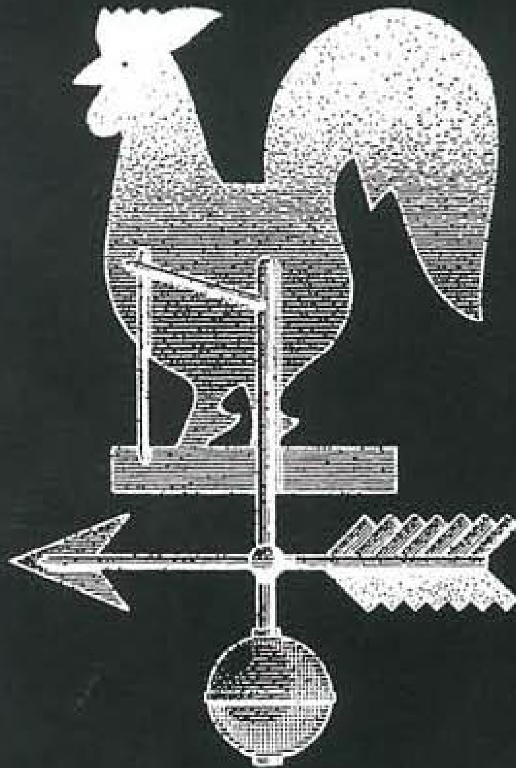
The Alabama Lawyer



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NOTICE OF ELECTION

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

PRESIDENT-ELECT

The Alabama State Bar will elect a president-elect in 1993 to assume the presidency of the bar in July 1994. Any candidate must be a member in good standing on March 1, 1993. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1993. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer.*

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 14, 1993.

COMMISSIONERS

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, places no. 4, 7 and Bessemer Cut-off; 11th; 13th, place no. 1; 17th; 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th; and 40th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1993 and vacancies certified by the secretary on March 15, 1993.

The terms of any incumbent commissioners are retained.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 30, 1993).

Ballots will be prepared and mailed to members between May 15 and June 1, 1993. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 8, 1993) to state bar headquarters.

IN BRIEF

January 1993 Volume 54, Number 1

ON THE COVER:

Ice storms in Alabama paint a picturesque landscape. *Photo by James Guier*

INSIDE THIS ISSUE:

Lawyers & Doctors Join Forces Against Drug Abuse
By Edward M. George ... 16

Reports from IOLTA Grant Recipients
By Timothy A. Lewis ... 22

Opening of Court Ceremony ... 24

ABA's Legal Technology Resource Center
By M. Wayne Wheeler ... 36

Enforcing Arbitration Agreements in Alabama: A Double Standard Dilemma
By Stanley D. Bynum and J. David Pugh ... 38

Beware of Tax Liens and the IRS Right of Redemption After Foreclosure
By Gilbert F. Dukes, III ... 46

Report of the Task Force on Specialization
By Keith B. Norman ... 55

Comparative Fault: A Primer – What Happens When the Lid Flies Off Pandora's Box
By Deborah Alley Smith and Rhonda K. Pitts ... 56

President's Page ... 4
Facts/Fax Poll ... 5
Executive Director's Report ... 8
Bar Briefs ... 10
Riding the Circuits ... 10
Building Alabama's Courthouses ... 12
Opinions of the General Counsel ... 20
Building Fund Honor Roll ... 23
CLE Opportunities ... 34
Young Lawyers' Section ... 35
Disciplinary Report ... 44
Legislative Wrap-Up ... 45
About Members, Among Firms ... 50
Volunteer Lawyers Program ... 52
Recent Decisions ... 63
Memorials ... 69

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The Alabama Lawyer

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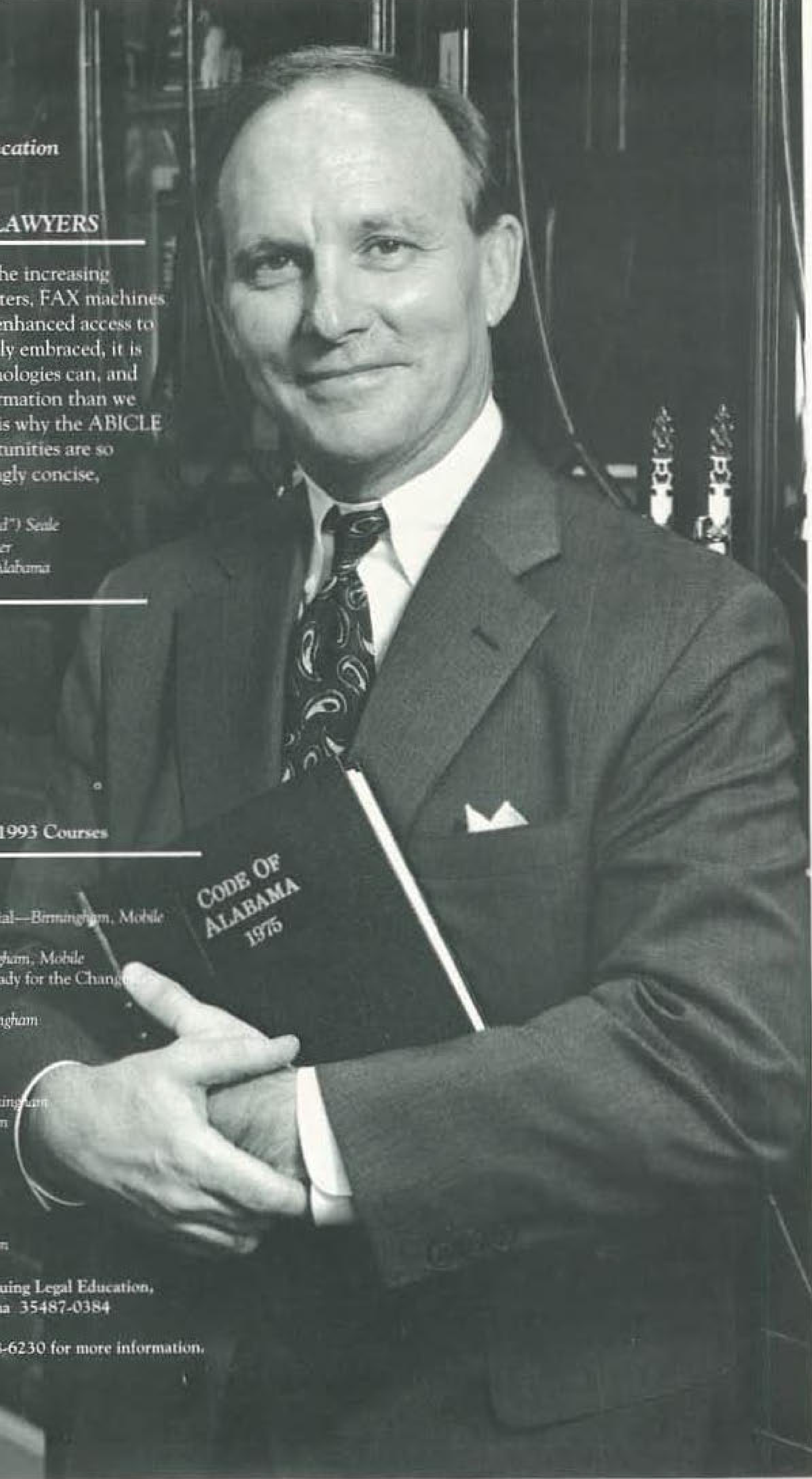
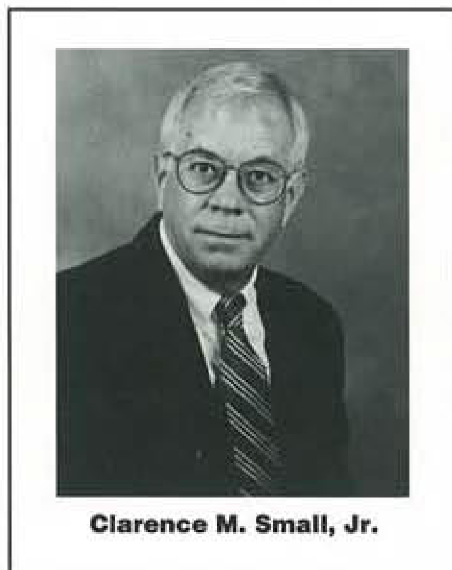


PRESIDENT'S PAGE

Are you genuinely satisfied with the practice of law as it exists today? If so, you are in a distinct minority. According to a recently released survey conducted by Washington's highly regarded Peter Hart and Associates, only 27 percent of the lawyers questioned were substantially satisfied with the state of the legal profession. Actually, this should come as no surprise. Surveys over the past five years have repeatedly announced that ever-increasing numbers of lawyers were unhappy in their work and with the quality of their lives. Between 1984 and 1990, the number of young lawyers disenchanted with their career choice jumped 77 percent even though their incomes had risen.

The three most frequently cited reasons for this growing discontent are (1) the lack of public respect for the legal profession, (2) the absence of fundamental courtesy among colleagues, and (3) the inordinate amount of time and effort spent in responding to contentious discovery, motions or other tactics designed to intimidate or harass one's opponent. These concerns appear to be valid and, in fact, interrelated.



Clarence M. Small, Jr.

The psychologists tell us that self-esteem and the satisfaction with our state in life which accompanies it, come, in part, from the knowledge that we have the respect and affection of others. After the recent presidential campaign, there can be little doubt that the public holds lawyers in low esteem. The bashing of the legal profession that took place there did not occur on a "hunch" that such a tactic would meet with voter approval. Opinion samples taken by campaign officials reflected a pre-existing public distaste for the legal community. Consequently, it made political sense to tie the nation's economic woes to an already unpopular group. Lawyers were the perfect scapegoat. It is little comfort to know that the charges leveled turned out to be completely false, based as they were on half- and quarter-truths and, in some instances, rank speculation. The public perception that lawyers foster and profit from an oppressive explosion of contentious and meritless litigation remains.

This false perception is, no doubt, aggravated by a parallel phenomenon being chronicled in current legal literature—the rise of the "Rambo" lawyer. More and more lawyers and judges complain that we have entered a new era of ruthlessness in the practice of law. Some counsel undoubtedly equate zealous representation with ridicule, intimidation and humiliation of the opposition, both lawyer and client. Accusations of misconduct are increasingly hurled with impunity and Rule 11 sanctions are sought against opposing counsel with alarming frequency. Studies throughout the United States reveal a widespread concern over this gradual change in the practice of law from a calling characterized by mutual respect for adversaries to one of abrasive confrontation. One judge underscored the dilemma this way:

"There must be a way to continue the spirit of the adversarial profession of law without the mentality of warfare and bitterness. We have lost sight of the fact that we are all brothers and sisters of a truly noble profession. We should be showing the best of the rule of law. Not how to conduct a brawl."

Professionalism has been defined by our bar as the pursuit of the learned art of the law as a common calling, with a spirit of service to the public and the client undertaken with competence, integrity and civility. The concept of lawyering envisioned by that definition is the antithesis of that reflected by "Rambo" tactics. Additionally, experience teaches us that a victory achieved by such tactics creates only long-term and implacable enemies who will not soon forget their bitter experience.

It occurs to me that there may well be a relationship between lawyer and public dissatisfaction with the current state of the legal profession and this burgeoning phenomena of the callous disregard of fundamental courtesies among lawyers. Certainly, we cannot and should not expect the public to respect us if we do not demonstrate respect for each other. And, we must have the respect of the public if we are to retain our exclusive franchise on the practice of law. But, there is more to be gained from professionalism and civility than that. Chief Justice Harold Clarke of Georgia put it this way:

"Our effort about professionalism is not a public relations effort. We are not doing this just to get the praise of

(Continued on page 9)

FACTS/FAX POLL

The last poll seemed to strike a chord as reader participation more than doubled that of the September 1992 poll. With some trepidation, the editors now want your honest appraisal of the quality of *The Alabama Lawyer*. Do you read it? If so, which features do you like or dislike? In short, we want a critique of the publication. Take a moment to complete the following questionnaire and then fax it to state bar headquarters, c/o Margaret Murphy, at (205) 261-6310. If you do not have access to a fax machine, you may mail it to P.O. Box 4156, Montgomery, Alabama 36101. All answers must be RECEIVED by January 29, 1993 to be included in the results published in the March issue.

CRITIQUE OF *THE ALABAMA LAWYER*

1. The following best describes my use of *The Alabama Lawyer:*

   a. _____ I never read it
   b. _____ I skim it
   c. _____ I read selected portions
   d. _____ I read it in its entirety

2. The following best describes my reading habits with respect to the features indicated:

President's Page
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Executive Director's Report
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Legislative Wrap-up
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Bar Briefs/About Members, Among Firms
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Building Alabama's Courthouses
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Substantive legal articles
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

CLE Opportunities
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Disciplinary Report
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Young Lawyers' Section
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Recent Decisions
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

Memorials
a. _____ Always read
b. _____ Sometimes read
c. _____ Never read

3. Please provide any comments on additions, deletions and changes to *The Alabama Lawyer* which you would like to see:

____

____

____

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Facts/Fax Poll RESULTS

In the November issue of the *Lawyer*, the editors asked for your participation in our second informal polling of the members. The five questions centered on the selection/election of judges. Eighty-five attorneys responded to the poll, either by faxing or mailing in their responses. Here are the results:

Of those who responded:

1. 24% agree that trial and appellate court judges in Alabama should continue to be elected under the present format, while 65% disagree with that.
2. 7% feel we should continue with the partisan election of judges, 65% feel we should adopt a procedure for nonpartisan election, 23% feel after the initial election of judges, any subsequent election would be on the basis of their record only, and 5% feel we should adopt nonpartisan elections AND elect only on the basis of the judge's record.
3. 12% want to retain the present system of allowing unlimited contributions and expenditures in judicial races, 20% want some type of limitation, 63% favor placing a limit or absolute prohibition on contributions by lawyers, and 5% favor placing a limit on BOTH expenditures and contributions.
4. 12% favor judicial appointments by the Governor, 70% favor appointment by the Governor from a list submitted by a local committee, 17% want appointment by a local committee and 1% chose none of the choices listed.
5. 20% feel we should follow the federal system of appointing judges for life, while 80% disagree with that option.

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James E. Turnbach, Turnbach & Warren, Gadsden, Alabama.

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"*I read and use ALABAMA Law Weekly. It gives me an edge in knowing what cases were decided and how they may affect my clients' files. It is invaluable to the busy practitioner.*"

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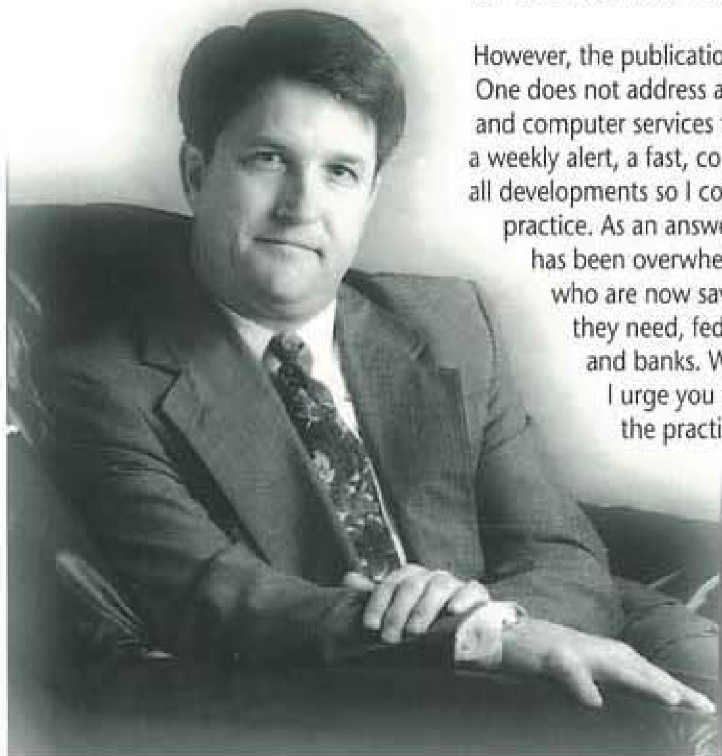
Micheal L. Fees, Watson, Gammons & Fees, Huntsville, Alabama.

"*As attorneys, we must stay abreast of appellate court decisions on a timely basis.*"



However, the publications available simply did not meet all my needs. One does not address all the decisions, the others were much too slow, and computer services too expensive in both time and money. I needed a weekly alert, a fast, concise summary of decisions to make me aware of all developments so I could immediately use the ones important to my practice. As an answer I created ALABAMA Law Weekly. The response has been overwhelming. Our subscribers include hundreds of lawyers who are now saving time and money while aquiring the knowledge they need, federal and state judges, libraries, insurance companies and banks. We're the new kid on the block and we're here to stay! I urge you to become a subscriber today and become a part of the practices that are setting the new standard.

J. Duane Cantrell, Editor
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*Usually cases released on Friday are briefed and in the mail by the following Thursday.

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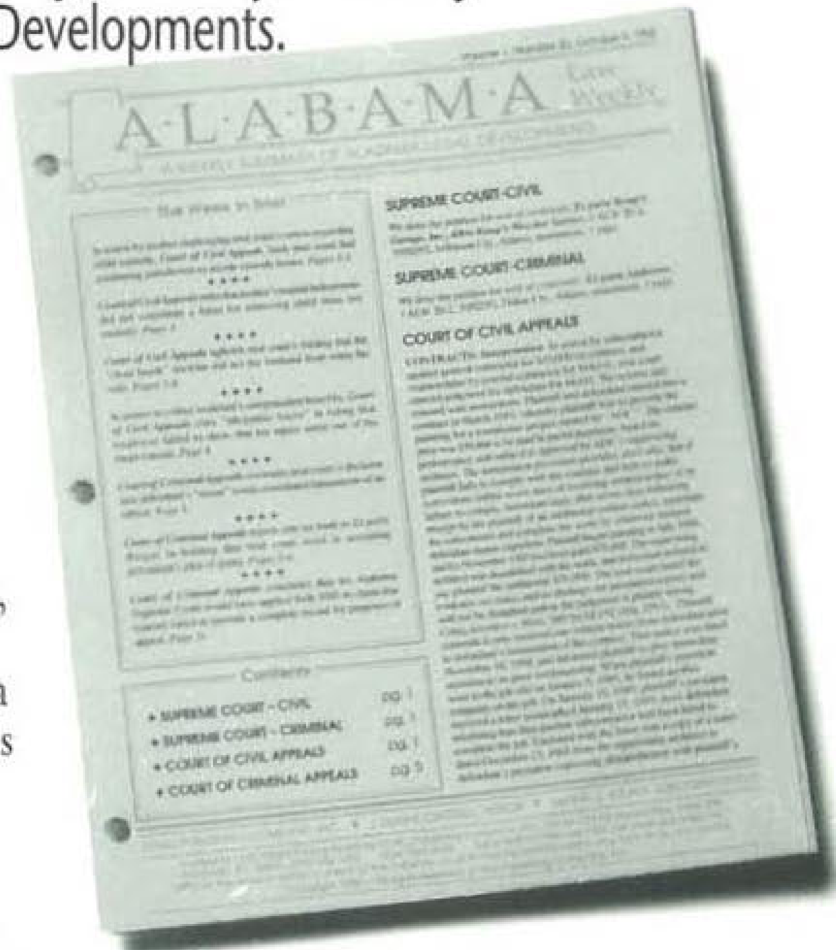

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SUPREME COURT-CIVIL

SUPREME COURT-CRIMINAL

COURT OF CIVIL APPEALS

Contents

- SUPREME COURT - CIVIL pg. 1
- SUPREME COURT - CRIMINAL pg. 1
- COURT OF CIVIL APPEALS pg. 1
- COURT OF CRIMINAL APPEALS pg. 5

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A WEEKLY SUMMARY OF ALABAMA LEGAL DEVELOPMENTS

All Appellate Courts and General Interest Actions of the Legislature, Executive Agencies, and the State Bar Disciplinary Commission

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EXECUTIVE DIRECTOR'S REPORT

MOVING! APOLOGIES! SURPRISE!

Moving!

The new year will be an exciting one at your new state bar headquarters. At long last, we are through with construction, reconstruction, missed deadlines and disappointments. The construction project is finished and we are "in".

This was no small project, even though one contractor who declined to bid on it—for that reason—told us it was. It was not easy working in a building that was being constructed and renovated. The project is almost five months overdue, but the wait has been worth it.

The staff has been truly magnificent throughout our chaos. Things were not always easy—or pleasant—but flexibility and anticipated new working conditions assuaged many frustrations. Committees and others who had meetings scheduled based upon the contract completion dates were equally flexible and cooperative.

I hope when you visit, you will agree the wait was worth it!

Our new space allows us to have up to seven meetings occurring simultaneously. One room holds 14 persons, another 25 to 30, two others hold six to ten, one holds up to 80, and two smaller rooms hold six to eight. We now have a visiting lawyer's office with adjacent secretarial space and two other small private offices for visitor use, and the bar president once again has an office.

Reginald T. Hamner

We have three refreshment areas and one modest catering kitchen. We have handicap access and visitor parking. The addition of two private telephone booths has been needed and long overdue.

The entire state bar operation is again under one roof in this location. Shortly after the first of the year, when a few remaining furnishings are received, we will dedicate our new facility with a week-long reception. Special days will be designated for the more densely populated circuits, but we hope everyone will make an effort to visit at their convenience. We are already taking reservations for space utilization for depositions, client conferences, arbitration and bar-related group meetings.

This is our profession's building. I hope you will use it and visit it often.

Apologies!

The best laid plans can be thwarted by a computer. We knew the issuance of 10,000 licenses and special membership cards would be a tremendous undertaking—considering the job now done by two people had been done by at least 67. Unfortunately, our computer program and the forms have taken too long to mesh, and, for that reason, we experienced a delay in getting the 1992-93 license certificates in the mail. Also, we experienced an inordinately large number of improper remittances which have taken long hours of overtime to correct. It is hoped that all of the "bugs" now are out of the system and it will be smooth sailing for 1993-94.

Surprise!

The amended pro hac vice rule has revealed by far and away a greater number of non-resident lawyers from other jurisdictions practicing in Alabama than ever imagined. The new rules implementation, with an effective date of October 1, 1992, revealed 186 such lawyers applying in the first week of filing. At this writing, we have or have in process 386 pro hac vice applications. One of these non-admitted lawyers has 88 cases pending in Alabama.

This new system of tracking—once the initial overload is processed—will afford our judges the facts upon which to see how many attorneys are abusing our rules governing admission. Many, in fact, may need to take steps to be admitted in Alabama, given their extensive practice in this state, to avoid a charge of unauthorized practice. This rule applies to practice in all of Alabama's state courts and before her agencies. ■

President's Page

(Continued from page 4)

our fellow (human beings). What we are really looking for is . . . the kind of self-satisfaction that you get from doing right for right's own sake."

We are fortunate in Alabama that few of our peers have fallen victim to this abrasive form of advocacy that seems to otherwise pervade our profession. Published in the November issue of this journal were the tenets of professionalism adopted by your board of bar commissioners. It reminded me of how I should conduct myself as a lawyer. A part of our creed requires that we offer to opposing parties and their counsel "fairness, integrity and civility." We are told by our forebears that these are among the most powerfull weapons a lawyer can possess. If we follow the standards of professionalism adopted by our commissioners, of which civility is an integral part, our satisfaction with the state of our profession, and, indeed, with our own state as practicing lawyers, should measurably increase. It is hoped the esteem of the public will follow. ■

ADDRESS CHANGES

Complete the form below ONLY if there are changes to your listing in the current *Alabama Bar Directory*. Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list and it is important to use business addresses for that reason. NOTE: If we do not know of an address change, we cannot make the necessary changes on our records, so please notify us when your address changes. **Mail form to: Alice Jo Hendrix, P.O. Box 671, Montgomery, AL 36101.**

________ - ________ - ________ Member Identification (Social Security) Number

Choose one: ☐ Mr. ☐ Mrs. ☐ Hon. ☐ Miss ☐ Ms. ☐ Other ________

Full Name ________________________

Business Phone Number ________ Race ________ Sex ____ Birthdate ________

Year of Admission ________________________

Firm ________________________

Office Mailing Address ________________________

City ________ State ____ ZIP Code ________ County ________

Office Street Address (if different from mailing address) ________________________

____

City ________ State ____ ZIP Code ________ County ________

NOTICE

JUDICIAL AWARD OF MERIT NOMINATIONS DUE

The Board of Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through **May 15.** Nominations should be prepared and mailed to **Reginald T. Hamner, Secretary, Board of Bar Commissioners, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101.**

The Judicial Award of Merit was established in 1987, and the first recipients were Senior U.S. District Judge Seybourn H. Lynne and retired Circuit Judge James O. Haley.

The award is not necessarily an annual award. It may be presented to a judge whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar which makes a recommendation to the board of commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

BAR BRIEFS

Gilmore

Chief Justice **Sonny Hornsby** has named **Oliver Gilmore** as administrative director of courts in Alabama.

Mr. Gilmore was named acting director in June when Judge Leslie Johnson resigned to become the director of the Mississippi Judicial College. Gilmore had served as director of finance at AOC since 1988.

A native of Lanett, Alabama, Gilmore has been with AOC since 1978. He was previously employed at West Point Pepperell, West Point, Georgia. He is a graduate of Auburn University and is married to the former Kathy Woodward of Opelika, and they have three children.

The Dickinson Law Center, named for the Honorable **William L. Dickinson,** U.S. House of Representatives, 2nd District, was dedicated October 26, 1992. The Center, located at Maxwell Air Force Base in Montgomery, will house the new Air Force Judge Advocate General School and the Directorate of Legal Information Services and will open May 1993. This $6.1 million center for legal education and information management will enclose more than 56,000 square fee and 14 seminar rooms, conference facilities, three computer education training classrooms, faculty offices, lounges, and a 40,000-volume capacity law library. Two lecture auditoriums, serviced by a state-of-the-art audio-visual support system, will provide facilities for students attending the 23 course offerings throughout the year.

U.S. Representative Bill Dickinson was first elected to Congress from southeast Alabama in 1964 and has served continuously since then.

Congressman **William L. Dickinson** *and then Lt. General Charles G. Boyd, commander of Air University, in front of Maxwell's Dickinson Law Center, named in honor of Dickinson's many contributions to the Maxwell-Gunter community during his 28 years in office* — Photo courtesy USAF

He has served as the Ranking Republican for the last 11 years on the House Armed Services Comittee and is also senior Republican on the subcommittee on Procurement and Military Nuclear Systems, and is a member of the subcommittee on Military Installations and Facilities. As ranking member, Dickinson is an ex officio member of all subcommittees of the full Committee.

Congressman Dickinson's Alabama district is home to three military installations, Maxwell Air Force Base (Air University), Gunter Annex to Maxwell (Air Force Communications), and Fort Rucker (U.S. Army Aviation Center).

Dickinson has received numerous awards, including the highest honor from the American Conservative Union, the "Statesman Award", the Army Aviation Association of America's "Congressional Appreciation Award", and the American Security Council's "Peace through Strength" award.

Dickinson is a native of Opelika, Alabama and obtained his law degree from the University of Alabama in 1950. He practiced in Opelika and from 1951-53, he served as a judge in the Opelika City Court. He became judge of the Court of Common Pleas, then served as judge of the Juvenile Court of Lee County and judge of the Fifth Judicial Circuit of Alabama. In 1963, he moved to Montgomery to serve as vice-president of Southern Railway, a post he held until he won Alabama's Second Congressional seat in 1964.

He served in the U.S. Navy during World War II and as an Air Force Reserve Judge Advocate from 1951-68. He is married to the former Barbara Edwards of Plant City, Florida. He has four children.

James D. Harris, Jr., formerly of the Montgomery firm of Harris & Harris and currently a partner in the Bowling Green, Kentucky firm of Harlin & Parker, has been appointed by the Kentucky Supreme Court as a member of the Kentucky Continuing Legal Education Commission.

Copies of newly adopted **Rules Governing Attorney Discipline** in the United States Court of Appeals for the Eleventh Circuit (Addendum Eight); newly adopted 11th Circuit Rule 33-1 which establishes an Appellate Conference Program; and amendments to Addenda Five, Six and Seven of the Rules of the U.S. Court of Appeals for the Eleventh Circuit are now available without charge. These rules and addenda took effect on October 1, 1992 following public notice and opportunity for comment pursuant to 28 U.S.C. §2071(b). To obtain copies contact: Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, NW, Atlanta, GA 30303, (404) 331-6187. ■

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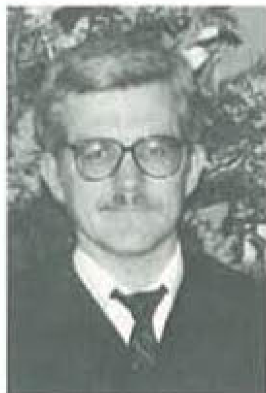

Judge Edward E. Carnes

Edward E. Carnes recently became the newest judge on the United States Court of Appeals for the Eleventh Circuit when he was sworn in October 29, 1992. The ceremony, which took place in Montgomery at the Frank M. Johnson, Jr. Federal Building, included remarks by U.S. Senators Howell Heflin and Richard C. Shelby, Alabama Supreme Court Justice Oscar W. Adams, Jr., Montgomery Mayor Emory Folmar and Morris S. Dees, director of the Southern Poverty Law Center in Montgomery. T.J. Carnes, a member of the state bar and Carnes' father, administered the oath. Carnes was nominated by the President to fill the vacancy left when Judge Frank Johnson assumed senior status.

Morris S. Dees, director, Southern Poverty Law Center

Florine Carnes, Julie Carnes, Becky Carnes, Judge Carnes and T.J. Carnes

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- Maxillofacial Surgery
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BUILDING ALABAMA'S COURTHOUSES

TALLADEGA COUNTY COURTHOUSE

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.*

The historic Talladega County Courthouse

Talladega County

The name "Talladega" is well known to modern day motor sports racing fans, being one of the fastest racetracks in the world. However, the name traces its roots deep into Alabama's Indian past.

In the Creek language, "Talwa" means town, and "Atigi" means border. A literal translation of the combined words forming Talladega means "border town". Talladega, an Upper Creek Indian village, was a border town near the Cherokee and Chickasaw lands. Talladega County is completely bordered on the west by the Coosa River, which served as a boundary between these Indian tribes.

After an Indian massacre of white settlers at Fort Mims on the Mobile River on August 30, 1813 precipitated the Creek Indian War, Governor William Blount of Tennessee called for volunteers and sent troops under Major General Andrew Jackson to fight the Indians and protect the southern frontier. One of the major battles in this war with the Red Stick branch of the Creek Indians took place at Talladega. Jackson used about 2,000 men to encircle the Red Sticks. The Battle of Talladega took place November 9, 1813 in the general area of today's downtown Talladega. The fighting was fierce, but the Indians finally broke out of the encirclement. Jackson lost 14 men and it is estimated that the Indians lost 500.

The Creek Indian War ended the next year after the Battle of Horseshoe Bend and the ensuing Treaty of Fort Jackson, which was concluded on August 9, 1814. By this treaty, the Creeks were forced to give up much of their territory with the exception of the historic Indian lands south and east of the Coosa River and north of a line running approximately from present-day Wetumpka to present-day Eufaula on the Georgia border. Talladega remained in Indian country.

Before the end of the decade, the State of Alabama was created. A significant amount of land located within the boundaries of Alabama remained under Indian control until the Treaty of Cusseta. Signed on April 4, 1832, the treaty transferred all of the territory of the Creek nation to the State of Alabama.

Alabama wasted no time assimilating the land. On December 18, 1832 the Alabama Legislature created nine new counties from this Indian territory. These included Barbour, Benton (later called Calhoun), Chambers, Coosa, Macon, Randolph, Russell, Tallapoosa, and Talladega. After the area was opened for settlement, only a few years passed before most of the Indians were given land in Oklahoma and removed to the West.

Until the Treaty of Cusseta, this land was a wilderness inhabited only by Indians, a few traders and some white squatters. The end of Indian control over the territory inspired a new wave of migration. Settlers came from Georgia, Tennessee, the Carolinas, and other Alabama counties.

The first permanent settlers came to Talladega County in 1833. They settled

near a spring at the site of the Battle of Talladega. This location became know first as Big Spring, then The Battleground, then Talladega Battleground, and finally Talladega.

An act of the Legislature on January 12, 1833 provided that the temporary seat of justice for Talladega County would be at the Talladega Battleground until a permanent site was selected. Eligible locations for consideration as the permanent county seat were the Talladega Battleground, the Ford of the Talladega Creek or Widow Anson's place, and Mardisville. On December 18, 1833 Talladega was confirmed as the permanent seat of justice and it has remained so ever since.

The first courts were held in a log house near the spring. Other buildings, including churches and taverns, were used as temporary locations. Then, on January 4, 1836, a legislative act provided for the building of a permanent brick courthouse. One source recounts that the courthouse was completed in 1838. However, other sources indicate that the building was not finally and fully finished until 1844. In any event, the Talladega County Courthouse has the distinction of being the oldest continously used county courthouse in the State of Alabama.

To pay for the courthouse, a special group of taxes was levied on February 1, 1836. These were the first of many taxes that had to be assessed before the courthouse could be completely paid off. Some of the more interesting taxes levied were the infamous time taxes: $1 for every gold watch; $.25 for every silver watch; $1 for every metal clock; and $.25 for every other clock. Sin taxes were common, including a $25 tax for each billiard table; $15 for a retail liquor license in town; $10 for a retail liquor license outside of town; $10 for a race track; and $1 for every pack of playing cards sold, loaned, given away or otherwise disposed of. There were also sales taxes, slave taxes, horse and cattle taxes, and taxes on money loaned for interest assessed against the lender.

The Talladega County Judicial Building

The contract for the building of the courthouse was signed February 26, 1836. The building contractors were Jacob D. Shelley and Robert K. Hampson. The contract price was $10,000. The contractors agreed to build a structure 40 by 60 feet and 30 feet high above the foundation. The building was to have a cornice going entirely around it and a cupola to conform to plans furnished by the county commission. The work was to include plastering, carpentering, glazing, painting, brick work, and all things necessary to make the building complete and finished in a first-rate workman-like manner.

The are constant references in the County Commission minutes in the years since the completion of the courthouse to work, repairs and purchases for the building. In 1845, the sheriff was authorized to repair a leaky roof. In 1848, $200 was appropriated to remove the cupola and cover the opening. In 1858, the lightning rods on the structure were repaired. Also in 1858, two loads of sawdust were purchased to cover the courtroom floor. Perhaps this was done to protect the floor from muddy shoes, or, more likely, to protect the floor from the errant aim of tobacco chewers. An allocation of $31.70 was made for spittoons. Fortunately, the courthouse suffered no damage during the Civil War years.

On December 19, 1881, the county commission met to discuss plans for repairing the courthouse or constructing a new one. The commission adopted a plan to renovate the building proposed by H.R. Therberge, an architect from New Orleans. On May 10, 1882 the commission awarded a contract to H.A. Howard for $11,935 to complete the work. George O. Wheeler was superintendent of construction. At this time furnaces and heaters were installed in the courthouse. This work was completed in December 1882.

A fence was installed around the courthouse in 1883. The building suffered roof damage from a storm in 1888. In 1889, the fence was changed and shade trees were planted around the building.

By April 1905, plans were approved to alter and repair the courthouse. H.K. Chapman of Atlanta submitted these plans. R.W. West received a contract with his bid of $13,500 to repair the building and add an annex. This construction was the first major addition to the courthouse. Photographs taken after 1905 show that with this addition the building was now shaped like a "T".

In 1911, a second annex was added to the courthouse. Charles W. Carlton of Anniston was architect for the project. The firm of Powell & Wolsoncroft was the contractor. The bid price was $16,743. This time, additions were made on both sides of the building to change the "T"-shaped structure to a square. Photos taken after 1911 show the addition and new entrances to the building.

A tornado struck the courthouse May 11, 1912. The roof was destroyed, a wall was knocked down, and the clock tower

Samuel A. Rumore, Jr.

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 serves as the bar commissioner for the 10th Circuit, place number four.

was lost. Architect Charles W. Carlton again submitted plans for the building and the Little & Cleckler Construction Company submitted a low bid of $3,670 to complete the repairs, build a new tower, and install a new clock.

On Friday the 13th of March 1925, bad luck struck the Talladega Courthouse once again. This time a fire destroyed the roof and inside walls of the building, but the exterior walls remained intact. Fortunately, when the fire was discovered, a former probate office worker broke the window, entered the building, opened the office vault, and placed the probate recordbooks in the fireproof chamber. All of these records were saved due to this quick action.

After the fire, the county commission agreed to rebuild the courthouse, preserving as much of the original structure as possible. The entrances on the east and west sides of the buildings were enclosed, thus providing more needed space. R.H. Hunt, an architect from Chattanooga, submitted the plans for the courthouse restoration. W.L. Little served as contractor. The county paid $60,000 to rebuild the courthouse after the 1925 fire.

In June 1934, "Mother Nature" struck the courthouse in the form of a lightning bolt which damaged the roof and dislodged some bricks. The county commission decided to repair the structure, but also made some minor improvements. Charles H. McCauley of Birmingham was the architect and M.C. Munroe, with a bid of $7,003, was awarded the construction contract.

In the 1970s, rumors began to circulate that the courthouse might be torn down. Local citizens and groups, such as the Talladega County Historical Association, went into action. On October 18, 1972, 39 structures, including the courthouse and surrounding buildings, were named to the National Register of Historic Places as the Talladega Courthouse Square Historic District. The district was later expanded to include 72 buildings and approximately four acres in Talladega's central business area.

The Talladega County Office Building in Sylacauga

Instead of tearing down their courthouse when the needs of the court system required modern and expanded facilities, the citizens of Talladega County constructed a new court building, and allowed their historic courthouse to remain. The new Talladega County Judicial Building was completed in 1974. Martin J. Lide of Birmingham was the architect, and Motes Construction Co. Inc. of Sylacauga was the contractor.

When the courts moved to the new judicial building, the county seized an opportunity to completely renovate, modernize, landscape and preserve its historic courthouse. Streeter Wiatt of Wiatt, Watson & Cole Architects of Montgomery supplied the specifications for the renovation. E.G. Harris, Jr. of Harris Construction Company in Goodwater, Alabama submitted the low bid of $953,736. While the construction proceeded, the county offices moved to the old post office building on the court square.

The Talladega County Courthouse is a structure of red brick, white marble, steel and concrete. It has two stories, an attic and a basement. It is basically a square building with external dimensions of 110 by 104 feet. It is 40 feet high. Its Classical Revival details include a pedimented central portico supported by two sets of double columns with decorative bands and Corinthian capitals, a Classical cornice, and a pediment with a circular window. The first-floor windows are crowned by tapered bricks which create the impression of heads of wheat.

On October 2, 1977, Talladega County hosted a rededication of the Talladega County Courthouse in what was billed as its "137th Year of Continuous Service to the Citizens of Talladega County". Those citizens can certainly be proud of their rich heritage and their keen foresight in preserving a cherished historic landmark—their courthouse.

To conclude the story of the Talladega County courts, it must be noted that Sylacauga in Talladega County is also considered a court site by the Administrative Office of Courts. A courtroom is provided in the Talladega County office building located at Sylacauga. The architect for this building, which was constructed in 1964, was Charles H. McCauley & Associates of Birmingham. The contractor was Motes Construction Company, Inc. of Sylacauga, which also built the new Talladega County Judicial Building.

The author acknowledges the work of Betty R. Lessley of Sylacauga, who compiled information on the history of the Talladega County Courthouse for the rededication brochure of October 2, 1977 and for the pamphlet honoring the 150th Anniversary of the Founding of Talladega County, which was celebrated April 2, 1982. ■

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Lawyers & Doctors Join Forces Against Drug Abuse

by EDWARD M. GEORGE

At the Governor's Youth Conference on Drug Awareness held at the Montgomery Civic Center October 26-28, several hundred junior high and high school students were introduced to the concept of "Partners in Prevention," a strategy involving the joint presentation by a lawyer/doctor team of information about the consequences of drug and alcohol abuse. In particular, three groups of approximately 200 students each heard discussions by Montgomery County Juvenile Court Referee Robert Bailey and Dr. Sandra Morrison about the legal, medical and social effects of substance abuse. Bailey spoke to the students from the point of view of a judicial official and made them aware of the types of legal difficulties which teenagers can suffer as result of the illegal usage of alcohol or other drugs. For example, Bailey explained that under Alabama's juvenile justice statutes, persons under the age of 18 who are convicted of a juvenile offense can be subjected, at the discretion of the court, to one or more of a wide variety of punitive measures, ranging from unsupervised probation, to compulsory community service, to incarceration in a juvenile facility until the offender reaches the age of 21. Bailey made the students aware that under certain circumstances a juvenile drug offender over the age of 14 can be treated by the circuit court as an adult offender and sentenced to the same prison term as would an adult criminal convicted of a similar offense.

Dr. Morrison, a board-certified addictions specialist, serves as medical director at the Bradford Alcoholism and Chemical Dependency Treatment Center in Pelham, Alabama. During her portion of the joint presentations Morrison discussed some of the myths about substance abuse, as well as some of the signs indicating that a teenager is having a problem with drugs or alcohol. Morrison warned the students not to be fooled by the widely-held notion that alcohol is a less dangerous substance than illicit street drugs. According to Morrison, nearly one-half of all automobile accidents in which teenagers are killed involve the use of alcohol, and alcohol abuse has a direct relationship to the likelihood that an adolescent will suffer death from another tragic event such as drowning, suicide or fire. Morrison informed the students that the majority of the teenagers who are patients at the Bradford Center are not being treated for addiction to illicit drugs, but alcoholism or alcohol abuse problems.

Juvenile Court Referee Bailey, Dr. Morrison and committee chairperson Shaner

Lawyer/Doctor Education Team Project

The presentations by Bailey and Morrison were examples of a nationwide program called the Lawyer/Doctor Education Project. The formation of this project was first formally announced at the January 1990 meeting of the American Bar Association by the respective presidents of the ABA and the American Medical Association. The Lawyer/Doctor Project is a community-based drug and alcohol abuse prevention program designed to reach young people in grades three through 12. In particular, the project targets seventh-graders because persons in that age group are entering puberty and experiencing many physical and emotional changes, including becoming less dependent upon parents and more dependent upon peers as

behavioral role models.

The Lawyer/Doctor Project calls for attorneys and physicians to serve as the nucleus of a community-based drug abuse prevention effort which can also include participation by law enforcement agencies, other medical professionals, businesses, schools, social service agencies, and civic organizations.

According to the ABA, the project's goals are:

To disseminate to young people, and adults who work with them, authoritative and practical information about the physiological, psychological, social and legal consequences of alcohol and other drug abuse;

To strengthen young people's social competencies and peer resistance skills in dealing with life's pleasures and pains;

To affect policies in schools, in their communities and state and local governments, and the media;

To raise public awareness and understanding of the medical and legal implications of alcohol and other drug use by young people;

To promote positive alternative and life options for young people;

To train key figures, both adults and young people, in a position to influence others in their school and community; and

To collaborate with other institutions and partnerships to support existing comprehensive prevention programs.

Guiding assumptions

From its initial stages, the lawyer/doctor prevention effort has been guided by the following assumptions about establishing and expanding the project:

Edward M. George

Edward M. George earned his undergraduate degree at Auburn University, his master's degree at Troy State University and his law degree at Jones School of Law. He was employed for seven years by the Alabama Mental Health Department and then by the Alabama Department of Postsecondary Education. He recently joined the Montgomery firm of Jeffery A. Foshee & Associates.

The partnership project can be adapted to participating lawyers' and doctors' interests and time commitments;

The partnership's activities complement the current prevention efforts of the schools and organizations in which they are volunteering;

The lawyer/doctor partnership can set an example for building other partnerships in the same school and other organizational settings;

The lawyer/doctor teams are presented as positive, professional role models who can talk in a straightforward manner on how young people can channel their energy into positive, productive activities.

The prevention activities the partnership uses do not require extensive preparation;

The prevention activities involve interaction between young people and the lawyer/doctor team;

The partnership gives clear no-use messages substantiated by valid, proven social, psychological, legal and medical reasons for not using; and

The lawyer/doctor partnership can be very effective in educating adults, staff, parents and community leaders, as well as working directly with young people in a variety of settings.

Prevention Project is nationwide

At the present time, there are 13 state and 26 community lawyer/physician drug prevention projects being conducted throughout the United States. While most of the state and local projects are being carried out in school settings, others are being conducted in community youth organizations, such as Boys Clubs, Girls Clubs, juvenile justice systems, parent groups, and social service agencies. Respondents to an Alabama Bar Association survey on the various lawyer/doctor programs have cited a variety of benefits which are being derived from the collaboration between medical societies and bar associations. Among the benefits most frequently expressed by respondents to the survey are: increased dialogue between medical and legal groups; improved working relationships between the medical and legal communities; improved public image of doctors and lawyers; involvement of medical and legal associations in schools and community youth organizations; development of networks with civic service groups, parents groups and other professional groups, such as pharmacists, nurses and law enforcement officers; and greater insight into the reality of how today's young people are affected daily by others' use of alcohol and other drugs.

Exemplary state and local projects

Among state and local lawyer/doctor drug prevention programs which have been designated as exemplary by the American Bar Association are the Detroit Bar Association's MELL Team Project, the Maryland State Bar Association's Doctor/Lawyer/Teacher Partnership Against Drugs, and the Pennsylvania Bar Association Young Lawyers' Division's Lawyer/Doctor Education Team Partnership Against Drug and Alcohol Abuse.

The MELL (Medical-Education-Legal-Law Enforcement) Team project involved teams of medical, legal and law enforcement representatives meeting simultaneously on three successive weeks with over 45,000 students in grades three through eight in all of Detroit's 156 public elementary schools. After the initial meetings, team members made themselves available as mentors for the entire school year for the schools they had visited. In addition to meeting with students, five teams met with parents at the five regional school district offices where they discussed drug prevention and distributed "Growing Up Drug-Free: A Parents' Guide to Prevention", a U.S. Department of Education publication.

In Maryland, the state bar association has joined forces with the Medical and Surgical Faculty of Maryland to send teams of lawyers and doctors into most of Maryland's 213 middle schools where the team members have spoken to nearly 20,000 seventh graders on the realities of drug abuse and its related problems. The MSBA partnership project was coordinated with the state's drug education and prevention initiatives and has involved other civic groups, including a local Rotary Club, bar association and medical society.

In Pennsylvania, the state bar association's Young Lawyers' Division's Medicological Committee and the Pennsylvania Medical Association's Young Physician's Section formed lawyer/doctor education teams to speak to classes at Pennsylvania middle schools as well as to other groups of youths between the ages of nine and 13. The goal of the Pennsylvania project is to engage adolescent children in frank and meaningful discussions about the dangers of drug and alcohol abuse.

Attendees of the October conference in Montgomery

Each of the three projects described above is designed to give practical, up-to-date, reliable and actual case history information on the health dangers and legal risks of drug and alcohol abuse. The lawyer/doctor teams are presented as positive, professional role models who can talk in a straightforward manner on how young people can channel their energy into positive, productive activities.

Alabama's effort

The Alabama State Bar's Committee on Substance Abuse in Society has taken on, as part of its plan of action for 1992-93, the goal of working "toward the implementation of Lawyer/Doctor Education Teams consistent with the guidelines of the 'Partnerships in Prevention' Program of the American Bar Association in cooperation with the American Medical Association." The Committee currently is investigating the possibility of developing and implementing a Lawyer/Doctor Education Team Project with the assistance of the Medical Association of the State of Alabama. Physicians and attorneys who think they might be interested in participating in such a project should contact Committee Chairperson Patricia E. Shaner, who is the staff attorney for the Alabama State Board of Medical Examiners. Her mailing address is P.O. Box 946, Montgomery, Alabama 36101-0946, and her office telephone number is (205) 242-4116.

She will assist interested parties by providing them with information on the establishment of lawyer/doctor education teams and by helping bring together lawyers and doctors who share a common interest in prevention of adolescent drug abuse. ■

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OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

FACTS:

Client's ex-husband is far behind in his court-ordered child support. Client wants me to try and collect the child support but client has no money to pay a reasonable attorney's fee. Client does not have sufficient information to cause a wage withholding order to be issued (in Mobile the client can go directly to the clerk of the court, pay $15 and a wage withholding order will be issued if she knows the name and address of her ex-husband's employer and he is more than 30 days in arrears).

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QUESTION:

Can I take the case on a contingency fee basis?

ANSWER:

You may enter into a contingent fee agreement to collect child support where the client is unable to pay a reasonable attorney fee on a non-contingent basis.

DISCUSSION:

Contingent fees have been condemned and prohibited in divorce cases because they are seen as pitting the lawyer's interests against those of the parties and of society. A fee contingent upon the securing of a divorce gives the lawyer an interest in discouraging or thwarting reconciliation of the parties. A fee contingent upon the amount of support or property settlement has the same effect. In addition, the lawyer would be encouraged to maximize the amount of support or property awarded the client, perhaps sacrificing the client's other interests, such as child custody. (Florida Bar Professional Ethics Committee, Opinion 87-3, 10/87, released 11/87).

The Code of Professional Responsibility of the Alabama State Bar in effect from 1974 until the end of 1990 did not contain a disciplinary rule prohibiting contingent fees in domestic relations matters. The *Code* did contain, however, an "Ethical Consideration" stating that contingent fee arrangements in domestic relations cases are rarely justified because of the human relationships involved and the unique character of the proceedings. (EC 2-20, *Code of Professional Responsibility*, Alabama State Bar).

In prior opinions, the Disciplinary Commission has noted that the enforcement of contingent fee contracts in a domestic relations case poses primarily a question of law rather than one of ethics. A fee contract contingent upon the amount of alimony an attorney obtains for a client upon the attorney's procuring a divorce is generally held void as against public policy. The major arguments in support of this position are that these agreements give the attorney an interest in avoiding reconciliation. RO-83-22, *The Alabama Lawyer*, July 1983, pg. 219. Having noted this the Disciplinary Commission concluded that:

"Once a final decree of divorce has been entered awarding alimony and/or child support, the collection of arrearages concerning the same would not discourage reconciliation, promote divorce and, therefore, violate the public policy against the destruction of marriages. Furthermore, the mechanics of reducing an order for child support and/or alimony to judgment and proceeding to collect the same would not appear to involve 'the human relationships' or 'the unique character of the proceedings' referred to in Ethical Consideration 2-20." *Supra* 219.

In subsequent opinions, the Disciplinary Commission held that a lawyer could accept representation in a paternity action on a contingent fee basis (RO-87-96) and could represent a wife on a contingent fee basis in an action seeking money damages for breach of an antenuptial contract. (RO-88-103).

Rule 1.5(d) of the Alabama Rules of Professional Conduct, which became effective January 1, 1991, prohibits a contingent fee in a domestic relations matter that is contingent upon the amount of alimony, support or property settlement. This language is broader than the language contained in EC 2-20 and contains no specific exception. The rule reads as follows:

"(d) A lawyer shall not enter into an agreement for, charge, or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof."

The pivotal question here is whether this broadly restrictive language prohibits contingent fee agreements in child support cases under any circumstances. Clearly, it would prohibit contingent fees in the initial divorce proceeding where the marriage is terminated and property and support matters are settled. At least one jurisdiction has ruled that a contingent fee may be charged for collecting a judgment for alimony entered in another state. The theory of this decision is that the prohibition against charging contingent fees in domestic relations matters does not apply because the court had already ascertained the amount of alimony and the representation is limited to collecting an existing judgment. (Opinion 90-98 [undated], Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association). Under the old rules, although, the Disciplinary Commission of the Alabama State Bar in Ethics Opinion 170 used similar rationale in a case involving arrearages of unpaid child support. The Commission stated, "Although the proceeding originated as a domestic relations matter, once the arrearages of child support were reduced to judgment, the collection of the same was analogous to the collection of any other indebtedness."

There are several reasons for continuing this rationale in our interpretation of new rule 1.5(d). First, where the client cannot afford to pay a reasonable attorney's fee, a strict application of the rule would deny the client the benefits of legal representation. In this situation, a contingent fee arrangement would serve the desirable purpose of ensuring that the party with lesser means is able to secure competent counsel to protect that party's interest and, indirectly, the interest of society. (Opinion 87-3, Florida Bar Professional Ethics Committee, *supra*).

Second, the evils that the rule attempts to avoid are not present in this situation. The marriage has been terminated and the contingent fee would not give the lawyer an interest in discouraging or thwarting reconciliation of the parties. Another evil, not present here, is that the lawyer may, because of the contingent fee, influence the distribution of property toward a distribution that favors the lawyer and does disservice to the client and the client's children.

For these reasons, it is our view that it would not be a violation of Rule 1.5(d) to charge a contingent fee in a case involving collection of arrearages in unpaid child support, subject to the following conditions:

(1) that the fee is fair and reasonable;

(2) that the client is indigent and no alternative fee arrangement is practical; and

(3) there are no means available to the client (similar to those mentioned in your question) to collect the arrearage. ■

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"The Law... Should Be Accessible to Every Man at All Times"

by TIMOTHY A. LEWIS

This is the second in a series highlighting those who have benefited from the Alabama Law Foundation's IOLTA program.

"Before the Law stands a doorkeeper. To this doorkeeper comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. 'It is possible,' answers the doorkeeper, 'but not at the moment.' These are difficulties the man from the country has not expected to meet; the Law, he thinks, should surely be accessible at all times and to everyone . . . " (Kafka, Franz, "Before the Law", in ***Franz Kafka, The Complete Stories,*** *Schocken Books, 1946.)*

If there is a purpose to public law libraries, it is embodied in this story. Public law libraries are gateways to the law, thresholds to be crossed before entering the halls of justice. Access to the law is a fundamental right of every citizen of every state of the United States, and an essential element of this right is access to the sources of the law. This access is accomplished through public law libraries. Yet, in Alabama in 1989, these doors to justice were in disrepair, many literally off their hinges. Of the 67 county law libraries, some could not afford basic legal research materials, others had these materials but could not afford to supplement them, many lacked basic equipment necessary for a library, and most had inadequate facilities. Three years later, thanks to the Alabama Law Foundation's IOLTA grant program, there is hope for public law libraries in Alabama.

In 1987, when the supreme court amended Disciplinary Rule 9-102, they listed as one of the purposes of the IOLTA program, "to help maintain public law libraries." In making law libraries one of the beneficiaries of the grant program, both the supreme court and the IOLTA Task Force recognized the importance of legal information to the judges and attorneys in Alabama. They also recognized that, by definition, public law libraries are to serve the legal information needs of the average Alabamian, whether they be *pro se* litigants, student or casual researcher. Thus, the reason for helping to fund public law libraries is not narcissistic, but a true desire to make the law accessible to everyone.

Included in the term "public law libraries" are the 67 county law libraries, established under the authority of §11-25-1 for the "use and benefit of the county and state officials, court system and the public." These law libraries are principally funded by a library fee assessed as part of the cost of filing a case in court. Because these fees are the only financial support for county law libraries, the budgets of county law libraries are dependent on the number of cases filed in each county causing funding for law libraries to vary with the amount of litigation. This fact, coupled with rising legal materials costs, and the fact that law library fees in some counties have not increased in years, caused a fiscal crisis in county law libraries. The result was the cancellation of existing subscriptions and the inability of law libraries to purchase new materials or invest in new technology. In 1989, the advent of the IOLTA grant program began to turn around this situation. That year, ten county law libraries received IOLTA grants totaling $50,977.50. This money was used to purchase law books, much-needed computer equipment, telefacsimile machines, CD ROM workstations, and essential items such as photocopiers and library shelving.

Since that time, the Law Foundation has provided 27 grants to county law libraries to help meet the needs of their users. In Montgomery County, the law library used an IOLTA grant to purchase video equipment and continuing legal education videotapes to be used by local attorneys and law students. The Huntsville-Madison County Law Library, with the help of an IOLTA grant, installed a WESTLAW terminal, as did the Colbert County Law Library. In the four years the IOLTA program has been awarding grants, county law libraries have received $277,496.50, or approximately 9 percent of the all IOLTA funds awarded.

Also included among public law libraries is the supreme court and state law library in Montgomery. In 1990, the state's oldest and largest public law library began its automation project, the goals of which were to create a computerized catalog of the law library's materials, automate its clerical functions, and provide a public access WESTLAW terminal and a CD ROM workstation. The ultimate aim of this project is to network the supreme court library with other law libraries in the state. Without the help of IOLTA grants totaling $54,421.00 over a three-year period, this project would never have begun and, it is hoped, future IOLTA grants will help the project reach its ultimate goal.

The public law libraries in Alabama are fortunate to have a friend like the Alabama Law Foundation, a friend that is as committed as they are to making the law accessible to all who request it. ■

Timothy A. Lewis

Timothy A. Lewis is a 1988 admittee to the state bar. He received his undergraduate degree in 1979 from the University of Alabama and his law degree in 1984 from the University's School of Law and his master's of library science in 1981 from the University. He serves as the state law librarian and director of the supreme court library.

BOOK REVIEW

by Patrick H. Graves, Jr.

Alabama Tort Law Handbook

by Michael L. Roberts and Gregory S. Cusimano

(Michael L. Roberts is a 1977 admittee to the Alabama State Bar and practices with the firm of Floyd, Keener, Cusimano & Roberts in Gadsden. Gregory L. Cusimano was admitted to the state bar in 1968 and also practices with Floyd, Keener, Cusimano & Roberts.)

If a novel is to be judged by its ability to entertain, a legal treatise must be judged by its usefulness to the profession. The *Alabama Tort Law Handbook*, written by Michael L. Roberts and Gregory S. Cusimano and published in 1990 by The Michie Company, has been out long enough to make a judgment about its usefulness to the profession. By all standards, the treatise is an outstanding contribution to the Alabama bench and bar.

A strong point of the book is its organization and format. The book can be accessed very simply through the table of contents, which is detailed enough to allow the user to locate a specific topic. The index, generally a shortcoming in many books, likewise is concise, yet thorough.

While the name "handbook" implies that this book is merely a finding tool, the *Alabama Tort Law Handbook*, with its outstanding commentary, is a strong secondary source for information. It offers an excellent substantive presentation, clearly a cut above many treatises which merely state a proposition of law followed by a string of citations in a footnote. A good example is the chapter on fraud. These 66 pages contain the best presentation on the topic of fraud this writer has seen.

One of the unique features of this book is the practical aspect found in the appendices. These appendices cover the preparation and trial of the tort case in general and, more specifically, the practical aspects of five of the more important torts, plus remittitur.

While some lawyers may judge this book to have a plaintiff's bent to it, one must ask if anyone other than a plaintiff's lawyer could write a good torts book. In addition to giving defense lawyers a good insight into the plaintiff's case, the book sets out, in much detail, defenses to the various torts. The guiding hand of Gregory Cusimano, an experienced and respected trial lawyer, is evident in these pages. This fact alone should dispel any doubt about the value of the book to a trial lawyer, whether plaintiff or defendant.

In sum, the *Alabama Tort Law Handbook* is the first treatise of any weight on tort law in Alabama and is highly recommended. Michael L. Roberts and Gregory S. Cusimano have made a valuable contribution to the profession.

As an aside to this book review, it is noted that the state remains short on legal treatises devoted to Alabama law, even though there has been a tremendous increase in such treatises in recent years. Anyone who has ever published a legal book in Alabama knows it is not lucrative. Such acts are done to some degree for love of profession. We need to encourage the publication of future such works.

PATRICK H. GRAVES, JR. is a 1972 graduate of the University of Alabama School of Law and practices with the firm of Bradley, Arant, Rose & White in the Huntsville office.

HONOR ROLL

Between September 26 and November 30, 1992, the following attorneys made pledges to the Alabama State Bar Building Fund. Their names will be included on a wall in the portion of the building listing all contributors. Their pledges are acknowledged with grateful appreciation.

For a list of those making pledges prior to September 26, please see previous issues of *The Alabama Lawyer*.

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DENNIS M. WRIGHT

Opening of Court Ceremony

Remarks by Parham Williams

October 5, 1992

The following memorial address was given by Parham Williams, Dean of the Cumberland School of Law, Samford University, at the Opening of Court Ceremony.

May it please these Honorable Courts.

We are gathered here today for two significant purposes:

One is to participate, as citizens of this state and nation, in the Opening of Court Ceremony for these important appellate courts. This day marks the beginning of yet another term during which these courts will review and make ultimate decisions in hundreds of legal matters affecting the lives of people like you and me.

I readily confess that I am honored—and a little awed—to have the privilege of speaking on this occasion. For I have long regarded the appellate courts of Alabama as the most *effective* state appellate courts in the United States. By the term "effective", I mean three things:

Integrity.

Competence.

Productivity.

The judges who comprise these courts epitomize those attributes.

The lawyers of our state—indeed the people of Alabama—are fortunate to have judges of this caliber on the benches of our highest courts.

I am told that this is likely the last Opening of Court Ceremony to be held in this historic chamber. Next year, the ceremony will take place in the splendid new Justice Building under construction across the street.

Mr. Chief Justice, I have one request: When you become ensconced in that august temple of justice, please remember ordinary folk like me!

Browsing through the cards in a Hallmark store recently, I found a verse that expresses my request perfectly:

When you're in a jam, call on me. When you're up a tree, Call on me. And when you win the lottery, Remember who was there, When you were in a jam or up a tree!

The second purpose of our gathering today is to honor the memory of 62 of our colleagues of the bench and bar who have died during the past year.

Their lives reflect the spectrum of our profession;

Some were partners in big city law firms;

Some were small-town practitioners;

Most were men; some were women;

Some were litigators; others had successful office practices;

Some achieved wealth in tangible form;

Others claimed wealth only in the form of family and friends.

But each one was a *hero* of our profession.

I use the term "hero" as Justice Oliver Wendell Holmes did in his famous essay, "The Profession of the Law." He wrote:

"I say to you [who would uphold our profession] that *you must be heroes* as well as idealists."

He then defined "hero" in the original Greek sense of the word: namely, one who is a *protector* of others.

What a wonderfully apt description of those whom we honor today, for in that sense they truly are heroes of our profession.

And, in this time of great challenge to lawyers and the law, we need to remember Justice Holmes' ringing challenge to be heroes and take renewed pride in our profession and in ourselves as lawyers.

What are the attributes of a hero of our profession?

In the last two years, I have done a number of workshops for bar associations and for law firms, workshops in which we explore, as candidly as possible, the quality of professionalism among lawyers. As part of the process, I ask the participants to list the most important qualities which a lawyer should possess. Their responses are invariably consistent. Let's see if you agree with them.

Integrity is always ranked first.

Then a sense of *fairness*.

Then *courage*,

imagination,

compassion, and

intellect.

Do you agree with their ranking?

I suspect that most of us do. And that we also would agree that these attributes are beautifully appropriate descriptions of those whom we memorialize today.

The quality of *integrity* is undeniably the paramount feature of the good lawyer. Integrity encompasses both honesty and mature ethical values, values which are the guiding principals of a life lived upon a higher moral plane than that upon which most of us grope and struggle.

A sense of *fairness* implies a willingness to exalt that quality of the law which opens her doors to all persons,

weak or strong,

rich or poor,

white or black,

of whatsoever religion, creed or belief.

The quality of *courage* is absolutely essential in the makeup of a lawyer. The courage to represent unpopular clients, to espouse causes which, though legally and morally right, may subject the advocate to ridicule and ostracism, even to economic retaliation or physical violence. There are some among those we honor today who, as a lawyer or judge, confronted

such situations with unwavering courage and fidelity.

Imagination is that quality which distinguishes a really good lawyer from an ordinary one. You know, it is rare that an appellate court ever comments on the permissible range of a lawyer's imagination in handling and arguing a case. But there is one case, decided nearly 60 years ago in our sister state of Mississippi. The style of the case is itself memorable: *Nelms & Blum v. Fink*, 159 Miss. 372, 131 So. 817 (1930).

The issue: Whether Plaintiff's lawyer had strayed too far from the facts when he told the jury in closing argument that, throughout the trial, defense counsel had been "striking at the plaintiff, this wife and mother, like a viperous snake."

In deciding that the characterization of his opponent was permissible, the supreme court had this to say about the range of a lawyer's imagination in framing an argument:

"Counsel may draw upon literature, history, science, religion and philosophy for material for his argument. He may navigate all rivers of modern literature or sail the seas of ancient learning; he may explore all the shores of thought and experience; he may, if he will, take the wings of the morning and fly not only to the uttermost parts of the sea but to the outer reaches of space in search of illustrations, similes and metaphors to adorn his argument. He may reach the supreme heights of attainable eloquence, soar into the empyrean peaks where his shadow may fall on the highest mountain top, as the eagle in its loftiest flight. He may clothe the common occurrences of life in the habiliments of poetry and give to airy nothings a habitation and a name. He may weave of words a rhetorical bouquet that enchants the ear and mesmerizes the mind. He may make the learning of the ages the servant of his tongue."

Whew! Mr. Chief Justice, after wading through that I have renewed respect for those who must hear the arguments of lawyers!

The quality of *compassion* derives from sources outside our meager store of talents. It is the gift we receive, unmerited

from loving families,
from the teachings of our religion,
from the moving of the Holy Spirit within us.

Finally, *intellectual strength* connotes a broad and conscious knowledge of the law coupled with an openness, a willingness to listen, to hear new ideas and new theories of the law.

Those whom we honor today as *heroes of our profession* possessed these qualities which mark the good lawyer. And, in addition to intellect and integrity, courage and compassion, fairmindedness and imagination, they displayed *a love of family, church and nation* which marked them as superior human beings.

Ultimately, these courts,
the legal profession, the state,
indeed, all of us,
are better, more useful, more complete,
because they lived among us, and served us well. ■

Deceased Attorneys, October 7, 1991 – September 30, 1992

Theodore Jarrett Abercrombie .... Virginia Beach, Virginia
Clarence William Allgood, Sr. .... Birmingham, Alabama
Ingram Beasley .... Birmingham, Alabama
William Whyte Bedford .... Birmingham, Alabama
James L. Beech, Jr. .... Jasper, Alabama
David Ross Benson .... Sprague, Alabama
Rowan Bone .... Gadsden, Alabama
Robert P. Bradley .... Montgomery, Alabama
Ralph Lee Brooks .... Anniston, Alabama
Rufus Arthur Burns .... Birmingham, Alabama
Allan R. Cameron .... Mobile, Alabama
John E. Campbell .... Alexandria, Virginia
Lewis Vernon Chesser .... Andalusia, Alabama
Stephen B. Coleman, Sr. .... Birmingham, Alabama
Robert Timothy Cox .... Anniston, Alabama
Laura Ann McDonald Dahle .... Fairhope, Alabama
Christopher Hartwell Davis .... Montgomery, Alabama
Joseph Mathes Scott Dawson .... Scottsboro, Alabama
Thomas Eric Embry .... Birmingham, Alabama
Richard Bailey Emerson .... Anniston, Alabama
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Richard Vaiden Evans, Sr. .... Birmingham, Alabama
Alex D. Fancher .... Birmingham, Alabama
John Wagner Finnell .... Tuscaloosa, Alabama
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James E. Hart, Jr. .... Brewton, Alabama
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Joseph Allen Hornsby .... Gadsden, Alabama
Watkins Cook Johnston, Sr. .... Montgomery, Alabama
William Quinton Kendall .... Selma, Alabama
Ralph Kennamer .... Mobile, Alabama
Morris Clinton McGee .... Tuscaloosa, Alabama
William Earl McGriff, II .... Anniston, Alabama
Frank J. Martin .... Gadsden, Alabama
Pelham J. Merrill .... Montgomery, Alabama
Carol Joan Millican .... Rainsville, Alabama
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Edward Raymond Murphy .... Florence, Alabama
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Martha Leslie Miller (1992), Anita Leslie Cochrane (1974), Henry A. Leslie (1948) and Arthur Leslie (1981) (admittee, mother, grandfather and uncle)

Sara N. Creed (1992) and Wayne M. Jones (1987) (admittee and brother-in-law)

Sterling V. Frith (1992) and Roianne H. Frith (1987) (admittee and wife)

Jack Martin Bains, Jr. (1992) and Jack Martin Bains (1953) (admittee and father)

Kate Baldwin Gamble (1992), William Jordan Gamble (1967) and Harry Whitehead Gamble, Sr. (1923) (admittee, father and grandfather)

David E. Avery, III (1992) and James O. Spencer, Jr. (1965) (admittee and father-in-law)

E. Ansel Strickland, Jr. (1992) and Edwin Ansel Strickland (1964) (admittee and father)

Apsilah Owens (1992) and John A. Owens (1967) (admittee and father)

Courtenay F. Williams (1992) and James S. Williams (1991) (admittee and husband)

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Richard F. Horsley (1992) and William F. Horsley (1964) (admittee and father)

Sterling DeRamus (1992) and Lesley Smith (1989) (admittee and fiancee)

Philip Dale Segrest, Jr. (1992) and Judge Philip Dale Segrest, Sr. (1967) (admittee and father)

Benjamin H. Albritton (1992), Thomas B. Albritton (1992), William Harold Albritton, IV (1985), and Judge William Harold Albritton, III (1960) (co-admittees, brother and father)

Joseph S. Miller (1992), Teresa Miller Norman (1986) and Keith B. Norman (1981) (admittee, cousins)

Seth B. Thompson (1992) and James E. Thompson (1953) (admittee and father)

Thomas Lea Douglas, Jr. (1992), Barbara Douglas Williams (1984) and Brian T. Williams (1979) (admittee, sister and brother-in-law)

Ralph W. Hornsby, Jr. (1992) and Ralph W. Hornsby, Sr. (1965) (admittee and father)

Maureen Kelley (1992), Jim Thompson (1969), Patricia Kelley (1987), and John Thompson (1969) (admittee, uncle, sister and uncle)

LAWYERS IN THE FAMILY

M. Warren Butler (1992) and Judge Charles R. Butler, Jr. (1966) (admittee and father)

Heidi Price Harp (1992) and Jimmie G. Harp, Jr. (1991) (admittee and husband)

C. Clay Torbert, III (1992), Mary Dixon Torbert Martino (1984) and C.C. Torbert, Jr. (1954) (admittee, sister and father)

Carey Bennett McRae (1992) and Judge C. Bennett McRae (1962) (admittee and father)

J. William Cole (1992) and Judge William H. Cole (1947) (admittee and father)

A. Wade Leathers (1992) and M. Lionel Leathers (1980) (admittee and brother)

Sharon Anne Donaldson (1992) and Frank W. Donaldson (1954) (admittee and father)

Timothy Wade Knight (1992), Ginger Hill Knight (1992) and Tommy Edward Hill (1967) (co-admittees, father-in-law/father)

Patricia Anne Klinefelter (1992) and James L. Klinefelter (1951) (admittee and father)

LAWYERS IN THE FAMILY

Billy C. Burney (1992) and Billy C. Burney (1966) (admittee and father)

George M. Zoghby (1992) , Judge Michael E. Zoghby (1957) and Alex W. Zoghby (1983) (admittee, father and uncle)

Eliza Lee Paschall (1992) and Charles E. Tweedy, Jr. (1928) (admittee and grandfather)

H. Lanier Brown, II (1992) and Houston L. Brown (1973) (admittee and father)

Kenneth A. Dowdy (1992) and Kristi A. Dowdy (1992) (husband and wife admittees)

Gina Thomas (1992) and Chad Wachter (1990) (admittee and brother-in-law)

Sara C. Semmes (1992) and Thomas M. Semmes (1977) (admittee and husband)

James Darrington Hamlett (1992) and Rosa Hamlett Davis (1972) (admittee and aunt)

James M. Proctor (1984), Laura E. Proctor (1992) and John F. Proctor (1957) (brother, admittee and father)

• ALABAMA STATE BAR •

FALL 1992 ADMITTEES

FALL 1992 ADMITTEES

Stacy Wade Adams
James Edgar Akridge, Jr.
Benjamin Howard Albritton
Thomas Bynum Albritton
Allison Lynn Alford
Laurie Ayers Ames
David Michael Anderson
Kathleen Claudia Anderson
William Brantley Anderson
Robert Stephen Aultman
David Edward Avery, III
Paul Alan Avron
Jack Martin Bains, Jr.
Jason James Baird
David Stuart Baker
Ernest William Ball
Mary Elizabeth Barile
William Bruce Barr, Jr.
Ronald Bruce Barze, Jr.
Bennett Lee Bearden
Mary Susan Beatty
Randal Dean Beck
Richard Michael Beckish, Jr.
Emil Erich Bergdolt
John Milton Bergquist
Karen Geekie Baigi
Laureen Catherine Binns
Jody Wade Bishop
Clarence Blake
David Berman Block
Howard Elliot Bogard
Carmen Elena Bosch
William Hollis Bostick, III
Benjamin Max Bowden
Matthew Wayne Bowden
Jeffrey Lowell Bolwing
Aimee Marie Brandon
Houston Lanier Brown, II
Hall Balke Bryant, III
Barbara Jeanne Bugg
Stephen James Bumgarner
Patricia Powell Burke
Billy Carpenter Burney, II
Clint Wade Butler
Michael Warren Butler
William Crumbly Byrd, II
David Bryson Byrne, III
Joseph Welch Cade
Cynthia Moore Calhoun
David Hall Carter
David Michael Carter
Rodney Reed Cate
Stephen Douglas Christie
Lee Brian Chunn
Jay Harvey Clark
Patrick Fred Clark
Richard Scott Clark
Edwin Brobston Cleverdon
James Paul Clinton
Steven Lee Cochrun
John William Cole
Lucinda Pittman Cole
Darin Wayne Collier
Kelly Ann Collins
Benjamin Owings Collinson
Lisa Ann Copeland
Constance Elizabeth Cox
Kim Allyson Craddock
Sara Nell Creed
Brent Lindsey Crumpton
Michael Lawrence Cumpton
Paige Maddox Davis
Thomas Andrew Davis
Patricia Dunn Demos
Terry Lee Dempsey
Sterling Lanier Deramus
Ann Stella Derzis
Joyce Louise Dietzen
Ralph Laurence Dill, IV
Kimberly Dobbs-Ramey
Courtney Lenore Dodge
Sharon Anne Donaldson
Joel Frank Dorroh
Thomas Lee Douglas, Jr.
David Hamill Dowdy
Kenneth Alden Dowdy
Kristi Allen Dowdy
Allison Leigh Downing
Lee Allen Dubois
Diane Leigh Dunning
Howard Wayne East
Allyson Leigh Edwards
Richard Randolph Edwards
Larry Bill Eliason
Leslie Sturdivant Ennis
Cheryl Denise Eubanks
Gina Marie Fichter
Frederick Lane Finch, Jr.
John Michael Fincher
Barry Joseph Fisher
Gilbert Larose Fontenot
Patricia Ann Ford
Eric Douglas Franz
Sterling Vernard Frith
Floyd Denard Gaines
Kate Baldwin Gamble
Kimberly Beth Glass
Elizabeth Moore Golson
Helen Ann Goodner
John Mark Graham
Twala Michelle Grant
Victor Benjamin Griffin
Staci Brabner Gwinn
Connie Jill Hall
David Baker Hall
Harry Preston Hall, II
July Layne Hamer
James Darrington Hamlett
David Ronald Hanbury
Gregory Floyd Harley
Anthony Cameron Harlow
Heidi Price Harp
James Frederick Harrington
Marie Hillery Head
William Harrison Hedrick
Steven Keith Herndon
Ronald Alford Herrington, Jr.
Charles Bernard Hess
Steven Anthony Higgins

FALL 1992 ADMITTEES

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Jerry Dean Hillman
Leigh Anne Hodge
Anthony Michael Hoffman
Ashley Miller Holbrook
William Knight Holbrook
Cynthia Anne Holland
Lee Maxwell Hollis
Christopher Robert Hood
James Andrew Hoover
Ralphy Wayne Hornsby, Jr.
Richard Freeman Horsley
Stewart Leon Howard
Brian Paul Howell
Fay Richardosn Howell
Charles Dennis Hughes
Janna Lynn Ifshin
Donald Randolph James, Jr.
Paul McGee James, Jr.
Thomas Alan Jennings
Anthony Boggs Johnson
Lamar Coleman Johnson
Michael Hugh Johnson
Paul Whitson Johnson
Yolanda Nevett Johnson
Christopher Ralph Jones
Haskins Williams Jones
Michael Lance Jones, Jr.
Susan Donovan Josey
Alan Parish Judge
Jill Tarte Karle
John Patrick Kavanagh, Jr.
Maureen Gaye Kelley
William Franklin Kelley, Jr.
Joseph Robert Kemp
Karol Jane Kemp
James Rayburn Kennamer
Anita Jane Kimbrell
Jonathan Noel King
Robert Christopher King
Kyle Lee Kinney
Amos Lorenzo Kirkpatrick
Robert Arthur Kirksey
Valerie Theresa Kisor
Jim Charles Klepper
Patricia Anne Klinefelter
Ginger Hill Knight
Timothy Wade Knight
Timothy Martin Knopes
Ann Monica Koszuth
Christopher Lawrence Kottke
Thomas G.F. Landry
Paul Kenneth Lavelle
Anthony Nicholas Lawrence, III
Kenneth James Lay
Anthony Wade Leathers
Betty Bobbitt Lee
Rita Kay Lett
Thomas Michael Lewis
William Dice Lineberry
John Joseph Lloyd
Larry Stephen Logsdon
Earle Walter Long, IV
N. Blanche Wilkinson Lowery
David Joseph Maloney
Milton Andrew Mantler
Tracy Leann Marlowe
David Paul Martin
Robert Lester Martin, III
Kevin Francis Masterson
Dianna Kidd McCay
Randall Davis McClanahan
James William McGlaughn
Thomas Scott McGrath
JoAnn McClain McKee
Jennifer Byers McLeod
Darren Todd McLeroy
Carey Bennett McRae
Michelle Anne Meurer
Charles Ivor Middleton
John Hamilton Miglionico
Jeffrey Scott Miller
Joseph Stuart Miller
Martha Leslie Miller
Carolyn Evelyn Moller
Richard Hunley Monk, III
Carl Grady Moore, III
Gregory Keith Morgan
Sebrena Retonya Moten
Tammy Denise Mountain
Mark David Mullins
Carroll James Ogden

FALL 1992 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam 444
Number certified to Alabama Supreme Court 320
Certification rate .... 72 percent

CERTIFICATION PERCENTAGES:

University of Alabama .... 92 percent
Cumberland School of Law .... 77 percent
Birmingham School of Law .... 36 percent
Jones Law Institute .... 15 percent
Miles College of Law .... 0 percent

FALL 1992 ADMITTEES

Apsilah Geer Owens
Jene William Owens, Jr.
Marva Joyce Owens
Alison Lyn Padgett
James MacLeod Parker, Jr.
Eliza Lee Paschall
Tina Denise Patrick
Samuel Donelson Payne
Paul Stephen Peatross
Anita Louise Perkins
Giles Gilpin Perkins
Michael Kirk Perry
John Frederick Pilati
Nathan Edwin Proter
Teresa Elaine Poust
Thomas Marshall Powell
William Virgil Powell, Jr.
Jeffery Travis Poynor
Barry Carlton Prine
Laura Ellison Proctor
Randall Dean Quarles
Lori Mallette Quigley
Jill Olivia Radwin
Matthew Doyle Ramsey
Charles Clayton Ratcliff
Thomas Charles Rawlings
James Robert Reeves, Jr.
Katherine Leigh Reynolds
Julie Kathleen Robberson
Christian Edward Roberson
John Lloyd Roberts
Pamela Patrice Robinson
Thomas Michael Rockwell
Carl James Roncaglione, Jr.
Richard Rockwell Rosenthal
Neil M.B. Rowe
Lee Aubra Rudolph
Andrew John Rutens
Bradley Paul Ryder
Scott Meyers Salter
Philip King Seay
Philip Dale Segrest, Jr.
Sara Cook Semmes
Lisa Johnson Sharp
John Willard Sheffield
Denise Stanford Shostak
Amy Meacham Shumate
Christopher Scott Simmons
Nathan Wayne Simms, Jr.
Kimberly Hallmark Skipper
David Philip Slepian
Beverly Ann Smith
John Garland Smith
William Lamar Smith
John Winston Smith T
Reginald Van Speegle
Jeffrey Todd Stearns
Marikay Kolacz Stewart
Sarah Suzanne Stewart
Anne Robinson Strickland
Edwin Ansel Strickland, Jr.
Todd Stephen Strohmeyer
Edward Best Strong
Margaret Elizabeth Stutts
Robert Paul Taylor
Wilmer Ray Tharpe
Gina Lola Thomas
Melissa Blanch Thomas
Vanessa Thomas
Ray Charles Thomason
Mary Harvill Thompson
Seth Balfour Thompson
Elizabeth Lelie Thomson
Lane Kelley Tolbert, Jr.
Clement Clay Torbert, III
Walquiria Trujillo
Minnie Louise Tunstall
Arnold William Umbach, III
Terry Lee Underwood
Meredith Van Houten
Amy Catherine Vibbart
Sherrie Marie Vice
Vivian Deason Vines
Rebecca Ann Walker
Roderick Walls
Lonnie Anthony Washington
Ashley Elizabeth Watkins
James Fatherree Watkins
William Houston Webster
Thomas David Weston, Jr.
Melissa Wynn Wetzel
Lisa Marie White
Tina Marie Whitehead
Paula Lynn Whitley
Samuel Edward Wiggins, III
Courtney Fraley Williams
Mary Kathleen Williams
John Charles Wilson
Lisa Anne Wilson
Terri Elena Wilson
Melissa Carol Wimberley
William Andrew Wing, II
Daniel Serenus Wolter
Barry Dean Woodham
George Michael Zoghby
Edward Ira Zwilling

DECEMBER 1992 ADMITTEES

Scott Patrick Archer
Melvin Lamar Bailey
Albert Owen Drey, III
Charles MacNeill Elmer
Warren Albert Flick
William Jackson Freeman
Sabrie Gracelyn Graves
Corrie Patricia Haanschoten
Paula Daugherty Kennon
Lewis Wardlaw Lamar
Billie Boyd Line, Jr.
Wanda Stubblefield McNeil
Janet Novtnak
Gilmer Tucker Simmons
Stanley Bernard Stallworth
Emily Napier Walker
Elizabeth Camilla Wible
Ann Lee Witherspoon ■

C·L·E OPPORTUNITIES

The following programs have been approved by the Alabama Mandatory Continuing Legal Education Commission for CLE credit. For information regarding other available approved programs, contact Diane Weldon, administrative assistant for programs, at (205) 269-1515, and a complete CLE calendar will be mailed to you.

JANUARY

14-16 Thursday - Saturday

MIDWINTER CONFERENCE
Birmingham, Wynfrey Hotel
Alabama Trial Lawyers Association
(205) 262-4974

20-22 Wednesday - Friday

WINTER CONFERENCE
Birmingham, Crown Sterling Suites
Alabama District Attorneys Association
(205) 242-4191

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NYC 10013

22 Friday

ALABAMA EVIDENCE: WINNING AT TRIAL (video)
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Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

DAMAGES (video)
Birmingham, Civic Center
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

MOTION PRACTICE (video)
Birmingham, Civic Center
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Credits: 6.0
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TORTS (video)
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Credits: 6.0
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EVIDENCE (video)
Mobile
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Credits: 6.0
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MOTION PRACTICE (video)
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Credits: 6.0
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WORKERS COMPENSATION IN ALABAMA
Birmingham
Lorman Business Center, Inc.
Credits: 6.0
(715) 833-3940

BASIC REAL ESTATE LAW IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

29 Friday

NURSING HOME LAW
Birmingham
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

WORKERS COMPENSATION
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

FEBRUARY

19 Friday

ALABAMA APPELLATE PRACTICE
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

25 Thursday

LEGAL ISSUES OF PROBLEM COLLECTIONS IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

26 Friday

LEGAL ISSUES OF PROBLEM COLLECTIONS IN ALABAMA
Huntsville
National Business Institute, Inc.
Credits: 6.0
(715) 835-7909

ADVANCED FAMILY LAW
Birmingham
Alabama Bar Institute for CLE
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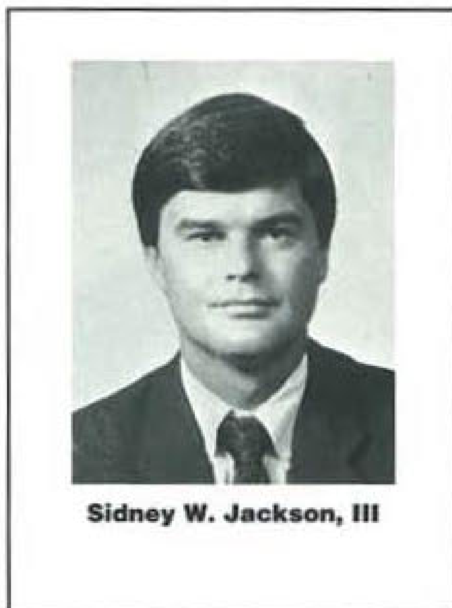
YOUNG LAWYERS' SECTION

By SIDNEY W. JACKSON, III, president

Bar admissions ceremony biggest ever

Elizabeth Smithart expertly arranged and conducted the fall admissions ceremony in Montgomery October 27, 1992. Over 300 admittees took part in the ceremony, which included addresses by Clarence Small, president of the state bar, Reggie Hamner, executive director of the bar, and members of the court of civil appeals, court of criminal appeals and the supreme court.

One of the highlights of the ceremony was Morris Dees of the Southern Poverty Law Center, who gave an impressive and powerful speech during lunch. Incidently, Dees is coming out with another book in February, titled *Hate on Trial*. It is sure to be a bestseller.



Sidney W. Jackson, III

Young Lawyers' Section publishes guide for volunteers

Under the direction of Keith Norman, immediate past president of the Young Lawyers' Section, Laura Crum of Montgomery has produced an outstanding booklet, entitled "A Guide to Civil Liability for Alabama Volunteers." The 16-page booklet explains in laymen's terms the potential liabilities of volunteer organizations and their volunteers. The booklet explains the types of responsibility in general, the standard of care for negligence, legal defenses to liability and includes the Volunteer Service Act. There are approximately 40 citations to cases in the back of the book which are helpful to both lawyers and laypersons.

The booklet is *free* and available through the Governor's Office on Volunteerism. The contact person for this booklet is Jeff Johnson, Director, 11 South Union Street, Montgomery, Alabama 36130.

Proposed bylaws for the YLS

As reported earlier, Robert Baugh of Birmingham is heading a committee to propose new bylaws and guidelines for the functioning of the Young Lawyers' Section. The proposed draft is close to final form. The final draft will be printed in an upcoming issue of *Alabama Lawyer* magazine. ■

Make Plans Now for Sandestin Seminar

It is never too early to reserve your condominium or room for the annual Sandestin Seminar at the Gulf. The seminar will be held May 14 and 15, 1993. Sandestin reports that the condominiums reserved for the YLS are booking fast. This year's seminar promises to be one of the best ever. Frank Woodson has rounded up a stellar range of topics. Hal West has done an excellent job of lining up the facilities, cocktail parties, band parties, beach fun, etc. As usual, there will be an elaborate cocktail party Saturday night with hors d'oeuvres sponsored by Pittman, Hooks, Dutton & Marsh. There will also be a golf and tennis tournament and possibly a 5-K run. Make your plans now!

Fill out this form and mail to the address below. Attendees registering before March 1, 1993 will receive a substantial break on the cost of the seminar. The reservations desk at Sandestin is 1-800-277-0802.

Registration Form for Sandestin Seminar

May 14-15, 1993

Name ____________________

Address ____________________

City ____________ **State** ____________ **Zip** ____________

Enclose check for $110 and mail to: **Alabama Young Lawyers' Section, c/o Barry Ragsdale, Treasurer**
P.O. Box 55727, Birmingham, Alabama 35255

ABA'S LEGAL TECHNOLOGY RESOURCE CENTER

By M. WAYNE WHEELER

On a recent trip to Chicago, Illinois I had the opportunity to visit the American Bar Association on North Lake Shore Drive. The ABA is adjacent to Northwestern University Law and Medical School campus in Chicago. I was going to be in Chicago and I had called the ABA to make an appointment at the Resource Center. For the members of the bar who do not know, the Center is a facility designed to acquaint lawyers with various computer hardware and software. The Center has a full-time administrator to help with computer problems and demonstrate the recent developments in legal-related software.

Carol Woodbury, the project coordinator, has been a practicing attorney and now works full-time for the Center. The best thing about the Center is you do not have to be computer-oriented or even "user-friendly" to derive a substantial benefit. Carol can tell from talking with visitors the various levels of expertise and is glad to arrange a time for them to examine the computer items she feels are appropriate.

For the uninitiated in the computer field, the technology is moving fast. Most of the hardware is outdated in two to three years, and the new software upgrades are coming out daily.

The Center is available to all attorneys by calling (312) 988-5465. Also, if you are going to be in Chicago, you need to call Carol and make an appointment to spend the day looking at the various items.

The specific items I was interested in looking at during my visit were:

1. Optical scanner and software

The technology is now here and available for less than $3,000. The scanners are not quite perfect, but the software system creates a wiggly horizontal line at every point the scanner is having trouble reading the document. Then the software allows you to zoom in on the area and correct the document. Now is the day for scanners, both in operation and in cost. Scanners and computer-generated fax are going to be the new future for office operation.

2. CD ROM

During the day at the Center, I had the opportunity to look and examine the new CD ROM storage discs. These discs are like an old 78 record you used to see in jukeboxes, but they are smaller, thicker and gold-plated. Each disc holds millions of bits of permanent storage information. On the CD ROMs that I examined, contained were the entire Florida Code on just two discs. You operated the system by accessing the index and then using a word search to find everything else in the Code pertaining to that subject. It is similar to WESTLAW and its search capacity. The system operates on the current logic system and is very effective.

The access time is less than a second. It is my understanding that the State of Georgia has all of its Code Law and all of its Reporters on CD ROM. The beauty of the system is that you can reduce the library space and the costs, plus you do not have to worry with bulky books and numerous volumes. The down side is the problem of updates. The CD ROM is a "write once read many" (WORM) system. Each year, you have to update to get the latest information. I assume that the book companies could have some type of agreement to allow a trade-in on old CD ROM or maybe just a CD ROM update disc.

Perhaps the most appealing aspect of the technology is that a new lawyer could get an immediate library as close as his or her computer. The possibilities are endless for practical use.

3. Miscellaneous software

While I was in the Center, I reviewed several different types of software. I looked at time and billing, bankruptcy and real estate closing. The primary problem with all of the software I examined was that there were too many keystrokes, menus and miscellaneous items. Plus, the manuals were complex and unreadable. None of the systems were easy to use.

I would point out to members of the bar that now is the time to hire computer-friendly lawyers. A friend of mine in Atlanta told me that their firm only hires lawyers with computer knowledge. The firm's operation consists of sections with one secretary and three lawyers with systems in their offices. Each lawyer does his or her own typing and document production. The secretary does the dockets, appointments and final proofing on draft documents. The economics of the cost of hiring help and new lawyers are such that the new lawyers have to do their own pleading, documents, data basing and forms.

It is a new world for lawyers, and we all need to get on the bandwagon. If you do not use computers, you are behind the times and non-productive. Only computers can handle the document orientation production practice that lawyers are called upon to produce in a rapid manner. No longer can or will our clients wait a day or two for documents. The practice demands immediate production.

If you have no experience, some computer experience or are an expert, the trip to the Resource Center is just the thing for you. Call the ABA Technology Clearinghouse at (312) 988-5465 and make an appointment. They will be glad to hear from you and are interested in the problems facing lawyers. Also, if you have a modem system, the ABA has a bulletin board known as ABA/NET. You subscribe by calling 1-800-242-6005, ext. ABA. ■

M. Wayne Wheeler

M. Wayne Wheeler is a 1966 admittee to the Alabama State Bar and practices in Birmingham.

CLE REMINDER

1992 CLE Transcripts
were *mailed* on or about **December 1, 1992**

All CLE credits
must have been *earned* by **December 31, 1992**

All CLE transcripts
must be *received* by **January 31, 1993**

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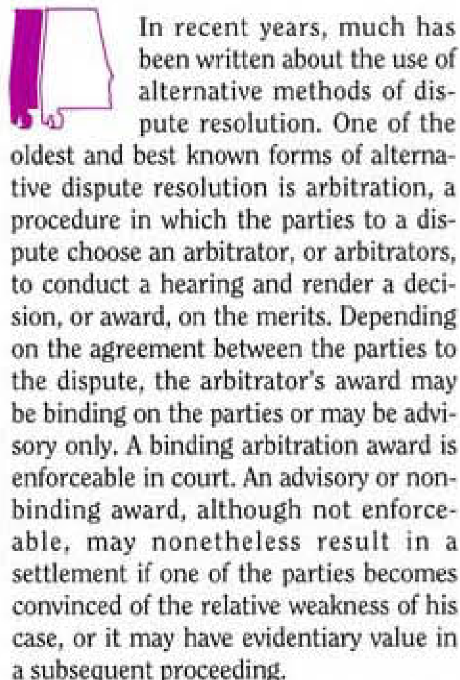
Enforcing Arbitration Agreements in Alabama:

A DOUBLE STANDARD DILEMMA

By STANLEY D. BYNUM and J. DAVID PUGH

Introduction



In recent years, much has been written about the use of alternative methods of dispute resolution. One of the oldest and best known forms of alternative dispute resolution is arbitration, a procedure in which the parties to a dispute choose an arbitrator, or arbitrators, to conduct a hearing and render a decision, or award, on the merits. Depending on the agreement between the parties to the dispute, the arbitrator's award may be binding on the parties or may be advisory only. A binding arbitration award is enforceable in court. An advisory or non-binding award, although not enforceable, may nonetheless result in a settlement if one of the parties becomes convinced of the relative weakness of his case, or it may have evidentiary value in a subsequent proceeding.

Arbitration is often preferred over litigation. Although it is not a cure-all for the shortcomings of litigation, arbitration does have certain advantages. While it is not always fast, arbitration is generally concluded faster than litigation, and only very limited rights of appeal are available. Likewise, it is not always cheap, but arbitration is generally less expensive than litigation. Arbitration also offers the luxury of informality because arbitrators are not required to follow the rules of procedure and evidence strictly. Additionally, arbitration affords the parties a private and confidential hearing and award unlike litigation which involves a public trial and an order which becomes a public record. In litigation, even when discovery is placed under seal pursuant to a protective order to preserve confidentiality, it is not unprecedented to unseal all or part of the discovery in subsequent litigation or at the request of some unrelated third party, such as a political special interest group, that argues it has a right to the information on public policy grounds. The privacy of an arbitration avoids this problem.

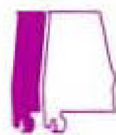
The most valuable advantage of arbitration, however, may be the fact that the parties can attempt to choose an arbitrator who has knowledge of the general subject matter of the dispute or, at least, familiarity with the business, profession or industry in which the disputants are engaged. For example, arbitration has been very popular as a dispute resolution procedure in the construction industry and in disputes between securities brokers and their clients. Often, when a dispute arises out of the performance of a construction contract, the resolution of the dispute depends on an understanding of a technical factual context requiring knowledge of engineering and construction. The parties to such a dispute may prefer an arbitrator with knowledge of engineering and construction rather than a judge and jury to whom many of the technical subtleties and construction industry standards may be unfamiliar.

Because of the perceived advantages of arbitration, parties to contracts may sometimes include an arbitration clause in their contracts mandating the arbitration of disputes. Federal law provides that such agreements may be specifically enforced and that any pending litigation of the same dispute must be stayed. 9 U.S.C. §§1-15, known as "The Federal Arbitration Act" (referred to herein as the "FAA" or the "Act"). The FAA will apply, however, only if the contract at issue involves interstate commerce. 9 U.S.C. §2. On the other hand, the Alabama Code provides that pre-dispute agreements to arbitrate may not be specifically enforced. Ala. Code §8-1-41 (3) (1975). So, unless the FAA is found to apply, there will be no arbitration if one of the parties does not want to arbitrate.

In 1986, the Alabama Supreme Court adopted the reasoning followed in most other jurisdictions providing that even the slightest nexus with interstate commerce was sufficient to invoke the applicability of the FAA. *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272 (Ala. 1986). *Costa & Head* was viewed as a very positive development by arbitration proponents, and the opinion brought Alabama law generally in line

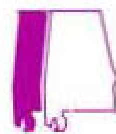
with the majority of other jurisdictions. Subsequent to the *Costa & Head* decision, however, a very troublesome double standard appears to have developed with regard to enforcing arbitration clauses. Individual plaintiffs or parties perceived to have been at a bargaining disadvantage apparently have a "favored son" status with the Alabama Supreme Court which has held the FAA not applicable in cases in which such parties sought to avoid arbitration. At the same time, the Court has not overruled *Costa & Head*. In fact, *Costa & Head* was held to control in other recent cases not involving a "favored son" seeking to avoid arbitration. This apparent dual standard is discussed in detail below.

Agreements to Arbitrate



Parties may agree to submit a dispute to arbitration after the dispute has arisen whether or not there was any pre-dispute agreement so to do. Such post-dispute agreements to arbitrate can be specifically enforced, even under Alabama law. A problem may develop, however, when a dispute arises during the performance of a contract containing an arbitration clause if one of the parties does not wish to be bound by the contractual arbitration clause. The party desiring arbitration then has two options. He may proceed with the arbitration and obtain what is, in essence, a default judgment, hoping that it will be enforceable in court. *See, e.g.*, the American Arbitration Association's Construction Industry Arbitration Rule 30 providing for a hearing and award in the absence of a party. Alternatively, he may seek to have the arbitration agreement specifically enforced by petitioning a court for an order compelling arbitration.

The Federal Arbitration Act



Under Federal Law, written agreements to arbitrate future disputes are specifically enforceable under 9 U.S.C. §2, which states:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The FAA, originally promulgated in 1925, has been held to be reflective of the strong federal policy favoring the amicable resolution of disputes by arbitration. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). In *Moses Cone*, the Supreme Court stated:

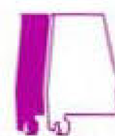
> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses Cone, 460 U.S. at 24-25.

The Act has been construed so broadly, in fact, that results which, on their face, may seem unlikely have nonetheless been held appropriate given the broad policy under the FAA favoring arbitration. For example, in one case a bank which financed the construction of a condominium and the condominium owners association, neither of which were parties to the underlying construction contract between the contractor and the developer, were held subject to the arbitration clause in the construction contract. *Dunn Constr. Co., Inc. v. Sugar Beach Condominium Assoc., Inc.*, 760 F. Supp. 1479 (S.D. Ala. 1991). The claims asserted by the bank and the association against the contractor were deemed to be intimately dependent upon and founded upon the underlying construction contract. In this context, and given the relationship of the parties combined with the banks' assertion of third party beneficiary status under the construction contract, the court held that the bank and the association must arbitrate their claims against the contractor.

Another example of the extent to which federal courts will stretch to find an agreement to arbitrate or that issues are arbitrable is *McBro Planning and Development Co. v. Triangle Electrical Constr. Co., Inc.*, 741 F.2d 342 (11th Cir. 1984). In *McBro*, a contractor was required to arbitrate its disputes with the construction manager even though there was no written contract between the parties. The contractor had a contract with the owner which required arbitration. The construction manager had a similar contract with the owner. Since both contracts spoke in terms of the performance required by each of the parties towards completion of the same construction project and since each contract contained an arbitration clause, the court required the parties to arbitrate their disputes.

Arbitration Clauses Under Alabama Law



The Alabama Constitution expressly requires the Alabama legislature to pass laws "necessary and proper" to provide for the arbitration of disputes between parties. Ala. Const. §84. Moreover, it has long been stated that it is the public policy of Alabama to encourage the amicable settlement of differences between parties by arbitration. *Wells v. Mobile County Board of Realtors*, 387 So. 2d 140, 144 (Ala. 1980) *citing Headley v. Aetna Insurance Co.*, 202 Ala. 385, 80 So. 466 (1918). In contrast to Alabama's policy of encouraging arbitration, however, is the countervailing policy that pre-dispute agreements to arbitrate are void as an attempt to oust or defeat the jurisdiction of Alabama's courts to settle differences between parties. *Wells v. Mobile County Board of Realtors*, 387 So. 2d at 144.

As a result of these countervailing public policies in Alabama, arbitration was often an elusive alternative dispute resolution procedure for Alabama parties, at least prior to *Costa & Head* in 1986. Courts would enforce arbitration awards already made, but they would not enforce pre-dispute arbitration clauses if

one of the parties to the contract decided it did not wish to arbitrate.

A significant change occurred in 1984, however. The previous year, the Alabama Supreme Court had issued a writ of mandamus ordering a trial court to vacate its stay of an action pending arbitration. *Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158 (Ala. 1983). In *Alabama Oxygen*, the Industrial Development Board of Bessemer (the "Board"), the owner of an air separation facility, and Alabama Oxygen Company, Inc. ("Alabama Oxygen"), the lessee-user of the facility, had filed a lawsuit against York International ("York"), the supplier of an allegedly defective refrigeration unit installed at the facility. York had signed a contract with Lotepro, the Board's general contractor. The contract between Lotepro and York contained an arbitration clause. The trial court found that the FAA applied because York was from Pennsylvania and the refrigeration package which they supplied had been brought from out-of-state thus supplying the necessary involvement with interstate commerce. The trial court further found that the Board was bound by the contract executed by its agent Lotepro with York and that Alabama Oxygen was bound by the same contract by virtue of its third-party beneficiary status under that contract. Accordingly, the trial court stayed the litigation pending arbitration between the parties.

The Board and Alabama Oxygen petitioned for a writ of mandamus which was granted by the Alabama Supreme Court. On certiorari, the United States Supreme Court vacated the Alabama Supreme Court's opinion and remanded with instructions to reconsider the case in light of the Court's recent pronouncements in *Southland Corp. v. Keating*, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984). *York International v. Alabama Oxygen Co.*, 465 U.S. 1016, 104 S. Ct. 1260, 79 L. Ed. 2d 668 (1984). In *Southland*, the Court held that state statutes which invalidate arbitration clauses covered by the FAA were violative of the Supremacy Clause and that the FAA covered all contracts involving interstate commerce. *Southland v. Keating, supra*. On remand, the Alabama Supreme Court vacated its earlier opinion, denied the petition for writ of mandamus and adopted Justice Maddox' dissent from the court's earlier opinion. *Ex parte Alabama Oxygen Company, Inc.*, 452 So. 2d 861 (Ala. 1984).

Two years later, the Alabama Supreme Court granted a writ of mandamus compelling a trial court to stay court proceedings pending arbitration. *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272 (Ala. 1986). In *Costa & Head*, the owner of a construction project demanded arbitration of claims against its general contractor. The general contractor declined to submit to arbitration, preferring instead to litigate the claims. The Alabama Supreme Court found that the owner was a limited partnership partially composed of limited partners from other states, that the general contractor's principal place of business was Tennessee, that some of the subcontractors either resided or were incorporated outside of Alabama, and that materials incorporated into the project were manufactured in states other than Alabama. Based on these findings, the Alabama Supreme Court found that the transaction easily met the test then adopted by the court, that is, that the FAA applied if the transaction had the "slightest nexus with interstate commerce."

The *Costa & Head* decision was viewed quite favorably by proponents of arbitration. Most of the other states had, by that time, amended their arbitration statutes to conform substantially with the FAA or with the Uniform Arbitration Act, both of which provide for the specific enforcement of arbitration clauses. Both acts implicitly acknowledge that an arbitration clause in a written contract is part and parcel of the consensual agreement between the parties which should be enforced just like payment or performance provisions in the same contract.

In 1989, however, the Alabama Supreme Court confused the law with its *Ex parte Warren* decision in which the court adopted a new standard for determining the applicability of the FAA. *Ex parte Warren* 548 So. 2d 157 (Ala. 1989), *cert. denied*, 493 U.S. 998, 110 S. Ct. 554, 107 L. Ed. 2d 550 (1989). Instead of the "slightest nexus with interstate commerce" test adopted in *Costa & Head*, the *Warren* court held that the FAA would only apply, if, "at the time the parties entered into the contract and accepted the arbitration clause, they contemplated substantial interstate activity." *Ex parte Warren*, 548 So. 2d at 160. No other jurisdiction in the country has adopted the subjective "state of mind" test applied in *Warren*. The only authority cited by the Alabama Supreme Court for the new test adopted in *Warren* was language from a concurring opinion to a 1961 decision from the Court of Appeals for the Second Circuit. *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, Chief Judge, concurring) *cert. denied*, 368 U.S. 817, 82 S. Ct.

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31, 7 L.Ed.2d 24 (1961). Even if the test from the *Metro Industrial* concurrence were ever followed (for which there is no evidence), then it has long been completely eroded by subsequent United States Supreme Court decisions which recognize the FAA was intended to apply as broadly as the constitutional dimensions of the commerce power. *See, e.g., Shearson/American Express v. MacMahon, supra; Southland v. Keating, supra.; Moses Cone, supra.*

In *Warren*, the Alabama Supreme Court held that the FAA did not apply to an automobile sales contract because the new motor vehicle involved was already located in Alabama and the sale was made by an Alabama dealership to an Alabama resident who was buying it as a consumer and not for commercial purposes. This finding was reached in spite of a stipulation in the contract that the motor vehicle had "heretofore [been] traveling in interstate commerce and has an impact upon interstate commerce." Although it is purely speculation, the probable reason for the court's holding in *Warren* was recognized by Justice Maddox in his dissenting opinion, where he stated:

> Also, in *Costa & Head*, petitioners contend, the transactions were all of a commercial nature between businessmen of equal bargaining strength, whereas in this case, petitioners argue, the purchasers are ordinary consumers contracting with a large corporation to purchase a consumer good for family use.

Ex parte Warren, 548 So. 2d at 162.

Justice Maddox believed the Court had improperly latched onto this distinction, and he argued that Congress did not intend for the application of the FAA to be determined on a case-by-case analysis of the relative bargaining strength of the parties. *Id.*

After *Warren*, it appeared that Alabama had abandoned the "slightest nexus" test and had instead adopted the *Warren* "subjective intent of the parties at the time of contracting" test to determine whether the contract involved interstate commerce. Although the *Warren* decision is inconsistent with all other jurisdictions that have addressed the issue, the United States Supreme Court denied certiorari and the decision stands. The opinion did, however, hint that it was to be narrowly construed and stated that it applied only to the "narrow factual context of the [*Warren*] case."

The *Warren* decision was followed shortly thereafter by *Ex parte Clements*, 587 So. 2d 317 (Ala. 1991). In *Clements*, the plaintiff Communications Resources, Inc. ("CRI"), entered into a stock purchase agreement with defendant Clements which provided that CRI would employ Clements in furtherance of its business of selling telecommunications equipment in Alabama, Florida and Louisiana, as well as various other states. The agreement also contained an arbitration clause and a covenant on the part of Clements not to compete with the CRI anywhere within the states of Alabama, Florida or Louisiana. When disputes arose between Clements and CRI, CRI moved to compel arbitration which motion was granted by the trial court. Clements then petitioned the Alabama Supreme Court for a writ of mandamus ordering the trial court to vacate its order.

Although the Alabama Supreme Court had stated that *Warren* was confined to the "narrow, factual context" in that case, the Court, nonetheless, applied the *Warren* "subjective intent of the parties" test. CRI argued that the transaction pertained to an employment agreement which involved interstate sales of telecommunications equipment and contained a covenant not to compete effective in at least three states. In rejecting CRI's argument, the Alabama Supreme Court held that there was no sufficient nexus with interstate commerce activity citing *Warren* and *H.L. Fuller Construction Co. v. Industrial Development Board of the Town of Vincent*, 590 So. 2d 218 (Ala. 1991).[1] In *Fuller Construction*, no question was presented as to whether interstate commerce was involved since the parties agreed that the FAA applied. Nonetheless, the court stated it "felt compelled to point out its disfavor of predispute arbitration agreements," and devoted the next several paragraphs to make its point. That the court felt compelled to address the issue seems to be an implicit recognition by the court of the weakness of *Warren* and a perceived need to support *Warren* with additional authority before the issue was again addressed by the court. After *Clements*, it appeared that Alabama's new subjective test was firmly adopted and that *Costa & Head* was no longer good law.

Less than six months later, however, the Alabama Supreme Court issued its opinion in *Maxus, Inc. v. Sciacca*, 598 So. 2d

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1376 (Ala. 1992). The *Maxus* case did not involve enforcement of an arbitration clause. Rather, it involved the enforcement of an arbitration award. The question on appeal to the Alabama Supreme Court was whether the FAA or the Alabama arbitration statutes applied in the review of the arbitrator's award.

Certain disputes had arisen between the Sciaccas and their contractor, Maxus, regarding the construction of the Sciacca's residence in Shelby County, Alabama. The construction contract included the standard form arbitration clause from the American Institute of Architect A201 General Conditions.[2] The court noted that the construction contract involved the purchase and installation of materials and equipment manufactured in different states and shipped by common carrier across state lines, and which were ordered and paid for using the U.S. mails, telephones and interstate financial transaction settlement procedures and institutions. Additionally, Maxus and the Sciaccas had established an escrow fund for the payment of disputed billing amounts. The escrow agent was a national banking association which had also used the U.S. mails, telephones and interstate financial transaction settlement procedures. Accordingly, the court found that the interstate commerce requirement was met and that the FAA applied. Interestingly, however, the court did not cite *Warren* nor attempt to apply *Warren's* subjective test. Instead, it applied the *Costa & Head* slightest nexus test.

Stanley D. Bynum

Stanley D. Bynum is a graduate of Princeton University and the University of Alabama School of Law. He is a partner with the firm of Bradley, Arant, Rose & White.

J. David Pugh

J. David Pugh is a graduate of the University of Alabama and the Vanderbilt School of Law. He is an associate with the firm of Bradley, Arant, Rose & White.

Two months after *Maxus*, the Alabama Supreme Court issued its opinion in *Ex parte Brice Building Co., Inc.*, 1992 WL 165068 (Ala. 1992).[3] In *Brice Building*, the general contractor moved to compel arbitration of disputes it had with the owner, the Zamora Shrine Temple Association. When the trial court refused to compel arbitration, the contractor sought a writ of mandamus. The writ was granted by the Alabama Supreme Court, primarily on the authority of *Costa & Head*, and on the finding that the contract provided for the use of building materials from out-of-state manufacturers and for the use of an out-of-state subcontractor. Accordingly, the *Costa & Head* "slightest nexus with interstate commerce" test was satisfied, and the FAA applied. The Zamora Shrine Temple argued that *Warren* had implicitly overruled *Costa & Head*, and that the parties' subjective intent of substantial interstate activity required by *Warren* was not present in the case. The Alabama Supreme Court rejected this argument and stated:

> The *Warren* case was expressly addressed by this court with regards to its "narrow factual context." Implicitly, we have recognized that the *Costa* standard, rather than the *Warren* standard, is the appropriate standard to utilize within the factual context of this case.

Brice Building, 1992 WL 165068 (Ala. 1992).

After the *Maxus* and *Brice Building* opinions, it appeared that the *Warren* and *Clements* decisions were aberrational or were no longer going to be followed by the court which expressly reaffirmed its 1986 *Costa & Head* decision in the *Brice Building* opinion. But, the Alabama Supreme Court was not finished yet.

On August 3, 1992, the Court issued its opinion in *A. J. Taft Coal Co., Inc. v. Randolph*, 602 So. 2d 395 (Ala. 1992). In *Taft Coal*, the Alabama Supreme Court affirmed the trial court's denial of Taft Coal Company's motion to compel arbitration in an action filed by the lessors alleging trespassing and nuisance. The plaintiff lessors were individuals who had entered into an agreement with Taft leasing their surface mining rights on property in Walker County, Alabama, to Taft. The lease agreement contained an arbitration clause. When the plaintiffs sued Taft for trespass and nuisance, Taft moved to compel arbitration and to stay the litigation pending arbitration.

An interstate commerce nexus appears to have been present in *Taft Coal*. Certain of the parties to the lease agreement were not Alabama residents. One of the parties to the lease agreement signed the agreement in Illinois, and Taft had mailed rental payments to the out-of-state residents using the U.S. mails. In its opinion, the court applied the "slightest nexus" test citing *Maxus* and *Costa & Head*. In spite of the apparent interstate commerce activity however, the court concluded that the facts in *Taft Coal* did not provide the required nexus with interstate commerce.

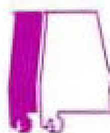
The *Taft Coal* opinion is irreconcilable with *Maxus*. The court was apparently stretching to find some way to avoid the application of the FAA and to compensate for the seemingly disparate bargaining power between the plaintiffs and Taft. The holding seems to be based on Alabama law which states that *in rem* actions must be heard in the court with jurisdiction over the subject property. Ala. Code §6-3-2 (1975) (providing that actions of a legal nature for the recovery of land must be commenced in the county where the land is located); Ala. Code §35-11-220 (1975) (stating that lien actions must be commenced in the Circuit Court where the property is situated). In the case of *Taft Coal*, the court stated that:

> In the instant case, the property that is the subject of the lease agreement is located in Alabama, and the surface mining described in the lease agreement was to be performed in Alabama.

Taft Coal, 602 So. 2d at 397.

Thus, it seems that the Court covertly applied some type of *in rem* jurisdiction analysis to avoid the application of the FAA even though an action for trespass and nuisance it not an action *in rem*.

The Double Standard Dilemma



Now that some of the dust has temporarily settled, the law in Alabama regarding enforcement of arbitration clauses is less clear than ever. In *Warren*, the defendant car dealership was a Delaware corporation and the automobile that was sold had been designed and manufactured out-of-state and shipped to Alabama from out-of-state. The court not only found that the *Costa & Head* slightest nexus test was not met, but also adopted a new test, borrowed from a 28-year-old 2nd Circuit Court of Appeals concurrence, which depends on the parties' subjective intent at the time of contracting. In *Clements*, the employment agreement at issue covered the employee's obligations in multiple states and contained a covenant not to compete which was effective in multiple states. Nonetheless, it was held that interstate commerce was not involved citing *Warren* as authority. In *Taft Coal*, the court did not apply the subjective intent of the parties test adopted in *Warren*, yet found that even the *Costa & Head* slightest nexus test was not met even though the dispute was between out-of-state parties and concerned a mineral rights lease which had been executed by at least one of the parties out-of-state.

During the same period of time that the *Warren*, *Clements*, and *Taft Coal* trilogy of cases were decided, the court also decided *Maxus* and *Brice Building*. In *Maxus* and *Brice Building*, the court held that the slightest nexus with interstate commerce was present on the basis that certain materials to be used in the respective construction projects had been brought in from out-of-state and shipped by common carrier across state lines and were ordered and paid for using the U.S. mails, telephones and interstate financial transaction settlement procedures. Clearly, a dual line of cases has developed creating a double standard. The holdings are irreconcilable in that the interstate commerce nexus appears to have been present in each case, but the results are inconsistent. Parties no longer have any certainty whether their arbitration clauses will be enforced in Alabama.

A common thread in the *Warren*, *Clements*, and *Taft Coal* trilogy is an individual plaintiff or plaintiffs seeking to avoid arbitrating against a corporation. The arbitration clauses in each of the three cases were more or less boilerplate provisions in agreements that were probably drafted by the corporate party (an automobile sales invoice in *Warren*, an employment agreement in *Clements* and a mineral lease in *Taft Coal*). That a particular clause may not have been expressly negotiated is no reason not to enforce the clause, however. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, U.S., 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) (enforcing a boilerplate forum selection clause). There was no evidence in any of the three cases that any of the subject agreements had been negotiated at arm's length; therefore, it seems the Alabama Supreme Court apparently reached its decision on a presumption that the parties did not enjoy equal bargaining strength. These factors should not be used as a basis for avoiding the applicability of the FAA.

The likelihood that an arbitration clause will be enforced can be increased with careful contract drafting, however. First the contract should include a written acknowledgement that the parties contemplated interstate activity at the time of contracting and that the agreement involves interstate commerce. Rather than a simple assertion to that effect, however, one might also attempt to describe how interstate commerce is affected by the transaction. For anyone contemplating entering into an agreement with a party that is likely to try to avoid arbitration, it is also advisable that the presence of the arbitration clause in the contract be specifically brought to the attention of the other party who should then be required to initial the provision separately, thereby acknowledging its inclusion in the contract. Although these recommendations offer no guarantee that the clause will be enforced, they should certainly help.

Given the current double standard, it is impossible to speculate what direction the Alabama Court will take next. One recent opinion may provide an indication, however. On October 16, 1992, the Alabama Supreme Court granted a writ of mandamus ordering the Jefferson County Circuit Court to decide whether the FAA applied to a dispute between a securities broker and one of its clients. *Ex parte McEllen*, So. 2d, 27 ABR 62, 1992 WL 282043 (Ala., Oct. 16, 1992). The trial court was directed to follow the "slightest nexus" test cited in *Costa & Head* and *Brice Building*. *Id* at 68.

The recent *McEllen* opinion bodes well for the future but may not go far enough. Even though certiorari was denied in *Warren*, it is likely that, given the right facts, the U.S. Supreme Court would accept certiorari review of an Alabama case which is decided contrary to the policy of the FAA. Although an argument can be made that *Warren* was purely a local action not involving interstate commerce, such an argument is not justifiable on the facts of *Clements* and *Taft Coal*, both of which are inconsistent with the policy of the FAA. Furthermore, the *Warren* subjective test encourages the party seeking to avoid arbitration to fabricate, after the fact, his alleged "state of mind" at the time of contracting to avoid the enforcement of an unambiguous, written arbitration clause. Rather than continuing to be burdened with the subjective, case-by-case analysis of whether the parties contemplated interstate activity at the time of contracting, the Alabama Supreme Court should overrule *Warren*, *Clements* and *Taft Coal* and reaffirm *Costa & Head* and its progeny.

ENDNOTES

1. The reported *Fuller Construction* opinion was substituted for an earlier opinion of the court dated August 16, 1991, which was withdrawn. *H.L. Fuller Constr. Co., Inc. v. Industrial Development Board of the Town of Vincent*, 1991 WL 170853 (Ala., Aug. 16, 1991).

2. AIA A201 General Conditions, §4.5.1 states:

   Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, ...

   This clause and similar clauses have been construed very broadly to find that not only are contract claims arbitrable but also tort claims, such as fraud, and claims for punitive damages. *See, e.g., Willoughby Roofing & Supply v. Kajima International, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984).

3. An application for rehearing was pending in this case as of November 13, 1992. ■

Disciplinary Report

Reinstatement

- **Walter Lee Bragan, Jr.** was reinstated to the practice of law by order of the Supreme Court of Alabama, effective September 28, 1992. (Pet. #92-04)

Surrender of License

- In an order dated October 20, 1992, the Supreme Court of Alabama cancelled and annulled the license and privilege of Montgomery attorney **Jesse Eldridge Holt** to practice law in all of the courts in the state of Alabama, effective November 10, 1992. The order of the court was based upon Holt's having voluntarily relinquished and surrendered his license to practice law.

Suspensions

- Effective September 30, 1992, Birmingham attorney **William Kent Eason** has been suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules. (CLE No. 92-57)
- By order of the Supreme Court of Alabama, dated October 20, 1992, Anniston attorney **Hugh Merrill Vardaman** was suspended from the practice of law in the State of Alabama for a period of 90 days, said suspension to become effective October 30, 1992. Vardaman pled guilty in federal court to the misdemeanor offense of failing to pay his federal income taxes. Vardaman's suspension was based upon his conviction, pursuant to Rule 22(a)(2), Alabama Rules of Disciplinary Procedure. [Rule 22(a)(2) Pet. #92-06]
- Columbus, Georgia lawyer **Charles Clifford Carter,** also admitted in Alabama, was suspended from the practice of law for a period of three years effective October 28, 1992. A former client of Carter's complained that he had been advised by other lawyers that the divorce decree obtained for him by Carter contained a number of errors and may not be valid and that Carter would not respond to his numerous telephone calls and letters. The client was also concerned that Carter was on inactive status with the Alabama State Bar when the Alabama divorce decree was obtained.

Carter was specifically requested to address the allegation that he did not hold a current Alabama license to practice law. He did not respond to this request. The records of the Alabama State Bar indicate that Carter did not purchase a license to practice law in Alabama from October 1, 1990 until December 1, 1991.

Formal charges were filed April 27, 1992. Carter filed no defensive pleadings and a default judgment was entered. After a hearing to impose discipline, with Carter present pro se, the Disciplinary Board suspended Carter for a period of three years. (ASB No. 91-595).

Public Reprimands

- Fairhope attorney **James Conrad Powell** was publicly reprimanded October 30, 1992 for violating Rule 1.3 of the Rules of Professional Conduct which provides that a lawyer shall not willfully neglect a legal matter entrusted to him, and Rule 1.4(a) which requires that an attorney keep his client reasonably informed about the status of pending legal matters and promptly comply with the client's request for information.

In January 1988, Powell was employed to represent a client in a fraud and breach of contract claim. After suit was filed, the defendants filed for bankruptcy and the proceeding was stayed. Thereafter, the client made repeated attempts to contact Powell but he failed or refused to return the client's telephone calls or to communicate with the client concerning the status of the case. In August 1990, Powell represented to his client that the case would likely come up in October 1990. From October 1990 through February 1991, the client repeatedly attempted to contact Powell by telephone, but Powell again refused to return the calls. In November 1990, the client sent Powell a certified letter, which was delivered to Powell's office December 3, 1990. Powell failed or refused to respond to this letter. Thereafter, the client made inquiry of the circuit clerk's office and discovered that the stay was lifted in March 1990, and his case had been set for trial on May 4, 1990, but that his case was dismissed because of Powell's failure to appear in court on the day of trial. Thereafter, the client attempted again to communicate with Powell concerning the outcome of his case, but Powell again failed or refused to return the client's telephone calls. The Disciplinary Commission determined that as discipline for the above described conduct, Powell should receive a public reprimand with general publication. (ASB No. 91-778)

- Mobile attorney **Bryan G. Duhe'** was publicly reprimanded on October 30, 1992 for violating Rule 1.1 of the Rules of Professional Conduct which provides that a lawyer shall provide competent representation to a client; Rule 1.5 which prohibits an attorney from charging/collecting an excessive fee; and Rule 5.4 which provides that a lawyer shall not share legal fees with a non-lawyer.

In 1989, Duhe' negotiated a settlement on behalf of his clients, Mr. and Mrs. Clarence Vaughn, under the terms of which the Vaughns were to receive a 20-year annuity. Given the advanced age of the Vaughns at the time of the settlement, a 20-year annuity was not in their best interest. Furthermore, Duhe' calculated his attorney's fees based on the total amount to be paid out over the 20-year period, rather than reducing the settlement to its present value for purposes of calculating his attorney's fees as is required under Alabama law. In addition, the investigation indicated that Duhe' shared a portion of his fees with a non-lawyer. The Disciplinary Commission determined that as discipline for the above-described conduct, Duhe' should receive a public reprimand without general publication. (ASB No. 90-644) ■

LEGISLATIVE WRAP-UP

By BOB McCURLEY, director, the Alabama Law Institute

January 1993

The 1993 Regular Session of the Alabama Legislature will begin Tuesday, February 2, 1993. Facing the Legislature is a possible financial crisis which may result from the equity funding lawsuit brought by the Alabama Coalition for Equality in which the school boards contend the funding of education is unconstitutional to afford their students an equal education to those in the more affluent counties. Funding of prisons, mental health and Medicaid also will be before the Legislature. The court system got a temporary reprieve from its funding shortage last year with the passage of Act No. 92-227, which provided for a one-year supplemental court costs to expire September 30, 1993.

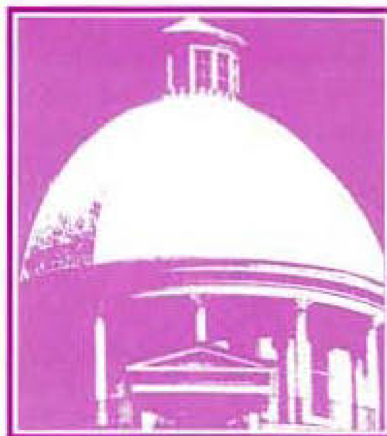
During the interim period between Regular Sessions of the Legislature there have been eleven Joint Senate House Committees studying subjects as election reform and the environment that should report early in the session. Governor Hunt has also appointed two special committees: the Tax Reform Committee, chaired by Birmingham lawyer Tom Carruthers, and the Ethics Reform Committee, chaired by Demopolis attorney Rick Manley.

The Committee most likely to be in the forefront is the permanent legislative reapportionment committee chaired by Speaker *Pro Tem* and Law Institute President James M. Campbell from Anniston. This Committee was presented numerous reapportionment plans.

Already pending in the Montgomery Circuit Court is a lawsuit concerning legislative reapportionment. The last legislative reapportionment plan passed by the Legislature ten years ago was thrown out by the Federal Courts after the 1982 Legislature had already been elected. Consequently a new election was held the following year under a Court-drawn plan. Ms. Marilyn Terry serves as Reapportionment Director, and Mr. David Boyd of the law firm of Balch & Bingham serves as Counsel to the Committee.

Law Institute Legislation

The Alabama Law Institute will present to the Legislature a revision of the Alabama Probate Procedure law which will set forth automatic duties and powers of personal representatives much like that now found for conservators. It will reduce the amount of bond required from double the value of the estate to single value of the estate.



The Alabama Law Institute expects to complete in the early part of 1993 a revision of the Business Corporation Act and a new Limited Liability Company Act (see *Alabama Lawyer*, November, 1992). These should be introduced during the Legislative session.

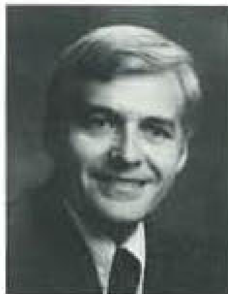
The uniform Commercial Code Article 2A, "Leases", and Article 4A, "Funds Transfers" both passed the Legislature in the Second Special Session in 1992 and both became effective January 1, 1993. Copies of these Acts are included in an interim supplement published by Alabama's Code publishing company, The Michie Company.

Renovated State Capitol

After seven years and twenty-eight million dollars of renovation, the State Capital reopened December 12, 1992 and is now open to the public. The Governor's office, Lt. Governor's Office, Treasurer, Auditor and Secretary of State moved back into the Capital.

The Alabama House and Senate will continue to meet in the State House, and members will continue to have their offices in the State House. The Attorney General's Office will also continue to be in the State House.

For further information contact Bob McCurley, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486, or call (205) 348-7411. ■



Robert L. McCurley, Jr.

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.

NOTICE

JUDICIAL AWARD OF MERIT NOMINATIONS DUE MAY 15

The Board of Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through **May 15.**

Nominations should be prepared and mailed to **Reginald T. Hamner, Secretary, Board of Bar Commissioners, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101.**

For important details see the boxed article on page 9.

Beware of Tax Liens and the IRS Right of Redemption After Foreclosure

By GILBERT F. DUKES, III

THE FACTS:

The following facts will serve as the basis for this article:

1. Company A borrows $200,000 from Bank 1 and mortgages its land and building (the "Property") to Bank 1. Bank 1 records the mortgage.
2. Company A fails to pay federal taxes and the IRS records a Notice of Federal Tax Lien on the Property.
3. Company A fails to pay Bank 1 which then purchases the Property at non-judicial foreclosure for $200,000.
4. Company B purchases the Property from Bank 1 for its fair market value of $210,000.
5. The Property is in poor condition and Company B spends an additional $250,000 repairing and improving the Property.
6. Within one year of Bank 1's foreclosure, IRS notifies Company B that it intends to redeem the Property from Company B by paying $200,000 plus 6 percent interest and incidental maintenance expenses, less the reasonable rental value of the Property during Company B's ownership.[2] According to IRS, the purchase price will be slightly over $200,000.
7. Company B is facing a loss of approximately $260,000!

The "Amount to be Paid" by the IRS:

Company B's dilemma begins with § 7425(d)(2) of the Internal Revenue Code and the regulations thereunder.[3] Section 301.7425-4(b)(1) states as follows:

> ***"In general.*** In any case in which a district director exercises the right to redeem real property under section 7425(d), the amount to be paid is the sum of the following amounts —
>
> **(i)*The actual amount paid for the property...*** being redeemed (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent legally satisfied by reason of the sale);
>
> **(ii)*Interest on the amount paid...*** at the sale by the purchaser of the real property computed at the rate of 6 percent per annum for the period from the date of the sale...to the date of redemption;
>
> **(iii) The amount, if any, equal to the excess of (A)*the expenses necessarily incurred to maintain such property...*** by the purchaser (and his successor in interest, if any) over (B) the income from such property realized by the purchaser (and his successor in interest, if any) plus a reasonable rental value of such property (to the extent the property is used by or with the consent of the purchaser or his successor in interest or is rented at less than its reasonable rental value); and
>
> (iv) With respect to a redemption made after December 31, 1976, the amount, if any, of a payment made by the purchaser or his successor in interest after the foreclosure sale to a holder of a senior lien...." (emphasis added)

The starting point in calculating the "amount to be paid" by the IRS seems to be the $200,000 Bank 1 paid at foreclosure rather than the $210,000 purchase price paid by Company B to Bank 1. The regulations are somewhat unclear. Section 301.7425-4(b)(1)(i) begins with "[t]he actual amount paid for the property...being redeemed." This amount is defined as follows: "The actual amount paid for property by *a purchaser*, other than the holder of the lien being foreclosed, is the amount paid by him at the sale."[4]

Company B might argue that "a purchaser" refers to the party to whom the IRS is asserting its right to redeem, and as such, the starting point in calculating the "amount to be paid" is the $210,000 it paid to Bank 1 rather than the $200,000 paid by Bank 1 at foreclosure. In support of Company B's argument, §301.7425-4(c)(3) (discussing the title received by the IRS upon a redemption) implies that "the purchaser" is "the person, from whom the district director redeemed the property."

The IRS would disagree with Company B's argument given its interest in protecting the delinquent taxpayer's (Company A's) equity in the property and

insuring that a full price is paid at foreclosure. As support for the IRS's position, in several places the regulations include the phrase "and his successor in interest, if any."[5] The Treasury Department contemplated subsequent transfers such as the sale to Company B, yet neither this phrase nor something similar thereto appears in §§301.7425-4(b)(1)(i) or 301.7425-4(b)(2) defining the amount to be paid. With this in mind, it seems that "the actual amount paid" refers to the amount paid by a purchaser *at foreclosure* (the amount paid by Bank 1) rather than an amount paid for the property by such purchaser's successor in interest (Company B).

The "amount paid" issue is presented in *Black v. U.S.*,[6] which involved a quiet title proceeding in connection with foreclosed property upon which the IRS had recorded a tax lien. There, the January 31, 1986 foreclosure sale price was $33,916.26.[7] The holder of the second and third mortgage redeemed the property by paying $33,916.26 plus 10% interest.[8] The property was later sold to Loeda Black for $122,225.05.[9] On January 29, 1987, two days before the expiration of the one year period of redemption, the IRS offered to redeem the property from Black for $33,916.26 plus 6% interest.[10] "Black, who had paid $122,225.05 for the property, refused this offer."[11] The IRS immediately recorded a "Certificate of Redemption of Real Property by United States" and quitclaimed the property to a third party purchaser for $66,000.[12] The District Court held in favor of Black stating that "the government's tender to plaintiff in this case of $36,064.60, for property for which she legitimately paid $122,225.00, is so woefully inadequate as to be unconscionable."[13]

Although the outcome of *Black* seems fair, the holding was contrary to the §7425 regulations. First, as previously discussed, the regulations indicate that the "amount to be paid" by the IRS is based on the foreclosure sales price of $33,916.26, not the $122,255.00 Loeda Black "legitimately paid."[14] Second, the District Court concluded that the applicable federal statutes "were clearly written with the intent that they be construed in conjunction with state law, and not as creating a scheme separate and apart from that of the state."[15] The District Court stated that "[c]learly, the Code and regulations contemplate that state law will be referenced at every turn when the United States attempts to redeem property upon which it has a tax lien."[16] To the contrary, §301.7425-4(a)(2)(ii) preempts Alabama law by stating that "section 7425 and this section shall govern the amount to be paid and the procedure to be followed." The regulations turn to state law in two limited circumstances: To determine (i)the period within which the IRS may redeem,[17] and (ii)the "amount paid" at foreclosure by a foreclosing lien holder who may or may not have rights to a deficiency judgment under local law.[18] Last, the District Court stated that "the amount tendered [by the IRS] must include amounts due on other junior mortgages owned by the purchaser, whether or not owned at the time of foreclosure."[19] Section 301.7425-4(b)(1) makes no mention of these amounts when setting forth the "amount to be paid" by the IRS upon a redemption.[20] Instead, the regulations indicate that by exercising its right of redemption, the IRS steps into the shoes of the buyer and is subject only to encumbrances that exist and are senior to the foreclosed interest at the time of the sale.[21]

Thus, although *Black* indicates that the IRS is subject to Alabama rules of redemption, and although the case may come in handy in the event of litigation with the IRS over this issue, the District Court's holding seems contrary to §7425 and its regulations and will not likely be followed by other courts. The IRS was unsuccessful in its attempt to appeal the *Black* decision (evidently because it had quitclaimed the property to a third party and lacked standing to appeal) and has indicated that it will seek a reversal of *Black* when the time comes.

Improvements:

An issue which is more significant than the "amount paid" involves Company B's expenses of $250,000 in repairing and improving the Property. Although §301.7425-4(b)(1) requires the IRS to pay for "expenses necessarily incurred to maintain" the property,[22] the IRS is generally not required to pay for "improvements." Section 301.7425-4(b)(3) states as follows:

> "Expenses necessarily incurred in connection with the property include, for example, rental agent commissions, repair and maintenance expenses, utilities expenses, legal fees incurred after the foreclosure sale and prior to the redemption in defending the title acquired through the foreclosure sale, and a proportionate amount of casualty insurance premiums and ad valorem taxes. *Improvements made to the property are not considered as an expense unless the amounts incurred for such improvements are necessarily incurred to maintain the property.*" (emphasis added)

As there is very little (if any) case law on point, the IRS argues that if expenses are of the type which should be capitalized for income tax purposes rather than currently deducted, then such expenses are not "necessarily incurred to maintain" the property and should not be included in the redemption purchase price. Generally, expenses for ordinary and necessary repairs to property used in a trade or business or held for the production of income may be deducted in the year paid or incurred,[23] whereas expenses for permanent improvements that either add to the value of the property or appreciably prolong its life must be capitalized.[24]

As such, even if most of Company B's expenses were associated with environmental clean-up costs or were necessary to comply with local building codes or laws such as the Americans With Disabil-

Gilbert F. Dukes, III

Gilbert F. Dukes, III received his B.S. in accounting and business administration from Washington & Lee University and his J.D. from the University of Alabama School of Law, where he was a member of Order of the Coif. He received his LL.M. in Taxation from New York University where he served as graduate editor of Tax Law Review. He is a liaison for the Alabama State Bar on the IRS/Practitioner's Council and practices at Lyons, Pipes & Cook in Mobile, Alabama.

ities Act, and even if Company B was required to replace the leaking roof, drainage systems, sheetrock, fixtures, faulty electrical wiring and lighting, doors, windows, fences, etc., all to simply bring the Property to a condition suitable for occupancy and use by Company B, the IRS will not include such expenses in its redemption purchase price if such expenses were incurred in connection with an overall "improvement" of the premises calling for a capitalization (rather than a current deduction) of such expenses for income tax purposes.

Obviously, the amount payable by the IRS is significantly different from the amount which would be payable upon a redemption by other creditors under Alabama law. Section 6-5-253(a) of the *Code of Alabama* (1975) requires "[a]nyone entitled and desiring to redeem real estate" to pay for the value of "permanent improvements" in accordance with § 6-5-254. If another creditor of Company A (such as a "Bank 2" with a second mortgage on the Property having priority over the IRS tax lien) were to exercise its right of redemption, it would likely pay Company B something close to $460,000, thereby placing Company B in substantially the same financial position as existed prior to its purchase of the Property from Bank 1. Nevertheless, if Bank 2 exercised its right of redemption by paying Company B $460,000, or in the alternative, if a third-party bought the Property from Company B for its fair market value of $460,000, the IRS could assert its right to redeem the Property from Bank 2 or such third-party, as the case may be, by paying $200,000 plus interest and incidental maintenance expenses.

Priority Liens:

Another significant difference between the IRS right of redemption and that of other creditors under Alabama law is the ability of the IRS to redeem without satisfying priority liens. Section 301.7425-4(c)(3) states as follows:

> "When a certificate of redemption is recorded, *it shall transfer to the United States all the rights, title, and interest in and to the redeemed property acquired by the person, from whom the district director redeemed the property*, by virtue of the sale of the property. Therefore, if under local law the purchaser takes title free of liens junior to the lien of the foreclosing lienholder, *the United States takes title free of such junior liens upon redemption of the property*." (emphasis added)

This section would seem to transfer to the IRS "all the rights, title, and interest" acquired by Company B, which, in our hypothetical, would be "the person...from whom the district director redeemed the property." As Company B acquired clear title to the Property, subject only to the right of redemption held by other junior creditors of record, it seems that the IRS would acquire the same clear title without having to satisfy any liens having priority over that of the IRS under Alabama law.

Section 6-5-248(c) of the *Code of Alabama*, on the other hand, states as follows:

"When any judgment creditor or junior mortgagee or any transferee of a judgment creditor or a junior mortgagee redeems under this article, *all recorded judgments, recorded mortgages and recorded liens having a higher recorded priority in existence at the time of the sale are revived* against the real estate redeemed and against the redeeming party and such shall become lawful charges pursuant to section 6-5-253(a)(4) *to be paid off at redemption*." (emphasis added)Thus, any creditor other than the IRS must satisfy priority liens upon a redemption.

To further illustrate these conflicting principals, again assume that Bank 1 sells the Property to Company B, but the real estate records reflect, in chronological order, Bank 1 with a first mortgage, Bank 2 with a second mortgage, a judgment creditor and the IRS lien. If the IRS exercises its right to redeem from Company B, it need not pay any amounts to Bank 2 or the judgment creditor. On the other hand, if the judgment creditor redeems the Property from Company B, it must, under Alabama law, satisfy Bank 2's second mortgage, and pay Company B the purchase price, "lawful charges" (including the fair market value of permanent improvements) and interest on such amounts. If the IRS then redeems the Property from the judgment creditor, the IRS would not have to reimburse the judgment creditor for the amount it paid to Bank 2,[24] and the redemption price would again be based on Bank 1's foreclosure price of $200,000 rather than the amount paid by the judgment creditor to Company B. Under these circumstances, the judgment creditor would have made a big mistake.

Conclusion:

Section 7425(d)(2) is a trap for unwary entrepreneurs such as Company B who would be out-of-pocket by as much as $260,000 in the event the IRS exercises its right of redemption. Where a tax lien is in place, §7425(d)(2) effectively prevents "improvements" to otherwise unproductive, foreclosed property during the one year period of redemption. Thus, many properties must remain stagnant until the period of redemption ends. If a person mistakenly "improves" foreclosed property upon which the IRS has a tax lien, § 7425(d)(2) allows the IRS to collect its taxes at such person's expense and effectively prevents a redemption by other priority creditors as otherwise allowed by Alabama law. When faced with a client who wishes to purchase or redeem foreclosed property upon which the IRS has a tax lien, attorneys must learn the significant differences between §7425(d)(2) and the Alabama rules of redemption, and at the very least advise the client to avoid purchasing the property for more than the foreclosure sale price or making "improvements" to the property during the one year period of redemption.

ENDNOTES

1. Congress has provided the Treasury Department with a $10,000,000 revolving fund for use in redeeming property. IRC § 7810.
2. Unless referring to a section of the Code of Alabama, all section references are to the Internal Revenue Code or its regulations.
3. Reg. § 301.7425-4(b)(2)(i) (emphasis added).
4. See §§ 301.7425-4(b)(1)(iii) and 301.7425-4(b)(4).
5. Black v. U.S., 683 F.Supp. 770 (N.D. Ala. 1987).
6. Id. at 772.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id. at 773.
12. Id. at 776.

13. Reg. § 301.7425-4(b)(1).
14. Black, at 776.
15. Id. at 774.
16. The IRS may redeem foreclosed property within the longer of 120 days from the date of the property sale, or the period allowed for redemption under local law. IRC § 7425(d)(1).
17. See Reg. §301.7425-4(a)(2)(ii); see also examples in Reg. §301.7425-4(b)(5).
18. Id. at 775.
19. Note, however, that the fourth part of the "amount to be paid" is as follows: "(iv) With respect to a redemption made after December 31, 1976, the amounts, if any, of a payment made by the purchaser or his successor in interest after the foreclosure sale to a holder of a senior lien...." Reg. § 301.7425-4(b)(1)(iv) (emphasis added). This "applies only to a payment made after the foreclosure sale and before the redemption to a holder of a lien that was, immediately prior to the foreclosure sale, superior to the lien foreclosed." Reg.§301.7425-4(b)(4)(i).
20. Reg. § 301.7425-4(c)(3).
21. The district director has the right to request a written itemized statement of the amount claimed by the purchaser as expenses necessarily incurred in connection with the property between the foreclosure sale and the end of the government's redemption period. Reg. § 301.7425-4(b)(3)(ii).
22. IRC §§ 162, 212; Reg. § 1.162-4.
23. IRC § 263(a)(1); Reg. § 1.162-4.
24. See IRC §301.7425-4(b)(4)(i) ("This paragraph applies only to a payment made after the foreclosure sale and before the redemption to a holder of a lien that was, immediately prior to the foreclosure sale, *superior to the lien foreclosed.*") (emphasis added); see also IRC §301.7425-4(b)(5)(Example 3). ■

Address Changes

Complete the form below ONLY if there are any changes to your listing in the current *Alabama Bar Directory.* Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list and it is important to use business addresses for that reason. NOTE: If we do not know of a change in address, we cannot make the necessary changes on our records, so please notify us when your address changes.

Please mail form to: Alice Jo Hendrix, P.O. Box 671, Montgomery, Alabama 36101.

________ - ________ - ________ Member Identification (Social Security) Number

Choose one: ☐ Mr. ☐ Mrs. ☐ Hon. ☐ Miss ☐ Ms. ☐ Other ________

Full Name ________________________

Business Phone Number ________ Race ________ Sex ________

Birthdate ________________________

Year of Admission ________________________

Firm ________________________

Office Mailing Address ________________________

City ________ State ____ ZIP Code ________ County ____

Office Street Address (if different from mailing address) ________________

City ________ State ____ ZIP Code ________ County ____

About Members, Among Firms

ABOUT MEMBERS

Gordon G. Armstrong, III, formerly with Clark, Deen & Copeland, announces the opening of his office at 205 Congress Street, Mobile, Alabama 36603. The mailing address is P.O. Box 1464, Mobile, 36633. Phone (205) 434-6428.

John Thomas Horn announces the opening of his office at 2800 Zelda Road, Suite 100-9, Montgmery, Alabama 36106. Phone (205) 271-4789.

Charles C. Elliott, formerly secretary and counsel for Southern Life and Health Insurance Company, announces the opening of his office at 3918 Montclair Road, Suite 120, Birmingham, Alabama 35213. The mailing address is P.O. Box 530893, Birmingham, 35223. Phone (205) 879-1075.

Richard W. Vickers announces the relocation of his office to 100 W. College Street, Columbiana, Alabama 35051. The mailing address is P.O. Box 649. Phone (205) 669-1771.

Randall K. Bozeman announces the opening of his office at 10 Lafayette Street, Hayneville, Alabama 36040. The mailing address is P.O. Box 337, Hayneville, 36040. Phone (205) 548-2244.

J. Michael Broom announces the opening of his office at 1314 Sixth Avenue, Decatur, Alabama 35601. The mailing address is P.O. Box 1626, Decatur, 35602. Phone (205) 355-9151.

Leonard F. Mikul announces the opening of his office at 200 E. Second Street, Bay Minette, Alabama. The mailing address is P.O. Box 296, Bay Minette, 36507. Phone (205) 937-0046.

J. Michael Conaway announces the relocation of his office to Hall, Sherrer & Smith, 316 N. Oates Street, Dothan, Alabama. Phone (205) 792-6752.

Kendall W. Maddox announces the opening of his office at 250 Farley Building, 1929 Third Avenue, N., Birmingham, Alabama 35203. Phone (205) 251-4775.

Micki Beth Stiller of Montgomery announces the opening of a second office. The new office is located at 116 Mabry Street, Selma, Alabama. Phone (205) 872-5545.

Robert H. Ford announces that he has withdrawn from Emond & Vines and opened his office at Two Metroplex Drive, Suite 111, Birmingham, Alabama 35209. Phone (205) 868-0104. He also has an office at 3322 S. Memorial Parkway, Suite 22B, Huntsville, Alabama 35801.

Mary P. Williamson, formerly with Gorham & Waldrep, announces the opening of her office at 1919 Morris Avenue, Suite 1300, Birmingham, Alabama 35203.

William Houston Oliver became a member of the Madrid, Spain bar in September. He was admitted to the Alabama State Bar in 1984.

AMONG FIRMS

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces the firm has moved its offices to Park Place Tower, Suite 700, 2001 Park Place, North, Birmingham, Alabama 35203. Phone (205) 252-8800.

Meacham, Flowers & Earley announces the relocation of its offices to 5704 Beallwood Connector, Columbus, Georgia 31904. Phone (706) 576-4064.

John T. Mooresmith announces that **Howard E. Bogard** has become associated with the firm, with offices located at 100 Brookwood Place, Suite 202, Birmingham, Alabama 35209. Phone (205) 871-3437.

Graddick & Belser announces that **Anne Elizabeth McGowin** and **Roy Wylie Granger, II** have become associated with the firm. Offices are located at 138 Adams Avenue, Montgomery, Alabama 36104. Phone (205) 262-2000.

The American Mental Health Counselors Association announces the appointment of **Mary Lyn Pike** as executive director, effective July 1, 1992. Offices are located at 5999 Stevenson Avenue, Alexandria, Virginia 22304. Phone (703) 823-9800.

Stone, Granade, Crosby & Blackburn announces that **L. Brian Chunn** has become an associate of the firm. The mailing address is P.O. Drawer 1509, Bay Minette, Alabama 36507.

Samford, Denson, Horsley, Pettey & Martin announces that **Corinne Tatum Hurst** has become an associate. Offices are located at 709 Avenue A, Opelika, Alabama. The mailing address is P.O. Box 2345, Opelika, 36803. Phone (205) 745-3504.

Dillard & Ferguson announces that **Richard F. Horsley** and **Vanessa Thomas** have become associates. Offices are located at The Massey Building, 290 21st Street, N., Suite 600, Birmingham, Alabama 35203. Phone (205) 251-2823.

Rushton, Stakely, Johnston & Garrett announces that **Amy C. Vibbart, Paul M. James, Jr.** and **N. Wayne Simms, Jr.** have become associates. The mailing address is P.O. Box 270, Montgomery, Alabama 36101-0270. Phone (205) 834-8480.

Jackson & Taylor announces that **Steven A. Martino** has become a member of the firm, and the firm name will be **Jackson, Taylor & Martino**. Offices are located at SouthTrust Bank Building, 61 St. Joseph Street, Suite 1500, Mobile, Alabama 36602. The mailing address is P.O. Box 894, Mobile, 36601. Phone (205) 433-3131.

Brannan & Guy announces that **Andy D. Birchfield, Jr.** and **Hugh R. Evans, III**, formerly city attorney for the City of Montgomery, have become associated with the firm. New offices are located at 602 S. Hull Street, Montgomery, Alabama. Phone (205) 264-8118.

Balch & Bingham announces that **Clark R. Hammond** has become a member of the firm in the Birmingham office. The firm also announces that **R. Bruce Barze, Jr., David B. Block, Matthew W. Bowden, Courtney L. Dodge, Larry S. Logsdon, Randall D. McClanahan, C. Grady Moore, III, Lisa J. Sharp,** and **Terri E. Wilson** have joined the Birmingham office

as associates, and that **Cynthia A. Holland** has joined the Montgomery office as an associate. The firm has two Birmingham offices, and one each in Huntsville and Montgomery, Alabama, and Washington, D.C.

Grace & Shaw announces the relocation of the firm to 108 Jefferson Street, N., Huntsville, Alabama 35801. Phone (205) 534-0491.

Dominick, Fletcher, Yeilding, Wood & Lloyd announces that **Scott Patrick Archer** and **Judy P. Hamer** have become associated with the firm, with offices at 2121 Highland Avenue, Birmingham, Alabama 35205. Phone (205) 939-0033.

Adams & Reese announces that **A. Evans Crowe** has joined the firm. Crowe is a 1989 admittee to the Alabama State Bar. The firm has offices in New Orleans and Baton Rouge, Louisiana, Mobile, Alabama and Washington, D.C.

Emily Sherwinter and **J. Glenn McElroy**, formerly with the firm of Sherwinter & Tokars, announce the formation of **Sherwinter & McElroy**, with offices located at 1801 Peachtree Street, Suite 250, Atlanta, Georgia 30309. Phone (404) 355-9800. McElroy is a 1988 admittee to the Alabama State Bar.

Espy, Nettles & Scogin announces that **Laurie A. Ames** has joined the firm as an associate. Offices are located at 2728 8th Street, Tuscaloosa, Alabama. Phone (205) 758-5591.

Hollis & Leathers announces that **A. Wade Leathers** has become a member of the firm. Offices are located at 28 E. First Avenue, N., Winfield, Alabama. The mailing address is P.O. Box 708, Winfield 35594. Phone (205) 487-4301. Offices are also located at 109 First Street, S.E., Fayette, Alabama 35555. Phone (205) 932-8866.

Hand, Arendall, Bedsole, Greaves & Johnston announces that **J. Michael Fincher** and **Sarah H. Stewart** have joined as associates. Offices are located at 3000 First National Bank Building, Mobile, Alabama. The mailing address is P.O. Box 123, Mobile, 36601.

Bradley, Arant, Rose & White and **Vulcan Materials Company** announce that **Donald M. James** has become senior vice-president and general counsel of Vulcan.

Tanner & Guin announces that **Allyson L. Edwards** has become an associate. Offices are located at 2711 University Boulevard, Suite 700, Tuscaloosa, Alabama 35401. Phone (205) 349-4300.

Najjar, Denaburg announces that **Thomas M. Lewis** has joined as an associate. Offices are located at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 8400.

Paxton, Crowe, Bragg, Smith & Keyser announces that **Thomas B. Miller** has joined as an associate. Miller is a 1988 admittee to the Alabama State Bar. Offices are located at 1615 Forum Place, Suite 500, West Palm Beach, Florida 33406.

David A. Garfinkel has become a partner in the firm of **Datz, Jacobson & Lembcke**, and the firm name has been changed to **Datz, Jacobson, Lembcke & Garfinkel.** Offices are located at 2902 Independent Square, Jacksonville, Florida 32202. Phone (904) 355-5467. Garfinkel is a 1983 admittee to the Alabama State Bar.

Holly J. Hamner and **Herschel T. Hamner, Jr.** announce the formation of **Hamner & Hamner**. Offices are located at 2310 15th Street, Tuscaloosa, Alabama 35401. Phone (205) 349-4000.

Lange, Simpson, Robinson & Somerville announces that **William A. Major, Jr.**, formerly senior vice-president and general counsel for **Southern Natural Gas Company** and senior vice-president, regulatory and government affairs, **SONAT Gas Group**, is now *of counsel* to the firm in the Birmingham office.

David P. Shepherd announces that **Joseph R. Kemp** has joined the firm as an associate. Offices are located at 913 Plantation Boulevard, Fairhope, Alabama 36532. Phone (205) 928-4400.

Rives & Peterson announces taht **Louise Dietzen** and **Denise V. Hill** have become associates. Offices are located at 1700 Financial Center, 505 N. 20th Street, Birmingham, Alabama 35203. Phone (205) 328-8141.

Burr & Forman announces that **Patti Powell Burke, Darin Collier, Allison Downing, Eric Franz, Pete Grammas, Greg Harley, Jeff Miller, and Yolanda Nevett-Johnson** have joined the Birmingham office as associates, and **Alan Judge** has joined the Huntsville office as an associate.

ITT Consumer Financial Corporation announces that **Robert H. Carpenter, Jr.** has joined the company as general counsel and senior vice-president in the company's Plymouth, Minnesota office. Carpenter is a 1975 admittee to the Alabama State Bar.

Crownover, Coleman & Standridge announces that **Ralph L. Dill** has become associated with the firm, with offices located at 2600 7th Street, Tuscaloosa, Alabama. The mailing address is P.O. Box 2507, Tuscaloosa, 35403.

Spain, Gillon, Grooms, Blan & Nettles of Birmingham announces that **Rennie S. Moody**, formerly with Lanier, Ford, Shaver & Payne in Huntsville, **Earl H. Moody**, formerly with Wilson & King in Jasper, **Kate B. Gamble** and **Anthony C. Harlow** have joined the firm as associates.

Emond & Vines of Birmingham announces that **Thomas Marshall Powell** has joined the firm as an associate.

Floyd, Keener, Cusimano & Roberts announces that **David A. Kimberley** has become a partner in the firm. Offices are located at 816 Chestnut Street, Gadsden, Alabama 35901. Phone (205) 547-6328.

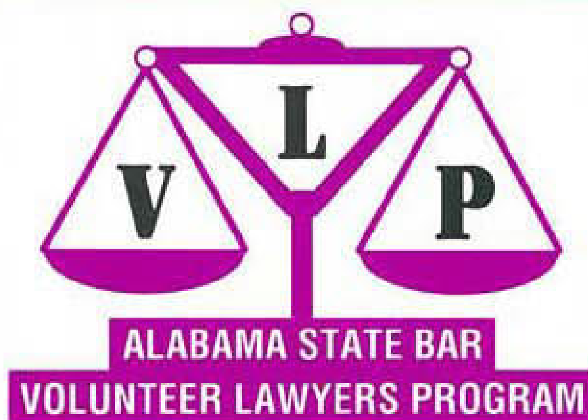
Bradley, Arant, Rose & White announces that **John W. Hargrove, John E. Hagefstration, Jr., Stuart J. Frentz** and **Paul S. Ware** have joined the firm in the Birmingham office, and **G. Rick Hall** has joined the firm in the Huntsville office. Offices are located at 1400 Park Place Tower, 2001 Park Place, Birmingham, Alabama 35203, and 200 Clinton Avenue, W., Suite 900, Huntsville, 35801. Phone (205) 521-8000 Birmingham, and (205) 517-5100 Huntsville.

Rosen, Cook, Sledge, Davis, Carroll & Jones of Tuscaloosa announces that **Joseph W. Cade** has joined the firm as an associate.

Bert P. Taylor announces that **Perry G. Shuttlesworth, Jr.**, formerly with Balch & Bingham, has become associated the firm. Offices are located at 710 Title Building, 300 N. 21st Street, Birmingham, Alabama 35203.

Sasser & Littleton announces that **James D. Hamlett** and **Christopher R. Hood** have become associated with the firm, and the firm has relocated to One Commerce Street, Suite 700, Montgomery, Alabama 36104. ■

ALABAMA STATE BAR VOLUNTEER LAWYERS PROGRAM



Helping Others Helps Us All: Law Students Donate Services

by MELINDA M. WATERS

Often overlooked in surveys concerning pro bono work performed by the legal profession are the many hours donated by law students to persons less fortunate than themselves. It is an inspiration for the practicing bar in Alabama to learn of the pro bono services provided by these young adults - they have few free hours during their law school career, but still find innovative, useful ways to engage in public interest work.

Cumberland School of Law

The Student Bar Association of Cumberland School of Law (CSBA) actively pursues public interest project ideas for the law students at the school. The Committee for the Advancement of Public Interest was formed this year to coordinate such projects and to publicize them to all students. Jeanette Rader, Cumberland's Career Services director, assists chairman Ann Shook, Scottsboro, with keeping the students informed about public interest opportunities.

Annually the CSBA sponsors several pro bono projects to assist citizens in the Birmingham Area. The Volunteer Income Tax Assistance Program (VITA) offers free income tax assistance to low income elderly, handicapped, or non-English speaking individuals. The Internal Revenue Service, primary sponsor for the project, provides training free of charge for the law students and all necessary forms. Actual sites for the VITA clinics are arranged by and advertised through the IRS and are typically held in public libraries or community centers. The CSBA provides office supplies and, of course, law student volunteers. In addition to participating in clinics during the tax season, several students volunteer with the IRS on a year-round basis, speaking to various organizations or working with late-filing individual taxpayers. David Weilbaecher, Dallas, Texas, serves this year as director of the VITA project for Cumberland.

For the past several years, the CSBA has sponsored an Explorer Post of the Boy Scouts of America. The purpose of this post is to provide career and hobby information to young persons between the ages of 14 and 20. In order to meet its goals, the CSBA works on this project both with the Birmingham Area Council of Boy Scouts of America and the Birmingham office of Balch & Bingham law firm.

The post meets at Cumberland School of Law two evenings each month. Judges, lawyers and professors make presentations to the groups. Field trips are offered to the offices of Balch & Bingham, the courthouse, and even the jail. The young people are also given the opportunity to view a mock trial, tour the school law library and learn about admission requirements for law school.

The Birmingham Area Council of Boy Scouts of America provides support to the post, including training for adult leaders, a service team member to advise the student post leaders, and a program of activities to supplement those of the CSBA post. A weekend leadership retreat is also provided as is a tour of local businesses operating at night in the Birmingham area.

Shawn Junkins, Gulf Shores, president of the CSBA, is serving as student director for the post this year. Volunteer law student post leaders include: Amy Himmelwright, Auburn; Mark Gibson, Stone Mountain, Georgia; Ann Shook, Scottsboro; and Maggie Bagley, Columbus, Georgia. Jesse Vogtle of Balch & Bingham serves as director of the Explorer Post and is assisted by other attorneys of the firm, David Chandler, Lisa Sharp and Kelly Kelley.

During the 1992 spring break in March, eight Cumberland law students and the CSBA's executive sercretary, Carla York, traveled to Waco, Texas, to volunteer for Habitat for Humanity. Arrangements were made by student Amy Himmelwright through the national Habitat headquarters. Meals and lodging were provided by Waco area churches.

The law students worked primarily on two homes while in Waco. They painted, erected fencing and laid walkways and sidewalks. Several students even helped with roofing and shingling jobs. The families themselves worked with the students throughout the week as did other volunteers from the area. Shawn Junkins summarizes the experience: "Though many other students traveled to exotic places for spring break, I do not think anyone had as much fun as those of us who went to Waco. Sure, we worked from 8:00 a.m. to 5:00 p.m. every day, and were tired and sore, but the feelings we all had in our hearts when a litle boy named Johnny thanked us for helping build Habitat homes for families like his can't be beat. We all brought home a lot more than we left with. The experience and appreciation that we gained from traveling to Waco are far greater than anything many will ever know unless they participate in such a project."

Accompanying Ms. Junkins and Ms. York to Waco were law students: Daniel Barker of New Bern, North Carolina; Richard Voight of Spartanburg, South Carolina; Chris DiGeorgio of Birmingham; Melissa Gifford of Chicamauga, Georgia; Tommy Douglas of Birmingham; Cathy Calloway of Nashville, Tennessee; and Ed Fricia of Clearwater, Florida.

University of Alabama School of Law

The Student Farrah Law Society at the University of Alabama School of Law consists of close to 50 percent of the student body at the law school and annually selects three philanthropic projects for its membership. This year, the students unanimously voted to support public interest law fellowships. During a recent class reunion held by the law school, Student Farrah raised over $4,500 through a silent auction which will be used to fund public interest law internships for students during summer 1993.

This year's officers of Student Farrah include: Gary Howard, Hartselle, president; Marie Robbins, Silver Springs, Maryland, vice-president; Shelton Foss, Montgomery, treasurer; Tammy Dobbs, Birmingham, secretary; and Brian White, Hartselle, student recruitment. Social co-chairs are Lisa Wathey, Milton, Florida, and Sharon Wheeler, Signal Mountain, Tennessee.

Guided by Professors Pamela Bucy and Brian Fair, law students recently established a campus chapter of the National Association for Public Interest Law (NAPIL). NAPIL is a coalition of law student organizations throughout the country that offers grants and other forms of assistance to students and recent graduates engaged in public interest employment. The University Law School chapter serves as a clearinghouse for information relating to public interest employment oportunities and sponsors seminars at the law school designed to foster interest among students in this type of service. It also raises funds for public interest fellowships and is supporting the efforts of the Alabama State Bar Volunteer Lawyers Program to organize summer internships with participating local bar associations and legal services groups in Alabama.

The NAPIL at the law school is chaired by Dan Cochran of Birmingham. Other officers include: Windy Hillman of Brewton, counsel; Stacey Haire of Huntsville, publicity chair; Cathy Carpenter of Nashville, Tennessee, fundraising chair; and Felicia Brooks of Mobile, David Hale of Huntsville and Sonya Powell of Chesapeake, Virginia, special projects cochairs.

Tuscaloosa area charities have greatly benefited from the individual efforts of several law students. The local "Meals-on-Wheels" project, through which meals are delivered every week to elderly, homebound citizens, is assisted by students Dee Anderson of Monroeville, Alex Goldsmith of Birmingham, Amy Hubbard of Attalla and Ward Beeson of Montgomery. David Tomlinson of Florence works with his church group to make and deliver meals for Hospice of Tuscaloosa. Deborah Kay King, Gig Harbour of Washington and Stella Shackleford of Birmingham are volunteers for the Tuscaloosa "Spouse Abuse Network," and Amy Strain of Scottsboro plans annual blood drives at the law school. Volunteers with the United Way Big Brother/Big Sister program locally are Kelvin Jones, III of Huntsville and Cathy Carpenter. Mr. Jones has also tutored students at both Martin L. King, Jr. Elementary School and Stillman College. Student Julie Mosley of Muscle Shoals serves as a Girl Scout leader and Ward Beeson, Cathy Carpenter and Jake Brabston of Birmingham are working with Tuscaloosa Project Literacy U.S.

Through a program sponsored by the Law School Student Bar Association, several students have volunteered to tutor seventh grade "at-risk" children in Tuscaloosa Middle School. For an initial four-week period, the volunteers assist their assigned students with schoolwork and study skills. The students are then evaluated by the volunteers to determine whether further time with the child would be beneficial. Windy Hillman of Brewton, Mark Sabel of Montgomery, Robert Minor of Gulf Breeze, Florida, Courtney Stallings of Atlanta, Georgia

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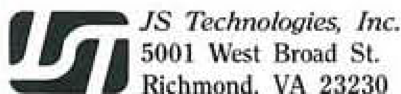

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and Christine Marie Coody of Montgomery have each provided special attention to needy children through this project.

Dan Cochran, chair of the law school's NAPIL chapter, volunteered last summer with DNA-People's Legal Services in Arizona working with indigent Native Americans of the Navajo, Hopi and Paiute tribes. In describing this *pro bono* experience, Dan stated: "Working in Arizona helped tie up many loose ends for me professionally as it really brought home how important basic first-year courses are to the practice of law. Additionally, working with the Native Americans was both depressing and rewarding – depressing because this particular special group of needy citizens historically has often been overlooked, but rewarding as well because I realized how different things can be and what a difference we can make in others' lives. If enough people care, then we can turn things around and really help those around us who are less fortunate than ourselves."

As demonstrated by these outstanding women and men presently at Cumberland and the University of Alabama Law Schools, helping others can make a visible, positive difference in our communities. It is gratifying to know that the future of our profession rests with such committed young adults for whom professionalism means more than just practicing law for compensation – it means offering your time and skills to guarantee that justice is accessible at all times to all persons.

For regular members of the bar, the Alabama State Bar Volunteer Lawyers Program offers an organized, efficient mechanism through which to volunteer your expertise to help indigent citizens in this state in civil, non-fee-generating cases. More information on the project can be obtained from Melinda Waters, program director, at the Alabama State Bar. ■

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REPORT OF THE TASK FORCE ON SPECIALIZATION

by KEITH B. NORMAN, director of programs & activities

"Specialization" in its simplest terms is a concentration of a lawyer's practice within one, or, at most, a few fields of law. As a result, lawyers who do concentrate expect to be more proficient than if they devoted their time to many areas of practice. Although *de facto* specialization is a fact of legal life, the legal profession has been slow in developing formal plans for the recognition and regulation of specialists in their training. Forces outside and within the bar have prompted a further need to study the possible implementation of a formal program. Indeed, the public demand for more specific information to assist in finding a lawyer tends to create a need for the identification of specialists. While some lawyers consider more liberal advertising rules to be a means of satisfying that need, others find advertising to be an inappropriate, unacceptable or, at best, incomplete solution.

In 1990, Alabama State Bar President Alva Caine appointed a task force to revisit the issue of specialization, particularly in light of the Alabama Supreme Court's decision in *Ex Parte Howell*, 487 So.2d 848 (Ala. 1986), which required the development of a rule allowing advertisement of a certification. The task force was charged with studying whether or not the procedures adopted in response to *Howell* (see Rule 7.7, *Alabama Rules of Professional Conduct*), continue to be appropriate for Alabama or whether another type plan, including the bar's being the sole certifying authority for specialties in Alabama, would better serve the public and the profession. The task force was to consider the experience of other state bars which have implemented specialization plans, as well as the experiences of those state bars which have not adopted such plans.

Chaired by Will Lawrence of Talladega, the task force reviewed various certification plans from around the country, in addition to considering the ramifications of the United States Supreme Court decision in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), which was released shortly after the creation of the task force. In that case the Supreme Court ruled that Illinois attorney Gary Peel's truthful disclosure of his civil trial certification must be permitted. Peel had contested his censure by the Illinois Attorney Registration and Disciplinary Commission for representing himself as a certified legal specialist, contrary to the Illinois Code of Professional Responsibility. Peel had truthfully printed on his letterhead that he was a "certified civil trial specialist by the National Board of Trial Advocacy." The court, while prohibiting a categorical bar of certification advertising, *in dictum* suggested that the public interest in prohibiting misleading or deceptive advertising would be served by regulation of certifying organizations and the content and placement of the advertised message.

Keith B. Norman

After a great deal of study and work, the task force presented to the board of bar commissioners a plan of legal specialization. The proposed Alabama Rules of Specialization, considered at the board's May 22, 1992 meeting, were modeled after Minnesota's specialization plan. The proposed rules provide for the certification of "outside" agencies or entities other than the state bar or its committees or sections, to prepare and administer programs approved by a state board of certification. The proposed rules recommended by the task force were approved by the board of bar commissioners.

Presently, the Alabama State Bar's Permanent Code Commission is considering modification of Rule 7.7 to accommodate the proposed specialization plan. Modifications to Rule 7.7 must be considered by the board of bar commissioners and, along with the specialization rules, approved by the Alabama Supreme Court before implementation.

As of May 1990, only 14 states had specialization plans. Since the announcement of the *Peel* decision, 16 states now have specialization plans and at least seven are presently considering plans. While states that have had the benefit of formal specialization plans for some time have witnessed only moderate interest by attorneys who desire to specialize, only time will tell how popular specialization becomes in Alabama. ■

COMPARATIVE FAULT: A PRIMER

What Happens When the Lid Flies Off Pandora's Box

By DEBORAH ALLEY SMITH and RHONDA K. PITTS

Zeus planned his revenge on man. He took counsel with the other gods, and together they made for man a woman. All the gods gave gifts to this new creation. She was named Pandora, which means All-Gifted, since each of the gods had given her something. The last gift was a chest in which there was supposed to be a great treasure, but which Pandora was instructed never to open.

Eventually, Pandora's curiosity got the better of her, and she determined to see for herself what treasure it was that the gods had given her. One day when she was alone, she went over to the corner where her chest lay and cautiously lifted the lid for a peep. The lid flew up out of her hands and knocked her aside, while before her frightened eyes dreadful, shadowy shapes flew out of the box in an endless stream. There were hunger, disease, war, greed, anger, jealousy, toil, and all the griefs and hardships to which man from that day has been subject. Each was terrible in appearance, and as it passed, Pandora saw something of the misery that her thoughtless action had brought on her descendants. At last the stream slackened, and Pandora, who had been paralyzed with fear and horror, found strength to shut her box. The only thing left in it now, however, was the one good gift the gods had put in among so many evil ones. This was hope, and since that time the hope that is in man's heart is the only thing which has made him able to bear the sorrows that Pandora brought upon him.

Coolidge, *Greek Myths* (The Riverside Press 1949)

Introduction

On February 21, 1992, the Alabama Supreme Court withdrew its original opinion and announced that it would consider the judicial adoption of comparative fault in *Williams v. Delta International Machinery Corp.*, [Ms. 1901255, Feb. 21, 1992] ___ So. 2d ___ (Ala. 1992). The court invited all interested parties to submit briefs and participate in oral argument on the issue of whether comparative fault should be adopted as the law of this state and, if so, what form should be adopted. The court also requested briefs and argument on what effect the adoption of comparative fault would have on well-established rules of law such as joint and several liability, the prohibition on apportionment of damages, the doctrines of last clear chance and assumption of risk, and Alabama's wrongful death statute. At least 15 amicus briefs were filed on behalf of more than 66 companies, associations and individuals. On May 14, 1992, the court heard an unprecedented five and one-half hours of oral argument. The court took the issues under submission at the close of argument. At presstime, no opinion had yet been released.

Certainly, no one can predict what the court will do. It could simply decline to reach the comparative fault issue. However, if the court does decide to reach the issue, the resulting opinion could dramatically change the practice of law in this state. Adopting comparative fault involves more than simply abandoning contributory negligence. The legal principles that have been used by the bench and bar to determine tort liability for more than 100 years would be forever changed. Adopting comparative fault would open a judicial Pandora's box of other issues that could be the source of potential confusion to the bench an bar for years to come. Virtually every tort case filed in this state could be affected.

This article will attempt to outline

briefly the different forms of comparative fault advocated by the various parties and amici in the *Williams* case and to point out a few of the more important issues that the adoption of comparative fault would raise. This discussion is by no means exhaustive. Countless other important issues will arise if comparative fault is adopted.

Forms of comparative fault

The pure form of comparative fault allows all parties to recover their damages reduced by their percentage of fault. The pure form is a minority doctrine in the United States, with only 13 of the 46 comparative fault states endorsing this form. The vast majority of states have opted for a modified comparative system.

The modified "not as great as" form (also known as the "less than" form or the 49 percent rule) allows plaintiffs to recover damages, reduced by their percentage of causal negligence, so long as their contribution to the total negligent conduct causing their injury is "less than" or "not as great as" that of the parties from whom recovery is sought. The damages are reduced by the percentage of plaintiff's fault, but when the plaintiff's negligence is equal to or greater than that of the party from whom recovery is sought, the plaintiff is barred from any recovery. This form of modified comparative fault was first adopted in Wisconsin in 1931. Tennessee recently became the tenth state to adopt this form. See *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

The second modified form is referred to as the "not greater than" form or the 50 percent rule. This system allows plaintiffs to recover reduced damages so long as their comparative or proportional contribution to the total negligence causing their injuries is not greater than that of the parties from whom recovery is sought. Plaintiffs are allowed to recover their damages reduced by the proportion of causal negligence attributed to them up to and including the point where their negligence constitutes 50 percent of the total in a two-party situation. Unlike the "not as great as" form, under the 50 percent form, plaintiffs can recover even if their negligence is equal to that of the defendants. This form, the most popular, is in effect in 21 states.

The least favored version of comparative fault is the slight-gross rule, currently in effect in only two states. The rule retains the recovery bar of contributory negligence unless the plaintiff can show that his negligence was slight and the defendant's negligence was gross. The slight-gross rule is appealing in that it would be the least radical change to existing law but would still ameliorate the harshness of contributory negligence.

One of the difficulties with the pure comparative fault rule is that it focuses solely on the hypothetical "plaintiff" without recognizing that once pure comparative fault is embraced, all injured parties whose negligence or fault combined to contribute to the accident are automatically potential plaintiffs. It is difficult to justify the adoption of a system which permits parties who are 95 percent at fault to have their day in court as plaintiffs because they are 5 percent faultfree. See *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 883 (W.Va. 1979). The "pure" system encourages a race to the courthouse, favoring the first to file.

More importantly, the pure form favors parties who have incurred the most damages, regardless of their amount of fault or negligence. See, e.g., *Lamborn v. Phillips Pacific Chemical Co.*, 89 Wash.2d 701, 575 P.2d 215 (1978) (plaintiff found 99 percent negligent in causing an accident but awarded a verdict of $3,500 based on damages of $350,000). Furthermore, a plaintiff, who has sustained a moderate injury with a potential jury verdict of $20,000 and who is 90 percent fault free, may be reluctant to file suit against a defendant who is 90 percent at fault but who has received severe injuries and whose case carries a potential of $800,000 in damages. Even though the verdict is reduced to $80,000 by the defendant's 90 percent fault, it is still far in excess of the plaintiff's potential recovery of $18,000. The courts that have adopted the pure comparative fault rule have not discussed this kind of result, but rather seem to proceed on the unstated assumption that all parties will be covered by sufficient insurance to pay all the verdicts stemming from a multiparty accident.

Advocates of the pure form argue that it is simpler and easier to administer than are the modified forms. However, experience appears to disprove this contention. Several states that judicially adopted pure comparative systems have since displaced those systems with legislatively enacted modified comparative statutes. See Ill. Ann. Stat. ch. 110, para. 2-1116 (Smith-Hurd Supp. 1990); Iowa Code Ann. 668.3 (West 1987).

The modified form seems to discourage frivolous lawsuits, encourages settlements and minimizes runaway jury verdicts. In the case of two negligent parties, the mutual fear of a jury outcome placing one party's fault over 50 percent and thereby precluding damages, weighs heavily in favor of settlement. Under the pure system, each party would continue to trial, knowing that some recovery would be available regardless of the jury's allocation of fault. This would surely increase costs in an already overburdened court system.

The modified form likely would generate fewer counterclaims than the pure form. In a pure comparative fault state, a badly injured plaintiff, although 90 percent at fault, will bring an action against a 10 percent negligent defendant because the plaintiff can still recover 10 percent of his or her damages. The 10 percent negligent defendant, having been sued by the plaintiff, naturally will counterclaim, the result likely being two lawyers for each side in virtually every suit.

The manner in which negligence is compared between the plaintiff and two or more joint tortfeasors is very important in a modified system. There are two possible approaches, the individual rule and the unit or aggregate rule. Under the individual rule, the plaintiff can recover from a particular defendant only when the plaintiff's negligence is less than the fault of the particular defendant. See *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934). Under the aggregate rule, plaintiffs are entitled to recover so long as their fault is less than the fault of all the defendants combined. See, e.g., Ark. Stat. Ann. §16-64-122 (1991).

In multiple defendant cases, the individual rule preserves the principle of nonliability for any defendant less at fault than the plaintiff. The individual rule reduces the prospect of recovery for

grossly faulty plaintiffs, but an innocent plaintiff still can recover from a defendant minimally at fault. In an aggregate rule case, a marginally negligent defendant will be forced to pay damages to a more negligent plaintiff. Further, the coexistence of the aggregate principle of comparison with joint and several liability serves as an incentive for negligent plaintiffs to join "deep pocket" defendants only marginally involved in the incident.

Joint and several liability

No matter what form of comparative fault is adopted, the Court must decide whether joint and several liability will be retained. Defense lawyers for years have cried that joint and several liability is patently unfair. Though one might expect that joint and several liability would be abolished as a matter of course with the adoption of comparative fault, many argue emphatically that joint and several liability should be retained. In the last few years, the law of joint and several liability has been abolished or modified in at least 37 of the 46 comparative fault states. See Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 Tenn. L. Rev. 199, 304 (1990). Many jurisdictions have recognized that joint and several liability is inconsistent with a comparative fault system and essentially have eliminated joint and several liability entirely. Other jurisdictions have abolished joint and several liability in all cases except those in which the plaintiff is found not to be at fault. Still other jurisdictions have abolished joint and several liability for a defendant whose fault is below a certain threshold. Others have formulated schemes modeled after the Uniform Comparative Fault Act, which retains joint and several liability in the first instance, but reallocates uncollectible damages among all parties at fault, including the plaintiff. Some jurisdictions have enacted schemes distinguishing between economic and non-economic loss or other similar distinctions.

Although the variations on the abolition of joint and several liability are widespread, they represent a consensus that joint and several liability should not coexist equally with comparative fault. The rationale behind comparative fault is that liability should be assessed according to the relative fault of the parties. Joint and several liability makes each joint tortfeasor liable for the entire amount of plaintiff's injury, regardless of the amount of fault assessed to that defendant. "Since the doctrine is antithetical to the basic premise of the comparative fault concept — that liability for damages will be borne by those whose fault caused it in proportion to their respective fault — logic compel[s] its abolition." Eilbacher, *Comparative Fault and the Non-Party Tortfeasor*, 17 Ind. L. Rev. 903, 907 (1984). If liability is to be assessed according to fault, then no party should be held responsible for more than its proportionate share of fault. To hold otherwise is to favor one wrongdoer over another. The advocates of comparative fault maintain that it is unfair to place the burden of a loss caused by the fault of two parties on one alone (the plaintiff), especially when one's fault may be relatively minor in comparison to the fault of the other. A principle of loss apportionment that allows plaintiffs to recover despite their fault should also serve to insulate defendants from liability for loss to the plaintiff attributable to the negligence of another defendant.

Allowing joint and several liability in a comparative fault system leads to results that clearly are unjust and incompatible with the comparative fault rationale. See, e.g., *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987)(Plaintiff 14 percent at fault, Disney 1 percent at fault and plaintiff's finance 85 percent at fault, but Disney held responsible for 86 percent of plaintiffs damages because fiance was immune from suit). If liability is to be assessed according to fault, whether a defendant can actually pay a judgment should not be considered in assessing liability. The application of joint and several liability in a comparative fault system destroys the asserted fairness of a fault-based recovery and shifts the focus from liability according to fault to liability according to collectability. Adler, *Allocation of Responsibility After American Motorcycle Association v. Superior Court*, 6 Pepp. L. Rev. 1, 5 (1978). Such a policy is fundamentally unfair. As the Kansas Supreme Court observed in *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867, 874 (1978), "[t]here is nothing inherently fair about a defendant who is 10 percent at fault paying 100 percent of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss."

Few courts have set forth any reasoned analysis in deciding whether joint and several liability should be retained in a comparative fault system. None of the justifications cited by the few courts that have examined this issue and retained joint and several liability withstand meaningful scrutiny.

The courts rationalize that the plaintiff's injury is indivisible because each defendant's negligence caused the entire injury. This ignores the fact that the plaintiff's negligence also caused the entire injury. If indivisibility is no longer a bar to plaintiff's recovery, then it should not be used to deny modification of joint and several liability. Comments, *Where is the Principle of Fairness in Joint and Several Liability — Missouri Stops Short of a Comprehensive Comparative Fault System*, 50 Mo. L. Rev. 601, 617 (1985). If the Court accepts the ability of the fact-finding process to apportion degrees of negligence then the foundation of joint and several liability, the previously assumed inability to apportion fault among tortfeasors, has been eliminated. *American Motorcycle Ass'n v. Superior Court*, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977), *rev'd* 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).

Some courts have suggested that because plaintiff has only violated a duty to protect himself and the defendants have violated a duty to prevent harm to others, the defendants' conduct is somehow more culpable than is the plaintiff's. However, there is no qualitative difference in the culpability of the parties' conduct simply by reason of one being a plaintiff and the others being defendants. The label "plaintiff" does not change the nature of a party's conduct. A plaintiff's conduct often creates a tremendous risk of harm to others. Sometimes the conduct fortuitously does not result in any injury to anyone else, but other times plaintiff's conduct, in fact, does cause injury to one or more of the defendants or to non-parties. If a plaintiff's conduct is less culpable than the defendants', the

jury will assess fault accordingly, but that is not something that should require one defendant to pay all the damages caused by all the defendants. To hold that the mere fact that a party is the plaintiff makes that party's conduct less culpable than the defendants' conduct simply encourages a race to the courthouse.

Some courts reason that joint and several liability should be retained to assure that injured plaintiffs are compensated for their injuries. However, the court cannot assume that each defendant will not be responsible for his or her apportioned share of a judgment. Certainly, there occasionally will be an insolvent defendant, but the majority of defendants, through insurance or otherwise, are able to pay their just debts. The fact that plaintiffs occasionally may be unable to collect a portion of their damages, is an insufficient basis for shifting the responsibility for one defendant's liability to another defendant. "Between the plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants and one is insolvent?" *Barlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579, 585 (N.M. App.) cert. denied 98 N.M. 336, 648 P.2d 794 (1982). If the risk of insolvency shifts when there are multiple defendants, the court is determining liability not on the basis of blameworthiness but on the financial conditions of the defendants. Ball, *A Reexamination of Joint and Several Liability under a Comparative Fault System*, 18 St. Mary's L.J. 891 (1987). "If we are ever to achieve a just and equitable tort system, we must predicate a party's liability upon his or her blameworthiness, not upon his or her solvency or a codefendant's susceptibility to suit." *Walt Disney World*, 515 So. 2d at 205-6 (McDonald, J., dissenting).

The final cited rationale for retaining joint and several liability is *stare decisis.* If stare decisis does not prevent the abolition of contributory negligence, it should not prevent the abolition of joint and several liability. It has long been recognized that the *stare decisis* rule is only a starting point. *Ex parte Marek*, 556 So. 2d 375 (Ala. 1989). A change in the law that resulted in the development of the joint and several rule dictates a change in the rule itself. If the Court adopts a comparative fault system then it is recognizing the ability of the fact finder to apportion fault. If the fact finder can apportion fault, it can apportion damages. The rationale that damages cannot be apportioned, which has been the justification for joint and several liability, is no longer valid.

Neither reason nor the rationales cited by other courts can justify the retention of joint and several liability in a comparative fault system.If the Court adopts comparative fault and the rationale that liability should be assessed according to fault, then joint and several liability must be abolished or, at the very least, modified. If liability is to be assessed according to fault, then no party can be held responsible for more than his or her proportionate share of the fault. Fairness and equity dictate that each party be responsible for those damages attributable to his or her fault, and *only* for those damages.

Problems presented by absent or immune culpable parties

Another troublesome problem and one closely related to the joint and several liability issue is the question of what treatment should be given to tortfeasors whose fault contributed to cause the injury but who are not parties to the suit. For example, what happens if the plaintiff settles with one of the parties at fault or chooses not to join, or cannot obtain jurisdiction over, one of the parties at fault? What happens if one of the parties at fault is immune from suit or has a valid statute of limitations defense to the plaintiff's claim? The only fair and equitable means of dealing with each of these problems consistent with the rationale behind comparative fault is to assess the fault of all parties whose fault contributed to cause the injury, regardless of whether they are or can be made parties to the suit. As one commentator has observed:

> To the extent that a given legal system ignores the fault of any tortfeasor, and shifts the financial burden from one culpable person to another, the fundamental principle of comparative fault is compromised. Thus, the manner in which a given comparative fault system addresses the issue of allocation of fault and responsibility for damages to the non-party tortfeasor provides the measure of fairness of that system of loss distribution.

Eilbacher, *Comparative Fault and the Non-Party Tortfeasor*, 17 Ind. L. Rev. 903 (1984).

The need for such a rule is obvious in cases in which the plaintiff chooses not to join a culpable party or allows the statute of limitations to run as to a culpable party. Certainly, if the plaintiff chooses not to proceed against a party who is partially at fault for the plaintiff's damages, the other defendants should not be penalized. Plaintiffs can choose not to sue potentially liable parties, but in so doing, they should not be able to manipulate the principles of comparative fault effectively to shift the fault of one tortfeasor to the other tortfeasors. Nor should plaintiffs be allowed to shift the fault of a tortfeasor who has a statute of limitations defense to another tortfeasor. "A defendant should not be penalized for a plaintiff's lack of diligence in identifying and suing each tortfeasor. If diligence is to be encouraged, so as to achieve true apportionment and liability according to fault, the burden of loss must fall on that party who determines who should be defendants in the suit." Id. at 912.

Somewhat more troublesome is the case in which a defendant cannot be served or is beyond the jurisdiction of the court because inconsistent results could occur if the plaintiff is forced to pursue some tortfeasors in a separate action. Another difficult problem is presented by immune tortfeasors. However, the fault of all culpable parties must be considered or the principles and rationale behind comparative fault are defeated. "It would be unfortunate to permit the fear of occasional inconsistencies in loss distribution to prevent the adoption of a system of spreading loss which would in most cases abolish the Archaisms of our present common law rules of negligence." Goldenberg and Nicholas, *Comparative Liability Among Joint Tortfeasors: The Aftermath of Li v. Yellow Cab Company*, 8 U. West L.A. L.

Rev. 23, 52-53 (1976).

The settling tortfeasor presents the additional question of whether the plaintiff's damages should be reduced by the settling tortfeasor's percentage of fault or by the amount of the settlement. The rationale behind comparative fault dictates that the plaintiff's damages be reduced by the settling tortfeasor's percentage of fault and not by the amount of the settlement. A contrary rule would allow the plaintiff effectively to shift the loss to the party best able to pay by settling with the other parties. Moreover, the contrary rule would result in the non-settling defendants bearing the risk that the settling parties misevaluated the case. If plaintiff makes the decision to settle with one tortfeasor, *the plaintiff* should bear the risk that that settlement may be less (or more) than the settling tortfeasor's percentage of plaintiff's damages. It is far more equitable for plaintiffs to bear the risk of their own failure to accurately evaluate their cases than it is for the remaining defendants to bear that risk. The percentage reduction method is the only fair and equitable method of accounting for the settling tortfeasor.

In summary, in order to effectuate fully the goals of a comparative fault system, the fault of all parties to the occurrence must be considered when allocating fault. The plaintiff's damages then must be reduced by the percentage of fault of all non-party tortfeasors.

Other issues

Assumption of Risk Abolition of contributory negligence does not necessarily dictate abolition of the assumption of the risk defense. Assumption of risk and contributory negligence embody distinguishable concepts. Assumption of risk employs a subjective standard to assess whether a particular plaintiff appreciated a risk prior to voluntarily proceeding to encounter it. Contributory negligence utilizes an objective reasonableness criterion. The Alabama Supreme Court has steadfastly recognized the distinction. See, e.g., *Slade v. City of Montgomery,* 577 So. 2d 887 (Ala. 1991).

Further, assumption of risk rests on different theoretical grounds than does comparative fault. It does not conflict with the policies underlying comparative fault, nor does its application circumvent the comparative fault enactments. Contributory negligence rests on the plaintiff's failure to exercise reasonable care. It measures the plaintiff's conduct objectively, against that of the "reasonable person." Assumption of risk does not employ any such notion of fault or negligence, but rather, rests on the plaintiff's informed decision to encounter the risk created by the defendant's dangerous conduct. Where assumption of risk is applicable, the plaintiff, although able to avoid the risk of proceeding, has made a conscious, informed choice to accept that risk and to proceed in harm's way. Having made that conscious choice, it is neither illogical nor inequitable to require the plaintiff to accept the consequences, which so easily could have been avoided.

Intentional, Reckless, Willful and Wanton Conduct. Generally, comparative fault jurisdictions have refused to apply comparative fault principles to intentional conduct. However, a number of courts have determined that comparative fault should be applied to all forms of aggravated conduct short of intentional injury. Emphasizing that aggravated negligence concepts were developed to ameliorate the harsh common law bar of contributory negligence, these courts reason that the advent of comparative fault makes such concepts superfluous. See, e.g., *Sorenson v. Allred*, 112 Cal. App.3d 717, 725, 169 Cal. Rptr. 441, 446 (1980). Since the harshness of contributory negligence will be eliminated with the adoption of comparative fault, the rationale for refusing to apply the defense to claims of recklessness, willfulness and wantonness no longer exists. Laufenberg, *Comparative Negligence Primer*, Defense Research Institute, Inc. (1975).

Interaction of Comparative Fault with Statutory Enactments. When longstanding tort doctrines are abrogated, the new doctrines established inevitably will conflict in some respects with statutory enactments premised upon those longstanding doctrines. Abolition of contributory negligence in favor of comparative negligence would be no exception.

Seat belt defense. Although the majority of states, including Alabama, do not recognize the seat belt defense, a number of state courts have held recently that the principles of comparative fault require that the jury be allowed to consider a motorist's nonuse of a protective safety device in apportioning damages. See generally Annot., *Nonuse of Automobile Seatbelts as Evidence of Comparative Negligence*, 95 A.L.R.3d 239 (1979).

Guest statute. Some have argued that the adoption of comparative fault should impliedly repeal the guest statute. While the guest statute in a comparative fault case could produce some unkind results, no court in any state has held that the adoption of comparative fault has impliedly repealed a guest statute. The guest statute remains viable until specifically repealed by the legislature or overturned by the Alabama Supreme Court on constitutional grounds.

Other enactments. In several statutes the legislature has made specific findings with regard to the contributory negligence defense. See, e.g., Ala. Code 25-6-1 (1975) (Employer's Liability Act); Ala. Code 32-5-222 (1975) (child passenger restraints); Ala. Code 21-7-7 (1975) (rights of blind persons not using cane or guide dog). In addition, the Worker's Compensation Act is also premised upon the *quid pro quo* of not holding employees' contributorily negligent. Adoption of comparative fault will have an impact on these and other statutory enactments that are premised upon contributory negligence principles.

Negligence of Children. In the past many categories of plaintiffs, such as infants, children, and aged or incapacitated people, have been held either incapable of contributory negligence or at least capable only of some diminished form of contributory negligence. The comparative system may permit a more realistic evaluation, for example, of a child's own responsibility for his or her injury and of the defendant's responsibility. For example, the age and experience of the child can be considered in determining whether that child was in fact negligent. If so, these same factors again can be considered in comparing the negligence of the minor plaintiff with that of the adult defendant. The capacity of the child is thus used for establishing which standard of care applies to the minor plaintiff and in apportioning fault. See *Blahnik v. Dax,* 22 Wis. 2d 67, 125

N.W.2d 364 (1963).

Res Ipsa Loquitur. A part of the classic *res ipsa loquitur* doctrine is a requirement that the plaintiff be free of contributory negligence. Comparative fault obviously will modify this rule. See, e.g., *Turk v. H. C. Prange Co.*, 18 Wis. 2d 547, 119 N.W.2d 365 (1963). Where a modified form of comparative fault is in effect, such as in Colorado, res ipsa can be applied since the jury could find that plaintiff's "negligence was not as great [and] . . . the essential elements of res ipsa were established." *Gordon v. Westinghouse Electric Corp.*, 599 P.2d 953 (Colo. App. 1979).

Counterclaims. Adoption of comparative fault likely will dramatically increase the number of counterclaims filed. Even if the defendant clearly is at fault in causing the accident and the plaintiff's fault is relatively minor, defendants can virtually always counterclaim seeking to recover some portion of their own damages. The possibility of both the plaintiff and the defendants recovering, presents the additional problem of whether a set-off should be made. This problem would not arise in modified comparative jurisdictions where a party can recover only if his negligence is less than that of the other party. Set-offs have the virtue of being easy to administer and to apply, but some courts have felt that they lead to inequitable results in some circumstances. See Heft & Heft, *Comparative Negligence Manual*, §A.220 (1978). Where both parties are insured, for example, a set-off results in both insurers saving money and both claimants recovering less than the damages to which they are otherwise entitled. Refusal to apply set-offs also can have equally inequitable results. For example, if one party is solvent and the other is not and no set-off is allowed, the solvent party will pay the entire amount of its liability with little hope of recovering its judgment from the insolvent party. Some courts have refused to apply set-offs in cases in which the parties are insured. See, e.g., *Jess v. Herrmann*, 26 Cal. 3d 131, 161 Cal. Rptr. 87, 60§ P.2d 208 (1979).

Conflicts of Interest. If comparative fault is adopted, representation of more than one defendant by one defense attorney may become obsolete. It will almost always raise a conflict of interest because it would always be in one defendant's best interest to attempt to increase the percentages of fault to be assessed to the other defendants, as well as the plaintiff.

Conclusion

If the Supreme Court of Alabama decides to adopt the doctrine of comparative fault in the *Williams* case, like Pandora's Box once opened, it is difficult to envision the chaos which may ultimately emerge. It is impossible to predict the endless stream of "shadowy shapes" of issues that may ultimately be unleashed once the lid is opened. Only a few have been touched upon herein. Additional issues include the proper pleading of comparative fault, special verdicts, whether the jury should be told about the impact of the verdict, prospective versus retrospective application, the effect upon phantom vehicle uninsured motorist cases, and the impact of comparative fault on indemnity and subrogation claims.

The one good gift of hope allowed Pandora to survive her misery. Perhaps, the hope of a fair and equitable tort system will give us the strength to endure the initial chaos that will come to bear if the lid on the comparative fault Pandora's box is lifted. ■

Deborah Alley Smith

Deborah Alley Smith is a member of the firm of Rives & Peterson. She is a 1982 graduate of the University of Tennessee and 1985 graduate of the University of Alabama School of Law.

Rhonda K. Pitts

Rhonda K. Pitts is an associate with Rives & Peterson. She received her undergraduate degree from Judson College in 1986 and her law degree from Cumberland School of Law in 1989. She joined Rives & Peterson after serving as law clerk to the Honorable Oscar W. Adams, Jr. of the Alabama Supreme Court.

NOTICE OF ELECTION

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

PRESIDENT-ELECT

The Alabama State Bar will elect a president-elect in 1993 to assume the presidency of the bar in July 1994. Any candidate must be a member in good standing on March 1, 1993. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1993. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer.*

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 14, 1993.

COMMISSIONERS

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, places no. 4, 7 and Bessemer Cut-off; 11th; 13th, place no. 1; 17th; 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th and 40th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1993 and vacancies certified by the secretary on March 15, 1993.

The terms of any incumbent commissioners are retained. All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 30, 1993).

Ballots will be prepared and mailed to members between May 15 and June 1, 1993. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 8, 1993) to state bar headquarters.

RECENT DECISIONS

By DAVID B. BYRNE, JR. and TERRY A. SIDES

ALABAMA SUPREME COURT - CRIMINAL

Double jeopardy—critical analysis; proof of conduct

Staten v. State, 26 ABR 5048 (August 14, 1992). The Double Jeopardy Clause of the United States Constitution and the Alabama Constitution bars any subsequent prosecution on which the Government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

In February 1990, Staten was convicted in the Guntersville Municipal Court of assault in the third degree. The warrant charged Staten with causing physical injury to Betty Saint by hitting her and trying to close the trunk lid of an automobile on her. In April 1990, based on the earlier incident, the Marshall County Grand Jury charged Staten with attempting to kidnap Saint in the first degree by abducting her with the intent to physically injure her.

Staten pled guilty to second degree kidnapping, but reserved the right to appeal the trial court's denial of her motion to dismiss based on the ground of double jeopardy. The court of criminal appeals affirmed her conviction.

The Alabama Supreme Court granted certiorari to consider Staten's claim that the trial judge erred by not vacating her attempted kidnapping conviction on the ground of double jeopardy. Specifically, Staten argued that the State had to prove conduct for which she had already been prosecuted in order to establish an essential element of the attempted kidnapping charge, and, thus, her conviction was barred by the double jeopardy provisions of the Alabama and United States constitutions. The supreme court, in an opinion authored by Justice Shores, reversed the conviction and rendered judgment in favor of Staten.

The U.S. Supreme Court, in *Grady v. Corbin*, 495 U.S. 508 (1990), held that a subsequent prosecution must do more than pass the elements test under *Blockburger v. United States*, 284 U.S. 299 (1932). The Supreme Court stated in pertinent part as follows:

[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that consitutes an offense for which the defendant has already been prosecuted. This is not an 'actual evidence' or 'same evidence' test. *The critical inquiry is what the State will prove, not the evidence the State will use to prove that conduct.*

While an essential element of attempted kidnapping is intent to injure and not actual injury to the victim, the State in this case presented evidence of Saint's actual injury in order to allow the factfinder to infer Staten's intent in trying to kidnap Saint. The State proved Staten's intent to injure Saint by showing the following conduct on her part: pushing the victim into the trunk of the car, trying to close the trunk lid, stating to the victim that she [Staten] would "take off and kill [Saint]," and, finally, hitting the victim and telling her to stay in the trunk. This conduct constitutes an offense that Staten had already been convicted of in the municipal court, specifically assault in the third degree, and according to the doctrine of *Grady v. Corbin*, the admission of evidence of this conduct is barred by the double jeopardy provisions of both the United States and Alabama Constitutions.

Summary testimony relating to business records subject to Best Evidence Rule and defendant's right to examine underlying documents

Walker v. State, 26 ABR 5254 (August 21, 1992). Walker was the manager of a restaurant located in Saraland and was charged with the embezzlement (theft in the first degree) of $9,100 from the restaurant's owners.

During the trial, the State questioned the bookkeeper about the restaurant records for the first six months of 1990. The bookkeeper testified that the $9,100 was missing during this time period. The State then attempted to question the bookkeeper about the second six months of 1990 and the regularity of deposits after Walker's termination as manager of the restaurant.

Because the bookkeeper's knowledge was based upon his examination of the restaurant's records, the defense objected to the testimony under the "Best Evidence Rule". More specifically, Walker contended that the bookkeeper's summary testimony of what the restaurant records showed should have been precluded unless the defendant was given an opportunity to examine the records. The evidence was without dispute that the records had never been made available to Walker before trial notwithstanding the State's obligation to produce all documentary evidence for the defendant's inspection as a part of the court's standard pretrial discovery order.

(Continued on page 64)

David B. Byrne, Jr.

David B. Byrne, Jr. is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Belser.

Terry Alan Sides

Terry Alan Sides, who covers the civil portion of the decisions, is a graduate of the University of Alabama and Cumberland School of Law of Samford University. He is a member of the Montgomery firm of Hill, Hill, Carter, Franco, Cole & Black.

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In a per curiam decision, the Supreme Court of Alabama reversed. The supreme court, citing C. Gamble, *McElroy's Alabama Evidence*, made the following critical observation about the Best Evidence Rule:

It sometimes occurs that a fact to be proven requires an inspection and compilation of numerous and voluminous documents, such that inspection and compilation by the judge or jury at the trial would be unreasonable, impracticable, or impossible. Under these circumstances, a qualified witness, who has made an examination of such documents, may state the result of his computations therefrom if, but only if, the documents are made available to the opponent for his inspection. The witness, therefore, may testify to his summary of voluminous records without having to produce the original or account for their loss.

C. Gamble, *McElroy's Alabama Evidence*, §220.01 (4th Ed. 1991).

The opposing party's opportunity to examine the records that are the subject of the witness's summary testimony is a condition precedent to the admissibility of the summary testimony, and the trial judge does not have discretion to waive this requirement. The purpose of giving the opposing party an opportunity to examine the records is to enable the opposing party to attack and disprove the summary testimony by showing inaccuracies, ambiguities, etc., if they should exist.

In the case *sub judice*, Walker never had the opportunity to inspect the underlying restaurant records for the second six months of 1990, nor did Walker have reason to expect that the State would elicit the bookkeeper's summary testimony as circumstantial evidence of Walker's guilt.

One more time a *Batson* reversal

Yelder v. State, 26 ABR 5076 (August 14, 1992). Yelder's conviction for burglary, sodomy and rape was reversed because of the failure of a Montgomery County prosecutor to follow the clearly-established precedent in *Ex parte Bird*, 594 So.2d 676 (Ala. 1991).

In a stinging opinion, Justice Adams critically noted that the prosecution used 24 of its 32 peremptory strikes to remove 24 of the 27 black veniremembers. Following the defendant's timely objection to the racial composition of the prospective jury panel, pursuant to *Batson*, the prosecution offered various explanations for the prosecution's strikes.

The supreme court's opinion noted the remarkable resemblance of the *Yelder* facts to those presented in *Ex parte Bird*. In *Bird*, although black veniremembers comprised 36 percent of the venire, the percentage of black jurors actually seated on the jury represented only 8 percent of the trial jury. Id. at 680. The State, in *Yelder*, used 85 percent of its peremptory challenges, that is, 17 or 20 strikes, to eliminate 89 percent of the black veniremembers.

As the supreme court pointed out in *Bird*, the sheer weight of statistics such as these raises a strong inference of racial discrimination requiring clear and cogent explanations by the State in rebuttal. However, as noted by Justice Adams, "Instead of such explanations, however, those proffered in this case virtually parallel the whimsical, *ad hoc* excuses we rejected in *Bird*."

Following a review of the reasons given by the State in justification of the use of its peremptory, the Court stated:

"We are compelled to conclude that the explanations advanced by the State for its challenges of these veniremembers represent no more than a pretext for racial discrimination."

Justice Adams concluded his opinion by noting:

"We regret that the conduct of the prosecution has, because of actions taken on the basis of race, once again necessitated a retrial, thus creating an additional strain on the judicial and economic resources of this state. At the present time, 'blacks are serving in substantial numbers as jurors and meting out stiff sentences, including death. This is because, although in some instances blacks may be the perpetrators of the crime, in even more substantial numbers, they are the victims of crime.' *Beck v. State*, 396 So.2d 645, 665 (Ala. 1980). Consequently, we look forward to the eventual demise of the notion that blacks possess an inherent bias in favor of defendants."

Out-of-court statement to rebut State's proof of flight

Bunn v. State, 27 ABR 76 (October 16, 1992). Bunn was convicted of manslaughter in the shooting death of Jack McDaniel. At trial, the State presented evidence that, after the shooting, Bunn fled Alabama. In response to this evidence and in order to explain his flight, Bunn attempted to solicit from Russell Johnson, his roommate at the time of the shooting, testimony that Johnson had told Bunn that McDaniel's family had threatened Bunn's life. The trial court sustained objection by the

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State and refused to allow the testimony, holding that it was hearsay. By a three-to-two margin, the court of criminal appeals affirmed, agreeing that the statement was inadmissible hearsay. Judges Bowen and Taylor dissented.

The supreme court granted Bunn's petition for certiorari to review that holding. The supreme court, in an unanimous opinion, reversed the judgment of the court of criminal appeals, holding that the testimony was proper to explain Bunn's flight, an issue raised by the State.

"Hearsay has been defined as an out-of-court statement offered to prove the truth of the matter stated." *Ex parte Bryars*, 456 So.2d 1136, 1138 (Ala. 1984). Johnson's statement that he told Bunn that McDaniel's family had threatened Bunn's life was not offered to prove that McDaniel's family had actually threatened Bunn's life, but, rather, to prove that Bunn left Alabama because he had been told that his life had been threatened. Stated differently, the statement was not offered to prove its truth, but to prove *the effect it had on Bunn*.

"If it is material to prove that a person at a specified time had been put on notice about a matter, or entertained a specific belief, acted in good or bad faith, had a specified motive to do or not to do an act or to do an act with a specified motive, or was mentally deranged, proof that a statement was made to him prior to the time in question which was reasonably calculated to create, and which is offered for the purpose of showing, notice, belief, good or bad faith, motive or mental derangement is not violative of the hearsay rule."
Charles Gamble, *McElroy's Alabama Evidence*, §273.02 (4th Ed. 1991).

Primer on *Batson's* technical procedure

Huntley v. State, 26 ABR 5589 (September 18, 1992). In *Huntley*, the State petitioned the supreme court for certiorari to review the judgment of the court of criminal appeals which had reversed Huntley's conviction in Jefferson County for rape and sodomy. The court of criminal appeals reversed the conviction because the State exercised its peremptory challenges in a racially discriminatory manner. The supreme court, in an opinion authored by Justice Adams, affirmed.

Before the *Huntley* jury was sworn, the defense moved to quash the jury panel on the ground that the State had exercised its challenges in a racially discriminatory manner, in violation of the defendant's constitutional guarantee of a right to an impartial trial. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

The record reflects that after the defense made its motion, the assistant district attorney stated:

[By the prosecutrix]. I'm assuming I'll be given an opportunity to put my reasons on the record for [the] strikes.

[By the court]. If I find it necessary. For the record, I'd like to say that . . . the State did use five of its seven strikes to strike blacks. However, according to my records, [there are] still five remaining blacks on this jury, is that correct?

[By the defense]. Yes, your Honor. The problem is that I . . . think the Court should rule that if one strike is not a — [if] there is not a race-neutral reason for one of the strikes, . . . the Court can turn around and order the whole venire . . . [quashed] and a new one empaneled.

In response, the trial judge stated:

"For the record, the Court does not find evidence of racial bias in the strikes, especially in light of the fact that there are still five [blacks] remaining . . . but for the purposes of the record, I will let the [prosecutrix] give her reasons in each case."

The court of criminal appeals reversed the trial court and remanded the case, holding that the State had "failed to carry its burden of articulating . . . clear, specific and legitimate reasons for the challenges which related to the particular case to be tried and which were non-discriminatory."

It is important to note that the grant of certiorari in this case was to consider the contention that because the trial court expressly determined that the defendant had failed to present a *prima facie* case of discrimination, the court of appeals erroneously concluded that the burden had shifted to the State to justify its challenges, and, consequently, erroneously held that the State had failed to carry its burden.

Justice Adams, in this case, gives to the Alabama practitioner an excellent review of the technical procedure invoked by *Batson* as follows:

Upon the exercise of the prosecution's first peremptory challenge of a black veniremember, a defendant is entitled to a *Batson* hearing. *Harrell v. State*, 555 So.2d 263, 267-68 (Ala. 1989) (adopting a 'bright line test' for determining the defendant's right to a hearing); . . . This hearing provides the defendant the opportunity to marshal all available evidence in order to construct a prima facie case of discrimination. *Ex parte Branch*, 52 So.2d 609, 620 (Ala. 1987); *Ex parte Jackson*, 516 So.2d 768, 772 (Ala. 1986) . . . If the circumstances raise an inference of discrimination, the State must attempt to justify its challenges, the burden having shifted to the State to rebut the defendant's prima facie case. *Ex parte Bird*, 594 So.2d 676, 680 (Ala. 1991). Following the State's explanations, the defendant may offer rebuttal evidence 'showing that the reasons or explanations are merely a sham or pretext' for racial discrimination. *Ex parte Branch*, 526 So.2d at 624 . . .

Justice Adams reasoned that, "Although each logical step within this procedural framework is theoretically severable, considerations of justice, expediency, and judicial economy oppose a slavish adherence to the framework in practice. First, considerations of judicial economy require a record of *all* the evidence bearing on the issue of alleged discrimination. Although, technically, the State is under no compulsion to rebut an inference of discrimination until a *prima facie* case exists, this Court, if it determines that an inference clearly exists, will not hesitate to remand a cause to the trial court with directions to examine the State's explanations."

In short, the supreme court refused to reverse the judgment of the court of criminal appeals for considering the entire record with which the trial court sought to expedite the judicial process. Justice Adams further observed that, " . . . considerations of justice invite a *contemporaneous* record, rather than *post hoc* excuses offered by the state long after the events have faded from the trial judge's memory."

For example, a defendant may both *construct* a *prima facie* case and *rebut* the State's proffered explanations by

showing that the prosecution exercised (1) desultory voir dire, (2) "[d]isparate examination of the members of the venire," (3) "disparate treatment" of the veniremembers who shared certain characteristics other than race, and (4) a number of challenges to black veniremembers disproportionate to their representation on the venire. See *Ex parte Branch*, 526 So.2d at 623-24.

ALABAMA SUPREME COURT - CIVIL

Relation back doctrine cannot be used to circumvent *Ala. Code* §11-47-23

In *City of Birmingham v. Carla Davis*, (Ms. 1911140, November 6, 1992), ______So.2d_____(Ala. 1992), the court held that the doctrine of relation back cannot be used to save a claim that is otherwise barred by the notice of claims statute, *Ala. Code* §11-47-23.

On January 17, 1990, the plaintiffs sued the defendants for injuries allegedly suffered in a two-car accident which occurred on September 30, 1989 with the City of Birmingham. In addition to the named defendants, the complaint also listed various fictitiously named defendants, including one described as follows: "Defendant No. 10, that person or entity who controlled or maintained the roadway and roadway signs where the accident was caused to take place." On April 10, 1990 the plaintiffs amended their complaint to substitute the City for "Defendant No. 10".

The City moved for a summary judgment on grounds that the plaintiffs had not filed a notice of claim with the City as required under §§11-47-23 and 11-47-192. The plaintiffs argued that the City's substitution of a named defendant for a fictitiously named defendant properly sued relates back to the date the complaint was originally filed. The trial court denied the City's motion for summary judgment. The City was granted an interlocutory appeal raising the issue of whether the bar of the municipal notice statute can be avoided by substitution under Rule 9(h), A.R.Civ.P., and the relation back doctrine under Rule 15(c), A.R.Civ.P.

In reversing the trial court's order denying the City's motion for summary judgment, the court drew an analogy between the municipal notice of claims statute and the probate non-claims statute. Both are statutes of non-claim, as opposed to statutes of limitations. In construing the probate non-claim statute, the law is that the non-claim does not fall within the healing provisions of the relation back doctrine. *Motley v. Battle*, 368 So.2d 20, 21 (Ala. 1979). This is because nothing in the original complaint can be said to put the estate on notice of the additional claim. So, too, is the rule in the context of the municipal notice statute. The doctrine of relation back cannot be used to save a claim that is otherwise barred by that statute. In the instant case, the plaintiffs' claims were barred because the City was not given notice within six months of the accrual of those claims. The substitution, outside the six-month notice period, of a municipality for a fictitiously named party properly sued is not a sufficient presentation of the claim to the municipality to avoid the bar of §11-47-23.

Fraud claims - when does statute of limitations begin to run?

In *Howard v. Mutual Savings Life Insurance Company*, (Ms. 1910698, September 4, 1992), ____So.2d____(Ala. 1992), the court was presented with the issue of when a plaintiff is charged with knowledge of fraud by a defendant so as to begin the running of the statute of limitations.

In December 1983, the plaintiff's husband was diagnosed with cancer and was hospitalized three times before his death on January 27, 1984. At the time of her husband's death, the plaintiff was paying premiums to the defendant for several health insurance policies then in effect for her and her husband.

Approximately one week after her husband's death, the plaintiff talked with officers of the defendant because she "did not feel they had paid where the insurance man told us that they would." At that time, the plaintiff had a firm conviction in her mind that the defendant was not paying all that it should pay under the policies. The plaintiff believed that there were claims under the policies that should have been paid but were not paid. When the plaintiff asked the defendant to pay those additional claims, the plaintiff was told that the defendant had paid all it was going to pay.

In August 1990, the plaintiff sued, alleging that the defendant had fraudulently failed to pay to her all amounts that were due under the insurance policies. The defendant moved for a summary judgment, arguing that since the plaintiff had had actual knowledge of her fraud claim just a few weeks after her husband's death in 1984, her claim was barred by the applicable two-year statute of limitations. The plaintiff countered by arguing that although she had been dissatisfied with the payment on the policies, she had no actual knowledge of the defendant's alleged fraud until a lawyer examined the matter for her after a chance discussion between her and the lawyer's wife. The trial court granted the defendant's motion for summary judgment, finding that as a matter of law, the plaintiff had actual notice of the alleged fraud more than two years before the filing of her suit.

In reversing the trial court's grant of summary judgment, Chief Justice Hornsby, writing for the majority, stated that the trial court's summary judgment rested on its conclusion that the plaintiff's suspicions that the defendant had not properly paid on her cliams required the finding that she knew of the alleged fraud as a matter of law. The majority concluded, however, that in this case such a finding was erroneous. Though there was evidence which certainly supported an inference that in 1984 the plaintiff believed she had been defrauded, there was also evidence supporting an inference that the plaintiff simply beleived her insurance with the defendant was inadequate and she chose to find more satisfactory insurance elsewhere. After citing the rule that the question of when a plaintiff would have discovered fraud should be taken away from the jury and decided as a matter of law only in cases where the plaintifff *actually knew* of facts that would put a reasonable person on notice of fraud (see *Hicks v. Globe Life & Accident Ins. Co.*, 584 So.2d 458 (Ala. 1991)), the

majority concluded as follows:

Reasonable people could disagree on whether Howard could justifiably rely on the representations by Mutual Savings. In light of the complexity and inter-relation of the policies and the fact that she was speaking to the manager at the company office, Howard could have concluded that she had received all that she was entitled to under the policy terms. The evidence would support the inference that she learned of facts showing the possibility of fraud only after an attorney scrutinized the policies; if the factfinder accepts that inference, then the record indicates that she filed her claim with two years from the date she learned of those facts.

The question whether she justifiably relied on the insurer's representations as to the policy coverage cannot be resolved as a matter of law. Under these facts and the law as it has developed since *Hickox v. Stover*, [551 So.2d 259 (1989)], that is a jury question.

In separate opinions, Justices Maddox, Houston and Stegall dissented. Justices Houston and Stegall concluded that as of February 1984, when the plaintiff admittedly allowed her insurance policies to lapse "because [Mutual Savings] didn't do what [Mutual Savings] was supposed to do", she had actual knowledge of the facts that would put a reasonable person on notice of fraud. Accordingly, the statutory period of limitations began to run at that time, and it expired in 1986. Justice Houston also opined as follows:

"The majority of the Court has now allowed the new justifiable reliance standard—the subjective standard—in fraud cases to 'tread into the arena' of the discovery rule for the purpose of determining when the statutory period of limitations began to run." [Citation omitted]. This is contrary to Chief Justice Hornsby's special concurrence in *Southern States Ford, Inc. v. Proctor*, 541 So.2d 1081, 1090-92 (Ala. 1989): "[S]tatutes of limitations, even when based on the 'discovery rule' in the fraud context, should be measured by objective standards." 541 So.2d at 1091.

An award of compensatory or nominal damages is not a pre-requisite to an award of punitive damages.

In *Shoals Ford, Inc. v. McKinney*, [Ms. 1902012, August 7, 1992], ____So.2d____ (Ala. 1992), the plaintiffs purchased a pickup truck from the defendant. The defendant's sales representative represented to the plaintiffs that the truck was "new". No discussion took place as to whether any body work or repairs had been done on the truck. A few weeks later, the plaintiffs discovered that the paint on the truck was chipping and that there were dents in the hood. The plaintiffs later learned that the truck had been damaged by hail and had been subsequently repaired and repainted. The plaintiffs sued the defendant and asserted claims for wantoness and fraud in connection with the sale of the truck. The plaintiffs only sought to recover punitive damages. Following trial, judgment was entered in favor of the plaintiffs on a jury verdict awarding them $50,000 in punitive damages.

On appeal, the defendant argued, *inter alia*, that the trial court erred in failing to set aside the jury verdict on grounds that the jury failed to award the plaintiffs either compensatory or nominal damages.

In a *per curiam* opinion, the supreme court affirmed the trial court's judgment. The majority concluded that based upon the trilogy of *O.K. Bonding Co. v. Milton*, 579 So.2d 602 (Ala. 1991), *First Bank of Boaz v. Fielder*, 590 So.2d 893 (Ala. 1991), and *Caterpillar, Inc. v. Hightower*, [Ms. 1901465, August 7, 1992], ____So.2d____, an award of compensatory or nominal damages is not a pre-requisite to an award of punitive damages.

In *O.K. Bonding*, the court, speaking through Justice Almon, held that an award of compensatory or nominal damages *was* a pre-requisite to award of punitive damages. Seven months later, however, in *First Bank of Boaz*, the court, due to an apparent oversight of *O.K. Bonding*, held the other way. The inconsistency in the holdings in these two cases was discussed in *Caterpillar*, where the court, speaking through Justice Adams, distinguished *O.K. Bonding* and *First Bank of Boaz*. In the instant case, the majority ruled upon the reasoning of *First Bank of Boaz* and *Caterpillar* to hold that as long as there is evidence to support findings by the jury that (1) the plaintiff was injured or damaged, at least nominally, by the defendant's actions, *and* (2) the defendant's actions justify the imposition of punitive damages (i.e., the defendant acted with an intent to deceive, or recklessly or wantonly), then an award of compensatory or nominal damages is not a prerequisite to an award of punitive damages.

Standard of liability for innkeeper's wrongful or unauthorized entry into guest's room

In *Thetford, etc. v. City of Clanton*, [Ms. 1910567, September 18, 1992], ____So.2d____(Ala. 1992), the court finally addressed the standard of liability for an innkeeper's wrongful or unauthorized entry into a guest's room.

On or about June 10, 1989, Shirley Ann Banks was a business invitee of the Holiday Inn in Clanton, Alabama. On or about the same date, Eddie Gore, the manager and an employee of the Holiday Inn, accompanied Ms. Banks' husband to her room, where, in the presence of a representative of the Clanton Police Department, Gore sawed through a locked door chain to gain entry to Banks' room. Mr. Banks later took his wife to another location, where he inflicted such severe injuries to her that she died as a proximate result of his beatings.

In April 1990, Mary Thetford, Ms. Banks' sister and personal representative, filed a wrongful death action against Gore, Holiday Inn, Inc. and the City of Clanton. Her complaint was later amended to add Williams Motels, Inc. which operated the Holiday Inn in Clanton. All defendants filed motions for summary judgment which the trial court granted. Thetford appealed.

In reversing the trial court's summary judgment as to Gore and the hotel defendants, the supreme court, in a *per curiam* opinion, specifically addressed for the first time the standard of liability for an innkeeper's wrongful or unauthorized entry into a guest's room. Though the court did not expressly adopt any specific standard, it noted that the general rule appears to be as follows:

After a guest has been assigned to a room at an inn or hotel for his exclusive use, he has a right of occupation for all lawful purposes until it is vacated, subject only to the right of the innkeeper or his servants to enter the room at reasonable times and in a proper manner,

and for such purposes as might be necessary in the general management of a hotel, or upon the happening of some unanticipated contingency . . . .

An innkeeper is liable if he or his servant unjustifiably or unreasonably interferes with his guest's right to privacy and the peaceful enjoyment of his room.

Stated another way, the innkeeper has "an affirmative duty, stemming from a guest's right of privacy and peaceful possession, not to allow unregistered and unauthorized third parties to gain access to the rooms of its guests."

After citing and discussing cases from other jurisdictions which have discussed innkeeper's liability, the majority of the court concluded that questions of material fact existed as to (1) whether Gore's actions of cutting the chain on Ms. Banks' door and allowing her husband to enter her room were justified and/or reasonable under the circumstances; and (2) if the actions were not justified and/or reasonable under the cirucmstances, whether Mr. Banks' criminal conduct was foreseeable when Gore cut the chain. Viewing all of the evidence in a light most favorable to the plaintiff, the majority cited evidence demonstrating that upon checking into the hotel, Ms. Banks notified the clerk that she had been beaten by her husband and was hiding from him for fear of additional abuse. The majority concluded that this evidence presented an issue of fact about whether Gore and Holiday Inn knew that Ms. Banks was an abused wife who was hiding in fear from her husband. Accordingly, a jury question was presented as to whether the hotel manager could foresee another beating by Ms. Banks' husband.

The majority affirmed the trial court's summary judgment as to the City of Clanton. The plaintiff argued that the failure of the City's police officers to comply with the mandates of *Ala. Code* §15-10-3 (1975) ("whenever a law enforcement officer investigates an allegation of family violence, whether or not an arrest is made, the officer shall make a written report of the alleged incident, ...") constituted "statutory negligence," and, therefore, summary judgment as to the City was inappropriate. After discussing the elements necessary to recover under the theory of statutory negligence, the majority opined that though the statute (which had only been in effect for three weeks before the incident involved in this case) requires the officer to file a report, it does not say where and does not say what should be done with the report. The majority found that under these circumstances, a jury could not conclude that the officer's failure to file a report required by the statute proximately caused the death of Ms. Banks.

Abatement of claims—can personal injury action be amended by personal representative after plaintiff dies as result of personal injury, even though more than two years have expired after death of plaintiff?

In *King v. National Spa and Pool Institute, Inc.* [Ms. 1910620, September 4, 1992], ____So.2d____ (Ala. 1992) and *Hogland v. The Celotex Corporation,* [Ms. 1910077, September 4, 1992], ____So.2d____ (Ala. 1992), the Court overruled *Elam v. Illinois Central Golf R.R.,* 496 So.2d 740 (Ala. 1986), and held that personal injury actions do not abate when a plaintiff dies as a result of the alleged wrongful act of the defendant.

After tracing the history of *Elam* and Alabama's wrongful death statute, codified at *Ala. Code* §6-5-410 (1975), the majority, in an opinion written by Chief Justice Hornsby, held that the survival statute, *Ala. Code* §6-5-462 (1975), means exactly what its plain language states, that "*all* personal claims upon which an action has been filed . . . survive in favor of and against personal representatives . . . " (Emphasis supplied). The fact that the injury that serves as the basis for the personal injury action later gives rise to a wrongful death claim does not extinguish the original personal injury claim. The majority also overruled the holdings in *Mattison v. Kirk,* 497 So.2d 120 (Ala. 1986), *Parker v. Fies & Sons,* 243 Ala. 348, 10 So.2d 13 (1942), and *Carroll v. Florala Memorial Hospital, Inc.*, 288 Ala. 118, 257 So.2d 837 (1972), to the extent that they relied upon the rule that a personal injury action does not survive the plaintiff's death if a wrongful death claim could be based on the same injury. The rule that a plaintiff substituted for a deceased plaintiff must file an entirely new complaint in order to recover for wrongful death is no longer the law. Should the plaintiff die as a result of the injuries alleged in the original personal injury suit, the properly substituted personal representative may amend the original complaint to add a wrongful death claim. Henceforth, the original personal injury action survives the death of the plaintiff just as if the injury had not caused the death.

Moreover, and perhaps just as importantly, the majority held that in addition to recovering punitive damages on the wrongful death claim, the personal representative in such cases may also now recover compensatory damages on the personal injury claims. ■

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• M·E·M·O·R·I·A·L·S •

Frank B. Parsons

On the third day of August 1992, Frank B. Parsons died. Frank Parsons will be truly missed by his family, brothers in the law and the citizens of both Fairfield and the state of Alabama.

Frank Parsons was born and raised in Fairfield, Alabama. He graduated from Fairfield High School in 1936. After attending Birmingham Southern College for two and a half years, he went to the University of Alabama School of Law and graduated in January 1942. It was at the University that Frank met and married the former Elizabeth Reams.

Once home, Frank began the practice of law. He served as the city attorney for both the cities of Fairfield and Hueytown, serving Fairfield continuously for 40 years. He also served twice as president of the Bessemer Bar Association, president of the Fairfield Chamber of Commerce, president of the Fairfield Exchange Club and president of the Birmingham Northwest Camp of Gideons, International. In addition, he served on the board of trustees of Lloyd Noland Hospital in Fairfield for the past eight years. Frank was a member of the Alabama State Bar, the Birmingham Bar Association, the American Bar Association, the Alabama Trial Lawyers Association, and the American Judicature Society. Just three weeks before his death, Frank was honored by members of the state bar for 50 years of service as an attorney.

The church was an important part of Frank's life. He joined Fairfield United Methodist Church when he was 12. At the age of 17, he began to teach Sunday School and continued to do so until his death. He also had served on the board of trustees of the church since 1950.

Frank Parsons contributed to his profession, the State of Alabama, his family and his church. He was a man of compassion and honor, and was revered and admired by all those who knew him.

Elizabeth Parsons died July 5, 1974; Frank never remarried. He is survived by a daughter, Mrs. Betty Frank McDowell; two sons, Donald and Bruce Parsons; three sisters, Mrs. Marguerite Maveety, Mrs. Sadie Slaughter and Mrs. Freda Woodman; and two brothers, Joe and Carl Parsons.

— J. Clewis Trucks
Fairfield, Alabama

• M·E·M·O·R·I·A·L·S •

William Henry Burton
Muscle Shoals
Admitted: 1928
Died: October 27, 1992

John Chason
Bay Minette
Admitted: 1928
Died: September 26, 1992

Samuel Skinner Heide, Jr.
Vestavia
Admitted: 1940
Died: September 4, 1992

Richard Clayton Hunt
Fort Payne
Admitted: 1939
Died: April 19, 1992

Charles Pollard Jackson, Jr.
Mountain Brook
Admitted: 1941
Died: October 3, 1992

Leslie Allen Jeffries
Admitted: 1978
Died: September 6, 1992

Jordan Walker McAfee, Jr.
Cullman
Admitted: 1937
Died: October 22, 1992

George Albert Mitchell
Birmingham
Admitted: 1945
Died: August 28, 1992

Donald L. Newsom
Birmingham
Admitted: 1952
Died: May 12, 1992

Virgil Lee Pelfrey, Jr.
Clio
Admitted: 1980
Died: October 13, 1992

Charles Robert Richards
Russellville
Admitted: 1969
Died: October 12, 1992

Bernard Farrior Sykes
Montgomery
Admitted: 1942
Died: November 1, 1992

Harold O'Dell Weeks
Scottsboro
Admitted: 1932
Died: August 22, 1992

William Bruce White
Birmingham
Admitted: 1940
Died: September 24, 1992

• M·E·M·O·R·I·A·L·S •

Charles A. Poellnitz, IV

Mr. Heflin. Mr. President, I rise today to pay tribute to Charles Augustus Poellnitz, IV, who passed away recently. He was a prominent member of the legal community in Alabama, and a close personal friend of mine.

Charles was a native of Greensboro, Alabama where he was born in 1908 to Dr. Charles A. Poellnitz, III and Annie Roulhac Poellnitz. He graduated from the Alabama Military Institute in Anniston in 1926 and then enrolled at the University of the South, located in Sewanee, Tennessee. He subsequently attended the law school at the University of Alabama. While a student, Charles was involved in all facets of campus life. He received many awards and honors for his leadership, was president of his senior class at Sewanee, was active in honor societies and was an avid outdoorsman.

After law school, Charles moved to Florence, Alabama where he began practicing law with George Bliss Jones in the firm of Jones & Poellnitz. Mr. Jones left the firm to become executive secretary to Gov. Chauncey Sparks. Later, Charles joined with Will Mitchell, one of Alabama's most distinguished lawyers, to form the firm of Mitchell & Poellnitz.

The firm grew to be one of the state's most renowned law firms. At the time of his death, it was known by the name of Poellnitz, Cox & Jones. In addition to W.H. Mitchell, Charles had some great lawyers as partners over the years, including Bill Mitchell, who left the firm to become president of the First National Bank of Florence, George McBurney, Bob Cox, Sam Robinson, Rob Jones, Gary Wilkinson, and Brant Young. His brother, Richard Poellnitz, is a truly outstanding lawyer in Greensboro, Alabama. He practiced law for more than 50 years before retiring several years ago.

During World War II, Charles entered the Army as a private, but was later assigned to the Judge Advocate Corps, receiving his commission from the Judge Advocate School at the University of Michigan. After completing several assignments as a first lieutenant, he served with the 5th Air Force in the Mediterranean theater, where he was stationed in North Africa and Italy for over two years. He was discharged in 1945, having attained the rank of major.

During his lifetime, Charles earned many civic honors and was a fixture in local community projects. He served as director of the First National Bank of Florence for 40 years, and was a director of several other corporations. He was also a real estate developer. He remained a member of Trinity Episcopal Church from the time he settled in Florence in 1933 until his death, serving as senior warden and on the vestry.

Charles was an enthusiastic golfer and hunter, but his first love was always the legal profession. He practiced in both the state and federal courts, and was a member of the Alabama Judicial Inquiry Commission, and was honored by his selection as a fellow of the American College of Trial Lawyers and American Bar Foundation.

Charles Poellnitz, IV was highly respected by his peers and the judges before whom he appeared. He was a lawyer's lawyer. Many young attorneys sought his counsel and advice. He always found time to help young lawyers, and was a role model for them to emulate. He was a great supporter of legal education and of improving the legal profession. His was a lifelong commitment to the profession and to the community in which he made his home. He possessed a warm and ingratiating personality. He was a kind man. He will be sorely missed by his family and those of us fortunate enough to have known and worked with him over the decades.

— Congressional Record, September 17, 1992

Virgil Lee Pelfrey

Virgil Lee Pelfrey of Clio, Alabama died on October 13, 1992 at his residence following a brief illness. The bench and bar of Barbour and Pike Counties mourn the loss of this outstanding attorney, citizen, family man and friend.

Lee graduated from the University of Alabama School of Law in 1980. He returned to his native Barbour County where he practiced law for a dozen years mostly in Pike and Barbour Counties.

During his brief but bright legal career Lee developed a reputation among the bench and bar as a tenacious litigator. He was a zealous advocate and worthy adversary. His painstaking throughness and animated personality helped him to develop a fiercely loyal and admiring clientele.

Lee was a loving husband and father who undeniably placed only the love of his family above his love of the law. He was a member of a remarkable family and is survived by his lovely wife, Theresa, and their precious daughter, Anne, as well as his parents, Virgil and Grace Pelfrey, and his brothers, Dr. William V. Pelfrey, Dr. Robert J. Pelfrey and Jackson L. Pelfrey.

Lee was a good, honest, hardworking lawyer, a devoted family man and a trusted friend. His passing leaves a void that will be felt not only by his family and friends but by his community and his colleagues.

— Joel Lee Williams
Troy, Alabama

• M·E·M·O·R·I·A·L·S •

JAMES E. HART, JR.

RESOLVED, that the members of the Escambia County Bar Association adopt this Resolution in tribute to the memory of James E. Hart, Jr., and in recognition of his substantial contributions to our profession, as well as to our community and State.

Jim was born on March 26, 1942, and graduated from Marion Military Institute in 1962. While there, he was a member of the Monogram Club, Morgan's Raiders, Honor Council and played varsity football. He received a Bachelor's in Business Administration from Auburn University and graduated from Cumberland School of Law at Samford University in 1970 with a Doctor of Jurisprudence, cum laude. While at Samford, he was a member of the Cordell Hull International Law Society, Phi Alpha Delta Law Fraternity and Alpha Tau Omega Fraternity. He was the managing editor of the Cumberland-Samford Law Review for 1969-70.

Jim was admitted to the practice of law in Alabama in 1970, and in Florida in 1972. He was a member of the Alabama State Bar, The Florida Bar, the American Bar Association, the American Trial Lawyer's Association, the Alabama Trial Lawyer's Association and the Criminal Defense Lawyer's Association. He served as Chairman of the Oil, Gas and Mineral Law Section and the Lawyers Public Relations Committee of the Alabama State Bar. He was a past president of the Escambia County Bar Association and was, at the time of his death, serving as Bar Commissioner for the 21st Judicial Circuit.

Jim was a skillful, aggressive trial and appellate lawyer who not only recognized, but believed in, the concept that the practice of law is a profession, not simply business. He was a warm and true gentleman to his colleagues at the Bar and always adhered to the highest ethical and intellectual standards.

Jim's interests were many and varied. He was very active in other organizations. He was a member of the Escambia County and the State of Alabama Cattlemen's Associations, serving in various capacities, including President of the Alabama Cattlemen's Association. At the time of his death, he was President of the Southeastern Livestock Exposition. He was a very active member of the Brewton Rotary Club, having served in several capacities, as well as President and had been honored by being named a Paul Harris Fellow. He was a past president of the T.R. Miller Quarterback Club, served as Chairman of the Escambia County Democratic Executive Committee, as a member of the Marion Military Institute Presidential Advisory Council, a member of the Advisory Board of Cumberland School of Law and a member of the Centennial Committee for the City of Brewton.

Jim was an active member of First United Methodist Church of Brewton, having served as a Lay Leader, Chairmen of the Administrative Board, and on other committees and boards of the church. He was a past member of the Conference of Board of Trustees of the Alabama-West Florida Conference of the United Methodist Church. he was also actively involved in the Gulf Coast Council of the Boy Scouts of America and many other civic organizations. He also served as Chairman of the All-America City Award Committee for the City of Brewton. In recognition of his many contributions to his community, Jim was selected as Brewton's 1990 Citizen of the Year.

In Jim Hart's death, we have lost a forceful leader, a wise counselor, a kindly man and a dear friend. His was a sterling character. His genuineness was reflected in his gentlemanly demeanor, his sense of duty to his profession and to the public, his unselfishness, his kindness, his understanding and his wholesome good fellowship. It was his privilege to make for himself a fortunate life and to be given the satisfaction of knowing that the ample fruits of his labors were to remain for the enrichment of his community.

The members of the Escambia County Bar Association wish to express their great appreciation of these qualities and this service and to adopt this Resolution as a testimony to the memory of one we could ill afford to lose.

— Adopted at a meeting of the Escambia County Bar Association held in Brewton, Alabama, on August 13, 1992.

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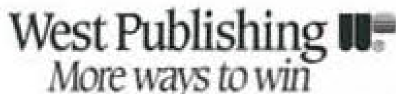

Opperman Drive • Eagan, MN 55123-1308

Mr. James Anthony McLain
Alabama State Bar
P. O. Box 671
Montgomery AL 36101

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