair Percy Badham of Birmingham and Keith Norman of Montgomery, YLJP chair. Alan S. Kopit, ABA Young Lawyers' Division president, announced the full amount requested by the YLS was approved.

Legal Services to the Elderly—Birmingham chair Rebecca Shows worked with the senior bar committee counterpart preparing a resource manual for the elderly, to be disseminated to senior citizen centers and other locations in order to better inform the elderly of legal offices in their communities in which they can seek assistance.

ABA Young Lawyers' Division appointments—ABA Young Lawyers' Division chairperson-elect William Hubbard recently announced that nine of the YLS officers and Executive Committee members had been appointed to leadership positions in the Young Lawyers' Division for the year 1987-88. They are Percy Badham, assistant editor, MemberNet; Claire Black, vice chairperson, public service sub-grant program affiliate outreach; Laura Crum, Barrister and Law Practice Notes, Estate Planning Section; Keith Norman, vice chairperson, pre-law counseling; Terry McElheny, communications; Steve Rowe, Real Property Executive Committee; Jim Sasser, communications; Steve Shaw, Law Week; and Rebecca Shows, legal services to the elderly. In addition, Jim Priester of Birmingham will be serving as chairman of the Ethics Committee and on the National Conference Team of Affiliate Outreach Programs.

UPCOMING YLS EVENTS

The YLS has planned events for July 16-18, 1987, at the state bar annual meeting at the Riverview Plaza, Mobile. Following the Thursday afternoon business meeting and election of officers, the YLS, in conjunction with the Mobile Young Lawyers, will host a party from nine until midnight aboard the U.S.S. Alabama. The cost is $5 per person.

On Friday the YLS will sponsor the "Update '87: Recent Developments in the Law" seminar. Steve Rowe and Mary Lyn Pike served on the planning committee for the event, which last year drew more than 700 attorneys. The format for this year's event will include the following speakers and topics: Bill Scruggs, 1987 tort reform legislation; Wendell Mitchell, other legislative updates; Larry Clark, practical effects of tort reform on defendant's practice; Sonny Hornsby, practical effects of tort reform on plaintiff's practice; L.B. Feld, tax reform: what every practitioner should know; Frances Hare, Jr., recent Alabama Supreme Court decisions, civil cases; David Byrne, recent Alabama Supreme Court decisions, criminal cases; Bob Prince, marital law update: child custody and visitation; Gary Huckaby, a summary of recent disciplinary actions, rule changes and developments; Clay Alspaugh, insurance practice from the plaintiff's viewpoint; and Bert Nettles, insurance practice from the defendant's viewpoint.

Six hours of continuing legal education credit will be given for attendance at the seminar. The cost is included in the registration fee for the convention and will include a handout.

Charlie Mixon will assume the office of YLS president at the annual meeting. He is a very capable, energetic leader and has proved to be of invaluable assistance to the YLS. If you are under the age of 36 or have been licensed less than three years and would like to play a part in the YLS, now is the time to contact him for information at 432-7682. ■

Give this copy to your secretary.

At the YLS Executive Committee Meeting in Sandestin were, front row, left to right: Percy Badham, John Plunk and Sid Jackson. In the middle row were: Terry McElheny, Jim Sasser, Gunter Guy, Amy Slayden, Claire Black, Rebecca Shows and Laura Crum. In the back row were: Charlie Mixon, Tom Heflin, Pat Harris, James Anderson, Keith Norman and Bernie Brannan.

Among those associated with the Walker County Bar Association's People's Law School were attorneys Jim Brooks (front row, far left), Chairman Warren Laird (front row, center) and Richard Fikes (front row, far right).

Legislative Wrap-up

by Robert L. McCurley, Jr.

The 1987 regular session of the legislature has seen tort reform as its primary interest. The house of representatives approved nine of the ten bills backed by the Alabama Business Council (see *Alabama Lawyer*, May 1987). The only bill not passed reduced the statute of limitations for 1983 actions.

The senate, with some amendments, passed the house bills and returned them for ratification of the changes. These bills make substantial changes to the existing law. Anyone wishing a copy of any of the bills should write **John Pemberton, Clerk of the House, Room 512, Alabama State House, Montgomery, Alabama 36130, or call 261-7637.** The bills are as follows:

H. 432—Medical malpractice This bill provides a cap of $400,000 for pain and suffering and $1,000,000 in wrongful death cases. It abolishes the scintilla rule and establishes a standard of "clear and convincing evidence" as the burden of proof. It provides that future damages may be paid in periodic payments at the discretion of the trial court. This is a very comprehensive bill and contains additional sections.

H. 24 is a constitutional amendment to Article XII, section 232, providing for the venue for suits against foreign corporations that are not qualified to do business in Alabama but are to be treated the same as domestic corporations. This bill was passed unamended by the senate.

H. 25 provides that a judge is authorized to transfer a case to another county for the convenience of the parties and witnesses or in the interest of justice. This bill does not apply to pending or child custody cases.

H. 26 gives Alabama judges the authority to refuse out-of-state cases on the basis of convenience or inconvenience to the parties, but once the case is accepted, the judge can transfer it to the most appropriate court. This bill was not amended by the senate.

H. 27—Punitive damages The bill establishes a cap on punitive damages of $250,000 unless there is a pattern or practice of intentional wrong conduct or conduct involving actual malice. It further establishes the burden of proof to be clear and convincing evidence. Any punitive damage award must be reviewed by the judge in a post-judgment hearing. It sets forth that there can be no punitive damages against the State of Alabama. This bill is exclusive of the medical malpractice bill and does not apply in wrongful death cases.

H. 28 abolishes the collateral source rule to allow the jury to be informed of medical bills and lost wages that have been paid by a third party. It also permits the jury to be informed if the injured party must reimburse any insurer or his employer for any payments he receives. The bill does not apply to any pending cases.

H. 29 abolishes the scintilla rule and substitutes the substantial evidence rule. It also does not apply to any pending case.

H. 30—Frivolous lawsuits The bill allows the court to assess court costs and attorney's fees against a party or the party's attorney if the court determines the case to lack substantial justification. The judge, at his discretion, also may assess attorney's fees and court costs against the defendant for frivolous defenses. This bill will not be enforced against pending suits until 180 days after the effective date of the act.

H. 81—Structured settlements This bill gives the judge the discretion to spread the payment of future damages over a period of years, but does not apply to wrongful death.

H. 82 eliminates the 10 percent penalty imposed against defendants in civil cases who appeal and lose in the appellate court.

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

These tort reform bills backed by the governor, lieutenant governor and speaker of the house are not the only bills limiting recovery. Other tort reform bills introduced include a statute of limitations against architects, engineers and builders, and another provides basically the same limitations against materialmen.

Additional bills introduced provide protection from suits against officers, board of directors and trustees of nonprofit corporations and organizations; limit liability against state employees; and amend the Good Samaritan Act to provide civil immunity to physicians, medical and nursing staff and hospitals in emergency situations and provide immunity to school personnel. The repeal of the dram shop law and limitations on recovery against the vendor has been proposed, while there is a bill providing for civil immunity for fire marshalls acting within their duties. A legal malpractice bill has been introduced paralleling the medical malpractice bill.

Law Institute bills

The Alabama Law Institute has the following pending bills before the legislature (See *Alabama Lawyer*, May 1987):

The Uniform Guardian and Protective Proceedings Act, S.B. 134, H.B. 233

Tradesecrets, S.B. 83, H.B. 333

Deeds in Lieu of Foreclosure, S.B. 141, H.B. 107

Redemption of Real Property, S.B. 142, H.B. 111

Powers Contained In Mortgages, H.B. 143, H.B. 284

Lawyers assist legislative committees

Keith Norman and Will Givhan have served as staff attorneys to the House Judiciary and House Ways and Means Committees, respectively. The legislature continually bas had the assistance of the Legislative Reference Service; however, this is the first time in recent history that house committees obtained outside counsel.

Keith Norman is "on loan" from the law firm of Balch, Bingham in Montgomery while Will Givhan is from the Mobile law firm of Hand, Arendall, Bedsole, Greaves and Johnston. ■

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 _____

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Bar Briefs

Sweeney elected officer of National School Attorney Board

Donald B. Sweeney, Jr., a partner in the Birmingham firm of Rives & Peterson, has been elected secretary-treasurer of the 19-member board of directors of the Council of School Attorneys. The council is a major component of the National School Boards Association, headquartered in Alexandria, Va.

The council has 2,100 members and 21 affiliated state councils, and serves as a forum on practical legal problems faced by attorneys who are retained or employed by local school districts.

A member of the Birmingham, Alabama and American bar associations, Sweeney also is president and founder of the Alabama Council of School Board Attorneys and state chairman of the National Organization on Legal Problems of Education (NOLPE). He received his law degree from the University of Alabama.

$50,000 scholarship fund honors Cumberland Dean Donald E. Corley

A $50,000 endowed scholarship fund honoring the late Cumberland School of Law Dean Donald E. Corley has been established at Samford University.

Cumberland alumnus Steve Whicker presented the check to Jeanette Corley, widow of the dean, during a Cumberland National Alumni Association luncheon at the school in March.

Corley served as dean of the law school during 1974-84; he died December 1986. Interest on the $50,000 principal, which was contributed by alumni and Cumberland faculty members, will be used to provide scholarships for Cumberland students.

Jerry W. Powell named general counsel for Central Bank of the South

Jerry W. Powell recently was named general counsel for Central Bank of the South. In addition to his responsibilities as general counsel for the direction of the company's legal and regulatory affairs through its legal division, Powell also will supervise the bank's risk management and compliance sections.

Manning

Corley

Powell joined Central Bank in 1981 as counsel and assistant secretary; in 1986, he was named associate general counsel of Central Bank and Central Bancshares of the South, Inc.

A native of Montgomery, Powell received his undergraduate degree from Birmingham Southern College and law degree from the University of Alabama. He served as a clerk to the Honorable Seybourn H. Lynne, senior United States District Judge, and as an associate in a Birmingham law firm. He is a member of the American and Alabama State bar associations.

Dawson named to top White House post

Robert K. Dawson, assistant secretary of the Army for Civil Works (ASACW), has been appointed to serve as associate director of the Office of Management and Budget for Natural Resources, Energy and Science at the White House, and assumed his new position May 4.

Dawson will be responsible for the management and budget of the Departments of Agriculture, Energy and Interior; the Environmental Protection Agency; the Council on Environmental Quality; the National Aeronautics and Space Administration; the Tennessee Valley Authority; the Nuclear Regulatory Commission; and other agencies.

Dawson also will be responsible for his present agency, the United States Army Corps of Engineers. In all, he will have responsibility for 15 agencies with a total budget of over $50 billion and staffing levels of more than 200,000 positions.

ASACW since May 1984, Dawson is the youngest person ever to hold that position and has served in the Office of the Assistant Secretary of the Army for six years, longer than any previous occupant. He previously served as Deputy Assistant Secretary of the Army. Prior to his service with the Army, Dawson was Administrator of the Committee on Public Works and Transportation in the U.S. House of Representatives, and was legislative assistant to U.S. Representative Jack Edwards.

Law school gives Prince top award

Tuscaloosa attorney Robert Prince recently was named recipient of the Uni-

versity of Alabama Law School's most prestigious award.

Prince was presented the Bench and Bar Most Outstanding Alumni Award, based on continuing contributions to the legal community in Alabama.

He also was presented the Dean's Award for his work with student trial advocacy teams.

UA Law School faculty members who received awards included George Peach Taylor, who was given a special trial advocacy award presented by the Birmingham law firm of Hare, Wynn, Newell and Newton; Frances McGovern, who received the Dean Thomas W. Christopher Award, presented to recognize lasting contributions to the betterment of the law school; and Nathaniel Hansford, who received the Student Bar Association Outstanding Faculty Award.—*The Tuscaloosa News*

Cumberland students take top honors in national mock trial competition

Students representing Cumberland School of Law, Samford University, placed first in national mock trial competition sponsored by the American Trial Lawyers Association in Washington, D.C., in April.

The Cumberland team, coached by Judge James 0. Haley and Michael V. Rasmussen, defeated law students from the University of San Diego in the final round of the competition.

Cumberland had qualified for the national event after winning regional eliminations. The eight regional winners were narrowed from a field of 87 teams vying for the national title.

During the national finals, the Cumberland team argued both sides of a case involving a suit filed by a college baseball player who had been hit in the head by a baseball thrown by a player from an opposing team.

Cumberland professor chosen to attend Princeton institute

R. Kenneth Manning, Jr., a professor at Cumberland School of Law, Samford University, was among 24 college teachers selected to participate in a special summer institute at Princeton University June 21-July 31.

The six-week institute, Religion and Western Political and Ethical Thought, is supported by the National Endowment for the Humanities. The institute assists college teachers in integrating the insight of major Western religious traditions into courses in political theory, Western civilization, intellectual history and ethics.

At Cumberland, Manning teaches a law and religion seminar, and has taught a law and morality seminar.

An ordained minister of the United Church of Christ, Manning holds advanced law and theology degrees from Boston University. He also has a master's degree in law and society from the University of Denver, and has been a member of the Cumberland faculty since 1973. ■

Riding the Circuits

Autauga County Bar Association

The Autauga County Bar Association observed Law Day by sponsoring a poster contest for all fifth-graders of Autauga County. The theme of the contest was "We the People." In addition, the bar presented to the Autauga-Prattville Public Library an updated version of the McGraw-Hill Encyclopedia of Science and Technology in honor of Bill Newby, a member of the bar for many years, who recently passed away, and also in observance of Law Day.

The bar association, under the guidance of Cindy Funderbunk and with the assistance of the bar auxiliary, held its first annual cook-out and softball game on the night of April 30 at Newton Park in Prattville.

The members, families and guests of the bar associations of Autauga, Elmore and Chilton counties (19th Judicial Circuit) gathered at the Ramada Inn in Prattville, Alabama, in honor of retired presiding Circuit Judge Joe Macon. Judge Macon was honored for more than 20 years of service to the circuit. Those attending the event included retired presiding Judge Joseph Mullins and the current presiding judge of the circuit, Walter C. Hayden, Jr., as well as the entire family of Judge Macon.

Judge Ferrill D. McRae, U.S. Deputy Attorney General Arnold I. Burns, U.S. Attorney Jeff Sessions and MBA President Marshall J. DeMouy (Mobile Bar Association)

Thursday, July 16, 1987 Mobile
SECTION MEETINGS

SECTION	LOCATION
10 a.m.-noon	
	RIVERVIEW PLAZA
Environmental Law	Merrimac I
Family Law	Alabama II & III
2-3:30 p.m.	
Labor Law	Alabama III
Litigation	Plantation I
Oil, Gas and Mineral Law	Alabama I
Taxation	Merrimac I & II
3:45-5:15 p.m.	
Corporation, Banking and Business Law	Alabama II
Criminal Law	Alabama I
Real Property, Probate and Trust Law	Plantation II
Young Lawyers'	Merrimac I & II
2-5 p.m.	
	ADMIRAL SEMMES
Administrative Law	Crystal A
Bankruptcy and Commercial Law	Crystal C
Business Torts and Antitrust Law	Crystal B

CLE credit: 1.0-3.0 each

Colbert County Bar Association

At the February 1987 meeting of the Colbert County Bar Association, the following officers were elected for this year:

President: Gene Hamby, Sheffield
Vice-President: Terry L. Mock, Tuscumbia
Secretary/Treasurer: John Kennemer, Tuscumbia

In celebration of Law Day '87 and the Bicentennial anniversary of the United States Constitution, the Colbert County Bar Association sponsored a mock trial entitled *"State of Mellow vs. Elston Neddy."* Honorable Inge Johnson, circuit judge of the 31st Judicial Circuit, presided over the ficticious murder trial, and senior high government/economics students participated as witnesses and jurors. The event drew a capacity crowd of students from all six school systems in Colbert County. Bryce Graham, Sr., former circuit solicitor for Franklin and Colbert County, participated as prosecutor and Jim Stansell, attorney in Muscle Shoals, represented the defendant, Elston Neddy.

The Law Day Committee was comprised of Terry L. Mock, chairman, John Kennemer, Steve Gargis, Billy Underwood, Bobby Baker, Alan Gargis and Jim Stansell.

In addition, many members of the Colbert County Bar Association are seeking to have legislation passed providing the Colbert County Law Library with additional funding. Members of the Law Library Committee are Gene Hamby, John Clement, Hon. Inge Johnson and Vince McAllister.

The Colbert County Bar Association also is planning to hold a continuing legal education seminar during the summer months.

Huntsville-Madison County Bar Association

The Huntsville-Madison County Bar Association and the North Ala-

bama Chapter of the Federal Bar Association celebrated Law Day by having the Alabama Supreme Court, *en banc*, be a part of the festivities.

There was a reception honoring the court the evening of Thursday, April 30, 1987, at Huntsville's Von Braun Civic Center, and the reception was attended by the justices, bar members and their guests.

On the morning of May 1, Douglas C. Martinson, president-elect of the Huntsville-Madison County Bar Association, welcomed the court and then a civil and a criminal case were argued before the court. There was a large audience of lawyers, students from junior civic classes of all local high schools and the general public.

Upon completion of the oral arguments, a religious ceremony was held at Huntsville's First Baptist Church with scriptures read by Justice Gorman Houston and an inspirational talk by Representative Ronnie Flippo, United States Representative for the Fifth District of Alabama. A barbecue dinner followed in the fellowship hall of the church.

Mobile Bar Association

On Friday, May 1, the Mobile Bar Association celebrated Law Day with a Red Mass, luncheon and open house in both federal and state courthouses.

The Red Mass was conducted by the Archbishop Oscar Lipscomb, and approximately 150 attorneys, federal and state judges, families and friends participated in the celebration designed specifically for judges, lawyers and court officials to invoke God's blessing and guidance on the administration of justice.

Over 250 attorneys and guests attended the luncheon to hear Deputy Attorney General Arnold I. Burns. Burns is the second highest ranking official in the United States Department of Justice. From 1960 to 1985 he was a practicing attorney and chairman of the Management Committee of the 200-member Wall Street law firm of Burns, Summit, Rovins & Feldesman.

Guided tours of both federal and state courthouses were conducted in the afternoon, concluding Law Day '87 in Mobile.

Walker County Bar Association

The Walker County Bar Association held annual elections April 24, 1987, and the new officers are:

President: Kerri J. Wilson, Jasper
Vice-president: G. Warren Laird, Jr., Jasper
Secretary: James Patrick Thomas, III, Jasper
Treasurer: Richard E. Fikes, Jasper

■

Memorials

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

Albritton, James Marvin—Andalusia
Admitted: 1950
Died: March 26, 1987

Gibson, White Edward, Jr.—Birmingham
Admitted: 1930
Died: April 30, 1987

Hall, Peter Alfonso—Birmingham
Admitted: 1948
Died: August 1, 1986

Herbert, Jule Rembert—Montgomery
Admitted: 1936
Died: February 17, 1987

Hines, James A.—LaFayette
Admitted: 1938
Died: March 18, 1987

Lee, Alto Velo, III—Dothan
Admitted: 1937
Died: May 8, 1987

Lindsey, Wallace Henry, Jr.—Butler
Admitted: 1932
Died: January 18, 1987

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

Perrine, Kenneth Tiley—Birmingham
Admitted: 1928
Died: April 9, 1987

Reese, Charles Theodore—Daleville
Admitted: 1948
Died: October 31, 1986

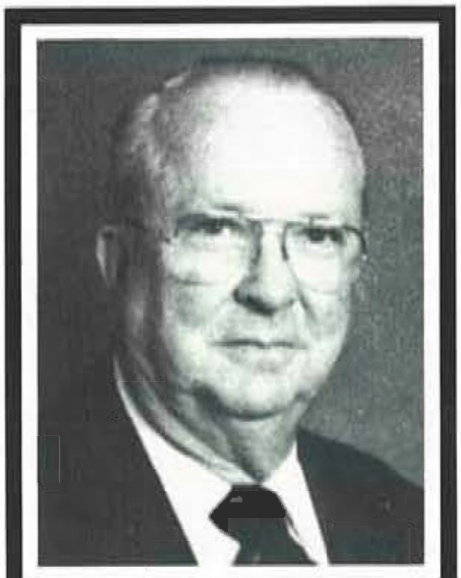
Sansone, Aldo James—Montgomery
Admitted: 1968
Died: June 14, 1987

Thrower, James Tennyson—Dothan
Admitted: 1938
Died: May 5, 1986

Traeger, James Watson—Montgomery
Admitted: 1979
Died: June 11, 1987

Winston, William Overton, III—Vernon
Admitted: 1976
Died: March 27, 1987

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



ALTO V LEE, III

Alabama lost a giant in the legal profession when Alto V. Lee, III, passed away May 8, 1987, after a lengthy bout with cancer.

A devoted alumnus of the University of Alabama and its law school, Lee began his lifelong practice of law in his hometown of Dothan in 1937. He served in virtually every important leadership position in the state and local bar associations. He was a past president of the Alabama State Bar, the Houston County Bar Association and the Alabama Defense Lawyers' Association.

While maintaining a general practice of law, his personal preference lay in the arena of the courtroom. He was a skilled orator and a master of trial tactics. Lee's skills led to his induction as a Fellow in the American College of Trial Lawyers and membership in the International Society of Barristers.

Lee's strong advocacy of his profession was no less zealous than his devotion to public service. He served as a member of the state legislature and chairman of both the Alabama State Docks Board and the Alabama Ethics Commission. Service to his community was exemplified by his membership on the Dothan Board of Ed-

ucation, the Dothan Recreation Board, the Dothan Rotary Club, the Dothan Chamber of Commerce and the National Peanut Festival. Lee was immediate past president of the board of directors of the Alabama-West Florida United Methodist Foundation, Inc., and honorary member for life of the administrative board of the First United Methodist Church of Dothan and had served as president of the board of directors of the Dothan Benevolent Association, a local charitable foundation.

Lee is survived by his wife, Rosa, and three children: Mrs. Heidt F. Neal, III, (Elizabeth) of Columbus, Georgia; William L. Lee, III, of Dothan; and Mrs. B. Michael Watson (Margaret) of Dothan.

The state, his community and our legal profession has lost a devoted servant, but his legacy and service to mankind will endure for years to come.

KENNETH TILEY PERRINE, SR.

Kenneth T. Perrine, Sr., a Birmingham attorney for almost 60 years, died April 9, 1987. He was a member of the firm of Kracke, Thompson and Ellis.

Perrine graduated from Phillips High School and attended Rhodes College in Memphis. In 1928, he graduated from the University of Alabama School of Law.

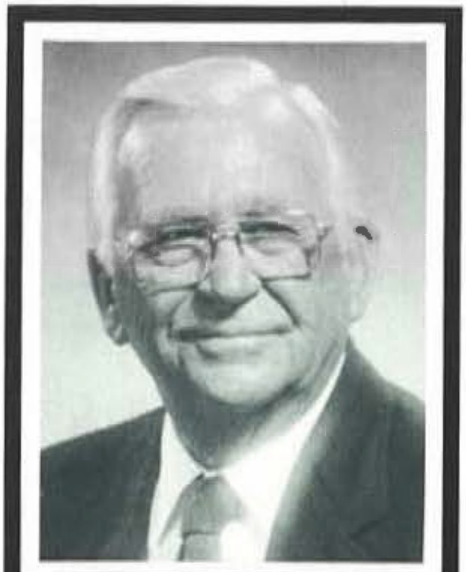
He was one of the original board members and secretary of the Birmingham Downtown Improvement Association, which formed Operation New Birmingham, and was active in many civic organizations, having been a member of the Downtown YMCA since 1915.

Perrine also was a member of the Birmingham Bar Association and the Alabama State Bar.

Among the most well-known of his cases involved a lawsuit brought against the *Birmingham Post-Herald* for publishing a political editorial on election day, November 6, 1962. The paper endorsed a switch from a commission to a mayor-council form of government for Birmingham. Perrine represented the paper, which was accused of electioneering, a violation of the Alabama Corrupt Practices Act. The case finally wound up in the United States Supreme Court where that section of the act was declared unconstitutional.

Perrine was a Sunday school teacher and lay preacher for Handley Memorial Presbyterian Church and a co-founder of and teacher at Shades Valley Presbyterian Church. He later became a member and teacher at Mountain Brook Baptist Church.

Survivors include his wife, Martha Perrine; sons Kenneth T. Perrine, Jr., of Jasper, and Dr. George Perrine of Birmingham; and a daughter, Martha Howell, of Cartersville, Georgia.



JAMES MARVIN ALBRITTON

James Marvin Albritton, a prominent attorney in Andalusia, died March 26, 1987, at the age of 71. Born in Andalusia in 1915, he was the senior partner in the firm of Albrittons, Givhan & Clifton, founded by his grandfather in 1887.

Albritton was a graduate of the University of Alabama, and following his discharge from the Navy after World War II, he returned to the state to begin his study of the law. A member of the Farrah Order of Jurisprudence and an editor of *The Alabama Law Review* at the University of Alabama Law School, he received his law degree in 1950.

Active in the legal profession on both local and state levels, Albritton was known and respected as a man of integrity and intelligence. He was a past president of the Covington County Bar Association, served two terms as a delegate from Alabama to the House of Delegates of the American Bar Association and three terms as a member of the Board of Commissioners of the Alabama State Bar and the State Bar Grievance Committee. A Fellow in the American Bar Foundation, he also was a member of the Alabama Defense Lawyers' Association, currently serving as a vice-president and director. He was a member of the International Association of Insurance Counsel and the Alabama Court of the Judiciary.

Albritton exemplified a family belief that service to one's church and community, as well as to one's profession, was the foundation upon which to build a successful life. He was a member of the First Presbyterian Church of Andalusia and the Andalusia Rotary Club. He was an active member of the board of John Knox Manor and served on the Alabama Commission on Higher Education, having been appointed by Governor George Wallace.

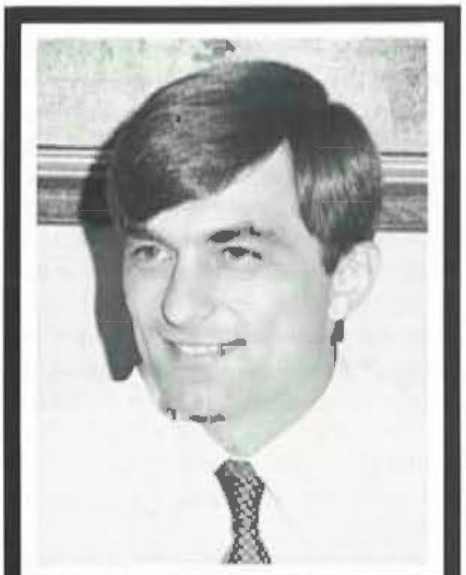
The law firm of Albrittons, Givhan & Clifton celebrated its centennial March 21 of this year. The toast given by Albritton's daughter in honor of the firm and its senior partner follows:

"As a child, I always felt a special pride in my heritage. Even though it was never loudly proclaimed, I, as did all the children of the firm, shared a special knowledge of being surrounded by good men —strong and decent men. Their quiet actions shaped our lives, and, if we are successful adults, it is because they gave us the tools to build good lives.

"This law firm has always stood for integrity, honesty and equal justice under the law for all men, no matter what their station in life. To that I would propose a toast.

"I also offer a toast to my father, Marvin Albritton, a man to whom integrity, honesty and equal justice under the law were always black or white, and never shades of gray."

Survivors include his daughter, Emily Albritton Hill; son-in-law, Dr. Kenneth Hill; and two grandchildren, Alice and Ben Hill.



WILLIAM O. WINSTON, III

Former Lamar County District Judge William O. Winston, III, died Friday, March 27, 1987, due to injuries received in a traffic accident near Fayette.

Winston, 37, was a graduate of the University of Alabama and Auburn University. He served one year as assistant district attorney for the 24th Judicial Circuit comprised of Lamar, Fayette and Pickens counties in 1977, and was appointed district judge for Lamar County by then Gov. George C. Wallace in 1978 to fill a vacancy. He was elected to a full six-year term in 1980.

He served two terms as president of the Lamar County chapter of the University of Alabama Alumni Association; was a past president of the Vernon Kiwanis Club; and had served as vice president of the Alabama Juvenile Judges Association and as chairman of the Alabama District Judge's Education Committee. Winston also was a member of the Lamar County Cattlemen's Association, the 24th Judicial Circuit Bar and the Alabama State Bar. He was a member of the Vernon First United Methodist Church.

Among his survivors are his wife, Beth Etherton Winston of Vernon; a daughter, Allison Winston, also of Vernon; stepmother Maxine Winston of DeKalb, Mississippi; one brother, Charles Anthony Winston of Montgomery, AL; two sisters, Margaret McGough of Houma, Louisiana, and Patricia Ann Winston of Mobile, Alabama; and five nieces and two nephews. ■

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Alabama State Bar BOARD OF BAR COMMISSIONERS' ACTIONS

April 3, 1987, Montgomery, Alabama

Present: Commissioners Thornton, L. Jackson, Reeves, Hamner, Crownover, Coleman, F. Hare, Hill, Cassady, J. H. Jackson, Harris, Gill, L. Martin, Manley, Baxley, Garrett, Albritton, Huckaby, Vinson, Brassell, Chason, McPherson, Knight, Bedford, D. Martin, Adams, Proctor and Alexander; past President North; Secretary Hamner; General Counsel Morrow; staff members Jackson, Pike and Lacey.

Absent: Commissioners Turner, Love, Watson, Laird, Head, Gosa, C. Hare, Wood, Jones, Boswell and Owens.

The board:

- approved as written the minutes of its February 6, 1987, meeting;
- administered one private reprimand and one public censure;
- by a vote of 14 to 13, tabled a resolution expressing support for the availability of legal services and for continued funding for the Legal Services Corporation;
- authorized printing of a drug abuse awareness brochure for use in the United States Attorney's (Northern District) program;
- accepted a resolution mourning the death of Mobile bar member William E. Johnston;
- instructed that a resolution mourning the death of former board member J. Marvin Albritton be prepared;
- received the report of the Permanent Code Commission recommending adoption, in whole and part, of the American Bar Association's Model Rules of Professional Conduct;
- voted that certain changes be made and the report reconsidered at its May 15 meeting;
- received the final draft of a proposed uniform arbitration act, amended section 2(f) and took no further action;
- received a report on the Legislative Fiscal Office's evaluation of the Alabama indigent defense system;
- received copies of bills known as the "civil justice reform package" and decided to meet again on April 15 to establish the bar's position on them;
- received the secretary's report that preliminary second quarter figures indicated the bar's revenues were $49,628 over projections and expenditures were $34,393 under the amount budgeted;
- received the report that 110 policies covering 278 attorneys were written by the bar's endorsed professional liability carrier between December 5, 1986, and March 25, 1987.

April 15, 1987, Montgomery, Alabama

Present: Commissioners Turner, Thornton, L. Jackson, Reeves, Hamner, Crownover, Coleman, Watson, F. Hare, Hill, Cassady, Harris, Laird, L. Martin, Manley, Head, Baxley, Garrett, Huckaby, Gosa, Vinson, Brassell, C. Hare, Chason, Wood, McPherson, Jones, Knight, Owens, D. Martin, Adams, Proctor and Alexander; Secretary Hamner; past President North; YLS President Black; Legislative Counsel Mitchell.

Absent: Commissioners Love, J. H. Jackson, Gill, Albritton, Boswell and Bedford.

The board:

- approved as written the minutes of its April 3, 1987, meeting;
- elected Oneonta lawyer Hugh A. Nash to the Court of the Judiciary;
- accepted resolutions memorializing deceased bar members Zack Rogers, Jr., and Wallace H. Lindsey, Jr.;
- by voice vote, expressed its support, in principle, of modification of the doctrine of *forum non conveniens;*
- received reports from Chief Justice Torbert and courts administrator Tapley on matters of mutual interest to the bench and bar;
- by voice vote, gave the president authority to speak and act in the matter of tort reform, authorized him to consult the executive committee and others deemed appropriate and requested that he communicate any negotiated position shifts to the board in writing, for advice and consent;
- unanimously conferred upon the president authority to attempt to influence tort reform legislation in accordance with the views and comments of the board:

  1. The legislation must be constitutional, both as to the United States Constitution and

the Constitution of Alabama;

2. The legislation should not unnecessarily overlap into other existing statutes;
3. The legislation should use language already defined under prior case decisions in the state of Alabama;
4. The legislation should be in harmony with the Alabama Rules of Civil Procedure and the Alabama Rules of Appellate Procedure as established under the Judicial Article of the Constitution of Alabama;
5. The legislation is the most technical, broadest and most serious kind of legislation that can be imagined because it affects every citizen, and every citizen is both a potential plaintiff and a potential defendant;
6. The social costs of injuries and frauds are always paid by somebody; either the victim, the guilty party or the public through welfare and charity;
7. Any changes by the legislature invariably must take into consideration the impact of the legislation on all parts of the civil justice system in Alabama;
8. The present Constitution, statutes and rules should remain as they are, except for the following changes:
   a. *Scintilla rule* The scintilla rule should be abolished in favor of a substantial evidence rule.
   b. *Venue* Venue should be proper only in a county where the event occurred, an individual defendant lives or a defendant corporation does business by agent, except that an out-of-state corporation which has failed to qualify with the secretary of state to do business in Alabama could be sued in any county as long as that non-qualified corporation is and remains the only defendant in the case.
   c. *Forum non conveniens* If a case could be brought in more than one county, the trial court should have the authority to move the case to another proper county for the convenience of the parties. The convenience of individual parties should be given some preference over the convenience of corporate parties. Also, if a case arises under the laws of another state for an event that occurred in another state, the courts in Alabama should have the authority to decline to hear the case at all, unless the plaintiff agrees to have the case tried in the most convenient county in Alabama.
   d. *Statute of Limitations* The statute of limitations for civil rights claims should be reduced to two years.
   e. *Collateral source rule* This rule should be abolished in part and modified in part, except in wrongful death cases where it should remain as is. The amount the plaintiff has been paid or will certainly receive in the future from outside parties should be admissible in the trial of the case, but only if the plaintiff claims that particular type damage. The cost to the plaintiff of obtaining such outside payments also would be admissible at the trial of the case. The federal and state income tax implications of a damage award to the plaintiff should not be admitted into evidence unless the tax implications of a damage award against the defendant also are admitted into evidence; social security benefits or payments never should be admissible.
   f. *Frivolous claims, defenses and appeals* There should be both a statute and a rule of civil procedure and a rule of appellate procedure which will provide, in essence, that the trial court or the appellate court may assess fees, costs and penalties to parties if they file or pursue frivolous claims, defenses or appeals. If the court assesses penalties or the case is dismissed by agreement of the parties, or if the case is settled, then that should conclude the matter; on the other hand, if the trial or appellate court has not imposed penalties and the case has not been settled or dismissed, then the damaged party should have the right to file a separate suit if a claim or a defense or an appeal has been frivolous or groundless.
   g. *Fictitious party practice* The present rule of fictitious parties should be abolished, and a new rule for unidentified parties should be adopted. In essence, any party to a lawsuit should have a period of not less than one year from the filing of the case in which to add any additional party discovered to have been involved in the claim. This would help prevent extra parties from being added in the initial suit.
   h. *Punitive damages* All verdicts for punitive damages should be separate verdicts from any compensatory damages. There should be no caps, either in dollar form or formulas, but the measure of proof required should be raised from the present "reasonably satisfied" standard to a "clear and convincing proof" standard (bear in mind the scintilla rule also is abolished). Additionally, all punitive damage awards should receive a neutral review, both by the trial court and appellate court with the power of both the trial court and appellate court to modify any punitive damage award. The present law in Alabama that any jury verdict is presumed to be completely correct unless it is "patently obviously" wrong should be abolished in favor of the neutral review system. After the jury verdict of any punitive damages, both the trial court and the appellate court then can freely reassess the nature, extent and impact of such an award.
   i. *Medical malpractice* There is no need for a law that gives special privileges or special status to the medical profession, especially in view of the fact that other changes in the tort law obviously will apply to doctors. To cure some abuses and problems in malpractice claims against traditional professionals (doctors, dentists, attorneys and CPAs), the following should be adopted:

      A general statute of limitations of two (2) years, six (6) months after discovery or four (4) years maximum; a limitation on the number of interrogatories and depositions; a sequential

discovery rule setting out the order in which discovery is done by the plaintiff and the defendant; and a general statute establishing the qualifications of expert witnesses in all malpractice claims.

J. *Contributory negligence* To put Alabama in line with other states, we should abolish "contributory negligence" as a defense and adopt the well-known standard of "comparative negligence."

— discussed personnel matters in an executive session
— unanimously adopted a resolution requesting the governor, lieutenant governor and speaker of the house to give audience to the position of the Alabama State Bar as articulated by its president.

May 15, 1987, Montgomery, Alabama

Present: Commissioners Thornton, L. Jackson, Crownover, Love, Coleman, Watson, Hill, Cassady, Harris, Laird, J.H. Jackson, L. Martin, Manley, Head, Baxley, Garrett, Albritton, Gosa, Vinson, Brassell, C. Hare, Chason, Wood, McPherson, Jones, Knight, Bedford, D. Martin, Adams, Proctor and Alexander; immediate past President North, Secretary Hamner, staff members Jackson and Pike.

Absent: Commissioners Turner, Reeves, Hamner, F. Hare, Gill, Huckaby, Boswell and Owens

The board

— observed a moment of silence in memory of past president Alto V. Lee, III, who died May 8, 1987;
— administered four private reprimands and two public censures;
— approved as written the minutes of its April 15, 1987, meeting;
— elected Michael D. Waters as bar examiner for one Uniform Commercial Code section and authorized the executive committee to act for the board in nominating and electing an additional UCC examiner and an equity jurisprudence examiner;
— adopted the American Bar Association's "Model Rules of Professional Conduct," with amendments to Rules 1.5(a) and 1.5(e), and forwarded them to the supreme court;
— reviewed tort reform legislation passed by the Alabama Senate;
— adopted a resolution memorializing the late Honorable William 0. Winston, III;
— approved the bar's 1988 travel program, to be offered by INTRAV;
— chose two bar members to receive the bar's 1988 awards of merit;
— adopted the report of the Committee on Programs and Priorities, discontinuing three committees, changing "task forces" to "action groups," requiring board approval prior to establishment of any committees and action groups, allowing the incoming president-elect to appoint vice chairmen, changing the committee's name to "Committee on Continuity, Programs and Priorities" and reducing its membership to five;
— elevated the "President's Advisory Task Force" to a standing committee;
— learned that the president had appointed Commissioners John Hollis Jackson and Lynn Robertson Jackson to certify the results of the upcoming commissioner election;
— conducted an executive session where personnel matters were discussed. ■

MEMBERSHIP REGISTRATION
ALABAMA STATE BAR—FAMILY LAW SECTION

The Family Law Section of the Alabama State Bar is committed to improving the practice of family and domestic relations law in Alabama. Please join us by registering today for membership. (Section dues are $15.)

1. Name: _____

   Address: _____

   Telephone Number: _____

2. Are you willing to assist in monitoring the progress of pending legislation? Yes_____ No_____
3. Are you willing to write articles for the section newsletter? Yes_____ No_____
4. On which committees would you like to serve? (Program, Legislative, Nominating, Membership, Newsletter, Continuing Legal Education) _____

   _____

5. What goals or aims should the section have? _____

   _____

   _____

6. Other comments and suggestions: _____

   _____

   _____

PLEASE MAIL THIS RESPONSE AND YOUR CHECK TO:

Membership Committee—Family Law Section
Alabama State Bar • P.O. Box 2141 • Birmingham, AL 35201

Disciplinary Report

Temporary Suspensions

● Mobile lawyer **Samuel Robert Brooks, III,** was ordered temporarily suspended from the practice of law, under Rule 3(c), Rules of Disciplinary Enforcement, effective April 23, 1987.

Public Censures

● Birmingham lawyer **Charles Eugene Caldwell** was publicly censured on April 3, 1987, for having engaged in willful misconduct and conduct adversely reflecting on his fitness to practice law, in violation of the *Code of Professional Responsibility* of the Alabama State Bar. Caldwell pleaded guilty to (1) having assaulted two fellow lawyers, on two occasions and (2) having threatened to kill one of the assault victims, who had filed a civil suit against Caldwell for assault and battery, if the victim did not drop the lawsuit. [ASB No. 84-199]

● On May 15, 1987, Mobile lawyer **Major E. Madison, Jr.,** was publicly censured for willful neglect, and for intentional failure to seek the lawful objectives of a client through reasonably available means, by having accepted a retainer to represent a client in a civil matter, and then having failed to file suit on the client's behalf within the time allowed by law. Madison pleaded guilty to having violated Disciplinary Rule 6-101(A) and Disciplinary Rule 7-101(A), of the *Code of Professional Responsibility* of the Alabama State Bar. [ASB No. 85-489]

● Boaz lawyer **Larry W. Dobbins** was publicly censured for willfully neglecting the handling of an estate matter, in violation of DR 6-101(A), despite having been previously censured by the bar, on November 30, 1984, in case No. 84-53, for willful neglect in the same matter. [ASB No. 85-137]

Private Reprimands

● On Friday, May 15, 1987, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 1-102(A)(4) and 6-101(A). The Disciplinary Commission determined that the lawyer had undertaken employment in a certain matter and failed to timely file a lawsuit to protect his client's interest and had misled the client as to the actions actually taken by the lawyer. The commission determined that the lawyer should receive a private reprimand for willful neglect and misrepresentation. [ASB No. 86-261]

● On Friday, May 15, 1987, two Alabama lawyers, practicing together, received private reprimands for violation of Disciplinary Rules 1-102(A)(4), 1-102(A)(5) and 7-102(A)(5). The Disciplinary Commission determined that the lawyers in question had improperly obtained an *ex parte* adjudication of a motion pending before a circuit court in the state and had, with knowledge that the *ex parte* order was improperly entered, affirmatively pled that order in a related proceeding in another county. The commission determined that this conduct involved dishonesty, fraud, deceit or misrepresentation, was prejudicial to the administration of justice and that introducing the improperly obtained order in a parallel proceeding constituted a false statement of law or fact. The Disciplinary Commission determined the lawyers should receive a private reprimand for these violations. [ASB Nos. 86-119 (a) & (b)]

● On April 3, 1987, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law, for his failure to provide the Disciplinary Commission with a response to a complaint that a client had filed against him, alleging, in essence, a breach of confidence and neglect of a legal matter entrusted to him, despite his having received three separate written requests from the state bar, asking that he respond to the complaint. [ASB No. 86-187]

● On May 15, 1987, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 6-101(A), 7-101(A)(2) and 7-101(A)(3) of the *Code of Professional Responsibility.* The Disciplinary Commission determined that the attorney had dismissed a civil action in federal court without obtaining the prior consent of his client. The commission further found that the attorney failed to adequately advise his client as to the status of the case during his representation of her. [ASB No. 86-644] ■

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Classified Notices

NOTICE

POSITION AVAILABLE FOR FULL-TIME UNITED STATES MAGISTRATE

The Judicial Conference of the United States of America has upgraded the part-time position of United States Magistrate at Huntsville, Alabama, to a full-time position effective fall 1987. Accordingly, there will be a vacancy for the position of full-time United States Magistrate in the United States District Court for the Northern District of Alabama with an official duty station at Huntsville, Alabama. The person appointed will serve an eight-year term commencing in fall 1987.

Duties of the office are both demanding and wide-ranging and include: (1) the conduct of all initial proceedings including acceptance of complaints; issuance of arrest warrants or summonses; issuance of search warrants; conduct of initial appearance proceedings for defendants, informing them of their rights, imposing conditions of release and admitting defendants to bail; appointment of attorneys for indigent defendants and conduct of preliminary examination proceedings; (2) the trial and disposition of federal misdemeanor cases with or without a jury where the defendant consents to trial before the magistrate; and (3) acceptance of grand jury returns, conduct of arraignments and hearing all pretrial matters and motions.

In civil cases, the duties include: (1) the service as a special master in appropriate civil cases; (2) the review of appeals from final determinations by administrative agencies, such as those under the Social Security Act and similar statutes, and submitting a report and recommendation as to disposition of the case to the United States District Judge; (3) to conduct hearings and submit recommendations in *habeas corpus* actions and prisoner petitions challenging the conditions of their confinement; and (4) the conduct of pretrial and discovery proceedings in any civil case on reference from a United States District Judge. The basic jurisdiction of the United States Magistrate is specified in 28 U.S.C. § 636.

To be qualified for appointment an applicant must:

(1) be a member in good standing of the highest court of a state for at least five years;
(2) have been engaged in the active practice of law for a period of at least five years;
(3) be competent to perform all the duties of the office; of good moral character; emotionally stable and mature; committed to equal justice under the law; in good health; patient and courteous; and capable of deliberation and decisiveness;
(4) be less than 70 years old; and
(5) not be related to a judge of the district court.

A merit selection panel composed of attorneys and other members of the community will review all applicants and recommend, in confidence, to the judges of the district court the five persons whom it considers best qualified. The court will make the appointment, following an FBI and IRS investigation of the appointee. An affirmative effort will be made to give due consideration to all qualified candidates, including women and members of minority groups. The salary of the position is $72,500 per year.

Application forms and further information on the magistrate position may be obtained from:

Clerk, United States District Court
Northern District of Alabama
104 Federal Courthouse
Birmingham, Alabama 35203

Applications must be submitted personally by potential nominees and received no later than August 1, 1987. ■

Ex Arguendo . . .

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

An observation 200 years ago by British historian Alexander Tyler.

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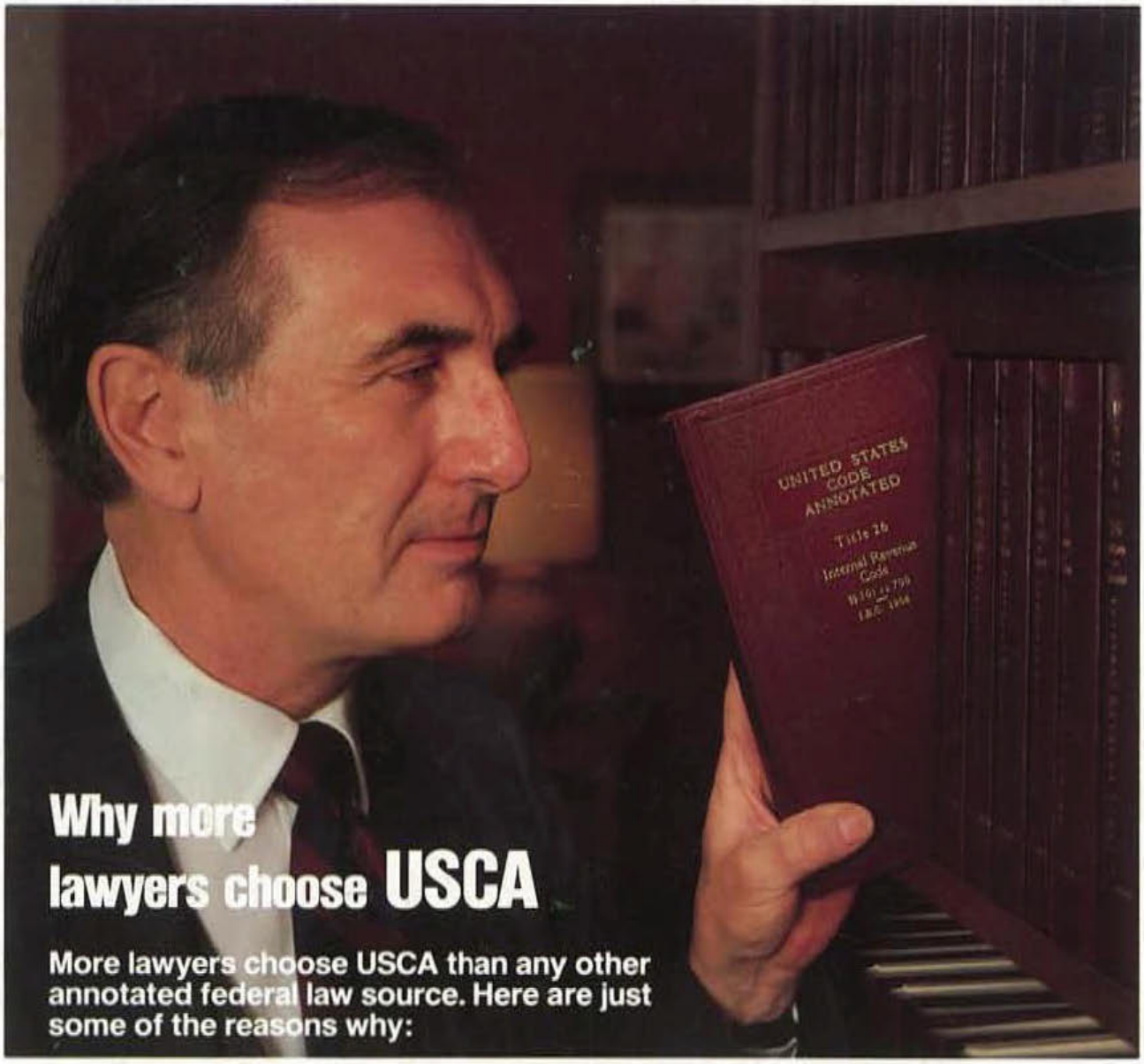

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