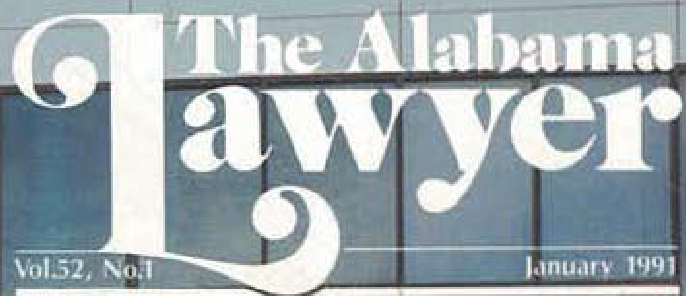

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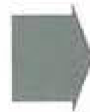
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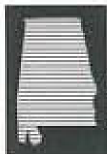

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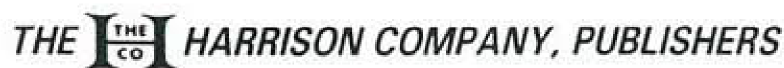

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In Brief

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ON THE COVER — The Civil Rights Memorial, located in Montgomery on the grounds of the Southern Poverty Law Center, was dedicated in a public ceremony November 5, 1989. The designer of the memorial, architect Maya Lin, described it as follows: "Set in a Plaza, the granite table records the names of forty martyrs of the civil rights movement and chronicles the history of the times in lines that radiate like the hands of a clock. Water emerging from the table's center flows evenly across the table's top over the inscriptions.

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President's Page

Pro bono publico: For the public good

The providing of free legal services to the poor has long been referred to as our profession's highest calling. The Alabama State Bar is launching an exciting new program that will allow us to expand such services in an organized manner, on a statewide basis. It is called the Volunteer Lawyer Program, and I want to share some thoughts about it with you. First, a little background.

Lawyers, more than any other profession, have always been in the forefront of giving themselves to community service. Look at civic clubs, United Fund drives, municipal boards, Little League and Scouting programs, and numerous other civic endeavors and you will see lawyers, giving freely of their spare time to help make life better for others.

ALBRITTON

Most lawyers are also generous with their professional time in cases of need. Free legal services to non-profit corporations of various types are a common occurrence, and it is rare for a lawyer to practice very long without developing a number of "pets" who cannot afford a lawyer but who know where they can go for legal advice, without charge and without fanfare.

Legal Services Corporation provides a network of free attorneys for the poor throughout the country, including many hardworking attorneys in Alabama, paid for by federal tax dollars and grants. Pro bono programs are in existence through local bar sponsorship in Mobile, Montgomery, Huntsville, Birmingham, and Tuscaloosa.

It might surprise many of you to know, however, that a statewide survey conducted in 1989 by a professional research firm on behalf of the Alabama State Bar Committee on Access to Legal Services concluded that there exists in Alabama a vast amount of legal needs of the poor not being adequately met by our current system. The survey also found that many of the poor do not even recognize problems they are experiencing to be legal problems for which there may be solution.

Certainly, the poor will always be with us, but that does not mean that we should close our eyes to their needs.

Some feel that meeting these needs is primarily a responsibility of the federal government and that this should be done by a great new influx of federal money into existing programs. Others feel that this should be considered a requirement of a lawyer's admission to practice and that delivery of free legal services to the poor should be mandatory for those who are given the privilege of earning a living by practicing law. Your state bar has taken a different approach, and that brings us to the Alabama State Bar Volunteer Lawyer Program.

Our Committee on Access to Legal Services believes that when the lawyers of this state are made aware of the great needs in this area and given an opportunity to help they will wholeheartedly respond. Last summer the board of bar commissioners approved the committee's recommendation for a coordinated approach to this problem, based on enlisting volunteer lawyers throughout the state, and endorsed an application for IOLTA funds to hire a state coordinator.

The first step in making this important new program a reality has now been taken. I am happy to announce that with IOLTA funding, Melinda Waters of Montgomery, a member of the state bar, has been hired as the coordinator of the Volunteer Lawyer Program. Her initial task will be to organize the program on a statewide basis, working with existing local pro bono organizations and developing a structure for delivery of needed services where no local organizations currently exist. Next will come recruitment of volunteers.

This effort is an excellent example of how different segments of our organized bar work together for the public good: several years of hard work by a dedicated committee resulting in a plan, consideration and approval of the plan by the board of commissioners, and funding made possible by the directors of the Alabama Law Foundation and lawyers who have made their trust accounts a part of the bar's IOLTA program.

The success of this new program, of course, will ultimately depend on you. Exciting in concept, the Volunteer Lawyer Program has now moved into the organizational stage. You will be kept fully informed of details as the program develops. When the time comes for recruitment of volunteers I believe that you will want to be a part. And, through being a part, you will be accepting the opportunity to make a personal contribution to our profession's highest calling—*pro bono publico.* ■

Executive Director's Report

Let's Do It!

"The bar can and must render more and improved services to the practicing attorneys and to the public."

—Sam W. Pipes, 1963
Building Campaign Chairman

"The Alabama State Bar has made great progress in recent years, as more and more Alabama attorneys take a greater and greater interest in its affairs, but we have now reached a point where adequate facilities are imperative if anything like our full potential is to be reached."

—J. Edward Thornton, 1963
President, Alabama State Bar

I believe both of the above statements to be as true in 1991 as when spoken 28 years ago. Through the last 28 years the bar has been dedicated to rendering improved services to the public and the profession. It has justified the faith of those visionaries who determined the bar would have a permanent home. Likewise, as our membership has increased by some 7,800 new lawyers in this time frame, the legal profession has seemingly been undergoing perpetual changes, and both those seasoned lawyers as well as our newer attorneys continue to exhibit a ongoing interest in the affairs of the bar. Again, adequate facilities are imperative to our continuing growth and achievement of our full potential.

The Alabama State Bar had no permanent headquarters for its first 88 years of existence. It operated with a part-time secretary who coordinated a network of volunteers. I marvel that this was done without Xerox, WATS lines, FAX machines, overnight mail and interstate roads.

A properly functioning bar association is a matter of vital concern to every practicing lawyer whether he or she realizes it. No one could sensibly maintain that a building itself can solve any of the problems that face us. On the other hand, without a headquarters suitable to our needs, we will continue to find ourselves frustrated and handicapped in bringing about those things which should be accomplished if the Alabama State Bar is to continue to come to full usefulness to our members and to its public.

The lawyers of this state have been farsighted in times past—they built and paid for our original headquarters. They, again in 1968, raised the funds to build the annex to the original building. In 1979, the lawyers of Alabama gave of their resources to purchase our Center for Professional Responsibility on Perry Street when no more space was available in our original building and no land was available upon which to expand the original building.

In 1968, Judge Scott noted, "It would not have been thought possible in 1961, when plans were instituted for a state bar headquarters, that in the span of seven years facilities which seemed so commodious would become cramped", when he alerted the bar to the need for the annex to the original structure.

When I succeeded to the position which John Scott held, he and I knew the bar would continue to grow; however, I do not think we were alone in failing to anticipate the pace at which we would do so. I remember Judge Scott's somewhat bewildered comments when 59 of us sat for the first exam given in the new building in February 1965—the greatest number of examinees ever—he did not know what we would all do. We were last able to use the "original" examining room because of space limitations in February 1971, 6,000-plus new lawyers ago.

I would not presume to equate my own with John Scott's visions for this bar. I do share one common belief with him. I believe as firmly in 1991, as he did in 1961, that our lawyers care sufficiently about our chosen profession to meet its needs.

HAMNER

Our goal of 3.5 million dollars is far greater than that first campaign to raise $85,000 because the number of members is now almost eight times greater and lawyers' incomes are many times greater than in 1961. Construction costs are significantly higher too!

All factors in perspective, it is still a very reachable goal. I believe we can and must succeed.

Please pledge generously and early. Our campaign is one of volunteers. We opted for an lawyer-to-lawyer appeal to save the cost of professional fund raisers.

I am dedicating my total personal effort for the next few months to this campaign. I *believe in you* the lawyers and judges of our state. There is much work yet to be done on behalf of our profession and the public we serve. Let's do it together. ■

Bar Briefs

Myerson and Max elected to serve organizations

The Birmingham firm of Najjar, Denaburg, P.C. recently had two members elected to serve in different organizations.

Edward P. Myerson was elected by the Board of Governors of the American College of Construction Law as its first member from Alabama.

During its inaugural meeting last month, the College elected 41 attorneys from 17 states as its first group of Fellows. Attorneys must be nominated for Fellowship in the College. To qualify for election they must have: practiced or taught law for a total of 15 or more years, devoting the ten years immediately prior to their nomination to construction law; made significant contributions to the practice of construction law through teaching, publishing or industry leadership; and demonstrated the highest ethical and professional standards of practice.

Rodney Max was recently elected co-chairperson of the Community Affairs Committee of Operation New Birmingham for 1990-91.

CAC is the oldest existing bi-racial committee in the Birmingham area. It is dedicated to promoting racial harmony through racial justice.

Roebuck promoted by First Alabama Bank

William E. Jordan, chairman and chief executive officer of First Alabama Bank in Birmingham, announced the promotion of Sidney O. Roebuck, Jr., to vice-president and senior trust officer.

Roebuck is a graduate of the University of Alabama, the Birmingham School of Law and the Southern Trust School. He joined the bank in 1977, and has been with the bank's trust department since 1980.

A native of Eutaw, Alabama, Roebuck holds memberships in the Birmingham Bar Association, Alabama State Bar and American Bar Association.

Alabama Environmental Law Handbook published

The Birmingham firm of Maynard, Cooper, Frierson & Gale, P.C. recently published the *Alabama Environmental Law Handbook*, written as a resource for lawyers and nonlawyers who confront environmental issues in their practice or business. The handbook focuses primarily on Alabama's environmental laws as they affect the private sector and real property owners.

Fournier J. Gale, III, H. Thomas Wells, Jr., Jarred O. Taylor, II, James L. Priester, Alfred F. Smith, Jr., and Kathryn O. Pugh jointly authored the handbook, which was published in October 1990 by Government Institutes, Inc. The authors include a past chairperson of the Alabama State Bar's Section on Environmental Law, and the current co-chairperson of the ABA Litigation Section's Environmental Litigation Committee. The authors are also represented in the ABA's Natural Resources and Environmental Law Section and Standing Committee on Environmental Law.

Smith elected president of UNA National Alumni Association

Florence city council member and attorney Robert F. Smith is the 1990-91 president of the University of North Alabama National Alumni Association.

Smith, the other officers and board of directors were elected to their posts during the recent homecoming activities.

Smith has served as president-elect for the past two years. He is a graduate of Cumberland School of Law.

DIALUP allows access to records

The Office of the Secretary of State announces the expansion of an on-line computer service pilot program.

The service is known as DIALUP (direct information access using personal computers), and allows users quick access to public records in the corporate and Uniform Commercial Code files.

DIALUP service allows anyone with a personal computer, a 1200 to 2400 bytes-per-second modem and a communications software package with VT-100 emulation capacity to dial directly into the Office of the Secretary of State computer system.

Subscribers can access UCC filings by filing number or debtor name to obtain the date and time of the filing, secured party, additional debtors, continuation of a filing, assignments, number of pages filed, and the filings expiration date.

The corporate access will display a corporation's legal name, county and date of incorporation, registered agent, principal address, capital amount and the names of incorporators.

Anyone interested in registering for the free pilot program should contact Robina Jenkins, Office of the Secretary of State, business division, at (205) 242-5231.

WESTLAW and DIALOG work together

West Publishing Company and Dialog Information Services, Inc. announce a new way to access information from DIALOG.

Beginning early this year, a new transparent interface designed by the two companies will enable WESTLAW subscribers to locate individual DIALOG databases through the WESTLAW directory and access these databases using familiar WESTLAW logic and commands.

WESTLAW subscribers will need to know only familiar WESTLAW com-

mands to search DIALOG. They will even be able to use West's EZ ACCESS, a menu-driven approach that will help them select the right DIALOG database and to formulate a query that will run in both WESTLAW and DIALOG databases.

Under the new arrangement, over 140 DIALOG databases will be available on WESTLAW early this year. These files will contain business and financial data, scientific and technical material, intellectual property registration data, and general news and information. Additional DIALOG databases will be added monthly.

The existing gateway between WESTLAW and DIALOG, available since 1987, will be maintained. Through this gateway, all 380 DIALOG databases can be accessed using DIALOG search language.

For more information on WESTLAW, call 1-800-WESTLAW (1-800-937-8529). For more information on DIALOG, call 1-800-3-DIALOG (1-800-334-2564) or (415) 858-3785, or FAX (415) 858-7069.

Philip Morris Companies, Inc. to sponsor national tour of original Bill of Rights

To commemorate the 200th anniversary of the adoption of the Bill of Rights, Philip Morris Companies, Inc. will sponsor a national tour of one of the original copies of the document. It is scheduled to be in Montgomery January 21-23, 1991.

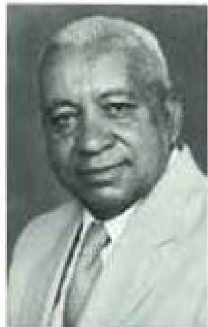
The historic parchment and multimedia exhibit will travel to all 50 states as part of the two-year bicentennial celebration of the ratification of the Bill of Rights. Begun in Barre, Vermont, on October 10, 1990, the 16-month tour will conclude in Richmond, Virginia, on February 9, 1992. The Commonwealth of Virginia's copy of the Bill of Rights, which has been recently restored and is on loan from the Virginia State Library and Archives, will be featured in the exhibit. The exhibit will be open to the public free of charge.

A 5,000-square-foot pavilion has been specially designed to house the exhibit. The architecture of the pavilion is a mix between aerospace-inspired high technology structural systems and traditional gallery-like display space. Visitors will be greeted by a collection of video images and graphic displays providing historical background on the Bill of Rights. As visitors move into a large, hexagonally-shaped audiovisual theater, they will be surrounded by dialogue that explores both past and contemporary civil liberties issues. Then visitors will enter the Bill of Rights viewing room and be as close as two feet from the environmental capsule protecting the 200-year-old document.

The 200th anniversary tour is being sponsored by Philip Morris Companies, Inc., the world's largest producer of consumer packaged goods. Its major domestic operating companies include Kraft General Foods, Miller Brewing Company and Philip Morris U.S.A.

Gathered at the 1990 Southern Conference of Bar Presidents in White Sulphur Springs, West Virginia, were Weezie Hairston, wife of Alabama State Bar Past President Bill Hairston; Louise Allen, wife of ASB Past President Bibb Allen; and current ASB President Harold Albritton and his wife, Jane.

Leaders from 19 bar organizations gathered for social events, break-out sessions and such keynote speakers as West Virginia Supreme Court Chief Justice Richard F. Neely and University of Texas law professor Michael E. Tigar.



Baker

Blanchard

Baker receives NIMLO award

Birmingham's City Attorney James K. Baker recently received the National Institute of Municipal Law Officers Award for Outstanding National Public Service by a Municipal Attorney at the Institute's 55th annual conference held in Boston.

Baker became Birmingham's first black city attorney in 1978. He has served as a trustee of NIMLO since 1980. He is a member of the Alabama League of Municipalities, and is a founding member and chairperson of the Alabama Committee on Humanities and Public Policy.

Baker is a graduate of Cornell University School of Law and a 1948 admittee to the Alabama State Bar.

Blanchard selected Clarence Darrow Award recipient

Montgomery native and attorney Bill Blanchard, Jr., was presented with the Alabama State Bar's Clarence Darrow Award. This award recognizes the contributions of an attorney in all areas of indigent representation covering capital defense, including trial, appellate, and post-conviction work, as well as organizational work. The award's recipient is announced at the state bar's annual meeting. Nominees for the award are recommended by members of the state bar's Indigent Defense Committee to the state bar's board of commissioners to approve or disapprove the selection.

Blanchard is a 1971 graduate of the University of Alabama and a 1977 graduate of Jones Law Institute. He worked for Alabama Legal Services system from 1980-82; was in private practice with Miller & Pappanastos from 1982-85; was a sole practitioner from 1985-90; and now is a member of the firm of Blanchard, Calloway & Campbell.

In describing Blanchard's contributions, Bryan Stevenson, executive director of the Alabama Capital Representation Resource Center in Montgomery, said, "Bill Blanchard has provided committed and effective representation to several people accused of capital cases and has withstood considerable opposition. His work in *Brown v. State*, which recently resulted in reversal of a capital conviction by the court of criminal appeals; his assistance to James Martin, presently under sentence of death; and his work on several pretrial cases . . . would I think make him an excellent selection." ■

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The **Richard L. Taylor** who was reported in the November issue of *The Alabama Lawyer* as being suspended from the practice of law for ten days **should not** be confused with **Richard Harrell Taylor,** who practices in Mobile, Alabama, with the firm of Jackson & Taylor.

The Disciplinary Commission
Alabama State Bar
Montgomery, Alabama
January 11, 1991

Letters to the Editor

Vaccine Injury Compensation Program

I am writing to update some amendments to the Vaccine Injury Compensation Program, a no-fault compensation system for individuals who have been injured by specified childhood vaccines.[1] 42 U.S.C. §300aa-10, *et seq.* In particular, I call attention to the amendment which extends until January 31, 1991, the filing deadline for a particular class of cases. This is discussed more fully below.

As noted in my letter of last January, the program, effective as of October 1, 1988, permits individuals who believe they are eligible for compensation to file a petition with the United States Claims Court. The Secretary of Health and Human Services is named as the Respondent, and is responsible for providing an answer to the Court regarding the allegations of each petition. The Secretary has delegated his responsibilities under the program to the Bureau of Health Professions, a component of the Public Health Service.

The Act imposes an ethical obligation on any attorney who is consulted by an individual regarding a vaccine-related injury or death to inform such individual that compensation may be available under the Vaccine Injury Compensation Program. *See* 42 U.S.C. §300aa-10(b). Individuals injured prior to October 1, 1988, must withdraw any pending civil suits if they choose to pursue a claim through the program. The previous version of the statute requried petitions for these injuries to be filed by October 1, 1990. *See* 42 U.S.C. §300aa-16(a)(1). On November 3, 1990, the President signed Public Law 101-502, which amended the statute in a number of respects. *See* 198 *Con. Rec.* S 15196 (October 12, 1990) for the text of these amendments. Of note among these amendments is a four-month extension of the deadline for filing petitions based on vaccines administered before October 1, 1988. Those individuals alleging injuries or deaths resulting from such vaccines will be permitted to file claims until January 31, 1991.

The deadline for filing claims based on vaccines administered after October 1, 1988, depends on the date of vaccine admininstration and is governed by 42 U.S.C. 300aa-16.

Accordingly, we think it is crucial that all attorneys be made aware of the program, the extension of the deadline for filing petitions relating to vaccines which were administered prior to October 1, 1988, and the statutory provision defining attorneys' ethical obligations. In addition, because the amendments include several technical changes to the Act, attorneys who plan to file claims under the program should consult the recent amendments prior to filing a petition for compensation.

Specific inquiries as to filing requirements and Claims Court procedures should be addressed to the United States Claims Court, 717 Madison Place, NW, Washington, D.C. 20005. If you have any suggestions regarding how to make this information widely known, or if you have any questions, please contact **David Benor** at **(301) 443-2006.**

Michael J. Astrue,
General Counsel,
Dept. of Health &
Human Services
Washington, D.C.

1. Vaccines included at this time are those against the following diseases: diptheria, pertussis, tetanus, measles, mumps, rubella, and polio.

Valid ballots

This letter is probably out of time sequence since elections to the board of bar commissioners will not occur again until next spring, but it seemed to me that the problem in submitting valid ballots for the bar commission races ought to be noted.

It is an odd circumstance that practicing lawyers, who ought to be most alert of all members of society to the technical requirements for casting valid ballots, should make as many strange and unnecessary errors as appear. As I am sure members of the bar know, the ballots are submitted to the Alabama State Bar, and are checked by a committee of current commissioners. In order to assure both the validity of mailed ballots and confidentiality of the voting, the instructions for casting a ballot and signing the envelope containing the ballot are set out clearly on the face of the envelope itself. These instructions are not difficult, but recent elections have demonstrated that there are repeated instances of ballots submitted where the certification is not signed, is signed in an illegible way (and with the printed name not being filled in) so as not to be able to ascertain whether the voter is a member in good standing of the bar, etc.

In elections during the last two years, the outcome of more than one contested commissioner's race would have been changed had all of the ballots received been capable of being counted. Because ballots could not be counted, due to the certification not being signed, or because the voter could not be identified, etc., the actual outcome of the election could have been different.

For attorneys to go to the trouble of casting a ballot, assembling inner and outer envelopes, and mailing them to the bar, but then not taking the trouble to execute the certification properly, is a peculiar contradiction.

The purpose of this letter is simply to remind all of the active members of the bar who desire to vote for commissioners' seats in their circuits to carefully follow the straightforward instructions for casting valid ballots. The number of eligible voters in all circuits is such that every ballot is potentially decisive, and it is a shame for the decision to be made without being able to count all of the votes.

Richard H. Gill,
Commissioner
Fifteenth Judicial Circuit
Montgomery, Alabama

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■

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William E. Bright, Jr., announces the opening of his new office at The Cole Center, 1100 East Park Drive, Suite 409, Birmingham, Alabama 35235. Phone (205) 833-4242.

■

Joel F. Danley announces the relocation of his office to 2970 Cottage Hill Road, effective October 1, 1990. The new mailing address is 2970 Cottage Hill Road, Suite 149, Mobile, Alabama 36606. Phone (205) 478-3600.

■

Bert P. Taylor, formerly of Smith & Taylor, announces the opening of his office for the practice of law under the name of **Law Offices of Bert P. Taylor.** Offices are located at Suite 710, Title Building, 300 21st Street, North, Birmingham, Alabama 35203. Phone (205) 252-3300.

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■

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■

Randolph P. Reaves announces the relocation of his Montgomery office to 400 South Union Street, Suite 295, Montgomery, Alabama 36104. The mailing address is P.O. Box 4389, Montgomery, Alabama 36103-4389. Phone (205) 834-2415.

■

Walter F. Scott, III, announces the opening of **The Office of Walter F. Scott, III, P.C.** at Suite 200 Massey Building, 2025 Third Avenue, North, Birmingham, Alabama 35203. Phone (205) 251-6500.

■

Anna M. Williams announces the opening of her office for the practice of law. Offices are located at 12671 Hwy. 90, Suite 2, Grand Bay, Alabama. The mailing address is P.O. Box 208, Grand Bay, Alabama 36541-0208. Phone (205) 865-3665.

AMONG FIRMS

Charles S. Doster and **Randall M. Woodrow** announce the formation of a partnership for the practice of law, with offices at 303 SouthTrust Bank Building, Anniston, Alabama. The mailing address is P.O. Box 2286, Anniston, Alabama 36202. Phone (205) 238-6005.

■

Wesley L. Laird announces that **Diana Dukes Mock** has become associated with his firm. The firm will be known as **Laird & Mock,** with offices at 104-B South College Street, Opp, Alabama 36467. Phone (205) 493-9716.

■

George H. Wakefield, Jr., and **Frederick T. Enslen** announce the relocation of their offices to 4145 Wall Street, Montgomery, Alabama 36106. The mailing address is P.O. Box 231207, Montgomery 36123-1207. Phone (205) 244-7333.

■

Capouano, Wampold, Prestwood & Sansone, P.A. announces that **Thomas B. Klinner,** formerly assistant attorney general, State of Alabama, has become an associate with the firm. Offices are located at 350 Adams Avenue, P.O. Box 1910, Montgomery, Alabama 36102. Phone (205) 264-6401.

■

Roby & Tweedy announces that **Polly Howell Chatham** is now associated with the firm. Offices remain at Walgreen Professional Building, Suite 203, 207 Johnston Street, Southeast, P.O. Box 2925, Decatur, Alabama 35602. Phone (205) 353-5212.

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J. Michael Manasco and **Ronald W. Wise** announce the formation of their partnership, **Manasco & Wise.** Offices are located at 2000 Interstate Park Drive, Suite 201, Montgomery, Alabama 36109. Phone (205) 270-1300.

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Ralph G. Holberg, Jr., and **Ralph G. Holberg, III,** announce the formation of **Holberg & Holberg, P.C.** Offices are located at 508 Commerce Building, 118 North Royal Street, Mobile, Alabama. Phone (205) 432-8863.

■

Robert E. Sasser and **Dorothy Wells Littleton** announce the formation of **Sasser & Littleton, P.C.,** and that **Gregory D. Crosslin** has become associated with the firm. Offices are located at One Commerce Street, Suite 201, Montgomery, Alabama 36104. Phone (205) 834-7800.

■

Barker & Janecky, P.C. announces that **Lily M. Arnold** and **F. Page Gamble** have become associates with the firm. The firm also announces the opening of its Florida office at 316 South Baylen, Suite 280, Pensacola, Florida 32501.

■

The firm of **Copeland, Franco, Screws & Gill, P.A.** announces that **Truman M. Hobbs, Jr.,** has become a member of the firm, and **Gregory L. Davis, James F. Vickery, Jr.,** and **George W. Walker, III,** have become associated with the firm. Offices are located at 444 South Perry Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 347, Montgomery, Alabama 36101-0347. Phone (205) 834-1180.

■

Roberts, Davidson, Wiggins & Crowder announces that **William B. McGuire, Jr.,** no longer is with the firm. **J. Doug Fields, Jr.,** formerly an associate of Lorant & Hollingsworth, Birmingham, is now an associate with the firm. Offices are located at 2625 8th Street, P.O. Box 1939, Tuscaloosa, Alabama 35403. Phone (205) 759-5771.

■

Torbert & Torbert, P.A. announces that **Jack Lee Roberts, Jr.,** has become an associate with the firm. Offices are located at 1024 Forrest Avenue, Gadsden, Alabama 35901. Phone (205) 547-7551.

■

The firm of **Schoel, Ogle, Benton, Gentle & Centeno** announces that **Carolyn Landon** has become associated with the firm. Landon received her law degree from Cumberland School of Law in 1989. The firm is located at 600 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203. Phone (205) 521-7000.

■

Davis & Neal announces the opening of two offices. The Opelika office is located at 2200-D Hamilton Road, 36801. Phone (205) 745-2779. The Dothan office is located at 215 West Main Street, 36301. Phone (205) 671-3990. The firm's main office is located at 4144 Carmichael Road, Montgomery, Alabama 36106 (mailing address: P.O. Box 4008, Montgomery, Alabama 36103-4008). Phone (205) 244-2097.

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■

The firm of **Webb, Crumpton, McGregor, Sasser, Davis & Alley** announces that the firm name has been changed to **Webb, Crumpton, McGregor, Davis & Alley,** and that **E. Wray Smith** has become associated with the firm. Offices are located at One Commerce Street, Suite 700, P.O. Box 238, Montgomery, Alabama 36101-0238. Phone (205) 834-3176.

■

The firm of **Watson, Gammons & Fees, P.C.** announces that **George K. Williams** has become *of counsel* to the firm, and that **J. Barton Warren** and **William F. Patty** have joined the firm as associates. Offices are located at AmSouth Center, 200 Clinton Avenue West, Suite 800, Huntsville, Alabama 35801. Phone (205) 536-7423.

■

Due to the withdrawal of **Jim DeBardelaben** as a partner in the firm of **McPhillips, DeBardelaben & Hawthorne,** and the addition of **Kenneth Shinbaum** as a name partner, the firm name has been changed to **McPhillips, Hawthorne & Shinbaum,** with offices located at 516 South Perry Street, Montgomery, Alabama. Phone (205) 262-1911.

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■

The firm of **Green & Pino, P.C.** announces that **Howard Y. Downey** became associated with the firm, effective September 1, 1990. Offices are located at 644 2nd Street, Northeast, Shelby Medical Building, Suite 205, P.O. Box 766, Alabaster, Alabama 35007. Phone (205) 663-1581.

■

Paul M. Harden and **Anthony J. Bishop** announce the relocation of their offices to 417 Rural Street, Evergreen, Alabama, and the firm's new name is **Harden & Bishop.** Phone (205) 578-4746 or 578-4219.

■

Rosen, Harwood, Cook & Sledge, P.A. announces that **Milton Brown, Jr.,** is an associate with the firm. Brown is a 1990 admittee to the state bar. Offices are located at 1020 Lurleen Wallace Boulevard, North, P.O. Box 2727, Tuscaloosa, Alabama 35403. Phone (205) 345-5440.

■

The firm of **Berkowitz, Lefkovits, Isom & Kushner** announces that **Frank S. James, III,** formerly associate professor of law and assistant dean of the University of Alabama School of Law, has become a partner in the firm, and **Andrew J. Potts** and **Melissa M. Jones** have become associated with the firm. Offices are located at 1100 Financial Center, Birmingham, Alabama 35203. Phone (205) 328-0480.

■

Gordon, Silberman, Wiggins & Childs, P.C., announces that **Naomi Hilton Archer, Joseph H. Calvin, III, Timothy D. Davis,** and **Linda J. Peacock** have become associated with the firm. Offices are located at 1400 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 328-0640. ■

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

Jefferson County

It is a little known fact that the first courthouse in Jefferson County was not the Jefferson County Courthouse. The reason is that the first courthouse physically located in what is now Jefferson County served as the Blount County Courthouse. Blount County was established February 7, 1818, by the Alabama Territorial Legislature. The act creating the county provided that court should be held at the home of Major Moses Kelly in Jones Valley. This log hut was located at a place probably within a few miles of the present Jefferson County Courthouse. Various accounts state that the home was located near the old Worthington Place, in the vicinity of present-day 6th Avenue and 31st Street, South, in Birmingham. The first court convened there on the third Monday in March 1819.

Jefferson County was created by the Alabama Legislature on December 13, 1819, from territory in large part carved from Blount County. The county seat was temporarily located at Carrollsville, now the Powderly section of Birmingham. It was reported that the Honorable Clement C. Clay, Alabama's first chief justice, convened court at Carrollsville on the second Monday in March 1820. The first regular term of the circuit court was held at Carrollsville on June 5, 1820. Like the home of Major Kelly, this courthouse at Carrollsville was a log cabin.

The first formal building to serve as a courthouse of Jefferson County was located at Elyton, near present-day Center Street and Tuscaloosa Avenue. William Ely of Hartford, Connecticut, was the agent of a school for the handicapped which had received a Congressional land grant in Jefferson County, Alabama. He offered land from this grant to the county for the construction of a courthouse and jail. The county commissioners gladly accepted this gift, and the village which grew from this beginning was named Elyton, in his honor. Elyton became the county seat in 1820. Early records show that the circuit court heard cases at Elyton as early as September 11, 1820. This first formal courthouse building was probably a small wooden structure constructed by Stephen Hall.

In an article published in *The Birmingham News* on December 13, 1949, R.B. Henckell, a member of the Birmingham Historical Society, wrote that a two-story brick courthouse was constructed at Elyton in 1841. The location of this building was directly behind the present-day Elyton School.

Following the War Between the States, plans were made to complete the construction of two railroads in Alabama. One would extend north and south, the other, east and west. Somewhere in this mineral rich region of north Alabama, the railroads would intersect. The town fathers of Elyton hoped that the railroad would cross in their town just as the pre-war stagecoach routes did, but a real estate syndicate purchased land two miles east of Elyton, and through its influence, the crossing came there. A new town, Birmingham, was incorporated at this site in 1871.

In April 1872, according to Henckell, the Elyton Courthouse burned. This structure was rebuilt on the existing foundation using the floor plan of the former

Samuel A. Rumore, Jr., is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore was recently elected to serve as the bar commissioner for the 10th Circuit, place number four.

courthouse as much as possible. Approximately 75 percent of the funds for rebuilding this courthouse was raised from private subscriptions by the citizens of Elyton.

Meanwhile, the promoters of the new city of Birmingham became ambitious for their town, and they influenced the Alabama Legislature to call an election so that the citizens of Jefferson County could vote on whether Elyton or Birmingham should be the county seat. The election was held on the first Monday in May 1873. At this time the circuit court had only held one term in the newly reconstructed Elyton Courthouse.

The 1873 county seat election in Jefferson County has gone down in history as one of the "classics" in Alabama politics. The promoters of Birmingham staged a gigantic barbecue on election day. They brought in special trains to carry voters to the polls. They had a band. It was reported that "Jefferson County" residents from as far away as Walker and Blount counties voted in this election. Many of the newly enfranchised blacks in the area voted in the election and then feasted at the Birmingham boosters' barbecue. Also in this election, voters were not required to cast their ballot in their home box or beat. To say that controls were lax is an understatement. Needless to say, Birmingham received a majority of the votes.

While the first courthouse in Birmingham was being built on land donated by the founding real estate firm of the city, ironically named the Elyton Land Company, the work of the county took place in several existing Birmingham buildings. The county commission rented two rooms in a building owned by B.E. Grace for the use of the sheriff and circuit clerk. The probate court was housed in a building owned by W.G. Oliver. And the circuit and chancery courts were conducted at Sublett Hall, a theater located at 2013 Second Avenue, North.

Jefferson County Courthouse

The residents of Elyton became outraged. Why should they be required to pay for an extravagant new courthouse when they had just paid for a newly rebuilt Elyton courthouse? A court battle ensued as Elyton attempted to fight for "its courthouse." But Elyton lost the war, and a contract for the Birmingham facility was awarded to Frank Bugh and Company on May 11, 1874, for a consideration of $30,500. The architect for the first Birmingham Courthouse was W.K. Ball. The building was completed by Frank P. O'Brien and Company, successors to Bugh. O'Brien later was a mayor of Birmingham.

The building was constructed at the northeast corner of Third Avenue and 21st Street, North, on property deeded to Jefferson County by the Elyton Land Company for $5 consideration. The property was legally described as the west 150 feet of Block 75. The Catholic Bishop of

Mobile owned the east 250 feet of the same block. This courthouse site is presently the Downtown YMCA property.

The courthouse was described as being a two-story red brick building with dimensions of 64 by 86 feet. It had a dome which contained a clock with four faces. On the front pediment facing Third Avenue sat a zinc eagle atop a globe. It was reported that the first floor ceilings were 15 feet high, the second floor ceilings were 14 feet high, and the circuit courtroom chamber ceilings were 22 feet high.

The first session heard at the first official Birmingham Courthouse was held Monday, May 17, 1875. The building was accepted as complete by the county on June 7, 1875, and as final touches the county purchased 21 spittoons and 200 feet of horse-hitching racks.

This courthouse served the county 12 years until a committee of architects and businessmen appointed by the probate judge declared the foundation unsafe and condemned the building. On October 14, 1887, the county purchased from the Bishop of Mobile a 50-foot strip of land adjoining the courthouse site to build a larger courthouse. This purchase of 50 feet cost the county $50,000. The transaction left the county and the church each owning 200 feet of Block 75.

From 1887 to 1889, in the interim between the domolition of the old courthouse and the construction of a new one on the same site, courts were held in what was known as the Jones Building on the east side of 20th Street between Third and Fourth avenues, North. Later they were held in the William Hood Building located at 300 20th Street, North, the old site of Blach's Department Store. The famous multiple murder trial of Richard Hawes, who was convicted of murdering his wife and two daughters, was held at the Hood Building in April 1889.

The cornerstone for the new courthouse was laid May 17, 1888, exactly 13 years to the day following the first court session in the original Birmingham Courthouse. The second Birmingham Courthouse cost ten times as much as the first, at approximately $300,000. Charles Wheelock and Sons of Birmingham and H. Wotlers of Louisville drew the plans, and Charles Pearch of Indianapolis was chosen as contractor. On June 16, 1889, the county commission accepted the new courthouse.

This brick building was four stories high with a central clock tower rising 180 feet. Photographs of this building show that it was a fitting complement to the Gothic St. Paul's Church which occupied the other portion of Block 75. This courthouse served the county from 1889 until 1931. The beautiful old building was razed in 1937. This property remained a parking lot until the Downtown YMCA was built there in 1984.

The present Jefferson County Courthouse has a unique history itself. A decision was made as early as 1923 that the growing Jefferson County would need a new courthouse and that the site should be at Woodrow Wilson Park. In 1927 a Jefferson County Courthouse Commission was created by the Alabama Legislature.

The first hurdle that the new courthouse commission had to face was a challenge to the general location selected. The original act of 1873 calling for an election to determine the location of the Jefferson County Courthouse had specified that if the voters approved a move to Birmingham, then the building would be constructed within the corporate limits of the town. A portion of the Woodrow Wilson Park site selected by the Commission was outside the 1873 corporate limits of Birmingham. The Alabama Supreme Court held that no courthouse could be built outside the 1873 town limits.

The legislature then passed a bill authorizing an election on the question of moving the courthouse site. This election was held June 5, 1928. The proposition passed and now a courthouse could be built outside the 1873 town limits.

Next, the courthouse commission modified its plans and sought a specific location at Woodrow Wilson Park whereby the new courthouse would face down 20th Street. Property on the east side of the park had been purchased previously for the courthouse. But the courthouse commission asked the Birmingham City Commissioners to take this property on the east side in exchange for the desired land at the head of 20th Street. The city commission would not consent to the swap, and a court ruling determined that the desired property could not be condemned for use as a courthouse without an authorizing election. So the courthouse commission returned to its original plan and decided to have the courthouse built on the property already owned on the east side of the park. Holabird and Root of Chicago and Harry B. Weelock of Birmingham were selected as architects.

The project was started in April 1929. Site preparation and phase one were completed by August 1930, but work was stopped due to a lack of funds in part caused by the Depression, and there was some question of whether the courthouse would be finished.

On March 10, 1931, an additional bond issue was approved by the voters of Jefferson County. On March 11, 1931, the cornerstone was laid, thus symbolizing the optimism that this building would be completed. It is interesting to note that the date on the cornerstone reads 1929, although the stone was not actually laid until 1931.

The present Jefferson County Courthouse was dedicated Friday, December 3, 1931, and it was formally accepted by the county as complete on January 28, 1932. The building itself is of granite and limestone and described as modernistic in design. Similar to the second Birmingham Courthouse, this third structure cost ten times as much as its predecessor, or approximately $3,000,000.

In 1964, a smaller annex was added to the main building. It also cost approximately $3,000,000. Charles H. McCauley and Associates served as architect for the annex, and the Daniel Construction Company of Alabama was the contractor.

Other improvements have taken place at the courthouse over the years. In 1974, a parking deck was completed. The cafeteria opened in September 1974. The church property directly across from the courthouse was purchased by the county and, for a short time, several judges held court in the church buildings.

In 1986, the Jefferson County Criminal Justice Center was completed. The center consists of a jail tower and a courts tower located at 8th Avenue and 21st Street, North. The center was dedicated Tuesday, October 21, 1986. Giattina, Fisher and Company served as architects for this project and Brasfield and Gorrie, Inc. was the general contractor. ■

Speech at the Dedication of the "Robert S. Vance Federal Building"

October 8, 1990
by Hon. Frank M. Johnson, Jr.

We come here today to dedicate this former federal courthouse in honor of United States Circuit Judge Robert Smith Vance. We do so not to memorialize this great jurist, statesman, and friend. Rather, in naming and dedicating this building the "Robert S. Vance Federal Building," we celebrate the contributions Judge Vance made to our nation and allow his life to stand before us as a symbol and reminder of the epitome of excellence which those contributions represent.

Those contributions began early in the life of Robert Vance. Never one to seek the limelight, yet a leader among his peers, he served as student body president at the University of Alabama where he graduated in 1950. He went on to earn a law degree from the University of Alabama Law School in 1952 and an LL.M. degree from George Washington Law School in 1955.

Robert Vance served his country during the Korean conflict as a member of the Judge Advocate General's Corps of the United States Army. He later continued serving his country as a member of the Army Reserves, retiring at the rank of lieutenant colonel.

He practiced law here in the city of Birmingham for 21 years. During part of that time he served as chairperson of the Alabama Democratic Party, leading that party through a troubled time, calling that political body to move beyond the past and to build bridges into the future.

Robert Vance was a dedicated husband to his wife, Helen Rainey Vance, and a loving father to his two sons, Robert, Jr., and Charles, and he would have, I know, been a proud and caring grandfather to the newest member of the Vance family, Robert Smith Vance, III, born just this last September 14, to Robert, Jr., and Joyce White Vance.

While Robert Vance practiced before me when I was a district judge he was a very good lawyer, but I knew him best as a United States Circuit Judge. Judge Vance was appointed to sit on the Fifth Circuit Court of Appeals on December 15, 1977, and entered duty on January 3, 1978. He served as a circuit judge first on the Fifth Circuit and then on the Eleventh Circuit when it was created in 1980. Over the 12 years that he served his country as a circuit judge he came to represent excellence, demonstrating reason, courage, and integrity. He was, as Chief Judge Tjoflat has often said of him, "a judge's judge." It is his qualities as a judge I would like for us to focus on today as we dedicate this old courthouse now referred to as the Federal Building. For in affixing Judge Vance's name to this structure, we cause it to become imbued with

Johnson

Vance

these qualities; we cause it to symbolize the excellence which Judge Vance strove for in his work and in his life; we cause it to become a constant reminder of the standards to which we should all aspire in our work in the judiciary and the legal profession and in our service to our country.

Because of the work of individuals such as Judge Vance, the people of America have learned to have faith in their courts and pride in their judges. Most lay citizens do not understand jurisdictional problems or legal procedures. Nevertheless, the individual citizen has confidence in the law. The individual citizen knows that oppression has its limits, that no agency or power can transgress upon individually owned property except by judgment of a duly constituted court applying the law of the land, that for any wrong there is a remedy under the Constitution and laws of this country. Judges are elected or appointed and their tenures come to an end. One generation rapidly succeeds another. But regardless of the individual who occupies the bench, the courts—both state and federal—and the law they dispense remain supreme. Strong traditions, consecrated by memories, fortified with the steadfast support of the profession that surrounds them, the courts have existed independently of the men and women who have served upon them. In this manner, the courts have maintained the precious supremacy of the law without which our country could not survive.

While it may be possible, as Sir Thomas More opined in describing his concept of Utopia, to live without lawyers,[1] it is not possible for society to get along without judges. Judges guard the gate between order and anarchy. They are the preservers of our system of ordered liberties. Each judge sitting in this country, whether in a state court or a federal court, whether in a trial court or an appellate court, has a grave responsibility to maintain our system of ordered liberties by maintaining supremacy of the law so that—to paraphrase Theodore Roosevelt—no person is above the law and no person is below it. On his watch, as keeper of that gate between order and anarchy, Robert Vance never nodded off, but remained ever alert.

I would like to focus today on three qualities exemplifying Judge Vance's work on the bench, though there are, of course, others, three qualities in which he excelled and in which he stands as an example to us all: reason, courage, and integrity.

1. Reason

In keeping his watch, Judge Vance was a man of strong reason. As Chief Justice of the United States Supreme Court John Marshall stated in 1803 in *Marbury v. Madison*,[2] "'It is emphatically the pro-

vince and duty of the judicial department to say what the law is. Those who apply the rule [of law] to particular cases, must of necessity expound and interpret that rule." Such pronouncement requires a clear head and sound logic. It requires a mind capable of sifting and culling through arguments and precedents to arrive at principles which may be applied to the case or controversy presented to the court.

Judge Vance was well-known for his intolerance of poorly reasoned, result-oriented decisionmaking. He believed that if an appellate court could not formulate clear, logical standards that trial judges and litigants could easily apply to conduct, then the appellate court was doing more harm than good. The members of the legal profession here today will remember, as one of many, many examples, Judge Vance's *en banc* opinion in *Washington v. Strickland*[3] in 1982, an opinion dealing with the adequacy of counsel in a criminal proceeding. In that opinion, Judge Vance attempted to set out clear, practical standards in a complicated area of the law so that the district courts might have a test or a basis from which to work. Though the Supreme Court eventually rewrote our circuit's decision in that case, it specifically praised Judge Vance's reasoning in striving to arrive at "particularized standards" which, in the words of Justice Thurgood Marshall, would "ensure that all defendants receive effective legal assistance."[4]

2. Courage

Not only did Judge Vance exhibit a keen mind, but he also serves as an example to us of courage. If the law is to remain supreme, a judge must have courage. By courage, I mean not physical bravery, but the moral courage to do what is right in the face of certain unpopularity and public criticism. Judges must—by their decisions and personal conduct—keep our courts removed from the passions of the moment, from politics, from partisanship, from prejudices, from personal, local or sectional interests and from undue influences. Courts, in our federalist system, do not reach out and take upon themselves the tantalizing issues of the day which they might see fit to pass judgment upon. Rather, litigants must come to the courts, file suit, and present those issues.

In granting the federal judiciary power to decide cases and controversies arising under our Constitution and laws, the framers of the Constitution fully recognized that the exercise of such power would inevitably thrust the courts into the political arena. In fact, as the writings of the founders of our government illustrate, this grant of power was a mandate to the federal courts to check and to restrain any infringement by the legislative and executive branches on the supremacy of the Constitution. James Madison, in cautioning his colleagues that the protections afforded by the Bill of Rights would be hollow without a judiciary to uphold them, wrote that the federal judiciary must serve as an "impenetrable bulwark" steeled "to resist every encroachment upon [the Bill of] rights."[5]

Thus, the judiciary's role as defender of the Bill of Rights and its occasional intrusion in the affairs of the legislative and executive branches of government result not from an arrogation of power but from compliance with a constitutional mandate. Those who criticize the federal courts for this occasional intrusion fail to recognize that, in the words of the French historian, Alexis de Tocqueville:

> "The American Judge is brought into the political arena independent of his own will. He only judges the law because he is obliged to judge a case. The political question which he is called upon to resolve is connected with the interest of the parties and he cannot refuse to decide it without abdicating the duties of his post."[6]

I would like to place emphasis upon that last phrase of de Tocqueville's statement, that is, that a judge "cannot refuse to decide [the case presented] without abdicating the duties of his post." As Justice Hugo Black once wrote, our "courts stand against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[7] If we abdicate responsibility to address the difficult questions of our time, those in need of refuge from the torrents of political, economic, and religious forces will find no haven in the law and the law will no longer be supreme. The law itself will become subject to those winds of which Justice Black spoke.

At times, it takes tremendous courage for a judge to accept that responsibility. Those of you here today in the legal profession may recall Judge Vance's *en banc* opinion in *O'Hair v. White* in 1982.[8] In that opinion he cautioned against the federal courts' "shirking" of their responsibility, as he said, to "guard, enforce, and protect every right granted or secured by the constitution."[9] He was speaking of the courage required of those who sit on the bench to decide the question placed before the court.

There was an era through which Judge Vance lived, through which I also and many here today lived, in which it became the political ploy of the day for politicians to punt the difficult issues and questions to the courts, especially the federal courts, for resolution. Knowing what was right, what was the law, but not wanting to take responsibility for what needed to be done, elected legislators and executives refused to take action. So, they waited for an outraged minority of citizens to press the issues into the courts as a last resort—seeking refuge in the courts for vindication of basic rights. The courts did not abdicate their responsibility, but upheld the law and withstood the unpopularity. Judge Vance was a judge who was willing to and did accept his responsibility head on, no matter how grave the consequences.

3. Integrity

Finally, Judge Vance was a person and a judge of great integrity. "Integrity," in the common parlance, describes a man or woman who is honest, straightforward, and upright. We, of course, expect or a least hope for such qualities not only from those in public service, but from all citizens in this country. Obviously, we live in an imperfect world and we all fall short of this description in one way or another. Judges, just as the rest of humankind, may fall short of this description. As Justice Black wrote, judges, like everyone else, may "be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or excessive zeal."[10]

But when I speak of judicial integrity, I mean something quite different from the integrity of which Justice Black wrote. The essential attribute of the judicial integrity of which I speak is a *passion* for justice informed by a deep and abiding *compassion* that propels the judge

toward not only the logical conclusion—but also the *just* conclusion. When I spoke a moment ago of the courage which Judge Vance exhibited in his work, I spoke of his ability to fulfill the duty of his office in the face of public outcry. When I speak of his integrity as a judge, I speak of his carrying out of those responsibilities free of the need to please, the need to please not only what may be a faceless public, but the need to please particular individuals in powerful positions. Judge Robert Vance never approached a judicial decision with a concern as to how that decision might affect his reputation in the eyes of those who wield influence in society, of those who exercise power in government, of those who hold the influence and power to elevate judges to higher courts. Rather, Judge Vance addressed his decisions with judicial honesty, with judicial straightforwardness, with judicial uprightness.

Though as members of the human race we may fall short of integrity at times, a judge in his or her work on the bench cannot. A judge must always be consumed by a passion for justice which propels judgment toward the just conclusion. It was Judge Vance's strong opinion that when the judge dons the black robe, the judge puts aside personal ambition and aspires only to justice.

This quality in a judge, I submit to you, is essential to the preservation of our society. Looking back over my 35 years on the federal bench, and the changes that have been wrought in our society through the courts during that time, I have come to the firm conclusion that the American people believe, fundamentally and absolutely, in the rule of law. They may disagree with the law; they may seek to change the law through the political processes—their right to do so is absolute. But we as Americans revere the concept of justice and the rule of law. Once we understand what the law is and know that the law is just, we obey it. This fact underlies the stability of our polity; without justice we cross through the gate that stands between order and anarchy.

As I stated at the outset, it is the role of the judiciary to guard that gate by saying what the law is. If the rule of law is to emanate justice, then the judge must have integrity. Robert Smith Vance personified such integrity.

In conclusion, as we dedicate this beautiful old building—a building listed on our National Historic Registry—as we name it the "Robert S. Vance Federal Building"—let us pause, each of us, to contemplate the life of this great jurist, statesman, and friend. Let us remember that with his life and energy he strove to contribute to his community and his country. He was a man of reason, a man of courage, and a man of integrity. Through his contribution, this world was made a better place; through his example, he continues to lead us. As you who work in this building labor, as you who pass it by on this city's sidewalks and streets glance up at it, *remember* the man who has given his name to this building and his life in service to his country—let him stand before us as an example to which we might all aspire in our work and in our lives. May we not ever forget Robert Vance. ■

FOOTNOTES

1. More, Thomas, Sir, *Utopia*, Bk. 2, p.299.
2. 5 U.S. (1 Cranch) 137, 177 (1803).
3. 693 F.2d 1243 (5th Cir. Unit B 1982) *(en banc)*.
4. *Strickland v. Washington*, 466 U.S. 668, 709 (1984) (Marshall, J., dissenting).
5. Madison's Address to the U.S. House of Representatives, June 8, 1789, L. Levy, *The Supreme Court Under Earl Warren* (1972).
6. de Tocqueville, *Democracy in America* 106 (1841).
7. *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (Black, J.).
8. 675 F.2d 680 (5th Cir. 1982).
9. *Id.* at 693.
10. *Green v. United States*, 356 U.S. 165, 198 (1958) (Black, J., dissenting).

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Remarks by Alabama Supreme Court Justice Hugh Maddox

October 23, 1990, Admissions Ceremony, Montgomery, Alabama

(The following remarks, edited for space, were addressed to one of the largest groups of admittees ever sworn in in a single sitting in Alabama.)

". . . You have taken a most solemn oath today. It is short, but it is powerful. It is so powerful, in fact, that virtually all of the *Rules of Professional Conduct* could be summed up in that short, simple oath which you just took. It is the same oath which each of us took. It is the same oath other lawyers before you took. What does it mean?

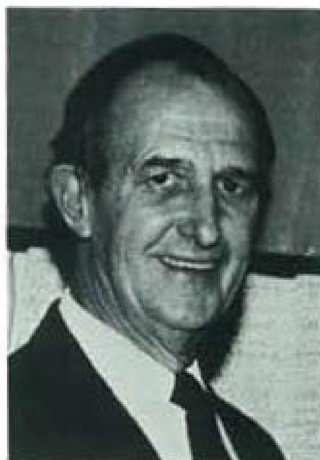
"It begins: 'I will demean myself as an attorney, according to the best of my learning and ability.' Demeanor means behavior toward others. It means appearance and it means conduct. In short, it means to be civil in all your dealings. Being an attorney means something. Attorneys are supposed to act like they are attorneys—at all times—to the very best of their learning and ability.

"Civility in the practice of law is most important. A great 19th Century English barrister, Odgers, writing at the end of that century about the English judicial system, said that formerly English judges browbeat the prisoners, jeered at their efforts to defend themselves, censured juries who honestly did their duty, and that formerly, too, counsel bullied the witnesses and perverted what they said.

"He then noted that the attitude and temper of the judges toward parties, witnesses, and prisoners completely changed, and that the Bar began to behave like lawyers were supposed to behave.

"Writing about the results of this changed behavior on the part of the judges and lawyers, Odgers penned: 'The moral tone of the Bar is wholly different . . . they no longer seek to obtain a temporary victory by unfair means; they remember that it is their duty to assist the Court in eliciting the truth.'

"In the second part of the oath you promised that, 'With all good fidelity, as well to the court as to the client, that I will use no falsehood or delay any person's cause for lucre or malice.' In that portion of the oath you have promised to be faithful to the courts and to your clients, that you will be honest, and that neither money nor the desire to get even will get between you and the goal of seeing that justice is done. Justice will always have priority. That is a solemn undertaking.



Maddox

"This past summer, I was privileged to attend an annual meeting of the American Inns of Court in Washington, D.C. Gathered there for that meeting were judges and lawyers from throughout the United States and former Chief Justice Warren Burger and present Chief Justice William Rehnquist, and several of the Justices were there. The subject of the conference was: Law: Business or Profession? One of the speakers on that occasion was a high-ranking English jurist, The Right Honorable Lord Goff of Chieveley.

"Speaking of the value of the rule of law, he said: 'Freedom in the world depends upon the dispensing of practical justice and the belief in the rule of law.'

"Today, you have solemnly promised that you will act like a lawyer, look like a lawyer and be like a lawyer.

"If you keep that oath, your future will be secure, and someday some writer, like Odgers, will say of you that the moral tone of the Alabama Bar is different—they do not seek to obtain a temporary victory by unfair means; they are honest in their dealings with the court and fellow lawyers, and they remembered the oath they took when they became a lawyer.

"Or maybe some writer like Harper Lee will write about you as she did in the courtroom scene in *To Kill a Mockingbird,* as Atticus Finch was leaving the courtroom after hearing the jury return a verdict of guilty against his client, Tom Robinson, 'Miss Jean Louise, stand up. Your father's passin'." ■

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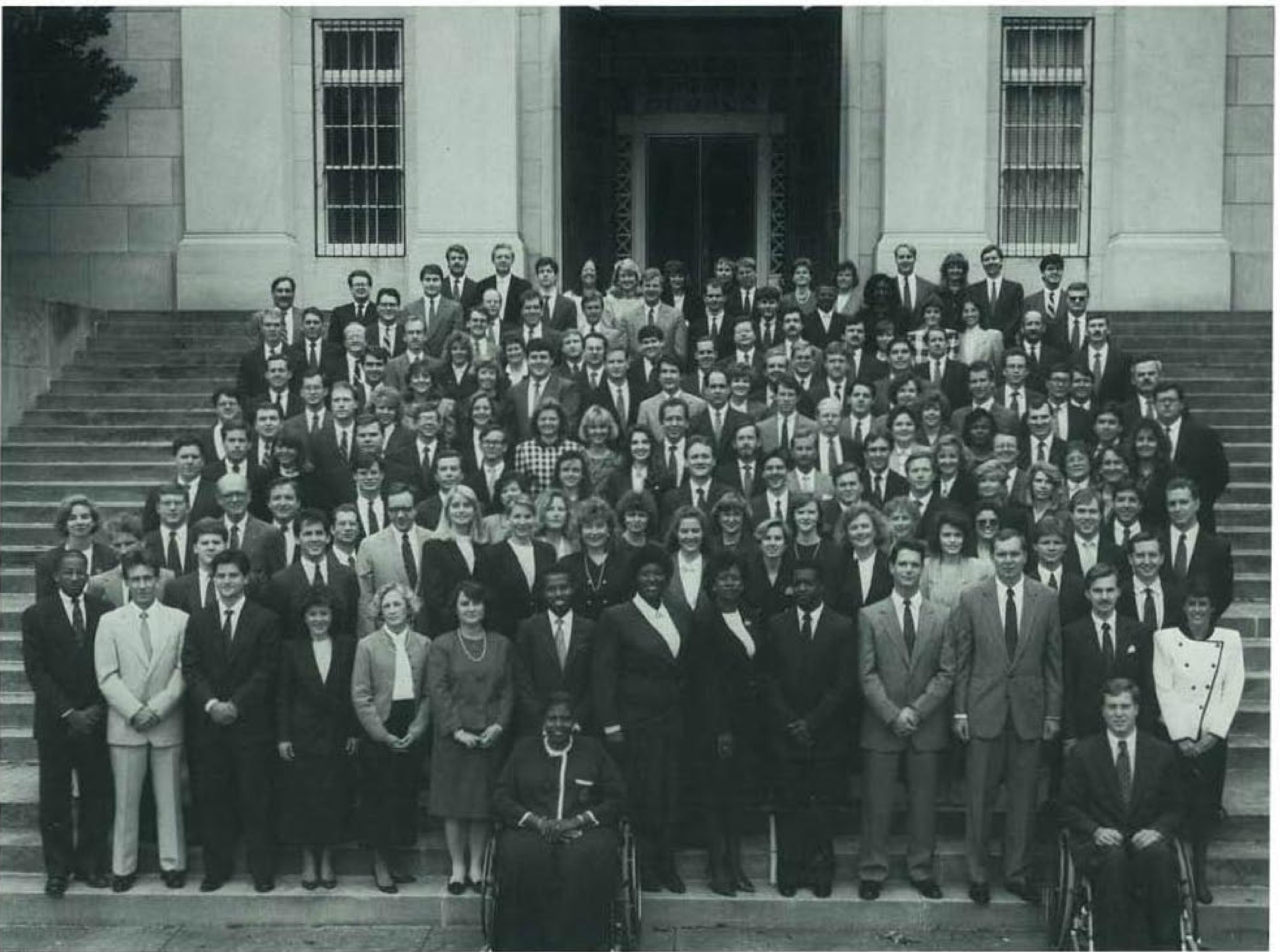

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31 thursday

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31-february 2

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1 friday

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4-6

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13-15

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28-march 2

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15-16

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Modifying Child Custody Decisions Because of Indiscreet Sexual Behavior —Changing Times and an Elusive Standard

by Randall W. Nichols

I. Overview

The times are not just changing. They have changed. With increasing frequency, single persons are living together without the benefit of marriage. Inevitably, this number includes divorced parents. *See* Wallerstein and Blakeslee, *Second Chances: Men, Women and Children a Decade After Divorce*, pp. 227-228, (Ticknor & Fields, 1989). *See also*, Wadlington, "Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws," 63 Va.L.Rev. 249 (1977). "Indiscreet sexual behavior," as discussed in the case law, ranges from visits by companions on a limited basis to open cohabitation outside of marriage. *Compare Roberson v. Roberson*, 370 So.2d 1008 (Ala. Civ. App. 1979) *with Wade v. Clark*, 564 So.2d 982 (Ala. Civ. App. 1990). This article will analyze the impact of such conduct in child custody modification cases.[1]

II. Standards for child custody modifications

Ex Parte McLendon, 455 So.2d 863 (Ala. 1984), changed the landscape in all child custody modification cases. Before *McLendon*, the moving party's burden was merely to show a change in circumstances which adversely affected the welfare of the child. *Lewis v. Douglass*, 440 So.2d 1073 (Ala.Civ.App. 1983). *McLendon* placed a higher burden upon those who would have the court change custody. A movant must now show that the change in custody will "materially promote the child's welfare." *McLendon*, 455 So.2d at 865. The heart of *McLendon* is the desire to prevent indiscriminate and frequent changes in custody. The court explained its ruling in this way:

> [This] is a rule of repose, allowing the child, whose welfare is paramount, the valuable benefit of stability and the right to put down into its environment those roots necessary for the child's healthy growth into adolescence and adulthood. The Doctrine requires that the party seeking modification prove to the Court's satisfaction that material changes affecting the child's welfare since the most recent decree demonstrate custody should be disturbed to promote the child's best interest. The positive good brought about by the modification must more than offset the inherently disruptive effect caused by uprooting the child. Frequent disruptions are to be condemned. *McLendon*, 455 So.2d at 865-866, citing *Wood v. Wood*, 433 So.2d 826, 828 (Ala.Civ. App. 1976).

The court of civil appeals calls this burden a "stringent standard." *Benton v. Benton*, 520 So.2d 534 (Ala.Civ.App. 1988).[2]

III. The Rule applied—the rejection of a *per se* approach

In cases involving alleged sexual misconduct, Alabama's courts have long held that it will not deny a parent custody for every act of indiscretion or immorality. *Gould v. Gould*, 55 Ala.App. 379, 316 So.2d 210 (1975). The oft-stated rule is as follows:

> [W]hile evidence of indiscreet conduct is a factor to consider in a custody modification action, custody will not be modified where the party seeking modification fails to establish a substantial detrimental effect on the welfare of the child as a result of the indiscreet conduct. *Smith v. Smith*, 464 So.2d 97 (Ala.Civ.App. 1984), citing *Roberson, supra; Accord, Benton, supra; Jones v. Haraway*, 537 So.2d 946 (Ala.Civ.App. 1988); *Durham v. Durham*, 555 So.2d 1093 (Ala.Civ.App. 1989).

Alabama's courts have likewise rejected any *per se* approach in dealing with the sexual behavior of custodial parents. Even prior to *McLendon*, courts cautioned that such behavior was "only a factor" in custody modification decisions. And even under the "change of circumstances" standard before *McLendon*, the movant basing his or her claim upon indiscreet sexual behavior had to show a "substantial detrimental effect." *Roberson, supra*. It is now abundantly clear that evidence of sexual misconduct is not enough, standing alone, to prove substantial detrimental effect. *Jones*, 537 So.2d at 947.

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IV. "Substantial Detrimental Effect"—the elusive standard

While the burden of proof is clearly upon a party seeking to modify custody, the evidence sufficient to meet that burden remains, to great extent, a mystery. The author's research of Alabama decisions did not reveal a single case in which a trial judge has been reversed for sustaining custody in the custodial parent where the controlling issue was alleged sexual misbehavior on the part of the custodial parent. On the contrary, however, many cases have been reversed in instances where the trial judge has changed custody based upon such allegations. In these cases, the appellate court has often found the indiscreet behavior to be an insufficient ground for modification. While some trial courts have been affirmed in changing custody, the trend is certainly against changing custody because of the indiscreet behavior of a parent. Admittedly, a review of appellate decisions is a limited inquiry. Nevertheless, there are certainly signs that allegations of indiscreet sexual conduct have proved an ineffective device to effect a change of custody.

This trend is perhaps a reflection of changing social mores with regard to such behavior. Some have suggested that psychological and sociological findings support a strict standard in changing custody in these cases. *See, e.g.,* Wexler, "Rethinking the Modification of Child Custody Decisions." 94 Yale L.J. 757 (1985). This idea is surely upsetting to some. Indeed, those rejecting the trend might point out that the statute empowering courts to make custody decisions instructs the court give regard to "the moral character and prudence of the parents." Section 30-3-1 *Code of Alabama* (1975).

It is more likely, in the author's opinion, that the apparent leniency toward such conduct is due to the increasing reluctance of courts to condone changes in custody, a reluctance exhibited in the adoption of the *McLendon* standard discussed above. Regardless, the de-emphasis of indiscreet conduct as a factor supporting child custody modifications leaves the lawyer with little guidance as to what evidence of such conduct would be sufficient to justify a change of custody.

In the late 1970s and early 1980, the focus of the case law was upon whether the children were present while the conduct occurred and whether they were aware of the conduct. While such awareness was not necessary for the conduct to be considered a substantial detrimental effect, it was a factor to which the courts looked closely.

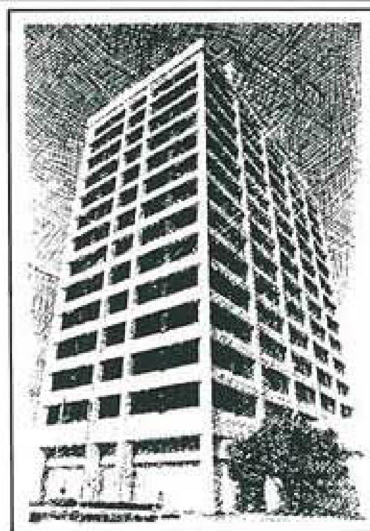
For example, in *Roberson, supra,* the father presented evidence, albeit disputed, that the mother had engaged in sexual escapades in her locked bedroom while the minor children were "crying and beating on the locked bedroom door." *Roberson,* 370 So.2d at 1009. The trial court changed custody and the court of civil appeals reversed:

> . . . [E]ven assuming the husband's evidence to be undisputed, this testimony in essence shows a single isolated act of impropriety on the part of the mother. . . . [T]here is no proof that it occurred in the children's presence or that it had a direct bearing on their welfare. *Roberson,* 370 So.2d at 1011.

Similarly, the court of civil appeals reversed a change of custody in *Patterson v. Patterson,* 399 So.2d 846, 848 (Ala.Civ. App. 1980) based upon its conclusion that "[T]here is no proof that such [indiscreet] conduct had adversely affected the children."

Roberson and *Patterson* were followed by a triology of cases in which the court of civil appeals affirmed the trial court's custody change. The three cases confirmed, to some extent, the focus upon the children's appreciation of the alleged misconduct. There was also a hint of other issues that courts might consider.

In *Small v. Small,* 412 So.2d 283 (Ala.Civ.App. 1982), the trial judge changed custody from the mother to the father based, in part, upon testimony from the father's investigator that the mother had engaged in indiscreet conduct with a man not her husband. The case is distinguishable from *Roberson* and *Patterson* in that the father had previously filed a motion to change custody, which the mother had successfully defended. In the prior modification action, the court warned the mother that it would consider a change of custody if she disobeyed the court's order prohibiting indiscreet behavior. *Small,* 412 So.2d at 284.



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The precedential value of *Small* is somewhat clouded because an independent ground for affirmance was present in the trial court's *in camera* interview with the minor child. *Small* suggests, however, that parties concerned about the sexual conduct of an ex-spouse should consider asking the court to include in the decree a clause similar to that entered by the trial court in *Small*. Interestingly, the language indicating that the court would reconsider custody upon a violation might be very important. *See, e.g., McKim v. McKim*, 447 So.2d 562 (Ala.Civ.App. 1983); *Cf. Melton v. Bounds*, 553 So.2d 614 (Ala.Civ. App. 1989).

The second case in the trilogy, *Medlin v. Sims*, 420 So.2d 272 (Ala.Civ.App. 1982) exhibits another angle a party might take in asking for a change in custody. The father requesting a change in custody in *Medlin* directed his efforts to proving the detrimental effect of the conduct on the children. The evidence showed the court that the mother was placing her social interest above her concerns for the children. The presentation (in addition to evidence of cohabitation) included testimony that the mother would often leave the children on evenings and on weekends. The *Medlin* court cited *Junkin v. Junkin*, 332 So.2d 392 (Ala.Civ.App. 1976), in which the court stated as follows:

> The evidence in this case is sufficient for the Court to find that the mother places her entertainment and social pursuits ahead of her regard for the child. The question is not the presence or absence of sexual activity in her social life; rather, the trial court must determine whether the emphasis on social life, promiscuous or chaste, detracts from a stable worthwhile home environment for the child.

McKim, supra, the last case in the triology, is perhaps the strongest statement in favor of a change in custody. The record in *McKim* was that a man had spent "many nights" in the mother's home. The court held that repeated sexual misconduct was a basis for a change of custody from the mother to the Department of Pensions and Securities.

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The mother tried to rely upon *Patterson*, asserting there was no evidence that the children were present when she engaged in the alleged conduct. The court delivered a strong statement that it has yet to apply with force to any other case:

> We observe that in the absence of any evidence that the children were present on such occasions, it was only reasonable for the court to conclude that they were there in their own home. . . . To construe what was said in the *Patterson* case to mean that repeated immoral conduct by a parent in the home of the children or with their knowledge, particularly impressionable teenagers, may not be reason for removing custody from such parent, is to err. Neither would it be proper to conclude from *Patterson* that sexual misconduct must occur in the physical presence of children for it to be material to their welfare. *McKim*, 440 So.2d at 563.

While *McKim* is a strong precedent for the proposition that indiscreet conduct need not occur in the presence of the children to cause a substantial detrimental effect, it is at odds with later precedent which has held that cohabitation with the knowledge of the children, even on a regular basis, is not enough. *See, e.g., Wade, supra*. Indeed, the court has sounded a retreat from the strong holding of *McKim*. It will not presume detrimental effect from the child's knowledge of such conduct, but requires a showing of a substantial detrimental effect upon the child. *Smith, supra*.

The vexing problem in these cases is defining "substantial detrimental effect." Judge Kenneth Ingram, formerly of the court of civil appeals and now sitting on the Alabama Supreme Court, deserves credit for eloquently addressing this issue in *Jones, supra*. The majority reversed the trial court, which had placed restrictions upon a father's visitation. The trial court based its limitations upon the father's open cohabitation with his girlfriend. In his dissent, Judge Ingram discussed authority from various jurisdictions which support the contention that restrictions on visitation and changes of custody are proper if indiscreet conduct is shown. Judge Ingram's conclusion is pointed:

> [P]rotection of a child's moral development should properly be a concern of our courts as part of the judicial search for the best interest of the child. I believe that courts can and should be involved in preventing the undermining

of a child's respect for marriage and the family. Like the majority, I feel a parent's immoral or indiscreet conduct is a factor to be evaluated by trial judges in the determination of both custody and visitation. I would hold, however, that a Court should assign considerable negative impact to the conduct of a parent who engages in continuous or repeated immoral or indiscreet sexual relationships, such as the cohabitation out of wedlock with a member of the opposite sex presented in the instant case. *Jones*, 537 So.2d at 951 (Ingram, J., dissenting).

Judge Ingram's overriding concern is that "substantial detrimental effect" not be equated with "tangible harm." *Jones*, 537 So.2d at 952 (Ingram, J., dissenting).

The latter point is well-taken. If, indeed, the job of courts is to protect the best interests of the child, then it would be questionable to use a standard which makes court action dependent upon proof of actual harm to a child. Nevertheless, the author would note that assigning "considerable negative impact" to cohabitation may be a move down the proverbial "slippery slope" to a *per se* rule. This would keep the focus of these cases upon the moral fitness of the ex-spouse instead of upon the overall best interests of the child.

In any event, the appellate courts have not adopted the views of Judge Ingram and have continued to insist upon a showing of substantial detriment, even in the face of admitted conduct. *Wade, supra*. Of particular note, however, is *Durham, supra*, in which the court of civil appeals issued a warning to the mother (who had retained custody) that "these cases are never *res judicata* and that, if certain conduct occurs or reoccurs, custody may well be changed." *Durham*, 555 So.2d at 1094. The decision, of course, provides no clue as to what "certain conduct" might justify a reconsideration as to custody.

V. Practice considerations

How, then, can one show substantial detrimental effect without showing tangible harm to the child? Certainly, those who seek to change custody as a result of indiscreet conduct must abandon any notion that simply showing the existence of such conduct will suffice. The author's review of the pertinent cases reveals that the moving parties rely almost exclusively on the mere fact that indiscreet sexual behavior is happening, perhaps believing that such is sufficient. This may well result from the confusion of moral precepts with legal ones.

A shift of the focus from the behavior itself to the tangible consequences of the behavior for the children (in the vein of the *Medlin* case discussed above) would provide the trial court with a better predicate for its actions. Unfortunately, proving the effect of the conduct upon the child may involve taking steps that are expensive, both financially and emotionally.

Expert testimony could be very valuable in establishing the impact (or lack thereof) of the indiscreet conduct on the child. In *Benton, supra*, for example, the court cites the testimony of a social worker, noting that "it was her opinion that as a professional in child welfare that the fact that the mother and stepfather were not married at that time was not 'out of the ordinary' and had no adverse effect upon the child." *Benton*, 520 So.2d at 535.

Parents, lawyers and judges will also have to consider involving the children themselves in the custody proceedings. The understandable reluctance of parties and their attorneys to involve children in the proceedings, regrettably, may give way to the demands required in proving substantial detriment. Friends of the family, clergy, and school teachers, as well, could often provide an assessment as to detrimental effect.

In closing, the author hopes that these suggested steps in preparing a case involving indiscreet sexual conduct will not be deemed onerous. The proper resolution of custody cases is desperately vital to the well-being of the children. The collective goal of the bench and bar must be to provide the trial court with all the information it needs to justly decide these matters.

FOOTNOTES

1. Although this article is addressed to child custody modification cases, the analysis is equally applicable to visitation cases. *See Jones v. Haraway*, 537 So.2d 946 (Ala.Civ.App. 1988).
2. For an excellent general discussion of child custody modification issues, see Fernambucq & Pate, *Family Law in Alabama: Practice and Procedure*, Sections 10.1-10.11 (*Michie*, 1986).

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Bank Customer Privacy in Alabama

by Bradley R. Byrne

In any deposit or loan relationship between a bank and its customer, a significant amount of information is generated about the customer and kept in the bank's files. A bank's records and information on a depositor will show the sources from whom the depositor receives money, how much he or she receives, when it is received, and to whom and when the depositor pays money and in what amounts. Loan files customarily contain financial statements showing assets and liabilities, credit histories, and, in many commercial loans, a host of data about the borrower's organization and operations.

Not surprisingly, most bank customers, whether businesses or individuals, regard such information as private and confidential. They do not intend for their bank to disclose documents and information to competitors, other banks and creditors, those in positions adverse to the customer, or, indeed, to anyone in the public at large. Generally, courts have acknowledged a customer's expectation of privacy and banks' qualified duty of confidentiality. R. Huhs, "To Disclose or Not to Disclose Customer Records," 108 *Banking L.J.* 30 (1991).

Although various federal statutes provide protection for bank customer records and information, these protections are limited in scope, and many states have also provided assurances of the privacy of such records by constitutional or statutory provision. Unfortunately, for banks and customers alike, there is no such broadly stated protection in Alabama law, either constitutional or statutory. Further complicating this issue is authority from some jurisdictions which *requires* disclosure of such information by banks under certain situations. *See id.* at 41-50.

This article examines the federal statutes that apply to the privacy of bank customer records; reviews the Alabama authority which relates to the issue; provides some pointers to counsel for banks, bank customers, and those seeking information from banks; and, finally, proposes adoption of a statute which clarifies the law in this area.

Applicable federal statutes

Four federal statutes have some applicability in this area: the Right to Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422; part of the Tax Reform Act of 1976, 26 U.S.C. §7609; the Fair Credit Reporting Act, 15 U.S.C. §§1681-1681t; and the Electronic Funds Transfer Act, 15 U.S.C. §§1693-1693r, and its implementing regulation, Federal Reserve Regulation E, 12 C.F.R. Part 205. Each of these measures contains very specific provisions which should be followed carefully and which are explained in general terms below.

A. The Right to Financial Privacy Act—This statute prohibits a bank from releasing information or documents to a federal department or agency, unless specified procedures and requirements are followed, 12 U.S.C. §3405, including agency notice to the customer of the request, and certification by the department or agency to the bank that it is in compliance with the Act. 12 U.S.C. §3403. Absent compliance with these procedures and requirements, the bank should not release documents pursuant to a federal agency's request. The Act is limited to documents and information regarding bank customers who are individuals or small partnerships of less than six individuals, 12 U.S.C. §3401(4), and does not apply to limited information regarding suspected violations of law, information incidental to perfecting a security interest or collecting a debt (including a claim in bankruptcy) or information relevant to a government loan

guaranty or the like. 12 U.S.C. §3403. The Act is riddled with other exceptions and limitations, 12 U.S.C. §3413, which should be closely reviewed.

B. Tax Reform Act of 1976—The Right to Financial Privacy Act does not restrict disclosure of records and information to the Internal Revenue Service. 12 U.S.C. §3413(c). The Tax Reform Act of 1976 contains a provision establishing requirements and procedures for issuance of a summons to a third party at the instigation of an Internal Revenue officer. 26 U.S.C. §7609. Like the Right to Financial Privacy Act, this statute has a requirement of agency notice to the customer of the request, and a number of exceptions and limitations. It is not limited to individuals or small partnerships, however. 26 U.S.C. §7701 (a)(1).

C. Fair Credit Reporting Act—This statute generally prohibits improper disclosure and use of information maintained by a credit-reporting agency. 15 U.S.C. §§1681b—1681o. Bank customer documents and information are generally excluded from the Act because they contain "information solely as to transactions or experiences between the consumer and the person making the report." 15 U.S.C. §1681a(d)(A). On the other hand, information which a bank obtains outside of its own transactions or experiences with the consumer, particularly information from other lenders or from a credit-reporting agency, does fall within the Act's restrictions. Such information should be disclosed only under the circumstances and the purposes outlined in the Act.

D. The Electronic Funds Transfer Act and Regulation E—This statute and regulation presume that some information concerning customer checking accounts will be disclosed to third parties in the ordinary course of business in a bank's handling of electronic funds transfers. 15 U.S.C. §1693 (a)(9); 12 C.F.R. §205.7(a)(9). The circumstances under which such information will be divulged must be disclosed to the customer. *Id*While neither the statue nor the regulation defines "ordinary course of buiness," Appendix A to the regulation provides the following model disclosure clause:

(a) Account information disclosure—We will disclose information to third parties about your account or the transfers you make:

> (1) Where it is necessary for completing transfers, or
> (2) In order to verify the existence and condition of your account for a third party, such as a credit bureau or merchant, or
> (3) In order to comply with government agency or court orders, or
> (4) If you give us your written permission.

12 C.F.R. Part 205, App. A at §A(7). Use of such model forms protects the bank only from liability under the Electronic Funds Transfer Act, 15 U.S.C. §1693 m(d)(2), and does not necessarily ensure protection from liability under other laws.

The applicable Alabama law

Many of the legal disputes in this area occur outside of the federal statutes described above. Indeed, much of the law on bank customer privacy consists of judicial decisions under state common-law theories holding banks liable for disclosing bank customer records and information. *See annot.*, 81 A.L.R. 4th 377 (1990). These theories include breach of a contractual duty of confidentiality, invasion of privacy, defamation, breach of trust, interference with business relations, common-law negligence, and the tort of outrage. *Id.*

Some states, by constitution or statute, specifically enumerate the circumstances under which such records or information can be disclosed without incurring liability, and when a bank will be held liable for disclosure. D. Nicewander, "Financial Record Privacy—What Are and What Should Be the Rights of the Customer of a Depository Institution," 16 *St. Mary's Law Journal* 601, 621-23 (1985). These constitutional and statutory provisions have the salutary effect of clarifying a bank's responsibilities and duties with respect to customer information.

Unfortunately, Alabama has no single statute which expressly deals with the privacy of bank customer records or information. Nor have the Alabama courts addressed the issue of the extent of the privacy rights of bank customers. There are several statutes which speak, at least in part, to the issue, and two cases which suggest that Alabama courts are inclined to give broad recognition to the privacy interests of bank customers.

The most directly applicable Alabama statute is found at Section 5-5A-43 of the *Alabama Code*. That statute is headed "Disclosure of Customer Financial Records" and reads as follows:

> A bank shall disclose financial records of its customers pursuant to a lawful subpoena, summons, warrant or court order issued by or at the request of any state agency, political subdivision, instrumentality, or officer or employee thereof and served upon the bank. No bank director, officer, employee or agent thereof shall be held civilly or criminally responsible for disclosure of financial records pursuant to a subpoena, summons, warrant or court order which on its fact appears to have been issued upon lawful authority.

Ala. Code §5-5A-43 (1981 repl. vol.). According to the comment following this statute, it was enacted for the first time in Alabama in 1980 as part of the new Banking Code.

Like the Tax Reform Act of 1976, Title 40 of the *Alabama Code*, on Revenue and Taxation, has a specific provision for

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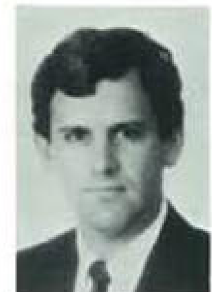

third-party summons by the State Department of Revenue. *Ala. Code* §40-2-11(8) (1985 repl. vol.). The Alabama provision is much less strict and, indeed, allows such a summons on a broad basis. A critical exception exists for bank customer deposit records, however: "provided, that no officer of any bank or banking institution shall be required to disclose to the department or any of its agents or clerks the deposits of its customers except upon order of court." *Id.* This provision, which originated in 1935, echoes Section 5-5A-43. Nevertheless, in the only reported decision under this provision, the court of civil appeals has held that it does not preclude the Department from issuing writs of garnishment for bank customers' accounts. *Ex Parte Alabama Nat'l Bank of Montgomery*, 375 So.2d 263 (Ala.Civ.App. 1979).

And the Alabama Business Corporation Act, *Ala. Code* §§10-2A-1 *et seq.* (1987 repl. vol.), specifically prohibits the production of bank customer records to non-insider shareholders:

> Provided, however, if a corporation is engaged in the business of banking, its books and records of account and minutes relating to the private financial affairs of borrowers and depositors who are neither officers, directors or employees of the bank nor who are related to or engaged in business with an officer, director or employee shall not be subject to examination by such a stockholder or by his agent or attorney in the absence of an order of a court of competent jurisdiction, after inspection of such books and records of account and minutes in camera, that such examination is necessary; and said order shall be subject to review in the Supreme Court of Alabama on writ of mandamus. Provided, further, that if a corporation is engaged in the business of banking, its said books and records of account and minutes shall be deemed not to include any reports of examination by state or federal supervisory agencies nor any actions taken nor reports made by the corporation to bank supervisory authorities pursuant thereto.

Ala. Code §10-2A-79 (1987 repl. vol.) Once again, a court order is required, but is to be granted only after *in camera* review by the court and a finding that the production is necessary, which the statute expressly makes reviewable by the supreme court on a writ of mandamus.

These statutes state what is perhaps obvious to most attorneys: bank customer records ordinarily should be produced only pursuant to a court order. For bank counsel, Section 5-5A-43 provides comfort that the bank will not be held liable for disclosing customer records pursuant to a facially valid court order, subpoena, summons or warrant.

Only two of these statutes, however, address requests for bank customer records where process of court is not used. Such requests, by non-insider shareholders of banks, or by the state Department of Revenue as to deposits, should be refused. What about an information request by a third party, such as another financial institution or an employer? What about requests under Rules 33 and 34 of the Alabama Rules of Civil Procedure? The comment to Section 5-5A-43 plainly states, "Customer records should be disclosed only upon subpoena or court order." Although the next sentence in the comment states that the section "governs disclosure to sate instrumentalities," Section 5-5A-43 and the other Alabama statutes cited herein express a strong public policy favoring the confidentiality of bank customer records and information.

While there are no reported decisions under Section 5-5A-43, there are two re-

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ported decisions in Alabama which indicate the judicial propensity on this issue. In *U.S. v. First Nat'l Bank of Mobile*, 67 F.Supp 616 (S.D. Ala. 1946), *modified*, 160 F.2d 532 (5th Cir. 1947) the court addressed a bank's refusal to produce customer records to the Internal Revenue Service under an Internal Revenue Code provision antedating the Tax Reform Act of 1976. As one of the grounds for its refusal, the bank cited its "fiduciary relationship" with its customers, especially as the request covered records for customers other than the taxpayer involved in that case. 67 F.Supp at 619. The court required the production because it found, under this pre-1976 statute, no violation of any confidential relationship, but in so doing made the following statement:

> No one questions its [the bank's] right to protect its fiduciary relationship with its customers, which in sound banking practice, as a matter of common knowledge, is done everywhere.

67 F.Supp at 624 (bracketed material added).

More recently, in *Jacksonville State Bank v. Barnwell*, 481 So.2d 863 (Ala. 1985), Justice Houston, writing for a unanimous supreme court, affirmed a general verdict against a bank for, *inter alia*, invasion of privacy. The *Barnwell* case, however, presents extreme facts which are not typical of requests to a bank for customer records. The plaintiff in *Barnwell* sued because of improper efforts by the defendant bank to collect a debt, including making between 28 and 35 harassing telephone calls and wrongfully attempting to repossess the plaintiff's automobile, even though the bank had no security interest in or lien on the vehicle. 481 So.2d at 864-65. While the facts in *Barnwell* do not present a case of third-party requests for bank customer information, and constitute extreme circumstances, both the language used in the opinion and the court's unanimity indicate the supreme court's concern for privacy interests of bank customers.

Given the emerging common law from around the nation, it is probable that a case soon will reach the Supreme Court of Alabama which more squarely presents the issue of bank customer privacy. While it is impossible to predict the outcome in such a case, the existing statutory and decisional authority indicate a strong public policy favoring customer confidentiality.

Of greater difficulty is the authority from other jurisdictions which seem to impose a duty of disclosure to third parties, even in the absence of a court order. The Alabama Supreme Court has not directly addressed this issue but has held that the creditor-debtor relationship between a bank and its loan customer does not create a general duty of disclosure absent customer reliance on the bank for financial advice or "other special circumstances." *Bank of Red Bay v. King*, 482 So.2d 274, 285 (Ala. 1985). Hence, in an arm's length transaction, a bank is not obligated to disclose facts regarding one customer to another customer. *Lee v. United Fd. Sav. & Loan Ass'n*, 466 So.2d 131 (Ala. 1985). *But see Associates Financial Serv. Co., Inc. v. First Nat'l. Bank of Mobile*, 292 Ala. 237, 292 So.2d 112 (1974) (under extraordinary circumstances a bank may be required to disclose customer information to third-party guarantors).

Pointers for counsel

Nearly all attorneys confront this issue at some point in their practice, either as counsel for a bank, a bank customer, or a third party seeking customer records or information from a bank. How should attorneys in Alabama proceed in light of the authority cited above?

First, if acting as bank counsel, caution is the obvious advice. Third-party requests should be honored only if made under a court order or valid administrative process, with written permission from the customer, or pursuant to one of the federal statutes discussed in this article. A bank should divulge information on its own initiative only under extreme circumstances, such as when there is reason to suspect fraudulent or criminal conduct, especially a check-kiting scheme involving two or more banks, where sharing of limited information is critical, or when the facts may impose a duty on a bank to disclose information to a third party because that third party is relying on the bank for advice. Even then, however, the information divulged

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should be carefully considered and limited to that which is necessary. Whether information is divulged pursuant to court order, administrative process, or on the bank's own initiative, the customer should be informed of the request or need to divulge, and given an identification of the documents or information produced.

Second, if one is counsel for a bank customer, it is appropriate to object to the release of information or records without the customer's authorization. If such records or information already have been released, the theories of common-law liability emerging from other jurisdictions should be considered.

Third, if one is counsel for a third party seeking bank customer records or information, it is likely that the request will be successful only if accompanied by a subpoena, summons, warrant or court order, or with permission of the customer. When these conditions cannot be satisfied, then the bank will have to be convinced of the critical need for the information sought and shown how the bank will or will not be affected by release of the information. Be aware that bank counsel is likely to be very cautious in advising the release of documents or information.

Finally, counsel for all parties will struggle with discovery requests under the Alabama Rules of Civil Procedure. Since such requests are normally not court orders or administrative process, bank counsel should consider objecting to and refusing the production, even though the bank is a party. Although there is no reported decision on the issue, most Alabama trial judges (indeed, in this writer's experience, *all* trial judges) will recognize any bank's legitimate need to protect the confidentiality of customer information and sustain the objection or enter an order requiring the production usually with appropriate limitations and protections. Counsel for all parties should work together, however, to agree in advance either on the propriety and extent of production, including measures to ensure that the discovering party will maintain the confidentiality of information produced, or on the appropriate basis for a court's order.

Need for an Alabama statute

As has been mentioned, many states by constitution or statute provide clear, positive law on this issue. Alabama should follow these states in enacting its own statute. While the scope of this article does not permit a review of the provisions from other states, several key points should be included in any such statute.

First, the statute should expressly declare that bank customers have a right of privacy in their records and information held by a bank, including confidential information on the customer that is obtained by the bank from third parties.

Second, banks should be prohibited from disclosing such information and records, except in situations clearly enumerated by the statute. Banks thereby would be protected from requests by third parties which do not satisfy the statutory requirements for disclosure, and there would be no common-law duty to disclose documents or information outside the exceptions.

Third, the exceptions should include production or disclosure:

—With the customer's written consent;
—Pursuant to facially valid court orders and administrative process;
—To state and federal bank regulatory agencies;
—Of information pursuant to the Fair Credit Reporting Act and as part of the check-clearing and electronic fund-transfer process;
—With limitations, when the bank has reason to suspect a violation of state or federal law;
—Where the bank has reason to suspect fraudulent conduct, check kiting schemes, and the like, pursuant to *ex parte* court orders; and
—Where the bank's interests clearly require disclosure.

Fourth, the procedure for obtaining court orders should include *in camera* review of the records, a finding of necessity and the right to appeal by mandamus, such as the Corporation Code now provides.

Fifth, banks and their officers, directors, and employees should be absolved from liability when they divulge or refrain from divulging information or records in accordance with the exceptions and procedures contained in the statute.

Conclusion

While the law in Alabama clearly shows a public policy favoring bank customers' rights or privacy in information maintained by their banks, practicality dictates that some such information and records appropriately will be released to third parties on some occasions. Under the present state of authority in Alabama, banks would be imprudent to release such information or records absent a court order, appropriate administrative process, customer consent, or, on a very limited basis, when the bank's interest requires disclosure. The need for further clarification is clear. The beneficiaries of such a clarification would be banks, bank customers and, indeed, the public at large. ■

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Medicare as a Secondary Payer Where Services are Reimbursable Under Automobile Medical, No-fault or Any Liability Insurance

by Gray Parker

Every day, cases are settled by attorneys without protecting the subrogation interest of the Medicare program. Many attorneys are not aware that Medicare has a subrogation right. Others are under the misconception that if they are not notified by Medicare of its subrogation interest, then Medicare's rights are forfeited. This is not true. As stated below, Medicare's right of subrogation is clearly defined by federal law.

Until 1980, when Congress mandated that Medicare pay only secondary benefits in certain situations, the program had generally assumed a position of primary payer responsibility for its beneficiaries. Since that time there have been other changes in the Medicare law which have added new circumstances under which Medicare is a secondary payer.

Medicare Secondary Payer is essentially the same concept known in the private insurance industry as "Coordination of Benefits" and refers to those situations where Medicare does not have primary responsibility for paying the medical expenses of a Medicare beneficiary. The main purpose of this presentation is to clarify those circumstances under which Medicare is the secondary payer.

Medicare Secondary Payer is not a completely new concept, since some other programs have been primary to Medicare since its inception. Services for which benefits are payable under Workers' Compensation plans, the Federal Black Lung Program or authorized by the Veterans Administration have always been excluded from payment under Medicare. The Medicare program, however, can pay secondary benefits in certain situations where these programs do not pay for services in full.

Currently, one of the areas addressed by recent legislation making Medicare secondary payer is where services are reimbursable under automobile medical, no-fault or *any* liability insurance.

Medicare's right of subrogation

The establishment of Medicare as a secondary payer and authorization of the Medicare program to seek reimbursement of its overpayment has its basis in §1862(b) of the Social Security Act [42 U.S.C. §1395y] as amended by §953 of the Omnibus Budget Reconciliation Act of 1980 [Pub. L. 96-499, 94 Stat. 2647 (1980)]. Prior to the adoption of §953, this legislation had originally focused on Medicare as a secondary payer when another insurance policy, plan or law, such as Workers' Compensation coverage, could also make payment. With the adoption of §953, this secondary payer status was expanded to specifically include "an automobile or liability insurance policy or plan (including a self-insured plan) or under no-fault insurance."

The specific legislative intent of the Omnibus Budget Reconciliation Act of 1980 was to establish Medicare as a secondary payer in instances where an automobile medical, no-fault, liability insurance plan or policy was available, and that Medicare, once it had made a payment, would seek reimbursement.

In April 1983, the Secretary for the Department of Health and Human Services issued a final rule designed to implement the statutes. This rule, presently codified at 42 C.F.R. §405.322-325 (1987) includes a description of the various types of insurance which are to be deemed primary, and the procedures involved for recovering its overpayment when a situation involving a primary insurer exists.

It is important to note that "automobile medical or no-fault insurance" has been defined as ". . . automobile insurance (including self-insured plans) that pays for all or part of the medical expenses for injuries sustained in the use, occupancy or operation of an automobile, regardless of who may have been responsible for causing the accident. (This insurance is sometimes called 'medical payments coverage', 'personal injury protection', or 'medical expense coverage'.)" 42 C.F.R. [405.322(b) (1987)].

"Liability insurance" has been defined as "insurance (including a self-insured plan) that provides payment based upon legal liability for injuries or illnesses or damages to property. It includes, but is not limited to, automobile liability, uninsured motorist, homeowner's liability, malpractice, product liability, and general casualty insurance. This exclusion does not apply where the homeowner receives payment under his or her *own* homeowner's insurance policy since such a payment does not constitute a liability insurance payment."

This regulation 42 C.F.R. [405.322(b) (1987)] also established that Medicare would be secondary to automobile medical or no-fault insurance and liability insurance "even though State law or

the insurance policy or plan states that its benefits are secondary to Medicare's or otherwise excludes or limits its payments if the injured party is also entitled to Medicare Benefits." 42 C.F.R. §405.323(b) (1987).

As noted above, the original focus of this legislation had been to establish Medicare as secondary when a workers' compensation law or plan was available; that original focus has not changed. The codification of this legislation can be found at 42 C.F.R. §405.316-321 (1987).

Instructive cases are *Colonial Penn Ins. Co. v. Heckler*, 721 F.2d 431 (3rd Cir. 1983) and *Abrams v. Heckler*, 582 F.Supp. 1155 (S.D. N.Y. 1984). These cases recognized the Congressional intent to establish Medicare as a residual rather than primary payer, and recognized that any state law which would interfere with this intent would be superseded.

In addition to judicial decisions establishing the federal right of subrogation, Congress, in enacting the Deficit Reduction Act of 1984 [Pub. L. 98-369, 98 Stat. 1095 (1984)], specifically established the right of the United States to bring direct litigative action against any entity responsible for primary payment and clarified the ability of the United States to be subrogated to "any right of an individual or any other entity to payment."

Another modification to the enforcement abilities of the United States in regard to Medicare as a secondary payer came about with the passage of the Omnibus Budget Reconciliation Act of 1986 [Pub. L. 99-509, 100 Stat. 1874 (1986)]. This act amended 1862(b) of the Social Security Act to create a private cause of action for damages "in an amount double the amount otherwise provided" against any "Workers Compensation law or plan, automobile or liability insurance policy or plan or no-fault insurance plan, group health plan, or large group health plan" which has been deemed primary and "fails to provide for primary payment (or appropriate reimbursement) . . . 42 U.S.C. §1395y(b)(5) [1987].

Attorney's fee

An often-asked question in regard to the Medicare program's primary right of overpayment reimbursement has been whether beneficiary counsel is entitled to collect a fee from the amount to be reimbursed. Unlike Blue Cross and Blue Shield of Alabama or other such entities, who as a private contractual insurer permits the payment of a fee to the attorney for recovering its funds, Medicare does not permit a direct payment of a fee for recovery of its overpayments. As noted earlier, Medicare has its entitlement to recovery of its overpayments expressly stated in federal law. This legislation has provided for several methods of collecting its reimbursement, including direct litigation against any entity responsible for payment, and offset against any monies owed the beneficiary by the federal government, such as Social Security benefits. 42 C.F.R. §401.607(d)(1).

As set forth by existing regulations, if Medicare is billed for goods or services that can reasonably be expected to be covered by an automobile medical or no-fault insurance policy or plan or under a workers' compensation law or plan of the United States or a state, then any request for Medicare payments will be denied. 42 C.F.R. §405.316(a); 405.322(c) [1987]. If, however, an automobile medical or no-fault insurance plan, policy or coverage, or a workers' compensation plan policy or coverage has made payment (or can reasonably be expected to make payment) for services for which Medicare has made payment as well, the Medicare program will seek reimbursement up to the amount paid by Medicare for that good or service. 42 C.F.R. §405.316(a), (b); 405.323(c) [1987].

There are situations, however, where the Medicare program will accept less than its actual payment as payment in full. Should the Medicare program's reimbursement be made from monies received as a *liability* insurance payment (regardless of its designation i.e., pain and suffering), the Medicare program will permit a reduction from the amount due for a proportionate share of the costs of procuring the payment. This computation, set forth at 42 C.F.R. §405.324(b), will allow for costs the beneficiary has incurred (including the fee arrangement between the beneficiary and counsel) in order to obtain the payment. It may be necessary for counsel to submit a copy of the settlement sheet, listing the procurement costs at time of settlement.

Medicare will not share in the procurement costs involved in collecting automobile medical benefits. Therefore, when notifying Medicare of the settlement received, benefits received through automobile medical payments should be separated from those benefits received through liability payments.

Statute of limitations

With regard to an applicable statute of limitations, it would be beneficial to review 28 U.S. §2415(a) and §2416 which states that " . . . every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . . ."

Thus, the Medicare program will have six years from the date it determines an overpayment has been made to enforce reimbursement of the overpayment.

Compromise or waiver

Many times, an attorney or agent for the Medicare beneficiary will request that Medicare agree to a compromise or total waiver of its subrogation lien in a

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particular case. A compromise or waiver is only granted in cases of hardship. If repayment of Medicare's lien would interfere with the beneficiary's ability to pay for ordinary living expenses, there is a chance that a compromise or waiver may be granted.

The appropriate hardship forms must be completed by the beneficiary and his or her attorney and returned to Medicare. The forms and request then will be forwarded to Medicare's regional office for a preliminary decision, and then on to Medicare's headquarters in Baltimore, Maryland, for the final decision on a compromise or waiver.

The entire decision process can take up to six months to complete. For this reason, attorneys wishing a compromise or waiver need to notify Medicare as soon as possible so that action will not be delayed more than is necessary.

Notification

Under existing law, there is no express requirement for notice of Medicare's involvement to be communicated to the beneficiary; if any payment is made by Medicare for an item or service rendered a beneficiary, and a payment for that same item or service is also made by an insurance plan, policy or coverage that is primary to Medicare, the Medicare payment *must* be reimbursed. 42 C.F.R. §405.316(b); 405.322(c), (d); 405.323; 405.324(a) [1987]. Specifically, it is noted in relation to situations involving automobile medical or no-fault insurance or liability insurance that "failure to send notice does not relieve the beneficiary of the obligation to refund the conditional payment." 42 C.F.R. §405.323(c)(5), 405.324(a)(5) [1987].

All attorneys need to inquire of all potential clients if they are a Medicare beneficiary. (Some Medicare beneficiaries are under age 65 if entitled to Medicare because of a disability.) If your client is on Medicare, please notify the department listed below as soon as possible to inform Medicare of your representation. Please include with your correspondence the name of the beneficiary, the beneficiary's Medicare number (Health Insurance Claim number), the date of the accident and any known providers of service.

Because Medicare's right of subrogation is set out in federal law, every state has the right of subrogation. Please inform Medicare in which state the accident or loss occurred. Medicare will contact the Medicare intermediaries in the appropriate state. The intermediary for the state that has paid out the most in benefits as a result of the accident or loss will be the lead carrier. All further action will be handled from this lead office.

By notifying Medicare at the onset of your case, there will be ample time to gather all of the information needed by the time you are able to negotiate your case.

Please direct all correspondence to:

Medicare Secondary Payer Unit
P. O. Box 12647
Birmingham, Alabama 35202

or call Medicare's Customer Service Department at (205) 988-2244. ■

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Notice

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Anyone wishing to submit articles for publication in the *Journal* should forward them to Box 5077, University of North Alabama, Florence, Alabama 35632-0001.

Notice

Office of the Chief Justice, November 26, 1990
Admininstrative Order

The administrative order of October 17, 1990, relating to "attorney calendar conflict resolution" is amended to read as follows:

Whereas, by Order of the Supreme Court dated June 12, 1990, time standards relating to delay reductions were adopted and became effective October 1, 1990, and

Whereas, lawyers engaged in a trial practice from time to time may be scheduled to appear in more than one court at the same time and on occasion after due diligence may be unable to resolve such a scheduling conflict, and

Whereas, the impact of time standards may significantly increase the number of scheduling conflicts and create a need for a procedure for resolving them,

Now, therefore, it is here ordered that an "Attorney Calendar Conflict Resolution Order" be, and it hereby is, adopted, to read in accordance with the appendix to this administrative order, and it is ordered that that order appearing in the appendix shall be incorporated as a part of this administrative order.

It is further ordered that the Hon. Richard L. Jones be, and he hereby is, appointed to resolve the conflicts that are not resolved by consultation of the judges and attorneys involved in the conflicting cases.

It is further ordered that this administrative order shall be effective October 22, 1990, and that it thereafter be evaluated based upon actual experience. At the expiration of six (6) months from its effective date, this order may be modified in accordance with the results of the evaluation.

Done by Administrative Order of the Chief Justice of the Alabama Supreme Court.

—Sonny Hornsby, Chief Justice

Appendix
Attorney Calendar Conflict Resolution Order

Whenever an attorney receives notice of the setting of any case for trial or of any motion for a hearing, the attorney shall immediately review his or her calendar and determine if the setting causes a scheduling conflict.

When an attorney is scheduled to appear in more than one court at the same time, or within such a short period that the attorney cannot reasonably be expected to appear in both courts, he or she shall, upon receipt of the notice producing the conflict, immediately attempt to make adequate arrangements for representation of each client's interest by substitution of counsel or shall otherwise attempt to resolve the conflict by consulting with counsel representing the adverse parties in the conflicting cases.

If the attorney is unable to resolve the conflict by the means suggested in the last paragraph, he or she shall promptly attempt to resolve the conflict by filing an appropriate motion with one or more of the courts involved.

If the attorney is unsuccessful in resolving the conflict by motion, he or she shall forthwith consult the judges involved in the conflicting cases, notifying them of the efforts he or she has made to resolve the conflict and of the fact that those efforts have been unsuccessful.

It shall be the duty of the judges involved to resolve the conflict by consultation and to notify the attorney of the resolution. In the event the judges involved cannot resolve the conflict, then either attorney may request that the conflict be resolved by a judge or a panel of judges appointed by the chief justice.

No resolution of a conflict shall result in a continuance unless a continuance is expressly ordered by a trial judge.

Once there has been entered an order establishing a priority among conflicting cases, that order will not relieve an attorney from appearing in secondary proceedings in the event the priority case is settled, dismissed, or rescheduled for whatever purpose.

Legislative Wrap-up

by Robert L. McCurley, Jr.

We now have 29 lawyers in the Legislature or about 21 percent of the 140 members.

In the Senate there are 17 lawyers or almost 50 percent. Of the eight new senators, six are lawyers. This is an increase of four lawyers from the last Legislature. The following lawyers are now serving in the Legislature:

James P. Smith, Huntsville
Don Hale, Cullman
Bob Wilson, Jr., Jasper
Jack Floyd, Gadsden
Doug Ghee, Jacksonville
Frank Ellis, Columbiana
John Amari, Birmingham
Mac Parsons, Hueytown
Earl Hilliard, Birmingham
Ryan deGraffenried, Tuscaloosa
Pat Lindsey, Butler
Hank Sanders, Selma
Charles Langford, Montgomery
Ted Little, Auburn
Wendell Mitchell, Luverne
Michael Figures, Mobile
Steve Windom, Theodore
David Barnes, Birmingham
Mark Gaines, Birmingham

In the House of Representatives, there are only 11 lawyers (10 percent). Two excellent lawyer/legislators, Bill Slaughter and Beth Marietta-Lyons, chose not to run for re-election. However, four additional lawyers were elected: Marcel Black of Tuscumbia, Hugh Holladay of Pell City, and, from Birmingham, David Barnes and Mark Gaines. Returning to the House of Representatives are:

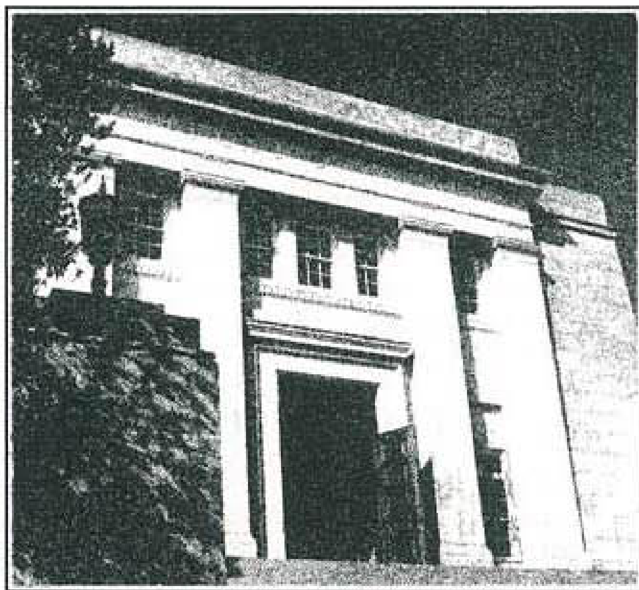
Morris Brooks, Huntsville
Tom Drake, Cullman
Jim Campbell, Anniston
Bill Fuller, LaFayette
Demetrius Newton, Birmingham
Phil Poole, Moundville
Michael Box, Mobile

This increase in lawyers in the Legislature reverses a downward trend that began in 1971 when the Senate was composed of 40 percent lawyers and the House contained 28 percent attorneys. Overall, the membership of the Legislature changed very little. The Senate has eight new legislators (77 percent returns) while the House has 23 new lawmakers (78 percent returns). This is in contrast to 97 percent of the United States Congress which returned.

The Legislature convened for an organizational session on January 8, 1991. Unlike the executive branch which was sworn in on January 14, 1991, legislators took office in November as soon as the election results were made official.

The 1990 Regular Session of the Legislature will begin April 16, 1991, and may continue until July 29, 1991. ■

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.



Recent Decisions

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

Recent Decisions of the Supreme Court of Alabama

Civil procedure . . . disinterested third parties may not be bound by *Robinson v. Hank Roberts, Inc.*

Tittle v. Alabama Power Co., 24 ABR 3884 (September 7, 1990). Alabama Power contracted with Combustion Engineering, Inc. for maintenance work at one of its steam plants. Tittle, an iron worker, performed maintenance work for Combustion and was injured when he slipped on some insulation dust. He sued Alabama Power, alleging that it negligently failed to make the premises safe. Alabama Power filed a motion for summary judgment, stating that it was merely the premises owner and, therefore, under no duty to make the premises safe. Tittle and his foreman, Nichols, filed affidavits in opposition to the motion for summary judgment. Alabama Power filed a motion to strike those affidavits, arguing that they contradicted earlier deposition testimony and could not be used to create a genuine issue of material fact under authority of *Robinson v. Hank Roberts, Inc.,*, 514 So.2d 958 (Ala. 1987). The trial court entered summary judgment for Alabama Power, and Tittle appealed. The supreme court reversed.

The supreme court acknowledged that it has held that when a *party* to an action has given clear answers to unambiguous questions that negate the existence of any genuine issue of fact, that *party* cannot later create an issue of fact by submitting an affidavit that directly contradicts, without explanation, that earlier testimony. The supreme court, however, noted that Nichols was *not* a party and that, to date, it has applied the aforementioned rule only to parties recognizing the motivation that they might have to fabricate a sham affidavit. The supreme court stated there is no reason to assume that disinterested third parties possess the same motive, and, thus, the logic that supports the application of the rule to parties is not present.

Insurance. . . UM benefits in death action not distributed under §6-5-410

Sprouse v. Hawk, 24 ABR 3685 (August 31, 1990). Mrs. Hawk was killed in an automobile accident with an uninsured motorist. She died testate, leaving all of her property to her husband. She was also survived by two sons. State Farm issued four policies, naming Mr. and Mrs. Hawk, and one policy, naming one of the sons, as the insured. Each policy provided for UM benefits and contained

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a payment provision which stated, "We will pay any amount due: (1) to the insured;. . .(3) to the surviving spouse . . . ." State Farm paid Mr. Hawk the combined policy limits of all the policies.

The sons contend that the UM benefits should be distributed in accordance with the Alabama Wrongful Death statute, §6-5-410, *Ala. Code* (1975), which is to be distributed in accordance with the statute of distribution. The trial court held that the UM proceeds were payable to the estate of Mrs. Hawk and divisible as a chose in action under her will. The supreme court affirmed.

The supreme court noted that an action to recover under the UM clause of a policy of insurance is an action *ex contractu*. In Alabama, there is no contractual claim for wrongful death. Section 6-5-410 is punitive and intended to punish. The UM statute is intended to *compensate*. Because they have different purposes, they cannot be read together to reach the result urged by the sons. Additionally, the policies have clear "payment-of-proceeds" clauses which provide for payment of proceeds to the spouse of the insured. Mr. Hawk, as the spouse, was entitled to the proceeds under the policy. Because the clause in not ambiguous, it will be enforced as written.

Medical malpractice . . .
"good faith" charges improper

Shumaker v. Johnson, 24 ABR 3371 (July 27, 1990). Shumaker experienced back spasms which progressed to numbness and weakness in both legs and she was taken to a hospital. She was examined by Dr. Johnson, and he noted that she had numbness in both legs. The X-rays showed no apparent spinal cord injury, and she was released. As she was getting off the examination table, her back popped and she became paralyzed.

She sued Dr. Johnson for negligence, and the jury returned a verdict in his favor. She appealed, contending that the "good faith error" jury charge was improper. The supreme court agreed and reversed.

The trial judge charged the jury that "a physician is not liable for an honest mistake or an honest error or judgment . . . ." The supreme court noted that the physicians' standard of care is clearly codified in §6-5-484, *Ala. Code* (1975), and there is no mention of "good faith" in the performance of his professional duties. Despite this fact, the supreme court acknowledged that the "honest mistake" rule has been followed for years in Alabama. However, the supreme court also noted that a growing number of jurisdictions have abandoned the "good faith" rule in recent years. Reversing prior authorities, the supreme court held that the "good faith error" charges should *not* be given in medical malpractice cases because of their potential for confusing the jury. Therefore, jury instructions should not contain language like "honest mistake, bona fide error or good faith error." Negligence that results in injury should support a finding of liability regardless of whether the act or omission involved an "honest error in judgment."

Torts . . .
trade association has duty of reasonable care in promulgating minimum safety standards

King v. National Spa and Pool Institute, Inc., 24 ABR 4215 (September 14, 1990). King's intestate dove into a pool from the diving board and hit his head on the bottom or side of the pool and sustained a broken neck and died. Mrs. King sued National Spa and Pool Institute, a trade association, alleging that it negligently promulgated minimum standards for residential pools by allowing a diving board in that type pool. National Spa moved for a summary judgment, arguing that it owed no duty to King's intestate. The trial court granted National Spa's motion, and Mrs. King appealed. The supreme court reversed.

In a case of the first impression in Alabama, the supreme court held that National Spa was under a legal duty to exercise due care in promulgating the standards in question. The supreme court reasoned that the trade association voluntarily undertook to promulgate minimal safety design standards for safe diving and disseminated those standards to its members to influence their design and construction practices, and it was foreseeable that harm might result to the consumer if it did not exercise due care. The supreme court stated that the fact that the standards are based on a voluntarly concensus of its members, or the fact that the trade association does not specifically control the acts of its members, does not, as a matter of law, absolve it of a duty to exercise reasonable care when it undertakes to promulgate standards for the "needs of the consumer."

Torts . . .
parent having legal custody may bring wrongful death action for minor

Rainer v. Feldman, 24 ABR 4502 (September 21, 1990). Rainer was the illegitimate child of Louis Vinson and Aretha Rainer. The child drowned in a swimming pool, and Vinson filed a wrongful death action pursuant to §6-5-391, *Ala. Code* (1975). Aretha Rainer subsequently filed a separate action based on the same statute. Vinson moved to dismiss Rainer's suit, and the court granted the motion, stating that §6-5-390 gives the father the right to bring the action. Rainer appealed, and the supreme court reversed.

The supreme court noted the §6-5-390, *Ala. Code* (1975), as amended, gives either the father or the mother the right to bring a wrongful death action. The father no longer has the priority. The statute provides that when the husband and wife are not lawfully living together "the party having legal custody . . . shall have the exclusive right to commence such action." Vinson and Rainer were never married and never lived together. There is a strong presumption in Alabama, which has not been modified or abolished either judicially or legislatively, that the mother of a child out of a wedlock has a superior right of custody over all other persons, absent good cause that custody should not be vested in her. The supreme court found no reason to ignore this presumption of custody, and the trial court erred in dismissing the mother's suit.

Worker's compensation . . .
§25-5-57(a)(4)b not unconstitutional

Ex parte David Atkins (Re: Atkins v. Gold Kist, Inc.), 24 ABR 3441 (July 27, 1990). Atkins settled a worker's compensation claim, and the circuit court entered judgment in his favor finding that he had a 70 percent permanent impairment of his ability to earn. Atkins' medical condition subsequently worsened, and he filed a motion to reopen the case, and ultimately alleged that §25-5-57(a)(4)b, *Ala. Code* (1975), is unconstitutional

since it permits an employer to request a review of a claim after adjudication, but does not provide the same right to the employee. The trial court denied Atkins' motion, and the court of civil appeals affirmed. On certiorari, the supreme court agreed with the lower courts.

The supreme court acknowledged that §25-5-57(a)(4)b treats employers and employees differently in that it allows the employer to reopen a case when the court has previously found the employee to be permanently and totally disabled. The supreme court noted that one of the principle objectives of the act is the rehabilitation of permanently totally disabled employees. By allowing employers to seek a reduction in the employee's disability classification, the act provides an incentive to the employer to rehabilitate the employee. In the process, the legislative purpose of having the employee rehabilitated is carried out. The legislation is therefore rationally related to a legitimate state interest and does not violate the equal protection clause.

Recent Decisions of the Alabama Court of Criminal Appeals

Probation revocation—hearsay alone not enough

Mallette v. State, CR-89-1054 (Ala.Crim. App., November 16, 1990)—Mallette contends that the trial court committed reversible error by revoking his probation solely based upon heresay evidence in the form of two laboratory analyses. A unanimous Alabama Court of Criminal Appeals agreed and remanded with directions.

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Some jurisdictions have upheld probation revocations based on hearsay where the hearsay evidence is demonstrably reliable or exhibits indicia of reliability; however, Alabama courts have consistently refused to sustain a revocation based solely on hearsay evidence. "While hearsay evidence may be admitted in probation revocation hearings in the discretion of the trial court, hearsay evidence cannot be the sole basis for revoking probation." *Ex parte Belcher*, 556 So.2d 366 (Ala. 1989); *Mitchell v. State*, 462 So.2d 740 (Ala.Crim.App. 1984).

In this case, the two laboratory reports showed traces of marijuana, and they were the sole basis for the revocation of probation. The persons who actually performed the tests were not called to testify.

The court of criminal appeals reasoned that "the use of such hearsay evidence as the sole means of proving the violation of the probation condition denied appellant the right to confront and cross-examine the person who originated the factual information which formed the basis for the revocation. For this reason, appellant was denied minimal due process of law and the evidence was insufficient to prove the alleged violation of probation."

Implied promise can negate voluntariness of confession

Jones v. State, CR-89-745 (Ala.Crim. App., November 16, 1990)—Can a police officer's statement to a suspect that "you can help yourself" amount to an implied promise that the defendant would receive lighter punishment and thereby negate the voluntariness of his confession? A unanimous Alabama Court of Criminal Appeals answered yes.

Defendant was indicted and convicted in the circuit court of Geneva County for two drug offenses. On appeal, he contended that his confession was rendered involuntary during the interrogation by an interrogating officer telling him that "he could help himself." During the course of the suppression hearing, the officer admitted that he made this statement. The Alabama Court of Criminal Appeals reasoned that ". . . it is reasonable to assume that when Deputy Hobbs told appellant that he could help himself, the deputy meant that the appellant could help himself by making a statement . . . We are of the opinion that the statement 'you can help yourself' in the manner and in the context in which it was used here, amounted to an implied promise that appellant would receive lighter punishment or no punishment at all if he cooperated and made a statement."

Judge Patterson, writing for the court, set out the legal yardstick as follows:

> "The true test of voluntariness of extra-judicial confessions is whether, under all the surrounding circumstances, they have been induced by a threat or a promise, express or implied, operating to produce in the mind of the prisoner apprehension of harm or hope of favor; and if so, whether true or false, such confessions must be excluded from the consideration of the jury as having been procured by undue influence. *See also Ex parte McCary*, 528 So.2d 1133 (Ala. 1988).
>
> "It has long been held, under the right against self-incrimination, that an involuntarily given confession or incriminating statement is not admissible in a subsequent criminal prosecution. A great variety of circumstances may cause a confession or incriminating statement to be classified as involuntary. The test applicable in both state and federal prosecutions is whether the confession was free and voluntary; that is, it must not have been extracted by any sort of threats or violence, nor obtained by direct or implied promises, however slight, nor by the exertion of any improper influence."

C. Gamble, *McElroy's Alabama Evidence* §200.01 (3d ed. 1977).

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Judge Patterson, in applying those legal principles to the facts, found that Deputy Hobbs' implied promise that the defendant could help himself under the circumstances existing when the promise was made, would necessarily engender a hope of favor in the appellant's mind. For this reason, the statement was not voluntarily given, and should have been excluded from the consideration of the jury.

Alabama's statute prohibiting brokering of adoption declared unconstitutional

State v. Gooden, CR-89-384 (Ala. Crim.App., September 21, 1990)—Crawford, his wife and their attorney were separately indicted for "advertising that they would adopt children and/or . . . holding out inducements to a parent . . . to part with her infant child" in violation of §26-10-8, *Code of Alabama* (1975). Each of the defendants moved to dismiss, challenging the constitutionality of the statute. At the hearing, the state was represented by assistant attorneys general from the Office of the Attorney General, as well as attorneys from the Alabama Department of Human Resources. The attorney general's office had "problems with the vagueness and some reservation about the constitutionality of the statute as it now stands." The attorneys from DHR felt "that the statute is sound."

The circuit court of Montgomery County found that §26-10-8, *Code of Alabama* (1975) was constitutionally defective. On appeal, the Alabama Court of Criminal Appeals, in an opinion authored by Judge Bowen, affirmed the judgment of the circuit court.

Section 26-10-8 states in pertinent part as follows:

> It shall be unlawful for any person or persons, organizations, hospitals or associations which have not been licensed by the State Department of Human Resources to advertise that they will adopt children or place them in foster homes or hold out inducements to parents to part with their offspring or in any manner knowingly become a party to the separation of a child from its parent, parents or guardian except through the commitment of a court having jurisdiction.

Under Article 1, §6 of the Alabama Constitution of 1901, the right of an accused to demand the nature and cause of the accusation is a fundamental component of the right to due process; the defendant must fully and intelligently understand the charge to adequately prepare a defense. *Young v. State*, 348 So.2d 544 (Ala.Crim.App. 1977). "Furthermore, because the charge is derived from a criminal statute, the statute itself must be sufficiently definite and certain to pass constitutional muster." *Newberry v. State*, 493 So.2d 995, 996-97 (Ala. 1986).

In conclusion, Judge Bowen critically noted the following:

> "We will not belabor this matter. The statute is so vague, ambiguous, and broad that reasonable people must necessarily guess at its meaning and differ as to its application. It is simply impossible to state what conduct is and is not prohibited under the statute.
>
> "In this particular case, a significant indication that the statute is unconstitutional is found in the fact that §26-10-8 has been repealed by 1990 Ala. Acts, No. 90-554, known as the 'Alabama Adoption Code,' which becomes effective January 1, 1991 (omitting citations). The significance is not merely in the fact that §26-10-8 has been repealed, but in the comparison of the specificity and definiteness of the new provisions with the ambiguity and vagueness of the old.
>
> ". . . Comparison of those provisions with §26-10-8 reveals the conspicuous glaring constitutional deficiencies of §26-10-8."

Vehicular homicide—error to inject uncharged misconduct

Turner v. State, CR-89-220 (Ala.Crim. App., September 21, 1990)—Turner was convicted of three counts of vehicular homicide and one count of leaving the scene of an accident. On October 27, 1988, Turner was driving a loaded tractor trailer truck and ran a red light in Sumiton, Alabama. This traffic violation (running the red light(resulted in Turner's truck colliding with a small automobile, killing the three occupants inside.

During the defense's case, the State elicited testimony from Ms. Pannell, the defendant's ex-girlfriend, regarding the use of over-the-counter diet pills. The defense objected on the ground that Pannell was not an expert witness and was not qualified to testify as to the effects of diet pills on the average person. The Alabama Court of Criminal Appeals agreed.

Presiding Judge Taylor observed:

> "Moreover, we are of the opinion that her testimony was unduly inflammatory in that it interjected the issue of driving under the influence of drugs into the trial even though the appellant was not charged in the indictment with that offense. *Minshew v. State*, 542 So.2d 307 (Ala.Crim.App. 1988). Therefore, the trial court erred by allowing the State to elicit testimony from Ms. Pannell regarding the use of over-the-counter diet pills."

The appellate court also found merit in the defendant's contention that the trial court erred in refusing to give his requested jury charge concerning the requisite mental intent for the offense of leaving the scene of the accident. Specifically, the court refused to charge on mental intent based upon its holding that §32-10-1 (leaving the scene) is a strict liability crime and no intent or mental state is required.

Section 13A-2-4, *Code of Alabama* (1975) states in pertinent part:

> (b) Although no culpable mental state is expressly designated in a statue defining an offense, an appropriate culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. *A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, states a crime of mental culpability.* (Emphasis added)

Section 32-10-1 contains no language indicating that it is a strict liability crime. *Bettis v. State*, 534 So.2d 1135 (Ala.Crim. App. 1988). Thus, the issue of the defendant's culpability should have been presented to the jury in the court's jury charge. This is true especially in light of the testimony that the defendant was found wandering down the highway in a state of shock and suffering from amnesia immediately following the collision. ■

MCLE

by Keith B. Norman
Director of Programs,
Alabama State Bar

On July 18, 1990, the MCLE Commission met at the Riverview Plaza in Mobile. At that meeting, the Commission: approved, for 6.0 credits, a mixed audience seminar on "S" corporations for both attorneys and CPAs offered by Cumberland Institute for CLE; overruled the director's original decision denying accreditation and approved, for 6.5 credits, a course on preventing employee lawsuits sponsored by the University of Alabama College of Continuing Studies; and waived Regulation 3.4 so that instructors for a program on the new rules of criminal procedure could claim CLE credit for their presentations without preparing separate materials.

On September 21, 1990, the MCLE Commission met at the state bar headquarters in Montgomery. At that meeting, the MCLE Commission: reviewed a bar member's request for a waiver of the MCLE requirement because he was called to active duty and noted that under Rule 2.C.1. when a reservist or a member of the National Guard is activated for military duty, an attorney is entitled to claim an exemption from the MCLE requirement for the year in which he or she is called and for as long as he or she continues to serve in the military; approved training programs sponsored by WESTLAW and LEXIS for computer-assisted legal research; upheld the director's decision denying accreditation for a program on RCRA corrective action which had been denied accreditation because the program was designed primarily for nonlawyers in violation of Regulation 4.1.2.; upheld the director's decision denying accreditation for an executive environmental briefing program which had been denied accreditation for the same reasons as the previous program; and approved for 6.0 credits a mixed audience seminar on law and church sponsored by Cumberland Institute for CLE.

On November 7, 1990, the MCLE Commission met at the state bar headquarters in Montgomery. At this meeting, the Commission took the following action: instructed the director to request more information before rendering a decision on a bar member's request for a waiver of the 1990 CLE requirement because the member would be on maternity leave from July 1, 1990, through December 1, 1990; and approved for 6.0 CLE credits, a nursing home law seminar for mixed audiences sponsored by the Cumberland Institute for CLE.

The Commission granted approved sponsor status for 1991 to the sponsors listed below: Accredited law schools (ABA, AALS); Administrative Office of Courts-Alabama Judicial College; Alabama Bar Institute for Continuing Legal Education; Alabama Consortium of Legal Services Programs; Alabama Criminal Defense Lawyers Association; Alabama Defense Lawyers Association; Alabama District Attorneys Association; Alabama Lawyers Association; Alabama State Bar and bar sections; Alabama Trial Lawyers Association; American Bar Association and bar sections; American College of Trial Lawyers; American Law Institute-American Bar Association, Committee on Continuing Professional Education; Association of Trial Lawyers of America; Atlanta Bar Association; Baldwin County Bar Association; bar associations of the sister states, the District of Columbia, Puerto Rico and the trust territories; Bessemer Bar Association; Birmingham Bar Association; Commercial Law League Fund for Public Education; Continuing Legal Education Satellite Network; Cumberland Institute for Continuing Legal Education; Defense Research Institute; Estate Planning Council of Birmingham, Inc.; Federal Energy Bar Association; Huntsville-Madison County Bar Association; Institutes on Bankruptcy Law; International Association of Defense Counsel Legal sections, agency programs-U.S. and state governments; Mobile Bar Association; Montgomery County Bar Association; Montgomery County Trial Lawyers Association; Nashville Bar Association; National Association of Attorneys General; National Association of Bond Lawyers; National Association of Railroad Trial Counsel; National Bar Association; National College of District Attorneys; National College of Juvenile Justice; National Health Lawyers Association; National Institute of Municipal Law Officers; National Institute for Trial Advocacy; National Judicial College; National Legal Aid and Defenders Association; National Organization of Social Security Claimants' Representatives; National Rural Electric Cooperative Association, Legal Division; Patent Resources Group, Inc.; Practising Law Institute; Southwestern Legal Foundation; Tennessee Association of Criminal Defense Lawyers; Transportation Lawyers Association; Tuscaloosa County Bar Association; and Tuscaloosa County Trial Lawyers Association.

The Commission also, for the first time, granted approved sponsor status to the following three sponsors: Bessemer Bar Association, National College of Juvenile Justice and Tuscaloosa County Trial Lawyers.

In other matters: the Commission voted to continue its past policy of denying credit for topics dealing with stress; voted to adopt a policy that no more than 20 percent of an approved sponsor's accredited programs be mixed audience seminars; and voted to table until its next meeting a request by the Ethics Education Committee fo the Alabama State Bar to amend Regulation 3.5 to allow extra credit for bar members attending approved CLE programs dealing with the new rules of conduct. ■

"Is That All There Is?"

by James Jay Mason

(This portion of the outgoing president's final address appeared in Vol. 29, No. 42 of the Bar Bulletin, *an official publication of the State Bar of New Mexico.)*

A couple of months ago, I'm sure many of you saw the story in the *Wall Street Journal* of an attorney in Laramie, Wyoming, Becky Klemt. She had gotten a $4,000 child support judgment for her client. The ex-husband had left Wyoming and moved to Los Angeles, so Becky wrote many letters to Los Angeles seeking an attorney who would collect the judgment for her client. She waited, but she received no response. Finally, a letter arrived from Steven G. Corris, a solo practitioner in Irving, California. It read as follows:

"Without sounding pretentious, my current retainer for cases is a flat $100,000.00, with an additional charge of $1,000.00 per hour. Since I specialize in international trade in geo-political relations between the Middle East and Europe, my clientele (which was misspelled) is very unique and limited, and I am afraid that I am unable to accept other work at this time."

This letter inspired Becky to write what has now become a famous letter around the country. She began:

"Steve, I've got news—you can't say you charge a $100,000.00 retainer fee and an additional $1,000.00 an hour without sounding pretentious...especially if you are writing to someone in Laramie, Wyoming, where you are considered pretentious if you wear socks to court . . . . Hell, Steve, all the lawyers in Laramie put together don't charge $1,000.00 an hour."

She then mentioned that her law firm in Laramie had an international flavor because people at the firm regularly ordered Mexican food and one partner had actually studied a foreign language, Latin, in high school and suggested that perhaps a merger of the two firms was in order. She continued:

"Steve, let us know when we should join you in California so that we can begin doing whatever it is that you do. In anticipation of the move, we've all been practicing trying to say we charge $1,000.00 an hour with a straight face, but we haven't been able to do it . . . . Anyway, because I'll be new to the area of international trade and geo-political relations, I'm thinking of only charging $500.00 to $600.00 to begin with. Will that cover our overhead? P.S. Incidentally, we have advised our client of your hourly rate. She is willing to pay you $1,000.00 an hour to collect this judgment provided it does not take more than four seconds."

Well, Becky Klemt has since gotten job offers and marriage proposals from all over the country. In fact, the main office of Amoco in California recommended to the regional office in Denver that they hire Becky solely on the basis of the letter.

So, again, I pose to you about the practice of law and the search for the ultimate number of billable hours. As Peggy Lee once sang, "Is that all there is?" Those of you who participate in other good causes know that there is much more to the practice of law.

Don't let your *Alabama Lawyers* get worn, torn or thrown away. Order a binder (or two!) at $10.00 each from: *The Alabama Lawyer* P.O. Box 4156 Montgomery, AL 36101 or call (205) 269-1515

Opinions of the General Counsel

by Alex W. Jackson, assistant general counsel

QUESTION:

The Disciplinary Commission has been asked to review three similar marketing schemes offered by the Personal Injury Trial Lawyers Association, Inc., Bankruptcy Attorneys Trust, and DWI/DUI Defense League. PITLA (the Personal Injury Trial Lawyers Association, Inc.), is organized as a non-profit corporation under the laws of the State of Delaware. Detailed materials of this nature are not available in reference to the Bankruptcy Attorneys Trust or the DWI/DUI Defense League, but their organization and governance is believed to be so similar that discussion of the PITLA program will be sufficient to address the other two.

ANSWER:

In the view of the Disciplinary Commission, participation by an Alabama lawyer in any of the three programs discussed herein, Personal Injury Trial Lawyers Association, Inc., the Bankruptcy Attorneys Trust, or the DWI/DUI Defense League, would constitute a breach of the *Code of Professional Responsibility.*

DISCUSSION:

Temporary Disciplinary Rule 2-102(C) of the *Code* prohibits the participation of an Alabama lawyer in a for-profit referral service. While it is acknowledged that PITLA styles itself a not-for-profit corporation, and further acknowledged that the State of Delaware has granted not-for-profit corporate status to PITLA, the admonition of Temporary DR 2-102(C) is not solely determined by the tax status of the corporate entity. One intent of DR 2-102(C) is to prevent in-person or telephonic marketing of legal services by non-lawyers, and by organizations or entities not subject to direct regulation by the authorized regulatory agency, (i.e., the state bar).

Another purpose of the rule is to prevent fee-splitting by lawyers with non-lawyers, and a third purpose is to limit the economic factors that might encourage solicitation. The not-for-profit language is suggested by United States Supreme Court opinions in the *Primus* and *Button* cases. *In re Primus,* 436 U.S. 412 (1978) and *NAACP v. Button,* 371 U.S. 415 (1963). Accordingly, these programs violate the spirit, if not the letter, of DR 2-102(C). Compliance with the form is not the same as compliance with the spirit of the rule. It is our opinion that the drafters of this rule intended the not-for-profit referral service concept to limit the operation of referral services to those organized and operated to serve the public and to provide information about legal services to the disadvantaged; something more in the nature of a public service than a limitation on the corporate or taxable status of the service was the motivation behind this provision. For-profit services are not permitted due, at least in part, to the fee-splitting considerations mentioned earlier. However, as previously stated, these issues do not form the basis of our opinion.

A more determinative issue, particularly in reference to the Personal Injury Trial Lawyers Association, Inc., arises from the implication of expertise or specialization conveyed by the title of the corporation. Temporary Disciplinary Rule 2-101, when read in totality, and when read together with Temporary DR 2-104, clearly prohibits any implication or statement of specialization or expertise. The Supreme Court of Alabama, in recognizing that some types of truthful and non-deceptive information about the educational qualifications and certifications granted to lawyers by outside certifying organizations should be allowed in attorney advertising, adopted Temporary Disciplinary Rule 2-112, which provides for the approval of certifying organizations by the Alabama State Bar prior to inclusion of that information in attorney advertising. The provisions of these various Disciplinary Rules are set forth herein, to-wit:

"Temporary DR 2-102 Advertising

(C) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of any advertisement or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service."

Temporary Disciplinary Rule 2-101 provides as follows:

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

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

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

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

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

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

Temporary Disciplinary Rule 2-104 states as follows:

"DR 2-104 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(A) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation 'patent attorney' or a substantially similar designation.

(B) A lawyer engaged in admiralty practice may use the designation 'admiralty,' 'proctor in admiralty' or a substantially similar designation."

Temporary Disciplinary Rule 2-112 provides as follows:

"DR 2-112 Advertising of Certifica tion

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

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

(C) The procedures for approval of a certifying organization shall be as follows:

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

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

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

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

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

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

It is our opinion that the name "Personal Injury Trial Lawyers Association" is an implicit statement regarding certification, specialization or expertise. It is our further opinion that this name omits facts necessary to make the title, taken as a whole, not materially misleading and thereby constitutes a per se violation of the above-cited Disciplinary Rules. We have noted in reaching this conclusion that the "Standards for Participation", previously attached hereto and made a part hereof, attempt to establish some minimum standards to be applied to attorneys participating in the PITLA program. These same standards create an additional implication that lawyers participating in the PITLA program have been certified or approved or endorsed by this group or entity and found to be deserving of inclusion in the PITLA program. In our view this quasi-certification standard violates the provisions of Temporary Disciplinary Rule 2-112 and the implied comparison with lawyers choosing not to participate in the program, for whatever reason, is violative of DR 2-101(C). To the extent that participation in the other programs considered herein is governed by similar provisions, they are also violative of these portions of the *Code*.

PITLA maintains that it is a cooperative advertising venture among lawyers, but that is not a factually sustainable position. No group of lawyers associated themselves together for the purpose of marketing their services as a group. In the instance of PITLA, and in the instance of Bankruptcy Attorneys Trust and the DWI/DUI Defense League, a sophisticated marketing and advertising scheme was put together by non-lawyers who then recruited a group of lawyers to participate in the program. When this has been completed the advertising agency then interfaces with the public, through non-lawyer personnel, in an environment totally separate and apart from the supervision, direction, or control of any of the lawyers involved in, or benefiting from, the marketing program. While the advertisements utilized by PITLA, and the other programs, may include the disclaimer, as required by DR 2-102(E), and may include the name of a lawyer paying for the placement of the ad [DR 2-102(D)], it is very doubtful that the named lawyer is, in fact, responsible for the content of the ad or that he in any way exercises any meaningful control over any aspect of the marketing pro-

gram. Once again, an apparent adherence to the form of the rule exists without due consideration of the substance, or intent, of the rule.

Under these programs a certain number of advertising slots are available in a given, defined market. PITLA materials indicate that "referrals are handled on a strict rotation basis and members may acquire as many positions as they desire. Of course, the more rotation slots per attorney will enhance the total percentage of the number of referrals for that member. . . ." Whatever this marketing scheme is, it is not a true referral service, nor is it a true cooperative advertising venture among attorneys. Pursuant to the rules of participation, an entire market can be captured by one lawyer or law firm willing to make an economic commitment. Under such a scenario the lawyer or law firm would receive all "referrals" generated, an apparent conceptual inconsistency to the self-proclaimed mutuality of interest embodied in the program. A one-lawyer referral service is a sham, as is a one-lawyer cooperative advertising venture.

The Disciplinary Commission is further troubled by the implication that PITLA, et al., are organized groups or associations of lawyers that have come together to offer specific legal services to the public. None of these particular programs contain or require any meaningful organizational structure among participating attorneys. There are no regular meetings, no educational or social programs; in short, no incidents of a normal organization or association (as used in Personal Injury Trial Lawyers *Association* or DWI/DUI Defense *League*) (emphasis added). While there may be mass mailings to all participants, and *pro forma* governing boards organized primarily to meet bar advertising criteria, the main point of common interest is economic; all of the participants make their checks out to the same marketing organization. Such organizational structure as there is, is imposed from the outside along these economic lines, a distinction in no way apparent to the consuming public though, in all likelihood, of interest to them.

The names of these groups were not chosen by accident. Concepts such as strength through numbers, group support, focused legal skills and the like are all a part of the intended subliminal message conveyed by the names of these programs, and that makes the messages misleading.

The group concept, or associational implication, is valid only in a limited, economic sense. There are no other meaningful associational characteristics. The consuming public is lead to believe that, by calling a WATS number mentioned in a very slick, professional ad, they are being plugged into a network of caring, competent, highly experienced lawyers, selected and approved by some group or entity and presented to the public wearing the mantle of "association". In fact, few, if any, of these assumptions are justified, but the public has no way of knowing this from the information provided. Competent, experienced, dedicated lawyers may participate in these programs, but the implication is that all participants meet some higher standard, and it is this implication that is so troublesome and so difficult to justify. This implication also constitutes a clear violation of DR 2-101, DR 2-104 and DR 2-112.

While these groups do not claim to be certifying organizations subject to approval under DR 2-112, an analysis of their method of operation and advertising content leaves the impression that they operate very close to the line. We have already opined that there exists an inference of associational acceptance and endorsement. We believe this inference to be sufficiently strong, and of such a character, as to constitute a breach of DR 2-101(D) and DR 2-112.

Taken in totality, all of these marketing programs must be viewed as operating outside the permissive parameters established by the *Alabama Code of Professional Responsibility* (and the Alabama Rules of Professional Conduct, effective January 1, 1991, and substantially similar in all material respects). Accordingly, we are of the opinion that participation in these programs by Alabama attorneys would be ethically improper. [RO-90-49(A) & (B)] ■

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Memorials

James A. Avary—Lanett
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Died: December 16, 1990

George Patrick Brown, Jr.—Marshall, Michigan
Admitted: 1948
Died: December 1, 1990

Clarence William Dunker—Modesto, California
Admitted: 1935
Died: August 9, 1990

Walter Frederick Eigenbrod—Huntsville
Admitted: 1947
Died: November 8, 1990

John Oscar Harris—Montgomery
Admitted: 1934
Died: December 19, 1990

Gifford Bennett Haynes, Jr.—Bessemer
Admitted: 1969
Died: November 27, 1990

George William McBurney—Florence
Admitted: 1940
Died: August 11, 1990

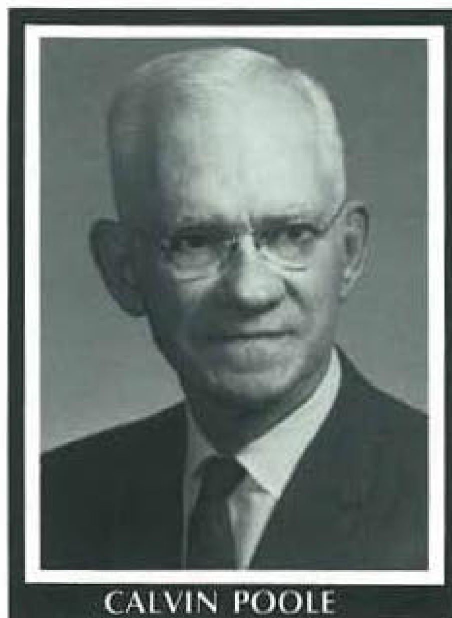
Wordlaw Ramsey McKinney, Jr.—Mobile
Admitted: 1965
Died: December 6, 1990

Jan Branton McMinn—Tuscaloosa
Admitted: 1978
Died: November 25, 1990

Calvin Poole—Greenville
Admitted: 1917
Died: September 20, 1990

Hubert Lee Taylor—Jasper
Admitted: 1967
Died: November 8, 1990

Elizabeth Johnson Wilbanks—Birmingham
Admitted: 1936
Died: October 17, 1990



CALVIN POOLE

After engaging in the general practice of law in Greenville, Alabama, for more than 60 years, Calvin Poole died at home September 20, 1990. He is survived by one son, Elisha C. Poole, also a lawyer, two grandsons, both of whom are lawyers, and four great-grandchildren.

Poole was born on a farm in Butler County on August 26, 1893, and received his undergraduate degree in 1914, Phi Beta Kappa, and his law degree in 1917 from the University of Alabama.

He enlisted in the Army in 1917, was commissioned and served with distinction with the 7th Infantry Regiment. He was sent to France with the A.E.F. and participated in the battles of the Marne, St. Mihiel and Meuse-Argonne. He was awarded the Purple Heart for wounds received in combat.

Poole entered the general practice of law in Greenville in 1920 and continued in practice until his retirement in 1986, a period of 67 years. He served as county solicitor (1921-23), circuit solicitor (1923-33) and as a member of the Alabama State Bar Board of Commissioners (1949-53).

As a lawyer, he was of the old school—colorful, tenacious, always an aggressive advocate and always a worthy foe. Even in his losses (which were rare), his opponents always knew they had been in a fight.

Poole's character was recognized early by Dean A.J. Farrah who commented in a letter dated July 27, 1917, in which he recommended him for a commission: "Mr. Poole is a good man, mentally, physically and morally, a man who discharged with fidelity every duty placed upon him during his connection with the Law School . . . He has, in a remarkable degree, the qualities of a leader and would inspire the confidence and respect of other men."

His ability again drew comment in 1970 from his old friend, J.O. Sentell (then editor of *The Alabama Lawyer*, who referred to him as "a very resourceful lawyer, who has the uncanny faculty of being at the right place at the right time." 31 *Ala. Lawyer* 365 (July 1970).

Also active and successful in business, Poole served for years as a director and later as chairman of the board of The First National Bank of Greenville.

Known for his sharp wit as well as for his legal talent, Calvin Poole will be long missed and not readily replaced.

H. Edward McFerrin
Poole & McFerrin
Greenville, Alabama

Disciplinary Report

Disbarment

● The Supreme Court of Alabama entered an order November 13, 1990, disbarring Birmingham lawyer **James Cannon, Jr.**, effective December 26, 1990. Cannon failed to file a responsive pleading to certain disciplinary charges pending against him, and, thus, was found guilty thereof. [ASB Nos. 88-747, 88-770 and 89-183]

Public Censure

● On November 2, 1990, **Charles Clifford Carter,** an Alabama lawyer practicing in Columbus, Georgia, was publicly censured for violating Disciplinary Rules 6-101 (A), 7-101 (A) (1) (2) & (3), and 1-102 (A) (5) of the *Code of Professional Responsibility* of the Alabama State Bar. Carter filed a bankruptcy petition in the United States Bankruptcy Court for the Middle District of Alabama for a client, and thereafter failed to attend the first meeting of creditors, failed to timely submit a confirmable proposed plan, failed to attend two "show cause" hearings ordered by the bankruptcy judge, and failed to make a timely refund of his fee to his client when ordered to do so by the court.

Carter was suspended from practice before the Bankrupty Court for one year and was found by the Disciplinary Board of the Alabama State Bar to have willfully neglected a legal matter entrusted to him, to have failed to seek the lawful objectives of his client, intentionally failed to carry out a contract of employment entered into with his client, prejudiced or damaged his client during the course of a professional relationship, and engaged in conduct that is prejudicial to the administration of justice. [ASB No. 89-501]

Private Reprimand

● On November 2, 1990, a lawyer was privately reprimanded for making false or misleading communications about the lawyer or the lawyer's services. The lawyer ran an advertisement seeking election to a judgeship. In that advertisement, the lawyer made material misrepresentations, omitted facts necessary to make the statement considered as a whole not materially misleading, and compared the quality of the lawyer's services with the quality of other lawyers' services. [ASB No. 90-406] ■

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Riding the Circuits

Tallapoosa County Bar Association

The following officers were elected for the 1991 year:

President:	E. Paul Jones, Alexander City
Vice-president:	Charles Reynolds, Alexander City
Secretary/Treasurer:	Charles R. Gillenwaters, Alexander City

Young Lawyers' Section

Walker Percy Badham, III
YLS President

On December 8, 1990, the Executive Committee of the Alabama State Bar Young Lawyers' Section met for the fourth and final time of 1990. The meeting was a resounding success. The committee laid the groundwork for an ambitious and important agenda for calendar year 1991. Harold Albritton, president of the state bar, attended the meeting as a special invited guest and provided much insight and encouragement, for which we are grateful.

Although it would be impossible for me to mention all of the projects and goals with which the YLS is involved, I take this opportunity to discuss a few of the highlights.

Bar admissions ceremony

Each year, the YLS assumes the task of planning the bar admissions ceremony for new admittees. The ceremonies provide an important opportunity for friends and family to gather in Montgomery to watch as new lawyers begin their careers as professionals in Alabama's legal community. The occasion is marked by happiness and solemnity, and acts as a reminder to each of us that we are public servants expected to maintain the highest degree of professionalism.

For the past few years, Rebecca Shows Bryan has done an outstanding job for the YLS in putting together the ceremonies. I offer our sincerest thanks to Rebecca as she passes the reins to Alyce Spruell for this important function of the section.

Youth Judicial program

The section works hand-in-hand with the Alabama YMCA Youth Programs organizations to conduct a youth judicial program each year for state high school students. The program is similar to law school moot court competitions and provides high school students a good opportunity to gain insight and appreciation for the legal system. Section Executive Committee member Charlie Anderson has worked tirelessly on this project, and its enormous success and growth are due in large part to him. If you are interested in working with one of our high school trial teams, contact Charlie or me for information. The experience is as rewarding for the lawyers as it is for the students.

Seminars and programs

Each year, the YLS sponsors a number of seminars and programs which serve the dual purposes of providing quality continuing legal education and a forum for the state's young lawyers to gather and share their experiences. Two of the more popular seminars, which are co-sponsored by the Alabama Law Institute, are the Bridge-the-Gap seminar and the yearly SanDestin seminar. This year, Steve Shaw is working with the Institute in planning the former seminar, which is one of the most comprehensive and helpful introductory programs for new lawyers. Frank Woodson and Hal West are spearheading the YLS' efforts on what promises to be one of the best SanDestin programs ever. Watch your mail for announcements, and make plans to attend.

New programs

The Executive Committee is also looking into a number of new projects which will be announced in upcoming articles. Among these, the YLS is developing projects addressing issues such as quality of life for Alabama attorneys, and various problems facing law students and pre-law students. I think the YLS is uniquely suited to address these issues.

National involvement

We have several Alabama young lawyers involved on a national level with the Young Lawyers' Division of the American Bar Association. Keith Norman, Jim Priester, Robert Baugh, Buddy Smith, Duane Wilson, Barry Ragsdale, and I all serve on various ABA/YLD committees. This national involvement has been rewarding and provided recognition and appreciation for Alabama's young lawyers.

Local affiliates

The Alabama YLS is a statewide organization which has a number of regional or local affiliates. For example, Birmingham, Mobile, Montgomery and Huntsville each have local young lawyer organizations. This year, our Executive Committee has set as its number one goal establishing better communication and closer ties to these local affiliate chapters. I think the state and local young lawyer organizations will benefit tremendously from this mutual cooperation.

Recently, I have been in touch with LaBella Alvis, president of the Birmingham YLS; Laura Crum, president of the Montgomery County YLS; Frank Woodson, president of the Mobile YLS; and Russ Eason, president of the West Central Alabama YLS in an effort to bring together these organizations in what I hope to be a long-term working relationship. In my next column, I will highlight the officers and activities of these groups.

The YLS is the future of the Alabama State Bar. It is up to us to ensure that future remains bright. This can only be done with involvement. I encourage each of you to become active in your local YLS chapters and volunteer your time and energy for the many projects being conducted. The time you spend may not be billable, but it will be rewarding. ■

Classified Notices

RATES: Members: 2 free listings per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings—$35 per insertion of 50 words or less, $.50 per additional word; Nonmembers: $35 per insertion of 50 words or less, $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule:

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March '91 Issue—Deadline January 31

No deadline extensions will be made. Send classified copy and payment, made out to *The Alabama Lawyer*, to: Alabama Lawyer Classifieds, c/o Margaret Murphy, P.O. Box 4156, Montgomery, AL 36101.

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Section News

Health Law Section formed

The year 1991 promises to be an exciting year for attorneys practicing in the health care field. At an organizational meeting Friday, November 30, 1990, health care practitioners from around the state met to elect officers, the executive council and committee participants.

Participation in the Health Law Section will be inexpensive, with annual dues only $15. Over the next couple of months, many plans will be made for the coming year. You will be receiving additional information regarding the Health Law Section. In the meantime, if you have questions, ideas or suggestions, feel free to contact the officers or committee participants set forth below.

At the organizational meeting, the following individuals were elected to serve as officers and committee participants:

Officers:

Gregg Everett, chairperson
Lant Davis, vice-chairperson
Joan Ragsdale, secretary/treasurer

Executive Council:

Jim McFerrin
Chip Durham
Al Hickey
Bob Roper
Joan Ragsdale
Elmer White
Lant Davis
Al Hickey

Program Committee:

Jim Wilson, chairperson
Sydney Cook
Lee Martin

Legislative and Significant Decisions Committee:

Mike Carlson, chairperson
Eugene Watson
Deane Corliss
John Nolen
Lenora Pate
John Humber
Mike Savage
Gregg Everett

Newsletter Committee:

Lois Beasley, chairperson
Nancy Jones
Jim Wilson
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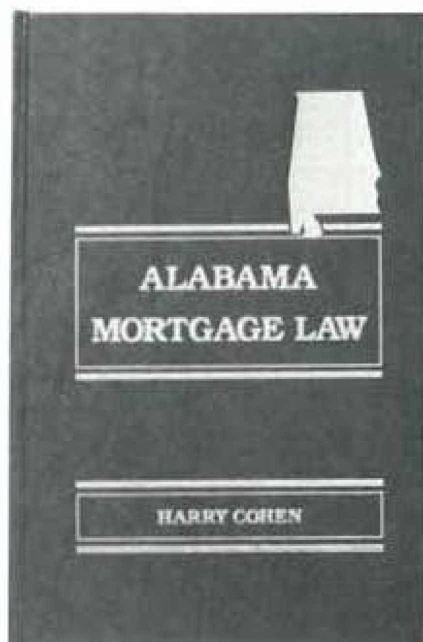

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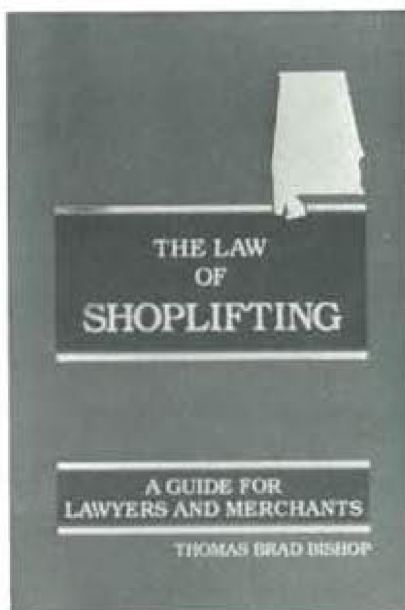

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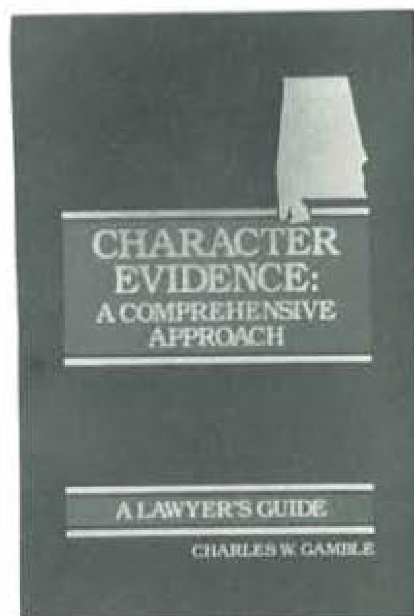

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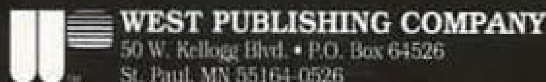

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