The Alabama Lawyer

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In Memoriam
Robert Smith Vance
United States Circuit Judge
Eleventh Circuit Court
of Appeals
1931-1989

The Alabama Lawyer In Brief

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INSIDE THIS ISSUE

Join us in Birmingham February 2 to celebrate the Bicentennial of the Bill of Rights and have dinner with the Honorable Anthony M. Kennedy, associate justice of the United States Supreme Court. Mr. Justice Kennedy will address the Friday night audience on the "Rule of Law."

Daytime activities include committee and task force meetings around Birmingham, a Bicentennial luncheon, afternoon lectures and a cocktail reception.

For more information, contact the Alabama State Bar at P.O. Box 671, Montgomery, Alabama 36101 or 269-1515.

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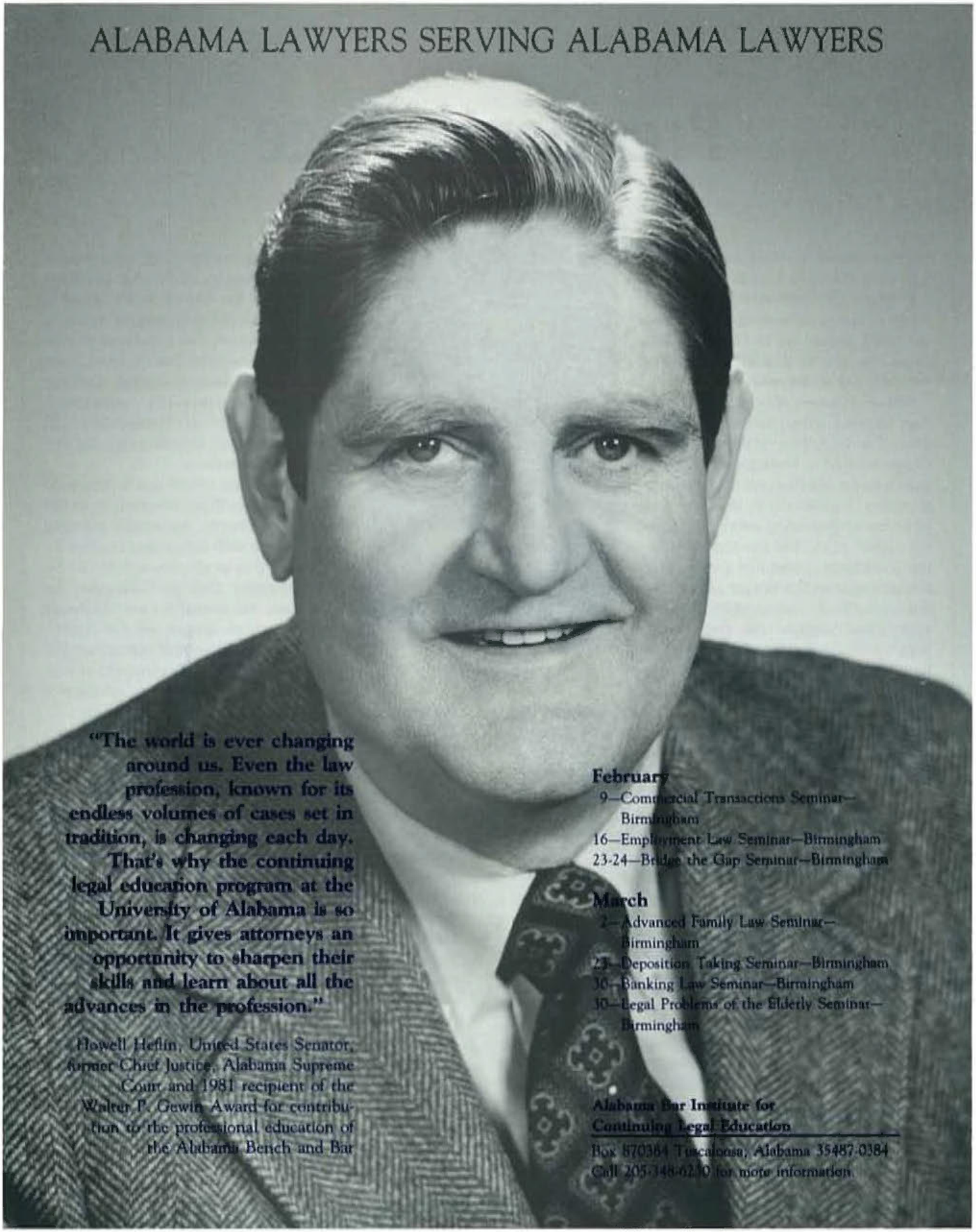

"The world is ever changing around us. Even the law profession, known for its endless volumes of cases set in tradition, is changing each day. That's why the continuing legal education program at the University of Alabama is so important. It gives attorneys an opportunity to sharpen their skills and learn about all the advances in the profession."

Howell Heflin, United States Senator, former Chief Justice, Alabama Supreme Court and 1981 recipient of the Walter P. Gewin Award for contribution to the professional education of the Alabama Bench and Bar

February

9—Commercial Transactions Seminar—Birmingham
16—Employment Law Seminar—Birmingham
23-24—Bridge the Gap Seminar—Birmingham

March

2—Advanced Family Law Seminar—Birmingham
23—Deposition Taking Seminar—Birmingham
30—Banking Law Seminar—Birmingham
30—Legal Problems of the Elderly Seminar—Birmingham

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President's Page

CAINE

The organized bar all over America is returning to a renewed commitment to professionalism. The image of lawyers is turning around, and the credit should go to lawyers themselves. The answer, dear Brutus, is not in the stars, but in ourselves.

Alabama lawyers are doing their part. I am referring to the creation of the Alabama Capital Representation Resource Center located in Montgomery. The resource center is a non-profit organization providing representation to death row prisoners and assisting attorneys handling capital cases. The concept of creating a resource center first grew out of concern by federal and state judges that processing death cases through the court system had reached the crisis stage. Judges John Godbold and Paul Roney of the Eleventh Circuit Court of Appeals, together with former Chief Justice C.C. Torbert, Jr., requested that the bar study this problem. In November 1987, bar President Ben Harris appointed former Governor Albert Brewer to chair a task force to consult with the courts and recommend to the board of commissioners a program to attract competent civil trial attorneys to volunteer to represent persons on Alabama's death row. The private criminal bar simply has had to shoulder the problem too long.

Alabama has one of the nation's largest and fastest growing death row populations. There are presently 109 people in Alabama under sentences of death with another 125 people currently facing capital murder trials or sentencing hearings. The problem in Alabama is the number of lawyers available to handle the pending caseload. Alabama has the sixth largest death row population in America and one of the smallest bar-to-prisoner ratios among the southern states where a majority of the capital cases originate. For example, Alabama has 70 attorneys per death row inmate and Mississippi, the next state in line per ratio, has 98 attorneys per capital defendant. For the past few years, Alabama has had to rely on out-of-state counsel with increasing regularity.

The resource center first began operations in February 1989 after receiving grants from the United States Administrative Office of Courts and the Alabama Law Foundation, the University of Alabama, the Southern Poverty Law Center and the Southern Prisoners' Defense Committee. The main office is located at 444 Clay Street in Montgomery and operates with an executive director and eight staff members.

The resource center was fortunate to attract attorney Bryan Stevenson as its first executive director. Stevenson assumed the position with outstanding credentials. He worked as an attorney with the Southern Prisoners' Defense Committee for five years. He earned his juris doctorate at Harvard Law School and also holds a masters degree in public policy from the Kennedy School of Government at Harvard University. I have every confidence the center will function well under his leadership.

November 12 and 13, 1989, the state bar sponsored a Capital Representation Resource Center Conference in Birmingham. Law firms throughout Alabama with nine or more members were invited to send a representative. The purpose of the conference was to acquaint civil trial lawyers with the operation of the resource center and to encourage the bar to support and participate in the program. The opening remarks by Alabama Chief Justice Hornsby brought the conference into focus. "I believe that cases carrying the possibility of the death penalty are the most important cases our courts can hear. There is nothing I can think of that is more final than death. It is awfully final." The chief justice pointed out that death cases in Alabama average approximately eight years from the day the crime is committed until the date of execution. He said, "I believe eight years is too long to complete these cases, and it should be the responsibility of our courts, both state and federal, to insure that more of them do not fall through the cracks as they swing back and forth between our systems.

"While the right to fairness and justice and due process

(continued on page 6)

Executive Director's Report

Preserving self-regulation

In recent months, I have received telephone calls that are disturbing, not so much in their number as in their inferences. I want to shed some light on the substance of these calls which concern actions pending or being investigated in the area of professional responsibility.

Under Rule 22, I do not necessarily know that a complaint has been made against a lawyer unless it is personally addressed to me. Even then, I forward it directly to the Center for Professional Responsibility. This is frequently done by my secretary without my ever knowing it was in the Dexter Avenue office. My role in the disciplinary process is that of a court clerk; I perfect service of final charges and receive responsive pleadings if charges are deemed proper by the Disciplinary Commission. I also can subpoena witnesses. Most often my name is "stamped" on the official papers in the process.

I do not, however, serve a system that is on a perpetual "witch-hunt" to "persecute" lawyers. Recent telephone calls from respondent attorneys or their attorneys too frequently imply this to be the case.

The four very able lawyers who practice in the office of the Center for Professional Responsibility, their dedicated support staff and the elected volunteers who serve on the Disciplinary Boards and the Disciplinary Commission work within a very finite and specific set of rules. The Code of Professional Responsibility and Rules of Disciplinary Enforcement and Procedure are approved by the Supreme Court of Alabama. Likewise, the local bar grievance committee members who play vital roles in the process are volunteers and your professional peers. Their task is a thankless one, but necessary.

While the vast majority of complaints are without basis, each must be investigated.

With increasing frequency, lawyers or their attorneys call me to complain they have not had an opportunity to respond to a complaint that may have reached a final stage in the process. The records simply do not support their contentions. In most cases, the lawyer has ignored the initial complaint or dismissed it as baseless in his or her own mind. Our staff or a local committee must process each complaint to resolution. An attorney's prompt cooperation can expedite an early resolution of a baseless complaint.

Should formal charges be preferred, then the panel which hears the charges is designated by a rotation system and the staff counsel assigned to the case is likewise randomly selected with the only concern being a possible conflict or overall case load at the time.

I am concerned that a perception apparently has evolved that by design and intent "the bar goes after lawyer 'X'" or a staff member has a personal motive in the pursuit of a disciplinary action. This simply is not true.

This reasoning demeans our profession's most prized privilege—self-regulation. It impugns the integrity of the volunteers and paid staff who are working within our historic self-regulating process.

HAMNER

Professional discipline is a unpleasant task for both the volunteer and bar professional, but it is essential. Every lawyer in the state should read the *Code of Professional Responsibility* as well as the Rules of Disciplinary Enforcement. Too many criticizing this system have never bothered to read and attempt to understand them. You are encouraged to call or write the office of the General Counsel for such assistance with the process as you may need to better understand a situation you may encounter. Often a lawyer's interest is provoked only when a complaint is made against him

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Report

(continued from page 5)

or her. This is still not too late. Attacking the system, however, is not necessarily the best defense.

I would ask only that you seek to understand the system before you or your counsel criticize it. Perfection may be lacking, but fairness to the public and the bar member demands its integrity be above reproach. This is the only goal of the state bar for its self-regulating process.

I hope I have not exhibited a "thin skin" in discussing this, but I am disappointed when good lawyers and good friends call to "express concern" (more often to complain or criticize) in such a way as to attack the integrity of our process and, indirectly, my own integrity as your chief paid executive. Many of these same persons, at other times and under other circumstances, have decried a "lack of professionalism." It is only when the issues are close to home that suddenly the system is viewed with suspicion. ■

President's Page

(continued from page 4)

must prevail, I am convinced that the public has a right to see all cases, including capital cases, adjudicated within a reasonable time period and without unnecessary delay."

Judge Robert S. Vance of the Eleventh Circuit Court of Appeals and Judge Sam C. Pointer, Jr., chief judge of the Northern District of Alabama, represented the federal courts at the conference. Judge Vance commented on the great need for additional lawyers to represent persons sentenced to death as these cases leave the state system and enter the federal courts. He said, "I believe that participation in the capital representation program is one of the finest examples of how the practicing bar can demonstrate a meaningful commitment to exercising professional responsibility. This type of service separates lawyers as professionals from managers of the marketplace."

I use this forum in the hope of adding emphasis to the need for additional attorney participation. The first step has been taken with the resource center now in full operation. What remains is for Alabama lawyers to come forward with a commitment to do their part to help ease the crisis of capital representation.

It would be an easy and simple response for any civil trial lawyer to decline participation in the program by reasoning that he or she did not have sufficient background and experience in the handling of criminal defense matters. It was precisely for this reason that the center was created. With the help and assistance of the center any civil trial lawyer can adequately and competently represent a death row inmate.

I encourage every lawyer to consider participating in the program. The need and the rewards are great. Although medals and certificates are not given for every act of professionalism, there is self-satisfaction from knowing that as a professional you freely chose not to sit back and allow someone else to do the work, but responded, as a professional, to a real need of the legal process. Truly, the reward for public service comes from the quiet voice within each of us which reminds us that we did not abdicate, but rather chose to discharge our professional duty to society in a much-needed way. If the image of lawyers is to continue to grow in the eyes of society it will take each of us doing our part. ■

We come here today in outrage to re
member and celebrate the life of a mar
who was the antithesis of outrage. So I
is that we put aside our outrage for the
moment and think about Bob Vance, the
man he was and the life he lived.

If, in that process, our outrage in
creases, so be it. If the taking of such a
noble life enrages us, Bob would be the
first to tell us that we honor him most by
remembering the values he held dear.

Bob Vance loved life. He lived life ful
ly and with gusto. He did not wish to die
He did not deserve to die. But his assas
sins were cheated if they picked Bob
Vance thinking that he was afraid to die.
Bob knew that death was the bargain we
all make to be born, and that the time
in between made the bargain a good
one.

The tragedy in Bob Vance's untimely
death is that he had so much yet to give.
We, the beneficiaries of his intellect and
wit, are the ones who have been robbed
by his death.

It is not unfitting that Bob's death has
come in this Advent Season of short days
and long nights. He knew that the days
will soon lengthen, and that a time of
good will and cheer is coming. That is
the way—the optimistic and hopeful
way—he approached all adversity. He al
ways knew, with his unique confidence,
that things would work out, given time.

More than any man I have known, Bob
Vance had perspective. He never lost
sight of his goal to resolve disputes rea
sonably and peacefully. He could and of
ten did reduce tension in hotly contend
ing groups with his unusual wit. He saw
and gave proportion to issues in terms of
their possible solutions.

He had the unique ability to draw his
circles to include his adversaries and to

In Memoriam

U.S. CIRCUIT JUDGE ROBERT SMITH VANCE

join them in the search for common ground on which both could honorably stand.

It is no wonder that his assassins, who lacked his capacity and belief in the rule of law, could not tolerate such a man in their presence.

Bob Vance distrusted accumulations of political power. He knew that such concentrations paved the way for despotic and arbitrary conduct, even by good people. He revered our Constitution. He trusted an informed electorate and believed passionately in the election process. He eschewed the hand-picking of candidates. When the Legislature turned down his proposal to require all candidates to file reports of their campaign finances *before* the election, he persuaded his party to adopt his rule. He then challenged other parties to follow his party's lead. When his side was beat at the polls in the selection of delegates to the national convention, he opposed all efforts to unseat the delegates selected by popular vote.

Bob Vance continued to develop and use his skills as a member of our federal appellate court system. His insistence on a level playing field for contending parties in our judicial process was well-known. So was his recognition that our liberties are assured only by our responsible conduct. He believed that a citizen's duty to pay the cost of government should bear reasonable proportion to the benefits that government bestowed on him.

He distrusted excessive governmental control. His instincts were for the underdog and the underprivileged. He participated in the fight to require reapportionment of state legislatures dominated by oppressive minorities.

U.S. Circuit Judge Robert Smith Vance

Bob Vance gave a good account of his talents and how he used them. We will not likely see his kind again, but he is a role model for those men and women who knew him and worked with him in the causes he promoted.

Through all of his work and accomplishments, Bob was supported by a loving wife, Helen Rainey Vance, to whom he was devoted. Their marriage was a paragon that produced two fine sons, Robert, Jr., and Charles. They have the support of their memories of a remarkable husband and father to carry them through their grief in which we all join.

I am sure they know that their grief, just now, cannot be less because their love for him was so great. May they be comforted by the certainty, born of faith, that Bob has entered the greater service of God in His creation and know that their pride in him will grow even as the intensity of their pain diminishes.

Finally, I read and saved a poem by Isla Paschal Richardson—never dreaming that I would ever use it on an occasion such as this. However, it says what I think Bob is saying now to his family and friends, if we could but hear him, and I want to share it with you in closing:

To Those I Love

If I should ever leave you whom I love
To go along the Silent Way,
Grieve not nor speak of me with tears,
But laugh and talk of me as if
I were beside you there.
(I'd come—I'd come, could I but
find a way!
But would not tears and grief be barriers?)
And when you hear a song or
see a bird I loved,
Please do not let the thought
of me be sad . . .
For I am loving you just as
I always have . . .
You were so good to me!
There were so many things
I wanted still to do—
So many things to say to you . . .
Remember that I did not fear . . .
It was just leaving you that
was so hard to face . . .
We cannot see Beyond . . .
But this I know:
I loved you so—
'twas heaven here with you!

(Poem by Isla Paschal Richardson)

—Honorable R. Clifford Fulford,
U.S. Bankruptcy Court,
Birmingham, Alabama

■

Letters to the editor

Most recent article in "Consultant's Corner" series

In this article in the September 1989 issue of *The Alabama Lawyer*, you imply that the word processor WordPerfect is a product of Microsoft. This is incorrect. WordPerfect is a product of WordPerfect Corporation in Orem, Utah, and is not to be confused with Microsoft Word, a word processor which is a product of Microsoft.

Janice Franks, law librarian
Legal Services Corporation
of Alabama
Montgomery, Alabama

No-fault divorce in Alabama

The basis of society is the family. No family, no human society. The basis of the family is marriage. No marriage, no family. That which destroys marriage, destroys human society. Is this debatable?

In 1971, the Legislature of Alabama enacted a law authorizing no-fault divorce. No-fault divorce destroys marriage. That which destroys marriage destroys human society. That which destroys human society should be prevented. Is this debatable?

In 1974, an article was written in *The Alabama Lawyer* urging the abolition of no-fault divorce. Nothing was done about this in Alabama. In other states, however, no-fault divorce was extended until now it seems to be in full force and effect throughout this nation.

In the November 1989 issue of the *American Bar Association Journal*, there is a law review article entitled, "No-Fault Divorce: Are Women Losing the Battle?" This article quotes quite a number of incidences which seem to say that women are losing this battle. It seems strange that apparently there are no women who think that human society needs protection from no-fault divorce. If the women were to agree that society should not have no-fault divorce, shouldn't they say so, even if they might not have the votes in the Legislature to abolish no-fault divorce?

I think so.

J. Edward Thornton,
Mobile, Alabama

Alabama courthouses

Your series on Alabama courthouses running in *The Alabama Lawyer* is most interesting and I have been following it regularly. My comment is directed to the one on the Limestone County Courthouse which ran about six-eight months ago.

You would not have been privy to this fact unless exploring very old local history writings. The legend or tradition in my family has long held that most sessions of the county courts until the first log courthouse was constructed were held in a tavern and hotel owned by Thomas Bass on the southeast corner facing the courthouse square. A plaque now denotes the site on a present-day drugstore front. The tavern had a large public room, hence the reasons for holding court sessions there and not in private homes.

Just thought you might like to know.

Thomas Bass was my great-great-grandfather. He not only ran the first public overnight stop between Nashville and Montgomery, but also was on a short detour from the Natchez Trace. He had 13 children by two wives, Sarah and Elizabeth, of whom nine were daughters; seven married and four named their first-born sons Thomas Bass Beasley, Jones, Fletcher and Leslie, respectively—the last, my grandfather.

Keep up the good work.

Thomas B. Leslie,
St. Louis, Missouri

Supreme Court of Alabama
Notice to Attorneys and Their Staff

Your attention is directed to several provisions of the appellate rules which will help in processing your case. Failure to strictly comply with these rules may result in the dismissal of your case.

Briefs—number of copies, color of covers, etc.:

Regular appeals—10 copies. Rule 32, ARAP, requires the following color of covers to be used on briefs—appellant/blue, appellee/red, intervenor or amicus curiae/green, reply/gray. (The rules do not indicate a color for the cover of rehearing briefs, but white is suggested.) (Certificate of service should contain name, address, phone number and party represented for all served.)

Petition for writ of certiorari—10 copies of the petition and supporting brief. No color for covers is required, but if any colored cover is used—petitioner/blue, respondent/red.

Petition for writ of mandamus—10 copies of the petition and supporting brief. (Certificate of service should contain name, address, phone number and party represented for all served.)

Petition for permission to appeal—10 copies of the petition and supporting brief. (Certificate of service should contain name, address and phone number and party represented for all served.)

Binding the briefs—Any clasps, staples or other fasteners used to bind the briefs must be covered by tape to prevent any injury to those handling the briefs.

Docket fees:

$100 Regular appeal

$50 Petition for Writ of Certiorari to Court of Civil Appeals
(No docket fee is required on criminal certs.)

$50 Petition for Writ of Mandamus

$50 Petition for Permission to Appeal
(If petition for permission to appeal is granted, an additional $50 is due.)

Extension of time for filing briefs on appeal:

One seven-day extension of time, as provided by Rule 31(d), ARAP, may be granted for the appellant's brief, the appellee's brief and the appellant's reply brief. Requests for extension will be granted over the telephone; however, the extension *must be confirmed* in writing to this office, stating the exact date your brief is due, and a copy of the confirmation letter sent to opposing counsel. For extensions, please call Sharon McLain, Rebecca Norris, Diane Dennis or Louise Livingston.

Filing

Papers shall be deemed filed on the day of mailing *if certified, registered, or express mail of the United States Postal Service* is used. Rule 25(a), ARAP.

Notice of the trial clerk when appellee brief is filed:

Rule 31(a), ARAP requires that the appellee give notice of the filing of appellee's brief to the clerk of the trial court. Compliance with this rule is necessary in order for the trial clerk to know when to forward the record on appeal to the appellate court.

Second copy of record on appeal or appendix:

Rule 30, ARAP, requires that the parties file either an appendix or a second copy of the record on appeal. This rule *must be* complied with before a case can be submitted to the court for a decision. *If you plan to use the second copy of the record on appeal, you should make arrangements with the clerk of the circuit court to photocopy the record for you before the original record on appeal is sent to this office.* ■

About Members, Among Firms

ABOUT MEMBERS

Tuskegee attorney **Ernestine S. Sapp** was elected a vice-president of the National Bar Association in Oakland, California, in November. The National Bar Association is the oldest and largest minority bar association in America. Founded in 1925, it serves over 12,000 lawyers, judges, law faculty and administrators, and law students. Sapp is a partner in the firm of **Gray, Langford, Sapp & McGowan** in Tuskegee, Alabama.

■

Marilyn S. Kavanaugh announces the relocation of her office to 200 Russell Street, NE, P.O. Box 10052, Huntsville, Alabama 35801. Phone (205) 536-4169.

■

Lee Armstrong, formerly staff attorney to the Chief Justice of the Alabama Supreme Court, announces his appointment as University Counsel, **Auburn University,** with offices at 101 Samford Hall, Auburn University, Alabama 36849-5163. Phone (205) 844-5176.

■

Gene Church announces that, effective August 1, 1989, he has withdrawn from the firm of Richardson & Church, and has opened a new office for the general practice of law. The office address is 107 Village East Mall, Haleyville, Alabama 35565. Phone (205) 486-8505.

■

Kenneth O'Neal Simon, formerly assistant director, division of Enforcement of the U.S. Securities and Exchange Commission, has been named a partner in the Birmingham firm of **Spain, Gillon, Grooms, Blan & Nettles.** Offices are located at 2117 2nd Avenue, North, Birmingham, Alabama 35203. Phone (205) 328-4100.

■

AMONG FIRMS

H. E. Nix, Jr., and Alex L. Holtsford, Jr., announce the association of **William Robert Chandler** with the firm of **Nix & Holtsford,** Bell Building, 207 Montgomery Street, Montgomery, Alabama.

■

Tanner, Guin, Ely, Lary & Neiswender, P.C. announces a change in their mailing address to P.O. Box 032206, Tuscaloosa, Alabama 35403. The firm office remains at Suite 700, Capitol Park Center, 2711 University Boulevard, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

■

Ian F. Gaston announces the relocation of his offices to Suite 607—Riverview Office Building, 63 S. Royal Street, Mobile, Alabama, where he will continue his practice under the firm name of **Gaston & Gaston.** Phone (205) 433-5585.

■

Pritchard, McCall & Jones announces that **James G. Henderson** has joined the firm as a partner, and **Robert Bond Higgins** has become associated with the firm. Offices are located at 800 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203-2605. Phone (205) 328-9190.

■

The firm of **Rushton, Stakely, Johnston & Garrett, P.A.,** Montgomery, Alabama, announces that **Edward Burt Locke** has become an associate of the firm. Offices are located at 184 Commerce Street, Montgomery, Alabama 36104. Phone (205) 834-8480.

■

Hand, Arendall, Bedsole, Greaves & Johnston announces the opening of its office at Suite 310, 1667 K Street, NW, Washington, DC 20006.

■

Barker, Janecky & Copeland, P.C. announces that **Reggie Copeland, Jr.,** has withdrawn from the firm and that the name of the firm has been changed to **Barker & Janecky, P.C.** The firm also announces that **Desmond V. Tobias,** formerly assistant attorney general for the State of Florida, has become associated with the firm.

■

The firm of **Wilson & Day** announces that **Christopher H. Griffith** has become associated with the firm. Offices are located at 153 South 9th Street, Gadsden, Alabama 35901. Phone (205) 546-6334.

■

The firm of **Uhrig, Munger & Howard** announces the relocation of its offices to 904 Merchants Walk, Central Park Office Complex, Huntsville, Alabama, and that **John C. Larsen** is now associated with the firm.

■

Leitman, Siegal, Payne & Campbell, P.C. announces the relocation of their offices to a Birmingham landmark, The Land Title Building, Suites 300-400, 600 20th Street North, Birmingham, Alabama 35203. Phone (205) 251-5900. The firm also announces that **Bradley G. Siegal, Shawn Hill Crook** and **Virginia Keel Hopper** have become associated with the firm.

■

The firm of **Wolfe, Jones & Boswell** announces that **Scott A. Rogers** has become an associate of the firm. Offices are located at 929 Merchants Walk, Huntsville, Alabama 35801. Phone (205) 534-2205.

■

The Birmingham firm of **Rives & Peterson** announces that **Thomas L. Oliver, II** and **Jane Greene Ragland** have become associates of the firm.

Oliver received his undergraduate degree from Auburn University and his J.D. from Cumberland School of Law. Ragland is a *magna cum laude* graduate of the University of Kentucky and received her J.D. from the University of Alabama School of Law.

■

The firm of **Sherrill & Batts** announces that **William G. Mathews** is associatec with the firm at 102 South Jefferson Street, Athens, Alabama 35611. Phone (205) 232-0202.

■

The office of **Prince, Coogler, Turner & Nolen, P.C.** announces that effective October 1, 1989, **Phil Pool** became *of counsel* with his office located at 2501 6th Street, Tuscaloosa, Alabama 35401. Phone (205) 345-1105. He also will maintain his office at P.O. Box 609, Market Street, Moundville, Alabama 35474. Phone (205) 333-8915 or 371-6337.

■

The firm of **Peters & Lockett, P.C.** announces that **Mark L. Redditt** has become associated with the firm. Offices are located at 160 South Cedar Street, Mobile, Alabama 36633. Phone (205) 432-3700.

■

David A. Simon announces that he has formed a partnership with **Robert Alan Wills,** to be known as **Wills & Simon.** Offices are located at the Lambert Building, P.O. Box 547, Bay Minette, Alabama 36507. Phone (205) 937-2411.

■

Dan M. Gibson announces that **Mark D. Morrow,** a 1989 graduate of the University of Alabama School of Law, has become associated with him in the practice of law. Offices are located at 2918 7th Street, Tuscaloosa, Alabama 35401. Phone (205) 758-5521.

■

Hubbard, Waldrop, Reynolds, Davis & McIlwain announces that **E. Kenneth Aycock** has joined the firm as an associate. Offices are located at 808 Lurleen Wallace Boulevard North, P.O. Box 2427, Tuscaloosa, Alabama 35403. Phone (205) 345-6789.

■

Byrd & Spencer announces that **David M. Atwell** has joined the firm as an associate. Offices are located at 116 East Main Street, Dothan, Alabama 36301. The mailing address is P.O. Box 536, Dothan, Alabama 36302. Phone (205) 794-0759.

■

The firm of **Trimmier & Associates, P.C.** announces that **Ben F. Hayley** has become a principal of the firm, located at 2737 Highland Avenue South, Birmingham, Alabama 35205. Hayley is a member of the American Bar Association, American Bar Association Credit Union Law Committee, Alabama State Bar and Birmingham Bar Association.

■

Mark W. Bond and **Bradford W. Botes** announce the formation of a professional corporation under the name of **Bond & Botes, P.C.** with offices located at 10 Inverness Center Parkway, Suite 350, Birmingham, Alabama 35242. Phone (205) 995-8588.

■

The firm of **Gamble, Gamble & Calame** announces that **Frank C. Wilson III,** has become a partner in the firm. The new name of the firm is **Gamble, Gamble, Calame & Wilson.** Offices are located at 807 Selma Avenue, P.O. Box 345, Selma, Alabama 36701. Phone (205) 875-7810.

■

Stowell, Anton & Kraemer, P.A. announces the relocation of the Tallahassee office to 201 South Monroe Street, Suite 200, Tallahassee, Florida 32301. Phone (904) 222-1055.

■

The firm of **Love, Love & Love, P.C.** announces that **P.S. Maxwell** has become associated with the firm. Offices are located at 117 North Street, P.O. Box 517, Talladega, Alabama 35160. Phone (205) 362-6670.

■

The firm of **Lanier, Ford, Shaver & Payne, P.C.** announces that **Joan-Marie Sullivan** and **David A. Thomas** have become associated with the firm. Offices are located at 200 West Court Square, Suite 5000, Huntsville, Alabama 35801.

■

Ritchey & Ritchey, P.A. announces the relocation of its offices to 1910 28th Avenue, South, Birmingham, Alabama 35209-2604. The mailing address is P.O. Drawer 590069, Birmingham, Alabama 35259-0069. Phone (205) 868-6800.

■

MacMillan Bloedel Inc. announces that **Rufus Craig** of Selma has been named vice-president for law, governmental affairs and resource development for the company. Craig has served as director of law, governmental affairs and resource development in Pine Hill since 1980. He received a B.A. degree in history from the University of Alabama in 1963 and a juris doctorate from the University's School of Law in 1966.

■

The Birmingham firm of **Engel, Hairston & Johanson, P.C.** announces that **Charles R. Johanson, III,** is the new Young Members' Section Representative to the Board of Governors for the Commercial Law League Association for 1989-90.

He has been a member of the league since 1978. Johanson is the immediate past chairperson of the Young Members' Section of that league. He previously held all other offices of the section and served two terms on its executive council.

He is currently serving on the executive council of the Southern Region of the Committee Law League Association.

The firm also announces that **Joseph F. Bulgarella** joined the firm as an associate in October 1989.

Offices are located at 109 N. 20th Street, 4th Floor, Birmingham, Alabama 35237. Phone (205) 328-4600.

■

McDermott, Will & Emery announces that **T. Raymond Williams** has joined its Washington, DC office.

Williams was formerly a partner with the firm of **Buchman, O'Brien & Williams.** He received his B.S. in 1962 and his LL.B in 1964 from the University of Alabama. ■

Thirteen new associates have joined the Birmingham office of the firm of **Bradley, Arant, Rose & White.**

T. Michael Brown graduated *magna cum laude* from Auburn University in 1986. He received a J.D. degree at Vanderbilt University in 1989.

Scott D. Cohen graduated with honors in 1986 from Washington University. He received a J.D. degree at the University of Michigan in 1989.

J. Paul Compton, Jr., is a *summa cum laude* graduate of the University of Alabama. He earned a J.D. degree from the University of Virginia in 1989.

Deane K. Corliss earned a B.S. degree *cum laude* from Duke University in 1967. She earned an M.S. degree at Ohio State University in 1970 and a J.D. degree at Cumberland School of Law in 1989.

Michael S. Denniston earned a B.A. degree in 1986 and a J.D. degree in 1989 from the University of Alabama.

L. Susan Doss graduated *summa cum laude* in 1986 and earned a J.D. degree in 1989 from the University of Alabama.

Frank C. Galloway, III, earned a B.A. degree from the University of Virginia in 1985 and a J.D. degree from the University of Alabama in 1988. Upon graduation from the University of Alabama School of Law, Galloway clerked for the Honorable James H. Hancock of the Northern District of Alabama.

George B. Harris graduated *magna cum laude* and Phi Beta Kappa in 1986 from the University of Alabama where he earned a B.A. degree. He received his J.D. degree from the University of Virginia in 1989.

Madeline H. Haikala earned a B.A. degree from Williams College in 1986 and a J.D. degree from Tulane Law School in 1989.

Amy B. McNeer graduated *cum laude* from Wake Forest University in 1986 where she earned a B.S. degree. She graduated from Vanderbilt University School of Law in 1989.

Thomas John Pack earned an M.A. degree in 1985 from St. Andrews University. He graduated from Harvard Law School in 1988. Pack recently completed a judicial clerkship with the Honorable John R. Brown of the Court of Appeals for the Fifth Circuit.

Greg G. Smith received a B.S. degree with honors from the University of California at Berkeley in 1985. Smith earned a J.D. degree from UCLA in 1989.

Anne R. Yuengert received a B.A. degree from the University of Virginia in 1984. She graduated from Washington & Lee School of Law in 1989.

Two new associates have joined the Huntsville office of the firm.

J. Jay Cheatwood graduated Phi Beta Kappa and *magna cum laude* from Vanderbilt University where he earned a B.A. degree in 1986. He received his J.D. from Vanderbilt in 1989.

Warne S. Heath received a B.A. degree from the University of Alabama in 1977. He earned an M.A. degree from Mississippi State University in 1983 and a J.D. degree from the University of Alabama School of Law in 1989. ■

Notice of Election

Notice is given herewith pursuant to the *Alabama State Bar Rules Governing Election of President-elect and Commissioner.*

President-elect

The Alabama State Bar will elect a president-elect in 1990 to assume the presidency of the bar in July 1991. Any candidate must be a member in good standing on March 1, 1990. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1990. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer.*

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 17, 1990.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices on the following circuits: 8th; 10th-Places #4 and 7; Bessemer Cut-off; 11th; 13th-Place #1; 17th; 18th; 19th; 21st; 22nd; 23rd-Place #1; 30th; 31st; 33rd; 34th; 35th; and 36th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1990, and vacancies certified by the secretary on March 15, 1990.

The terms of any incumbent commissoners are retained.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 27, 1990).

Ballots will be prepared and mailed to members between May 15 and June 1, 1990. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 12, 1990) to state bar headquarters. ■

Bar Briefs

UNA trustees appoint Robert L. Potts interim president

The University of North Alabama board of trustees recently appointed Robert L. Potts as the interim president of the institution.

The announcement came with a move for a nationwide search to fill the permanent post being vacated with the retirement on December 31, 1989, of longtime president Dr. Robert M. Guillot. Potts assumed the interim position January 1, 1990.

Potts, a Harvard Law School graduate, has served as general counsel of the University of Alabama system since 1984. From 1973 to 1983, he served as the attorney of UNA.

Potts

With his acceptance of the interim job, Potts resigned his University of Alabama counsel post and withdrew from a bid for an Alabama Supreme Court seat.

Potts, 45, graduated from Coffee High School in Florence, attended Newbold College in England and received a B.A. degree, *cum laude*, from Southern Missionary College in Collegedale, Tennessee.

He attained a law degree from the University of Alabama School of Law in 1969. There he graduated third in his class and served as Alabama editor of *The Alabama Law Review*. Following a judicial clerkship, he received an LL.M degree from Harvard University in 1971.

He has taught at Boston University Law School, the University of Alabama and UNA.

Prior to joining the University of Alabama system, he was a partner in the firm of Potts & Young in Florence.

The Huntsville native has served on the boards of trustees of Alabama State University in Montgomery and Oakwood College in Huntsville.

Presently, Potts is president of The Alabama Higher Education Loan Corporation and a member of the Board of Managers of the National Conference of Bar Examiners. He has served as chairperson of the Alabama State Bar Board of Bar Examiners.

Alabama attorneys elected fellows of the American Bar Foundation

Two Alabama attorneys recently were elected fellows of the American Bar Foundation.

The new fellows include William Bibb Eyster of Decatur and Clarence Merilton Small, Jr., of Birmingham.

The Fellows is an honorary organization of practicing attorneys, judges and law teachers whose professional, public and private careers have demonstrated dedication to the welfare of their communities and to the principles of the legal profession. Established in 1955, Fellows encourage and support the research program of the American Bar Foundation.

Eyster, a partner in the firm of Eyster, Key, Tubb, Weaver & Roth in Decatur, graduated from the University of the South in 1941, attended the University of Virginia from 1941-42, and graduated from the University of Alabama with a law degree in 1947. He has been a member of the Alabama State Bar and the Morgan County Bar Association since 1947. Eyster also was a member of the Alabama State Bar's Board of Bar Commissioners for 12 years and was a vice-president of the state bar for one year. In addition, he is a member of the Alabama Bar Foundation, the Decatur General Foundation and the president of the Calhoun Community College Foundation.

Small, a member of the firm of Rives & Peterson in Birmingham, received his undergraduate degree from Auburn University in 1956 and graduated with a law degree from the University of Alabama in 1961. He has been member of the Alabama State Bar and the Birmingham Bar Association since 1961. During 1978-79, he served as the president of the Birmingham Bar Association and the president of the Young Lawyers' Section in 1966. He also is a member of the Association of Trial Lawyers of America and the International Association of Defense Counsel, and was appointed by the Supreme Court of Alabama to serve on its advisory committee for appellate rules and the formulation of rules of evidence to be used throughout the state courts in Alabama.

The Fellows are limited to one-third of one percent of lawyers licensed to practice in each jurisdiction.

Task Force on Citizenship Education sponsors program at Boys' State

The Task Force on Citizenship Education participated in this year's Boys' State Program at Samford University. On June 14, various members of the Alabama State Bar appeared on the Samford University Leslie S. Wright Fine Arts Center Stage and presented a program on "Great American Debates: Federalists vs. Anti-Federalists."

Committee chairperson Chris S. Christ and director Cynthia Umstead divided the program into four scenarios. The first scenario highlighted the Federalist and anti-Federalist arguments during the Constitutional Convention. Chris Christ played John Adams, and Michael C. Shores

played Thomas Jefferson. The next scene featured a debate between Jefferson Davis, played by Louis Wilkinson, and Abraham Lincoln, played by Erskine Mathis. Doug Davis played a double role as a freed slave in one scene and a doughboy in another scene. The third scene took place in the World War I era where John Galvin played President Woodrow Wilson debating the issue of women's suffrage with Cynthia Umstead's playing a suffragette. The fourth scene featured Carol Rasmussen as Jane Roe, and Randy Dempsey as Texas Attorney General Wade debating the abortion issue.

The program was narrated and introduced by Charles W. Allen, and Charles W. Allen, Jr. Technical and artistic assistance was rendered by Wendy Williams and Virginia Vincent. After the presentation of the program, the floor was opened for questions by the Boys' State participants.

The group has chosen to call itself the Amicus Curiae Players, and plans to present other programs in the future. They invite anyone who might be interested in participating to contact Chris S. Christ at (205) 252-2222.

Kennedy named funding chairperson of CTF

Associate Alabama Supreme Court Justice Mark Kennedy, who has been the first and only chairperson of the Alabama Child Abuse and Neglect Prevention Board, was honored at a retirement dinner September 19 in Montgomery.

Justice Kennedy was recognized as the founding chairperson by Governor Guy Hunt and over two hundred of Kennedy's friends. Joining Governor Hunt in paying tribute to Justice Kennedy were Chief Justice of the Alabama Supreme Court Sonny Hornsby; Anne Cohn, executive director of the National Committee for Prevention of Child Abuse; Naomi Griffith, board member from the 5th Congressional District; Judge John Davis, circuit court judge; and Marian Loftin, vice-chairperson of the board.

Justice Kennedy was presented with gifts of appreciation from the CTF board and the CTF Advisory Committee. Letters of congratulation from Senator Howell Heflin and Richard Shelby were read at the dinner. Contributions in honor of Justice Kennedy totaled over $1,500 and were presented to the CTF.

Liquor Liability Litigation Group

The Association of Trial Lawyers of America recently established the Liquor Liability Litigation Group. Membership is open to ATLA attorneys actively representing victims of alcohol-related torts, including dram shop statute violations, drunken driver collisions, social host liability cases and other cases in which alcohol is directly involved. No lawyer is eligible for membership if he or she represents liquor interests. For additional membership information, call or write: Liquor Liability Litigation Group, P.O. Box 4160, Montgomery, Alabama 36103-4160, (205) 269-2343.

American Bar Association announces 1990 Law Day USA theme

"GENERATIONS OF JUSTICE" is the theme for Law Day USA 1990. The 1990 theme encourages Law Day program and event planners to focus their efforts on promoting the legal rights of children and the elderly. "GENERATIONS OF JUSTICE" also allows events planners to address the historical changes in the law and help all generations of Americans to become better informed about the legal system.

State and local bar associations, libraries, community organizations, schools, churches, law enforcement agencies, service clubs, legal auxiliaries and scouting organizations are among the many groups sponsoring Law Day USA programs and events. The events are numerous and varied, including no-cost legal consultations, mock-trials conducted in schools, court ceremonies, poster and essay contests, and television and radio call-in programs.

Recent programs have included coordination with sponsors of local campaigns against drunk driving, outreach programs to senior citizens and community participation in dispute resolution programs.

The American Bar Association, as the national sponsor of Law Day USA, prepares a detailed planning guide to assist individuals and organizations conducting Law Day programs. In addition, the ABA makes available promotional and educational informational materials, ranging from buttons and balloons to leaflets, brochures, booklets, speech texts and mock trial scripts.

The purpose of Law Day USA, celebrated annually on May 1, is to reserve a "special day of celebration by the American people in appreciation of their liberties and to provide an occasion for rededication to the ideals of equality and justice under laws." Law Day USA was established by United States Presidential Proclamation in 1958 and reaffirmed by a Joint Resolution of Congress in 1961.

For more information, write Law Day USA, American Bar Association, 8th Floor, 750 North Lake Shore Drive, Chicago, Illinois 60611, or phone (312) 988-6134. ■

Attorneys Admitted to Bar, Fall 1989

Scott Allen Abney ..... *Birmingham, Alabama*
Christine Warner Acker ..... *Birmingham, Alabama*
Adedapo Taiwo Agboola ..... *Birmingham, Alabama*
Mitchell Gilbert Allen ..... *Birmingham, Alabama*
Steven Johnson Allen ..... *Daphne, Alabama*
Robert Brian Allison ..... *Birmingham, Alabama*
Susan Joan Appel ..... *Birmingham, Alabama*
Gordon Gray Armstrong, III ..... *Mobile, Alabama*
James Paul Atkinson ..... *Florence, Alabama*
William Todd Atkinson ..... *Winfield, Alabama*
David Michael Atwell ..... *Slocomb, Alabama*
Ezra Kenneth Aycock, Jr. ..... *Tuscaloosa, Alabama*
Zack Michael Azar ..... *Montgomery, Alabama*
Cheryl Lynn Baggott ..... *Montgomery, Alabama*
Belinda Anne Barnett ..... *Birmingham, Alabama*
Lou Stevens Bartlett ..... *Birmingham, Alabama*
Nancy Hope Benjamin ..... *Birmingham, Alabama*
Bonnie Rowe Bennett ..... *Huntsville, Alabama*
James Radford Berry ..... *Albertville, Alabama*
Donald Edward Blankenship ..... *Birmingham, Alabama*
Charles Hikel Boohaker ..... *Birmingham, Alabama*
Donna Kay Bowling ..... *Birmingham, Alabama*
John Sanderson Bowman, Jr. ..... *Montgomery, Alabama*
Clifford Carrington Brady ..... *Mobile, Alabama*
Miles Logan Brandon ..... *Miami, Florida*
Rodger Keith Brannum ..... *Birmingham, Alabama*
Thomas Hamilton Brinkley ..... *Mobile, Alabama*
Kathleen Anne Brown ..... *Montgomery, Alabama*
Terrance Michael Brown ..... *Birmingham, Alabama*
Ronald Ray Brunson ..... *Birmingham, Alabama*
Raymond Charles Bryan ..... *Anniston, Alabama*
Joseph Edward Bulgarella ..... *Birmingham, Alabama*
Tony Derwin Calhoun ..... *Mountain Brook, Alabama*
Darrell Lloyd Cartwright ..... *Montgomery, Alabama*
William Robert Chandler ..... *Montgomery, Alabama*
Shirley Trivett Chapin ..... *Tuscaloosa, Alabama*
Jonathan Jay Cheatwood ..... *Huntsville, Alabama*
Patricia Wayne Cobb ..... *Scottsboro, Alabama*
Scott Douglas Cohen ..... *Birmingham, Alabama*
Pamela Felkins Colbert ..... *Birmingham, Alabama*
Sherri Grace Coleman ..... *Birmingham, Alabama*
Patrick Brian Collins ..... *Mobile, Alabama*
Sherry V. Collum-Butler ..... *Florence, Alabama*
Jerome Paul Compton, Jr. ..... *Birmingham, Alabama*
Denise Arlene Copeland ..... *Montgomery, Alabama*
Rebecca Lyn Copeland ..... *Tuscaloosa, Alabama*
William Ronald Corbett ..... *Birmingham, Alabama*
Deane Kenworthy Corliss ..... *Birmingham, Alabama*
Lee Pepper Cossar ..... *Birmingham, Alabama*
Carolyn Reasor Cox ..... *Selma, Alabama*
Alexander Bruce Crenshaw, Jr. ... *Birmingham, Alabama*
Shawn Hill Crook ..... *Birmingham, Alabama*
Silas Gwendell Cross, Jr. ..... *Birmingham, Alabama*
Gregory Stockton Curran ..... *Birmingham, Alabama*
John Patrick Darby ..... *Florence, Alabama*
Joan Yvette Davis ..... *Northport, Alabama*
Richard Eldon Davis ..... *Birmingham, Alabama*
Helen Crook Deas ..... *Birmingham, Alabama*
Michael Sandlin Denniston ..... *Birmingham, Alabama*
Michele Munsey Denton ..... *Birmingham, Alabama*
Silas Russell Deroma ..... *Washington Crossing, Pennsylvania*
Donald Leonide Dionne ..... *Birmingham, Alabama*
Laura Susan Doss ..... *Morris, Alabama*
Jeanne Olive Dowdle ..... *Tuscaloosa, Alabama*
George Whit Drake ..... *Cullman, Alabama*
Thomas Edwin Drake, II ..... *Cullman, Alabama*
John Steven Dugan ..... *Dauphin Island, Alabama*
Alice Wilkerson Durkee ..... *Birmingham, Alabama*
Matthew Scott Ellenberger ..... *Birmingham, Alabama*
Robert Graham Esdale, Jr. ..... *Birmingham, Alabama*
Victoria Ann Farr ..... *Tuscaloosa, Alabama*
James Earl Finley ..... *Birmingham, Alabama*
Murray Dixon Fleming ..... *Birmingham, Alabama*
Keith Blaine Franklin ..... *Birmingham, Alabama*
Michael Benton French ..... *Birmingham, Alabama*
Robert Spencer Frost ..... *Mobile, Alabama*
Cynthia Thelen Garrison ..... *Anniston, Alabama*
Sylvia Eleanor Garvin ..... *Huntsville, Alabama*
Christopher James Gerety ..... *Birmingham, Alabama*
John Duroc Gibbons ..... *Point Clear, Alabama*
William Joseph Gibbons, Jr. ..... *Huntsville, Alabama*
Michael David Giles ..... *Birmingham, Alabama*
Mark Sterling Gober ..... *Mobile, Alabama*
Sherryl Snodgrass Goffer ..... *Huntsville, Alabama*
Tyler Williams Goodwyn ..... *Bessemer, Alabama*
Linda Baker Gore ..... *Birmingham, Alabama*
Connie Shaw Granata ..... *Chelsea, Alabama*
Jim Bruce Grant, Jr. ..... *Gainesville, Florida*
Jeffrey Monroe Grantham ..... *Birmingham, Alabama*
Christopher Hugh Griffith ..... *Gadsden, Alabama*
Norman Jackson Grubbs ..... *Troy, Alabama*
Hal Sanders Gwin, Jr. ..... *Birmingham, Alabama*
Harri Johannes Haikala ..... *Birmingham, Alabama*
Madeline Hughes Haikala ..... *Birmingham, Alabama*
Don Lee Hall ..... *Tuscaloosa, Alabama*
Todd Neal Hamilton ..... *Birmingham, Alabama*
William Kennedy Hancock ..... *Birmingham, Alabama*
Debra Lynn Hardegree ..... *Leeds, Alabama*
Brenda Weigilia Hardison ..... *Washington, DC*
Benjamin Harte Harris, III ..... *Mobile, Alabama*
George Bryan Harris ..... *Birmingham, Alabama*
Glen Farris Harvey ..... *Tuscaloosa, Alabama*

William Morris Hawkins, Jr. ..... *Centre, Alabama*
Jennifer Lynn Hearle ..... *Slocomb, Alabama*
Warne Stahler Heath ..... *Tuscaloosa, Alabama*
Robert Jon Hedge ..... *Mobile, Alabama*
Candace Lee Hemphill ..... *Birmingham, Alabama*
Kathleen Gail Henderson ..... *Dothan, Alabama*
Kevin James Henderson ..... *Taylors, South Carolina*
Melissa Shaw Heron ..... *Huntsville, Alabama*
Robert Bond Higgins ..... *Birmingham, Alabama*
Randall Ian Hillman ..... *Daphne, Alabama*
Kenneth Allen Hitson, Jr. ..... *Montgomery, Alabama*
William Earl Hogg ..... *Marietta, Georgia*
Ethel Ann Holladay ..... *Pell City, Alabama*
Ralph Eugene Holt ..... *Florence, Alabama*
Virginia Keel Hopper ..... *Birmingham, Alabama*
Stephen Clark Jackson ..... *Birmingham, Alabama*
Dennis Wayne Jacobs ..... *Harpersville, Alabama*
Charles Randal Johnson ..... *Birmingham, Alabama*
Margaret Esther Johnson ..... *Montgomery, Alabama*
Raymond Lymon Johnson, Jr. .... *Birmingham, Alabama*
Tamara Harris Johnson ..... *Birmingham, Alabama*
Gerald Braxton Jones, Jr. ..... *Livingston, Alabama*
Olney Steven Jones ..... *Montgomery, Alabama*
Robert Kane Jordan ..... *Fort Payne, Alabama*
Lawrence Cannon Kasten ..... *Jackson, Missouri*
Kelly King Kelley ..... *Birmingham, Alabama*
Derel Kevan Kelly ..... *Tuscaloosa, Alabama*
Belinda Lee Kimble ..... *Phoenix, Arizona*
William Henry King, III ..... *Birmingham, Alabama*
Charles Timothy Koch ..... *Mobile, Alabama*
Kevin Duncan Lammons ..... *Huntsville, Alabama*
James Wayne Lampkin, II ..... *Daphne, Alabama*
Carolyn Landon ..... *Birmingham, Alabama*
Joe Lawayne Leak ..... *Arab, Alabama*
Kristi DuBose Lee ..... *New Orleans, Louisiana*
Gena Ruth Lentz ..... *Decatur, Alabama*
James Gregor Linderholm ..... *Birmingham, Alabama*
Edward Burt Locke ..... *Montgomery, Alabama*
Benjamin Lee Locklar ..... *Montgomery, Alabama*
Denise Jones Lord ..... *Birmingham, Alabama*
Andrew Gregg Lowrey ..... *Linden, Alabama*
Linda Lott Lund ..... *Tuscaloosa, Alabama*
Jennifer Lee Lunt ..... *Tuscaloosa, Alabama*
Cecil Howard Macoy, Jr. ..... *Birmingham, Alabama*
Leonard Anthony Mancini ..... *Huntsville, Alabama*
Douglas Claude Martinson, II .... *Boston, Massachusetts*
Virginia Lanair Martin ..... *Birmingham, Alabama*
Leonard Norman Math ..... *Montgomery, Alabama*
Melissa Gasser Math ..... *Montgomery, Alabama*
William Glenn Mathews ..... *Athens, Alabama*
Frederick Ball Matthews ..... *Montgomery, Alabama*
Annette Louise McDermott ..... *Mobile, Alabama*
Karen Riley McDonald ..... *Mobile, Alabama*
Frank Hampton McFadden, Jr. .... *Birmingham, Alabama*
Carolyn Jo McFatridge ..... *Montgomery, Alabama*
James Allan McGhee ..... *Mobile, Alabama*
Louise Shearer Brock McGowin ..... *Mobile, Alabama*
William Travis McGowin, IV ..... *Birmingham, Alabama*
James Calvin McInturff ..... *Birmingham, Alabama*
Paula Ann McLendon ..... *Tuscaloosa, Alabama*
Herman Knox McMillan ..... *Birmingham, Alabama*
Amy Burton McNeer ..... *Birmingham, Alabama*
Lisa Cathey Montman ..... *Northport, Alabama*
John Stanley Morgan ..... *Gadsden, Alabama*
Mark Davidson Morrow ..... *Northport, Alabama*
Lisa Frost Morton ..... *Birmingham, Alabama*
James Alan Nadler ..... *Birmingham, Alabama*
Michel Nicrosi ..... *Montgomery, Alabama*
Michael Brady O'Connor ..... *Birmingham, Alabama*
Jana Jawan Olive ..... *Florence, Alabama*
Thomas Lee Oliver, II ..... *Birmingham, Alabama*
Arthur Wooten Orr ..... *Danville, Alabama*
Lee William Parker ..... *Houston, Texas*
Pamela Constance Pelekis ..... *Birmingham, Alabama*
Peter Mark Petro ..... *Birmingham, Alabama*
Keith James Pflaum ..... *Birmingham, Alabama*
Brenda Joyce Pierce ..... *Mobile, Alabama*
William Eugene Pipkin, Jr. ..... *Mobile, Alabama*
Rhonda Kay Pitts ..... *Birmingham, Alabama*
James Marion Pool ..... *Birmingham, Alabama*
Dorothy Amelia Powell ..... *Mobile, Alabama*
Walter Jasper Price, III ..... *Birmingham, Alabama*
Leslie Marie Proll ..... *Birmingham, Alabama*
Mia Louise Puckett ..... *Huntsville, Alabama*
Charles Hillman Pullen ..... *Montgomery, Alabama*
Edward Quincy Ragland ..... *Birmingham, Alabama*
Jane Greene Ragland ..... *Birmingham, Alabama*
Mark Alexander Rasco ..... *Jemison, Alabama*
Borden Martin Ray, Jr. ..... *Tuscaloosa, Alabama*
Susan Elaine Reaves ..... *Birmingham, Alabama*
Jeffrey Carl Rickard ..... *Birmingham, Alabama*
James Archibald Rives ..... *Montgomery, Alabama*
Jeffrey Hoyt Roberts ..... *Hartselle, Alabama*
Laura Lee Robinson ..... *Mobile, Alabama*
Robert Vandiver Rodgers ..... *Huntsville, Alabama*
Scott Alfred Rogers ..... *Harvest, Alabama*
Stewart Francis Romack ..... *Birmingham, Alabama*
Kenneth Bruce Rotenstreich . *Greensboro, North Carolina*
Kay Webb Savage ..... *Birmingham, Alabama*
Eldon Sharpe ..... *Dadeville, Alabama*
Gregory Lynn Shelton ..... *Decatur, Alabama*
Judy Bateman Shepura ..... *Birmingham, Alabama*
Edward Eugene Sherlock ..... *Montgomery, Alabama*
Brett Farrell Shur ..... *Tampa, Florida*
Bradley Gerson Siegal ..... *Birmingham, Alabama*
Michael Reid Silberman ..... *Montgomery, Alabama*
Keri Donald Simms ..... *Birmingham, Alabama*
Claude McLaurin Sitton ..... *Blakely, Georgia*
Daniel Boyd Smith ..... *Birmingham, Alabama*
Edward Lee Dingler Smith ..... *Birmingham, Alabama*
Eleanor Lesley Smith ..... *Birmingham, Alabama*
Katharine Jeannine Smith ..... *Birmingham, Alabama*

Russell Hayden Smith ..... *Huntsville, Alabama*
Elizabeth Couey Smithart ..... *Fitzpatrick, Alabama*
Leon Bernard Smithart ..... *Fitzpatrick, Alabama*
Walter Elmore Stewart .... *South Hadley, Massachusetts*
Cletis Theodore Strickland, Jr. ..... *Tuscaloosa, Alabama*
Joan-Marie Sullivan ..... *Huntsville, Alabama*
Frances Parker Tankersley ..... *Tuscaloosa, Alabama*
Courtney Wayne Tarver ..... *Montgomery, Alabama*
Marx Franklin Tatom, II ..... *Dothan, Alabama*
Klara Bauer Tedrow ..... *Birmingham, Alabama*
David Ashby Thomas ..... *Huntsville, Alabama*
Charles Amos Thompson ..... *Birmingham, Alabama*
Robert Waylon Thompson .. *Panama City Beach, Florida*
Dana Latham Thrasher ..... *Birmingham, Alabama*
Richard Norman Tishler ..... *Birmingham, Alabama*
Desmond Vaughn Tobias ..... *Point Clear, Alabama*
Ayn Traylor-Sadberry ..... *Birmingham, Alabama*
Christopher Paul Turner ..... *Louisville, Alabama*
Mary Angela Turner ..... *Tuscaloosa, Alabama*
Tracy Patterson Turner ..... *Mobile, Alabama*
David Owen Upshaw ..... *Birmingham, Alabama*
Edwin Marshall Van Dall, Jr. ..... *Tuscaloosa, Alabama*
Esther Faye Van Dall ..... *Tuscaloosa, Alabama*
Ann Sybil Vogtle ..... *Birmingham, Alabama*
George Walton Walker, III ..... *Montgomery, Alabama*
Herbert Carey Walker, III ..... *Montgomery, Alabama*
James Edward Walker, III ..... *Montgomery, Alabama*
Donna Lynne Ward ..... *Mobile, Alabama*
Katharine Anne Weber ..... *Mobile, Alabama*
Jeffrey Harmond Wertheim ..... *Birmingham, Alabama*
Joseph Wiley, Jr. ..... *Columbus, Georgia*
Cynthia Forman Wilkinson ..... *Birmingham, Alabama*
Cindy Flora Willard ..... *Daphne, Alabama*
Mary Pugh Williamson ..... *Birmingham, Alabama*
Linda Elizabeth Winkler ..... *Birmingham, Alabama*
Ronald Eugene Wood ..... *Irondale, Alabama*
Lisa Alldredge Wright ..... *Birmingham, Alabama*
Winton Emmett Yerby, III ..... *Selma, Alabama*
Beverly Ann Young ..... *Mobile, Alabama*
Anne Regina Yuengert ..... *Birmingham, Alabama*

Fall 1989 Bar Exam Statistics of Interest

Number sitting for exam 351
Number certified to supreme court 245
Certification rate 70%
Certification percentages:
University of Alabama 85%
Cumberland 81%
Alabama non-accredited law schools 19%

December 1989 Admittees

Jeffrey Drew Bramer ..... *Woodbridge, Virginia*
Arlene Beverly Callendar ..... *Dothan, Alabama*
Aurelius Evans Crowe ..... *Montgomery, Alabama*
Dennis Gene Nichols ..... *Scottsboro, Alabama*
Thomas Richard Olsen ..... *Orlando, Florida*
Marcus Herbert Smith, Jr. ..... *Montgomery, Alabama*
Blaine Celone Stevens ..... *Montgomery, Alabama*

Lisa Alldredge Wright (1989); Cathy S. Wright (1975); Michael L. Hall (1980) (admittee, sister, brother-in-law)

Sherri Coleman (1989); Ralph E. Coleman (1958); Judge Ralph E. Coleman, Jr. (1982) (admittee, father, brother)

Mark Petro (1989); Laura Petro (1983); Mike Bybee (1982) (admittee, sister, brother-in-law)

William Henry King, III (1989); Kelly King Kelley (1989); Charles J. Kelley (1988) (brother/brother-in-law, sister/wife, brother-in-law/husband)

Fred B. Matthews (1989); John R. Matthews, Jr. (1950); Caroline B. Matthews (1950) (admittee, father, mother)

Robert V. Rodgers (1989); W. Stanley Rodgers (1964); Christopher S. Rodgers (1988) (admittee, father, brother)

Walter J. Price, III (1989); Walter J. Price, Jr. (1961) (admittee, father)

Douglas Claude Martinson, II (1989); Douglas Claude Martinson (1964) (admittee, father)

Ronald E. Wood (1989); Randal L. Wood (1980) (admittee, brother)

Ralph E. Holt (1989); Donald E. Holt (1962); J. Ben Holt (1971) (admittee, father, uncle)

Mark Rasco (1989); Jeanne Dowdle (1989); Jan Dowdle (1983) (husband, admittee, sister)

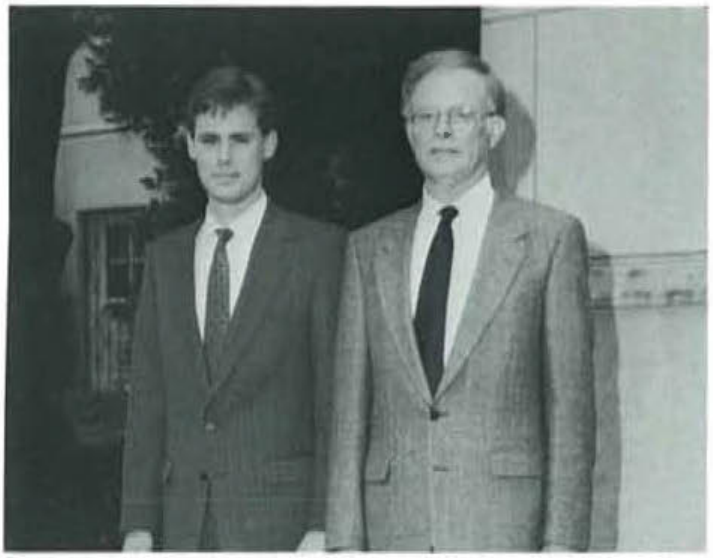
Annette McDermott Carwie (1989); John Gregory Carwie (1989); William Henry McDermott (1958) (admittee, husband, father)

Tracey Patterson Turner (1989); Karen Pailette Turner (1988) (admittee, wife)

Todd Hamilton (1989); L. Dan Turberville (1978) (admittee, uncle)

Carolyn R. Cox (1989); Stewart McKinnon Cox (1987) (admittee, son)

Melissa C. Math (1989); Leonard N. Math (1989) (wife, husband admittees)



Gregory Lynn Shelton (1989); Kenneth Shelton (1962) (admittee, father)

Burt Smithart (1989); Elizabeth Smithart (1989) (husband, wife admittees)

Edwin Van Dall (1989); Esther Van Dall (1989) (husband, wife admittees)

George Walton Walker, III (1989); James C. Stivender (1951) (admittee, stepfather)

Frank Hampton McFadden, Jr. (1989); Frank Hampton McFadden (1959) (admittee, father)

Mark D. Morrow (1989); John O. Morrow, Jr. (1979) (admittee, brother)

Borden Martin Ray, Jr. (1989); Martin Ray (1956) (admittee, father)

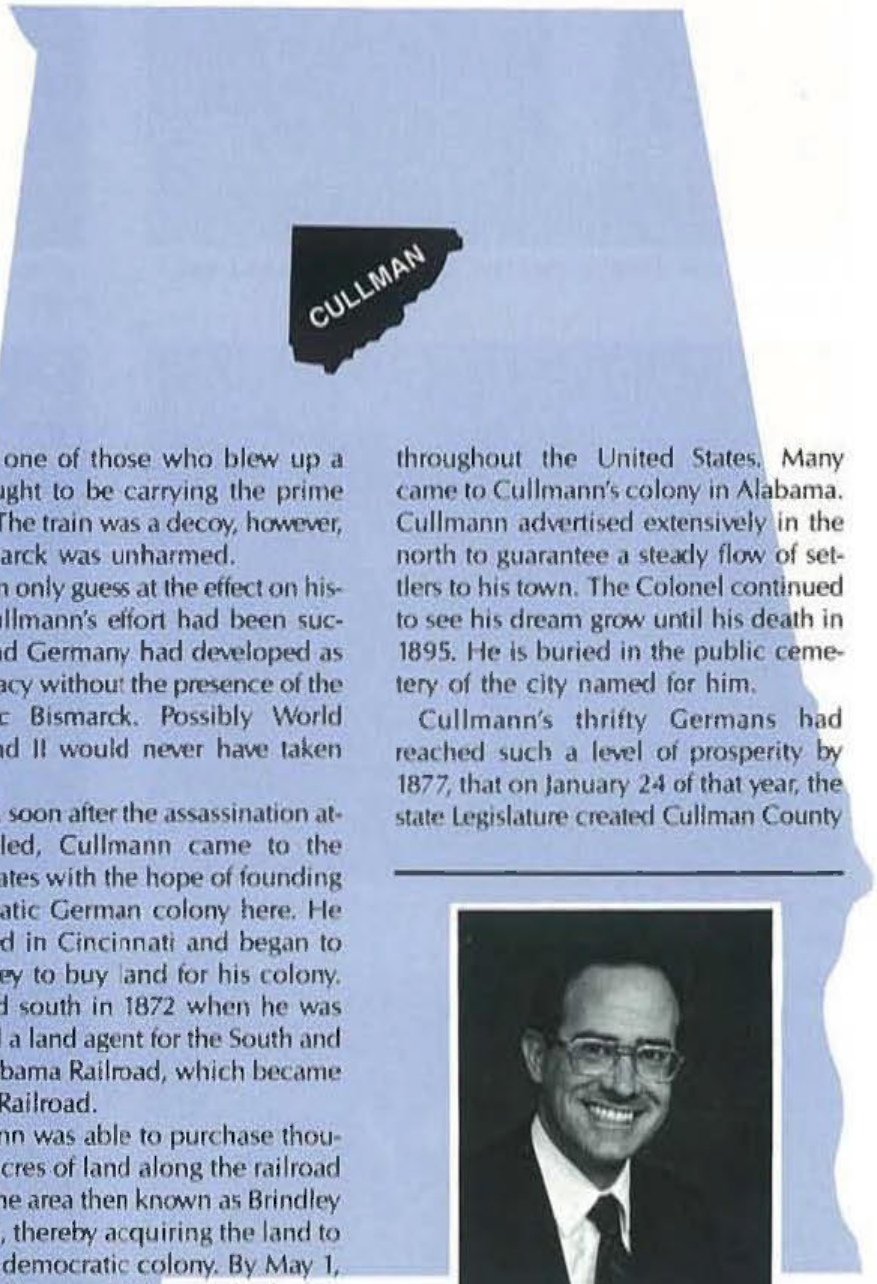
Jane Greene Ragland (1989); Edward Quincy Ragland (1989) (wife, husband admittees)

Building Alabama's Courthouses

by Samuel A. Rumore, Jr.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. *The Alabama Lawyer* plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to:

Samuel A. Rumore, Jr.
Miglionico & Rumore
1230 Brown Marx Tower
Birmingham, Alabama 35203



Cullman County

The story of Cullman County begins with the story of Colonel John G. Cullmann, who founded a German colony in north Alabama in 1873. Cullmann was born in Frankenweiler, Bavaria, in 1823 and, according to one of his descendants, Stanley Johnson, if Cullmann had been successful in his ventures in the "Old Country," the course of modern world history might have been different.

Cullmann was a revolutionary in his native Bavaria. He wanted to see Germany become a democratic state. As early as 1848 he participated in an unsuccessful attempt to establish a democracy in Bavaria. In the fighting that took place, he became a colonel in the revolutionary army. For the rest of his life he was known as "the Colonel."

In the 1860s, Prussia, which had long been a dominant power among the German principalities, began the movement to create a modern German state under the leadership of Otto von Bismarck, the Prussian prime minister. Cullmann again favored a democracy over the Prussian militaristic monarchy and, according to family legend, was implicated in a failed attempt to assassinate Bismarck. Stanley Johnson reported that the Colonel was probably one of those who blew up a train thought to be carrying the prime minister. The train was a decoy, however, and Bismarck was unharmed.

One can only guess at the effect on history if Cullmann's effort had been successful and Germany had developed as a democracy without the presence of the militaristic Bismarck. Possibly World Wars I and II would never have taken place.

In 1865, soon after the assassination attempt failed, Cullmann came to the United States with the hope of founding a democratic German colony here. He first settled in Cincinnati and began to save money to buy land for his colony. He moved south in 1872 when he was appointed a land agent for the South and North Alabama Railroad, which became the L&N Railroad.

Cullmann was able to purchase thousands of acres of land along the railroad tracks in the area then known as Brindley Mountain, thereby acquiring the land to found his democratic colony. By May 1, 1873, Cullmann had recruited five families from Ohio to his colony. By early 1874 more than 100 families had moved south, and the town of Cullman, with the second "n" dropped, was established. The town grew rapidly and, in 1875, it boasted a German language newspaper.

Through his efforts Cullmann attracted many immigrants from Germany to America. These immigrants settled throughout the United States. Many came to Cullmann's colony in Alabama. Cullmann advertised extensively in the north to guarantee a steady flow of settlers to his town. The Colonel continued to see his dream grow until his death in 1895. He is buried in the public cemetery of the city named for him.

Cullmann's thrifty Germans had reached such a level of prosperity by 1877, that on January 24 of that year, the state Legislature created Cullman County

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Cullman County Courthouse

as the 66th county of Alabama. Cullman County was carved from Winston, Blount and Morgan counties.

On March 6, 1877, an election was held to determine the site of the Cullman county seat. The voters chose the town of Cullman over Hanceville, the only other site considered, by an overwhelming majority.

Prior to the creation of the county, the immigrants held court at Armbruster's Hall, a building in Cullman. Later, a building adjoining Cullman's European Hotel was rented for court offices for $8 a month.

The souvenir booklet from the dedication of the current Cullman County Courthouse states that a small stone structure was first used as the county courthouse, but was gutted by fire. It also reported that a two-story wooden structure was used temporarily.

In any event, in March 1878, the construction of a courthouse building was begun on land donated by Christopher D. Scheuing. He was one of the five original German pioneers who settled in Cullman. This building was located on the corner of Second Avenue West and Fourth Street. It was completed in February 1879, cost $5,600, and was built by a contractor named Nelson. This structure was constructed of locally manufactured bricks, was two stories in height and was topped by a four-sided tower. This courthouse served Cullman County until it was badly damaged by a fire in January 1912.

Governor Emmett O'Neal laid the cornerstone for the next Cullman County Courthouse in November 1912. W.A. Schlosser was architect for the building constructed on the same site as its predecessor. Dobson and Free were the contractors.

The 1912 courthouse was constructed of red brick. It had white columns with Ionic capitals. Its style was Neoclassical and the building was graced with a four-faced clock tower.

The site of the present Cullman County Courthouse was purchased by the county from the City of Cullman at a cost of $40,000. Although purchased in 1943, the county waited more than 20 years to build the new courthouse. In 1964, U.S. Representative Carl Elliott of Jasper assisted Cullman County in obtaining a federal grant of two-thirds of a million dollars to be used for the construction of the courthouse. The total cost of the new building was approximately $1.5 million.

The architect for this white marble structure was Martin J. Lide of Birmingham. The contractor was Algernon-Blair of Montgomery. The county offices moved to the new courthouse February 22, 1965. However, the formal dedication did not take place until July 3, 1965. According to the souvenir booklet for this event, the invocation was given by the new probate judge of Cullman County, the Reverend Guy Hunt. ■

An Introduction to Federal Administrative Law Part II: The Availability of Judicial Review

by William L. Andreen

This is the last article in a two-part series which is intended to present a broad overview of federal administrative law. Part 1 in this series discussed the rulemaking and adjudicatory powers that are commonly possessed by federal agencies and the standards used by the federal judiciary to determine the validity of rulemaking and adjudicatory action. This final article will examine the various threshold questions that confront parties seeking judicial review of agency action such as jurisdiction, preclusions of review, sovereign immunity, standing, and timing.

I. Availability of judicial review

A. Jurisdiction

1. Specific grants

Most federal regulatory statutes specifically provide for judicial review of certain kinds of administrative action. In doing so, Congress has chosen a wide variety of routes for judicial review. For example, orders denying or terminating social security benefits are reviewable in federal district courts,[1] while cease and desist orders issued by the Federal Trade Commission may be challenged only in an appropriate United States court of appeals.[2]

Congress has in some cases made things even more complicated. Under the Clean Air Act, for instance, a national ambient air quality standard rule promulgated by the United States Environmental Protection Agency (EPA) must be challenged in the United States Court of Appeals for the District of Columbia.[3] However, a challenge to an EPA action which is locally or regionally applicable, such as EPA's approval of a state implementation plan, may be taken only to the court of appeals in the appropriate circuit.[4] In either case, the petition for review must be filed within 60 days after notice of the final rule or approval appears in the Federal Register.[5] In addition, the Clean Air Act authorizes a suit to be brought in a United States district court in a case where the complainant alleges a failure by EPA to perform any nondiscretionary duty under the Act.[6] Therefore, due to the complexity and variety of jurisdictional grants, one should pay close attention to the jurisdictional provisions contained in the particular regulatory statute in question.

2. General grants

Despite the plethora of specific jurisdictional grants, there are many kinds of administrative action for which Congress did not explicitly provide an avenue to obtain judicial review. In that situation, an aggrieved person must predicate jurisdiction upon a more general grant of jurisdiction such as 28 U.S.C. § 1331—general "federal question" jurisdiction. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Most challenges to federal administrative action for which there is no specific jurisdictional provision will clearly meet this test. Prior to 1976, however, section 1331 also required that the amount in controversy had to exceed $10,000.[7] Consequently, many challenges involving relatively small pecuniary amounts were based upon other general grants of jurisdiction such as 28 U.S.C. § 1361 which provides for mandamus. In a number of instances, plaintiffs asserted that sections 701-704 of the APA created an independent source of jurisdiction for district courts, and seven circuit courts agreed with that interpretation.[8]

This dilemma was resolved in 1976 when Congress eliminated the $10,000 jurisdictional amount in cases brought against a federal agency under section 1331.[9] A year later, the Supreme Court, relying in large measure upon the amendment to section 1331, held that sections 701-704 of the APA do not confer subject-matter jurisdiction upon district courts.[10]

B. Preclusion of review

Despite the assertion of an appropriate grant of jurisdiction, judicial review, nevertheless, may not be available. Section 701 of the APA states that the APA's provisions concerning judicial review do not apply where (1) a statute precludes judicial review or (2) "agency action is committed to agency discretion by law."[11]

These two hurdles to judicial review run counter to the basic presumption favoring judicial review which is embodied in the APA.[12] After all, the APA provides that any person "adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."[13] Consequently, the Supreme Court has declared that access to the courts should be restricted "only upon a showing of clear and convincing evidence" of congressional intent to that effect.[14]

Express statutory preclusion of judicial review is not common, and, even when such preclusion exists, the courts are likely to give it a narrow interpretation.[15] For instance, the administration of veteran benefits has long been insulated to some extent from judicial scrutiny. In *Tracy v. Gleason*,[16] the court held that the prohibition on review of "any question of law or fact concerning a claim for [veteran] benefits" (38 U.S.C. §211[a] [1958]) did not apply to the termination of benefits.[17] The court clearly thought that the termination of benefits did not involve a "claim." In response, Congress amended the section to bar judicial review of "the decisions of the Administrator of any question of law or fact under any law administered by the Veterans Administration [VA] providing benefits for veterans . . . ."[18] The Supreme Court, however, held that this prohibition did not preclude an attack on one such decision because the challenge went to the constitutionality of the Veterans' Adjustment Act of 1966 rather than the VA's administration of the statute.[19]

Judicial review under the APA is also unavailable where an "action is committed to agency discretion by law."[20] This exception to reviewability applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[21] The Supreme Court recently identified such a rare instance when it held that an agency's decision not to undertake administrative or civil enforcement against a violation of the law is a decision gen-

erally committed to the unfettered discretion of the agency. Therefore, such a decision is presumptively unreviewable.[22] The presumption may be rebutted, however, where Congress has indicated an intent to limit the agency's enforcement discretion and has provided guidelines for the agency to follow. In such an instance, there would be some "law to apply."[23]

C. Sovereign immunity

Only Congress has the power to determine whether the United States may be sued, and, if so, in which courts the suit may be brought.[24] Where Congress has not waived the sovereign immunity of the United States, no officer of the federal government has the authority to consent to a suit against the government.[25] Although the defense of sovereign immunity blocked many challenges to agency action in the past, it poses much less of a problem today.

Congress amended the APA in 1972 to eliminate the defense of sovereign immunity in cases brought in federal court where the complainant seeks "relief other than money damages."[26] Therefore, an action seeking declaratory and injunctive relief no longer will be hampered by sovereign immunity. This waiver, of course, does not apply to a case brought against the United States in a state court. In such a situation, the government still will be cloaked with sovereign immunity, unless an explicit statutory waiver applies. Moreover, sovereign immunity still may provide the federal government with an absolute defense to an action seeking monetary relief.[27]

D. Standing

Related to the issue of whether a particular claim is appropriate for judicial review is the question of whether that claim may be advanced by a particular plaintiff or petitioner. This latter question involves the requirement of standing. The constitutional source of standing law is Article III, § 2 which restricts federal judicial power to "cases" and "controversies."

Prior to 1940, the Supreme Court analyzed standing as if it were an integral part of the merits of a case. A party thus could obtain judicial review of agency action only if that action invaded a legal right of the party which was created by statute or common law.[28] This analysis, of course, confused the threshold issue of standing with the ultimate merits of a claim. Moreover, it served to reduce the ability of the federal judiciary to monitor the expanded activities of the federal bureaucracy. This venerable formulation of the standing doctrine began to crumble, as a result, during the 1940s.

The Supreme Court, during that decade, recognized that Congress could explicitly grant a right of judicial review to any person aggrieved or adversely affected by a particular agency action, regardless of whether that person could show a violation of a "legally protected interest." Thus, a party could obtain review merely by demonstrating a personal injury in a situation where a statutory provision granted standing to aggrieved persons or, in other words, to private attorney generals.[29]

In 1946, the APA was enacted and provided that a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute" could obtain judicial review.[30] The federal courts, however, generally refused to view section 702 as a broad grant of standing. Instead, the courts held that section 702 only provided standing where the interest in question was recognized by some other statute.[31] Consequently, the legal interest test still had some residual vitality.

In 1970, however, the Supreme Court re-examined the issue of standing under the APA and, in the process, drastically revised existing law. In *Association of Data Processing Service Organizations v. Camp*,[32] the court rejected, once and for all, the test of a legally recognized interest. In its place, the Court substituted a new two-part test. The first test is based on the constitutional requirement of a case or controversy. Thus, a plaintiff must allege that the agency's action caused the plaintiff some "injury in fact, economic or otherwise."[33] Moreover, the dispute must be "presented in an adversary context and in a form historically viewed as capable of judicial resolution."[34] The second test requires that "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[35] This is based upon section 702 of the APA as well as more general prudential considerations.[36]

Data Processing is still good law. Since 1970, however, the Supreme Court has handed down a number of decisions which refine the two-part test first enunciated in *Data Processing*. In *Sierra Club v. Morton*,[37] the Court held that the party seeking review must allege facts showing that he or she is among those adversely affected by the agency's action. A litigant thus must assert a direct stake in the controversy.[38] But such a stake need not be economic. Environmental or aesthetic injury, for example, is enough to satisfy the requirement of an injury in fact.[39] Furthermore, the alleged injury need not be significant. Even an "identifiable trifle" is enough to give a party standing to vindicate an important principle.[40]

It is clear, nevertheless, that the Court will not extend standing to a party who has not alleged facts demonstrating some causal link between the agency's action and the party's alleged injury.[41] If this causal link is too speculative or seriously attenuated, standing will also be denied.[42] Such denials have been predi-

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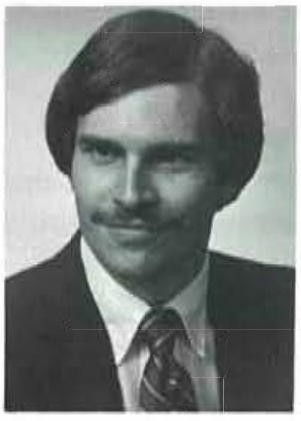

cated upon the Article III requirement that, in order to be justiciable, a case must be capable of judicial resolution.[43] These rules are easily articulated but rather difficult to apply. In close cases, therefore, it may be hard to predict whether a court will find that a party seeking judicial relief has satisfied the requirements of standing.[44]

E. Timing

The doctrines of primary jurisdiction, finality, exhaustion of administrative remedies, and ripeness are all designed to avoid unnecessary or untimely judicial involvement in the administrative process. They do not forbid judicial review, but merely postpone the time at which a court may entertain a particular matter.

1. Primary jurisdiction

The doctrine of primary jurisdiction is a judicially created principle designed to deal with a situation where both a court and an agency have the legal authority to address the same dispute. For example, the federal courts have the power to hear a complaint alleging an illegal restraint of trade such as a conspiracy to fix prices, while the Federal Trade Commission has the power to determine whether such price fixing constitutes an unfair trade practice. When both arms of government have the power to act, which should be regarded as having primary jurisdiction?

In such a case, the federal courts have recognized the primary jurisdiction of the agency, thereby postponing judicial consideration of the case, if that course of action will lead to more uniformity in decisionmaking.[45] The courts also have deferred to an agency where it possesses specialized knowledge and expertise that would be of use in resolving the controversy.[46]

2. Finality

Section 704 of APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[47] Consequently, in the absence of express statutory authority to the contrary, a preliminary or intermediate agency ruling is not reviewable until the agency has taken final action.[48]

A statute, however, may specifically speed up the process. For example, the Freedom of Information Act authorizes judicial review where an agency fails to respond to an information request within a certain time period.[49] On the other hand, a statute may state that an action is final for purposes of judicial review only after a number of steps (hearings, appeals, etc.) are taken within the agency. Finally, a number of agencies have also used regulations to define the point at which a particular action becomes final.

In the absence of a statute or regulation which defines finality for purposes of judicial review, it may not always be clear when agency action is final. In such a situation, reference to the judicially-created doctrines of exhaustion and ripeness may help define the time at which a dispute may be taken to court.

3. Exhaustion of administrative remedies

No party is entitled to judicial review until that party has exhausted the prescribed administrative remedies.[50] Thus, if an administrative proceeding is at an early stage and the party who seeks judicial review has a right to an agency hearing or appeal, a court generally will refuse to entertain the case because that party has failed to await the completion of the administrative process.

A number of factors favor the application of the exhaustion doctrine: (1) it respects the choice made by Congress to delegate initial decisionmaking authority to an agency; (2) it allows an agency to bring its expertise to bear on a particular issue; (3) it prevents judicial review from proceeding on the basis of an inadequate administrative record; and (4) it avoids the necessity for judicial involvement in cases where the agency is able to resolve the problem.[51] However, a court might intervene in a pending agency proceeding —an "extraordinary remedy"—where it is "necessary to vindicate an *unambiguous* statutory or constitutional right."[52]

4. Ripeness

The doctrine of ripeness concerns the ability of a court to resolve a particular dispute without further refinement of the issues by an administrative agency.

> [I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also

to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[53]

Abbott Laboratories v. Gardner[54] involved an attempt to obtain judicial review of a Food and Drug Administration (FDA) rulemaking before it was enforced against any party. The final rule required pharmaceutical companies to include a drug's generic name on all labels and in all advertising whenever the drug's proprietary name was used.[55] Abbott claimed that the FDA had exceeded its statutory authority in promulgating the rule. The FDA, on the other hand, argued that the case was not appropriate for judicial review since the rule had not yet been applied in the context of an actual enforcement action.

On the question of ripeness, the Supreme Court established a two-part test. First, a court must examine whether the issues presented are fit for judicial review. Second, a court must consider whether the parties seeking review will suffer substantial hardship if review is withheld.[56]

In applying the first part of the test, the Court held that the sole issue presented was appropriate for judicial review. This case posed the purely legal question of whether the FDA had the authority to require a generic name to appear every time a proprietory name was employed. Moreover, since the rulemaking was final, no further administrative action was necessary in order to refine the case for judicial review.[57] The Court also held that Abbott would suffer substantial hardship if judicial review were refused. Abbott either would have to comply with the regulation at some considerable cost, or refuse to comply and thereby risk prosecution.[58] Therefore, absent some statutory bar, Abbott was entitled to judicial review because the case was indeed ripe.

Allowing for pre-enforcement challenges to agency rulemakings makes a great deal of sense. If the government prevails, industry must comply. On the other hand, should the government lose, the agency can quickly change course and revise the rule as necessary. Recognizing the pragmatic nature of this reasoning, Congress now often restricts judicial review of rulemakings to the pre-enforcement period.[59]

Conclusion

The administrative state is neither a monster nor a misfortune. It is rather a structure built over the course of two centuries which is designed to further the collective goals of the American people. The rise of the administrative state, nevertheless, has posed a challenge to the ability of the American legal system to establish a proper equilibrium among our three branches of government. The challenge involves the question of how federal power will be allocated and requires our legal system to come to grips with the real tension which exists between the necessary role of administrative discretion and the need for some degree of accountability. The struggle to balance the conflicting, but complementary, roles of specialized expertise and external control is the dynamic that has shaped and continues to shape the contours of federal administrative law. ■

FOOTNOTES

1. 42 U.S.C. § 405(g) (1982).
2. 15 U.S.C. § 45(c) (1982).
3. 42 U.S.C. § 7607(b)(1) (1982).
4. *Id.*
5. *Id.*
6. 46 U.S.C. § 7604 (1982). The section is known as the citizen suit provision.
7. *See* Pub. L. 94-574, 90 Stat. 2721 (1976).
8. *See Califano v. Sanders*, 430 U.S. 99, 104 n.4 (1977).
9. Pub. L. 94-574, 90 Stat. 2721 (1976) (amending 28 U.S.C. § 1331).
10. *Califano*, 430 U.S. 99, 107 (1977).
11. 5 U.S.C. § 701(a) (1982).
12. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).
13. 5 U.S.C. § 702 (1982).
14. *Abbott Laboratories*, 387 U.S. at 141.
15. The federal courts generally refuse to imply a preclusion of judicial review on the basis of statutory materials. See, *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975) (finding that the Secretary of Labor "has failed to make a showing of 'clear and convincing evidence' that Congress meant to prohibit all judicial review of decision"); *but see Block v. Community Nutrition Institute*, 467 U.S. 340, 345-48 (1984) (implying preclusion from the language of the statute, the structure of the statutory scheme, the objectives of the legislation and the legislative history).
16. 379 F.2d 469 (D.C. Cir. 1967).
17. *Id.* at 473.
18. 84 Stat. 790 (1970).
19. *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974).
20. 5 U.S.C. § 701(a)(2).
21. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)(quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)).
22. *Heckler v. Chaney*, 470 U.S. 821, 837 (1985).
23. *See Id.* at 838.
24. *Minnesota v. United States*, 305 U.S. 382, 388 (1939).
25. *Id.* at 389.
26. 5 U.S.C. § 702.
27. Monetary relief from the federal government may be sought in appropriate actions brought in compliance with the terms of the Federal Tort Claims Act, 28 U.S.C. § 1346(b), and related, but scattered sections (1982), and the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1982).
28. *See, e.g., Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938).
29. *See, FCC v. Sanders Radio Station*, 309 U.S. 470 (1940) (applying language found in the Communications Act of 1934); *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942) (same).
30. 5 U.S.C. § 702.
31. *See, e.g., Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), cert. denied, 350 U.S. 884.
32. 397 U.S. 150 (1970).
33. *Id.* at 152.
34. *Id.* at 151-52 (quoting from *Flast v. Cohen* 392 U.S. 83, 101 [1968]).
35. *Id.* at 153.
36. *See id.* at 153-54; *see generally Barlow v. Collins*, 397 U.S. 159 (1970).
37. 405 U.S. 727 (1972).
38. *Id.* at 740.
39. *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 686 (1973).
40. *See id.* at 689 n.14 (quoting Davis, *Standing: Taxpayers and Others*, 36 U. Chi. L. Rev. 601, 603 [1968]).
41. *Warth v. Seldin*, 422 U.S. 490 (1975).
42. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976).
43. *Id.* at 38.
44. For more recent treatments of standing issues by the Supreme Court, see *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).
45. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907).
46. *See, United States v. Western Pacific R. Co.*, 352 U.S. 59, 64-65 (1956).
47. 5 U.S.C. § 704 (1982).
48. *See id.*
49. 5 U.S.C. § 552(a)(6)(C).
50. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).
51. *See McKart v. United States*, 395 U.S. 185 (1969).
52. *Coca-Cola Co. v. United States*, 475 F.2d 299, 304 (5th Cir. 1973) (emphasis added), *cert. denied*, 414 U.S. 877; *see also Leedom v. Kyne*, 358 U.S. 184 (1958) (involving an NLRB decision that was made in excess of its authority and contrary to a specific statutory prohibition).
53. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).
54. 387 U.S. 136 (1967).
55. *Id.* at 137-38.
56. *Id.* at 149.
57. *Id.*
58. *Id.* at 152-53.
59. *See, e.g.*, 33 U.S.C.A. § 1369(b) (West 1986 & Supp. 1989) (Clean Water Act) (barring a challenge to certain regulations in any subsequent enforcement action if review could have been obtained within 120 days after the rule was promulgated).

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19 friday

ADVISING SMALL BUSINESS CLIENTS
Ramada Civic Center, Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $110
(205) 870-2865

TAX CONSIDERATIONS IN REAL ESTATE TRANSACTIONS
Birmingham
Lorman Business Center, Inc.
Credits: 6.0 Cost: $95
(715) 833-3940

20-27

ANNUAL WINTER SEMINAR
The Sojourner Inn, Jackson Hole
Cumberland Institute for CLE
Credits: 11.0
(205) 870-2865

21-25

MIDWINTER CONVENTION
Marriott Orlando World Center, Orlando
Association of Trial Lawyers of America
Credits: 26.3
(800) 424-2725

23 tuesday

BASIC REAL ESTATE LAW IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

24 wednesday

BASIC REAL ESTATE LAW IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

NURSING HOME LAW
Radisson Hotel, Birmingham
Cumberland Institute for CLE
Credits: 6.0
(205) 870-2865

25 thursday

ENVIRONMENTAL LAW
Radisson Hotel, Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $110
(205) 870-2865

30 tuesday

EXEMPT ORGANIZATIONS AND CHARITABLE ACTIVITIES
Mobile
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

31 wednesday

EXEMPT ORGANIZATIONS AND CHARITABLE ACTIVITIES
Montgomery
National Business Institute, Inc.
Credits: 6.0 Cost: $98
(715) 835-8525

february

9 friday

CONSUMER ISSUES IN COMMERCIAL TRANSACTIONS
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

15 thursday

DUI
Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $110
(205) 870-2865

HOW TO EVALUATE AND SETTLE PERSONAL INJURY CLAIMS
Birmingham
Professional Education Systems, Inc.
Credits: 6.0 Cost: $115
(715) 836-9700

16 friday

EMPLOYMENT LAW
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

PERSONAL INJURY/WRONGFUL DEATH
Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $110
(205) 870-2865

HOW TO EVALUATE AND SETTLE PERSONAL INJURY CLAIMS
Montgomery
Professional Education Systems, Inc.
Credits: 6.0 Cost: $115
(715) 836-9700

17-22

BASIC COURSE IN TRIAL ADVOCACY
Ritz-Carlton Buckhead, Atlanta
Association of Trial Lawyers of America
Cost: $600
(800) 424-2725

21-23

OIL & GAS LAW & TAXATION
Westin Hotel, Dallas
Southwestern Legal Foundation
(214) 690-2377

23 friday

FAMILY LAW
Judicial Center, Pensacola
Alabama Bar Institute for CLE
Credits: 6.0 Cost: $110
(205) 348-6230

WORKERS' COMPENSATION
Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $110
(205) 870-2865

23-24

BRIDGE-THE-GAP
Birmingham
Alabama Bar Institute for CLE
Credits: 12.0
(205) 348-6230

24-27

FOCUS ON FAMILY LAW
Walt Disney World Swan, Lake Buena Vista
Law Education Institute, Inc.
Credits: 16.0 Cost: $425
(414) 961-0323

march

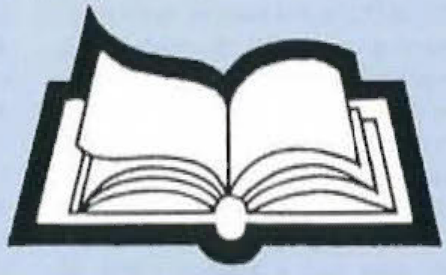
2 friday

SPECIAL ISSUES IN FAMILY LAW
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(205) 348-6230

TRIAL TACTICS
Birmingham
Cumberland Institute for CLE
Credits: 6.0 Cost: $110
(205) 870-2865

3-7

BANKRUPTCY LITIGATION INSTITUTE I
Olympic Hotel, Park City, Utah
Norton Institutes on Bankruptcy Law
Credits: 15.0 Cost: $550
(404) 535-7722



Rule 32, Alabama Rules of Judicial Administration—Child Support Guidelines

by Judge Richard H. Dorrough

I. Introduction

In 1974 Congress passed Title IV-D of the Social Security Act. 42 U.S.C.A. §§650-662. The purpose of this title was to shift a part of the burden of supporting needy children from the government, through AFDC, to the parents, by improving existing methods of establishing paternity and support obligations and by stricter enforcement. A decade later the system was re-examined and found to be lacking. Unpaid child support obligations exceeded $4 billion annually and only a little over 50 percent of custodial parents even had a support order in effect.

In response to this situation, Congress further enacted the Child Support Enforcement Amendments of 1984, Public Law 98-378. These amendments provided stricter administrative processes to expedite the establishment of support obligations and stronger methods of enforcement through wage withholding and tax refund interception. The amendments also demanded affirmative action at the local level by conditioning certain federal funding on state compliance. One of the required actions was that the states establish child support guidelines by legislation or by judicial or administrative process and have such guidelines in place by October 1, 1987.

In order to meet the requirements for child support guidelines, the Alabama Supreme Court appointed a committee of judges and other officials to draft proposed guidelines. After examining many different formulas and models for determination of child support, the committee recommended the adoption of the Income Shares Model, developed by the National Center for State Courts. As noted in the Comment to Rule 32, this model is premised on the idea that a child is entitled to the same proportion of parental income which would have been available for his support in an intact family. A Schedule of Basic Child Support Obligations was developed by the National Center and was appropriately adjusted to reflect Alabama's income distribution, as well as federal and state tax regulations. By application of the guidelines, the basic obligation is prorated between the parents based upon the ratio of their adjusted gross incomes to the support obligation. The proposed guidelines submitted by the committee were adopted by the Court and promulgated as Rule 32, ARJA, to become effective October 1, 1987.

Although the 1984 Amendments required the establishment of child support guidelines, they provided that the application of those guidelines could be made discretionary. Alabama's guidelines were made non-binding and the courts were given the discretion to deviate from the guidelines if their application would be inequitable. After the adoption of Rule 32, a concerted effort was made to educate judges and attorneys as to the use and application of the guidelines and, as of the end of 1988, the Administrative Office of Courts estimated that they were being utilized in approximately 60 percent of the state's jurisdictions. However, based upon slow nationwide response to the requirements of the Amendments and the increasing federal burden of child support, the government again strengthened the regulations and required more and swifter state action.

The I Support Act of 1988, Public Law 100-485, was enacted by Congress requiring additional revisions to state laws and procedures pertaining to establishment of paternity, child support and wage withholding, including more stringent timetables for expediting the pro-

cess. Among these requirements is the mandate that each state's child support guidelines be amended, effective on or before October 13, 1989, to provide a rebuttable presumption that the amount of support determined by their application is correct. And, that rebuttal of such presumption requires a written finding on the record stating the reason therefor, based on criteria established by the state.

Again, in response to the federal mandate, the supreme court requested that the committee draft proposed amendments to Rule 32. The committee was restructured to include a greater cross-section of affected persons, including practicing attorneys, and after several meetings made recommendations to the court, not only as to changes necessary to meet federal requirements but also those needed to clarify and/or rectify problems which had arisen in the practical application of the original guidelines. The court adopted the recommended changes and Rule 32 was amended to conform therewith. The Amendments were made effective October 9, 1989, to be applicable to all actions filed on or after that date.

II. Presumptive application

The Child Support Guidelines established by amended Rule 32 apply to all actions to establish or modify child support filed on or after October 9, 1989. In accordance with the federal mandate, amended Section (A) of Rule 32 provides that in all such actions, temporary or permanent, there shall be a rebuttable presumption that the child support award resulting from application of the guidelines is correct and should be awarded to the custodial parent. Application of the presumption in favor of the amount of support determined by utilization of the guidelines is mandatory and no longer discretionary. In order to rebut the presumption and make an award inconsistent with the guidelines, the court must make a written finding on the record that application of the guidelines would be unjust or inappropriate based upon one of the two criteria set out in Section (A)(i) or (ii): either that there is a fair written agreement of the parties stating the reasons for deviation; or, based upon the evidence presented, that application of the guidelines would be manifestly unjust or inequitable.

A. Forms required—The most significant initial effect of the mandatory application of the presumption in favor of the guidelines is that the provisions of Section (E) of Rule 32 become mandatory. Section (E) requires that a standardized Child Support Guideline Form (CS-42) and Child Support Obligation Income Statement/Affidavit (CS-41) be filed in all actions to establish or modify child support. The prior provisions of Section (A) that the Rule be non-binding having been deleted, the provisions of Section (E) are binding as to all actions filed on or after October 9, 1989. If not, it would be practically impossible for a court to make a written finding on the record that application of the guidelines would be unjust or inappropriate unless it had knowledge of what award the guidelines would produce. Therefore, there would appear to be no exception to the requirement that these two forms be filed in all actions filed after the effective date involving a minor child eligible for support.

Although the requirement to file the Income Affidavit and Child Support Guideline forms is now mandatory, it would not appear to be a jurisdictional requirement, such that failure to file the forms would affect the validity of the judgment or decree. However, it must be noted that failure to comply with a Rule of Judicial Administration may subject the violator, be he a filing attorney, accepting clerk or confirming judge, to sanctions for contempt pursuant to Rule 34, ARJA. Additionally, an attorney might become subject to a claim of malpractice, particularly from a custodial parent awarded less than the presumptive amount. And, considering the requirement of Section (A)(2) that the guidelines be used as the basis for future updates of child support, failure to file the initial guidelines forms may affect subsequent actions to modify support.

Rule 32 is silent as to when the newly required forms must be filed. Obviously, they must be filed before a judgment can be entered and, therefore, they will need to be filed together with the other pleadings in all non-contested actions filed on or after October 9, 1989. Otherwise, the actual time of filing primarily will be a matter determined by the policies and preferences of the judges and clerks of each local jurisdiction and/or by the circumstances of the case. It would be anticipated that local rules will be developed as to when the forms will be required in divorce or modification proceedings involving discovery and litigation with attorneys on both sides. But, it also would be expected that in most paternity cases, and modifications of previously established support orders, the information required may not be fully available until the day of trial, and time will need to be allowed for the forms to be completed prior to appearance before the court.

In contested cases, where there is an issue regarding one or more of the amounts to be used in completing the Guideline Form (usually the correct amount of income) each party should file his or her own Income Statement/Affidavit based on his/her allegations, together with a Guideline Form based on that information together with the figures

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alleged by that party for the other party. It then will be the court's job to reconcile which, if any, of the forms are correct. In some such cases, the court may decide to prepare its own Guideline Form based on its findings and have that form filed as part of the official record for use in future actions.

B. Guidelines applied—The intent of mandated child support guidelines is to promote uniformity and fairness in support awards and the guidelines are designed to produce that result. Hopefully, therefore, the amount of support determined by application of these guidelines will be awarded in the majority of cases. Although no specific finding is required of the court when the presumptive award is made pursuant to the guidelines, it would seem to be a good practice to note such fact in the record so that in the future it will not be necessary to compare forms to orders to make such determination, particularly if venue has changed and the entire record is not readily available. A possible notation in the written order or on the Case Action Summary might read as follows:

> The award of child support made herein was determined by application of the Child Support Guidelines established by Rule 32, ARJA.

Such notation in the record also might reference the fact that copies of the guideline forms are contained in the file and officially adopt the same as a part of the record, by adding the following:

> Copies of the guideline forms have been filed herein and are made a part of the record in this cause.

Of course, in consent or settled cases, when a stipulation is filed pursuant to Section (A)(1), filing of a Guidelines Notice of Compliance form (CS-43) would seem to obviate the need for such notations, in that the form would indicate that the guidelines were followed and applied.

C. Guidelines rebutted—If the award of child support is not based upon application of the guidelines, the presumption in favor of such an award must be rebutted by a *written finding on the record* that application of the guidelines would be unjust or inappropriate based on one of the criteria set out in Sections (A)(i) or (ii). When a divorce is being granted, a written decree is necessary and the finding would appropriately be included in the decree. *Bell v. Bell*, 509 So.2d 912 (Ala. Civ. App. 1987). However, initial or modified findings of child support in paternity and enforcement cases often are made in open court by minute entry and not further reduced to writing. In these cases, a written finding made on the Case Action Summary apparently would suffice to meet the requirements of the rule. Better practice, however, would suggest that the court or prosecuting attorney prepare a subsequent written order which assures notice to all parties of the findings. The Administrative Office of Courts has prepared and can furnish form orders for use in such cases.

1. Findings based on evidence—Unless there is a written agreement of the parties, in order to rebut the presumption, the court not only must make a written finding on the records, but, also, such finding must be made based upon evidence presented to the court from which it can determine that application of the guidelines would be manifestly unjust or inequitable. Rebuttal by means of Section (A)(ii) requires a specific evidentiary finding in each case and that such finding be made in writing. Therefore, it would not appear that application of the guidelines could be rebutted by adoption of a blanket order or finding that the guidelines are inappropriate or unjust. On the other hand, there does not appear to be

any requirement, comparable to that imposed on settling parties in Section (A)(i), that the court recite the specific reasons for its evidentiary findings or the facts upon which it bases its decision.

While a specific finding reciting the facts or reasons supporting rebuttal may be appropriate, and certainly would be useful in future actions for modification, a written finding of the ultimate issue would seem to be sufficient, e.g.:

> That based upon the evidence presented herein, the court finds that application of the Child Support Guidelines (Rule 32, ARJA) would be manifestly unjust or inequitable in this cause.

A common scenario, particularly in non-divorce cases, will be one in which the parties and/or a representative of DHR are before the court and reach an oral settlement based on an award different from that determined by application of the guidelines. In such cases when it is not practical to obtain a written agreement, the best advisable solution would be for the court to take testimony as to the agreement and the reasons therefor and make a written finding on the record similar to that set out hereinabove. It should be noted that the existence of an agreement does not alleviate the necessity that guideline forms be completed and filed as required by Section (E).

2. Written agreements/stipulations— The presumption in favor of application of the guidelines also may be rebutted by a *written finding* on the record that such application would be unjust or inappropriate based upon there being a *"fair, written agreement"* by the parties establishing a different amount and *stating the reasons therefor.* In other words, in order to rebut the presumption pursuant to Section (A)(i), the court must make a written finding that the parties have entered into a written agreement, setting forth their reasons for not following the guidelines, and further, that such agreement is "fair."

The court still has the discretion to accept or reject the agreement of the parties based upon its determination of "fairness" and also has the implicit duty to protect the rights of minor children to receive adequate and reasonable support from both parents. Section (A)(I) requires that stipulations (agreements) be presented to and reviewed by the court before approval. No evidentiary hearing is required, but the court is mandated to use the Income Statement/Affidavit and Guideline Form to review the adequacy of the child support award negotiated by the parties. In performing this review, the court should compare the amount of support determined by application of the guidelines to the amount agreed by the parties juxtaposed against the reasons for deviation set out in the agreement. Should the court have questions about the fairness of the agreement, or adequacy of the award, a hearing or status conference could be set or questions might be resolved by a conference call or other communication with counsel, requesting clarification or additional explanation of the reasons for deviation. In rare cases, it might be appropriate to appoint a guardian ad litem to represent the interests of the child.

In order to somewhat temper the court's burden of reviewing every settlement agreement, Section (A)(I) further provides that the court may accept a Child Support Guidelines Notice of Compliance (Form CS-43), indicating compliance with Rule 32 or in the event of non-compliance the reasons for deviation therefrom. Upon receipt of this notice, in addition to the Income Statement/Affidavit and Guideline Form, the court may accept the statements therein that the guidelines have been followed and need not further review the forms or agreement as to the determination of child support. Notification that the guidelines have not been followed provides a convenient way of advising the court that review will be necessary and provides a particular place for stating the reasons for deviation from the guidelines, saving the court's time in searching for such in the agreement.

Although not required, the Notice of Compliance should be filed in all uncontested cases and/or cases settled on the basis of a written agreement. Not only does it foster judicial economy by providing a quick reference for the court regarding its duty of review, but it also provides an element of protection for attorneys. Although the compliance form can be executed by either a party or an attorney, it would appear advantageous for attorneys to have their clients execute the form, the design of which would appear to require one form from each side in any event. By signing the form, the client impliedly acknowledges awareness of the use or non-use of the guidelines and cannot later claim to have been uninformed. Also, although the form was specifically designed not to require an attorney "to certify" facts to the court, and compliance is noted based on information as supplied by the parties, execution by the client will close any question of implied certification by counsel.

Upon a determination of fairness, after review or acceptance of a notice indicating compliance, the court still must make a written finding on the record to such effect. The most convenient place for such finding would appear to be in the divorce decree or order incorporating the agreement of the parties. The court also may wish to incorporate the reason stated for deviation in the agreement or notice form and attorneys should coordinate with individual judges to determine what local requirements may have been established in this regard. A pattern clause for inclusion into a decree or order might read as follows:

> The parties have entered into a fair written agreement establishing the award of child support herein [the adequacy of which has been reviewed by the court] or [and have filed a Notice of Compliance in accordance with Rule 32 (A)(1), ARJA]. The reasons stated in the agreement/Notice of Compliance in rebuttal of the presumption in favor of the guideline determination are adopted herein as findings of the court.

3. Reasons for deviation—Rule 32 does not attempt to list any specific reasons or justifications for deviation from a guidelines award. In determining the criteria required of state law by the federal act, the supreme court adopted the committee's recommendation that this be an area left to the discretion of the trial courts. Accordingly, the specificity and validity of reasons justifying deviation from the guidelines may vary between, and even within, different jurisdictions—depending on the philosophy, policy and custom of individual judges and/or referees. As a general rule, the reasons for deviation should be clear, concise and convincing. If the reason is obvious, for example, if the non-custodial parent is incarcerated, a simple one-sentence explanation may be sufficient. On the other hand, if the award is the product of an integrated bargain, based on considerations of property settlement and tax consequences, a more comprehensive explanation may be necessitated. Whatever the reason, however, it should be presented in a manner mindful of the court's express duty to determine fairness, both to the parties and to the child.

Some possible pitfalls to certainly avoid would include any agreement waiving or substantially reducing support based on non-exercise of rights of visitation. See, e.g., *Erwin v. Luna*, 443 So. 2d 1242 (Ala. Civ. App. 1983); *Willis v. Levesque*, 402 So.2d 1003 (Ala. Civ. App. 1981). Also, reference to debts, unemployment or underemployment should be avoided, in that the guidelines are based upon a policy of insuring consistent treatment based on income and the fact that unemployment or underemployment can be factored into the guidelines formula. Recitation of a spouse's duty to pay alimony to the other spouse also would not appear to be a sufficient reason for deviation in light of the notation in the comment that child support should be determined before a determination is made as to alimony.

D. Modifications—Section (A)(2) of the rule provides that the child support guidelines shall be used as the basis for periodic updates of child support obligations. The 1989 amendments to the rule provide for mandatory application of the

guidelines to modification proceedings, as well as initial proceedings to establish support, and the word "may" in the initial rule was changed to "shall." Therefore, the presumption in favor of the guidelines is equally applicable to actions for modification of child support obligations as it is to an initial determination.

Section (A)(2)(i) clearly states that modifications, made on or after the effective date of the amended rule, shall be prospective and only apply to support accruing after the filing of the petition for modification. Also, and most significantly, it further provides that modification of a child support obligation must be based upon a showing of a material change in circumstances, which is both substantial and continuing. The court of civil appeals has held that the enactment of the initial child support guidelines does not in and of itself constitute a material change in circumstances. *Davis v. Davis*, 535 So.2d 183 (Ala. Civ. App. 1988). It would appear that this decision also would apply to enactment of the amendment, however, the mandatory application of the rule may make a distinction in the reasoning of the court. While the committee did not intend for enactment of the guidelines to be considered as a material change in circumstances nor to attempt to modify existing case law by a Rule of Judicial Administration, it would be anticipated that this question again will be the subject of an opinion by the appellate courts in the near future. In the meantime, it would be good practice to allege and to prove factual allegations of a change in circumstances rather than relying solely on the promulgation of the amended rule.

In addition to the continued burden of proving a material change in circumstances, Section (A)(2)(ii) seeks to avoid unnecessary and/or continuing requests for modification by creating a rebuttable presumption that changes which result in less than a 10 percent difference in the support obligation are not material in nature. Therefore, one petitioning for a modification based on less than a 10 percent difference in result under the guidelines must meet a double burden of proving a material change and that the same is so substantial as to rebut the presumption against modification. The opposite, however, is not the case and there is no presumption that a difference in excess of 10 percent is entitled to any special consideration with regard to meeting the burden or proving a material change of circumstances.

The federal acts make certain provisions, primarily affecting Title IV-D cases, which eventually will require mandated periodic updates of child support. These provisions are not within the scope of this presentation, but should be reviewed by attorneys concerned with Title IV-D enforcement. General practitioners also should be aware that such requirements may come in the future and may want to consider whether negotiated agreements should contain provisions for periodic, automatic revision based upon application of the guidelines to future circumstances.

III. Determination of child support

A. Income—One of the primary policy decisions the committee had to make in the initial drafting of the guidelines was whether they should be based on "gross" or "net" income. After considerable discussion and numerous questions and

problems being raised as to a proposed definition of "net" income, (e.g., what employee deductions would be allowed—dues, insurance, retirement, savings, etc.) and the problem of claiming different numbers of exemptions before and after the order, it was determined that basic support based on "gross" income was preferable. Gross income is defined in Section (B)(2) and includes income from any and all sources, including unemployment compensation, social security and disability benefits. The only exclusions are set out in Section (B)(2)(ii): child support for other children or benefits from means-tested public assisted programs, such as ADC, SSI and food stamps. The definitions of income established by the rule and examples thereof also are contained on the back of the Income Statement/Affidavit form for easy reference with regard to completion of that form.

Section (F) of the rule requires that the Income Statement be verified by documentation of both current and past earnings and that documents of current earnings be supplemented with copies of the most recent tax return. It also provides that the court may direct the provision of such other documentation as it may require. The Income Statement/Affidavit must be signed under oath and the affiant is subject to penalties of contempt for intentional falsification of information. In most cases involving wage earners with one primary source of income, completion of the form will not be difficult and documentation will probably consist solely of a current payroll stub and the copy of last year's income tax filings. Situations involving commissioned salespersons or hourly workers with sporadic hours may need more documentation to produce a reliable estimated average income.

Obviously, there will be times when the requirement for support documents cannot be met, particularly in paternity cases and when a litigant appears pro se. Such cases should be dealt with on a practical basis and, to a great extent, will be dependent on the attitudes and requirements of individual judges and referees. However, documentation probably will be expected in most non-contested actions and it normally would be assumed that attorneys also would want such basic information in the file to protect their client and themselves. Should documentation not be available, that fact should be noted on the Income Statement/Affidavit form, together with some explanation for non-availability.

In order to promote the efficient production of required documentation, it would seem advisable to include in orders setting hearings a requirement that the parties bring with them a current pay stub and copies of recent tax returns. Such a requirement should be entered not only in paternity actions and/or modifications, but also as to pendente lite hearings in actions for divorce and final hearings if the forms have not previously been filed.

1. Self-employment income—Section (B)(3)(i) defines "self-employment income" as gross receipts, minus ordinary and necessary expenses required to produce income as allowed by the Internal Revenue Service. The intent of the definition is to include any and all income or imputed income which normally would be available for or used for the benefit of an intact family unit. Section (B)(3)(ii) further defines business expenses by disallowing accelerated depreciation expenses, investment tax credits or other expenses which the court deems inappropriate. The obvious purpose of this section is to eliminate paper deductions which do not, in fact, reduce income and the issue of which expenses will be allowed should hinge on whether they truly reduce the amount of income available to meet a support obligation.

2. Other income—Consistent with the foregoing, Section (B)(4) provides that reimbursement of business expenses and/or in-kind payments received from an employer or through self-employment shall be considered as income if they significantly reduce personal living expenses. For example, a company car should be factored in as additional income—certainly to the extent it is considered as imputed income for Internal Revenue purposes and is shown on the employee's W-2 form. Again, the issue will be what affirmative effect, if any, the benefits have on the ability to provide

support, either through direct reimbursement or by decreasing normal family expenses.

While at first glance it may appear that these requirements for determination of income present a new burden on parties and attorneys, in fact, the information required is no more than has previously been gathered by diligent attorneys for presentation to the court or for the purpose of negotiating and determining the equity of a settlement. Matters of determination of income from self-employment, employee benefits and reimbursements, payment of expenses, etc. by closely-held businesses always have been at issue and the only real change brought about by Rule 32 is that the information may need to be formalized at an earlier time and/or presented to the court.

3. Unemployment/underemployment— Section (B)(1) defines "income" as actual income if the parent is "employed to full capacity, or ability to earn income if unemployed or underemployed." This definition is consistent with current case law, which requires that a parent's obligation to pay child support should be based on the ability of the parent to earn income rather than his actual income. See, e.g., *Thompson v. Thompson*, 428 So.2d 76 (Ala. Civ. App. 1983). Section (B)(5) elaborates on this definition by providing that if *either* parent is voluntarily unemployed or underemployed, the court *shall* impute an income to that parent (or conceivably both parents) and calculate child support on the basis of such imputed income. While use of the word "shall" appears to mandate that the court impute income, it must be taken in context with the provision that such imputation should be made only when the court finds that either parent is *voluntarily* unemployed or underemployed. A finding of voluntary unemployment or underemployment is discretionary with the court and the duty to impute income does not arise until such a finding has been made.

The amendments to Rule 32 expanded this subsection by further providing that should the court determine that imputed income is appropriate, such income should be determined based upon the "employment potential and probable earning level of that parent based on the parent's recent work history, education, occupational qualifications, and prevailing job opportunities and earning levels in the community." These additions give clear indication of what facts and circumstances should be considered with regard to imputed income. In the absence of any recent work history or other occupational qualifications, it would appear that an imputation of income at a minimum age level would not be inappropriate.

Rule 32, as originally promulgated, provided that income should not be imputed to a parent who was physically or mentally incapacitated or who was responsible for the care of a child under five years of age, to which the parent owed a joint legal responsibility. The amendments deleted reference to a parent's being physically or mentally incapacitated on the basis that such would be a part of the court's determination as to whether unemployment or underemployment is voluntary and further deleted the specificity as to the age of a child in the home. The amended rule provides that the court shall have discretion to determine that a parent shall not be subject to imputation of income, based upon the fact that there is a young or disabled child which necessitates the parent's remaining in the home. The committee felt that leaving such matters to the discretion of the trial court was more equitable than using an arbitrary age of a child. Also, the amendments deleted the provisions that the child needing home care be a child for which the parents owe joint legal responsibility, opening the possi-

bility of such child being a child with a different father or from a prior marriage. The crucial issue now is whether it is reasonable to decide that the parent is actually required to remain in the home and not able to work for that reason.

Because attributing imputed income to a parent will increase the combined adjusted gross income, and consequently the basic child support obligation, it is wise to calculate child support with and without imputed income to determine the true effect of such imputation. Under certain circumstances, particularly when dealing with low income families, such imputation can produce unexpected results. For example: Assuming a non-custodial parent with an adjusted gross income of $1,200 per month and an unemployed custodial parent, the basic obligation for two children would be $334, to be paid 100 percent by the non-custodial parent. Imputing minimum wage income of $580 per month to the custodial parent produces a combined adjusted gross income of $1,780 and a basic obligation of $456, of which the non-custodial parent is liable for 67 percent or $305.

B. Pre-existing child support obligation—Section (B)(6) provides that a deduction may be from a parent's gross income for child support actually paid by such parent for other children that he or she is legally obligated to support. As originally promulgated, the rule limited this adjustment to amounts being paid pursuant to an *order for support*. Upon reexamination, the committee determined that there were a considerable number of cases where an obligor parent actually was supporting other children but was not under a specific order of support. For example, the father of an illegitimate child also may be supporting children or an existing family unit. Not allowing an adjustment for children being supported pursuant to a legal obligation merely because there was no court order requiring the same, therefore, was perceived to be inequitable and modification of the rule was recommended to and approved by the court. Amended Rule 32 allows for an adjustment to gross income not only for child support actually paid pursuant to an order for support, but also for support actually provided to children for whom the parent is legally responsible.

Several methods of determining the amount of this "imputed preexisting child support obligation" were considered by the committee, all of which might be considered arbitrary. However, recognizing the practical situation that in very few of these cases would actual income and expense figures be available, the committee opted for simplicity. The method recommended and adopted by the court provides that the imputed obligation be the amount specified in the Schedule of Basic Child Support Obligations for the number of children for whom such parent is legally responsible, based upon such parent's unadjusted gross income. In other words, to determine the imputed obligation, one should merely take the unadjusted gross income shown on the Guideline Form and then determine the basic child support obligation from the schedule column for the appropriate number of other children.

In order to comply with Alabama's existing case law, providing that first-born

children have a first-right to support, the amendments further provide that if the proceedings are to modify an existing award of support, no deduction should be made for an imputed duty to support children born or adopted after the initial award of support sought to be modified, unless support is paid pursuant to a specific order of support. The deduction for imputed child support obligation, however, applies only to children in existence at the time of an initial determination of child support for the child for which support or modification is being sought, regardless of the actual age or order of birth.

C. Health insurance—The actual cost of health insurance for a dependent child or children may be deducted from the gross income of a parent to determine adjusted gross income for the purpose of calculating child support. Due to the sometimes impossible problem of determining the actual cost of a child's portion of insurance costs, it was determined that an allowance of deduction for the entire cost of health insurance would be the most equitable solution and the rule so provides. Therefore, a parent who is actually paying for health insurance that provides benefits for the child or children supported is entitled to deduct the full cost of said insurance, regardless of whether the parent is also covered under such insurance policy. The rule does not limit the application of this deduction and when both parents are providing insurance which provides substantial benefits to a child or children, it would not be inappropriate to allow the deduction to both parents. Or, in appropriate circumstances, it may be advisable to examine the relative benefits of each policy and determine which policy should be maintained.

When the deduction for insurance is allowed, there should be a corresponding provision in the order or decree requiring the party or parties allowed the benefit of the deduction to maintain said insurance, or like insurance benefits, for the minority of the child(ren). Further, provision should be made for non-covered medical and dental expenses. For instance, the parties might be required to pay, or reimburse, non-covered expenses in the same percentage determined as their percentage share of income on line three of the Child Support Guideline Form.

D. Child care costs—Section (B)(8) provides that the actual net cost of child care incurred because of the employment of job search of a parent shall be added to the basic child support obligation. Actual net costs are defined as actual costs less the value of the federal income tax credit for child care, as allowed by the Internal Revenue Service. The adjustment is limited, however, to the level of payment required to provide care from a licensed source based on Department of Human Resources guidelines. Rule 32 is supplemented with a chart to use in determining federal tax credits and also by a schedule of day care cost standards published by DHR.

The calculation of the child care adjustment is probably the most difficult aspect of preparing the Guideline Form, and possibly the committee will address

simplification of this adjustment in making future amendments to Rule 32. In the meantime, the Administrative Office of Courts has prepared a table for use in determining net child care costs, copies of which can be obtained by writing *The Alabama Lawyer*, P.O. Box 4156, Montgomery, Alabama 36101.

In order to calculate child care costs, it is first necessary to determine the average monthly expense of such care. For example, child care costs may vary during the summer months and additional care be required when children are not in school. Also, it may be necessary to determine what portion of child care expenses are directly attributable to employment as opposed to other reasons. After determination of the average monthly child care expense, it will be necessary to determine the adjusted gross income of the custodial parent, who will be entitled to claim the tax credit. In this respect, it should be noted that the adjusted gross income used in the table appended to the rules and the AOC chart is the adjusted gross income reported to the Internal Revenue Service, not the adjusted gross income shown on the Guideline Form.

To determine net monthly work-related child care expense using the AOC table, first locate the line on the table containing the appropriate adjusted gross income for federal income tax purposes and then proceed across the chart to the proper column under the amount closest to the actual child care expense. For example, a custodial parent with one child who has an adjusted gross income of $21,000 annually and an actual child care cost of $200 per month would have a net child care cost of $152 per month.

Federal tax credits are limited to a percentage of maximum annual expenses of $2,400 for one child or $4,800 for two or more children, and tables are provided for child care expenses for one child and for two or more or more children. It will be noted that each of the tables has a darkly-printed column which corresponds to the maximum allowance.

To determine net monthly child care costs not included on the chart, it will be necessary to determine the tax credit percentage allowed and subtract the same from 100 percent and then multiply the remainder percentage times the average monthly expense up to the federal tax credit maximum of $200 per month for one child or $400 per month for two or more children. For example, if a custodial parent with an adjusted gross income of $13,000 annually has an average work-related child care expense of $137 per month, the federal tax credit available according to the chart would be 28 percent. Deducting 28 percent from 100 percent would leave 72 percent times $137 or $98.64. If the average monthly child care costs exceed the federal maximum level, the excess monthly expense should be added to the amount determined hereinabove. For example, if the custodial parent in the above illustration had average child care expenses of $214 per month for one child, the net expense would be $158 ($144 per month taken from the AOC chart under the column for $200 per month expenses plus the $14 excess over the maximum).

Formation Of Health Law Section

On July 20, 1989, Alva C. Caine, president of the Alabama State Bar, charged a task force of bar members with the responsibility of determining whether there is sufficient interest for the formation of a Health Law Section of the Alabama State Bar. Pursuant to this charge, the task force now is soliciting responses from interested members of the bar. Those persons who have an interest in participating in such a section should contact one of the following persons below:

Gregg B. Everett (task force chairperson)
1235 Forrest Avenue
Montgomery, Alabama 36106

Keith B. Norman (bar staff liaison)
P. 0. Box 671
Montgomery, Alabama 36101

The limits established by DHR guidelines are based upon a per child cost and the amount shown on the addendum to the rule should be multiplied by the number of children for whom child care costs are being expended. For example, the maximum child care cost allowed for full-time care of a two-year-old child ($155 per month) and a four-year-old child ($140 per month) would compute to a total maximum allowable charge of $295 per month. In cases where the actual net child care costs exceed the DHR limits, the amount provided by the limits should be inserted in the Guideline Form as opposed to the actual costs, or, in appropriate instances, the court may determine that the difference between actual and allowable child care costs is so substantial as to become evidence for rebuttal of an award of child support based upon use of the guidelines and may make an award of a higher amount with an appropriate finding of rebuttal as provided by the rule.

E. Determination of recommended child support

1. Basic child support obligation—The basic child support obligation to be entered on line four of the Child Support Guideline Form is found in the Appendix to Rule 32, Schedule of Basic Child Support Obligations, from the proper column relating to the number of children being supported based on the combined gross income of the parties, as determined on line two of the Guideline Form.

Under the original rule, basic support for income amounts between those listed on the chart were to be "extrapolated." In order to eliminate the mathematical calculations for extrapolation, the amended rule provides that when income amounts fall between amounts shown in the schedule, the lower value is used if the combined gross income falls less than halfway between the amounts shown, and the higher value is used if the amount falls halfway or more between the two amounts.

The "number of children due support" is defined to mean the children for whom the parents share joint legal responsibility and for whom support is being sought. It does not include children of a prior marriage of either of the parties, except with relation to amended Section (B)(6) concerning preexisting child support obligations.

The amendments to Rule 32 modified the Schedule of Basic Child Support Obligations to cover joint gross incomes as low as $550 per month to more easily accommodate minimum wage earners. Below a joint income of $550, the chart flattens out regardless of how many children are due support and also reaches the $50 amount which is allowed to be received by the custodial parent of children receiving ADC benefits. When the combined gross income falls below $550 per month, the amount of the support to be awarded is left to the discretion of the court. However, it is recommended that some child support obligation be determined in every case, regardless of income, in order to foster a sense of responsibility in the non-custodial parent.

2. Computation of child support—The total child support obligation is determined by adding the basic support obligation to work-related net child care costs to arrive at the amount to be entered on line six of the Guideline Form. Thereafter, each parent's respective obligation is determined by multiplying his/her percentage share of income, determined on line three, times the total support obligation, to determine each parent's share of the total obligation. The custodial parent is presumed to expend his or her share of the obligation in direct support of the children and the non-custodial parent should be required to pay his or share of the obligation to the custodial parent.

F. Additional awards for child support—As originally written, Rule 32 provided further additions to the basic child support obligation for extraordinary medical expenses, Section (B)(9), and extraordinary educational expenses, Section (B)(10). At various education sessions, judges, attorneys and other persons concerned with utilizing the guidelines in-

dicated numerous problems in defining and prorating extraordinary medical and education expenses under these provisions. The committee recognized that the purpose of "guidelines" was to provide a determination of reasonable expenses in a normal intact family and not to address extraordinary situations which are more suitable to a case-by-case analysis and exercise of judicial discretion. Accordingly, the committee recommended that these sections be deleted from the rule and that awards for extraordinary medical and educational expenses be considered on an individual case basis, separate and apart from the mathematical calculations of total child support obligations pursuant to the Guideline Form. Sections (B)(9) and (B)(10) were deleted and Section (C)(3) was added to provide that in addition to ordering recommended child support as determined by the guidelines, the court could make an additional award for extraordinary medical, dental and educational expenses as provided in a written agreement of the parties or as determined by the court to be in the best interests of the child (or children).

When making such an additional award of child support or providing for payment of specific additional expenses, the order of the court or agreement of the parties should specifically designate the additional amount awarded, the purposes of the award and any time limitations attached thereto. This will allow the additional award to be clearly identified for purposes of future modification and/or termination.

G. Payment of support—Section (H) of Rule 32 provides that payment of child support may be ordered through the clerk of the court for remittance to the obligee on the court's own motion or upon motion of either party. It further provides that payments shall be due on a certain date or dates of each month. If payment is not being made through the Department of Human Resources or its contracting agency, payment through the office of the clerk provides for a continuous record tracking child support payments and avoids future questions with regard to actions for enforcement and/or entry of an Income Withholding Order. The policies and procedures of local clerks' offices with regard to payment should be investigated and if an administrative charge is made for collection, the order should specify whether the same is to be paid by the obligor or deducted from the support paid to the obligee.

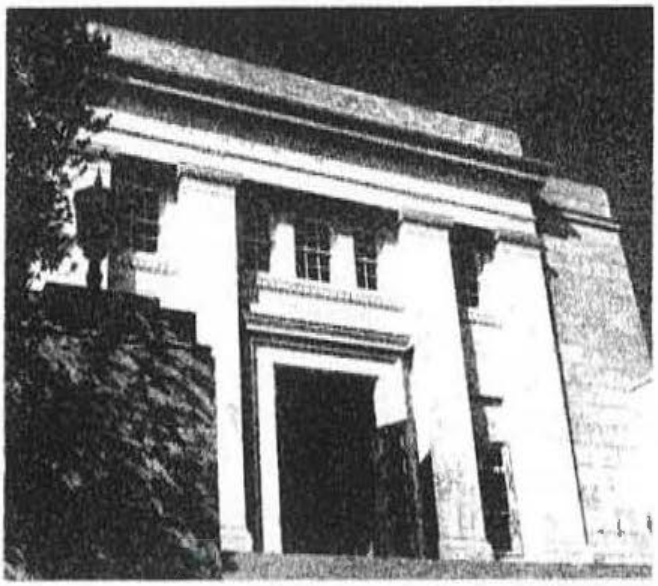
Regarding the timing of payments, consideration should be given to the pay periods of the obligor and the child support obligation ordered payable in accordance therewith. This is particularly important with respect to certain government employees, and the State of Alabama has requested that when a withholding order is to be served on it, the obligation be based on a biweekly schedule. In order to determine weekly payments, the monthly obligation shown on the Guideline Form should be multiplied by 12 and then divided by 52. To determine biweekly payments, the monthly support obligation should be multiplied by 12 and divided by 26.

H. Review—Section G of the rule provides that the administrative director of courts shall review the child support guidelines and schedule of obligations at least once every four years, to insure that their application results in a determination of appropriate awards of child support. This requirement is in conformance with federal mandates and also is necessary to verify the continued validity of the data used by the National Center for State Courts in establishing the schedule. Also, the committee will continue to function and review problem areas in application of the guidelines.

IV. Conclusion

Child support guidelines now are an established fact in the practice of family law. Among judges and practitioners who have been utilizing the discretionary guidelines, the verdict has been overwhelmingly favorable. Child support orders have become more consistent, particularly in paternity cases, and settlements have been facilitated. Attorneys not only are able to provide clients with an amount of child support anticipated to reflect the opinion of the court, but also to demonstrate how the figure is determined and that it reflects the obligation of both parents to meet the needs of their children. Use of the guidelines, however, certainly does not eliminate the need for the services of an attorney in establishing child support. As should be clear from a reading hereof, there still are many factual issues which must be addressed concerning application of the guidelines, and judicial discretion still plays a substantial element in the application of the rule.

In conclusion, it always should be remembered that guidelines are just that; they are based upon reasonable assumptions as to the normal facts and circumstances found in a basic family unit. They are designed to produce valid and equitable results in the majority of cases, but, as with all rules, there will be exceptions. Judges, attorneys and other persons utilizing the guidelines always should be conscious of this fact and not attempt to make the guidelines fit an otherwise inappropriate situation. In such situations, when the guidelines do not produce an equitable result or cannot be practically applied, the presumption in favor of their application should be rebutted and child support determined upon the facts and circumstances of the individual case.■



Recent Decisions

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

Recent Decisions of the Alabama Court of Criminal Appeals

Search and seizure—forced entry without notice of authority

McReynolds v. State, 2 Div. 710 (September 29, 1989)—Based upon informant information, Selma police obtained a search warrant for McReynolds' room at the Craig Motel. Mrs. Patel, the wife of the motel owner, went with the officers to the defendant's room. Patel knocked on the door but no one answered. When she attempted to open the door with her master key, the door was still fastened by the night chain.

The Selma police announced themselves and kicked the door. The door failed to open so Lt. Smith announced himself again and kicked the door a second time. Inside the room the defendant and a young woman were located along with a quantity of marijuana and a bag of cocaine.

On appeal, McReynolds argues that Lt. Smith improperly entered his motel room without first announcing his authority as required by §15-5-9, *Code of Alabama* (1975). The court of criminal appeals agreed and reversed and remanded the case to the circuit court for a new trial.

Section 15-5-9, *Code of Alabama* (1975) provides as follows:

> To execute a search warrant, an officer may break open any door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance.

Lt. Smith's testimony, which was corroborated by other police officers, was to the effect that the lieutenant had announced his authority. However, the announcement was almost simultaneous with the officers' forced entry. The officers were not "refused admittance" within the meaning of §15-5-9 before they broke into the defendant's motel room. From the evidence, it appears that the occupants of the motel room said nothing and did nothing in the very short time before the police broke into the room.

While it is true that a verbal or affirmative refusal from the occupants of a dwelling is not always required before officers may make a forced entry to execute a warrant, *Laffitte v. State*, 370 So.2d 1108 (Ala.Crim.App.), *cert. denied*, 370 So.2d 1111 (Ala. 1979), cases have held that there must be either (a) "some positive conduct on the part of the occupants indicating they are not going to open the door," from which the officers may "assume that they have been denied admittance," or (b) "a failure to re-

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spond within a reasonable time, from which refusal can be presumed." *See also Irwin v. State*, 415 So.2d 1181, 1183 (Ala.Crim.App.), *cert. denied*, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982).

In the case *sub judice*, there was no "positive conduct" by the occupants of the motel room from which the officers could have concluded that the defendant either was not going to open the door or was destroying evidence. In short, the officers in this case simply did not wait for a "failure to respond" before breaking the door. Hence, their execution of the search warrant was a violation of the fundamental law of the land.

Other acts of misconduct—cannot include false information on résumé

Carroll v. State, 6 Div. 890 (November 17, 1989)—Carroll was convicted on two cases of theft in the first degree and one case of theft in the second degree. The Alabama Court of Criminal Appeals, speaking through Judge Patterson, reversed and remanded Carroll's case for a new trial.

During cross-examination of the defendant, the prosecution was allowed to question him about certain details of a letter and personal résumé which he had previously submitted to the district attorney of Jefferson County, seeking employment. During the cross-examination, the prosecution implied that the information referred to in the résumé was false. The defendant timely objected to the questions on the ground that they constituted an attempt to impeach the defendant on a collateral and immaterial matter. The letter and résumé, along with a letter from the United States Department of Justice, stated that there was no record of the defendant's ever working for the Department of Justice.

In reversing, the court of criminal appeals observed:

> "It is not permissible in this state to prove good or bad character, either of a party on trial or of a witness, to fortify or impeach his testimony, by proving particular acts." *Lowery v. State*, 98 Ala. 45, 13 So. 498 (1893).

The prosecutor, in cross-examining the defendant about his job application and in showing that he had made false representations in it, was attempting to prove by unrelated and immaterial bad acts that the defendant's character, as a whole and for truth and veracity, was bad.

However, it is well settled in Alabama "that particular independent facts, though bearing on the question of veracity, cannot be put in evidence for the purpose of discrediting the witness." *Grooms v. State*, 228 Ala. 133, 152 So. 455 (1934).

Recent Decisions of the Supreme Court of Alabama—Civil

Civil procedure . . . trial court has broad discretion under Rule 37, A.R.Civ.P.

Iverson v. Xpert Tune, Inc., 23 ABR 4085 (September 8, 1989). Iverson took his car to Xpert Tune, and they determined that it had a defective fuel pump and replaced it. Iverson obtained possession of the "defective" pump and sued Xpert Tune, alleging that the pump was not defective. Xpert Tune served a request for production to inspect the pump. Iverson and Xpert Tune agreed to have the pump inspected. Subsequently, Iverson informed Xpert Tune that the pump was unavailable, and Xpert Tune filed a motion to dismiss pursuant to Rule 37, A.R.Civ.P. The trial court conducted a hearing and found that Iverson's actions amounted to gross negligence, and the trial court concluded that all the facts indicate that Iverson willfully discarded the pump to avoid production. The trial court dismissed the suit, and Iverson appealed, contending that the trial court abused its discretion by dismissing the suit absent a motion to compel. The supreme court affirmed.

The supreme court noted that the trial court is vested with broad discretion in controlling the discovery process, and the choice of discovery sanctions will not be disturbed on appeal absent gross abuse of discretion, and then only upon a showing that such abuse resulted in substantial harm to appellant. "Willfulness" on the part of the non-complying party is a key factor supporting dismissal. Generally, a motion to compel under Rule 37(a), A.R.Civ.P., must be obtained before sanctions under Rule 37(b) may be imposed. However, no court order is required in order to bring Rule 37(d) into play. It is enough that a request for production has been properly served on the party. Once a party has been served with a request for production or inspection, absent any objection thereto, that party must cooperate in good faith to reasonably protect the requested evidence from being destroyed or discarded. The trial court is the more suitable arbiter for determining with accuracy the culpability of the failure to produce, and the supreme court will show great deference toward a trial court's decision with respect to culpability.

Constitutional law . . . *Batson v. Kentucky* applies to civil cases

Thomas, etc. v. Diversified Contractors, Inc., 23 ABR 4141 (September 15, 1989). Plaintiff is black and the owner of defendant is white. In selecting the jury, each side was allowed eight peremptory strikes. The jury venire consisted of four black members and 24 white members. All four black members of the venire were struck by the defendant. After the jury was struck, but before they were sworn, the plaintiff objected to the fact that all of the black members had been struck by the defendant. The trial court did not rule on the objection and proceeded to seat the jury. In a motion for a new trial, plaintiff once again raised his objection to the jury. The trial court denied plaintiff's motion and specifically found that *Batson v. Kentucky*, 476 U.S. 79 (1986), did not apply in a civil case. Plaintiff appealed, and the supreme court reversed and remanded.

In a case of initial impression in Alabama, the supreme court recognized that the United States Supreme Court has not definitively decided whether standards established in *Batson* apply to civil actions. After reviewing conflicting federal decisions, the court decided to follow *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989). In that case, the court stated:

> ". . . when the objecting party shows that 'he is a member of a cognizable racial group' and that the 'relevant circumstances raise an inference' that his opponent 'has exercised peremptory challenges to remove from

> the venire members of [the objecting party's] race,' the objecting party has made out a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. The 'explanation need not rise to the level justifying exercise of a challenge for cause,' *id*; rather, it need only be 'a neutral explanation related to the particular case to be tried.'" *Id.* at 98, 106 S.Ct. at 1723.

In the present case, the trial court did not ask the defendant why he struck the four blacks, nor was there anything in the record to suggest why they were struck. It is for the trial court to decide whether the striking of the four blacks made out a *prima facie* case of discrimination. If the trial court finds that there was discrimination, the burden shifts to the defendant to provide a race-neutral explanation for these strikes. If no adequate reason is provided, the plaintiff must be given a new trial.

ERISA . . .
fraud in inducement and §27-12-6 preempted by ERISA

HealthAmerica and Merle v. Menton, 23 ABR 3436 (July 21, 1989). As part of his employment, Menton was provided with medical insurance, an employee benefit plan governed by ERISA, 29 U.S.C. §1001, *et seq.* Menton's employer offered alternative plans. Merle, an employee of one of the alternative plans, represented to Menton that her HealthAmerica plan was as good as or better than the plan he had. Based on this representation, Menton dropped his plan and enrolled in HealthAmerica. Menton subsequently learned that HealthAmerica's plan did not cover expenses that had been covered by his plan. He filed suit for fraud and alleged he was fraudulently induced to drop his plan to enroll in HealthAmerica. Defendants moved for a directed verdict at the close of all the evidence based on the ERISA preemption as set forth in 29 U.S.C. §1144(a), which preempts "all state laws insofar as they may now or hereafter *relate to any employee benefit plan* . . . ." The trial court denied defendants' motions, and the jury found in favor of the plaintiff. The trial court also allowed the plaintiff to amend the complaint to conform to the evidence to allege a violation of §27-12-6, *Ala. Code* (1975). Defendants appealed, and the supreme court affirmed.

The supreme court held that a state law claim for fraud in the inducement does not "relate to" an employee benefit "plan," and, therefore, is not preempted by ERISA. The court noted that Menton did not claim improper processing of a claim, nor any benefits under the terms of the plan. The court stated that neither Alabama's fraud statute nor the common law action for fraud purports to "relate to" or affect the administration of the "plan."

Defendants also argued that the trial court erred in allowing plaintiff to allege a violation of §27-12-6 which provides that no person shall make misleading comparisons of policies for the purpose of inducing a policyholder to change or convert to another policy. The supreme court recognized that the 11th Circuit Court of Appeals in *Farlow v. Union Cen. Life Ins. Co.* recently held that §27-16-6 does not create a private cause of action and, that if it did, a claim under it would be preempted under ERISA. The supreme court declined to follow the 11th Circuit and adopted the position taken by the Sixth Circuit which holds that "preemption by ERISA applies only once the benefit plan is in existence" and does not apply to alleged common law actions of fraud "to get the plaintiffs to join the plan."

***Forum non conveniens* . . .**
unless balance is strongly in favor of defendant, plaintiff's choice of forum rarely should be disturbed

Ex parte Auto-Owners Insurance Co. (In re: White v. Auto-Owners Insurance Co.), 23 ABR 3380 (July 21, 1989). White was injured in Crenshaw County, Alabama, when she was run off the road by an unidentified driver. She is a Florida resident. The accident was investigated by Alabama law enforcement personnel, and she was treated at the scene by an Alabama rescue squad. The only witness to the accident lives in Alabama. White filed an uninsured motorist claim against Auto-Owners in the Montgomery Circuit Court. Auto-Owners moved to dismiss the suit under §6-5-430, *Ala. Code* (1975), based on the doctrine of *forum non conveniens*. Auto-Owners maintained that the suit is a contract action, that the contract was made in Florida with a Florida resident and allegedly breached in Florida. The trial court denied Auto-Owners' motion, and Auto-Owners petitioned for writ of mandamus to order the trial court to dismiss the action on the grounds that Florida is the more appropriate forum. The supreme court denied the petition.

The supreme court noted that §6-5-430, as amended, became effective June 11, 1987, and provides that whenever a claim, either upon contract or upon tort, has arisen outside Alabama, the courts of Alabama shall apply the doctrine of *forum non conveniens* in determining whether to accept or decline to take jurisdiction. Therefore, essentially the doctrine allows a court, which has jurisdiction and is located where venue is prop-

er, to refuse to exercise its jurisdiction when, in the interest of the parties and witnesses, and in the interest of justice and judicial economy, the case could be more appropriately tried in another forum. The supreme court quoted from a United States Supreme Court case which stated that a plaintiff may not, by choice of a inconvenient forum, harass the defendant, but unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum rarely should be disturbed. The supreme court found that the relative inconveniencies were not so unbalanced that it should order the trial court to decline to exercise its jurisdiction.

Insurance . . .
action for negligent procurement of insurance accrues when loss occurs

Hickox, etc., et al. v. Stover, et al., 23 ABR 3645 (July 28, 1989). Citronelle Unit Operators' Committee ("Unit") and Hickox filed this action October 31, 1984, after their insurer, INA, refused to pay replacement costs for certain equipment destroyed by fire in June 1984. Unit alleged that defendants negligently failed to procure full and adequate coverage. A policy was issued effective April 1, 1983, and the policy was delivered to plaintiffs July 20, 1983. Defendants filed motions for summary judgment maintaining that the claims are barred by the statute of limitations. The trial court granted defendants' motions on authority of *Langley v. Mutual Fire, Marine & Inland Ins. Co.*, 512 So.2d 752 (Ala. 1987), and *Armstrong v. Life Insurance Company of Virginia*, 454 So.2d 1377 (Ala. 1984), and found that their negligence cause of action accrues when the premium is paid and the policy is issued. The plaintiffs appealed, and the supreme court overruled *Langley* and *Armstrong* to the extent that they held that claims against an insurance agent for failure to procure adequate insurance accrue as of the date the insurance company issues a policy that fails to meet the plaintiff's expectations.

The supreme court noted that *Weninegar v. S.S. Steele & Co.*, 477 So.2d 949 (Ala. 1985), involved a negligence claim for allowing insurance to lapse and that it had held that the negligence action did not accrue until the house was flooded and the insurer refused to cover the loss. The supreme court was unable to distinguish a negligence lapse case from a negligent procurement case and held that the action accrues when the loss occurs.

Worker's compensation . . .
what is "direct action" under §27-42-1, et seq.?

Alabama Insurance Guaranty Association v. Pierce, et al., 23 ABR 4203 (September 15, 1989). Pierce was injured on the job and filed a worker's compensation claim against his employer. His employer's insurance carrier went into receivership. However, his employer's carrier had an agreement with two other carriers, American Excess Insurance and Early American Insurance, wherein by endorsement Early American agreed to be liable in the event Pierce's carrier fails to pay the loss (Pierce's claim). Both American Excess and Early American subsequently went into receivership. Pierce amended to add the Alabama Insurance Guaranty Association (AIGA) and sought a declaration that AIGA had a duty to defend and indemnify his employer in the worker's compensation action.

AIGA maintained that Early American's endorsement is not "an insurance policy to which (the act) applies" so as to make Pierce's claim a covered claim and, thus, an obligation of AIGA. The trial court declared that the act applied to this endorsement, and AIGA appealed. The supreme court affirmed.

The Alabama Insurance Guaranty Act, §27-42-1, *et seq.*, *Ala. Code* (1975), was enacted to pay "covered claims." Section 27-42-3 states that the act applies to "all kinds of direct insurance." The term "direct insurance" is not defined as it is used in this context. Florida was faced with a similar case and held that "direct insurance" refers to "an insurance contract between an insured and an insurer that has accepted the designated risk of a designated loss to the insured." In this case, Early American agreed that if Pierce's carrier failed to pay any loss payable under the policy, then Early American would be liable. Therefore, American's endorsement constitutes "direct insurance" within the meaning of the act, and AIGA is bound to provide coverage.

Recent Decisions of the Supreme Court of Alabama—Criminal

Guilty plea inquiry—need to explain elements

Smith v. State, 23 ABR 3903 (August 25, 1989)—Smith pleaded guilty to a violation of the Alabama Uniform Controlled Substances Act. The Supreme Court of Alabama issued a writ of certiorari to review whether the defendant's guilty plea was knowingly and intelligently entered.

On February 22, 1988, Smith appeared before the trial judge and entered a plea of guilty. During the appearance in circuit court, the defendant and his attorney executed a "Statement of Rights" form as required by *Ireland v. State*, 250 So.2d 602 (1971).

On appeal, Smith asserts two claims of error. First, Smith argues that the trial judge, in accepting his guilty plea, erred by failing to explain to him the key elements of the offense as required by the supreme court's decision in *Henderson v. Morgan*, 426 U.S. 637 (1976). Second, Smith also claimed error in the trial judge's failure to explain that one of the sentence options available to the court was a fine of not more than $15,000.

A unanimous supreme court affirmed Smith's conviction. The importance of the *Smith* case lies in the court's refusal to interpret *Henderson* as a *per se* rule. Justice Adams reasoned as follows:

> "It is our interpretation of the *Henderson* opinion, *supra*, that the United States Supreme Court did not create a per se rule that all elements of an offense must be explained to the defendant. We are of the opinion that it is important for a defendant to understand the nature of the offense. It is necessary for the defendant to be given 'real notice' of the offense with which he has been charged. Clearly, Smith had been

given real notice of the charge because he stated: 'I got caught with some cocaine.'

"We must hold that Smith's statement is an indication that he had been given adequate notice of the nature of the charge. Furthermore, the Supreme Court, in *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983), held that, excluding any evidence to the contrary, the courts presume that the defense attorney advised defendant of the charge."

In the case *sub judice*, the supreme court found no evidence that defense counsel had failed to advise the defendant of the nature of the charge. The supreme court also rejected the defendant's second argument finding that the "'Statement of Rights' form executed by the defendant reveals that he was apprised of the possibility of a $15,000 fine."

Parent's refusal on behalf of child does not trigger admissibility under Alabama's Implied Consent Law

Hanks v. State, 23 ABR 4300 (September 15, 1989)—Hanks was indicted for manslaughter as a result of a traffic accident. After the accident, Hanks was taken to a hospital for treatment of a head injury. During Hanks' treatment, a Mobile police officer asked Hanks' father for permission to obtain legal specimens of blood and urine. The father refused to allow any specimens to be taken. The emergency room nurse who was present at the time the request was made testified that she did not know whether Hanks was asleep or awake. In any event, Hanks never had an opportunity to refuse the blood or urine test. The officer left the room after talking with the defendant's father, and never asked Hanks directly for permission to take the blood and urine specimens. Hanks was convicted by a jury of vehicular homicide.

The Supreme Court of Alabama granted *certiorari* to consider whether the trial court erred in ruling that evidence of the refusal by Hanks' father to allow a drug screen and blood alcohol test to be performed on the defendant was relevant and admissible against Hanks. In other words, the supreme court sought to review whether the evidence that the father refused to allow Hanks to be tested supported the same unfavorable inference that could be drawn if Hanks himself had refused to allow the test.

In *Hill v. State*, 366 So.2d 318 (Ala. 1979), a divided court held that the fact that a defendant refused a blood alcohol test could be introduced at trial. The supreme court held that it was "relevant" on the issue of whether or not he was intoxicated, and that he could explain to the jury why he refused, if his refusal was for a reason other than fear that he would fail, which is what made his refusal to undergo the test relevant.

In *Hanks*, the supreme court refused to extend the doctrine of *Hill v. State, supra*, to a parent's refusal. The court reasoned as follows:

"This Court never envisioned that a parent's refusal for a child to take a chemical test would support the same inference as that to be drawn from the refusal of the child himself.

"Under our rules of evidence, Hanks was precluded from testifying as to the reasons his father, who was deceased at the date of trial, may have had to refusing to permit the testing. Thus, the jury was unable to weigh the factors surrounding the refusal."

Supreme court abolishes "Tacit Admission Rule"

Marek v. State 23 ABR 4051 (September 8, 1989)—The Tacit Admission Rule allows an exception to the hearsay rule when an accused hears an accusatory statement and remains silent. The silence of the accused is used as substantive evidence that the accused has impliedly consented to the truth of the accusation and accordingly has admitted guilt. *Clark v. State*, 240 Ala. 65, 197 So. 23 (1940). *Clark, supra*, allowed both the accusatory statement and the fact that the accused remained silent into evidence.

In *Caldwell v. State*, 213 So.2d 919 (1968), the supreme court set forth the predicate for admitting a tacit admission as follows:

1) That defendant must have heard and understood the accusatory statement.
2) That defendant had an opportunity to deny the accusatory statement, under circumstances calling for a reply.
3) That defendant remained silent.

In the present case the supreme court squarely rejected the Tacit Admission Rule. Justice Adams explained the rationale for this important opinion as follows:

". . . [the] underlying premise, that an innocent person *always* objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent . . . . Furthermore, without that premise that silence in the face of an accusation means that the accused thinks he is guilty, the tacit admission rule cannot withstand scrutiny, because the observation that the accused remained silent could *not necessarily* lead to the inference that the accused knew that he was guilty; without the premise that silence in the face of accusation necessarily results from guilt, the tacit admission rule merely describes two concurrent events, accusation and silence, without giving the reason for the concurrence of the two events. Accordingly, neither logic nor common experience any longer support the tacit admission rule, if, indeed, either ever supported it."

The Supreme Court abolished the Tacit Admission Rule with these words:

"The tacit admission rule, to the extent that the rule allows the introduction of evidence of an accused's silence when confronted with an accusation, is hereby abolished. Although the constitutional impediments of the Fifth Amendment may not apply to a tacit admission occurring before an accused is arrested, *Miranda*, at 444, the fundamental logical problems with the rule remain. *Accordingly, this decision expressly applies to pre-arrest situations, as well as post-arrest situations.* This abolition of the rule applies prospectively." (emphasis ours)

Failure to investigate—ineffective assistance of counsel

Lockett v. State, 23 ABR 3597 (July 28, 1989)—Ineffective assistance of counsel claims are cognizable in Rule 20 petitions pursuant to Rule 20.1(a), Temp.A.R.Crim.P. The standard adopted to test the effectiveness is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). That standard requires the petition to show "that counsel's representation fell below an objective standard of reasonableness," *Id.*, 466 U.S. at 687-88, and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.*, at 694.

In *Lockett*, the supreme court held that a defense counsel's failure to investigate a defendant's prior convictions in a case brought by the state under the Habitual Offender Act, and if that failure were proven, would amount to a failure to meet the objective standard of reasonableness under *Strickland v. Washington, supra.* ■

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Tennessee Association of Criminal Defense Lawyers
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Tuscaloosa County Bar Association ■

Legislative Wrap-up

by Robert L. McCurley, Jr.

Projects under study

Institute committees often work two or three years on a revision before it is submitted to the Alabama Legislature. Currently four committees are at work revising areas of law. None of these revisions will be ready for the 1990 Legislature but should be completed in time for the 1991 or 1992 sessions. Should you have a suggestion in one of these areas please write us so that we may pass along your comments to the drafting committee. The following areas are under review:

Probate procedure—After the passage of the Probate Code (§43-8-1 et seq.) and the Alabama Uniform Guardianship and Protective Proceedings Act (§26-2A-1 et seq.), the Probate Committee began their review of Chapter 2 of Title 43 of the *Code of Alabama*. Chief draftsperson is Professor Tom Jones, with E.T. Brown serving as committee chairperson.

The committee is looking at giving the personal representative enumerated power similar to those proscribed for conservators. Title to realty will be reviewed to determine if title should vest in the heirs or in the personal representative. Consideration will be given to change the bond requirements to reduce the bond from double the value of the estate to a lesser amount. Finally, the committee will review the fees which now are based on a percentage to an alternate determination bond on a "reasonable" fee.

Revised Business Corporation Act—In 1980 the current Business Corporation Act was passed which became effective January 1, 1981. Subsequently the Model Act upon which our law was based has been revised and reorganized. Chief draftsperson for this study is Professor Howard Walthall with co-draftsperson Professor Richard Thigpen, while George Maynard serves as committee chairperson.

The model act upon which Alabama's present Business Corporation Act was based was subsequently revised in 1984. This revision creates a new organization of the Business Corporation Act into such chapters as General Provisions, Incorporation; Purposes and Powers; Office and Agent; Shares and Distributions; Shareholders; Directors and Officers; Amendments; Mergers and Share Exchange; Sale of Assets; Descendent's Rights; Dissolutionments; Foreign Corporations; and Records and Reports. Already, 22 states have adopted this latest revision.

Uniform Commercial Code, Article 2A—Alabama passed the *Uniform Commercial Code* in 1965. Except for Article 9 which was revised in 1981 there has been very little change to the UCC in almost 25 years. The American Law Institute and National Conference of Commissioners on Uniform State Laws approved a new Article 2A concerning the leasing of personal property. Currently, leasing of personal property has been covered by a combination of statutes using common law principles relating to real estate transactions and secured transactions. The need for uniformity in the commercial field and the expanding numbers of leases of personal property led the Institute to this revision. The chief draftsperson is Professor Peter Alces, and Bob Fleenor serves as chairperson of the committee.

Evidence—In conjunction with the Alabama Supreme Court the Institute is drafting Rules of Evidence. Professor Charles Gamble is the chief draftsperson, while Pat Graves serves as chairperson of the committee. The committee is using as a model the Federal Rules of Evidence. These rules are compared with present Alabama law. After determining the difference between the two laws the committee will decide which position is better. See *The Alabama Lawyer*, "Legislative Wrap-up," January 1989.

(continued on page 55)

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

Disciplinary Report

Disbarments

● Based upon his consent to disbarment affidavit under Rule 15, Rules of Disciplinary Enforcement, **Jeb Lewis Hughes** of Birmingham was disbarred by order of the supreme court, effective March 25, 1988. [ASB No. 87-635]

● Oneonta lawyer **Judy Dianne Thomas** has been ordered disbarred by an order of the Alabama Supreme Court, effective May 19, 1989. The disbarment order was based upon findings by the Disciplinary Board that Thomas had violated various provisions of the *Code of Professional Responsibility,* by engaging in conduct that adversely reflects on her fitness to practice law, and by failing to observe and comply with the oath of office of an attorney. [ASB No. 88-477]

Suspensions

● Mobile lawyer **Samuel F. Irby, Jr.,** was suspended from the practice of law in the state of Alabama for a period of three years, effective April 15, 1988, based upon his guilty plea to various violations of the *Code of Professional Responsibility.* [ASB Nos. 87-85, 87-284, 87-285, 87-549, 87-655(A) & 88-224] *The attorney in this case is not to be confused with attorney Samuel W. Irby of Fairhope, Alabama.*

● Mobile lawyer **Samuel F. Irby, Jr.,** has been ordered suspended from the practice of law for a period of three years, effective April 25, 1988. Irby's suspension was based upon his failure to comply with a writ of garnishment issued by the District Court of Mobile County and a subsequent judgment rendered by that court against Irby, which judgment remains unsatisfied. [ASB No. 88-264] *The attorney in this case is not to be confused with attorney Samuel W. Irby of Fairhope, Alabama.*

● Birmingham lawyer **Louis W. Scholl** was suspended from the practice of law for a period of 91 days, effective October 31, 1989, by order of the Supreme Court of Alabama. By failing to file any answer to formal disciplinary charges that were pending against him, Scholl admitted that he engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or was guilty of willful misconduct, and engaged in other conduct that adversely reflects on his fitness to practice law. [ASB No. 88-120]

● Birmingham lawyer **Louis W. Scholl** was suspended from the practice of law for a period of 91 days, effective October 31, 1989, by order of the Supreme Court of Alabama. The suspension order was based upon findings by the Disciplinary Board that Scholl had violated various provisions of the *Code Professional Responsibility* by engaging in conduct that adversely reflects on his fitness to practice law, and by failing to deposit funds of a client received by him in one or more identifiable bank trust accounts. [ASB No. 87-09]

Public Censures

● On November 3, 1989, Mobile lawyer **John A. Courtney** was publicly censured for violating Disciplinary Rule 6-101(A) of the *Code of Professional Responsibility.* Courtney was found guilty of willfully neglecting a legal matter entrusted to him. Courtney was retained by the family of a criminal defendant for representation. Following the defendant's conviction, Courtney gave oral notice of appeal. Courtney never had any further contact with the client, did not inform the client's family that they should seek other representation and failed to inform the family that the client might be eligible for court-appointed counsel. Even though Courtney never withdrew as counsel, he failed to notify the family that the appeal of the client had been dismissed by the Alabama Court of Criminal Appeals. [ASB No. 87-116] *The attorney in this case is not to be confused with attorney John P. Courtney, III, also of Mobile.*

● On November 3, 1989, Bessemer lawyer **Robert W. Graham** was censured for unprofessional conduct in violation of the *Code of Professional Responsibility.* Despite numerous written requests that he provide the Disciplinary Commission with a written response to a complaint that a client had filed against him, Graham failed to provide the requested response. [ASB No. 89-101]

● Dothan lawyer **Gregory P. Thomas** was publicly censured on November 3, 1989, for having violated DR 1-102(A)(6), DR 6-101(A), and DR 7-101(A) of the *Code of Professional Responsibility.* Thomas agreed to represent two residents of Tampa, Florida, in connection with certain real property that they owned in Dothan, Alabama. Thomas accepted a $500 retainer from the Florida residents in late February 1988, but thereafter took no action on behalf of the clients, who were unable to contact him about the matter, despite repeated telephone calls to his law office. Thomas returned the fee to the clients in August 1988, after they traveled to Dothan to discharge him and file a complaint against him with the bar. [ASB No. 88-589]

● On November 3, 1989, Montgomery lawyer **Douglas Charles Freeman** was censured for having been guilty of willful misconduct, having engaged in conduct prejudicial to the administration of justice, and having engaged in conduct adversely reflecting on his fitness to practice law. Freeman made an appointment at a state prison to confer with an inmate, and after he was inside the prison, but before he had been allowed to meet with the inmate, a small quantity of a controlled substance, known as marijuana, was found in his clothing by prison personnel, in the form of a hand-rolled cigarette. [ASB No. 87-753]

Private Reprimands

● On November 3, 1989, a lawyer was privately reprimanded for using and compensating a non-lawyer employee to solicit a client or professional business for the lawyer in violation of DR 2-103(A)(2), DR 2-104(B) and DR 2-104(C) of the Rules of

Professional Responsibility of the Alabama State Bar in effect prior to October 25, 1985 (subsequently superseded by Temporary DR 2-103). [ASB No. 85-541(B)]

● A lawyer was privately reprimanded on November 3, 1989, for having violated DR 1-102(A)(6) and DR 7-106(B)(2) by having appeared in open court in his professional capacity in a state of alcoholic intoxication. [ASB No. 89-53]

● On November 3, 1989, a lawyer was privately reprimanded for having violated DR 2-111(A)(2) and DR 1-102(A)(6). The lawyer represented an individual in appealing a criminal conviction, which was affirmed, and then ignored repeated requests from the client to deliver to the client his copy of the record on appeal. When the client filed a complaint against the lawyer, the lawyer ignored repeated requests from the bar to provide a response to the client's complaint. [ASB No. 89-58]

● On November 3, 1989, a lawyer was privately reprimanded for engaging in conduct adversely reflecting on his fitness to practice law, willfully neglecting a legal matter entrusted to him and intentionally failing to seek the lawful objectives of a client. The lawyer agreed to represent a couple in filing for bankruptcy, but failed to do so until they had filed a complaint against him with the bar. [ASB No. 88-31]

● On September 15, 1989, a lawyer was privately reprimanded for failing to seek the lawful objectives of a client, for failing to carry out a contract of employment for professional services, and for prejudicing or damaging a client during the course of the professional relationship. The client had been involved in an altercation wherein he suffered certain property damage. Civil actions against the assailants were pursued. The lawyer made a unilateral decision to disbelieve the client's statement as to the amount of property damage he suffered in the assault, settled the matter for a sum less than the amount claimed by the client as damages, and dismissed the lawsuit in progress, with prejudice, all without the consent of the client. [ASB No. 89-55] ■

Committees

Law Office Management Seminar in Mobile a success

The Professional Economics Committee of the Alabama State Bar, in conjunction with the Mobile and Birmingham chapters of the Association of Legal Administrators, sponsored a seminar on law office management on Friday and Saturday, September 22-23, 1989, at the Grand Hotel in Point Clear, Alabama. More than 50 lawyers and legal administrators registered for the seminar where they heard excellent preparations on a number of topics.

Donald Akins of Hildebrandt, Inc. gave a major presentation on the economic trends in the practice of law for the next decade. Tom Woods of New Orleans provided a comprehensive introduction to the utilization of computers for people who are not information professionals. He stressed the importance of management involvement and organizational commitment to any computer project.

Lawyers Bill Tidwell and Kirk Shaw of Mobile combined for a comprehensive presentation of personnel issues for lawyers including wage and hour problems, terms of employment and civil rights issues.

On Saturday, Paul Bornstein, the state bar's endorsed law office consultant, outlined the many areas of law office administration which outside experts can provide. Finally, Edward Burke of Hildebrandt, Inc. outlined the many challenges to law firms to be encountered in legal marketing.

Because of the quality of the presentations and the positive reaction from the participants, the Professional Economics Committee will be planning a similar seminar for next year and hopes to make this seminar an annual one. ■

Legislative Wrap-up

(continued from page 53)

1990 Legislative Session

The next regular session of the Alabama Legislature convenes Tuesday, January 9, 1990. Law Institute revisions which will be presented to the Legislature during this term include a revision of condominium law, securities law and the adoption law.

Alabama Pattern Jury Instructions—Criminal—A committee of circuit judges has just completed a revision of the *Alabama Pattern Jury Instructions—Criminal.* Principle editor for this revision has been Judge Joe Colquitt, Tuscaloosa, with the following members of the drafting committee: Judge Jeri Blankenship, Huntsville; Judge Henry W. Blizzard, Athens; Judge Billy Burney, Moulton; Judge Randall Cole, Fort Payne; Judge Jim Garrett, Birmingham; Judge Hardie Kimbrough, Grove Hill; and Judge Randall Thomas, Montgomery.

This is a complete revision of the *Pattern Jury Instructions—Criminal,* and is available to circuit judges from the Administrative Office of Courts and is available for purchase from Alabama Institute for Continuing Legal Education.

Anyone wishing additional information on the subjects discussed in this article may write:

Bob McCurley, Director
Alabama Law Institute
P.O. Box 1425
Tuscaloosa, Alabama 35486 ■

Consultant's Corner

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

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

The 90s—what's ahead?

As we begin the decade of the 90s it might be well to pause for a moment and make sure we are heading in the right direction. The practice of law is going to change in this decade and those hoping to succeed will have to adapt. There will be changes in the delivery of legal services and changes in the structure of the firms delivering them. Polishing up the old crystal ball, here is a forecast of the legal profession in the 90s, particularly as it will affect smaller firms.

Major urban areas

The small (under 20) major urban law firm will have to specialize to remain viable. The large firms will continue to dominate what is called "general practice" and, with their increasingly powerful business development and marketing clout, will squeeze the smaller general practitioners.

So, what is the smaller firm to do? You will have to find a niche and practice more capably *and more efficiently* than a specialty department of a larger firm. You can use this to your advantage, with a little thought. ("They have a department . . . we have a whole firm!") Some practice areas that lend themselves to specialization in a major urban setting include tax, labor, patent, construction and pensions and benefits law.

Solo practitioners in major urban areas will find it increasingly difficult to compete. Solos must carry a relatively heavy overhead burden, compared to their firm rivals, and it will become more onerous as urban rents and salaries escalate. Most will have to relocate to suburban areas, and *all* will have to specialize.

Minor urban areas

The situation here almost reverses itself. What is a small firm in a major urban area is probably large in a minor one. In many minor urban areas a ten-person practice is the dominant one. That being the case, these dominant firms, whatever their size, must *generalize* (like their big major urban brothers and sisters). They may well have to add services to hold their principal clients. The small firms in these areas (five and under) ought to specialize if there is enough work available. Absent that, they might major in one practice area and minor in another. Solo practitioners will probably do alright, although they would be well advised to specialize as well.

Bornstein

Rural areas

Rural areas are tailor-made for the generalist solo practitioner. Two or three may join together to share resources, but they must offer a broad array of general legal services. The chains (Joel Hiatt, etc.) will offer stiff competition in the urban areas, but not in the rural ones. It may not be as "exciting" as urban law practice is perceived to be, but it can be very rewarding, spiritually as well as financially.

Forms of governance

Most firms will remain partnerships, but it will be more for purposes of income distribution than for governance. Decisions will have to be made more decisively than previously and partnerships will gradually delegate decision-making to a trusted partner on an elected term basis. Externally they will remain partnerships. Internally they will closely resemble corporations, with a CEO (Mr. Outside—Business Development) and a COO (Ms. Inside—Practice Management). An increasing percentage of practitioners will be women. Those of you with "quaint" ideas about the proper place for women in society had better begin some sensitivity training now.

Technological implications

Computers will not be practicing law, but the speed made available by computers will have a very significant impact on how lawyers practice law. A few examples:

—You will be able to file documents electronically with most courts, either directly via modems and common communications protocols or via fax machines.

—Everyone will require at-hand or near at-hand access to legal research data bases. Case law will change so dynamically in some areas that not even periodic updates will be timely enough. Optical disks gradually will replace many specialty hardcover sets of books.

—It will become common to see a lawyer in the courtroom with a laptop computer. He will be accessing his litigation support data base, either directly or through a modem back to his office. ■

Opinions of the General Counsel

by Alex W. Jackson, assistant general counsel

QUESTION:

". . . our law firm is retained local counsel to a local grocery store. This store is a Delaware Corporation and has an Alabama division. We are also general counsel to the City of 'X'. Attached hereto you will find a Complaint by *Mr. 'A' v. Ms. 'A' et al.* Named as a Defendant in the case is our client, the local grocery store. Mr. 'A' is an employee of the City of 'X' and is employed, apparently, in their planning department. As you review the Complaint you will notice that it appears to be a 'alienation of affection' type of Complaint in that it alleges adultery, etc. The Complaint is filed pro se by the Plaintiff.

"I was called upon to defend the case by the local grocery store, on or about February 1, 1989. I filed a Motion to Dismiss on behalf of my client, and also corresponded with the Plaintiff, Mr. 'A'. Copies of those documents are attached hereto. After I was retained in the case, I was casually discussing the matter with one of my partners. He is the attorney who handles the local work for the City of 'X'. He advised me that a few weeks ago, Mr. 'A' telephoned him and asked if he could use our law library to do some research. We typically allow clients and their employees (particularly clients such as the City of 'X') to utilize our law library. When Mr. 'A' called, he asked my partner certain general questions about whether or not one could pursue a claim against persons who had allegedly had an affair with one's wife. Mr. 'A' did not ask my partners to represent him in the matter. My partner was aware that Mr. 'A' was recently divorced and they discussed, briefly, certain aspects of the divorce. My partner indicates that he recalls stating to Mr. 'A' something to the effect that there formerly was cause of action known as alienation of affection but that he thought it had been done away with by statute. He never agreed to represent Mr. 'A' in this matter, he never accepted a fee or quoted one, etc. He has never represented Mr. 'A' in any other matter.

"Please advise me at your earliest convenience as to whether or not I would have a conflict of interest in this matter. If so, I will promptly advise my client and suggest that they retain another attorney to represent them in this defense."

ANSWER:

Disciplinary Rule 5-101(C) provides as follows:

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

While Mr. 'A' is the employee of a client, we are of the opinion that his contact with a member of your firm, as detailed in your request, was not of such a character as to form an attorney/client relationship. Nonetheless, if during the course of his conversation with your partner, Mr. 'A' made any disclosures which might be considered to be confidences or secrets as defined by Canon 4 and the disclosure of which would be embarrassing or detrimental to Mr. 'A' then, and even in the absence of an attorney/client relationship, we are of the opinion that it would be advisable to withdraw from your representation of the local grocery store.

The mere fact that one of your partners gave general advice to a non-client and allowed that non-client to use your firm's law library does not in and of itself operate to disqualify you from your representation of the local grocery store in a lawsuit brought by Mr. 'A' The distinction to be drawn is fine and somewhat subjective but generalized discussion of the type detailed in your request would not, in our opinion, absent some other element that would indicate prejudice to Mr. 'A' dictate your withdrawal from this matter.

DISCUSSION:

A brief, non-specific interchange between an attorney and an individual who is not at that time a client should not become an absolute bar to an adverse relationship in future litigation. However, the attorney in question must carefully scrutinize any discussions held with a potentially adverse party in order to determine whether any confidential or secret information was obtained or whether any of the information conveyed by the attorney to the potentially adverse party might have been relied upon by that party in subsequent events. If, even in the absence of an attorney/client relationship, the non-represented party acted in reliance upon information given to him by the attorney, just cause might thereby exist to ethically disqualify the lawyer from subsequent representation of any interest adverse to the non-represented party. Any time that an attorney offers specific advice or counsel to a non-represented party, he should do so with the understanding that he might thereby inadvertently create a relationship sufficient to bring into operation the provisions of DR 5-101(C). At the same time the Commission recognizes the potential for abuse whereby casual conversation could be used as a device to manipulate counsel out of a potential representation.

As applied to this instance case the Commission is of the opinion that the contact detailed hereinabove is not sufficient as to mandate withdrawal but does caution and admonish that as a general proposition a ". . . lawyer should neither solicit legal representation nor volunteer legal advice to laymen...." (EC 2-3) [RO-89-16] ■

Memorials

Peyton Dandridge Bibb—Birmingham
Admitted: 1929
Died: October 30, 1989

Frank Owen House—Birmingham
Admitted: 1985
Died: November 26, 1989

Cyrus Roy Lewis—Dothan
Admitted: 1939
Died: November 6, 1989

Ottie Orestes McGinty—Tuscaloosa
Admitted: 1925
Died: September 14, 1989

Eris Freeman Paul—Elba
Admitted: 1937
Died: October 25, 1989

Robert Vance Smith—Birmingham
Admitted: 1952
Died: December 16, 1989

Hugh Reed, Jr.—Centre
Admitted: 1934
Died: August 24, 1989

Edgar Poe Russell, Jr.—Selma
Admitted: 1948
Died: October 22, 1989

William Cassell Stewart—Birmingham
Admitted: 1976
Died: October 28, 1989

Marion R. Vickers, Jr.—Mobile
Admitted: 1962
Died: November 30, 1989

Bellfield Travis Wells—Mobile
Admitted: 1952
Died: November 14, 1989

Norman Hartwell Winston—Homewood
Admitted: 1943
Died: September 9, 1989

Janella Jackson Wood—Mobile
Admitted: 1935
Died: July 28, 1989

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

DANIEL GAVIN AUSTILL

WHEREAS, Daniel Gavin Austill was born in Mobile, Alabama, on March 11, 1958, grew up in our community, and supported Mobile by his involvement in the community and the legal profession;

WHEREAS, the Mobile Bar Association desires to remember his name and to recognize his contributions to our profession and to this community:

NOW, THEREFORE, BE IT KNOWN, that Daniel Gavin Austill departed this life on August 1, 1989. During his high school years, Austill attended and graduated from UMS in 1976, after which he matriculated to the University of Alabama and received a bachelor of science degree in 1980. He received his masters of business administration degree from the University of South Alabama in 1983, after which he attended Cumberland School of Law and received his law degree in 1986.

Austill was employed as an associate with the firm of Brown, Hudgens, Richardson, P.C., in Mobile on October 1, 1986. During his tenure with that firm, he focused his practice primarily in the areas of real estate, probate, corporate and bankruptcy law. He was always eager to assist fellow attorneys and enthusiastically accepted new challenges.

Austill was a member of many local and professional organizations, including the American Bar Association, the Alabama State Bar, the Mobile Bar Association, the Mobile County Board of Realtors, the Homebuilders Association, Mortgage Bankers, a mystic society and the Athelstan Club.

He is survived by his wife, Leigh Lichty Austill; his mother, Katherine Isabelle Austill; his father, Jere Austill, Jr.; two brothers, and a sister. Austill came from a family of attorneys. His father, Jere Austill, Jr., and his uncle, Evan Austill, are attorneys practicing in Mobile, and one of his brothers, William Austill, is an attorney practicing in Birmingham. All of his family, together with the members of our association, mourn his passing.

—William H. McDermott, president
Mobile Bar Association

WALTER C. HAYDEN, JR.

Walter C. Hayden, Jr., 61, of Clanton, died January 16, 1989, at his home in Clanton. He was the presiding judge of the 19th Judicial Circuit at the time of his death.

Judge Hayden was a native of Birmingham, where he graduated from Ramsay

High School. He received his bachelor's degree from St. Bernard College in Cullman and his law degree from the University of Alabama School of Law in 1955. He was an Army veteran of the Korean War.

Judge Hayden practiced law briefly in Birmingham with his father, the late Walter C. Hayden, prior to his relocation in Clanton in 1956. His was a general practice in which he quickly made his mark as an accomplished civil and criminal trial lawyer.

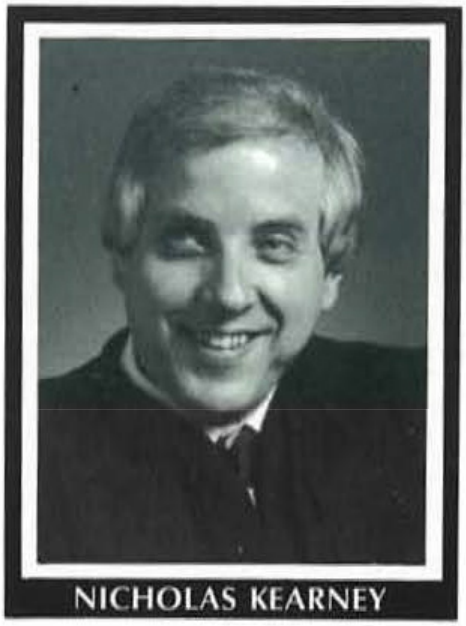
During his practice, he served as president of the Chilton County Bar Association, president of the 19th Circuit Bar Association and as a member of the Board of Bar Commissioners of the Alabama State Bar. He also served for ten years as judge of the Clanton Municipal Court and for four years as the county solicitor for Chilton County, which was then an elected position. In 1976 he was elected circuit judge for the 19th Judicial Circuit, composed of Autauga, Chilton and Elmore counties. The term for which he was elected to serve was to commence in January 1977, but upon the retirement of Judge Joseph J. Mullins, Governor George C. Wallace appointed Judge Hayden to the circuit judgeship on June 1, 1976. He was re-elected in 1982 but chose not to seek re-election in 1988, because of illness. He died on the last day of his term in 1989.

Judge Hayden is survived by his wife, Margaret Davis Hayden; three sons, Walter C. Hayden, III, Clanton; Dave Hayden, Clanton; and Jon Hayden, Tuscaloosa; and a daughter, Mrs. Rebecca H. Futral, Mobile. (One son, Walter, presently is serving as deputy district attorney for Chilton County and another son, Jon, presently is a senior law student at the University of Alabama.)

Judge Hayden also was survived by two brothers, Lt. Col. Bill Hayden, Anniston, and Thomas J. Hayden, Birmingham, and a sister, Miss Celeste B. Hayden, Birmingham. Judge Hayden was a long-time active member and leader of Resurrection Catholic Church in Clanton. He loyally supported his church and his community for the entire time that he lived in Clanton. He was especially interested in programs for the benefit of young people and he served for many years as a member of the Clanton Quarterback Club.

Walter Hayden was a large man, both physically and intellectually. His love of the law was second only to his love of his family and church. As a practicing attorney, he was an aggressive advocate who tirelessly represented the interests of his clients to the maximum of his ability. As a jurist, his practical nature combined with his legal experience to make him wise and fair and readily able to quickly digest legal arguments. He met the challenge of his last illness with courage and dignity and inspired us all with his determination to overcome it. The entire membership of the Chilton County Bar Association feels his loss as a friend and colleague, and mourns his passing.

—Chilton County Bar Association
Clanton, Alabama



NICHOLAS KEARNEY

On September 28, 1989, the state of Alabama and Mobile County lost District Judge Nicholas Kearney, who succumbed to a brief illness at the age of 44.

Judge Kearney was not your normal man. He was born with spina bifida and was able to walk only with the aid of crutches. Despite these physical limitations, he graduated with honors from Spring Hill College in Mobile in 1967 and the University of Alabama Law School in 1970. In 1976, he became one of the youngest judges ever elected in Alabama. Re-elected in 1982, he died while serving in this judicial capacity.

My initial encounter with Judge Kearney tells much about this fine individual. I had practiced law in Atlanta for 16 years and returned to my childhood home, Mobile, in 1980 to assist my brother in running our family home and commercial furnishings retail business. Having specialized in commercial litigation, I was not the least bit timid about going to court with just grievances involving my company. One such incident involved me with Judge Kearney.

In November 1981, our company sold an expensive order of residential carpeting to Mobile customers. In the usual fashion, we got a significant deposit prior to ordering. When the carpet arrived at the store, we called the customers and advised them that we were ready to set up the installation. They insisted on first coming to the store to look at the carpet, after which they pronounced that it did not match the sample from which they made the purchase. We disagreed, bringing about a classic Alabama Uniform Commercial Code Article II case. The customers sued us for the refund of their deposit; we counterclaimed for the complete retail price of the sale, since the expensive, special-order carpeting was of no use to us other than in the customers' home.

The case was tried before Judge Kearney in a crowded, active courtroom. We presented the sample from which the customer purchased the carpet, along with a small sample which we cut from the large roll of carpet which we had ordered for the customers. Our salesman and I testified that the sample did indeed match the carpet ordered, while the customers vehemently asserted that it did not. Judge Kearney took the case under advisement.

Several days later, while I was in my office at the store, I received word from our receptionist that Judge Kearney was here to see me. When I greeted the judge, he advised me in a no-nonsense manner that he was at the store to inspect the entire roll of carpet which we had ordered for the customer and to compare it directly with the sample which the customer

had ordered from. Without further ado, Judge Kearney and I trekked to our carpet warehouse adjacent to the store, where our warehouseman pulled down the carpet, rolled it out for the judge and placed the sample from which the customers ordered atop the carpet. Judge Kearney studied the carpet for a few moments, thanked me and left. A few days later, we received an order ruling in our favor and granting us judgement against the customers. Shortly thereafter, we installed the carpet in the customers' home. (Parenthetically, they ended up complimenting us on how it improved the beauty of their home!)

I have reflected many times about how Judge Kearney resolved that dispute. I had thought that at trial, the issue would be primarily decided based upon the credibility of the witnesses and the court's analysis of the small samples which had been brought to court. Too many times in Atlanta and Mobile, I have seen justice (or the lack of same) meted out with insufficient thought and analysis by judges who appeared either indifferent or uncaring. I had not known Judge Kearney until that day in court, and judging from his busy caseload on that day, it never occurred to me that he, afflicted with spina bifida, would get in his car, drive to our store, struggle with the long walk to the warehouse, and return to his office in order to be sure that he saw all of the evidence in the case, not just the sample and small piece of carpet which we were able to bring into the courtroom. This man *cared* that he render a just result, without regard to his own personal discomfort. Judge Kearney recognized litigation as serious business requiring of himself the best of resources he could muster.

I later became friendly with Judge Kearney and was pleased to serve with him on the board of the Mobile Theatre Guild, where he not only was distinguished in his service, but also portrayed the judge in one of the Theatre Guild's most successful productions, "Inherit the Wind."

I am the better for having known Nick Kearney; society is the better for having had the benefit of his service as Mobile County District Judge.

—Gerald A. Friedlander,
Mobile, Alabama

CYRUS ROYS LEWIS

Cyrus Roys Lewis, a prominent attorney in Dothan, Alabama, died November 6, 1989, at the age of 74. Born in Tuskegee, Alabama, February 8, 1915, his family moved to Dothan, Alabama, in approximately 1917 where his father, Oscar S. Lewis, established a law practice.

Lewis graduated Phi Beta Kappa from the University of Alabama in 1937. He received his law degree from the University of Alabama in 1939. He was a member of Omicron Delta Kappa and served as the president of the Student Government Association 1938-39.

He was admitted to practice law on June 15, 1939, and had been honored prior to his death with a 50-year certificate by the Alabama State Bar. He was admitted to practice before the United States Supreme Court, the Tax Court of the United States and the 11th Circuit Court of Appeals, as well as all state courts. He was a charter member of the Farrah Law Society, University of Alabama. In addition, he was a long-standing member of the American Trial Lawyers Association, Alabama Trial Lawyers Association, Alabama State Bar and the Houston County Bar Association, the latter of which he served as president twice.

Lewis served as a pilot in the 505th Bombardment Group during World War II (Pacific Theatre) from July 22, 1941, to March 17, 1946. By the time of his discharge he had risen to the rank of lieutenant colonel. Lewis' bombardment group was stationed on the island of Tinian, the same island from which the Enola Gay flew its missions over Hiroshima and Nagasaki. He was involved in bombing raids over Hiroshima and Nagasaki just prior to the dropping of the H-Bomb.

It was on the island of Tinian that Lewis met his wife, Madeleine Bryant Lewis, while she was serving with the American Red Cross. Mr. and Mrs. Lewis were married April 26, 1947. Lewis is survived by his wife and a daughter, Sarah Stevens Lewis.

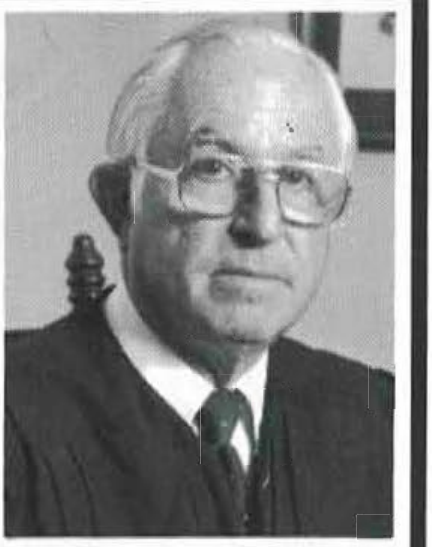
Lewis was the epitome of what we in the legal profession profess that a lawyer should be: dedicated to God, family, community and the representation of the legal profession with the highest of ethical and intellectual standards. He was a lawyer's lawyer.

The death of Cyrus Roys Lewis leaves a void, both personally and professionally, which will not be easily filled. However, we are reassured in the fact that his country, state, family, friends and fellow brothers and sisters at the bar were enriched by his life. We mourn his passing but at the same time rejoice in having experienced his zeal for life and his profession.

—Steven K. Brackin
Dothan, Alabama

Please Help Us . . .

We have no way of knowing when one of our membership is deceased unless we are notified. Do not wait for someone else to do it; if you know of the death of one of our members, please let us know. Memorial information **must be in writing** with name, return address and telephone number.



EDGAR POE RUSSELL, JR.

WHEREAS Honorable Edgar Poe Russell, Jr., departed this life on Sunday, October 22, 1989, after, a lengthy illness; and,

WHEREAS the said Edgar P. Russell, Jr., was born December 9, 1920, in Dallas County, Alabama, to the late Senator Edgar P. Russell and the late Ruth McDonald Russell; and,

WHEREAS the said Edgar P. Russell, Jr., was a descendant of one of the pioneer families of Dallas County, his family having settled in Dallas County in 1816 prior to creation of the county and the state; and,

WHEREAS the family of our dear brother was active in civic and governmental service to this county, his father having served as a member of the Senate of Alabama representing Dallas County and later having served in the executive branch of the government of the State of Alabama; and,

WHEREAS the said Edgar P. Russell, Jr., was educated in the public schools of Selma and subsequently graduated from the University of Alabama School of Law; and,

WHEREAS the said Edgar P. Russell, Jr., served his country as a naval aviator throughout World War II; and,

WHEREAS the said Edgar P. Russell, Jr., upon graduation from the University of Alabama School of Law, was admitted to the bar of this state in 1948 and returned to Selma to practice law with the late Joseph Edgar Wilkinson and the late Joseph Edgar Wilkinson, Jr., distinguished members of the bar of this county and of this state; and,

WHEREAS the said Edgar P. Russell, Jr., was a very highly qualified attorney and represented an extensive clientele within Dallas County and the western part of the Alabama blackbelt; and,

WHEREAS the said Edgar P. Russell, Jr., was appointed to the bench of the Fourth Judicial Circuit of Alabama in the year 1969 by the Honorable Albert P. Brewer, governor of Alabama, and was subsequently elected and served for three full terms prior to his retirement in the year 1984; and,

WHEREAS the said Edgar P. Russell, Jr., was a skilled and fairminded jurist who was held with high esteem by the lawyers of his circuit and of this state; and,

WHEREAS the said Edgar P. Russell, Jr., was a lifelong member of the First Presbyterian Church of Selma and was a dedicated Christian gentleman, serving his church faithfully throughout his life; and,

WHEREAS the said Edgar P. Russell, Jr., married the former Dora Wilkinson of Selma in the year 1942 and leaves surviving him his widow and two daughters, Mary Russell McKissack and Elizabeth Russell Williams, and four grandchildren, Mary Cameron Williams, Rickman Edgar Williams, III, Mary Elizabeth McKissack and Lauri Amanda McKissack; and,

WHEREAS the said Edgar P. Russell, Jr., was a devoted husband, father and grandfather and throughout his life held and fostered the belief that the family was the foundation of our society; and,

WHEREAS the said Edgar P. Russell, Jr., was the kind of man who enjoyed numerous hobbies and the companionship of his friends, of which he had many; and,

WHEREAS his character was typified by the manner in which he bore his last illness with fortitude, courage and a firm faith in the goodness of God; and,

WHEREAS the passing of our beloved friend has left a great void in our bench and bar and in our community.

—Robert E. Morrow, president
Dallas County Bar Association

—Richard H. Poellnitz, president
Hale County Bar Association

JANELLA JACKSON WOOD

There are those of us who knew and admired Janella Wood when she was studying law at the University of Alabama as Janella Jackson; who got to know her better and to respect her as a capable attorney beginning in the year 1935, when she, Doris Van Aller and Rosa Gerhardt were Mobile's only women attorneys; who missed her as a worthy opponent when she married and gave up the practice of law; and who were happy when, after a number of years, she decided to return to the practice of law. We know that she was proud that, by the time she died on July 28, 1989, the number of women in law in Mobile had increased from three to almost 100.

Janella was the gentle and genteel lady you would expect to come from Livingston, Alabama, but as an attorney she backed away from nothing, and she devoted untold hours in preparing and successfully handling tedious cases many of us would have thrown up our hands over and run away from, in despair.

WHEREFORE, be it resolved by the Mobile Bar Association in regular meeting assembled on this the 15th day of September 1989, that we honor the memory of our friend and fellow member, Janella Jackson Wood, and that we express our gratitude to God that He let her practice for so many years as a member of this association.

—William H. McDermott, president
Mobile Bar Association

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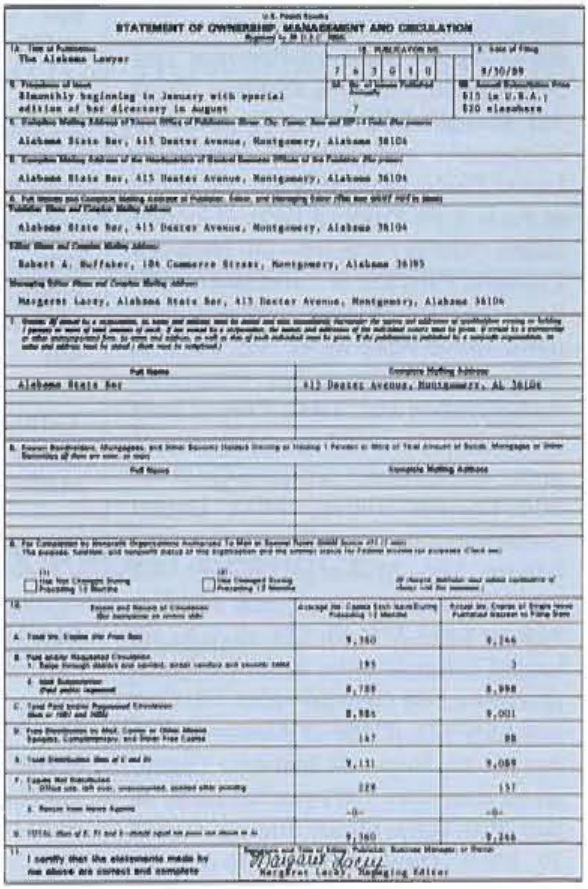
Reminder

On January 1, 1988, a new certificate of divorce was instituted by the State of Alabama. Also effective this date, all attorneys were required to file this completed certificate with the petition for divorce.

The Bureau of Vital Statistics will not accept the new certificates of divorce unless all items are complete, including the confidential section. (This notice originally ran in the September 1987 *Alabama Lawyer.*)

Forest E. Luden, Ed.D., M.P.H.
State Registrar and Director
Bureau of Vital Statistics



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D. Free Distribution by Mail, Carrier or Other Means Samples, Complimentary, and Other Free Copies	167	88
E. Total Distribution (Sum of C and D)	9,151	9,089
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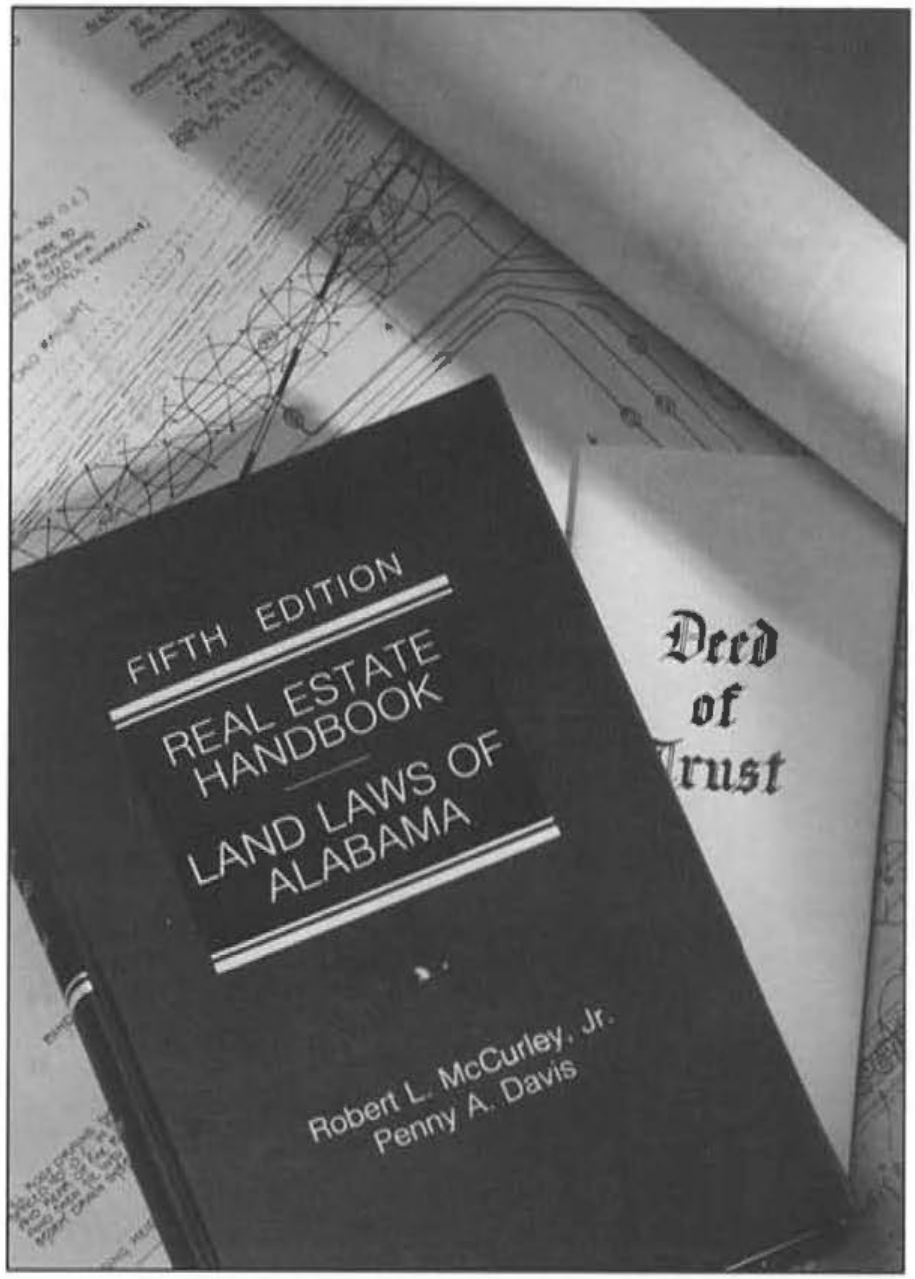

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