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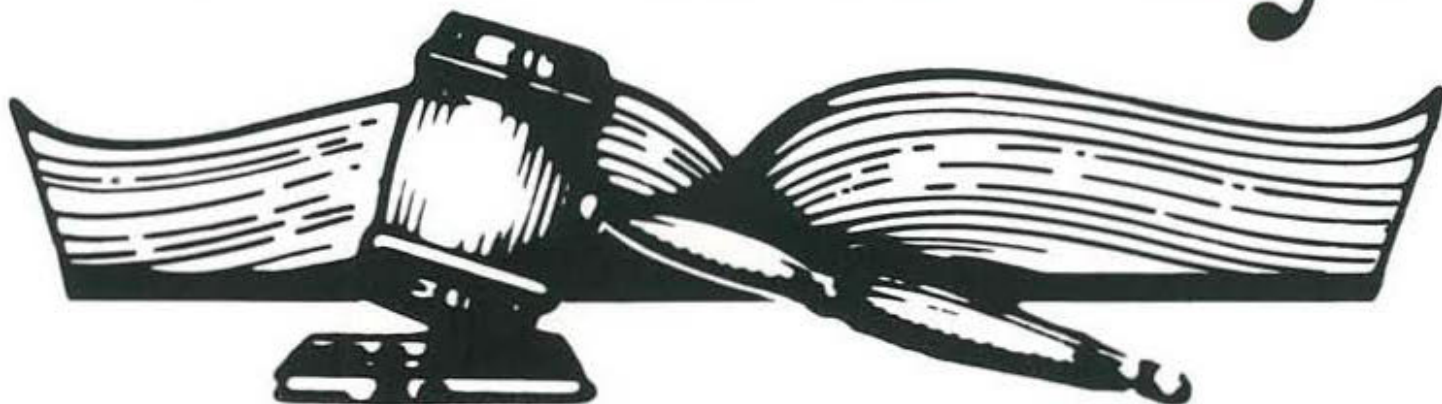
SEPTEMBER 1984



Walter R. Byars

Alabama State Bar
President 1984-1985

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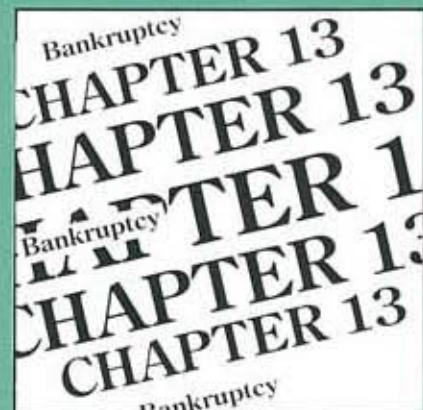
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THE SEPTEMBER



Foreclosure Sale or Bankruptcy Court?

— pg. 248

Bankruptcy practice and procedure remains in an unsettled state. What is the status of the bankruptcy court's jurisdiction over mortgaged Alabama real property?



On the Cover

Pictured in front of the newly restored fountain in downtown Montgomery is Walter R. Byars, who became president of the Alabama State Bar in July.

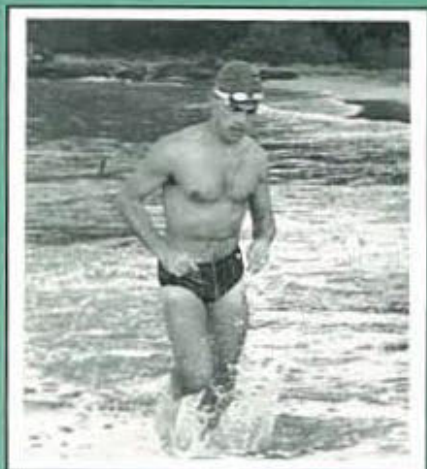


How to Succeed on "Cert"

— pg. 270

Compliance with procedural steps is imperative in obtaining review of decisions of courts of appeals. The scope of review by certiorari is described in Rule 39(k) ARAP.

1984 ISSUE IN BRIEF



Going for the Goal

— pg. 282

Meet Bob Cunningham, a Mobile lawyer who has competed in seven triathlons since his first just one year ago.



Blue Skies Smiling?

— pg. 295

Most practitioners probably have little familiarity with the Alabama Securities Act. Knowledge of this legislation is important since the enactment has sweeping parameters.



Annual Meeting Highlights

— pg. 302

The consensus is that *everyone* enjoys Mobile conventions. See highlights of the 1984 Alabama State Bar Annual Meeting... in pictures... inside. This photo of Mobile, which has been used in connection with the convention this year, was taken by assistant general counsel John A. Yung IV.

Correction

In the July issue you met our new bar commissioners; however, because of a typographical oversight, we would like to reidentify A.J. Coleman of Decatur. We had him listed as R.J. Coleman. Please excuse our mistake.

Upcoming

October 31 — November 1, 1984

Foreign Sales Corporation Seminar
(Replaces Exporters DISC)
Point Clear

July 25-27, 1985

Alabama State Bar
Annual Meeting
Huntsville

Regular Features

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BYARS

President's Page

A Year of Challenge . . and of Opportunity

In my first report to you as president of the Alabama State Bar, I must acknowledge with humility that you have bestowed upon me your highest honor and my greatest honor by choosing me to serve as your president. You also have presented me with an awesome responsibility, and I shall endeavor to carry on in the fine tradition of those who have served before me with distinction. I pledge to you my talents and best efforts, with full realization that I have large shoes to fill.

The State Bar's Annual Meeting in Mobile, under the leadership of Bill Hairston and the planning and guidance of Reggie Hamner, was, in my opinion, our finest convention. We had 889 lawyers registered — the largest ever. The Riverview Plaza was an excellent choice of physical facilities, and the Mobile Bar and convention committee provided us with all the best in Mobile hospitality. The Bar program was outstanding from an educational, business, and social standpoint.

The 1984-85 year is one of challenge to lawyers, to the bench and bar, and to our legal system. I inherit the reins of a viable, active organization with many excellent ongoing programs. Still, there is so much to be done. The stakes are high — the preservation of our profession and of our legal system.

During the preceding year, there

were forty-two committees and task forces in place as a result of the early appointment by the then president-elect. For the coming year, there are fifty-one which were, again, in place by the time of the Annual Meeting, actively pursuing the Bar's programs for the coming year. The enthusiasm of the leadership and membership of these committees and task forces was demonstrated by the attendance of more

"As lawyers, we must expect more of ourselves and must conduct ourselves ethically, professionally and competently."

than three hundred at the committee breakfast held in conjunction with the Annual Meeting in Mobile. Each committee or task force has an important role in our collective effort toward success of our bar, our profession and our legal system.

Our major challenge is our poor public image — how the public perceives lawyers. Our best opportunity is to project to the public our true image — that

lawyers are the protectors of their system of government of laws, rather than by men, of their personal and property rights and of their freedoms.

Much of the public's cynicism with lawyers arises out of its lack of understanding of our legal system and the lawyer's role in that system, and because of the escalating cost and expense of litigation. A task force has been charged with responsibility of studying and evaluating alternative means of dispute resolution. Further, the Task Force on Appellate Courts has been established to review the needs in the area of appellate review, to recommend changes in the present system that would benefit the processing and review of cases, and to determine whether or not our rules of procedure minimize the need of appellate review.

Some of our image problem may well come from media coverage of the criticism of lawyer competency from high places. Your bar has already established a successful mandatory continuing legal education program. Now its committees and task forces are considering and evaluating legal education, preadmission apprenticeship/internship programs, peer review, specialization, and judicial evaluation of lawyers as means of increasing lawyer competency.

(Continued on page 246)

Executive Director's Report



HAMNER

Conventions Three

Mobile, 1984

The many compliments that have been received on our Mobile annual meeting plus the record registration have been gratifying. Every meeting and program, with one exception, was filled to capacity.

The Riverview Plaza and its staff were outstanding. All the planning in the world without a dedicated hotel staff would be useless. This year was even more remarkable since the bar and the hotel were new to each other.

The Mobile Bar exhibited its customary hospitality that evokes the triennial inquiry of, "Why can't we meet in Mobile every year?" President Sage Lyons, local arrangements chairman Chris Hume, bar auxiliary president Moren Riley, and Mobile bar executive director Barbara Rhodes could not have been more supportive. They and the many committee members with whom they worked are due our collective thanks. The Mobile Bar has been called to perform double duty this 1984 year. It recently hosted the Eleventh Circuit Judicial Conference in May.

The Young Lawyers' Section Update '84 was the best ever! Carol Ann Smith and her committee members, along with MCLE Staff Director Mary Lyn Pike, did a superb job in coordinating the outstanding presentations. We had over four hundred people present in

each of our sessions.

Socially, the Dessert and Nightcap Party was a tremendous success. This new event, along with the Jazz Brunch on Saturday, was well attended. Spann Milner and Insurance Specialists, Inc., hosted the general membership cocktail reception on Friday evening before dinner, and this new activity proved to be one of the more popular.

I was particularly gratified that we were able to present ABC's Tim O'Brien to our Bench and Bar sell-out audience. I called Tim on Tuesday night after arriving at the Riverview to find a callback from Fred Graham advising me that CBS required his presence at the DeLorean trial in L.A. and he would be unable to keep his commitment with us for Thursday. I had worked with Tim at a Media-Law Conference in 1980 and found him to be the real professional he showed himself to be in Mobile.

Mobile would normally host the 1987 annual meeting; however, at this time, we are hoping to work Montgomery back into the annual meeting rotation. The convention plans for 1987 will be dependent upon the completion of the new Town Center Hotel which is scheduled for downtown Montgomery.

Huntsville, 1985

Huntsville will host the 1985 annual

meeting on July 25, 26 and 27. W.H. Griffin, the new president of the Huntsville-Madison County Bar, has begun making appointments to the local arrangements committee. It should be noted that the 1985 meeting is a week later than normal; however, these dates were selected to permit those persons desiring to attend the ABA meeting and its London segment the opportunity to do so. The 1985 ABA annual meeting convenes on July 4 in Washington, D.C. The meeting then recesses and reconvenes in London.

The state bar will offer a two-week INTRAV Adventure with the itinerary starting in Ireland and a subsequent intermediate stop in Scotland. The Adventure concludes in London on days 2, 3, 4 and 5 of the ABA annual meeting. Brochures announcing this trip will be mailed in August.

Birmingham, 1986

The Birmingham Hilton will be the headquarters hotel for the 1986 annual meeting on July 16, 17, 18 and 19. The Hilton is renovating a former academic building at the University of Alabama in Birmingham and this will be connected to the main hotel, giving that property an excellent conference facility.

(Continued on page 292)

President's Page

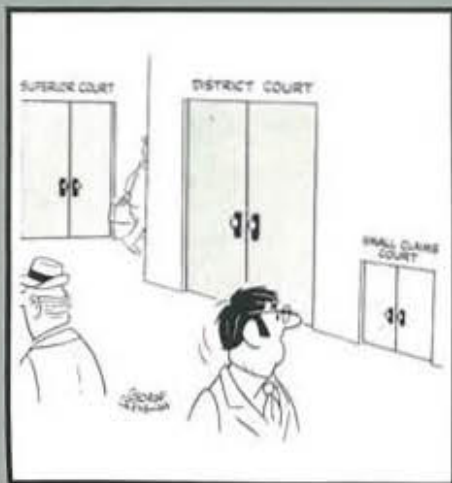
(From page 244)

All is not well with the legal profession. We cannot assume that the public's indictment of lawyers is totally ill-founded or based solely upon misunderstanding or unwarranted criticism. We must not find comfort in the comparison that lawyers are no worse than is society as a whole. Your bar is pursuing, and will continue to pursue, an active program of lawyer self-evaluation and self-improvement. As lawyers, we must expect more of ourselves and must conduct ourselves ethically, professionally and competently. We shall stand above the crowd and regain the public's respect.

As your elected leader of your bar association, I shall strive to provide you with bold, imaginative leadership to meet the challenges. But this is no solo dash to glory; we can succeed only with a team effort. Together, we Alabama lawyers shall meet the challenges. We shall seek and provide realistic solutions to our problems.

I am willing, and I am certain that you are willing to join with me, to push our bar and our profession forward IN THE PURSUIT OF EXCELLENCE — NOW AND IN THE FUTURE. □

— Walter R. Byars



Letters to the Editor

Policing our own ranks

I am a 1981 graduate of Cumberland Law School and admittee to the Alabama Bar. I am a major in the Marines and currently en route to Japan where I will serve as military judge. At the time of this writing I am 35,000 feet over middle America and have just finished my May issue of *The Alabama Lawyer*. Permit me to say, with the greatest respect for the Board of Commissioners, that their decisions in the Disciplinary Report section are, it seems to me, appalling. False statement under oath, willful disobedience of a judicial order, willful negligence of a client's legal interests, and the rest seem to me to be woefully poor standard-bearing, disparaging our profession and casting discredit upon the vast majority of competent, hard-working professionals. Alabama is not alone (last year an attorney and public servant in North Carolina was *fined and censured* for dealing illicit drugs), but that's no excuse. Lawyers today are not held universally in high regard by the general public. If we fail to properly police our own ranks, how can we blame them?

Japan

Eugene V. Kelley, Jr.

Concurring with letter

I would like to concur, absolutely, with the writer of the letter to you, regarding the recording of conversations by attorneys, that you published on page 188 of your July 1984 issue.

What he said is certainly true, and I do not think it could have been said any better. I had intended to write such a letter myself but can now only join in agreement with him. I used the transcript of such a recording in court and, in my opinion, it won the case for me. It is the best way to preserve the facts of the conversation.

Mobile

J. Glenn Cobb, Jr.

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. Members of the Alabama State Bar 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 of concern to the bar membership. The editor reserves the right to select excerpts therefrom to publish. 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 should be sent to: The Alabama Lawyer, Letters to the Editor, P.O. Box 4156, Montgomery, Alabama 36101.

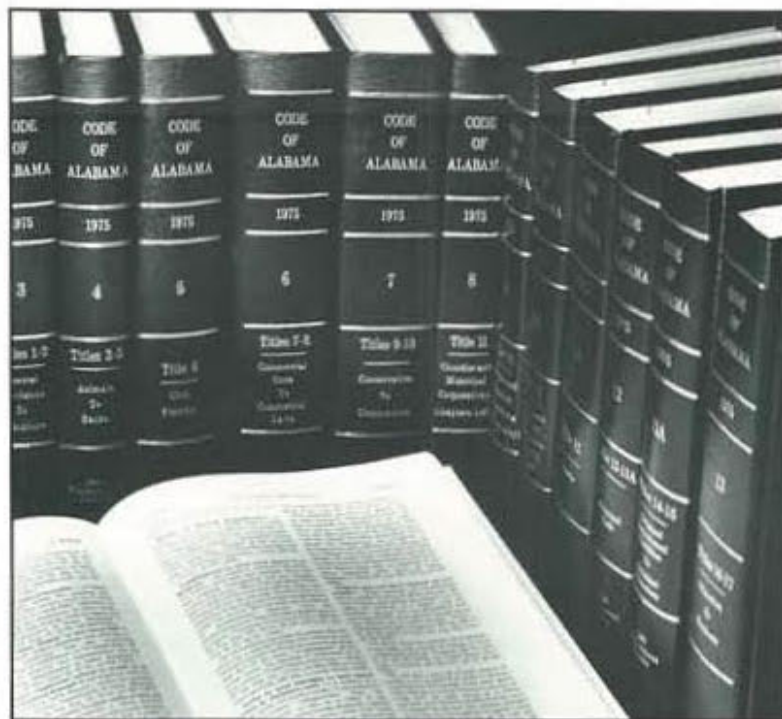
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The Title Question: Do Bankruptcy Courts Have Jurisdiction Over Mortgaged Alabama Real Property?

by
Romaine S. Scott III

When the gavel sounds, will it be the auctioneer's at the foreclosure sale or the judge's in bankruptcy court? This is the question many mortgagees ask when a mortgage goes into default. In Alabama, a different question should be asked by the mortgagee when the defaulted mortgagor files Chapter 13 bankruptcy: Does the bankruptcy court have jurisdiction over the mortgaged real property sufficient to stop the

mortgagee from proceeding to foreclosure? The answer, in theory, at least, is that bankruptcy courts do not have the jurisdiction over mortgaged Alabama real property necessary to keep the mortgagee from foreclosing.

The question of jurisdiction in the mortgaged real estate context is not predicated on a challenge of the bankruptcy court's basic powers pursuant to *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S.

___, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982), but is based on issues raised by a fact ignored by Congress in drafting the Bankruptcy Code and by the Supreme Court of the United States in applying the provisions of that code: Alabama is a *title* state. Recognition of that simple fact by the bankruptcy courts should, again in theory, have an enormous effect on the rights of mortgagees in Alabama whose mortgagors file Chapter 13 bankruptcy after defaulting in the terms of their mortgages.

The Scenario

Mr. Mortgagor executes a mortgage to Mortgage Company to secure an indebtedness evidenced by a note also executed to Mortgage Company the same day. The note recites that if any payment required by the note is not made when due, Mortgage Company may declare the entire indebtedness immediately due and payable.

The mortgage is a standard form mortgage deed used in Alabama and provides that Mr. Mortgagor, for and in consideration of the indebtedness to and the payment of ONE DOLLAR (\$1.00) by Mortgage Company, "does hereby grant, bargain, sell, assign and convey unto the said mortgagee the following described real property situated in Paradise County, Alabama, to-wit:

Lot 55, Lilly Pad Subdivision, according to plat thereof recorded in Map Book 9, page 161 of the records in the Office of the Judge of Probate, Paradise County, Alabama. . . ."

The mortgage also provides that, in the event of Mr. Mortgagor's default in payment or in the performance of any obligation imposed by the mortgage, Mortgage Company has an immediate right to possession as well as the option to accelerate the indebtedness. Mortgage Company is not required to notify Mr. Mortgagor of his default before Mr. Mortgagor loses his right to possession because, under the terms of the mortgage, the loss of that right is automatic upon actual default.

The mortgage further provides that a foreclosure sale may be held, regardless of whether Mortgage Company has taken actual possession, after no-



Romaine S. Scott III, a member of the Mobile law firm of Inge, Twitty, Duffy & Prince, received his B.A. degree from Washington and Lee University in 1974 and his law degree from Cumberland School of Law in 1980. Mr. Scott is a charter member of the Bankruptcy and Commercial Law Section of the Alabama State Bar and presently serves on the Board of Editors of The Alabama Lawyer.

tice of the sale date, time and place has been advertised for three consecutive weeks in a newspaper of general circulation published in Paradise County. Mortgage Company also has the right, under the terms of the mortgage, to purchase the property at the foreclosure sale.

Mr. Mortgagor defaults in payment of the indebtedness and, before Mortgage Company can hold its foreclosure sale, Mr. Mortgagor files a petition in bankruptcy court to commence a Chapter 13 case. Mr. Mortgagor now is Mr. Debtor and has listed in Schedule B-1, attached to his petition, the real property described in the mortgage to Mortgage Company, indicating he believes he owns the property. Mortgage Company is now normally considered to be Mr. Secured Creditor in the bankruptcy case. It is at this point, however, that Mortgage Company should assert the argument that Alabama is a title state and, therefore, the bankruptcy court has no jurisdiction to stop it from proceeding to foreclosure.

The Argument

The initial question is whether 11 U.S.C. §541, which defines interests subject to becoming property of the debtor's estate, is intended to pull mortgaged real property into the estate in Chapter 13 when the law of the state in which the real property is located provides that a mortgagor does not have legal title to the property unless and until such time as the note secured by the mortgage has been fully paid. If the mortgagor has no legal title to the mortgaged real property when he files bankruptcy, it should not become property of the debtor's estate. Therefore, the bankruptcy court should have no jurisdiction over the legal title to the real property and the automatic stay imposed by 11 U.S.C. §362 should not apply to prevent the foreclosure of a mortgage on that property.

Property of the Debtor's Estate and Jurisdiction

Federal case law dealing with how a bankruptcy court is to determine what property interests are to be included in the debtor's estate under 11 U.S.C.

§541 establishes two important principles: (1) The bankruptcy court has no subject matter jurisdiction over property interests not in the debtor's estate, and (2) State law determines the nature and extent of the debtor's interest in property. See, e.g., *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979); *In re Fair Department Store*, 26 B.R. 611 (S.D. Ala. 1982); *Lancaster v. Key*, 24 B.R. 897 (E.D. Tenn. 1982); *Georgia Pacific Corp. v. Sigma Service Corp.*, 22 B.R. 984 (M.D. La. 1982); *In re Lunsford*, 12 B.R. 762 (Bkrtcy. Ala. 1981); *In re Lambert*, 34 B.R. 41 (Bkrtcy. Colo. 1983); *In re Mass. Auto. Transmissions, Inc.*, 35 B.R. 328 (Bkrtcy. Mass. 1983), and *In re Vermont Real Estate Investment Trust*, 25 B.R. 813 (Bkrtcy. Vt. 1982).

A concise indication that only the debtor's interests in property become property of the debtor's estate and, more importantly, that the bankruptcy court has jurisdiction to deal only with the actual interest the debtor has in the property is set forth by Judge W. Brevard Hand in his decision in *In re Fair Department Store*, *supra*, which states:

As mentioned above, a debtor may commence a bankruptcy case by filing a petition under Section 301 of the Code. Once such a petition is filed, the bankruptcy estate is created. It consists of, *inter alia*, "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. 541(a) (1) (emphasis supplied). The legislative history makes clear the provision was not intended to expand the debtor's rights against others. . . .

In short, Section 541 does not expand the debtor's interest in property. [Citation omitted]. Once it was seized, the debtor had only a residual interest in the property in question . . . since the levy and seizure had for all practical purposes transferred ownership of the property to the United States prior to the filing of the petition in bankruptcy. Therefore, the Bankruptcy Court had no jurisdiction to order the turnover of the property to the debtor.

26 B.R. at 613. Judge Hand held that a seizure of property by the Internal Revenue Service which occurred prior to the filing of the bankruptcy petition

effectively transferred ownership of the property to the United States so that the property was not in the debtor's estate and, therefore, the bankruptcy court had no jurisdiction over the property. See 26 B.R. at 614-15. The United States Supreme Court dealt with the same basic fact situation in *United States v. Whiting Pools*, ___ U.S. ___, 76 L. Ed. 2d 515, 103 S. Ct. ___ (1983) and held that, in a Chapter 11 case, several bankruptcy code provisions read together with the legislative history may expand a debtor's interests in property under some circumstances. The court, however, did not alter the basic premise that, if the property interests are not property of the estate, the bankruptcy court has no jurisdiction to deal with them.

Similarly, a clear statement that the bankruptcy court must look to state law to ascertain what interests a debtor has in property, and, consequently, what property is subject to the court's jurisdiction, is set forth in *In re Lambert*, *supra*, as follows: "It is clear that state law determines the nature, extent and effect of the debtor's (and therefore the estate's) interest in property." *Id.* at 42. Accord *Butner v. United States* and *In re Drewitt*, *supra*. The United States District Court in *Georgia Pacific Corp.*, *supra*, elaborated on this principle of bankruptcy law, stating:

The trustee in bankruptcy succeeds only to the title and rights in property that the debtor possessed. [Citation omitted]. Where bankruptcy law deals with property rights regulated by state law, federal courts will look to the state law and the state court decisions to determine what those property rights are.

Id. at 985-86. Finally, the Federal District Court in Tennessee sets forth the following as a policy consideration which, although addressed in terms of the trustee's rights, applies by analogy to the jurisdiction of the bankruptcy court:

Only property interests owned by the bankrupt are his property and vest in the trustee. In *Pearlman v. Reliance Insurance Co.*, the Supreme Court set forth the parameters of the trustee's authority. 371 U.S. 132, 83

SKI STEAMBOAT SPRINGS.

**FEBRUARY
16-23**

The Steamboat Gondola



This February make plans for you and your family to join us on our Second Annual Alabama Ski Trip. This year it's Steamboat Springs, Colorado. In July we previewed this beautiful ski area for the 1985 season to make final preparations for our February trip. Our reservations have been made at the Steamboat Sheraton which is at the base of Mt. Werner and conveniently located between the Ski Center & Ski Time Square. This modern hotel is a ski-in/ski-out location and offers all the amenities, including hot tubs, swimming pool, saunas, ski storage and even a gameroom for your kids! We have also arranged for group ski rentals, lift tickets and lessons. In addition, we can provide you with information about Professional and Investment Seminars that are available in Steamboat.

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S.Ct. 232, 9 L.Ed. 190 (1962).

The Bankruptcy Act simply does not authorize a trustee to distribute other people's property among a bankrupt's creditors . . . property rights existing before bankruptcy in persons other than the bankrupt must be recognized and respected in bankruptcy.

Id. at 135-136, 83 S.Ct. at 234-235.

Id. at 898. The Honorable Rodney R. Steele, bankruptcy judge for the Middle District of Alabama, also has held that the bankruptcy court does not have jurisdiction over property interests which are not subject to the debtor's estate. See *In re Lunsford, supra*.

A Title State

That Alabama is a title state in which a mortgagor conveys his legal title to the mortgagee when he executes a mortgage to said mortgagee is beyond question. See *Foster v. Hudson*, 437 So. 2d 528 (Ala. Sup. Ct. 1983); *First National Bank of Mobile v. Gilbert Imported Hardwoods, Inc.*, 398 So. 2d 258 (Ala. Sup. Ct. 1981); *Trauner v. Lowrey*, 369 So. 2d 531 (Ala. Sup. Ct. 1979); *Jones v. Butler*, 286 Ala. 69, 237 So. 2d 460 (1970); *McCary v. Crumpton*, 267 Ala. 484, 103 So. 2d 714 (1958); *Garst v. Johnson*, 251 Ala. 291, 37 So. 2d 183 (1948), and *Mallory v. Agee*, 226 Ala. 596, 147 So. 881 (1932). See also §35-10-26, Ala. Code 1975. The property interests created by a mortgage are defined generally in *Trauner v. Lowrey, supra*, by the Alabama Supreme Court as follows:

Alabama classifies itself as a "title" state with regard to mortgages. Execution of a mortgage passes legal title to the mortgagee. [Citations omitted]. The mortgagor is left with an equity of redemption but upon payment of the debt, legal title reverts in the mortgagee. §35-10-26, Code of Alabama 1975. The equity of redemption may be conveyed by the mortgagor, and his grantee secures only an equity of redemption. [Citation omitted]. The payment of a mortgage debt by the purchaser of the equity of redemption invests such purchaser with the legal title. [Citation omitted]. The equity of redemption in either case, however, is extinguished

by a valid foreclosure sale, and the mortgagor or his vendee is left only with the statutory right of redemption. §6-5-230, Code of Alabama 1975.

369 So. 2d at 534. The Alabama Supreme Court, in *Mallory v. Agee, supra*, went even further in defining the respective interests a mortgagee and mortgagor have in the mortgaged property, stating:

We merely incidentally as a premise refer to the principle established in Alabama that a mortgage on real estate passes to the mortgagee a fee simple title, unless otherwise expressly limited. [Citations omitted] . . .

The mortgagor, before or after default, except by agreement, does not possess even the right of possession, as against the mortgagee.

226 Ala. at 599-600, 147 So. at 882-883. A thorough reading of Alabama case law and legislation defining the mortgagor's interest in real property makes clear that once the mortgage has been executed, the mortgagor has no legal interest in the property but has an equitable right of redemption.

Title and Jurisdiction

The theory that the bankruptcy court has no jurisdiction over legal title to real property mortgaged by the debtor is based on reasoning supported by the juxtaposition of Alabama mortgage law against the requisites of 11 U.S.C. §541 and federal case law which requires that the bankruptcy court look to the law of the state in which the mortgaged real property is located to determine the interests remaining to the mortgagor after the mortgage is executed and after a default in the terms of the mortgage has occurred.

In Alabama, when the mortgagor executes his mortgage to the mortgagee, he conveys all his right, title and interest in the real property to the mortgagee and retains an equitable right to redeem the property by satisfying the indebtedness. He also receives under the terms of the mortgage the right to possess the real property, but that right of possession is contingent upon the mortgagor avoiding default. When the mortgagor does default in

payment, he, at the moment of default, loses his right to possess the mortgaged real property. See generally *Mallory v. Agee, supra*.

The Right of Redemption as a Property Interest

The issue remains whether the debtor's equitable right of redemption prior to foreclosure is a property interest under Alabama law. That question has not been specifically addressed although Alabama law defines the statutory right of redemption after foreclosure as a personal privilege and not an interest in property. See §6-5-246, *Ala. Code* 1975 and *Foster v. Hudson, supra*. Notwithstanding the strong language found in the Alabama Code which states that the statutory right of redemption is a personal privilege, the United States Supreme Court, in *Wragg v. Federal Land Bank*, 317 U.S. 325, 84 L. Ed. 273, 63 S. Ct. 273 (1943), held, in effect, that there is no difference between the equitable right of redemption before foreclosure and the statutory right of redemption after foreclosure, at least for bankruptcy purposes, so that both rights of redemption may be considered property rights for bankruptcy law purposes. Consider *Southwestern Bank of Lauderdale County v. Internal Revenue Service*, No. CV 82-HM-5236-NW (N.D. Ala. February 16, 1984).

The mortgagee should assert that, regardless of whether the equitable right of redemption is property of the debtor's estate, the right of redemption would not be disturbed by conveyance of the legal title to the mortgaged real property even if such conveyance were made pursuant to a foreclosure proceeding. Upon foreclosure, the equitable right of redemption is actually extended by Alabama statute so the mortgagee's foreclosure action would have no practical effect on the right to redeem regardless of whether such a right is an interest which is property of the debtor's estate. See generally *Foster*, *First National Bank of Mobile*, *Trauner*, and *Mallory, supra*.

That the equitable right of redemption is retained by the debtor after execution of the mortgage and that the right may be a property interest does

not prevent the mortgagee from conveying legal title to the mortgaged real property prior to default because, in such a conveyance, a purchaser takes title subject to the debtor's right of redemption. The same is true after the debtor defaults because even after a foreclosure sale he has a right to redeem the property. Filing a petition in Chapter 13 bankruptcy does nothing to alter the situation.

The foreclosure sale of the mortgaged real property further would not deprive the debtor of any possessory interest in the property because the right to possession was terminated when the debtor defaulted under the mortgage. See generally *Mallory, supra*. The debtor had the right to possess the premises only for so long as he complied with the terms of the mortgage and, when he ceased to comply with the terms of the mortgage, any possessory interest he had immediately ended. The default is the event which gives the mortgagee the right to possession and, when the default occurs before the debtor files his petition, the bankruptcy court should not allow the terms of the mortgage to be altered to give the debtor the right to remain in possession. See generally 11 U.S.C. §1322(b) (2) and (5).

The Bottom Line

In Alabama, the mortgagee acquires legal title when the mortgagor executes the mortgage and further acquires the right to possess the mortgaged property when the mortgagor defaults under the terms of the mortgage. A foreclosure sale held after the

mortgagor files his petition in Chapter 13 bankruptcy does not alter any property right or interest he had at the time of the commencement of his bankruptcy case. The mortgagee's legal title and right to possession should not be interests included in the debtor's estate and, therefore, should not be subject to the bankruptcy court's jurisdiction. Not being subject to the jurisdiction of the court, the mortgagee's rights should be free from any of the constraints imposed by the Bankruptcy Code, including the automatic stay of 11 U.S.C. §362.

Again, the approach espoused by this article appears to be theoretical in that there are no published opinions dealing directly with the pertinent issues. There are indications in existing bankruptcy case law that the theory is well worth putting to the test. Failure to attempt to find new solutions to the problems confronting a real estate-secured creditor in Chapter 13 bankruptcy does nothing but increase the risk that the sound of the foreclosure auctioneer's gavel will be even more seldom heard. □

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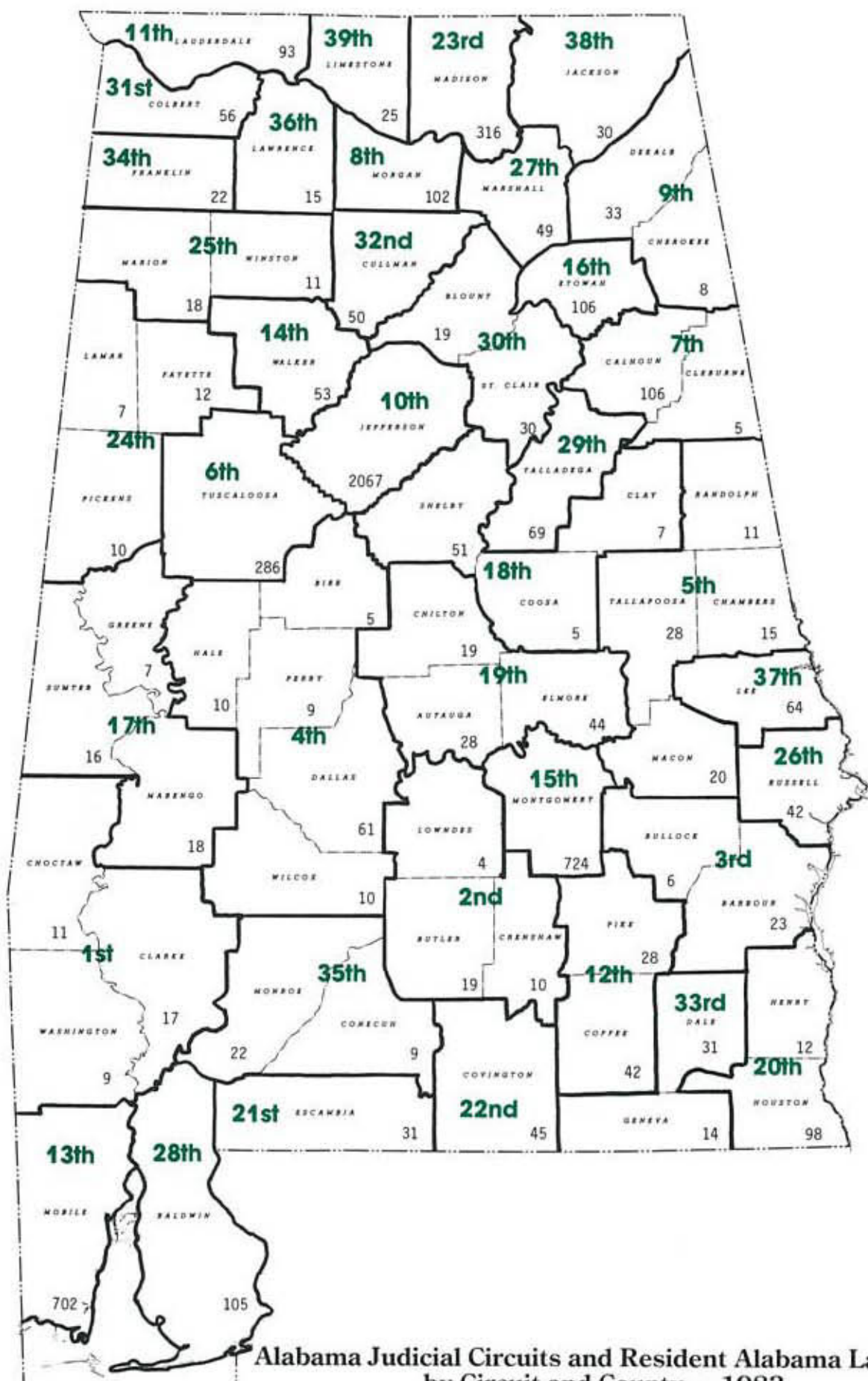
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Committee on Governance Seeks Input . . .

The Committee on Governance of the Alabama State Bar is seeking comments and suggestions from members of the association concerning issues it is presently facing. The committee, chaired by Commissioner Gary C. Huckaby of Huntsville, has been charged with studying the size, make up, and organization of the Board of Bar Commissioners; possible reapportionment of the board; the nomination of lawyers to stand for president-elect of the association; the procedure used to fill that office; and the legal authority for bar governance. Also serving on the committee, which is organized into four study groups, are:

Reapportionment

John F. Proctor (vice chairman),
Scottsboro
Frederick G. Helmsing, Mobile
Fred D. Gray, Tuskegee

House of Delegates-Board of Governors Approach

Alex W. Newton, Birmingham
Roger H. Bedford, Jr., Russellville

Election of the President

Alan C. Livingston, Dothan
William O. Kirk, Carrollton

Legal Authority for Bar Governance

Caroline E. Wells, Mobile

. . . on Reapportionment of Board of Bar Commissioners

Presently, the Board of Bar Commissioners is made up of elected representatives from each of the thirty-nine judicial circuits, each circuit having one representative and one vote. Sixty-seven percent of Alabama's attorneys reside within five circuits — Madison, Mobile, Montgomery, Jefferson and Tus-

caloosa counties. Some of the larger bar associations within the Alabama State Bar have stated that they are under represented and have called for action by the bar.

. . . on Method of Choosing the President-elect

Some members of the bar have proposed that the method of choosing the president-elect be changed from voting by those present at the annual meeting to a mail ballot by all of the membership. State Senator Gary Aldridge, a member of the bar, filed a bill to effect such a change in the last legislative session but withdrew the bill in order to give the bar a chance to study the matter.

. . . on Legal Authority for Bar Governance

In studying the organization of the Bar, the question arises as to whether the Supreme Court of Alabama or the Legislature is the proper body to create the legal structure of the bar. The Board of Bar Commissioners is organized under Sections 34-3-40 through 34-3-44, *Code of Alabama* (1975). The Supreme Court of Alabama has held that the Alabama State Bar, in its disciplinary and admission functions, acts as "an arm of the Court." The committee is also studying this issue.

The Committee on Governance anticipates conducting an open meeting on these matters during the 1985 Mid-year Meeting of the bar in March. In the meantime, please address your comments and suggestions to: Committee on Governance of the Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101. □

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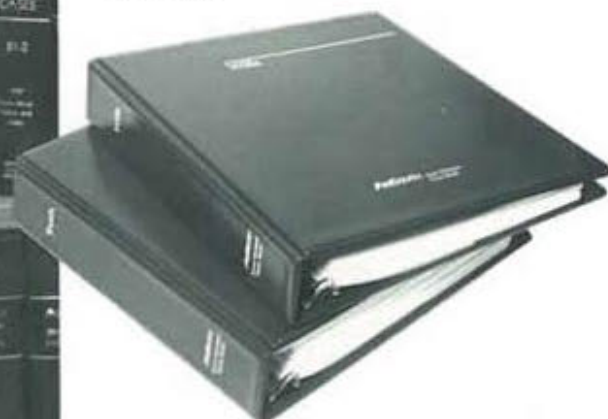
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Meet Walter R. Byars

Walter R. Byars was passed the gavel at the conclusion of the 1984 Alabama State Bar Annual Meeting held in Mobile and, hence, officially became the president of the association.

President Byars, a 1952 graduate of the University of Alabama School of Law, is a partner in the Montgomery law firm of Steiner, Crum & Baker. A member of the Montgomery, Alabama, and American Bar Associations, he has been actively involved in their leadership. He has served as president of the Alabama State Bar's Young Lawyers' Section, and also served on the executive council of the ABA Young Lawyers.

Byars served as president of the Pike County Bar Association in 1955 and as president of the Montgomery County Bar Association in 1979. During that year, under his leadership, the Montgomery County Bar was given the ABA Award of Merit for Overall Excellence.

Byars is a Fellow of the International Society of Barristers where he served on the board of directors and was president during the 1982-83 year. He, also, is a Fellow of the American College of Trial Lawyers.

The following interview with President Byars was conducted by Robert A. Huffaker, editor of The Alabama Lawyer and a member of the Montgomery law firm of Rushton, Stakely, Johnston and Garrett:

Now that you have ascended to the presidency of the bar association, what specific goals will be the focal point of your administration?

The number one goal is the improvement of the image of lawyers and, with that, the improvement of the profession. This is not an easy task. We have some specific ideas in this regard that we hope will prove fruitful in letting the public see lawyers in their true role — which is to protect their legal rights and their freedoms.

Do you think that the perception that the public has of lawyers in this state is worse than it was five years ago or ten years ago?

Yes, I do. I believe that there has always been a lack of understanding on the part of the public as to the role of the lawyer. That's not anything new, but I do believe that the public perception of the lawyer and the legal profession is not as good as it was some years ago.

Why has our perception in the eyes of the public deteriorated?

Some of it stems, I think, from criticism that has come from high sources such as Chief Justice Burger and former President Carter. This criticism has gained media attention and, in my opinion, the media coverage has

had a great influence on the public in this country with regard to its perception of lawyers. Further, the shift from professionalism to commercialism in the practice of law has brought on more criticism from the public.

One of the issues involved is the fact that the competency of lawyers has been challenged. We have set forth some specific task forces that will study and evaluate methods or means of improving or increasing lawyer competency such as peer review and judicial evaluation of lawyers.

What do you think the organized bar can do to correct or remedy the apparently poor public perception that we have?

It is really a matter of education. It is a matter of educating the public as to the true role of the lawyer, as to the roles of the courts, and the proper place of the judiciary within our system of separation of power and checks and balances. It also involves educating lawyers so that they will practice ethically and with more competence. Then lawyers will reflect a better image to the public than at the present time.

All lawyers are not bad, and all lawyers are not good. Maybe we are no better or no worse than a cross section of society in America, but being no worse or no better is not acceptable as far as I am concerned. I believe that the legal profession is the noblest of the professions, and that lawyers must conduct themselves ethically, professionally and competently so that the public perceives the proper image of lawyers, of the legal profession and of our legal system.

With respect to education, do you think that the mandatory CLE programs that we have had have helped in the educational process of lawyers?

I certainly do. There are so many laws being passed these days by the legislative branch of government, both nationally and in Alabama. There also are many changes in case law. A lawyer cannot read and digest all the materials available. The best way for a lawyer to educate himself on these changes is to attend seminars. CLE sponsors seminars on specifics that are more in depth on a particular subject and seminars that bring lawyers up to date on the current developments in the law. This is of a tremendous educational impact on lawyers.

We already have in place an outstanding mandatory CLE program. Not only is it outstanding in its content, but in its acceptance by the bar. The most recent survey conducted by the supreme court shows that 79.8% of the lawyers in Alabama approve of mandatory CLE.

Do you see any changes being made in the mandatory CLE programs that we have in this state?

The survey conducted by the bar indicated that there should be more specialization in seminars so that lawyers can pick topics which relate most closely with the type of practice that those lawyers maintain.

Do you think that we will see in the immediate future some type of a certification program for lawyer specialties?

We have appointed a task force to study specialization. Some years ago when the Board of Bar Commissioners adopted mandatory CLE it took that as an option rather than specialization. However, the law is growing more complicated and growing in the fields of specialties. For this reason, specialization is a matter that needs to be studied and an educated determination made as to whether Alabama lawyers and the Alabama State Bar are ready for specialization, including whether lawyers, through some form, may acquaint potential clients with the fact that they are engaging in or limiting practice to specialties. There are more and more lawyers who are specializing.

I don't know really how I feel personally about specialization. I do feel that lawyers should specialize or should have self-imposed negative specialization if they know they are unacquainted with a particular field. Trial practice for instance. A lawyer without trial experience shouldn't attempt to try a lawsuit without assistance. He can associate a lawyer who does try lawsuits. After trial experience is gained through association, then a lawyer may become a specialist or, at least, competent to try lawsuits. Or the same could be true of a federal tax matter. At one time, I prided myself on keeping up with the federal tax laws, but I no longer do and would not give any advice to any client on federal tax matters. I am certain we should have some self-imposed negative specialization. We'll wait for the task force to report. Maybe some form of specialization by lawyers, and some form of notifying potential clients of this specialization, would be appropriate.

You seem to be particularly interested in local bar activities. How do you intend to obtain more involvement in the state bar association by the local bars?

At the annual meeting of the state bar in Mobile, we had a meeting with those presidents and officers of local bar associations who were known to us. We have had a very difficult time in maintaining a correct, updated list of local bar officials even though *The Alabama Lawyer* provides a section for local bar news. I believe that by bringing the local bar presidents and officers together at the state bar meeting, we are going to gain a lot of input from the grassroots that will be helpful to the Alabama State Bar and its overall program. By the same token, maybe we can pass back to local bars some of our ideas and programs that they can implement best. The input and cooperation of the local bars is essential to the success of the Alabama State Bar.

Several letters have been published in the last several issues of *The Alabama Lawyer* in which the authors questioned whether punishments given for infractions of our disciplinary rules have been severe enough. Do you think that our system of policing lawyer abuses in this state is adequate?

I believe that we have a very fine disciplinary system. We have an overworked disciplinary group — the Board of Bar Commissioners. As to whether punishment has been severe enough, I can't comment. I am greatly concerned that we are having more ethical problems brought to the attention of the state bar. Maybe that indicates that we do need to hand out sterner discipline. Maybe that would have some deterring effect on ethical violations. I have no way to gauge whether discipline has or has not been severe enough, or whether harsher discipline would have any effect. I do know that the disciplinary problems and their resolution are getting the attention of the Alabama State Bar.

Have you seen an increase in the number of complaints that clients have rendered against attorneys?

Yes. This was the subject of President Hairston's speech to the Montgomery County Bar last year. He had documented the statistics. The increase in disciplinary matters or complaints brought to the Alabama State Bar for disposition was appalling.

Does there seem to be a common thread in the nature of these complaints?

The biggest problem that I see is the lack of understanding of the Code of Professional Responsibility in its application to the practice of law. The General Counsel's office is preparing ethical presentations for the CLE programs based on real life situations. This should assist lawyers in understanding better the practical application of the ethics code. Canon 6 relates to lawyer competency. I believe we are seeing more complaints against lawyers in this area. The Alabama State Bar is actively searching for and pursuing means to increase lawyer competency.

Last year the bar appointed a task force to study the explosion in the number of lawyers in this state. Has there been any report by that task force?

There has been a report by that task force, and the primary thrust is that the majority, including the public, believe that the supply of lawyers exceeds the demand. The task force has recommended that a statewide demographical survey be conducted at least every five years and that all bar examinees be surveyed at the time of taking their examination. These surveys have been approved by the Board of Bar Commissioners. The task force has further recommended that all prospective law students and their parents be informed of the existing overpopulation condition. A lateral placement bureau through the Alabama State Bar is another of its recommendations. There is no doubt in my mind that there is an overpopulation of lawyers in Alabama. At the July 1984 bar exam, the first survey questionnaire was solicited, with the result that only 54% of those sitting for the bar exam did have employment in a full time legal position.

Is there something that the organized bar can or should do about this overpopulation of lawyers?

Yes. To solve this, I think that the organized bar must, prior to admission in law school, acquaint and educate these young people and their parents with the fact that there is an overpopulation; that when they finish law school they may very well meet with the same job problem as those taking the bar exam today — there is not legal employment available for them.

It is always difficult, however, to talk about overpopulation, because there is always room at the top. The outstanding will find a place. How do you determine before you go to law school that you are not outstanding? You may have made an outstanding grade on the LSAT, you may have outstanding grades in undergraduate school, yet you may not be outstanding in the law school. The grading system is the only objective standard that a practicing lawyer will or will not be good in the practice of law. Maybe that is unfortunate. Nonetheless, it is the best standard available. We must let potential law students know in advance, not when they interview during the senior year, that there may or may not be a law-related job available when they finish law school.

There have been some suggestions in some quarters that perhaps this overpopulation of lawyers has resulted in the filing of more frivolous type lawsuits. You are a trial lawyer. Have you seen that in your experience?

Yes. We are seeing the filing of more and more frivolous lawsuits. I can blame that on overpopulation to some

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degree. However, I want to make it plain that it is not totally the young lawyer, the new admittee, who is filing the frivolous lawsuits. However, there is an overpopulation and the need for livelihood, and we are seeing more and more lawsuits — some frivolous.

There is another reason, and this goes to education. The abandonment of the system of commonlaw pleading (which I do not advocate be reinstated) in favor of notice pleading has taken away from the legal education of lawyers so that they do not understand the necessary elements to a winning lawsuit. We are not talking about just a dispute of facts. They don't know what elements, even if they had the undisputed facts, are necessary to recovery. We need to return to some system of pleading requiring at least enough elements of a theory of recovery present that a judge can look at the pleading and say this is or is not a meritorious lawsuit or defense. I think by having to do this the lawyer will expose himself to the fact that he does not have a meritorious lawsuit. At least this will aid in the speedy termination of those which are frivolous.

Do you perceive that part of this problem can be laid at the feet of the educational system in law school? Criticism is frequently made that new lawyers don't receive enough practical training at the law school level.

With the numbers they have in law school, I do not know whether they could give them the practical training that is necessary. Without condemning the law schools at all, I do think that the legal education today is not sufficient for the needs of the times. I believe that looking into the pre-admission apprenticeship/internship program as a means of practical education is a viable addition to the current legal education. This may take the form of an internship program after graduation or an apprenticeship program while in school, in the afternoons and during the summers, or a combination. This would be a uniform requirement before admission to the bar. Something is lacking in our current system of legal education. I believe that the law schools and the Alabama State Bar in cooperation will work towards solving that problem.

At the bar meeting in Mobile, you made the remark that there was too much divisiveness between the plaintiffs

and defense bar in this state. How did that situation come about?

I don't know how it came about, but divisiveness is there. The overall picture is that lawyers function to serve clients, to serve the members of the public, and the only way we can accomplish our goal of being acceptable to our clients is to work together to better the profession. I have no objection to the plaintiff's bar, for instance, dividing up for educational purposes. That is helpful in the representation of plaintiffs, their clients. The same is true of the defense bar. I do feel that only by pulling together can we be successful in our overall program.

Is there anything that you intend to do to heal this divisiveness?

Yes. I have appointed the president's advisory task force. It's not solely for this purpose, but its principal charge is to solve the problem of divisiveness. This task force is made up almost equally of plaintiff's lawyers and defense lawyers, all of whom are outstanding lawyers in this state. I am certain that working together we will end this fragmentation of the bar.

Recent statistics show that at least fifty percent of members of the bar in this state have been practicing less than five years. What can the organized bar offer to the young practitioner?

We can offer to them fellowship, understanding, and professional education and advice. The state bar has many ongoing programs and some new programs that should be of interest to the young lawyers. I, frankly, started my interest in the Alabama State Bar in the Young Lawyers' Section when it was known as the Junior Bar Section. I gained my interest at this time because I found that the "senior bar" was receptive to input from the younger lawyers. I want to assure the younger lawyers of the state of Alabama that your Alabama State Bar is interested in your input and participation.

The Young Lawyers organization is probably the most active section of the Alabama State Bar. Because of this, we have requested and they have accepted the responsibility of getting underway the buddy or silent partner system on the local level to be implemented through the cooperation of the local bar. Under this program, a practicing lawyer with experience will take under his or her guidance a newly admitted lawyer for the purpose of not only the professional aspects of how to practice law from the competency standpoint, but also from the ethical standpoint. The local bar activities committee proposed and is sponsoring that program, and we have encouraged the local bars to implement it. The Young Lawyers' Section has agreed to undertake the lead in its implementation because the newly admitted lawyers will be the beneficiaries of the program.

The Alabama State Bar is for all lawyers. The young lawyers, in my opinion, can gain much from our program, and I know the state bar can gain much from their participation.

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How can the young lawyer become more active in bar association activities?

As simple as letting another lawyer know. There are active young lawyer groups in all of our major cities in the state, and there is a very active young lawyer group or section of the Alabama State Bar. Just approach a lawyer who appears to be under thirty-five and I think you will find a very willing partner to assist you in becoming active. We all have the same interest — the betterment of the profession and system. The young lawyer organization will welcome you with open arms.

Speaking of young lawyers, the bar has sponsored legislation to remove the two year exemption period that exists exempting new lawyers from paying annual bar association dues. Why does the bar association want to remove this exemption?

The bar association legislative proposal is twofold. One is to increase the existing dues, and the other is to remove this exemption. It is simply a matter of economics. There is no known reason to exempt the young lawyer from the payment of dues. That young lawyer receives the same benefits of the practice of law and of the Alabama State Bar. Economically your state bar is running on a very, very tight budget and we are hopeful that we can improve our program, but without money we are limited. For instance, we have a committee on lawyer alcohol and drug abuse. The report of that committee has been accepted by the Board of Bar Commissioners but there are not funds to get this program implemented. This is just one of the many examples of very outstanding and worthwhile programs that are sitting on the back burner because economically the bar cannot fund them.

The recent bar convention had the largest preregistration by far of any prior conventions. To what do you attribute this?

I attribute it to a very active program that has been undertaken by the bar. Let me say that I inherited a very viable and active bar, a bar that was rededicated to the committee system and participation of lawyers on these committees and in the work of the committees. This was initiated by my predecessor, Bill Hairston, by sending out questionnaires soliciting all lawyers to volunteer to serve on the particular committees in which they had an interest. This helped to line up the participants' desires with the bar's needs. The participants have been more active in their committee activities because they were working in areas they had selected. Further, the committee program was underway when Bill Hairston took office. It commenced at the annual meeting with the committee breakfast. This year we have done the same thing. Prior to the bar meeting in Mobile, all the committees were appointed. All of the committee assignments, together with the scope and purpose of each, went to every committee member, and most of the appointments were made by virtue of a solicitation question-

naire that permitted the lawyers of Alabama to choose the committees on which they wish to serve. I believe that this has stimulated a tremendous interest in the state bar and its program.

Do you think that the site being in Mobile had anything to do with the large number of preregistration?

Yes. I shouldn't have overlooked that. Of course, Mobile is a beautiful city. It has much to offer in the way of entertainment, and it has always been that site in which the state bar drew the largest crowd. The hospitality of the Mobile Bar has always been outstanding and I am certain that that has a great deal to do with it. I believe that it is the revitalization of the interest of lawyers in their state bar coupled with the outstanding physical plant and the outstanding climate and hospitality of Mobile that brought about this great convention.

Since Mobile seems to be such a popular site, do you think we should look at changing our system of rotating sites for the bar meeting?

I would certainly be in favor of having the convention in Mobile in 1985 so that I could have the hospitality suite that our president, Bill Hairston, had! Seriously, I have no real feelings. The Mississippi Bar holds its annual convention in Biloxi each year. It might be well that the Board of Bar Commissioners should consider that we return to Mobile each year or maybe alternate it so that it would be every other year. But then we can't overlook our other

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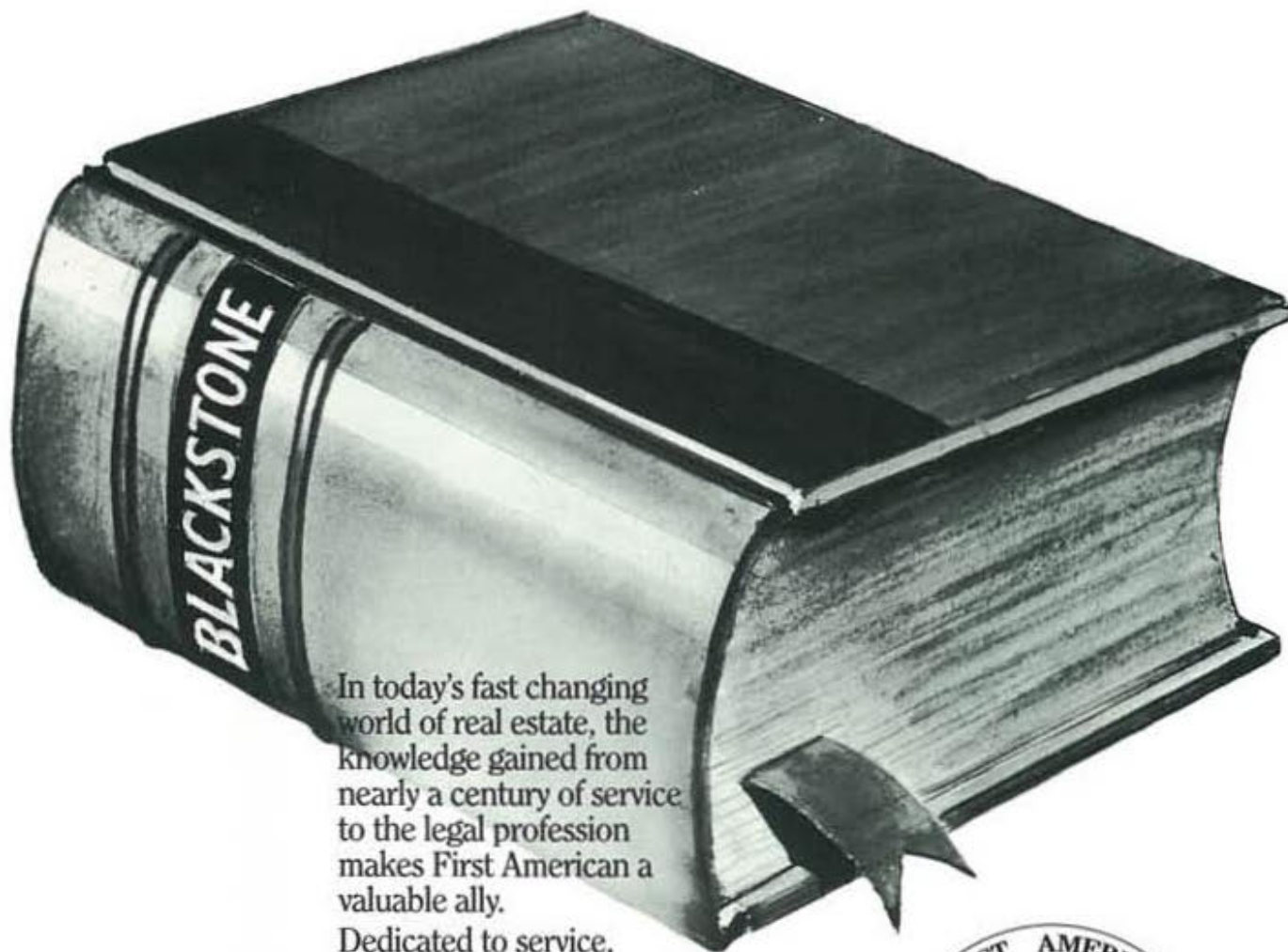
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good cities such as Birmingham and Huntsville. Of course, I was a little facetious when I made the comment about the presidential suite in Mobile. I look forward to being in Huntsville in 1985.

The bar convention is where the officers for the association are elected. Do you think that we need to make any changes in the election processes?

I think this is a matter that needs serious study and serious consideration. Bill Hairston and I jointly appointed, under the authority of the Board of Bar Commissioners, a standing committee on governance. This committee will look into the overall organization of the State Bar and its governance, which includes the election or the manner of selection of the officers of the State Bar. I believe that there is a better way than it is currently done. Remember we've made great strides just in very recent years with the provision for a president-elect to automatically ascend to the office of president without further election. This has helped in having continuity within the leadership and program of the bar. I do believe that we are going to have to improve our methods of governance. We probably are going to bring about a change in the manner of the election of the officers of the State Bar.

The American Bar Association becomes heavily involved in rating candidates for judgeships. Should the Alabama Bar Association initiate an evaluation program like this?

What you are referring to is the ABA Committee which rates candidates for federal judiciary appointment. This has been an outstanding program. I am not certain of what method the State Bar should employ in the evaluation of candidates for judicial appointment or election in this state. There has been a task force studying judicial selection, election and retention; it will be active this year also on the issue of judicial evaluation. There should be some evaluation of applicants for either judicial appointments or, if we retain popular elections in Alabama, judicial election. The Birmingham Bar Association and Montgomery County Bar on occasions have entered into the evaluation of candidates for judicial election. Hopefully, this is helpful to the public in making a selection of the most qualified candidate for office.

If the State Bar Association decided to get into this arena, would that require legislative enactments?

Under the present constitution of Alabama, the governor of the state of Alabama by appointment fills vacancies in the judiciary all the way from the district court to the supreme court, and all members of the judiciary are subject to reelection by partisan popular election. Any change would require that the constitution be amended.

It seems to me that there would be a better way if we could have some form of judicial commission to propose to the governor three to five qualified applicants for any vacancy. Presently Jefferson, Madison and Mobile counties have judicial commissions to assist in filling judicial vacancies to the circuit and district courts, the trial courts

in those counties. These commissions select three qualified candidates and recommend those names to the governor of Alabama. The governor then must appoint from that group of three. So the governor retains his power of appointment. The judicial commission attempts to present the governor with the best qualified candidates from which he should make that appointment.

We have dwelled on some of the negative aspects facing our profession, what do you see to be our strong points?

First of all, I'm not at all convinced that lawyers individually are nor that the legal profession is nearly as bad as the image the public has of us. As Sage Lyons, president of the Mobile Bar said before the annual convention, "Lawyers are indicted in the minds of the public." I believe that lawyers provide a very worthwhile service to the public; that they furnish the backbone for a viable judicial branch that is essential in the system of checks and balances which makes our government function in the manner that it does.

The strong point for the Alabama State Bar is that we are looking forward to a very, very active program this year and in the future. We are not playing ostrich. We are taking a look at ourselves. If there are matters that need correction, we will correct them. We must find out where the problems are and resolve those problems within the bar. I believe that the lawyers in this state and in the nation contribute greatly to society, and that without lawyers the public would have more to wail about than they have criticism of the lawyers. □



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Cullman County Bar Association

During Law Week in May, the Cullman County Bar Association was quite busy. On Tuesday, May 1, a panel of three distinguished attorneys fielded questions from the WFMH radio audience. Answering phone-in questions about the judicial system, the criminal justice system, and law related topics in general were Circuit Judge Fred Folsom, Deputy District Attorney Hugh Harris, and attorney Don L. Hardeman of the law firm of Hardeman, McClellan & Copeland. Carroll Eddins, owner and general manager of WFMH, was moderator. The program was a great success.

On May 3, the annual Law Day Banquet was held with guest speaker Jim Sullivan, president of the Alabama Public Service Commission. He spoke on Alabama's interest in the AT&T divestiture. The following day a continuing legal education seminar entitled General Practice and Procedure, jointly sponsored by the Cullman County Bar and the Cullman Legal Secretaries Association, was held with a total of twenty-five attending.

Dallas County Bar Association

Officers of the Dallas County Bar Association for the year are:

President: John W. Kelly III
Vice President: Robert H. Turner
Secretary/Treasurer: Frank C. Wilson III

The Selma Annual Charity Lawyers/Doctors Softball Game was held on June 14, 1984 with the Doctors defeating the Lawyers for the first time in six years by only one point. The defeat was averaged by the Legal Secretaries' 23 to 4 victory over the Nurses. All proceeds from the games were donated to the American Cancer Society.

Lauderdale County Bar Association

The new officers of the Lauderdale County Bar Association for the 1984-85 year are as follows:

President: John B. Holt

Vice President: Ralph M. Young
Secretary/Treasurer: William T. Musgrove, Jr.

Mobile Bar Association

During the Eleventh Circuit Judicial Conference that was held in Mobile in May, the Women Attorneys of the Mobile Bar Association entertained three of the visiting women judges at an early-morning breakfast in one of Mobile's old historic homes, Twelve Oaks. Over forty of the fifty-three women attorneys in Mobile were present and enjoyed getting better acquainted with Judges Nesbitt, Kravitch and Evans.

We were very proud and honored to be the host city for the Trial Court Judges Annual Conference July 11-12 as well as the Alabama State Bar Annual Meeting July 12-14. We hope your visit was a pleasant one and that you enjoyed the warm hospitality that Mobile and the Mobile Bar Association are noted for.

Russell County Bar Association

The Russell County Bar Association elected officers for the 1984-85 term at the regular monthly luncheon in June. They are:

President: Sam Loftin
Vice President: Carolyn Curtis
Secretary/Treasurer: Greg Waldrep

During Law Week in May, former Governor John Patterson, now a justice on the Alabama Court of Criminal Appeals, was guest speaker at the Annual Law Day Dinner. Judge Patterson offered some insightful and often humorous advice on the practice of law. His speech was enjoyed by all who attended.

Also, at the dinner, the past presidents and past bar commissioners were honored and presented plaques, thanking them for their service to the association. Additionally, two local high school students attended to accept their awards as winners of the Law Day Essay Contest sponsored by the Russell County Bar. □

1984-1985

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Bar Briefs

Two recognized for outstanding service

Alabama lawyers Harold F. Herring of Huntsville and Robert A. Huffaker of Montgomery were awarded the Alabama State Bar Award of Merit at the conclusion of the Alabama State Bar's Annual Meeting held in Mobile in July. The award was established in 1973 and is given for outstanding and constructive service to the legal profession in Alabama.

During the 1983-84 year, Herring served as chairman of the bar's task force, appointed in August 1983, to study and evaluate the proposed new state constitution. Herring is a 1951 graduate of the University of Alabama School of Law and is a partner in the Huntsville law firm of Lanier, Shaver and Herring. He is a Fellow of the American College of Trial Lawyers and was president of the Alabama Defense Lawyers Association in 1979.

Montgomery attorney Robert A. Huffaker was noted for his contribution to the association as editor of *The Alabama Lawyer*. Before being named editor in 1982, he served on the publication's Editorial Advisory Board for several years. Huffaker is a 1968 graduate of the University of Alabama School of Law and is a member of the Montgomery law firm of Rushon, Stakely, Johnston and Garrett where he has practiced since 1971.

DRI makes move

The Defense Research Institute, a national association of 12,000 defense trial lawyers, recently completed the move of its national headquarters office from Milwau-

kee, Wisconsin to its new location, Suite 5000, at 750 North Lake Shore Drive, Chicago, Illinois 60611.

Adams honored for sixty-one years as city attorney

Jackson city attorney John E. Adams, Sr., who probably holds the all-time record for municipal service, was recently honored by his local governing body. Mayor James Arrington and members of the Jackson City Council adopted a resolution on May 21, 1984, expressing gratitude to Mr. Adams for his sixty-one years of outstanding service and contributions to the city of Jackson as its city attorney.

Mr. Adams was admitted to the bar in 1919 and actively practices law in nearby Grove Hill where he is senior partner in the law firm of Adams, Adams & Wilson. His son, John E. Adams, Jr., is a partner in that law firm, and his brother, Robert F. Adams, is a partner in the Mobile law firm of Johnstone, Adams, Howard, Bailey & Gordon. Congratulations!

McKelvey appointed circuit judge

On Thursday, July 26, Governor George C. Wallace's office announced his selection of Anne Farrell McKelvey to replace retiring Circuit Judge Edgar P. Russell, Jr., as judge of the five-county Fourth Judicial Circuit. The circuit is composed of Wilcox, Dallas, Bibb, Hale, and Perry Counties.

Judge McKelvey is a native of Wilcox County. She graduated

from Auburn University and earned her law degree at Cumberland School of Law. She was with the attorney general's office prior to being appointed to the Wilcox County District Court bench in 1979, when Governor Fob James made the appointment upon the death of Judge Stanley Godbold. Judge McKelvey was elected to a full term as district court judge in 1980.

Judge McKelvey, at thirty, becomes the first woman judge in the history of the circuit. She is, also, the first native-born woman Alabamian to serve as a judge in any circuit.



McKELVEY



PETTWAY

Pettway appointed to district bench

On Thursday, July 26, Governor George C. Wallace appointed Jo Celeste Pettway as judge of the Wilcox County District Court to replace Judge Anne Farrell McKelvey upon her appointment to the circuit bench.

Judge Pettway earned her undergraduate degree at Auburn University in 1973 and attended graduate school at the University of Alabama where she received her master's degree in social work. She is a 1982 graduate of the University of Alabama School of Law.

Prior to her appointment, Pettway was practicing law in Tuscaloosa.

Complying with Rule 39(k), A.R.A.P. (How to Succeed on "CERT")

by
Henry T. Henzel

Your appeal to the Alabama Court of Civil Appeals or the Alabama Court of Criminal Appeals results in an unfavorable decision.¹ You are confident that a ground exists under Rule 39(c), Alabama Rules of Appellate Procedure, which permits you to seek review of that decision in the Supreme Court of Alabama by writ of certiorari,² but the lower appellate court has failed to include in its opinion all the facts necessary for the supreme court to reach a decision in your favor.³ What should you do? You must comply with Rule 39(k), A.R.A.P., to preserve and present vital facts for further review. Otherwise, you will lose on procedural grounds.

Unlike a direct appeal to the supreme court, a review by certiorari ordinarily limits the supreme court to the facts stated in the lower appellate court's opinion; not the entire record on appeal. The rule states the scope of review:

The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals.⁴

Conceptually, the operation of Rule 39(k) is not difficult to grasp. Unfortunately, however, as the volume of unsuccessful petitions implies, it continues to confound a substantial number of petitioners for certiorari. The rule,

for all practical purposes, requires the supreme court, in reaching its decision, to consider only those facts stated in the opinion of the lower appellate court, unless others are added or corrections are made via Rule 39(k).⁵ Where success of a petition depends on a consideration of facts not stated in the opinion of a lower appellate court, and Rule 39(k) has not been complied with, the petition will fail. Usually, in such cases, the supreme court will deny the petition on preliminary examination, often with no reason given.

The following examples illustrate the problem. A lower appellate court renders a decision adverse to your client. The opinion fails to include (or incorrectly states) facts from the record which, in your opinion, when considered with controlling legal principles, dictate a favorable decision. The omitted (or incorrectly stated) facts may involve a clause that estab-

lishes a statute of frauds defense to a contract on which your client was sued successfully, or testimony by an interrogating police officer showing an ineffective waiver of your client's Fifth Amendment rights. Whatever the case, if such essential facts are not preserved and brought to the attention of the supreme court, they cannot be considered. Consequently, your client cannot prevail.

Compliance in the Lower Appellate Court

Compliance with Rule 39(k) begins in the lower appellate court. Before the certiorari process starts, a procedural foundation must be laid. A condition precedent to review by certiorari is the overruling, by the lower appellate court, of an application for rehearing on the point advanced as a ground for certiorari. This means that for an issue to become a ground for certiorari, it must



Henry T. Henzel, a sole practitioner in Birmingham, received his B.A. degree from the University of Alabama and his J.D. from the Cumberland School of Law in 1977.

have been presented to the lower appellate court and rejected on application for rehearing. Rule 39(a), A.R.A.P.⁶

An application for rehearing must be made within fourteen days after the lower appellate court renders its judgment. Rule 40, A.R.A.P.⁷ Before making application for rehearing, review the opinion to determine if it contains all the necessary facts, correctly stated, to support the desired favorable decision. If it does not, then the second sentence of Rule 39(k) provides the course of action:

If petitioner is not satisfied with the statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing.⁸

Pursuant to this part of the rule, a statement of facts needed to support a favorable decision is set out in the application for rehearing. Because the concept of the rule is to supplement the opinion, only omitted and incorrectly stated facts are set out. In the above examples, these would be the misquoted clause establishing the statute of frauds defense and that part of the police officer's testimony proving an ineffective waiver of Fifth Amendment rights. Appropriate citations to the record on appeal should be given.⁹ Under the language of the rule, the aggrieved party apprises the lower appellate court of dissatisfaction with its statement of facts, and asks that it be supplemented or corrected.

Along with the application for rehearing, a new brief is filed. This is

mandatory. Rule 40, A.R.A.P. The new brief must *clearly and intelligently* deal with the alleged error in that opinion.¹⁰ Rule 39(k) contemplates that the requested facts will be discussed.¹¹

As indicated, Rule 39(k) applies to misstatements of fact by a lower appellate court as well as to omissions of fact.¹² Some misstatements are obvious: The misquotation of the clause establishing a statute of frauds defense to the contract in our above example. Other misstatements are more subtle and may appear in the form of factual conclusions. These occur where the lower appellate court states or suggests a fact without setting forth the physical or objective facts from the record on which the conclusion is drawn. When the court of criminal appeals stated, without more, in *Gwin v. State*,¹³ that "[the witness's] testimony in all material aspects, was fully corroborated," it stated a factual conclusion. The remedy under Rule 39(k) is to provide on application for rehearing a sufficient and accurate statement of facts which disprove that conclusion. If this is not done, an aggrieved party will be stuck with the factual conclusions as stated. The supreme court will not search the record to verify or disprove a lower appellate court's factual conclusions.¹⁴

Although a lower appellate court may employ the device of stating facts by way of conclusions, a party may not. Where an applicant for rehearing states facts which are merely his own conclusions or opinions, there is no compliance with Rule 39(k).¹⁵ The rule clearly contemplates specificity.

Perplexing is the situation where a lower appellate court renders an adverse decision, but gives no written opinion. This is called a "no opinion" decision.¹⁶ Without a set of facts there can be no review,¹⁷ and, therefore, no effective appeal by petition for writ of certiorari.¹⁸ The problem, however, is not without a remedy. The supreme court explains:

What the petitioner should do when it is a "no opinion" case and he wants a review is to file (on rehearing in the Court of Appeals) a Rule 39(k), ARAP, request for additional facts so as to

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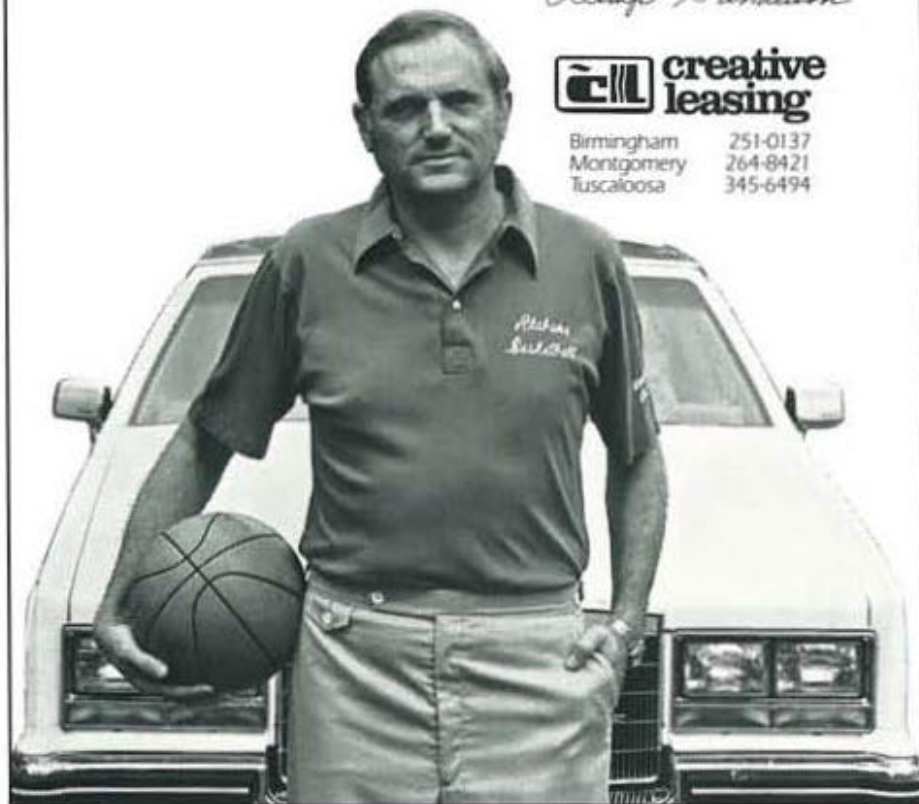
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present his point for review. If that court "fails to accede to this request," Rule 39(k), he should copy the same statement in his petition to this Court. The rule states "it will be considered . . . if found to be correct."¹⁹

An applicant requesting facts on rehearing must do so thoroughly and completely, so that there will be sufficient facts upon which a favorable decision ultimately can be based.

Normally the petitioner is required to file a new brief with the application for rehearing. Rule 40, A.R.A.P. In "no opinion" decisions, the court of criminal appeals notes an exception to this procedure. Allowing, in effect, the refiling of an original brief, the court of criminal appeals has held that a new brief is not required.²⁰

Decisions of the supreme court under earlier rules of appellate procedure held that Rule 39(k)-type compliance was not always required where the lower appellate court (court of appeals) rendered a "no opinion" decision, and federal or constitutional issues were involved.²¹ That result obtained because the former court of appeals lacked jurisdiction to fully deal with these questions.²² However, no such jurisdictional limitations restrict the present courts of civil or criminal appeals.²³ This present lack of jurisdictional limitation in the lower appellate courts, and the express language of Rule 39(c), which speaks to petitions for review of federal and constitutional issues, clearly suggest that the exception no longer exists. The exception, however, was applied recently to allow review of a constitutional issue not timely raised before the Alabama Court of Criminal Appeals. *Ex parte Duncan*, [18 A.B.R. 3043] — So.2d — (Ala. 1984) (application for rehearing pending). Until the supreme court speaks to the issue of the viability of the exception, caution dictates that a petitioner for certiorari comply with Rule 39(k) to obtain review of federal or constitutional issues.

After receiving an adverse decision on rehearing, an aggrieved party is then in the proper procedural position to petition the supreme court for a writ of certiorari. This must be done within fourteen days after the lower appellate court's decision. Rule 39(b), A.R.A.P.

Compliance in the Supreme Court

A petitioner for certiorari may be faced with a decision from the lower appellate court that falls into one of three categories. The first is a decision with an opinion that completely incorporates all additional or corrected facts as requested on application for rehearing. The second is a decision with an opinion that incorporates none, or less than all, of the additional or corrected facts requested. The third is a "no opinion" decision. Only the first requires no continuing compliance with Rule 39(k). The second and third demand additional steps in the Rule 39(k) compliance process at the supreme court level.

"Because the concept of the rule is to supplement the opinion, only omitted and incorrectly stated facts are set out."

Where the lower appellate court incorporates all requested additional or corrected facts on application for rehearing, this allows the easiest review by certiorari insofar as Rule 39(k) is concerned. Because all of the essential facts are contained within the body of the lower appellate court's opinion as corrected, no further compliance with the rule is necessary. The aggrieved party can simply petition by using a ground and means provided in Rule 39(c). The supreme court's review becomes one of applying the correct law to the facts as stated in the lower appellate court's opinion. Rule 39(k).²⁴

In cases where the lower appellate court fails on rehearing to include all the requested facts, further compliance with Rule 39(k) is needed. This is true for "opinion" and "no opinion" decisions. Here, the third sentence of Rule 39(k) applies:

If the [lower appellate] court fails to accede to the request, petitioner

may copy the statement in the petition to [the supreme] court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the [lower] appellate court, if found to be correct.²⁵

Under the rule, the additional or corrected facts submitted to the lower appellate court are copied in the petition for writ of certiorari, with references to the record on appeal. Form 22, A.R.A.P., provides the framework for a petition, but it does not illustrate how to incorporate the requested facts. A convenient way of including them in a petition is to set out the requested facts in groups, one group to each ground advanced as a basis for certiorari. Before each group, include a statement indicating you presented them to the lower appellate court on application for rehearing, and now ask the supreme court to consider them. This technique helps to clearly focus the issues as they relate to the alleged facts. In conjunction with this technique, or alternatively, the statement of facts contained in the application for rehearing may be copied and attached to the petition as an exhibit.

Petitioners for certiorari often make the mistake of providing a brief with a statement of facts which contains facts not found in the opinion of the lower appellate court or submitted to that court on application for rehearing. This is totally improper on petition for writ of certiorari. Unlike a direct appeal from the trial court, where the entire record may be before the supreme court for its consideration, on certiorari the petitioner is restricted to using only those facts contained in the opinion of the lower appellate court and those additional facts brought out through use of Rule 39(k). Other facts are presented only in vain, as they receive no consideration by the supreme court.²⁶

Documentation of Rule 39(k) facts, by specific reference to the record, is required. A general reference to facts contained over numerous pages in a transcript is insufficient compliance with the rule.²⁷

By rule, a supporting brief must be filed with the petition. Rule 39(b), A.R.A.P. It must adequately cover the

issues raised in the petition.²⁸ Decisions predating the adoption of Rule 39(k) hold that issues not briefed are not considered, and that filing the same brief submitted to the lower appellate court is ineffective.²⁹

Once a petitioner has completely complied with Rule 39(k) and properly brought before the supreme court the additional or corrected facts, they will be considered along with those contained in the opinion of the lower appellate court. The first stage in the supreme court's consideration of the petition is preliminary examination. Here, the corrected or additional facts alleged in the petition are considered on their face to be accurate, because the record is not yet before the supreme court. A "probability of merit" must be found for the petition to receive further

consideration. Rule 39(g), A.R.A.P. If this occurs, and the writ is preliminarily granted and the record brought up from the lower appellate court, the second stage takes place. During the second stage, the facts stated pursuant to Rule 39(k) are verified for accuracy from the record now before the supreme court. If the additional or corrected facts are accurately reflected in the record, they will ultimately be considered by the supreme court in reaching its decision.³⁰

Death Penalty Cases

Where the death penalty is imposed, certiorari is granted as a matter of right under Rule 39(c), A.R.A.P.³¹ The last sentence of Rule 39(k) provides that in such cases "the supreme court

may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court." Such error may be noticed whenever it "has or probably has adversely affected the substantial rights of the petitioner." Rule 39(k). This provision of Rule 39(k), for example, permits review of an issue neither raised by petitioner nor considered by the court of criminal appeals.³²

Superficially, the "plain error" provision of Rule 39(k) might suggest that there is no need to comply with the rule to preserve additional or corrected facts in death penalty cases. That is not the case. Not all error is "plain error" as defined by the supreme court.³³ In *Ex parte Dobard*,³⁴ the supreme court limited its consideration of the facts to those stated in the opinion of the court of criminal appeals, where Rule 39(k) was not employed, and a review of the record revealed no plain error or defect in the trial court proceeding. Thus, Rule 39(k) must be employed to preserve facts for theories of reversal which do not fall within the ambit of the plain error rule.

Conclusion

Complying with Rule 39(k) involves a process beginning in the lower appellate court, and continuing in the supreme court. It requires planning and foresight before filing the petition for writ of certiorari. Only through diligent and thorough compliance with the rule can omitted or incorrectly stated facts be preserved or corrected to support a theory of reversal. Compliance with Rule 39(k) may mean the difference between success and failure on petition for writ of certiorari. □



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Footnotes

¹A "decision" is a court's determination of an issue considered by it. It is to be distinguished from an "opinion," which is a court's written expression of the basis for its decision. A "judgment" is a court's written statement of the action it orders as the result of its decision. Alabama Bar Institute for Continuing Legal Education, *Alabama Appellate Practice*, at 133-37 (1979).

²Under Rule 39(c), A.R.A.P., six grounds exist for certiorari. The first involves criminal cases where the death penalty is imposed. Here certiorari is granted as a matter of right. Five other grounds exist where certiorari may be granted in the supreme court's discretion. These grounds arise in: (1) "decisions initially

holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or federal Constitution"; (2) decisions affecting a "class of constitutional, state or county officers"; (3) decisions involving "a material question . . . of first impression in Alabama"; (4) decisions that are "in conflict with prior decisions of the supreme court or the courts of appeals"; and (5) decisions "where petitioner seeks to have controlling supreme court cases overruled which were followed in the decision of the court of appeals." Rule 39(c), A.R.A.P.

³Any "short changing" of the facts by the lower appellate courts is rare. Traditionally, both lower appellate courts have been very conscientious in including within their opinions a full and accurate statement of the pertinent facts. But in the very nature of the process, the non-prevailing party may feel that his opportunity for a full and fair review has been prevented by an inadvertent omission or by an error in the lower appellate court's statement of facts. Perhaps the most common factual deficiency, in which compliance with Rule 39(k) is virtually mandated, is found in "no opinion" affirmances. See *infra* note 16.

⁴Rule 39(k), A.R.A.P.

⁵Although precedent allows the supreme court to review the trial court record for a better understanding of the facts, this is done only to aid the supreme court in understanding the lower appellate court's opinion. Usually this occurs where the facts are confusing, unclear, or undisputed among the parties but not fully reflected in the opinion of the lower appellate court. It is not a substitute for compliance with Rule 39(k). For the supreme court's employment of this device see: *Ex parte Peterson*, [18 A.B.R. 1654] — So.2d — (Ala. 1984); *Ex parte Harris*, 428 So. 2d 124 (Ala. 1983); *Ex parte May Refrigeration Company*, 344 So. 2d 156 (Ala. 1977).

⁶This has long been the rule, even under predecessor rules to the present 39(a). *Cofield v. State*, 275 Ala. 174, 153 So. 2d 252 (1963); *Richardson v. State*, 215 Ala. 581, 112 So. 193 (1927).

⁷"The application for rehearing may be made separately or may be included at the beginning of applicant's brief." Rule 40, A.R.A.P.

⁸Rule 39(k), A.R.A.P.

⁹Although the provision of Rule 39(k) requiring "references . . . to the pertinent portions [of the record on appeal]" has literal application to the petition filed in the supreme court, good practice dictates that such reference be supplied in applications for rehearing before a lower appellate court.

¹⁰*Cox v. State*, 380 So. 2d 384 (Ala. Cr. App. 1980).

1980).

¹¹*Sanders v. State*, 344 So. 2d 1243 (Ala. Cr. App. 1977).

¹²The language of the rule speaks to an "additional or corrected statement of facts." Rule 39(k), A.R.A.P.

¹³*Gwin v. State*, 425 So. 2d 500 at 510 (Ala. Cr. App. 1982), cert. quashed, 425 So. 2d 510 (Ala. 1983).

¹⁴Referring to the opinion of the Alabama Court of Criminal Appeals in *Gwin v. State*, note 13, *supra*, the supreme court stated, "Because the opinion states the fact of corroboration by way of conclusion, our review of that opinion may be invoked only through ARAP 39(k), which was not utilized in this case. Thus, this Court cannot be put to a search of the record to verify or disprove the factual conclusions stated by the Court of Criminal Appeals." *Ex parte Gwin*, 425 So. 2d 510 at 510-11 (Ala. 1983). For a limited exception to this rule see *supra* note 5.

¹⁵*Howard v. State*, 390 So. 2d 1070 (Ala. Cr. App. 1980).

¹⁶The Alabama Court of Criminal Appeals explains that where a case presents no new or unusual points of law, it may render a decision without a written opinion. *Suttle v. State*, 377 So. 2d 1121 (Ala. Cr. App. 1979).

¹⁷*Hardin v. State*, 276 Ala. 406, 162 So. 2d 616 (1964) (applying predecessor rule to the present 39(k)).

¹⁸*Ex parte Dunn*, 414 So. 2d 989 (Ala. 1982).

¹⁹*Ex parte Phelps*, 339 So. 2d 124 (Ala. 1976).

²⁰In *Cox v. State*, 380 So. 2d 384 (Ala. Cr. App. 1980), the applicant for rehearing reassigned all issues previously raised in brief and oral argument. The Alabama Court of Criminal Appeals noted the propriety of this action, observing that because "all grounds assigned as error on original appeal were considered and rejected by this court, the [applicant] without being clairvoyant could only assert that we were in error in rejecting each of those grounds and request that we reconsider each on rehearing." *Cox v. State*, at 385.

²¹*Graham v. City of Sheffield*, 292 Ala. 682, 299 So. 2d 291 (1974); *State v. Parrish*, 242 Ala. 7, 5 So. 2d 823 (1941).

²²Ala. Acts 1911, No. 121, p. 95, created the Alabama Court of Appeals, then Alabama's only lower appellate court. Section 2 of that act (later codified in Code 1940, Tit. 13, § 87), prevented the court of appeals from deciding cases where the validity of a state or federal statute was in question. In *Kendrick v. Boyd*, 255 Ala. 53, 51 So. 2d 694 (1951), the supreme court held § 2 to be inoperative, due to the field of operation of Code 1940, Tit. 13, § 98.

Code 1940, Tit. 13, § 98, originated in Ala. Acts 1911, No. 524, p. 449, § 1. Section 1 prevented the Alabama Court of Appeals from striking down any state or federal statute without first certifying the question involved to the supreme court and receiving from the supreme court a decision authorizing a statute to be struck down. Section 1 survived until 1969. In that year the present courts of civil and criminal appeals were created by Ala. Acts 1969, No. 987, p. 1744, which repealed the provisions under which the former court of appeals had operated. Acts 1969, p. 1752, § 34.

²³Code 1975, § 12-3-1, *et seq.*, which provides for the composition, powers, and jurisdiction of the lower appellate courts does not contain the former jurisdictional limitations under Ala. Acts 1911, No. 121, § 2; and No. 524, § 1. See *supra* note 22.

²⁴"The application of the law to the stated facts is included in the scope of review." Rule 39(k), A.R.A.P.

²⁵Rule 39(k), A.R.A.P.

²⁶*Ex parte Bennett*, 426 So. 2d 832 (Ala. 1982). In this case the petitioner attempted, without complying with Rule 39(k), to bring before the supreme court facts which were not contained in the opinion of the Alabama Court of Civil Appeals. The supreme court rejected petitioner's extra facts, observing: "In reviewing a court of appeals, we are limited to the facts stated in that court's opinion unless petitioner utilizes Rule 39(k). . . . No attempt was made . . . to invoke Rule 39(k), ARAP. Therefore, we have considered only those facts included in the opinion of the Court of Civil Appeals." 426 So. 2d at 834.

²⁷*Ex parte Ogden*, 440 So. 2d 1177 (Ala. 1983).

²⁸This has been required under predecessors to the present Rule 39: *Evans v. State*, 268 Ala. 344, 105 So. 2d 834 (1958) (brief which amounts to no brief at all is inadequate); *Graham v. City of Sheffield*, 292 Ala. 682, 299 So. 2d 281 (1974) (one-page brief with no authorities cited is insufficient).

²⁹*Jackson v. State*, 265 Ala. 690, 93 So. 2d 808 (1957) (issues not briefed are not considered); *Gandy v. State*, 274 Ala. 518, 150 So. 2d 397 (1963) (filing lower appellate court brief ineffective).

³⁰*Ex parte Yarber*, 437 So. 2d 1330 (Ala. 1983); *Ex parte O'Leary*, 417 So. 2d 232 (Ala. 1982).

³¹*Cook v. State*, 369 So. 2d 1251 (Ala. 1979); *Harris v. State*, 352 So. 2d 479 (Ala. 1977).

³²*Ex parte Bush*, 431 So. 2d 563 (Ala. 1983).

³³For a discussion of what constitutes "plain error" see *Ex parte Womack*, 435 So. 2d 766 (Ala. 1983).

³⁴*Ex parte Dobard*, 435 So. 2d 1351 (Ala. 1983).

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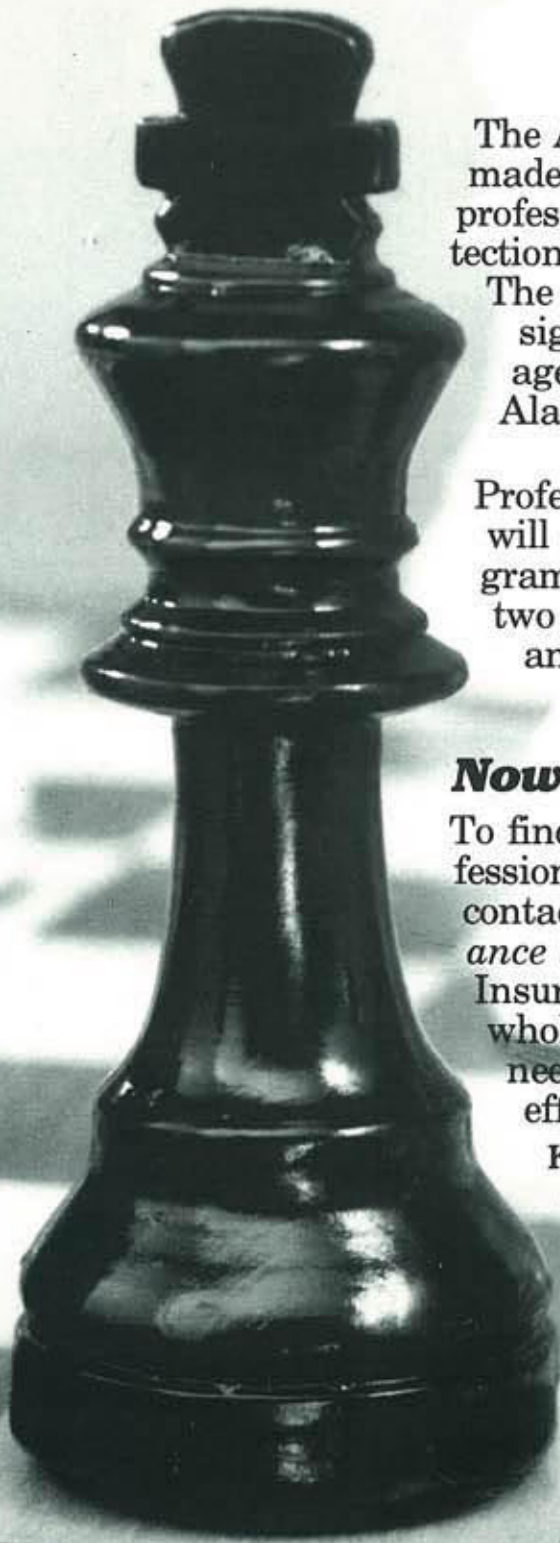
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by Robert T. Meadows III
YLS President

At the State Bar Annual Meeting held in Mobile, the Young Lawyers' Section concluded a very active and well-rounded program for the 1983-84 year. To climax this year's activities, on Thursday the YLS held a seminar entitled "Update '84: A General Practice Seminar." The seminar was very successful due to the hard work of Carol Ann Smith, the CLE chairman, and her committee.

On Thursday night of the convention, the Alabama Young Lawyers' Section in conjunction with the Mobile Young Lawyers sponsored an evening of dancing and socializing on the fantail of the *USS Alabama*. The function was a huge success in that it not only drew large numbers of Young Lawyers (approximately 750 Young Lawyers and spouses) but many of those attending the convention itself also joined in the festivities. A much deserved note

of appreciation should be expressed to Jim Newman and the Mobile Young Lawyers for their fine efforts in coordinating this event. It was truly an outstanding event and one which follows in the wake of a similarly successful function in Birmingham last year. Hopefully, this precedent will continue in the future and when the State Bar Convention is held in Huntsville next year, the Young Lawyers will be able to participate in a similar function.

On Friday afternoon of the convention, the Young Lawyers' Section met and held its annual business meeting at the Riverview Plaza in Mobile. The election of officers of the Young Lawyers' Section was held and the following officers were elected for the coming year: President, Robert T. Meadows III; President-elect, Bernie Brannan; Secretary, Claire Black; and, Treas-

urer, Charlie Mixon.

In order to do a good job at anything one must surround himself with good people. As president my job should be relatively simple this year due to the caliber of the officers who were elected in Mobile and of the Executive Committee members who have been appointed. They are the type people who will enthusiastically support and assist me in fulfilling the responsibilities of the office.

During the past several years the presidents of the Young Lawyers' Section have done a truly outstanding job. Most recently Edmon McKinley served as president. For those of you who do not know, Edmon devoted an inordinate amount of time to the service of the Young Lawyers and he is to be commended for that effort. This year I hope that we can involve more Young Lawyers throughout the state and thereby make the Young Lawyers' Section more visible and enlarge the activities of the Section.

During the first week of August, the American Bar Association held its annual meeting in Chicago. The Alabama Young Lawyers' Section had six delegates to that convention. They were: Tom King, Edmon McKinley, Mac Greaves, Robert Eckinger, Maibeth Porter, and J. Hobson Presley, Jr. These individuals represented the Alabama Young Lawyers' at the various meetings of the Young Lawyers' Division Assembly. They will report to the Young Lawyers at the first Executive



Members of the Young Lawyers' Section collect tickets for the party on the USS Alabama during the Alabama State Bar Annual Meeting in Mobile.

Committee meeting in the fall of this year.

For those of you who are not aware, Alabama has been, and is, well represented in the Young Lawyers' Division of the American Bar Association. J. Hobson Presley, Jr., was last year's finance director of the Young Lawyers' Division and Edmon McKinley, our immediate past president, is in his second year as the district representative to the Executive Council of the Young Lawyers' Division for Alabama and Georgia. If any of you would like to participate on committees of the Young Lawyers' Division, please convey that desire to Hobby or to Edmon and I am sure either of them will be happy to assist you in getting involved with the Young Lawyers' Division. Similarly, if you have a concern which you feel should be addressed by the Young Lawyers' Division, I am certain that either Hobby or Edmon would be happy to express that concern to the appropriate people.

The upcoming year promises to be a very exciting one based on the proposals and projects which Walter Byars, president of the Alabama State Bar, has in the works. In connection with his work with the Alabama State Bar, Walter has allowed me as president of the Young Lawyers' Section to appoint a Young Lawyer as a representative to each of the committees which he has appointed to work on behalf of the State Bar. Each of you who are on the State Bar committees as a representative of the Young Lawyers' Section should be aware that yours is a highly visible and highly responsible position. Each of the members of the committee judges the Young Lawyers by the type effort and enthusiasm which you exhibit on the committee. Therefore, I would encourage each of you to participate as fully as you possibly can on your committees.

In connection with the activities of the State Bar, several new ideas are expected to generate interest from the Young Lawyers' Section and the Bar as a whole this year. Among those which impact on the Young Lawyers' of the state is the proposal which Walter Byars hopes to implement called the "Buddy Program." In this program experienced lawyers volunteer to as-

sist Young Lawyers in their geographical area by providing them with practical tips and assistance in specified areas of practice. Young Lawyers who are not with large firms where this expertise is readily available will be able to pair up with that experienced lawyer on certain matters. This program should greatly assist the Young Lawyer and enhance the relationship between the Young Lawyers and the Bar as a whole. For those of you who might be interested in being a part of the "Buddy Program", I direct your attention to the form adjoining my article, which you can fill out and send in to the State Bar if you are interested in participating in this program. The Young Lawyers' Section's representative on this committee is Wes Romine of Montgomery. Feel free to contact Wes if you have any questions and/or suggestions.

Another matter which should im-

pact on the Young Lawyers of the state is the updating of the lawyer's *Desk Book*. This book, as most of you know, is put out by the State Bar. In the past it has included forms, the Code of Professional Responsibility, names, addresses and phone numbers of lawyers in the state, and other matters. This book has in the past been given to Young Lawyers and used as a handy reference. Its updating should greatly assist all Young Lawyers. The Young Lawyers' representative on this committee is Frank Potts of Florence. If any of you have any questions and/or suggestions concerning this particular project, please feel free to contact Frank.

In the upcoming year a committee formed by Walter Byars named the IOLTA Committee should draw a great deal of attention. IOLTA stands for Interest on Lawyers' Trust Accounts. As some of you may know, other states have implemented procedures where-

BE A BUDDY

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

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



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by various attorneys may participate in the program by placing their trust account funds into interest-bearing accounts and using the interest gained thereon for various projects of the State Bar or other matters. This is a very complex area and one about which you will probably be hearing a great deal in the future. The Young Lawyers' representative on this particular committee is Boyd Miller of Mobile. If any of you have any questions and/or suggestions regarding this particular matter, please feel free to contact Boyd.

In addition to the seminars which the Young Lawyers will sponsor this year, we will cosponsor the First Annual Cooperative Interviewing Conference with the University of Alabama School of Law and Cumberland School of Law. This will be held in Montgomery in conjunction with the 1985 Midyear Bar Meeting. It will enable young lawyers seeking jobs to interview with prospective employers at a place and time convenient to both.

As each of you probably know, the Young Lawyers' Section is governed by an Executive Committee of approximately twenty Young Lawyers chosen from throughout the state who are responsible for certain significant areas of the Young Lawyers' activities. I have recently appointed the Executive Committee. If there are any of you who would like to participate in our functions or assist us in our activities, please feel free to contact me and I will make every effort to enable you to work with us and to become involved.

In closing, let me say that it is a distinct privilege and honor for me to serve as President of the Young Lawyers' Section during 1984-85. I anticipate a very active and fulfilling year and I look forward to working not only with members of the Executive Committee but with as many of you as possible. It goes without saying that the work and strength of any organization, is based on the energy and enthusiasm of the various members of the Executive Committee, of those Young Lawyers who make up the subcommittees, of the officers of the Section and of those others of you who desire to get involved. Based on my knowledge of these individuals it promises to be an exciting year. □

CLE News



by Mary Lyn Pike
Staff Director, MCLE Commission

Forms for reporting 1984 CLE compliance are being mailed to most members of the Alabama State Bar this month. Individuals who have previously claimed the exemption available to attorneys sixty-five years of age or older will not receive reporting forms.

Attorneys who are subject to the twelve hour requirement should be prepared to report the sponsor, title, date, location, and credits earned for each activity attended. A list of approved sponsors accompanies this article.

Credits carried forward from 1983 are being posted on the forms prior to mailing of them. Remember that extra credits brought forward from 1983 may be used to satisfy the 1984 requirement. Such credits may not, however, be carried beyond 1984. Extra credits earned but not needed in 1984 may be carried forward to meet the 1985 requirement, if they are reported in 1984.

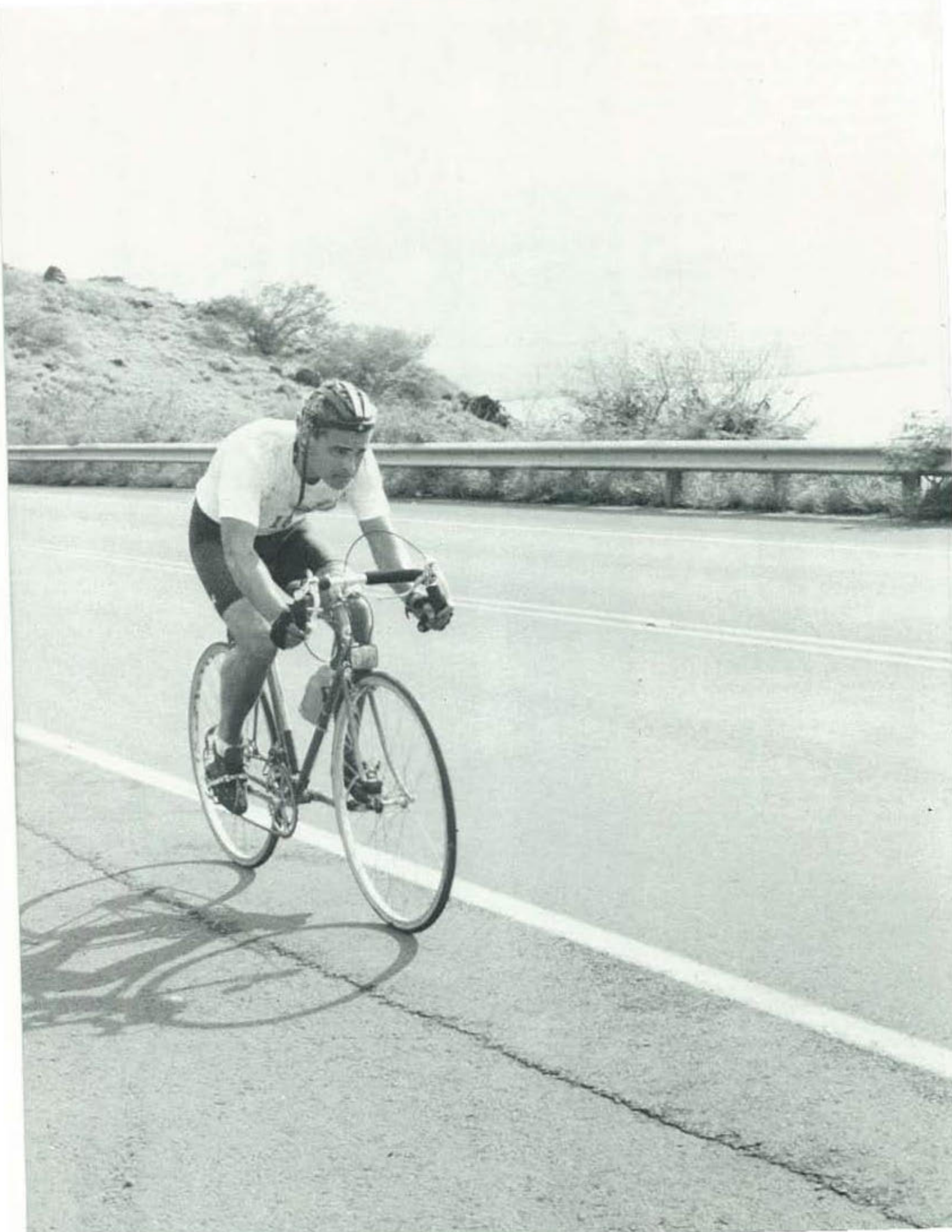
To ascertain the accreditation status

of a seminar conducted by some other organization, direct your inquiry to that organization. If the activity has not been submitted to the MCLE Commission for approval, request that the organization seek retroactive approval of it.

Individuals who are exempt from the CLE requirement are required to file reporting forms, claiming their exemptions by checking the appropriate box. Full-time judges, new admittees, legislators, special members, and individuals sixty-five years of age or older are clearly exempt from the requirement. Others who are prohibited from the private practice of law should not claim that particular exemption until or unless a ruling has been obtained from the MCLE Commission.

Be sure to call the MCLE Commission staff at Bar headquarters (205/269-1515) if we may be of assistance to you as you seek to meet your continuing education obligation. □

[See page 311 for list of approved seminars for 1984.]



PROFILES PROFILES PROFILES

Bob Cunningham, Jr. — From Mobile to Maui . . . Swimming, Biking, Running

by Jen Nowell

It's too bad that watching the Olympics almost every night for two weeks doesn't make one a super-athlete — maybe a more well-rounded sports fan. What watching these great sportsmen does, however, is make one aware of the time and dedication and immense physical stamina it takes to excel as an athlete. But all athletes were not in Los Angeles last month — one was in Mobile practicing law and not taking his great athletic ability that seriously . . . at least until after hours.

Most people have heard of a triathlon and some have probably even seen the event on television, but very few dare to actually participate. Bob Cunningham, with the Mobile law firm of Cunningham, Bounds, Yancey, Crowder & Brown, is one of those few. In fact, Bob has participated in seven triathlons since his first in the summer of 1983.

Just what is a triathlon? Bob explains that the triathlon is a three event sport

involving swimming, biking and running — in that order. It is timed from the beginning of the swim to the end of the run. The distances vary in different triathlons from the shortest called the "sprint triathlon" to the "ultra-distance triathlon," such as the *Ironman* held annually in Hawaii.

Although most of Bob's races have been medium-distance triathlons, in January of this year Bob participated in a long-distance triathlon in Maui. This involved a 1.2 mile swim in the ocean (which can be rather rough), a 56 mile bike ride, and a 13.1 mile run. When asked when he stopped to rest, he explained, "You don't rest. You don't stop. The idea is to complete it without stopping . . . after you finish swimming you have to change into biking gear and jump on your bike . . . and that's part of the race so you try to do that as fast as you can." Bob completed that one in just over seven hours.

Bob gets off to a good start because swimming is his favorite event — and is also his strongest event. "Most people have trouble with the swimming," says Bob. "That really is a hang up for a lot of people, and it's difficult when two hundred or so, sometimes in some of the races, and you all hit the water at once. If you're not pretty confident in the water, you can get scared pretty badly."

Bob works out at the YMCA regularly and swims, bikes, and runs three to four times a week, or maybe more depending on the upcoming race. He also plays racquetball (which, incidentally, is not presently a triathlon event). It was at the "Y" that Bob heard of somebody doing a triathlon and he wanted to see if he could do it. He did — and his wife, Joanna, completed her first sprint triathlon in Panama City recently.

"... after you finish swimming you have to change into biking gear and jump on your bike — and that's part of the race so you try to do that as fast as you can."

What about winning? Bob explains that there are winners in various age groups, men, women, etc. "I never have thought about that much. There are kids that do that — I just try to finish," says the thirty-eight year old. "Winning is not a big thing, I don't think, to the vast majority of people who do it. There are professionals that do nothing but work out all day every day — they're the ones that win them."

As for advice to the individual who has recently been infused with the Olympic spirit and might want to give a triathlon a go . . . Bob says, "It's not all that difficult — it's just a matter of training for it, putting in the time. If you don't like working out, you wouldn't enjoy getting ready for one because it does take a lot of time. Anybody can do it if you're willing to take the time." □



After a 1.2 mile swim in the ocean, Bob bikes 56 miles in a long-distance triathlon in Maui in January.

About Members Among Firms

About Members

John D. Saxon was recently named by President Reagan to the President's Commission on White House Fellowships. Former counsel to the U.S. Senate Select Committee on Ethics, Saxon is now director of corporate issues for RCA Corporation.

William H. Satterfield, formerly deputy solicitor of the Department of the Interior, has been named general counsel of the Federal Energy Regulatory Commission by Chairman Raymond J. O'Connor.

Madison County District Attorney **Bud Cramer** has been named "public citizen of the year" by the National Association of Social Workers. He was presented the national award at ceremonies held on June 11 at the Hyatt Regency Hotel in Washington.

Vanzetta Penn Durant, a faculty member of the National Judicial College and the National Conference of State Legislatures, presented paternity and child support enforce-

ment workshops before the South Carolina Family Court Judges Association in Columbia in May and before a Texas Legislative Conference on Child Support Enforcement in Austin in June. Mrs. Durant also participated as a panelist at a Symposium on Child Support Enforcement sponsored by the Secretary of Health and Human Resources in Washington, D.C., in August.

Among Firms

The law firm of **Barnett, Tingle, Noble & Sexton** is pleased to announce that **James P. O'Neal** has become a partner of the firm and **Roger L. Bates** has become associated with the firm. Offices are located at Suite 1600, City Federal Building, Birmingham, Alabama 35203. Phone 322-0471.

The firm of **Nettles, Barker and Janecky** is pleased to announce that **Reggie Copeland, Jr.**, has become a member of the firm and that **J. Stuart Wallace**, formerly of the Birmingham Bar, has become associated with the firm. Offices are at 3311 First National Bank Building, P.O. Box 2987, Mobile, Alabama 36652. Phone 432-8786.

The law firm of **Sirote, Permutt, Friend, Friedman, Held & Apolinsky, P.C.**, is pleased to announce the merger of the practice of **J. Mason Davis**, who is now a member of our firm, and that **Judith F. Todd**, **John R. Chiles**, and **C. Paul Davis** have become members of our firm and **Dale B. Stone**, **Carol Gray Caldwell**, and **Timothy A. Bush** have become associates of our firm. Offices are located at 2222 Arlington Avenue South, Birmingham, Alabama 35255. Phone 933-7111.

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

Corley, Moncus, Bynum & De Buys, P.C., 2100 16th Avenue South, Ash Place, Birmingham, Alabama, takes pleasure in announcing that **James S. Ward** has become a member of the firm and **Mark S. McKnight** has become an associate of the firm.

The law firm of **Stanard & Mills** is pleased to announce that **Ronald Wesley Farley** has become associated with the firm. Offices are located at Southtrust Bank Building, Seventh Floor, Mobile, Alabama 36652. Phone 432-0701.

Gene M. Hamby, Jr., and **Robert M. Baker** are pleased to announce the formation of a partnership for the practice of law under the firm name of **Hamby & Baker**. Offices are at 1205 South Montgomery Avenue, Sheffield, Alabama 35660. Phone 383-6797.

Bill Thompson and Richard Shoemaker are proud to announce the relocation of their law offices to historic "Boxwood" at 406 North Street East, P.O. Box 1059, Talladega, Alabama 35160. Phone 362-8341.

The Mobile law firm of **Johnstone, Adams, Howard, Bailey & Gordon** is pleased to announce that **Bruce P. Ely** has become associated with the firm.

Hand, Arendall, Bedsole, Greaves & Johnston, 30th Floor First National Bank Building, Mobile, Alabama, takes pleasure in announcing that **Neil C. Johnston** and **George M. Walker** have become partners in the firm and that **Kathy D. Jones** has been named counsel to the firm.

The law firm of **Dawson & McGinty** takes pleasure in announcing that **Pamela McGinty Parker** is now associated with the firm in the practice of law. Offices are located at 206 South Broad Street, P.O. Box 100, Scottsboro, Alabama 35768.

Wilson, Pumroy & Bryan, Attorneys at Law, takes pleasure in announcing that **Bruce N. Adams** has become associated with the firm. Offices are at 1431 Leighton Avenue, P.O. Box 2333, Anniston, Alabama 36202.

Blanchard L. McLeod, Jr., and **J. Patrick Cheshire** proudly announce their association for the practice of law under the firm name of **McLeod and Cheshire**. Offices are located at 902 Alabama Avenue, P.O. Box 656, Selma, Alabama 36702. Phone 875-2282.

Daniel M. Gibson, Attorney at Law, is pleased to announce that **Donna Wesson Smalley** will be associated with him for the practice of law as of September 10, 1984. Offices are located at 2918 7th Street, Tuscaloosa, Alabama 35401. Phone 758-5521.

Robert H. Hood, Cheryl A. Huie, and Susan M. Ankenbrandt are pleased to announce the formation of a partnership for the general practice of law under the firm name of **Hood, Huie & Ankenbrandt**. Offices are located at 2234 Magnolia Avenue, Birmingham, Alabama 35205. Phone 252-2490.

George E. Trawick takes pride in announcing that **Ray T. Kennington** is now a shareholder of the firm under the name of **Trawick & Kennington, Attorneys P.C.** Offices continue to be located at Highway 51 North (Clio Road), P.O. Box 47, Arton, Alabama 36311. Telephones are: Arton 762-2356 and Ozark 774-3175.

Robert Earl Patterson is pleased to announce the relocation of his offices to 106 South Side Square, Huntsville, Alabama 35801. Phone 539-3496.

The law firm of **Azar, Campbell & Azar** takes pleasure in announcing that **Denise Boone Azar** has become an associate of the firm. Offices are located at 260 Washington Avenue, Montgomery, Alabama 36103.

Announcements for this column must be received by the first day of the month prior to publication date.

WE WANT YOU TO JOIN OUR SPEAKERS BUREAU!

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



SPEAKER'S BUREAU APPLICATION

Name _____

Firm Name (if applicable) _____

Address _____

City _____ State _____ Zip _____

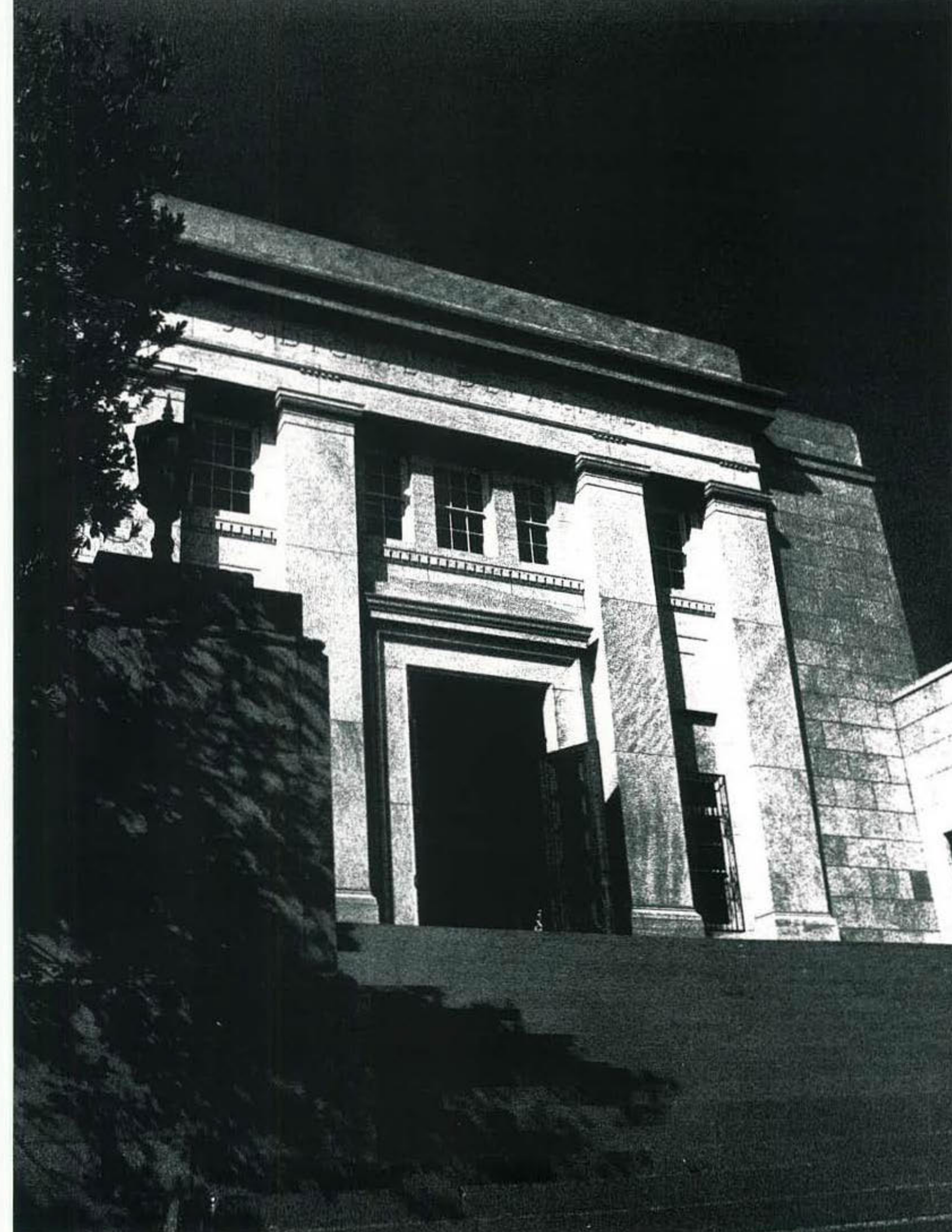
Telephone _____

Please list subjects on which you are willing to speak:

1) _____

2) _____

3) _____



Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

The right to withdraw a guilty plea

Alston v. State, 8th Div. 952 (June 12, 1984). The defendant pled guilty to four counts of third-degree burglary. The trial court sentenced the defendant to six years' imprisonment for each crime, but ordered that the sentences adjudged in cases one and two were to run concurrently as were the sentences in cases three and four. However, the latter sentences were to be consecutive to the first two sentences. The net result was a total of twelve years' imprisonment.

Judge Harris, writing for a unanimous court of appeals, reversed holding that the trial court's refusal to permit the defendant to withdraw his guilty plea after the trial court had refused to follow the bargained for sentence recommendation by the state, constituted reversible error. The court reasoned that, as one of the inducements for the defendant's four guilty pleas, the state agreed to recommend and did recommend six year sentences to be served concurrently. The trial court did not follow the state's recommendation. Instead, the trial court sentenced the defendant to a combination of concurrent and consecutive six years' sentences

which resulted in a total penitentiary term of twelve years rather than the six years recommended by the state. Afterwards, the trial court would not permit the appellant to withdraw his guilty plea. This refusal to permit the defendant to withdraw his guilty pleas after the trial court had refused to follow the "bargained for" sentence recommendation offered the state constituted reversible error.

Recent Decisions of the Supreme Court of Alabama—Civil

Certified question . . . homestead . . . Mobile home deemed a homestead

First Alabama Bank of Dothan v. Renfro, 18 ABR 1710 (May 11, 1984). In a certified question proceeding pursuant to Rule 18, ARAP, the supreme court was asked whether an unattached mobile home which is admittedly personalty, but which is a principle place of residence of an individual, shall be deemed a "homestead" for purposes of Sections 6-10-3, 6-10-121, and 6-10-122, Ala. Code 1975. The supreme court answered this question in the affirmative. Consequently, Section 6-10-3 requires the voluntary signature and assent of both husband and wife to any mortgage, deed, or other conveyance of such mobile home. Sec-

tion 6-10-122 requires that a waiver of homestead exemption must be by separate written instrument subscribed by the party and attested by one witness. And, if the subscriber is married, the wife must also sign and assent.

The supreme court reasoned that although the aforementioned statutes did not specifically refer to unattached mobile homes, it is unreasonable to conclude otherwise since the homestead laws were passed to secure to the householder a home for himself and his family. The supreme court also noted that in amending Section 6-10-2, so as to include mobile homes, the Alabama Legislature recognized the increasing number of mobile homes as the principle place of residence and, therefore, it would be unjust to recognize the homestead rights of mobile home dwellers in Section 6-10-2 and then deny them the protection of Sections 6-10-3 and 6-10-122.

Civil procedure . . . rule 55 (b) (2) requires an inquiry to determine damages

J & P Construction Co. v. Valta Construction Co., 18 ABR 1884 (June 1, 1984). The plaintiff sued for breach of contract and claimed the defendant owed \$35,000. The defendant failed to answer and the plaintiff filed an application for default with the clerk claiming \$42,665. Thereafter, the plaintiff filed a motion for default pursuant to Rule 55 (b) (2), ARCP, and the court entered a judgment by default in the amount of \$42,665. The trial court did not conduct a hearing to determine the amount of damages. The plaintiff filed a Rule 60 (b) motion after the court denied its Rule 55 (c) motion. On appeal, the supreme court held that the Rule 60(b) motion should have been granted for two reasons. First, the judgment was excessive. The complaint sought \$35,000 and the judgment exceeded that amount. A default judgment cannot be entered for an amount greater than the amount claimed in the complaint. Second, since the claim was not for a sum certain (i.e., pursuant to Rule 55 (b) (1)), Rule 55 (b) (2), ARCP, requires the court to make an inquiry into the amount of damages. The su-

preme court recognized that although Rule 55 (b) (2) states that the court "may" hold hearings, the discretion bestowed by the Rule is not so great as to entirely vitiate the need for some sort of inquiry into the amount of damages claimed.

Civil procedure . . .

workmen's compensation immunity must be affirmatively pled under rule 8 (c)

Bechtel v. Crown Central Petroleum Corp., 18 ABR 2018 (June 1, 1984). In a case of first impression in Alabama, the supreme court held that the employer's immunity from suit by the employee under Section 25-5-53, *Ala. Code* 1975, is an "affirmative defense" under Rule 8(c), ARCP, and, therefore, must be specially pled. In this case, the defendant raised the immunity by motion for summary judgment but failed to plead the immunity as a special defense. The plaintiff timely filed a motion to strike the defense, and the defendant failed to amend his plea to set

forth the defense. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed. The supreme court noted that if the defendant had sought to amend the plea, the trial court in its discretion could have granted the amendment and this problem would have been avoided.

Domestic relations . . .

child custody . . . parents burden of proof to regain custody stated

Ex parte W.R. McLendon (McLendon v. McLendon), 18 ABR 3029 (July 6, 1984). The supreme court granted certiorari to restate the standard of proof required of a noncustodial parent (mother) seeking to regain custody of her child. The supreme court noted that for several years, the court of appeals has incorrectly stated that the parent seeking custody has the burden of showing a change in circumstances which *adversely* affect the welfare of the child. The supreme court also

stated that a mere showing that a change was in the "best interest of the child" is not the appropriate standard. Although the child's best interest is paramount, the parent's burden is to prove that the change of custody "materially promotes" the child's welfare and best interest, i.e., "that she produce evidence to overcome the 'inherently disruptive effect caused by uprooting the child.'" The supreme court also noted that although the natural parent is presumed to be the proper person to have custody, this presumption does not apply after a voluntarily forfeiture of custody or a prior decree removing and awarding custody to a non-parent.

Insurance . . .

subjective standard determines whether an injury is "accidental"

Alabama Farm Bureau Mutual Casualty Ins. Co., Inc. v. Dyer, 18 ABR 1918 (June 1, 1984). In this declaratory judgment action, the supreme court was asked to declare the proper standard for determining whether "bodily injury . . . is either expected or intended from the standpoint of the insured," i.e., accidental or intentional. The evidence revealed that the insured deliberately pulled a gun from his pocket, pointed the gun at his brother, pulled the trigger, and killed his brother. Farm Bureau argued that the supreme court had previously approved an objective standard which amounted to an objective test of foreseeability. In other words, since a reasonable and ordinarily prudent person would foresee that pulling the trigger of a loaded gun aimed point-blank at another person would result in injury to that person, the injury could therefore be "expected or intended from the standpoint of the insured."

The supreme court rejected Farm Bureau's argument, although it acknowledged that there might be some confusion due to language in previous cases. The supreme court held that a purely subjective standard determines whether the injury is "expected or intended." An injury is "intended" from the standpoint of the insured if the insured possessed the specific intent to

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cause the bodily injury. An injury is "expected" if the insured subjectively possessed a high degree of certainty that bodily injury to another would result. Since the insured and the victim were brothers and enjoyed a longstanding amicable relationship, and since the gun was only partially loaded and the insured seemed shocked after the gun discharged, the supreme court determined that the trial court could reasonably have concluded that the insured subjectively neither "intended" nor "expected" the injury.

Landlord and tenant . . . "unbargained for" exculpatory clause in residential apartment lease voided

Lloyd v. Service Corp. of Alabama, Inc., 18 ABR 2093 (June 8, 1984). The supreme court was asked to reexamine its treatment of exculpatory clauses in residential leases. The exculpatory clause relieved the landlord from liability for future negligent conduct. The leased premises had a defective door. Although being warned of the defect, the landlord refused to remedy the defect. One day the tenant was assaulted and raped in her apartment, the rapist having gained access through the defective door. The landlord pled the exculpatory clause as a defense to the suit.

The tenant argued that these clauses

are typically part of adhesive contracts, that they are not truly bargained for, and that their enforcement is against public interest. While refusing to hold that exculpatory clauses in residential leases are void *per se*, the supreme court did hold that when a tenant can show that an exculpatory clause in a residential lease is unconscionable due to unequal bargaining power of the parties, the clause is void because it is contrary to public policy. The landlord seeking to enforce the clause must show that the clause was explained to the tenant and "that there was in fact a real voluntary meeting of the minds."

Torts, negligence surveying . . . expert testimony normally required

Paragon Engineering, Inc. v. Rhodes, 18 ABR 1769 (May 25, 1984). In a case of first impression in Alabama, the supreme court was asked to consider the standard of care to be exercised by professional surveyors and whether expert testimony is necessary to establish the appropriate standard of care. Looking to other jurisdictions, the supreme court stated that a surveyor is bound to exercise that degree of care which a skilled surveyor of ordinary prudence would have exercised under similar circumstances. Ordinarily, therefore, the standard of care can be established only by an expert witness. The supreme court compared professional surveyors to other learned professions.

The supreme court added, however, that a witness need not be an expert in the strict technical sense to give testimony as to things which he knows by study, practice, experience, or observation on the particular subject.

Recent Decisions of the Supreme Court of Alabama—Criminal

Brady is alive in Alabama

Duncan v. State, 18 ABR 3043 (July 6, 1984). The Supreme Court of Alabama reversed the conviction of the defendant for criminal mischief where the state withheld exculpatory evidence. The defendant was convicted of four charges of criminal mischief in the first degree based upon circumstantial evidence. He was sentenced as a youthful offender to concurrent terms of eighteen months and required to make restitution of one-third of the total amount of damages as a condition of probation. The conviction was affirmed by the Court of Criminal Appeals, and the Supreme Court of Alabama granted certiorari on the basis of the prosecution's failure to produce certain laboratory findings before trial which were exculpatory in nature.

The evidence presented at trial revealed that the Anniston police had received calls indicating that males were slashing tires at various car dealerships in Anniston, Alabama. When the

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officers arrived at a used car lot, they observed the defendant and two other males standing by a van which had damaged tires. One of the subjects (not Duncan) dropped an object by the van. Two knives were found beside it.

The City of Anniston's Police Laboratory examined the knives that were taken from the scene. The laboratory examination revealed that the black substance on the knives was inconsistent with or was not rubber from the side walls of the tires. These laboratory findings were not produced by the prosecution before trial.

Justice Embry held that to allow the conviction of the defendant to stand when the state had withheld exculpatory evidence, regardless of the reasons involved, would be a travesty of justice. The court reaffirmed the mandate of the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) which held:

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either as to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Interestingly, the Alabama Supreme Court noted that although *Brady* does not require disclosure of such exculpatory evidence before trial, as a matter of course, such early disclosure is required if necessary to provide the defendant with a fair trial. *United States v. Ellsworth*, 647 F.2d 957 (9th Cir. 1981).

The limits of *Yarber*

Congo v. Alabama, 18 ABR 2107 (June 8, 1984). The supreme court granted certiorari in *Congo* to determine whether the Court of Criminal Appeals had correctly applied the principles of *Ex parte Yarber*, 437 So.2d 1330 (Ala. 1983). The supreme court reversed and remanded the case to the Court of Criminal Appeals and in so doing, set out the limits of the *Yarber* decision.

In a five to four decision, Justice Beatty held:

"[A] defendant who has negotiated a plea bargain with the State is not automatically entitled to a judgment based upon that agreement. He does

have the right to have it submitted to the trial court for that court's consideration. The trial court is not bound to accept the agreement. The power of the trial court to so decide carries with it the power to determine whether or not such an agreement exists between the State and the defendant."

In *Congo*, the trial court found that no agreement existed. Accordingly, the decision of the Court of Criminal Appeals finding an enforceable plea bargain was therefore error.

How to preserve instructional error

Knight v. State, 18 ABR 2081 (June 8, 1984). The Supreme Court of Alabama granted certiorari in *Knight* to determine whether the objections interposed by defense counsel were sufficient to preserve instructional error under the case of *Allen v. State*, 414 So.2d 989 (Ala. Crim. App. 1981).

Knight was found guilty of manslaughter. The evidence was undisputed that the shooting occurred outside a nightclub which *Knight* and his family were using as their residence. At the conclusion of the evidence, the trial court refused *Knight's* written charge on self-defense in the defense of one's home. Following the close of the court's oral charge to the jury, the court, outside the presence of the jury, summoned both sides to the bench. At that time, *Knight's* defense counsel repeated his request to have the trial judge charge the jury on "defense of the home." The Court of Criminal Appeals upheld the lower court's judgment of conviction based upon the finding that the defense counsel's objections to the court's charge were insufficient to preserve error under *Allen v. State, supra*. In that case the Court of Criminal Appeals held that the *automatic exception* to refuse requested written charges *no longer exists* and that the aggrieved party must object and state his grounds before the jury retires, in order to preserve alleged errors in the trial court's refusal to so charge.

In reversing, Justice Almon held that *Knight's* defense counsel had made an adequate objection to the court's oral charge before the jury retired to consider its verdict by calling to the court's attention its failure to charge on the

specific principal of self-defense in the context of the defense of one's home. Under the circumstances of this case, it is apparent that the requested charge was a correct statement of law and should have been given. Likewise, the supreme court held that it was clear that the trial judge understood the nature of the objection and refused to give the requested written charge. Under such circumstances, the defense counsel's intervention was sufficient to preserve the error on appeal.

Recent Decisions of the Supreme Court of the United States

The demise of the fourth amendment exclusionary rule

United States v. Leon, 52 USLW 5155 (July 5, 1984). In *Leon*, the Supreme Court held that evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded, as a matter of federal law, from the case-in-chief of federal and state criminal prosecutions. In so doing, the Supreme Court writes yet another chapter in the volume of Fourth Amendment law opened by *Weeks v. United States*, 232 U.S. 383 (1914).

Acting on the basis of information from a confidential informant, officers of the Burbank, California Police Department initiated a drug trafficking investigation involving surveillance of the defendants' activities. Based on an affidavit summarizing a police officer's observations, an application was prepared for a search warrant to search three residences and the defendants' automobiles for an extensive list of items. The application (affidavit) was reviewed by several deputy district attorneys and a facially valid search warrant was issued by a state court judge. Ensuing searches produced large quantities of drugs, drug paraphernalia and other evidence. The defendants were indicted for federal drug offenses and filed motions to suppress the evidence seized pursuant to the warrant.

After an evidentiary hearing, the district court granted the defendants' mo-

tions to suppress, in part, concluding that the affidavit was insufficient to establish probable cause. The district court recognized that the officer preparing the affidavit had acted in good faith but the court rejected the government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable good faith reliance on a search warrant. The court of appeals affirmed also refusing the government's invitation to recognize a "good faith exception" to the exclusionary rule.

After granting certiorari Mr. Justice White, writing for the majority, reversed the judgment of the Court of Appeals. In reaching the result, the Supreme Court held that the Fourth Amendment exclusionary rule *should not* be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. The question, whether the exclusionary sanction is appropriately imposed in a particular case, as a judicially created remedy to safeguard Fourth Amendment rights through its deterrent effect, must be resolved by weighing the cost and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence. The Supreme Court concluded that the indiscriminate application of the exclusionary rule impeded the criminal justice system's truth-finding function and allowed some guilty defendants to go free.

In applying the societal balancing test, the Court concluded "that the marginal or non-existent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion. 'We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms.'"

Finally, the Court attempted to signal some limit to the "good faith exception" by stating in pertinent part as follows:

"The good faith exception for searches conducted pursuant to war-

rants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice . . . Our conclusion is that the rule's purpose will only rarely be served by applying it in such circumstances."

The doctrine of *Leon* extended

Massachusetts v. Sheppard, 52 USLW 5177 (July 5, 1984). *Massachusetts v. Sheppard* involved the application of the rules articulated the same day in *United States v. Leon*, *ante*, to a situation in which police officers seized items pursuant to a search warrant subsequently invalidated because of a technical error on the part of the issuing judge.

On the basis of evidence gathered in the investigation of a homicide in Boston, a police detective drafted an affidavit to support an application for an arrest warrant and a search warrant for the search of the defendant's residence. The affidavit stated that the police wished to search for certain described items, including clothing of the victim and a blunt instrument that may have been used on the victim. The affidavit was reviewed and approved by the district attorney.

Because it was Sunday, the police had a difficult time finding a warrant application form. The detective finally found a warrant form previously used in another police district to search for *controlled substances*. After making some changes in the form, the detective presented it and the affidavit to a judge at his residence, informing the judge that the warrant might need to be changed further. The judge then signed the warrant and returned it and the affidavit to the detective informing him that the warrant was sufficient authority in form and content to carry out the requested search.

The ensuing search of the defendant's residence by the detective and other police officers was limited to the items listed in the affidavit but did not coincide with the items listed in the search warrant to be seized. Several incriminating pieces of evidence were discovered; thereafter, the defendant

was charged with first-degree murder. At a pretrial suppression hearing the trial judge ruled that notwithstanding the defect in the warrant, the incriminating evidence could be admitted because the police had acted in "good faith" in executing what they thought to be a valid warrant. The Massachusetts Supreme Court held that the evidence should have been suppressed.

Justice White relying upon the rationale of *United States v. Leon* reversed and remanded. The Court pointed out that the officers took every step that could reasonably be expected of them. At the point where the judge returned the affidavit and warrant to the detective, a reasonable police officer would have concluded as the detective did, that the warrant authorized a search of the materials outlined in his affidavit. The Court further reasoned that a police officer is not required to disbelieve a judge who has just advised him that the warrant he possesses is proper authorization for him to conduct the search. Finally, the Supreme Court concluded that suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurance that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve.

The taint that doesn't rub off

Segura v. United States, 52 USLW 5128 (July 5, 1984). Acting on information that the defendants probably were trafficking in cocaine from their apartment, New York DEA agents began a surveillance of the defendants. Thereafter, they observed the defendant Colon deliver a bulky package to one Parra at a restaurant parking lot, while the defendants Segura and Vidal visited inside the restaurants. The DEA agents followed the receivers of the bulky package to their apartment where they were stopped and arrested. One of the arrestees admitted that he had purchased cocaine from Segura and confirmed the delivery of the bulky package at the restaurant.

The DEA agents were authorized by an assistant United States attorney to arrest the defendants and were advised that a search warrant for the defendants' apartment probably could not be

obtained until the following day, but that the agents should "secure the premises" to prevent destruction of evidence. Pursuant to that authorization, the agents arrested Segura in the lobby of the defendant's apartment building, took him to the apartment, knocked on the door and, when it was opened by the defendant Colon, entered the apartment without requesting or receiving permission. The agents conducted a "limited security check" of the apartment and in the process observed, in plain view, various drug paraphernalia. Two DEA agents remained in the apartment awaiting the warrant but because of "administrative delay" the search warrant was not issued until some nineteen hours after the initial entry into the apartment. In the search, pursuant to the warrant, the agents discovered cocaine and records of various narcotic transactions. These items were seized together with those observed during the security check.

The district court granted the defendant's pretrial motion to suppress all the seized evidence. The court of appeals held that the evidence discovered in plain view on the initial entry but not the evidence seized during the warrant search must be suppressed. The Supreme Court affirmed.

Chief Justice Burger held that the exclusionary rule does not apply, if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated" as to dissipate the taint. As, for example, where the police had an independent source for discovery of the evidence. Citing, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385.

The Chief Justice found that there was an independent source for the challenged evidence; the evidence was discovered during a search of the defendants' apartment pursuant to a valid warrant. The information on which the warrant was secured came from sources wholly unconnected with the initial entry and was known to the agents well before that entry. Hence, whether the initial entry was illegal or not is irrelevant to the admissibility of the evidence, and exclusion of the evidence is not warranted as derivative evidence or as "fruit of the poisonous tree."

Prosecutorial misconduct . . . the application of *Blackledge*

Thigpen v. Roberts, 52 USLW 4912 (June 27, 1984). The defendant was involved in an automobile accident in Mississippi in which he lost control of his car and killed a passenger in a pick-up truck. Defendant was charged in a Mississippi Justice of the Peace Court, with reckless driving, driving while his license was revoked, driving on the wrong side of the road, and driving while intoxicated. Following his conviction, he exercised his statutory right of appeal for a trial de Novo in the circuit court.

While the appeal was pending, the defendant was indicted in the circuit court for manslaughter arising out of the same accident. After conviction he appealed to the state supreme court, but his conviction was affirmed. Subsequently, the defendant brought a federal habeas action in the United States District Court. The United States Magistrate recommended that the writ be granted based upon *Blackledge v. Perry*, 417 U.S. 21 (1974).

The Supreme Court, in an opinion by Justice White, held that the prosecution of the defendant for manslaughter following his invocation of his statutory right to appeal his misdemeanor convictions, was unconstitutional as a violation of due process. Citing *Blackledge v. Perry*, 417 U.S. 21 (1974), Justice White reasoned that this sequence of events suggested "a realistic likelihood of vindictiveness." Under such circumstances, the Court feared that the prosecutor who has a considerable stake in discouraging convicted misdemeanants from appealing and, thus, obtaining a trial de Novo would make retaliatory use of his power to "up the ante." In reaching the conclusion, Justice White analogized Perry's plight to the imposition of a stiffer sentence after reversal and reconviction.

Double jeopardy does not attach to a hung jury

Richardson v. United States, 52 USLW 4993 (June 29, 1984). The defendant was indicted on three counts of federal narcotics violations. At his trial, the jury acquitted him on one count but was unable to agree on a verdict on the

remaining counts. The district court declared a mistrial as to the remaining counts and scheduled a retrial. The defendant then moved to bar the retrial claiming that it would violate the double jeopardy clause of the Fifth Amendment.

On appeal Justice Rehnquist held that the defendant did not have a valid double jeopardy claim. The Court reasoned that the protection of the double jeopardy clause by its terms applies only if there has been some event, such as an acquittal, that terminates the original jeopardy. Neither the failure of the jury to reach a verdict nor a trial court's declaration of a mistrial following a hung jury is an event that terminates the original jeopardy. Accordingly, the case was remanded to the District Court for trial by jury.

Supreme court applies *Miranda* to misdemeanor traffic offenses

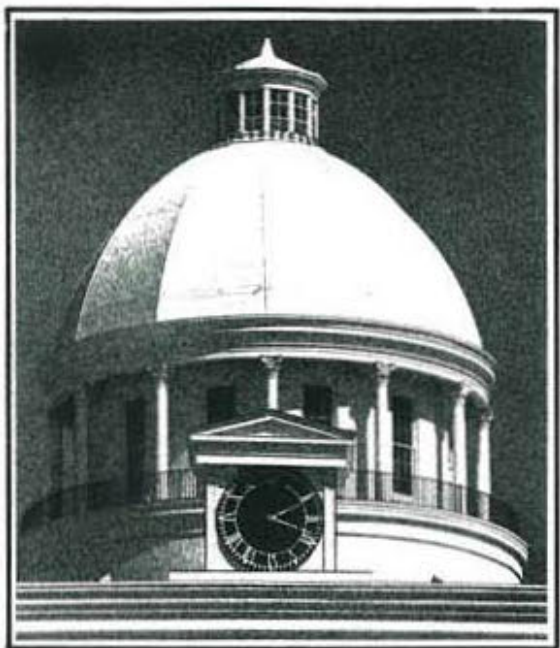
Berkemer v. McCarty, 52 USLW 5023 (July 3, 1984). A unanimous supreme court rules that a person subjected to custodial interrogation is entitled to receive the warnings set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966) even when he is suspected of, or arrested for, a misdemeanor traffic offense. However, the court critically notes that roadside questioning during a "routine traffic stop" does not constitute custodial interrogation unless the officer subjects the motorist to treatment that renders him "in custody for practical purposes." □

'Executive Director's 'Report

(From page 245)

Our annual meetings are one of our more visible member services. We welcome your suggestions to further improve these meetings. Our president is generally responsible for our theme and our format. The presidential goal each year is to build upon the prior successes and afford the members not only a pleasant social activity but a meaningful opportunity for professional enhancement. These are your meetings. We covet your attendance. □

— Reginald T. Hamner



LEGISLATIVE WRAP-UP

by Randolph P. Reaves
and Robert L. McCurley, Jr.

by Randolph P. Reaves

My previous report was written immediately following the abrupt adjournment of the regular session. Since that time certain other bills which passed have been assigned Act numbers and a special session has been held. Some of the more important bills passed are outlined below:

Banking, Commercial and Corporate

The state's interest and usury laws were altered somewhat during the regular session. *Code of Alabama* 1975, Section 8-8-5 was amended twice. Section 8-8-5 (a), relating to loans or credit sales to which usury laws do not apply, was amended so as to reduce the amount on which interest may be negotiated to \$2,000. The limit was previously \$5,000. Section 8-8-5 (f) was deleted thereby removing the Sunset or termination date on the provisions of the section as it applied to loans of \$25,000 or more. The Acts amending this statute are No. 84-308 and No. 84-108 respectively.

Criminal Law and Procedure

Some bills relating to the state's criminal laws passed during the regular session. Act No. 84-285 and 84-470 relate to charges of child pornography. Act No. 84-471 amends *Code of Alabama* 1975, Section 41-16-55 relating to penalties for violations of the state public bid law. Act No. 84-658 creates the Alabama Crime Victims Compensation Commission.

Of particular interest to young lawyers around the state is

Act No. 84-793 amending Alabama's indigent defense laws. The hourly rates remain the same. However, in capital cases or in cases which carry a possible sentence of life without parole, the limits are now \$1,000 for out-of-court work plus payment for all in-court work at \$40/hr. Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense, if approved in advance by the trial court. Retrials of a case are considered a new case.

The allowable caps on appeals have also been increased. Now, counsel may bill up to \$1,000 for an appeal to the Court of Criminal Appeals, and an additional maximum of \$1,000 if certiorari is granted to the Alabama Supreme Court.

Domestic

In the July edition, I reported the passage of the 1984 Child Protection Law (Act No. 84-261) and S.B. 86 relating to court ordered continuing income withholding. This latter bill is now Act No. 84-445. Also passed in the regular session were Act No. 84-244, providing for the enactment of the Alabama Uniform Parentage Act creating a civil cause of action for the determination of paternity, and Act No. 84-254 relating to adoptions.

This act amends *Code of Alabama* 1975, Section 26-10-5 to provide for certain rights of natural grandparents. Now, in cases of adoption by a stepparent or a grandparent only, visitation rights for natural grandparents may be maintained or allowed upon petition for modification at any time after the final order of adoption is entered. Additionally, upon the death of an adoptive parent or parents, the rights of

the natural grandparents as to matters of custody may be considered by the court.

Judiciary

Act No. 84-610 substantially increases the number of circuit judges in the state as of October 1, 1984. Nine new circuit judges will be appointed by the governor. The 11th, 12th, 13th, 15th and 28th Circuits will get one new judge each and the 10th Circuit will get four. A new district judge slot was also created for Russell County.

Clerks and registers across the state are much happier following the passage of Act No. 84-731 in the first special session. Circuit and district clerks received 18.35% pay raises. Circuit registers received raises ranging from 10% to 34%.

Law Institute Update

by Robert L. McCurley, Jr.

At the Alabama Law Institute Annual Meeting, held on Thursday, July 12, 1984, in Mobile, Finis E. St. John III of Cullman was reelected president and Oakley Melton of Montgomery was reelected vice president. Members of the Executive Committee for 1984-85 are:

Lt. Governor Bill Baxley
Speaker Tom Drake
Chief Justice C.C. Torbert, Jr.
Senator Ryan deGraffenried
Representative Jim Campbell
Mr. George Maynard
Mr. Rick Manley
Mr. Yetta Samford

Mr. L.B. Feld of Birmingham was recognized and presented a certificate for drafting Alabama's Non-Profit Corporation law that was passed during the 1984 Regular Session and will become effective January 1, 1985.



Representatives Beth Marietta (left) and Michael Onderdonk (right) were presented with plaques at the bar's annual meeting for their sponsorship of the Alabama Non-Profit Corporation Act. Pictured with them is Bob McCurley, director of the Alabama Law Institute. Also receiving plaques were Representatives Jim Campbell and Senator Ryan deGraffenried, who are not pictured.

The status of the following Institute projects are as follows:

Alabama Rules of Criminal Procedure — These rules have been pending before the Alabama Supreme Court since 1977. The rules have been reviewed by the court and the revised drafts were presented to the court in January 1983. During the past year, the court adopted Temporary Rule 15 entitled "Charges: Indictment, Information and Complaint"; Rule 16 "Preparation for Trial: Pleadings and Motions"; Rule 17 "Appeal by State From Pre-Trial Ruling" and Temporary Rule 18 "Discovery."

Condominium Law Revision — Committee chairman E.B. Peebles, Mobile, reported that after two years of study, the Revised Condominium law should be completed in early 1985.

Eminent Domain Revision — Associate Director Penny Davis reported that the initial draft of the Revised Eminent Domain Code first published in June 1980 has been redrafted to take into account recommendations from various lawyers and interested parties. This revision should be completed by November 1984.

Guardianship Revision — Alabama's numerous laws dealing with guardianship of minors and other protected persons are undergoing revision. The committee is distinguishing between guardianship of the person and conservator of the estate, thereby elevating the confusion in the present law. It further attempts to simplify guardianship procedure. Mr. Lyman Holland reported that this committee should complete its initial draft in the fall of 1984.

Adoption Law Revision — The Institute is reviewing Alabama's adoption laws to determine their adequacy. Camille Cook of Tuscaloosa has been named chairman of the committee. This study came at the request of legislators due to the increasing complexities of the law created by stepparent and grandparent visitation rights with respect to adoption.

Mortgage Foreclosure and Redemption — The Institute is presently reviewing the present law on this subject and has named Hugh Lloyd of Demopolis as chairman of this review committee.

The Institute has just published the third edition of *The Legislative Process: A Handbook for Legislators*. Additional revisions of the *Tax Assessors-Tax Collectors Handbook* and *County Commissioners' Handbook* will be made in the fall of 1984.

Senator Ryan deGraffenried and Representatives Beth Marietta, Jim Campbell and Michael Onderdonk were presented with plaques for their sponsorship in 1984 of the Alabama Non-Profit Corporation Act. This presentation was made during the Bench and Bar luncheon at the State Bar Annual Meeting. □

The Alabama Securities Act Meets the Average Practitioner [or "Blue Skies Smiling(?) At Me"]

by
R. Frank Ussery

The objective of this article is to point out how the Alabama Securities Act (§8-6-1, et seq Ala. Code 1975) applies to some ordinary transactions that come across the desk of the practicing lawyer. Securities law is complex and foreign to the average practitioner. Rather than making the reader an expert, the article will address the very basics, with a "GO-FOR-IT" or a "WATCH IT" thrown in at intervals to either encourage a shallow wade in these dark and murky waters or to warn of the deep holes that await the unsuspecting step.

I. AN OVERVIEW OF STATE REGULATION OF SECURITIES, IN GENERAL, AND ITS INTERACTION WITH FEDERAL SECURITIES LAW

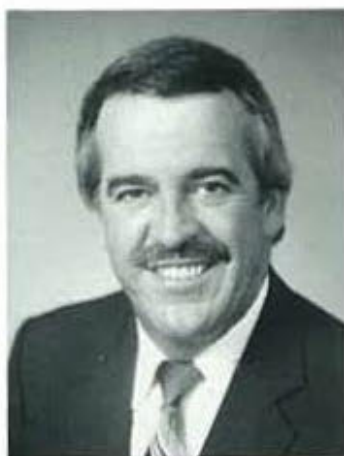
Without getting too technical, it will be helpful to understand some history and philosophy behind state securities

laws and how they interface with the federal securities laws. The first such state law was enacted in 1911 by Kansas, and most states quickly followed that lead. The acts typically contain: (1) prohibitions against fraud in the sale of securities, (2) requirements for the registration (licensing) of brokers, dealers and salesmen, and (3) requirements for the registration of securities to be sold in the state. The state securi-

ties acts became known as "Blue Sky Laws" because they were commonly referred to as legislation designed to control "speculative schemes which have no more basis than so many feet of blue sky." *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917).

In response to the stock market crash of 1929, Congress created the Securities and Exchange Commission ("SEC") to regulate the stock exchanges and administer the federal securities act (Securities Act of 1933), which prohibits offers and sales of securities unless registered with the SEC, subject to exemptions for certain types of securities or transactions. The 1933 Act also prohibited fraud and deception in the offer or sale of securities. The Securities Exchange Act of 1934, in addition to regulation of the exchanges, required disclosure of publicly-traded companies and regulated brokers and dealers.

This short history points up the difference in emphasis between the Blue Sky Laws and the federal securities acts: although states do cover the traditional common stocks and bonds that are publicly traded, their primary focus is on the atypical security and the newly formed company or enterprise, whereas, the SEC directs its resources toward regulating national markets. Also, there is a fundamental difference in approach to regulation between the two: the federal scheme of regulation of securities is guided by a disclosure standard — i.e., the issuer of a security must disclose the terms of the offering and the risks associated with the investment; whereas, most



R. Frank Ussery is director of the Alabama Securities Commission. He attended the University of Alabama, receiving his B.S. degree in 1959 and law degree in 1962. Previous to becoming director of the Alabama Securities Commission, he was in the private practice of law in Montgomery from 1966 to 1975, served as insurance commissioner from 1969-70 during former Governor Brewer's administration, and was an assistant attorney general from 1980-82.

states utilize "merit" regulation, wherein the state, in addition to requiring disclosure, undertakes to protect its citizens from fraudulent or worthless securities. As a result, the SEC cannot prevent the sale of a security (even though the deal is a poor one with little chance of success) as long as all the material information about the deal is disclosed. On the other hand, a state administrator has the authority under the "merit" approach to refuse to allow the public sale of a security in his state if the deal "tends to work a fraud upon the purchaser," "involves excessive compensation or profits to the promoters," or is not "fair, just and equitable" to the investor.

Although Alabama has had a securities act since 1919, the Act in its present form was adopted in 1959 and patterned after the Uniform Securities Act, which is the statutory format in the majority of states.

II. A QUICK LOOK AT THE ALABAMA SECURITIES ACT ("THE ACT")

The Act begins with a definition section (§8-6-2). Attention is invited to the definitions of "offer" and "security," of which more will be said later ("WATCH IT"). Section 8-6-3 provides for registration of dealers and salesmen which we'll overlook for purposes of this article. Section 8-6-4 provides that it is unlawful for any person to offer or sell any security in the state unless it is registered (procedures for registration are found in Sections 8-6-5 to 9) or exempted from registration under Sections 8-6-10 or 11. The remainder of the Act provides for administration of the Act and contains anti-fraud prohibitions and liabilities for violations of the Act ("WATCH IT").

A. About Sanctions

It is important to note three particular sections of the Act:

The anti-fraud prohibition — §8-6-17.

"It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly, to:

- (1) Employ any device, scheme or artifice to defraud;

- (2) Make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (3) Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person."

The criminal liability — §8-6-18.

"(a) Any person who willfully violates any provision of this article shall, upon conviction, be fined not more than \$15,000.00 or imprisoned no more than ten years, or both.

(e) In any proceeding under this article, scienter need not be alleged and proved in prosecutions involving the sale of unregistered securities or in the

failure to register as a dealer or salesman under this article."

The civil liability — §8-6-19.

"(a) Any person who:

- (1) Sells or offers to sell a security in violation of any provision of this article or of any rule or order imposed under this article or of any condition imposed under this article, or
- (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have

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known of the untruth of omission, is liable to the person buying the security from him who may bring an action to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, court costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security."

The bottom line here is *absolute* liability, both criminally and civilly, for sales of unregistered securities by unregistered persons, and conditional liability for sale of *any* security (even though registered or exempt) if the sale was in violation of the anti-fraud prohibition (§8-6-17) unless the seller or its agent sustains the burden of proof of a "due diligence" defense.

B. About Registration of Securities

The primary result of registration under the Act is the development of a disclosure document that tells the prospective investor all material information about the issuer, its business and the terms of the security being offered. Securities being registered will be sold to the general public and, therefore, both the federal and state acts have specific and voluminous requirements for the data supplied. States further apply the merit standards alluded to above to these offerings.

C. About Exemptions From Registration

Every security sold does not have to

meet this requirement of registration. Exemptions are allowed at both the federal and state level. Certain types of securities are exempted, such as government securities, securities issued by companies already regulated by other branches of government (e.g. banks, utilities, common carriers), and, at the state level, those securities listed on the national exchanges.

Further, an exemption exists because of the nature of the transaction in which the security is offered and sold. Examples here are certain non-issuer transactions, mergers, and, of particular note, sales to institutional investors and limited offerings (finally, a "GO-FOR-IT"). It is in the realm of limited offerings that the average lawyer will come into contact with the Securities Act.

III. A TYPICAL FACT SITUATION

A year ago, two fellows came into your office and asked that you prepare a simple, \$1,000 capital, corporation which they would own equally and under which they would manufacture and sell the ever-popular WIDGET with \$10,000 borrowed from a local bank. Now they return and explain the \$10,000 bank loan has run out, the bank has said "no" to further loans, and they need to raise \$100,000. Your clients believe they could get several individual sources of venture capital — friends, distributors, material suppliers — through sale of additional stock.

A. The Limited Offering Exemption

Section 8-6-11(a) (9) provides an exemption for:

"any transaction pursuant to an offer directed by the offeror to not more than 10 persons, other than those designated in subdivision (a) (8) of this section in this state during any 12 consecutive months, whether or not the offeror or any of the offerees is then present in this state if:

- The seller reasonably believes that all the buyers are purchasing for investment; and
- No commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer."

eration is paid or given directly or indirectly for soliciting any prospective buyer."

The theory behind this exemption is that registration should not be necessary for such a small, nonpublic offering, and such a common securities transaction should not present a trap for the unwary businessman who has not retained legal counsel.

So, if the number of persons to be offered the stock in our example above is fewer than ten, and the conditions of the exemption (purchasers have investment intent and no remuneration is paid directly or indirectly for soliciting the buyers) are met, then "GO-FOR-IT"! (But, see "WATCH IT! — §8-6-17," and "WATCH IT! — other considerations," infra).

B. "WATCH IT!" — Section 8-6-17

Even though you've avoided the registration of securities requirement, you must still be acutely aware of the anti-fraud provisions of §8-6-17, which impose liability in the event the securities are offered or sold through use of an untrue statement of a material fact or by omitting a material fact necessary to make your statements not misleading. This liability to the investor exists and continues even though no registration is necessary with the Commission. An attorney practicing in this area will recommend that, even though no prospectus is required, some form of disclosure document be prepared that outlines the facts to which a reasonable investor would attach importance in making his investment decision. Let's look at some of those facts in our typical situation.

An investor would certainly want to know about the business of WIDGET, INC., who is managing the business and how the ownership is structured. He would certainly want to know how many shares are being sold in this transaction, the price of each share, how that price differs from the amount paid by the insiders, and the use of the proceeds of the offering. A very simplified information statement might look like this:

Richard Wilson & Associates

Registered
Professional
Court Reporters

132 Adams Avenue
Montgomery, Alabama 36104

264-6433

"Widgets, Inc. ("the Company") is hereby offering 10,000 shares of its common stock at \$10 per share.

The offering involves a HIGH DEGREE OF RISK. The Company is newly formed, has operating losses, and has not yet realized any income.

THESE SECURITIES ARE OFFERED PURSUANT TO A CLAIM OF EXEMPTION UNDER THE ALABAMA SECURITIES ACT. A REGISTRATION STATEMENT RELATING TO THESE SECURITIES HAS NOT BEEN FILED WITH THE ALABAMA SECURITIES COMMISSION. THE COMMISSION DOES NOT RECOMMEND OR ENDORSE THE PURCHASE OF ANY SECURITIES, NOR DOES IT PASS UPON THE ACCURACY OR COMPLETENESS OF THIS PRIVATE PLACEMENT MEMORANDUM. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The offering will be made by officers of the Company. No one will receive any remuneration either directly or indirectly for soliciting any prospective purchases.

Each purchaser must understand that these securities are being sold to him as an investment, that there is no market for securities, and that the securities are subject to transfer restrictions which limit the purchasers' ability to resell this stock.

RISK FACTORS: (1) The Company is in the development state, has not yet commenced its full business activities, and is dependent on the proceeds from the sale of securities offered hereby and for funds to carry out its planned operations.

(2) At the present time, there is no market for the company's common stock, nor can there be any assurance that a market will develop at the conclusion of this offering. Consequently, investors may not be able to sell any shares purchased.

(3) Substantial dilution of the book value of new investors' shares will immediately occur. (See "DILUTION").

(4) If all the shares offered hereby are sold, the purchasers of the shares will have no voice in the management of the company since the officers, directors and promoters will retain voting control of the company and its business policies.

(5) There is no assurance that the proposed plan of business can be developed in the manner contemplated and if not, investors may lose all or a substantial part of their investment.

(6) The product to be manufactured and marketed is novel and unique. There is no assurance of its public acceptability. If successful, competitors will enter the market which are larger than the Company in size and financial resources.

USE OF PROCEEDS: The Company intends to use the proceeds of this offering to get the business going. The \$100,000 will be spent as follows:

Repay bank loan	\$10,000
Build first stamping machine	40,000
Expenses of obtaining patent	10,000
Inventory of raw materials	10,000
Operating expenses (estimated for 1st six months)	10,000
Sponsors' salaries	20,000
	\$100,000

Even if the business is successful in the first six months, there will be a need for additional working capital for continued opera-

tions. The Company will attempt to obtain funds by borrowing from the bank based upon the initial success or may have to sell more stock. No assurance is given of the availability of financing. Inability to finance future operations could result in an investor losing all or a portion of his investment.

THE COMPANY: Widgets, Inc. was formed in July, 1983, by A.N. Vantor and Durr T. Mecanick ("the Sponsors") for the purpose of manufacturing and selling widgets. The Sponsors have developed a prototype stamping machine that will produce 1,000 widgets a day. The widget is a curved hook that can be attached to the nose bridge of a pair of eyeglasses, facilitating the removal of the eyeglasses by the wearer, particularly where only one hand is available. Although this is a new product, the Sponsors believe that it will be accepted by the eyeglass-wearing public and suitable markets can be developed.

[Explain here about your business plan: availability of raw materials, negotiations with eyeglass manufacturers, feasibility studies, marketing strategies, patent applications and rights, etc.]

MANAGEMENT: [Here include a resume of the two sponsors]. The Sponsors are the sole stockholders prior to the offering, each holding 10,000 shares for which they paid \$500 each. The Sponsors do not presently hold any stock options. The sponsors will be paid a salary of \$10,000 each for the next six months.

DESCRIPTION OF CAPITAL STOCK: Widgets, Inc. originally authorized 10,000 shares of common stock, \$1 par; 1,000 shares were issued to the sponsors for \$1,000 cash. On June 25, 1984, the shareholders increased the authorized stock to 200,000 with \$.05 par, splitting the outstanding stock 20-1.

Holders of Common Stock are entitled to one vote for each share held. Shareholders are not entitled to cumulative voting, so the Sponsors, who will hold the majority of the shares at the conclusion of this offering, will be able to elect the entire Board of Directors. Holders of Common Stock have no preemptive rights to purchase their respective proportion of shares of any future issuance of the Common Stock.

Dividends may be declared and paid from the Company's capital and earned surplus. The Company does not anticipate declaring a dividend in the foreseeable future.

The offering is made in reliance upon an exemption from the Alabama Securities Act, which severely restricts any transfer of the shares by a holder.

DILUTION: If all of the shares offered hereby are sold, the Sponsors, at a cost to them of \$1,000, will own 20,000 shares (approximately 66-2/3%) of the Company's then outstanding Common Stock; whereas, the new investors will own 10,000 shares (approximately 33-1/3%) of the Company's stock at a cost to them of \$100,000.

If the entire issue is sold, the net tangible book value of the Sponsors' stock will be increased from \$.05 per share to \$3.37 per share at no additional cost to them; whereas, the new investors who will pay \$10 per share for each share acquired by them will have a book value of \$3.37, thus suffering an immediate dilution of \$6.63 for each share purchased.

ADDITIONAL INFORMATION: Attached is a copy of the Company's Articles of Incorporation, By-Laws, and financial statement. Prospective investors have the opportunity to ask for and receive any further information they deem necessary."

With all due respect to comedian Steve Martin and the producers of a funny movie called *The Jerk*, our widget company probably will not get off the ground. So, I'd probably go back over this information statement and double check to see if I'd left out anything that might be material. Also, this is a very simple example — as the situation becomes more complex, amplification of the disclosure statement is mandated.

Further, you must recognize that most entrepreneurs don't like to think negatively. A.N. Ventor and Durr T. Mecanick, our erstwhile sponsors, will not want to talk about risk factors without being stimulated by probing questions from their attorney who must objectively put himself in the place of a potential investor.

C. "WATCH IT" — Other Considerations

1. *The burden of proof* — When proceeding with a transaction you believe to be exempt from registration, be aware that the burden of proving the

availability of an exemption is upon the person claiming it (Section 8-6-30).

2. *Ten offerees* — The importance of the burden of proof is of particular importance in the limited offering exemption. If an investor sues for a return of his money, interest and attorney fees under §8-6-19 claiming he was sold an unregistered security, you'll have to be able to document that stock was offered to ten or fewer persons. To show that fewer than ten actually purchased the stock is not sufficient unless the possibility of other offers can be eliminated. The client must be cautioned and instructed in the need to keep extremely careful records in this regard.

The Commission has endorsed proposed legislation to change the limited offering exemption from an "offeree" concept to a "purchaser" approach, wherein the statutory exemption will be available if a limited number of purchasers result from a nonpublic offering. This modification should eliminate the confusion as to what constitutes an offer and, hopefully, make

your wade into the waters of securities regulation more footsure.

3. *The twelve-month period* — The emphasis here is that the ten offers "in any period of twelve consecutive months" does not mean a calendar or fiscal year. This is a "rolling" twelve months, and once the offering starts you should always count backwards twelve months from the date of the proposed sale to determine if the maximum offers have occurred.

IV. THE TYPICAL FACT SITUATION...CONTINUED

Suppose in determining the plan of offering it appears certain that the number of offerees will have to exceed ten. There are a couple of further steps you can take to obtain the limited offering exemption. Section 8-6-11(a)(9), after establishing the "10 or fewer offeree" standard, goes forward to provide that:

"(9) [T]he commission may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption or decrease or increase the number of offerees permitted, or waive the conditions in paragraphs a. and b. of this subdivision (9) with or without the substitution of a limitation on remuneration."

A. Regulation D

The Commission has adopted a Rule 830-X-6.11 to expand the statutory limited offering exemption for an offering that complies with the requirements of a federal securities law exemption called Regulation D. This exemption allows sales to an unlimited number of "accredited investors" (a defined term based upon large net worth, income or amount of purchase) and to not more than thirty-five purchasers who do not meet the "accredited" definition but who are considered sophisticated. Regulation D and the Alabama Rule which coordinates with it, will be overlooked for purposes of this article.

B. Commission Order Expanding the Limited Offering Exemption

Many limited offerings will involve

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| <input type="checkbox"/> Employee stock ownership plans | |

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more than ten offerees, but will not justify the expense or specificity of disclosure of a Regulation D filing for exemption. As in our typical example, the transaction may be an uncomplicated common stock offering involving a relatively small amount of required capital. Based upon the particular facts and circumstances of the transaction, the Commission has the authority under the last clause of §8-6-11(a)(9) to expand the exemption by order for a particular transaction as well as by rule for a general type of transaction.

So, here is another way to "GO-FOR-IT" — if you believe there are compelling reasons to avoid registration procedures for your client, a request can be made to the Commission for an "Order Expanding the Limited Offering Exemption" to accommodate the contemplated securities transaction. In an effort to ease the regulatory burden of the small businessman, the Commission has authorized the staff to use such exemption authority liberally where it appears from the particular facts and circumstances that investor protection would not be significantly advanced by requiring registration. The application for such order is informal — an explanatory letter is sufficient (§8-6-11(c) does require a filing fee of \$150).

Some of the particular facts and circumstances considered by the Commission are: (1) extent of enlargement, (2) characterization of proposed offerees (will the offering be confined to persons who already have a personal or business relationship with the promoters), (3) will an informational document be used, (4) complexity of the transaction, (5) extent of tax consequences (tax shelters should use Regulation D), (6) amount of capital being raised, (7) whether the offering will result in creation of jobs or similar enhancement of the state's economy, (8) and the like.

V. THE NOT-SO-TYPICAL TRANSACTION

In addition to the typical corporate finance security that we have discussed, there are many other instruments which are considered within the

definition of a security. If "securities" only pops into your mind when thinking of stocks and bonds, you need to come to grips with the concept of an "investment contract." This term (which is included in §8-6-2(10) defining a security) was interpreted by the United States Supreme Court in its decision in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946), where the Court said: "[A]n investment contract . . . means a contract, transaction, or other scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." The *Howey* case involved the sale on an installment basis of narrow, strip-shaped parcels of a planted citrus grove along with a service contract for the raising, harvesting and marketing of the fruit on a common basis with other similar investors. The SEC contended successfully that such contracts were securities.

The Alabama Supreme Court adopted the *Howey* test in *Gallion v. Alabama Market Centers, Inc.* 282 Ala. 679, 213 So. 2d 841 (1968), holding that founder's contracts issued by the defendant to investors, who in turn delivered discount purchase cards to potential customers of defendant, generated commissions to the investors as a result of the investors' efforts and thereby failed to meet one element of the *Howey* test, i.e., profits derived "solely" from the efforts of others. However, in *Burke v. State*, 385 So. 2d 648 (1980), the Alabama Supreme Court subsequently modified the "solely" element, finding the more flexible criteria to be:

... [W]hether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

Burke involved a franchise scheme where the investor, as in *Gallion v. Alabama Market Centers, Inc.*, was required to exert some effort in the scheme, although the success of the venture was completely in control of the franchisor. The court relented from the strict test of *Gallion* and found that

a security was involved. This modification of the *Howey* test had already occurred at the federal level in such franchise/pyramid cases as *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 Fed 2d 476 (9th Cir. 1973) and *SEC v. Koscol Interplanetary, Inc.*, 497 Fed 2d 473 (5th Cir. 1974), in which the respective courts read the Supreme Court in *Howey* as adapting a more flexible criteria than the strict application of the term "solely."

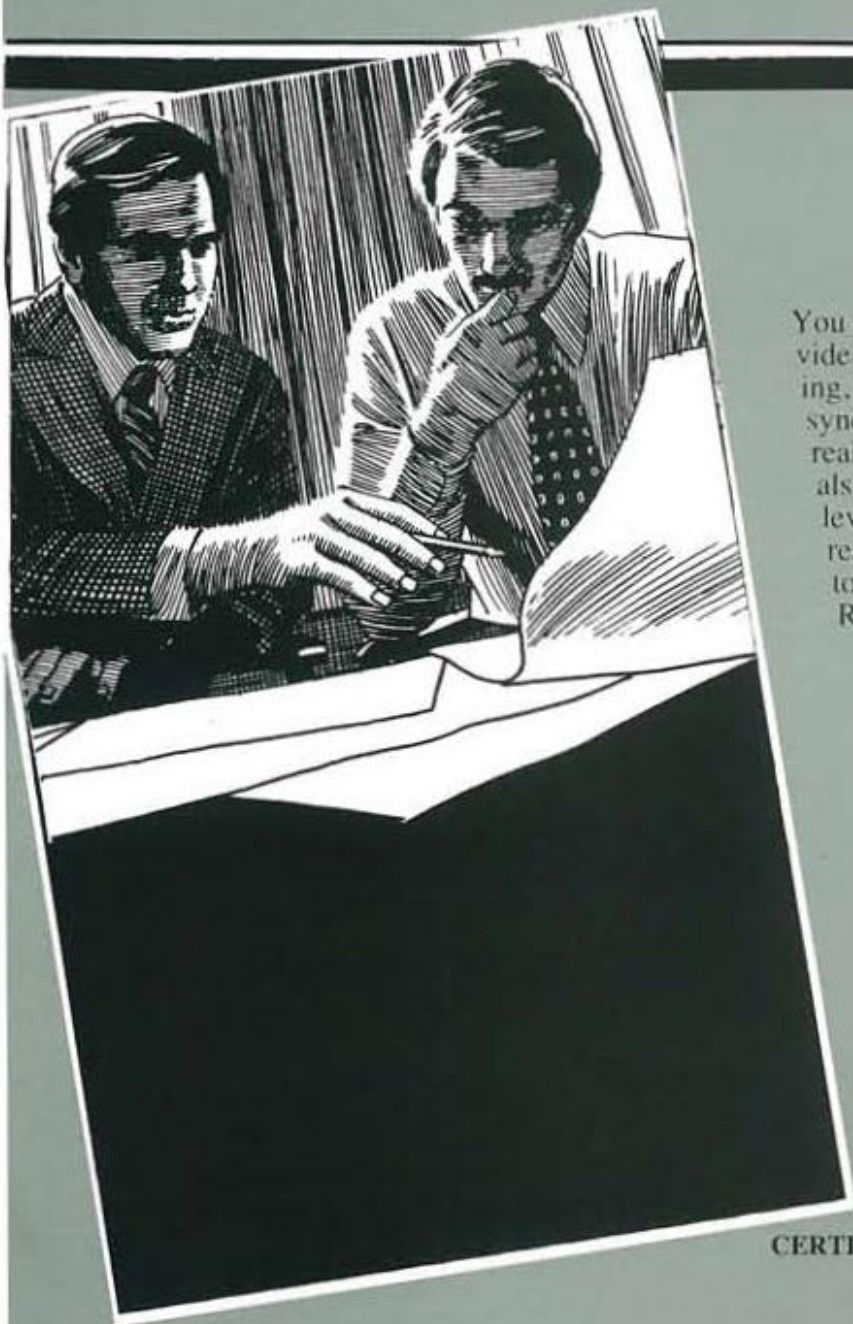
So, with the four modified *Howey* elements of (1) investment of money, (2) in a common enterprise, (3) with the expectation of profit, (4) with that profit to be realized substantially through the efforts of someone other than the investor, many investments come within the definition of a security: fractional, undivided working interests in oil leases, cattle feeding programs, "critter" contracts (where rabbits, chinchillas, earthworms, etc., are sold to an investor with the understanding that the seller would provide a market for progeny, pelts, meat, etc.) master leases of art works, recordings, etc., (with the lessor providing distribution outlets), the sale of a condominium unit coupled with a mandatory rental pool agreement, are just a few examples.

Remember, as you develop a feel for the investment contract concept, that if a particular investment comes within the definition, registration will be required and the antifraud disclosures implicated. This concept is important not only to your client who wants to sell these atypical securities, but to a client that might have purchased such an investment. The purchaser will have available to him the panoply of civil remedies which we discussed previously. When you represent the plaintiff all "WATCH IT"s become "GO-FOR-IT"s!

VI. CONCLUSION

This article was designed for general information and should not be relied upon to solve individual problems. Hopefully, the information and suggestions will remind you to "WATCH IT!" at the proper time, but to "GO-FOR-IT" when appropriate. □

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1984 Alabama State Bar Annual Meeting Highlights in Pictures



Here's where it all happened on July 12, 13 and 14 — the lovely River-view Plaza in Mobile.



President Bill Hairston drops by the registration table bright and early Thursday morning and then opens the annual meeting beginning with the Update '84; A General Practice Seminar sponsored by the Young Lawyers' Section. Carol Smith of Birmingham served as chairman of the Young Lawyers' CLE committee responsible for the planning of the program.



Attendance at the seminar topped four hundred. It was said that this was Commissioner Nelson Vinson's first experience with CLE.



Dean Charles Gamble was one of the program speakers on the seminar agenda.





Before the Bench and Bar Luncheon, guest speaker Tim O'Brien, legal correspondent for ABC, is interviewed by a member of the Mobile press.

Champ Lyons of Mobile and Billy Melton of Evergreen chat at the Bay View Cocktail Supper on the veranda of the Riverview...



... while everyone enjoys the music of *Three on a String*.



Later Thursday night, the Alabama Young Lawyers' Section in conjunction with the Mobile Young Lawyers sponsored a party on the *USS Alabama* with more than seven hundred attending. Pictured are Alex Zoghby, Cheryl Dumas, Barre Dumas, Michelle Martin and Roy Scholl.



While committee members met for a planning breakfast on Friday morning, the past presidents of the bar enjoyed a traditional breakfast of their own. Pictured are past presidents John Cad-dell (1951-1952), Red Clark (1967-1968), Tommy Greaves (1975-1976), Oakley Melton (1979-1980), and Pat Richardson (1969-1970).

Mort Herold showed attendees to this Friday morning program a memory system that works.





Kent Henslee quickly tested that memory system . . .



. . . while Yetta Samford took a second to think further.



Will these ladies' spouses remember that they have gone to Point Clear for the day to attend a special luncheon and a collectibles seminar just for them?

At the Friday night cocktail reception sponsored by Insurance Specialists, Inc. . .



. . . Birmingham lawyer Don Collins speaks with Ralph Maril of Insurance Specialists.



Who would pass up a dessert like this? We can promise you that those who came to the Dessert and Nightcap Party didn't, rather, enjoyed every calorie of it . . . coupled with the magnificence of pianist Mac Frampton.





During the Annual Meeting Convocation, General Hugh Clausen, Judge Advocate General of the U.S. Army, spoke . . .

. . . and several special awards were given. Harold Herring, of Huntsville, and Robert Huffaker, of Montgomery, were presented the Alabama State Bar Awards of Merit. Pictured (left) is Harold Herring accepting his award from President Bill Hairston.



Among those presented certificates for fifty years of lawyering was Walter L. Mims of Birmingham.

Immediate Past President Norborne Stone (left) presents the traditional sterling silver president's plaque to President Bill Hairston and his wife, Weezie.



President Hairston then passes the gavel to President-elect Walter Byars (left) of Montgomery, who officially becomes the president of the Alabama State Bar for the 1984-85 year.



Immediately following the adjournment of the 1984 Alabama State Bar Annual Meeting, President Walter Byars is pictured with newly elected President-elect Jim North of Birmingham, and Vice President Joe Cassady of Enterprise.

Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

"If an attorney who actively represents one party in a litigated matter becomes a partner or associate in a law firm representing the adverse party, must all partners and associates of the firm that the attorney joins withdraw from the case despite (1) the most careful screening to insure that the attorney joining the firm has no access to the files involving the case or discusses the case with any partner or associate and (2) all parties to the litigation consent to the firm continuing representation after a full disclosure of the facts?"

ANSWER:

The firm that the attorney joins must withdraw from the case and no partner or associate may participate further therein.

DISCUSSION:

Ethical Consideration 5-15 in part provides:

"A lawyer should *never* represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests." (emphasis added)

Disciplinary Rule 5-101(C) provides:

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

Disciplinary Rule 5-105(B) provides:

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

Disciplinary Rule 5-105(C) in part provides:

"In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if

he reasonably determines that he can adequately represent the interest of each and if each consents to representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." (emphasis added)

Disciplinary Rule 5-105(D) provides:

"If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, or partner or associate of his or his firm may accept or continue such employment."

The Code of Professional Responsibility under the section denominated "Definitions" contains the following:

"Unless the context otherwise requires, wherever in these rules the conduct of a lawyer is prohibited, all lawyers associated with him are also prohibited."

The initial inquiry addresses the problem of whether an attorney could represent one party in a litigated matter after having previously actively represented an adverse party in the same matter. It is obvious that the attorney could not.

Although Disciplinary Rule 5-105 does not speak specifically of the "former client" problem, courts and ethics committees have expressly or impliedly found that the drafters of the Code intended to include the former client problem within Disciplinary Rule 5-105. *E.F. Hutton and Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969); *In re Evans*, 113 Ariz. 458, 556 P. 2d 792 (1976).

The Office of the General Counsel and the Disciplinary Commission have made only one exception to the application of the doctrine of "vicarious disqualification." As will be hereinafter noted, the Office of the General Counsel and the Disciplinary Commission have refused to base a second imputation of knowledge upon a first imputation of knowledge.

In the case of *G.A.C. Commercial Corp. v. Mahoney Typographers*, 66 Mich. App. 186, 238 N.W.2d 575 (1975), the Supreme Court of Michigan held that under DR 5-105(D) an entire law firm was disqualified from representing their client when during the pendency of litigation it hired an attorney who represented the opponent in the same case.

In the opinion the Supreme Court of Michigan stated:

"SHOULD A LAW FIRM BE DISQUALIFIED FROM CONTINUING TO REPRESENT A CLIENT WHERE, DURING THE PENDENCY OF THE LITIGATION, IT HIRED AN AT-

TORNEY WHO REPRESENTED THE OPPOSING PARTY IN THE SAME CASE?

[T]he bottom line should always be this: where it is a question of ethics, the answer is 'no.' There is no room for 'close' questions of professional propriety, particularly at a time when public trust in and respect for the legal profession is not at its highest level." (capitalization added by the court)

There are a number of other cases with holdings similar to that in *G.A.C. Commercial Corp. v. Mahoney Typographers*, *supra*.

The Ethics Committee of the Illinois State Bar Association heretofore held that a partnership that acquires a partner from a firm that it frequently opposes in litigation must withdraw from representation in all cases in which the new member participated or was familiar with while with the other firm. However, the Committee further held that the firm may continue representation in pending cases that the new partner did not participate in and had no knowledge of, but the new member might not take part in any such matters.

Some courts have given a literal and uncompromising interpretation to the rules of "vicarious disqualification." In the case of *Westinghouse Electric Corporation v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), the court held that "there is no basis for creating separate disqualification rules for large firms even though the burden of complying with ethical considerations will naturally fall more heavily upon their shoulders." See also *Schloetter v. Railco of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976); *N.C.K. Organization, Ltd. v. Bregman*, 542 F.2d 128 (2nd Cir. 1976); *Hull v. Celanese Corp.*, 513 F.2d 568 (2nd Cir. 1975); *Emle Industries, Inc. v. Patenex, Inc.*, 478 F.2d 562 (2nd Cir. 1973) and *Motor Mart, Inc. v. Sabb Motors, Inc.*, 359 F. Supp. 156 (S.D.N.Y. 1973).

Other courts have taken a more liberal and common sense approach to the problem of "vicarious disqualification." In denying a motion to disqualify an attorney the court in *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2nd Cir. 1975) stated:

"It is unquestionably true that in the course of their work at large law firms, associates are entrusted with the confidence of some of their clients. But it would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the names of all the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm. Obviously, such legal osmosis does not occur. Their mere recital of such a proposition should be selfrefuting. And a rational interpretation of the Code of Professional Responsibility does not call for disqualification on the basis of such an unrealistic perception of the practice of law in large firms."

See also *Woods v. Coffinton County Bank*, 537 F.2d 804 (5th Cir. 1976); *International Electronics Corp. v. Flanzer*, 527 F.2d 1288 (2nd Cir. 1975) and *Allegaert v. Perot*, 565 F.2d 246 (2nd Cir. 1977).

In Ethics Opinion 81-557 the Disciplinary Commission observed:

"We do not feel that your leaving the firm of A, B et al. and becoming an associate of the firm X, Y et al. would necessarily require the latter firm to withdraw from all cases wherein A, B et al. represent adverse parties. To uncompromisingly apply the rule would require us to base a presumption upon a presumption. In other words, we would have to presume that you acquired all of the knowledge possessed by every member and associate of the firm of A, B et al. (a fact which we know to be untrue). Then we would have to assume that this knowledge (which you do not possess) would be irrebutably imputed to every member and associate of the firm of X, Y et al. (a fact which we know to be untrue)."

The Office of the General Counsel and the Disciplinary Commission have refused to give a literal interpretation to the principle of "vicarious disqualification." We have perhaps adopted a minority, although we regard as a common sense, view in this regard.

In Ethics Opinion 83-144 the Office of the General Counsel and the Disciplinary Commission held that where an attorney had represented the plaintiff and joined the firm representing the defendant, the firm representing the defendant was required to withdraw from the case. That opinion involved a fact situation where all the parties would resort to very careful screening to insure that no facts would be divulged as between the new member of the defendant firm and the members and associates of the defendant firm.

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The present request for opinion adds a new element, namely, the effect of client consent after a full disclosure.

Three significant factors distinguish this case from those cases in which client consent after full disclosure has rendered simultaneous representation of parties with conflicting interests ethical. (1) Disciplinary Rule 5-105(A) (B) & (C) speak of the representation of multiple parties having interest which are conflicting, inconsistent or diverse. None of these Rules contemplate the same attorney representing both the plaintiff and the defendant in pending litigation. (2) Disciplinary Rule 5-105(C) presupposes a reasonable determination by the lawyer that he can adequately represent the interest of each multiple client. Obviously, no such reasonable determination could be made to justify an attorney representing both plaintiff and the defendant in a litigated matter. (3) If consent and waiver after a full disclosure is not significant to permit an attorney to sue a former client on a substantially related matter, *a fortiori*, consent and waiver after a full disclosure would not permit an attorney to simultaneously represent both the plaintiff and the defendant.

Canon 9 provides "a lawyer should avoid even the appearance of professional impropriety." Although this is an aspirational goal and not a disciplinary rule for which discipline can be imposed, your request for opinion which you have tendered creates a classic example of the appearance of impropriety.

Client consent in conflict of interest situations can be a treacherous and dangerous thing, especially, under circumstances where the lawyer could not possibly "reasonably

determine that he can adequately represent the interest of each." Although all adverse parties to a litigated matter consent to a law firm's continuing representation of one adverse party after being joined by an attorney who previously represented the opposing party, we have no assurance that some turn of events might not prompt one or both parties to withdraw such consent. This is illustrated by Informal Opinion 1125 (1969) of the American Bar Association Committee on Ethics and Professional Responsibility. A wife consented to an attorney's representation of a husband in a divorce action, which representation would have been barred but for such consent because of a conflict of interests. The Committee held that the attorney must cease to represent the husband upon the wife's withdrawal of her consent, observing:

"We feel that it was unfair for the wife to give her consent and then withdraw the consent for the attorney to represent her husband, but even in view of the unfairness of this action on the part of the wife, the Committee feels that there could be a possible conflict of interest and under the Opinions herein cited, the Committee feels that it would be to the best interests of all parties if the attorney withdrew from representation of the husband."

Furthermore, it would be difficult, if not impossible, to convince the party that does not prevail in the litigation that the result was not due to information exchanged between the attorneys involved. □

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For more information, telephone (205) 870-2714.

Write: Jim Kee, Research Director
Cumberland School of Law
Samford University
Birmingham, Alabama 35229

Disciplinary Report

Public Censure

On July 11, 1984, Mobile lawyer **Reynolds T. Alonzo, Jr.** was publicly censured for having willfully neglected a legal matter entrusted to him and having failed to seek the lawful objectives of a client, by undertaking to represent a client in a workman's compensation disability case, and then, after failing to settle the matter, having failed to file suit on the client's behalf before the statutory period during which suit could be filed had expired.

Surrenders of License

On March 2, 1984, the Supreme Court of Alabama entered an Order accepting a Surrender of License tendered by **Clifford B. Wentworth** of Hollywood, Florida. Mr. Wentworth's surrender was made subsequent to his conviction of a felonious violation of Title 18 of the U.S. Code.

On July 9, 1984 the Supreme Court of Alabama accepted the Surrender of License tendered by **Elwood L. Hogan** of Mobile County, Alabama. The supreme court cancelled and annulled Mr. Hogan's license and privilege to practice law, effective at 12:01 a.m. June 21, 1984. Mr. Hogan had previously been convicted of a felonious violation of the United States Code in the United States District Court for the Southern District of Alabama.

On July 9, 1984 the Supreme Court of Alabama accepted the Surrender of License tendered by **James D. Sullivan** of Mobile County, Alabama. The Supreme Court cancelled and annulled Mr. Sullivan's license and privilege to practice law, effective at 12:01 a.m. June 12, 1984. Mr. Sullivan had previously been convicted of a felonious violation of the United States Code in the United States District Court for the Southern District of Alabama.

Suspension

Mobile lawyer **Walter L. Davis** was suspended from the practice of law in the state of Alabama for a period of six months, effective June 20, 1984, based upon an order of the Disciplinary Board finding Mr. Davis guilty of willful neglect in having failed to pursue a divorce matter for a client for a period of approximately eleven months.

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BEFORE THE DISCIPLINARY COMMISSION OF THE ALABAMA STATE BAR ORDER

The Disciplinary Commission of the Alabama State Bar having taken under advisement the opinion of the General Counsel heretofore published in the July 1984 issue of **The Alabama Lawyer** for reconsideration, the enforcement of the provisions of the Code of Professional Responsibility of the Alabama State Bar as applied and interpreted in said opinion is suspended for a period of ninety (90) days.

DONE AND ORDERED this 17th day of August, 1984.

Ben H. Harris, Jr. Chairman
The Disciplinary Commission
of the Alabama State Bar

In Memoriam



R.B. Barnes, Jr.

Reid Boylston Barnes, Jr., of Birmingham died on May 13, 1984. He was eighty.

Mr. Barnes was born in Opelika, Alabama on August 4, 1903. He earned his undergraduate degree at Auburn University and graduated from the University of Alabama School of Law in 1926. He was elected to Phi Beta

Kappa, being the first member admitted to membership while in law school, and he was, also, a member of Omicron Delta Kappa.

Mr. Barnes was a partner in the law firm of Lange, Simpson, Robinson and Somerville where he had practiced since 1930. Barnes served as a law professor at the Birmingham School of Law from 1936 to 1942 when he entered military service as a captain in the Litigation Division of the Judge Advocate General's Department. He later served as Litigation Officer of the Fourth Service Command until being discharged from service as a lieutenant colonel in 1946. For military service he received the Legion of Merit Award.

At his funeral on May 15, 1984, the Honorable Seybourn H. Lynne spoke these words of his friend:

"When one comes to bid farewell to a dear friend for half a century strong

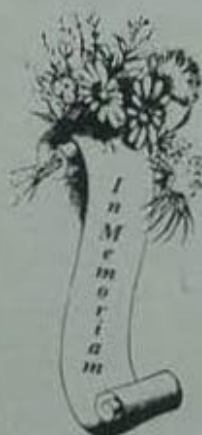
emotions surface, softened by his legacy of precious memories. As was his father before him, Reid Barnes was a giant of the legal profession. In him were blended a diamond like intellect and a warm, gentle personality. He lived and worked on a higher moral and ethical plane than most of us who were his fellow laborers. His was the firm and unpretentious Christian faith of a patrician southern gentleman. Today he would have us recall the words of Tennyson:

Sunset and evening star,
And one clear call for me!
And may there be no moaning of the bar,
When I put out to sea.

"He refused to surrender to the pain and suffering which he endured with courage and dignity. All that has passed away. Hear now the words of another poet:

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

Survivors include his wife, Nell Woodall Barnes; two daughters, Celeta Barnes Manley and Lyndall Barnes Hutchinson; and one son, Reid B. Barnes III.



Andrews, William Frank, Jr.—Anniston
Admitted: 1973 Died: July 21, 1984

Ellis, William Hawkins—Homewood
Admitted: 1925 Died: July 7, 1984

Hinton, James Forrest, Sr.—Gadsden
Admitted: 1948 Died: June 2, 1984

Loftin, Gordon Bartley, II—Huntsville
Admitted: 1969 Died: June 24, 1984

Moseley, Pope Lloyd, III—Sylacauga
Admitted: 1949 Died: April 14, 1984

Smith, Royal Randolph—Selma
Admitted: 1928 Died: June 22, 1984

Thomas, Andrew Johnston—Birmingham
Admitted: 1920 Died: July 11, 1984

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 appreciate your assistance in providing biographical information for *The Alabama Lawyer*.



J.F. Hinton, Sr.

James Forrest (Jimmy) Hinton, Sr. of Gadsden died on June 2, 1984. He was fifty-eight at the time of his death.

Jimmy Hinton was born in Anniston on December 3, 1925. He attended undergraduate school at the University of Alabama and obtained his law degree from the University of Alabama School of Law in 1948. After graduation from law school, he moved to Gadsden where he began a legal practice that spanned more than thirty-five years. During his career, Mr. Hinton served as city judge for the city of Gadsden, municipal judge for the town of Glencoe and city attorney for Rainbow City. Throughout his professional life, he maintained an active practice in state and federal courts and was a member of the bar of the Supreme Court of the United States. He was a member of the Etowah County, Alabama and American Bar Associations. Last year, his humorous account of two cases from his early days of practice, "Pies and Dogs," was published in *Litigation* magazine, the journal of the ABA's Litigation Section.

At Mr. Hinton's funeral service on June the fifth in Gadsden, Judge Cyril Smith delivered a eulogy in which he praised Jimmy Hinton's selflessness, intelligence, wit, compassion and undying dedication to the practice of law. Judge Smith noted that, despite a grave and debilitating illness, Mr. Hinton continued to practice law and, in doing so, earned even greater respect from members of the bench and bar as well

as the community at large. Quoting St. Paul, Judge Smith declared that Jimmy Hinton had "run the race and fought the good fight" in his courageous battle against cancer.

Mr. Hinton was a member of the First United Methodist Church in Gadsden where he taught Sunday School for many years. His abiding faith in God, despite a terribly painful and prolonged illness, was an inspiration to all who came into contact with him.

All who knew Jimmy Hinton knew of his great admiration and respect for less privileged students who, like him-

self, were compelled to support themselves through law school by working after classes. For that reason, the James Forrest Hinton, Sr., Memorial Scholarship has been established at the University of Alabama School of Law for deserving second-year students. Donations can be made to the scholarship fund by writing the University of Alabama School of Law.

Mr. Hinton is survived by his wife, Juanita Weems Hinton, and their three children, J. Forrest Hinton, a practicing attorney in New Orleans; Paula W. Hinton, a practicing attorney in Houston; and Julia A. Hinton, a student in Mobile.

CLE NEWS (Continued from page 281)

Approved Organizations for 1984

Regulation 4.2 For 1984, continuing legal education activities sponsored by the following organizations are presumptively approved for credit, provided that the standards for course approval (Regulations 4.1.1, through 4.1.12) are met:

Accredited law schools (ABA, AALS)
Administrative Office of Courts — The Judicial College
Alabama Consortium of Legal Services Programs
Alabama Criminal Defense Lawyers Association
Alabama Defense Lawyers Association
Alabama District Attorneys Association
Alabama Institute for Continuing Legal Education
Alabama Lawyers Association
Alabama State Bar and Bar Sections
Alabama Trial Lawyers Association
American Academy of Judicial Education
American Bar and Bar Sections
American College of Trial Lawyers
American Law Institute/American Bar Association Committee on Continuing Professional Education
Association of Trial Lawyers of America
Bar associations of the sister states, the District of Columbia, Puerto Rico and the Trust Territories
Birmingham Bar Association
Commercial Law League of America
Cumberland Institute for Continuing Legal Education
Defense Research Institute
Federal Bar Association
Federal Publications, Inc.

Huntsville/Madison County Bar Association
International Association of Insurance Counsel
International Society of Barristers
Legal sections, agency programs — U.S. and state governments
Library of Congress — Congressional Research Service
Maritime Law Association
Mobile County Bar Association
Montgomery County Bar Association
Montgomery Trial Lawyers Association
Motor Carrier Lawyers Association
National Association of Bond Lawyers
National Bar Association
National College of District Attorneys
National College of Juvenile Justice
National District Attorneys Association
National Health Lawyers Association
National Institute for Trial Advocacy
National Judicial College
National Organization of Social Security Claimants' Representatives
National Rural Electric Cooperative Association Legal Division
Patent Resources Group, Inc.
Practising Law Institute
Rocky Mountain Mineral Law Foundation
Southwestern Legal Foundation
Trial Lawyers Association of Madison County
Tuscaloosa County Bar Association
Tuscaloosa Trial Lawyers Association

Classified Notices

books for sale

FOR SALE: Eight-volume set, OIL & GAS LAW, Williams and Meyers; pub. Matthew Bender, 1983 (current). \$800.00. Contact: Marion F. Walker, 608 N. 21st Street, Birmingham, Alabama 35203 or call 254-3388.

BENDERS FORMS OF DISCOVERY (Vols. 1-16; complete set), New cost \$770.00; will sell for \$350.00. Updated through 1980. Books are in new condition. Contact Beth Baker at Post Office Box 416, Fairhope, Alabama 36533. Phone 928-1355.

FOR SALE: Newly printed and updated Code of Professional Responsibility of the Alabama State Bar — Rules of Disciplinary Enforcement. Every lawyer should have one accessible. \$1.75 plus postage (\$1.05 third class, \$1.56 first class). Send check to Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.

positions offered

COMMERCIAL REAL ESTATE attorney to practice in medium sized Montgomery firm. At least three years experience in commercial real estate required. Salary commensurate with experience and academic credentials. Reply to P.O. Box 4524, Montgomery, Alabama 36103.

services

EXAMINATION OF QUESTIONED Documents. Handwriting, typewriting, and related examinations. Internationally court qualified expert witness. Diplomate, American Board of Forensic Document Examiners. Member: American Society of

Questioned Document Examiners, the International Association for Identification, the British Forensic Science Society, and the National Association of Criminal Defense Lawyers. Retired Chief Document Examiner, USA CI Laboratories. Hans Mayer Gidion, 218 Merrymont Drive, Augusta, Georgia 30907. (404) 860-4267.

STRUCTURAL ENGINEER/ Consultant/Failure Analyst/Expert Witness, Ph.D. in applied mechanics. Alabama registered professional engineer. Experience in codes & standards, product liability, and failure analysis of industrial equipment and structures, construction, marine, pipeline, and pressure vessels. National/International experience. Dr. Samuel J. Brown, E.E., QED Corp., P.O. Box 1275, Crosby, Texas 77532. (713) 328-5538.

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

miscellaneous

CONDOMINIUM WANTED at Colorado ski resort during Christmas 1984, for about 4 people (prefer larger resort area). Call Brian Dowling 793-0117.

ALABAMA LAWYER BINDERS: More than 300 Alabama lawyers have found a convenient way to keep *The Alabama Lawyer* organized and accessible for easy reference or to place in the lobby of their law office. They have ordered custom made binders, available for \$6.50 each, by writing The Alabama Lawyer, P.O. Box 4156, Montgomery, Alabama 36101. Please include payment by check.

THE ALABAMA LAWYER CLASSIFIEDS

All requests for classified ad placement must be submitted typewritten and are subject to approval. Alabama State Bar members are not charged for classified notices, however are limited to two announcements per year. Nonmember advertisers must pay in advance and will receive a complimentary copy of *The Alabama Lawyer* in which their advertisement is published. Additional copies are \$3.00 plus postage.

RATES:

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Nonmembers: \$30 per insertion of fifty words or less
\$5.00 per additional word

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