The Alabama Lawyer

Vol. 44, No. 5 SEPTEMBER 1983

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1983-84 Alabama State Bar
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THE SEPTEMBER

Sophistication and the private offering of securities in Alabama

—pg. 240

An activist Alabama Securities Commission has promulgated regulatory procedures relating to exemptions from registration provisions of the Alabama Securities Act. The regulations do not accomplish their goal of achieving greater coordination between federal and state securities laws.

Annual state bar meeting largest ever

—pg. 244

Attendance at the 1983 Alabama State Bar Annual Meeting in Birmingham topped all others. Highlights and pictures inside.

On the cover

William B. Hairston, Jr., 1983-84 president of the Alabama State Bar, and his wife, Louise, are pictured in front of their Birmingham home. Hairston is a partner in the firm of Engel, Hairston, Moses and Johanson.

1983 ISSUE IN BRIEF

LEXIS vs. WESTLAW

—pg. 256

There are two principal vendors of computer research facilities—WESTLAW and LEXIS. Each has its advantages and disadvantages.

Alabama Workmen's Compensation Law—a primer

—pg. 270

The initial article in the "Nuts and Bolts" feature is a primer on Workmen's Compensation law. This area of practice is no longer exclusively within the realm of the specialist, but is an area frequently encountered by the general practitioner.

Bill Hairston—the man and the office

—pg. 279

Bar President Bill Hairston speaks out on issues facing the bar now and in the near future. He talks of the proposed constitution, CLE, night law schools, lawyer discipline, election of judges, and other topics of interest in this interview.

Regular Features

Hairston

President's Page

My first report to you as president of the Alabama State Bar is one of enthusiasm. The Annual State Bar Meeting in Birmingham under the leadership of Norborne Stone and Reginald Hamner was beyond expectation. The interest shown in our association is wonderful. As the words of Henry Grady directed to the New South are applicable to the Alabama State Bar: "It is living, breathing and growing every hour."

We are just getting in to the concept of utilizing a president-elect as a planning process to enable the Bar to develop new programs and to continue old programs. This past year the Board of Bar Commissioners added to that concept by permitting the president-elect to appoint the committees for the coming year before taking office as president. As a result we were able to get the committees appointed so that they could have their initial meeting in connection with the annual meeting. It was in the form of a committee breakfast that was attended by over two hundred committee members. The committees have elected their secretaries, have divided themselves into subcommittees, they have determined the initial steps to be taken in carrying out the charge, and they have set a date for their next meeting.

There are forty-two committees and task forces that are presently working for the Bar. There are eleven sections that address those substantive areas of the law in which sufficient number of our membership have shown an interest. Before this year is over it is expected that there will be at least five more committees. All this committee and section activity is not sufficient to accommodate those who want to serve this Bar in an organized capacity. So while on one hand the activities are increasing, there is, on the other hand, a need for even more activities.

"Whoever does justice to the law, to him, in the end, will the law do justice."

Part of this need can be met by establishment of more sections to accommodate interest. One of the goals of this administration is to do just that, particularly in the area of family law, bankruptcy law and energy law. We expect that when the Bar meets in Mobile in 1984 that you will be able to attend the inaugural meeting of sections in these three areas.

We also look forward to increased emphasis within the existing sections to allow opportunity of their membership to participate in a positive manner. The Committee on Sections will undertake an aggressive program to assist the sections' move in this direction.

The Alabama State Bar was created to serve the legal profession. When I speak of the "legal profession" I am talking about lawyers, I am talking about courts, I am talking about judges and I am talking about the system that we know. That the Bar effectively carries out its mandate is to some extent dependent on what those needs are. Herein lies the opportunity of each and every member of this association to participate. The Board of Bar Commissioners and myself invite your comments, your suggestions and your complaints. We want you to have what you deserve and that is nothing short of the best. Perfection we cannot offer but the best we can assure.

I have already had the opportunity to visit with the Dothan Bar Association, to attend the Conference of Southern Bar Presidents and the National Conference of Bar Presidents. In the near future I will visit with the freshman class at both the University and Cumberland and attend the opening of court ceremonies. It looks to be a busy year.

I came away from the meeting of the National Conference of Bar Presidents with a renewed appreciation of the Alabama State Bar and Alabama lawyers. In my opinion we stand head and shoulders above the rest of the states.

We have some major problems. One is the inability to get our programs through the legislature. A new lawyer gets a two year moratorium on license payments following admission. During that period this lawyer enjoys full membership benefits. The time has come when the Bar can no longer afford to subsidize the large number of admittees that join our ranks each year. Unfortunately we can't get the legislature to grant us any relief.

Continued on page 282

Executive Director's Report

Hamner

"Meetings, Bloody Meetings." This phrase is the title of a film shown at the first-ever committee breakfast at the Birmingham Annual Meeting. It was intended to inspire the state bar committee members to undertake their responsibilities for 1983-84.

The current level of committee activity in the bar indicates it served its purpose well. I predict that 1983-84 will be remembered as the most productive year in the history of our association. New life and new thoughts abound. Our committees are result oriented.

Committee meetings, annual meetings, ABA meetings—speaking of these meetings, the 1983 Annual Meeting of the state bar is now history. The meeting which concluded in Birmingham was the largest in the history of the state bar. A total of 983 persons registered at this meeting. Prior to the convention's opening date 585 lawyers were registered, and 398 registered during the three days of the meeting. The general education sessions were consistently well attended and the programs of the section meetings were equally well received.

A convention of this magnitude requires much preplanning and a considerable amount of individual effort. Special thanks are due to the host committee of the Birmingham Bar and to the president of the Birmingham Bar, J. N. Holt, and his wife, Margaret Ann, who is serving as president of the Birmingham Bar Auxiliary this year. The various program chairmen for the sections did an outstanding job. Beth Carmichael, executive director of the Birmingham Bar, was of immense help to all involved in the convention planning process. Julia Smeds, who chaired the Young Lawyers Section Recent Developments Seminar, did an outstanding job. Special thanks for planning the ladies brunch and the entertainment are extended to Julia Pope and to Margaret Ann Jones.

The Reflective Roundtable was a highlight of the 1983 Annual Meeting. This presentation afforded the members of the bar an opportunity to travel back through time with seven "deans" of the Alabama Bar who reflected on the practice of law as it used to be. The popularity of this program with those in attendance justified the decision which had been made earlier to videotape the presentation for purposes of historical value. This videotape is available to local bar associations who may wish to borrow it and use it as a meeting program. The tape is approximately one and one-half hours in length and could be shown as two separate programs by a local bar.

Following the adjournment of the Alabama State Bar Annual Meeting, many members of the bar traveled to Atlanta for the 1983 Annual Meeting of the American Bar Association. This meeting was highlighted by an address at the opening assembly by President Ronald Reagan.

At this same assembly program, the ABA recognized its 300,000th member, a young lawyer from Macon, Georgia. Membership in the ABA is a voluntary act on the part of the 300,000 plus members. It may interest you to know that on a per capita basis Alabama ranks fifth among the states in having the highest percentage of its lawyers belonging to the American Bar Association. At the end of June 1983, 68.5% of the total membership of the Alabama State Bar also belonged to the American Bar Association. Only the lawyers in Connecticut, Delaware, Virginia and Maryland have a higher percentage of membership.

Alabamians not only belong to the ABA, they play important roles in the affairs of the association. Five Alabama lawyers, Marvin Albritton, Gary Huckaby, Mark White, Lee Cooper and Roland Nachman, served in the 387 member policy-making House of Delegates of the ABA. Lee Cooper has served as chairman of the drafting committee of the House of Delegates which had the responsibility of reducing the new Code of Professional Responsibility, approved in Atlanta, to the final form in which it was adopted. Gary Huckaby chaired the ABA Standing Committee on Lawyer Referral and Information Services. David Ellwanger, another member of the Alabama State Bar, and currently the executive director of the State Bar of California, was installed as chairman-elect of the ABA Section on Individual Rights and Responsibilities. The chairmanship of this section has also been held by U.S. Circuit Judge Patrick Higginbotham, another member of the Alabama State Bar. Mr. Cooper also was installed as vice-chairman of the 40,000 member Litigation Section of

Continued on page 283

Letters to the Editor

Dear Editor:

Another Alabama State Bar Convention has come and gone. In anticipation of attending, I registered and made reservations early. However, the day before the Convention began, I had to enter the hospital for some relatively minor yet important corrective surgery. Following my doctor's advice, I called the State Bar Headquarters and cancelled my registration.

I was disappointed that I was unable to attend and enjoy the festivities and take part in the election. Therefore, I feel I have every reason to comment on the election procedure followed by the State Bar. I particularly wanted to attend and cast my vote for Richard Jordan for president-elect since I had helped him in his campaign and was keenly interested in his candidacy. However, since one must be present to vote, I could not do so. I know of others who were for one reason or another unable to attend. For those members who are prevented from attending due to illness, emergencies, or National Guard duty, I think they should be able to vote by mail or proxy. There has got to be a better way. As the immediate past President of the Mobile Bar, I have some working knowledge of Bar politics. I would like to offer some suggestions and raise some questions.

1. The election procedure should be in printed form and distributed to all members of the Bar. It should include qualifications, declaration of intent to become a candidate, nominations, and eligibility requirements for voting and balloting.

2. After deadline for qualifying, written notice should be given to all members of all candidates who qualified.

3. Since all members are qualified to vote, why should they be required to pay a registration fee before voting?

4. Why not have the nominating speeches earlier in the Convention and use a voting machine for balloting? The polls could be kept open during the entire Convention to encourage greater voter participation. This would eliminate the Saturday confusion and rush to vote.

I think it is extremely important that a prospective candidate be required to declare his intent to become a candidate well in advance of the Convention so that the members know who they are. While it was common knowledge that Richard Jordan was a candidate, very few knew who his opponent would be until arriving at the Convention.

That is when the politics become serious. Most every lawyer is buttonholed several times by supporters of both candidates. Several lawyers who attended expressed their criticism of the way the election was conducted. Surely there is enough expertise in the Bar to devise a better way.

Mobile **Mylan R. Engel**

LETTERS TO THE EDITOR

The purpose of the Letters to the Editor column is to provide a forum for the expression of the readers' views. Readers of *The Alabama Lawyer* are invited to submit short letters, not exceeding 250 words, expressing their opinions or giving information as to any matter appearing in the publication or otherwise. The editor reserves the right to select the excerpts therefrom to publish. Unless otherwise expressed by the author, all letters specifically addressed as Letters to the Editor will be candidates for publication in *The Alabama Lawyer*. The publication of a letter does not, however, constitute an endorsement of the views expressed. Letters to the Editor should be sent to:

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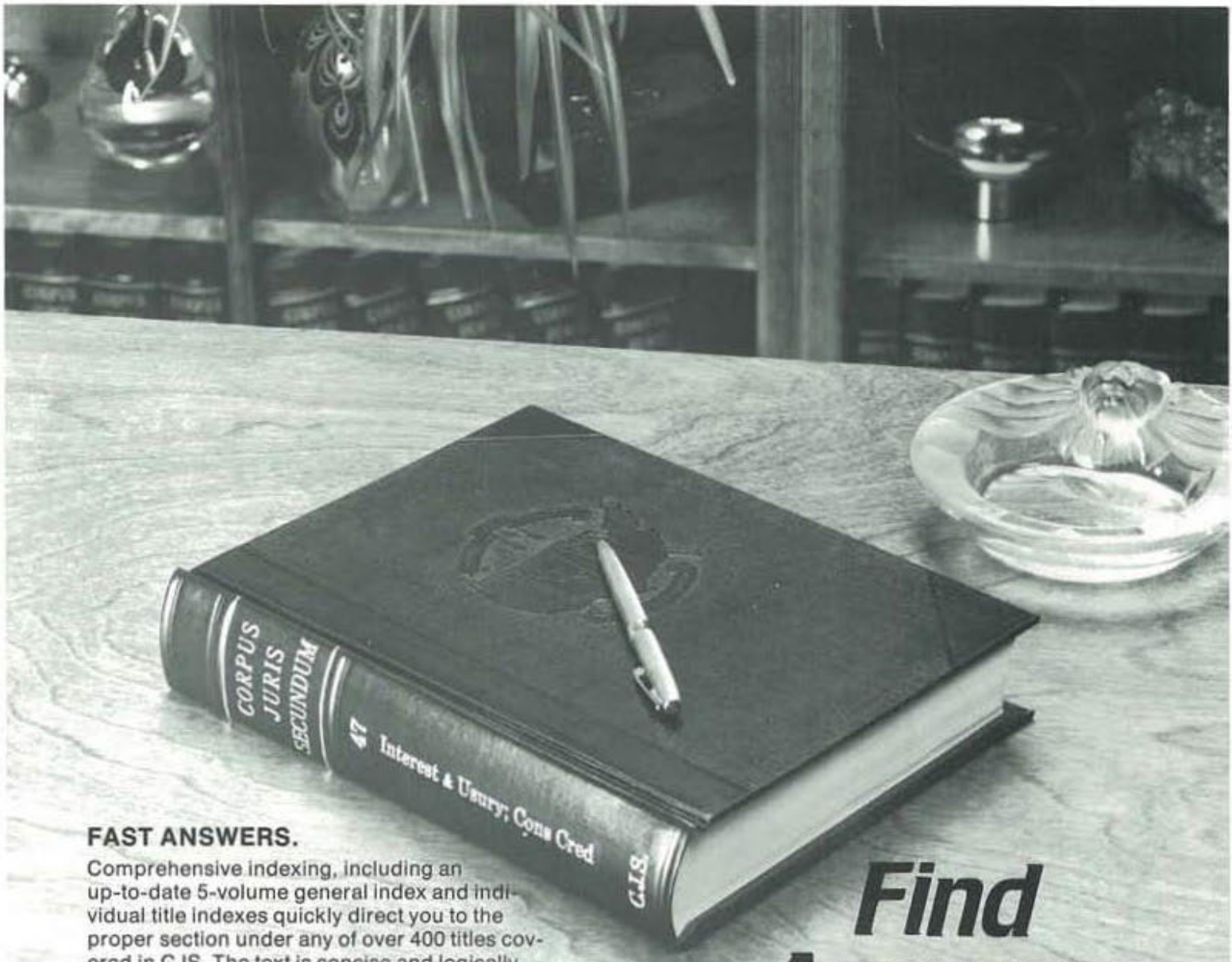

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Michael D. Waters is partner in the Mobile firm of Miller, Hamilton, Snider & Odom. He earned a B.A. from Duke University, M.A. from Oxford University (where he was a Rhodes Scholar), and in 1977 received his J.D. from the University of Alabama School of Law.

SOPHISTICATION AND THE PRIVATE OFFERING OF SECURITIES IN ALABAMA—

A Lack of Federal and State Law Coordination

Michael D. Waters

On September 29, 1982, the Alabama Securities Commission adopted Rule 830-X-6-.11 (Rule 6-11) to provide procedures for an exemption from the registration provisions of the Alabama Securities Act, *Ala. Code* §§ 8-6-1 to 8-6-33 (1975) (hereinafter, the Alabama Act), and to account for the adoption by the Securities and Exchange Commission (hereinafter, the SEC) of Regulation D, a new rule designed to facilitate capital formation by small businesses and to encourage the coordination of state and federal securities laws in this area. 17 C.F.R. §§ 230.501-506. While a major reason for the adoption of Regulation D by the SEC was greater coordination between federal and state securities laws, this goal has been frustrated in Alabama and in most states, as the following discussion will show.

Background—Early Steps to Define "Private Offering"

Rule 6-11 became effective on October 18, 1982, and was adopted pursuant to Section 8-6-11 (a) (9) of the Alabama Act which provides that the registration provisions thereof shall not apply to any transaction pursuant to an offer of securities directed by the offeror to not more than ten persons if the seller reasonably believes that all the buyers are purchasing for investment and no commission or remuneration is paid or given for soliciting any buyer. The section also provides, however, that the Alabama Securities Commission may "by rule or order" increase the number of offerees permitted. This section is the analogue to the so-called "private offering" exemption of Section 4(2) of the Securities Act of 1933 (hereinafter, the 1933 Act) which exempts offers of securities not involving a public offering. 15 U.S.C. § 77d (2) (1981).

Because the circumstances under which a sale of securities involves a public offering and therefore requires registration were not clearly established by case law, the SEC adopted Rule 146 in 1974 to provide objective standards as to when an offer of securities would be exempt under Section 4(2) of the 1933 Act. One of the conditions of Rule 146 was that securities be sold to no more than thirty-five purchasers. In order to allow offers of securities to be made to more than ten persons in the state of Alabama, the Alabama Securities Commission, shortly after the adoption of Rule 146 by the SEC, promulgated a rule under Section 8-6-11 (a) (9) of the Alabama Act. A condition of that rule, a forerunner of Rule 6-11, was the offeror's full compliance with Rule 146.

The SEC rescinded Rule 146 on June 30, 1982, however, and adopted Regulation D to govern certain exempt offers of securities under the 1933 Act. A frequent criticism of Rule 146 was its requirement that the issuer of the securities, prior to any offer, shall have reasonable grounds to believe, and, prior to any sales shall believe that all offerees and purchasers have such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the investment. Over the years this requirement came tooo be known as the "sophistication test." In order to rely on the private offering exemption of Rule 146, the issuer had to be prepared to prove that offerees and purchasers were "sophisticated."

The sophistication test imposed significant burdens on issuers, especially small issuers. Not only did the issuer have to provide all material information about the offer to offerees and purchasers (generally in a private placement memorandum), it also had to determine whether offerees and purchasers were sophisticated. This determination was a cumbersome process, for questionnaires regarding each purchaser's educational and business background, financial position, income and other factors had to be obtained. See, *e.g., Mary S. Krech Trust v. Lake Apartments,* 642 F.2d 98, 102-03 (5th Cir. 1981). Often purchasers were reluctant (and sometimes refused) to provide such information.

Even when provided, the information was not always determinative of sophistication. For example, was a highly educated person sophisticated under Rule 146? Issuers relying on Rule 146 would sometimes assume that a medical doctor, a lawyer, or a Ph.D. in economics would *ipso facto* be considered sophisticated, as would a successful businessman. Education alone or success in business did not always guarantee sophistication under Rule 146, however. To be safe, many offerors required previous investment experience in the type of venture involved as well as some demonstrated ability to read and understand financial statements. An understanding of nuclear physics was an insufficient test of sophistication under Rule 146.

The sophistication test subjected the offeror to significant legal risks as well. If, after the fact, a court determined that the offeror had no reasonable grounds to believe that the purchaser was sophisticated, the Rule 146 exemption would be lost, and securities would have been issued in violation of the 1933 Act. Thus, the process of determining whether offerees and purchasers were sophisticated generally rquired considerable advice from legal counsel, and such process made reliance on Rule 1 expensive, especially for small issuers. The determination of sophistication required a subjective determination by the issuer or offeror, and as a result, Rule 146 was not as convenient a vehicle for relying on the private offering exemption as many thought at the time of its adoption.

Regulation D and Rule 6-11

As previously stated, Regulation D represents in part an effort by the SEC to eliminate the burdens imposed upon smaller businesses in their attempts to raise capital. Securities Act Release No. 6389 (March 8, 1982) (hereinafter, Release No. 6389). Regulation D contains six rules (Rules 501-506), three of which are definitional and procedural and three of which relate to specific types of offers exempt under Regulation D. Rule 504, for example, exempts offers by certain issuers not exceeding $500,000 in twelve months from the necessity of providing specific information to purchasers and from any limitation on the number of purchasers. Basically, Rule 504 offers are left unregulated by the SEC with state securities regulators playing the primary enforcement and supervisory role. The other two exemptions of Regulation D are the primary focus here, for they are the heart of Regulation D and represent an attempt by the SEC, apparently in vain, to develop more coordination between federal and state securities laws.

The first of these exemptions is Rule 505 of Regulation D. Rule 505 exempts offerings not exceeding $5,000,000 within twelve months, if, among other things, there are no more than thirty-five purchasers of the securities, excluding "accredited investors." (An "accredited investor," defined in Rule 501, includes certain institutional investors, such as banks and insurance companies, purchasers of at least $100,000 of the offering, directors and executive officers of the issuer, and natural persons whose net worth exceeds $1,000,000 or who had income in excess of $200,000 during each of the last two years and who reasonably expect to have income in excess of $200,000 in the year of purchase.) In a Rule 505 offer, the issuer must also provide the same kind of information to all nonaccredited investors as would be required to be included in Part I of a registration statement filed under the 1933 Act. There is *no* requirement in Rule 505 offers, however, that purchasers be sophisticated.

The second major exemption of Regulation D is Rule 506. In contrast to Rule 505, this rule contains no limitation upon the amount of securities which may be offered. Like Rule 505, it only allows sales to thirty-five purchasers who are not accredited investors, and it requires that material information of the same kind as would be required in a registration be furnished. Unlike Rule 505, however, Rule 506 stipulates that with respect to the thirty-five nonaccredited purchasers, the issuer shall reasonably believe immediately prior to making any sale that such purchaser has "such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment." This provision represents a major difference between Rules 505 and 506 of Regulation D. The lack of a requirement in Rule 505 that the thirty-five nonaccredited investors be sophisticated makes Rule 505 a less burdensome rule and a major aid to small issuers.

The Alabama Securities Commission's notice of the adoption of Rule 6-11 states that the rule embodies the provisions of Regulation D and contains "certain additional limitations and requirements." Ala. Sec. Comm., Notice of Final Adoption of Chapter 830-X.6 (Formerly Interim Rule 6-11) (October 13, 1982). One of those additional requirements is that in any offer pursuant to the rule, purchasers be sophisticated. Paragraph 4 of the notice states:

> 4. In all sales to nonaccredited investors, the issuer and any person acting on its behalf shall have reasonable grounds to believe, and after making reasonable inquiry shall believe, that the purchaser either alone or with his or her purchaser representative(s), has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the prospective investment.

Id. This requirement applies to *any* offer by the issuer under Regulation D, whether in reliance on Rule 505 or 506. Thus, the adoption of Paragraph 4 by the Alabama Securities Commission reintroduces the sophistication test to Rule 505, which the SEC had abolished, and, for practical purposes, eliminates Rule 505 as an available rule for exempt offerings in the state of Alabama.

In proposing Rule 6-11, the Alabama Securities Commission noted that the rule was to account for the adoption of Regulation D. *Id.* In adopting Regulation D, the SEC made clear that it was attempting to eliminate some of the burdens imposed upon smaller businesses in attempting to raise capital. Release No. 6389. Regulation D, however, is not merely a recognition by the SEC that smaller issuers need more flexibility in capital formation; it is also a product of Congressional enactment which calls for such flexibility. The Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2275 (1980), added three amendments to the 1933 Act. One of these amendments, found in Section 19(c) of the 1933 Act, states that the purpose of the section is to engender cooperation between the SEC and state

securities regulators, among other things, in the "development of a uniform exemption from registration for small issuers which can be agreed upon among several states or between the states and the Federal Government." 15 U.S.C. § 77s (c) (3) (1981). Thus, Regulation D represents an attempt by the SEC to eliminate, in response to Congressional direction and in coordination with the states, some of the burdens that have previously been imposed upon small businesses in their efforts to raise capital.

One of those burdens was the requirement in Rule 146 that in the offer and sale of securities, the issuer reasonably believe that both offerees and purchasers are sufficiently sophisticated to judge the merits and risks of their investment. In adopting Rule 505, and despite some criticism that it had "gone wild for industry," the SEC abolished that requirement because it believes that in offers of no more than $5,000,000 within a twelve month period, the sophistication test is unnecessary. By reintroducing the sophistication test in paragraph 4 of Rule 6-11, however, the Alabama Securities Commission has imposed upon certain offers of securities within the state of Alabama a requirement which the SEC, acting pursuant to the Small Business Investment Incentive Act of 1980, purposefully eliminated from Regulation D and has eliminated one major area where Alabama and federal law would otherwise coincide.

Rule 505 reflects a policy that in offers not exceeding $5,000,000 in twelve months and involving no more than thirty-five purchasers who are not accredited investors, sophistication by those purchasers is not required because, under Rule 502(b) of Regulation D, the issuer must disclose basically the same type of information that would be disclosed in a registered offering. The availability of informaton to offerees and purchasers provides the foundation for the exemption under Rule 505. Eliminating the purchaser sophistication test in Regulation D is rational because disclosure is all that the registration process provides for the protection of investors (apart from the antifraud provisions, which are available in both registered and exempt offerings). Schneider, *Section 4(2) and "Statutory Law,"* 1 ALI-ABA Postgraduate Course in Federal Securities Law, 80-81 (1981). In other words, in a registered offering, it is permissible, and presumably quite common, to have purchasers who lack sophistication, *i.e.*, who have no ability to understand the investment or to assume the risk, as long as *disclosure* is adequate. Rule 505 implicitly recognizes this principle and, therefore, makes reliance on the rule less burdensome.

The Fifth Circuit—An Argument Against Sophistication

A number of recent Fifth Circuit cases, which are precedent in the new Eleventh Circuit by virtue of *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981), also support de-emphasizing the purchaser sophistication requirement in certain circumstances. In *Doran v. Petroleum Management Group*, 545 F.2d 893, 902, note 10 (5th Cir. 1977), the court noted that evidence of the offeree's sophistication is not required in all cases to establish a private offering exemption under Section 4(2) of the 1933 Act. In an earlier case, *Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 612, note 14 (5th Cir. 1975), *vacated and remanded on other grounds*, 426 U.S. 944 (1976), the Fifth Circuit pointed out that the two case law requirements for the exemption under Section 4(2) are disclosure and a limited number of people affected, and it made clear that Rule 146 was more restrictive than the cases construing the exemption under Section 4(2) because it imposed an additional requirement that the offeree be sophisticated.

Finally, in *Swenson v. Engelstad*, 626 F.2d 421, 425 (5th Cir. 1980), the court noted that there are four "quantitative factors" that are often useful in evaluating the character of an offering: (1) the number of offerees and their relationship to each other and to the issuer; (2) the number of units offered; (3) the size of the offering; and (4) the manner of the offering. *Id.* at 425. The ultimate test of a private offering exemption, however, is whether the purchasers of the securities need the protection of the securities laws. Thus, according to the court, the person relying on the exemption must establish that "each and every" offeree either had the *same* information that would have been available in a registration statement or had access to such information. *Id.*, at 426-27. In formulating this rule, the court did not list sophistication of the offeree as an element which must be present for reliance on the private offering exemption. In a footnote, the court commented upon the importance of sophistication as follows:

> Evidence of the offeree's investment sophistication also is helpful. See *Doran v. Petroleum Management Corp.*, 545 F.2d 893, 902 n. 10 (5th Cir. 1977). Lack of proof of investment sophistication, however, does not preclude a finding that the offer was private. By the same token, proof of investment sophistication is of little value unless accompanied by evidence that the offerees had or had access to the information that would have been included in a registration statement.

Id., at 426, note 12. See also *SEC v. Spence & Green Chemical Company*, 612 F.2d 896 (5th Cir. 1980).

One argument for requiring sophistication in a private offering is that the sale of securities pursuant to such an offering is undertaken without SEC scrutiny and, therefore, inherently involves more risk. By contrast, as the Fifth Circuit has acknowledged, registered offerings of securities are subject to review by the SEC which is empowered to take a variety of corrective measures against the issuer if the disclosure in the registration is incomplete or otherwise inadequate. *Woolf v. S.D. Cohn & Company*, 515 F.2d 591, 611 (5th Cir. 1975).

Accordingly, the argument for sophistication is that sales of securities in a private offering should be made only to persons who are sufficiently sophisticated to judge the merits and risks of the investment. See *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953). Because the Fifth Circuit has acknowledged this argument, the importance of the cases discussed above with respect to sophistication should not be overemphasized. Nevertheless, they lend judicial support to the principle underlying Rule 505 that sophistication is unnecessary if adequate disclosure is made and the number of purchasers is limited. *Contra*, Nimkin, *Offeree Sophistication in Private Offering*, 15 Rev. Sec. Reg. 863, 869 (1982).

Uniformity Among the States

Paragraph 4 of Rule 6-11 is similar to paragraph J(1)b of the Uniform Limited Offering Exemption—Option A promulgated by the North American Securities Administrators Association, Inc. ("NASAA"), on October 12, 1981. In response to the SEC's publishing of Regulation D for public comment, NASAA adopted a policy guideline which contained two suggested options to be used by state securities commissions for providing exemptions under state law similar to the exemptions contained in Regulation D. Blue Sky L. Rep. (CCH) ¶ 5294. Both options contained a requirement that purchasers be sophisticated or otherwise suitable for the investment. Rule 6-11 is, therefore, consistent with the suggestions of NASAA and the rules of many other states. At the same time, however, the SEC stated in its release adopting Regulation D that while NASAA's two alternatives contained a sophistication requirement, NASAA intended to revise its options to provide greater uniformity between Regulation D and its proposals by eliminating the requirement from one of its options. Release No. 6389. Yet, while the SEC had hoped that NASAA would endorse uniform state exemptions that would conform to Rules 505 and 506 of Regulation D, these modifications have not been forthcoming, and most of the states which have adopted Regulation D type exemptions (all but eight) have included a sophistication test for all purchasers.

Conclusion

Although the SEC recognizes that state rules need not be identical to Regulation D, especially if there are policy reasons for a variance with the federal rule, it clearly supports uniformity between Regulation D and state law. Moreover, there does not appear to be a compelling policy reason for requiring sophistication in a Rule 505 offer. If all material information is provided to purchasers, the lack of a sophistication requirement should work no harm. Nevertheless, the Alabama Securities Commission disagrees. As a practical matter, the lawyer advising an issuer of securities in Alabama, which is relying on the exemption afforded by Rule 6-11, must advise his or her client that each purchaser of the securities who is not an accredited investor must meet the sophistication test. By reintroducing the sophistication test to all offers under Rule 6-11, the Alabama Securities Commission has eliminated Rule 505 of Regulation D for offers in Alabama and taken a step away from needed uniformity between state and federal securities laws in this area. □

Hundreds make it history, Heros reminisce, Hairston becomes bar president

by Jen Nowell

Some have commented that the incorporation of the Young Lawyers "Recent Developments in the Law" seminar into the agenda of the Alabama State Bar Annual Meeting was the reason for the outstanding attendance; some say it was the neck-in-neck race for the office of president-elect of the association; others think it was simply the fact that the meeting was in Birmingham, the state's largest city, with more lawyers, and located centrally. Probably for all of the reasons mentioned above, and a half dozen others, the 1983 Annual Meeting of the Alabama State Bar, held July 21-23 in the Magic City, was an enormous success in many, many ways. In fact, the thousand lawyers registering for the convention made it the largest in the history of the bar.

Novel to the regular scheduling of the meeting, the first day's agenda began in the morning rather than the afternoon. This was planned to give members the opportunity to earn a full day of CLE credit by attending the Young Lawyer sponsored "Recent Developments" seminar. Attendance totaled more than four hundred and each lawyer was able to gain 6.6 hours of CLE.

Programs and guest speakers at this year's meeting were the best ever. The bar was honored to have Morris Harrell, the president of the ABA, as guest speaker at the Bench and Bar Luncheon on Thursday. Harrell told the assembly that although the legal business is changing, lawyers should not allow those changes to come between them and their clients. "The lawyer in the past spent more time face to face (with the client) . . . it is vital that we retain this individual relationship." Harrell said that lawyers must not permit the practice of law to become just another business. "If we are to retain our status as a respected profession, the essential role of the lawyer . . . must not change," he warned.

Highlighting the programs on Thursday was Colonel Joshua Shani, the pilot of the lead aircraft in the 1976 Israeli raid to rescue

As the largest bar meeting in the association's history begins, Reggie Hamner, executive director of the bar, takes a minute to help with registration.

President Stone congratulates Edwin C. Page, Jr. of Evergreen who is receiving the Alabama State Bar Award of Merit.

Wanda Devereaux congratulates Walter Byars on his election to the office of president-elect of the bar. Both are with the Montgomery firm Steiner, Crum and Baker.

Alabama Supreme Court Chief Justice C. C. Torbert and Morris Harrell, president of the ABA, enjoy a joke at the Bench and Bar luncheon before the business begins.

At the 1983-84 Committee Breakfast on Friday morning, Doug Key, George Finkbohner, Wayman Sherrer, and Wilbur Silberman, of the Federal Bankruptcy Court Liaison Committee, make their game plan for the coming year.

President Norborne Stone welcomes to the convention Colonel Joshua Shani, who gave a vivid portrayal of his feat as lead pilot in the 1976 Israeli raid on Entebbe.

Commissioners Phil Adams, of Opelika, and Wade Baxley, of Dothan, take a break between meetings. Commissioner Adams is new to the board this year.

Douglas Arant, of Birmingham, tells of bar conventions years ago.

the 103 hostages being held at the Entebbe airport. He gave a humorous, frightening and vivid portrayal of what it took to accomplish that mission. The meeting room was filled, eyes were open wide, and ears were sharply tuned in to every word of the story of the mission that made this man a true hero.

And standing ovations continued the following morning when seven "heroes" of the legal profession met in a program entitled "The Reflective Roundtable." Those attending were enlightened and entertained as Bob Adams of Mobile told of law in days when a roll of 500 stamps cost only fifteen dollars, as Guy Hardwick of Dothan, former lieutenant governor of Alabama, told of a fishing trip that could have made him, with one quick slip of a razor, the governor of Alabama; and as Douglas Arant of Birmingham spoke of "dry" bar conventions held in Sheffield many years ago. John A. Caddell of Decatur moderated the roundtable. Jimmy Carter of Montgomery, the Honorable Robert B. Harwood of Tuscaloosa, and the Honorable Seybourn H. Lynne of Birmingham told of many memorable times of the past. *The Alabama Lawyer* plans to run excerpts from this program in the next issue of the bar journal. The program was also videotaped to become a part of the permanent history of the bar. If you weren't there, you missed quite an experience.

These were only a sampling of the programs at the bar meeting. The bar was fortunate to have so many outstanding speakers this year.

Social events at the convention would be hard to beat. Insurance Specialists, Inc., broke the ice on the social scene by hosting a Bloody Mary party on Thursday morning. The numerous hospitality rooms were filled to overflowing at almost any time of the day or night. The Starlight Jazz Cocktail Membership Reception, catered by Encore restaurant on Thursday evening, was delightful as a hundred or so mingled in the open-air courtyard at the Birmingham-Jefferson Civic Center. Immediately following was the Young Lawyer's sponsored dance that many enjoyed into the early morning hours.

On Friday evening at the Annual Dinner the bar gave Fifty-year Certificates to twelve lawyers. Several others were unable to at-

L. Tennent Lee, Jr., of Huntsville, also, received the Award of Merit for his outstanding contribution to the bar.

President Bill Hairston pins outgoing President Norborne Stone "Chancellor of the Alabama State Bar."

Seybourn Lynne, Douglas Arant, Guy Hardwick, John Caddell, Bob Adams, Robert Harwood and Jimmy Carter, all participants in the "Reflective Roundtable," share experiences from the days when "a roll of five hundred stamps cost only fifteen dollars."

At the conclusion of an excellently planned and executed, history-making annual meeting, Executive Director Reggie Hamner, Out-going President Norborne Stone, and the new president, Bill Hairston, pose for one last picture before falling apart. Congratulations on a great convention!

tend. Tennent Lee and Edwin Page were awarded the bar's Awards of Merit for their *outstanding* contribution to the state bar. Seattle lawyer, and the lady recognized as the "pre-eminent law librarian in the U.S.," Marion Gallagher, entertained with a talk on "being a law librarian." For obvious reasons the topic was unannounced, but her style and unerring wit captivated and delighted all.

Closing out the bar meeting on Saturday was the business meeting where President Norborne C. Stone, of Bay Minette, passed the gavel to President-elect William B. Hairston, Jr., of Birmingham, to assume the highest elected office in the bar association. Hundreds were assembled to participate in the election for president-elect of the association. Congratulations are extended to Walter Byars of Montgomery who will serve as president during the 1984-85 bar year.□

Commissioner Philip Reich signs in after completing the two-mile Vulcan, Too Run on Saturday morning.

Riding the Circuits

Cullman County Bar Association

New officers for the Cullman County Bar Association have been elected for the 1983-84 year. They are:

President: Steve Skipper
Vice President: Juliet St. John
Secretary: Don Hardeman

Houston County Bar Association

The Houston County Bar Association was honored to have as its guest and speaker for its regular monthly meeting on Wednesday, July 27, 1983, our new State Bar president, William (Bill) Hairston, Jr. Bill delighted the members with his remarks which centered around comments and advice he had thought about giving his son who was about to enter the practice of law. He also gave the members an overview of the goals and objectives of his administration and how he proposed to meet them. The members were most appreciative of Bill taking time out from his busy schedule to travel to Dothan to be with his fellow lawyers.

New officers were elected for the association's year who will formally take office September 1, 1983. The officers elected for the 1983-84 term are:

President: Samuel L. Adams
Vice President: Joel W. Ramsey
Secretary: Phyllis Lodgsdon
Treasurer: Jack Blumenfeld
Executive Committee: Huntley Johnson
Randy Brackin
Doug Bates
Jere Segrest
L.A. Farmer, Jr.

Plans are being made to install the new officers at the annual Installation Banquet to be held in late August 1983.

Huntsville-Madison County Bar Association

The newly elected officers for the 1983-84 term are:

President: Harvey B. Morris
V.P./President-Elect: William H. Griffin
Secretary: George Royer
Treasurer: Laura Jo Wilbourn

On August 6, 1983, the Bar Auxiliary sponsored a backyard barbeque party at the home of Buck Watson.

The Huntsville-Madison County Bar Association wishes to welcome the following new members: James R. Henson, Camille G. Scales, J.E. Emerson, Jr., L. Thompson McMurtrie, Thomas F. Hayes, Clyde A. Blankenship, John R. Barran, Solomon I. Miller, Patrick A. Jones, Lee Ann F. Pasker, Thomas E. Parker, Jr., Marilyn E. Bradley, Curtis M. Simpson, Barbara S. Corner, John C. Hay III, Robert V. Wood, Jr., Robert G. Butler, Jr., Frank C. Vaughn, Jr., Marcia E. Stevens, and Joe W. Campbell.

Montgomery County Bar Association

The Montgomery County Bar Association held its monthly meeting on June 15, 1983, with Reginald T. Hamner, executive director and secretary of the Alabama State Bar, as guest speaker. Mr. Hamner gave an interesting report on Alabama State Bar activities. The meeting was well attended by members of MCBA, and we were honored to have visiting with us Judge Jack Wallace.

The program for our July luncheon meeting was presented by the Administrative Law Section of the Alabama State Bar. Alvin T. Prestwood, as chairman of the Administrative Law Section, presided over the "Dedication of Eugene W. Carter Medallion" presented to a former

public servant in recognition of their extensive records of consistent, fair, and honest balancing of governmental interests against the rights of individuals. This is the first year for this award and it was given to the Honorable Eugene W. Carter. Judge Truman Hobbs and the Honorable T.B. Hill, Jr., also participated in the program.

The Montgomery County Bar Association would like to take this opportunity to congratulate Walter Byars on being elected president-elect of the Alabama State Bar at the Annual Meeting in Birmingham.

MCBA welcomes the following new members of our association: Jeffery H. Long, Wendell Cauley, Bruce MacPherson, Sarah B. Mooneyham, N. Gunter Guy, Jr., Bobby N. Bright and Ellis D. Hanan.

Tuscaloosa County Bar Association

The Annual Meeting of the Tuscaloosa County Bar Association was held at the County Courthouse on June 17, 1983. Officers elected for the 1983-84 year are as follows:

President: C. Delaine Mountain
Vice President: Ralph Burroughs
Secretary/Treasurer: Claire A. Black
Executive Committee: Joe Pierce
Robert Wooldridge III
Robert F. Prince
Ralph Knowles
A. Colin Barrett
Wilbur Hust

Mountain

Local Bar Meeting Schedules

Geneva County Bar Association: Regular luncheon meetings of the Geneva County Bar Association are held on the first Monday of each month at the Chicken Box Restaurant in Geneva. Members of the state bar are invited to attend the meeting which begins at noon.

Houston County Bar Association: Regular meetings of the Houston County Bar Association are held the fourth Wednesday of every month at 12:00 noon at the Sheraton Inn, Dothan, Alabama. Visiting members of the State Bar and judiciary are invited to attend the meeting without reservations.

Huntsville-Madison County Bar Association: The Huntsville-Madison County Bar Association meets the first Wednesday of the month at 12:15 p.m. at the Huntsville Hilton.

Lee County Bar Association: The monthly luncheon meeting of the Lee County Bar Association is held on the third Friday of each month at the Auburn-Opelika area Elk's Club.

Mobile Bar Association: Monthly meetings of the Mobile Bar Association are held the third Friday in each month at the Mobilian, located at 1500 Government Boulevard. All attorneys, local and visiting, are invited to attend the meeting and luncheon. No reservation is required.

Mobile Bar Association Women Attorneys: The regular monthly luncheon meeting is held the last Wednesday of each month at the International Trade Club. No reservation necessary.

Montgomery County Bar Association: The monthly meetings of the Montgomery Bar Association generally are held the third Wednesday in each month at 12:00 noon at the Whitley Hotel.

Local bar associations with regular monthly meetings can have their meeting listed by sending a notice to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, Alabama 36101.

Bar Briefs

One hundred plus club

The Alabama State Bar Mandatory Continuing Legal Education Commission has reported that nine members of the bar earned more than one hundred CLE credits for attendance of CLE activities during 1981 and 1982. These individuals are: Algert S. Agricola, Jr.; Daniel L. Burgess; Richard H. Clem; Benjamin Cohen; D. Kyle Johnson; Walter E. Jospin; Charles N. Reese; Jeffrey W. Sacher; and Scott L. Speake. These members of the "hundred-plus club" earned a combined total of 1,520 CLE credits for an average of 169 credits each.

Mary Lyn Pike, Staff Director of the MCLE Commission, says compliance forms for the 1983 year will be sent out this month. If you do not receive yours by month's end, you may request a form by calling (205) 269-1515 or writing to the MCLE Commission, P. O. Box 671, Montgomery, AL 36101.

Huckaby reappointed chairman ABA committee on lawyer referral

Gary C. Huckaby, a partner in the Huntsville law firm of Smith, Huckaby & Graves, P.A., was reappointed chairman of the American Bar Association Standing Committee on Lawyer Referral and Information Services.

The committee is seeking implementation of standards it developed for state and local bar association lawyer referral and information services, and it oversees development of ABA policy in the area. Such services are to assist individuals in locating lawyers willing to handle the person's particular legal problem. Using services that comply with ABA standards, individuals can obtain a list of names from which to select a lawyer, and can obtain information about the professional qualifications of each of those to whom they have been referred. They also can obtain a preliminary interview with the lawyer at low cost.

Huckaby has been a member of the committee since 1979, and its chairman since August of 1982. He was reappointed by incoming ABA President Wallace Riley of Detroit at the close of the 1983 ABA Annual Meeting in Atlanta. Huckaby also is a member of the ABA's policy-making House of Delegates.

Cooper reelected Alabama state delegate to ABA

N. Lee Cooper, a partner in the Birmingham law firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal, was elected on August 3, 1983, to his second three-year term as Alabama State Delegate to the American Bar Association House of Delegates.

As state delegate, Cooper heads a five-member delegation to the 380-member House, and is the official representative of the more than five thousand Alabama lawyers who are members of the ABA. Cooper was reelected at the close of the 1983 ABA Annual Meeting in Atlanta.

The House of Delegates meets twice each year to set association policy on matters of broad social impact, as well as those of more particular relevance to the legal profession. The ABA is the largest voluntary professional association in the world.

Opponents feel making Georgia thirteenth state with mandatory CLE will be very unlucky

The Georgia bar board of governors, at its March meeting, adopted a hotly contested mandatory CLE proposal. If the state supreme court goes along with the bar association's controversial decision, Georgia will become the thirteenth state to adopt mandatory CLE. Georgia has more lawyers than any other state with mandatory CLE.

If passed, Georgia's rule will require lawyers to attend eighteen hours of CLE programs per year. Other mandatory CLE states require fifteen or fewer hours per year. The Georgia requirement will also include six hours of legal ethics every three years. Only Colorado has an ethics requirement as part of its mandatory CLE rule—two hours every three years, or forty minutes per year.

While the Georgia Supreme Court ponders the board's proposal, opponents of mandatory CLE are asking to have the Georgia bar membership polled. Opponents of mandatory CLE claim that overwhelming support does not exist for a proposal. The Georgia Supreme Court should render their decision in October.

American Board of Trial Advocates has new chapter in Alabama

The new Alabama Chapter of the American Board of Trial Advocates (ABOTA) was chartered on June 29, 1983. Charter members of the new chapter include the following attorneys: Robert L. Byrd, Jr., Robert T. Cunningham, Jr., Francis H. Hare, Jr., Roscoe B. Hogan, Ernest C. Hornsby, William J. McDaniel, William D. Melton, W. Boyd Reeves, W. Stancil Starnes and Richard W. Vollmer, Jr.

The following officers were elected: Francis H. Hare, Jr., president; Richard W. Vollmer, Jr., vice-president; Ernest C. Hornsby, secretary/treasurer; and William D. Melton, National Executive Committee representative.

ABOTA is an organization whose membership is by invitation only and is limited to top trial lawyers who are actually engaged in jury litigation and who can meet the qualification requirements. Membership is balanced between the plaintiff and defense bar.

In order to be elected an Advocate, an attorney must have tried fifty jury cases to a conclusion. In order to be elected an Associate, an attorney must have tried twenty jury cases to a conclusion. To be advanced to Diplomate, an attorney must have tried one hundred jury cases to a conclusion.

ABOTA now has a membership of 1,600 with chapters and/or members-at-large in forty-eight states.

Alabama Law Institute elects officers

The annual meeting of the Alabama Law Institute was held Thursday, July 21, 1983 at the Hyatt House in Birmingham. The following officers and executive committee members were elected: Finis St. John, president; Oakley Melton, vice-president; Robert L. McCurley, Jr., secretary/director; and Hugh D. Merrill, chairman.

Members on the executive committee are: Douglas Arant, Yetta Samford, Bill Baxley, Rick Manley, C.C. Torbert, Jr. and Tom Drake.

Farrah-Coif alumni elect new officers

New officers of the Farrah Order of Jurisprudence and Order of the Coif were elected at their alumni breakfast held at the State Bar Annual Meeting in July.

The 1983-84 officers are: Larry U. Sims, president; David H. Bibb, vice-president; Charles D. Fleming, secretary/treasurer; and John J. Smith, historian.

The legal services corporation and private bar involvement

This year, about four hundred private bar members throughout the state are providing legal assistance to low-income citizens who are clients of the Legal Services Corporation of Alabama (LSCA). By the end of the year, these lawyers will have handled about 1,700 cases. LSCA's staff casehandlers—62 lawyers and 28 paralegals—will have closed about 15,000 cases in 1983.

The private lawyers are participating in LSCA's private bar involvement projects, which include *pro bono* plans, paid referrals—sometimes called Judicare—and one contract agreement. These projects will expend ten percent of LSCA's resources in 1983, as required by federal regulations. About $300,000 in cash outlays will be spent by LSCA on private bar involvement this year.

The Legal Services Corporation of Alabama is a private, non-profit organization funded by Congress to provide free legal help to low-income persons in civil matters in sixty of Alabama's sixty-seven counties. Clients are seen in seven main, regional offices located in Florence, Gadsden, Tuscaloosa, Selma, Montgomery, Dothan and Mobile, and in about fifty other full and part-time offices throughout LSCA's service area. Two other federally funded programs, Birmingham Area Legal Services Corporation and Legal Services of North Central Alabama, serve the remaining seven counties.

Eight of the nine lawyers who serve on LSCA's fifteen-member board are private lawyers appointed by the Alabama State Bar. The Alabama Black Lawyers Association makes the ninth lawyer appointment.

New bar appointees are Laura Bess Cox of Florence, John Gruenewald of Dothan and Celia J. Collins of Mobile. The other bar appointees are Wayne P. Turner and Robert Segall of Montgomery, McGowin Williamson of Greenville, William V. Neville of Eufaula and John Bivens of Tuscaloosa.

The Alabama Black Lawyers Association has reappointed Merceria Ludgood of Mobile to the board.

Currently, two LSCA *pro bono* projects are in operation, in Tuscaloosa and Montgomery counties. In both cases, the lawyers who coordinate these projects are selected by the local bar associations. These lawyers are paid by LSCA and housed in LSCA offices. Their secretaries and all office expenses are also paid by LSCA. These *pro bono* coordinators (Ginger Garrett in Tuscaloosa and Randye Rosser in Montgomery) refer clients to private lawyers in their counties who have agreed to handle certain cases for no fee. They also represent clients themselves.

These two *pro bono* projects cost a total of about $60,000. About 160 private lawyers participate. The remaining $240,000 obligated by LSCA to private bar involvement goes to another 240 private lawyers who are members of LSCA's paid referral panels and to one lawyer under contract in the Gadsden region to provide services to clients in two counties. There are eleven private lawyer referral panels in operation in five of LSCA's regions.

About eighty-five percent of cases handled by private lawyers in cooperation with LSCA are family law, mostly divorces. The other cases handled represent a variety of legal problems encountered by poor people.

LSCA began its private bar involvement projects in July 1982. After a year's experience, the facts show that cash payments to lawyers, through the paid referral panels, do not significantly increase the number of clients that LSCA is able to serve. The emphasis in the future, in order to get the greatest benefit for each dollar spent, will be to enlist more private lawyers in a *pro bono* effort.

Cook receives award of special merit

Camille Wright Cook, Professor of Law, University of Alabama, was recently honored at the American Bar Institute-American Bar Association (ABI-ABA) Annual Meeting in Atlanta. Professor Cook was presented with "The Award of Special Merit" by the American Bar Institute-American Bar Association Committee on Continuing Professional Education for distinguished service to the legal profession in the development and expansion of the continuing legal education programs in Alabama and nationally as director of Alabama Bar Institute for Continuing Legal Education during 1972-1983.

Since receiving the Juris Doctor degree in 1947, Professor Cook has contributed greatly to the state of Alabama and national education programs at Auburn University (1948-68) and University of Alabama Law School (1970-Present), where she has served as Professor of Law, Associate Dean, and Director of CLE. Professor Cook has been involved in several national and state committees relative to the legal profession and law school admissions programs. She is a member of the ABI-ABA; Board of Directors, Law School Foundation; Board of Trustees, Farrah Law Society; and a member of the Expedited Arbitration Panel-Steel Industry.

Charles W. Gamble, Acting Dean and Professor of Law, University of Alabama Law School, stated, "Professor Cook is worthy of this high honor as no one person has contributed more to the state of Alabama and national legal profession. She is one of the very best."

No axes to grind, no battles to fight . . . let's just tell the folks what it says

What exactly does the new proposed constitution say? On Friday afternoon, August 12, President Bill Hairston appointed a twenty-one member task force to evaluate the proposed constitution for the specific purpose of finding that out. He then called a press conference to announce his plans. Hairston's concern is that there are very few people who know what is contained in the new fifty-seven page document. The task force, therefore, has been given the job to review, study and evaluate the proposed constitution. A report will then be made and released to the news media in hopes that the voters in the state will be educated on the document when they go to the polls in early November.

Hairston told the members of the press, "The public has a right to know what it says. The public has a right to know what it doesn't say. They have a right to know how it differs from the 1901 Constitution and why it differs. They have a right to know how it will affect you and me. If the voters are

Continued on page 296

CLE News and Seminars

Mary Lyn Pike
Staff Director, MCLE Commission

MCLE NEWS

Compliance Reports: 1983

Forms for reporting CLE compliance for 1983 are being mailed this month to most members of the Alabama Bar. Those individuals who claimed the age exemption in 1982 will not receive reporting forms. Credits carried forward from 1981-82 are being posted on the forms by the MCLE Commission's staff. As specified in Rule 4.B and Regulation 3.7 of the Rules and Regulations for Mandatory Continuing Legal Education, carryover credits from 1981-82 may be used to satisfy the 1983 requirement but may not be carried beyond 1983. Unused credits earned in 1983 may be used to satisfy the 1984 requirement if they are reported in 1983.

Attorneys should be prepared to report the dates, names, locations, and sponsors of activities attended in 1983 as well as credits earned. Individuals who are exempt from the CLE requirement are expected to claim their exemptions by checking the appropriate box on the form and returning it to the address printed at the top left corner of the form. Individuals other than full-time judges,

CONTINUING LEGAL EDUCATION OPPORTUNITIES

September—December, 1983

LIST OF SPONSORING ORGANIZATIONS

Sponsor Code	Sponsor Name	Telephone Number
ABANI	American Bar Association National Institutes	(312) 567-4683
ABICLE	Alabama Bar Institute for Continuing Legal Education	(205) 348-6230
ADLA	Alabama Defense Lawyers Association	(205) 265-1246
ALI-ABA	American Law Institute-American Bar Association	(215) 243-1630
BBA	Birmingham Bar Association	(205) 251-8006
CC	Cambridge Courses U.S.A., Inc.	(415) 346-4457
CICLE	Cumberland Institute of Continuing Legal Education	(205) 870-2865
DRI	Defense Research Institute	(414) 272-5995
FP	Federal Publications, Inc.	(202) 337-7000
MBA	Mobile Bar Association	(205) 433-9790
MCLI	Mid-South Commercial Law Institute	(615) 748-4671
NCDA	National College of District Attorneys	(713) 749-1571
NHLA	National Health Lawyers Association	(202) 393-3050
NYU	New York University School of Continuing Education	(212) 790-1320
PLI	Practising Law Institute	(212) 765-5700
SFTI	Southern Federal Tax Institute	(404) 524-5252
TLS	Tulane Law School	(504) 865-5939
TTLA	Tuscaloosa Trial Lawyers Association	(205) 758-8332

SCHEDULE OF SEMINARS

The following list of approved CLE activities was compiled in July, 1983. It is not inclusive of all approved activities for September through December, 1983.

An attorney planning to attend an activity that is not listed should contact the sponsoring organization to determine whether it is approved for CLE credit in Alabama. If it has not been approved, the sponsor should submit an application for approval at least 30 days in advance of the program. Applications are available upon request from the MCLE Commission office: P. O. Box 671, Montgomery, AL 36101.

Dates	Names and Places
September 15, 1983	Tuscaloosa. ***Proving Diminished Earning Power*** (Part 1). TTLA. Credits: 1.0.
September 15-16, 1983	Las Vegas. ***Products Liability Litigation.*** DRI. Credits: 14.1. Cost: $310/members; $330/non-members.
September 16, 1983	Dothan. ***Current Developments.*** ABICLE. Cost: $65.
	Mobile. ***Employee Benefits.*** MBA. Credits: 3.5. Cost: $10.
September 21-22, 1983	Washington. ***Preferred Provider Organizations.*** NHLA. Credits: 9.0. Cost: $190/members; $210/non-members.

September 22, 1983	Huntsville. ***Current Developments.*** ABICLE. Cost: $65.
September 22-24, 1983	Philadelphia. ***Condo Planning, Development & Operation.*** ALI-ABA. Credits: 18.9. Cost: $360.
September 23, 1983	Birmingham. ***Current Developments.*** ABICLE. Cost: $65.
	Birmingham. ***Age, Race and Sex Discrimination.*** BBA Credits: 3.4. Cost: $10/members; $20/non-members.
September 25-29, 1983	New Orleans. ***Prosecution of Violent Crime.*** NCDA. Cost: $325.
September 26-27, 1983	San Francisco. ***Environmental Compliance in a Changing Legal Environment.*** PLI. Credits: 13.2. Cost: $350.
September 26-30, 1983	Atlanta. ***Southern Federal Tax Institute.*** SFTI. Credits: 36.2. Cost: $325.
September 29, 1983	Mobile. ***Current Developments.*** ABICLE. Cost: $65.
September 29-30, 1983	San Antonio. ***Advanced Evidence and Trial Techniques.*** ALI-ABA. Credits: 15.5. Cost: $335.
	Birmingham. ***Medical Malpractice.*** CICLE. Cost: $75.
September 30, 1983	Montgomery. ***Current Developments.*** ABICLE. Cost: $65.
September 30-October 1, 1983	San Francisco. ***Medical Malpractice.*** PLI. Credits: 13.2. Cost: $350.
October 2-4, 1983	Washington. ***Contracts.*** NHLA. Credits: 13.5
October 3-4, 1983	New Orleans. ***At Will Termination in the South.*** FP.
October 5, 1983	Birmingham. ***Estate Planning.*** CICLE. Cost: $75.
October 5-7, 1983	New Orleans. ***Tulane Tax Institute.*** TLS. Credits: 16.5 Cost: $275.
October 6-7, 1983	New Orleans. ***Medicine For Lawyers.*** DRI.
	San Francisco. ***Insurance, Excess and Reinsurance Coverage Disputes.*** PLI. Credits: 13.8. Cost: $360.
October 7, 1983	Birmingham. ***David Epstein on Bankruptcy.*** ABICLE. Cost: $65.
October 13-14, 1983	San Francisco. ***Letters of Credit and Bankers' Acceptances.*** PLI Credits: 13.2. Cost: $375.
	Washington. ***Cost Containment.*** NHLA. Credits: 7.8
October 14, 1983	Birmingham. ***Limited Partnerships.*** CICLE. Cost: $75.
	Birmingham. ***Alabama Defense Lawyers Association Seminar.*** ADLA. Credits: 4.0.
October 14-15, 1983	New York. ***Medical Malpractice.*** PLI. Credits: 13.2 Cost: $350.
October 17-19, 1983	Williamsburg. ***Practical Environment Law.*** FP.
	Atlantic City. ***Product Liability.*** FP.
October 20, 1983	Mobile. ***Real Estate.*** ABICLE. Cost: 65.
	Tuscaloosa. ***Proving Diminished Earning Power*** (Part 2). TTLA. Credits: 1.0.
October 21, 1983	Montgomery. ***Real Estate.*** ABICLE. Cost: $65.
	Birmingham. ***Proposed ABA Code of Professional Responsibility.*** BBA. Credits: 1.0. Cost: $10.
	Anniston. ***Workers' Compensation.*** CICLE. Cost: $75.
	Mobile. ***Federal Practice.*** MBA. Credits: 3.5. Cost: $10.
October 23-26, 1983	Washington. ***Public Civil Law Problems.*** NCDA. Cost: $255.

who believe they are eligible for a Rule 2.C.1. exemption because they are prohibited from the private practice of law, should not claim this exemption until they have submitted documentation of the prohibitions applicable to their employment and have been granted the exemption by the Commission.

New MCLE Commissioner

At its meeting on July 22, 1983, the Board of Bar Commissioners of the Alabama State Bar elected Commissioner John B. Scott, Jr., of the Fifteenth Judicial Circuit to serve on the MCLE Commission. He replaces Richard Gill, who ably completed the unexpired term of the late Albert Copeland of Montgomery.

Approved Sponsor Status

At its meeting on July 20, 1983, the MCLE Commission approved applications by the Montgomery Trial Lawyers Association, the Tuscaloosa Trial Lawyers Association, and the National Association of Bond Lawyers for the status of approved sponsor. Continuing legal education activities conducted by these organizations are presumptively approved for 1983, provided the criteria for course approval are met. These criteria are specified in the regulations accompanying Rule 4 of the Rules for Mandatory Continuing Legal Education.

Recent Supreme Court Orders

By an order of June 14, 1983, the Supreme Court of Alabama amended Rule 2.C.1. of the Rules for Mandatory Continuing Legal Education. Members of the Alabama Senate and its secretary and members of the Alabama House of Representatives and its clerk, if they are lawyers, are now exempt from the CLE requirement. Additionally, the Court amended Rule 4.A. Two hours of CLE credit are available to attorneys who attend the annual business meeting of the Alabama State Bar. Because the 1983 annual meeting brochure had already gone to press when the order was received, notice of this credit could not be included in it. The credit is available to those who attended the July 22 business meeting.□

October 24-25, 1983	New York. ***Secured Creditors and Lessors Under the Bankruptcy Reform Act.*** PLI. Credits: 13.2. Cost: $350.
	San Francisco. ***Taxation of Investments.*** NYU. Credits: 15.8. Cost: $420.
October 27, 1983	Huntsville. ***Real Estate.*** ABICLE. Cost: $65.
October 27-28, 1983	Nashville. ***Representing the Closely-Held Business in a Growing Economy.*** MCLI. Credits: 13.2. Cost: $175.
October 28, 1983	Birmingham. ***Real Estate.*** ABICLE. Cost: $65.
	Birmingham. ***Retirement Plans for Lawyers.*** BBA. Credits: 3.4. Cost: $10/members; $20/non-members.
October 31-November 2, 1983	Washington. ***Anatomy and Physiology for Lawyers.*** FP.
November 2-4, 1983	Orlando. ***Medicine in the Courtroom.*** FP.
November 4, 1983	Birmingham. ***Collections.*** ABICLE. Cost: $65.
November 4-5, 1983	New Orleans. ***Employee Dishonesty: Claims, Bond Coverages and Caveats.*** ABANI. Credits: 13.4. Cost: $350/members; $375/non-members.
	Dallas. ***Successful Personal Injury Practice.*** CC. Credits: 10.8. Cost: $355.
November 9-10, 1983	New York. ***Institute on State and Local Taxation.*** NYU. Credits: 15.2. Cost: $400.
November 11, 1983	Birmingham. ***TEFRA Changes and Pension and Profit Sharing Plans.*** CICLE. Cost: $75.
	New York. ***Property Taxation.*** NYU. Credits: 7.8. Cost: $170.
November 13-19, 1983	New York. ***Institute on Federal Taxation.*** NYU. Credits: 54.4. Cost: $625.
November 14-16, 1983	Williamsburg. ***Practical Construction Law.*** FP.
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November 16-18, 1983	New Orleans. ***Construction Contract Litigation.*** FP.
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	Tuscaloosa. ***Summation and Argument: The Key to an Adequate Award*** (Part 1). TTLA. Credits: 1.0
November 17-18, 1983	Washington. ***Age and Sex Litigation.*** FP.
November 18, 1983	Birmingham. ***Appellate Practice.*** ABICLE. Cost: $65.
	Birmingham. ***Alabama Probate Code.*** BBA. Credits: 3.4. Cost: $10/members. $20/non-members.
	Birmingham. ***Real Estate.*** CICLE. Cost: $75.
November 28-30, 1983	Washington. ***Proving Construction Contract Damages.*** FP.
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December 2, 1983	Birmingham. ***Estate Planning.*** ABICLE. Cost: $65.
December 5-7, 1983	Vail. ***Product Liability.*** FP.
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December 9, 1983	Birmingham. ***Social Security Disability.*** CICLE. Cost: $75.
December 15, 1983	Tuscaloosa. ***Summation and Argument: The Key to an Adequate Award*** (Part 2). TTLA. Credits: 1.0.
December 16, 1983	Birmingham. ***Real Estate Law.*** BBA. Credits: 3.4. Cost: $10/members; $20/non-members.
	Mobile. ***Irving Younger Videotape Seminar.*** MBA. Credits: 3.5. Cost: $10.

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COMPUTER ASSISTED LEGAL RESEARCH: TWO METHODS

Paul E. Holcomb

Paul E. Holcomb received his B. S. degree from Indiana University and his J. D. degree from the University of Kentucky. He is currently Director of Development at the University of Alabama.

Electronic time-sharing retrieval systems for legal research are with us now and, like it or not, will be affecting your practice. Time-sharing in this instance means the data-base is owned by someone else. LEXIS and WESTLAW are the two most often mentioned computer assisted legal research systems and both are a part of all law students' vocabulary.

The need for newer and better legal research methods has been recognized for some time. It was because of the efforts of the Ohio Bar that the computerization of legal research methods has advanced to its present state. A group of individual attorneys in Ohio established a nonprofit venture to determine if an electronic retrieval system were possible. These attorneys discovered a company that developed a prototype. This company was eventually taken over by Meade Data Central, a division of the Meade Corporation, Dayton, Ohio, that began to test market the system they named LEXIS in the early seventies.

Meanwhile, a group of researchers were hard at work at Queens University in Kingston, Ontario, working on a computer-based research system. This system, called Quick Law, was ultimately purchased by the West Law Publishing Company of St. Paul, Minnesota, renamed WESTLAW and began competing head-to-head with LEXIS.

Since the creation of LEXIS and WESTLAW, both systems have gone through numerous modifications as a result of competition and the demands of the attorneys who use the systems. Each system is still experimenting and adding data bases, libraries, and files.

LEXIS and WESTLAW are the only two systems, specifically relating to law, that are commercially available to lawyers. There are other systems in Juris and Flite, but those are not available outside the Federal Government. There are, however, more than one thousand data bases available to users of computer assisted research systems. The problem is that these data bases are not standardized and the user must learn different logic and ways to ask the questions. Therefore, they are of less importance to the legal researcher than LEXIS and WESTLAW.

From the aspect of marketing, at least in the southeast, LEXIS and WESTLAW do a fair job. However, it would be a fair assumption that most practicing attorneys aren't aware of the contents of the data bases of either system.

How the Systems Operate

LEXIS is a full-text research system. For example, if the particular library being searched is said to contain all Supreme Court cases since 1938, that is precisely what it contains—every word of every case, unedited and unannotated. Instructions are given to the computer by the user in plain English. This means the user doesn't have to know one of the computer languages to use the system.

Firms that use LEXIS must lease or buy two things: (1) the hardware, which consists of a television screen, a typewriter console and high-speed printer; and (2) the software, the right to plug into a computer where the libraries are stored on disks. The Meade Corporation has just recently reached an agreement with IBM Corporation that will enable users of certain IBM hardware to gain access to Meade's data bases of periodicals and legal decisions.

Lawyers who choose WESTLAW can use any mini-computer that is programmed to act as a WESTLAW terminal. This same computer terminal can also be programmed to act as a word processor or to keep a set of books for the firm. The firm would then lease the right to gain access to WESTLAW's data base. It does, however, take as many as ten steps to reach the point where the user can begin researching a legal point from the WESTLAW data base.

When searching under LEXIS, the words or patterns of words are typed in,

the requested library or libraries are electronically scanned, and the computer reports back on the television screen how many cases satisfy the request. All or portions of these cases can be quickly reproduced on the screen or the printer. In short, it comes down to being able to electronically browse through millions of pages of printed matter almost instantaneously.

WESTLAW also is a full-text research system, but in addition contains the West headnotes, case summaries and key number topics which are contained in the West Law Publishing Company's "West Reporters." These added materials are probably WESTLAW's most valuable attribute because, from the very beginning, every law student begins his or her legal research using these items.

In using either LEXIS or WESTLAW, the user will find several similarities. Both systems require a terminal and a telephone line connected to the data base storage facility and a user with the insight of a researcher. Both systems have information stored in a central location. LEXIS has its information stored in Ohio and WESTLAW's data base is in Minnesota. Both contain the texts or summaries of cases of state, federal and federal agency and service decisions. In both systems, a user can search for a word, or phrase, or a number, or a combination of those to find a case in point.

Researchers on both systems must be trained to use the terminal to retrieve information by specific subdivisions. The whole data base cannot be searched at one time; therefore, researchers must pick and choose which part of the whole will be searched.

LEXIS, Meade Corporation's terminal, can only be used for the purpose of researching legal problems from the libraries and files in Ohio. It is, therefore, called a dedicated terminal because of this limitation. It is easier to learn how to use LEXIS because the keyboard has been designed for this one purpose. After turning the LEXIS terminal on, there is just one additional step to get into the system. This is the single biggest advantage of LEXIS over WESTLAW. However, if a law firm takes advantage of the new agreement Meade has with IBM, this advantage diminishes.

At the University of Alabama School of Law, students are taught how to use both LEXIS and WESTLAW. Students practice on LEXIS more than WESTLAW and, undoubtedly, this familiarity will carry over so that, when they begin practice, they may be inclined to use LEXIS.

Being mechanical, both systems are subject to breakdowns and both are moderately expensive to use and maintain. In addition, neither of the systems are intended to replace the present law library, but, instead, compliment it. Therefore, the lawyer or law firm isn't faced with an either/or decision but rather with the problem of whether they can afford both the library and the computer. It is this situation that has caused some law firms to share a computer or perhaps to lease a LEXIS and share a WESTLAW.

LEXIS was the first system to be marketed and Meade Data Central advertised that LEXIS frees the researcher "from the constraints of formal indexing and enables the attorney to search directly through the judicial language without the intervention of an indexer." To a large degree this is true. In any manual system, the indexer might have used synonyms or phrases different from ones the user anticipated. Electronic indexing assists in overcoming this problem by expanding the key words and phrases that may be used as the starting point in a research situation. This saves time for the researcher.

Also, in computer research it is easier to locate cases that contain arbitrary patterns of words, phrases and numbers. For example, in a computer search a user can search for the words "Internal Revenue Service" and then follow it with the appropriate code section number. To do this manually would be difficult and time consuming.

Both LEXIS and WESTLAW computer-based research systems assume that the user has a familiarity with the specific area of law being researched. The researcher would have read the background material on a given topic prior to beginning the search. Reading treatises, encyclopedias, and law review articles are a necessity because the computer cannot search for legal concepts. This restriction is the single biggest limitation of any computer-based research system.

For example, in a situation involving an automobile damage case, the attorney first identifies the problem as "Last Clear Chance" from applying the facts in the case and from a background reading of a treatise. The attorney goes to LEXIS or WESTLAW to search case law for a case in point. LEXIS and WESTLAW would not have been able to identify the problem for the attorney. The attorney must comprehend the legal concept involved and apply this concept by searching the correct subdivision in LEXIS and WESTLAW.

In searching, WESTLAW is perfectly literal while LEXIS is more flexible. LEXIS will search for a plural, but neither system will search for a synonym. WESTLAW has recently added a root expansion that will aid in certain searches. For instance, in searching for the word *woman,* the user can search for wom*n and WESTLAW will search for *woman* or *women*. In forming a text search, an attorney will examine the question from different angles; should he search for "freedom of speech," or "right to free speech," or "First Amendment Right"? To be certain, he should include them all.

Both systems permit the user to search for phrases as well as single words. On WESTLAW you must put quotation marks around your phrase while on LEXIS there isn't any such requirement. However, the user must know the exact words in the phrase for the search to be successful. In fact, it may be better not to search for the phrase but for the terms imbedded in the phrase.

In the two systems, the "connectors" are different. LEXIS uses the words "and" and "or" as connectors while WESTLAW uses the ampersand "&" for *and* and a blank space between search terms for *or*. If the user runs a search as follows:

cats or dogs (LEXIS)

cats dogs (WESTLAW),

the user will obtain (1) all the cases that only contain the word "dogs," (2) all the cases that contain only the word "cats" and (3) all the cases that contain both words.

Both systems have connectors that allow for searches of terms in proximity

of each other and word order. WESTLAW uses grammatically defined proximities and LEXIS' proximities use a word count. (The WESTLAW connectors are "/p" and "/s." LEXIS uses "W/#.") These connectors are used most frequently when the user is searching for the appearance of a citation to a case or code section.

The WESTLAW connector "+s," requires that two terms be in the same sentence with the first word (or number) coming first. The LEXIS equivalent is "pre/#," which requires that the two words be in the stated order within the given number of words.

For example, in a search for cases that cite 42 USC 1395, the search might look as follows:

42 Pre/2 1395 (LEXIS)
42 +s 1395 (WESTLAW)

In both systems, the researcher initially restricts the scope of the search by selecting a data base or file, as the case may be. Furthermore, it is possible to restrict the search geographically to a state and a district or circuit and to a particular judge. It is also possible to restrict a search to cases decided before a date, after a date, or between two dates.

WESTLAW allows the researcher to place a restriction on the search that is keyed to the West Publishing Company digest system. LEXIS cannot offer this feature. This is an advantage of the WESTLAW system. Simply explained, the digest system is a method whereby key words or topics are converted to numbers and letters. For example, 48a is the digest topic "automobiles."

An example of a search under WESTLAW using a restriction of the digest system could be as follows: Researcher searches for cases involving the defective gasoline tank on the Ford Pinto. The search looks like:

pinto/p fire accident explo*.

(The asterisk is a root expander.) Because there are western states with a Pinto County, the search will give every appellate case from Pinto County that has involved a fire, an accident, or an explosion. The researcher now restricts the search by using a digest system number. The search is changed and it now looks like:

topic (48a) & pinto/p fire accident explo*.

(48a being the number for the digest topic "automobiles"). This will produce the desired results and can only be done on WESTLAW.

David Lowe, Assistant Law Librarian for Computer Services at the University of Alabama School of Law, recently ran the above search example. In searching for just Pinto/p fire accident explo* in the South Western data base, eighteen cases were cited. In restricting the search using 48a, one case was cited. Changing the data base to Pacific, ten cases were cited in the first example while only three were cited using the restriction of 48a. This demonstrates the value of WESTLAW.

Both WESTLAW and LEXIS deliver the results of a search in similar fashion. The user can look at a full-text, look at locations in the text where the search terms were used, look at a list of citations, or obtain printouts of any of the above.

At the present time, West Publishing Company is publishing material twice. One is in printed book form, "The West Reporters," and the second time is in WESTLAW. The WESTLAW copy is, therefore, an inexpensive by-product of computer-based typesetting. Presently, LEXIS does not have this advantage. If LEXIS joins with a publishing firm that is printing decided cases, WESTLAW's advantage would not be as great.

The Cost to the User

In figuring costs for the systems, it appears that WESTLAW and LEXIS are about equal. There are two types of contracts available from both systems: (1) a flat-rate academic contract and (2) a commercial contract which charges by the minute.

The Tuscaloosa County Bar Association has a WESTLAW system, housed in the University of Alabama School of Law, with a commercial contract. The costs are approximately two dollars per minute and the median search takes about fifteen minutes.

The University of Alabama leases a LEXIS system as a teaching tool, with a flat-rate academic contract.

The Alabama Supreme Court Library in Montgomery has the WESTLAW system as does the Montgomery County Bar Assssociation. The latter bills at two dollars per minute. The average search at that library is ten to fifteen minutes. Both systems are competitive, however, LEXIS has an unduly complex billing system.

Conclusion

In conclusion, both systems have advantages that appeal to the researcher and both have shortcomings.

LEXIS' terminal is easier to learn to operate and has been on the market since 1973. However, the Meade Corporation's terminal and console are dedicated and can only be used to search LEXIS' libraries and files. LEXIS is more flexible in its search than WESTLAW and doesn't require as much legal background to operate.

WESTLAW is keyed into the West Publishing Company's reporter system and this single fact makes, in my opinion, WESTLAW the more valuable when compared with LEXIS. WESTLAW requires more training to operate but a researcher, because of the key digest capability, is also able to produce more from a WESTLAW than a LEXIS. Also, WESTLAW is coming out with a new custom terminal that will neutralize LEXIS' dedicated terminal.

The systems do not do research, they assist in the research process. If the person using the computer is a skilled legal researcher the system's ability to track down cases is extremely effective. If the person is not skilled, that fact is quickly noticeable.

While the systems are excellent at finding cases, they are an expensive and ineffectual way to read cases. They provide a quicker and more accurate access to the law library, but the ultimate research tool is the library itself.

In my opinion, it appears that soon such systems will be routine parts of any law office library, large or small. The financial exposure is minimal. The potential rewards, in terms of the improved quantity and quality of legal research that any firm can perform, are great.□

Meet Our Newly Elected Bar Commissioners

(1983-86 Term)

Adams

PHILLIP E. ADAMS, JR., commissioner for the 37th Judicial Circuit, was born in Farmville, Virginia on December 25, 1943. Commissioner Adams is a 1965 graduate of Auburn University and received his J.D. from the University of Alabama School of Law in 1968. He was admitted to the Alabama State Bar in 1968 and is also a member of the Lee County and American Bar Associations. As well as serving as a bar commissioner, Adams is presently a member of the Board of Editors of *The Alabama Lawyer*. He is a partner in the Opelika law firm of Walker, Hill, Adams, Umbach, Herndon & Dean. Commissioner Adams is married to the former Chris Akin of Tuskegee, and they have two sons, Josh and Kirk.

Gray

FRED D. GRAY, commissioner for the 5th Judicial Circuit, was born in Montgomery, Alabama on December 14, 1930. Commissioner Gray is a graduate of Alabama State University and of Western Reserve University Law School in Cleveland, Ohio. He was admitted to the Alabama State Bar in 1954 and is also a member of the Ohio, American, and National Bar Associations. He presently is president of the Macon County Bar. Commissioner Gray is the senior member of the Gray, Seay and Langford law firm with offices in both Montgomery and Tuskegee. He is married to the former Bernice Hill of Montgomery, and they have four children—Deborah, Vanessa, Stanley, and Fred, Jr.

Scott

JOHN B. SCOTT, JR., commissioner for the 15th Judicial Circuit, was born in Montgomery, Alabama on July 21, 1930. Commissioner Scott attended college at Duke University and the University of Alabama. He received his LL.B. from the University of Alabama School of Law in 1954 and was admitted to the Alabama State Bar that same year. After serving as a law clerk for a year, he entered private practice with his father who was secretary of the Alabama State Bar from 1950 to 1969. Commissioner Scott joined the Montgomery law firm of Capell, Howard, Knabe & Cobbs in 1964 and has continued in general practice with that firm to present. He is married to the former Bettie Hill of Montgomery, and they have three daughters—Ellie, Laura, and Amelie.

Brassell

BOWEN H. BRASSELL, commissioner for the 26th Judicial Circuit, was born in Montgomery, Alabama on April 29, 1922. Commissioner Brassell received his undergraduate degree from Auburn University in 1949 and his LL.B. from the University of Alabama School of Law in 1952. Upon his admission to the Alabama State Bar in 1952, he began his private practice of law in Phenix City where he is in his thirty-first year of continuous and active practice. He is a member of the Russell County Bar Association. Commissioner Brassell and his wife, the former Dorothy Williams of Phenix City, have one son, Bowen, Jr.

Wilson

ROBERT T. WILSON, Sr., commissioner for the 14th Judicial Circuit, was born on April 23, 1922, in Dora, Alabama. He is a graduate of the University of Alabama, received his LL.B. from the University of Alabama School of Law, and was admitted to the state bar in 1950. Commissioner Wilson is also a member of the American Bar Association and the Walker County Bar Association where he has served as president. He was a senator in the Alabama Legislature from 1962 to 1978 and is a partner in the Jasper law firm of Wilson & King. Commissioner Wilson is married to the former Ruth McDaniel of Dover, New Hampshire, and they have four children—Sue, Sally, Alice, and Robert Terry, Jr.

Commissioners reelected to the board to serve an additional three-year term include: EDWARD P. TURNER, JR., of Chatom, representing the 1st Circuit; J. GORMAN HOUSTON, JR., of Eufaula, representing the 3rd Circuit; WALTER P. CROWNOVER, of Tuscaloosa, representing the 6th Circuit; H. WAYNE LOVE, of Anniston, representing the 7th Circuit; NELSON VINSON, of Vernon, representing the 25th Circuit; J. DON FOSTER, of Foley, representing the 28th Circuit; and JOHN DAVID KNIGHT, of Cullman, representing the 32nd Circuit.

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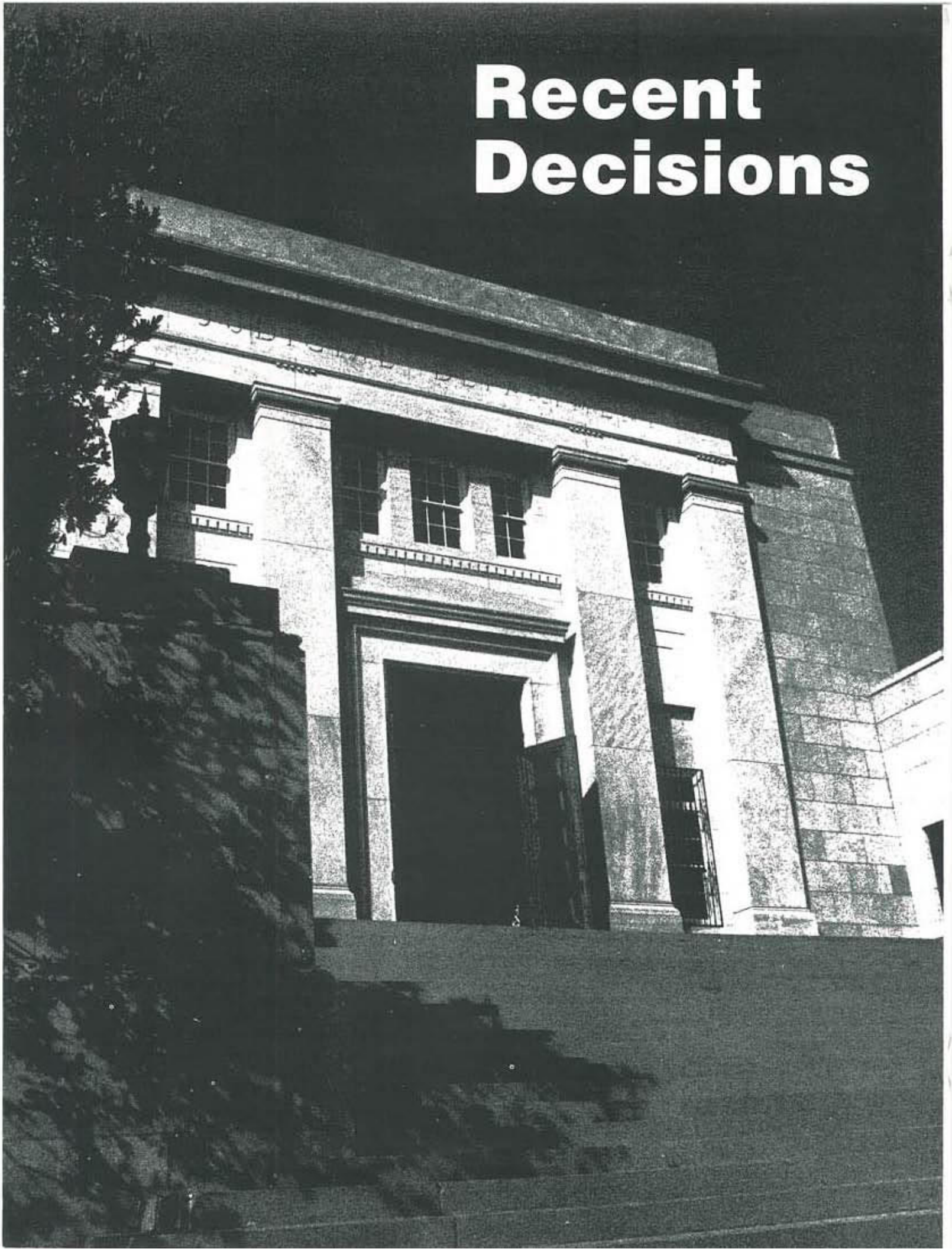
Recent
Decisions

John M. Milling, Jr., a member of the Montgomery law firm of Hill, Hill, Carter, Franco, Cole & Black, received his B.S. degree from Spring Hill College and J.D. from the University of Alabama.

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Mr. Byrne and Mr. Milling are co-authors of this section of ***The Alabama Lawyer*** *concerning significant decisions in the courts. Mr. Byrne will cover the criminal area and Mr. Milling the civil.*

Recent Decisions of the Supreme Court of Alabama—Civil

Asbestosis case . . . statute of limitations affecting damages

Cazalas vs. Johns-Manville Sales Corp., 17 ABR 2870 (July 8, 1983). In this case, the Supreme Court held that Act No. 80-566 (effective 5/19/79) permits the plaintiff to recover *all* damages to which he is entitled, including damages which may have occurred more than one year prior to filing the complaint, provided the plaintiff filed suit within one year of the date he "through reasonable diligence should have reason to discover the injury giving rise to such civil action." The Supreme Court stated that its holding did not violate Section 95, Alabama Constitution 1901, because Section 95 merely prohibited the legislature from reviving a cause of action. Section 95 does not require that the damages be apportioned to conform with the prescriptive period for filing suit. The Supreme Court also held that an asbestos manufacturer's breach of a duty to warn, without more, while actionable, does not rise to the level of fraudulent concealment and, hence, does not toll the running of the statute of limitations.

Divorce . . . ex-spouse's pension plan benefits not affected

Ex parte: R. W. Pitts (R. W. Pitts as Administrator of the Estate of Carol Pitts Palmer), 17 ABR 2734 (July 1, 1983). In a case of first impression, the Supreme Court affirmed the court of appeals which had held that a divorce decree did not affect the ex-spouse/beneficiary's right to receive accumulated death benefits under a retirement pension plan. The Supreme Court also reaffirmed *Flowers vs. Flowers*, 224 So.2d 590 (Ala. 1969), which had held that divorce does not affect an ex-spouse/beneficiary's right to receive group life insurance benefits in the absence of a clause in the policy. The Supreme Court, however, noted that the separation agreement executed at the time of the divorce made no specific mention of the pension plan.

Foreclosure—"due-on sale" clause . . . *Tierce vs. APS Co.* explained

Powell vs. Phenix Federal Savings and Loan Assoc., 17 ABR 2564 (June 17, 1983). In this case, the Supreme Court seized the opportunity to amplify *Tierce vs. APS Co.*, 382 So.2d 485 (Ala. 1980), holding that a trial court exercising its equity powers could in proper cases refuse to enforce a "due-on sale" clause when the particular circumstances of the case render acceleration and foreclosure inequitable or unconscionable. Thus, even though the due-on sale clause is not *per se* invalid, and even though the trial court finds that the clause serves a "valid business purpose," for example, to obtain a higher interest rate, the trial court may yet refuse to enforce that clause on equitable principals.

Insurance . . . *Utica Mutual* re-examined

Wixom Brothers Co. vs. Truck Insurance Exchange, 17 ABR 2403 (June 3, 1983). The Supreme Court reconsidered its holdings in *Utica Mutual Insurance Co. vs. Tuscaloosa Motor Co., Inc.*, 329 So.2d 82 (Ala. 1976), and in this case held that the public policy of Alabama would *not* permit the court to enforce an insurance clause which excluded liability when the incident giving rise to the bodily injury occurred after the policy's period of coverage. The insuring clause limited the legal obligation to pay damages to events

which produced bodily injury *during the policy period.*

In *Utica, supra,* the Supreme Court disapproved of the policy limitation but nevertheless enforced it. In this case, however, the Supreme Court stated that Alabama public policy favors contracts of insurance which make the insurer's coverage concurrent with the time of the insured's culpable conduct. The private right to contract must yield to public interest.

Torts, invasion of the right of privacy . . . Section 652B *Restatement* adopted

Phillips vs. Smalley Maintenance Services, Inc., 17 ABR 2343 (June 3, 1983). In a certified question, the Supreme Court specifically adopted the language of *Restatement (Second) of Torts,* Section 652B (1977) as the law of Alabama concerning the tort of "invasion of privacy." Concerning Section 652B the Supreme Court held that: (1) a defendant need not actually *acquire* information about the plaintiff's private activities through intrusion before the cause of action is established; (2) the "publication" or "communication" of the plaintiff's private information to a third party is not a necessary element of Section 652B liability; (3) "clandestine" or "surreptitious" actions by the defendant are not necessary elements of Section 652B liability; (4) it is not necessary that the defendant intrude upon a physical place, analogous to a trespass, before liability may be predicated; (5) the intentional tort allows assessment of damages for mental and emotional suffering, shame, or humiliation and any other special damages which proximately result from the wrongful intrusion.

Torts . . . Section 6-5-218, statute of repose unconstitutional

Jackson vs. Mannesman DeMag Corp., 17 ABR 2876 (July 8, 1983). In this case, the Supreme Court for the third time held that the statute of repose regarding improvements to real estate, Section 6-5-218, *Ala. Code,* 1975, was constitutionally infirm. Section 6-5-218 abolishes causes of action for injuries caused by improvements to real property over seven years old. The statute was designed to protect architects and contractors.

This time the Supreme Court held that the statute violates Section 13, Alabama Constitution, 1901, because it not only limits the period of time during which an action could be brought but also prevents a cause of action from accruing after seven years. The Supreme Court declined to distinguish this statute of repose as to improvements to real estate from the statute of repose as to manufactured products invalidated in *Lankford vs. Sullivan, Long and Hagerty,* 416 So.2d 996 (Ala. 1982).

Recent Decisions of the Supreme Court of Alabama—Criminal

Medicaid fraud prosecution . . . venue where the physician lives

The Supreme Court of Alabama, in an opinion with far-reaching effects, ruled that a violation, if any, of Section 22-1-11 (Medicaid fraud) occurs when the Medicaid application for payment is completed in the physician's office in the county which he resides.

In reaching its conclusion the Supreme Court reasoned:

> [W]e perceive nothing in the language of the statute evidencing that the offense therein proscribed required receipt by, or reliance upon the part of, the Medicaid Agency of the allegedly false claim in order that the offense be completed or consummated . . .
>
> *[T]he crime is complete, once one, with intent to defraud, makes or causes to be made or assists in the preparation of any false statement, representation or omission of a material fact in any claim or application for any payment.*

Finally, the court concluded that the defendant had the right to be tried in Mobile County if the venue laws are to be fairly and justly applied and not applied so as to require him to bring all his witnesses and records a distance of almost two hundred miles from where he resides and where the alleged offense was consummated.

"Other acts of misconduct" must be relevant to the indicted offense

Ex parte Lee Killough, 17 ABR 2908 (July 8, 1983). The defendant was charged with a theft of a portable building which belonged to the State of Alabama in violation of Section 13A-8-3 *Ala. Code* 1975. During the course of the trial, the state sought to prove other acts of misconduct by the defendant through testimony from two witnesses. Their testimony linked the defendant to a number of alleged criminal conspiracies not charged in the indictment, including acts of bribery, bid-rigging and kickbacks.

The dispositive issue was whether the trial court erred in admitting uncharged acts of misconduct in light of the defendant's contention that evidence of bid-rigging, bribes and kickbacks bear little or no relationship to the crime charged. The state asserted that the extrinsic evidence of the defendant's involvement with bribery, kickbacks and bid-rigging was admissible under either the intent or common plan or scheme exception to the so-called "exclusionary" rule. See *McElroy* at Section 69.01(5). The state contended the theft of the building was one facet of a larger scheme between the defendant and his confederate to unlawfully enrich themselves.

The Alabama Supreme Court rejected the state's argument, thereby limiting how far afield a district attorney can go with extrinsic act evidence.

Justice Embry stated in pertinent part:

> The fatal flaw in the [state's] reasoning is that such an extensive conspiracy was neither charged in the indictment, nor is the evidence of such other offenses relevant to this offense for which he was indicted. Evidence offered under the exceptions to the exclusionary rule must be relevant to a crime *charged*, rather than to an uncharged conspiracy. In other words, evidence of other crimes must be both *relevant* and *material*. (Emphasis ours).

Finally, the court noted that "bid-rigging, bribery and kickbacks are so unconnected by circumstances with the crime of theft of a portable building that proof of these acts has no bearing on the ultimate issue of guilt and is therefore inadmissible."

Physician's prescription . . . not a violation of the controlled substances act

Ex parte H. Ray Evers, 17 ABR 2529, (June 10, 1983). H. Ray Evers, a licensed practicing physician, was indicted, tried and convicted in the circuit court of Houston County for violating Section 20-2-70(a) *Ala. Code,* 1975, which prohibits the possession, sale or transfer of controlled substances. The evidence at trial revealed that Evers had written a prescription for amphetamines for an unlicensed pharmacist who turned out to be an undercover agent. The prescription for amphetamines was in fact filled by a pharmacy. The reason given for furnishing the amphetamines to the undercover agent was in response to his request to have something to keep him awake on a long automobile trip.

In reversing the conviction the Supreme Court of Alabama declared that under the facts of this case Section 20-2-70(a) *Ala. Code,* is not applicable to the act of a licensed physician writing a prescription which is in turned filled by a pharmacy.

Recent Decisions of the Supreme Court of the United States—Criminal

The erosion of *Aguilar* and *Spinelli*

Illinois v. Gates, 81-430 (June 8, 1983). In a plurality opinion, the Supreme Court abandoned the rigid "two-pronged test" under *Aguilar* and *Spinelli* for determining whether an informant's tip establishes probable cause for the issuance of a search warrant. In its place, the Supreme Court announced its "totality of the circumstances approach."

On May 3, 1978, the Bloomingdale, Illinois Police Department received an anonymous letter which described Lance and Sue Gates as dope dealers. Specifically, the letter stated that the wife would drive their car to Florida on May 3 to be loaded with the drugs and that the husband would fly down in a few days to drive the car back, that the car's trunk would be loaded with the drugs, and that the Gates presently had over $100,000 worth of drugs in their basement. Acting on this tip, police officers verified that the husband had made a reservation on a May 5 flight to Florida. DEA agents conducted surveillance and verified that the husband took the flight and stayed overnight in a motel room registered in the wife's name. The following morning, Gates left with a woman in a car bearing an Illinois license plate. A search warrant for the Gates' residence and automobile was obtained from an Illinois state court judge based upon the Bloomingdale police officer's affidavit setting forth the foregoing facts and a copy of the anonymous letter. When the Gates arrived at their home, the police were waiting and discovered 350 pounds of marijuana in their car trunk in addition to other contraband inside the house.

Prior to the defendants' trial on charges of violating state drug laws, the trial court suppressed all of the items seized. The Illinois appellate court affirmed. The Illinois Supreme Court also affirmed, holding that the letter and affidavit were inadequate to sustain a determination of probable cause for issuance of the search warrant under the doctrine of *Aguilar* and *Spinelli*. The Illinois Supreme Court specifically held that the information provided to the magistrate failed to satisfy the "two-pronged test" of (1) revealing the informant's *basis of knowledge* and (2) providing sufficient facts to establish the informant's veracity or reliability.

Justice Rehnquist writing for the majority held that the rigid "two-pronged test" under *Aguilar* and *Spinelli* for determining whether an informant's tip establishes probable cause for issuance of a warrant is abandoned, and that the "totality of the circumstances" approach is substituted in its place. The majority reasoned that the elements under the "two-pronged test" concerning the informant's "veracity," "reliability" and "basis of knowledge" should be understood simply as closely intertwined issues that may usefully illuminate the common sense practical question of whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

In defining the task which confronts the magistrate in passing on affidavits under the warrant requirement of the Constitution, the court held:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether given all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of a reviewing court is simply to insure that the magistrate had a substantial basis for concluding that probable cause existed. This flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

The Supreme Court, in reversing, held that the judge issuing the warrant had a substantial basis for concluding that probable cause to search the respondent and car existed, and that under the "totality of circumstances" analysis, corroboration by the police of the details of the informant's tip is of significant value.

Revocation of probation . . . failure to pay a fine

Bearden v. Georgia, 81-6633 (May 24, 1983). In this case the Supreme Court held that if a state determines a fine or restitution to be the appropriate and adequate penalty for a crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.

The defendant pled guilty in a Georgia trial court to burglary and theft, but the court, pursuant to the Georgia First Offender's Act, did not enter a judgment of guilt and sentenced the defendant to probation on the condition that he pay a $500 fine and $250 in restitution. The court ordered the fine and restitution to be paid $100 on the day sentence was imposed, $100 the following day and the balance within four months. The defendant borrowed the money and paid the first $200, but a month later was laid off from his employment and despite repeated efforts was unable to find other work. Thereafter, the State filed a petition to revoke the defendant's probation because he had not complied with the conditions thereof. After a hearing the court revoked probation, entered a conviction and sentenced the defendant to prison.

Justice O'Conner focused the issue as follows:

> The question in this case is whether the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine and restitution. Its resolution involves a delicate balance between the acceptability, and indeed wisdom, of considering all relevant factors when determining an appropriate sentence for an individual and the impermissibility of imprisoning a defendant solely because of his lack of financial resources.

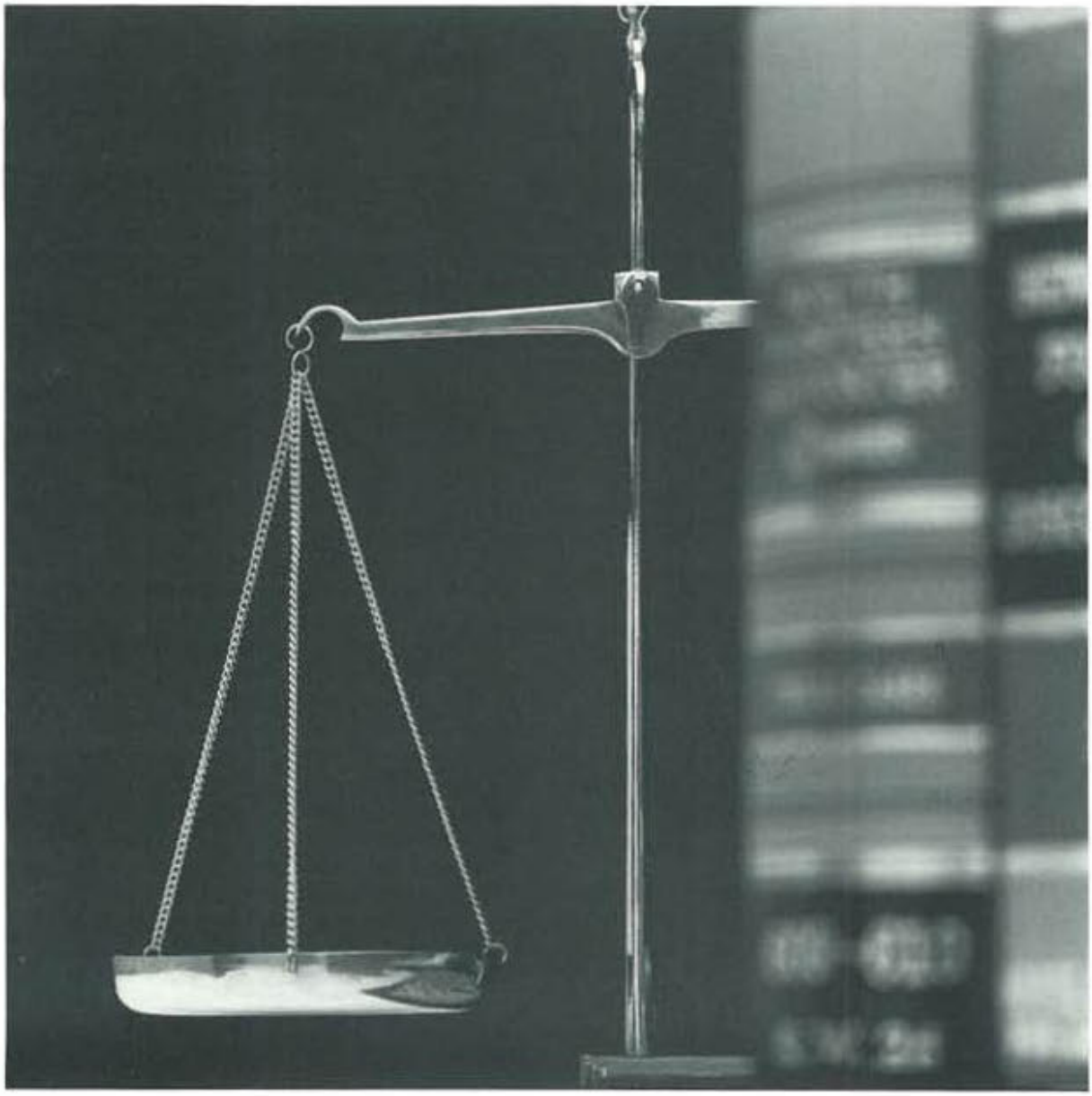
Justice O'Conner concluded that the trial court erred in automatically revoking probation simply because the petitioner could not pay his fine and restitution, without determining that the petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist.

Sixth amendment . . . right to counsel

Morris v. Sloppy, _____U.S. _____, 81-1095 (July, 1983). The defendant was charged with various offenses against a young female who had been robbed and sexually assaulted in her apartment building. Some of the stolen jewelry was found in the defendant's possession a few blocks from the scene. His appointed counsel was unable to go to trial because of his hospitalization, and another lawyer was then appointed to handle the case a few days prior to trial. The newly appointed counsel prepared his defense and indicated he was ready to proceed when his client objected on the grounds that his new lawyer could not have had enough time to prepare the case and that a continuance should be granted so that his prior counsel could handle the case. After his conviction, the defendant sought habeas relief based upon his Sixth Amendment right to counsel. The court of appeals granted a new trial on the ground that there should be a "meaningful attorney-client relationship."

In reversing, Chief Justice Burger authored a strongly worded opinion which sets forth distinct limits to the Sixth Amendment right to counsel.

> The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a meaningful attorney-client relationship," 649 F.2d, at 720 (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.□



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Nuts & Bolts

With this issue, ***The Alabama Lawyer*** *inaugurates a new feature entitled "Nuts and Bolts." To be published under this byline on a regular basis will be articles which set forth basic tenets and principles which are applicable in various areas of the legal practice. The articles are intended to provide the new practitioner with an introduction to various legal subject areas which are frequently encountered in the practice of law. Similarly, the articles should serve as a refresher for the established practitioner.*

ALABAMA WORKMEN'S COMPENSATION LAW— A PRIMER

Nicholas T. Braswell III

Nicholas T. Braswell III is a member of the Montgomery law firm of Rushton, Stakely, Johnston & Garrett. He received his undergraduate degree from the University of Alabama and LL.B. from the University of Alabama School of Law in 1965.

An Alabama practitioner can scarcely avoid handling workmen's compensation claims. Not only have the benefits been greatly enhanced—a death claim can exceed $90,000—but also, nearly every workmen's compensation case involves a potentially important co-employee or third-party action. This "primer" is designed to help the practitioner deal with the confusion of the Alabama Workmen's Compensation Act ("the Act") found in § 25-5-1, et seq. *Ala. Code* 1975.

Since the Act has been amended on a regular basis, it is necessary in each case to utilize the statutory provisions which were in effect on the date of the injury. *Loggins v. Mallory Capacitor Co.*, 344 So. 2d 522 (Ala. Civ. App. 1977). The date of injury is essential in determining the applicable maximum and minimum weekly benefits.

Workmen's compensation benefits are payable where the employee is injured or killed as the result of an accident that arises out of and occurs in the course of his employment without regard to any question of negligence. Certain willful misconduct, such as intentional injury, intoxication, willful refusal to use a safety device, or willful violation of a law or safety rule, can bar recovery. Section 25-5-51, *Ala. Code* 1975. The burden of proof is on the claimant, *Ex parte Little Cahaba Coal Co.*, 213, Ala. 244, 104 So. 422 (1925), except that if the employer pleads willful misconduct, etc., he must prove his plea. Section 25-5-51.

An accident is defined in the Code as, "an unexpected or unforeseen event, happening suddenly and violently, with or without human fault . . ." Section 25-5-1 (8). The courts have construed this definition to include the inhalation of paint fumes for several days, *Kane v. South Central Bell Telephone Co., Inc.*, 368 So.2d 3 (Ala. 1979), and willful assault by another employee, *Tiger Motor Co. v. Winslett*, 278 Ala. 108, 176 So. 2d 39 (1965). In essence, the test seems to be whether the job caused the injury or death. *Kane v. South Central Bell Telephone Co., Inc.*, supra.

The requirement that the injury or death must arise out of the employment involves causation of the accident. The requirement that it must occur "in the course of" the employment refers to time, place, and circumstances. *Wiregrass Comp. Mental Health Clinic v. Price*, 366 So.2d 725 (Ala. Civ. App. 1978); cert. den., 366 So.2d 728 (Ala. 1979).

The basis for all computations is the average weekly wage as defined in § 25-5-56(b). In addition to wages paid, the Act includes as earnings, "whatsoever allowances of any character made to an employee in lieu of wages are specified as part of the wage contract shall be deemed a part of his earnings." Thus, tips received by waitresses, being part of their wage contract, are included in their average weekly earnings. *S. M. Incorporated v. Wise*, 373 So.2d 868 (Ala. Civ. App. 1979).

In determining an employee's average weekly wage, the Alabama Court of Civil Appeals in *Farmers Gin Co. V. Rose*, 374 So.2d 351 (Ala. Civ. App. 1979), stated the test as follows:

> "(w)hat was the value of the employee's services to his employer calculated as a weekly average for the preceding fifty-two weeks which the employer paid or contracted to pay in money or allowances in lieu thereof."

Thus, the average weekly wage might include tips, bonuses, travel allowances, room and board, and other fringe benefits or "perks." See Volume 2, Larson's, The Law of Workmen's Compensation, § 60.12.

The basic and most usual computation is a 52 week average of the weekly wage. If the employee has been employed for 52 weeks or more, this method is mandatory and exclusive. *Odell*

v. Myers, 52 Ala. App. 558, 295 So.2d 413 (Ala. Civ. App. 1974).

Where the employee has been employed for less than 52 weeks, the average weekly wage is the average of his weekly earnings divided by the number of weeks he worked, provided, "results just and fair to both parties will thereby be obtained." Section 25-5-57(b). This second method might be used in the instance in which an employee worked for 45 weeks in the same employment.

In the situation where the employment has been so short or casual that a fair and just average cannot be computed by using the injured employee's figures, the Act provides yet a third method for determining the average weekly wage. In such instance the 52 weeks average of a worker in the same grade, employed in the same job by the same employer, can be used. See *Patterson v. Whitten,* 57 Ala. App. 297, 328 So.2d 301 (Ala. Civ. App. 1975) for an application of the third or "comparative wage method." In the event the employer has no such other employee, the wages of a similar worker, in the same district, doing the same type work, can be considered.

Temporary Total Disability Benefits

In the usual case, temporary total disability payments consisting of 66 2/3 of the employee's average weekly wage are paid to the injured worker while he is healing, subject to a limitation of 300 weeks. Section 25-5-57(a) (1). The Alabama Court of Civil Appeals in *Defense Ordinance Corp. v. England,* 52 Ala. App. 565, 295 So.2d 419 (Ala. Civ. App. 1974) per Judge Holmes, has provided a most practical definition of temporary total disability:

> "Temporary total disability refers to the period of time the employee is recuperating. This is distinguished from permanent partial which is based on the medical condition *after* maximum improvement has been reached."

The period of temporary total disability cannot exceed 300 weeks; however, it can exist at different periods, but it is not synonymous with unemployment. See *Defense Ordinance Corp. v. England,* supra, and *Miller v. Childers,* 421 So.2d 118 (Ala. Civ. App. 1982). The trial judge can, from all the evidence, make an estimate as to the duration of temporary total disability, even past the trial date.

All weekly benefits, including temporary total benefits, are subject to a maximum and minimum limitation as prescribed in § 25-5-68. The current maximum weekly benefit is $184 and the minimum is $69. As to temporary total benefits, however, if the employee's average weekly wage were less than the minimum, then he should receive his entire average weekly wage.

Each June, the Alabama Department of Industrial Relations determines the statewide average weekly wage which is the basis for the maximum (66 2/3 of same) and the minimum (25% of same). These figures are published by the department and remain in effect for the 12 months following July 1 of each year. The maximum and minimum in effect on the date of the injury continues for the entire claim. Information as to the maximum and minimum amounts is available from the Department of Industrial Relations, Workmen's Compensation Division, State Capitol, Montgomery, Alabama 36130, telephone 832-5040.

Permanent Partial Disability Benefits

The majority of all workmen's compensation claims involve permanent partial disability which, in turn, brings into play one of two statutory divisions. Each division has a separate and different computation.

First, for lack of a better designation, these injuries to specific members are described as "scheduled injuries." Section 25-5-57 (a) (3). This injury can be a total loss or a proportional loss of the scheduled member. The Act lists each member of the body and combination and ascribes to each the equivalent value in number of weeks. Lack of ability to earn is not the test for loss of a scheduled member and what the employee makes thereafter is of no concern. *Conagra v. White,* 348 So.2d 502 (Ala. Civ. App. 1977). Thus, for the loss of a thumb, a worker receives his temporary total disability benefits and then, in addition, he receives 66 2/3 of his average weekly wage each week for 62 weeks, which is the equivalent value in number of weeks for a thumb as prescribed by the Act. Another example is loss of an eye and leg for which the worker receives 350 weeks.

There is often a dispute as to whether an injury is "scheduled" or "unscheduled." In receiving this dispute the test is:

> "when there are resulting injuries that extend to other parts of the body and interfere with their efficiency. Then the schedule is and should not be exclusive."

Leach Manufacturing Co. v. Puckett, 284 Ala. 209, 224 So.2d 242 (1969). Compare, however, *Republic Steel Corp. v. Kimbrell,* 370 So.2d 294 (Ala. Civ. App. 1979) and *Loggins v. Mallory Capacitor Co.,* supra.

The second division, and possibly the most litigated, is the "unscheduled injuries" which are often described as injuries to the "body as a whole." These injuries are dealt with in § 25-5-57 (a) (3) (g), which provides a catch-all mainly to cover back, hip, and head injuries. Under this section the measure of damages is the loss of ability to earn wages. See *Ashley v. Blue Bell, Inc.,* 401 So.2d 112 (Ala. Civ. App. 1981).

The weekly benefit for this type injury is computed as 66 2/3 of the average weekly wages X percentage of loss of ability to earn wages. These weekly benefits are then paid for 300 weeks.

Another distinction is that the number of weeks paid to the worker as temporary total disability benefits for an injury to the body as a whole are deducted from the 300 weeks. For a scheduled member, temporary total disability benefits are not deducted.

Commonly, parties will settle claims based on a medical rating, and this is obviously a good guide, but it should be emphasized that the measure is not physical disability but loss of the ability to earn wages. In making this determination, the court will look to other factors as well. See *Miller v. Childers,* supra, where the court enumerated other considerations, such

as age, education, vocational training, and experience. Expert testimony from the vocational and rehabilitative fields is commonly utilized in these cases.

The weekly benefits, whether for permanent partial, scheduled or unscheduled, total permanent, or death, can be paid on a lump sum basis which is the present value of the defined number of weeks computed at six percent. The parties must agree and the circuit judge must find that payment in this form is in the best interests of the employee. Section 25-5-83. Tables of present value, computed at six percent per annum, are published by the Department of Industrial Relations, Workmen's Compensation Division.

The table of present values is used to obtain the factor for the number of weeks to be paid in a lump sum which is multiplied by the weekly benefits. Weeks which have accrued, however, cannot be commuted. Normally, the only parties whose agreement is required to obtain a lump sum settlement are the employer and employee. An insurer does not have to approve such lump sum settlement. See *County Coal Co. of Alabama v. Bush,* 251 Ala. 25, 109 So. 151 (1926).

Examples of computation of compensation for the loss of a scheduled member and computation of an unscheduled or body as a whole injury are as follows:

Example I—Computation of loss of scheduled member:

FACTS: Claimant on December 1, 1981, suffered a traumatic amputation of his left arm, five inches below his elbow, in an accident arising out of and occurring in the course of his employment. His average weekly wage was $200 and he had a wife and two minor children. He has been paid temporary total disability benefits for 18 weeks, along with all necessary medical, hospital, etc. He is agreeable to accepting a lump sum settlement and his employer is agreeable to this disposition. Settlement date is April 26, 1982.

Computation of compensation:

$200.00 average weekly wage X 66 2/3 = $133.34

Therefore, claimant is entitled to receive as a weekly benefit $133.34 for 170 weeks per schedule for loss of hand.

Temporary total already paid, 18 weeks X $133.34 =		$2,400.12
(no credit allowed for this)		
3 weeks accrued, 4-5-82 to 4-26-82, $133.34 X 3 =		400.02
If compensation paid weekly, 167 weeks X $133.34 =		$22,267.78
Commuted: Factor from Table of Present Values, 152.6374 X $133.34		$20,352.67
Plus 3 weeks already accrued (3 X $133.34)		400.02
Lump Sum Settlement		$20,752.69
Total settlement		$20,752.69
Temporary total disability already paid		2,400.12
Total compensation paid (plus all medical, hospital, artificial members required)		$23,152.81

Example II—Computation of permanent partial injury to body as a whole (nonscheduled injury, e.g., back injury)

FACTS: Claimant suffered a herniated intervertebral disc at L5 in an accident occurring on January 2, 1982. His average weekly wage was $175. He has a wife and two children and he has been paid 12 weeks temporary total. The treating orthopedic surgeon rated his permanent disability as 10% to the body as a whole. Both parties agree that claimant's wage loss was 10% and that the claim be settled on a lump sum or commuted basis. Settlement date is April 24, 1982.

Computation of compensation:

$175.00 average weekly wage X 66 2/3 =	$116.73
Temporary total paid to 3-27-82, or 12 weeks $116.73 X 12 (credit allowed for these weeks)	$1,400.76
Permanent partial: $116.73 X 10% = $11.67 weekly rate	
300 weeks allowed	
−12 weeks temporary total already paid	
288 weeks due at permanent partial rate	
− 4 weeks permanent partial accrued for period 3-27-82 to 4-24-82	
284 weeks that can be commuted	
Factor from Table of Present Values, 245.5267 X 11.67	2,865.30
4 weeks due X 11.67	46.68
Lump sum settlement (plus medical, hospital, etc.)	$2,911.98

Total Permanent Disability

Total permanent disability is specifically defined in § 25-5-57(4)(d) as the permanent and total loss of both eyes, or the loss of both arms at the shoulders. This section then more generally describes a total disability as a physical or mental impairment resulting from an acccident which totally and permanently incapacitates an employee from working at or being restrained for gainful employment. The courts have defined total disability as, "inability to perform the work of one's trade or inability to obtain reasonably gainful employment." This is, of course, a question of fact. See *Brunson Milling Co. v. Grimes,* 267 Ala. 95, 103 So.2d 315 (1959); *Den-Tal-Ese Manufacturing Co. v. Gosa,* 388 So.2d 1006 (Ala. Civ. App. 1980).

The weekly benefits due for total disability are at the identical weekly rate as computed for temporary total, that is, 66 2/3 of the average weekly wage, subject to the same maximum and minimum. Such benefits are paid, as nearly as possible, to the employee's regular pay schedule unless there is agreement otherwise. Total permanent disability can be paid in a lump

sum, but only with the agreement of both parties and approval of a circuit judge.

Total permanent weekly benefits are due for no certain period but for the duration of the disability. It is commonly described as lifetime, but § 25-5-57 (4) (b) provides that a petition to alter, amend, or revise can be filed if, as a result of physical or vocational rehabilitation or "otherwise," the disability is no longer a permanent, total disability.

In the event an employee is receiving compensation for a disability, whether temporary, permanent partial, or total permanent, and dies as a result of the injury, all compensation he has received shall be deducted from the compensation due his dependents for his death. Section 25-5-58 (5). This section also provides that if an employee has sustained a permanent partial or permanent total disability and the court has either adjudged the extent or the parties have agreed as to the extent of the injury and the employee dies from reasons other than the injury, the dependents will be entitled to the balance of payments the employee would have received. In no case shall the dependents receive more than the 500 weeks provided for a death benefit.

Death Benefits

Death benefits are computed on a different percentage, according to the number of dependents the employee had. If there is only one dependent, he will receive 50% of the employee's average weekly wage for 500 weeks. If there are two or more dependents, they will receive 66 2/3 of the average weekly wage. Both, of course, are subject to the maximum and minimum limitations and all death benefits are subject to dependency. There is a provision for partial dependents which allows such individuals to receive only the proportion of the benefit allowed for total dependents that the deceased employee's contribution bears to the total support of such partial dependents. Section 25-5-60(d).

The death benefit can be paid without administration or guardianship. The circuit judge can provide for payment to any other person for the use and benefit of such dependent. This is more useful in the situation where dependents are in different households as the result of divorce or illegitimacy. Since there is no guide as to how much each individual dependent is entitled to, the circuit court has inherent authority to apportion the weekly death benefits among the various dependents. *Ex parte Blansit,* 380 So.2d 859 (Ala. 1980).

While weekly death benefits are payable for 500 weeks, they are not due if dependency ceases by reason of death or marriage of such dependent. Also, benefits cease if the dependent child reaches the age of 18 (an exception would be if the minor were physically or mentally incapable of earning) or marries. See *Central Iron & Coal Co. v. Coker,* 217 Ala. 472, 116 So. 794 (1928). In the event dependency ceases for any dependent, the remaining dependents or dependent would receive that amount of the weekly benefit they would have been entitled to had they been the only dependent at the time of the employee's death. If there are no remaining dependents, no further compensation would be owed. Dependents and the order of their taking are defined in §§ 25-5-61 through 25-5-65.

A hypothetical death claim might involve the following facts and computation of the benefit:

Example III—Computation of Death Benefit

FACTS: Deceased employee was killed in an accident arising out of and occurring in the course of his employment on January 2, 1982. He left a wife and one child, age 17, who was born on June 5, 1964. Deceased's average weekly wage was $200. Settlement is not to be in a lump sum.

Computation of compensation:

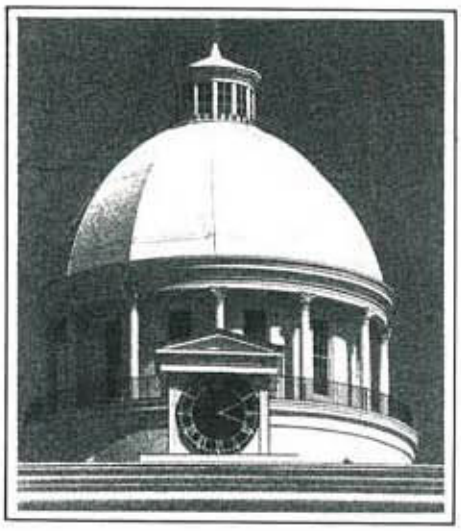
Two dependents = 66 2/3 of average weekly wage $200.00 X 66 2/3		= $133.34
One dependent = $200.00 X 50% =		$100.00
Therefore, claimants are entitled to $133.34 X 22 weeks		$ 2,933.48
When the child becomes 18 (on June 5, 1982), compensation rate is reduced to $100.00, $100. X 478 weeks		47,800.00
Total compensation payments (plus medical, hospital, etc.)		$50,733.48
Plus funeral expenses	$1,000.00	
Plus Second Injury Trust Fund	100.00	

Medical and Rehabilitative Benefits

The employer is liable for all reasonable and necessary medical and surgical treatment required without any limitations as to time or amount. Section 25-5-77. This includes artificial members, crutches, drugs and would also include psychiatric treatment if found to be related to the work injury. *Fruehauf Corp. v. Prater,* 360 So.2d 999 (Ala. Civ. App. 1978). In defining physicians, the statute also includes chiropractors.

The employer has the right to the initial selection of physicians. If the treatment is by an unauthorized physician, the employer will not be responsible for his charges. *Condry v. Jones Farm Equipment,* 358 So. 2d 1030 (Ala. Civ. App. 1978). However, if the employee is not satisfied with the employer's selection of physicians, he can notify the employer and a second physician will be selected. Unreasonable refusal to submit to examination and treatment can result in the suspension of compensation during the period of refusal. See *Black v. Daniel Ornamental Iron Co.,* 351 So.2d 578 (Ala. Civ. App. 1977), cert. den. 351 So.2d 576 (Ala. 1977).

Finally, if the employer elects, the employee must undergo vocational rehabilitation at the employer's expense. By the same token, an employee has the option to undergo vocational rehabilitation at the employer's expense if the treating physician concludes that the employee is unable to return to his former employment. Section 25-5-77(c). If the employee refuses vocational rehabilitation, he can lose his right to compensation during the period of refusal, and this is a question of fact for the trial judge. See *J. S. Walton & Co. v. Reeves,* 396 So.2d 699 (Ala. Civ. App. 1981).□



LEGISLATIVE WRAP-UP

Robert L. McCurley, Jr. Randolph P. Reaves

Alabama State Representative Jim Campbell, and Senators Jim Smith and Don Harrison receive Certificates of Appreciation from the Alabama Law Institute for their support of the Limited Partnership Act bill. Those sponsorers of the bill who are not pictured include Senators Reo Kirkland and Earl Hilliard, and Representatives John Casey and Rick Manley.

Legislature Adopts Institute Bills

The Alabama Legislature unanimously approved and the governor has signed into law the Limited Partnership Act and the Professional Corporation Act. Both will become effective January 1, 1984.

Limited Partnership Act

The Limited Partnership Act (Act No. 83-513) sponsored by Senators Jim Smith, Don Harrison, Reo Kirkland and Earl Hilliard and Representatives John Casey, Rick Manley and Jim Campbell passed the legislature without amendment. The revision was the work of a committee chaired by Mr. Richard Cohn of Birmingham with Professor Howard Walthall of the Cumberland School of Law serving as draftsman. See 44 *Alabama Lawyer* 162 (May 1983).

Professional Corporation Act

The Professional Corporation Act (Act No. 83-514) sponsored by Senator Ryan deGraffenried and Representatives John Casey and Charles Langford passed both Houses without amendment. The revision was the work of a committee chaired by Mr. Harold Apolinsky of Birmingham with Professor Jim Bryce of the University of Alabama School of Law serving as draftsman. See 44 *Alabama Lawyer* 210 (July 1983).

Bar Sponsored Bills Met with Limited Success

This was an unusual regular session for the Alabama Legislature. It started at an odd time and ended at an odd time. It killed two hundred bills on the last day and yet managed to pass both the General Fund and Education budgets along with a proposed new Constitution. It even managed to adjourn *sine die* at midnight on the 30th legislative day. Now lawmakers return home to campaign for three year terms from newly reapportioned legislative districts.

The package of bills endorsed by the Board of Bar Commissioners met with limited success. House Bill 81, to remove the exemption from license taxes for first and second year lawyers and thereby raise needed revenue for the organized Bar, failed to pass the House. On the senate side, Senate Bill 204, to reduce the statute of limitations in actions against lawyers to two years, never gained any momentum and likewise died. House Bill 366, which continues the operations of the Board of Bar Examiners without change, was successfully passed.

Among the two hundred bills which died on the calendar the last day, while a small cadre of senators filibustered the Jefferson County horse racing bill, was the controversial comparative negligence bill endorsed by the Alabama Trial Lawyers Association. While the bill weathered a filibuster in

the senate, it met with strong opposition from insurance and industry in the House.

Also dying a slow death on the House calendar was Senate Bill 278, which purported to instruct the Supreme Court to modify its rules for admission to the Bar, to continue to allow graduates of Birmingham School of Law, Miles College School of Law and Jones Law Institute to sit for the bar examination even though the schools remain unaccredited. Despite its dubious constitutionality, the bill passed the senate and had strong, vocal support in the House. House Bill 782, the perennial bill to increase the limits for small claims court actions, met with a sure demise in the House Judiciary Committee and never made the House calendar.

Deadlines being deadlines, this article does not document the bills which did pass, as the governor has yet to sign a number of successful measures and many act numbers have not been assigned. The next issue of *The Alabama Lawyer* will contain a summary of the more important bills which did pass and become law. □

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

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

contests! contests! contests!contests! contests! contests! contests! contests! contests! contests! contests! contests!contests! contests!

CALLING ALL WRITERS!

The Alabama Lawyer is sponsoring a short-story writing contest for members with a creative, literary talent. We want you to enter!

SPECIFICATIONS: Those entering must be either members of the Alabama Bar or law students. The subject-matter is to your own choosing. Keep stories to 3000 words or less—twelve typed, doublespaced pages on 8 1/2" x 11" paper. The deadline for submitting stories is January 31, 1984. The winning short story, and possibly others, will appear in the May 1984 issue of *The Alabama Lawyer*.

We urge those who participate to submit entries early, rather than waiting until the closing date.

Send two copies to:

The Alabama Lawyer
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SPECIFICATIONS: Photographs must be verticle shots and very sharp so that they can be enlarged. We are interested in outdoor Alabama seasonal scenes, law-related photos (courthouses, for example), or any ideas you may have for an interesting cover. At this time we need covers for: November 1983; January 1984 (winter); March 1984 (restored law offices); May 1984 (Law Day related or spring); July 1984 (Mobile photo for convention issue).

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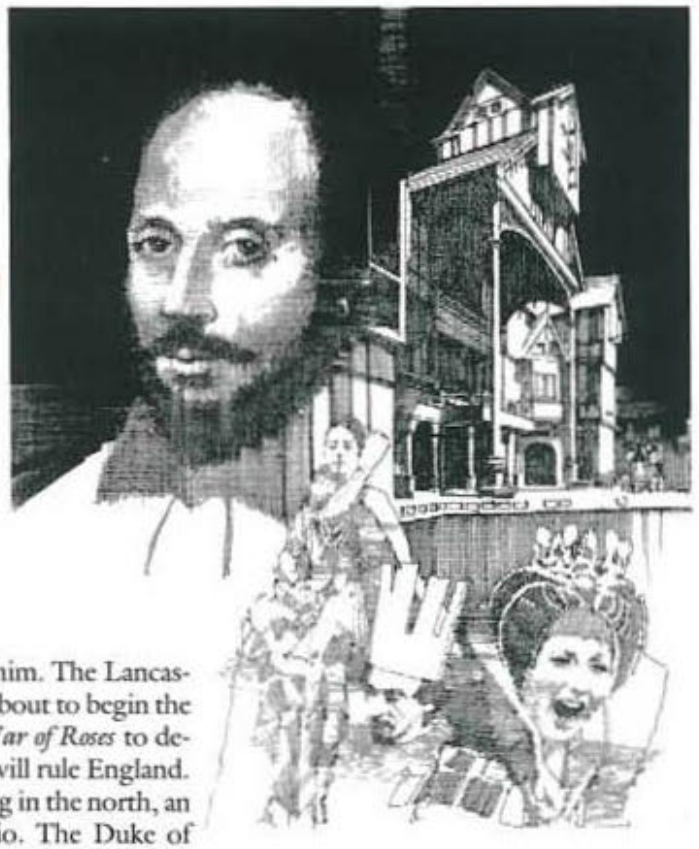
"THE FIRST THING WE'LL DO, LET'S KILL ALL THE LAWYERS."

E. M. Friend, Jr.



Today, much of the public has a jaundiced view of lawyers. To those of us in the legal profession, Shakespeare's widely-quoted expression—"the first thing we'll do, let's kill all the lawyers"—is something less than endearing. Many of our laymen friends, however, find this quotation both logical and highly amusing. By its very nature the legal profession, from its inception, has not and could not be noted for its popularity.

The immortal William Shakespeare needs no one to defend his place in history. His insight into human behavior and character is astounding. In addition, he was a property owner, an employer, and a man with at least some knowledge in commercial affairs. The original mortgage which he executed when he purchased the Blackfriars Gate-House in London hangs on the walls of the British Museum. It would be both disappointing and surprising, therefore, if the character which called for the extermination of all lawyers was really expressing Shakespeare's personal views. My conviction that the quotation should not be taken at face value without further investigation prompted me to find out how this statement originated. I found the answer in Shakespeare's second part of *King Henry VI*.

The action in this play takes place in the middle of the fifteenth century. Henry VI, a deeply religious man, is the incompetent and indecisive ruler of England. He is married to a scheming, unfaithful queen, Margaret of Anjou. Courtiers plot against him. The Lancasters and the Yorks are about to begin the long and sanguinary *War of Roses* to determine which House will rule England.

The Irish are rebelling in the north, an all too familiar scenario. The Duke of York is about to be dispatched by order of the king from London to Ireland to quell the rebellion. The duke covets the throne. He plans to subdue the Irish, return home victorious, and set himself up as the sovereign. Before his departure, he carefully lays his plans. He reasons that if the government of England should be in shambles when he returns, the crown may be his for the asking.

To ensure that his machinations will succeed, York plans to cause confusion and disorder in England during his absence. He seeks the assistance of one John Cade, an unmitigated scoundrel, expressing his thoughts in this soliloquy (Part II, Act III, Scene I):

> "Whiles I in Ireland nourish a mighty band, I will stir up in England some black storm . . .
>
> For a minister of intent,
> I have seduced a headstrong Kentishman,
> John Cade of Ashford,
> To make commotion, as full well he can . . .
>
> Why, then from Ireland come I with my strength
> And reap the harvest which that rascal sow'd . . ."

After York departs for Ireland, his plans immediately go awry. Cade now decides that he will seize power for himself. In Scene II, Part II, Act IV, Cade addresses his followers, making various promises calculated to tempt the lawless:

> "There shall be in England seven halfpenny loaves sold for a penny: the three-hooped pot shall have ten hoops; and I will make it a felony to drink small beer; all the realm shall be in common; and in Cheapside shall my palfry go to grass [Cade is saying that his horse shall graze in the chief shopping street of old London, Cheapside]; and when I am king, as king I will be . . ."
>
> *ALL:* "God save your majesty."
>
> *CADE:* "I thank you, good people: there shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers and worship me their lord."
>
> *DICK:* (One of his adherents, and a butcher by occupation)
>
> "The first thing we'll do, let's kill all the lawyers."
>
> *CADE:* "Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man? Some say the bee stings: but I say, 'tis the bee's

wax; for I did but seal once to a thing, and I was never my own man since . . .' "

Cade's attitude towards law and order, learning and civilization, becomes even clearer as the play develops. The clerk of Chatham tells Cade (later in the same scene referred to in the preceding paragraph): "Sir, I thank God, I have been so well brought up that I can write my name."

Cade replies: "Away with him, I say! Hang him with his pen and ink-horn about his neck."

A messenger reports to Henry VI concerning Cade's activities, saying: "All scholars, lawyers, courtiers, gentlemen; they call false caterpillars and intend their death."

In Scene VII, Part II, Cade says: "So, sirs: now go some and pull down the Savoy; others to the inns of court; down with them all." Subsequently, in the same scene, he continues: "I have thought upon it, it shall be so. Away, burn all the records of the realm: my mouth shall be the parliament of England."

When Shakespeare, through Cade's follower, Dick, says ". . . let's kill all the lawyers," he is paying them a supreme compliment. Cade can succeed to the throne of England only through a successful, bloody rebellion. He cannot suffer lawyers, the exponents of law and order, to live for they will surely oppose and defeat him.

As advocates, especially when we are advocates of unpopular causes, we cannot expect to enjoy a high degree of public approval. Rather, we should take pride in the knowledge that evil men who seek power by unlawful means wish our destruction because we stand in their way. We should recognize the expression—"let's kill all the lawyers"—for what it meant in Shakespeare's time and what it means today. It is an acknowledgment of the great contribution that the law and lawyers have made towards the establishment of order, stability and peace in every society in which they have lived. Neither the legal profession nor any individual lawyer has any reason to be smug, but the next time someone quotes this expression to derogate them, can we not in all candor ask him if he really knows what he's talking about?☐

About Members Among Firms

About Members

Alice Meadows, with the Mobile law firm of Meadows & Howard, was presented the Community Service Award by the Mobile Community Committee Against Domestic Violence at the second annual awards luncheon in July.

William H. Satterfield has been appointed as deputy solicitor at the Department of the Interior in Washington, D.C.

Judge John D. Snodgrass of Huntsville has been elected to the Board of Directors of the National Judicial College for a three-year term.

Leonard Wertheimer III of Mobile has been elected as a Fellow of the American College of Probate Counsel.

Among Firms

The law firm of **Volz, Capouano, Wampold & Sansone, P.A.,** takes pleasure in announcing that **Charles H. Volz III** and **Ellis D. Hanan** have become associated with the firm and **Charles H. Wampold, Jr.** has become of counsel. Offices are located at 350 Adams Avenue, Montgomery, Alabama 36104.

Jeff S. Barganier, Attorney at Law, is pleased to announce the opening of his office at 25 Washington Avenue, Suite 104, Montgomery, Alabama 36104.

Joseph E. Walden, Attorney at Law, is pleased to announce the relocation of his office to 2925 Montgomery Highway North, Pelham, Alabama. Telephone: 663-2960.

Kenneth H. Looney is pleased to announce the opening of his office for the general practice of law at 100 East Peachtree Street, P. O. Box 1162, Scottsboro, Alabama 35768. Phone: 250-2004.

John F. Tanner, Attorney at Law, is pleased to announce the relocation of his office to 2925 Montgomery Highway North, Pelham, Alabama. Telephone: 663-2960.

Alabama State Bar member **William Watt Campbell,** associated with the law firm **Geisenberger & Herr** in Lancaster, Pennsylvania, announces that their offices have moved to 36 East King Street, Lancaster, Pennsylvania 17602.

David Chip Schwartz announces the relocation of his law offices to new and larger quarters at 2025 2nd Avenue, N., Bradford Building, Birmingham, Alabama 35203.

Bruce MacPherson is pleased to announce the opening of his office for the practice of law at 33 East South Street, Montgomery, Alabama 36104.

Merrill, Porch, Doster & Dillon, P.A., takes pleasure in announcing that **Randall M. Woodrow** has joined the firm in the practice of law. Offices are located at Suite 500 Southtrust Bank Building, 1000 Quintard Avenue, Anniston, Alabama.

Marcel E. Carroll is pleased to announce the relocation of his office for the practice of law to Suite 1215, Union Bank Tower, Post Office Box 83, Montgomery, Alabama 36101. Telephone 264-3225.

The law firm of **Otts and Moore** takes pleasure in announcing that **Michael D. Godwin** has become associated with the firm which is located at 401 Evergreen Avenue, Brewton, Alabama.

J. Michael Manasco and **Bobby N. Bright** are pleased to announce the opening of their individual offices for the general practice of law with offices located at 555 South Perry Street, Suite 306, Montgomery, Alabama 36104. Telephone 263-2333.

The law firm of **Johnson, Huskey, Hornsby & Etheridge** is pleased to announce that **Cheryl S. Woodruff** has become associated with the firm. Offices are located at 131 North Oates Street, P. O. Box 1193, Dothan, Alabama 36302.

Balch, Bingham, Baker, Hawthorne, Williams & Ward, with offices in Birmingham and Montgomery, and the Montgomery firm of **Smith, Bowman, Thagard, Crook & Culpepper, P.A.,** are pleased to announce the merger of their firms for the general practice of law under the name of **Balch, Bingham, Baker, Ward, Smith, Bowman & Thagard.** The firm also announces that **S. Revelle Gwyn** and **James H. Miller III** have become partners in the firm. Offices are located at 600 North 18th Street, P. O. Box 306, Birmingham, Alabama 35201 and at The Winter Building, 2 Dexter Avenue, Court Square, P. O. Box 78, Montgomery, Alabama 36101.

Robert Earl Patterson announces the relocation of his law office to 2220 Highland Avenue, Birmingham, Alabama 35205. Phone 933-2756.

Darryl C. Hardin takes pleasure in announcing that **Steven L. Wise** has joined him in the general practice of law under the firm name of **Hardin and Wise.** Formerly, Mr. Wise was a law clerk for the Alabama Court of Civil Appeals. Offices have been relocated to 2813 Eighth Street, Tuscaloosa, Alabama 35401.

The law firm of **Pappanastos, Samford, Roberts & Blanchard, P.C.,** is pleased to announce that **Susan Shirock DePaola** has become an associate of the firm. Offices are located at Suite 311, One Court Square, P. O. Box 1402, Montgomery, Alabama 36102.

Horace V. O'Neal, Jr., Attorney at Law, wishes to announce the relocation of his office to 7216 First Avenue North, Birmingham, Alabama 35206. Phone (205) 836-9522.

Bill Hairston talks about Bar Issues—

"We've got one Whale of a job ahead of us!"–

by Jen Nowell

Bill Hairston is quickly recognized when his green checked cab comes down the street. He doesn't consider himself an old car collector, he simply says, "I just want cars that will last. I fall in love with one and I can't get rid of it."

His uncle was a doctor and thought that would be a good profession for young Bill. He was undecided until he got the opportunity to observe an appendectomy. It was then he was sure—he would never become a doctor.

William B. Hairston, Jr., was born in Birmingham on December 14, 1924 and has resided there since. He is a 1950 graduate of the University of Alabama School of Law and has a list of honors, accomplishments, and contributions to the legal profession that could fill a book. He's a partner in the Birmingham firm Engel, Hairston, Moses and Johanson.

Bill is an orator, a writer, a lawyer, and a Sunday school teacher. He, above all, is a family man. Bill and his wife, "Weezie," have one son, Bill III. At the time of the following interview, less than a week after Bill took office as president of the Alabama State Bar, Bill III was taking the bar exam in Montgomery. His father commented, "I ***hope*** *I've still got him."*

Q. What do you consider the most significant issue presently facing the bar?

A. Of course, the biggest issue facing the state right now is the proposed new constitution. Our biggest concern is to be able to inform the public, in an impartial manner, the value of this document. I think the bar is the one organization in the state that is capable of informing the folks as to whether it is good, bad or indifferent.

Q. How best do you think the bar can inform the public?

A. By having a committee of outstanding constitutional experts review it, to make challenges that are needed to be made, to underscore the strong points that need to be underscored and inform the lawyers of the state what we've got. The lawyers can then inform the rest of the state—the folks who are going to vote on it. Now, then, that's the big thing. New issues come up all the time that we have to meet.

Q. The constitution is something that was recently thrust upon us. What are other concerns of the bar?

A. The next thing is the disciplinary proceeding. We are choking in handling disciplinary matters. We've got to find some relief for those who serve on the Board of Bar Commissioners, because they can't afford to spend all of their time worrying about the shortcomings of people that probably ought not to be in the bar to start with. There are a lot of counterfeits in our organization; we call them lawyers, but, they, really down deep in their heart, are not lawyers, and they ought not to be here. There are disciplinary panels meeting all of the time, all over the state, and it's just more than a group of humans assigned as bar commissioners can stand. Perhaps using disciplinary panels that have a part of their membership composed of non-bar commissioners is going to be one answer and we'll look into that.

Q. I believe the Pennsylvania Bar, there may be others, has a couple of non-lawyer members on their disciplinary board. What is your opinion of that arrangement?

A. Not much. We are self-disciplined and if we can't discipline ourselves then we ought to get out of the law business. We don't need to bring lay-folks in to worry about our failure to reach the standards required by our rules.

Q. Are there any other main issues?

A. Yeah, lots of them. I'll sit here all day long . . . but the next thing bar-wise is that we don't have any long-range planning. For example, this new constitution—I don't know how we've been prepared to meet that. We *react* rather than *act*.

We have what will be a very active committee that is designed to handle long-range planning so the bar will know this year what it's going to do five years from now. Of course, with the tremendous increase in the number of lawyers over the past decade, and the potential for a substantial increase in the next decade, we need to plan. We need to know how big our staff for the bar association ought to be. We ought to know whether or not we need computers to help us do all these things. And we need to know how big of a physical plant we need to have. All of these things we need to plan ahead for.

What's it going to cost to operate the bar association to meet the needs of all these new lawyers? Do we need to provide a means by which younger lawyers, as they come into the bar, come in where they can participate not just as members but as working members?

Q. How can we get the lawyers involved in bar association work—especially the young lawyer or those new to the profession?

A. By providing them with the opportunities. Now, that's actually all it takes. The lawyers out there have indicated to the bar association by the responses to requests for committee assignments that they're willing to work, that they want to work, and that they are enthusiastic about the work. So what the bar has got to do is to broaden its base of activity to give more and more people an opportunity to work. We've got to have more committees. Committees have got to go into more matters, and the sections have got to divide themselves into committees so that everybody that seeks an opportunity will have an opportunity. We've got to open the door by invitation. We've got plenty of untapped manpower—can I say *man*power?—throughout the ranks of the bar association that we're just not using, and that's terrible.

Q. The response to your Committee Preference Form sent to members in April was overwhelming. How many were you able to place on committees for the 1983-84 year?

A. For every one that was selected, two could not be selected. And it will be even less next year because some people were selected on committees for two or three year terms. So only one-third of the committee assignments will come up for appointment next year. This gives continuity to our work, but it also cuts down on the number of those involved.

Q. Do you expect these committees to be active?

A. These committees *are* being active. We've got one whale of a job ahead of us. Just loads and loads of things to do.

Q. What is another concern facing the bar?

A. Another problem we have is the way in which we select judges. We put judges in an unconscionable position. We say to them, "You've got to run for office in the political arena." We say to them, "You've got to run in a political race that will require the expenditure of substantial amounts of money." And then we say to them, "We want you to be unbiased in all your decisions; we don't want you to have favors, we don't want you to be in a position where there would be anything that would taint your objectivity." And, you see, we've kind of thrown them on the horns of dilemma. They're at the mercy of everybody, because where are they going to get the money to run? They've got to get it from lawyers. Well, if one group of lawyers can come in and put a substantial amount in the campaign kitty of someone or can go up there and say, "Look I want you to run and we've got substantial money that we can put in your campaign," while it may not color the decisions that that judge will make, it still gives a feeling of uneasiness to those who come before that judge knowing that some lawyer has participated heavier than some other lawyer in financing the campaign. It destroys, not in the minds of the judges, but in the minds of the people whom they serve, the integrity of the judiciary.

We've got people, as we saw in the last election, who have no qualifications at all and are running for judicial office—folks that are just out of law school and people who have never handled a case before the Supreme Court. It seems to me that we need some qualifications. That will be one of our objectives.

Of course another thing is, as we saw in the case that went before the Supreme Court following the last election, that the Supreme Court is charged with enforcing the rules of conduct for those non-judges who seek judicial office. But, the Judicial Inquiry Commission is charged with enforcing the rules governing judges who are running for judicial office. And as I see it, the standard of conduct is not the same—the non-judge running for judicial office is charged with a much lower standard of conduct than is the judge. And if the judge is in error, then the punishment is that he is charged by the Judicial Inquiry Commission and, when that charge goes out, he is suspended from the bench. And everybody knows about it until he's exonerated or found guilty by the court of the judiciary. Not true as far as the practice of the lawyer is concerned. He has to wait until after the election and then the Supreme Court has a tendency to say, well, it's all over and done with. We need to change those rules. So we've got a lot of work in that field, and we've got a very outstanding task force that's going to work on it.

Q. The bar association has recently addressed the problem of the unjust criticisms of the bench and bar. Has the press been unjust and where do you think the problem lies?

A. Well, we say unjust, and, of course, if I were to say the criticism was unjust, the person that was doing the criticism might say otherwise. The fact that the person could say otherwise, I think, comes from a failure on the part of the educational system, whereby the general populace understands fully the role of the judge, and the courts, and the jury in our system of justice; and also, the role of the lawyer as a part of that system of justice. We tend to get away from the understanding that it's the advocacy system, where one side argues one way and one side the other, that keeps the freedom and the concept of government that we know alive and kicking and in bounds. The judge,

of course, has the part of refereeing between the two, and the whole system is designed to search for the truth. I think our education has let us down. The president of Yale just came out with the announcement that he thought that the place to start to repot these roots in the system would be to alert the schools and the colleges and have some mandatory course on government, the system of justice and the mechanics by which we live.

Q. Will you as president of the bar, be responsible for publicly responding to the criticisms?

A. I really don't know, and that's a problem. Of course the only people who can speak for the bar is the Board of Bar Commissioners, or maybe, the president with the authority of the Board of Bar Commissioners. That's been very unwieldy when it comes to responding to criticisms, because that's something you've got to do right now. In fact, Patrick Richardson's committee on Meeting the Criticisms of the Bench and Courts is now trying to work up a procedure by which we can make immediate response or give somebody the authority to make a response.

Q. What are your thoughts on the night law schools in the state—those that are unaccredited—and the "to take or not to take the bar exam" issue?

A. I guess since Alabama Christian College has purchased Jones Law School, it will be not just a night law school, but now will become a day law school. Certainly, they are going to pump the money and teachers into it that will allow for accreditation. Night law schools have served a beautiful and wonderful purpose in the state. They've provided an educational opportunity for folks that could not have it otherwise. A lot of great lawyers have been produced by those schools. They've given people working for the government and in corporations the opportunity to get a legal education, and, thereby, enhance their earning power and you can't minimize that. I'm afraid that the time has come that night law schools cannot fulfill the obligations and responsibilities that they have so tremendously fulfilled in the past, plus the fact that we don't have any means, or the bar association has not been able to develop a means, of setting out rules and regulations to govern non-accredited law schools. Therefore, the big problem is that if we let non-accredited law schools domiciled in Alabama take the bar exam, then there's no way in this world we could refuse to let non-domiciled, non-accredited law schools take that bar exam. Once a fellow gets down here in Alabama and starts looking around, you just can't run him out with a stick.

Q. Is there really a lawyer explosion in Alabama and, if so, is there a solution?

A. Of course the solution is the marketplace, and the solution is making itself manifest right now when you have fifty people that opt to take the bar exam and then change their mind between graduation and the exam. There is a lawyer explosion. We've got more lawyers in Alabama, I think we've got more lawyers in Alabama, than we can say grace over. Well, I guess we have to say that, because forty percent of the graduating class of this year (1983) do not now have a job. And that's *a job period*–not a law-oriented job or a job as a lawyer; they just don't have anything! And that explains why a lot of people are not taking the bar exam. Why should they take it now when they're not going to use it?

Lawyer explosion will take care of itself. The problem is the fallout. The fact that we're having increasing disciplinary problems. Tradition and history have shown us that these problems increase with a decline in economic conditions. We've got lawyers out there that are trying to practice law part of the time, or ten percent of the time, or what have you, and they don't have the daily contact with the law that gives them the opportunity to fully utilize the skills that they learned in law schools, and you know, by not using skills you lose them. And they're not getting the best advantage. We've got lawyers right now that because of the competition and because of the economic problems we're having, are in bad financial shape. And a lawyer in bad financial shape is not in the best interest of our society.

Q. Since all lawyers in Alabama are required to be a member of the bar association, do you feel like the bar association has a special obligation to those lawyers in the services it provides or should provide for them?

A. I think there's no doubt about it.

Q. Are we doing enough?

A. We are never doing enough. There's always more that you could do—just like preparing a case, you never get it prepared to your satisfaction. But time just runs out on you. One thing folks don't understand is we are not a trade organization. We are an integrated bar and we are that by statute. There are certain things that the bar association can do and those are the ones set out by statute. We can set up and police the admission standards, the educational standards that are prerequisite to admission, we can discipline, we can educate them and that's about it.

Q. Is Mandatory CLE a good program? Are twelve hours a year enough?

A. History has shown us that CLE is a good thing, and law has gotten so blasted complicated until it's hard to know the fullness of what you're doing right now, to know the areas that you're going to come in contact with and the

effect of those areas on what you're doing now. So CLE I don't think can be classified as being a good thing, but I think you've got to classify it as a *must* thing. Whether twelve hours is enough or not I don't know. As the law gets more and more complicated, or as Elisha Poole says, our mysteries get "more and more fatter," then we'd have to have more CLE. Accountants have forty hours, and they live a right complicated life, but ours are getting more and more complicated.

Q ■ How do you feel about all of the exemptions being given?

A ■ Well, I think the exemptions erode what you're trying to accomplish. The fact that we tell legislators that they don't have to take CLE is really putting your head in the sand and ignoring the obvious—every lawyer needs to take CLE. And there are a number of lawyers here that are just outstanding in their field, they're writing books on what they're doing, they're giving papers on what they're doing, and everybody that's got a problem comes to them. But still, these lawyers have been confined in a situation where they need to go out and learn other things. They need to think and find out what other people say about it. CLE is for everybody.

Q ■ Above and beyond representing the client, does a lawyer have a responsibility to the public?

A ■ The lawyer's sole responsibility is that to his client. It's a very sacred trust that we assume and I would hate to see any encroachments on that trust. Well the good book says you can't serve two masters, and you can't. And I don't think it is right, nor proper, that we place on the lawyer the concept of doing what the Lord says you can't do. And there's only one master that the lawyer can serve, and anytime he attempts to serve somebody other than his client, then he's violating a very sacred trust. □

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President's Page

Continued from page 236

The presentation of a new Constitution offers the Bar a rare opportunity and responsibility. If the public is to make an informed choice when it comes to ratification or rejection of the proposed Constitution, the Bar will have to furnish the information. We are in the process of appointing a select Task Force to Study and Evaluate the Proposed Constitution. This task force will furnish the Bar, and through the Bar the citizens of this state, with an unbiased, objective analysis of the proposed Constitution to replace old 1901.

I want to end this report by thanking you for letting me serve as president of this association. With this honor I am fully cognizant of those who have gone before: so many names—so many faces—so many man-hours devoted to our profession. But in the end what we are and what we can be as an organized Bar is entirely dependent upon our individual membership. The fortunes of this association are literally in your hands, to be made or marred by your own conduct. "Whoever does justice to the law, to him, in the end, will the law do justice." □

William B. Hairston, Jr.

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Executive Director's Report

Continued from page 257

the ABA. S. Eason Balch of Birmingham serves on the Council of the Public Utilities Law Section of the ABA, while Joseph H. Johnson of Birmingham has relinquished the chairmanship this year of the Urban, State and Local Government Section of the ABA. Supreme Court Justice Richard L. Jones is currently serving as secretary of the Appellate Judges Conference. Boots Gale of Birmingham serves on the ABA Standing Committee on Environmental Law, and this writer is serving on the ABA Standing Committee on Continuing Education of the Bar. Hobbie Presley of Birmingham is the new chairman of the budget committee of the Young Lawyers Division of the ABA.

The American Bar Association has made a significant change in plans for the 1984 Midyear Meeting. These meetings have traditionally been business meetings of the association; however, the ABA, through a special grant, is promoting a series of continuing education programs at the 1984 Midyear Meeting to be held in Las Vegas on February 9-10, 1984. Several sections of the association are planning outstanding programs. The seminars will be three hours in length and a person can attend four of the programs if they choose to do so. Each of the seminars will have a separate registration fee; however, there is no registration fee charged for the Midyear Meeting of the ABA. Extensive promotional materials will be mailed to lawyers throughout the country later in the year. Some of the subjects to be showcased at the 1984 Midyear Meeting in Las Vegas will be: "After-Survival Growth of the Law Practice," "Partnerships and Preservation, How To Work Together," "Representation of the Entertainer and the Athlete," "A Products Liability Update," and "Criminal Problems that a Civil Law Practitioner Cannot Escape."

If meetings make the world go around, lawyers seem to have their share of opportunities. Most participate at the committee level within their local or state bar association. Others have an opportunity to participate on a national level. The important aspect of all of these meetings is that they not only afford those participating an opportunity to expand their own horizons, but, in the long run, they benefit the profession and the public as we seek to improve the administration of justice. □

Reginald T. Hamner

Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

"Where a prospective client seeks to employ an attorney to file a divorce proceeding on his behalf and pays a retainer therefor, but misrepresents to the attorney the identity of his wife, knowing that the attorney would not accept employment against her, may the attorney, upon learning the identity of the wife, return the retainer and accept employment by the wife in defense of the divorce action filed by another attorney employed by the husband?

If the attorney may accept employment by the wife, is any "confidence" or "secret" imparted to the attorney by the husband protected by the attorney-client privilege?"

ANSWER:

Since the husband affirmatively misrepresented to the attorney the identity of his wife, no attorney-client relationship came into being. Therefore, the attorney is not precluded from accepting employment by the wife or from using information imparted to him by the husband and favorable to the wife and adverse to the husband.

DISCUSSION:

Disciplinary Rule 4-101 (A) provides:

> "DR 4-101 Preservation of Confidence and Secrets of a Client.
>
> (A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Disciplinary Rule 5-101 (C) provides:

> "DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
>
> (C) A lawyer shall not represent a party to a cause or his successor after having previously represented an adverse party or interest in connection therewith."

Disciplinary Rule 5-105 (A) provides:

> "DR 5-105 Refusing to Accept to Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
>
> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)."

The office of General Counsel and the Disciplinary Commission have on a number of occasions held that a lawyer cannot sue a former client if there is a "substantial relationship" between the former representation and the representation of the new client against the former client. It is not necessary to show that a "confidence" or "secret" was obtained which the lawyer can now use favorably to the new client and adversely to the former client. The Supreme Court of Alabama adopted this view in the case of *Ex Parte Taylor Coal Co., Inc.*, 401 So. 2d 1 (Ala. 1981).

No discussion of the various opinions interpreting the above-quoted rules is necessary in the instant case. The question is resolved by an initial determination as to whether or not an attorney-client relationship came into being which would invoke the application of the above-quoted rules. Every consultation between a prospective client and an attorney does not necessarily bring into being an attorney-client relationship.

In an opinion rendered by the Ethics Committee of the Michigan State Bar (1959) the committee held that where a wife misrepresented her identity in consulting a lawyer about a divorce and the husband had been a client of the lawyer, an attorney-client relationship was not established with the wife such as to prevent the lawyer from representing the husband in a divorce between the parties nor from revealing such consultation to the husband if the lawyer deems it necessary to protect the husband's interest. The Ethics Commission of the Arizona State Bar (1970) held that a lawyer who refused to represent a party in bankruptcy because of the party's refusal to disclose his assets is not bound to respect the party's confidences in this request.

The General Counsel and the Disciplinary Commission have issued several ethics opinions holding that the mere fact that a potential client consults an attorney and discusses the subject matter of representation does not necessarily establish an attorney-client relationship which will preclude the attorney from accepting employment adverse to the potential client concerning the subject matter of the consultation.

We do not recall a prior case where a potential client affirmatively misrepresented facts in consulting with an attorney, knowing that a revelation of the true facts would result in the attorney's refusing to accept employment. Although the client's motive is not necessarily determinative, it is entirely possible that the client's actions were designed to neutralize the attorney in later proceedings. We agree with the rationale of the opinion of the Ethics Committee of the Michigan State Bar hereinabove cited.

QUESTION:

"When an attorney is appointed to defend an indigent defendant may the attorney ethically demand and collect from his client a fee as a condition precedent to the attorney's exerting his best efforts to have the client placed on probation or given a suspended sentence?"

ANSWER:

It would be unethical for an attorney appointed to defend an indigent defendant to demand and collect a fee from his client as a condition precedent to the attorney's exerting his best efforts to have the client placed on probation or given a suspended sentence whether such action on the part of the attorney is done with the consent or even at the suggestion or insistence of the court.

DISCUSSION:

After rather careful research, we do not find an opinion of a court or of an ethics committee addressing a fact situation identical or closely analogous to that posed in this request for opinion.

Despite this dearth of authority, we are constrained to the conclusion that the actions described in the request for opinion would constitute a violation of the Code of Professional Responsibility of the Alabama State Bar.

Ethical Consideration 2-29 provides in part as follows:

> "No attorney appointed to represent an indigent defendant shall condition his willingness to represent said defendant, or to expend his best efforts in such representation, on the payment of a fee by the defendant, or those persons interested in him. If it shall appear to the attorney that the person whom he is appointed to represent actually is capable of paying an attorney's fee, the appointing court should be made aware of such fact. It is not unethical for an appointed attorney to receive a fee voluntarily paid by the defendant, or persons interested in him; but any appointed attorney receiving such payment shall forthwith advise the appointing court of such fact."

Ethical Consideration 2-31 in part provides as follows:

> "Trial counsel for a convicted defendant shall continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court."

Disciplinary Rule 2-107 (A) provides:

> "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

Of course, an attorney appointed to defend an indigent defendant is governed by Canon 7 of the Code of Professional Responsibility as is any other lawyer. Canon 7 provides "A lawyer should represent a client zealously within the bounds of the law." A lawyer appointed to represent an indigent defendant should represent his client zealously not only in pretrial proceedings, at the trial, at the sentencing, but also in all post trial proceedings including a zealous effort to obtain probation for the client or a suspended sentence if the circumstances warrant such. To condition the obtaining of probation or a suspended sentence for a client upon his payment to the attorney of a fee is, by analogy, the entering into arrangement for, charging, or collecting a contingent fee for representing a criminal defendant in one phase of the criminal proceeding. In our opinion this is true whether it is done with the consent or even at the suggestion or insistence of the court.

Disciplinary Rule 2-106(C), Code of Professional Responsibility of the American Bar Association is identical to Disciplinary Rule 2-107(A), Code of Professional Responsibility of the Alabama State Bar. Although the case of *State* v. *Hilton*, 217 Kan. 694, 538 P.2d 799 (1975), did not involve an indigent defendant, the case is helpful by analogy. The court was called upon to construe Disciplinary Rule 2-106 (C), Code of Professional Responsibility of the Kansas State Bar which is identical to the rule with which we are concerned. The court held that at least the spirit of DR 2-106 (C) was violated when, during a probation hearing, the court had the matter in question under advisement and counsel for a criminal defendant demanded an additional fee as a condition for his continuing appearance at the probation hearing. In the opinion the court stated:

> "[R]espondent's demand for an additional fee of $1,000.00 at the time and under the circumstances existing cannot be condoned. Respondent made demand for the additional fee at the conclusion of the first day's hearing on probation. The court still had the matter under advisement and the issue whether probation would be granted was not to be decided until the following day . . . faced with going to court the next day without a lawyer and, thus, apparently agreed to the additional fee . . . The demand, at this point in the proceedings, for an additional fee that was not contemplated in the retaining agreement violated the spirit, if not the letter of DR 2-106 (C)."

In the situation described in your request for an opinion an indigent defendant is faced with going to jail unless he pays a fee as a condition precedent to his being placed on probation, or given a suspended sentence, a status which he is virtually guaranteed if he pays the fee, especially, if done with consent or at the suggestion or insistence of the court.

Although the General Counsel and the Disciplinary Commission are without jurisdiction to decide questions of law, it is significant that § 15-12-21 through 15-12-23, *Ala. Code* 1975, which deal with appointed counsel in the trial court, on

appeals and with regard to post conviction proceedings each contains substantially the same language namely: "It shall be the duty of such counsel, as an officer of the court and as a member of the bar to represent and assist such defendant."

True § 15-12-25, *Ala. Code,* 1975, deals with reimbursement of fees of court appointed counsel by defendant. We must observe that this statute is very narrowly drawn and, although we are not called upon to determine the constitutionality of the same, we do observe that the statute is worded in such a way as to provide for the reimbursement of the state for expenses which have been paid to an appointed counsel or public defender.

Statutes similar to § 15-12-25, *Ala. Code,* 1975, have generally been upheld by the courts, the leading case being *Fuller* v. *Oregon* 417 U.S. 40, 40 L.ED 2d 642, 94 S.Ct. 2116 (1974). The Supreme Court of the United States observed that the statute involved was directed only at those convicted defendants who were indigent at the time of the criminal proceeding against them but who subsequently gained the ability to pay the expenses of legal representation, and that the convicted person from whom recoupment was sought thus retained all the exemptions accorded other judgment debtors, in addition to the opportunity to show at any time that recovery of the cost of the legal defense would impose "manifest hardship." The Supreme Court upheld the attack on the Oregon statute under the Fifth and Sixth Amendments, the Equal Protection Clause of the Fourteenth Amendment and the Involuntary Servitude Clause of the Thirteenth Amendment. We observe that the procedure which you outline would be unethical whether the fees sought from the indigent defendant are those prescribed by statute or whether the attorney involved seeks to exhort a larger fee.□

Disciplinary Report

Surrender of License

On July 13, 1983, the Supreme Court of Alabama entered an order accepting the voluntary surrender of license tendered by Baldwin County attorney **James A. Hendrix.** The court ordered that Mr. Hendrix's name be stricken from the Roll of Attorneys in all courts of the state of Alabama, and that his license and privilege to practice law in all the courts of the state of Alabama be cancelled and annulled, effective at 12:01 A.M., July 6, 1983. Mr. Hendrix had previously been convicted in the United States District Court for the Southern District of Alabama of violation of Section 946 and 963, Title 21, U.S. Code, and sentenced to two concurrent 5-year terms of imprisonment.

Suspension

Louis A. Mezrano, of Birmingham, was suspended from the practice of law for 120 days, without automatic reinstatement, effective August 11, 1983, for having failed to include in a newspaper advertisement the disclaimer required by DR 2-102(A)(7)(f), and for having failed to send the General Counsel of the State Bar a copy of the advertisement within three days of first publication, as required by DR 2-102(A)(7)(e), and for having engaged in private practice under a trade name, in violation of DR 2-102(B).

Private Reprimands

On June 24, 1983, private reprimands were given for the following violations:

- An attorney was privately reprimanded for violation of Disciplinary Rule 6-101(A) which states that a lawyer shall not willfully neglect a legal matter entrusted to him. In this case the disciplined attorney had been hired to represent a client in an accident case. The damages involved were minimal and liability was hotly disputed. Once it became obvious to the attorney that the claim could not be concluded without litigation, the attorney lost interest in the file and allowed the statute of limitations to expire. The attorney admitted that he had willfully neglected this legal matter and, in accord with his admissions, the Disciplinary Board determined that appropriate discipline for the admitted offense would be a private reprimand.
- An attorney was privately reprimanded for having violated DR 2-111(B)(2) by failing to withdraw from a lawsuit for approximately four and a half months after having been discharged by the client.
- An attorney was privately reprimanded for violating DR 1-101(A) and DR 1-102(A)(4) by having falsely stated on his application for admission to the Bar of Alabama that he had never been committed to a mental institution or been treated medically for a mental condition. On the same date, the same lawyer was privately reprimanded for having violated DR 1-102(A)(5) by having accepted fee money on behalf

of a criminal defendant, and having also collected funds from the State of Alabama as appointed counsel for the same criminal defendant in the same case.

- A lawyer was privately reprimanded for having violated DR 9-102(B)(4), by having collected certain funds from the seller in a real estate equity sale for the purpose of making a monthly mortgage payment that was overdue at the closing, and, then, having failed to pay those funds to the mortgage company for over a year.

- An attorney was privately reprimanded for having been guilty of "willful misconduct," in violation of DR 1-102(A)(4), and for having engaged in conduct that adversely reflected on his fitness to practice law, in violation of DR 1-102(A)(6) by having illegally purchased and used marijuana and cocaine.

- A lawyer received a private reprimand for violation of Disciplinary Rule 6-101(A) which states that a lawyer shall not willfully neglect a legal matter entrusted to him, for failing to complete distribution of an estate's assets, and for failing to file a final settlement of an estate, where the estate had been pending for more than ten years. The disciplined attorney had prepared the Last Will and Testament in question and had been named as executor of the estate by that instrument. Subsequent to the death of the testator the disciplined attorney filed the instrument for probate and was named as executor. After a passage of more than ten years a portion of the estate's assets still had not been distributed, and no final settlement had been made by the attorney/executor, who was serving without bond. A panel of the Disciplinary Board determined this to be a violation of DR 6-101(A) and imposed a private reprimand as appropriate discipline.

- An attorney received a private reprimand for violation of Disciplinary Rule 1-102(A)(6) which states that an attorney shall not engage in any conduct that adversely reflects on his fitness to practice law. In this case, the attorney had prepared two different instruments of conveyance which he also witnessed and notarized. In one of the instruments, the captioned grantor did not sign the instrument, but, rather, the notation "deceased 1/28/78" was entered in place of a signature. Nonetheless, the instrument was notarized by the respondent attorney and duly filed for record. In the other instrument the heirs of a certain estate appeared as grantors. Among those heirs was a child approximately six years of age. The child signed the instrument of conveyance and his signature was witnessed and notarized by the attorney with no notation of the child's infirmity and no indication of his capacity to sign. In fact, the child's infirmities of non age had not been relieved and he lacked the capacity to convey his interest in the property. It was determined that the attorney's role in preparing, witnessing and notarizing these instruments, with their obvious defects, adversely reflected upon his fitness to practice law. It was further determined that a private reprimand constituted appropriate discipline for the specified violation.

NOTICE

The legislature by Act 83-744, 1983 Regular Session, increased the appellate courts' docket fee provided for in Rule 35A(1), Alabama Rules of Appellate Procedure from $50 to $100. This increase becomes effective September 6, 1983.

Young Lawyers' Section

Edmon McKinley
President

YLS Reports Successful Seminars and Socials

In Birmingham at the State Bar Convention, the Young Lawyers Section of the Alabama State Bar concluded a very active and well-rounded program for the 1982-83 year. To climax this year's activities, the YLS held a "Recent Developments in the Law" seminar at the Birmingham Hyatt. Over four hundred attorneys were in attendance. The success of the seminar was the result of the hard work of Julie Smeds and her committee.

On Thursday night after the General Membership Reception, the Alabama Young Lawyers Section and the Birmingham Young Lawyers sponsored an evening of dancing and socializing on the balcony of the Birmingham-Jefferson Civic Center. The function was a huge success in that it not only drew large numbers of young lawyers but many of those attending the membership reception also joined in the festivities. A much-deserved note of appreciation must be expressed to Jim Lloyd, president of the Birmingham Young Lawyers, and Carol Smith, of our Executive Committee, for coordinating this fine event. Reggie Hamner, executive secretary, and his staff did an outstanding job of facilitating this event. It is hoped that this sets a precedent for the Young Lawyer affiliates in each of the convention cities to co-sponsor with the YLS a large social function at the conventions. Plans are already under way to sponsor such a function in Mobile next year.

YLS Members Take Leadership Roles

On Friday afternoon of the convention, the Young Lawyers Section met and held its annual business meeting, and an unusually large number of Young Lawyers attended the business meeting. The election of officers of the Young Lawyers Section was held and the following officers were elected for the coming year.

President:	Edmon H. McKinley
President-Elect:	Robert T. Meadows III
Secretary:	J. Bernard Brannan, Jr.
Treasurer:	Claire Black

In addition, the Executive Council of the YLS were recognized. It was reported that William B. Hairston, Jr., president of the Alabama State Bar, requested that I recommend to him a young lawyer to serve as a liaison between the YLS and each of the standing committees and task forces of the Alabama State Bar. Those recommendations were made prior to the convention, and those appointments were made by Bill Hairston. Those various individuals serving as liaisons had been personally contacted by me prior to their recommendation, and they were recognized at the business meeting. Those individuals will serve as a very important link between the YLS and the State Bar and will, in effect, be representing the YLS on those various committees. During the coming year, those representatives will be asked to be present at various Executive Committee meetings and report to the Executive Committee on the activities of the various committees and task forces.

Young Lawyers Nationwide Meet

The week following the Alabama State Bar convention, the American Bar Association met in Atlanta. The Alabama Young Lawyers Section was represented at the Young Lawyers Division (YLD) Assembly by the largest delegation of voting delegates that has represented Alabama in quite some time. In fact, at times there were more Alabama delegates present in the assembly than there were Georgia delegates at which a table was shared. Those Alabama Young Lawyers representing Alabama as voting delegates were: Edmon H. McKinley, Meg Sloan, Wanda D. Devereaux, Mac B. Greaves, Robert D. Eckinger, along with J. Hobson Presley, Jr., who is currently Budget Director of the Young Lawyers Division of the ABA. Those delegates represented Alabama in a very astute and sincere manner. It is always important that Alabama is represented at the YLD functions so that all of Alabama young lawyers will be represented and their concerns expressed to the organization that represents all of the nation's young lawyers.

This year was the year for the election of a district representative from District 10 representing Alabama and Georgia to the Executive Committee of the ABA Young Lawyers Division. At the gathering of the delegates, I was honored to be selected as the District 10 representative to the Executive Council of the YLD for the next two years.

In regard to the activities of the ABA Young Lawyers Division, let me encourage any of you who would like to participate on committees of the YLD to convey that desire to me and I will do whatever I can to see that you are put to work in an area of your choice. Likewise, if you have a concern which you feel should be addressed by the YLD affecting our profession, please let me know and I will contact you about expressing that position to the Resolutions Committee of the YLD.

Many Thanks to Outstanding Past Presidents

In previously mentioning the success of the Alabama YLS, it would be remiss not to express to Norborne C. Stone, Jr., as immediate past president of the Alabama State Bar, and the Board of Commissioners our Section's sincere appreciation for their encouragement and receptiveness last year. Bill Hairston has expressed to me his deep concern for our section in the coming year and his willingness to work with us any way possible. His appointment of those Young Lawyer liaisons mentioned previously is an exemplification of his recognition of the importance of having Alabama young lawyers' points of view expressed to the State Bar committees and task forces. Both he and I are looking forward to a good working relationship in the coming year in areas of mutual interest.

The success of the 1982-83 year for the YLS was in large measure due to the herculean efforts of our immediate past president, J. Thomas King, Jr. He was able to coordinate the various diverse activities of the YLS with a rare combination of diplomacy and forcefulness. He spent many long, lonely hours doing those mundane things that keep an organization running well. He never tired of keeping all of us on the Executive Committee—and particularly me—informed by either letters or phone calls of the many and continuing developments as the YLS year progressed. I must give a personal note of thanks to him for the tremendous job he did in making the task of my becoming the current president easier. In addition, I must thank his wonderful wife, Pam, for giving Tom the encouragement and time to be such an outstanding president and for attending all of the many functions with him through the year.

Executive Committee Broadens Base

In appointing the various members of the Executive Committee, a concerted effort was made on my part to appoint a significant number of first-year members in an effort to broaden the base of the Executive Committee so that the various geographical areas of Alabama would be more effectively represented. In that regard, I would like to note that the various local Young Lawyer groups make outstanding contributions to their local bar associations and to the public in both professional and social activities. Anyone interested in forming a local Young Lawyers association should contact me or Stephen D. Heninger, 7th Floor, City Federal Building, Birmingham, Alabama 35203, for those associations in Jefferson County and north, and J. Bentley Owens III, 1550 First National/Southern Natural Building, Birmingham, Alabama 35203, for those associations south of Jefferson County. These two fine young lawyers are serving as co-chairmen of our state YLS Local Bar Coordinating Committee. In addition, should you wish to participate in the YLS by becoming active on one of the YLS committees, please contact me and I will forward your request to the appropriate subcommittee chairperson.

It is an honor for me to serve as president of the YLS during 1983-84. A very active year is anticipated, and I look forward to working not only with members of the Executive Committee but with as many of you as possible. The work and the strength of the YLS is based on the tremendous energy of the various members of the Executive Committee and those young lawyers who make up the sub committees. Therefore, let me request that any of you who might have a suggestion regarding the work of our section, or who might need assistance from YLS for a local young lawyers project, please contact me, and I assure you that an effort will be made to provide you with an appropriate response.

Edmon H. McKinley

The Final Judgment

Francis Hutcheson Hare
1904-1983

President of Alabama State Bar
1949-1950

On Wednesday, June 22, 1983, Francis Hutcheson Hare, one of Alabama's and America's finest lawyers, passed away.

In his poem, "A Psalm of Life," Henry Wadsworth Longfellow wrote:

"Lives of great men all remind us
We can make our lives sublime,
And, departing, leave behind us
Footprints on the sands of time."

If Longfellow were a poet of this century, Francis Hare might well have been the inspiration for these immortal lines, for there have certainly been few men who left behind such large footprints.

There are many phrases with which tribute may be paid to attorneys, but probably none convey greater respect than the description "a lawyer's lawyer." Francis Hare was truly a lawyer's lawyer, deeply respected by the entire bench and bar, both in and out of Alabama. His colleagues illustrated this respect, by electing him president of the Birmingham Bar Association in 1942-1943, president of the Alabama Bar Association in 1949-1950, and president of the International Academy of Trial Lawyers in 1967.

Francis Hare was a rare and unique character, as well as a tremendous trial lawyer. He was widely known for his wit and would often come up with ideas that, at first glance, seemed shocking. Only after careful reflection and close examination would the shock fade away, leaving behind the deep thought, excellent logic, and true merit of his ideas.

Born in Lower Peach Tree, Alabama in 1904, Francis received his law degree from the University of Alabama and was admitted to the practice of law in 1927. Throughout the last fifty-six years, his contributions to the legal profession seem endless. As the Memorial Resolution of the Alabama State Bar Association states, "To list all of Mr. Hare's contributions and achievements would be impossible. To list none would be an injustice."

One particular major contribution was his work in the advancement of the relationship between law and science, for which he was awarded the Gold Medal Award by the Law-Science Academy of America. Another was his firm insistence that our State Bar Association establish a Continuing Legal Education program.

In addition, Francis served his alma mater as president of the Alabama Law School Alumni Association. He served the judiciary, as a member of the Advisory Committee to the Supreme Court of Alabama, and as an associate justice of the court in 1967.

Through it all, Francis Hare served the law.

There is no question that Francis Hare was a great legal scholar. He had a fine and keen analytical mind. He possessed a perceptive insight, almost beyond belief. His memory was superb, and his integrity beyond reproach. His voice, personality, and manner were all as if tailored to his chosen craft. Together these qualities meshed to make Francis Hare one of the most outstanding trial attorneys of this, or any, era.

One of the most treasured books on my bookshelf was written by Francis Hare. It is entitled, "My Learned Friends: Memories of a Trial Lawyer," and is a reminiscence of his many years as a member of the bar. On the book jacket, there is a quotation about the author which conveys a clear and correct impression of Francis Hare. It comes from Tom Lambert of the Association of Trial Lawyers of America, and reads, "Francis Hare is the Poet Laureate of the American Bar—the complete advocate." From my own personal experiences and observations, I can testify that no truer words were ever spoken.

With sadness we mourn Francis' death, and extend our heartfelt sympathy to his wife Isabelle, his son Francis, and his daughter Lucille.

To remember Francis Hare is to remember a spirit of love and laughter, of wisdom and warmth, of duty and honor. We have all suffered a tremendous loss, but have been left with a joyous legacy—memories of a true "lawyer's lawyer" who has left his footprints in the sands of time.

Senator Howell Heflin

H. P. Feibelman, Jr.

Herbert P. Feibelman, Jr., vice-president of the Mobile Bar Association, died on June 29, 1983, in Mobile. He was fifty years of age.

Bert, as he was called, was born on May 19, 1933, in Vicksburg, Mississippi. He received his undergraduate degree from the University of Alabama where he received the Phi Beta Kappa key, and later graduated from the University of Chicago School of Law. He clerked for the Alabama Supreme Court for one year before moving to Mobile to begin the practice of law. At the time of his death, he was the senior partner in the law firm of Feibelman, Shulman and Terry in Mobile.

Mr. Feibelman will be greatly missed by the Bar, the community and the state, as well as by his family, friends and law partners. He was truly a lawyer who loved his profession and enjoyed his work. He consistently devoted a substantial amount of his time and energy to both civic and professional endeavors throughout his career in an attempt to make this world a better place in which to live. He was well respected by his fellow lawyers for the creativity and imagination which he brought to the practice of law and was admired by everyone who knew him well for his conscientious and unselfish service to others.

In addition to having been vice-president of the Mobile Bar Association at the time of his death, he was serving as vice-president of the National Federation of Temple Brotherhoods and president of the Spring Hill Avenue Temple in Mobile. He was also past president of the International Parents Organization of the Alexander Graham Bell Association for the Deaf, past president of the Alabamians interested in Deafness, past member of the Board of Directors of the Mobile Junior Chamber of Commerce, past vice-chairman of the America's Junior Miss Pageant, and was a member of the Bankruptcy Sub-Committee of the American Bar Association and a member of the Mobile Rotary Club.

Bert is survived by his wife, Phyllis, and two sons, Samuel Frederick and Phillip Lawrence.

J. S. Foster

John Strickland Foster of Birmingham died April 14, 1983. He was seventy-six.

Mr. Foster was born in Birmingham on May 16, 1907. He received his preparatory education at Webb School in Bell Buckle, Tennessee and as a loyal alumnus served later as a trustee of the school. Mr. Foster attended college at Vanderbilt and received his LL.B. from the University of Alabama School of Law in 1931, the year after his admission to the Alabama Bar.

From the day of his graduation from law school until shortly before his death, Mr. Foster was busily and constantly engaged in the practice of law, uninterrupted except for the time spent as a legal officer during World War II. During his long and successful career, he was known as an indefatigable researcher and expositor of the law and was considered to be one of Alabama's leading experts on governmental law and on statutory construction.

As busy as he was, Mr. Foster still found time to serve in many capacities in his community and church. He also loved politics and was active in many campaigns.

Mr. Foster was regarded not only for his sage counsel and tough advocacy, but for his great sense of humor. He will be missed by his friends, family and clients.

Sympathy is extended to his wife, Dorothy, and his two step children, Barbara Fant and Dr. John Howick.

F. W. Nicol

Frederick Walter Nicol, former judge of the circuit court of Tuscaloosa County, died on June 13, 1983. He was seventy-three.

Judge Nicol was born on March 14, 1910, in Tuscaloosa and it was there he chose to attend school and practice law. He was admitted to the Alabama Bar upon graduation from the University of Alabama School of Law in 1934.

For four years before World War II, Judge Nicol was a special agent in the Federal Bureau of Investigation. He served three years in the Army in military intelligence during World War II, and, after the war, he returned to Tuscaloosa to enter the private practice of law. After ten years of law practice, he served as deputy circuit solicitor of the Sixth Judicial Circuit for four years and served five years as circuit solicitor. In 1964 he was elevated to the position of judge of the Sixth Judicial Circuit where he served continuously and with distinction until his retirement on October 1, 1982.

Among numerous other distinctions, during his career, Judge Nicol served as president of the Alabama Circuit Solicitors Association, the Alabama Circuit Judges Association, and the Tuscaloosa County Bar Association. He was an elder in the First Presbyterian Church of Tuscaloosa and was a Mason and Shriner.

Judge Nicol always showed skill, diligence and fairness in his work; compassion for his fellow man; and respect for law and order.

Sympathy is extended to his wife, Rachel; his children, Dorothy, Nancy and Robert; to other members of his family; and to his many friends.

Belcher, William Richard—Phenix City
Admitted: 1935 Died: May 26, 1983

Booker, John William, Sr.—Montgomery
Admitted: 1932 Died: May 5, 1983

Feibelman, Herbert P., Jr.—Mobile
Admitted: 1958 Died: June 30, 1983

Hare, Francis Hutcheson, Sr.—Birmingham
Admitted: 1927 Died: June 22, 1983

Lee, Mickey Martin—Huntsville
Admitted: 1978 Died: June 26, 1983

Noel, James Barney, Jr.—Birmingham
Admitted: 1951 Died: July 11, 1983

O'Rear, William Gunter—Montgomery
Admitted: 1950 Died: July 3, 1983

Smith, Larry Eugene—Arlington, Virginia
Admitted: 1967 Died: May 9, 1983

Sparks, Fielder Guy, Jr.—Anniston
Admitted: 1950 Died: June 28, 1983

Woolf, Roy Michael—Anniston
Admitted: 1927 Died: July 3, 1983

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

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CONSULTANT: Industrial Safety Consultant specializing in consultations, accident investigations, inspections and professional testimony. Fifty yrs. industry and private experience. Fred Melof, 4 Pamona Drive, Birmingham, Alabama 35209. (205) 879-5159.

miscellaneous

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Bar Briefs *Continued from page 251*

called upon to ratify a new Constitution they need to know what's in it."

Hairston said he expected the report to be released in mid-October. The members appointed to the task force include: Harold F. Herring (chairman), Yetta G. Samford, Jr. (vice chairman), Lawrence Dumas, Jr., Joseph F. Johnston, Dean M. Leigh Harrison, Hon. Conrad M. Fowler, Thomas A. Johnston III, George C. Hawkins, John P. Adams, Robert H. Harris, Richard S. Manley, H. Harold Stephens, Joseph H. Johnson, Jr., J. Pelham Ferrell, Ernest C. Hornsby, Louis B. Lusk, Charles D. Cole, James Jerry Wood, John P. Kohn, Champ Lyons, Jr. and W. Ryan deGraffenried.

On July 1, 1983, the Alabama State Bar discount on the AVIS RENT-A-CAR "We Mean Business" unlimited mileage rates was increased to 22%.

The following attorneys admitted to the bar in Spring 1983 were not listed in the July issue of *The Alabama Lawyer:* Robert Lee Aldridge, Birmingham; Deborah Pauletta Anthony, Montgomery; Paul Steven Drake, Tuscaloosa; and James Lynwood Kessler II, Birmingham. Congratulations!

CLE compliance forms for 1983 are being mailed this month. If you do not receive yours by the end of the month, you may request one by calling (205) 269-1515 or writing to the MCLE Commission, P. O. Box 671, Montgomery, Alabama 36101.

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UPCOMING

1983

October 3
Opening of Courts Ceremony, Montgomery

October 7
Board of Commissioners Meeting, Montgomery

1984

February 8-15
ABA Midyear Meeting, Las Vegas

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MON 5 Labor Day	THURS 15 Proving Diminished Earning Power, Tuscaloosa (TTLA), Part 1	FRI 16 Current Developments, Dothan (ABICLE) Employee Benefits, Mobile (MBA)
THURS 22 Current Developments, Huntsville (ABICLE)	FRI 23 Current Developments, Birmingham(ABICLE) Age, Race and Sex Discrimination, Birmingham (BBA)	THURS 29 Current Developments, Mobile (ABICLE) Medical Malpractice, Birmingham (CICLE)
FRI 30 Medical Malpractice, Birmingham (CICLE) Current Developments, Montgomery (ABICLE)		

OCTOBER

MON 3 Opening of Courts Ceremony, Montgomery	WED 5 Estate Planning, Birmingham (CICLE)	FRI 7 David Epstein on Bankruptcy, Birmingham (ABICLE) Board of Commissioners Meeting, Montgomery
FRI 14 Limited Partnerships, Birmingham (CICLE) Alabama Defense Lawyers Association Seminar, Birmingham (ADLA)	THURS 20 Proving Diminished Earning Power, Tuscaloosa (TTLA), Part 2	FRI 21 Real Estate, Montgomery (ABICLE) Proposed ABA Code of Professional Responsibility, Birmingham (BBA) Workers' Compensation, Anniston (CICLE)
FRI 21 Federal Practice, Mobile (MBA)	THURS 27 Real Estate, Huntsville (ABICLE)	FRI 28 Real Estate, Birmingham (ABICLE) Retirement Plans for Lawyers, Birmingham (BBA)

NOVEMBER

FRI 4 Collections, Birmingham (ABICLE)	FRI 11 TEFRA Changes and Pension and Profit Sharing Plans, Birmingham (CICLE)	THURS 17 Appellate Practice, Montgomery (ABICLE) Summation and Argument: The Key to an Adequate Award, Tuscaloosa (TTLA) Part 1	FRI 18 Appellate Practice, Birmingham (ABICLE) Alabama Probate Code, Birmingham (BBA) Real Estate, Birmingham (CICLE)	THURS 24 Thanksgiving Day