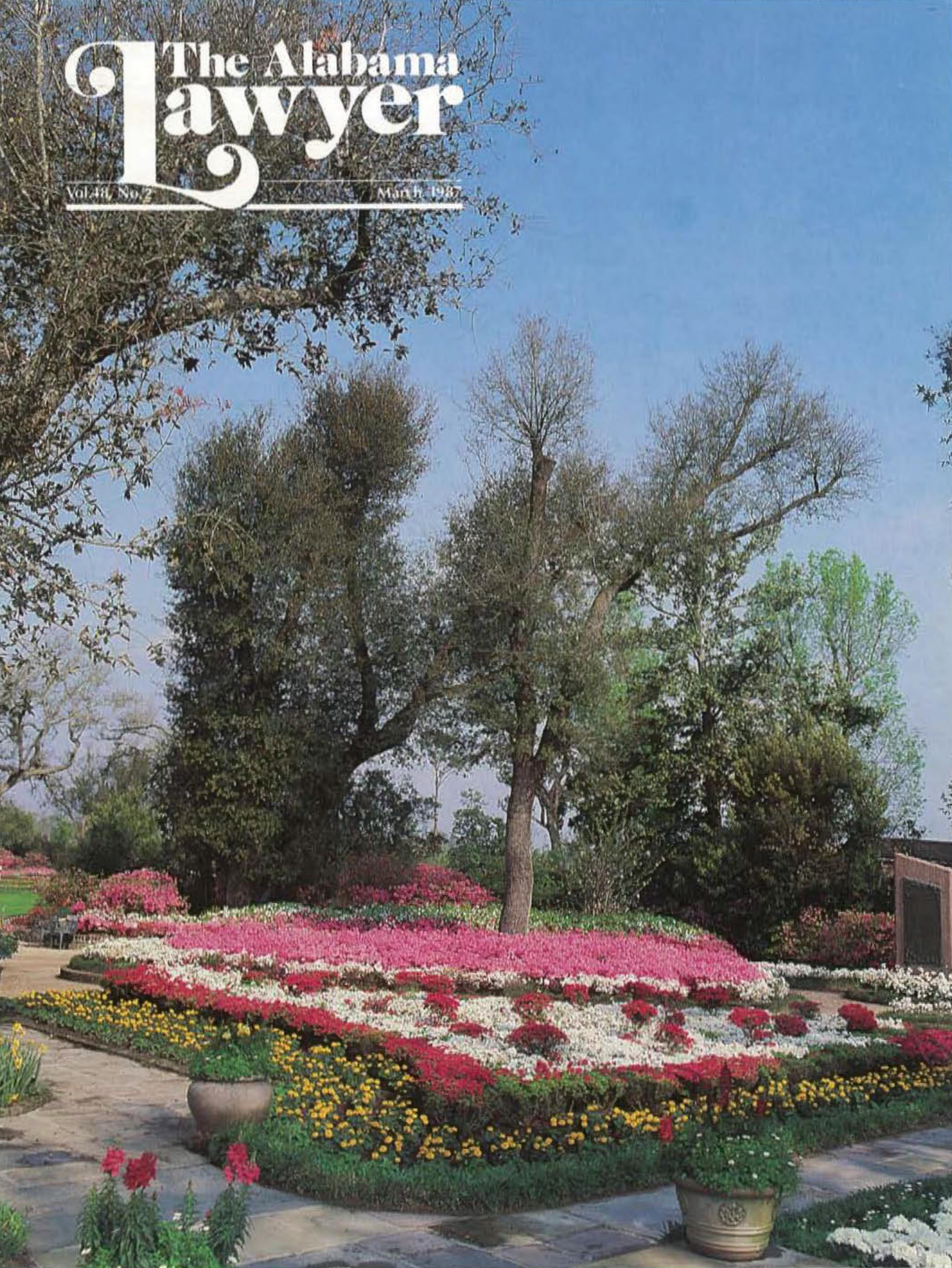
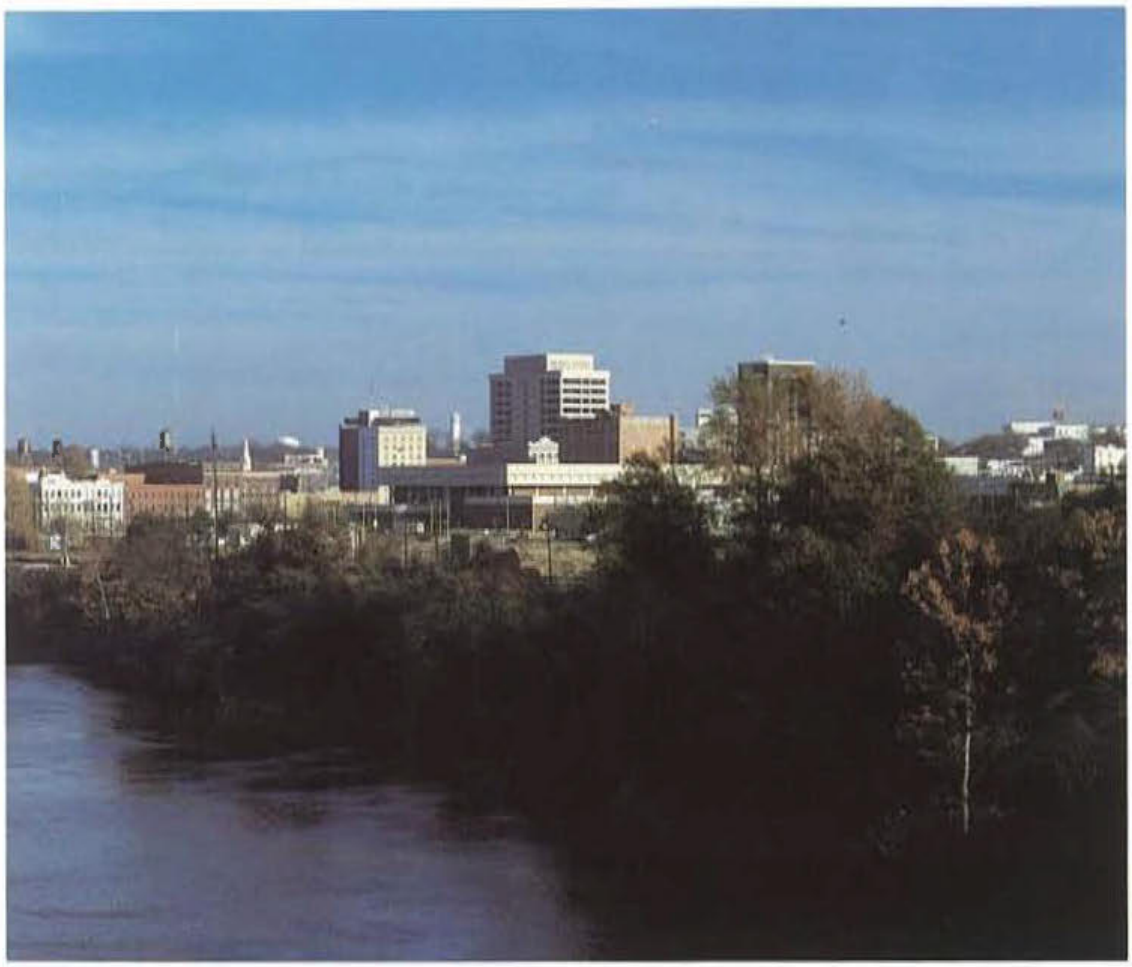
The Alabama Lawyer

Vol. 48, No. 2 March 1987





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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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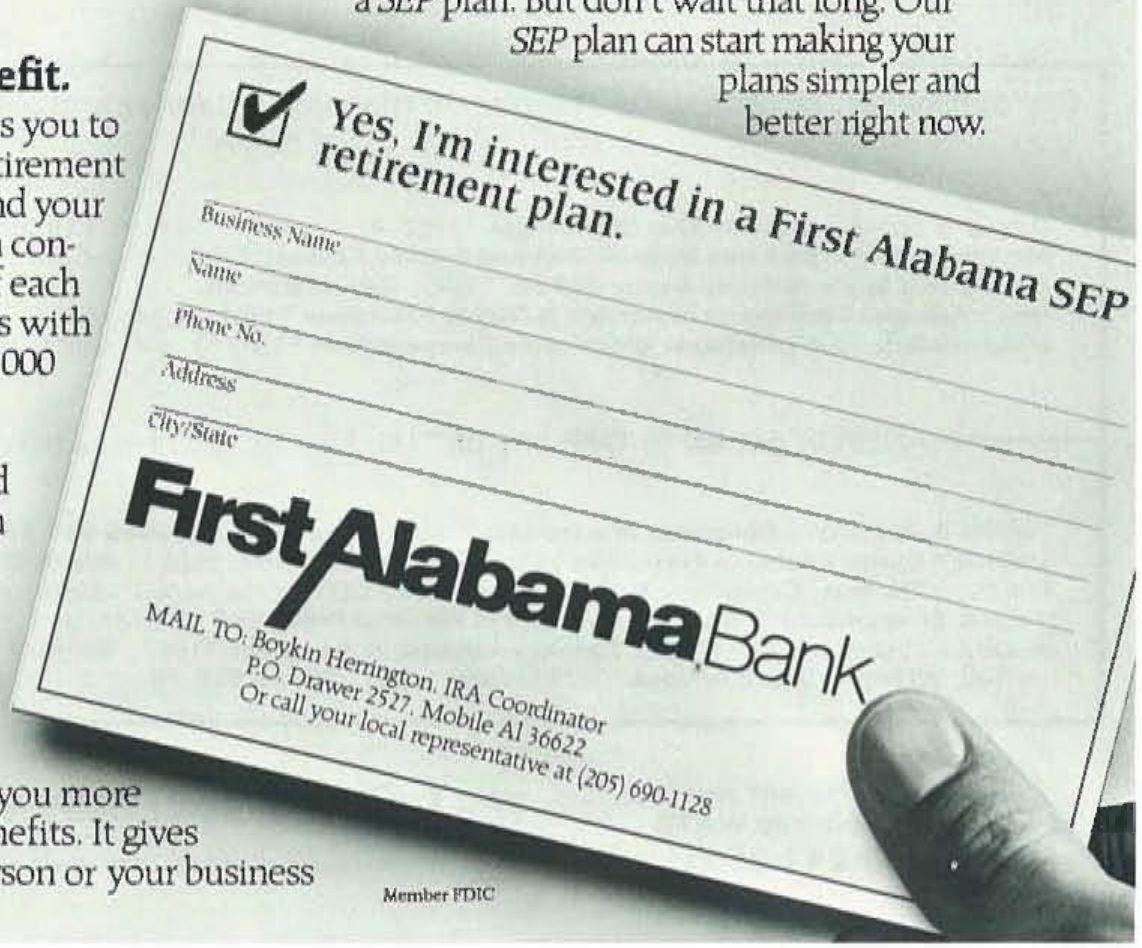

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The Alabama Lawyer

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In Brief

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Carol Ann Smith—Associate Editor
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, 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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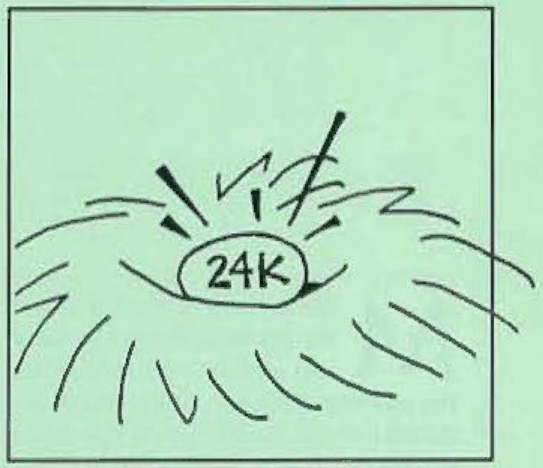
On the cover—

When the gardens are in full bloom this is just one of many sights you will see when you visit Bellingrath Gardens and Home in Theodore, Alabama.



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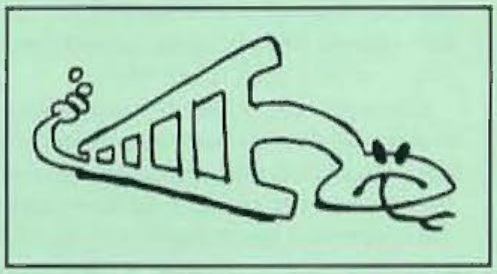
In commercial litigation a claim for lost profits is frequently the focal point of a damage award. Can a plaintiff recover lost profits for a new business venture?



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Should a lawyer drafting a will for a client resist the temptation to serve as executor? There are obvious pitfalls confronting a lawyer electing to accept an executorship.

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President's Page

SCRUGGS

Midway through the bar year is the appropriate time to pause and acknowledge the fact that the majority of the accomplishments and success of our association is due to the volunteer committee work of our membership.

The value of the service to the bar by volunteer attorneys amounts to approximately TWO HUNDRED FIFTEEN THOUSAND DOLLARS ($215,000.00) annually, if these lawyers were paid a modest hourly billing rate. The sacrifice and devotion of committee chairmen and members allow the bar to carry on its programs while keeping bar membership cost at a reasonable level.

Last year's committee on computerization, chaired by Harold Speake, has done an outstanding job in the selection, installation and programming of our new computer system. As those of you who have been through it know, the conversion to computer can be an exasperating and expensive process. Thanks to that committee the computerization of the bar has been relatively painless. The result is very impressive and will continue to pay dividends in the future.

The Permanent Code Commission, under the patient and careful leadership of Wilbur Silberman, has been plowing through the ABA's proposed model rules of conduct for attorneys. Their task is without question the largest, most far-reaching undertaking in recent bar history. The commission is making a word-by-word and line-by-line review of the model rules, comparing them with the Alabama *Code of Professional Responsibility*. I am confident that when the commission gives its report to the board of bar commissioners, the new rules governing our conduct will have been as thoroughly reviewed as those of any bar in the country.

By now each of you should have received the latest edition of the *Alabama Bar Directory*. While the new format and size are more expensive, both in production and mailing costs, I have received numerous comments from Alabama lawyers praising the book, especially its larger type and layout. Thanks to committee leaders Dorothy Norwood, Brenda Smith Stedham and Rick Flowers for this fine work.

As always, the Young Lawyers' Section is full of energy and vitality, especially this year under the leadership of Claire Black. I had the pleasure of attending one of their recent executive committee meetings and was quite impressed with the scope and result of their work.

January 1, 1987, marked a new system of governance for the Alabama State Bar. As of that date, the Executive Committee of the bar has authority to make decisions between meetings of the board of bar commissioners. A greater degree of continuity is assured by statute with the presence on the committee of the past president and the president-elect. The Executive Committee's ability to act for the bar is an absolute necessity in this day of rapidly changing demands and expectations.

The next president of the state bar, of course, will be elected by a mail ballot, and the number of bar commissioners will be increased by approximately ten (10); projections now are that Birmingham will have an additional six (6) commissioners, Montgomery two (2), Bessemer one (1), Tuscaloosa one (1) and Huntsville one (1).

The two most important and, frankly, burdensome committees of your bar have to do with admission to practice. The three panels of the Character and Fitness Committee, chaired respectively by Wanda Devereaux, James Jerry Wood and Caroline Wells Hinds, must wade through hundreds of applications per year, and the actions of these

panels directly determine the quality and makeup of your bar. I very much appreciate their service and dedication.

The Board of Bar Examiners of the Alabama State Bar has a national reputation for thorough and fair examination, and David Boyd and his predecessors deserve all the credit. The preparation, administration and grading of the Alabama essay portion of the bar exam is a tremendous effort. A number of states have abandoned or substantially reduced their localized or essay bar exam requirement and rely entirely or almost entirely on the multi-state exam to screen admittees. It is a great satisfaction that in this state, we still have lawyers willing to make a real and substantial sacrifice to prepare and administer a localized exam, in spite of the trauma associated with it.

Although not a program of the Alabama State Bar, I would like to congratulate the Alabama Trial Lawyers and their People's Law School Committee, chaired by Al J. Sansone, for developing one of the most innovative, popular and civically responsible programs I have ever seen. The People's Law School is at once educational, an enhancer of the lawyers' image, and, further, has economy of skill, all to the extent that it deserves to be a permanent program.

Dennis Balske and his Indigent Defense Committee have completed recommendations and study on the level of competence of appointed counsel, the results of which will be seen in The *Alabama Lawyer* in the future. Dennis is serving his fourth term as chairman and is a national expert in the field.

Finally, I want to praise the members of the Mandatory CLE Commission, past and present, for their diligence in the even-handed administration of the CLE rules over the last five years. Fourteen states have adopted such rules since Alabama's were adopted and several of them have patterned their rules and administrative policies after those of the Alabama State Bar. Under the leadership of Richard Hartley, John Scott and, at present, Gary Huckaby, this program has been successful and well-developed. ■

Executive Director's Report

HAMNER

Lawyers and the Legislature

Lawyers historically have been active in the affairs of government and contributed to the foundation of our country since its earliest days. Forty persons signed the United States Constitution; thirteen of those, or 35 percent, were lawyers.

In Alabama, lawyers long have filled positions of leadership from the precinct to the state Capitol. Many positive accomplishments have been made by these public servants in years past—and in spite of their diminishing numbers, I am confident they will continue in the future.

I confine my comments to lawyers and the legislative climate in Montgomery I have observed or worked in for over 20 years. I genuinely am concerned about the anti-lawyer atmosphere that I see and about which you probably have read. I hope you are equally concerned because your state bar needs your help in stemming this tide by working with your legislators "back home."

That person who would oppose an issue just because it is "a lawyer's bill" would be less likely to do so if his neighbor, city attorney or P.T.A. member "lawyer-friend" took the time to articulate his or her sentiments on the issue. Your legislator most probably is thinking of "other" lawyers if he or she is caught up in so-called anti-lawyer sentiment. Believe me—such sentiment is presently at an all-time high in Montgomery.

The current speaker of the Georgia House of Representatives, a lawyer, recently wrote to that bar on the subject of lawyer-legislators. He said:

> "I firmly adhere to the premise that if we as lawyers serve our clients to the best of our abilities, treat our clients as we would like to be treated and in general 'be ourselves' we won't have to worry about any so-called anti-lawyer sentiment."

Mr. Speaker Murphy reviewed the factors reducing the number of lawyers willing to seek legislative office. They included a practice of law that now is more involved, as well as the amount of time legislative service takes from a practice. Inflation and the cost of running one's practice, in addition to the general costs of getting elected, have had a negative impact on the number of lawyer-legislators. Finally, he cites the ominous situation involving potential, perceived and real conflicting interests.

Given this increased anti-lawyer sentiment in the legislative environment and the declining lawyer-legislator population, it is going to be increasingly difficult to be sure our views on what is in the public interest—and, yes, what is in our professional interest—are accorded a fair hearing. YOU are the key, if we are to continue to fulfill our historic role in the governmental processes.

I would be surprised if you do not enjoy more than a nodding acquaintance with one or more of your county's legislative delegation members. You probably were asked to contribute to a campaign or two. Do not be taken for granted—you have constituent rights, too! When called upon by your local bar association, your bar commissioner or a committee or section of the state bar and bar leadership, I urge you to be prepared to do some real "homework." That is where the grade will be made.

Lawyers are uniquely qualified to make positive contributions to the legislative process. Let us not be subjected to a default judgment. ■

—Reginald T. Hamner

Editorials

(The views expressed here are those of the author and not necessarily those of the bar, its officers or members.)

Dear Editor:

Responding to Jim North's "President's Page" article in *The Alabama Lawyer* last May, and because the legislature is expected to take up the issue of "tort reform" again during its upcoming session, I submit a few thoughts on the subject.

Despite Mr. North's assertions, there is no single cause motivating efforts to change the tort reparations system; the finger cannot be pointed solely at the insurance industry. The crisis, if there be one, is not solely an insurance crisis.

Jim condemns the insurance industry for "competing frantically for premium dollars when interest rates were at historic highs," by charging lower premiums when investment returns permitted it and then raising premiums when they did not. This argues that insurers should have conspired to keep premiums high and reap windfall profits from high interest rates.

To blame insurers for high premiums and limited availability is akin to shooting the messenger. Insurance premiums and availability are a reflection of risks and investment returns. As Jim points out, insurers *are* competitive. If risks could be profitably underwritten, or at lower premiums, they would. Jim fails to account for the fact that, for the past ten years, verdicts have increased at an average of 15.23 percent annually. Many of the largest increases in verdicts coincide with the highest increases in the consumer price index. Jury verdicts, beginning in 1979, rose dramatically, jumping from a 6.5 percent increase in 1978 to 30.49 percent in 1981. In 1983, the rate of increase began to decline, going from 27.54 percent to 12.24 percent for part of 1985.

There is a popular perception that insurance premiums and availability do reflect loss exposure and, as Jim observes, that the tort reparations system should be re-evaluated and, many say, revised, to lower the loss exposure and, presumably, insurance premiums, and make insurance more readily available. I agree with Jim in his observation that the bar should be in the forefront of any study or revision of the tort system. Obviously lawyers are more concerned and have more knowledge of the tort system than any other group of citizens. If we leave the project to others, we are likely to find that the baby has been thrown out with the bath water and the house burned to rid it of termites . . . .

Jim North's assertion that "it is well documented that insurance rates have not come down in states adopting 'tort reform'" is unsubstantiated, in his piece and in fact. In many "tort reform" jurisdictions the "reform" has been more cosmetic than real, offsetting one measure with another of opposite effect. In most it is too early to conclude what the result will be. However, the Institute for Civil Justice reports that carefully drawn "tort reform" measures have apparently lowered medical malpractice premiums. No reason is evident why similar results would not be obtained in other areas.

In principal, and in practice over most of its several centuries, our tort system is the best yet devised for the redress of wrongful injury and damage. Public acceptance has supported it, because it appealed to most people as being basically fair and sensible. But there is now undeniable pressure for adjustments, and I am convinced that intransigence is the road to disaster for us in the litigation bar.

Some of us contend that comparative negligence would be an improvement in our tort system, and that extension of the one-year period of limitation was an improvement. "Improvement" possibilities surely are not confined to measures calculated to facilitate plaintiffs' recoveries, or to enhance them. The popular perception is clearly that the system is out of balance. We lawyers in litigation had best involve ourselves in readjusting that balance before it is thrown out of kilter in another direction and/or we are removed from it.

Sincerely yours,
Patrick W. Richardson
Huntsville, AL
January 15, 1987

Please send your editorials and letters to:

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

Your opinions on subjects of interest to other Alabama Lawyers are always welcomed.

Dear Editor:

I read the editorial by Mr. J. Edward Thornton with much interest, having experienced the same situations in the Army.

Today I read the counter-editorial by Ms. Lindsey R. Gravlee. To the most casual observer, it appears that Ms. Gravlee missed the point of Mr. Thornton's editorial. Simply put, I viewed his editorial as a commentary on attorneys, not secretaries. I suggest that most attorneys have encountered, to varying degrees, the frustration described by Mr. Thornton, and as a result, read his editorial in the same vein as I.

It appears that Ms. Gravlee may now work for attorneys not included in Mr. Thornton's editorial, but apparently is still defensive about her former employers.

Certainly she is correct in asserting that secretaries shoulder most of the blame when working for an attorney matching the description in Mr. Thornton's editorial.

Thank you for your time.

John R. Stewart, Jr.
Major, Judge Advocate General's Corps
U.S. Army
January 20, 1987

About Members, Among Firms

ABOUT MEMBERS

Marion Spina is pleased to announce his association with the firm of **Kim, Chang & Lee** in the practice of international law. Offices are located at the International Insurance Building, 8th floor, 120, 5-ka, Namdaemun-ro, Chung-ku, Seoul 100, Korea. Phone 82-2-777-9061.

■

Grady O. Lanier, III, formerly the Covington County district attorney, announces the opening of his office at 5 Court Square, Andalusia, Alabama 36420. Phone (205) 222-1158.

■

Lauren L. Becker announces her association with the firm of **Martin, Cavan & Anderson, P.C.,** 1140 Monarch Plaza, 3414 Peachtree Road, N.E., Atlanta, Georgia 30326. Phone (404) 231-9800.

■

J. Richard Duke announces the opening of his office at 500 Bank for Savings Building, Birmingham, Alabama 35203. Phone (205) 328-2200.

■

Barry A. Friedman announces the relocation of his offices to 115 South Dearborn Street, East Church Street Historic District, Mobile, Alabama 36620. Phone (205) 432-2660.

■

H. Jere Armstrong has been appointed as a **United States Immigration Judge and Assistant Chief Immigration Judge.** A native of Dothan, Armstrong was counsel to the chief immigration judge prior to his appointment. He now resides in Annandale, Virginia, with his wife and two daughters.

■

Thad Yancey, Jr., announces the relocation of his office to 114 Williams Street, Troy, Alabama 36081-1912. Phone (205) 566-3400.

■

Joseph G. Gamble, Jr., formerly secretary and assistant general counsel for Torchmark Corporation, announces the opening of his office at Suite 100, 2120 16th Avenue, South, Birmingham, Alabama 35205. Phone (205) 933-1065.

■

Michael F. Terry announces the relocation of his office to 116 Lee Street, N.E., Decatur, Alabama 35601. Phone (205) 351-1911.

■

LeAnne Estes Bonner announces the opening of her office at 502 14th Street, Phenix City, Alabama; the mailing address is P. O. Box 1369, Phenix City, Alabama 36868-1369. Phone (205) 297-6478.

■

Ernest N. Blasingame, Jr., announces the relocation of his office to 206 South Pine Street, Suite 203, P.O. Box 1402, Florence, Alabama 35631. Phone (205) 764-1224. He previously was a member of the law firm of Potts, Young, Blasingame & Putnam, Florence, Alabama.

■

Carol J. Millican announces that she has changed the location of her law office from Birmingham, Alabama, to 115 Main Street, E., P.O. Box 1025, Rainsville, Alabama 35986. Phone (205) 638-4453.

■

Joseph W. Walker announces the opening of his practice at 960 East Andrews Avenue, P.O. Box 1487, Ozark, Alabama 36360. Phone (205) 774-5533.

AMONG FIRMS

Martinson & Beason announce the association of **Charles Hooper,** former assistant district attorney, with offices at 115 North Side Square, Huntsville, Alabama 35801. Phone (205) 533-1666.

■

The law firm of **John T. Mooresmith, P.C.,** is pleased to announce that **Sheryl Tatar Dacso,** formerly legal counsel for Providence Hospital, has become of counsel to the firm, with offices at 2970 Cottage Hill Road, Suite 158, Mobile, Alabama 36606. Phone (205) 479-0953.

■

Cassady, Fuller & Marsh announce that **Mark E. Fuller** has become a partner of the firm, with offices at 203 East Lee, P.O. Drawer 780, Enterprise, Alabama 36330. Phone (205) 347-2626.

■

Kevin Teague and **John Zingarelli** announce the formation of a partnership under the name **Teague and Zingarelli,** with offices located at 2128 6th Ave., S.E., Suite 509, Decatur, Alabama 35601. Phone (205) 350-1264.

■

Balch & Bingham, of Birmingham and Montgomery, Alabama, announce that **William H. Satterfield,** formerly general counsel of the Federal Energy Regulatory Commission and deputy solicitor for the U.S. Department of the Interior, has joined the firm as a partner. Phone (205) 251-8100 (Birmingham) and (205) 834-6500 (Montgomery).

■

The law firm of **Lyons, Pipes & Cook** announces that **Oby T. Rogers** and **Caroline L. C. McCarthy** have become associated with the firm, with offices at 2 North Royal Street, P.O. Box 2727, Mobile, Alabama 36652. Phone (205) 432-4481.

■

The members of the firm of **Miller, Hamilton, Snider & Odom** announce that **Richard P. Woods, Lester M. Bridgeman** and **Louis T. Urbanczyk** have become partners of the firm, and **Joseph R. Sullivan** and **Thomas P. Oldweiler** have become associated

with the firm. Also, the Washington, D.C., firm of **Bridgeman & Urbanczyk** has merged with **Miller, Hamilton, Snider & Odom.** Mobile offices are located at 254-256 State Street, 36603. Phone (205) 432-1414.

■

The law firm of **Loggins & Loggins** announces the closing of their offices in Opp, Alabama, as of January 15, 1987. **Timothy B. Loggins** has accepted a position as staff attorney with **Alabama Electric Cooperative, Inc.,** in Andalusia, Alabama, and **Eugenia L. Loggins** has been elected district attorney for the 22nd Judicial Circuit, Covington County.

■

Steven D. Tipler announces the association of **Michael S. Herring** and the relocation of his offices to the 8th floor, Farley Building, 1929 Third Avenue, N., Birmingham, Alabama 35203. Phone (205) 328-6800.

■

The firm of **Floyd, Keener & Cusimano** announces that **James E. Hedgspeth** has left the firm to serve as Etowah County district attorney and that **Mary Ann Stackhouse** has become associated with the firm. The firm name has been changed to **Floyd, Keener, Cusimano & Roberts** with offices at 816 Chestnut Street, Gadsden, Alabama 35999-2701. Phone (205) 547-6328.

■

Phelps, Owens, Jenkins, Gibson & Fowler announces the association of **Susie T. Carver** and the relocation of the firm to 1201 Greensboro Avenue, P.O. Drawer 20, Tuscaloosa, Alabama 34502-0848. Phone (205) 345-5100.

■

The law firm of **Colebeck & Yates** announces that **J. Wilson Mitchell** has become a member of the firm, which will continue the practice of law under the new name of **Colebeck, Yates & Mitchell.** Offices are located at Suite 300, First Federal Building, Florence, Alabama 35630. Phone (205) 764-0582.

■

The law firm of **Blackburn and Maloney** announces that **Lynn Belt Schuppert** and **Kenneth M. Schuppert, Jr.,** have become members of the firm, with offices at 802 Bank Street, P.O. Box 1469, Decatur, Alabama 35602. Phone (205) 353-7826.

■

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor, First National Bank Bldg., Mobile, Alabama, announces that **T. Bruce McGowin** and **Orrin K. Ames, III,** have become members of the firm.

■

Roger C. Appell, James S. Oster, J. Edmund Odum, Jr., and **Tom F. Young, Jr.,** announce the relocation of their offices to the Leary Redus Building, 2122 First Avenue, N., Birmingham, Alabama 35203.

■

Prince, McGuire & Coogler, P.C., announces that **Jon M. Turner, Jr.,** and **R. Shan Paden** have become associates in the firm, with offices at 2500 6th Street, Tuscaloosa, Alabama 35401. Phone (205) 345-1105.

■

Rosen, Harwood, Cook & Sledge, P.A., announces that **C. Barton Adcox** has become a shareholder-employee, effective January 1, 1987, and that **Kathryn McCollough Harwood** is a new associate. Offices are located at 1020 Lurleen Wallace Boulevard, N., P.O. Box 2727, Tuscaloosa, Alabama 35403. Phone (205) 345-5440.

■

Bolt, Isom, Jackson & Bailey, P.C., announces that **Thomas H. Young** has become a partner in the firm, and **Thomas B. Richardson** has joined the firm as an associate, with offices at 822 Leighton Avenue, P.O. Box 2066, Anniston, Alabama 36202. Phone (205) 237-4641.

■

The law firm of **Tanner & Guin, P.C.,** announces that **Bruce P. Ely** and **Kim Ingram Lary** have become members of the firm, effective January 1, 1987, and that the firm will now be known as **Tanner, Guin, Ely & Lary, P.C.** Offices are at Suite 700, Capitol Park Center, 2711 University Boulevard, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

■

The law firms of **Brantley & Calhoun** and **Clower & Watkins** announce the merger of the firms under the name of **Calhoun, Watkins & Clower. Richard F. Calhoun, Keith Watkins** and **James G. Clower** are partners in the firm, with offices located at 104 South Brundidge Street, Troy, Alabama 36081. Phone (205) 566-0424.

■

Crownover & Black announces that **Cindy S. Waid** has become an associate of the firm, with offices at 2600 7th Street, P.O. Box 2507, Tuscaloosa, Alabama 35403. Phone (205) 349-1727.

■

The law firm of **Schoel, Ogle and Benton** announces that **Douglas J. Centeno** has become a partner in the firm. The firm also announces that **Edgar C. Gentle, III,** formerly associated with the law office of James L. North, has become a partner in the firm. Offices are located at Third Floor Watts Building, 2008 Third Avenue, N., Birmingham, Alabama 35203. Phone (205) 324-4893.

■

James W. Webb, Robert B. Crumpton, Jr., and **Thomas C. McGregor,** formerly of Webb, Crumpton & McGregor; **Robert E. Sasser** and **John T. Alley, Jr.,** formerly of Jones, Murray and Stewart, P.C.; and **James E. Davis,** formerly of Azar, Campbell & Azar, announce the formation of a partnership for the general practice of law, under the name **Webb, Crumpton, McGregor, Sasser, Davis & Alley,** and that **Dorothy Wells Littleton,** former law clerk to United States District Judge Truman M. Hobbs, has become associated with the firm. Offices are located at 166 Commerce Street, Montgomery, Alabama 36104. Phone (205) 823-2250.

■

Effective December 31, 1986, the law firm of **Azar, Campbell & Azar** was dissolved. **Woodley C. Campbell**

and **W. Clark Campbell, Jr.**, announce the formation of **Campbell & Campbell,** attorneys at law, and the relocation of their offices to 25 Washington Avenue, Suite 201, P.O. Box 5018, Montgomery, Alabama 36103. Phone (205) 262-0232.

■

The law firm of **Farmer & Farmer, P.A.,** announces that **W. Davis Malone, III,** has become an associate of the firm. Offices are located at 112 West Troy Street, Dothan, Alabama 36303. Phone (205) 794-8596.

■

Maynard, Cooper, Frierson & Gale, P.C. announces that **Deborah J. Long, Frank D. McPhillips** and **Maibeth J. Porter** have become partners with the firm. Offices are located at 1200 Watts Building, Birmingham, Alabama 35203. Phone (205) 252-2889.

—NOTICE—
Administrative Law Reports

In September 1983, the Alabama Revenue Department organized an Administrative Law Division to comply with the provisions of the Alabama Administrative Procedure Act, *Code of Alabama* 1975 §41-22-1 et seq. The stated purpose of the Administrative Procedure Act is "to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public."

To accomplish that goal, the Administrative Law Division provides all parties who would be directly affected by any proposed action of the Revenue Department an opportunity to be heard at a formal, contested case hearing before an impartial administrative law judge. Said proceedings encompass disputed preliminary assessments; contested refund petitions; the granting, renewal or revocation of licenses, certificates of title, etc.; and declaratory rulings on the applicability of regulations and statutes.

The purpose of the Administrative Law Reports is to provide all interested parties with a substantive summary of the facts and conclusions of law involved in each case of interest decided by the Administrative Law Division. Publication of the decision itself is prohibited by the confidentiality statutes contained in the revenue code. For reference purposes, a key word digest and statutory index has been developed to allow the reader to easily find and research cases involving a particular topic or statute. Applicable federal and Alabama appellate court authorities are included with each case.

The Administrative Law Reports are published by the Administrative Law Division of the Revenue Department and may be obtained by writing **Bill Thompson, Chief Administrative Law Judge, 219 Administrative Building, Montgomery, Alabama 36130. An initial charge of $15 must accompany your order. Each subsequent monthly report will be issued without extra charge.** ■

Committees

Alabama State Bar Model Mediation Program Available

The Alabama State Bar has made available a model mediation program. It is a public service project endorsed by the board of bar commissioners on April 19, 1985, developed by the Task Force on Alternative Methods of Dispute Resolution and operated by local bar associations in cooperation with city and county courts.

The program offers citizens of Alabama a voluntary alternative hearing process, outside normal court procedures. Through such hearings, interpersonal disputes that might otherwise develop into criminal or civil court cases may be resolved.

Court personnel screen possible participants, and licensed attorneys who are members of the participating local bar associations serve as mediators. Referrals are made through various sources, e.g. city attorneys', district attorneys' and court clerks' offices, police and sheriffs' departments and social service agencies. Citizens also may come directly to the program.

The model for the state bar program was the Birmingham Dispute Settlement System begun in 1982 by Judge T. M. Smallwood, with the assistance of local attorneys. Judge Smallwood started the program to assist with a heavy municipal court caseload. About 1,000 cases have been heard and 92 percent have been deemed successful.

Members of the state bar task force have been authorized to assist any local bar interested in starting a mediation program. Questions may be answered and speakers obtained by calling **Rodney J. Max at 328-5760** or **William D. Wise at 226-6298.** Copies of the plan are available from the state bar, P. O. Box 671, Montgomery, AL 36101.

This report was prepared by task force member William D. Wise, a 1978 Alabama State Bar admittee and an attorney in private practice in Birmingham. Wise assisted Judge Smallwood in developing the Birmingham program.

Riding the Circuits

Baldwin County Bar Association

On Friday, November 21, 1986, the Alabama Supreme Court held court for the first time in its history in Baldwin County. The court session was jointly sponsored by the Baldwin County Bar Association, the Baldwin County Commission, the Bay Minette Chamber of Commerce and Faulkner State Junior College. Approximately 2,000 people attended the session.

Attorney and Chamber of Commerce President Allan R. Chason was the coordinator of the visit, and a reception and river tour were given in honor of the justices and their spouses, with attorneys Daniel Blackburn and Mollie Johnston helping organize these events.

Oral arguments were heard in one civil case and one criminal case with Baldwin County attorneys Bob Wills, Tolbert Brantley, Sam Crosby and Dan Blackburn presenting oral arguments in the civil case; Mobile attorney Linda Perry and Assistant Attorney General Cecil Brindle presented oral arguments in the criminal case.

The Baldwin County Bar Association, through bar President Marion Wynne, Secretary-Treasurer Mollie Johnston and attorneys Greg Jones and Sam Crosby, hosted an Appellate Advocacy Seminar presented by Justices Richard L. Jones and J. Gorman Houston, Jr., as part of the Continuing Legal Education Program.

(left to right) Bay Minette Chamber of Commerce President Allan Chason, Alabama Supreme Court Chief Justice C. C. Torbert, probate judge Harry D'Olive and manager, Scott Paper Company, Woodlands Southern Operations, Tom Kelley—photo courtesy The Baldwin Times

—NOTICE—

Attorneys Filing Chapter 13 Cases in Birmingham Division of the Bankruptcy Court

Beginning **MARCH 1, 1987,** debtors must begin payments within 30 days from the filing of a case. Payment may be made directly to the standing trustee or by payroll deduction, if requested. Failure to make payment as proposed will be grounds for denial of confirmation and/or dismissal of the case.

William E. Johnson, Jr.
Bankruptcy Judge
January 7, 1987

Bar Briefs

Wright

Judge Wright retires

Judge L. Charles Wright retired January 19 after serving on the Alabama Court of Civil Appeals since 1969; for almost 15 of those years, he was presiding judge.

Judge Wright was born in Etowah County May 14, 1922, and is a graduate of Etowah County High School and Auburn University, and received his law degree from the University of Alabama in 1948. He served in the United States Navy from 1943-1946 and is a commander, USNR, (Ret.). Wright practiced law in Gadsden from 1948 to 1955 and 1963 to 1969, and was circuit solicitor, Sixteenth Judicial Circuit, from 1955 to 1963. He was elected as a state representative from Etowah County and served from 1967-69.

Judge Wright is a member of Farrah Order of Jurisprudence, Phi Alpha Delta Legal Fraternity, the Alabama and American Bar Associations and the VFW. He served as president of the Etowah County Bar in 1954, and is a member of the Baptist Church. He married Maxine McClendon in 1944 and they have three children, L. Charles Wright, Jr., Dennis M. Wright and Adele Wright Kallick, and five grandchildren.

At the time of his appointment to the court of civil appeals, he was a partner in the law firm of Dortch, Allen, Wright and Wright. He was elected to the court in 1970 and reelected in 1974 and 1980. Wright is a member of the Alabama Law Institute and was presiding judge of the Alabama Court of the Judiciary until his retirement.

Alabama's judicial disciplinary panels

The retirement of Judge Wright from the court of civil appeals created some changes on the state's two judicial disciplinary panels. Judge Wright was also chief judge of the court of the judiciary, the five-member court which hears complaints filed by the Judicial Inquiry Commission.

Replacing Wright as chief judge of the disciplinary court is Judge Richard L. Holmes of the court of civil appeals. Judge Holmes has been a member of the appeals court since 1972 and served as vice chairman of the Judicial Inquiry Commission until his appointment by the supreme court to serve as chief judge of the court of the judiciary.

Holmes' move from the Inquiry Commission to the court of the judiciary left a vacancy, and the supreme court named William M. Bowen, Jr., presiding judge of the court of criminal appeals, to fill Holmes' position on the commission. Bowen has served on the appellate court since 1977 after serving as an assistant attorney general from 1973-76.

Judge Kenneth Ingram, who was elected to replace Wright on the court of civil appeals, had served as chairman of the Inquiry Commission while on the circuit bench. His elevation to an appellate judgeship created a vacancy on the commission to be filled by the State Association of Circuit Judges.

The association of circuit judges named Circuit Judge Braxton Kittrell of Mobile to replace Ingram on the commission. Kittrell has served as a circuit judge since 1976 and currently represents Alabama on the ABA's National Conference of State Trial Judges.

Birmingham attorney William B. Hairston has been elected chairman of the Judicial Inquiry Commission.

The composition of the court of the judiciary is:

Richard L. Holmes of Montgomery, chief judge
Circuit Judge J. Edward Tease of Florence
Circuit Judge William C. Sullivan of Talladega
Attorney William D. Scruggs of Fort Payne
Attorney J. Marvin Albritton of Andalusia

The composition of the Judicial Inquiry Commission is:

Attorney William B. Hairston of Birmingham, chairman
Appeals Court Judge William M. Bowen, Jr., of Montgomery
Basil Thompson of Andalusia
Circuit Judge Tom Younger of Huntsville
Martha M. Scott of Opelika
Attorney Don Foster of Foley
Circuit Judge Braxton Kittrell of Mobile

Alabama's judgeship changes

A circuit judge moved to the state appellate courts, four district judges assumed the circuit bench and 17 new district judges have taken office in appointment or election changes since September.

Circuit Judge Kenneth Ingram was seated January 20 on the Alabama Court of Civil Appeals. He ran unopposed for the position to fill the vacancy created by the retirement of L. Charles Wright, presiding judge of the appeals court. Ingram served as a circuit judge of the 18th Judicial Circuit for the past 18 years and also as president of the State Association of Circuit Judges and chairman of the State Judicial Inquiry Commission.

Judge Robert P. Bradley succeeds Wright as presiding judge of the court of civil appeals. He has served on the court since 1969; prior to that he was an assistant attorney general and legal advisor to former Governor John Patterson. Bradley was the first chairman of the Judicial Inquiry Commission.

A list of the state judgeship changes follows:

Appellate Judgeship Changes:

Court of Civil Appeals:	L. Charles Wright Retired: 1/19/87
	Kenneth P. Ingram Elected: 1/20/87

Circuit Judgeship Changes:

3rd Circuit:	Jack W. Wallace Retired: 12/21/86 William H. Robertson Appointed: 12/22/86
4th Circuit:	Farrell McKelvey Wright End of Term: 1/19/87 Charles A. Thigpen Elected: 1/20/87
12th Circuit:	Samuel Adams End of Term: 1/19/87 Gary L. McAliley Elected: 1/20/87
16th Circuit:	Cyril L. Smith Retired: 1/12/87 William H. Rhea, III Appointed: 1/13/87
18th Circuit:	Kenneth F. Ingram Resigned: 1/15/87 Elected to Court of Civil Appeals John E. Rochester Appointed: 1/16/87
19th Circuit:	Joe Macon Retired: 12/7/86 John B. Bush Appointed: 12/8/86
21st Circuit:	Earnest R. White End of Term: 1/19/87 Bradley E. Byrne Elected: 1/20/87

District Judgeship Changes:

Barbour County:	William H. Robertson Resigned: 12/21/86 Appt. to Circuit Court Jack W. Wallace, Jr. Appointed: 12/22/86
Calhoun County:	Nathaniel D. Owens End of Term: 1/19/87 Larry F. Warren Elected: 1/20/87
Choctaw County:	John Y. Christopher Retired: 1/19/87 Pedro Scurlock Elected: 1/20/87
Clay County:	John E. Rochester Resigned: 1/15/87 Appt. to Circuit Court George Simpson Appointed: 1/16/87
Coffee County:	Gary L. McAliley Resigned: 1/19/87 Elected to Circuit Court Thomas E. Head, III Appointed: 1/19/87
Dallas County:	B. M. Miller Childers Retired: 1/19/87 Nathanial Walker Elected: 1/20/87
Hale County:	Charles A. Thigpen Resigned: 1/19/87 Elected to Circuit Court
Jackson County:	John L. Haislip End of Term: 1/19/87 Ralph H. Grider Elected: 1/20/87
Lamar County:	William O. Winston End of Term: 1/19/87 John Langley Elected: 1/20/87
Lee County:	James Noel Baker Retired: 1/19/87 Michael A. Nix Elected: 1/20/87
Limestone County:	Howard D. Burns End of Term: 1/19/87 George T. Craig Elected: 1/20/87
Marion County:	Edward Fowler Retired: 9/6/86 James C. Cashion Appointed: 9/8/86 Elected: 1/20/87
Mobile County:	Thomas F. Sweeney Retired: 1/19/87 Michael E. McMaken Elected: 1/20/87
Pickens County:	B. G. Robison, Jr. Retired: 1/19/87 Thomas Woodward Elected: 1/20/87
Tuscaloosa County:	Barbara W. Mountain End of Term: 1/19/87 Jim Guin Elected: 1/20/87

—Administrative Office of Courts

Holmes

Bowen

Ingram

Kittrell

Hairston

Bradley

Profit Recovery for the New

by Michael L. Roberts

For many years, new and unestablished businesses' efforts to recover damages for lost profits were impeded by a principle known as the "per se" rule or the "new business" rule. The per se rule was applied to preclude profits claims of new or unestablished businesses, with courts declaring that such anticipated profits are too remote, contingent and speculative to meet required standards of reasonable certainty.[1] The rule was manifested by refusing to admit evidence of profits that would have been earned or by withdrawing the issue from the trier of fact.[2]

In February 1985, however, the supreme court in *Morgan v. South Central Bell Tele. Co.*, 466 So.2d 107 (Ala. 1985), demonstrated that Alabama does not labor under the artificial constraints of the per se rule. *Morgan*, which allowed profits recovery for a new business, represents pragmatic and commendable protection for the rights of business.

In declining to apply the per se exclusory rule, Alabama's holding is consistent with modern case law development elsewhere. Most jurisdictions that have considered the question in recent years have decisively refused to apply a per se exclusory rule.[3] One apparent reason is the more sophisticated and reliable scientific evidence now available for projecting business performance. Significant technological advances in business forecasting and projection methodology, particularly in computer capabilities and usage, produce data systematically relied on to justify management decisions.[4] This data is being submitted by litigants when future business performance is at issue.

Another factor is the policy recognition that denying recovery merely because a business has little or no operating history would encourage a wrongdoer to commit or aggravate its breach to prevent the generation of a performance track record.[5]

Three requirements for profit damages often expressed are: the damages must have been foreseeable by the defendant; the damages were proximately caused by the wrongful conduct of the defendant; and the damages are proven with "reasonable certainty."[6]

Although much discussion in profit cases focuses on "reasonable certainty," few opinions undertake to define the term.[7] Its practical application seems to involve some degree of "probability," tempered with certain principles operating as qualifications upon the requirement. These include the following: if the fact of damages is proven with certainty, the extent or amount thereof may be left to reasonable inference; where a defendant's wrong has caused the difficulty in proving damages, he cannot complain of the resulting uncertainty; mere difficulty in ascertaining the amount of damages is not fatal, and mathematical precision in fixing the exact amount is not required; and it is sufficient if the best evidence of damage available is produced. As seen in the following discussion, these and similar ideas[8] figured significantly in evolving interpretations of "reasonable certainty" in the new business context.

I. Alabama treatment of new or unestablished business profit claims

Although Alabama did not adopt the per se exclusory rule in so many words, for many years there were cases appearing to embrace its substance, with language declaring that profits for new businesses were too speculative to recover. For example, *Taylor v. Shoemaker*, 34 Ala.App. 168, 38 So.2d 895 (1948), affirmed a denial of profit claims where a defendant had breached a contract to provide automobiles that the plaintiff planned to use in a new taxi business. The court applied these generalizations:

> "The prospective profits of the new business or enterprise are generally regarded as being too remote, contingent, and speculative to meet the legal standard of reasonable certainty . . . . Prospective and contemplated profits from a new business enterprise are too uncertain to be susceptible of requisite proof."

More recent cases have invoked this language while denying profits, particularly in situations where little profits data is proffered. *Wray v. Harris*, 350 So.2d 409 (Ala. 1977), held that specific performance should be ordered for conveyance of property on which defendant had contracted to build for plaintiffs a filling station, restaurant and motel. The court stated *in dictum* that profits were not recoverable, as there were "no prior records" on which profits for this new business could reasonably be based.

In *King Coal Co. v. Carmon*, 388 So.2d 886 (Ala. 1980), plaintiff miners sued a coal company on contract for rejecting plaintiffs' coal. Finding no breach, the court also observed that plaintiffs were engaging in a "new business for which they had no record of past profits, expenses or overhead." The opinion does not indicate the use of any expert testimony regarding profits.

In *Mall, Inc. v. Robbins*, 412 So.2d 1197 (Ala. 1982), a former mall tenant alleged fraud in a transaction involving the mall's rejection of a proposed subtenant, a discotheque. The court rejected the tenant's claim for anticipated profits from the proposed sublease, stating that those profits would have been dependent upon the fu-

or Unestablished Business

ture success of the unestablished business, the discotheque; yet by the time of the trial, the disco's business performance had faltered, being $31,000 behind on its rent. A clue that adequate profits evidence might produce a different analysis, however, is found in the comment that "subsequent business experience is not necessarily conclusive on the issue of lost profits."

Even while language in some cases appeared to exclude profit claims for new businesses as a matter of law, Alabama courts nevertheless retained a pragmatic inclination to examine the merits of the damages evidence where sufficiently reliable proof was presented. *Western Union Tele. Co. v. Tatum*, 35 Ala.App. 478, 49 So.2d 673 (1950), allowed a recovery by a plaintiff who had missed an opportunity to serve as a ship master because of defendant's late telegram delivery. Although the business relationship between the plaintiff and the ship company never became established, the court approved recovery for the lost future income. The ship company's accountant confirmed plaintiff's qualifications as a ship master and the evidence demonstrated a "reasonable probability" of his employment for a "reasonably substantial time," though it would have been at will. The court quoted *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931), stating that "the wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

American Life Ins. Co. v. Shell, 265 Ala. 306, 90 So.2d 719 (1956), also permitted income recovery from an unestablished business relationship. Shell, who was setting up a life insurance agency, entered into a contract with a Mr. Forsyth, whose agency had a number of salesmen, under which Shell would receive commissions on military insurance to be sold by Forsyth's salesmen. Libel by the defendant caused Forsyth to terminate Shell's contract only a few days after it was made. Shell claimed as damages the loss of the commission income he would have received through this arrangement with Forsyth and his salesmen.

Evidence was introduced of the premium income produced by Forsyth's salesmen, selling for another insurance company, during a six-month period after the termination of Shell's contract. There was proof that the type of insurance sold, the territory and the conditions for sale of this other insurance were comparable to those that would have applied to Shell's enterprise. The absence of a prior performance track record for the Shell-Forsyth venture did not trouble the court, which rejected the defendant's argument that the damages were speculative. Quoting *Story Parchment* extensively, the court noted that damages may be a matter of opinion and probable estimate, and that public policy requires the defendant bear the risk of uncertainty produced by his own wrongful act.

Files v. Schaible, 445 So.2d 257 (Ala. 1984), affirmed recovery for a restaurant operated by plaintiff for only eight months prior to the defendant's breach of a non-competition agreement. Despite the brevity of the operating history, the court concluded that evidence had been adduced sufficient for a reasonable basis to establish the "losses." The business' accountant provided a detailed analysis of the business records during the pre-breach eight-month period, and the plaintiff showed there were no reasons for loss of customers other than the defendant's competition. The opinion stated damages need not be measured with mathematical precision, and evidence need only be produced affording a reasonable basis for estimating the loss.

Finally, *Morgan v. South Central Bell Tele. Co.*, 466 So.2d 107 (Ala. 1985), resolved any doubt that Alabama would decline to impose a per se exclusory rule upon a new business that adequately proved lost profits. This decision found erroneous a trial court's J.N.O.V. order that set aside a verdict against Bell and another defendant in a suit arising from the omission of a Dr. Morgan's name from the Yellow Pages.

Drs. Morgan and Speed, periodontists, retired from teaching at the University of Alabama at Birmingham's Dental School to form a professional association for private practice. Though their business had not been established prior to the defendants' breach[9], the court held their evidence did provide a reasonable basis for the jury to approximate their damages.

Morgan, who had a background as a statistical researcher, performed a survey, asking patients whether they had come to the offices as a result of the Yellow Pages' advertisement of Speed (whose name was not omitted). The interviews with 18 patients during the three weeks studied showed that 1.6 patients per week were brought by the advertisement. Multiplying this by 48 weeks, and by the "normal fee" charged, produced a total 1978 loss of $55,760.

A non-party expert in statistical research examined this survey and confirmed that the sampling was large enough that the inferences could be projected onto the plaintiffs' total number of

patients, and that "Dr. Morgan's data were reasonable and the projections derived from the data were reasonable." The supreme court approved the "commonly acceptable practice of making a horizontal comparison of two businesses," and held that absolute certainty is not required. The rule precludes only damages not resulting from the wrong, allowing damages stemming from the wrong but uncertain in amount. The court noted that disallowing damages unless absolutely certain would encourage breaches of contract with new businesses and those whose profits fluctuate.

Shortly after *Morgan*, the Alabama Supreme Court issued another decision, *Dean v. Myers*, 466 So.2d 952 (Ala. 1985), approving profits recovery for an unconsummated business venture. The parties had agreed to pool their efforts and resources to construct a condominium complex, involving five phases of construction. After substantial completion of the first phase, the defendant wrongfully terminated the plaintiffs' involvement in the project. Evidence relied on by the court in affirming the judgment included pre-dispute projections that the plaintiffs had prepared to obtain bank financing. Most of the profits anticipated by the projections were to be realized from the later phases never built, due to the defendant's conduct.[10]

The court held that the evidence of profits could sustain the verdict, stating," Upon Dean's breach, the work and labor done and expenses incurred by Myers and McCracken, together with profits reasonably certain to be realized from later stages of the project, became proper elements of damages."

II. Proof of profits by new or unestablished businesses

How does the new or unestablished business prove lost anticipated profits? The case law reveals certain patterns into which much of the evidence utilized in these cases can fall.

(A) Prior performance history of the subject business—Where the business upon which the claims are based has some operating history, even if brief, prior to the breach or wrong by the defendant, courts have allowed this evidence to be used in measuring damages for the profits claim.[11] Even if the subject business lacks a prior performance track record, where it was planned to be associated with a large-scale, standardized business system, the experience of this system and its components may be probative of the likelihood of success of the subject business.[12] The plaintiff's own pre-breach experience in a similar business or involvement in the same industry may be pertinent to the issue of his qualifications to successfully operate the enterprise.[13]

(B) Subsequent performance history of subject business—The actual experience of the business, subsequent to the breach or wrong, also has been accepted in approximating losses.[14]

(C) Comparable experience of other businesses—This type of proof is allowed where it is established that the compared businesses, though operated by persons other than plaintiff, have characteristics sufficiently similar to the subject business regarding such factors as location, operating methods, size, capitalization or market.[15]

Particularly in a more sophisticated operation, the question of similarity lends itself to expert testimony, and, naturally, room for disagreement between the adversaries' experts regarding the degree and significance of the similarities and differences. Courts are especially receptive to comparisons where the compared business appears to be a successor to the opportunity or location promised to the plaintiff[16] or where the defendant has taken advantage of or assumed for himself the plaintiff's opportunity.[17]

(D) Industry averages—Where the nature of the business lends itself to analysis through industry averages, this evidence has been relied on by courts.[18]

(E) Defendant's statements of the anticipated success of the subject business—Considerable deference naturally has been accorded such evidence, particularly where projections of business performance were made prior to the dispute for the purpose of inducing or guiding the parties in determining whether to enter into the contract or relationship.[19] As one court observed, pre-dispute projections are "no mere 'interested guess' prepared with an eye on litigation. Instead, they [are] the product of deliberation by experienced businessmen charting their future course."[20]

A number of cases have involved an expert analyzing data establishing a projected annual return for the subject business, then extrapolating this income over a certain period of time (such as the period of the planned relationship or contract) to determine total profits.[21] This income stream then may be the basis for calculations supporting the expert's fair market value opinion.[22]

The following are notable cases typifying the manner in which these types of proof have been applied:

Chung v. Kaonohi Center Co., 62 Hawaii 594, 618 P.2d 283 (1980), affirmed a future profits recovery for a Chinese restaurant that never became established, due to the defendant mall's breach of contract to grant the plaintiff a lease. The plaintiff's expert, an appraiser, gave an income stream value analysis.

He estimated first-year gross income by examining similar Chinese restaurants, including one that occupied the site originally committed to plaintiff; a one-day survey of customers and gross receipts of this comparable restaurant was performed. The expert projected that this gross income figure would increase 10 percent annually, and estimated expenses from industry standards data and the plaintiff's operational plans. Profits for the ten years of the promised lease were calculated, with these being capitalized and discounted to present value. The court rejected the defendant's arguments that this testimony was speculative, observing that the expert was qualified. The defendant's complaints about the factors and reasoning employed in the analysis were deemed matters going to the weight rather than the competence of the testimony.

Somewhat similar evidence authorized a recovery in *Lee Shops, Inc. v. Schatten-Cypress Co.*, 350 F.2d 12 (6th Cir. 1965), for a discount department store that was never built. The plaintiff intended to institute what would have been the first discount department store in Nashville, and

contracted to sublease a desirable site from the defendant. Due to defendant's problems in negotiations with a third party, a site was not provided.

The plaintiff's evidence included information provided by the defendant that there could be $5,000,000 in annual sales at that location, and a survey made by the plaintiff's treasurer, prior to the contract, confirming the validity of that representation. This expert prepared profit and loss statements showing estimated annual sales and costs of goods and operations, for which he provided a detailed explanation. The annual profits shown then were projected into the 15-year term of the proposed sublease, producing total profits for that period. The expert gave his opinion of the fair market value of the promised lease, considering these expected sales and profits. The court held the verdict sustained by the proof, stating that it is sufficient if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result be only approximate.

Expert testimony will not, however, bootstrap an inherently speculative project into the realm of reasonable certainty. In *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 140 Ariz. 174, 680 P.2d 1235 (1984), an award of profits for a new catfish ranch venture was disallowed, where the industry averages demonstrated a 95 percent failure rate for this type of business, and the record showed defects in the feasibility studies the plaintiff had conducted. Further, it appeared that the plaintiff lacked an adequate system for marketing the fish, as his planned distributor had gone bankrupt.

Similarly, in *Kenford Co. v. County of Erie*, 489 N.Y.S.2d 939 (A.D. 4 Dept. 1985), affirmed 67 N.Y.S.2d 257, 493 N.E.2d 234 (1986), the court remitted profits damages where, notwithstanding expert testimony, the novel and unique nature of the proposed venture made it simply too speculative. This suit sought profits because of a county's failure to construct a domed stadium, around which plaintiff had intended to develop a theme park, golf course, hotel and office park; to acquire a major league baseball franchise; and to operate a stadium management contract for promoting such events as professional football games, circuses and consumer and entertainment shows.

Even though substantial expert testimony was presented attempting to project the revenue that would be derived from these events, the very nature of this enterprise limited the types of proof applicable. The only facility arguably available for comparison was the Houston Astrodome, and this type of contract could not lend itself to industry averages. Accordingly, the court found no rational basis for calculating lost future profits.

Central Telecommunications, Inc., v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), affirmed a recovery of $35.8 million, of which $10.8 million were actual damages, for an unestablished business' claims under Missouri interference with business expectancy law and under federal antitrust law. TCI acted improperly to prevent Central from obtaining a cable television franchise in Jefferson City, Missouri. TCI's arguments that a business can prove only anticipated profits with past income and expenses were unsuccessful. The record showed Central had made sufficient preparations to enter the cable television business; it had raised and arranged for capital commitments, detailed feasible plans for its cable system, ensured its personnel had the necessary expertise and secured the award of the franchise by vote of the city council.

Stating that the wrongdoer should bear the risk of uncertainty created by its wrong, the court cited Central's detailed damages study and extensive supporting expert testimony, including that of an "industry rule of thumb" establishing the lost franchise's value to be "ten times (the) cash flow in Central's proposed third year of operations." The award was held sustained by the evidence, as Central presented an "estimate of damages based on reasonable industry assumptions."

Conclusion

The recent willingness of courts to look past exclusory labels and realistically examine the merits of profits evidence makes sense. There certainly are no valid policy reasons for arbitrary discrimina-

tion based on the age of the business; reasonably reliable proof of expected business performance should be scrutinized and given appropriate weight. A per se exclusory rule would encourage those who have obligations with new businesses to commit or aggravate their breach so that the victim might be altogether prevented from commencing business.

The argument for declaring a damages claim speculative as a matter of law no longer is warranted when advanced scientific forecasting techniques, routinely used by businesses to project performance for their own management decisions, are available to assist the trier of fact. The developments discussed in this article are evidence of pragmatic and fair protection for fundamental expectancy interests of businesses. ■

FOOTNOTES

–See, e.g., *Taylor v. Shoemaker*, 34 Ala. App. 168, 38 So.2d 895 (1948).

[2]E.g., *Bromberg v. Eugenotto Constr. Co.*, 162 Ala. 359, 50 So. 314 (1909) (admissibility); *King Coal Co. v. Garmon*, 388 So.2d 886 (Ala. 1980)(submission to jury).

[3]The following cases are illustrative of jurisdictions that have declined to apply a per se rule to new or unestablished business profit claims: *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984)(Maritime law—appealed from S.D. Ala.); *Walgreen Ariz. Drug Co. v. Levitt*, 670 F.2d 860 (9th Cir. 1982) (Ariz.); *Computer Systems Engineering, Inc. v. Qantel Corp.*, 740 F.2d 59 (1st Cir. 1984) (Mass.); *Upjohn Co. v. Rachelle Labs., Inc.*, 661 F.2d 1105 (6th Cir. 1980) (Mich.); *Unique Systems, Inc. v. Zotos Int'l., Inc.*, 622 F.2d 373 (8th Cir. 1980) (Minn.); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.* 800 F.2d 711 (8th Cir. 1986) (Mo.); *El Ranco, Inc. v. First Nat'l Bank of Nevada*, 406 F.2d 1205 (9th Cir. 1968) (Nev.); *Lee Shops, Inc. v. Schatten-Cypress Co.*, 350 F.2d 12 (6th Cir. 1965) (Tenn.); *Crues v. KFC Corp.*, 546 F.Supp. 217 (E.D. Mo. 1982); *Perma Research & Development Co. v. Singer Co.*, 402 F.Supp. 881 (S.D.N.Y. 1975), affirmed, 542 F.2d 111 (2d Cir. 1976); *Morgan v. South Central Bell Tele. Co.*, 466 So.2d 107 (Ala. 1985); *Guard v. P & R Enterprises, Inc.*, 631 P.2d 1068 (Alas. 1981); *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 140 Ariz. 174, 680 P.2d 1235 (1984); *S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.*, 58 Cal.App.3d 173, 130 Cal. Rptr. 41 (1976); *Int'l Technical Instruments, Inc. v. Engineering Measurements Co.*, 678 P.2d 558 (Colo.App. 1983); *Gordon v. Indusco Management Corp.*, 164 Conn. 262, 320 A.2d 811 (1973); *Chung v. Kaonohi Center Co.*, 62 Hawaii 594, 618 P.2d 283 (1980); *Clark v. Int'l Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Harsha v. State Savings Bank*, 346 N.W.2d 791 (Iowa 1984); *Vickers v. Wichita State Univ.*, 213 Kan. 614, 518 P.2d 512 (1974); *Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399 (Ky. 1985); *John D. Copanos & Sons, Inc. v. McDade Rigging & Steel Erection Co.*, 43 Md. 204, 403 A.2d 402 (1979); *Fera v. Village Plaza, Inc.*, 396 Mich. 639, 242 N.W.2d 372 (1976); *Leoni v. Bemis Co.*, 255 N.W.2d 824 (Minn. 1977); *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 204 Neb. 248, 281 N.W.2d 778 (1979); *Wilko of Nashua, Inc. v. TAP Realty, Inc.*, 117 N.Y. 843, 379 A.2d 798 (1977); *Welch v. U.S. Bancorp Realty & Mortgage Trust*, 286 Or. 673, 596 P.2d 947 (1979); *Merion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.*, 31 Pa. Super. 469, 462 A.2d 686 (1983); *Smith Dev. Corp. v. Bilow Enterprises, Inc.*, 112 R.I. 203, 308 A.2d 477 (1973); *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161 (Utah 1983); *Wyoming Bancorporation v. Bonham*, 563 P.2d 1382 (Wyo. 1977). See Restatement of Contracts 2d, Section 352, Comment b; Comment 2 to the Uniform Commercial Code, Section 2-708. For discussions of the per se rule's decline, see R. Dunn, Recovery of Damages for Lost Profits 2d, ch. 4 (1981), and Comment, Remedies Lost Profits as Contract Damages for an Unestablished Business: The new Business Rule Becomes Outdated, 56 N.C.L. Rev. 693 (1978). These issues have evolved primarily in contract litigation, though some of these decisions have also involved fraud or other theories.

[4]Comment, *supra*, at 696, 723; see J. Hanke & A. Reitsch, Business Forecasting at 429 (2d ed. 1986); G. Kress, Practical Techniques of Business Forecasting at 227-30 (1985); S. Wheelwright & S. Makridakis, Forecasting Methods for Management at 1-2 (4th ed. 1985).

[5]E.g., *Morgan v. South Central Bell Tele. Co.*, *supra* at 116, *Vickers v. Wichita State Univ.*, *supra*, at 517.

[6]E.g., *Morgan v. South Central Bell Tele. Co.*, *supra*, at 115; *Paris v. Buckner Feed Mill, Inc.*, 279 Ala. 148, 149, 182 So.2d 880, 881 (1966); *Dunn*, *supra*, at 1-6. Some cases, such as *Paris*, have tended to dispose of profit claims with a "collateral transaction" or "subsequent transactions" rule, which seems to be an outgrowth of foreseeability and proximate cause requirements. As typically expressed, lost profits expected from a collateral transaction with a third party, of which the defaulting party did not have notice, were considered too remote and not recoverable upon breach of the original contract between plaintiff and defendant. See *Dunn*, *supra*, at 40-46. In modern cases, however, the "collateral" nature of transactions from which a profit was to be derived has not impeded profits recovery. E.g., *Morgan v. South Central Bell Tele. Co.*, *supra*; *Dean v. Myers*, 466 So.2d 952 (Ala. 1985); *Fera v. Village Plaza, Inc.*, *supra*.

[7]*Welch v U.S. Bancorp Realty & Mortgage Trust*, *supra*, at 964, states:

> "What is meant by 'reasonable certainty' is discussed in McCormick, Damages 100, Section 27 (1935), in which it is stated '[i]t appears that the epithet 'certainty' is overstrong, and that the standard is a qualified one, of 'reasonable certainty' merely, or, in other words, of 'probability'."

See *Western Union Tele. Co v. Tatum*, 35 Ala.App. 478, 480, 49 So.2d 673, 675 (1950).

[8]*Story Parchment Co. v. Paterson Parchment Paper Co.*, 286 U.S. 555, 556, 51 S.Ct. 248, 251, 75 L.Ed. 544, 547 (1931); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, *supra*, at 729, 730; *United Bonding Ins. Co. v. W. S. Newell, Inc.*, 285 Ala. 171, 180, 232 So.2d 616, 624 (1969); *American Life Ins. Co. v. Shell*, 265 Ala. 306, 311, 312, 90 So.2d 718, 719, 725 (1956); *Brendle Fire Equip., Inc. v. Electronic Engineers, Inc.*, 454 So.2d 1032, 1034 (Ala.Civ.App. 1984); see Comment, *supra*, at 709.

[9]Neither Dr Morgan nor Dr. Speed had engaged in private practice as periodontists for at least 15 years. Brief for Appellee L. M. Berry & Co. at 30, *Morgan v. South Central Bell Tele. Co.*, *supra*.

[10]No units had been sold at the time of the breach and no profits were actually realized. Brief for Appellant at 7, *Dean v. Myers*, *supra*. Accordingly, the profit claims focused on the pre-dispute projections produced prior to defendant's derailing the project. Brief for Appellee at 15, 61, app. D, *Dean v. Myers*, *supra*.

[11]E.g., *Files v. Schaible*, *supra* (8 months of pre-breach operation by plaintiff); *Harsha v. State Savings Bank*, *supra* (less than one year of pre-breach operation).

[12]E.g., *Smith Development Corp. v. Bilow Enterprises, Inc.*, *supra* (McDonald's franchise); *Walgreen Ariz. Drug Co. v. Levitt*, *supra* (national drug store chain); *Pauline's Chicken Villa, Inc. v. KFC Corp.*, *supra* (Kentucky Fried Chicken franchise).

[13]E.g., *Pauline's Chicken Villa, Inc. v. KFC Corp.*, *supra* (plaintiff's prior operation of similar franchises); *Cardinal Consulting Co. v. Circo Resorts, Inc.*, *supra* (plaintiff's extensive experience in tours industry).

[14]E.g., *Morgan v. South Central Bell Tele. Co.*, *supra*; *Files v. Schaible*, *supra*; *Miller Industries, Inc. v. Caterpillar Tractor Co.*, *supra*.

[15]E.g., *Smith Development Corp. v. Bilow Enterprises, Inc.*, *supra*; *Miller Industries, Inc. v. Caterpillar Tractor Co.*, *supra*; *Galindo v. Hubbard*, *supra*; *Wilko of Nashua, Inc. v. TAP Realty, Inc.*, *supra*.

[16]E.g., *Chung v. Kaonohi Center, Inc.*, *supra*; *Autowest, Inc. v. Peugeot, Inc.*, *supra*.

[17]E.g., *Western Geophysical Co. v. Bolt Associates, Inc.*, 584 F.2d 1164 (2d Cir. 1978).

[18]E.g., *Central Telecommunications Inc. v. TCI Cablevision, Inc.*, *supra*; *Vogue v. Shopping Centers, Inc.*, 402 Mich. 546, 266 N.W.2d 148 (1978).

[19]In the following cases, the defendant's pre-dispute performance projections or information was utilized in measuring lost profits damages: *Computer Systems Engineerings, Inc. v. Qantel Corp.*, *supra* (profit and loss statement for second year of operation as defendant's distributor); *Perma Research & Development Co. v. Singer Co.*, *supra* (sales projections by defendant's market expert); *Lee Shops, Inc. v. Schatten-Cypress Co.*,*supra* (defendant's pre-dispute estimate of annual sales for plaintiff); *Wyoming Bancorporation v. Bonham*, *supra* (defendant-competitor's pre-suit computations of its losses due to plaintiff bank's competition). Pre-dispute projections prepared by plaintiff are also accorded weight where they had been intended to justify entering into the relationship or project. See, e.g., *Autowest, Inc. v. Peugeot, Inc.*, *supra*; *Dean v. Myers*, *supra*; *Lee Shops, Inc. v. Schatten-Cypress, Inc.*, *supra*; *Upjohn Co. v. Rachelle Laboratories, Inc.*, *supra*.

[20]*Autowest, Inc. v. Peugeot, Inc.*, *supra*, at 566.

[21]E.g., *Computer Systems Engineering, Inc. v. Qantel Corp.*, *supra*; *Upjohn Co. v. Rachelle Laboratories, Inc.*, *supra*; *Lee v. Joseph E. Seagram & Sons, Inc.*, *supra*; *Perma Research & Dev. Co. v. Singer Co.*, *supra*; *Autowest, Inc. v. Peugeot, Inc.*, *supra*. Such projection techniques appear somewhat anaolgous to projections of lifetime future earnings employed in personal injury cases. E.g., *Deakle v. John E. Graham & Sons*, 756 F.2d 821 (11th Cir. 1985).

[22]E.g., *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, *supra*; *Lee Shops, Inc. v. Schatten-Cypress Co.*, *supra*; *Chung v. Kaonohi Center Co.*, *supra*; *Welch v. U.S. Bancorp Realty & Mortgage Trust*, *supra*.

Michael L. Roberts, of the firm of Floyd, Keener, Cusimano & Roberts in Gadsden, graduated from Samford University in 1974 and Cumberland School of Law in 1977. He serves as a special assistant attorney general and is a member of the Etowah County, Alabama State and American Bar Associations, as well as the Alabama Trial Lawyers Association.

Legal Malpractice: The Alabama Story 1987

ABOUT THE SEMINAR

Legal malpractice claims are a fact of life, in Alabama as well as the rest of the nation. Many of them arise from simple administrative errors or breakdowns in client relations. In a period when legal malpractice insurance rates are escalating rapidly, it is appropriate to address malpractice prevention.

The seminar information has been compiled by professional risk managers and customized with Alabama claims data. All who work in law offices need to consider the risk management problems and techniques that will be discussed. You are encouraged to attend and invite as many of your support staff as you deem appropriate.

WHERE AND WHEN

Day/Date	Time	Location
Monday, March 16	9-11 a.m.	Parlor A, Von Braun Civic Center, Huntsville
Monday, March 16	3-5 p.m.	Holiday Inn Sheffield
Tuesday, March 17	10 a.m.-noon	Holiday Inn Attalla, Gadsden
Tuesday, March 17	3-5 p.m.	Carriage House Inn, Anniston
Wednesday, March 18	9-11 a.m.	North Exhibit Hall, Civic Center, Birmingham
Wednesday, March 18	3-5 p.m.	Sheraton Capstone, Tuscaloosa
Thursday, March 19	9-11 a.m.	Parlor A, Civic Center, Montgomery
Thursday, March 19	3-5 p.m.	Sheraton, Dothan
Friday, March 20	10 a.m.-noon	Plantation Ballroom, Riverview Plaza, Mobile

CLE CREDIT

This course has been approved by the Alabama State Bar Mandatory Continuing Legal Education Commission for a maximum of 2.0 credits. You must register in order to be credited with attendance of it.

LEGAL MALPRACTICE: THE ALABAMA STORY

I. ANALYSIS OF ALABAMA LEGAL MALPRACTICE CLAIMS
   - A. Profile of the professional
     1. size of firm
     2. number of years admitted at date of error
   - B. Profile of the claim
     1. who brings claims
     2. the collection
     3. area of law
     4. error types
     5. activity
   - C. Profile of the cost of the claim
     1. time intervals
     2. disposition
     3. costs of claims

II. RISK MANAGEMENT
   - A. Causes common to all areas
     1. docket control
     2. documentation
     3. conflicts
     4. client relations
   - B. By area of law
     1. real estate
     2. personal injury—plaintiff
     3. collection/bankruptcy
     4. criminal
     5. estate/trust/probate
     6. family
     7. corporate/business
     8. personal injury—defendant
   - C. When all else fails
     1. the insurance policy and its pitfalls
     2. the carrier and stability

ABOUT THE SPEAKER—JO ANN FELIX

Jo Ann Felix has been extensively involved in the subject of legal malpractice for the past 15 years, as an underwriter, marketer, consultant and bar staffer. She began her involvement in California with Equity General Agents. After four years she joined Alexander & Alexander's team in the professional liability fields and worked at the national marketing and underwriting management levels. In 1981 she took a temporary leave from the insurance industry and became the staff director of the American Bar Association's Standing Committee on Lawyers' Professional Liability.

Ms. Felix now has re-entered the industry side of the professional liability field with Kirke-Van Orsdel Insurance Services as the account manager of their professional associations department. As such, she is responsible for the professional liability programs of the Iowa, Kansas, Virginia and Alabama bars, as well as serving as the director of the KVIS loss control program.

She has written many articles on legal malpractice, and is the author of "A Lawyer's Guide to Legal Malpractice Insurance" published by the American Bar Association and the co-author of "A Practice Guide to Preventing Legal Malpractice" published by Shepard's/McGraw-Hill.

Ms. Felix also is an accomplished lecturer on the subject of legal malpractice, having spoken at many state continuing legal education seminars and ABA national programs. In addition, she has taught a legal writing course on legal malpractice at Chicago's Kent School of Law.

COMMENTATORS

Harold F. Herring, Huntsville
Robert O. Cox, Sheffield
J. Curtis Wright, Gadsden
Walter J. Merrill, Anniston
W. Stancil Starnes, Birmingham
John A. Owens, Tuscaloosa
Charles A. Stakely, Jr., Montgomery
H. Dwight McInish, Dothan
W. Boyd Reeves, Mobile

Notice of Election

Notice is given herewith pursuant to the *Rules Governing Election of President-elect and Commissioners* for 1987.

President-elect

The Alabama State Bar will elect a president-elect in 1987 to assume the presidency of the bar in July 1988. Any candidate must be a member in good standing on March 1, 1987. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1987. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 14, 1987.

Commissioner

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th, 11th, 13th, 17th, 18th, 19th, 21st, 22nd, 23rd, 30th, 31st, 33rd, 34th, 35th and 36th and the Bessemer Cut-off division of the 10th Judicial Circuit. Additional commissioners will be elected in all circuits having 300 or more members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1987, and vacancies certified by the secretary on March 15, 1987.

The terms of any incumbent commissioners are retained and, for 1987 only, commissioners in multiple commissioner circuits will be elected for terms as follows:

Places 2, 5, 8	1 year
Places 3, 6, 9	2 years
Places 4, 7, 10	3 years

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 24, 1987).

Ballots will be prepared and mailed to members between May 15 and June 1st. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 9, 1987) at state bar headquarters.

Economic Experts for Reduction to Present Value of Future Lost Earning Awards

by David A. Bagwell

I. The present uncertainty

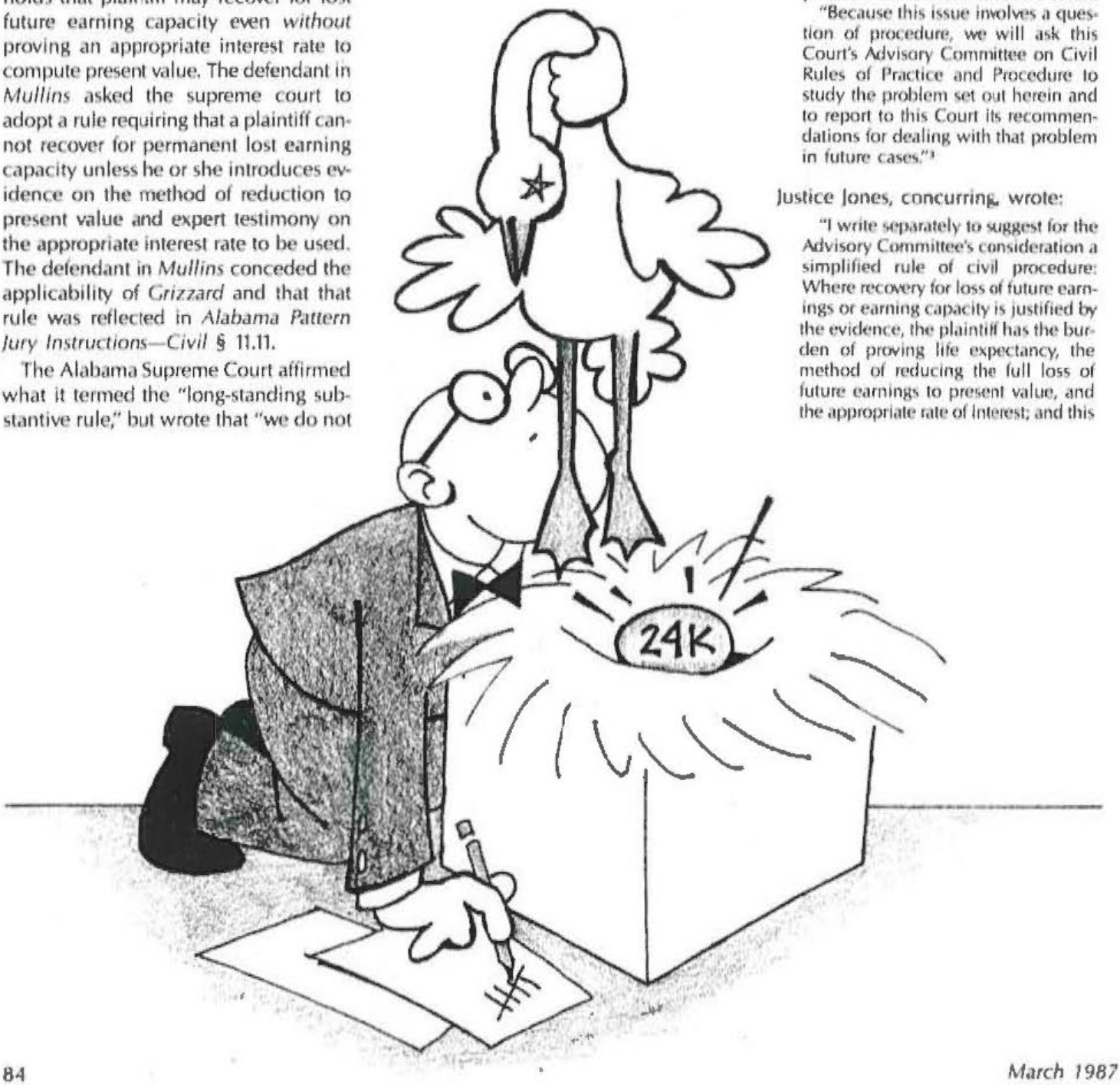
The Supreme Court of Alabama in *Mullins v. Summers*, 485 So.2d 1126, (Ala. 1986) dealt with the contention of a *defendant* that the supreme court should overrule the holding in *Louisville & Nashville R.R. Co. v. Grizzard*,[1] which holds that plaintiff may recover for lost future earning capacity even *without* proving an appropriate interest rate to compute present value. The defendant in *Mullins* asked the supreme court to adopt a rule requiring that a plaintiff cannot recover for permanent lost earning capacity unless he or she introduces evidence on the method of reduction to present value and expert testimony on the appropriate interest rate to be used. The defendant in *Mullins* conceded the applicability of *Grizzard* and that that rule was reflected in *Alabama Pattern Jury Instructions—Civil* § 11.11.

The Alabama Supreme Court affirmed what it termed the "long-standing substantive rule," but wrote that "we do not reject the irrefutable logic of [defendant's] argument",[2] and, further, that:

> "While rejecting at this time Appellant's challenge to the standard of proof approved in *Grizzard*, the Court is sympathetic to Appellant's argument. It is the apprehension of acting—without a detailed study of the problem—to add one more layer of expert evidence to what ordinarily is already a complex trial that influences this result. But we acknowledge that this position is not easily defensible in light of the jury's obvious need for help in its application of the substantive rule of law.
>
> "Because this issue involves a question of procedure, we will ask this Court's Advisory Committee on Civil Rules of Practice and Procedure to study the problem set out herein and to report to this Court its recommendations for dealing with that problem in future cases."[3]

Justice Jones, concurring, wrote:

> "I write separately to suggest for the Advisory Committee's consideration a simplified rule of civil procedure: Where recovery for loss of future earnings or earning capacity is justified by the evidence, the plaintiff has the burden of proving life expectancy, the method of reducing the full loss of future earnings to present value, and the appropriate rate of interest; and this



burden may be met by introducing into evidence the mortality tables, the annuity tables, and the legal rate of interest (8 percent per annum for written contracts), all of which are found in the annual *Acts of Alabama* and *Alabama Code* (1975)."[4]

II. Advisory committee action

The Advisory Committee, aware as is the court of the limitation upon the court's rulemaking power, set out in Section 6.11 of the Judicial Article (Amendment 328 to the Alabama Constitution of 1901), has deferred action on the question, at least for the present, leaving the issue to be handled either by the Supreme Court's pattern jury instruction committee, or litigants in individual cases, or both.

Hence, the need (or not) of expert testimony, and the mechanics of it if offered, are timely questions in Alabama law.

III. Present Alabama rule: computations leading up to the present value issue

The rule in *Grizzard* cannot be analyzed in isolation and must be examined with the backdrop of the mechanics of proof of diminished future earning capacity.

The question is made more difficult by the fact that there are not many recently reported Alabama cases on the issues raised here, which one commentator explains to be the result of Alabama's punitive damages standard for death cases, and the preference of the Alabama plaintiffs' bar to seek punitive rather than compensatory damages in personal injury cases so that limiting analysis cannot be so rigorously applied.[5]

First, plaintiff must prove by lay or expert testimony that his ability to earn money in the future has been reduced or eliminated as a proximate consequence of the wrong of the defendant.[6]

Second, plaintiff must prove (with the requisite certainty) how much he would have made during the period in which he will be unable to work, which may be the same as or in some cases more than he made prior to the accident.[7]

Third, if the reduction in earnings is to be permanent, plaintiff must show how many years' loss of earning there would be. In many "garden-variety" cases this element is proved simply by introduction of mortality tables showing life expectancy.[8] This is done undoubtedly for reasons of ease and cost, since mortality tables printed in the *Acts of Alabama* are the subject of judicial notice under *Ala. Code* 1975 § 35-16-4. Though the reported cases do not address the issue, the difference between the age of probable death and that of probable cessation of employment—if treated in the trial at all—presumably is simply argued to the jury.

Fourth, the remaining life or work life multiplied by the rate of lost earnings must be reduced to present value, and it is here that we arrive at the *Grizzard* case and the supreme court's posed dilemma.

IV. Reduction to present value

As Deans Gamble and Corley wrote:

> "Personal injury awards in Alabama are in a lump sum and the plaintiff has the advantage of investing the money and receiving income from it. To account for this factor the 'reduction to present value rule' has been employed to reduce the award by a reasonable rate of return that might be expected during the compensation period."[9]

Exactly how this should (or even actually does) take place in circuit courts over the state is subject to some question. In some reported cases plaintiffs have called expert witnesses (actuaries, in two reported cases) to testify upon the calculation of the reduction of the lost earnings award to present value.[10] As the supreme court recognized in *Mullins v. Summers*[11], however, under the rule in *Louisville & Nashville R.R. Co. v. Grizzard*[12], the plaintiff need *not* introduce testimony on the appropriate rate of interest or method of reduction to present value. An informal survey of lawyers practicing in various parts of the state indicates that in most "garden-variety" tort cases, the reduction to present value issue is handled simply by giving the jury an annuity table of which judicial notice is taken under *Ala. Code* 1975 § 35-16-2[13]. In such a situation the problem of the choice of the actual interest rate is taken care of simply by oral argument and/or reliance upon the everyday experience of the jury.

Though it does not appear to be widely known or followed, the actual rule in Alabama seems to be that in an *Alabama* law case the reduction to present value should be on the basis of the "legal rate" of interest of 8 percent, though in federal law cases (such as F.E.L.A. and Jones Act cases) the rate may be set by use of the actual current interest rate in the business world.[14] The federal rule will be discussed in more detail in the following parts of this article. The *Reiter* court, in fact, included a helpful table (apparently for purposes of judicial notice) along with comments by the "able mathematician of this State" who prepared it, noting the need for an 8 percent table, since in Europe "where annuities are popular, 8 percent is an unheard-of rate."[15] This may well explain why a plaintiff in "the old days" might have called an actuary to compute present value, even though *Grizzard* says he does not have to (basically, a task in which defendant might have had more interest than plaintiff), since by doing so plaintiff could limit the *amount* of the present value reduction from 8 percent to, say, 4½ percent in the "old days" as in *Louisville & Nashville Rd. Co. v. Richardson*.[16]

It is probably safe to say that practice in many or most circuits does not currently follow the 8 percent rule, though that rule appears to remain the law in a case in which Alabama law supplies the rule of decision.

V. Should *Grizzard* be overruled by rule or otherwise: the experience in federal law cases in which experts are used

The issue raised by the supreme court in *Summers v. Mullins* is whether it would be a good idea to require that plaintiff call expert witnesses to explain to the jury the method of reduction to present value.

The question is particularly important because of the extra expense to *each* party in connection with the hiring of experts.

Alabama is fortunate to have a test case to examine: personal injury cases under federal law, such as F.E.L.A. and the Jones Act (which adopts F.E.L.A. by reference). We next examine the experience of the federal courts in those cases over many years with the use of economic experts.

VI. Economic experts in the courtroom: the federal experience

The experience of the federal courts with experts on this topic is bad.

The supreme court in *Jones & Laughlin Steel Corp. v. Pfeifer*[17] summed up years of dreary experience with experts in personal injury cases to reduce future lost earnings awards to present value, by quoting the Second Circuit, that "[t]he average accident trial should not be converted into a graduate seminar on economic forecasting".[18] Anyone who reads four cases[19] usually wishes the same principle applied to appellate opinions and easily can see why the federal trial courts have such problems with the issue.

There are said to be four steps to the procedure, namely, "estimating the loss of work life resulting from the injury or death, calculating the lost income stream, computing the total damage, and discounting that amount to its present value".[20] For purposes of clarity it is worth taking those four steps one at a time, though for the true picture it is useful to read any of the cases.

A. Estimate loss of work life[21]

1. The courts use worklife tables (not covered by the Alabama judicial notice statute); worklife tables often show cessation at ages *less* than 65, for early retirement, disability or death.[22]
2. Evidence on likelihood of plaintiff's being different from the norm is admissible.[23]
3. Parties *may* agree on the age of cessation of work; in *J & L* they agreed it was 65,[24] but that may give too much to plaintiff, because most worklife tables show cessation at younger ages, and thus counsel typically do not agree.

B. Calculate lost income stream

1. **Annual wage or base**
   a. **Base** The computation "[b]egins with the gross earnings of the injured party at the time of injury."[25]
   b. **Add-ons** "To this amount other income incidental to work, such as fringe benefits, should be added,"[26] as well as "insurance coverage, pension and retirement plans, profit-sharing and in-kind services."[27] Fringes "are frequently excluded for simplicity's sake,"[28] presumably by agreement.
   c. **Deducts**
   (i) Taxes On the other hand, the injured worker's lost wages would have been diminished by state and federal income taxes. Since the damages award is tax-free, the relevant stream is ideally of after-tax wages and benefits.[29] If taxes are *de minimis* the parties may ignore them,[30] but taxes normally are not *de minimis* except in non-tax states, like New Hampshire. Economists often ignore state taxes on the theoretical assumption that the person could have moved to and worked in a non-tax state, but this seems unreasonably theoretical and overstates the amount of future lost earnings.
   (ii) Unreimbursed expenses Workers often incur unreimbursed costs, such as transportation to work and uniforms, that the injured worker will not incur. These costs also should be deducted in estimating the lost stream.[31]
2. **Expected evidence by plaintiff: increase for individualized factors** "If sufficient proof is offered, the trier of fact may increase that figure [i.e., the basic annual wage] to reflect the appropriate influence of individualized factors (such as foreseeable promotions).[32] Example:

> With the passage of time, an individual worker often becomes more valuable to his employer. His personal work experiences increase his hourly contributions to firm profits. To reflect that heightened value, he often will receive "seniority" or "experience" raises, "merit" raises, or even promotions. Although it may be difficult to prove when, and whether, a particular injured worker might have received such wage increases . . . . *[cite omitted]*, they may be reliably demonstrated for some workers.[33]

3. **Expected testimony from plaintiff: increase for society factors** If sufficient proof is offered, the trier of fact may increase that base wage figure to reflect the appropriate influence of "societal factors," such as foreseeable productivity growth within the worker's industry.[34]

C. Compute total damage

This is the simplest step and the least discussed—apparently just add the sum of the annual payment during the remaining working life, keeping in mind this cannot be the end result.[35]

D. Discount rate

If the entire sum of lost income were paid on the judgment date, plaintiff would get a windfall, since he could invest the money and earn interest. To adjust for that interest, since 1916 estimated future benefits of present investments of future income have been discounted in making up the award in federal cases.[36] It is this area, in particular, in which expert economic testimony has made federal court litigation of present value intolerably complex.

1. **Three possible theories** The supreme court in *J & L* identified three possible methods of discounting for interest and inflation, namely the "case-by-case method," the "below-market discount method" and the "total offset method".[37] In discussing the amount of the rate, the supreme court wrote that "[a]lthough we find the economic evidence distinctly inconclusive regarding an essential premise of those approaches",[38] still:

> "We do not believe a trial court adopting such an approach in a suit under § 5(b) should be reversed if it adopts a rate between 1 and 3 percent and explains its choice."[39]

The supreme court left open the possibility of an even *greater* discount rate.[40]

2. **Which theory to use?**
   a. **Federal court's Hobson's choice: "below-market discount rate method"** The Court of Appeals for the old Fifth Circuit *en banc* reduced the available options from three to one in federal courts in the southeastern states, holding in *Culver II*[41] that factfinders in federal courts in this circuit *must* adjust damage awards to account for inflation by using the "below-market discount rate method," which the *en banc* court describes as follows:

> "In the below-market discount method, the factfinder does not attempt to predict the wage increases the particular plaintiff would have received as a result of price inflation. Instead, the trier of fact estimates the wage increases the plaintiff would have received each year as a result of all factors other than inflation. The resulting income stream is discounted by a below-market discount rate. This discount rate represents the estimated market interest rate, adjusted for the effect of any income tax, and then offset by the estimated rate of general future price inflation."[42]

No case comes very close, but *Culver II* comes closest to giving lawyers a black-letter rule under this theory:

> "We hold that factfinders in this Circuit must adjust damage awards to account for inflation according to the below-market discount rate method. The parties may, if they wish, stipulate the below-market discount rate, as they may stipulate any other disputed issue. If they are unable to do so, they may introduce expert opinion concerning the appropriate rate. Other evidence about the effect of price inflation is inadmissible. Evidence about the likelihood that the earnings of an injured worker would increase due to personal merit, increased experience and other individual and societal factors continue, of course, to be admissible. We recognize that the supreme court declined in *Pfeifer* to select a single method of accounting for inflation. We are confronted, however, with the need to adapt that opinion to jury trials. We

also think it desirable to afford litigants and the courts the opportunity to determine the actual operation of this less complex method in order that its efficacy for national use can be determined.

"As we have noted, the discount rate may be affected by the factfinder's assumption about the type of investment the plaintiff will choose, for long-term investments usually yield higher nominal interest rate returns than short-term investments of the same quality. The supreme court having said in *Pfeifer* that it perceives "no intrinsic reason to prefer one assumption over the other," we mandate neither. However, the factfinder should not consider the plaintiff's possible need for emergency funds as a factor in favor of short-term investments; the injured wage-earner should have no greater right to a resource against future emergencies than he would have had if he had continued to work.

"In judge-tried cases, a trial court adopting a pre-tax discount rate between 1 and 3 percent will not be reversed if it explains the reasons for its choice. This guideline, however, goes only to the reasonableness of the correlation between the pre-tax market rate of interest and the inflation rate. As discussed above, this pre-tax discount rate must then be adjusted for tax effects. If supported by appropriate expert opinion, the trial judge might make no discount or even adopt a negative rate not to exceed -1.5 percent before adjusting for tax effects. In jury trials, the jury should be instructed in the usual fashion concerning the weight to be given expert opinion evidence. The jury may then be permitted to return a single-figure award for damages or it may be required to answer interrogatories stating, among other items, the amount of loss of future earnings for each year for which it makes an award, and the discount rate it chooses to apply. The court will then be able to compute the total award or to require the parties to complete the arithmetic.[43]"

That is not, of course, much of a black-letter rule for an Alabama circuit court jury, or a federal jury either, for that matter. It shows how complex the issue gets with expert testimony.

b. State court: horns of the dilemma On federal law questions the Alabama Appellate Courts have repeatedly said that Alabama courts are *not* bound by Fifth or Eleventh Circuit precedent, but only by the decisions of the United States Supreme Court,[44] clearly a correct rule. Thus, an Alabama Circuit Court, even in an F.E.L.A. or Jones Act case, is *not* required to follow *Culver*, and may hear testimony on all three methods allowed by the U.S. Supreme Court in *J & L*, which may produce differing results—some more favorable to plaintiff (usually the below-market method), others to the defendant. The choice is open.

Conclusion

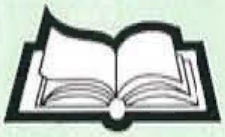
The oldtimer says, "If it ain't broke don't fix it." *Routine* tort litigation in the circuit courts of Alabama should not be unwittingly turned into an expensive, boring and lengthy "graduate seminar in economics" of the sort routinely aired in federal law personal injury cases. The current method in use in the circuit courts works well in practice and is not expensive. Please do not ask the supreme court to *require* the use of economists. If you do, you will really be sorry in routine cases. ■

FOOTNOTES

[1]238 Ala. 49, 189 So. 203 (1939).
[2]485 So.2d at 1130.
[3]Id. at 1130 *(per curiam)*.
[4]Id. at 1131.
[5]Note, Future Inflation as An Element of Damages in Alabama, 5 CUMB.L.REV. 72, 75-76 (1974).
[6]E.g., *Carnival Cruise Lines, Inc. v. Snoddy*, 457 So.2d 379, 381-84 (Ala. 1984).
[7]*Birmingham Ry. Light & Power Co. v. Simpson*, 177 Ala. 475, 59 So. 213, 215 (1912); *Penney v. Weems*, 144 Ala. 184, 39 So. 574, 575 (1905).
[8]E.g., *Feazell v. Campbell*, 358 So.2d 1017, 1021 (Ala. 1978); *Ala. Farm Bureau Ins. Co. v. Smelley*, 295 Ala. 346, 349, 329 So.2d 544 (1976); *Collins v. Windham*, 277 Ala. 128, 131, 167 So.2d 690 (1964); *Alabama Elect Southern Rd. Co. v. Gambrell*, 262 Ala. 290, 297, 78 So.2d 619 (1955).
[9]C. GAMBLE & D. CORLEY, *ALABAMA LAW OF DAMAGES* ¶ 36-4 at 395.
[10]E.g., *Louisville & Nashville R.R. Co. v. Richardson*, 285 Ala. 281, 231 So.2d 316 (1970); *Louisville & Nashville R.R. Co. v. Steel*, 257 Ala. 474, 480, 59 So.2d 664 (1952).
[11]485 So.2d at 1130.
[12]238 Ala. 49, 59, 189 So.2d 203 (1939).
[13]Annuity Tables under § 35-16-1 were last published in ALA. ACTS (Reg. Sess.) 1984, Vol. II, pp. 1412-15 (2% to 6%) and arguably ALA. ACTS 1985 (Reg. Sess.) 1985, Vol. II (unnumbered pages after 1499)(8%).
[14]*Mobile & O.R. Co. v. Williams*, 219 Ala. 238, 247, 121 So. 722 (1929); *Reiter-Conley Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 So. 280, 299-91 (1906).
[15]40 So. at 290.
[16]285 Ala. 281, 283, 231 So.2d 316 (1970).
[17]462U.S. 523, 76 L.Ed.2d 768 (1983)("*J & L*")(all cites to *J & L* herein will be to Lawyers Edition pages, in the light of limited availability of U.S. advance sheets).
[18]Id. at 790.
[19]*Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 76 L.Ed.2d 768 (1983)*(J & L)*; *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980)("Norfolk"); *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983)*(en banc)*(old 5th)("Culver II"); *Madore v. Ingram Tank Ships, Inc.* 732 F.2d 475 (5th Cir. 1984)(new 5th)("Madore").
[20]Culver II at 117.
[21]Culver II at 117.
[22]Madore at 478, *J & L* at 781 Source in Madore: Labor Dept. Table introduced in evidence, Id. at 478.
[23]Madore at 478; see *J & L* at 781.
[24]*J & L* at 781.
[25]Culver II at 117.
[26]Culver II at 117.
[27]*J & L* at 781 n. 12.
[28]*J & L* at 781.
[29]*J & L* at 781; citing Norfolk & Western; Madore at 479 n. 4, Norfolk at 495 n. 7.
[30]Madore at 479 n. 4; Norfolk at 495 n. 7.
[31]*J & L* at 781.
[32]*J & L* at 783.
[33]*J & L* at 782. Accord, Culver II at 122. See Madore at 478 n. 3 (testimony on rate of income growth in transportation industry from 1964-1979; court indicates should modify inflation rate to reflect real growth rate).
[34]*J & L* at 782. Accord, Culver II at 122.
[35]*J & L* at 783.
[36]*J & L* at 783.
[37]Culver II at 118.
[38]*J & L* at 790.
[39]*J & L* at 790-91.
[40]*J & L* at 791.
[41]Id at 122.
[42]Culver II at 118. See also *J & L* at 790.
[43]Culver II at 122.
[44]*Ballew v. State*, 296 So.2d 206, 210 (Ala. 1974); *Seibold v. State*, 253 So.2d 302(Ala. 1971); *Bass v. State*, 417 So.2d 582, 583 (Ala.Cr.App.), cert. denied, 417 So.2d 588 (Ala. 1982); *Harris v. State*, 367 So.2d 524, 530 (Ala.Cr.App. 1978).

David A. Bagwell, a partner in the Mobile firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, graduated from Vanderbilt University and the University of Alabama School of Law. He serves on the Alabama Supreme Court Advisory Committee on the Civil Rules and is a member of the American Law Institute.

cle opportunities



14-21

EMPLOYMENT LAW BRIEFING
The Lodge at Vail, Vail
National Employment Law Institute
Credits: 36.3 Cost: $895
(415) 924-3844

16 monday

LEGAL MALPRACTICE: THE ALABAMA STORY
Von Braun Civic Center, Huntsville
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

LEGAL MALPRACTICE: THE ALABAMA STORY
Holiday Inn, Sheffield
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

17 tuesday

LEGAL MALPRACTICE: THE ALABAMA STORY
Holiday Inn Attalla at I-59, Gadsden
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

LEGAL MALPRACTICE: THE ALABAMA STORY
Carriage House Inn, Anniston
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

18 wednesday

LEGAL MALPRACTICE: THE ALABAMA STORY
Birmingham-Jefferson Civic Center, Birmingham
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

LEGAL MALPRACTICE: THE ALABAMA STORY
Sheraton Capstone, Tuscaloosa
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

19 thursday

COMMERCIAL REAL ESTATE FINANCING
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6 (satellite)
(205) 348-6230

LEGAL MALPRACTICE: THE ALABAMA STORY
Civic Center, Montgomery
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

LEGAL MALPRACTICE: THE ALABAMA STORY
Sheraton, Dothan
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

19-20

TITLE INSURANCE
Ambassador West Hotel, Chicago
Practising Law Institute
Credits: 14.4 Cost: $325
(212) 765-5700

20 friday

LEGAL MALPRACTICE: THE ALABAMA STORY
Riverview Plaza, Mobile
Alabama State Bar
Credits: 2.0 Cost: none
(205) 269-1515

20-21

BRIDGE THE GAP
Birmingham-Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 12.3
(205) 348-6230

22-25

REPRESENTING STATE & LOCAL GOVERNMENTS
The Antlers Hotel, Colorado Springs
National College of District Attorneys
Cost: $335
(713) 749-1571

27 friday

DUI
Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $85
(205) 870-2865

april

3 friday

BANKING LAW
Wynfrey Hotel, Birmingham
Alabama Bar Institute for CLE
Credits: 6.3 Cost: $85
(205) 348-6230

3-4

SCHOOL LAW
Hyatt on Union Square, San Francisco
National School Boards Association
Credits: 14.5 Cost: $325
(708) 838-6712

PREPARING & TRYING THE MOTOR VEHICLE COLLISION CASE
Westin Crown Center, Kansas City
Association of Trial Lawyers of America
Credits: 12.6 Cost: $240
(800) 424-2725

5-9

PROSECUTION OF VIOLENT CRIME
The Antlers Hotel, Colorado Springs
National College of District Attorneys
Cost: $415
(713) 749-1571

6-7

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

9 thursday

CHOICE OF BUSINESS ENTITY AFTER TAX REFORM ACT
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6 (satellite)
(205) 348-6230

9-11

BUSINESS REORGANIZATIONS UNDER THE BANKRUPTCY CODE
Marriott, San Antonio
American Law Institute-American Bar Association
Credits: 18.3 Cost: $375
(215) 243-1600

9-12

CRITICAL LEGAL ISSUES IN HEALTH CARE DELIVERY
Calloway Gardens, Pine Mountain
Cumberland Institute for CLE
Credits: 13.5
(205) 870-2865

10-11

ADVANCED FAMILY LAW
Gulf State Park, Gulf Shores
Alabama Bar Institute for CLE
(205) 348-6230

17 friday

SOUTHEASTERN TRIAL INSTITUTE
Wynfrey Hotel, Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

23 thursday

EMPLOYMENT AT WILL
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6 (satellite)
(205) 348-6230

23-25

CORPORATE LAW INSTITUTE
Grand Hotel, Point Clear
Alabama Bar Institute for CLE
Credits: 12.9
(205) 348-6230

UNIFORM COMMERCIAL CODE
Hyatt Regency, Chicago
Uniform Commercial Code Institute
Credits: 18.3 Cost: $585
(717) 249-6831

24 friday

LITIGATION
Birmingham
Cumberland Institute for CLE
Credits: 6.0
(205) 870-2865

24-25

BANKRUPTCY
Birmingham
National Business Institute
Credits: 12.0 Cost: $196
(715) 835-8525

30 thursday

PENSIONS AND TRA '86
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6 (satellite)
(205) 348-6230

cle opportunities

april-may

30-1

TITLE INSURANCE
Holiday Inn Union Square, San Francisco
Practising Law Institute
Credits: 14.4 Cost: $325
(212) 765-5700

may

1 friday

ADVANCED REAL PROPERTY LAW
Birmingham-Jefferson Civic Center, Birmingham
Alabama Bar Institute for CLE
Credits: 7.3
(205) 348-6230

3-7

TRIAL ADVOCACY
The Monteleone Hotel, New Orleans
National College of District Attorneys
Cost: $415
(713) 749-1571

4-8

LABOR LAW & LABOR ARBITRATION
Hilton Inn, Dallas
Southwestern Legal Foundation
(214) 690-2377

7-17

TRIAL ADVOCACY
Univ. of North Carolina School of Law, Chapel Hill
National Institute for Trial Advocacy
Credits: 75.0 Cost: $1,350
(612) 644-0323

7-8

WILLS AND PROBATE
Westin, Dallas
Southwestern Legal Foundation
(214) 690-2377

8 friday

OIL, GAS AND MINERAL LAW
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 6.2
(205) 348-6230

8-9

TRIAL ADVOCACY
Ann Arbor
Institute for Continuing Legal Education in Michigan
Credits: 12.7
(313) 764-0533

13-15

WORKER'S COMPENSATION
Mobile
Alabama Department of Industrial Relations
Credits: 10.9
(205) 261-2868

15-16

YOUNG LAWYERS' ANNUAL SEMINAR ON THE GULF
Sandestin, Destin
Alabama Bar Institute for CLE
(205) 348-6230

21 thursday

LEGAL MALPRACTICE
Law Center, Tuscaloosa
Alabama Bar Institute for CLE
Credits: 4.6 (satellite)
(205) 348-6230

21-23

NEGOTIATIONS
Northwestern Univ. School of Law, Chicago
National Institute for Trial Advocacy
Credits: 17.0 Cost: $650
(612) 644-0323

29 friday

TECHNOLOGY IN THE LAW OFFICE: COMPUTERS AND BEYOND
Civic Center, Birmingham
Alabama Bar Institute for CLE
(205) 348-6230

Amendments To *Code Of Professional Responsibility* —Supreme Court Invites Comments—

The Alabama Supreme Court has before it for consideration proposed amendments to Canon 2 of the *Code of Professional Responsibility of the Alabama State Bar.* The proposed amendments are as follows:

1. The following "Temporary DR 2-112" is added to Canon 2:

"Temporary DR 2-112 *Advertising of Certification*

(a) A lawyer shall not advertise that he has been certified by any certifying organization, unless the certifying organization has been approved for advertising of certification by the procedures set forth below.

(b) Approval of certifying organizations shall be granted only upon a finding that the advertising by a lawyer of a certification by the certifying organization will provide meaningful information that is not false, misleading, or deceptive, for use of the public in selecting or retaining a lawyer.

(c) The procedure for approval of a certifying organization shall be as follows:

(i) Application for approval of a certifying organization shall be made to the General Counsel of the Alabama State Bar pursuant to such procedures as the General Counsel may from time to time establish in writing. The application shall be accompanied by a reasonable application fee to be set by the General Counsel. Such procedures and fees shall not be effective until approved by the Disciplinary Commission.

(ii) The General Counsel shall make such investigation, formal or informal, as he shall deem necessary or desirable. Upon conclusion of his investigation, he shall prepare a written report approving or disapproving the certifying organization.

(iii) Upon approval by the General Counsel of the certifying organization, the General Counsel shall give notice of the approval.

(iv) If the General Counsel disapproved of the certifying organization, then the applicant may within sixty (60) days of the date of the General Counsel's report appeal the disapproval to the Disciplinary Board of the Alabama State Bar, which shall assign the appeal to a panel of the Board for a hearing. The hearing shall be conducted in a proceeding *de novo*, with the burden of proof on the applicant. All costs of the appeal proceeding shall be taxed to the applicant.

(v) The applicant or the General Counsel may appeal the order of the panel of the Disciplinary Board to the Supreme Court of Alabama pursuant to the Alabama Rules of Appellate Procedure and Rule 8(d) of the Rules of Disciplinary Enforcement.

(vi) The approval of a certifying organization shall be effective for five years from the date of the approval; provided, however, that, for reasonable cause, the General Counsel may withdraw in a written report the approval of a certifying organization, which withdrawal may be appealed to the Disciplinary Board under the same procedures as if an application were disapproved by the General Counsel. The burden of proof shall remain on the certifying organization."

2. The present Temporary DR 2-101 is amended (by the addition of "(D)") to read as follows:

"Temporary DR 2-101 *Communications Concerning a Lawyer's Services*

A Lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(A) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(B) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;

(C) compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Temporary DR 2-104; or

(D) communicates the certification of the lawyer by a certifying organization except as provided in Temporary DR 2-112."

IT IS FURTHER ORDERED that these amendments be effective June 1, 1987.

The court invites comments from interested parties. Such comments should be addressed to the Clerk of the Supreme Court, P.O. Box 157, Montgomery, Alabama 36101. Such comments should be received by the clerk no later than April 1, 1987.

Lawyers as Executors and Trustees: Snakes and Ladders

by Edgar C. Gentle, III

It has been traditional for many lawyers and firms to engage in estate planning as a "loss leader," hoping to recoup their fee for drafting a client's will when the estate is filed. However, as shopping for a probate lawyer becomes popular, this practice may no longer make economic sense. An attorney therefore may be tempted to maintain the profitability of his or her trust and estate practice by naming himself or another member of the firm as executor or trustee. Following this course may be unwise, however, due to the many potential ethical, malpractice and economic pitfalls that may be encountered.

Ethically, there apparently is nothing improper *per se* in a lawyer's serving as the fiduciary representative for an estate or trust. See, for example, *7 A.B.A Real Property, Probate and Trust Journal* (1972), at 747-748. Possible disciplinary problems arise from the means by which an attorney obtains the appointment as estate fiduciary. In planning an estate, a lawyer must be careful not to suggest or insinuate to the testator that the lawyer should be appointed in a fiduciary capacity, lest he be found to have violated Alabama State Bar *Code of Professional Responsibility* Canon 5, requiring him to exercise independent professional judgment on his client's behalf and Disciplinary Rule 2-103, providing that he shall not recommend his employment to a nonlawyer who has not sought it. 57 A.L.R. 3d 703; *State v. Gulbenkian*, 196 N.W.2d 733 (Wis. 1972); and *Disciplinary Board v. Amundson*, 297 N.W. 2d 433 (N.D. 1980)

Moreover, if an attorney routinely is named a fiduciary in wills that he drafts, the appearance of solicitation will arise, which may be subject to discipline in and of itself. *State v. Gulbenkian, supra* Even being named a fiduciary in one will may prevent the will's admission to probate due to the presumption of undue influence if the will scrivener is named fiduciary with broad powers over estate assets. *Zeigler v. Coffin*, 218 Ala. 586, 123 So. 22 (1929)

Finally, even if the testator, unsolicited and without undue influence, asks the lawyer to serve in such a capacity, accepting the engagement without disclosing the resulting pitfalls for the estate may traduce Disciplinary Rule 5-101(A), which forbids a lawyer, without consent and after full disclosure, from representing a client in a matter in which their interests conflict. *Financial and Estate Planning Ideas and Trends in Summary*, April 10, 1986

Additional ethical considerations, as well as malpractice problems, arise when the lawyer actually serves as fiduciary of the estate or trust. Even if he lacks specified expertise as an investor, the lawyer may be held to a professional standard of care in managing an estate's assets comparable to that applied to a bank or trust company. *Trusts and Estates*, Jan. 1984, at 12 The Alabama "prudent man" rule with respect to estate asset management is discussed in *Birmingham Trust National Bank v. Henley*, 371 So.2d 883 (Ala. 1979); and *First Alabama Bank of Huntsville, N.A. v. Spragins*, 475 So.2d 512 (1985).

As estate fiduciary, the lawyer may be tempted to appoint himself or another member of his firm as the attorney for the estate. In so "wearing two hats," the lawyer or his firm is exposed to possible dual liability as fiduciary and estate attorney, with conflict of interest complications. Although the performance of an executor's or trustee's duties may not constitute the practice of law, serving as both fiduciary and estate lawyer does, in whole or part, exposing the lawyer-fiduciary or his firm to potential malpractice liability for the consequences of all actions taken on behalf of the estate.

Another legal malpractice complication may result when one lawyer in a firm represents a corporation in its securities matters and another lawyer in the firm is managing the same securities for an estate. Each consideration should be weighed before accepting an appointment as estate fiduciary and in choosing the estate's attorney.

Among the economic complications to be expected from serving as estate fiduciary are decreasing referrals from banks and trust companies, which traditionally are an estate planning lawyer's best source of business. A lawyer, therefore, may conclude that it is as imprudent for him to act as a professional executor or trustee as it is for a bank or trust company to draft wills or trusts to provide complete financial and estate planning services.

If he serves as both executor and attorney for an estate, the attorney may expect to have his total estate administration fee disputed by the will beneficiaries. He would be hard put to justify receiving both the maximum percentage fee allowed executors under *Code of Alabama* 1975, § 43-2-681, and payment for all of the time devoted to the estate under the guise of an attorneys' fee, although this

Edgar C. Gentle, III, is a native of Birmingham. He graduated, summa cum laude, from Auburn University in 1975 and received his master's, summa cum laude, *from the University of Miami in 1977. From Oxford University, where he was a Rhodes Scholar, he received an Honours B.A., Jurisprudence, in 1979, and from the University of Alabama School of Law, his J.D. in 1981. He is a partner with the Birmingham firm of Schoel, Ogle & Benton.*

is apparently the practice in New York. 7 A.B.A *Real Property, Probate and Trust Journal* (1972), at 764 The prospect of having a will beneficiary disgruntled with the lawyer-fiduciary's total fee may preclude a final settlement of the estate by consent. *Code of Alabama* 1975, §§ 43-2-502 and 43-2-682 In petitioning for a fee as lawyer-fiduciary at the final settlement hearing or in negotiating the fee with the will beneficiaries in an attempt to settle the estate by consent, conflict may be minimized by requesting only a reasonable overall fee for the total services rendered to the estate. Such a fee should take into account the time expended in providing the services and the fact that malpractice liability increases with the size of the estate. 10 A.B.A *Real Property, Probate and Trust Journal* (1975), at 262

Note, however, that in *Clark v. Knox*, 70 Ala. 607, at 617 (1881), the Supreme Court of Alabama held that a lawyer-fiduciary's legal fee for professional services rendered to an estate should not be based on "the usual professional charges for such service, but a compensation fixed and determined by the inquiry, what is fair and reasonable in view of all the circumstances of the estate."

Of course, this fee dispute pitfall may be avoided if the attorney discloses to the testator appointing him executor what his total fee as executor and attorney could be and that he (the testator) has a right to bargain with the attorney concerning the level of the fee and if the result of the bargain is recorded in the will itself. Based on the foregoing considerations, serving as estate fiduciary to make an estate practice profitable may not be worth the gamble. The simple alternative is to charge an economic rate for estate planning services. However, if the client, unsolicited, engages the estate planning attorney to be the estate fiduciary, and the attorney agrees to the appointment despite the risks, the following procedures are recommended to minimize the adverse consequences of receiving and carrying out the appointment.

(1) Prepare a standard fiduciary engagement letter, to be signed by the testator at the will closing, reciting that (a) the testator requested that the lawyer serve as fiduciary without the suggestion, influence or inducement of the lawyer; (b) the lawyer explained the potential problems for the estate resulting from such an appointment (which the letter should describe in detail) and the testator requested that the lawyer serve as fiduciary nonetheless; (c) the lawyer described the total fees which he may receive as executor or trustee (and also as estate attorney if the attorney will serve in such a dual capacity) and explained to the testator that he may bargain with the lawyer concerning the total amount of the fee; and (d) the lawyer and the testator agreed to a fee set forth in the letter or the will.

(2) In memorializing the fee agreement in the fiduciary engagement letter (in which case the letter would be incorporated in the will by reference) or the will, the terms of compensation should not be in fixed monetary amounts, but self-adjusting for inflation, in order to avoid negotiating a second fee agreement with the will beneficiaries. For example, a reasonable fee agreement may be based on the lawyer's receipt of the lesser of a fee equal to a certain percentage of the fair market value of the probate estate at death or a fee based on the lawyer's standard hourly rate charged for providing legal services during the time covered by the administration of the estate.

(3) The will should name a contingent fiduciary to serve if the attorney is unwilling or unable to do so. Upon the testator's death, and prior to probating the will, the attorney should share the estate engagement letter with all will beneficiaries, and have them confirm in writing that they consent to his serving as fiduciary under the terms in the letter (and as attorney for the estate, if he intends to do so). If, however, this consent is not obtained, the attorney then will be apprised of potential exposure and may wish to submit a letter of fiduciary resignation to the contingent fiduciary, who then would probate the will and serve as its executor or manage the testamentary trust, as the case may be.

(4) Serving as both fiduciary and lawyer for the estate should not be practiced absent consent following complete disclosure to the testator, the will beneficiaries and all members of the attorney's firm, and a careful consideration of the resulting risks and benefits. ■

Consultant's Corner

The following is a review of and commentary on an office automation issue with current importance to the legal community, prepared by the office automation consultant to the state bar, Paul Bornstein, whose views are not necessarily those of the state bar.

This is the second article in our Consultant's Corner series. We would like to hear from you, both in critique of the article written and suggesting topics for future articles.

Copier charges

All firms, large and small, metropolitan, suburban and rural, are facing increased pressure on profit margins. Couple this with the hardening of client resistance to rate increases, and one has all the elements of a dilemma—almost. There are opportunities for increased profitability without rate squabbles with clients. These opportunities are found below the dotted line (on the bill) and generally are grouped in two categories: reimbursable expense such as postage, telephony, travel, copying, etc. and value-added services such as legal research, technical support, etc.

Capturing copier charges is a piece of cake, right? You simply put a sign-up sheet somewhere in the vicinity of the copier, then sit back and watch those charge tickets multiply. Wrong. Our experience is that many firms are missing up to 90 percent of chargeable copies and do not know it. Worse, they fail to appreciate just how much money is involved. Twenty-cent charges do not add up to a row of beans, right? Wrong again. They can add up to more than $100 per lawyer, per month, all of which falls to the bottom line. Further, clients are more understanding of (at least less unsympathetic toward) reimbursable expenses. After all, they travel and mail and copy.

Conduct a self-audit of your performance in this area. Determine the monthly volume on your main copier (which should be dedicated to client copying). This can be done either by noting the monthly meter reading or asking your copier vendor to furnish your recent volume history. Take 85 percent of that volume figure, allowing 15 percent for throw-aways and internal copies. Extend that figure by 20 cents, and call it potential income. Take 67 percent of that figure and call it realizable income, stipulating that 33 percent of the potential charges may be written off for various reasons. Compare realizable income to charges for the matching period, whether billed or not.

If the data is a bit difficult to extract from your billing system, have your bookkeeper maintain a separate manual tally for a period or review a month's invoices. If your actual charges approach 50 percent of realizable income for a matching period, congratulations. You may want to tighten up a bit, but nothing drastic is in order. On the other hand, if you find yourself at 33 percent, or 10 percent, for example, you ought to consider decisive action. Until recently the only remedy has been "raising the level of awareness," a not-so-subtle way of saying "screaming and shouting." This has only a transient effect and still relies on remembering to record client data.

Now, however, there is an automation solution to this problem, at least in some circumstances. Several specialty vendors (Equitrac, Computrac, Infortext) have developed devices that attach to most copiers. They require the input of a client and matter number as a condition for starting the copier and then print the client/matter numbers, and associated copies, as input to the billing system.

Bornstein

Such devices vary in simplicity (and price) from merely capturing the data to validating it as well. The costs run from $3,000—10,000 and can pay for themselves in less than a year. One gets control of the process without reliance on "remembering." The copier simply will not start without a client and matter number. Internal copies are enabled by setting up a dummy client number for the firm. An added benefit is a monthly "bill" for internal copying; that might be interesting in itself.

The major legal-specific vendors are offering an added twist. For firms whose billing software program is mini-computer based, they offer conversion software to interface the control devices to the mini-computers directly, automatically calculating and posting to the proper client account. Such interface software is priced from $2,000—6,000, depending on vendor. Note that interface software of this type currently is not offered for micro-computer-based billing products.

In summary: if you have not conducted a recent audit of copy cost recovery charges, it is very likely you are losing money that can make a noticeable impact on your bottom line. Automated solutions are available to plug this leak. They can vary from a relatively simple (and inexpensive) stand-alone control device to integrated (more expensive) systems. ■

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Book Review

Consumer Law: Sales Practices and Credit Regulation

by Howard J. Alperin and Roland F. Chase, West Publishing Co., St. Paul, MN, 521 Pages

Reviewed by Greg Ward

For the average practitioner, it is a day long-dreaded when a client comes in, sits in the side chair and begins to discuss a problem which the attorney quickly analyzes as one involving one of the many areas generally grouped as consumer law. Consumer law is far-ranging, and includes general contract law, laws peculiar to each state and a multitude of relatively new federal laws. It encompasses all law regulating consumer transactions, including loans, advertising, credit sales and some leases, and is a unique mold of our oldest and newest concepts. Thus, consumer law gives rise to a great deal of confusion.

One of the more experienced members of my bar recently was discussing consumer law and stated that an attorney just out of law school has an advantage over an elder counterpart because the younger attorney is freshly versed in the field. A younger member of the bar recently confided in me that because of their experience, he felt that older attorneys have a big advantage in consumer law problems.

Since neither our more experienced brethren nor new admittees consider themselves to have any special advantage, how can one be gained?

Books such as Howard F. Alperin and Roland F. Chase's two-volume set, *Consumer Law: Sales Practices and Credit Regulation*, certainly help. The authors' goal is to draw reasonable boundaries around the subject of consumer law and then analyze and explain it.

The authors begin with a 50-page discussion of basic contract law, much the same as found in a hornbook. They then move into issues involving media advertising, discussing issues surrounding deceptive advertising, puffing, the old bait-and-switch and the use of endorsements and testimonials, (the Good Housekeeping Seal of Approval, etc.).

What happens when a seller advertises "easy credit terms" and the credit or repayment terms are anything but easy? The authors give a short (one-page) discussion on this. Then comes a useful section concerning remedies for unlawful advertising, such as action by the Federal Trade Commission (investigations, injunctions). Ever wonder how to find out if a statement made in an advertisement was true? Under an FTC resolution the advertiser is required to file a report substantiating all claims made in the ad, and the report must be open to the public.

Perhaps the scariest and least understood area of consumer law involves the federal Truth-in-Lending Act. The authors consider it so important that they devote the major portion of the book—chapters seven through 12—to it.

As appendices, Regulation Z is included, the most well-known section of the Code of Federal Regulations designed to implement the Act, and Regulation M, the new section of the Code of Federal Regulations dealing with consumer leases. This makes for easier reference, especially in locales where there is no Code of Federal Regulations nearby (the better part of Alabama).

There are chapters dealing with the effect the Act and regulations have on advertising, credit cards, billing errors and consumer leases. How to enforce truth-in-lending provisions has a chapter, including how to ask for and receive attorney's fees.

The book closes with chapters on credit reports, credit insurance, third party insurance and debt collection. The chapter on debt collection is especially useful for the attorney who collects debts for clients, has to take action to collect his own accounts or represents banks or collection agencies. There is a good discussion of the Federal Fair Debt Collection Practices Act showing who is covered by the Act, damages under the Act and defenses to the Act.

Consumer Law is a handy set to have around the office. It is concise enough so that it does not take up a lot of shelf space, yet complete enough to help you give solid advice. It is a useful tool for a quick reference at client inquiries, and is indispensable for attorneys needing to give advice on short notice.

Alperin and Chase make an excellent stab at drawing acceptable boundaries around the field on consumer law, and then explaining the field—no small task on either score. They also do a good job of helping the attorney, who previously has been wary of consumer law issues, turn it into a bread and butter part of his or her practice.

Not all questions will be answered—no book can do that. But it will take care of more than enough to make it worth the cost. And it certainly will help to "bring up to snuff" an attorney who knows little about the field. ■

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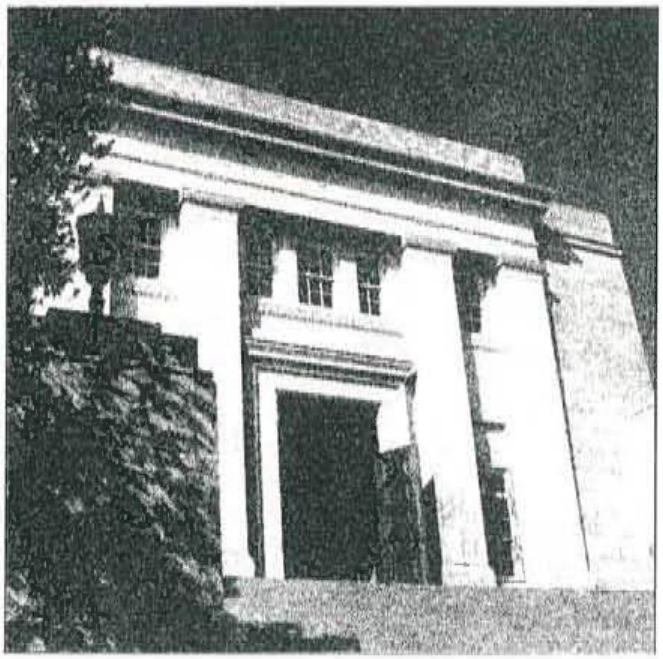

Recent Decisions

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

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . Rule 41(b) dismissal without prejudice

Ex parte: *Hamilton & Riggs Agency, Inc., etc. (In Re: Boyette V. Travelers Indemnity Co. of America)*, 21 ABR 602 (September 26, 1986)—Boyette filed a declaratory judgment action against Travelers in state court, and Travelers removed the case to federal court. Two days later Boyette attempted to amend the state court complaint by adding Hamilton & Riggs Agency, an Alabama corporation. Hamilton & Riggs Agency filed a motion to dismiss the amended complaint on the basis that it was a nullity because the state court lost jurisdiction when the case was removed to federal court. The state court judge denied the motion, and Hamilton & Riggs Agency filed this petition for mandamus asking the supreme court to direct the trial court to grant its motion to dismiss. Boyette filed his answer to the petition and requested that the supreme court make the dismissal be "without prejudice."

In a case of initial impression in Alabama, the supreme court stated the general rule that a dismissal is "with prejudice" is explicitly made inapplicable to a dismissal for lack of jurisdiction because Rule 41(b), A.R.Civ.P., provides that such a dismissal is not considered an adjudication on the merits.

Civil Procedure . . . the general rule in *Parker v. Fies & Sons* left undisturbed by *Price v. Southern Railway Company*

Elam v. Illinois Central Gulf R.R., 21 ABR 724 (October 3, 1986)—Duncan was injured in May 1983 and one week later filed suit against the defendant for personal injuries. Duncan died in July 1983, and his personal representative was substituted and an amendment filed adding a claim for wrongful death. Elam, the personal representative, subsequently filed another wrongful death claim, and the defendant moved to dismiss that action based on Section 6-5-440, *Ala. Code* 1975, prohibiting the maintenance of two actions at the same time. The court dismissed the second action, and Elam appeals.

The issue is whether the death of a sole plaintiff in a tort action for personal injury extinguishes that action so that it cannot be amended, and therefore any further prosecution must be by a new and separate action for wrongful death. The supreme court answered the issue in the affirmative.

The original suit filed by Duncan

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was only for personal injuries. Because there were no other parties and no other claims, that action was extinguished when Duncan died. Rule 15, A.R.Civ.P., does not change this result. This, however, does not mean that a personal injury action is never amendable after the injured plaintiff dies. Clearly, if any claim of the original action survives the death of the injured party, or if, by alternative allegations, the original complaint asserted inconsistent or mutually exclusive claims, the original complaint is "amendable."

Civil procedure . . .

Cobb v. Malone standard of review after grant of new trial overruled

Jawad v. Granade, 21 ABR 626 (September 26, 1986)—Since *Cobb v. Malone* was decided in 1891, the standard for reviewing a trial court's order granting a new trial, on the ground that the jury's verdict is against the great weight and preponderance of the evidence, has been that "the ruling will not be disturbed unless the evidence plainly and palpably supports the verdict." Although that standard of review has been criticized over the years, it nevertheless remained the law until this case. It had been argued that to allow the judgment to stand, setting aside a verdict by the jury, when tested by this standard of review would give one person the power to substitute his judgment for 12 people. In other words, the constitutional right of a trial by jury was judicially curtailed or diminished.

To correct this problem the supreme court adopted Justice Jones' dissent in *Hubbard Brothers Const. Co., Inc. v. C.F. Halstead*. Specifically, the standard for appellate review of orders granting new trials on the ground that the verdict is against the great weight or preponderance of the evidence is that the trial court will be reversed for abuse of discretion only if it is easily perceivable from the record that the jury verdict is supported by the evidence.

Defamation . . .

court appears to adopt restatement (2nd) of Torts Section 587 (1977)

Walker v. Majors 21 ABR 702 (October 3, 1986)—In a case of initial impression in Alabama, the court was asked to decide whether a defamatory publication made before the commencement of an action in court is absolutely privileged when made with some relation to a contemplated court proceeding. The supreme court said yes.

Walker and Majors had a dispute over a real estate commission which Walker did not pay because he decided not to sell the property. Majors had already procured two purchasers, and when Walker refused to sell, Majors wrote the purchasers and enclosed their earnest money check. Majors also accused Walker of fraud and sent copies of the letters to Walker and Mr. Langford, who subsequently became Majors' attorney handling this suit.

Shortly thereafter Majors filed suit for fraud and Walker filed this defamation action. Majors claimed that the defamatory publication was absolutely privileged even though made prior to an actual judicial proceeding.

Although not expressly adopting Restatement of Torts Section 587, the court quoted the section at length and noted that the trend of authority is toward adopting the rule set therein. This rule and the comment afford an absolute privilege for a defamatory publication prior to a judicial proceeding when the publication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The supreme court stated the issue of the relevancy of the communication is a matter for the trial court's determination and that all doubts should be resolved in favor of a finding of relevancy.

Torts . . .

section 6-2-39 cannot revive time-barred causes of action

Bajahia v. Jim Magill Chevrolet, Inc., 21 ABR 1119 (October 31, 1986)—In September 1983, Bajahia delivered an automobile to Magill Chevrolet for repairs. During October 1983, the automobile was stolen from the lot by third parties. Bajahia claims that during October 1983 he called the defendant to inquire about the car and was told the car was not quite ready, when in fact the car had already been stolen. Bajahia claims the defendant was therefore guilty of fraud.

Bajahia admits that he knew the car had in fact been stolen by October 31, 1983, but did not file suit until September 19, 1985. The defendant moved for a summary judgment based on Section 6-2-39, *Ala. Code* 1975, as it existed in October 1983. The court granted the defendant's motion, and Bajahia appealed.

Therefore, the issue on appeal was whether the present two-year statute of limitations, Section 6-2-39, effective January 9, 1985, is applicable to a cause of action which had become time-barred prior to January 9, 1985. The supreme court said no.

CORRECTION

The notice in the January 1987 edition of *The Alabama Lawyer* that Thomas E. Baddley, Jr., of Birmingham, had been suspended for a period of six months, effective November 19, 1986, based upon a felony marijuana conviction in Jefferson County Circuit Court, was in error. The Disciplinary Commission ordered Baddley suspended for six months, but he appealed that order, and his suspension is automatically stayed pending determination of his appeal by the Alabama Supreme Court. [ASB 83-254]

Relying on *Tyson v. Johns-Manville Sales Corporation*, the court stated that while the power of the legislature exists to alter or amend, nevertheless, it cannot be used to revive a cause of action already barred. Bajahia's cause of action was completely barred as to the fraud claim on October 31, 1984, before the new two-year statute became effective.

Recent Decisions of the Supreme Court of Alabama—Criminal

District attorney's non-statutory grant of immunity—a basis for compelled grand jury testimony?

State v. Roberts, 21 ABR 886 (October 3, 1986)—In Roberts, the supreme court granted cert to determine the validity of a purported grant of immunity from prosecution signed by the district attorney, an assistant attorney general and the foreman of the grand jury as it bears on the question of whether Roberts could be compelled to testify before the grand jury. The supreme court said no, but that non-statutory grants of immunity could be valid in Alabama provided they followed the guidelines set forth in Roberts.

Roberts was an employee of the Alabama State Docks and was subpoenaed to testify as a witness before the Baldwin County Grand Jury regarding his knowledge of alleged criminal activities at the state docks. Roberts appeared with counsel and filed a motion for protective order.

During the hearing on the motion, the court asked the prosecuting attorney if he intended to grant Roberts immunity from prosecution in return for his truthful testimony before the grand jury, and the prosecuting attorney said that was his intent. Roberts then was called to answer questions before the grand jury and offered immunity. Upon advice of counsel, Roberts refused to waive his right not to testify when his answers might tend to incriminate. The prosecutor urged that since Roberts had been given immunity from prosecution and still refused to testify, he should be ordered by the circuit court to answer all questions posed to him. In compliance with the state's request, the court then ordered Roberts to answer all questions or be held in contempt and in prison. The trial court's order compelling Roberts' testimony was the subject of immediate petition for writ of mandamus. *State v. Roberts*, 21 ABR 886

In August 1985, the court of criminal appeals vacated the circuit court's order. The appellate court also prohibited any interested party from compelling Roberts to give potential incriminating testimony, against his will, before any grand jury. As a result of the court of criminal appeals' holding, the state filed a petition for *writ of certiorari*.

Justice Adams, in an excellent opinion, surveyed the Alabama law regarding non-statutory grants of immunity. In *Gipson v. State*, 375 So.2d 514 (Ala. 1979), the leading case in Alabama on this issue, the court held in a plurality opinion that under appropriate circumstances, non-statutory grants of immunity were allowable in Alabama. The supreme court in *Roberts* reaffirmed the rationale in *Gipson* and clearly held "that non-statutory grants of immunity can be valid in Alabama, so long as they follow the guidelines hereinafter announced."

In order for an immunity agreement to be valid, it must be signed by the district attorney and approved by the trial judge. The involvement of the trial judge in the agreement to grant immunity pledges the public faith to the potential witness, and further insures that the state will not renege on its promise not to prosecute and will proceed in good faith. In return for this added assurance by the trial judge, the witness not only must testify, but testify truthfully in response to the prosecutor's question. If the witness gives false testimony, he or she will have failed to perform his or her end of the agreement, and the prosecutor will not be bound by the agreement not to prosecute.

It is important to point out "that this requirement upon the witness is also a limitation on the prosecution, because it forbids unconditional grants of immunity."

Justice Adams, having found that the grant of immunity in *Roberts* was valid, turned to the issue of whether Roberts could be forced to waive his privilege against self-incrimination under Art. I, § 6 of the Alabama Constitution, and thereby, be forced to testify against his will. The supreme court answered that Roberts could not be forced to testify against his

will before the grand jury. Roberts never accepted the tendered grant of immunity; rather, he chose not to waive his right against self-incrimination. The supreme court concluded:

> ". . . We are of the opinion that this is a choice that Roberts must be allowed to make. Otherwise we would be saying that a fundamental protection guaranteed to him by the Alabama Constitution could be taken away from Roberts against his will. We do not believe that the prosecution's interest in obtaining a conviction in this case is so great as to warrant such an intrusion upon Roberts' constitutionally protected right."

Speedy Trial

Stevens v. State of Alabama, 21 ABR 513 (September 19, 1986)—The supreme court granted cert to determine whether the court of criminal appeals erred in denying Steven's petition for *writ of error coram nobis* based on a speedy trial.

On direct appeal, in *Stevens v. State*, 418 So.2d 212 (Ala.Cr.App. 1982), the court of criminal appeals recognized the four-point test set out in *Barker v. Wingo*, 407 U.S. 514 (1972), for a determination of whether a defendant has been denied his right to a speedy trial. The factors to be weighed in a *Barker v. Wingo* analysis include: the length of delay; defendant's assertion of his right; reasons for delay; and prejudice to the defendant.

The court of criminal appeals focused on the second factor, the defendant's responsibility to assert his rights, and found nothing in the record to establish that the defendant had requested his speedy trial prior to his *pro se* motion filed on August 6, 1980, and granted on August 21, 1980. However, the original record omitted two letters written by defendant to the clerk of the circuit court demanding or requesting a speedy trial of his cases.

The supreme court held that the two letters requesting his speedy trial which were included in the record for consideration on his *coram nobis* appeal, but missing from the record on direct appeal, constituted a factor requiring a materially different evaluation of Barker's four-point test. In that regard, the supreme court noted that the only *pro se* activity engaged in by the defendant during the first three years and four months, prior to his arraignment, were his efforts to obtain a speedy trial. Thus, it was the inordinate length of delay of more than three years before any substantial movement in the prosecution occurred, as opposed to the one-year preparation for trial after arraignment and appointment of counsel, that was crucial to the court's consideration of the speedy trial issue. Ultimately, the court held that the three-year period prior to his arraignment constituted prejudice to the defendant as a matter of law.

The prosecutor's comment about defendant's failure to take the stand

Ward v. State of Alabama 21 ABR 545 (September 26, 1986)—Ward was indicted for murder in the first degree. At trial, the state called two eyewitnesses to the alleged murder, both of whom testified that a dispute had occurred between Ward and the deceased immediately prior to the shooting. One witness stated that the fatal shot was fired during a struggle between Ward and the deceased. The defendant did not present any evidence at trial; rather, following the close of the state's evidence, he rested his case, relying on the testimony of the state's witnesses to prove his claim of self-defense.

During the state's closing argument, the prosecutor said, "Did you hear one voice, one voice from that witness stand, say, 'I thought Donald Underwood was going to hurt him'?" The defense made timely objection, and the court merely instructed the jury, "Don't consider that statement made in your consideration of the case." The defendent was convicted of second degree murder. On appeal, Ward contended that this statement by the prosecutor was a comment on his failure to testify and that the trial court failed to properly cure the resulting prejudice.

In *Beecher v. State*, 294 Ala. 674, 682, 320 So. 2d 727, 734 (Ala 1975), the supreme court held that Section 6 of the Constitution of Alabama is violated "where there is the possibility that a prosecutor's comment could be understood by the jury as a reference to the failure of the defendant to testify."

In *Ex Parte Whitt*, 370 So.2d 735 (Ala 1979), the Alabama Supreme Court established the standard to be applied in testing curative instructions in "direct comment" cases as follows:

> "We suggest that at a minimum, the trial judge must sustain the objection, and should then promptly and vigorously give appropriate instructions to the jury. Such instructions should include that such remarks are improper and to disregard them; that statements of counsel are not evidence; that under the law the defendant has the privilege to testify on his own behalf or not; that he cannot be compelled to testify against himself; and, that no presumption of guilt or inference of any kind should be drawn from his failure to testify . . . ."

Applying the *Whitt* standard to the facts in the *Ward* case, the supreme court held that the trial judge's instructions to the jury did not cure the prejudice created by the prosecutor's improper remark.

Robbery—violence element must occur at time of commission and/or in immediate flight

Sapp v. State, 21 ABR 598 (September 26, 1986)—Sapp left Wal-Mart with a black jacket. Approximately five or ten minutes later, Sapp returned to the store wearing the jacket which proved to be the property of Wal-Mart. It was after this return to the store that the violence occurred and the defendant escaped.

In an option authored by Justice Beatty, the supreme court found that the court of criminal appeals incorrectly concluded that those facts constituted robbery. The court held that armed force was not used "in the course of committing" the theft or "in immediate flight after the commission," but rather occurred after the theft itself clearly had ceased.

Thus, to be found guilty under the Alabama Robbery Statute, § 13A-8-41, *Code of Alabama* (1975), the force or threat must have been used "in the course of committing the theft," which by statutory definition, § 13A-8-40, *Code of Alabama* (1975), embraces acts which occurred . . . in immediate flight after the attempt or commission.

Criminal forfeiture and condemnation

Metropolitan Toyota v. State of Alabama ex rel. Chris N. Galanos, 21 ABR 794 (October 3, 1986)—The state brought an action for condemnation and forfeiture of an automobile under the authority of § 20-9-93, *Code of Alabama* (1975). Pugh, a prospective purchaser of the car, used it to transport marijuana for sale while he had the car on loan from Metropolitan Toyota of Mobile. Metropolitan intervened to challenge the condemnation and argued that it had no

knowledge or notice of Pugh's intended use of the car for sale of controlled substances and that notice could not be imputed to the dealership because it could not have discovered, by the exercise of reasonable diligence, that Pugh would use the car for that purpose.

Justice Almon conducts an exhaustive analysis in this case between the statutes permitting forfeiture of vehicles used in illegal transportation of liquor and those permitting forfeiture of vehicles used for the purpose of transporting or selling controlled substances.

Justice Almon reasoned: "That a close inspection of the statutes and cases, however, reveal that the statutes are not in pertinent respects similar, and that the 'notice imputed as a matter of law' and 'reasonable diligence' rules arise from provisions in the 1919 liquor law which are not found in the controlled substances law."

The facts of this case do not show circumstances likely to arouse the suspicion of Metropolitan's agent that Pugh was likely to use the car to violate the controlled substances law. The court noted specifically that the salesman's poor judgment in allowing Pugh to use the car for 11 days in the face of a bad credit report does not amount to notice of the fact that Pugh planned to use the car for drug dealing. In reaching the ultimate decision in the case, the court noted:

> "Because § 20-2-93 unlike §§ 28-4-285 and 28-4-290 does not require reasonable diligence in inquiring as to the proposed use of the car or contain a provision that would impute notice of reputation as a matter of law, we hold that the trial court erred in determining that Metropolitan Toyota had not met its burden of proof required to defeat condemnation."

Recent Decisions of the United States Supreme Court

Involuntary confession—the need to find official coercion

Colorado v. Connelly, 55 U.S. LW 4043 (December 10, 1986)—Defendant approached an off-duty Denver police officer and stated that he had murdered someone and wanted to "talk about it." The officer advised defendant of his Miranda rights, and the defendant stated he understood those rights but still wanted to talk about the murder. Shortly thereafter, a detective arrived and again advised the defendant of his rights. After acknowledging the second advisement of rights, defendant told the police he had come all the way from Boston to confess to the murder. He later pointed out the exact location of the crime.

The next day, defendant became visibly disoriented during an interview with the public defender's office and was sent to a state hospital for evaluation. Following the evaluation, the psychiatrist revealed that defendant was following the "voice of God" in confessing to the murder.

On the basis of one psychiatrist's testimony that the defendant suffered from a psychosis interfering with his ability to make free and rational choices, the trial court suppressed the defendant's initial statements, as well as his custodial confessional, because they were "involuntary." The Colorado Supreme Court also found the defendant's mental state vitiated his attempted waiver of his right to counsel and his Fifth Amendment privilege.

A divided Supreme Court reversed; Chief Justice Rehnquist, speaking for the

majority, stated that the Colorado court stretched the idea of involuntariness too far. Rehnquist held that coercive police activity is a necessary predicate to finding that a confession is not "voluntary" within the meaning of the due process clause. "While a defendant's mental condition may be a significant factor in the voluntariness calculus, this does not justify a conclusion that his mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional voluntariness."

The Supreme Court further observed that the cases considered by the court over the 50 years since *Brown v. Mississippi*, 297 U.S. 278 (1936), have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of facts justifying the conclusion that police conduct was oppressive, all have contained a substantial and common element of coercive police conduct. Simply stated, absent police conduct causally related to the confession, there simply is no basis for concluding that any state actor has deprived a criminal defendant of due process of law. The Supreme Court also held that whenever the state bears the burden of proof in a motion to suppress a statement allegedly obtained in violation of the Miranda doctrine, the state need prove waiver only by a preponderance of the evidence.

Criminal restitution is not dischargeable in bankruptcy

Kelly v. Robinson, 55 U.S. LW 1077 (November 12, 1986)—A woman listed as a debt in her bankruptcy petition a restitution obligation that had been imposed as a condition of probation in a criminal sentence. The state was notified but did not file objections to the discharge in bankruptcy. The bankruptcy court granted the discharge, and the woman ceased making the restitution payments. When the state notified her that it considered the restitution obligation nondischargeable, she filed an action to prevent the state from forcing her to pay.

Justice Powell, writing for a divided court, held that criminals should not be able to use bankruptcy laws to avoid restitution obligations imposed on them in state criminal proceedings. The court reasoned that such obligations are nondischargeable under § 523(a)(7) of the Bankruptcy Code, which provides that a discharge in bankruptcy does not alter any debt that "is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

Federal defendant bears burden of proving insanity

U.S. v. Amos, 55 U.S. LW 2239 (8th Cir. October 16, 1986)—A kidnapping and weapons offense defendant relied on an insanity defense. The jury was instructed in accordance with the 1984 Insanity Defense Reform Act, 18 USC 20, i.e., that the burden of proving mental irresponsibility by clear and convincing evidence was on the defendant. The defendant was convicted; on appeal, he argued that the jury instructions and underlying statute unconstitutionally shifted to him the burden of proving an essential fact necessary for conviction.

Congress' decision to put the burden of proving insanity on those who would plead it as a defense does not offend the Fifth Amendment's due process clause, according to the Eighth Circuit. In what appears to be the first federal appellate decision on the issue, the Eighth Circuit upholds the 1984 Insanity Defense Reform Act insofar as it requires a defendant to prove insanity by clear and convincing evidence.

Approximately 90 years ago, the United States Supreme Court ruled that the government should bear the burden of proving insanity beyond a reasonable doubt once the defendant raises the issue. *Davis v. U.S.*, 160 U.S. 469 (1895) However, Davis simply announced a rule of procedure for federal courts and has not been read as having constitutional underpinnings.

The appellate court's reasoning still makes clear that the defendant may not be made to bear the burden of disproving an element of the crime charged. "While insanity is an ingredient of the requisite *mens rea*, it is not an element of the crime, and, as noted in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the 'existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.'" ■

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YLS President

Young Lawyers' Section Awarded Grant by American Bar Association's Young Lawyers' Division

The Young Lawyers' Section has been awarded an ABA Young Lawyers' Division grant for the year 1986-87 for its Affiliate Outreach Project Public Service Subgrant Program, as announced by ABA YLD Chairperson Alan S. Kopit. The subgrant proposal, prepared by Keith B. Norman, Montgomery, and Percy Badham, Birmingham, was submitted on behalf of the cosponsorship by the YLS and the YMCA of the Alabama Youth Judicial Program, which provides high school students with an opportunity to become participants in the judicial process through a series of local mock trials culminating in statewide competition in Montgomery. In the Youth Judicial Program, students participate as attorneys, judges, witnesses and jurors, involving them in the spectrum of courtroom experiences. Young lawyers serve as team advisers to the individual teams competing in the program.

It is notable that the YLS received the total amount requested in the grant proposal for the 1986-87 year. Plans include producing videotapes publicizing the Youth Judicial Program to schools across the state, as well as including training material for the program participants. Also, there will be an indoctrination to trial procedures and a full-length mock trial.

The mock trial for this year's program is the case of *The State of Mellow v. Elston Neddy*, involving a murder. Manuals and casebooks are being prepared for all student participants to acquaint them with legal premises, such as the principles of "beyond a reasonable doubt," "culpable mental state," "murder," "the condition of mind of the accused" and "first-degree felony punishment." Local trials will take place March 1-20, and the culminating competition on the state level will be in Montgomery April 2-5. Also there will be a judicial training conference in Montgomery for the youth judges March 21.

Chairpersons for the local mock trials include Lynne Riddle-Thrower, Wetumpka; Lexa Dowling, Dothan; Robert Childers, Montgomery; William 0. Walton, III, Auburn; John C. Hay, III, Huntsville; Frank B. Potts, Florence; Celia Collins, Mobile; and Percy Badham, Birmingham. Although the mock trial problem includes some serious legal issues, there is an entertaining aspect with testimony to be given by Quinn C. Hackensaw, M.D., M.E., a forensic pathologist; 0. Bosse DePlane, a resident of the City of Hottub, who discovered the strangled body of the decedent, Portencia "Porky" Maceville; and I.U. Snow, a friend of the accused who was with him the night of the murder. Lawyers, both those in the YLS and in the state bar, may contact any of the local chairpersons, the Youth Judicial Program Chairman, Keith B. Norman, 834-6500, or the U.S. Constitution Bicentennial Chairman, Lynn McCain, 546-9205.

In addition to advisers for the mock trials, lawyers are needed to serve as actors for the production of the play written by the ABA Young Lawyers' Division in celebration of the Constitution Bicentennial. The play is entitled, "There's Trouble Right here in River City," and will include an all-lawyer cast for the local productions to be held in conjunction with each city in which the mock trials are held. This is an excellent opportunity for you, your local bars and the state YLS and senior bar to receive positive publicity, and opportunities abound for your participation. The play is centered on a First Amendment freedom of speech issue taking place at a fictitious school parents' meeting. Directors/chairpersons for the eight cities in which "There's Trouble Right Here in River City" appears are as follows: Ed Cassady, Birmingham; Jeff Deen, Mobile; Leah Harper, Montgomery; David Ellis, Tuscaloosa; Taylor Flowers, Dothan; Evie VanSant Maulden, Muscle Shoals; Taylor T. Perry, Jr.,

Gadsden; Margaret MacElvain, Opelika. If you can help in any capacity as cast or crew for the production, please get in touch with the director/chairperson in your area.

The Alabama YLS is coordinating efforts with the state bar to participate in the National Bicentennial Mock Trial Program and Student Seminar to be held May 16-23 in Washington, D.C. The event includes a week-long educational program for high school students, opening with students' mock trials in district courtrooms and unfolding with a moveable feast of seminars held on Capitol Hill and other Washington sites.

Recent YLS activities

The YLS Executive Committee met the weekend of November 21, 1986, at Desoto State Park. After the morning session and an afternoon of viewing Desoto State Falls and Little River Canyon, the Executive Committee members were entertained at a cocktail reception at the home of ASB President and Mrs. Bill Scruggs.

Upcoming YLS events

On March 20 and 21, the YLS, in conjunction with the Alabama Bar Institute for Continuing Legal Education, will sponsor the annual "Bridge the Gap" seminar in Birmingham. The format of the program has been changed to a comprehensive, two-day civil, criminal and commercial program and includes a workshop with typical fact situations encountered in domestic relations practice. Both YLS members and speaker Drew Redden of Birmingham will participate in the workshop. This new approach to general continuing legal education should provide information for both new practitioners and those more advanced in their practice. Assistant ABICLE Director Jenelle Mims Marsh can be contacted at 348-6230 for more information.

The Conference of the Professions will be held either in Gulf Shores or Destin on April 10 and 11. For the past five years, the YLS has sponsored this conference to bring together members of the regulatory boards in the state to discuss administrative and regulatory law. Past YLS President Randolph P. Reaves of Montgomery is serving as adviser for this venture and can be contacted at 832-4202 for more information.

Recently, the ABA announced the 1987 Law Day U.S.A. theme to be "We the People," in keeping with the celebration of the Constitution Bicentennial. As established by presidential proclamation in 1948 and reaffirmed by a joint resolution of Congress in 1961, the purpose of Law Day U.S.A. is to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws." This purpose is especially poignant in this year of the bicentennial of our Constitution.

(seated, front left, counterclockwise) Cornelia Heflin, Tom Heflin, Bill Scruggs, Kay Scruggs, Patty Badham, Percy Badham (standing, left to right) Gunter Guy, Patsy Wright, Claire Black, Amy Slayden—at Cragsmere Manor in Desoto State Park

The 1987 theme, "We the People," encourages Law Day programs and events to focus on the privileges Americans enjoy because of the historical foundation of our system of law. The events are numerous and varied, ranging from mock trials, court ceremonies, poster and essay contests, to television and radio call-in programs. Recent innovative programs have included write-ins with child fingerprinting to aid in the location of missing children, coordination with sponsors of local campaigns against drunk driving, outreach programs to senior citizens and community participation in dispute resolutions. For ideas and assistance with local bar Law Day activities, contact Steve Shaw, Birmingham, 322-0457, or write Law Day U.S.A., 8th Floor, 750 North Lake Shore Drive, Chicago, IL 60611, or telephone (312) 988-6134.

Information on the YLS-ABICLE cosponsored Annual Seminar on the Gulf will be announced soon, but please mark your calendars for May 15 and 16. The place of the two-day seminar, which, incidentally, includes several social opportunities, is the Sandestin Beach Resort. Chairman Sid Jackson, Mobile, is responsible for the speaker and program events, and Chairman Preston Bolt, Mobile, is taking care of arrangements for the seminar. Each year, registration for this event increases, and lawyers who will be attending would do well to contact the resort as soon as the seminar pamphlet arrives.

Response to inquiries concerning committee opportunities within the YLS has been very encouraging, especially in light of the most recent tabulations of the YLS as constituting close to 55 percent of the 8,123 ASB members. The range of YLS activities is particularly broad and offers young lawyers and new admittees the chance to become involved in our state bar right "out of the chute." Please call me at 349-1727 to receive information about the workings of the YLS. As always, I continue to request that all new admittees and lawyers under the age of 36 help boost Alabama's representation in the YLD of the American Bar Association by becoming a free member of it. Contact the American Bar Association, Young Lawyers' Division, 750 North Lake Shore Drive, Chicago, IL 60611, to receive a membership application. ■

Legislative Wrap-up

by Robert L. McCurley, Jr.

Lawyers elected pro tem

Senator Ryan deGraffenried, Tuscaloosa, and Representative Jim Campbell, Anniston, were elected by their fellow legislators as president pro tem of the Senate and speaker pro tem of the House, respectively.

For the first time in recent history, neither the governor, lieutenant governor nor speaker of the house are lawyers. Furthermore, neither the chairman of the Senate nor the house judiciaries are lawyers.

The judiciary members who are lawyers are designated by an asterisk.

House Judiciary

Chairperson—Dutch Higginbotham, Opelika
Vice chairperson—*Mike Box, Mobile
John Beasley, Columbia
Harrell Blakeney, Thomasville
*Jim Campbell, Anniston
*Tom Drake, Cullman
Steve Hettinger, Huntsville
R. G. Johnson, Sylacauga
Ken Kvalheim, Mobile
Richard Laird, Roanoke
*Beth Marietta, Mobile
Herman Marks, Decatur
Tony Petelos, Birmingham
*Bill Slaughter, Birmingham
James Thomas, Selma

Senate Judiciary

Chairperson—James Preuitt, Talladega
Vice chairperson— Lowell Barron, Fyffe
*Don Hale, Cullman
Ann Bedsole, Mobile
Perry Hand, Gulf Shores
*Jim Smith, Huntsville
Chip Bailey, Dothan
Bill Menton, Irvington
Charles Cabaniss, Birmingham
Gerald Dial, Lineville
Larry Dixon, Montgomery

The regular session of the legislature will begin Tuesday, April 21, 1987.

Alabama Uniform Guardian and Protective Proceedings Act

E. T. Brown of Birmingham served as chairman of the Institute's Alabama Uniform Guardian and Protective Proceedings Act, and Professor Thomas L. Jones of the University of Alabama School of Law was the reporter. The members are as follows:

Professor Annette Dodd
L. B. Feld
Judge O. H. Florence
Randy Fowler
John W. Gillon
Forest Herrington
Lyman F. Holland
Louis B. Lusk
Judge Gary L. McAliley
Joe McEarchern
Irvine C. Porter
Mary Lee Stapp
Judy Todd
Bob Morrow
John N. Wrinkle

The Alabama Uniform Guardianship and Protective Proceedings Act (AUGPPA) is based to a large extent on Article V of the Uniform Probate Code, parts 1, 2, 3 and 4, and covers guardianships for minors and reasons other than minority, and protective proceedings seeking court-appointed conservators or other protective orders for the estate concerns of minors, adult incompetents, absentees and others. The act has several features representing significant improvements over prior Alabama law.

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.

First, this act distinguishes between "guardians" of the person and "conservators" of the estates of wards. Prior to this act, Alabama used one term, "guardian," to characterize the duties and responsibilities of both of these offices. The single-term designation is ambiguous and not only confusing to persons dealing with the "guardian," but also to the fiduciary acting in that capacity. Use of the two designations, even though one person may be acting in both capacities, provides a much-needed clarification.

Second, this act gives definition to the procedures for appointing guardians and conservators and to their respective powers and duties that had been lacking in Alabama. While Alabama has had guardianships for many years and, therefore it cannot be said that procedures for appointing guardians were non-existent, the procedures needed refinement and definition to make them clearer. More clearly stated procedures also will make these procedures more consistent throughout the state. A severe gap in Alabama law existed with respect to the powers and duties of guardians; this act makes an enormous contribution with respect to the powers and duties of guardians and conservators.

Third, prior to this act for most of Alabama's history, guardians could be appointed only for minors and "incompetents." Even though there might be agreement that an individual needed help in his business or personal affairs, there was and is a stigma that accompanies having that individual judicially declared an "incompetent." This act uses the term "incapacitated" and greatly expands the various grounds for appointment of a guardian or conservator based on the definition of "incapacity." While Alabama has adopted this broader concept, in some instances (e.g., with regard to "curators" and in the Adult Protective Services Act), this act consolidates the concept in one comprehensive act and gives more definition to the concept.

Fourth, this act adopts the concept of "limited guardianships" and "limited conservatorships." This admonishes a court to seek the "least restrictive" protective arrangement commensurate with the individual's mental and adaptive limitations. The purpose is to encourage the development of maximum self-reliance and independence of the protected person. The concept has developed largely in response to recommendations from several public-interest groups and the American Bar Association project, the ABA Commission on the Mentally Disabled.

These groups suggested that state laws be changed to avoid an asserted "overkill" implicit in the standard guardianship proceedings. Traditionally, the only grounds for appointment of a guardian was a finding of *non compos mentis* or incompetence, and the appointment of a guardian resulted in all personal and legal "rights" being stripped from the protected person and vested in the appointing court and guardian. In short, rather than permitting only an "all-or-none" status with regard to the rights of a protected person, the concept of a "limited guardian" or "limited conservator" recognizes an intermediate status, probably more sensitive to the needs of the protected person, through which courts will restrict the personal liberties and prerogatives of the protected person only to the extent necessary under the circumstances.

Alabama also recently adopted the concept of "limited guardians" and "least-restrictive" arrangements, but it was adopted in skeletal form, and perhaps the use of the "least-restrictive" arrangements is so uncertain as to do very little to encourage their use. This act consolidates protective proceedings, including the concept of "limited guardianships" and "limited conservatorships," in a way to make their use available in a wider variety of situations and describe them in sufficient detail to be more usable. This provides greater flexibility regarding the dimensions of a protective order and the legal authority granted to the guardian or conservator.

Anyone desiring a copy of this proposed revision may write the Alabama Law Institute, P.O. Box 1425, University, Alabama 35486. ■

Memorials

Corley, Donald Earl—Birmingham
Admitted: 1969
Died: December 18, 1986

Graves, Eugene Hamiter, Jr.—Eufaula
Admitted: 1950
Died: August 30, 1986

Hamilton, William—Greenville
Admitted: 1929
Died: October 22, 1986

Howard, Hal William—Birmingham
Admitted: 1929
Died: November 8, 1986

Lanphier, Platt Alvin—Ashville
Admitted: 1974
Died: November 22, 1986

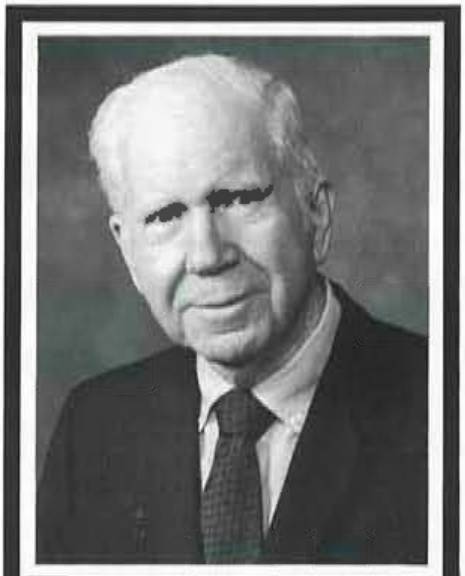
Lovelace, Barnes Flournoy—Brewton
Admitted: 1932
Died: December 13, 1986

Malone, William Warren, Jr.—Athens
Admitted: 1939
Died: October 26, 1986

Rogers, Zack, Jr.—Butler
Admitted: 1943
Died: November 9, 1986

Samford, Frank Park, Jr.—Birmingham
Admitted: 1947
Died: December 6, 1986

Watkins, Percy B.—Birmingham
Admitted: 1948
Died: January 3, 1987



JOHN CHARLES PEARSON

John C. Pearson, the oldest practicing attorney of the Tuscaloosa Bar and a former mayor of Tuscaloosa, died December 16, 1986, at the age of 86. He was born in 1899 in Thomasville and moved to Tuscaloosa in 1901, attended local schools and the University of Alabama, received his L.L.B. degree and was admitted to the Alabama State Bar in 1923. In law school he was vice president of his senior class and one of the local founders of the Phi Alpha Delta Law Fraternity.

He was associated with the firm of Foster, Rice & Foster, 1923-25; with Judge John R. Bealle in the firm of Bealle & Pearson, 1925-27; and with his brother, Spencer J. Pearson, in the firm of Pearson & Pearson, 1927-40, with offices located with their principal clients, Duckworth-Morris Real Estate and Insurance Cos. and the First Federal Savings and Loan Association. Following the death of his brother in 1941, he became principal attorney and resident counsel for these businesses where he remained until his retirement around 1976.

Along with his law practice, he became one of the owners and chief executive officer of the Tuscaloosa Title Company, Inc., during which time he became the major authority in Tuscaloosa County on land titles and legal problems concerning real property. His retirement was gradual, and he continued to maintain a law office until his death.

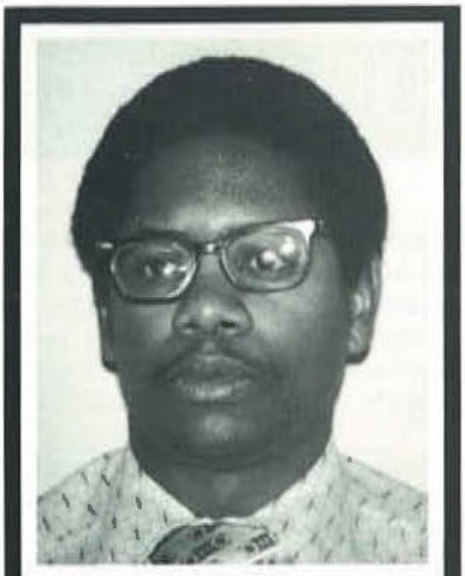
Pearson was elected to the Tuscaloosa City Commission in 1930 at the age of 30, and in 1932, by the commission board to serve as chairman and mayor of Tuscaloosa, the youngest mayor to serve in this century. He continued on the commission until 1937.

He served as president of the Tuscaloosa and State Junior Chamber of Commerce, the Tuscaloosa Rotary Club and the Tuscaloosa County Historical Society. He was a life elder and Sunday school teacher of the First Presbyterian Church, and was married in 1929 to Marguerite Martin, of Clayton, Alabama, an English teacher in the local schools, who survives him.

The Tuscaloosa Bar recognizes him as a lawyer of the utmost integrity and competence, particularly in the field of real property and probate practice, a support of the bar and his community, and stated that his "productive career has been marked by a strong sense of purpose, personal responsibility and integrity which instilled confidence and respect in all of his undertakings. He has been a supportive member of the bar and an outstanding example of the true qualities of the ideal lawyer—intelligent, studious, skillful and totally loyal to the best interest of his client. These basic qualities, and his added warmth and friendliness, plus his genuine interest in all with whom he had contact, made him a special person."

EDGAR HIBBERD SMITH

Edgar Hibberd Smith died September 29, 1986, at the early age of 34. Edgar received his undergraduate degree from Morehouse College in Atlanta, Georgia, in 1973 and his Juris Doctor degree from the University of Iowa, graduating with distinction. He was admitted to practice before the bars of Alabama and South Carolina.



EDGAR HIBBERD SMITH

During his career Edgar served as staff attorney for the Legal Aid Services Corporation of Alabama, assistant professor at Alabama State University, instructor at Tuskegee Institute and legal research assistant with the Southern Poverty Law Center in Montgomery. He was a member of the American Bar Association, the Alabama State Bar, the NAACP and The National Urban League.

He is survived by his mother, Mrs. Theodora S. Smith, and one brother, Charles Mifflin Smith, Jr.

THE ALABAMA BAR INSTITUTE FOR
CONTINUING LEGAL EDUCATION AND
THE ALABAMA CORPORATE COUNCIL ASSOCIATION
jointly present

THE 24TH ANNUAL SOUTHEASTERN CORPORATE LAW INSTITUTE

April 23, 24, 25, 1987
Marriott's Grand Hotel, Point Clear, Alabama

This institute will bring together an outstanding, nationally-known faculty who will address the following topics:

The IRS Perspective on Recent Changes in Corporate and Personal Taxes, James I. Owens, Deputy Commissioner of Internal Revenue Service, Washington, D.C.

Liability of Officers and Directors, Dan A. Bailey, Arter & Hadden, Columbus, Ohio

Banking Law: Interstate Banking, Walter Moeling, IV, Powell, Goldstein, Frazer & Murphy, Atlanta, Georgia

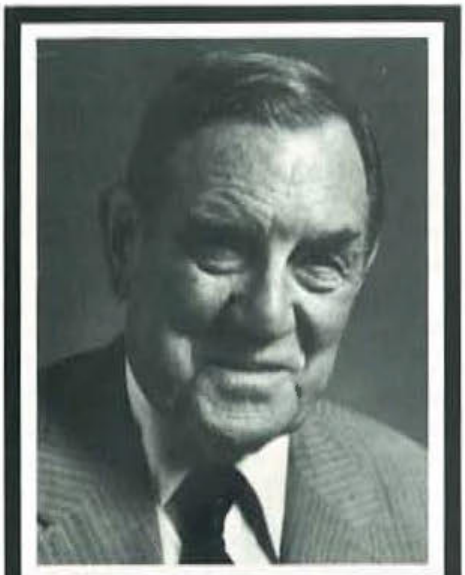
Recent Developments in Corporate Takeovers, Business Judgment Rule, and Acquisitions, Victor I. Lewkow, Cleary, Gottlieb, Steen & Hamilton, New York, New York

Antitrust, Roger Anderwelt, Deputy Assistant Attorney General, U.S. Department of Justice, Washington, D.C.

Review of Recent Changes in Corporate and Personal Taxes, Speaker To Be Announced.

Approved for 12.9 Alabama MCLE credit hours. CLE credit applied for in Florida, Mississippi & Georgia.

For more information contact Alabama Bar Institute for Continuing Legal Education, P.O. Box CL, Tuscaloosa, AL 35487, (205) 348-6230.



A. FLETCHER GORDON

A. Fletcher Gordon, a member of the Mobile, Alabama and American bars, died September 29, 1986.

He was born in Mobile, Alabama, November 26, 1907, the son of Robert E. Gordon, a Mobile attorney, and Lucy H. Gordon.

He graduated from University Military School, Davidson College and the University of Alabama. He received his LL.B. degree in 1931 from the University of Alabama Law School.

In that same year, he commenced the practice of law in Mobile with William Hamilton. Shortly thereafter, he joined his father's law firm, Gordon, Edington, Leigh & Gordon. Subsequently, he had as his partners various prominent Mobile attorneys, and at the time of his retirement in 1984 was the senior partner in the firm of Gordon & House.

Following his marriage to Jean Henry in November 1941, he served with distinction in World War II with United States Army Counter-Intelligence in both overt and covert operations in the European Theater.

During his legal career he served diligently as chairman of various major committees for The Mobile Bar Association. He always has been known for his generosity in contributing time to assist other attorneys in difficult legal matters. However, his commitment to the community was not limited to the legal profession, as witnessed by the fact that he actively supported a number of local endeavors, especially the Mobile Symphony, the Mobile Chamber Music Society and the Mobile Library Board, for which he served as chairman.

At the time of his death, he was a dedicated member of the Government Street Presbyterian Church.

Fletcher Gordon leaves surviving him his wife, Jean Henry Gordon; his sisters, Roberta Murphy, Lucy Beaven and Lee Gordon Shearer; and several nieces and nephews.

The Mobile Bar Association recognizes A. Fletcher Gordon as one showing special dedication to the bar, this community, the performing arts and his church, and his death represents a great loss to each. ■

Disciplinary Report

Suspensions

● On December 16, 1986, the Disciplinary Board of the Alabama State Bar ordered Mobile lawyer **C. Christopher Clanton** temporarily suspended from the practice of law, under Rule 3(c), Rules of Disciplinary Enforcement of the Alabama State Bar.

● Panama City lawyer **Sam Patrick Robinson** was suspended, effective September 30, 1986, for failure to comply with the Mandatory Continuing Legal Education requirement of the Alabama State Bar. [CLE 85-33]

Public Censures

● On December 5, 1986, Linden lawyer **Leonard M. Lowrey, Jr.,** was publicly censured for having been guilty of 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. Lowrey failed to comply with his written agreement to sell a parcel of real property, under specified conditions, even though the person to whom he agreed to sell the property complied with the specified conditions. [ASB No. 86-266]

● On December 5, 1986, Birmingham attorney **Charles M. Purvis** received a public censure from the president of the Alabama State Bar for violation of Disciplinary Rules 1-102(A)(4), 2-107(A), 5-103(A) and 6-101(A) of the *Code of Professional Responsibility.* Purvis was found to have taken a criminal matter on a contingency fee basis, misrepresented the status of the case to his client, acquired a proprietary interest in the case and neglected the case contrary to the terms of his employment. The Disciplinary Commission determined that Purvis should receive a public censure for these violations of the *Code.* [ASB No. 85-582]

● On December 5, 1986, Talladega County lawyer **James J. Clinton** was publicly censured for having violated the *Code of Professional Responsibility* of the Alabama State Bar by engaging in conduct adversely reflecting on his fitness to practice law. Clinton willfully neglected a legal matter entrusted to him, and failed to carry out a contract of employment entered into with a client for professional services. He agreed to represent a client in seeking recovery for damages suffered in a motor vehicle accident, on a one-third contingency fee basis, but thereafter failed to negotiate a settlement or file suit on the client's behalf, to advise the client concerning the representation and to respond to any of the client's efforts to contact him concerning the matter. [ASB No. 82-239]

Private Reprimands

● On December 5, 1986, a lawyer was privately reprimanded for violation of DR 7-102(A)(1), DR 7-102(A)(2), DR 7-102(A)(3), DR 7-102(B)(2) and DR 7-102(C). The lawyer represented paternal grandparents in intervening in their son's divorce action and seeking custody of their grandson. He pursued the matter, without notifying the court, even after he was informed that the child's mother had never been divorced from her first husband, the present marriage was void and the court, thus, had no jurisdiction over the pending divorce matter. [ASB No. 86-04]

● On December 5, 1986, a lawyer was privately reprimanded for willfully neglecting a legal matter entrusted to him and intentionally failing to seek the lawful objectives of his client through reasonably available means. He filed a suit on behalf of a client in a Louisiana court, without being licensed to practice in Louisiana and without qualifying as a visiting attorney under Louisiana law, and failed to take remedial action for nine months after learning the Louisiana court had dismissed his client's lawsuit because of the lawyer's failure to qualify as a visiting attorney. [ASB 86-196]

● On Friday, December 5, 1986, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 1-102(A)(4) and 7-102(A)(5). The Disciplinary Commission determined that the lawyer, in corresponding with an adverse party, made material misrepresentations to that party regarding the filing of a lawsuit. In addition, he prepared and forwarded to that adverse party a document purporting to be an order setting down a matter for a hearing when in fact no lawsuit had been filed and no order had been entered by the court. The Disciplinary Commission found the lawyer had violated the above-cited provisions of the *Code* and determined he should receive a private reprimand. [ASB No. 86-425]

● On December 5, 1986, an Alabama lawyer received a private reprimand for violation of Disciplinary Rule 7-101(A)(2). The Disciplinary Commission determined the attorney failed to conclude a settlement of a worker's compensation case in which he had been retained, to the detriment of his client. The Disciplinary Commission determined the attorney should receive a private reprimand. [ASB No. 84-431]

● On December 5, 1986, a lawyer was privately reprimanded for conduct adversely reflecting on his fitness to practice law, in violation of DR 1-102(A)(6), by having neglected his representation of a client in a divorce proceeding, during a period in which the lawyer was abusing the use of alcohol. [ASB No. 86-294]

Reinstatements

● Birmingham lawyer **Herbert P. Massie** was reinstated, effective November 25, 1986, from a Mandatory Continuing Legal Education suspension of the Alabama State Bar. (CLE No. 86-67)

● **Deanna Saunders Higginbotham,** a attorney, was reinstated, effective December 11, 1986, by the Disciplinary Board of the Alabama State Bar. ■

MCLE News

by Mary Lyn Pike
Assistant Executive Director

December 5 commission meeting

At its December 5 meeting in Montgomery, the MCLE Commission made the following decisions:

1. Strict compliance with Rules 5A and 5B and Regulation 5.1, Rules for Mandatory Continuing Legal Education, requires all attorneys, exempt from the CLE requirement or not (except those 65 or over), to submit a CLE form each year and, further, requires the commission to certify to the Disciplinary Commission those who do not file. Additionally, anyone who files a form for the preceding calendar year after January 31 is required to attach a late filing fee of $50, in the form of a check made payable to the Alabama State Bar;
2. An attorney who attends makeup courses in January without obtaining approval of a deficiency plan, as provided in Rule 6A, Rules for Mandatory Continuing Legal Education, will be considered filing a *de facto* deficiency plan and required to pay the $50 late compliance fee;
3. Attorneys certified to the Disciplinary Commission under Rule 6B will be required to pay a $50 late filing fee when compliance is reported;
4. Any attorney with an approved deficiency plan who does not make up the credit deficiency by March 1 must be certified to the Disciplinary Commission, even if credits are made up after March 1;
5. Seminars broadcast by satellite to law firms may be approved if accreditation is sought by the firms under Regulation 4.1.14, or if the broadcaster obtains approval as provided in Regulations 4.1.8 and 4.5;
6. Denied a request for a retroactive special membership exemption for an attorney because she held a regular license for one month during 1986 and was able to practice law during that month;
7. Granted a waiver of the 1986 CLE requirement to a disabled attorney;
8. Denied an attorney's request for CLE credit for taking a statistical analysis course;
9. Ruled that a course on computer-assisted case preparation qualified for half credit under Regulation 4.1.12. (Cumberland Institute for CLE);
10. Approved for full credit a loss prevention seminar conducted by an attorneys' liability insurer for its insured attorneys (Attorneys' Liability Assurance Society, Inc.);
11. Approved parts of a 1986 Soviet-American legal study tour (Professional Seminar Consultants);
12. Declined to approve a public utility management and regulation seminar designed for utility personnel, regulators and professionals in related fields;
13. On appeal, approved in part a medical, dental and legal malpractice and management seminar (American Educational Institute);
14. Also on appeal, denied approval of two segments of a law office management seminar (Alabama Bar Institute for CLE);
15. Designated the National Association of Railroad Trial Counsel an approved sponsor of CLE activities for 1987.

Morgan County Bar Young Lawyers' Section

The Morgan County Bar YLS was inadvertently omitted from the list of 1987 approved sponsors published on page 15 of the January issue of this journal.

How to reach an approved sponsor

Printed below are frequently requested addresses and telephone numbers of a few approved sponsors. Please keep a copy of this list for use in obtaining course information.

American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

Alabama Bar Institute for CLE
P. O. Box CL
Tuscaloosa, AL 35487-2889
(205) 348-6230

Alabama District Attorneys Association
122 South Hull Street
Montgomery, AL 36104
(205) 261-4191

Alabama Defense Lawyers Association
1101 South Hull Street
Montgomery, AL 36104
(205) 265-1276

American Law Institute-
American Bar Association
4025 Chestnut Street
Philadelphia, PA 19104
(215) 243-1600

Alabama Trial Lawyers Association
750 Washington Avenue, Suite 210
Montgomery, AL 36104
(205) 262-4974

Birmingham Bar Association
109 20th Street, N., 2nd Floor
Birmingham, AL 35203
(205) 251-8006

Cumberland Institute for CLE
800 Lakeshore Drive
Birmingham, AL 35229
(205) 870-2865

Defense Research Institute
Suite 5000, 750 North Lake Shore Drive
Chicago, IL 60611
(312) 944-0575

Mobile Bar Association
P. O. Drawer 2025
Mobile, AL 36652
(205) 433-9790

Montgomery County Bar Association
P. O. Box 72
Montgomery, AL 36101
(205)265-4793

National College of District Attorneys
University of Houston Law Center
University Park
Houston, TX 77004
(713) 749-1571

Practising Law Institute
810 7th Avenue
New York, NY 10019
(212) 765-5700 ■

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